

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

In the matter of an Application for
Revision made under Article 138 of
the Constitution read with Section 364
of the Code of Criminal Procedure
Act No. 15 of 1979.

The Attorney General,
Attorney General's Department,
Colombo 12.

Petitioner

VS.

**C.A. Revision Application No. 09/2015
H.C Jaffna Case No. HC/1706/13**

Ramalingam Selvaratnam,
1st Mile Post, Masi Adi,
Kalwayal,
Chavakachcheri.

Accused – Respondent

BEFORE: : **W.M.M. Malinie Gunaratne, J. and
P.R. Walgama, J.**

COUNSEL : Anoop de Silva, S S C
for the Petitioner

Respondent was absent and unrepresented.

Argued on : 10.12.2015

Written submissions
filed on : 25.01.2016

Decided on : 10.05.2016

Malinie Gunaratne, J.

The Petitioner has preferred this application seeking to revise the Order of the learned Trial Judge dated 30.09.2014 and for an order directing the learned Trial Judge of Jaffna to allow the prosecution to call the prosecutrix to give evidence on her behalf.

The Accused – Respondent was indicted in the High Court of Jaffna for having committed the following offences.

- (i) The Respondent between the period of 1st January 2011 – 20th April 2011, at Chavakachcheri committed the offence of kidnapping Sachithanandhan Hamsa (a female under 16 years of age) from her lawful guardian, namely Sachithanandhan Yoganathan Sachithanandhan and thereby committed an offence punishable under Section 354 of the Penal Code.

- (ii) The Respondent during the course of the same time, place and transaction referred in Count No.1, committed the offence of Statutory Rape of Sachithanandhan Hamsa (a female under 16 years of age) and thereby committed an offence which is punishable under Section 364 (2) E of the Penal Code as amended by Act No. 22 of 1995.

The indictment was read over to the Respondent and upon the Respondent pleading not guilty, the case was fixed for trial.

On 30th September 2014, upon an application made by the State Counsel, to the learned Trial Judge, the case was taken for trial in camera; the learned Trial Judge having identified the prosecutrix is 13 years old, decided to test the competency of the witness to testify before the Court.

The learned Trial Judge asked several questions from the prosecutrix with regard to her name, age, school, class, country of birth, village and date of birth. The prosecutrix accurately answered those questions. Further, the Trial Judge asked a question from the witness with regard to the name of the President of Sri Lanka and the name of the capital of Sri Lanka. There was no response from the prosecutrix to the said questions. Thereafter again the

learned Trial Judge posed another question whether she knows the Courts and the prosecutrix answered the said question affirmatively.

A certified true copy of the proceedings dated 30.09.2014 in Tamil language marked as P3 and the English Translation of the same marked as P4 and pleaded as part and parcel to the Petition.

Thereafter the learned Trial Judge ruled that the witness is not a competent witness and she is not in a position to give clear answers to the questions put to her by the Court and further ruled that, accordingly her evidence is rejected by the Court.

The learned Trial Judge has recorded the evidence of the prosecutrix in question and answer form to make it possible for this Court to determine for itself whether she comprehended the questions and gave rational answers to them.

It is relevant to note that the learned Trial Judge has failed to give a reason for the said ruling. He has only said **“the witness is not in a position to give clear answers to the questions put to her by Court”**.

Being aggrieved by the said ruling, the Petitioner has moved this Court to set aside the said ruling.

Firstly, it is necessary to draw the attention to the Section 118 of the Evidence Ordinance. It reads as follows:

“All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind”.

There is no provision in the Evidence Ordinance specifically dealing with child witnesses. However, if a witness is not competent he / she will not be examined in Court.

Whenever a witness appears before Court, the Court will proceed on the basis that he is competent to testify. When a person of tender years or extreme old age or a person who suffers from disease or other abnormality of the body or mind, the Court is alert on the need to decide whether oath can be administered. Ordinarily this satisfaction is to be arrived at by preliminary examination of the witness by the Court.

Competence of a child witness is tested on the basis of an old Latin Maxim “*Varitatem Dicere a Corruption of viodire*” which means that examination of a witness is a series of questions by the Court usually in the

nature of an examination as to his / her competence to give evidence in some other collateral matter prior to his examination in chief.

It was held in *R. vs. Hampshire* (1995) 2 All E R 1019, although a judge was under no duty to conduct a preliminary investigation of a child's competence to give evidence, he retained the power to do so, where he considered that there was a question as to the child's knowledge of the difference between truth and falsehood and the importance of telling the truth.

The whole object behind such examination is to assess whether the witness has understood the questions asked and has been able to give rational answers to them. Apart from that, a child witness may or may not be fully matured. By virtue of his/her tender years, is susceptible to tutoring by a person interested in the case or by near relatives. A child witness is susceptible to influence from such persons. It is therefore necessary that Court should examine the child witness with care or caution bearing in mind the susceptibility and possible immaturity of the child.

To have a preliminary examination, namely *voire dire*, of a child witness in order to make her / his testimony admissible. Such a course

however was considered necessary, for it offers an opportunity to the Court to assess the mental capacity of the witness.

In the instant case, at the preliminary examination, the learned Trial Judge has recorded the evidence of the prosecutrix in question and answer form. Questions and answers which could help the Court to come to the conclusion whether or not the learned Trial Judge's decision on the competency of the prosecutrix was right or erroneous.

The learned Trial Judge, after questions were asked and answered by the prosecutrix, has given a certificate that she was not in a position to answer clearly to those questions.

The learned State Counsel contended that, the proceedings amply demonstrate the fact that, the questions which the prosecutrix opted to respond were answered accurately and also that the questions which the prosecutrix opted not to respond, she remained silent. She further contended that, accordingly, there is absolutely no merit in the ruling given by the learned Trial Judge.

I have carefully considered the questions and answers, the nature and the tenor of answers given by her and the manner in which she faced, and I am satisfied that she understood the questions and gave rational answers to

the questions. Also I am satisfied that she is a witness competent to testify and understands the need to speak the truth.

The proceedings amply demonstrate the fact that, the prosecutrix was competent to give evidence. Hence, I am of the view that, the ruling given by the learned Trial Judge is wrongful, erroneous and not in accordance to the principles of Law relating to ascertaining the competency of a child witness.

In the aforesaid circumstances, I set aside the Order dated 30.09.2014 made by the learned Trial Judge and direct the learned Trial Judge of Jaffna to allow the prosecution to call the prosecutrix to give evidence on her behalf.

Accordingly, the Revision is allowed.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL