

**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, read with  
Article 138 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka.*

**Court of Appeal No:**

Democratic Socialist Republic of Sri Lanka

CA/HCC/0046/22

**COMPLAINANT**

**High Court of Panadura**

**Vs.**

Case No. HC/3536/2017

Liyana Arachchige Lesli Wijesekara *alias*

Liya Arachchige Lesli Wijesekara

No. 83/1, Koslanda,

Halhota.

**ACCUSED**

**AND NOW BETWEEN**

Liyana Arachchige Lesli Wijesekara *alias*

Liya Arachchige Lesli Wijesekara

No. 83/1, Koslanda,

Halhota.

**ACCUSED-APPELLANT**

**Vs.**

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

**RESPONDENT**

**Before** : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

**Counsel** : Ershan Ariaratnam for the Accused-Appellant

: Chathurangi Mahawaduge, S.C. for the Respondent

**Argued on** : 26-06-2023

**Written Submissions** : 23-06-2023 (By the Respondent)

: 05-07-2022 (By the Accused-Appellant)

**Decided on** : 13-09-2023

**Sampath B. Abayakoon, J.**

This is an appeal by the accused-appellant (hereinafter referred to as the appellant) being aggrieved by his conviction and the sentence of the learned High Court Judge of Panadura.

The appellant was indicted before the High Court of Panadura for having committed an offence punishable in terms of section 365B(2)(b) of the Penal Code, as amended by Penal Code (Amendment) Act No. 22 of 1995, 29 of 1998 and 16 of 2006. The allegation against the appellant was that he touched the vaginal area of a minor at or about 06-02-2016 in a place called Madampe for sexual gratification.

After trial, the appellant was found guilty as charged by the learned High Court Judge of Panadura of his judgement dated 19-11-2021, and was sentenced to a period of 7 years rigorous imprisonment. He was ordered to pay a fine of Rs. 1500/- and in default, a sentence of 3 months simple imprisonment was imposed. In addition to the above, he was ordered to pay Rs. 100000/- as compensation to the victim child and in default, he was sentenced to a period of 6 months rigorous imprisonment.

### **The Facts in Brief**

The facts that led to the conviction and the sentence can be summarized in the following manner.

The victim child (PW-01) had been a child of about 5 years of age at the time relevant to this incident. The prosecution has relied on the provisions of section 163A of the Evidence Ordinance as amended by Evidence (Special Provisions) Act No. 32 of 1999, to produce a video recorded interview of the victim child as the evidence-in-chief of the child at the trial.

It is born out of the case record of the High Court that before leading such video evidence, the prosecution has taken steps in terms of section 7 (1) of the Evidence (Special Provisions) Act No. 14 of 1995 and had given due access as required to the appellant in terms of the said section before the trial commenced.

With the permission of the Court, the video recording of the interview conducted with the child has been played in open Court and the learned State Counsel who prosecuted the matter has only asked questions from the victim child to determine the identity of the person mentioned by the child at the video interview as the person who committed the sexual abuse on her. The child has identified the person named Raalahami in her interview, as the appellant, who stood indicted before the High Court.

In her video interview, the child has stated that on the day of the incident, her mother and father was at work and she was with her grandmother. She was a

Montessori student at that time. It has been her evidence that while they were at home in the night, Raalahami came, and at that time, she was alone with her grandmother. At that time, she was in the living area of the house but had subsequently stated that she was sleeping in her room and her grandmother was in the living area. It had been her statement that after coming into the room, the person called Raalahami touched her vaginal area, and while this was happening, her mother came home from work and started kicking the person called Raalahami. She has stated that her grandmother also assaulted him using her walking stick and he left the house.

She has mentioned about the person called Raalahami telling her grandmother to close the door before her mother came into the house. She has stated that she was taken before a doctor and she has four other siblings living with her in the house.

She has been subjected to cross-examination on behalf of the appellant. It has been her position that she cannot exactly remember what was stated by her in the video interview, but has stated that she was not coached by anyone before she came to Court, and when this incident occurred, her grandmother was in her armchair in the living area. She has maintained the position that when Raalahami, whom she has identified as the appellant, came in and touched her vaginal area, she was in the room and her mother came after work while this was happening.

She has maintained the position that the persons who recorded the interview did not coach her to say things she said in the interview. She has admitted that when she was taken before the doctor, it was her mother who spoke with the doctor.

It needs to be noted that when PW-01 gave evidence before the High Court, she was a 10-year-old child.

During her evidence, an admission has been recorded in terms of section 420 of the Code of Criminal Procedure Act admitting the child's date of birth, and the fact that she was a child under 16 years of age.

The prosecution has marked the relevant compact disc which contains the video recording as P-01, subjected to the identification of the same by the relevant officials who recorded the interview.

The prosecution has called the mother of the victim child (PW-02) to give evidence in this trial. She is a person working in a garment factory, and on the day of the incident she has returned home as usual around 10 p.m. in the night after finishing her shift work. It has been her evidence that she lived in the house with her husband and three children and the mother of her husbands' father namely Magallin Nona. This is the lady the child referred to as her grandmother.

She has admitted that she made a statement to the Milleniya Police on 27-02-2016 about the sexual abuse incident faced by her daughter. It was her evidence that some days before the date of the complaint, she came home after work around 10.30 – 11 in the night, and at that time only her daughter (PW-01) and the grandmother was at home. Her elder daughter was living with her parents at that time, and her 3<sup>rd</sup> child was not born by then. She has remembered this date as a date closer to the Independence Day of February 4<sup>th</sup>.

When nearing her house, she has heard somebody telling the grandmother to close the door. Upon reaching the house, she has seen the appellant sleeping on a mat placed in between the two rooms of the house in the living area. He has been holding the victim child close to his body and covered with a bedsheet. Since this is an unusual sight to her, she has hurried and removed the bedsheet to find the appellant having his hand inside the knickers of the child. She has observed that the appellant being heavily drunk. He has not even seen the witness coming and only taken out his hand of the victim child after she started kicking him after seeing what was happening.

PW-02 has chased the appellant while continuously assaulting him, and the appellant has run away towards his house which was nearby. The witness has then assaulted the grandmother too, due to the agitated state she was in, because of her failure to protect her child.

It was her evidence that when she reached the house, the grandmother was in the armchair. It had been her evidence that she went to the house of the appellant and informed his son and daughter about the incident of grave sexual abuse faced by her daughter and started assaulting the appellant again, after forcing the appellant to come back to her house. It was her position that because of the assault by her, the daughter of the appellant called the police.

She has maintained the position that since the child was a Montessori child, and she has not received any injury, it was not her intention to complain to the police with regard to the incident of sexual abuse. It had been her evidence that the daughter of the appellant has gone and made a complaint to the Grama Niladhari of the area stating that she is insulting her father, which has led to her informing the Grama Niladhari of the sexual abuse incident. It was the Grama Niladhari who was instrumental in informing this matter to the Child Protection Officer of the area and to the police.

The position taken up by the appellant during the cross-examination of the mother of the victim child had been that due to a dispute he and the mother of the victim child had over plucking of coconut in the land where the witness lived, she has made a false complaint against him in order to take revenge, which the witness has denied. It had been her position that there was no dispute between them until this incident occurred.

She has admitted that when the child was taken before the doctor, it was she who spoke with the doctor as the child was not communicating with him. She has explained the delay in making a statement, stating again, that it was not her intention to take the child before a Court and when this incident was revealed to the police only, she made a statement to the police.

The prosecution has called the Child Rights Development Officer of the Divisional Secretary's Office of Panadura to give evidence in this matter. According to her, she has received an anonymous telephone call that a child abuse incident has occurred and accordingly, she has gone to the house of the victim child and met the mother of the child and the child. After hearing of the incident, she has advised the mother to lodge a complaint with the police and inquired from her after two weeks whether it was done. As the mother has not lodged a complaint as advised, she has informed the Milleniya police in this regard on 27-02-2016 and has given a statement to the police.

PW-09 Police Inspector Wijesinghe was the officer who arrested the appellant and he has instructed one of his subordinate officers to record his statement. The witness has identified the appellant as the person arrested by him.

PW-07 WPC 3048 Kanthi was serving at the children and women's bureau section of the Milleniya police during the time relevant to this incident. She has received an information from the area Child Rights Development Officer about the child abuse incident relevant to this case and had initiated investigations. She has gone to the place of the incident and had recorded the statement of the victim child's mother and the father of the child and that of the grandmother who was living with them at that time. The grandmother had been a 95-year-old person when she recorded her statement.

The officer has taken steps to produce the child before the Judicial Medical Officer and since the child was not in a position to give a proper statement to her, she has taken steps to obtain permission of the Court and to take the child to National Child Protection Authority office in Colombo and had taken the necessary procedural steps to have a video recording of the interview the child had with the relevant officers of the National Child Protection Authority. The interview has been recorded on 04-04-2016. It had been her position that it was the mother of the child who showed the place of the incident as the child did not communicate well with her.

The prosecution has taken steps to call the relevant officers of the National Child Protection Authority who were instrumental in interviewing and video recording of the interview they had with the child, which was the video recording relied on by the prosecution as the evidence in chief of the victim child.

PW-11, WPC 329 Janaki Priyangika Jayathunga was attached to National Child Protection Authority Special Police Investigation Unit during the time relevant to this matter. She is a person with a special training as to how to conduct interviews with small children who are victims of crime. She has conducted the video interview with the victim child relevant to this incident on 04-04-2016.

In her evidence, the witness has well explained the facilities and the necessary precautions taken in recording this interview, which was conducted in a purpose-built video recording studio. She has conducted the interview from 12.21 p.m. to 12.39 p.m. on that day. She had been the main officer who conducted the interview. However, WPC 3048 Kanthi of Milleniya police who produced the child at the National Child Protection Authority had participated at the interview as a second interviewer.

She has explained further that after an interview is concluded in this manner, it is the technical officer who record such an interview and take necessary steps to ensure proper sealing and proper custody of the compact disc prepared for that purpose.

PW-12, namely Kumudumali Maddumage was the technical officer who recorded the interview conducted by the previous witness, and she had been a specially trained officer in this regard. She has confirmed that it is she who recorded the video evidence and had explained the procedures adopted in order to have a proper custody of the video recording to ensure its authenticity. She has explained that once a recording is done, the recording would be sent to the database of the National Child Protection Authority and 3 copies out of it will be taken and all 3 copies would be properly sealed and one is kept under the custody of the National Child Protection Authority. The 2<sup>nd</sup> copy would be



released to the relevant Court and the 3<sup>rd</sup> copy prepared, would be handed over to the Attorney General's Department when requested.

She has identified the video recording CD prepared by her and the cover used to seal the production, which has been marked as P-02. She has also identified her signatures and the relevant sealing marks.

She has also given evidence and stated that when a request is made for a typewritten copy of the video recording, it is she who does that as well and hand over the same to the requesting authority, may it be a Court, Attorney General's Department or Counsels representing the parties. In this matter, the typewritten of the video recording has been sent to the Panadura High Court for the purposes of this trial, she has identified the typewritten copy prepared by her and marked the cover it was sent to the High Court as P-03 and the relevant copy as P-04.

It needs to be noted that the Counsel who represented the appellant at the trial had not challenged the procedure adopted by PW-11, the officer who conducted the interview and PW-12, the officer who recorded it in any material terms. In fact, the recording officer (PW-12) had not been cross-examined.

The Judicial Medical Officer (JMO) who examined the child has given evidence in this trial as PW-05. He has confirmed that he examined the victim child relevant to this case and had marked the Medico-Legal Report (MLR) prepared by him as P-05. According to the report, the examination has been done on the basis of the Medico-Legal Examination Form issued by Milleniya police on 28<sup>th</sup> February 2016. The victim child had been 5 years old when she was examined by him on 29-02-2016. According to the doctor, it is the mother of the child who has given the history mentioned in the MLR.

The history recorded by the JMO reads as follows;

“මම වැඩට යනවා. 2016 පෙබරවාරි 6 වන දින මම වැඩට ගියා. ගෙදර ආවේ 10.15 ට විතර. ළමයා ඉන්නේ ආව්වින් එක්ක. මම ගෙදරට එනකොට ළමයා සාලයේ ඉටි පැදුරක නිදාගෙන හිටියා. රාලහාමි කියන කෙනාත් ළමයව තුරුළු කරගෙන හිටියා. රෙද්දකින් වහගෙන හිටියා. අපි

රාලහාමිව අදහනවා. නිතර එන්නේ නැහැ. මම රෙද්ද ඇද්දා. එතකොට එයාගේ අත දරුවාගේ කලිසම ඇතුලේ තිබුණා. මම එයාට ගැහුවා. හවස රාලහාමි මාමා එයාගේ වූ එක මිලිකන්න කිව්වා කියල බබා කිව්වා.”

It had been his position since the child did not communicate with him, he took steps to obtain information from the mother. He has observed no injuries to the vaginal area of the child or any other marks suggestive of sexual abuse. However, he has expressed the opinion that given the history, there is a very low probability of observing any injuries to the child and has expressed the opinion that such an abuse as claimed cannot be excluded, as such a thing can happen without any visible marks. He has stated that the examination was done some 23 days after the alleged incident.

After having led the above summarized evidence, the prosecution has closed its case.

The learned High Court Judge has considered the evidence of the prosecution and has decided to call for a defence of the appellant. The appellant has made a statement from the dock and has called his daughter as a witness on his behalf.

It had been his statement that he owned three coconut trees situated near the house of the victim child and her family, and scolded the mother of the victim child because of plucking coconuts by them of the coconut trees owned by him. He has claimed that he scolded the grandmother too, and as a result, this complaint has been made against him. He has also alleged that the victim child's family engaged in selling of illicit liquor and has claimed that he has two children and he is very fond of children. He has stated that he did not do any harm to the child.

The daughter of the appellant had given evidence under oath, and has stated that she lived in her house with her brother and the appellant, who is doing manual labour work. According to her evidence, her father has come home around 7 p.m. on 06-02-2016, and after having his meals, was watching TV by the time she went to bed around 8 p.m. According to her, around 10 p.m., PW-

02, the mother of the victim child had come and knocked at the door and called for her father who was also sleeping at that time.

She has stated that the mother of the victim child alleged that when she came home from work, the grandmother informed her that her child was touched by the appellant and inquired whether it was true. According to her version of events, her father denied doing such a thing and stated that the child only spoke with him. She has also claimed that the mother of the victim child and her mother used to fight over plucking of coconuts from the trees belonging to them. She has claimed that her father was a good person and was not drunk when he was confronted by the mother of the victim child and her husband on that night.

After the witness being subjected to cross-examination by the prosecution, the appellant's case has been closed and the learned High Court Judge of Panadura pronouncing his judgement, has convicted the appellant as charged and accordingly, after considering the mitigatory circumstances, sentenced the appellant as stated earlier.

### **The Grounds of Appeal**

At the hearing of this appeal, the learned Counsel for the appellant urged the following grounds for the consideration of the Court.

1. Reliability and the credibility of the victim's evidence.
2. The probability of the prosecution version.
3. Admissibility of the video recording in the case.

It was the position of the learned Counsel for the appellant that the video recorded evidence of the victim child and the evidence of the mother (PW-02) are contradictory to each other, therefore, the prosecution version was highly improbable.

He specially highlighted the evidence where the child had stated that the incident happened at a room of the house and the evidence of the mother where she says

when she came home, the appellant was sleeping on a mat in the living area of the house.

The learned Counsel has also pointed out that the victim child has claimed that the appellant was assaulted by her grandmother as well, but the mother's evidence was that she assaulted the grandmother, because of her failure to protect the child.

The learned Counsel questioned the reliability of depending on the evidence of the relevant witnesses, which he claimed as contradictory.

The learned Counsel was of the view that the learned High Court Judge was misdirected when he decided that the victim child's evidence was reliable, given the contradictory nature of the evidence placed before the Court. It was his position that the prosecution has failed to prove the case beyond reasonable doubt against the appellant and pleaded for the acquittal of the appellant from the charge preferred against him.

It was the position of the learned State Counsel that the victim child's evidence was credible and trustworthy. It was her position that the location of the incident described by the child is not a reason to discredit her evidence as the mother of the child is a direct witness to the incident. It was her contention that given the age of the child who was 5 years old at the time of the incident and had given evidence when she was 10 years old, she may have forgotten the intricate details of the incident which can be justified under the given circumstances.

It was also her position that the mother of the child has well explained the reason for the delay of complaining to the relevant police with regard to this incident as it was not her wish to pursue this matter any further until she has been questioned by the police in this regard. The learned State Counsel contended further that at no stage of this trial, the video recording of the child's statement has been challenged and the prosecution has adequately proved that it was done following the necessary safeguards as required by law.

It was further pointed out that the prosecution has taken necessary steps to give the required access to the appellant, for him to inspect the equipment used in the recording of the relevant video evidence as required by law. The learned State Counsel moved for the dismissal of the appeal on the basis that it has no merit.

### **Consideration of The Grounds of Appeal**

As the 1<sup>st</sup> and the 2<sup>nd</sup> grounds of appeal urged are interrelated, I will now proceed to consider the said grounds of appeal together.

It is my considered view that the credibility of the victim's evidence has to be considered not only in relation to her evidence but considering it along with the totality of evidence. The victim child was about 5 years old when this incident has taken place. She was a 10-year-old when she had to give evidence before the trial Court.

It is abundantly clear from the evidence that when this complaint was made to the police, the victim child was not able to communicate with the investigating officers so that they could take down a formal statement in writing. The evidence of PW-07 clearly indicates that fact, and it was the very reason why the investigators has sought the Court permission to video record the statement of the victim child in a form of an interview in terms of section 163A of the Evidence (Special Provisions) Act No. 32 of 1999.

The prosecution has led the said video interview marked as P-01 as the evidence -in-chief of the victim child under the provisions of the Evidence (Special Provisions) Act No. 32 of 1999. The learned State Counsel who conducted the prosecution has very correctly asked questions necessary only to establish the identity of the person whom the child has mentioned as Raalahami in her video interview for the purposes of this trial. The child has identified the person as the appellant.

At the trial, what was stated in the video recording has been taken down before the trial Court in writing and some of her gestures during the interview also has

been duly recorded. It is clear from the recoding that at no stage of the interview, the officer who was instrumental in questioning the child or PW-07, the female police officer who took the child to the National Child Protection Authority and participated at the interview as the 2<sup>nd</sup> person, has attempted to unduly interfere with the child's statement, other than attempting to obtain the child's statement as to what happened to her. It is clear that only with that above objective in mind, the interviewer has posed questions to the child and not to fix anybody to the offence.

In her statement, the child has clearly stated that when the appellant to whom she referred to as Raalahami came to their home in the night, she was also with her grandmother whom she referred to as Magallin Aachchi. She has described the incident and has stated that it happened in the room. She has described what happened when her mother came home from work and found the appellant fondling her vaginal area. She has described how her mother assaulted the appellant and has stated that her grandmother also assaulted the appellant with her walking stick and had identified the appellant as the perpetrator of the crime. Under cross-examination, she has clearly stated that she was not coaxed before she made the video statement.

Unlike in most of the cases of rape or grave sexual abuse where there are no eyewitnesses, this is a case where the mother of the victim child has witnessed the incident by herself.

In the evidence of the mother of the victim (PW-02), she has clearly stated what was witnessed by her when she came home from work around 10.30 in the night. She has seen the appellant sleeping on a mat cuddling her young daughter and covered with a bedsheet. When she removed the bedsheet, what she has witnessed was that the hand of the appellant inside the knickers that her child was wearing. The appellant has been in a heavy state of intoxication at that time. Being the mother who has witnessed what was happening to her young child, her emotions had gotten over her and she had assaulted the appellant and

chased him to his house which was nearby. She has even informed the daughter and the son of the appellant of what happened. Her evidence before the Court clearly demonstrates that she was telling the truth and nothing else.

Although the defence put forward by the appellant had been that due to a dispute he had with the mother of the victim child over plucking of coconut, she has farmed this false accusation against him, the evidence led in this case clearly suggests otherwise.

It is clear from the evidence of the mother of the victim child that it was not her intention to pursue a complaint against the appellant because of the young age of her daughter and also of her reluctance to expose her to Court proceedings, and due to the fact that no harm has been caused to her.

It was due to the actions of the daughter of the appellant who complained to the Grama Niladhari of the area about harassment to the appellant by the mother of the victim child, the incident of sexual abuse has come to light. It was the law enforcement authorities who had taken the initiative to investigate this matter and arrest the appellant, which has resulted in the indictment against him.

I find no basis, under any circumstance, to believe that this is a concocted story against the appellant when considering the evidence in its totality.

Even the evidence given by the daughter of the appellant on behalf of him before the trial Court provides sufficient corroboration of the evidence of PW-02. The PW-02 says in her evidence that after the incident, she chased the appellant to his house and informed his children what happened. The daughter of the appellant too says that PW-02 came to their house around 10.00 p.m. and scolded the appellant alleging that she was informed by the grandmother of the sexual abuse committed by him to her child.

The evidence of the JMO suggests that he has not observed any obvious marks of sexual abuse on the child which are consistent with the evidence of the mother of the child. The JMO has stated that he was unable to communicate effectively

with the child due to her young age, and it was from the mother of the child he obtained the history in relation to the incident, which is also very much consistent with the evidence of PW-02, the mother of the child.

I do not find anything wrong in obtaining the history of the incident from the mother of the child as she was a clear eyewitness to the incident.

Under the circumstances, I am in no position to agree with the learned Counsel for the appellant that the evidence of the child and her mother are contradictory to each other.

A contradiction to be relevant in a criminal trial, it has to be a material contradiction that creates a doubt as to the case put forward by the prosecution.

The place where this incident occurred has been clearly established by the mother of the child in here evidence as she is the eyewitness to the incident. A child of 5 years of age may forget some of the intricate details of an incident some period after it occurred, due to various factors.

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. 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.*

For the reasons as considered above, I find no merit in the considered grounds of appeal, as the evidence adduced in this trial are reliable and probable, as well as highly credible which creates no doubt in that regard.

The other ground advanced by the learned Counsel for the appellant is that the admissibility of the video recording in the case. This ground was advanced not on the basis that the video recording was done contrary to the legal provisions or it cannot be admitted as evidence, but, on the basis that the video evidence produced does not prove the charge against the appellant.

As I have considered before, it has been established by evidence that the video recording was the preliminary interview conducted by the police with the victim in relation to this incident.

The officer who recorded the video evidence and the officer who interviewed the child in that regard has given evidence in the trial and well explained the procedures adopted by them to record the interview and to ensure that nobody can tamper with it until the evidence is led at the trial.

When an application was made by the prosecution to lead the video evidence as the evidence-in-chief of the victim child, the Court has allowed the application and the child has been cross-examined by the learned Counsel for the appellant in that regard.

Therefore, I do not find any discrepancy in the video evidence led, which has caused any prejudice or had occasioned a failure of justice towards the appellant, which amounts to a denial of fair trial towards him.

In the judgement, I find that the learned High Court Judge was clearly misdirected when he stated at page 09 of the judgement (page 256 of the appeal brief) that;

“පැමිණිල්ලේ හා විත්තියේ සාක්ෂි සමස්තයක් වශයෙන් සලකා බැලීමේදී මෙම නඩුවට අදාළ සිද්දිය තහවුරු කිරීම සඳහා පැමිණිල්ල මගින් වූදිනට එරෙහිව කැඳවා ඇති එකම සෘජු සාක්ෂිය වනුයේ වින්දිත තැනැත්තියගේ සාක්ෂිය පමණි. පැමිණිල්ලෙන් කැඳවා ඇති ඉතිරි සාක්ෂි සියල්ල පරිවේශනීය සාක්ෂි වේ.”

Having said so, it appears from the judgement that the learned High Court Judge had considered the evidence of the mother of the child as an eyewitness account of the incident, which would not amount to circumstantial evidence.

The learned High Court Judge has well considered the legal position as to discrepancies or omissions in evidence on the basis that they cannot be considered material unless they go into the core of the matter and creates a doubt in the case of the prosecution, which in my view is the correct approach in a case of this nature.

The learned High Court Judge has considered the delay in making the complaint and justified it with proper reasoning. After having considered the defence version, it had been determined that it cannot be accepted or creates any doubt in the prosecution case.

It is the view of this Court that although the learned High Court Judge was somewhat misdirected when he determined that there is no direct evidence of this incident, it is not a reason to consider that as a misdirection that has caused any prejudice towards the appellant.

It is my view that this is a clear case where even if the evidence of the victim child is disregarded, the prosecution has proved the case beyond reasonable doubt against the appellant, based on eyewitness account and other evidence led in this trial.

Although I find no merit in this appeal, it is with regret I need to note that our trial Judges have failed to grasp the importance of correctly adhering to the provisions of Evidence (Special Provisions) Act No. 32 of 1999 (hereinafter sometimes referred to as the Act). Clearly, these provisions have been enacted as an exception to the rules of evidence, considering the rights and the vulnerability of a child in criminal proceedings.

Under the provisions, a child can be allowed to testify without causing an oath or affirmation to be administered under certain circumstances.

The provisions have been made as to the applicability of the probable age of a child in cases where the age of a child is not certain.

For matters of clarity, I would now reproduce the relevant section 163A which was inserted immediately after section 163 of the Evidence Ordinance, which is the relevant section in relation to video recorded interview with a child that may be used as evidence in a trial.

**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.**

Having considered the above provisions, it is my considered view that it is an essential requirement for a trial Judge to satisfy himself that the video recording of the interview is the preliminary interview in that regard, and that it has been done according to the provisions and procedure laid down.

I am of the view that giving leave to a prosecutor, merely because the permission is sought is not sufficient in a situation where a child is permitted to give evidence without administering an oath and a video interview recorded previously is permitted as evidence-in-chief of that child witness.

I am of the view that a trial Judge needs to satisfy himself that the requirements of section 163A(2) as stated above, have been fulfilled before granting leave to lead the video recording as the evidence-in chief in a matter of this nature.

Towards achieving that, it is my view that the prosecution should establish the following matters to the satisfaction of the Court.

- (1) The video recording intended to be led as evidence is the preliminary interview relating the matter.

- (2) That the requirements of section 07 of the Evidence (Special Provisions) Act No-14 of 1995 have been complied with as in the matter under appeal.
- (3) That the child witness is available to the cross examined by the defence.  
[To fulfil the requirement under section 163A(2)(a)]
- (4) That the circumstances in which the video recording was made, how it was made, and also it was made ensuring the essential requirements as to the trustworthiness of such a recording, should be considered before granting leave to lead that video evidence as the evidence-in-chief of the child witness. [To fulfil the requirements under section 163A(2)(b)] In my view, this can be achieved by calling the interviewer of the child and the person who was responsible for the recording of the interview to give evidence and substantiate their actions in that regard.

Trial Judges have to be mindful that under these provisions, even if the child witness contradicts what he or she has stated in the video interview, in terms of section 163A(5), an accused can still be convicted under certain circumstances. It is, therefore, very much important for a trial judge to adhere to the provisions of this section to ensure fair play towards a child witness as well as the accused person, as these provisions are exceptions to the normal rules of evidence.

However, when it comes to the facts and the circumstances of the case under appeal, although the trial Court and the prosecution has not followed the requirements as I have stated above in its chronological order, the prosecution and the trial Court have fulfilled the requirements that are necessary in order to grant a fair trial towards the appellant.

The prosecution has allowed access to the accused as required in terms of section 07 of the Evidence (Special Provisions) Act No. 14 of 1995 before the video evidence was produced in the Court as evidence.

The prosecution has established that the video recording was the preliminary inquiry conducted in this matter with child by calling PW-07, the investigator who was instrumental in taking steps to record the video recorded interview, because the child could not provide a formal statement to the police.

After calling the victim child as a witness, the prosecution has also called PW-11 who was the person who conducted the interview with the child and PW-12, the person who recorded the interview to give evidence before the Court. It has been well established that both of them are well-trained officers in their respective fields. I am of the view that the prosecution has satisfied the relevant requirements of section 163A of the Act before the prosecution case was closed.

It also needs to be noted that the appellant who was represented by a Counsel at the High Court trial has never challenged the production of video recorded evidence before the Court or the relevant steps taken in that regard and has in fact relied on the evidence to present the case of the appellant. This goes on to establish that no prejudice or a failure of the substantial rights of the accused has been occasioned in any manner at the trial.

The proviso of the Article 138(1) of The Constitution which provides for the appellate jurisdiction of the Court of Appeal reads thus,

**138(1). Provided that no judgement, 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.**

Section 436 of the Code of Criminal Procedure Act No. 15 of 1979 reads as follows,

**436. Subject to the provisions hereinbefore contained any judgement passed by a Court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-**

**(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgement, summing up, or other proceedings before or during the trial or in any inquiry of other proceedings under this Code.**

For the reasons as considered above, the appeal preferred by the appellant is dismissed, as I find no basis to interfere with the conviction and the sentence of the learned High Court Judge of Panadura.

The conviction and the sentence affirmed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal