

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of
Section 331(1) of the Code of Criminal
Procedure Act No. 15 of 1979.

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

Complainant

Court of Appeal Case No:
CA/HCC/0079/2025

High Court of Badulla Case No:
HC 167/2018

Vs

Mohamed Asmeen Mohamed Asmeer
alias Babi *alias* Mohamed Asmeen
Mohamed Haneefa

Accused

AND NOW BETWEEN

Mohamed Asmeen Mohamed Asmeer
alias Babi *alias* Mohamed Asmeen
Mohamed Haneefa

Accused-Appellant

Vs

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

Complainant-Respondent

Before : **P. Kumararatnam, J.**
Pradeep Hettiarachchi, J.

Counsel : Ershan Ariaratnam for the Accused-Appellant.
Anoopa De Silva D.S.G. for the State.

Argued on : 06.03.2026

Decided on : 12.06.2026

Pradeep Hettiarachchi, J

Judgment

1. The Accused-Appellant (hereinafter referred to as “the Appellant”) was indicted before the High Court of Badulla on two counts:
 - a. For kidnapping a girl of under 16 years of age named W.A. Gayani Udeshika from her lawful guardian, an offence punishable under Section 354 of the Penal Code; and,
 - b. For committing a rape on the said W.A. Gayani Udeshika, an offence punishable under Section 364 (2) of the Penal Code as amended by the Act No. 22 of 1995.
2. The trial commenced before the High Court Judge of Badulla, during which nine witnesses testified for the prosecution. At the conclusion of the case for the prosecution, the Appellant made a dock statement. Upon the conclusion of the trial, the Learned High Court Judge found the Appellant guilty of the charge and accordingly convicted him.
3. For the first count, the Appellant was sentenced to 2 years’ rigorous imprisonment and a fine of Rs. 2500.00, with a default sentence of 03 months’ simple imprisonment. For

the second count, the Appellant was sentenced to 10 years' rigorous imprisonment and a fine of Rs. 5000.00, with a default sentence of 4 months' simple imprisonment. Furthermore, the Appellant was ordered to pay Rs. 200,000.00 as compensation to the prosecutrix, with a default sentence of twenty-four months' simple imprisonment.

4. It is against that conviction and sentence that the Appellant has preferred the instant appeal. As directed by this Court, both parties have filed their respective written submissions. During the hearing, the Appellant pursued the following grounds of appeal:

- a. Credibility of the prosecutrix was not established;
- b. The Learned Trial Judge has erred in not complying with Section 196 of the Code of Criminal Procedure Act;
- c. The prosecution has failed to place all material evidence before the court fairly and impartially;
- d. The Learned Trial Judge has failed to consider the dock statement properly; and
- e. The prosecution has failed to call a material witness.

5. First, I shall consider whether the failure of the Learned Trial Judge to comply with Section 196 of the Code of Criminal Procedure Act is fatal to the conviction against the Appellant.

6. It was submitted on behalf of the Appellant that, although the indictment had been served on the Appellant and read over to him on the same day, upon which he pleaded not guilty to both counts, the Learned High Court Judge failed, on the day the trial commenced and the prosecutrix testified, to cause the indictment to be read over to the Appellant and to record his plea.

7. For ease of reference, Section 196 of the Code of Criminal Procedure Act is reproduced below:

Section 196:

“When the court is ready to commence the trial, the accused shall appear or be brought before it, and the indictment shall be read and explained to him, and he shall be asked whether he is guilty or not guilty of the offence charged.”

8. Furthermore, according to the proviso to Article 138(1) of the Constitution, no judgment or order shall be reversed on account of any error or irregularity unless such error or irregularity has caused prejudice to a party or occasioned a failure of justice.

Proviso reads:

“Provided that no judgment, decree, or order of any court shall be reversed or varied on account of any error, defect, or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.” (Emphasis added)

9. Thus, the Appellant’s contention regarding the non-compliance with Section 196 of the Code of Criminal Procedure Act must be considered in light of the aforesaid legal provisions.

10. The purpose of reading out the indictment to an Accused is to inform him of the charge or charges levelled against him and to afford him an opportunity to state whether he pleads guilty or not guilty. In the instant case, the Appellant was represented throughout the proceedings in the High Court by an Attorney-at-Law. Since he had been informed of the charges on the day the indictment was served on him, no prejudice was caused to him, as he was fully aware of the nature of the charges against him.

11. Furthermore, there is no evidence to suggest that any failure of justice was occasioned by the Learned Trial Judge’s failure to cause the indictment to be read out to the Appellant.

12. A similar issue was dealt with by the Supreme Court in ***Kirimahattaya vs. Attorney General [2020] (1) SRI.L.R.10***, where it was held:

“1. It is imperative under section 196 of the Code of Criminal Procedure Act to have the indictment read and explained to the accused and to ask the accused whether he is guilty or not guilty of the offence charged.

2. Non-compliance with section 196 by itself will not vitiate the conviction.

3. If the conviction is to be vitiated, the appellant is required to satisfy the court that such non-compliance has caused prejudice to the substantial rights of the

accused or has occasioned a failure of justice, as stipulated in the proviso to Article 138(1) of the Constitution.”

13. Accordingly, the failure of the Learned Trial Judge to read out the indictment on the day the trial commenced does not, in my view, vitiate the conviction, nor can it be considered a valid ground of appeal. Thus, I find no merit in the argument advanced by the Appellant.
14. The next issue to be considered by this Court is the credibility of the prosecutrix. In her testimony, the prosecutrix explained the sequence of events that led to her ending up at the house where she underwent the ordeal in question. Although she was extensively cross-examined by defence counsel, the credibility of her testimony remained intact. More importantly, no material omissions or contradictions undermining her credibility are discernible in her evidence.
15. It is pertinent to note that in an offence of this nature, a victim cannot be expected to recount every detail with photographic memory at trial.
16. In ***Sunil vs. Attorney General*** [1999] 3 Sri LR 191, it was held that;

“[...] Nevertheless, the Court must not be unmindful of the fact that they are human witnesses and it is a hall mark of human testimony that such evidence is replete with mistakes, inaccuracies and misstatements. Though one has to be careful in the assessment of evidence given by the bribery officers, the Court has to be equally mindful of the fact that the evidence tendered by human testimony will suffer from certain deficiencies and defects [...]” (At pg. 193)

17. Grounds of appeal (c) and (e) advanced by the Appellant challenge the prosecution’s failure to call all material witnesses and to place all relevant evidence before the Court. In this regard, the Appellant contended that the failure to summon PW14, who was the owner of the house where the victim was allegedly raped by the Appellant, was prejudicial to the defence.

18. The mere failure of the prosecution to call a particular witness does not, by itself, render the prosecution's case defective or warrant the drawing of an adverse inference against the prosecution. An adverse inference under section 114(f) of the Evidence Ordinance arises only where the uncalled witness is shown to be a material witness capable of giving direct and relevant evidence on a matter in issue, and where the withholding of such evidence appears deliberate or unexplained.

19. It is also well settled that the prosecution is not bound to call every witness connected to the facts of the case, provided that the evidence adduced is sufficient to establish the charge beyond reasonable doubt. The Court must ultimately consider whether the non-calling of a witness has occasioned any prejudice to the accused or created a gap in the prosecution case.

20. In the instant case, no material prejudice has been demonstrated by the Appellant arising from the failure to call PW14. Nor has it been shown that PW14 possessed evidence favourable to the defence which was deliberately withheld by the prosecution. Accordingly, I am unable to accept the contention that the failure to summon PW14 warrants the drawing of an adverse inference against the prosecution.

21. The prosecutrix and the Appellant were found by the police inside the house belonging to PW14, a fact which remained unchallenged throughout the trial. Indeed, the Appellant, in his dock statement, admitted that the victim was present in PW14's house and that he had access to the said premises.

22. The prosecutrix, in her testimony, firmly stated that she had been taken to a house which was subsequently identified as the house belonging to PW14. Furthermore, the medical opinion expressed by the Judicial Medical Officer who examined the prosecutrix confirmed evidence of recent penetration. The three injuries detected in the genital region of the prosecutrix were, according to the Judicial Medical Officer, capable of having been sustained within seven days prior to the examination and were consistent with the history provided by the prosecutrix.

23. In these circumstances, the absence of PW14's testimony does not create any material lacuna in the prosecution's case, particularly when the relevant facts relating to the location and circumstances were otherwise established by cogent evidence.
24. Further, another principal ground advanced by the Appellant relates to the prosecution's failure to produce the DNA report in evidence despite its availability. The Appellant contended that, in such circumstances, an adverse inference ought to be drawn against the prosecution under section 114(f) of the Evidence Ordinance.
25. It is pertinent to note, however, that the existence of the DNA report was well known to the Appellant, as the report had been filed by the police before the Magistrate's Court during the course of the investigation. If the Appellant considered the contents of the report to be material to his defence, it was open to him to have the report produced in evidence.
26. It was IP Gemunu Sirisena who visited the scene together with SI Aruna Kantha, SI Nadeeka, and the prosecutrix. The prosecutrix informed PW7 that the alleged rape had been committed on a bed placed in the second room of the house. According to PW7, there was a bedsheet on the bed, upon which he observed certain stains suspected to be blood and semen, as well as a strand of hair. These items were subsequently forwarded to Genentech for DNA profiling.
27. However, it is significant to note that neither the evidence of PW1 nor that of any of the police officers establishes that the bedsheet recovered was in fact the same bedsheet on which the alleged incident had taken place. The recovery was effected five days after the alleged incident. In such circumstances, it cannot reasonably be inferred, in the absence of cogent evidence, that the recovered bedsheet was the very same bedsheet connected to the alleged offence.
28. In the absence of evidence establishing the identity and continuity of the recovered item, the evidentiary value of any DNA analysis conducted on such material becomes inherently uncertain. Even if the DNA report had been produced, its probative value would necessarily depend upon proof that the analyzed material was directly connected

to the alleged offence. That foundational fact has not been satisfactorily established in the present case.

29. Moreover, the prosecution's case does not rest solely upon scientific evidence. The testimony of the prosecutrix, which the Learned Trial Judge had the advantage of observing firsthand, was accepted as credible. Her testimony is materially corroborated by the medical evidence, which confirmed recent penetration and injuries compatible with the history narrated by her. Further, the Appellant himself admitted in his dock statement that he had access to the house where the prosecutrix was found.
30. It is also pertinent that the existence of the DNA report was known to the Appellant throughout the proceedings, as the report had been filed before the Magistrate's Court during the investigation. If the Appellant considered the report favourable to his defence, it was open to him to seek its production in evidence.
31. Accordingly, in the circumstances of this case, the failure of the prosecution to produce the DNA report does not justify the drawing of an adverse inference under section 114(f) of the Evidence Ordinance, nor does it create a reasonable doubt sufficient to undermine the prosecution's case.
32. Hence, the failure to mark the DNA report in evidence has not, in my opinion, caused any prejudice to the Appellant.
33. The Appellant further contended that the dock statement made by him had not been given due consideration by the Learned Trial Judge. However, upon a perusal of the impugned judgment, it is evident that the Learned Trial Judge has adequately analyzed and evaluated the dock statement and has provided sufficient reasons for declining to place reliance upon it.
34. Furthermore, the Learned Trial Judge has carefully considered the infirmities and discrepancies discernible in the evidence of the prosecution witnesses and has explained why such matters were not of sufficient significance to undermine the prosecution's case.

35. It is also pertinent to consider whether the evidence adduced by the prosecution is sufficient to establish the charge of kidnapping the prosecutrix from lawful guardianship.
36. Undoubtedly, the prosecutrix was under 16 years of age at the time she met the Appellant at the bus station. According to her evidence, the Appellant induced her to accompany him by threatening that she would be handed over to the police if she refused to do so. It is also in evidence that the prosecutrix had left her residence without informing her mother, while her father was stationed at the Poonerin Army Camp at that time.
37. In these circumstances, the question that arises for determination is whether the prosecutrix can be said to have been removed from lawful guardianship, notwithstanding the fact that she had already left her residence when she encountered the Appellant.
38. It is Section 352 that defines kidnapping from lawful guardianship; Section 352 of the Penal Code reads as follows;

“Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to 'kidnap such minor or person from lawful guardianship’.”

39. The essential elements of this offence may be formulated as follows;
- a. The person taking must belong to a specified category of persons;
 - b. The person taken must have been subjected, at the time of taking, to lawful guardianship;
 - c. There must have been “taking” or “enticing” of the person from the “keeping” of the guardian;
 - d. The taking or enticing should have taken place without the guardian’s consent.

40. Thus, in order to convict a person under Section 352, there must be evidence establishing that the aforementioned elements enumerated in Section 352 of the Penal Code.
41. Firstly, it is a requirement of the law that the person taken must fall within one of the three definite categories of persons, namely a male child under the age of fourteen years, a female child below the age of sixteen years, and a person of unsound mind. Accordingly, in the present case, it is evident that the prosecutrix was under 16 years of age at the time she encountered the Appellant at the bus station. Therefore, the prosecutrix falls within the category of persons whom the law is presumed to protect under this provision of law.
42. Secondly, as to “lawful guardianship” of the person taken, the statutory explanation is given that the word lawful guardian in this section includes any person lawfully entrusted with the care or custody of such minor or other person. It is well-established law that it is required to be a taking or enticing out of the “keeping” of the lawful guardian.
43. Accordingly, the substance of “keeping”, it is submitted, is custody in respect of the child enjoyed by the guardian. However, it is noteworthy that the concept of “keeping”, in this context, is not limited in scope by any requirement of physical custody.
44. Thus, in *Shaik Adam (1888) 8 S.C.C. 161*, held that the accused met the girl some distance away from her parents’ house, but this was not held to affect the parents’ custody of the girl.
45. Accordingly, in the present case, the prosecutrix encountered the Appellant while leaving her house without informing her parents. Notwithstanding the absence of immediate physical custody on the part of the parents, as held above, the prosecutrix must nevertheless be deemed to have remained in the “keeping” of her guardians at the relevant time.
46. Thirdly, it is necessary to establish that the accused “took” or “enticed” the child out of the keeping of the lawful guardian. The essence of this requirement does not necessarily

involve the use of force or violence by the accused. In certain instances, the child may voluntarily accompany the accused at his behest or inducement.

47. In this regard, it is necessary to establish the requisite nexus between the accused and the child's departure from her home. The severance of the child from the custody of her guardian must be an objective fact at the time the accused enters the scene. Where the child has independently decided to leave the guardian's custody and thereafter communicates that decision to the accused, requesting him to look after her, the accused cannot be said to have "taken" or "enticed" the child merely because he failed to remonstrate with her or persuade her to return home.
48. On the other hand, the mere fact that the child herself took the initiative does not necessarily absolve the accused of responsibility, particularly where the accused has taken advantage of the child's lack of judgment or has exploited his moral ascendancy over the child in furtherance of his own interests.
49. Accordingly, in the present case, the prosecutrix was under the age of sixteen years and, by reason of her tender age, was not in a position to make a mature and informed decision on her own. The Appellant took advantage of this vulnerability and induced her to accompany him by threatening that, in the event she refused, she would be handed over to the police.
50. Although, at the time the Appellant encountered the prosecutrix, she had already left the custody of her lawful guardians and appeared to have accompanied the Appellant voluntarily, such apparent willingness cannot, in the circumstances, be constructed as valid or informed consent. The prosecutrix lacked the capacity to exercise proper judgment, and the Appellant knowingly exploited her immaturity and vulnerability for his own purpose.
51. In these circumstances, the conduct of the Appellant clearly amounts to "taking" or "enticing" the prosecutrix out of the keeping of her lawful guardians within the meaning of Section 352 of the Penal Code. Therefore, it is my considered view that the third requirement necessary to constitute the offence of kidnapping has also been satisfactorily established.

52. Finally, in order to constitute the offence of kidnapping from lawful guardianship, it must be established that the taking or enticing of the child occurred without the consent of the lawful guardian.
53. In this regard, the consent of the victim herself does not absolve the accused of liability, since the very object of the law in recognizing the offence of kidnapping from lawful guardianship is to protect certain categories of exceptionally vulnerable persons from the consequences of immaturity, lack of judgement, and susceptibility to influence. Accordingly, it is the absence of the lawful guardian's consent, and not the apparent willingness of the child, that is material for the purposes of this offence.

54. In *Shaik Adam (1888)* 8 S.C.C. 161 at pg. 163, held as follows;

“As long as the girl is under the statutory age, no amount of forwardness on her part will prevent the person taking her away from being guilty of the offence created by the statute....This is, to my thinking, an eminently sensible reading of the enactments, and to adopt any other would be to render such enactments powerless in some of the very cases most of all requiring their operation.....To rule otherwise would be to deprive the enactment of a large part of the effect it was designed to exercise in protecting females of tender age, not merely from force or fraud, but from results of their own immature judgment and unreasoning impulses.”

55. In *Don Stephen (1928)* 6 Times of Cey. 34, the fact that the girl went to the accused's house of her own accord was held not to affect his liability.
56. It is significant to note that, in the present case, although the Prosecutrix appeared to have accompanied the Appellant, such accompaniment nevertheless amounted to her being taken away from the custody and lawful guardianship of her parents without their consent. Accordingly, the final requirement of the offence is also satisfied.
57. In these circumstances, in my view, the mere fact that the prosecutrix had left her residence prior to meeting the Appellant does not, by itself, take the case outside the scope of removal from lawful guardianship. What is material is whether, at the relevant

time, she remained in the “keeping” of her lawful guardians and whether the Appellant’s conduct had the effect of inducing, facilitating, or continuing her separation from such guardian without their consent.

58. Accordingly, the question of whether the prosecutrix can be said to have been removed from the lawful guardianship of her parents, notwithstanding the fact that she had already left her residence when she encountered the Appellant, must be answered in the affirmative, as the prosecutrix, being a minor, was still in law within the protective custody of her guardians. And her subsequent association with the Appellant did not negate the fact that she was removed from such lawful guardianship within the meaning of the relevant provision.

59. Upon consideration of the foregoing analysis of law and facts, I find no merit in the arguments advanced on behalf of the defence. Accordingly, there is no basis to interfere with the judgment of the Learned High Court Judge, and the conviction and the sentence are affirmed.

60. Accordingly, the appeal is dismissed.

Judge of the Court of Appeal

P. Kumararatnam, J

I agree,

Judge of the Court of Appeal