

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an Appeal made under
Section 331(1) of the Code of Criminal
Procedure Act No.15 of 1979 read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

Court of Appeal Case No.

CA/HCC/ 0031/2024

High Court of Ampara

Case No. HC-AMP/2064/2019

Momamed Cassim Hilmy alias Hilmy
Chaachchaa

ACCUSED-APPELLANT

Vs

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **P. Kumararatnam, J.**
R. P. Hettiarachchi, J.

COUNSEL : **Amila Palliyage with Sandeepani**
Wijesooriya, Savani Udugampola, Lakitha
Wakishta Arachchi and Subaj De Silva for
the Appellant.
Maheshika Silva, DSG for the Respondent.

ARGUED ON : **20/06/2025 and 17/07/2025**

DECIDED ON : **25/08/2025**

JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General for committing an offence under Section 354 and 365B (b) (2) (b) (Two Counts) of the Penal Code that is, Kidnapping from lawful guardianship and Grave Sexual Abuse respectively, on Mohamed Subair Farvin on 14.01.2006.

The trial commenced on 01/09/2022. After leading all necessary witnesses, the prosecution had closed the case. The Learned High Court Judge had called for the defence and the Appellant gave evidence from the witness box and closed the case for the defence.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant for the 1st and 2nd counts as per the indictment and for the 3rd count, he was convicted under section 345 of the Penal Code and sentenced as follows:

For the 1st count under section 354 of the Penal Code the Appellant was sentenced to 4 years rigorous imprisonment with a fine of Rs.5000/-. In default, 3 months simple imprisonment was ordered.

For the 2nd count under Section 365B (b) (2)(b), the Appellant was sentenced to 15 years rigorous imprisonment and a fine of Rs.10,000/- was imposed subject to a default sentence of 06 months simple imprisonment. A compensation of 250,000/- was ordered subject to a default sentence of 1-year simple imprisonment.

For the 3rd count the learned High Court Judge found the Appellant guilty under section 345 of the Penal Code and sentenced him to 4 years rigorous imprisonment with a fine of Rs.5000/-. In default, 3 months simple imprisonment was ordered. Additionally, a compensation of Rs.200,000/- was ordered with a default sentence of 1-year simple imprisonment.

Being aggrieved by the aforesaid convictions and sentences, the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence. During the argument he has been connected via Zoom platform from prison.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. The Learned Trial Judge has failed to consider the test of probability and improbability of the testimony of PW1 in convicting the Appellant.
2. The prosecution failed to prove its case beyond reasonable doubt.
3. The Learned Trial Judge has failed to evaluate the 'inter se' and 'per se' contradictions which have arisen from the evidence of the prosecution witnesses.
4. The Learned Trial Judge has failed to consider the defence evidence in the light of the evidence adduced on behalf of the Appellant.
5. The Learned Trial Judge has failed to consider the evidence which is in favour of the Appellant.

Before commencement of the argument, as a preliminary issue, the Learned Counsel for the Appellant took up the matter of convicting the Appellant under Section 345 of the Penal Code for which he was not indicted in the

indictment. He contended that the 2nd count and the 3rd count in the indictment arise on the single sexual act committed by the Appellant. Therefore, the Counsel argues that convicting the Appellant for count two and three are improper and caused great prejudice to the Appellant.

The Learned Deputy Solicitor General (hereinafter referred to as the 'DSG') having considered the submissions made by the Counsel for the Appellant, moved time to consider the argument advanced by the Appellant's Counsel.

When this matter resumed on 17.07.2025, the learned DSG informed the Court that given the facts and the circumstances that led to the conviction and other incidental matters, that she will not be contesting the sentence passed on the 2nd count by the learned High Court Judge of Ampara.

The Facts of this case *albeit* briefly are as follows.

The victim was 08 years old and was schooling at the time of the incident. The Appellant is a relative of the victim and according to the relationship, he is known as her uncle.

On the day of the incident, the Appellant left the house with the victim with her mother's permission to see the Olivil Harbour and thereafter to go to the Appellant's house in Ampara. Both rode on the Appellant's motor bike. Whilst on their way and under the guise of showing her some elephants, the Appellant had parked his motor bike in a forest area and after making her to sit on the motor bike, had kissed her face. A villager who had observed this incident had warned them to leave the place immediately. Thereafter, the Appellant had taken the victim to a hilly area, made her lie atop a rock, removed her undergarment and kissed her again. At that time, about six villagers accompanied by a police officer had arrested the Appellant and handed him over to the Buddhangala Police Post. Thereafter, both had been taken to the Ampara Police Station and an investigation has been conducted. The Appellant had been a police officer by profession at that time.

The learned Counsel for the Appellant, in view of the stance taken by the learned DSG in respect of count two, now rests his argument on the sentence pronounced on counts one and two.

Considering the facts of the case and the submissions made by both Counsel, I set aside the conviction and sentence imposed on count two in the indictment. The learned DSG also admitted that the 2nd and 3rd counts arise from a single sexual act committed by the Appellant. Therefore, he is acquitted from count two of the indictment. I affirm the conviction and sentence imposed on count one and count three. Considering all the circumstances of the case, I consider it is appropriate to order the sentence imposed on count one and count three to run concurrent to each other from the date sentence, i.e. 11.08.2023.

Subject to above variation, the appeal is dismissed.

The Registrar of this Court is directed to send this judgement to the High Court of Ampara along with the original case record.

JUDGE OF THE COURT OF APPEAL

R.P.Hettiarachchi, J,

I agree.

JUDGE OF THE COURT OF APPEAL