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.

Court of Appeal Case No.
CA/HCC/ 0079/2022
High Court of Puttalam
Case No. HC/128/2019

Fernando Pulge Joseph Jude Susantha

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE	:	**P. Kumararatnam, J.** **R. P. Hettiarachchi, J.**
COUNSEL	:	**Rajinda Kandegedera for the Appellant.** **Wasantha Perera, DSG for the Respondent.**
ARGUED ON	:	**24/11/2025**
DECIDED ON	:	**23/01/2026**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted in the High Court of Puttalam for committing three counts of grave sexual abuse on the victim, Weragodagamage Dinusha Lakmali punishable under Section 365(B) 2 (b) of the Penal Code as amended by Acts No.29 of 1998 and No.16 of 2016. The date of offence mentioned in the indictment was between 24.06.2015 to 23.06.2016.

The trial commenced on 09/07/2020. After leading the evidence of the victim, PW2, the victim's mother, PW7 WPC 2532, PW8 SI/Bandara and PW5 JMO who examined the victim, the prosecution had amended the 1st and 2nd charges from anal intercourse to touching the female organ of the victim by using the male organ of the Appellant. The 3rd charge was amended from anal intercourse to touching the breast of the victim by using the male organ of the Appellant.

Before the amendment, the learned State Counsel, very correctly requested the court to re-call PW1 for additional evidence regarding the sexual act committed on the victim by the Appellant.

The learned Counsel for the Appellant objected to the amendment as it would cause great prejudice to the Appellant. The learned High Court Judge by her order dated 13.07.2021 disallowed the application made by the prosecution and dismissed the objection raised by the Counsel for the Appellant.

After the amendment made to the indictment and with the evidence recorded, the prosecution had closed the case on 22/11/2021. The Learned High Court Judge had called for the defence on 03.12.2021 and the Counsel for the Appellant had moved for a day to call witnesses on his behalf. The Appellant had made a dock statement and called one witness in support of his case.

The Learned High Court Judge, after considering the evidence presented by both parties, convicted the Appellant under the second count under Section 365 (B) (2) (b) of the Penal Code as amended, and sentenced the Appellant to 14 years rigorous imprisonment and imposed a fine of Rs.20,000/- subject to a default sentence of 06 months simple imprisonment. In addition, a compensation of Rs.200,000/- was ordered with a default sentence of 01-year simple imprisonment. He was acquitted from the 1st and 3rd counts.

Being aggrieved by the aforesaid conviction and sentence, the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant had given consent to argue this matter in his absence. The Appellant was connected via the Zoom platform from prison during the argument.

The following grounds of appeal were raised on behalf of the Appellant at the argument.

1. Has the learned High Court Judge misdirected herself in analysing and evaluating the credibility of PW1?
2. Has the prosecution failed to prove the charges beyond reasonable grounds?
3. Has the learned High Court Judge erroneously found the Appellant guilty of the charge prior to analysing the defence evidence?

Background of the case *albeit* **as follows:**

According to PW1, the perpetrator was her mother's second husband. The incident had happened when she was studying in grade six. On the day of

the incident, she had gone along with the Appellant to a nearby forest area to collect firewood. At that time, the Appellant had first touched her breast and private part and had continued to touch her vagina and her breast with the Appellant's penis. According to her all the sexual acts had been performed on the same day. After informing the said incidents to her mother and her grandmother, the complaint was lodged with the police.

At the time of giving evidence as the victim had not placed her evidence as stated to police, the learned State Counsel made an application under Section 154 of the Evidence Ordinance and directed certain questions as directed by the defence and continued her examination-in-chief.

PW2, the mother of the victim, was treated as a hostile witness by the prosecution and contradictions from X1 to X5 on her statement given to the police were marked.

PW8 had conducted the investigation upon receiving a complaint via 119 of the Police Emergency Hotline. He had arrested the Appellant at his residence on 24.06.2016. He had not inspected the place of incident as the victim could not correctly describe the place of incident in her statement.

According to PW 5, the JMO who examined the victim stated that he examined the victim on 27/06/2016 at the District Hospital, Puttalam. In the history, the victim had stated that the Appellant after taking her to the forest on the pretext of collecting firewood, had indulged in sexual and anal intercourse several times. Upon genital examination, the JMO had noted that there was a complete healed tear at 6' clock position of the hymen, along with attenuation of the hymen from 8'clock position. Anal orifice was dilated and anal folds were absent. Sphincter tone reduced. According to the JMO, the history given by the victim was very much consistent with his examination on the victim's vagina and her anus.

At the very outset, it is worthy to be noted that neither in the original or amended indictment filed by the prosecution, the acts described in the

history by the victim and the findings of the JMO are not reflected in any of the charges. In the Original indictment, all three charges were framed for anal intercourse and the subsequent amendment to the indictment were for intercrural sex.

But when the victim was giving evidence before the High Court, she had not come out with the incident until the conclusion of her evidence. The relevant portions of the proceedings are re-produced below:

Pages 50,52,53 of the brief.

ප්‍ර : මේ විත්තිකාරයාගෙන් තමයි දිනූෂාට මේ කරදරය වුණේ කියලා කියන්නේ ?

උ : ඔව්.

ප්‍ර : මේ කරදරය එක් අවස්ථාවකදී ද සිද්ධ වුණේ නැත්නම් අවස්ථා ගණනාවක සිදු වුණා ද?

උ : එහෙම මතකයක් නැහැ.

ප්‍ර : මේ කරදරය දිනූෂාට සිද්ධ වුණේ කොහේදී ද කියලා මතකයක් තියෙනවාද ?

උ : එහෙම මතකයක් නැහැ.

ප්‍ර : ඒ ගිහිල්ලා වනාන්තරේ ඇතුළට කොච්චර දුර ගියා ද ?

උ : එහෙම මතකයක් නැහැ.

ප්‍ර : තමායි මෙම විත්තිකරුයි වනාන්තරේට ගිහිල්ලා දර කැඩුවද?

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ප්‍ර : වනාන්තරේට ගිහින් ඊට පස්සේ මොකද වුණේ ?

උ : භයානක සිද්ධියක් වුණා.

ප්‍ර : කාගෙන්ද ඒ භයානක සිද්ධිය වුණේ ?

උ : අම්මා ගත්තු දෙවැනි එක්කෙනාගෙන්.

ප්‍ර : ඒ මෙම විත්තිකරු ද ?

උ : ඔව්.

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උ : ඔව්.

ප්‍ර : දිනූෂා වනාන්තරේට යද්දි මොන වගේ ඇඳුමක් ද ඇඳන් ගියේ ?

උ : එහෙම මතකයක් නැහැ.

ප්‍ර : දිනූෂාගේ ඇඳුම්වලට ඔය වනාන්තරේ ඇතුලේ දී මොනවා හරි වුණා ද ?

උ : එහෙම මතකයක් නැහැ.

Halfway through the examination-in-chief of the victim, suddenly without any basis or reason, the learned State Counsel had made an application under Section 154 of the Evidence Ordinance to ask questions as by the defence. The learned High Court Judge, without considering the said application, simply allowed the application of the prosecution. This is a clear abuse of Section 154 of the Evidence Ordinance both by the prosecution as well as by the court. Although the prosecution was allowed to direct questions as asked by the defence, the prosecution was unable to elicit from the victim the sexual act said to have committed by the Appellant. Although, the prosecution had drawn attention towards the relevant portion of the statement to the police by the victim, she could not describe the sexual act as reflected in the indictment. The relevant portion of the proceeding is re-produced below:

<u>Page 68 of the brief.</u>

ප්‍ර : ඒ ප්‍රකාශයේ දිනූෂා කියලා තියෙනවා නම් **"එදා ඉඳලා දර ඉවරවෙන කොට මාව දර කඩන්න එක්කගෙන ගිහින් ඒ දේ හැමදාම මට කළා"** කියලා දිනූෂා ඒ ප්‍රකාශය දෙන වේලාවේ පොලිසියට කියලා තිබුණා නම් දිනූෂාට මොකද්ද කියන්න තියෙන්නේ ඒ ගැන ?

උ : අම්මාට කිව්වාට පස්සේ කළේ නැහැ. ඊට කලින් කළා.

The learned High Court Judge who wrote the judgement commented on this misdirection but she decided to disregard those proceedings when she considered the evidence of the victim.

The charge is the most basic foundation in a criminal trial. The accused can gather information on the nature of the allegation levelled against him by observing the charge. The charge must specify clearly the act committed by the accused, the law alleged to have been violated by him, as well as the particulars relating to the alleged offence. The prosecutor bears the duty of framing the charge/s by cautiously considering the available evidence within the case at the time of drafting the charge. The requirements needed for a charge to be a valid charge are contained in Sections 164 and 165 of the Code of Criminal Procedure Act No.15 of 1979.

In the indictment filed by the prosecution, the charges were framed on the basis that the Appellant had committed three counts of anal sex on the victim. But in her evidence, she did not mention about anal intercourse being committed on her. Instead, she had only stated that a dangerous act was performed on her by the Appellant. After the conclusion of her evidence, the prosecution had made an application to amend the charges from anal intercourse to intercrural sex. In keeping with the concept of fair trial, the learned State Counsel made an application to re-call the victim. At the same time the defence had objected to the amendment of the charges. The learned High Court Judge disallowed the said application of the prosecution but allowed the proposed amendment to the indictment despite the objection of the defence.

The learned Counsel for the Appellant, citing Article 13(3) of the constitution of the Democratic Socialist Republic of Sri Lanka submits that allowing the application to amend the indictment after the conclusion the evidence of the victim and all other prosecution witnesses, has caused great prejudice to the Appellant and deprived him of a fair trial.

An accused has the right to a fair trial, where the accused's innocence or guilt in respect of the alleged crime will be ascertained. This right remains an internationally recognised and respected human right, as fair trials are essential in discovering the truth and would therefore be of utmost importance to each party involved in a case. Fair trials are a major cornerstone of democracy, as such fair trials assist in ensuring fairness and justice, and to limit abuse of powers of governments and other state authorities and institutions.

Section 167 of the Code of Criminal Procedure Act No.15 of 1979 states:

1. Any court may alter any indictment or charge at any time before the judgment is pronounced or, in the case of trials before the High Court by a jury, before the verdict of the jury is resumed.
2. Every such alteration shall be read and explained to the accused.
3. The substitution of one charge for another in an indictment or the addition of a new charge to an indictment and in a Magistrate's Court the substitution of one charge for another or addition of a new charge shall be deemed to be an alteration of such indictment or charge within the meaning of this section.

In **the Attorney General v Segulebbe Latheef & Another** [2008] (1) SLR 225 the court held that:

> *"The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice is denied. The right to a fair trial was formally recognised in international law in 1948 in the United Nations Declaration of Human Rights. Since 1948 the right to a fair trial has been incorporated into many national, regional and international instruments.*
>
> *Like the concept of fairness, a fair trial is also not capable of a clear definition, but there are certain aspects or qualities of a fair trial that could be easily identified.*

The right to a fair trial amongst other things includes the following: -

1. The equality of all persons before the court.

2. A fair and public hearing by a competent, independent and impartial court/tribunal established by law.

3. Presumption of innocence until guilt is proven according to law.

4. The right of an accused person to be informed or promptly and in detail in a language he understands of the nature and cause of the charge against him.
5. The right of an accused to have time and facilities for preparation for the trial.
6. The right to have a counsel and to communicate with him.
7. The right of an accused to be tried without much delay.

8. The right of an accused to be tried in his presence and to defend himself or through counsel.
9. The accused has a right to be informed of his rights.
10. If the accused is in indigent circumstances to provide legal assistance without any charge from the accused.
11. The right of an accused to examine or have examined the witnesses against him and to obtain the evidence and examination of witnesses on his behalf under the same conditions as witnesses against him.
12. If the accused cannot understand or speak the language in which proceedings are conducted to have the assistance of an interpreter
13. The right of an accused not to be compelled to testify against himself or to confess guilty".

In this case the amendment to the indictment was allowed by the learned High Court Judge without re-calling the victim. Further, the defence had

vehemently objected the amendment. Therefore, the amendment caused to the indictment has caused great prejudice to the Appellant.

In **John Perera v Weerasinghe** 53 NLR 158 the court held that:

> *"Held, that an amendment of a charge should not be refused by the Judge unless it is likely to do substantial injustice to the accused. Section 172 of the Criminal Procedure Code is wide enough to permit the withdrawal of one or more counts or charges in an indictment or complaint".*

In the case of **Rodrigo v The Queen** (1953) 55 NLR 49 it was held that:

> "*The primary responsibility for the accuracy and suitability of an indictment rests with counsel for the prosecution, and not on the court. The court may, however, decide to amend the indictment on its own responsibility, but before such a decision in made, both the prosecution and the defence should be given an opportunity of making their submissions on the point. The power vested in the Supreme Court under section 347 (6) (ii) of the Criminal Procedure Code to alter a verdict to a conviction on an amended charge which the appellant had not specifically been called upon to meet at any stage of the trial must be used with discretion, and only if the accused was not misled by the form of the charge and there is not any chance of injustice being done*."

In this case**,** I consider that allowing an amendment to the indictment after the conclusion of prosecution witnesses, has caused great prejudice to the Appellant and has thus deprived the Appellant of a fair trial which has clearly been enshrined in our constitution.

In this case, the victim had not disclosed any incident as mentioned in the charges in her evidence. Instead, she had said that she cannot remember.

Further she had told this incident to her mother and her grandmother. Victim's mother's evidence had been rejected as she was treated as an adverse witness by the prosecution. Further, PW3 was not called by the prosecution. Hence, no corroborative evidence was led in the trial.

The JMO had noted down the history given by the victim. In the history the victim had said that she was raped by the Appellant several times and he had also performed anal intercourse on the victim. The findings of the JMO are quite consistent with the history given by the victim. But surprisingly, the prosecution has not charged the Appellant for statutory rape. Although, the Appellant was indicted for three counts of anal intercourse, after leading evidence of the victim and all other prosecution witnesses, the indictment was amended as stated above. Although, the indictment was amended by including totally different offences, the court disallowed the application by the prosecution to re-call the victim.

Considering the evidence given by the victim, I conclude that her evidence needs corroboration. I am of the belief that accepting her evidence without corroboration would cause great prejudice to the Appellant. Considering these circumstances, her evidence had failed to satisfy the Court's tests of consistency, spontaneity, and probability.

In this case PW1 is the key witness. Her evidence is not clear and not matched on material points discussed above. Her evidence is tainted with much ambiguity and uncertainty, which definitely affects the root of the case. Hence, the appeal grounds advanced by the Appellant have a very serious impact on the prosecution case.

Taking all these circumstances into consideration, I am of the view that the conviction of the Appellant cannot be allowed to stand as the prosecution had failed its duty to prove this case beyond reasonable doubt. I set aside the conviction and sentence imposed by the Learned High Court Judge of

Puttalam dated 12/05/2022 on the Appellant. Therefore, he is acquitted from this case.

The appeal is allowed.

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

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL