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/ 0201/2023
High Court of Kegalle
Case No. HC/3963/2019

Mohamed Junaid Mohamed Nalir
alias Dhore

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL	:	**Kalinga Indatissa, PC with for the Waseemul Akram, Rashmini Indatissa and Ovini Haththotuwa for the Appellant Anoopa De Silva, DSG for the Respondent.**
ARGUED ON	:	**18/11/2025**
DECIDED ON	:	**20/01/2026**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted in the High Court of Kegalle for committing one count of grave sexual abuse on Mohamed Madeen Mohamed Sanad, punishable under Section 365(B) 2 (b) of the Penal Code as amended by Acts No.29 of 1998 and No.16 of 2006.

It was alleged that the Appellant had sexual gratification by inserting his male organ into the mouth of the victim.

The trial commenced on 16/11/2021. After leading the evidence of the victim and other lay witnesses, the prosecution had closed the case on

06/02/2023. The Learned High Court Judge had called for the defence. The Appellant had made a dock statement and closed his case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant as charged and sentenced the Appellant to 08 years simple imprisonment and imposed a fine of Rs.20,000/- subject to a default sentence of 08 months simple imprisonment. In addition, a compensation of Rs.300000/- was ordered with a default sentence of 02-year simple imprisonment.

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

On behalf of the Appellant the following Grounds of Appeal were raised:

1. The prosecution had failed to prove the case beyond reasonable doubt.
2. That the learned Trial Judge failed to appreciate that the recording of victim's statement was contrary to the provisions of Section 109 of the Code of Criminal Procedure Act No.15 of 1979.
3. That the learned Trial Judge failed to consider the *inter se* contradictions between the prosecution witnesses.

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

PW1 was only 15 + when he encountered the unpleasant incident as he described in his evidence. Every day, the victim used go to his aunt's hotel which is about 200 meters from his house and he would remain there till the evening. On the date of the incident, he had gone to the hotel after sitting for an exam at his school. First, he had gone to his house from his school, changed his dress and had gone to the hotel thereafter.

The incident had taken place at about 2.00pm in a room of a shop located adjoining the hotel of the victim's aunt. The shop was owned by the Appellant. The victim had referred to the Appellant's name as 'Nana'. When

the victim went to the Appellant's shop to buy something, the Appellant had forcibly taken the victim to a room, removed his sarong and requested the victim to take his penis into the victim's mouth. Thereafter, the Appellant had poked his male organ into the mouth of the victim. At that time the Appellant was standing and the victim was made to kneel down on the floor. This act had lasted for 10 minutes and the victim had said he had done the act due to fear for his life, as the Appellant had threatened him.

After the first act, the Appellant had taken the victim on to a bed and lowered his underwear and had inserted his male organ into victim's mouth again. The second act also lasted about 10 minutes. Thereafter, the Appellant had allowed the victim to go away. The victim had divulged this incident to his father. Initially, his father had taken him to the mosque but he did not divulge the incident to anybody there. On the following day, his father had taken him to the police where he had lodged his complaint first.

The victim was taken to the Mawanella District Hospital where he was examined by PW5, the JMO of the hospital. In his history to the JMO, the victim had said that a known person had done to him. He did not reveal the name of the Appellant. The JMO had not excluded the sexual abuse or child abuse in his report.

In his dock statement, he had denied the charge.

Considering the Appeal grounds submitted, I think it is appropriate to consider ground number two first. In the said ground, on behalf of the Appellant, it was contended that the learned Trial Judge failed to appreciate that the recording of the victim's statement was contrary to the provisions of Section 109 of the Code of Criminal Procedure Act No.15 of 1979 (Hereinafter referred to as the CPC).

Section 109(2) of the CPC states:

> If such information is given orally to a police officer or to an inquirer, it shall be reduced to writing by him in the language in which it is given and be read over to the informant:
> Provided that if it is not possible for the officer or inquirer to record the information in the language in which it is given the officer or inquirer shall request that the information be given in writing. If the informant is unable to give it in writing, the officer or inquirer shall record the information in one of the national languages after recording the reasons for doing so and shall read over the record to the informant or interpret it in the language he understands.

According to PW1, he had given his statement in Tamil Language, the only language he understands. But his statement was recorded in Sinhala language by PW3, WPS 3773 Yapa. PW3 had not stated reasons as to why she recorded the statement in Sinhala. This is a clear violation of Section 109(2) of the CPC.

Although PW1 said in his examination-in-chief that his father did not say anything when recording his statement by the police, in his cross examination, PW1 stated that certain words in Tamil were subsequently translated in Sinhala by his father. (Page 129 of the brief). This position was endorsed by PW3 as well (Page 129 of the brief).

PW3 under cross examination admitted that she recorded that the victim can speak the Sinhala language. Whereas, PW1 in his evidence categorically said that he cannot read or write the Sinhala Language. (Pages 55-56 of the brief). Further, when the recording of his evidence commenced on 16.11.2021, translation was provided by the court to the victim. Therefore, it is very clear that the victim would not have the capacity of explaining the incident clearly in Sinhala.

The learned High Court Judge in her judgement at page 164 of the brief stated;

Page 164 of the brief.

පැ.සා 1 ගේ සාක්ෂිය පොලිස් නිලධාරිගේ සාක්ෂිවල දී මනා සේ තහවුරු වී ඇත. පොලිස් නිලධාරීන් සාක්ෂියේ දී හරස් ප්‍රශ්නවලට ලක් කිරීමේ දී පැ.සා 1 දරුවා මුස්ලිම් ජාතිකයකු වීම සහ සමහර දෙමළ වචන පියාගෙන් අසා පරිවර්ථනය කරන තිබූ බව පිළිගෙන ඇත. එහි වරදක් නොමැත. ඒ අනුව දරුවාගේ සාක්ෂිය එම කරුණා මත බැහැර කළ නොහැකි බවට තීරණය කරමි. එමෙන්ම පොලිස් නිලධාරීන් දරුවා විසින් කියන ලද දෙමළ වචන පමණක් සිංහලට පරිවර්ථනය කිරීම සම්බන්ධයෙන් පමණක් ඔහුගේ පියාගෙන් අසා ඇති බව හරස් ප්‍රශ්නවල දී තහවුරු වී ඇත.

I conclude that this has caused great prejudice to the Appellant.

In the 3rd ground of appeal, the Appellant contends that the learned Trial Judge failed to consider the *inter se* contradictions between the prosecution witnesses.

According to PW1, the complaint was lodged at the police station on the following day after the incident. But according to PW4, the investigation commenced upon receiving a complaint from the Child Protection Authority. As such, PW4 had gone to the victim's house to record his statement. As the victim was not at home, a message was left with a relative asking PW1 to come to the police. This was not elicited from the evidence of PW1.

As stated above, PW3 had used the victim's father as a translator, but PW1 in his examination-in-chief stated that his father did not utter anything when his statement was recorded.

A contradiction was marked as V1 by the defence. In his statement, he had stated that nothing came out from the Appellant's penis when he had inserted it into the victim's mouth**.** But when giving evidence, the victim had said that he felt something going into his mouth.

The victim did not utter a single word regarding ejaculation in his mouth in his history to the JMO.

The following omissions were also highlighted from the evidence of PW1.

- That PW1 did not tell the police that 'Naana' pulled him into the shop room and that there was a bed in the room.
- That PW1 did not tell the police that 'Naana' asked him to get on the floor and kneel.
- That PW1 did not tell police that 'Naana' removed his trouser and underwear and asked him to take it in his mouth.

In the recent **Court of Appeal judgment CA HCC 190/2024,** dated 28.03.2025 it was noted that:

> *"It is essential to recognise that while discrepancies may exist, they do not necessarily reflect a lack of credibility and reliability; instead, it is quite clear that they stem from the complexities of human memory or the detailed nature of the events in question. Ultimately, these issues should not distract from the comprehensive truth the prosecution seems to establish.*
>
> *It is essential to understand the implications of such discrepancies and the broader principles of justice that must prevail. Therefore, absence of a precise date should not be viewed as a lack of credibility rather it highlights the need for sensitivity and understanding the judicial process. Moreover, the cornerstone of a fair trial lies in the comprehensive examination of all evidence presented, rather than singular date. To dismiss a case solely due to an imprecise date undermines the principal of justice and the potential for truth to be revealed through crucial examination."*

In the case of **Mohamed Niyas Naufer and others v. Attorney General** (Sc. 01/2006 decided on 08/12/2006), the Court observed that;

> *"when faced with contradictions in a witness's testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness."*

In **Aadam Kasam Shaikh vs. The State of Maharashtra,** 2006 Cr LJ 4585 (4589), the Court held that;

> *"the evidence of a witness cannot be discarded merely because he has made improvements over his police statements by stating some of the facts for the first time in his deposition before the court, if the facts stated for the first time before the court is in the nature of elaboration, do not amount to a contradiction, and the evidence of witness does not militate against his earlier version"*

The learned High Court Judge in considering the contradictions and omissions, simply referred the history to the JMO by the victim to corroborate the statement of the victim to the police. However, the contradiction was marked as V1 upon the evidence given by PW1 and his statement to the police. The learned High Court Judge simply used the history to given to the doctor by the victim to corroborate the statement given to the police. The relevant portion of the judgment is re-produced below:

Page 160 of the brief.

විත්තිය විසින් ලකුණු කර ඇති පරස්පරතාවය ලෙස “ඒකෙන් මොකුත් ආවේ නැහැ” යන පරස්පරතාවය සම්බන්ධයෙන් අවධානය යොමු කළවිට පෙනී යන්නේ එම පරස්පරතාවයන් අධිකරණ සළකා බැලිය නොයුතු බවත් එයට හේතුව වන්නේ වෛද්‍යවරයාට ද ලබා දී ඇති කෙටි ඉතිහාසයේ දරුවා චූදිතගේ පුරුෂ ලිංගයෙන් සුක්‍රාණු පිටවීමක් සම්බන්ධයෙන් සඳහන් නොකළ බවත් එම කෙටි ඉතිහාසයේ වෛද්‍යවරයා විසින් සඳහන් කිරීම අනුව දරුවා විසින් “ඒකෙන් මොකුත්

ආවේ නැහැ" යන්න ප්‍රකාශ කිරීම නිවැරදි බවත් ඒ අනුව එම ප්‍රකාශ පරස්පරතාවයක් ලෙස සළකමින් බැහැර කළ නොහැකි බව අධිකරණයේ තීරණයයි.

The medical history provided by a victim to a doctor can be used by the Court, however, its legal status is usually categorized as evidence of consistency rather than corroboration, in a strict legal sense. As per Section 157 of the Evidence Ordinance, a previous statement made by a witness can be used in order to corroborate their current testimony in court, by way of demonstrating consistency. In other words, if the story told to the doctor is the same as the story told in court, the witness's credibility is strengthened.

In this case, the history narrated to the doctor did not match with the victim's evidence on material points. But the learned High Court Judge had used the history given to the doctor to corroborate the statement given to the police. This is a clear misdirection by the learned High Court Judge. This is a clear testament that the learned High Court Judge had not considered the contradictions marked and the omissions highlighted in evaluating the evidence. Further, the JMO who had been listed as PW5 was not called to give evidence in court. Instead, the Medico Legal Examination report was marked as an admission under Section 420 of the CPC. This too has caused great prejudice to the Appellant.

In **King v Athukorala** 50 NLR 256 the court held that:

> "*Where an accused is charged with rape, corroboration of the story of the prosecutrix must come from some independent quarter and not from the prosecutrix herself. A complaint made by the prosecutrix to the police in which she implicated the accused cannot be regarded as corroboration of her evidence.*
>
> *The corroboration which should be looked for in cases of this kind is some independent testimony which affects the accused by connecting or tending to connect him with the crime".*

In **Premasiri v. Attorney General [2006] 3 Sri.L.R** held that:

> *“The rule is not that corroboration is essential before there can be a conviction in a case of rape but the necessity of corroboration as a matter of prudence except where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge”.*

In **Premasiri vs. The Queen** 77 NLR the Court of Criminal Appeal held;

> *"In a charge of rape, it is proper for a jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such a character as to convince the jury that she is speaking the truth* "

In **Sunil and another vs. The Attorney General** 1986 I SLR 230 Court of Appeal held thus;

> *"Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible. It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration.”*

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

Hence, I conclude that all appeal grounds placed before this court have merit.

The learned Deputy Solicitor General in keeping with the highest traditions of the Attorney General's Department informed that she is leaving the matter to be decided by the Court.

As discussed above, the evidence adduced by the prosecution does not support the conviction entered by the Learned High Court Judge of Kegalle dated 06/07/2023. Hence, I set aside the conviction and acquit the Appellant from the charges.

Therefore, the appeal is allowed.

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

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL