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/ 0063/2025
High Court of Anuradhapura
Case No. SHC/222/2021

Hambegamuwe Chandrananda Thero

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **P. Kumararatnam, J.**
R. P. Hettiarachchi, J.

COUNSEL	:	**Nuwan Premadasa for the Appellant.** **Wasantha Perera, DSG for the Respondent.**
ARGUED ON	:	**13/02/2026**
DECIDED ON	:	**12/05/2026**

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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 Ihalagama Sumanajothi Himi alias Tharukshan Niwanthaka Nilakshan Bandara between 06.05.2016 and 21.05.2016.

The trial commenced on 14.09.2022. The prosecution had led evidence of PW1, PW2, PW3, PW7, PW9, PW10, PW11 and PW14 and had marked productions P1 to P4. The defence agreed under Section 420 of the Penal Code that PW5, PW6, PW12, PW13, PW15 and PW16 had performed official duties in conducting investigation. After the closure of the prosecution case, as the prosecution evidence warranted the calling of the defence, the Learned High Court Judge had called for the defence. The Appellant made a lengthy 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 07 years of rigorous imprisonment and imposed a fine of Rs.5,000/- subject to a default sentence of 03 months simple imprisonment.

In addition, a compensation of Rs.100,000/- was ordered with a default sentence of 06 months 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, after leading some peripheral matters including the age of the victim, video recorded evidence of the victim was played in the open court under Section 163A of the Evidence Ordinance as his evidence-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, was about 09 years old when he faced this grave violation. At the time of giving evidence, he was 15 years old and was still schooling.

At the age of 09, due to a family situation, the victim was ordained as a Buddhist Priest at a Temple situated in Kekirawa. The Appellant was the chief priest of the temple. The incident had happened on the day after the ordination.

The alleged incident had happened while he was sleeping on a bed. According to the victim, another priest of his age was made to sleep facing the wall of the room. The Appellant slept in the middle and the victim had slept at the edge of the bed. While sleeping, the Appellant had first touched the victim's penis. When he turned to the other side, the Appellant had kept his penis over his anus. As he had felt wetness, he got up from the bed and went to the other room. The transcript of the video recording was marked as P2 by the prosecution.

The victim had first divulged this incident to his mother who had in turn lodged the complaint with the police.

The JMO who had examined the victim had not excluded the possibility of sexual abuse. In his history to the doctor, the victim had stated the same as in his 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 has failed to evaluate the inter se contradictions between the evidence of PW1, PW2 and PW3.
II. The Learned Trial judge has failed to evaluate the contradictions of the evidence of PW1 and PW7, the JMO.

III. The Learned Trial judge has failed to consider the probability and improbability of the testimony of PW1.

IV. The Learned Trial judge has failed to consider in favour of the Appellant the prosecution's failure to call Wimalajothi Thero to give evidence.

V. The time frame mentioned in the indictment is not correct in view of the evidence of PW1.

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

Taking into consideration the 1st ground of Appeal, I agree with the Learned Deputy Solicitor General on the fact that the victim had experienced such an unpleasant event at an extremely young age. Due to the victim being 09 years old at the time, it cannot be reasonably expected for him to give evidence which is 100% accurate. However, in the evidence in chief which consists of a video recorded interview of him, it is evident that he had very accurately recalled the events that had occurred on that day. As such, I agree with the finding of the Learned High Court Judge and consider that the evidence by witnesses had been correctly evaluated by him.

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 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 the case of **R. v. B. (G.),** 1990 CanLII 7308 (SCC) ; [1990] 2 S.C.R. 30, it was stated;

> *"... it seems to me that he was simply suggesting that the judiciary should take a common-sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess 13 the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children."*

Although the Learned Counsel for the Appellant contended that the evidence given by PW1 contradicted with the evidence of PW2 and PW3, the defence had not marked any contradictions or highlighted any omissions by any of the witnesses. PW1 reiterated that the incident pertaining to this case had happened after the ordination and after returning to the temple. This position was never contradicted. The Learned High Court Judge had very correctly considered this issue in his judgement at page 228 of the brief. As

the evidence given by PW1, PW2 and PW3 are cogent and sans any contradictions or omission, this ground has no merit.

In the second ground of appeal, the Learned Counsel for the Appellant contended that the evidence given by PW1 and PW7, the JMO is contradictory, which had escaped the attention of the Learned High Court Judge.

As stated earlier, the victim was only 09 years old when he encountered this incident. In the history to the doctor, he had told how the Appellant had committed anal intercourse which had left no bleeding or pain felt while passing stool. PW1, in his evidence quite consistently said what he experienced on that day. He had not contradicted his evidence with PW7. It is important to note that PW7, JMO has not excluded the history given by the victim. Hence, this ground also has no merit.

In the third ground, the Appellant argues that the Learned Trial judge has failed to consider the probability and improbability of the testimony of PW1.

The Learned High Court Judge in his judgment, at pages 221-224 of the brief, had very correctly and adequately analysed the evidence given by PW1 and had arrived at his decision. He had given plausible reasons as to why he accepts the evidence given by PW1 as cogent and believable. Under these circumstances, it is incorrect to argue that the Learned High Court Judge had not considered the evidence given by PW1 in its correct perspective. Hence, this ground also has no merit.

In the fourth ground of appeal, the Learned Counsel contends that the Learned Trial judge has failed to consider in favour of the Appellant the fact that the prosecution had failed to call Wimalajothi Thero to give evidence.

Calling witnesses is entirely on the prerogative of the prosecution. This concept was endorsed by the Court in the case of **Bandaranaike v Premadasa** 1978-79 (1) SLR 369 that:

> *"In Sri Lankan courts where sections 136(2) and 157 do not apply, the practice is that the right to determine the order of calling witnesses is given to Counsel subject to the overriding discretion given to the Court by Section 135 to direct the order in the interests of justice. This practice giving the Counsel the right to decide what witnesses he will call and in what order, is linked at one end with the adversary system and at the other end with the audi alteram partem rule of natural justice: with the adversary system because the judge is cast in the role of an impartial umpire ruling on the case as presented by the counsel and not descending into the area of combat; with the audi alteram partem rule of natural justice because the judge has to give the counsel an opportunity of being heard and presenting his case to the best possible advantage of which the corollary is that the Counsel is entitled to call his witnesses in the order he chooses. The Court will interfere with the practice in the exercise of its discretion only in an exceptional case to avert a miscarriage of justice".*

In this case the prosecution has called all necessary witnesses to prove their case. The Learned High Court Judge in his judgement had dealt with this point raised in this appeal at pages 224-227 of the brief and had given reasons as to why he accepts the evidence of PW1 as cogent. Therefore, this ground also has no merit.

In the final ground the Appellant questions the time frame mentioned in the indictment, and that it is not correct in view of the evidence of PW1.

In the indictment, the date of offence has clearly been mentioned. The victim giving evidence had clearly said that the incident had taken place after the ordination and when he had returned to the temple. The victim was just 09 years old when he 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 the 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."

In the case of ***D. R. M. Pandithakoralage (Excise Inspector) v. V. K. Selvanayagam*** 56 NLR 143 it was noted:

"There can be no doubt that the accused was in no way misled by the mistake as regards the date in the plaint. In the case of William Edward James it was held that a mistaken date in an indictment, unless the date is of the essence of the offence or the accused is prejudiced, need not be formally amended. In the course of his judgment dismissing the appeal the Lord Chief Justice referred to the judgment of Atkin J. in the case of Dossi where it was held that from time immemorial a date specified in an indictment has never been considered a material matter unless time was of the essence of the offence."

Due to the Appellant being given sufficient notice regarding the date of offence under which he was indicted, and since plausible evidence was led regarding the period, I consider that no prejudice or failure of justice has been caused by this, as an entirely different issue was raised by the Appellant in the trial. Therefore, I consider that the Learned High Court Judge has correctly addressed this issue to arrive at his decision.

In this case, the credibility of the evidence given by the victim did not suffer at any stage of the trial. No contradictions were marked and no omissions were highlighted.

The Learned High Court Judge had correctly considered the evidence by PW1, with sufficient caution and care, and held that such evidence is convincing and cogent, which makes it sufficient on its own to prove the case against the Appellant.

The principles of the presumption of innocence and reasonable doubt are two very fundamental principles in criminal law, which refers to the prosecution's duty to prove the guilt of the Accused beyond a reasonable doubt.

Reasonable doubt refers to the most fundamental legal principle which entails the principle that insufficient evidence would essentially prevent the conviction of a defendant of a crime. The burden of proving the defendant's guilt in respect of the crime with which he has been charged falls on the prosecution, without which the defendant cannot be convicted. As such, the phrase "beyond a reasonable doubt" would mean that the prosecution's evidence and arguments to establish the guilt of the defendant must be done clearly, in a way it is accepted as fact by any rational person.

In **Nandana Kumarage Sujeewa 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."*

In **Wijesekera (Excise Inspector) v Arnolis,** (1940) [17 CLW 138], Justice Wijeyewardene held that:

> *"… it is not every kind of doubt the benefit of which an accused person is entitled. An accused person could claim only the benefit of a reasonable doubt. It is always possible to conjure up a doubt of a very flimsy nature. But an accused person cannot be acquitted on the ground of such doubt…The guilt or innocence of an accused person must be determined on evidence and not on some suggestion made in the course of an argument…".*

Justice Kodagoda in **Sivathasan v. Attorney General** [2021] 2 Sri LR 290 at 304-305 emphasized that:

> "*a reasonable doubt is a real, substantial doubt arising from objective consideration of the facts, not an imaginary or flimsy one: A reasonable doubt is a real or actual and a substantial doubt, as opposed to an imaginary or flimsy doubt that may arise in the mind of the decider of facts (judge or the jury, as the case may be), following an objective consideration of all the attendant facts and circumstances. It is a doubt founded on logical and substantial reasoning (well-founded) which a normal prudent person with not less than average intelligence and learnedness in men, matters and worldly affairs, would naturally and inevitably develop in his mind following a comprehensive, objective, independent, impartial and neutral consideration of the totality of the evidence and associated attendant circumstances. It is a doubt that makes the case for the prosecution significantly less probable to have occurred than in the manner purported to have occurred. A reasonable doubt is not the type of doubt that arises due to incorrect, abnormal or unreasonable comprehension of testimonies and other material which amount to evidence presented at the trial, or due to irrational fear, inappropriate sympathy, or unjustifiable mercy. It is not a doubt that develops in the mind of an imbecile, indecisive or timid person, or in a*

weak or vacillating mind. A shadow of a doubt, an imaginary doubt, a vague doubt or a speculative or trivial doubt should not be confused with a reasonable doubt. A reasonable doubt is not a doubt that a partisan individual with vested interests would entertain in his mind, or a doubt that such a person would advocate that purportedly exists."

Considering the evidence led in this case and guided by the judgements mentioned above, I conclude that the Learned High Court had correctly convicted the Appellant as charged. I, therefore, dismiss the appeal.

Considering all the circumstances of this case, I order the sentence will be operative from the date of conviction, i.e., 17.12.2024.

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

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL