

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

The Democratic socialist Republic of  
Sri Lanka

**Complainant**

**Vs.**

Jeyarasa Sajeevan

**Accused**

Court OF Appeal Case No.

CA HCC 189/2020

High Court of Vavuniya Case No: **And Now in Between**

HCV 2834/2019

Jeyarasa Sajeevan

**Accused – Appellant**

**Vs.**

The Hon. Attorney General

Attorney General's Department,

Colombo 12.

Before : Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel : Anil Silva, P. C with N.M. Shaheed and

Amaan

Bandara for the Accused-Appellant.

Azvard Navavi, S. D. S. G. for the State.

Argued on : 26.09.2023

Decided on : 26.10.2023

**MENAKA WIJESUNDERA J.**

The instant appeal has been lodged to set aside the judgment dated 01.07.2020 of the High Court of Vavuniya.

The accused appellant (hereinafter referred to as the appellant) had been indicted for kidnapping, rape and grave sexual abuse of a girl under 16 years of age.

The appellant had pleaded not guilty to the indictment and upon the conclusion of the trial the learned trial judge had convicted the appellant for the charges of kidnapping and grave sexual abuse and had acquitted him of the charge of rape.

**The grounds of appeal by the Counsel for the appellant were that,**

- 1) The indictment being defective on the ground of preferring charges of grave sexual abuse and rape in the same indictment.**
- 2) The prosecution altered the charge of grave sexual abuse to suit the evidence and there by caused prejudice to the appellant.**
- 3) The prosecution story being incredulous there by being improbable.**

The learned Counsel for the appellant submitted that the charge of grave sexual abuse was altered after the victim has been concluded and the doctor also has given evidence and has been cross examined, and he further submitted that the charge was

altered to fit the evidence of the victim in Court and thereby it caused grave prejudice to the appellant.

On perusal of the case record we observe that the charge of grave sexual abuse has been altered upon the conclusion of the victim's evidence and the evidence of the doctor. But we observe that the trial judge had read over the charge to the appellant and had proceeded to trial. But the Counsel appearing for the appellant has not made any application to recall any of the witnesses who has been led.

Hence the question arises that, if there is no specific application to recall any witness after the alteration of the charge is it the duty of the judge to do so in the absence of such application.

The provision relating to the alteration of a charge in an indictment is at section 167 of the CPC and according to which the indictment can be amended until the judgment is delivered. But under 167 (2) it says if the charge has been so altered the altered charge has to be read over to the accused which in this case has been done by the trial judge.

But under section 171 of the CPC the Court shall allow the defense and the prosecution to recall witnesses if an application is made to that effect.

Hence according to the above section if the defense or the prosecution makes an application to recall the witnesses after an alteration of the charges in the indictment the Court has to allow the same, but in this instant no such application has been made.

Hence it is the opinion of this Court that the trial judge had followed the procedure which is incumbent on him but the Counsel for the appellant has not played his part for reasons best known to him.

Hence, we are unable to agree that it caused any prejudice to the appellant and even after the amendment the appellant has given evidence from the box and he had completely denied the allegation.

The Counsel has further submitted that the prosecution has altered the charge to suit the evidence which transpired in Court but with this submission also we are unable to agree because

according to section 167 (1) of the CPC a charge in an indictment can be altered until the judgment is delivered.

Another ground of appeal raised by the counsel for the appellant is that when a charge of rape is framed in the same indictment a charge of grave sexual abuse cannot be framed because the acts referred to are part of one act.

According to section 173 of the CPC for every distinct offence a separate charge may be drafted. Hence for each distinct offence a separate charge has to be drafted. If that is so the word distinct appears to be the vital word here and it means, something different and something which has its own characteristics.

The offence of rape and grave sexual abuse has its own ingredients under the respective definitions in the Penal Code and if we may simplify it, grave sexual abuse can be defined as contact without consent and rape can be defined as vaginal penetration without consent.

Hence it is very clear when considering the definition of rape and grave sexual abuse under the Penal Code that the two are distinct and unconnected offences.

This submission of the Presidents Counsel we do agree with for the simple reason that if a man is charged for committing grievous hurt, he will not be charged for simple hurt as well committed on the same victim during the same transaction because both offences although distinct in nature it involves acts committed during the same series of events.

At this stage we have considered the objection to the indictment (even though it was not raised at the High Court level) in the interest of justice because it is enshrined in our Constitution that every citizen has to be given a fair trial.

As such we find that the indictment against the appellant filed by the Attorney General is not in order, and there was no proper indictment for the appellant to plead to.

Hence, we are compelled to set aside the conviction and the sentence imposed by the trial judge based on that ground.

In addition to the above, upon considering the evidence adduced at the trial we find that the evidence of the victim is wholly

untrustworthy due to the reason that the Attorney General had to amend the charges for the reason that she had contradicted her position in the statement to the police although the defense counsel had failed to bring it to the notice of Court. Furthermore, the trial judge also had failed to consider the same.

As such we find the evidence of the victim to be very untrustworthy and unreliable.

The Counsel appearing for the respondents made a very valiant effort to support the conviction and the sentence of the trial judge but we find that the two authorities cited by the Counsel for the respondents did not address the issues raised by the Counsel for the appellant.

As such the instant appeal is allowed for the reasons stated above, and the conviction and the sentence imposed by the trial judge is hereby set aside.

**JUDGE OF THE COURT OF APPEAL**

**Hon. Justice B. Sasi Mahendran**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**