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

In the matter of an Appeal under and in terms of Section 331 (1) of Code of Criminal Procedure Act No. 15 of 1979 (as amended) read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/HCC/52/2024

HC Puttalam Case No.HC/30/2022

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Madduralalage Nimal Ananda alias Sudha Mama

Accused

And Now between

Madduralalage Nimal Ananda alias Sudha Mama

Accused-appellant

Vs.

The Attorney General

Attorney General's Department

Colombo 12.

Complainant -Respondent

Before : **B. Sasi Mahendran, J.**
Amal Ranaraja, J

Counsel: Amila Palliyage with Sandeepani Wijesooriya, Savini Udugampola, Lakitha Wakishtaarachchi, Sampath Perera and Subaj De Silva for the Accused-Appellant
Hiranjan Peiris ASG for the Respondent

Argued On: 25.08.2025

Judgment On: 08.10.2025

JUDGMENT

B. Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as 'the Accused') was indicted before the High Court of Puttalam on the count of rape committed on Kachcakaduwage Champika Fernando punishable under Section 364 (2)(e) of the Penal Code as amended by Act No.22 of 1995.

At the trial, the prosecution led the evidence through 8 witnesses, and marked productions from P1 to P3 and thereafter closed its case. After the conclusion of the prosecution case, the Accused, in his defence, made a dock statement.

Although the accused was charged with the offence of rape, the accused was finally convicted of the offence of grave sexual abuse which is an offence punishable under Section 365(b)(2)(b) in the Penal Code and was sentenced to a term of 12 years rigourous imprisonment, to a pay a fine of Rs. 20,000/- carrying a default sentence of 6 months simple imprisonment and to pay Rs.200,000/- as compensation to the victim carrying a default sentence of 1 year simple imprisonment.

Being aggrieved by the afore-mentioned conviction and the sentence, the Accused has preferred this appeal to this Court. The following are the grounds of appeal as pleaded by the Accused.

1. Did the Learned Trial Judge err in law by convicting the Appellant for Grave Sexual Abuse punishable under section 365(2)(B)(2) of the Penal Code when the charge of rape on the Indictment remained unaltered?

2. Did the Learned Trial Judge err in law by failing to consider the provisions under Sections 167, 168, 169, 176 and 177 of the Criminal Procedure Code?

3. Did the Learned Trial Judge err in law by convicting the Appellant for Grave Sexual Abuse in the absence of a specific act of Grave Sexual Abuse on the Indictment either altered by the Prosecution or by the Learned Trial Judge at the time of delivering the impugned judgement?

4. In the absence of such evidence adduced by the Prosecution did the Learned Trial Judge err law and facts when arriving at a conclusion that the Prosecution had proved the ingredients of the charge beyond reasonable doubt?

5. Did the Learned Trial Judge err in law by not complying with the procedures stipulated under Criminal Procedure Code which amounts to a denial of a fair Trial to the Appellant?

In the present case, the accused-appellant was charged with an offence, namely the charge of rape. He was acquitted of the charge of rape. This shows that the evidence led at the trial was not sufficient to convict him of the offence of rape.

“එම සාක්ෂියට අනුව වින්දිත තැනැත්තියට යෝනිගත පුරුෂ ලිංග ප්‍රවේශයක් සිදු වී නොමැති බව විශේෂඥ අධිකරණ වෛද්‍යවරයා විසින් නිශ්චිතවම හරස් ප්‍රශ්නවලදී ප්‍රකාශ කර ඇත. ඒ පිලිබඳව පැමිණිල්ල විසින් කිසිදු පැහැදිලි කිරීමක් නැවත ප්‍රශ්නවලදී සිදු කර නැත. ඉදිරිපත් කර ඇති අධිචෝදනාවේ සංඝටක සහ වින්දිත තැනැත්තියගේ සාක්ෂිය පිළිබඳව කිසිදු අවබෝධයකින් තොරව මෙම විශේෂඥ අධිකරණ වෛද්‍යවරයාගේ සාක්ෂිය පැමිණිල්ල විසින් මෙහෙයවා ඇති බව මෙහිදී නිරීක්ෂණය කරමි.

ඉහත සඳහන් සාක්ෂි මත පැමිණිල්ල විසින් දණ්ඩ නීති සංග්‍රහයේ 364 වගන්තියෙහි දක්වා ඇති "ස්ත්‍රී දූෂණ" නම් වරදට අදාළ සංඝටක ඔප්පු කර නොමැති බවට තීරණය කරමි ."(vide page 131 and 132 of the brief)

The accused-appellant came to the trial Court to defend a charge of rape. His line of defence is apparently to attack the charge of rape. He was not given any opportunity to defend a charge under Section 365(B)(2)(a) of the Penal Code.

In a charge of rape, the prosecution must prove the penetration. In a charge of grave sexual abuse, prosecution is not required to prove penetration. Penetration can be minimal, and placing the penis between the labia majora or labia minora would be sufficient. Thus, to constitute the offence of rape, even a penile erection is not necessary. On the other hand, the moment the penis, genitals or any part of the human body or instrument touches the vagina without consent of the victim the offence of grave sexual abuse is completed. Thus, the ingredients in a charge of rape are different from the ingredients that must be proved in a charge of grave sexual abuse. We also find that the accused was gravely prejudiced by the fact that the trial judge failed to inform him of the charge of grave sexual abuse, giving him the opportunity to defend him self on the charge. Instead, the Judge has, at the conclusion of the judgment, arrived at a decision to convict him for grave sexual abuse instead of rape.

We are mindful that the indictment was filed by the Honourable Attorney General based on the statement provided by the prosecutrix. Accordingly, if during the trial her testimony fails to disclose the occurrence of penetration, it raises a substantive question as to whether the accused's actions legally constitute rape.

"මෙම නඩුවේදී විත්දිත තැනැත්තිය පැහැදිලිව ප්‍රකාශ කර ඇති පරිදි චුදිතගේ පුරුෂ ලිංගය ඇයගේ ස්ත්‍රී ලිංගය මත පාවිච්චි කිරීමක් සිදු වී ඇත. තවද එකී ක්‍රියාව චුදිත විසින් සිදුකර ඇත්තේ ලිංගික තෘප්තියක් ලබා ගැනීම පිණිස බව ඔහු එය සිදු කර ඇති සියලු අවස්ථානුගත කරුණු සැලකිල්ලට ගැනීමේදී පැහැදිලිව පෙනී යයි. ඒ අනුව දණ්ඩ නීති සංග්‍රහයේ 365 (ආ) (2) (අ) වගන්තිය යටතේ වන බරපතල ලිංගික අපයෝජනය නම් වරද මෙම චුදිත විසින් සිදු කර ඇති බවට පැමිණිල්ල විසින් ඔප්පු කර ඇතැයි තීරණය කරමි."

Upon reviewing the judgment, the learned High Court Judge observed that the act described by the prosecutrix falls under Section 365(B)(2)(a) of the Penal Code. However, the prosecutrix failed to articulate the specific acts that constitute rape. In particular, she did not establish the occurrence of penetration, which is a fundamental element that must be proven in order to sustain a charge of rape.

It is well established that in rape cases, the court expects the prosecution's evidence to be sufficiently convincing. When the testimony of the prosecutrix is credible and trustworthy, corroboration is not deemed necessary by the court.

In **Premasiri v. Attorney General [2006] 3 S.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".*

I am mindful that our courts place great emphasis on the consistency of witness testimony. In the present case, the evidence provided by the prosecutrix lacks credibility. We have already determined that the accused was not afforded a fair opportunity to defend against the charge of grave sexual abuse. Given that the prosecutrix's testimony was inconsistent and therefore unreliable, we find it unsafe to sustain the conviction.

Accordingly, we set aside both the conviction and the sentence.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J

I AGREE.

JUDGE OF THE COURT OF APPEAL