**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/0225/2024**
**High Court of Puttalam**
**Case No. HC/109/2019**

Udukumburage Sumith Rohana Bandara

**ACCUSED-APPELLANT**

**Vs.**

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

**COMPLAINANT-RESPONDENT**

**BEFORE** : **P. Kumararatnam, J.**
**R.P. Hettiarachchi, J.**

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| **COUNSEL** | : | **Kasun Sarathchandra for the Appellant.**<br>**Shanil Kularatne, PC, ASG for the Respondent.** |
| **ARGUED ON** | : | **10/02/2026** |
| **DECIDED ON** | : | **02/04/2026** |

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**JUDGMENT**

**P. Kumararatnam, J.**

The above-named Appellant was indicted in the High Court of Puttalam 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 penis.
2. The accused had sexual gratification by touching prosecutrix's genital with his penis.
3. The accused had sexual gratification by touching prosecutrix's genital with his penis.

The trial commenced on 30/01/2023. Before the conclusion of the examination-in-chief of the prosecutrix, the Learned State Counsel moved the Court to amend the 1st and 2nd charges in the indictment. Accordingly, the prosecution had amended the 1st and the 2nd charge as follows:

1. Committing the offence of Statutory Rape against Ambagahawattage Chathurika Lakmali Perera at Eluwankulama between the time period of 01st June 2013 and 30th June 2013, an offence punishable under Section 364(2) of the Penal Code as amended by Act No 22 of 1995.
2. Committing the offence of Statutory Rape against Ambagahawattage Chathurika Lakmali Perera at Eluwankulama between the time period of 01st June 2013 and 30th June 2013, an offence punishable under Section 364(2) of the Penal Code as amended by Act No 22 of 1995.

After leading all necessary witnesses, the prosecution had closed the case on 27/11/2023. 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 closed his case on 25.03.2024.

The Learned High Court Judge after considering the evidence presented by both parties, decided to acquit the Appellant from the 1st and 2nd charges. Acting under Section 178(1) of the Code of Criminal Procedure Act No.15 of 1979, the Learned High Court Judge convicted the Appellant under Section 345 of the Penal Code as amended for the 3rd count and sentenced him as follows:

- 5 years rigorous imprisonment.
- Rs.10,000/- fine with a default sentence of 03 months simple imprisonment.
- Rs.100,000/- compensation with a default sentence of 01-year simple imprisonment.

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. During the argument he was connected via the Zoom platform from prison.

**On behalf of the Appellant the following Grounds of Appeal were raised.**

1. The prosecution had failed to satisfy the court on the tests of consistency, spontaneity, and probability.
2. The Learned High Court Judge's failure to properly evaluate the belated nature of the complaint.

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

PW1 was only 13 years old when she encountered the unpleasant incidents as she described in her evidence. The Appellant was the manager of an estate where her father and mother both worked. On the day of the incident, her mother was summoned to the estate bungalow to cook dinner for the Appellant. She too had gone to the bungalow and helped to wrap papaya harvest with newspapers. At that time, the Appellant had made an indecent proposal to the victim, and he had further informed that she will not get pregnant by doing the act he had proposed to her.

Later in the evening, the Appellant had asked both the mother and the victim to stay in the bungalow and had offered them both dinner and beer to drink. As she was a vegetarian, she had vomited after eating meat. Her mother had retired to bed early, as she was slightly intoxicated after consuming beer. Thereafter, according to the victim, the Appellant had raped her after taking her to his bedroom.

When the victim gave evidence, she was 22 years of age and married. Although the victim had said that she was raped by the Appellant, PW11, the JMO who gave evidence, stated that that there was no medical evidence of vaginal penetration. However, the Doctor had not excluded intercrural penetration which leaves no injury or marks.

PW3, the mother of the victim said that she had gone to the bungalow, as the Appellant had requested her to cook dinner. She too had confirmed that the Appellant had forcefully given beer to them and tried to misbehave with them. Due to fear, she had run away from the bungalow.

The victim had lodged her complaint on 19.07.2013 which is about one month after the incident.

The charge is the most basic foundation in a criminal trial. The accused can gather information on the nature of the allegation levelled against him by observing the charge. The charge must clearly specify the act committed by the accused, the law alleged to have been violated by him, as well as the particulars relating to the alleged offence. The prosecutor bears the duty of framing the charge/s by cautiously considering the available evidence within the case at the time of drafting the charge. The requirements needed for a charge to be a valid charge are contained 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 examination-in-chief of PW1, 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 to charges of statutory rape.

However, the evidence led by the prosecution was unsuccessful to maintain the 1st and 2nd 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. Section 172 of the Criminal Procedure Code is wide enough to permit' the withdrawal of one or more counts or charges in an indictment or complaint."*

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 the case of **Rodrigo v The Queen** (1953) 55 NLR 49 it was held that:

> *"The primary responsibility for the accuracy and suitability of an indictment rests with counsel for the prosecution, and not on the court. The court may, however, decide to amend the indictment on its own responsibility, but before such a decision in made, both the prosecution and the defence should be given an opportunity of making their submissions on the point. The power vested in the Supreme Court under section 347 (6) (ii) of the Criminal Procedure Code to alter a verdict to a conviction on an amended charge which the appellant had not specifically been called upon to meet at any stage of the trial must be used with discretion, and only if the accused was not misled by the form of the charge and there is not any chance of injustice being done."*

In her history to the doctor the prosecutrix had said that the Appellant had committed sexual intercourse on her. However, the medical evidence does not support her version not at all.

Considering the evidence given by the prosecutrix, the prosecution should have placed corroborative evidence, as the evidence given by the prosecutrix failed to satisfy the court on the tests of consistency, spontaneity, and probability.

I agree with the Learned High Court Judge regarding the acquittal of the Appellant from the 1st and 2nd counts. Further, I agree with the Learned High Court Judge's conviction of the Appellant under Section 345 of the Penal Code as amended.

The Learned Counsel for the Appellant finally argued that given the circumstances of the case, the sentence given by the court is very high. Hence, he requested a reconsideration of the sentence imposed on the Appellant under count number three.

The Learned Additional Solicitor General in keeping with the highest traditions of the Attorney General's Department, let the sentence be decided by this Court, as the sentencing is entirely on the discretion of the Court.

Considering all the circumstances of this case, I set aside the five-year jail sentence and substitute it with 18 months rigorous imprisonment effective from the date of conviction, i.e., from 28.08.2024. The fine and compensation imposed by the High Court will remain the same.

Subject to the variation in the jail sentence, the appeal is partly allowed.

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

**JUDGE OF THE COURT OF APPEAL**

**R. P. Hettiarachchi, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**