IN THE COURT OF APEPAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

CA No: 191/2002
HC Batticaloa No: 1749/2001(B)

Mohamed Aboobakar Ibrahim
Station Road,
Biranthiraichenai,
Valaichenai.

Accused-Appellant

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

CA 191/2002 **HC-Batticaloa-1749/01**

Before : **M.M. A. Gaffoor, J. &**

K. K. Wickramasinghe, J.

Counsel : Tenny Fernando for the Accused Appellant
P. Kumararatnam, DSG for AG

Decided on : 12.08.2016

M.M. A Gaffoor, J.

We have heard both counsel in support of their respective cases and we find that the learned High Court Judge has committed a grave irregularity and also has erred in law, where he decided to convict the accused for the offence of grave sexual abuse under section 365(2)(b), when the Accused was charged for rape.

The facts of this case as submitted by the learned counsel for the Accused Appellant was that on 29.10.1998 around 2.00-3.00 p.m in the afternoon, the victim had gone to the Mosque. On her way to Mosque, she had gone to pluck jam fruit in the land

of the Accused Appellant. This fact has been admitted by the Accused Appellant in his dock statement. Alleged incident has taken place at that time, when she went to pluck jam fruit in the land of the Accused Appellant. She has returned home and informed the incident to her mother when she was questioned by her. Thereafter they have complained to the Police on the following day and thereafter investigation has carried out.

However, learned counsel for the Accused Appellant submitted that there is a question of law related to this case. He submits that the Accused Appellant had been charged for rape under Section 364 (2) (e) of the Penal Code as per the indictment. However after prosecution and the defense, cases were closed. Learned trial judge having considered the medical evidence, has decided to amend the charge to grave sexual abuse under Section 365 (b) of the Penal Code as amended by Act No. 22 of 1995. Learned Counsel for the Accused Appellant submits that this is a misdirection of law made by the learned High Court Judge.

Learned DSG appearing for the State upholding the best traditions of the Attorney General's Department concedes the

argument made by the learned counsel for the Accused Appellant. He submits that both charges of rape and charge of grave sexual abuse are cognate offenses introduced to the Penal Code of Sri Lanka and therefore grave sexual abuse is not a lesser offence. We are pleased with the submissions made by both Counsel.

In dealing with question of law, it is important to note a jugement delivered by this Court in CA 88/2002 where H/L Justice W.L.R. Silva has held thus '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 or as having certain ingredients that constitute a different offence under section 175 or as coming under section 177 of the Criminal Procedure Code.

Grave sexual abuse is a cognate offence introduced by a separate amendment and is a specific offence having its own ingredients. In a case of rape one has to prove penetration. Penetration can be minimum and placing the penis between the labia majora or labia minora would be sufficient. Thus to constitute the offence of rape even a penile errection is not

necessary. (Vide books on forensic Pathology written by 'Narayan Renddy, Keet Simpson, Chandrasiri Nirialle etc.)

It cannot be argued that touching or placing a finger for sexual gratificate are ingredients comprised in a charge of rape. Because without any fingering or touching the offence of rape could be committed. Therefore I am inclined to the view that none of these sections in the Criminal Procedure Code with regard to framing of charges could be applied to justify the cause adopted by the trial judge in this case. 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 himself on that charge. Instead the judge has at the conclusion of his judgment arrived at a decision to convict him for grave sexual abuse instead of rape.

This is a grave irregularity and a glaring error of law, it cannot be condoned no excused. Therefore we are unable to apply the proviso to article 138, or the proviso to section 334 of the Criminal Procedure Code.'

Where in a similar case my sister judge H/L K.K. Wickramasinghe in case No. C.A 122/2013 held thus *"After considering all these facts, the evidence given by all the witnesses and the dock statement made by the Appellant, the learned Trial Judge had come to a conclusion that the Appellant was not guilty of the offence he was indicted.*

As the learned DSG had clearly mentioned in her written submissions, that the Appellant was not given an opportunity to defend himself on the charge that he was ultimately convicted on. It is so true that the ingredients of the charge of rape are different from the ingredients that must be proved in a charge of sexual harassment. Therefore, both the conviction and the sentence imposed by the learned Trial Judge are bad in law. However, although the learned Trial Judge has adopted an incorrect procedure, he has placed reliance on the evidence of the Victim when arriving at a decision in this case".

Further it was also considered following cases:-

In the case of Upul de Silva v. Attorney General 1999 (2) it was held that *"re-trial must necessarily be limited to the*

offence or offences upon which the accused had been convicted by the trial Court, and against which he had preferred an appeal and none other. 'In the case of Banda and Others v. Attorney General (1999) 3 SLR 168 at page 171, Justice FND Jayasuriya held 'The issue whether a re-trial should be ordered or not would depend on whether there is testimonially trustworthy and credible evidence given before the High Court.'

By going through proceedings it is evidence that he learned High Court Judge had not taken steps to amend the indictment and read the new charge to the Appellant. Therefore we too agree with the preliminary objection raised by the Counsel for the Appellant. But at this junction considering the evidence and other legal issued it would be relevant to consider the full case of Kahandagamage Dharmasiri Bogahahena v. The Republic of Sri Lanka SC Appeal 04/2009 decided on 3rd February 2012, Her Lordship Justice Thilakawardane held that 'A criminal trial is meant for doing justice to the accused, victim and the society so that law and order is maintained. A judge does not preside over a criminal trial merely to see

that no innocent man is punished. A judge also presided to see that a guilty man does not escape. One is as important as the other. Both are public duties [Ambika Prasad and another V State (Delhi Administration) 2000 SCC Cri 522]'.

Therefore, considering the above, we set aside the conviction and the sentences imposed by the learned High Court Judge and send this case for re-trial.

We further direct the Accused Appellant to appear before the High Court when he receives a notice.

JUDGE OF THE COURT OF APPEAL

K.K. Wickramasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL

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