

**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/ 0139/2024

Rasika Nalin Kumara Ranaweera

High Court of Colombo

Case No. HC/146/2018

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE

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

COUNSEL

: **Anuja Premaratna, PC with Imasha
Senadeera, Emal Gunasekara and
N. Thanthrige for the Appellant.
Hiranjan Peiris, ASG for the Respondent.**

ARGUED ON : **09/10/2025**

DECIDED ON : **02/12/2025**

JUDGMENT

P. Kumararatnam, J.

The above-named Appellant, by an amended indictment dated 01.07.2019 was indicted by the Attorney General under Section 365 B(2)(b) of the Penal Code for committing two counts of grave sexual Abuse, and one count under Section 345 of the Penal Code for committing sexual harassment on Tashmila Didulani Rukshan between 12.08.2013 and 11.08.2014.

Initially, he was indicted for one count of grave sexual abuse punishable under Section 365 B (2)(b) and one count of sexual harassment punishable under Section 354 (As per the indictment dated 29.12.2019 at pages 9-12 of the brief) of the Penal Code.

The trial commenced on 16/10/2019. After leading all the necessary witnesses and marking Productions P1 to P2, the prosecution had closed the case on 05/07/2023. The Learned High Court Judge had called for the defence on the same day and the learned Counsel for the Appellant had moved for a day to call witnesses on his behalf. The Appellant had given evidence and had called witnesses on his behalf and closed his case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant as charged and sentenced him as follows:

- For the first count, he was sentenced to 10 years rigorous imprisonment and a fine of Rs.20,000/- was imposed on him subject to a default sentence of 06 months simple imprisonment.
- For the second count, he was sentenced to 10 years rigorous imprisonment and a fine of Rs.20,000/- was imposed on him subject to a default sentence of 06 months simple imprisonment.
- For the third count, he was sentenced to 02 years rigorous imprisonment and a fine of Rs.10,000/- was imposed on him subject to a default sentence of 06 months simple imprisonment.
- Further, the learned High Court Judge had ordered the sentence imposed on counts one to three to run concurrently with each other.

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

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

The Learned President's Counsel contends that based on the evidence offered, it is impossible to conclude that the prosecution has proven its case against the Appellant beyond a reasonable doubt.

The following appeal grounds were raised on behalf of the Appellant:

1. Did the Learned Trial Judge err in the non-consideration of the period of time and that the Accused is infringed of his right to a fair trial due to the inability to present a defence?
2. Did the Learned Trial Judge err in not legally analysing and concluding the belatedness of the complaint to the police?
3. Did the Learned Trial Judge err in not considering the ingredients of the offence of grave sexual abuse and the burden of proof casted on the prosecution in proving those ingredients?

4. Did the learned High Court Judge err in not considering the evidence of the defence which remained unchallenged?

The Appellant is a close relation of the victim as he got married to the sister of the victim's mother. Due to this relationship, the victim and her mother were frequent visitors to the Appellant's house and had spent several nights at the Appellant's residence. The Appellant's house was a small rented house and the inmates of his house were his wife, daughter, son and a person called Thimira who was a bank employee at that time.

As per PW1, who is the victim in this case, the incident mentioned in this case had taken place around 8 or 9 months before the complaint was lodged with the police. The victim was not able to provide or confirm any details about what grade in school she was in, whether it was a weekday or a weekend or whether she was on school holidays when the incident had taken place.

The victim claims that the first incident had taken place during a day where she had visited the Appellant's house with her mother. According to her, on that given day, while she was watching television with her cousins (the Appellant's children), the Appellant had sat on the arm rest of the chair and had touched her chest by inserting his hand into the T-shirt she was wearing at that time. During this time, the victim's mother and the Appellant's wife had been inside the kitchen.

The second incident had occurred when the victim was sleeping near the Appellant's daughter. As per the victim, she had been sleeping on a bed along with her mother, aunt and the daughter of the Accused. The Appellant had slept on the ground with his son. In the morning, the Appellant had been lying on the bed between the victim and the Appellant's daughter, according to the victim. The Appellant had been talking to her and his daughter when the second incident had taken place. In that moment, the Appellant had touched her genital area over her clothes, while kissing her ear. When the

victim had then tried to leave the room, the Appellant had hugged the victim from behind.

The third incident had taken place when she was leaving Thimira's room after taking a wash. At that moment, the Appellant had come behind her and hugged her again. At the time the victim had encountered this, she was 13 years and 8 months old.

The victim and her mother had continued to visit the Appellant after the incident. However, the victim had not complained about this to anyone except an unnamed friend. Later on, due to a misunderstanding having occurred between the two families in respect of a financial transaction, she had revealed about these incidents to her mother, after which, they had lodged a complaint to the police.

JMO H. T. D. W. Ariyaratne, who is PW3 in this case, had examined the victim and had gone on to note that no external injuries were noted on the victim's body. According to PW3, as the victim had seemed sad, he had referred the victim to a Consultant Psychiatric.

The Learned President's Counsel argues that the nature of the acts allegedly committed by the Appellant cannot constitute grave sexual abuse. His claim lies in the argument that the Learned High Court Judge had merely proceeded to convict the Appellant of the 1st and 2nd charges in the indictment without proper consideration of whether the mentioned acts do, in fact, constitute grave sexual abuse.

In the 1st charge in the indictment, the sexual act noted by the prosecution was 'touching the chest area of the victim'.

In the 2nd charge in the indictment, the sexual act described by the prosecution is 'touching the genital area of the victim over her dress'.

365B. Grave Sexual Abuse

(1) 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 circumstances falling under any of the following descriptions, that is to say—

- (a) without the consent of the other person;
- (aa) with or without the consent of the other person when the other person is under sixteen years of age;
- (b) with the consent of the other person while such other person was in lawful or unlawful detention or where that consent has been obtained, by use of force, or intimidation or threat of detention or by putting such other person in fear of death or hurt;
- (c) with the consent of the other person where such consent has been obtained at a time the other person was of unsound mind or was in a state of intoxication induced by alcohol or drugs.

The acts that fall under the scope of Section 365B must be graver than mere touch. The definition found within the section also consists of the words: “which does not amount to Rape”, clearly indicating that the most accurate interpretation would be that the act, to constitute grave sexual abuse, must be more than merely touching a person.

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 this case, the pertinent issue at hand would be whether the 1st and 2nd charges in the indictment could clearly constitute offences under Section 365 B (1) of the Penal Code as amended. In respect of the 1st charge, the alleged act is that the Appellant had touched the chest area of the victim to obtain sexual gratification. In respect of the 2nd charge, the alleged act is that the Appellant had touched the genital area of the victim over her dress to obtain sexual gratification.

As examined above, there must be serious, grave circumstances involved in the situation in order to punish an accused under Section 365B (1). In this case, as seen in the charges, the Appellant had only touched the chest area and the genital area of the victim. Thereby, I conclude that mere touching of such sensitive areas of a person would not fall under the scope of grave sexual abuse, as Section 365 B only includes graver situations which fall short of rape.

Accordingly, it must now be considered whether the Appellant could be found guilty in respect of a lesser offence, with the evidence available in this situation.

As per the facts of this case, it is quite evident that the Appellant, while being a close relation of the victim, had used his authority and breached the trust placed in his capacity as a guardian/elderly relation, by using force

intentionally on the prosecutrix and touching her chest area and genital area over her dress.

After conducting a plain reading of Section 365 B (1) of the Penal Code, I conclude that the acts described in the 1st and 2nd counts do not constitute an offence under 365 B (1) of the Penal Code in this case. Therefore, it is then necessary to determine the appropriate section of the Penal Code that is most applicable in this scenario.

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.

Therefore, as per Section 335(2) (b) of the Code of Criminal Procedure Act No. 15 of 1979, I substitute a conviction under Section 345 of the Penal Code as amended and instead, impose a period of 02 years rigorous imprisonment

each on 1st and 2nd counts upon the Appellant. Further, a fine of Rs.10,000/- with a default sentence of 06 months simple imprisonment each on 1st and 2nd counts will be imposed on the Appellant. The Appellant is also ordered to pay a sum of Rs.100,000/- to PW1 as compensation, and in default serve 01-year simple imprisonment.

In respect of the 3rd count, the sentence imposed by the Learned High Court Judge will remain the same.

I order the jail sentence imposed on counts 01-03 to run concurrently with each other.

Thereby, as the 3rd ground of appeal has merit, it will not be necessary to consider the other grounds of appeal raised by the Appellant.

Considering all circumstances in this case, I order the sentence to take effect from the date of conviction i.e., 20/03/2024.

Subject to the above variations, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL