IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an appeal against the Judgment and Sentences of the High Court of Putlam in terms of section 331(1) and (4) of the Criminal Procedure Code read with section 11 with the Provincial High Court (Special Provisions) Act No. 19 of 1990 and also with Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs

Nilanthilage Amila Sudarshana Silva

Accused

AND NOW BETWEEN

Nilanthilage Amila Sudarshana Silva

Accused - Appellant

Vs

Hon. Attorney General,
Attorney General's Department,

Colombo 12

Court of Appeal Case No:
CA/HCC/307/24

High Court of Putlam Case No:
HC/77/2021

Before : **P. Kumararatnam, J.**

Pradeep Hettiarachchi, J.

Counsel : Punarjith D. Karunasekera with Kifsiya Banu for the Accused-Appellant.
Hiranjan Peiris ASG for the State.

Argued on : 07.08.2025

Decided on : 26.09.2025

Pradeep Hettiarachchi, J

Judgment

Introduction

1. The Accused-Appellant (hereinafter referred to as the "Appellant") was indicted before the High Court of Puttlam for following charges;

   (a) On or about 28-02-2016, within the jurisdiction of this Court, at Mundel, the Appellant by having sexual intercourse with a girl below sixteen years of age, namely Rajapakshe Pathiranalage Gimhani Hansika, who was the daughter of his wife by another father and who stands towards him in some enumerated degrees of relationship as described in section 364A (1), committed the offence of rape on said Rajapakshe Pathiranalage Gimhani Hansika which is an offence punishable under section 364 (3) of the Penal Code as amended by the Act No. 22 of 1995

   (b) At the time and the place mentioned in the above charge and at the same transaction, the Appellant, by using the Appellant's genitals on any orifice or part of the body of a girl below 16 years namely, Rajapakshe Pathiranalage Gimhani Hansika committed the offence of grave sexual abuse, which is an offence punishable under section 365B (2)(b) of the Penal Code as amended by the Act No. 22 of 1996, 29 of 1998 and 16 of 2006.

   (c) During the period of 29-02-2016 to 18-03-2016, within the jurisdiction of this Court, at Mundel, the Appellant by having sexual intercourse with a girl below sixteen years of age, namely Rajapakshe Pathiranalage Gimhani Hansika, who was the daughter of his wife by another father and who stands towards him in some enumerated degrees of relationship as described in section 364A (1), committed the offence of rape on aid Rajapakshe Pathiranalage Gimhani Hansika which is an offence punishable under section 364 (3) of the Penal Code as amended by the Act No. 22 of 1995

2. When the charges were read out to the Appellant, he pleaded not guilty of the charges. Accordingly, the matter had been taken up for trial before the High Court Judge without a jury. At the conclusion of the trial, the learned High Court Judge convicted the Appellant for the 3rd charge, after reducing it to a lesser offence under section 365B (2) (b) of the

Penal Code (as amended) and imposed a sentence of 14 years rigorous imprisonment. Additionally, the Appellant was also ordered to pay a fine of Rs. 20,000/- and serve a sentence of three months' imprisonment in the event of default. Also, he was ordered to pay the victim a sum of Rs. 200,000/- as compensation and a default sentence of one-year simple imprisonment.

3. Being aggrieved by the Judgment and the Sentencing Order dated 27-11-2024, the Appellant has preferred the instant Appeal.

Brief Facts of the Case

4. As per the testimony of PW1, she had been living in her mother's house with her mother, step-father and her sister at the time this incident of sexual abuse took place. While PW1 was sleeping in her room, her mother's second husband, the Appellant in the present case, had come to her room and touched her breasts. Thereafter, he has undressed her and committed some act on her female organ using his penis. However, no evidence was forthcoming from PW1 to suggest that that the vaginal penetration had taken place.

5. According to PW1, this has happened only once when her mother and the sister had been away from home. After this incident she had gone and informed her mother about the same. However, the mother did not believed her story. PW1 had stopped going to school after this incident and the class teacher had come to her place looking for her. Then, after about two weeks, she had informed her class teacher about this incident when she went to the school once again. Thereafter, upon being informed by the class teacher of PW1, the Principal has informed the police about the said incident. Subsequently, the police had visited the school, after which PW1 was taken to police, where she gave a statement on the sexual abuse that was committed on her.

Analysis

6. Although several grounds of appeal were set out in the Petition of Appeal, at the hearing the learned Counsel for the appellant informed the Court that the appellant intended to contest only the sentence. Accordingly, the sole question for determination in this appeal is whether the sentence imposed on the appellant by the learned High Court Judge of Puttalam is excessive in the circumstances of the case.

7. The main contention of the Counsel for the Appellant is that it is inappropriate to apply the rationale of ***Withanapathiranalage Dickson Nihal Appuhamy v Attorney General*** HCC/0289/2019 (Decided on 17-12-2021) to the instant case as the facts and the circumstances of the present case are different to that of ***Dickson Nihal Appuhamy***. It was submitted that, in the case of ***Dickson Nihal Appuhamy*** the victim was unconscious at the time the Accused committed the offence due to an attack by the accused himself, while in the present case, the prosecutrix was conscious during the incident and was quite capable of providing an accurate account of the incident that took place. Therefore, it was submitted that applying the rationale of ***Dickson Nihal Appuhamy*** as it is, without any discrimination, was prejudicial to the Appellant in the present case.

8. Before proceeding to consider whether it is correct to adopt the reasoning in *Dickson Nihal Appuhamy* to the present case, it is necessary first to examine the circumstances which persuaded the learned High Court Judge to apply the ratio decidendi of that decision

9. Upon the conclusion of the trial, and after carefully analyzing the evidence placed before her, the learned High Court Judge has arrived at the conclusion that the Appellant cannot be convicted for the first count of rape as no evidence was forthcoming from PW1 to establish that the alleged incident of rape had taken place during the time period mentioned in the indictment (i.e. on or about 28-02-2016). The second charge relates to an act of anal sex committed on PW1 by the Appellant. However, at the trial before the High Court, PW1 has not mentioned anything regarding the alleged act of anal sex committed on her by the Appellant. Since the first and the second charges remain unproved, the learned High Court Judge has proceeded to consider whether the Prosecution has proved the ingredients of third count of rape beyond reasonable doubt.

10. After considering the evidence placed before her, the learned High Court Judge has noted that, while other ingredients such as the time, place, the fact that PW1 was a girl below 16 years of age and her relationship to the Appellant have been proved, no evidence was forthcoming from PW1 to establish that the Appellant has had sexual intercourse with PW1. In the aforesaid circumstances, the learned High Court Judge has considered whether this is an appropriate case to apply the legal principles encapsulated in section 177 of the Code of Criminal Procedure Act (hereinafter referred to as "CCPA") to convict the Appellant for the offense of grave sexual abuse which is a lesser offence.

11. Section 177 of the CCPA reads as follows;

> *If in the case mentioned in section 176 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.*

12. When applying the provisions of section 177 to convict the Appellant for the lesser offence of grave sexual abuse, the learned High Court Judge has heavily relied on the case of ***Dickson Nihal Appuhamy.*** In ***Dickson Nihal Appuhamy***, the accused was the step father of the prosecutrix. She had been at home with the accused and the sister. The accused had been consuming alcohol in the sitting room. After having a bath, she had come to her room wearing a towel, to change. Then the accused had come and held her by the hand and covered her mouth. Within the scuffle, her head struck on the wall or the cupboard, where she fell unconscious. When she regained consciousness, she has felt dizzy and also pain in the genital area. Thereafter, she had seen the accused sleeping on the floor near the cot where her sister was. The prosecutrix in her evidence has never stated that the accused inserted the penis into her vagina. All what she said was she fell unconscious, and when she regained consciousness her vaginal area was painful. Furthermore, in her evidence she has also denied having any sexual penetration by anyone else other than the alleged incident that happened with the accused.

13. While the prosecutrix never mentioned in direct terms that the accused inserted his penis into her vagina, the Medical Officer who testified in Court has stated that there was evidence of vaginal penetration. However, there was no evidence whatsoever to establish that it was penile penetration. Therefore, in that case the Court of Appeal has found that the prosecution has failed to prove the charge of rape and that the learned High Court Judge has erred when she convicted the accused for rape. Accordingly, the conviction for rape against the accused was set aside by the Court of Appeal. However, Priyantha Fernando J, applying the legal provisions of section 177 convicted the accused for the grave sexual abuse committed on the prosecutrix even though he was not charged for that offence. He held that;

> *[…] However, insertion of any other part of the human body or an instrument to the vagina will constitute the offence of Grave Sexual Abuse as defined in Section 365B of the Penal Code. Hence, when the charges were framed there had been a clear doubt*

as to which offence was committed, Rape or Grave Sexual Abuse, as the PW1 was unconscious when the penetration happened. Thus, in terms of Section 176 of the Code of Criminal Procedure Act the prosecution was entitled to indict him either for Rape and alternatively Grave Sexual Abuse or for one of the offences. As it was doubtful as to which of those offences the facts which can be proved will constitute, the succeeding Section 177 provides for convicting for the offence which the appellant is shown to have committed although he was not charged with it. It is also pertinent to note that Rape and Grave Sexual Abuse come under the same class of sexual offences and also defined in the same chapter of offences affecting the human body, Chapter XVI of the Penal Code. As there was a doubt as to which of the offences was committed due to the nature of the act, the Honourable Attorney General could have indicted the appellant with a charge of Grave Sexual Abuse as well, at least alternatively. As the prosecution has proved all the elements to constitute Grave Sexual Abuse as provided in Section 365B (1)(a) of the Penal Code beyond reasonable doubt, the appellant can be found guilty and convicted for the same in terms of Section 177 of the Code of Criminal Procedure Act, although he was not charged with Grave Sexual Abuse.

14. Therefore, the underlying rationale in ***Dickson Nihal Appuhamy*** is that, when there is no sufficient evidence to convict an accused under the charge that was originally presented and read over to him, but the prosecution has already established the elements that constitute a different offence that the accused appeared to have committed, the accused may be convicted for that offence by applying the legal principles enunciated in section 177 of the CCPA even if he has not been charged with it.

15. Notably, the facts and circumstances of the present case are very similar to Dickson Nihal Appuhamy. In the present case, the prosecutrix was also sexually abused by her stepfather. Most importantly, the prosecutrix never stated in clear and unambiguous terms that the Appellant inserted his penis into her vagina. She merely stated that the Appellant committed some act on her female organ using his penis, a claim that remains unchallenged. The relevant portion of her evidence is produced below:

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(*Vide* pg. 81-82)

16. In the aforesaid circumstances, the Counsel for the Appellant submitted that it is not justifiable to impose a heavy jail term on the Appellant when PW1 submits a testimony before the Court in a very vague manner, especially taken into consideration the fact that PW1 is 23 old at the time of testifying before the High Court and the unavailability of proper cross examination of PW1.

17. It is true that the only evidence that is forthcoming from PW1 is that the Appellant committed some act on her female organ using his penis. PW1, despite being an adult who has already been married, has never stated that the Appellant inserted his penis into her vagina. However, it is important to note that, at the trial, no contradictions or omissions have been marked by the Appellant's Counsel. Even though PW1 has been cross examined by the Counsel for the Appellant regarding the previous instances of sexual abuse committed on her by her own father and the grandfather, it has never been

suggested to her that it was only them who committed these acts of sexual abuse on her and not the Appellant. PW1 has only been suggested that she is fabricating evidence to falsely frame the Appellant, to which, she has answered in the negative.

18. Moreover, even if the Appellant has made a statement from the dock denying all the allegations against him and stating that she has made similar kind of allegations against her father and the grandfather, such mere denial does not suffice to create a reasonable doubt on the Prosecution's case. In the aforesaid circumstances, PW1's evidence that the Appellant committed some act on her female organ using his penis remains unchallenged.

19. In this context, it is imperative to consider the following observation made by Priyantha Fernando J in ***Dickson Nihal Appuhamy*** regarding the *actus reus*/constituent elements of the offence of grave sexual abuse;

> *[…]As I have mentioned before, the moment the penis, genitals or any other part of the human body or instrument touches the vagina of a victim, the offence of grave sexual abuse is completed [….].*

20. In the present case, the Prosecution has established elements of grave sexual abuse even though it has failed to establish the constituent elements of the offence, which the accused was charged. Therefore, the learned High Court Judge was correct in applying the reasoning of ***Dickson Nihal Appuhamy*** to the present case.

21. Furthermore, Counsel for the Appellant contended that it is not justifiable to rely solely on the convicting rationale in Dickson Nihal Appuhamy when mitigatory factors were also present in that case, which the Court of Appeal took into consideration in reducing the sentence imposed by the High Court. It was further submitted that the mitigatory grounds considered in that case were similar to those advanced by the defense in their submissions in mitigation before the High Court.

22. However, the learned High Court Judge, even after considering those mitigatory factors has still imposed a heavy jail term on the Appellant, i.e. 14 years of rigorous imprisonment.

23. In the case before the High Court, it was submitted that the Appellant is 46 years old, married, and has two children; that his wife is unwell and unable to earn a living; and that, therefore, the Appellant is the sole breadwinner upon whom the entire family is

financially dependent. Additionally, Counsel for the Appellant submitted that PW1 had not been subjected to harsh cross-examination by the defense, and that the absence of such cross-examination should be considered a mitigatory factor in the present case.

24. Accordingly, the principal ground urged by the defense in mitigation is the hardship likely to befall the Appellant's family consequent to his incarceration.

25. In deciding whether the mitigatory grounds advanced by the Appellant warrant a reduction of sentence, this Court must not lose sight of the aggravating circumstances surrounding the case, nor of the legislative intent in prescribing severe custodial sentences for sexual offences.

26. Sri Lankan Courts, in a long line of judicial authorities have held that cases involving sexual offences, especially where the victims are children, have to be severely dealt with so as to create deterrence on the society.

27. In ***Attorney General v Hewa Walimunige Gunasena*** CA/PHC/110/2012 (Decided on 12-02-2014) it was held by Sunil Rajapakshe J that;

> *After analyzing the submissions made by the Petitioner and the accused Respondent I am of the opinion that the facts relating to this case warrants that the accused should be severely dealt with. Therefore a sentence of two years rigorous imprisonment suspended for ten years on the accused for a grave child abuse is a very lenient sentence considering the beastiliness of the crime. When an offence of child abuse is proved victims of tender age and innocent behavior the sentence of imprisonment should be imposed severely. Further I hold two years R.I suspended for tend years is not adequate for the purpose of preventing the commission of further offences by the accused. Cases of indecent touching, threats by an older man on a small girl seem to attract custodial sentence.*

28. Furthermore, in ***State of Andra Pradesh v. Bodem Sundara Rao***, (1995) 6 SCC 230, AIR 1996 SC 530 the Indian Supreme Court while dealing with a case of reduction of sentence from 10 years rigorous imprisonment to 4 years rigorous imprisonment by the High Court in the case of rape of a girl aged between 13 and 14 years, observed:

In recent years, we have noticed that crimes against woman are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the Legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the Courts verdict in the measure of punishment. The Courts must not only keep in view the right of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 year old girl shakes our judicial conciseness. The offence was inhumane.

29. The Courts are therefore, expected to deal with cases of sexual offenses committed against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. Dealing with the offence of rape and its traumatic effect on a rape victim, it was held in ***State of Punjab v. Gurmit Singh*** 1996 AIR 1393, 1996 SCC (2) 384 that;

Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's right in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a greater responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity

30. In the present case, when PW1 faced this unfortunate incident, she was a girl of 14 years of age. According to PW1's evidence she had been previously subjected to sexual abuse by her own father and the grandfather on numerous occasions. Since she was sexually abused by her father, PW1 had left her father's house and gone to stay at her mother's place as she could not live with her father anymore. At the time, her mother had been

living with the Appellant and it was while PW1 was at the Appellant's place that this heinous crime was committed by the Appellant to satisfy his lustful desires.

31. This is a story involving an incestuous stepfather who took advantage of his relationship with PW1 to satisfy his lustful desires. Needless to say, when PW1 returned to stay with her mother after the alleged incidents of sexual abuse by her father and grandfather, she must have already been traumatized and in a very vulnerable position. She expected her mother's home to be a safe haven.

32. It is also pertinent to note that the Appellant was 40 years old at the time. Instead of affording PW1 the necessary protection and care expected of a responsible adult, he exploited her helplessness and vulnerability to satisfy his own desires, conduct that cannot be condoned under any circumstances. Furthermore, following the incident, PW1 informed her mother of what had transpired; however, the mother did not believe her account, which may have driven PW1 into an even more vulnerable and helpless situation.

33. In ***Archbold: Sentencing Guidelines (2019), Thomson Reuters, on page 274***, under the heading of applicability of guidelines on sexual offences, it is stated that;

> *"Starting points define the position within a category range from which to start calculating the provisional sentence.*
>
> *……. Once the starting point is established, the court should consider further aggravating and mitigating factors and previous convictions so as to adjust the sentence within the range. Starting points and ranges apply to all offenders, whether they have pleaded guilty or been convicted after trial."*

34. Having regard to the aggravating circumstances set out above, the mitigatory grounds advanced by the defence do not persuade this Court to interfere with the sentence imposed by the learned High Court Judge. To elaborate, the aggravating factors clearly outweigh the mitigating factors, and accordingly, the sentence imposed on the Appellant by the learned High Court Judge does not warrant any reduction.

35. However, it is important to note that the Appellant has been serving his sentence since 27-11-2024. Therefore, approximately, the Appellant has spent 10 months in remand custody by now.

36. At this juncture, it is imperative to consider the legal provisions of section 333(5) of the CCPA;

    Provided that, the Court of Appeal may, in appropriate cases, order that the time spent by an appellant in custody pending the determination of his appeal and any time spent in custody prior to the conviction, such time not having been considered as part of his sentence passed at the time of his conviction by the court of first instance, be considered as part of his sentence ordered at the conclusion of his appeal.

37. Accordingly, Section 333(5) of the Code of Criminal Procedure Act (CCPA) empowers the Court of Appeal to treat the period an accused person has spent in custody prior to conviction as part of the sentence ultimately imposed.

38. Having considered the period the Appellant has spent in remand, I am of the view that it is appropriate to deduct the ten months spent in custody until the determination of this appeal from the sentence imposed on the Appellant.

39. Accordingly, I direct that the period of ten months which the Appellant has already spent in remand custody be deducted from the sentence imposed. Furthermore, I order that the Appellant's term of imprisonment shall operate from the date of conviction, namely 27.11.2024. The order as to fine, compensation, and the default sentence shall remain unaltered. Subject to the aforesaid variation, this appeal is hereby partially allowed.

Judge of the Court of Appeal

P. Kumararatnam,J

I agree,

Judge of the Court of Appeal