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/ 0134/2022
High Court of Colombo
Case No. HC/8408/2016

Kalutara Koralage Hemantha Brito

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Darshana Kuruppu with Sahan Weerasinghe and Dineru Dundara for the Appellant.**
Maheshika De Silva, DSG for the Respondent.

ARGUED ON : **21/02/2024**

DECIDED ON : **28/06/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General at the High Court of Colombo for committing two counts of Grave Sexual Abuse punishable under Section 365B (b) 2 (b) and one count of Sexual Harassment punishable under Section 345 of the Penal Code as amended on Kevin Heman Brito between 01/11/2012 and 30/11/2012.

At the trial the prosecution had called 06 witnesses and marked production P1-P5 and closed the case. When the defence was called, the Appellant gave evidence from the witness box and called two witnesses on his behalf and closed his case.

After the trial, the Appellant was convicted as charged and was sentenced as follows:

1st Count- 07 years rigorous imprisonment with a compensation 500,000/-. In default 06 months simple imprisonment.

2nd Count- 07 years rigorous imprisonment with a compensation 500,000/-. In default 06 months simple imprisonment.

1st Count- 02 years rigorous imprisonment with a compensation 200,000/-. In default 03 months simple imprisonment.

The Learned High Court further ordered that the sentences imposed on all three counts to run consequently.

In this case as the victim was 04 years old at the time of the incident. The Child Protection Authority had video recorded the statement of the victim under Section 163(c) of the Evidence Ordinance (Special Provisions) Act No. 32 of 1999 and marked as P2 and the translated script was marked as P1 in the trial.

Being aggrieved by the aforesaid conviction and the sentence, the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant had 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 are raised.

1. The Learned Trial Judge has failed to consider the fact that the child victim was tutored by PW1, the mother of the child during the video recording.
2. The Appellant was denied a fair trial by presenting incorrect transcript of the interview conducted by the Child Protection Authority.
3. The Appellant was denied a fair trial by convicting him by using and perusing the Police Information Book by the Learned High Court Judge, as it had not been produced as evidence in the trial.
4. The Appellant has been denied a fair trial by shifting the burden on the Appellant to rebut the evidence of the prosecution.
5. The Learned High Court Judge has failed to consider that the failure to produce the CD's which were taken into custody by the National Child Protection Authority warrants the Application of Section 114(f) of the Evidence Ordinance.

6. The trial Judge has not considered that PW1 had strong motive to implicate the Appellant through the child who was 04 years of age at the time of the incident.
7. The Learned High Court Judge had failed to consider that PW1, who was the wife of the Appellant is not competent witness to give evidence as far as the charges are concern.

The Facts of this case *albeit* **briefly are as follows.**

In this case, the prosecution had led the video evidence of a preliminary interview of the victim conducted and recorded by the Child Protection Authority at the time of the investigation and it was played before the Learned Trial Judge in terms of Section 163 (A) of the Evidence (Special Provisions) Act No 32 of 1999. The prosecution had led evidence of official witnesses who had taken part in the process of recording of video evidence to establish that the recording had been done after following due process.

The procedure regarding recording and presentation of Video Evidence laid down in the Section 163A of the Evidence Ordinance (Special Provisions) Act No. 32 of 1999 is set out below for clarity.

Section 163A states:

> (1) In any proceedings for an offence relating to child abuse a video recording of a preliminary interview which-
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> > (a) is conducted between an adult and a child who is not the accused in such proceeding (hereinafter referred to in this section as "a child witness"); and

(b) relates to any matter in issue in those proceedings, may notwithstanding the provisions of any other law with the leave of the court, be given in evidence in so far as it is not excluded by court under subsection (2).

(2) Where a video recording is tendered in evidence in any proceedings referred to in subsection (1) the court shall give leave under that subsection unless-

(a) it appears to court, that the child witness will not be available for cross examination in such proceedings; or

(b) any rules of court requiring the disclosure of the circumstances in which the video recording was made have not been complied with to the satisfaction of the court.

(3) Where a video recording is given in evidence under this section-

(a) the child witness shall be called by the party who tendered the video recording in evidence;

(b) such child witness shall not be examined in chief on any matter which in the opinion of the court, has been dealt with in his recorded testimony.

(4) Where a video recording is given in evidence under this section, any statement made by the child witness which is disclosed by the video recording shall be treated as if given by that child witness in direct oral testimony and accordingly, any such statement shall be admissible evidence of any fact of which direct oral testimony from him would be admissible.

(5) Where the child witness, in the course of his direct oral testimony before court, contradicts, either expressly or by necessary implication, any statement previously made by him and disclosed by the video recording, it shall be lawful for the presiding judge, if he considers it safe and just in all the circumstances of the case, to act upon such previous statement as disclosed by the video recording, if such previous statement is corroborated in material particulars by evidence from an independent source, for the purpose of this section-

(a) "an offence relating to child abuse" means offence under section 286A, 308A, 360A, 360B,360C, 363, 364A, 365, 365A, or 365B of

the penal code when committed in relation to a child;

(b) "child" means a person under eighteen years of age, at the time when the preliminary interview is video recorded;

(c) "video recording" means any recording in any medium from which a moving image may by any means be produced and include the accompanying sound track.

After the initial submission by the prosecution and the defence, the Learned High Court Judge had granted permission to place the video recording of PW7, the victim in this case on 07.08.2018. After playing the same, the prosecution had marked the video recording as P2 and the transcript of the same as P1.

Before going into the video recording of the victim, which has been produced as victim's examination-in-chief, I think it is appropriate and necessary to satisfy whether the video recording of the victim can be accepted as good evidence against the Appellant. It is the duty of the trial judge to satisfy whether recording was in its original state sans any editing. Therefore, the trial judge should pay due attention to the video recording and its transcript and ensure whether the transcript carries the *verbatim* of the video recording.

As the 1st, 2nd and 6th grounds of appeal are interconnected, all three grounds will be considered together hereinafter.

In his first ground of appeal, the Appellant contends that the Learned Trial Judge has failed to consider the fact that the child victim was tutored by PW1, the mother of the child during the video recording and in the second ground the contention of the Appellant is that he was denied a fair trial by presenting incorrect transcript of the interview conducted by the Child Protection Authority.

In this case, the evidence surfaced during the trial was that the matrimonial relationship had been strained between PW1 (wife) and the Appellant (husband). The victim was in the exclusive care of PW1 when his video evidence was recorded. Therefore, risk of undue influence which could badly reflect on the Appellant should be excluded before accepting video evidence.

In a case of this nature, it is the profound duty of the prosecution to present the original recorded conversation along with an accurate transcript. The use of a transcript raises critical issues of authentication, admissibility, and presentation during the trial. The transcript must faithfully reflect the recording and should not be a blend of the recording and hearsay testimony from those present during the conversation. If inaccuracies in the transcript are compounded by potential bias in the transcription process, the transcript may be excluded from evidence. The crucial standard is the transcript's accuracy, as it is essential for assisting all parties involved in the trial in comprehending the content of the recording.

When this case came up for argument before this Court, the Learned Counsel for the Appellant informed this Court that he had the opportunity of observing the video recording of the evidence of the child which was relied on by the prosecution as the evidence in chief and the transcript of the evidence produced before the Court was very much different to the video recorded evidence of the child and the Learned Counsel requested the Court to play the video when this matter was taken up for argument.

As it is a material point, the Learned Deputy Solicitor General who appeared for the Hon. Attorney General undertook to go through the video recording and reply appropriately with regard to this allegation as this is a material point in deciding this appeal. Accordingly, the case was fixed for mention enabling the parties to study the video recording.

Accordingly, the Learned Counsel for the Appellant by way of a motion, filed a transcript marked as "Z" highlighting the inaccuracies in the transcript which had been marked as "P1" in the trial. The relevant portions of the transcript of the video recording which had been marked as P1 and the original video recording with omitted parts from the transcript are re-produced below:

Marked 'Z' in the docket.

Disc Number	Timestamp	Transcript of the video recording	Original Video Recording *(The bold section illustrates the omitted parts from the transcript)*
VTS 01-01 **Z – 1**	07.01 – 07.30 **(13:13:05-13:13:34)**	***(Page No: 06, 04th to 08th Lines)*** පළමු සාකච්ඡාකරු :- අම්මා මොනවහරී දැක්කද ඔයාට කරනවා කියන්න. දරුවා :- අම්ම මට සෙල්ලම්කරන බැට් එකෙන් එයා ගැහුවද ? ගැහුවා බැට් එකෙන්. පළමු සාකච්ඡාකරු :- බැට් එකෙන් ගැහුව. තව මොනවද තාත්තා පුතාට කලේ ? පුතාට	පළමු සාකච්ඡාකරු :- අම්මා මොනවහරී දැක්කද ඔයාට කරනවා කියන්න. දරුවා :- අම්ම මට සෙල්ලම්කරන බැට් එකෙන් එයා ගැහුවද **?(මවගේ ඔඩොක්කුවෙහි සිටින දරුවා මවගේ දෙස බලයි. මව එය හිස සලා අනුමත කරන බවක් පෙනේ.)** ගැහුවා බැට් එකෙන්. පළමු සාකච්ඡාකරු :-බැට් එකෙන් ගැහුව. තව මොනවද තාත්තා පුතාට කලේ? **(මේ අවස්ථාවේදී මව දරුවාට රහසින් "කියන්නකෝ" යනුවෙන්**

		රිදෙන දේවල් කලා ද? පුතාගේ කොහෙහරි මේ..අ..හැපුවද? දරුවා :- කවුද? පළමු සාකච්ඡාකරු :- තාත්තා	**පවසනු පසුබිමින් ඇසේ. එවිට දරුවා මව දෙස බලා "මම දන්නේ නෑ" යනුවෙන් පවසයි.)** පුතාට රිදෙන දේවල් කලා ද? **(මෙවිට දරුවා "නැත" යනුවෙන් හඟවන ආකාරයට හිස දෙපසට සලයි.)** පුතාගේ කොහෙහරි මේ..අ..හැපුවද? දරුවා :- කවුද? පළමු සාකච්ඡාකරු :- තාත්තා
VTS 01 – 01 **Z - 2**	07.31 – 7.57 **(13:13:35 – 13:14:01)**	***(Page No: 06, 09th to 13th Lines)*** දරුවා :- නෑ. එයා.. අම්මි හැපුවද එයා ? අම්මි හැපුව තමයි නේ. පළමු සාකච්ඡාකරු :- ඔයාට මොනවද කලේ ළමයිනෙ. දදා කරපු දේ කියන්න. දරුවා :- මි..... පළමු සාකච්ඡාකරු :- දැන් කිව්වනේ ගොඩක් කිවා. නෝට් කිව්වා. ඩඩා ගැහුවා කීව. බැට්ටෙකෙන් ගැහුව කීව. නෝට් වචන කිව්වා කීව. මෝඩයා කිව්වා කීව. තව මොනවද ? දරුවා :- තව එච්චරයි.	දරුවා :- නෑ. එයා.. අම්මි හැපුවද එයා ? **(නැවතත් තම මව දෙස බලයි)** අම්මි හැපුව තමයි නේ. පළමු සාකච්ඡාකරු :- ඔයාට මොනවද කලේ ළමයිනෙ. දදා කරපු දේ කියන්න. **(දරුවා මේ අවස්ථාවේදී තම අතේ ඇති කන්නාඩිය මව දෙසට හරවන අවස්ථාවේ එය වළක්වමින් එපා, කියන්න. "චූ මියා කටට දාපු එක කියන්න" යනුවෙන් මව රහසින් දරුවාට පවසනු පසුබිමින් ඇසේ.)** පළමු සාකච්ඡාකරු :- දැන් කිව්වනේ ගොඩක් කිවා. නෝට් කිව්වා. **(නැවතත් පසුබිමින් මව "කියන්න ඒක" යනුවෙන් දරුවාට රහසින් පවසයි.)** දදා ගැහුවා කීව. බැට්ටෙකෙන් ගැහුව කීව. නෝට් වචන කිව්වා කීව. මෝඩයා කිව්වා කීව. තව මොනවද ? දරුවා :- තව එච්චරයි.

VTS 01 – 01 **Z - 3**	07.58 – 08.18 **(13:14:02 – 13:14:22)**	***(Page No: 06,14th to 19th Lines)*** පළමු සාකච්ඡාකරු :- එච්චර ද කලේ තාත්, ඩැඩී ඩඩා ? දරුවා :- හ්ම්. ඔව්. පළමු සාකච්ඡාකරු :- ඈ ? අර අම්ම දැක්කේ මොනවද ඩඩා ඔයාට කරනව ? දරුවා :- අ.. චූ මීයා කටට දෙනවා. පළමු සාකච්ඡාකරු :- චූ මීයා කටට දෙනවා. ආ.. ඒ කොහොමද ඒක කරන්නේ ? දරුවා :- අම්ම හාවෙක් වගේ එයා නිදාගත්තම එයා මං ලඟට ආවා.	පළමු සාකච්ඡාකරු :- එච්චර ද කලේ තාත්, ඩැඩී ඩඩා ? දරුවා :- හ්ම්. ඔව්. පළමු සාකච්ඡාකරු :- ඈ ? අර අම්ම දැක්කේ මොනවද ඩඩා ඔයාට කරනව ? **(මේ අවස්ථාවේදී මව විසින් දෙවන වතාවටත් චූ මීයා කටට දෙන එක කියන්න යනුවෙන් රහසින් දරුවාට පවසනු ඇසේ. එවිට දරුවා ශබ්දයෙන් පිළිතුරු දෙයි)** දරුවා :- අ.. චූ මීයා කටට දෙනවා. පළමු සාකච්ඡාකරු :-චූ මීයා කටට දෙනවා. ආ.. ඒ කොහොමද ඒක කරන්නේ ? දරුවා :- අම්ම හාවෙක් වගේ එයා නිදාගත්තම එයා මං ලඟට ආවා.
VTS 01 – 01 **Z - 4**	08.19 – 08.28 **(13:14:23 – 13:14:32)**	***(Page No: 06, 20th to 21st Lines)*** පළමු සාකච්ඡාකරු :- අම්ම නිදාගත්තා අතරේ ඔයා ලඟට ආවා ? ඇවිල්ලා ? කාගේ චූ මීයා ද කටට දුන්නේ ? දරුවා :- මගේ	පළමු සාකච්ඡාකරු :- අම්ම නිදාගත්තා අතරේ ඔයා ලඟට ආවා ? ඇවිල්ලා ? **(මෙහිදී දරුවා නෑ කියයි)** කාගේ චූ මීයා ද කටට දුන්නේ ? දරුවා :- මගේ
VTS 01 -01	05.21 – 05.40	***(Page No: 04, 11th to 17th Lines)***	පළමු සාකච්ඡාකරු :- ගහනකොට රිදෙනවා. තව මොනවද කරන්නේ ?

Z - 5	**13:11:25 – 13:11:44**	පළමු සාකච්ඡාකරු :- ගහනකොට ඊදෙනවා. තව මොනවද කරන්නේ ? දරුවා :- ඇඳ. අම්මේ අර ඇඳ මේ පැත්තෙන් එනවා ඇඳ තියෙනව ද (දරුවා මවගෙන් අසයි. මව හිස සලයි) ඇඳ තියෙනවා. පළමු සාකච්ඡාකරු :- ඈ ? දරුවා :- ඇඳ තියෙනව. පළමු සාකච්ඡාකරු :-ඇඳ තියෙනව කීවෙ ? (මේ අවස්ථාවේ දී දරුවාගේ මව විසින් පළමු සාකච්ඡාකරු සමඟ කිසිවක් රහසින් පවසන බවක් දිස්වේ.) දරුවා :- ඇඳ මාරු කෙරුවා පිටිපස්සෙන්.	දරුවා :- ඇඳ. අම්මේ අර ඇඳ මේ පැත්තෙන් එනවා ඇඳ තියෙනව ද (දරුවා මවගෙන් අසයි. මව හිස සලයි) ඇඳ තියෙනවා. පළමු සාකච්ඡාකරු :- ඈ ? දරුවා :- ඇඳ තියෙනව. පළමු සාකච්ඡාකරු :-ඇඳ තියෙනව කීවෙ ? (මේ අවස්ථාවේ දී දරුවාගේ මව විසින් පළමු සාකච්ඡාකරු සමඟ කිසිවක් රහසින් පවසන බවක් දිස්වේ.) **(මෙහිදී මව විසින් ඇඳ මාරු කෙරුවා කියල කියන්නේ යනුවෙන් පළමු සාකච්ඡාකරුට පවසනු ඇසේ.)** දරුවා :- ඇඳ මාරු කෙරුවා පිටිපස්සෙන්.
VTS 01 -01 **Z – 6**	01.57 – 01.59 **(13:08:01 – 13:08:04)**	***(Page No: 01, 07th to 09th Lines)*** පළමු සාකච්ඡාකරු :- කෙවින්. පුතාගේ වයස දන්නවාද ? දරුවා :- දන්නෑ. පළමු සාකච්ඡාකරු :- තාත්තගේ නම මොකක්ද ? දරුවා :- ම්.. ඩඩා.	පළමු සාකච්ඡාකරු :- කෙවින්. පුතාගේ වයස දන්නවාද ? **(මේ අවස්ථාවේ දී අම්මා හස්ත සංඥාවෙන් 04 ක් බව පෙන්වා සිටින නමුත් දරුවාට එය ග්‍රහණය කරගැනීමට නොහැකි වේ.)** දරුවා :- දන්නෑ. පළමු සාකච්ඡාකරු :- තාත්තගේ නම මොකක්ද ? දරුවා :- ම්.. ඩඩා.

VTS 01 – 01 **Z - 7**	02.04 – 02.29 **(13:08:08 – 13:08:33)**	***Page No: 01, 12th line to Page No: 02, 05th Lines*** පළමු සාකච්ඡාකරු :- ඩඩා. ඩඩා මොනවද තාත්තා බබාට කලේ? දරුවා :- ගහනවා. පළමු සාකච්ඡාකරු :- ආ කියන්න ඩඩා මොනවද කලේ? දරුවා :- (පෙරට වඩා ශබ්දයෙන්) ගහානවා. පළමු සාකච්ඡාකරු :- ගහනවා. තව මොනවද කලේ? දරුවා :- මි... මි... දන් නෑ (දරුවා මව දෙසට නැඹුරුවේ) පළමු සාකච්ඡාකරු :- අම්මා මුකුත් කරන්න එපා. පුතා කියන්න ඩඩා කරන දේවල්. දැන් එකක් කිව්වා ගහනවා කිව්ව. තව මොනවද කරන්නේ පුතාට.	පළමු සාකච්ඡාකරු :- ඩඩා. ඩඩා මොනවද තාත්තා බබාට කලේ? දරුවා :- ගහනවා. **(මේ අවස්ථාවේදී මව කියන්න, ගහනවා කියන්න යනුවෙන් පවසනු පසුබිමින් ඇසේ)** පළමු සාකච්ඡාකරු :- ආ කියන්න ඩඩා මොනවද කලේ ? **(මෙම අවස්ථාවේදී මව කියන්න යනුවෙන් පවසා දරුවා ව මයික්‍රෆෝනය දෙසට නැඹුරු කරනු හඳුනාගත හැක)** දරුවා :- (පෙරට වඩා ශබ්දයෙන්) ගහානවා. පළමු සාකච්ඡාකරු :- ගහනවා. තව මොනවද කලේ? දරුවා :- මි... මි... දන් නෑ (දරුවා මව දෙසට නැඹුරුවේ) **(කියන්න, ඔයා දන්නවනේ කියන්න යනුවෙන් අම්මා පවසනු පසුබිමින් ඇසේ)** පළමු සාකච්ඡාකරු :- අම්මා මුකුත් කරන්න එපා. පුතා කියන්න ඩඩා කරන දේවල්. දැන් එකක් කිව්වා ගහනවා කිව්ව. තව මොනවද කරන්නේ පුතාට.
VTS 01 -01	06.20 – 06.31	***(Page No: 05,09th to 10th Lines)*** පළමු සාකච්ඡාකරු :- මේ ඩඩා. ආ.. ඔහොම ගහනවා. තව	පළමු සාකච්ඡාකරු :- මේ ඩඩා. ආ.. ඔහොම ගහනවා. තව මොනවද කරන්නේ ඩඩා? නෝට් වචන

Z - 8	**(13:12:23 – 13:12:34)**	මොනවද කරන්නේ ඩඩා? නෝට් වචන මොනවද පුතේ කියන්නෙ. නෝට් වචනයක් කියන්න බලන්න. දරුවා :- මෝඩයා කියනවා.	මොනවද පුතේ කියන්නෙ. නෝට් වචනයක් කියන්න බලන්න. **(මව කියන්න ඔයාට කියන ඒවා යනුවෙන් ඔඩොක්කුවේ සිටින දරුවාට පවසනු පසුබිමින් ඇසෙයි)** දරුවා :- මෝඩයා කියනවා. **(ඒවා නෙවෙයි. යනුවෙන් මව නැවතත් රහසින් දරුවාට පවසයි)**
VTS 01 -01 **Z - 9**	11.15 – 11.44 **(13:17:18 – 13:17: 48)**	***Page No: (09, 11th to 16th Lines)*** පළමු සාකච්ඡාකරු :- දැන් මේ.. මේ.. ඩඩාගෙ චූ මීයා කියමුකෝ.. (නැවත පළමු සාකච්ඡාකරු බෝනික්කා රැගෙන එහි යට ඇඳුම් පහත් කර පෙන්වා) මේ තියෙන්නේ ඩඩාගෙ චූ මීයා දැන් මේක මොකක්ද කරන්ඩ කිව්වේ ? දරුවා :- **ඒ චූ මීයා නෙමෙයි දැන් ඉන්නේ** නිදාගත්ත එක්කෙනෙක් පළමු සාකච්ඡාකරු :- පුතා ඩඩාගෙ චූ මීයා ඔයාගෙ කටට දාන්න කියල ඔයා **ඉරුවද** ඒක ? දරුවා :- එයා.. (ශබ්දය කඩින් කඩ ඇසේ..) පි... **ඩෙනිම් කලිසමක්** ඇඳන් ආවෙ. පළමු සාකච්ඡාකරු :- ඈ පුතේ. දරුවා :- ෂර්ට් එකයි ඩෙනිම් කලිසමයි	පළමු සාකච්ඡාකරු :- දැන් මේ.. මේ.. ඩඩාගෙ චූ මීයා කියමුකෝ.. (නැවත පළමු සාකච්ඡාකරු බෝනික්කා රැගෙන එහි යට ඇඳුම් පහත් කර පෙන්වා) මේ තියෙන්නේ ඩඩාගෙ චූ මීයා දැන් මේක මොකක්ද කරන්ඩ කිව්වේ ? දරුවා :- **ඒ චූ මීයා නෙමෙයි හලෝ ලැමින් ලඟ** නිදාගත්ත එක්කෙනෙක් පළමු සාකච්ඡාකරු :- පුතා ඩඩාගෙ චූ මීයා ඔයාගෙ කටට දාන්න කියල ඔයා **හැපුවද** ඒක ? දරුවා :- එයා.. (ශබ්දය කඩින් කඩ ඇසේ..) **ෂර්ට් එකක්** ඇඳන් ආවෙ. පළමු සාකච්ඡාකරු :- ඈ පුතේ. දරුවා :- ෂර්ට් එකයි ඩෙනිම් කලිසමයි

VTS 01 -01 **Z - 10**	13.09 – 13.22 **(13:19:13 – 13:19:26)**	***(Page No: 10, 18th to 20th Lines)*** දරුවා :- අම්ම ඩඩා සිගරට් බොනවද ? සිගරට් බොනව සිගරට් බොනව එයා. පළමු සාකච්ඡාකරු :- පුතාට කවුරුවත් කියන්න කිව්වද ඕව ? දරුවා :- ඔව්. නෑ ඩඩා සිගරට් බීල ඉවරවෙලා වමනෙ දැම්මා.	දරුවා :- අම්ම ඩඩා සිගරට් බොනවද ? **(මව දෙස බලා මවගෙන් විමසයි)** සිගරට් බොනව සිගරට් බොනව එයා. පළමු සාකච්ඡාකරු :- පුතාට කවුරුවත් කියන්න කිව්වද ඕව ? දරුවා :- ඔව්. නෑ ඩඩා සිගරට් බීල ඉවරවෙලා වමනෙ දැම්මා.
VTS 01 – 02 **Z - 11**	00.08 – 00.22 **(13:21:33 – 13:21:47)**	***(Page No: 12, 11th Line)*** - දෙවන සාකච්ඡාකරු :- කියන්නකො කොහෙද ඉස්කෝලේ යන්නෙ ? (දරුවා සෙල්ලමට මෙන් හිස සලයි) යන්නැද්ද ඉස්කෝලෙ? ගෙදර ද ඉන්නෙ. යාලුවොත් නැද්ද එතකොට ? (දරුවාගේ මව කතා කිරීමට සඳන විට පළමු සාකච්ඡාකරු උපදෙස් දෙන්න එපා යයි මව දැනුවත් කරයි.)	දෙවන සාකච්ඡාකරු :- කියන්නකො කොහෙද ඉස්කෝලේ යන්නෙ ? (දරුවා සෙල්ලමට මෙන් හිස සලයි) යන්නැද්ද ඉස්කෝලෙ? **(මව විසින් " නම කියන්න ඉස්කෝලේ" යනුවෙන් පවසනු පසුබිමින් ඇසේ.)**ගෙදර ද ඉන්නෙ. යාලුවොත් නැද්ද එතකොට? (දරුවාගේ මව කතා කිරීමට සඳන විට පළමු සාකච්ඡාකරු උපදෙස් දෙන්න එපා යයි මව දැනුවත් කරයි.)
VTS 01 – 02 **Z - 12**	00.48 – 00.55 **(13:22:15 – 13:22:20)**	***(Page No: 13, 03rd to 04th Lines)*** - දෙවන සාකච්ඡාකරු :- කාත් එක්කද ඔයා ඉස්කෝලෙ යන්නේ ? යනවනෙ ඔයා ඉස්කොලෙ ? දරුවා :- අම්මෙ ඩැඩත් එක්ක අපි යන්නෙනැද්ද ඉස්කෝලෙ? නෑ	දෙවන සාකච්ඡාකරු :- කාත් එක්කද ඔයා ඉස්කෝලෙ යන්නේ ? යනවනෙ ඔයා ඉස්කොලෙ ? දරුවා :- අම්මෙ ඩැඩත් එක්ක අපි යන්නෙනැද්ද ඉස්කෝලෙ? නෑ **(මව නැත ලෙස හිස දෙපසට වනා සන් කරයි)**

In the absence of well-defined guidelines for recording video evidence in Sri Lanka, it is prudent to examine the methods or rules established in other jurisdictions for recording such evidence.

The American Professional Society on the Abuse of Children, in its Practice Guidelines under subheading "Parents" states:

> "In general, parents (or other relatives and caregivers) should not be present during the interview. If a child refuses to separate, it may be appropriate to allow the caregiver to be present during the initial stages of the interview. The caregiver should be instructed not to influence the child in any way. If possible, he or she should leave the room prior to issues of abuse being raised."

In **Panchhi and Others v State of Uttar Pradesh** (1998) 7 SCC 177 the Court held that:

> "*The law is that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring".*

In **Liyana Arachchige Lesli Wijesekera v The Attorney General** CA/HCC/0046/22 decided on 13.09.2023, Sampath B. Abayakoon.J, held that:

> *"It is clear from the recording that the no stage of the interview, the officer who was instrumental in questioning the child or PW7, the female police officer who took the child to the National Child Protection Authority and participated at the interview as the 2nd person, has attempted to unduly interfere with the child's statement, other than attempting to obtain the child's statement as to what happened to her. It is clear that only with that above objective in mind, the interviewer has posed questions to the child not to fix anybody to the offence".*

In this case, as per the transcript submitted by the Appellant marked as "Z", it is manifestly clear that PW1 who was present with the child victim had intervened and induced the victim to say against the Appellant. This clearly reflects the mala fide intention to fix the Appellant to the crime. As his Lordship Abayakoon. J, in the above cited judgment stated the video recording evidence can be safely accepted if the interviewer did not intend to fix anybody.

Also, above mentioned APSAC Practice Guidelines lays down that the caregiver should be instructed not to influence the child in any way during the interview.

In this case, the original video recording transcript submitted by the Counsel for the Appellant with the leave of the Court is quite different from the transcript relied upon the prosecution as the evidence in chief of the victim. The transcript submitted by the Appellant clearly shows instances where PW1, mother of the Appellant prompts the child victim to say certain things against the Appellant, whereas, the child victim himself does not mention anything about the Appellant's involvement in such acts.

PW1, the mother of the victim child admitted in her evidence that several complaints had been lodged against the Appellant regarding domestic violence existed between them. A restraining order against the Appellant had been issued by the Learned Magistrate of Mahara. Therefore, it appears that PW1 had a strong motive to fabricate a case against the Appellant through the victim. Hence, I conclude that accepting and considering the video recording evidence of PW7 against the Appellant had caused great prejudice which certainly vitiates the outcome of the case.

As the 3rd and 4th grounds are also connected to each other, the said grounds will be considered together hereinafter.

In the 3rd ground of appeal, the Appellant contended that he was denied a fair trial by convicting him by using and perusing the Police Information

Book by the Learned High Court Judge, as it had not been produced as evidence in the trial. Further, he articulates that he has been denied a fair trial by shifting the burden on the Appellant to rebut the evidence of the prosecution.

The right to a fair trial ensures that court proceedings are conducted justly and impartially. These right mandates that the court strictly adheres to all legal procedures and treats all parties involved with equal consideration, ensuring that the trial process itself remains equitable and effective, regardless of the final decision or outcome. Furthermore, the right to a fair trial includes specific provisions regarding the composition and structure of the court, as well as procedural safeguards designed to protect the rights of all participants throughout the legal process. These safeguards are essential for maintaining the integrity of the judicial system and upholding the principles of justice and fairness.

This Court, in several of its judgments repeatedly held that the IB Extracts, police statements of witnesses, non-summary proceedings and inquest proceedings which are not properly admitted in evidence cannot be perused or utilized in the judgment by the trial judge.

In **Punchimahattaya v The State** 76 NLR 564 the Court held that:

> *"Court of Criminal Appeal (or Supreme Court in appeal) has not authority to peruse statements of witnesses recorded by the police in the course in their investigation, (i.e., statement in the Information Book) other than those properly admitted in evidence by way of contradiction or otherwise".*

This Court in **Priyal Indrajith and two others v The Attorney General** CA/HCC/ 300-302/2018 decided on 16.01.2023 held that:

> *"It is trite law that a judge has no power to utilize the statements made by witnesses to the police, inquest evidence and non-summary evidence when they were not properly admitted in evidence. In this case as the Learned High Court Judge had adopted an incorrect approach by referring and*

comparing police statement and non-summary evidence of PW2 when she evaluated the evidence given by PW2 in the High Court trial. This is a fundamental error on the part of the Learned High Court Judge which certainly prejudicial to the substantial rights of the Appellant."

In the case, the Learned High Court Judge had examined the Information Book of the police and utilized in her judgment to reach the conclusion that the Appellant is guilty of the charges brought against him.

The relevant portions of the judgment are re-produced below:

Pages 435-436 of the brief.

පැ.සා. 1 ගේ සාක්ෂියේදී වැඩිදුරටත්, චූදිත අසභ්‍ය දර්ශන ඇතුළත් වීඩියෝ පට දරුවාට නැරඹීමට සලස්වන බවට සාක්ෂි දී ඇත. එකී අසභ්‍ය වීඩියෝ පට විමර්ෂනය සඳහා නිවසට පැමිණි පොලිස් නිලධාරී මහතා හට භාරදුන් බව ඇයගේ ස්ථාවරයයි. පැ.සා. 10 වන පොසැ. ධර්මකීර්ති මහතාගේ විමර්ෂන සටහන් අනුවද ඔහු වෙත පැ.සා. 1 විසින් 2013.01.31 වන දින චූදිත නිවසට රැගෙන විත් පැ.සා. 7 වන වින්දිත දරුවාට නැරඹීමට සැලැස් වූ අසභ්‍ය වීඩියෝ තැටි 4ක් භාරදී ඇති අතර, පොසැ. 20832 ධර්මකීර්ති විසින් එය හරියාකාරව භාරගත් බවට සටහන් කර අත්සන් තබා ඇත. එලෙස භාර ගත් වීඩියෝ තැටි පසුව නඩු බඩු කුවිතාන්සි අංක 2913 ට ඇතුල් කර පොකො. 60348 සිතුම් වෙත භාර දී ඇත. එය පරීක්ෂා කර බලා මුද්‍රා යහපත් තත්ත්වයේ තිබියදී භාරගත් බවට සටහන් ද යොදා ඇත. නමුත් අවාසනාවකට මෙන් එලෙස භාරගන්නා ලද අසභ්‍ය වීඩියෝ තැටි හතර නඩු භාණ්ඩ ලෙස අධි චෝදනා පත්‍රයට ඇතුල් කර නැත.

ජාතික ළමා ආරක්ෂණ අධිකාරියේ එවකට සභාපතිනිය ලෙස සිටි නීතිඥ අනෝමා දිසානායක මිය ලිපියක් මඟින් ගරු නීතිපතිතුමාගෙන් උපදෙස් ඇය අයැද ඇති අතර, එකී ලිපියේද අසභ්‍ය දර්ශන ඇතුළත් සී.ඩී. තැටි 4 ක් භාරයට ගත් බව සටහන් කොට ඇත. ඒ අනුව සියලු උධෘත සහිතව උපදෙස් අයැද ඇත.

නමුත් මූලික සාක්ෂි මෙහෙයවීමේදී රජයේ අධි නීතිඥ වරිය මෙම අසභ්‍ය වීඩියෝ තැටි අත්අඩංගුවට ගැනීම පිළිබඳව කිසිදු ප්‍රශ්නයක් නගා නැති අතර, එවැන්නක් අපරාධ ස්ථානයේ නිරීක්ෂණය කිරීමේදී පැ.සා. 1 ලබාදුන් බවට පොලිස් සාක්ෂි ද මෙහෙයවා නොමැත. නමුත් ඉතා පැහැදිලිව විමර්ෂන සටහන් ගොනුවේ පැ.සා. 10 අත්සන් තබා අසභ්‍ය වීඩියෝ පට හතරක් භාරයට ගෙන ඇති බව පැහැදිලිය.

Page 436-437 of the brief.

පැ.සා. 10 ගේ සාක්ෂි අනුව, ඔහු මෙම ස්ථානයේ විමර්ෂන සඳහා මුලින් පිටව ගොස් ඇත්තේ, 2013.01.31 වන දින පො.කො. 61838 උදිත යන නිලධාරියා සමඟ වේ. ඒ අනුව එකී නිලධාරියා විසින් යොදා ඇති නිරීක්ෂණ සම්බන්ධයෙන් වූ මෙම ඉහතින් සඳහන් කොටස ඉතා වැදගත් කොටසක් වන අතර, උදිත නමැති නිලධාරියා සාක්ෂි සඳහා නොකැඳවූවද, මෙම කොටස මෙම නඩුවේ වැදගත් සිද්ධියකට අදාළ ප්‍රකාශයක් බවට තීරණය කර සිටී.

Page 446 of the brief.

සාමාන්‍යයෙන් පුතෙකු සම්බන්ධයෙන් හොඳ සහතිකය ලබා දිය හැක්කේ මවට වන අතර, මෙම නඩුවේ චූදිතගේ මව සාක්ෂි දීමේදී මෙන්ම ළමාරක්ෂක අධිකාරියට කරන ලද ප්‍රකාශයේදී ද තම පුතා වන චූදිතගේ හැසිරීම් රටාව පිළිබඳව මනාව අනාවරණය කොට ඇත.

In a criminal trial, it is incumbent on the prosecution to prove the case beyond reasonable doubt. There is no burden on the Appellant to prove his innocence. This is the “Golden Thread” as discussed in **Woolmington v. DPP** [1935] A.C.462. In this case Viscount Sankey J held that:

> *“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt…… If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner…..the prosecution has not made out the case and the prisoner is entitled to an acquittal.*

The Learned High Court Judge in her judgment at pages 442, 443 and 446 had stated as follows:

Page 442 of the brief.

චූදිත වෙනුවෙන් සාක්ෂි ඉදිරිපත් කළද, පැමිණිල්ලේ ප්‍රහල නඩුව බිඳ හෙළීමට එය කිසිසේත් ඉවහල් වී නොමැති අතර, **ඒ තුළින් තවදුරටත් පැමිණිල්ලේ නඩුව තහවුරු වීමක් සිදුවී ඇති බවට පැහැදිලි වේ.**[Emphasis added]

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ඒ අනුව සමස්ථයක් ලෙස පැමිණිල්ලෙන් ඉදිරිපත් කරන ලද සාක්ෂි සැළකිමේ දී **චූදිත එකී සාක්ෂි බිඳහෙළීම සඳහා හෝ කිසිදු සැකයක් උපචය කිරීම සඳහා හෝ කිසිදු කරුණක් ඉදිරිපත් කර නොමැති බව මෙම අධිකරණයේ තීරණයයි.** [Empasis added]

Page 446 of the brief.

මෙම ප්‍රධාන සිද්ධීන් කිසිවක් හරස් ප්‍රශ්නවල දී බිඳ හෙලීමට චූදිත වෙනුවෙන් අසමත් වී නොමැති අතර, **කිසිඳු බිඳ හෙළීමේ සාක්ෂියක් ද කැඳවා නොමැත.** [Empasis added]

The above cited portions of the judgment of the Learned High Court Judge are testaments that the Appellant had been denied a fair trial by shifting the burden of proof on to the Appellant which is a clear misdirection of law.

In the fifth ground of appeal the Appellant contends that the Learned High Court Judge has failed to consider the failure to produce the CD's which were taken in to custody by the National Child Protection Authority warrants the Application of Section 114(f) of the Evidence Ordinance.

Production of obscene Compact Disks (CD) is important to secure conviction in count number three in the indictment. It should be one of the allegations was that the Appellant had showed obscene video to the victim child who was 4 years and four months old at the time of the offence.

PW10, the investigating officer had taken into custody the Compact Disks which contained obscene videos. But the prosecution had not produced those CDs in the trial. As correctly noted by the Counsel for the Appellant, although PW1 testified that the victim had requested the police officers to play the obscene video when they played cartoon CDs, the failure to produce the obscene CDs undermines the credibility of the prosecution's case.

Although the Learned High Court Judge after perusing the IB Extracts confirmed that the police had taken the CDs into their custody, the benefit

of non-production the same was not awarded to the Appellant. Ignorance of the legal maxim that justice to one party should not result into injustice to other party had caused great prejudice to the Appellant and denied a fair trial which is guaranteed in the Supreme Law of the country.

Finally, under the sixth ground of ground appeal, the Appellant extended a legal argument that the Learned High Court Judge had failed to consider that PW1, who was the wife of the Appellant is not competent witness to give evidence as far as the charges are concern.

When PW1, the wife of the Appellant gave evidence, their marriage had not been dissolved by a competent court. As such, she is the legal wife of the Appellant.

As per Section 120(2) of the Evidence Ordinance, PW1 is not a competent witness to give evidence against the Appellant.

But Section 81 of the Children and Young Persons Ordinance as amended states:

> Notwithstanding anything in the Evidence Ordinance contained, the wife or husband of a person charged with an offence specified in the first schedule shall be a competent witness for the prosecution.

FIRST SCHEDULE

OFFENCES AGAINST CHILDREN AND YOUNG PERSONS IN RESPECT OF WHICH SPECIAL PROVISIONS OF THE ORDINANCE APPLY.

(1) Any offence under Section 308 or 360 of the Penal Code.
(2) Any offence against child or young person under any of the following section of the Penal Code.

Sections: 296,297,343,345,360A,365,365A

(3) Any offence against any of the following sections of this Ordinance;
Sections: 72,74,73 and 74

Any other offence involving bodily injury to a child or young person.

In this case, the Appellant was indicted with two counts of Grave Sexual Abuse punishable under Section 365 (b) 2 (b) of the Penal Code as amended by Act No.22 of 1995. The third count was indicted under Section 345 of the Penal Code as amended by Act No.22 of 1995.

As submitted by Learned Counsel for the Appellant, Sections 365 (b) 2 (b) and 345 were introduced by the Penal Code amendment Act No.22 of 1995. Therefore, in order to make wife or husband a competent witness under the Children and Young Persons Ordinance, the 1st schedule should have been amended by adding Sections 365 (b) 2 (b) and 345 of the Penal Code to the 1st schedule. But the Legislature has not yet brought such an amendment to make the wife or husband a competent witness when the husband or wife is charged under Sections 365(b) 2 (b) and 345 of the Penal Code. Hence, by allowing PW1 as a competent witness against the Appellant, the Learned High Court Judge had misdirected herself and illegally used the said evidence against the Appellant and thereby denied a fair trial to the Appellant.

In **Hattuwan Pedige Sugath Karunaratne v. The Attorney General** SC Appeal 32 of 2020 Aluwihare PC J., held that:

> *"No doubt the duty of a State Counsel is to present the Prosecution in an effective manner to the best of their ability in furtherance of securing a conviction, if the evidence can support the charge. The Prosecutor, however, is an officer of the court and their role is to assist the court to dispense justice. Thus, it is not for a Prosecutor to ensure a conviction at any cost, but to see that the truth is elicited, and justice is meted out. A Prosecutor is not expected to keep out relevant facts either from the court or from the accused. It the investigation has revealed matters which are favourable to the Accused and the accused is unaware of the existence*

of such facts, it is the bounden duty of the Prosecutor to make those facts available to the court and to the defence".

In this case the grounds of appeal considered above have merits which certainly disturbs the judgment of the Learned High Court Judge.

The prosecution had failed to prove the case beyond reasonable doubt. The Learned High Court Judge misdirecting herself had failed to consider the improbability of the story of the prosecution. She had misdirected in law and had failed to follow accepted legal concepts that should have been followed in this case.

Considering all the circumstances discussed above, this court could only come to the conclusion that the prosecution has not proven the case beyond reasonable doubt. Therefore, the Appellant is acquitted from the charges.

The appeal is allowed and the conviction is set aside.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL