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/ 0036/2023
High Court of Negombo
Case No. HC/206/2018

Nagendran Thevan Wijeyananda alias Nagendran Deva Wijeya Nanda

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Dharsana Kuruppu with Tharushi Gamage for the Appellant.**
Anoopa de Silva, DSG for the Respondent.

ARGUED ON : **17/09/2025**

DECIDED ON : **23/10/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General under Sections 354 and 365 B (2) (b) of the Penal Code for committing the offence of Kidnapping from lawful guardianship and two counts of Grave Sexual Abuse on Hettiarachchilage Sanduni Indunl Kumari on 17/11/2010.

The trial commenced on 16/01/2016. After leading all necessary witnesses, the prosecution closed their case. The learned High Court Judge had called for the defence and the Appellant had made statement from the dock and closed his case.

The learned High Court Judge after considering the evidence presented by both parties before him and his predecessor, convicted the Appellant as charged, and sentenced the Appellant to 02 years of rigorous imprisonment and imposed a fine of Rs.10,000/- subject to a default sentence of 03 months simple imprisonment for the first count.

For the second count, the Appellant was sentenced to 10 years of rigorous imprisonment and imposed a fine of Rs.10,000/- subject to a default sentence of 06 months simple imprisonment.

For the third count, the Appellant was sentenced to 10 years of rigorous imprisonment and imposed a fine of Rs.10,000/- subject to a default sentence of 06 months simple imprisonment.

In addition, a compensation of Rs.100,000/- was ordered with a default sentence of 06 months simple imprisonment. The Learned High Court Judge had further ordered the sentences imposed on count one, two and three to run concurrent to each other.

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

According to PW1 - the victim of this case, she had been about 08 years old when she faced this bitter ordeal. When she gave evidence, she was 17 years old. The victim and her other siblings had been staying with her parents at the time of the commission of the offence. The Appellant is a well-known person to the victim's father as both had worked together. On the day of the incident, in the morning the Appellant had gone to the victim's house to accompany victim's father. As victim's father was getting ready, the Appellant under the guise of buying a pencil box to the victim, took the victim on his bike without informing her family.

The Appellant, first took the victim to the beach and bought food for her. Thereafter, he took the victim to an unfinished and abandoned house, removed the under garment of the victim and kissed, licked and fingered her vagina. After that, when both were returning home, one tyre of the Appellant's bicycle got puncture. Thereafter, the Appellant had taken his bicycle to a repair shop and dropped the victim near a cometary.

In the meantime, the family members had started to search for the victim, even informed the police. The victim's brother PW7 had located the victim and the Appellant near a bicycle repair shop. He had caught the Appellant, handed over him to police check point and took the victim back home. Thereafter, a complaint was lodged at the Negombo Police Station.

The JMO who had examined the victim had opined that the examination findings of genital area are consistent with alleged sexual abuse involving genital area.

After the closure of the prosecution's case, the defence was called, and the Appellant had given statement from the dock and closed his case.

The following Grounds of Appeal were raised on behalf of the Appellant:

1. The Learned High Court Judge has failed to consider the significant contradictions which goes to the root of the prosecution case.
2. The Learned High Court Judge had failed to consider that the Appellant was denied the right to a fair trial by denying the right to have the assistance of an interpreter in the event of any language disparity.
3. The Learned Trial Judge has come to the conclusion that the prosecution has proved the case before analysing the defence evidence.
4. The learned trial judge has failed to consider that the prosecutrix 's evidence has not been corroborated by any independent evidence.

In a case of this nature, the testimonial trustworthiness and credibility of PW1, mainly the probability should be assessed with utmost care and caution by the trial judge. The learned Trial Judge must satisfy and accept the evidence of a child witness after assessing her competence and credibility as a witness. Hence, before analysing the grounds of appeal advanced in this case, I consider it of utmost importance that the following authorities from other jurisdictions on the topic be appraised.

It was recognized in England as early as 1778 that children could be competent witnesses in criminal trials.

R v. Brasier168 Eng. Rep.202 [1779] the court held:

> "…….*that an infant, though underage of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take oath, their testimony cannot be received ….".*

In **Ratansinh Dalsukhbhai Nayak v. State of Gujarat [2004] 1 SCC 64** the court held that:

> *"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shak ed and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an*

impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness".

In **Ranjeet Kumar Ram v. State of Bihar [2015] SCC Online SC 500** the court held that:

"Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one".

In **R v. Baker EWCA Crim 4 [2010]** Lord Chief Justice (England and Wales of Court of Appeal) held that:

(At para 40) "….. We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However, children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristic of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking

into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence".

In **R v. B. (G),1990 CanLII 7308 (SCC); [1990] 2 S.C.R. 30, at pp.54-55** the Court held that:

> *"...it seems to me that he was simply suggesting that the judiciary should take a common-sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children".*

E.R.S.R Coomaraswamy in his "Law of Evidence" Volume 2 Book 2 at page 658 has stated referring to child witness;

"There is no requirement in English law, that the sworn evidence of a child witness needs to be corroborated as a matter of law. But the jury should be warned, not to look for corroboration, but of the risks involved in acting on the sole evidence of young girls and boys, though they may do so if convinced of the truth of such evidence……. This requirement is based on the susceptibility of children to the influence of others and to the surrender to their imaginations".

At page 659 it states, "As regards the sworn testimony of children, there is no requirement as in England to warn of the risk involved in acting on their sole testimony, though it may desirable to issue such a warning, though the failure to do so will generally not affect the conviction".

Barry Nurcombe, M.D., F.R.A.C.P. in his article "The Child as Witnesses: Competency and Credibility" states:

"Before the trial, the child is expected to recount the details of the alleged offense, again and again, to strangers. Repeated court appearance may be required. In court, the child will eventually be confronted by the accused who is exercising his or her constitutional rights. In contrast to the accused, the child has no advocate. His or her testimony is open to direct challenge on the grounds of incompetence, confabulation, or fabrication. These considerations deter victims from reporting offenses, lead to false restrictions, and erode the apparent credibility of honest witnesses."

Considering the above cited judicial decisions and the writings, as the credibility of the evidence of a child witness would predominantly depend on the circumstances of each case, it is the duty of the Learned Trial Judge to assess and decide on the evidence given by the child witness.

In this case, the creditworthiness of the evidence given by the victim did not suffer at any stage of the trial. No contradictions were highlighted in her

evidence. But only one omission was highlighted by the defence. This with regarding to informing the incident to her mother. The Learned DSG highlighting this evidence of the victim rightly submitted that even if this was to be considered as an omission, it is not forceful enough to shake the credibility of the victim or the core issues of the case against the Appellant.

I too agree with the argument that this omission would not affect the core of the case. The learned High Court Judge had considered the evidence given by PW1 with caution and care and correctly held that her evidence is convincing and cogent and sufficient on its own to prove the case against the Appellant.

According to PW7, Jeewantha Peiris, the brother of the victim he had handed over the Appellant to a police post immediately after he saw the Appellant. But according to the investigating officer, the Appellant was arrested on the following day at his resident. The learned Counsel for the Appellant, highlighting this submitted that as the evidence given by prosecution witness had contradicted each other and therefore, prosecution had not discharged their function properly.

It is appropriate note that PW7 was only 13 years old when this incident happened. He had handed over the Appellant to the police barrier. He is not aware as to what action had taken by the police officers who were present at the barrier. Therefore, this cannot be considered as a contradiction which affect the root of case. Hence, the 1st ground has no merit.

In the second ground of appeal, the learned Counsel for the Appellant contended that the learned High Court Judge had failed to consider that the Appellant was denied the right to a fair trial by denying the right to have the assistance of an interpreter in the event of any language disparity.

Upon perusal of the court record, the Appellant was represented by a Counsel throughout the trial. There was no application, whatsoever, to get an interpreter for the Appellant. This court can reasonably assume that the

Appellant had given necessary instructions to his lawyer who appeared on behalf of him. Though, the learned High Court had mentioned that he explained to the evidence which is not clear to him, even at that point no application came from the defence of requirement of an interpreter. Therefore, I conclude that the Appellant had not denied a fair trial in this case. As such, the second ground also has no merit.

In the third ground of appeal, the Appellant contends that the Learned Trial Judge has come to the conclusion that the prosecution has proved the case before analysing the defence evidence.

The learned defence Counsel highlighting following portion of the judgment, submits that the learned High Court Judge had come to the conclusion before considering the defence evidence. The relevant portion is re-produced below:

Page 148 of the brief.

පැමිණිලිකාර පාර්ශවය වෙනුවෙන් ඉදිරිපත් වී ඇති සාක්ෂි පෙර සඳහන් ආකාරයට වූ කල එම සාක්ෂිවල හරයටම බලපාන පරස්පරයන් දක්නට නැත. මෙම සාක්ෂිවල හරයටම බලපාන ඌනතාවයන් කෙරෙහි අධිකරණයේ අවධානය ලක් කර නැත. සාක්ෂි ඒකාකාරී වේ. සාක්ෂි වල ගැලපීමක් ඇත. මෙම සාක්ෂි වියහැකි භාවයේ පරීක්ෂණය සමත් වේ. අප්‍රමාදයේ පරීක්ෂණය සමත් වේ.

Considering the above portion of the judgement, the learned High Court Judge has not come to the conclusion that the prosecution has proved their case. He only considered whether, the evidence presented by the prosecution pass the tests which needs to be considered in a criminal trial. Therefore, it is improper to say that the learned Hogh Court has come to the conclusion only after considering the evidence presented by the prosecution. Hence, this ground too has no merit.

In the final ground appeal, the Appellant contended that the learned trial judge has failed to consider that the prosecutrix ‘s evidence has not been corroborated by any independent evidence.

In sexual offence cases, corroboration is not a *sine qua non* to secure a conviction. As long as the victim's evidence does not suffer from ambiguity or infirmity in a manner which affects the root of the case, there is no bar for the court to act and rely on the said evidence to decide the case. Hence, the argument put forward by the learned Counsel under this ground of appeal regarding the corroboration cannot be accepted. Further, as stated above, in this case the prosecution had adduced all necessary witnesses to prove their case. Due to reasons given above, this ground is also not successful.

The Appellant in his dock statement admitted taking the victim out of her house on the date of incident and taking her to the beach.

The Learned High Court Judge when writing the judgment had combined the history given to doctor and the evidence given in court by the victim. Although this is a misdirection, it had not caused any prejudice to the Appellant considering the stance taken in his dock statement.

Article 138 of The Constitution of Democratic Republic of Sri Lanka states:

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any court of First Instance, Tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitution in integrum, of all cases, suits, actions, prosecutions, matters and things of which such High Court of First Instance, Tribunal or other institution may have taken cognizance;
>
> **Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect, or irregularity, which has not prejudiced the substantial right**

of the parties or occasioned a failure of justice". [Emphasis added**]**

The above-mentioned provision of the Constitution clearly demonstrates that any failure to adhere to the legal provisions can be considered only if such failure prejudices the substantial rights of the parties or occasion a failure of justice.

Considering the evidence led in this case and guided by the judgements mentioned above, I conclude that this is not an appropriate case in which the judgement delivered by the learned High Court Judge on 08/10/2021 against the Appellant can be interfered upon. I therefore, dismiss the appeal.

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

JUDGE OF THE COURT OF APPEAL

Pradeep Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL