

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

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

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

Complainant

CA Case No: CA/HCC/178/22

HC of Mannar Case No: HC/MN/09/20

Vs.

1. Kachchumohamed Saleem alias Sali
2. Nizm Ubaithullah

Accused

AND NOW BETWEEN

Nizm Ubaithullah
of Puthukudyiruppu,
Mannar

2nd Accused-Appellants

V.

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

Complainant-Respondent

Before: B. Sasi Mahendran, J.
Amal Ranaraja, J

Counsel : Nizam Karriapper, PC, with Ilham N. Kariapper and Chathurika Perera
for the 2nd Accused-Appellant
Azard Navavi, ASG for the Respondent

Written 29.10.2025 (by the 2nd Accused-Appellant)

Submissions 26.01.2024 (by the Respondent)

On:

Argued On: 11.12.2025

Judgment On: 09.02.2026

JUDGEMENT

B. Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as Appellant), along with the 1st Accused, were indicted before the High Court of Mannar on the following counts,

1. On or about 17h of April 2007 at Puthukudiyiruppu, 1st Accused, by inserting his male organ into the anus of Sultan Suhadeen, the victim under the age of 16 years and thereby committed an offence of a Grave Sexual Abuse punishable under section 365(b)2(b) of the Penal Code.

2. On the said date and the said place, the appellant, having aided and abetted the 1st accused to commit said crime, thereby committed an offence of a Grave Sexual Abuse punishable under section 365(b)2(b) read along with Section 102 of the Penal Code.

At the trial, the prosecution presented evidence through eight witnesses and marking productions P1-P2 and thereafter closed its case. Both Appellants, in their defence, made dock statements.

Upon conclusion of the trial, the Learned High Court Judge delivered judgment on 3rd November 2022. The first accused was convicted on the first count and sentenced to ten years' imprisonment. In addition, a fine of Rs. 50,000 was imposed, with a default sentence of six months' imprisonment. The court further ordered the first accused to pay Rs. 150,000 as compensation, with a default sentence of six months' imprisonment.

The appellant was convicted on the second count and sentenced to seven years' imprisonment. A fine of Rs. 25,000 was imposed, with a default sentence of six months' imprisonment. The appellant was also ordered to pay Rs. 150,000 as compensation, with a default sentence of six months' imprisonment.

Being dissatisfied with both the conviction and the sentence imposed by the Learned High Court Judge, the second appellant alone preferred an appeal before this Court. The appellant advanced the following grounds in support of the challenge.

1. The Learned High Court Judge has failed to identify the circumstances he considered having been proved beyond reasonable doubt by the prosecution to draw an unerring inference that the 2nd appellant committed the offence set out in the indictment.
2. The Learned High Court Judge has failed to consider whether any such circumstances justify the drawing of the only inference that is consistent with the guilt of the 2nd accused.
3. The Learned High Court Judge without due regard to the proven facts wrongfully came to the conclusion that the case has been proved beyond reasonable doubt against the 2nd accused

4. The Learned High Court Judge has failed to identify the items of the Evidence led by the prosecution that established that the 2nd appellant shared a common intention to commit the offence set out in the indictment as against him.
5. The Learned High Court Judge has failed to afford a fair trial to the 2nd appellant.
6. The Learned High Court Judge has failed to consider the rules of the Evidence enunciated in the case of,
 - a. Ago Singho v De Alwis 46 NLR 154
 - b. K v Marshal 51 NLR 157
 - c. Toussint v Dharmadasa 48 NLR 445

The facts and circumstances of this case are as follows

PW3, Sultan Suhadeen, the victim in this case, was eight years old at the time of the incident and twenty-one years old when he gave evidence. After school, he attended classes at Madarasa. According to his testimony, the incident occurred on 17 April 2007 at approximately 5:30 p.m., shortly after he returned home from the Madarasa. At that time, both the first accused and the appellant were engaged in wiring work at his residence, and the witness stated that no one was at home at that time. When the victim went to the toilet situated outside to pass urine, the 1st Accused came inside the toilet and gave Rs 7 to the victim. Having removed the victim's cloth the 1st Accused pressed his male organ inside the anus of the victim, causing a lot of pain, and there was bleeding. The victim testified that following the incident, he went to a corner of the house and began shouting. He also noted that during the incident, the Appellant remained outside the bathroom, monitoring the surroundings.

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Q: Where was Ubaithullah when the incident you mentioned took place?

A: He had been outside.

Q: When you say outside, where was he in particular?

A: He was outside the bathroom.

Q: What was he doing?

A: He had been simply standing there.

Q: What did the person Ubaithulla do to you?

A: He did not do anything to me.

Court

Q: Was Ubaithulla aware of the incident that happened?

A: Yes. He knew.

Q: How do you know that he was aware of it?

A: The person Sally came into the bathroom. The other one was standing outside. He stood outside looking if anyone was coming there.

Q: When you were going out, Ubaithullah who was standing outside, tell you anything?

A: He said nothing.

Q: When you were going outside, screaming, didn't he ask you anything?

A: No. he did not ask anything. I did not go outside. There was a small corner there and I went and was seated there. Thereafter Sally went away, I remained screaming. My mother came and took me.

At that moment, his mother, PW 2, who was returning home, approached and inquired about what had happened. He recounted the incident to her, after which she informed his father, PW 1, and together they lodged a police complaint the following day. According to the victim, the entire incident lasted approximately one minute, and he was taken to the hospital the following day.

PW02, Meera Mohideen Nismin Ummah, the victim's mother, testified that the accused and the Appellant who had come to carry out wiring work, asked her for a hammer. The witness went to the neighborhood to fetch it, and upon returning, she saw the victim screaming and crying. At that point, the first Accused left the toilet, and the appellant was standing nearby. Both departed when they saw her approaching. The witness further stated that the victim told her the first accused had assaulted him inside the toilet. When

she attempted to wash the victim, she observed bleeding from his anus. She then informed her husband, PW01, who lodged a police complaint the following day.

During cross-examination, the witness testified that no one was at home when the incident occurred. She added that she returned after about five minutes and admitted that, upon her arrival, the appellant was standing outside the toilet. She further clarified during her testimony that the toilet was situated behind the house and was fitted with a temporary door, which could not be locked securely.

PW01, Muhaideen Hanin Sultan, the father of the victim, testified that he learned of the incident from his wife at around 5:45 p.m. After PW02 mentioned it, he questioned the victim directly, who stated that the accused, who engaged in wiring work at the house, had sexually assaulted him when he went to the toilet upon returning from the Madarasa. The witness further stated that he lodged a police complaint the following day.

During cross-examination, the defence alleged that the complaint was motivated by a religious rift, but the witness denied this and emphasized that his actions were inconsistent with holding any grudge.

According to PW 7, JMO, Dr Sellaiah Pranavan, testified that he prepared a new Medico-Legal Report based on the earlier examination conducted by Dr Aravindan. The medical findings recorded lacerations and reduced rigidity of the anal passage, with noticeable expansion. The witness opined that these injuries were consistent with the forcible insertion of an object, which could cause tearing and loosening of the anal opening. He concluded that the medical evidence was compatible with the victim's history.

Upon the conclusion of the evidence of the prosecution, in the Dock statement, the appellant stated that on 17 April 2007, he accompanied the first accused to the victim's house to carry out wiring work. The first accused then asked him to fetch a screwdriver from his own house. Upon returning with the tool, he observed the victim's mother shouting at the first accused and following this, both left the premises.

When considering the evidence, it is clear that the appellant was positioned near the toilet at the time the first accused committed the act of abuse. This fact was neither denied nor challenged by the appellant. It is a well-established principle that when certain material evidence is not disputed by the opponent, it may be treated as admitted.

This principle has also been recognised and applied in the following judgments,

In ***Edrick de Silva v. Chandradasa de Silva***, 70 NLR page 169 at 170, Justice H.N.G. Fernando held that,

“Where there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in Cross-examination that is a special fact and feature in the case. It is a matter falling within the definition of the word “Prove” in section 3 of the evidence Ordinance, and a trial Judge or court must necessarily take that fact into consideration in adjudicating the issue before it.”

In ***Ajith Samarakoon v. State*** 2004 2 SLR page 209 at page 230 Ninian Jayasuriya, J held that,

“evidence not challenged or impugned in cross examination can be considered as admitted and is provable against the accused.”

CA Appeal 78-80/2001 Decided on 01.10.2007, ***2007 (vol.ii) Appellate Court Judgments (Unreported)*** Ranjith Silva, J held:

“On the other hand when this witness gave evidence she was never challenged on the important aspects. If certain material evidence was not challenged when it was opportune and possible for that party to challenge that evidence, that evidence has to be taken as admitted.”

This concept has also been recognized in Indian jurisprudence.

In ***Sarwan Singh v. State of Punjab*** 2002 AIR SC III 3652 at 3655,3656

“It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted’

It was held ***Motilal v. State of Madya Pradesh*** (1990) Cri L.J. NOC 125 MP *“Absence of cross-examination of prosecution witnesses of certain facts leads to the inference of admission of those facts.”*

In *Himachal Pradesh v. Thakur Dass* (1983) 2 Cri L.J. 1694, at 1983 V.D. Misra CJ held;

“whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed.”

In the instant case, the following facts remained undisputed by the appellant:

1. At the time the victim was abused, the appellant was positioned near the entrance of the toilet, a fact confirmed by a third witness.
2. Immediately after PW02 arrived, both the accused and the appellant left the scene together.

I hold that the Learned High Court Judge has rightly determined that the appellant aided and abetted the first accused in committing the offence of Grave Sexual Abuse, and that this finding has been established beyond a reasonable doubt.

In those circumstances, I am not inclined to interfere with the judgment delivered by the Learned High Court Judge dated 3rd November 2022, together with the sentencing order and dismiss the appeal.

The Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE

JUDGE OF THE COURT OF APPEAL