

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

Democratic Socialist Republic of Sri Lanka

Court of Appeal No:

Vs.

CA/HCC/288/18

Merinchchage Janaka Perera

High Court of Colombo

**Accused**

HC/3936/07

**AND NOW**

Merinchchage Janaka Perera

**Accused – Appellant**

Vs.

The Attorney General

**Respondent**

Before : Menaka Wijesundera J.  
Wickum A. Kaluarachchi J.

Counsel : Shanaka Ranasinghe P.C. with Mihindukulasooriya and  
Sandamali Peiris for Accused-Appellant.  
Azhad Navavi, SDSG for the Respondent.

Argued on : 06.05.2024

Decided on : 05.06.2024

**MENAKA WIJESUNDERA J.**

The instant appeal has been lodged to set aside the judgment dated 30.08.2018 of the High Court of Colombo.

The accused appellant has been indicted under section 354 and 365 (B ) of the Penal Code.

The grounds of appeal raised by the Counsel for the appellant are as below,

- 1) The trial judge had failed to consider the dock identification of the appellant,
- 2) The trial judge has not considered the evidence of the prosecution in its proper perspective.

According to the evidence of the prosecution, the victim has been called to give evidence and at the time of the offence she had been only eight years of age and at the time she gave evidence she had been 11 years of age.

The victim had said that they lived by the side of the railway line running from Nugegoda to down south and that on the day of the incident she had gone to buy toffees in the evening at about 6pm and a three-wheeler had stopped and the person inside had boarded her to the three-wheeler and had taken her to his house and had sexually abused her.

She had said in answer to the questions put to her that she was taken by an uncle and had showed the appellant in the dock and had never mentioned any person by name nor had she said in evidence that she had seen or known the appellant before. She had infact given evidence in a manner which is indicative of being coached or being taught although she had denied of being so. But of course, there had been a contradiction marked which is indicative of previous acquaintance but that cannot be considered as substantive evidence. Hence, it can be presumed from evidence of the victim that it had been actually a dock identification by her of the appellant.

The mother of the victim also had given evidence and she had said that on the day of the incident she had found the victim to be missing in the evening and she had made a complaint in the Mirihana police and thereafter in the midnight she had been told by her father that the victim had been hiding inside a cupboard outside. Then once more she had informed the police and then the police had wanted her to bring the daughter to the police and had recorded a statement.

During cross-examination a contradiction had been marked and which is indicative of the fact that she had been having an affair with the appellant and that she had gone to look for the victim firstly in the house of the appellant but

this she had denied and nevertheless a contradiction cannot be considered as substantive evidence.

According to the evidence of the investigative officers the Mirihana police had received a complaint with regard to a disappearance on the 19<sup>th</sup> May 2005, but on the 21<sup>st</sup> May the police had received a complaint with regard to the sexual abuse from the victim and the mother.

The appellant has been arrested on the same day and the place had been shown by the victim and the mother.

The doctor who had examined her had not been available to give evidence but a doctor who was able to read his handwriting had given evidence and according to him the victim had given a case history and it had said that the person by the name of Janaka had committed the offence on her.

The prosecution had closed its case with that and when the defense was called, the appellant had made a dock statement in which he had said that he knew the victim's mother, and she had shown him some interest and thereafter they had some relationship but he says because of that the story was concocted by the victim's mother.

The trial judge, in his analysis of evidence, he had said that the evidence of the victim had revealed that the appellant was a well-known person to her and that she showed the appellant in Court as "this is the uncle".

The reasoning for the above observation by the trial judge is may be because he had said that the manner in which the child had got in to the three-wheeler of the appellant shows that she had known him before but the child had denied of knowing him before and so is the mother.

Hence, the evidence in Court does not substantiate the trial judge's assumption.

But the appellant had said that he had known the victim's mother before but the victim and the mother deny the same.

Hence, this is why this Court has observed above that the evidence of the victim had sounded very artificial and false which is further substantiated by the evidence of the victim.

On considering the evidence of the mother and the victim, it reveals the fact that they were trying to concoct a story which had taken place differently.

The farther of the victim's mother also had given evidence and he is the person who had discovered the child inside the cupboard but he does not speak to the identity of the appellant.

Hence, upon considering the evidence of the victim and her mother's evidence the probability factor of the evidence appears to be doubtful and it creates a reasonable doubt in the story for the prosecution.

The trial judges' affirmations on the probability factor of the prosecution story does not appear to be with merit and reason acceptable to this Court.

The trial judge had merely glossed over the contradictions and the omissions marked in the evidence of the prosecution.

Hence, the reasoning of the trial judge upon which he has based his conclusion appears to be very superficial and void of any analysis of the legal principles of deciding a criminal case of this nature.

The learned Counsel for the respondents vehemently tried to justify the reasoning of the trial judge but we find the reasoning in the judgment and the evidence of the prosecution witnesses lack clarity and truthfulness.

As such, for the reasons set above this Court is compelled to set aside the judgment of the trial judge and allow the instant appeal.

As such the instant appeal is allowed and the appellant is acquitted.

**Judge of the Court of Appeal**

**Hon. Justice Wickum A. Kaluarachchi**

**I agree.**

**Judge of the Court of Appeal**