

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

In the matter of an Appeal made
under Section 331 of the Code of
Criminal Procedure Act No.15 of
1979.

**Court of Appeal Case No.
CA/HCC/ 0238/2024
High Court of Colombo
Case No. HC/1631/2020**

Adam Nizar Mohommed Asmir
alias Adam Nizar Mohommed
Asmir

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Rahul Nuwanara Jayathilake for the
Appellant.
Anoopa De Silva, DSG for the Respondent.**

ARGUED ON : **04/08/2025**

DECIDED ON : **24/09/2025**

JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General under Section 365 B (2) (b) of the Penal Code for committing two counts of Grave Sexual Abuse on Mohommed Asmir Fathima Alfara between the period of 26.05.2017 and 03.06.2017.

The trial commenced on 07.10.2022. After leading all necessary witnesses, the prosecution closed the case. The Learned High Court Judge had called for the defence and the Appellant gave evidence from the witness box, called a witness on his behalf and closed the case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant for the 2nd count and sentenced the Appellant to 10 years of rigorous imprisonment and imposed a fine of Rs.25000/- subject to a default sentence of 06 months simple imprisonment. In addition, a compensation of Rs.100000/- was ordered with a default sentence of 06 months simple imprisonment. He was acquitted from the 1st count.

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 has given consent to argue this matter in his absence. During the argument he was connected via Zoom platform from prison.

The following Grounds of Appeal are raised on behalf of the Appellant.

1. The Appellant has been denied of a fair trial as when leading evidence an incompetent witness has been led to give evidence against the Appellant.
2. The Learned High Court Judge has failed to evaluate the inter se and per se contradictions of the evidence adduced by the prosecution witnesses and thereby has erroneously decided that the prosecution has proved the case beyond a reasonable doubt.
3. The Learned High Court Judge has failed to evaluate the evidence adduced on behalf of the Appellant.

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

According to PW1, the victim of this case, she was about 11 years old when she had undergone this ordeal. The Appellant is her father. She has a younger brother and all had been living at Sangaraja Mawatha, Colombo-13. The Appellant had been an iron smith addicted to liquor. As their house had been a small one, all had been sleeping in one room at night. The victim had been sleeping in the middle between the Appellant and her mother. The younger brother slept next to the Appellant.

On the day of the incident, when the victim was sleeping, the Appellant had inserted his hand inside the top she was wearing and she had pushed the Appellant's hand away immediately. Thereafter, the Appellant had grabbed

her hand very hard and had shoved her hand inside his sarong. Although, she tried to resist the act, she had been unable to do so as the Appellant had held her hand very tightly and had held her hand against his male organ. When the Appellant loosened his grip, the victim had pulled her hand back and felt some sticky substance on her finger. Immediately, she had wiped it off on the Appellant's sarong. Although, she had tried to wake her mother up she had been unable to do so as her mother PW2, used to take some sedative at night due to an illness.

She could only inform the incident to her mother in the afternoon as the Appellant was at home until noon. PW2, had first gone to her elder sister and then had approached her younger sister thereafter and had stayed there overnight.

As PW2 did not believe the victim's allegation, the complaint was only lodged at the Kotahena Police Station two days after the incident.

PW9 W/IP Wickramanayake, who conducted the investigation confirmed that the complaint was lodged on 09.06.2017. The Appellant was arrested on that day itself and the victim was produced before the Colombo JMO and a report has been obtained.

According to the JMO, the victim had clearly described the incident to him. The JMO entered his opinion in the report and not excluding the sexual abuse narrated by the victim, has mentioned that such acts as narrated may not leave any marks.

In the first ground of Appeal, the Appellant contends that the Appellant has been denied a fair trial as an incompetent witness has been led to give evidence against the him.

Section 120 (2) of the Evidence Ordinance states:

In Criminal proceedings against any person the husband or wife of such person respectively shall be a competent witness if called by the accused,

but in that case all communications between them shall cease to be privileged.

In view of the Section 81 of the Children and Young Persons Ordinance 48 of 1939 (as amended) the wife or husband of a person charged with an offence specified in the First Schedule shall be a competent witness for the prosecution.

Therefore, the first ground advanced by the Appellant has no merit.

In the second ground of appeal the Learned Counsel contended that the Learned High Court Judge has failed to evaluate the inter se and per se contradictions of the evidence adduced by the prosecution witnesses and thereby had erroneously decided that the prosecution has proved the case beyond a reasonable doubt.

The victim had given evidence without any contradictions or omissions. When the incident happened, she was only 11 years old. But her evidence was quite consistent and clearly implicated the Appellant.

PW2 had given evidence and reasonably explained why she was delayed in going to the police. Although PW2 did not believe the victim, she had gone to the police three days after the incident and lodged the complaint.

As the evidence given by the victim is clear and quite consistent, the Learned High Court Judge has accurately considered and accepted them in this case. Hence, this ground of appeal is devoid any merit.

In the final ground of appeal, the Appellant contends that the Learned High Court Judge has failed to evaluate the evidence adduced on behalf of the Appellant.

The Learned High Court Judge had accurately stated in his judgment that the stance taken by the Appellant in his evidence did not tally with his defence taken during the trial. Further, the Learned High Court Judge had commented that the Appellant had presented his defence as an afterthought.

The evidence of the defence witness, the son of the Appellant, is not forceful enough to create a doubt over the evidence provided by the prosecution witness.

Due to the aforesaid reasons, the Appellant is not successful under this ground as well.

In this case the victim had given firm evidence as to the atrocities committed on her by the Appellant. Even though the incident had happened when the victim was of a tender age, she had given evidence without any contradictions or omissions.

In **Iswari Prasad v. Mohamed Isa** 1963 AIR (SC) 1728 at 1734 his Lordship has held that;

“In considering the question as to whether evidence given by the witness should be accepted or not, the court has, no doubt, to examine whether the witness is, an interested witness and to enquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination. That is whether there is a ring of truth surrounding his testimony.”

Similarly, Justice Thakkar in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** 1983 AIR SC 753 has stated:

“By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen”.

Therefore, considering the evidence led in this case and guided by the judgements above, I conclude that this is not an appropriate case in which

to interfere with the judgement delivered by the Learned High Court Judge on 05.02.2024 against the Appellant. I therefore, dismiss the appeal.

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

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

JUDGE OF THE COURT OF APPEAL