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/ 0232/2016
High Court of Negombo
Case No. HC/162/2009

Mervin Nissanka Anthony

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Anil Silva, P.C. with Isuru Jayawardena for the Appellant.**
Madawa Tennakoon, DSG for the Respondent.

ARGUED ON : **14/02/2022**

DECIDED ON : **05/04/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General for committing an offence under section 364(1) of the Penal Code against Gunasekera Archchilage Niluka Krishanthi on or about the 10th of October 2005.

The trial commenced on 11/01/2011. The Appellant had elected a non-jury trial when the indictment was served on him. After leading all necessary witnesses, the prosecution had closed the case on 15/11/2011. The Learned High Court Judge had called for the defence on the same day and the counsel for the Appellant had moved for a day to call witnesses on his behalf. When this case was called on 09/01/2012, the defence counsel had filed a list of witnesses on behalf of the Appellant.

When this case was called for the defence case on 09/02/2012, the prosecuting counsel had informed the court that after considering the evidence presented, the prosecution was going to amend the indictment by adding an alternative charge for Grave Sexual Abuse under Section 365 (b) (2) of the Penal Code as amended. Accordingly, the amended indictment under Section 167 of the Code of Criminal Procedure Act No.15 of 1979

was filed in court on 09/02/2012 amidst the objection of the defence counsel.

The second alternative count in the amended indictment reads as follows:

In the alternative to the above mentioned charge and at the time, place and in the course of the same transaction the accused had for the purpose of obtaining sexual gratification, using a part of his body, that is by threatening Gunasekera Archchilage Nilusha Krishanthi by showing a knife, made Gunasekera Archchilage Nilusha Krishanthi drink a liquid and removed her clothes so as to reveal her genitalia and by so revealing Gunasekera Archchilage Nilusha Krishanthi's genitalia, has committed an offence punishable under Section 365 (b) (2) the Penal Code as amended by Act No. 22 of 1995 known as sexual abuse.

Thereafter, with the leave of the court, the prosecution had recalled witnesses 1,2,3 and 11 and closed the case.

Defence was called after refusing the application made under Section 200(1) of the Code of Criminal Procedure Act No.15 of 1979. The Appellant gave evidence and was subjected to cross-examination by the State Counsel. Before the cross-examination, upon the Application of the prosecution, both the counsels had gone to the place of the incident for an inspection. After conclusion of the Appellant's evidence, several others had also been called to give evidence on behalf of the Appellant and the defence had then closed their case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant for the alternative charge under Section 365 (b) (2) of the Penal Code as amended, and sentenced the Appellant to 20 years rigorous imprisonment and imposed a fine of Rs.20,000/- subject to a default sentence of 01-year simple imprisonment. In addition, a compensation of Rs.400000/- was ordered with a default sentence of 02 years simple imprisonment.

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 due to the Covid 19 pandemic. During the argument he was connected via Zoom from prison.

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

1. The amendment made to the indictment.
2. The Learned Trial Judge failed to make a determination that the prosecution had proved the identity of the appellant beyond reasonable doubt.

The Learned High Court Judge had allowed an application made by the prosecution to amend the indictment after the conclusion of the prosecution case. Amidst the objection, the prosecution amended the indictment and brought an alternative count under section 365 (b) (2) of the Penal Code as amended. The only reason for the amendment was that the victim had not elicited any evidence pertaining to the charge of rape levelled against the Appellant.

In a criminal trial the basic foundation is the charge. 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, the law alleged to have been violated by him and particulars pertaining to the alleged offence must be specified in the charge.

It is the profound duty of a prosecutor to frame charge/s after careful consideration of evidence available in the case at the time of drafting the charge. The requirements of a valid charge are set out in Sections 164 and 165 of the Code of Criminal Procedure Act No.15 of 1979.

In this case the Hon. Attorney General in the first indictment indicted the Appellant under 364(1) of the Penal Code as amended. After the conclusion of the prosecution case and when the defence was called the State Counsel making an application under Section 167 of the Code of Criminal Procedure Act No. 15 of 1979, requested the court to grant permission to amend the indictment. Despite the objection raised by the counsel for the Appellant, the Learned High Court Judge had allowed the application. In the second indictment the State Counsel added an alternative charge under Section 365(b) (2) of the Penal Code as amended.

This clearly shows that the evidence led by the prosecution was unsuccessful to maintain the charge under section 364(1) of the Penal Code as amended.

Section 167 of the Code of Criminal Procedure Act No. 15 of 1979 reads as follows:

1. Any court may alter any indictment or charge at any time before judgment is pronounced or, in the case of trials, before the High Court by a jury, before the verdict of the jury is returned.
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 the addition of a new charge shall be deemed to be an alteration of such indictment or charge within the meaning of this section.

In **John Perera v. Weerasinghe** 53 NLR 158 the court 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."*

In **Doole v. The Republic of Sri Lanka** [1978-1979] 2 SLR 33 the court held that:

> *"as a rule an amendment to an indictment should be allowed if it would have the effect of convicting the guilty or securing the acquittal of the innocent, but it should not be allowed if it would cause substantial injustice or prejudice to the accused."*

In this case, after the conclusion of the prosecution case and after calling the defence, the prosecution had made an application to amend the existing charge under Section 167 of the Code of Criminal Procedure Act No. 15 of 1979. But the prosecution had presented the amended indictment with an alternative count under Section 365 (b) (2) of the Penal Code as amended. The reason for the amendment was that evidence presented during the trial was not fitted to bring a conviction under Section 364(1) of Penal Code as amended. Hence, the question arises as to whether the charge brought under Section 365(b) (2) to the indictment as an alternative count is proper in this case.

In this case, at the time of closing the case for the prosecution, they were unable to prove the charge of rape against the Appellant. As the prosecutrix had already doubted about her evidence, the prosecution is not entitled to bring an alternative charge to the indictment under Section 365(b) (2) (b). In a charge of rape, the prosecution must prove penetration. In grave sexual abuse prosecution is not required to prove penetration. Thus, the ingredients in a charge of rape are different from the ingredients that must be proved in a charge of grave sexual abuse. Hence, the best course of action should have been the amendment of the existing charge as requested under Section 167 of the Code of Criminal Procedure Act.

In **CA/88/2002** decided on 19/06/2007 W.L.R.Silva J held that:

> *"Grave sexual abuse is a cognate offence introduced by a separate amendment and is a specific offence having its own ingredients."*

The court further held that:

> *We are of the view, that grave sexual abuse can never be considered as a lesser offence under Section 178 of the Criminal Procedure Code."*

In **R. T. Wilbert and 3 others v. Newman** 75 NLR 138 the court held that:

> *"It should have been apparent to the Magistrate, if he had made the slightest study of the Charge, that 'to fell tress' is an offence distinct from 'causing trees to be felled'. I presume that he is aware that Section 178 of the Criminal Procedure Code enacts that 'for every distinct' offence of which any person is accused there shall be a separate Charge and every such Charge shall be tried separately."*

Hence, in this case, amending the indictment by bringing an alternative count, which is a distinct offence is an error caused by the prosecution. The proper procedure that should have been followed by the prosecution is to amend the charge of rape to one of grave sexual abuse and then to proceed with the case.

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".*

In this case it is very important to consider whether the alternative charge clearly reflected the offence under Section 365 B (1) of the Penal Code as amended. In the body of the charge, it is alleged that in order to obtain sexual gratification, the appellant used his body by threatening the victim using a knife and so forced the victim to drink some liquid and thereafter removed her clothes so as to reveal her genitalia.

As discussed above, Section 365B (1) requires the presence of grave circumstances to punish an accused under it. In this case as per the charge the Appellant was said to have threatened the victim with a knife, made her to drink some liquid and removed her clothes so as to reveal her genitalia.

According to PW1 the victim of this case, she had travelled from her home to Bandaranayake International Airport on 09/10/2005 to go to Kuwait for employment. When she was seated near the departure gate following the requisite formalities, the Appellant had arrived and enquired whether anybody there had come through Saman Agency. As she had come through Saman Agency, the Appellant had taken her passport along with the other documents and escorted her to another floor in a lift with two others. After speaking to the other persons, the Appellant had opened a room and took her inside. One of the persons had dissolved something in a glass and the

Appellant had forced her to drink the same. At that time the Appellant had threatened her with a knife. After drinking she had lost her consciousness and when she regained her senses, she was on a cardboard sheet and her blouse was half removed and her skirt was fully removed revealing her genitalia. The Appellant was in the room and he had removed his shoes and his cap. Thereafter, she was taken to the departure gate and guided into a bus for boarding. Although it was her evidence that she informed what happened to her to several female airline officers who were present, no one has taken any action. She had left for Kuwait but had fallen sick upon arrival. Hence, she was sent back to Sri Lanka after about 10 days. She had lodged a complaint with the Foreign Employment Bureau after her arrival. After inquiry the Airport Police had arrested several people including the Appellant. She had identified the Appellant at the identification parade.

With the evidence of PW1 it is very pertinent to consider whether the alternative charge properly reflected and supported her evidence in this case. According to the charge the Appellant used part of his body only to threaten the victim with a knife and forced her to drink some liquid. Thereafter, the charge goes on to say that the Appellant had removed her clothes revealing her genitalia.

According to the plain reading of Section 365 B (1) of the Penal Code, I conclude that none of the acts said to have committed on the victim constitute an offence under 365 B (1) of the Penal Code in this case. Hence it is necessary to consider what the appropriate section is, that should have been considered under the Penal code 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.

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

or annoyance....." "To constitute the offence of sexual harassment, assault or criminal force is a pre-requisite. Section 341 of the Penal Code defines criminal force in following words- 'whoever intentionally uses force to any person without that person's consent.....knowing it to be likely that by the use of such force he will illegally cause injury, fear

According to the facts of this case, taking the victim under his authority, the Appellant intentionally used force on the victim and removed her clothes and thereby had caused sexual harassment and committed 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 this case Learned High Court Judge who delivered the judgment had not gone through the ingredients of the Sections 365B and 345 of the Penal Code as amended with the alternative charge filed in the amended indictment. Had this been looked into 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 the appeal ground one has merits and greatly affect the finding of the trial court, it is not necessary for this court to consider the second ground of appeal raised by the Appellant.

As discussed above, the evidence adduced by the prosecution does not support the conviction entered by Learned High Court Judge of Negombo dated 10/08/2016. Hence, I set aside said conviction and substitute a conviction under Section 345 of the Penal Code as amended and impose five years rigorous imprisonment and a fine of Rs.10000/- with a default sentence of 01-year rigorous imprisonment. Further, the Appellant is ordered to pay a sum of Rs.300000/- to the 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 10/08/2016.

Subject to the above variations, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL