

[COURT OF CRIMINAL APPEAL]

1954 Present : Rose C.J. (President), de Silva J. and Sansoni J.

T. SUMANASENA, Appellant, and THE QUEEN, Respondent

C. C. A. 31 OF 1954, WITH APPLICATION 60

S. C. 19—M. C. Matara, 33,135

Evidence—Child—Capacity to give evidence—Procedure for ascertaining it.

In a trial before the Supreme Court the questioning of a child with a view to considering whether that child is of sufficient mental power and fit to give evidence must be done in the presence of the jury.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

M. M. Kumarakulasingham, with *S. Saravanamuttu*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Crown.

August 3, 1954. ROSE C.J.—

In this matter the appellant was convicted of the offence of rape against a small girl who is stated to be about 6 years of age. One of the questions which the learned Commissioner had to consider was whether this child was of sufficient mental power to be able to be affirmed to enable her to give evidence. Now, unfortunately, before deciding that question, which was eminently a matter for the learned Commissioner, no jury having yet been empanelled the whole panel of the jury for that Assize were asked to withdraw from the precincts of the Court. The learned Commissioner then proceeded to consider the point. He put certain questions to this child and as a result of her answers to those

questions he decided that she was fit to be affirmed and that her evidence should therefore be received. Thereupon the panel of the jury returned to the Court, the selection of this particular jury was made and the trial began.

Now, Counsel for the appellant contends that the fact that this child was questioned on these preliminary matters in the absence of the jury is a fatal irregularity. It seems to us—had the matter not been covered by authority—that this is a point that might well be argued with substantial cogency either way. But this very problem has been considered by the Court of Criminal Appeal in England by a Bench presided over by the Lord Chief Justice in the case of *Ernest Albert Reynolds*¹. The Lord Chief Justice there said that in the view of the Court it was essential that the questioning of a witness with a view to considering whether that witness was fit to give evidence must be done in the presence of the jury. Moreover, that has, we understand, been the general practice in Ceylon. It seems to us that that is an authority which we should follow. It follows therefore that the appeal must succeed.

The only other question that remains for consideration is whether we should order a new trial. In all the circumstances of this case we think that it is not desirable to do so. The appeal is therefore allowed and the conviction quashed.

Appeal allowed.
