IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Revision under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Complainant

Court of Appeal
Case No. **CPA 0003/2025**

Vs.

High Court of Puttalam
Case No. **HC 195/2019 (Revision)**

Mohamad Bazir Mohomad Asmil,
No. 21/61,
Western Saultern Road,
Puttalam.

Accused

AND NOW BETWEEN

Mohamad Bazir Mohomad Asmil,
No. 21/61,
Western Saultern Road.
Puttalam.

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Accused-Petitioner

Vs.

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

Complainant-Respondent

Before: **B. Sasi Mahendran, J.**
Amal Ranaraja, J.

Counsel: D. Weerasuriya, P.C. with H. K. Malinda Tissera for the Accused-Petitioner.

Wasantha Perera, D.S.G. for the Complainant-Respondent.

Supported on: 29.01.2025

Decided on: 17.02.2025

ORDER

AMAL RANARAJA, J.

1. The accused-petitioner (hereinafter referred to as the "Petitioner") has been indicted in the *High Court of Puttalam* in case no. HC 195/19. The charges in the indictment are as follows;

    i. That on or about 17.10.2015, in the district of *Puttalam*, within the jurisdiction of this Court, the accused-petitioner has committed the offence of kidnapping, of a minor who was less than sixteen (16) years of age at the time, from her legal guardianship, an offence punishable under section 354 of the Penal Code.

ii. That in the course of the same transaction, the accused-petitioner committed the offence of grave sexual abuse on the said minor who was less than 18 years of age by sexually gratifying himself by entering his male organ to the anus of the said victim and thereby committing an offence punishable under section 365(B)(2)(b) of the Penal Code as amended by Act No.22 of 1995, Act No. 29 of 1998 and Act No.16 of 2006.

iii. That in the course of the same transaction, the accused-petitioner did commit rape on the said victim, and have thereby committed an offence punishable under section 364(2) of the Penal Code as amended by Act No.22 of 1995.

2. When the Court was ready to commence the trial, the petitioner has been summoned to the *High Court of Puttalam*. When the petitioner appeared before such Court, the indictment has been read and explained to him, also the petitioner was asked whether he is guilty or not guilty of the charges. The petitioner has pleaded not guilty. Thereafter, the trial has commenced and the prosecution witnesses examined. Among others, prosecution witnesses' no's 07, 16 and 18 have been examined. At the conclusion of the examination of prosecution witness no. 07, the complainant-respondent has sought permission of the *High Court* to replay in open Court the compact disk of a video recording of a preliminary interview of PW1

recorded by PW7 and another police officer to be given in evidence as per the provision set out in section 163A of the Evidence (Special Provisions) Act No.32 of 1999. The Learned Counsel for the petitioner has objected to permission being granted to the complainant-respondent on the following grounds;

a. That the general procedure of recording of statements of person acquainted with the facts and the circumstances of a criminal matter in a criminal investigation is laid down in section 110(1) of the Code of Criminal Procedure Act No.15 of 1979 (hereinafter referred to as the "CPC") which states that such statement shall be reduced into writing. Therefore, it is certain and clear that there was no other manner/method or medium of recording of statements of persons acquainted with the facts and circumstances of a criminal matter under investigation, could be done as per the law in force.

b. That however, deviating from the above legal procedure of recording of such statements, the Evidence (Special Provisions) Act No.32 of 1999 introduced another special method of recording the statements of persons in cases of child abuse. That is by video recording of the interview/statements. It is submitted that though the word interview is used in the Evidence (Special Provisions) Act No.32 of 1999, section 110(1) of the CPC too permits the

inquirer or the police officer to record a statement to question the person making the statement to clarify matters. Therefore, there is no difference between recording a statement under section 110(1) of the CPC and the Evidence (Special Provisions) Act No.32 of 1999. That, it is the only change/exception/deviation that was made to section 110(1) of the CPC as to the manner or medium as to how a statement could be recorded in respect of a special case of child abuse. The other provisions of the CPC remained unchanged regarding the recording of statements.

c. That the Evidence (Special Provisions) Act No.32 of 1999 has not changed the other provisions of the CPC including section 110(3) of the Code of Criminal Procedure Act. Further, that the Evidence (Special Provisions) Act No.32 of 1999 introduced section 163A to the Evidence Ordinance, clearly states that it is a special provision which makes video recording of statements/interviews admissible in special cases of child abuse to the normal provisions of admissibility stipulated in the Evidence Ordinance. Therefore, section 110(3) continues to apply the statements/interviews video recorded under the provisions of Evidence (Special Provisions) Act No.32 of 1999, as much as to the statements reduced into writing under section 110(1) of the CPC.

d. That the interview was conducted by or the statement of the child was recorded by means of video recording was done by two police officers namely WPC 7732 *Niluka* and WPC 6515 *Swranamali*. That therefore, section 110(3) applies to the said statement, interviews of the child, recorded, by way of video recording under section 163A introduced by Evidence (Special Provisions) Act No.32 of 1999, instead of reducing it to writing as required by section 110(1) of the CPC.

e. As per provisions of section 110(3) of the CPC since the video recording had been done by police officers, it cannot be legally used to corroborate the child who made the said statement or who was interviewed as per the provisions of Evidence (Special Provisions) Act No.32 of 1999. That if the video recording was done by any person/ persons other than a police officer/police officers it may have been possible to use the video recording as per the provisions of the Evidence (Special Provisions) Act No.32 of 1999 at the trial.

3. The Learned Counsel for the petitioner has also objected to playing the said video recording in open Court in the presence of PW1, i.e. the child witness.

4. The Learned High Court Judge has overruled the objections of the Learned Counsel for the petitioner. The relevant orders have been marked P4c and P5d.

5. The petitioner aggrieved by the orders marked P4c and P5d has tendered the instant revision application and prayed as follows;

    a) Issue notice on the complainant-respondent.

    b) Revise and set aside the order of the Learned High Court Judge of *Puttalam* made on 02.12.2024 in High Court case no.195/19 marked as P4c in these proceedings.

    c) Revise and set aside the order of the Learned High Court Judge of *Puttalam* made on 02.12.2024 in High Court case no.195/19 marked as P5d in these proceedings.

    d) By way of interim relief to issue a stay order staying further proceedings in case no.195/19 pending in the *High Court of Puttalam* till the final termination of the application.

6. The instant application was supported by the Learned Presidents' Counsel seeking notice and interim relief to issue a stay order, staying further proceedings in case no 195/19 pending in the *High*

Court of Puttalam till the final determination of the instant application.

7. **Article 138** of the **Constitution** identifies the general jurisdiction of the Court of Appeal as follows;

(1) *The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitution in integrum, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance:*

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.

(2) *The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain.*

8. Accordingly, Article 138 vested within the Court of Appeal appellate and revisionary jurisdiction in respect of orders made by Courts of first instance.

9. In ***Mariam Beebee vs. Seyed Mohamed and Others*** [69 CLW page 34 at page 35], Sansoni, C.J. has held,

> *"Power of revision is an extra-ordinary power of the Court which is independent and distinct from the appellate jurisdiction. The object of revisionary jurisdiction is to ensure the due administration of justice and the correction of all errors in order to avoid a miscarriage of justice."*

10. Hence in an application by way of revision, the Court will only be concerned of the legality and the procedural correctness of an order. If the order of the original Court is legal and if the correct procedure has been followed, the Court of Appeal would not interfere with such an order. In an application for revision, the Court will not be interested in the merits of the case, whereas, its focus would be on the legality and the correctness of the disputed orders.

11. The bill relevant to the Evidence (Special Provisions) Act No.32 of 1999, has been passed by the parliament in October 1999. In view of the frightening number of sexual offences committed on children,

the relevant statute has been introduced as a special law to enact a special mechanism to admit the evidence of children on whom such offences have been committed. The primary purpose of the statute has been to introduce fresh provisions relating to the admissibility of evidence of children without an oath and affirmation being administered on such children. Though Courts have insisted upon the requirement of a witness giving evidence under an oath, such requirement has been removed in proceedings of an offence relating to "child abuse". An offence relating to child abuse as per the statute means an offence under sections 286A, 308A, 360A, 360B, 360C, 363, 364A, 365, 365A or 365B of the Penal Code when committed in relation to a child. A child means a person under 18 years of age.

12. Another significant feature introduced through this statute is the video recording of a preliminary interview between an adult who was not the offender and the child who was the victim to be given in evidence in a Court of law.

13. The relevant statute has not been enacted as an accessory to Chapter XI of the Code of Criminal Procedure Act No.15 of 1979 nor to give practical effect to the provisions in such statute bound up with those in Chapter XI of the Code of Criminal Procedure Act. The preamble

to the Evidence (Special Provisions) Act No.32 of 1999 is clear in that regard. The preamble of the Act enunciate as follows;

> *"An act to make provision for a Court to receive evidence of a child without causing an oath or an affirmation to be administered to such child; and to amend the Evidence Ordinance."*

14. For the purpose of providing greater clarification or aiding in the interpretation, I reproduce section 163A which was inserted immediately after section 163 of the Evidence Ordinance No. 14 of 1895.

Section 163A of the Evidence (Special Provisions) Act No.32 of 1999 provides;

> *(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 any 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

implications, 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 statement as disclosed by the video recording, if such previous statement is corroborated in material particulars by evidence from an independent source.

For the purposes of this section-

(a) "an offence relating to child abuse" means an offence under section 286A, 308A, 360A, 360B, 360C, 363, 364A, 365, 365A or 365B of the Penal Code when committed in relation to a child;

(b) "child" means a person under eighteen years of age, at the time when the preliminary interview is video recorded;

(c) "video recording" means any recording in any medium, from which a moving image may by any means be reproduced and includes the accompanying sound track"."

15. Section 163A provides for a video recorded interview with a child witness be given in evidence in a Court of law. Section 163A(3) provides for the material child witness to be called by the party which tendered the video recording interview as evidence. Though such child witness is called, he shall not be examined-in-chief on any matter dealt with in his video recorded testimony. However, the child witness should be made available for examination by the

adverse party i.e. for cross-examination. Hence, the video recorded testimony tendered to Court, contemplated to be the evidence-in-chief of the child witness.

16. In ***Liyana Arachchige Lesli Wijesekara alias Liya Arachchige Lesli Wijesekara vs. AG*** [CA HCC/0046/22], pages 19 and 21, decided on 13.09.2023, Sampath B. Abayakoon, J has stated,

> *"…it is with regret I need to note that out 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… 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..."

17. In those circumstances, the disputed orders marked P4c and P5d are legal and do not shock the conscience of this Court. Further, I see no reason to interfere with the disputed orders. Accordingly, I am not inclined to issue formal notice on the complainant-respondent and dismiss the instant application.

    I make no order regarding cost.

18. The Registrar of this Court is directed to transmit this order to the *High Court* of *Puttalam* for information.

    Notice refused.

Judge of the Court of Appeal

B. SASI MAHENDRAN, J.

I agree.

Judge of the Court of Appeal