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/ 0170/2020

High Court of Kurunegala
Case No. HC/127/2018

Hiththatcharilage Gnanaratna alias Shantha Mama

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL	**:**	**Amila Palliyage with Sandeepani Wijesooriya, Eric Balasooriya and S. Udugampola for the Appellant.** **Suharshi Herath, DSG for the Respondent.**
ARGUED ON	**:**	**26/01/2023**
DECIDED ON	**:**	**10/03/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted in the High Court of Kurunegala for committing three counts of grave sexual abuse on the prosecutrix, 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 three counts of the indictment are:

1. The accused had sexual gratification by touching prosecutrix's genital with his hands.
2. The accused had sexual gratification by inserting his male organ into the mouth of the prosecutrix.
3. The accused had sexual gratification by committing intercrural sex on the prosecutrix.

The trial commenced on 16/01/2020. After leading the evidence of the prosecutrix and other lay witnesses, the prosecution had amended the 1st and the 2nd charge as follows:

1. The accused had sexual gratification by making the prosecutrix to touch his genital with her hands.
2. The accused had sexual gratification by keeping his male organ on the mouth of the prosecutrix.

After leading all necessary witnesses, the prosecution had closed the case on 17/01/2020. 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. The Appellant had made a dock statement and called three witnesses in support of his case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant for the 2nd charge only, under Section 365 (B) (2)(b) of the Penal Code as amended, and sentenced the Appellant to 10 years rigorous imprisonment and imposed a fine of Rs.10,000/- subject to a default sentence of 03 months simple imprisonment. In addition, a compensation of Rs.100000/- was ordered with a default sentence of 01-year rigorous imprisonment. The Appellant was acquitted from 1st and 3rd charges as the prosecution had failed to prove the same.

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 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 were raised.

1. The prosecution had failed to satisfy court the test of consistency, spontaneity and probability.
2. The presumption under Section 114(f) of the Evidence Ordinance should be accrued to the Appellant as the prosecution has failed to call PW2 who is the mother of the prosecutrix.
3. Amending the indictment after leading lay witnesses is irregular.
4. The Learned Trial Judge failed to consider such amendment to the indictment is not in consistence with the provisions of the Code of Criminal Procedure Act No.15 of 1979.
5. Use of the police information book to determine the guilt of the Appellant.
6. Dock statement of the Appellant has not been considered adequately in the judgment.

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

PW1 was only 08 years old when she encountered the unpleasant incidents as she described in her evidence. During the school holidays she stayed at her grandmother's house and she used to go to sleep at the neighbouring house of the Appellant who is her maternal uncle. The Appellant's wife always sent her to sleep in her uncle's room as she got a baby at that time. Using this opportunity, the Appellant allegedly had made sexual advancements towards her.

During her tender age she did not realize the alleged sexual acts performed on her were serious. But after five years, when she had attended an awareness programme regarding child abuse conducted by the police to school children, she had realized that she had been abused by the

Appellant sexually. First, she had divulged this incident to her friend (PW4) and then to her teacher (PW5) in her school. The teacher had conveyed this to her mother immediately. As the Appellant is the brother of her mother, her mother did not make any complaint to the police, but she had prevented the prosecutrix going to the Appellant's house. Even her mother had not given her statement to the police.

One day, the prosecutrix had fainted in school and she was admitted to hospital on a complaint of abdominal pain. The prosecutrix had told a woman (PW3) who was in the hospital that she had been raped by 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 the 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 indictment, indicted the Appellant with three counts under 365B (2) (b) of the Penal Code as amended. After the conclusion of the lay witnesses, 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 1st and the 2nd counts in the indictment.

In the first count, the State Counsel wanted to include "making prosecutrix to touch his genital with her hands" instead of "touching her genital by the Appellant".

In the second count, the State Counsel wanted to include "Keeping the male organ on the prosecutrix's mouth" instead of "inserting the male organ into prosecutrix's mouth".

This clearly shows that the evidence led by the prosecution was unsuccessful to maintain the charges depicted in the indictment. Hence the Learned State Counsel amended the first and the second counts to suit the evidence given by the prosecutrix.

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."*

The prosecutrix had informed the alleged act of abuse for the first time to her classmate PW4. Thereafter, this had been intimated to her class teacher PW5. She admitted that she told them what kind of abuse she suffered from the Appellant. But the witnesses PW4 and PW5 did not disclose in their evidence as to the kind of sexual abuse she had suffered from the Appellant. She had told PW3 that she had been raped by the Appellant.

Further, in her history to the doctor she had said that the Appellant had bitten her chest. But she had failed to state this sexual act both to the police and in her evidence.

The prosecutrix, in her evidence stated that the Appellant had sexually abused her in the year 2008, as her aunt had given birth to a child. She was sent to sleep with the Appellant as there was no space in the room. Contradicting her earlier position, the prosecutrix had said that her aunt had given birth to the child not in 2008 but in 2009.

According to the dock statement of the Appellant, he had only one room and a kitchen during the time pertaining to this case. He had completed the construction of the house with three rooms only in the year 2011.

Further, the prosecutrix had failed to mention in her complaint that she went to her grandmother's house at night when the alleged sexual acts were committed by the Appellant.

Justice Dheeraratne in **Sunil and others v. Attorney General [1986] 1 Sri.L. R 230** held that:

> "*Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.*
>
> *It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even the absence of corroboration."*

In **Premasiri v. Attorney General [2006] 3 Sri.L.R** held that:

> *"The rule is not that corroboration is essential before there can be a conviction in a case of rape but the necessity of corroboration as a matter of prudence except where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge".*

Considering the evidence given by the prosecutrix, the prosecution should have placed corroborative evidence, as the evidence given by the

prosecutrix failed to satisfy court the test of consistency, spontaneity and probability.

As correctly pointed out by the Counsel for the Appellant that the Learned High Court had used the statement made to the police to decide the guilt of the Appellant for the second count. It appears that the portion, from the statement of the prosecutrix, had been used by the Learned High Court Judge to corroborate the evidence given by the prosecutrix. This is clearly an irregular procedure adopted by the Trial Judge. The relevant portion is re-produced below:

(Page 257 of the brief.)

චූදිත ඔහුගේ පුරුෂ ලිංගය දැරියගේ මුඛය තම තැබූ බව දැරිය සාක්ෂියේ දී ප්‍රකාශ කර ඇත. ඒ බව පොලිසියට කල ප්‍රකාශයේ ද විස්තර කර ඇත. ඒ අනුව ඒ සම්බන්ධව පරස්පරතා දක්නට නොමැති බැවින් සම්පූර්ණ සාක්ෂිය සලකා බලා 02 වෙනි චෝදනාව ඔප්පු වී ඇද්ද නැද්ද යන්න තීරණය කල යුතු වේ.

In **Wickramsinghe v. Fernando 29 NLR 403** the court held that refence to police information book for the purpose of testing the credibility of a witness by comparing his evidence with a statement made to the police is irregular.

This is a serious misdirection which certainly vitiates the conviction.

In this case, the amendment of the 2nd count of the indictment after leading the evidence of prosecutrix has caused great prejudice to the Appellant. As this is not a proper case to believe the evidence given by the prosecutrix to secure conviction against the Appellant, the prosecution should have corroborated the evidence of the prosecutrix. Hence, I conclude that all appeal grounds placed before this court have merit.

As discussed above, the evidence adduced by the prosecution does not support the conviction entered by Learned High Court Judge of Kurunegala dated 12/02/2020. Hence, I set aside the conviction and acquit the Appellant from the 2nd charge.

Therefore, the appeal is allowed.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL