

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Section
331 of the Code of Criminal Procedure Act
No. 15 of 1979.

Democratic Socialist Republic of Sri Lanka

Complainant

Vs

Court of Appeal Case No:
CA/ HCC/0015/2023

High Court of Badulla Case
No:**58/2016**

Abeykoon Mudiyanseelage Kithsiri Abeykoon

Accused

AND NOW BETWEEN

Abeykoon Mudiyanseelage Kithsiri Abeykoon

Accused -Appellant

Vs

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

Complainant-Respondent

Before : **P. Kumararatnam, J.**
Pradeep Hettiarachchi J.
Counsel : P.B Herath for the Accused-Appellant
: Hiranjan Peiris ASG for the Complainant-Respondent
Argued on : 01.07.2026
Decided on : 23.07.2026

Pradeep Hettiarachchi, J

Judgment

1. The Accused-Appellant (hereinafter referred to as “the Appellant”) in the instant appeal was indicted in the High Court of Badulla on two counts:
 - a. On or about 01.03.2007, within the jurisdiction of the High Court of Badulla, the Accused, by unlawfully entering the dwelling house of one Dissanayake Mudiyanseelage Somawathie, thereby committed an offence of criminal trespass, which is an offence punishable under Section 483 of the Penal Code; and,
 - b. On or about 01.03.2007, within the jurisdiction of the High Court of Badulla, the Accused committed the offence of rape upon one Dissanayake Mudiyanseelage Somawathie, an offence under Section 364(1) of the Penal Code, punishable under Section 364(2) of the Penal Code.
2. As elected by the Appellant, the trial was conducted before the Judge of the High Court sitting without a jury. The prosecution called five witnesses in support of its case. In addition, the Court Interpreter testified and produced the Appellant's statutory statement made during the non-summary inquiry.

3. At the conclusion of the trial, the Learned Trial Judge acquitted the Appellant on the first count but found him guilty on the second count and convicted him accordingly. The Appellant was consequently sentenced to 15 years' rigorous imprisonment and ordered to pay a fine of Rs. 10,000, with a default sentence of six months' imprisonment. In addition, he was directed to pay Rs. 500,000 as compensation to the prosecutrix, with a default sentence of twelve months' imprisonment.
4. Aggrieved by the said conviction and sentence, the Appellant has preferred the present appeal. The principal grounds of appeal are that the evidence of the prosecutrix is not credible and that the prosecution has failed to establish, beyond reasonable doubt, the identity of the Appellant as the perpetrator of the alleged offence.
5. Since the Appellant has impugned both the credibility of the prosecutrix's testimony and the correctness of her identification of him, it is convenient to consider these grounds together.
6. According to the prosecutrix, she was alone in her house on the night of the incident. At about 10.00 p.m. to 10.30 p.m., while she was asleep, the accused entered the house by removing several roof tiles. He then restrained her by covering her mouth and stuffing a piece of cloth into it, thereby preventing her from calling for assistance, and thereafter committed the alleged offence.
7. At one stage of her testimony, the prosecutrix stated that she was made to lean against the wall and was raped by the accused. However, elsewhere in her evidence, she stated that the accused pulled her from the bed onto the floor and committed the offence there. These two versions are materially inconsistent as to the manner in which the alleged offence was committed.
8. In a prosecution of this nature, the identity of the perpetrator is of paramount importance. It is incumbent upon the prosecution to establish, beyond reasonable doubt, that it was the accused, and no other person, who committed the alleged offence. Where the prosecution case rests substantially on the evidence of the prosecutrix, the reliability of her identification and the consistency of her testimony must be subjected to careful scrutiny before a conviction can safely be sustained.

9. A careful examination of the testimony of the prosecutrix reveals that she failed to identify the Appellant at the time the offence was allegedly committed. Moreover, her evidence relating to the identification of the Appellant is not free from inconsistency. At one stage of her testimony, she stated that the Appellant was a person with a disability. If that were so, it raises the obvious question as to how such a person could have gained entry into the house by climbing onto the roof and removing several roof tiles.
10. Significantly, there is no evidence from either the defence or the prosecution that the Appellant was, in fact, a person with a disability. PW5, the police officer who arrested the Appellant, also testified and stated unequivocally that he examined the Appellant and found no external injuries on his body.
11. If the Appellant had in fact been a person with a disability, as suggested by the prosecutrix, it is reasonable to expect that PW5 would have noticed such a condition and recorded it. The absence of any such observation in his evidence further undermines the reliability of the prosecutrix's identification of the Appellant.
12. This unexplained inconsistency casts further doubt on the reliability of the prosecutrix's identification of the Appellant and diminishes the probative value of her testimony on that issue.
13. The Learned Trial Judge failed to give due consideration to this material discrepancy, which goes to the very root of the issue of identification of the accused. The prosecutrix unequivocally stated that the perpetrator was a person with a disability. However, there was no evidence whatsoever to establish that the Appellant suffered from any such disability. This inconsistency inevitably gives rise to a serious doubt as to whether the prosecutrix had correctly identified the Appellant as the perpetrator of the alleged offence. Where such a substantial doubt exists regarding the identity of the perpetrator, it would be unsafe to found a conviction on the evidence of the prosecutrix alone. Accordingly, the Appellant is entitled to the benefit of that doubt.
14. It is undisputed that the alleged incident took place during the night. The prosecutrix herself admitted that she was unable to switch on the light, and that the house was in

complete darkness when the perpetrator entered. Her evidence was that she was able to observe the perpetrator only by the moonlight filtering through the window panes. In these circumstances, the sufficiency of the lighting conditions to enable a reliable identification of the assailant requires careful scrutiny.

15. The inconsistency and uncertainty in the prosecutrix's evidence relating to the identification of the Appellant are further demonstrated by her answers during cross-examination.

16. When it was suggested to the prosecutrix that she assumed the perpetrator was the Appellant merely because he proceeded in the direction of the Appellant's house, she answered in the affirmative. She testified as follows:

“ප්‍ර: මා ඔබට යෝජනා කරනවා ඔබට කරදර කරපු පුද්ගලයා මේ විත්තිකාරයාගේ ගෙදර පැත්තට ගිය හින්දා තමයි ඔබ හිතුවේ මේ මනුස්සයා තමයි කරදර කරන්න ඇත්තේ කියලා?

උ: එහෙමත් හිතුවා. ගෙදරට අවට පස්සෙන් හිතුවා.” (*at vide page 57 of the appeal brief*)

17. Moreover, the prosecutrix stated that, when leaving the place, the Appellant was carrying a torch. She subsequently stated that the Appellant had forgotten to take the torch and therefore returned to the house of the prosecutrix to retrieve it. However, the police officer who recorded the prosecutrix's statement confirmed that no such fact was mentioned in her statement to the police.

18. This omission is of considerable significance to the prosecution case, as the evidence of the prosecutrix suggests that she identified the perpetrator as the Appellant only after seeing a person carrying a torch proceed towards the Appellant's house. This material omission further affects the reliability and credibility of the prosecutrix's testimony regarding the identification of the Appellant and the sequence of events alleged to have taken place after the commission of the offence.

19. In the present case, the evidence of the prosecutrix regarding the identification of the Appellant and the sequence of events leading up to the Appellant's departure from the

scene lacks consistency and gives rise to a number of inherent improbabilities. In particular, her evidence that, after leaving the scene, the Appellant returned to the house shortly thereafter to retrieve his torch appears to be highly improbable.

20. Furthermore, the prosecutrix testified that she followed the Appellant to his house at around midnight, observed that the lights in the house were on, and heard sounds suggesting that he was bathing. This account is equally improbable, as such conduct would not ordinarily be expected of a reasonable and prudent person in the circumstances she described. These improbabilities further undermine the reliability and credibility of her testimony.
21. Generally, in criminal trials, minor discrepancies in the testimony of witnesses are bound to occur, particularly because there is often a considerable lapse of time between the date of the incident and the date on which the witnesses testify before the Court. Such discrepancies, by themselves, do not necessarily impair the credibility of the witnesses. However, where the contradictions are of such a material nature that they create a serious doubt in the mind of the Court as to the truthfulness of the witnesses, or where they disclose clear improvements or embellishments to the original version, it would be unsafe to place reliance upon such evidence.
22. It is also pertinent to examine the medical evidence placed before the Court. The Judicial Medical Officer who examined the prosecutrix, Dr. Ruwanpura, was not available to testify at the trial as he was out of the country. Consequently, Dr. Ruhul Huck testified by referring to and explaining the Medico-Legal Report prepared by Dr. Ruwanpura.
23. According to the findings recorded in the Medico-Legal Report, no injuries were observed in the genital region of the prosecutrix. Nor did the medical findings disclose any objective evidence that conclusively supported the version of events narrated by the prosecutrix. It is, however, noteworthy that the prosecutrix was examined by the Judicial Medical Officer seven days after the alleged incident. Dr. Ruhul Huck explained that, had the examination been conducted shortly after the incident, any minor injuries that may have been sustained could have been detected, as such injuries are capable of healing within a period of seven days. It is significant to note that the

medical evidence does not provide any convincing corroboration of the alleged act. Although the Judicial Medical Officer stated that the possibility of the alleged act could not be excluded, the medical findings do not furnish any objective evidence supporting the prosecutrix's version.

24. The Learned Trial Judge's failure to undertake a proper judicial evaluation of the identification evidence has rendered his finding as to the identity of the Appellant both unsatisfactory and unsafe. This Court notes that, apart from the identification evidence, the reliability of which is seriously in doubt, the prosecution has failed to adduce any independent evidence connecting the Appellant with the commission of the alleged offence of rape. Accordingly, the conviction cannot be sustained, as permitting it to stand would result in a miscarriage of justice.
25. With regard to identification, the following was held in **S v Mthetwa 1972(3) SA 766 (A)**;

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities.”

26. A careful perusal of the impugned judgment reveals that the Learned Trial Judge failed to evaluate the identification evidence with the requisite degree of caution and judicial circumspection mandated by law. He did not subject the evidence relating to the identification of the Appellant to the careful scrutiny mandated by law, nor did he adequately assess its integrity, quality, reliability, and sufficiency before concluding that the Appellant had been identified beyond reasonable doubt.

27. The following was held in ***S v Miggel 2007(1) SACR 675 (C)*** regarding the evidence of a single witness;

“That it was settled law that the evidence of a single witness had to be approached with caution. In the normal course of events, the evidence of a single witness would only be accepted if it were in every important respect satisfactory or if there were corroboration for that evidence. The corroboration that was required was confirmatory evidential material outside the evidence that was being corroborated. The corroboration did not necessarily need to link the accused with the crime.

Held, further, that the court had to be satisfied that the witness making the identification was not only honest but also reliable. Honesty by itself was no guarantee of reliability. Consequently, a witness’s honesty and own conviction as to the correctness of his or her identification could never be allowed to take the place of an independent inquiry into the reliability of the identification itself.”

28. *“Even if the witness appears to be honest, the accuracy and reliability of his evidence must be closely examined because of the fallibility of human observation and memory. The Positive assurance with which an honest witness will sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence.” [R v Masemang 1950 (2) SA 488 (A) at 493; S v Mehlape 1963 (2) SA 29 (A)].*

29. It is to be noted that the Learned Trial Judge rejected the dock statement of the Appellant on the ground that the defence version had not been put to the prosecutrix during cross-examination. However, it must be emphasized that where the prosecution evidence itself, particularly the evidence relating to the identification of the Appellant, gives rise to a reasonable doubt and thereby undermines the credibility of the prosecution case, any weakness or deficiency in the defence cannot be relied upon to strengthen the prosecution case.

30. It is a fundamental principle of criminal law that the prosecution must prove its case beyond reasonable doubt on the strength of its own evidence and not on the weakness of the defence. Accordingly, even if the defence version is rejected in its entirety, where

the identity of the Appellant as the perpetrator remains doubtful, the Appellant is entitled to the benefit of that doubt, and no conviction can safely be sustained.

31. Having considered the aforementioned authorities in the context of the facts and circumstances of the present case, I am unable to agree with the findings of the Learned Trial Judge.

32. For the foregoing reasons, the conviction and sentence imposed on the Appellant by the Learned High Court Judge of Badulla on 22.11.2022 in respect of the second count are hereby set aside, and the Appellant is acquitted of that charge. Accordingly, the appeal is allowed.

Judge of the Court of Appeal

P. Kumararatnam, J

I agree,

Judge of the Court of Appeal