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

In the matter of an appeal under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 as Amended.

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

Complainant

Vs

James Rodney Oliver Pereira

Accused

Court of Appeal Case No:
CA/HCC/153/2023

High Court of Colombo Case No:
6938/2013

AND NOW BETWEEN

James Rodney Oliver Pereira
Presently at:
Welikada Prison

Accused-Appellant

Vs

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

Complainant-Respondent

Before	:	**Hon. P Kumararathnam, J.** **Hon. Pradeep Hettiarachchi, J.**
Counsel	:	Sarath Jayamanna PC with Vireshka Mendish, Prashan Wickramaratne and D.Rathnayake for the appellant. Jayalakshi De Silva SSC for the Respondents.
Argued on	:	30.05.2025
Decided on	:	01.08.2025

Pradeep Hettiarachchi, J

JUDGMENT

1. The Accused- appellant (hereinafter referred to as "the accused") has filed the present appeal against the judgment dated 14.02.2023 by the High Court of Colombo, by which he was convicted on two counts of grave sexual abuse in the indictment and sentenced to 15 years of rigorous imprisonment for each count.

2. Although several grounds of appeal were raised, when the matter was taken up for argument, the learned President's Counsel for the appellant primarily relied on the following grounds, namely:

    a. The learned High Court Judge has failed to consider the evidence of the defence witness Ruby, who was at the list of prosecution witnesses;
    b. Test of probability was not applied and PW1's evidence was not judicially evaluated;
    c. The prosecution never called Ruby and thus, the presumption of section 114(f) of the Evidence Ordinance will apply; and
    d. The statement made by Ruby was not recorded in compliance with section 109(2) of the Code of Criminal Procedure.

3. Both charges against the appellant relate to committing grave sexual abuse on a child under 16 years of age. Evidently, the investigation into the alleged incident commenced following an anonymous complaint received by the Bureau for the Investigation of Abuse of Children and Women. However, the complaint did not disclose the names of any victims.

4. According to the prosecution, the alleged incident took place in a room used by the appellant to interview inmates of the children's home. The victim in this case, as identified by the prosecution, was Anjalee Silva (PW1). It was argued on behalf of the appellant that the alleged incident is highly improbable in the light of PW1's testimony.

5. I shall first consider the second ground of appeal, namely whether the learned High Court Judge failed to apply the test of probability and to evaluate the evidence of PW1 in a judicial manner perspective.

6. According to the prosecution, the appellant, a pastor, routinely visited the children's home for inspections and had a practice of meeting children in a room. The procedure involved calling two children at a time. When the victim was called by the pastor, she entered the room accompanied by one Ruby another inmate of the home, whereupon she was sexually abused by the appellant.

7. In her testimony, PW1 described the incident and stated that the appellant committed the alleged offence while another inmate, namely Ruby, was present in the same room. According to her evidence, the appellant first asked her to remove her brassiere, but she refused. Thereafter, the appellant forcibly removed her brassiere and sucked her breasts. He then removed her dress and inserted his finger into her vagina. Following this, the victim ran out of the room and reported the incident to Mary (PW7), who told her to go to her (Mary's) room, lock the door, and sleep. PW1 further stated that Mary instructed her not to tell anyone about the incident.

8. It is interesting to note that when PW1 entered the room, no one else was present, and it was the appellant who asked PW1 to bring another inmate into the room. If the appellant had intended to sexually abuse PW1, why would he ask PW1 to bring someone else? Would it not have been easier for him to commit the alleged act when he was alone with PW1, rather than asking the victim to bring another child?

9. It's also in evidence that the room door was remained open during the alleged sexual abuse by the appellant, which casts further doubt on the victim's version of events. The prosecution's detailed account, wherein the appellant summoned two girls concurrently, requested the victim to bring an additional girl to the location of the alleged offense, then proceeded to remove the victim's clothing and sexually abuse her in the presence of the other girl, all while the room entrance door remained ajar, presents a composite scenario of extreme unlikelihood, rendering it excitedly difficult, if not impossible, to accept as credible.

10. Despite the appellant touching her genitalia and inserting his fingers, the victim neither raised an objection nor tried to flee the room to prevent the assault, even

though the door remained open. It's in evidence that several girls were waiting outside or nearby, presumably within earshot of the room where the victim was allegedly sexually abused. Significantly, the victim's own testimony confirms that another girl, Ruby, was also present in the room during the alleged offense. There was no evidence to suggest the appellant threatened either the victim or Ruby with harm.

11. I have examined the evidence in this case, and on a careful scrutiny of the entire evidence in this case, I am of the view that the prosecution evidence has so many contradictions and the whole incident seems to be highly improbable.

12. The prosecution inexplicably failed to call Ruby as a witness, despite her inclusion in the witness list. It is indeed true that in cases of this nature, a conviction can rest solely on the victim's testimony, provided it is credible to the court. Nevertheless, if the victim's version lacks supporting medical evidence, or if the attending circumstances are highly improbable and undermine her narrative, the court should not act on her solitary evidence alone. In essence, the court must exercise extreme caution when accepting a victim's sole testimony if the overall case is improbable and appears unlikely to have occurred.

13. The alleged incident, as narrated by the victim and PW7, appears highly improbable in light of the surrounding circumstances of the case and, therefore, casts serious doubt on the truthfulness of the prosecution's version.

14. I shall now consider the next two grounds of appeal: namely, the failure to call Ruby as a witness for the prosecution, and the failure of the police to comply with Section 110 of the Code of Criminal Procedure when recording Ruby’s statement.

15. For easy reference, let me reproduce the relevant section.

Section 110(1): Any police officer or inquirer making an investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and shall reduce into writing any statement made by the person so examined, but any oath or affirmation shall not be administered to any such person. The whole of such statement shall be recorded in full in the manner set out in section 109 (2). If the police officer or inquirer asks any question in clarification such question and the answer given thereto

shall be recorded in form of question and answer. Such record shall be shown or read to such person or if he does not understand the language in which it is written, it shall be interpreted to him in a language he understands and he shall be at liberty to explain or add to his statement.

16. The above section is clear and unambiguous. Once a statement is recorded, it must be shown or read to the person who made it. If the person does not understand the language in which the statement is written, it must be translated into a language he understands. Furthermore, the individual must be given the opportunity to clarify or supplement the statement.

17. In the instant case, the testimony of the defense witness, Ruby, was recorded in the High Court with the assistance of a Tamil/Sinhala interpreter, indicating that the witness is not conversant in Sinhala. However, her statement to the police was recorded in Sinhala. In her evidence, the witness clearly stated that although she can speak Sinhala, she cannot read or write in the language. In such circumstances, the authorities should have provided a Tamil/Sinhala interpreter to assist her. Regrettably, the officers of the National Child Protection Authority—the main body established to safeguard the rights of children—paid little or no attention to this vital requirement and showed a concerning lack of diligence when recording Ruby's statement.

18. Clearly, this amounts to a blatant violation of Section 110(1) of the Code of Criminal Procedure Act No. 10 of 1979, as well as a denial of the witness's constitutional rights.

19. It is noteworthy that the learned High Court Judge applied the presumption contained in illustration (d) of Section 114 of the Evidence Ordinance and presumed that the recording of Ruby's statement was properly done. Consequently, the Judge concluded that the failure to provide a Tamil/Sinhala interpreter did not affect the validity of her statement. However, I respectfully disagree with this conclusion for the following reasons.

20. The requirement to provide an interpreter exists to safeguard the rights guaranteed under the Constitution. Admittedly, the witness in question was a 12-year-old Tamil-speaking girl at the time her statement was recorded. It is evident that the statement was recorded by an officer who was not conversant in Tamil, and no evidence was led to show that an interpreter was present during the recording. Therefore, it was not

possible for the officer to have complied with the requirements of Section 110(1) of the Code of Criminal Procedure Act. Regrettably, the learned High Court Judge failed to consider this procedural irregularity and erroneously presumed, by relying on illustration (d) of Section 114 of the Evidence Ordinance, that the statement had been properly recorded.

21. The failure to properly interpret and record a statement under Section 110(1) of the Code of Criminal Procedure Act can have significant consequences in a criminal trial, potentially impacting the admissibility of the statement and the strength of the prosecution's case. Case law emphasizes the importance of adhering to the rules for recording and interpreting these statements, particularly the principle of best evidence.

22. The next ground urged by the appellant is that the failure to call PW4, Ruby, gives rise to the presumption under Section 114, illustration (f), of the Evidence Ordinance.

23. In the present case, apart from the victim, the only eyewitness according to the prosecution is Ruby, who was allegedly present in the same room at the time the appellant committed the act of sexual abuse on the victim.

24. The prosecution failed to call PW5, Ruby, who had accompanied the victim to the room where the accused conducted interviews with the children. Notably, it was in this room that the alleged act of grave sexual abuse is said to have occurred. According to the testimony of PW1, Ruby was present in the room when the accused committed the offence and witnessed the incident. If that were the case, why did the prosecution choose not to call Ruby to testify, given that she would have been the most suitable independent witness to narrate the alleged events?

25. In cases involving offences of this nature, there are rarely any eyewitnesses apart from the victim. Accordingly, the court is often required to rely solely on the testimony of the victim and the supporting medical evidence. However, in the present case, where the victim’s evidence is not entirely convincing and contains apparent improbabilities, the most reliable evidence would have been that of Ruby — the only eyewitness who, according to the prosecution, was present in the same room at the time the alleged offence was committed. PW1, in her testimony, categorically stated that Ruby was in the room and witnessed the offence being committed.

26. In ***Walimunige John vs The State 76 NLR 488****, it was held inter alia that:*

> *The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the ' prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (f) of the Evidence Ordinance."*

27. Similarly, the case of ***Kumara De Silva and Two Others vs. Attorney General [2010] (2) SLR 169*** reinforced the principle that an adverse presumption under Section 114(f) can be drawn when a witness's evidence is willfully withheld by the prosecution and constitutes a vital missing link in the case.

28. In ***R vs. Stephen Seneviratne 38 NLR 208***, the Privy Council held that the prosecution must call witnesses whose evidence is essential to the unfolding of the narrative of the case. It was further held inter alia that:

> *The prosecution is not bound to call witnesses irrespective of considerations of number and of reliability.*
>
> *Witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.*

29. However, the learned trial judge permitted the defence to call Ruby as a witness, even after the parties had made their respective submissions. Therefore, the question of drawing a presumption under Section 114(f) of the Evidence Ordinance does not arise in the present case.

30. It is also significant to note that PW1, in her testimony, stated that immediately after the alleged incident, she informed one Mary Aunty, who allegedly instructed her not to disclose it to anyone. However, the testimony of Mary, who was called by the prosecution as PW7, does not corroborate PW1's version. According to Mary's evidence, PW1 merely informed her that the appellant had kissed her. At no point did

Mary state that she told PW1 not to reveal the incident to anyone. It is also noteworthy that a person named Sister Arlin, who was superior to Mary, was present at the home. If Mary had truly been informed of the incident on the same day, she could have easily reported it to Sister Arlin. In fact, Mary was in charge of the children during Sister Arlin's absence, yet, for no apparent reason, she failed to report the alleged incident to anyone until she was questioned by the police.

31. It may be observed that, in the impugned judgment, the learned trial judge concluded—without any supporting medical or credible evidence—that the appellant was intoxicated at the time of committing the alleged offence. Similarly, the trial judge found that, as the appellant was the founder of the children's home and had acted as a trustee, he exerted significant influence over the other inmates and employees, which allegedly prevented them from promptly reporting the incident to the police. However, no evidence to support these findings was presented at trial. Therefore, the trial judge's conclusions in this regard are not supported by the evidence adduced.

32. As stated earlier, the investigation in this case commenced upon an anonymous complaint received by the Bureau. Notably, the complaint did not mention the name of any specific victim. Statements were recorded nearly two months after the alleged incident, which involved an act of grave sexual abuse. If, as claimed, Mary had been informed of the incident by the victim on the very same day, what prevented her from reporting it to her superior officer or any relevant authority? No plausible explanation was provided by Mary in this regard. Furthermore, there was no evidence to suggest that Mary was under pressure or had been threatened by anyone to withhold information relating to the alleged incident.

33. All these circumstances create serious doubt about the prosecution's case and strongly suggest the improbability of the events as alleged by the prosecution witnesses—factors which appear to have escaped the attention of the learned High Court Judge.

34. It is also noteworthy that when the defence attempted to call Ruby as a witness, the learned High Court Judge initially disallowed the application on the ground that she had been present in the courtroom while the prosecution witnesses were testifying.

35. A perusal of the proceedings dated 18.05.2018 reveals that the said witness was not in a position to hear any material evidence related to the case, as she was asked to leave the courtroom shortly after PW1 began testifying. Furthermore, at that point, no evidence material to the case had been elicited from the witness.

36. Thus, it is evident that Ruby had no opportunity to hear any evidence pertaining to the alleged incident during that period. More importantly, the mere fact that a witness may have listened to the testimony of another does not, by itself, disqualify that witness from giving evidence. As noted in Law of Evidence, Vol. I by E.R.S.R. Coomaraswamy, such an occurrence does not justify the trial judge in refusing to allow the witness to testify. The judge may record the incident and take it into account when assessing the credibility of the witness, but it is not a valid ground to exclude the testimony altogether.

37. Therefore, the trial judge's refusal to permit the defence to call Ruby as a witness is patently erroneous in law.

38. However, after the parties made their oral submissions and the case was fixed for judgment, the learned trial judge allowed the defence witness Ruby to testify. Accordingly, she testified at a later stage and stated that no such incident occurred on that day, as she was present in the same room where the appellant had interviewed the victim.

39. It is also significant to note that the trial judge, in his judgment, reached an erroneous conclusion regarding the credibility of the defence witness Ruby, who testified that nothing happened to the victim while they were in the room where the accused conducted the interviews.

40. Although the prosecution highlighted two contradictions during the cross-examination of Ruby, in my view, these do not undermine the credibility of her testimony. She consistently stated that she could not converse well in Sinhala and that no Tamil translator assisted her when her statement was recorded.

41. It is also significant to note that the prosecution failed to prove the alleged contradictions, as the police officer who recorded Ruby's statement was not

examined. Nevertheless, the learned High Court Judge disbelieved Ruby's evidence based on these purported contradictions, despite the fact that they remained unproven.

42. Moreover, the defence witness testified with the assistance of a Tamil/Sinhala translator, having informed the court that she could not understand Sinhala. However, the learned High Court Judge, relying on Section 114(f) of the Evidence Ordinance, concluded that the witness was attempting to use her purported lack of proficiency in Sinhala to favour the defence. Regrettably, the learned High Court Judge failed to appreciate the underlying principle of Section 110 of the Code of Criminal Procedure.

43. Upon consideration of the above, I conclude that serious doubt exists regarding the appellant's alleged sexual abuse of the victim. For this reason, I believe that the appellant is entitled to the benefit of these doubts, and the learned High Court Judge's decision to find the appellant guilty was therefore erroneous.

44. On the above premise, I set aside the conviction and sentence of the appellant. Accordingly, the appeal is allowed.

Judge of the Court of Appeal

Hon. P. Kumararatnam, J (CA)

I agree.

Judge of the Court of Appeal