

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

Herath Mudiyanseelage Jayatissa
alias Saman

Vs.

The Attorney General

C.A. No. 30/2008

H.C. Kurunegala 152/2006

Before : Sisira J. de Abrew, J. (Acting P/CA) &
P.W..D.C. Jayathilaka, J.

Counsel : Darshana Kuruppu for the Accused-Appellant.
Varunika Hettige for the Respondent.

Decided on : 17.01.2014

Sisira J. de Abrew, J (Acting P/CA).

The Accused-Appellant produced by the Prison Authorities is present in Court.

Heard both counsel in support of their respective cases.

The Accused-Appellant in this case was convicted for raping a girl named Weerakkody Mudalige Hemali Trisha, and was sentenced to a term of ten years rigorous imprisonment, to pay a fine of Rs. 5000/- carrying a default sentence of six month rigorous imprisonment and to pay a sum of Rs. 100,000/- as compensation to the victim carrying a default sentence of one year rigorous imprisonment. Being aggrieved by

the said conviction and the sentence, he has appealed to this court. The facts of this case may be briefly summarized as follows.

Victim's father in this case was employed by the Accused-Appellant. The place of the incident as alleged by the prosecution witnesses was in the compound of the Accused-Appellant. The incident has taken place in a room which was housed in the compound of the Accused-Appellant. On the day of the incident, the Accused-Appellant entered this room and raped the victim. The victim says that she tried to shout, but she could not do so as the Accused-Appellant prevented the said course of action. The Accused-Appellant, in his evidence, denied the incident. The victim, in her evidence, says that at the time of the incident, the wife of the Accused-Appellant was cooking in her house. The distance between the place of the incident and the kitchen of the Accused-Appellant was shown by the victim. The Court has observed that this distance to be a distance of 100 feet. However, the investigating Police Officer says that this distance was 100 meters. Since the distance shown by the witness was calculated to be 100 feet by court, I believe the distance shown by the witness in court is the correct distance. I further note that the distance of 100 meters was calculated by the Police Officer. But the distance 100 feet was calculated by the Trial Judge. The victim says that the act of sexual intercourse was committed without her consent. The most important question that must be decided in this case is whether the Accused-Appellant would commit

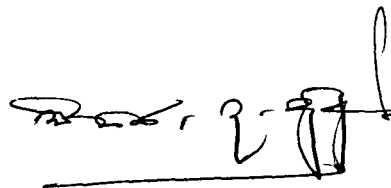
the act of sexual intercourse on the victim, when his wife was within a distance of 100 feet. According to the victim, at this time, the Accused Appellant's child was also in the kitchen. I am unable to believe the contention that the Accused-Appellant would commit an act of sexual intercourse on a girl without her consent when his wife was within a distance of 100 feet. I therefore hold that the evidence of the victim does not satisfy the test of probability. On this point alone in my view the Accused should be acquitted.

The Accused-Appellant in the Magistrate court agreed to subject himself to a D.N.A. test. But the Learned Magistrate has not taken steps to conduct a D.N.A. test. It has to be stated that the victim has delivered a child after the alleged sexual intercourse. If the D.N.A. test was carried out and the negative results were shown, the accused could not have been convicted by the Trial Judge. Thus the benefit of this failure on the part of the Magistrate should be given to the Accused-Appellant. The victim, at the time of the incident, was above 16 years of age. Therefore the prosecution must prove that the sexual intercourse was committed by the Accused-Appellant without the consent of the victim. Can the court believe that the sexual intercourse as alleged by the victim was committed without her consent under the above circumstances. I say "no" to this question. To prove a charge of rape it is not sufficient to prove that the Accused-Appellant committed sexual intercourse on the woman. Prosecution must prove that the sexual intercourse was done

without her consent if she was above 16 years of age. If there is a reasonable doubt on this matter from the prosecution evidence itself the accused must be acquitted. From the prosecution evidence it is difficult to believe that if sexual intercourse was committed on the girl, it was committed without her consent. I therefore held that the prosecution has not proved beyond reasonable doubt that the Accused Appellant committed sexual intercourse on the girl without her consent. When I consider all these matters, I hold the view that the prosecution has not proved its case beyond reasonable doubt. I therefore set aside the conviction and the sentence and acquit the Accused-Appellant.

Registrar of this Court is directed to send a copy of this Judgment to the Prison Authorities. The Prison Authorities have no authority to keep the Accused-Appellant in their custody, once they receive a copy of this judgment. I hereby nullify the committal signed by the Trial Judge dated 13.05.2008. It is not necessary for the Prison Authorities to produce the Accused -Appellant in the relevant High Court and get an order of release.

Appeal allowed.



JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilaka,J.

I agree.

JUDGE OF THE COURT OF APPEAL

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