IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal against the Judgment and Sentences of the High Court of Badulla in terms of Section 331 of the Code of Criminal Procedure Code Act read with Section 14 of the Judicature Act No. 02 of 1978, Section 11 of the High Court (Special Provisions) Act No. 19 of 1990.

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

Complainant

-Vs-

Paneer Selvam Sanjeewan *alias* Seeni

Accused

AND NOW BETWEEN

Paneer Selvam Sanjeewan *alias* Seeni

Accused-Appellant

-Vs-

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

Complainant-Respondent

Court of Appeal Case No:
CA/HCC/291/24

High Court of Badulla Case No:
HC/21/2021

Before	:	**Hon. P Kumaratnam, J.** **Hon. Pradeep Hettiarachchi, J.**
Counsel	:	Neranjan Jayasinghe with Randunu Heellage for the Accused-Appellant. Azad Nawawi, A.S.G. for the Respondent.
Argued on	:	30-03-2026
Decided on	:	12-05-2026

Pradeep Hettiarachchi, J

Judgement

Introduction

1. The Accused-Appellant (hereinafter referred to as the "Appellant") was indicted before the High Court of Badulla for the following charge;

> On or around 04-07-2018, within the jurisdiction of High Court of Haputale, the Appellant, by using the Appellant's genitals on any orifice or part of the body of a boy below 16 years namely, Weerasingham Sadeesh Kumar committed an offence of grave sexual abuse, which is an offence punishable under Section 365B (2)(b) of the Penal Code as amended by the Act No. 22 of 1996, 29 of 1998 and 16 of 2006.

2. Upon the Appellant pleading not guilty to the charge, the matter was taken up for trial before the High Court. At the conclusion of the trial, the Learned High Court Judge found the Appellant guilty of the charge and convicted him. Accordingly, the Appellant was sentenced to ten years' rigorous imprisonment. In addition, the Appellant was ordered to pay a fine of Rs. 5,000/-, in default of which he is to undergo six months' imprisonment. The Appellant was further directed to pay a sum of Rs. 150,000/- as

compensation to the victim, in default of which he is to undergo one year's simple imprisonment.

3. Being aggrieved by the judgment and the Sentence, the Appellant has preferred the instant appeal to this Court.

Brief Facts of the Case

4. At the time of the incident, PW1's father was employed at a work site in Colombo, while his mother was abroad for foreign employment. Consequently, PW1 had been placed under the care of his uncle and was residing at his uncle's house. However, on the day of the incident, PW1 had returned to his own residence to collect a book and to light an oil lamp, which he habitually did on a daily basis.

5. As PW1 was about to leave the house after completing these tasks, he noticed the Appellant standing near the front door. The Appellant requested permission to use PW1's phone to send a text message. PW1 responded that he could do so after he had closed the door. The Appellant then stated that there was no need to remain outside and suggested that they could go inside and send the message.

6. Thereafter, the Appellant grabbed PW1 by the hand and forcibly pulled him into the house. PW1 was then pushed onto the bed. The PW1 had been wearing a pair of denim trousers and a t-shirt at the time the alleged incident had taken place. The Appellant had then removed the denim trousers which the PW1 had been wearing and slept on the top of the victim's body, as a result of which PW1 could not breathe. He had screamed, saying "aunty," and then the Appellant had strangled his neck. The Appellant had removed his trousers too. Thereafter, the Appellant had intercrural sex with the victim for about 2-3 minutes. Since PW1 was unable to breathe, he has struggled, and the table nearby had fallen onto the floor as a result of this struggle.

7. Thereafter, a neighbor known as "Mani" arrived at PW1's residence upon hearing PW1's cries for help. At that point, the Appellant fled the scene by jumping over the gate. PW1 informed Mani of the incident, following which Mani left the premises, stating that he needed to proceed to the estate to collect his tools.

8. However, PW1 did not disclose the incident to anyone at the time, as he was apprehensive that it would cause difficulties and adversely affect his studies. Subsequently, his uncle became aware of the incident through another source and took PW1 to the police station. Thereafter, the victim was produced before the Medical Officer of Panketiya Hospital for examination.

Grounds of Appeal

9. The grounds of appeal urged by the Appellant are as follows;

    a. The prosecution has failed to prove the sexual offence mentioned in the Indictment.
    b. The Learned High Court Judge had failed to consider the omissions which go to the root of the case.
    c. The prosecution's version is improbable.
    d. The decision not to call PW3 warrants the application of adverse inference under section 114 (f) of the Evidence Ordinance.
    e. The Learned High Court Judge had erred in coming to the conclusion on the premise that the Accused had failed to prove his stance through credible witnesses and evidence.

Consideration of the Grounds of Appeal

10. It was contended by Learned Counsel for the Appellant that the prosecution had failed to establish the offence of grave sexual abuse as set out in the indictment. The Learned Counsel submitted that there exists a material inconsistency between the particulars of the charge and the evidence adduced at trial. While the indictment alleges that the Appellant committed grave sexual abuse by engaging in intercrural sexual activity with PW1, the testimony of PW1 suggests that the Appellant merely pressed his penis against PW1's genital area. It was therefore argued that the prosecution had failed to prove the specific act alleged in the indictment. The relevant portion of PW1's evidence is reproduced below:

ප්‍ර: දැන් සතීෂ් කුමාර්ගේ ඇඟ උඩ හාන්සි වුනා කිව්වා. දැන විත්තිකරු සතීෂ් කුමාර්ගේ ඇඟ උඩ හාන්සි උනාම විත්තිකරුගේ වූ කරන තැන කොහෙද තිබ්බේ?

උ: මං වූ කරන තැනට තමයි තියා ගත්තේ

ප්‍ර: සතීෂ් කුමාර් ගේ වූ කරන තැන තියාගත්තේ?

උ: ඔව්

ප්‍ර: ඊට පස්සේ විත්තිකරු මොනවහරි කරාද?

උ: උස් පහත් කරා

ප්‍ර: කොච්චර වෙලාවක් උස් පහත් කරාද?

උ: විනාඩි 2-3 ක් විතර.... (vide page 58 of the Appeal Brief)

11. PW1 faced this unfortunate incident in 2018 when he was thirteen years old, and he testified before the High Court four years later. In my opinion, PW1's evidence must be evaluated in that context; he cannot be expected to recollect every detail of the period with mathematical precision. Furthermore, it can be inferred that when a male organ is placed against the genitals of another male and moved in a repetitive, upward and downward motion, such conduct amounts to inter-crural sexual activity. Hence, the specific nature of the act committed does not, in my view, create a significant departure from the charge contained in the indictment.

12. **Sakar - Law of Evidence – 20th Edition – Volume 02 – page 2808,** where it has been said that "When a minor child witness is giving evidence… the court has to examine evidence of such child with utmost caution…. In the case of such evidence, the court has to search for reliable corroborative evidence either orally or documentary as a matter of prudence after being satisfied that evidence of such child witness is itself free from infirmity and is sterling sound, in rape cases it is utmost necessary."

13. At this stage, it is appropriate to refer to the Indian case of ***Bhoginbhai Hirjibhai vs. State of Gujarat (AIR 1983-SC 753 at pp 756-758),*** often cited in our Courts, where it was held:

"1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

2) Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

3) The powers of observation differ from person to person. What one may notice, and the other may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part another.

4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purpose of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

5) In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates of such matters. Again, it depends on the time-sense of individuals which varies from person to person.

6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on."

14. PW6, the Judicial Medical Officer (JMO) who examined PW1, also testified at the trial. He stated that while he could exclude the possibility of anal penetration, he could not rule out acts that leave no physical trace, such as the touching of external genitalia or inter-crural intercourse. In these circumstances, I am of the view that the inconsistency highlighted by Learned Counsel is immaterial.

15. Another ground of appeal urged by the Appellant is that the Learned Trial Judge failed to consider material omissions. At the trial before the High Court, defence counsel drew

the attention of the Court to several omissions in the statement made by PW1 to the police.

16. At the trial, it was brought to the attention of the Learned Trial Judge that PW1 had not mentioned in his statement to the police that he was pushed onto the bed (vide page 64 of the appeal brief). However, at the time this alleged omission was raised, Learned State Counsel pointed out that it did not in fact constitute an omission, as PW1 had stated in his statement that he was "dragged by the hand and then put onto the bed."

17. Furthermore, it was pointed out that PW1 had not stated in his statement to the police that the Appellant had lain on his body (vide page 65 of the appeal brief). It was also brought to the attention of the Learned High Court Judge that PW1 had not mentioned in his statement that, as a result of the Appellant lying on his body, he was unable to breathe (vide page 65 of the appeal brief).

18. It was further submitted that PW1 failed to mention in his statement that the Appellant had strangled him (Vide pg. 66 of the Appeal Brief). It is pertinent to note that in an offense of this nature, a victim cannot be expected to narrate every detail with photographic memory at trial; such an event is a traumatic experience that a person of his age would not naturally wish to constantly recollect or memorize. On the contrary, there is often a tendency to suppress or erase such memories as one grows older. Consequently, in my opinion, trivial or insignificant omissions and discrepancies in the victim's evidence should not be given undue prominence. In this regard, the following authorities are instructive:

19. *"Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions."* As held by the Supreme Court of India in the ***Bhajan Singh @ Harbhajan Singh & Ors vs. State of Haryana on 2011 (7) SCC 421.***

20. 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)

21. Having regard to the aforesaid principles laid down in a line of authorities, I am unable to agree with Learned Counsel for the Appellant that the omissions highlighted by him in the course of submissions undermine the credibility of the testimony of PW1 or create any reasonable doubt as to his trustworthiness. It was further contended by Learned Counsel that the decision not to call PW3 warrants the application of the presumption under Section 114(f) of the Evidence Ordinance.

22. As held in the case of ***Walimunige John vs. The State*** 76 NLR 488, where two Accused were convicted of murder, one argument raised in the appeal was the failure of the prosecution to call two witnesses, whose names were on the back of the indictment and who were alleged to have been present at the scene. The Appellants argued that the trial judge should have directed the jury to draw an adverse inference from the prosecution's failure to call these witnesses, as per Section 114(f) of the Evidence Ordinance. The Court, however, reaffirmed that the prosecution is not obligated to call all witnesses listed on the indictment. It emphasized the prosecutor's discretion in determining which witnesses to present, and the Court saw no necessity to call the other two witnesses because their evidence would have been merely cumulative, supporting the testimony of the deceased's widow. The Court further held that the trial judge is not required to instruct the jury to draw adverse inferences unless the omission of a witness creates a significant gap in the prosecution's case.

23. Accordingly, the application of Section 114(f) of the Evidence Ordinance would arise when considering whether an adverse inference ought to be drawn from the absence of a witness who might be expected to give evidence on an important issue of fact.

24. Furthermore, section 134 of the Evidence Ordinance states that no particular number of witnesses is required for the proof of any fact. In ***Attorney General vs. Mohomed Saheeb Mohamed Ismath*** CA No 87/97 (Decided on 13-07-1999), Jayasuriya J. interpreted it to mean that evidence should be evaluated and weighed, not counted.

25. In the present case, PW3 did not witness the commission of the offence. He merely arrived at the scene after hearing PW1's screams. By the time PW3 reached the crime scene, the Appellant had already fled. Accordingly, the evidence of PW3 does not assist in establishing any material fact relevant to the commission of the offence.

26. In these circumstances, it cannot be contended that the failure to call PW3 created a material lacuna in the prosecution's case. Therefore, the adverse inference under Section 114(f) of the Evidence Ordinance is not applicable against the prosecution for its failure to call PW3 as a witness.

27. It was also contended by the Learned Counsel for the Appellant that the Learned High Court Judge had erred in coming to the conclusion on the premise that the Appellant had failed to prove his stance through credible witnesses and evidence.

28. When evaluating the dock statement of the Appellant, the Learned Trial Judge has stated as follows;

> *"ඉහත නීති තත්වය ප්‍රකාරව චූදිත විසින් විත්ති කූඩුවේ සිට කරන ලද ප්‍රකාශය සළකා බැලීමේදී සදීශ් කුමාර් ඇඹුල් පේර කමින් සිටියදී ඇත්ත කඩන බිමට වැටීම හේතුකොටගෙන ඔහුට පහර දුන් බවත්, පසුව පැමිණ ඔහුගේ නිවසේ අයවලුන් තමාට බැන වැදුණු බවට සඳහන් කර ඇත. කෙසේවෙතත් පැස 01 ඇඹුල් පේර කමින් සිටියදී ඔහුට පහර දුන් බවටද එලෙස පහර දීම හේතු කොටගෙන මෙවැනි අසත්‍ය පැමිණිල්ලක් පැස 01 විසින් කර ඇති බවට වන ස්ථාවරය පැහැදිලි සාක්ෂි මගින් ඔප්පු කිරීමට විත්තියට හැකියාවක් ලැබී නොමැත."(At pg 19 of the Judgement dated 06-09-2024)*

29. In this regard, it is pertinent to emphasize that, in a criminal case, the burden of proving the charges beyond a reasonable doubt rests entirely on the prosecution, and no corresponding burden is cast upon the Accused. Therefore, the Learned Trial Judge's observation that the Appellant failed to establish his defence through credible witnesses and evidence is not consistent with established legal principles.

30. Nevertheless, I am of the view that the Appellant's dock statement, when considered in conjunction with the prosecution version, does not give rise to a reasonable doubt. In his dock statement, the Appellant stated that he had assaulted the victim on the basis that the victim had fallen from a tree. He further stated that he thereafter proceeded to the estate and, upon his return, the victim's family members arrived and scolded him. The Appellant's position is that he has been falsely implicated due to the said incident.

31. However, it is noteworthy that this version was never put to the victim during cross-examination. During cross-examination, it was merely suggested that there had been a dispute between the Appellant and the victim.

32. The other important circumstance to be noted is that, had the victim fallen from a tree as asserted in the dock statement, the Judicial Medical Officer would reasonably have observed at least some abrasions or injuries consistent with such a fall. However, no such evidence was elicited from the testimony of the JMO.

33. Accordingly, the Learned Trial Judge's misdirection regarding the Appellant's burden of proving the contents of the dock statement does not, in my view, vitiate the conviction, as the dock statement, even when considered in its entirety, does not create a reasonable doubt in the prosecution's case.

34. 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 is affirmed.

35. However, the sentence of imprisonment imposed on the Appellant warrants revision in light of the circumstances of the case. There was no evidence that the victim sustained any injuries consequent to the alleged offence, nor was there cogent evidence that the Appellant had used violence upon the victim. It is also relevant that the Appellant was 20 years of age at the time of the offence and had no previous convictions or pending cases against him.

36. Upon consideration of the foregoing, I am of the view that a sentence of seven years' rigorous imprisonment would be sufficient to meet the ends of justice. Further, the compensation payable to the victim is reduced to Rs. 75,000/-, with a default sentence of six months' simple imprisonment. The fine imposed by the Learned High Court Judge is maintained. Subject to the aforesaid variation in sentence, the appeal is dismissed.

Judge of the Court of Appeal

Hon. P. Kumararatnam, J

I agree,

Judge of the Court of Appeal