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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal Case No.
CA/HCC/ 0167/2024
High Court of Hambantota
Case No. HC/47/2018

Hewa Kekanadurage Nishantha

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Rajindra Kandegedera for the Appellant.**
Wasantha Perera, DSG for the Respondent.

ARGUED ON : **10/12/2025**

DECIDED ON : **22/01/2026**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General for committing two counts of grave sexual abuse punishable under Section 365B (2) (b) of the Penal Code on Ridiyagama Radage Sithupraba Chamini Pradeeptha between the period of 01.04.2015 and 07.11.2015.

The trial commenced on 15/07/2019. After leading all the necessary witnesses, the prosecution had closed the case. The Learned High Court Judge had called for the defence and the Appellant opted to give evidence from the witness box and closed the case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant for the second count and sentenced the Appellant to 08 of years rigorous imprisonment and a fine of Rs10,000/- was imposed, subject to a default sentence of 06 months rigorous imprisonment. In addition, a compensation of Rs.50,0000/- was ordered with a default sentence of 01-year rigorous imprisonment.

The Appellant was acquitted from the 1st count.

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 has given consent to argue this matter in his absence. At the time of the argument, he was connected via the Zoom platform from prison.

Before the commencement of the argument, as a preliminary issue, the Learned Counsel for the Appellant informed this court that the evidence given by the victim did not disclose the act which had been mentioned in the second charge. Therefore, he had contested that the prosecution has not proven the second charge beyond reasonable doubt.

The Learned Deputy Solicitor General, in keeping with the highest traditions of the Attorney General's Department, conceded that the prosecution has not elicited the particular act mentioned in the indictment from the victim. In the second charge, the Appellant was charged for committing fingering into the victim's vagina. However, in her evidence, she had only mentioned that the Appellant had touched her vagina over her clothes.

The charge acts as the most basic foundation in a criminal trial. By charging, an accused is provided information as to the nature of the allegation levelled against him. The charge must identify the act committed by the accused and the law alleged to have been violated by him. Furthermore, the particulars pertaining to the alleged offence must be specified in the charge.

In **Hattuwan Pedige Sugath Karunaratne v Hon.Attorney General** SC Appeal 32 of 2020 dated 20.10.202 his Lordship Aluvihare, J. held that:

> *"…… No doubt the duty of a State Counsel is to present the prosecution in an effective manner to the best of their ability in furtherance of securing a conviction, if the evidence can support the charge. The Prosecutor, however, is an officer of the court and their role is to assist the court to dispense justice. Thus, it is not for a Prosecutor to ensure a conviction at any cost but to see that the truth elicited, and justice is meted out".*

The Supreme Court in **The Queen v Liyanage and Others** (1963) 65 NLR 337, stated that:

> *"… on a trial upon Indictment, by the very essence of the pre-trial procedure, an accused person becomes aware of all the evidence relied*

upon by the Crown in support of the Indictment and which the Crown intends to place against him at the trial. He is entitled in law to know such evidence before he is called upon to plead to the Indictment. It is a right of his, inherent in that procedure."

In the case of **Rowe and Davis v the United Kingdom** [2000] ECHR, The European Court of Human Rights held:

"… in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party."

In the case of **Edwards and Lewis v. United Kingdom** (2004) 40 EHRR 593 it was held that:

"It is in any event a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (ibid., § 51). In addition, Article 6 § 1 requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (ibid.)."

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

The victim was 08 years old and was in grade three at the time of the incident. She cannot remember the exact date or the time of the incident. The Appellant is her father's brother who lived in close proximity to her house. The incident had taken place when the Appellant had arrived at her house to do wiring. At that time, the Appellant had allegedly showed pornographic scenes to the victim by using his mobile phone.

This incident had come to light when the victim told this incident to her sister who had in return told the same to her mother. The complaint was lodged on 07.11.2015.

The Appellant had given evidence from the witness box and denied the charge.

Section 365 B (1) states:

> Grave Sexual Abuse is committed by any person who, for sexual gratification does any act by the use of his genitals or any other part of the human body or any instrument on any orifice or part of the body of any other person being an act which does not amount to rape under section 363…

In **Mahalakotuwa v. The Attorney General** [2011] 2 B.L.R 406 D.S.C Lecamwasam,J. held that:

> *"On a plain reading of the above section it is clear, that the section envisaged a grave situation which falls short of rape. It cannot be a mere 'Touch'. It has to be much more serious than a touch and to come within the ambit of 'Grave Sexual Abuse' it must be of a very high degree, so serious and grave in nature that it can only fall short of Rape, but must surpass situations expected in section 345,365 and 365A".*

Further, in the case of **Yoga v. Attorney-General** [2010] 2 Sri L.R. 162 it was held that:

> *"To establish a charge under section 365 (B) of the Penal Code the prosecution must establish that the alleged act was done with the intention of having sexual gratification. This aspect must be proved beyond reasonable doubt."*

In the case of **Jayathilaka v. Attorney-General** [2008] 2 Sri L.R. 117, rape and grave sexual abuse was distinguished as follows:

"In a charge of rape, the prosecution must prove penetration, in acharge of grave sexual abuse prosecution is not required to prove penetration. The ingredients in a charge of rape are different from the ingredients that must be proved in a charge of grave sexual abuse."

In the body of the charge, it is alleged that in order to obtain sexual gratification, the Appellant had inserted his finger into the vagina of the victim. However, when the victim gave evidence, she quite notably restricted her evidence to claim that the act was a mere touch of her vagina over her clothes. According to the plain reading of Section 365 B (1) of the Penal Code, I conclude that the act which was said to have been committed on the victim does not constitute an offence under 365 B (1) of the Penal Code in this case. Hence, it is necessary to consider what the appropriate section under the Penal Code should have been considered in this case.

Section 345 of Penal Code as amended states:

"Whoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment and shall on conviction be punished with imprisonment of either description for a term which may extend to five years or with fine or with both and may also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person."

EXPLANATION

1. Unwelcome sexual advances by words or action used by a person in authority, to a working place or any other place, shall constitute the offence of sexual harassment.

2. For the purposes of this section an assault may include any act that does not amount to rape under section 363 or grave sexual abuse under section 365B.

3. "injuries" includes psychological or mental trauma.

According to the facts of this case, taking the victim under his authority, the Appellant had intentionally used force on the victim and touched her vagina over her clothes and thereby had caused sexual harassment, therefore committing an offence under section 345 of the Penal Code and not under section 365 B (1) of the Penal Code as amended.

In **Mahalakotuwa v. The Attorney General** (Supra) the court further held that:

> *"Assuming but without conceding, that the act committed by the appellant falls within both sections 345 and 365B or alternatively if it is uncertain as to which precise section of the two it falls under, then he should be convicted under section 345 and not 365B. According to Maxwell on Interpretation of Statutes 12th edition page 239 Lord Esher M.R. had held in Tuck and Sons v. Priester (1887 (19) QBD 629 at 638) .....if there are two reasonable constructions, we must give the more lenient one"*

In the case of **Sebastian Fernando v Katana Multi -Purpose Co-operative Society Ltd and Others** (1990) 1 SLR 342 it was held that:

> *"Statutes which encroach upon the rights of the citizen have to be "strictly" construed: they should be interpreted, if possible, to respect such rights, and if there is any ambiguity, the construction which is in favour of the freedom of the individual should be adopted. Statutes which impose pecuniary burdens or penalties are subject to the same rule. If there are two reasonable constructions, one of which will avoid the penalty, that construction must be preferred."*

In the case of **Wickramasinghe v Attorney General and Another** (2010) 1 SLR 141 it was held that:

> *"Assuming that there are two different interpretations of the words in the Bail Act, is it reasonable, sensible or justifiable to keep a suspect or accused on remand indefinitely without being prosecuted? I think not. For these reasons I think that courts will have to interpret the law giving a meaningful interpretation to the intention of the legislature."*

In this case, the Learned High Court Judge who delivered the judgment had not evaluated the ingredients of Sections 365B and 345 of the Penal Code as amended to consider what the appropriate charge is, to be framed against the Appellant. Had this been correctly analysed and considered at that time, the court could have sentenced the Appellant under Section 345 of the Penal Code.

In **Mahalakotuwa v. The Attorney General** (Supra) the court further held that:

> *"In a case of this nature when the facts clearly show that the accused cannot brought under 365B (2) b, learned judges should not hesitate to use their prudence in deciding whether a particular set of facts constitute the offence contained in the indictment or not. If not, without mechanically passing the sentence on the indictment already filed they must have the audacity to act under 177 or 178 of the CPC and convict the accused accordingly for a different offence."*

As discussed above, the evidence adduced by the prosecution does not support the conviction delivered by the Learned High Court Judge of Hambantota dated 30/05/2024. Hence, I set aside the said conviction and substitute it with a conviction under Section 345 of the Penal Code as amended and impose three years rigorous imprisonment and a fine of Rs.10,000/- with a default sentence of 01-year rigorous imprisonment.

Further, the Appellant is ordered to pay a sum of Rs.300000/- to PW1 as compensation and in default serve 2 years of rigorous imprisonment. Considering all the circumstances of this case, I order the sentence to take effect from the date of conviction i.e., from 30/05/2024. Subject to the above variations, the appeal is dismissed.

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

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL