

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

In the matter of an Appeal made under
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 Case No.
CA/HCC/0267/2023
High Court of Kalutara
Case No. HC/802/2014**

Kukule Kankanamge Sumanathissa

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **P.Kumararatnam,J.
R.P.Hettiarachchi, J.**

COUNSEL : **Kavithri Hirusha Ubeysekera for the
Appellant.
Oswald Perera, SC for the Respondents.**

ARGUED ON : **09/07/2025**

DECIDED ON : **26/08/2025**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Kalutara on the following charge namely, committing the offence of rape on Jayasundarage Subhashini on or before the 09th July 2011, within the jurisdiction of the court which is an offence punishable under Section 364(1) of the Penal Code.

On 27.08.2014, the Appellant was present in Court and requested a Counsel assigned by the Court. Accordingly, a Counsel was assigned and served the indictment on the Appellant. Thereafter, the Appellant had absconded the Court. As such evidence under Section 241(1) of the Code of Criminal Procedure Act No.15 of 1979 (Hereinafter referred to as 'CPC') was led and the case fixed for trial in absentia of the Appellant.

Before leading evidence led under Section 241 of the CPC, on 28.11.2016 the Counsel assigned for the Appellant withdrew from the case. As such the Appellant was not represented by a Counsel at the Trial Court.

As the Appellant absconded the Court, the trial proceeded in absentia and after a trial by the judge, the Appellant was convicted as charged, and was sentenced to 12 years rigours imprisonment and a fine of Rs.10,000/-. In default 06 months simple imprisonment was imposed. Further, a sum of Rs.200,000/- compensation was ordered with a default term of 24 months simple imprisonment.

Being aggrieved by the aforesaid conviction and the sentence the Appellant preferred this appeal to this court.

The learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence. Also, at the time of argument the Appellant was connected via zoom platform from prison.

The Counsel for the Appellant advanced the following grounds of appeal:

1. There is a fatal procedural irregularity that denied the Appellant a fair trial.
2. The charge has not been proved beyond reasonable doubt.

In this case the prosecutrix was 17 years old at the time of the incident.

In the first ground of appeal, the learned Counsel for the Appellant highlighted certain irregularities that denied the Appellant a fair trial.

A fair trial ensures that accused of crimes receive a just and impartial legal process. This right includes various elements such as the right to counsel, the right to confront witnesses, and the right to a public hearing.

The Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a fair trial by a competent Court.

The Attorney General v. Segulebbe Latheef and Others [2008] 1 SLR 225 J.A.N. de Silva. J. held:

"The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice is denied."

(2) Like the concept of fairness, a fair trial is also not capable of a clear definition.

The right to a fair trial amongst other things includes the following: -

- 1. The equality of all persons before the court.*
- 2. A fair and public hearing by a competent independent and impartial court/tribunal established by law.*
- 3. Presumption of innocence until guilt is proven according to law.*
- 4. The right of an accused person to be informed or promptly and in detail in a language he understands of the nature and cause of the charge against him.*
- 5. The right of an accused to have time and facilities for preparation for the trial.*
- 6. The right to have a counsel and to communicate with him.*
- 7. The right of an accused to be tried without much delay.*
- 8. The right of an accused to be tried in his presence and to defend himself or through counsel.*
- 9. The accused has a right to be informed of his rights.*
- 10. If the accused is in indigent circumstances to provide legal assistance without any charge from the accused.*
- 11. The right of an accused to examine or have examined the witnesses against him and to obtain the evidence and examination of witnesses on his behalf under the same conditions as witnesses against him.*
- 12. If the accused cannot understand or speak the language in which proceedings are conducted to have the assistance of an interpreter.*
- 13. The right of an accused not to be compelled to testify against himself or to confess guilty.*

In this case the Appellant was tried in absentia until the conclusion of the prosecution case. The indictment was not read out to him as he absconded the very next date after service of the indictment. But he was arrested and produced before the case was fixed for Judgment. When he was produced before the High Court on 14.09.2023, neither a Counsel appeared nor a

Counsel was assigned by the Court. Although, the learned High Court Judge, in his judgment at page 119 of the brief stated that when inquired as to why the Appellant evaded the Court, he did not say anything.

Upon perusal of the brief, there is no proceedings available to say that the learned High Court Judge had asked explanation from the Appellant for his absence nor assigned a Counsel to defend his case. Further, no record whatsoever available to establish that he was afforded an opportunity under Section 241(3) of the Code of Criminal Procedure Act No.15 of 1979 to prove his absence was bona fide.

Although, the learned High Court Judge stated that the trial was commenced after the indictment was read over and the Appellant pleaded guilty, there is no record to say that the Appellant was produced, indictment was served and was read over to him.

The Appellant was produced before the High Court on 14.09.2023. Previously, on 08.09.2023 the case was fixed for written submission. But the judgment was delivered on 19.09.2023.

In **Jayasooriya and Others v Attorney General** [2009] 1 SLR 101 held:

"Every trial judge has, an obligation and responsibility to maintain a proper and accurate record of what transpires before him in every trial. ... the appellate Court should always be guided by what transpires in the case record and not on some extrinsic material of which the trial judge had no control whatsoever."

Proper and accurate record ensures integrity of the fair trial. Absence of proceedings renders a denial of a fair trial.

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring a procedurally

equal position during the course of a trial. It would be difficult to identify in advance all of the situations that could constitute violations of the fair trial principle.

Jayant Patel, J. in the case of **Jusabbhai Ayubhai v. State of Gujarat** CR.MA/623/2012 stated that:

“.....It is by now recognized principles that justice to one party should not result into injustice to the other side and it will be for the Court to balance the right of both the sides and to uphold the law.”

In the 2nd ground of appeal advanced, the Appellant contended that the prosecution has failed to establish beyond reasonable doubt that sexual intercourse took place without the consent of the prosecutrix.

The prosecutrix giving evidence admitted that she was 17 years old at the time of the incident and only her father was in the house. The Appellant said to have entered the house at 11.00pm and told her that he wants to marry her. Although she had refused the proposal, but failed to raise cries or inform her father at that time. During the said period, the Appellant was residing in her house as he had separated from his wife.

The victim remained silent when she was questioned about the incident. But the learned State Counsel had posted several leading questions to get the incident from the victim.

The victim admitted that the Appellant did not threaten her but proposed to marry her. But the learned High Court Judge in his judgment concludes that the victim was threatened by the Appellant.

Although her father was at home at the time of the incident, she had only informed her mother who returned from abroad after three months of the incident. The complaint was lodged after the arrival of her mother. But the prosecution had not called her mother who was listed as PW2 in the indictment.

Further, in her history to the doctor she had said when she was sleeping with her grandmother the Appellant had committed the offence. Her grandmother was neither listed as a witness in the indictment nor called as a prosecution witness.

According to the investigating officer, investigation revealed that the victim's father had committed a sexual act on the daughter of the Appellant.

Under these circumstances, calling evidence of PW2 and the grandmother of the victim is very essential in this case.

Professor G. L. Peiris in his book **“Offences under the Penal Code of Sri Lanka”** at page 222 states:

“It is a fundamental principle that, where the woman's consent is an issue, a conviction of rape will be upheld only in circumstances where the prosecution has succeeded in establishing absence of consent beyond a reasonable doubt. If proof of this element is lacking, the cause of the prosecution is necessarily incomplete. Consequently, no burden devolves on the defence in these circumstances. Any departure from this position culminates in a miscarriage of justice.”

In the case of **Premasiri v. Attorney General** (2006) 3 Sri.L.R. 106, Justice E. Basnayake observed that,

“The learned counsel complained that the accused was convicted on uncorroborated evidence. There is no rule that there must in every case, be corroboration before a conviction can be allowed to stand. (Gour on Penal Law of India 11th Edition page 2567 quoting Raghobgr Singhe vs. State (2); Rameshwar, Kalyan Singh vs. State of Rajasthan (3). It is well settled law that a conviction for the offence of rape can be based on the sole testimony of the prosecutrix if it is reliable, unimpeachable and there is no infirmity. (Bhola Ram vs. State of Madhya Pradesh (4)). If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particular. The

*testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation. **State of Punjab vs. Gurmit Singh (5).***

*The rule is not that corroboration is essential before there can be a conviction in a case of rape, but the necessity of the corroboration as a matter of prudence, except where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge. (Schindra Nath Biswas vs. State (6)). In **Sunil and another vs. the Attorney General Dheeraratne J with H. A. G. De Silva and Ramanathan JJ** agreeing held that **“if the evidence of the complainant is so convincing, they could act on that evidence alone, even in the absence of her evidence being corroborated”**. (Emphasis added).”*

In the case of **State of Andhra Pradesh v. Garigula Satya Vani Murthy** AIR 1997 SC 1588, it was held that:

“...the courts are expected to show great responsibility while trying an accused on a charge of rape. They must deal with such cases with utmost sensitivity.”

When an accused is facing a serious criminal charge it is essential that every point in favour of the accused, though it may seem trivial, should be placed before the judge. It may well be that all such matters, if so, placed before the judge may create a reasonable doubt, the benefit of which should accrue to the accused.

In this case the learned High Court judge had not considered the evidence favourable to the Appellant. He only considered the evidence given by the prosecutrix and arrived at the conclusion that the evidence given by the prosecutrix is convincing and reliable and therefore, the prosecution had proved the case beyond reasonable doubt.

After careful perusal of the evidence presented in the trial, I am of the view that the evidence presented by the prosecution is tainted with serious shortcoming and ambiguity. Therefore, it is not safe to act on such evidence of the prosecution against the appellant.

Considering the evidence presented by the prosecution and the very serious procedural irregularities taken place in this case, I concluded that the grounds of appeal advanced by the Appellant carry sufficient merit to substantiate awarding the benefit of the doubt to the Appellant.

I, therefore, set aside the conviction and the sentence imposed on the Appellant by the learned High court Judge of Kalutara. The Appellant is acquitted from the charge.

The appeal is allowed.

The Registrar is directed to send this judgment to High Court of Kalutara along with the original case record.

JUDGE OF THE COURT OF APPEAL

R.P.Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL