

**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/ 0109/2024

High Court of Ampara

Case No. HC-AMP/2044/2019

Dilan Anuruddha Liyanarachchi alias

Dilan Mama alias Dilan

APPELLANT

Vs.

The Hon. Attorney General

Attorney General's Department

Colombo-12

RESPONDENT

BEFORE

: P. Kumararatnam, J.

R. P. Hettiarachchi, J.

COUNSEL : **Darshana Kuruppu with Tharushi Gamage
Anjana Adhikaramge and Rajitha
Kulatunga for the Appellant.
Wasantha Perera, DSG for the
Respondent.**

ARGUED ON : **18/11/2025**

DECIDED ON : **14/01/2026**

JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General under Section 365B (2) (b) of the Penal Code for committing one count of grave sexual abuse on Kankanamge Thisari Yuwanika Liyanarachchi on 13.10.2018.

The trial commenced on 23.10.2019. After leading all necessary witnesses, the prosecution closed the case. The learned High Court Judge had called

for the defence and the Appellant had made a dock statement 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 08 years of rigorous imprisonment and imposed a fine of Rs. 20,000/- subject to a default sentence of 06 months simple imprisonment.

In addition, a compensation of Rs.250,000/- was ordered with a default sentence of 02 years simple imprisonment.

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 the Zoom platform from prison.

The Facts of this case albeit briefly are as follows.

In this case, video recorded evidence of the victim was played in the open court under Section 163A of the Evidence Ordinance as her examination - in-chief. Hence, I consider reproducing Section 163A of the Evidence Ordinance to be very important.

163A (1). In any proceedings for an offence relating to child abuse a video recording of a preliminary interview which-

(a) is conducted between an adult and a child who is not the accused in such proceeding (hereinafter referred to in this section as "a child witness"); and

(b) relates to any matter in issue in those proceedings.

May notwithstanding the provisions of other law with the leave of the Court, be given in evidence in so far as it is not excluded by Court under subsection (2).

(2) Where a video recording is tendered in evidence in any proceedings referred to in subsection (1), the Court shall give leave under that subsection unless-

(a) it appears to Court, that the child witness will not be available for cross-examination in such proceedings; or

(b) any rules of Court requiring the disclosure of the circumstances in which the video recording was made have not been complied with to the satisfaction of the Court.

(3) Where a video recording is given in evidence under this section-

(a) the child witness shall be called by the party who tendered the video recording in evidence;

(b) such child witness shall not be examined in chief on any matter which in the opinion of the Court, has been dealt with in his recorded testimony.

(4) Where a video recording is given in evidence under this section, any statement made by the child witness which is disclosed by the video recording shall be treated as if given by that child witness in direct oral testimony and accordingly, any such statement shall be admissible evidence of any fact of which direct oral testimony from him would be admissible.

(5) Where the child witness, in the course of his direct oral testimony before Court, contradicts, either expressly or by necessary implication, any statement previously made by him and disclosed by the video recording, it shall be lawful for the presiding Judge, if he considers it safe and just in all the circumstances of the case to act upon such previous statements as disclosed by the video recording, if such previous statement is corroborated in material particulars by evidence from an independent source.

PW1 - the victim of this case, had been about 08 years old when she faced this grave violation. At the time of giving evidence, she was 12 years old and was still schooling. The victim has siblings and she had been in grade 03 at the time of this incident.

The alleged incident had happened while she was watching T.V at a neighbouring house. She had gone there with all her siblings. At that time the Appellant had entered the house and kept the victim on his lap and touched her body. When the Appellant performed this act, her siblings were not in the house. After touching her body, the Appellant took the victim to a nearby room and made the victim to sit on a polythene sheet. Thereafter, the Appellant had raised her frock, lowered her panty, and licked her vagina despite her resistance. The Appellant had continued the act until a small child had opened the curtain of the door. Thereafter, the Appellant had told the victim not to divulge this to anybody and promised that he would buy toffees for her.

At that time the owner of the house had gone to a nearby house. Hence, nobody was at home when the Appellant committed this offence. After the act, when the victim resumed watching T.V, the Appellant had started to touch her body again. Seeing this her elder brother had called the victim to come near him.

The victim had first divulged this incident to her elder sister and her elder sister had conveyed the same to PW5, Sandya.

The JMO who had examined the victim had not excluded the possibility of sexual abuse. In her history to the doctor, the victim had stated the same as in her interview.

After the closure of the prosecution's case, the defence was called, and the Appellant denied the charges while he gave evidence from the witness box.

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

- I. The Learned Trial Judge erred in law and in fact by failing to consider and give due weight to the material circumstance that neither PW-01, Kankanamge Thisari Yuwanika Liyanarachchi (the prosecutrix), nor PW-05, Jayasinghe Mudiyanselage Sandya Dilhani (the lady of the house where the incident is alleged to have occurred), made any disclosure whatsoever of an act of sexual abuse at the first opportunity. Their initial accounts, given on the very day of the alleged incident, referred only to the Accused-Appellant touching the child's hand, and contained no allegation of sexual misconduct. The Learned Trial Judge's failure to evaluate this crucial omission, and its impact on the credibility of the later, embellished allegation, amounts to a material non-direction and a grave misappreciation of evidence, thereby occasioning a miscarriage of justice.
- II. The Learned Trial judge has failed to consider that the prosecution hasn't proved the date of offence beyond reasonable doubt.
- III. The Learned Trial judge has misdirected himself in law by holding that the date of offence is not an ingredient of the offence that the prosecution should prove.
- IV. The Learned Trial judge has failed to consider that the unexplained inordinate delay of the first complaint creates a reasonable doubt on the prosecution case.
- V. The Learned Trial judge has failed to consider that the unexplained inordinate delay to conduct the video recording interview of the Victim's creates a reasonable doubt on the prosecution case.
- VI. The Learned Trial judge has failed to consider that the story of the prosecution is highly improbable and doesn't inspire confidence to convict the accused-appellant.

VII. The Learned Trial judge has failed to consider that the serious contradiction of the prosecution witnesses goes to the very root of the prosecution case.

VIII. The accused-appellant was denied the right to the fair trial by

- Conducting the pre-trial conference after the conclusion of evidence of JMO.
- Not providing the defence a copy of video recording interview prior to the evidence of the JMO.
- By playing the video recording in the presence of the prosecutrix Kankanamge Thisari Yuwanika Liyanarachchi (PW 01).

In a case of this nature, the testimonial trustworthiness and credibility of PW1; particularly the probability of the occurrence of events as recounted by her 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.

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 **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, shaked 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 the case of R v Barker [2010] EWCA Crim 4 – Lord Chief Justice (England and Wales Court of Appeal) it was held;

“.....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 characteristics 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 the 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 12 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 **State of UP. v Krishna Master** AIR 2010 SC 3071 it was held;

“This Court is of the firm opinion that it would be doing injustice to a child witness possessing sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in its life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future.”

Considering the 1st ground of appeal, I agree with the learned Deputy Solicitor General that the victim had encountered her bitter ordeal at a very tender age. She was only 08 years old and reasonably cannot be expected to give 100% accurate evidence. But in her evidence-in-chief produced by way of a video recorded interview, she had very correctly recalled the events which had taken place on that day. The Learned High Court Judge had very correctly and accurately analysed the evidence given by witnesses in his judgment and had arrived at a correct finding.

In **Don Kuruppu Arachchige Indika Gayan v The Republic of Sri Lanka**, CA/205/2007 Ranjith Silva, J. held that:

“A small child who had undergone such harrowing experience mental and physical torture and trauma, is bound to make mistake with regard to the dates and also bound to confuse several acts of sexual intimacy from one another”.

In the second and the third grounds of appeal, the learned Counsel has argued that the prosecution has failed to prove the date of offence which certainly affects the core of the case.

In the indictment, the date of offence has clearly been mentioned. The victim giving evidence had clearly said that the incident had taken place on a Saturday. The victim was just 08 years old when she encountered this bitter ordeal.

As per the Section 165 of the Code of Criminal Procedure Act No.15 of 1979, the Appellant had been given reasonable notice regarding the time of incident. For clarity the Section 165 of CPC is re-produced below:

Particulars as to time, place and person.

(1) The charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged and to show that the offence is not prescribed.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of movable property, it shall be sufficient to specify the gross sum or, as the case may be, the gross quantity in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 174:

Provided that the time included between the first and last of such dates shall not exceed one year.

(3) When the nature of the case is such that the particulars mentioned in section 164 and the preceding subsections of this section do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

In **Bhoginbhai Hirjibhai v. State of Gujarat** (supra) the court held further:

“In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters.”

“It is unrealistic to expect a witness to be a human tape recorder.”

In **R. v. Dossi** 13 Cr. App. R. 158 the court held that:

“A date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided that there is no prejudice below) where it is clear on the evidence that if the offence was committed at all, it was committed on the day other than that specified.”

As the Appellant had been given sufficient notice regarding the date of offence under which he had been indicted, and plausible evidence was led through witnesses regarding the period, I conclude that this has not caused any prejudice or failure of justice, as the Appellant had raised a totally different issue in the trial. The Learned High Court Judge in his judgment had addressed this issue very correctly to come to his decision. The relevant portion of the judgment is re-produced below:

Pages 211-212 of the brief.

શેખાવીનું અદીવોંડના પત્રાનું સાંદર્ભનું દ્રિના લેટી વોંડનાને સાંદર્ભનું વરદ સમિબનીદયને વિચેતર રૂપીરેખાનું કિરીમે કાર્યક્રમ સાંદર્ભના પત્રાનું સાંદર્ભનું કોઠ આતી કરીતું હોય સાંદર્ભનું હોય.

ඒබැවින් වරද සිදු කරන ලද දිනය නිශ්චිත දිනය පැමිණිල්ල විසින් ඔප්පු නොකිරීම වූදිතයෙකුට අගතිදායි ලෙස බලපෑමක් ඇති කරන කරුණාක් ලෙසට සැලකිය නොහැක. මේ අවස්ථාවේදී වූදිත විසින් ඉදිරිපත් කොට ඇති විත්තිවාචකය සම්බන්ධයෙන් අවධානය යොමු කිරීම උචිත වේ. අධිකරණය විසින් විත්තිවාචකය කැඳවන ලදා වූදිත විත්ති කුඩාවේ සිට ප්‍රකාශයක් සිදු කොට ඇත. එහිදී ඔහු, ඔහුට එල්ල වී ඇති වේදානාව ප්‍රතික්ෂේප කිරීමක් සිදු කර නොමැති අතර, ඔහු සඳහන් කොට ඇති එකම කාරණය වන්නේ සිද්ධිය වූදිනයේදී ඔහු අධික ලෙස බ්‍රිමන්ව සිටි බවත්, එමෙස ඔහු අධික ලෙස බ්‍රිමන්ව සිටීම නිසා එම දිනයේදී සිදු වූ කිසිදු සිද්ධියක් ඔහුට මතක නොමැති බවය.

තවද, විශේෂයෙන් මෙහිදී අවධානය යොමු කළ යුතු කරුණාක් වන්නේ වූදිත කිසිදු අවස්ථාවක වරද සිදු වූදිනය සම්බන්ධයෙන් භඩ කිරීමක් සිදු කොට නොමැත. ඒබැවින් වූදිත විසින් විත්ති කුඩාවේ සිට සිදු කරන ලද ප්‍රකාශය මගින් පැමිණිල්ලේ නඩුකරය කෙරෙනි කිසිදු ආකාරයක සාධාරණ සැකයක් ජ්‍යිත කිරීමට සමත් වී නොමැති බව මෙම අධිකරණයේ නිගමනයයි.

Next the learned Counsel highlighting the 4th and 5th grounds of appeal strenuously argued that the unexplained delay in lodging the 1st complaint and the delay in video recording had caused great prejudice to the Appellant.

According to the evidence of PW14, the investigating officer, the first complaint had been lodged on 18.10.2018, five days after the incident. Further, the video recording had been done about two months after the incident. The learned High Court Judge in his judgment had very correctly considered the delay in making the first complaint and the video recording and had given reasons as to why the evidence given by the victim was accepted. The relevant portion is re-produced below:

Pages 213-214 of the brief.

ඉහත සඳහන් කරන ලද **Thimbirigolle Sirirathna Thero Vs. Attorney General** නඩුවේදී කුඩා දුරක්ෂාවක් අපයෝජනයට ලක් වූ විට ඒ පිළිබඳ පැමිණිලි කිරීමට අපරාධ විත්තිගේ ප්‍රවාල් සාමාජිකයන් දෙවරක් සිතා බැලීමට කාලය ගත වීම සාමාන්‍ය තත්ත්වයක් බවත්, මෙවැනි වරදවල් හෙළි කිරීම තුළින් අපරාධ විත්තියට භාජනය වීමට සිදු විය හැකි සාමාජිය බලපෑම පිළිබඳ අපරාධ විත්තිගේ ප්‍රවාල් සාමාජිකයන්ට සළකා බැලීමට සිදුවීම වැදුගත් කරුණාක් බවත් එහිදී යම්කිසි ප්‍රමාදයක් සිදු විය හැකි බවත් අධිකරණය විසින් අවධානය යොමු කොට ඇත. තවද

එම නඩු නින්දුවේ ලිංගික අපයෝජනයන්ට භාජනය වූ දරුවෙකු ඒ පිළිබඳව දක්වන ප්‍රතිචාරය ඒකාකාරී නොවන බවත් විවිධාකාරයේ ප්‍රතිචාර දක්වන බවත් සමහර වින්දුනයන් එක්වරම පැමිණිලි කිරීම සිදු කරන අතර, සමහර වින්දුනයන් බියවීම, කම්පනයට පත්වීම, ලැප්පාවට පත්වීම, තීරණයක් ගැනීමට නොහැකිව සිරීම, මද හෝ සිද්ධියෙන් අනතුරුව යම් කාලසීමාවක් ගතවනතුරු කතා කිරීමෙන් වැඳි සිරීම වැනි ප්‍රතිචාර දක්වන බවට අධිකරණය විසින් අවධානය යොමු කොට ඇත. එවැනි තත්ත්වයක් යටතේ දී පැමිණිල්ලක් සිදු කිරීමට ප්‍රමාදයක් සිදු විය හැකි බවද එම නඩු නින්දුවේ දී අධිකරණය සාලකා බලා ඇත. තවද එවැනි අපරාධ වින්දුනයෙකුට ප්‍රමාදය පිළිබඳ සාධාරණ හේතුවක් අධිකරණයේදී ඉඳුරිපත් කිරීමට නොහැකි විය හැකි බවද එම නඩුවේ දී අධිකරණය අවධානය යොමු කොට ඇත.

Next considering the 6th and seventh grounds of appeal, the Appellant contends that the story of the prosecution is highly improbable and that the learned High Court Judge had not considered the serious contradictions of the prosecution witnesses which certainly affect the root of the case.

The learned Counsel for the Appellant seriously argued that PW2, the mother of the victim, in her evidence, only stated that the Appellant had held the victim by her hand. As such, the Counsel contends that there is a contradiction between the evidence of PW1, PW2 and PW5.

According to the victim she had told the incident to PW5, who is the owner of the house. According to PW5, the victim had told her that the Appellant had removed her undergarment and placed his face. Immediately after she heard this, she had removed the victim's undergarment and inspected her vagina and had noticed no abnormality. Although she had told this to PW2, she had not inquired in detail. PW2 had admitted that she did not inquire fully as the case was handled by her husband.

Further, the Appellant in his dock statement did not deny the incident. He had simply said that he was under the influence of liquor and was unable to remember as to what happened after his intoxication.

The learned High Court Judge in his judgment had very correctly analysed the evidence of the prosecutrix and had given reasons as to why he accepted the same.

In **The Attorney General v. Sandanam Pitchai Mary Theresa** [2011] 2 SLR 292 the court held that:

“Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are true material to the facts in issue.”

In this case, the credibility of the evidence given by the victim did not suffer at any stage of the trial. Further, the contradiction marked in the evidence of PW5 is not forceful enough to shake the credibility of the victim or the core issues of the case against the Appellant.

In the final ground of appeal, the learned Counsel for the Appellant contended that the Appellant was not served the copy of the video recording interview prior to the evidence of the JMO. Further he contended that when the interview was played in open court, the victim was inside the court and had listened to the same.

It is notable that the Appellant, when being represented by a Counsel at the High Court trial, did not challenge the production of the video recording evidence at any point, before the Court, nor had taken the necessary steps in that regard. In fact, in order to present the Appellant's case, he had relied on the evidence presented. This clearly establishes that no prejudice or failure in relation to the substantial rights of the Appellant had taken place in any way during the course of the trial.

Furthermore, in respect of the facts and the circumstances of the case under appeal, although the Trial Court and Prosecution had not followed the requirements stated above in its chronological order, it is evident that the prosecution and the Trial Court have fulfilled the necessary requirements to grant a fair trial towards the Appellant.

The learned High Court Judge had considered the evidence given by PW1 with caution and care and had correctly held that her evidence is convincing and cogent and sufficient on its own to prove the case against the Appellant.

In criminal law, the principle of the presumption of innocence and the principle of reasonable doubt are two extremely fundamental principles which requires the prosecution to prove the guilt of the Accused beyond reasonable doubt.

“Reasonable doubt” refers to the legal principle which establishes that insufficient evidence would prevent the conviction of a defendant of a crime. The prosecution bears the weight of proving to the judge the defendant’s guilt in respect of the crime with which he has been charged, in order to prove why the defendant should be convicted. Accordingly, in this context, the phrase “beyond a reasonable doubt” indicates that the evidence and arguments brought forward by the prosecution to establish the defendant’s guilt must be done so clearly, in a manner that it is accepted as fact by any rational person.

In Nandana Kumarage Sujeewa v Officer-in-charge, Police Station, Rambukkana SC/APPEAL/61/2023 it was reaffirmed that:

“The fundamental principle in criminal law is that the burden of proving the charge beyond a reasonable doubt lies solely with the prosecution and never shifts to the accused.... Therefore, the shifting of the burden referred to previously does not diminish the prosecution’s responsibility to prove the case beyond a reasonable doubt. The burden shifts only after the prosecution has established its case, not before that stage is reached.”

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 14/11/2023 against the Appellant can be interfered upon. I therefore, dismiss the appeal.

The sentence will be operative from the day the Appellant appears before the High Court of Ampara.

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

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL