

176/13

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

In the matter of an appeal under
Section 331 of the Code of Criminal
Procedure Act No. 15 of 1979.

C.A.Case No:-176/2013

H.C.Kurunegala Case No:-110/2005

N.A.Susantha Bandara

Accused-Appellant

V.

Hon.Attorney General

Respondent

Before:- H.N.J.Perera, J &

P.W.D.C.Jayathilake, J.

Counsel:-J.Terry Fernando for the Accused-Appellant

T.Mudalige S.S.C. for the Respondent

Argued:-14.10.2014

Written Submissions:-24.10.2014

Decided On:-07.11.2014

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Kurunegala for committing the offence of rape on Disanayake Mudiyanseelage Shayamali an offence punishable under Section 364(2) F of the Penal Code. The trial was conducted before a judge of the High Court sitting without a jury and at the trial the accused-appellant was found guilty and accordingly was convicted and sentenced to a term of twelve years' rigorous imprisonment. In addition the accused - appellant was asked to pay Rs.10,000/= as a fine, and a sum of Rs 1,50,000/-was to be paid to the prosecutrix as compensation. The present appeal is against the said conviction and the sentence.

The accused-appellant had been indicted on the footing that the offence of rape on D.M.Shayamali was committed by the accused – appellant on a date between 01.01.2000 and 30.02.2000. The first complaint has been made by one R.P.Jayanthi on 31.08.2000. Prosecutrix was not in a position to state the exact date of the incident. It was observed by the learned trial judge that the prosecutrix is a person with lower mental capacity comparing her age. This fact has been confirmed by the evidence of doctor Edirisinghe who examined the prosecutrix on 15.09.2000 and also by doctor P.T.de Soyza psychiatrist who examined the prosecutrix on 04.06.2001.

The witness R.P.Jayanthi who made the first complaint has very categorically testified that she complained to the police in respect of an incident that took place on 31.08.2000. Retired police Inspector

R.R.Indrawansa too had testified to the fact that the witness R.P.Jayanthi made the first complaint on 31.08.2000 and that he inquired into the same on 14.9.2000.

The doctor E.A.N.Edirisinghe has testified to court what he had observed when he examined Shayamali on 15.09.2000. The doctor had observed a tear of the hymen but he categorically expressed the opinion that the tear of the hymen had taken place at least two weeks prior to his examining the prosecutrix. It was contended by the Counsel for the accused-appellant that the learned High Court Judge has failed to consider that the prosecution has failed to establish the time and the date of the offence as articulated in the indictment.

The crucial issue that arose for determination by the learned trial judge in the instant case was whether this girl Shayamali had been in fact subjected to sexual inter-course on a date between 01.01.2000 and 30.02.2000 by the accused-appellant as alleged by the prosecution. As stated earlier the doctor had expressed his opinion that the tear of the hymen he had observed would have occurred two weeks prior to the date he examined her namely 15.09.2000. Hence the probable date would be 01.09.2000 or a date prior to that date. In our view the medical evidence and the evidence of the witness R.P.Jayanthi creates a serious dent in the version of the prosecution that the prosecutrix was ravished by the accused-appellant on a date between 01.01.2000 and 30.02.2000. The learned trial judge's failure to give his mind to such an important issue that arose in this case is a grave non direction amounting to a misdirection which would by itself, be sufficient to vitiate the conviction.

The learned Senior State Counsel too concedes the fact that the prosecution has failed to establish the date of offence as mentioned in the indictment. For the above reasons I quash the conviction and sentence and acquit the accused-appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C.Jayathilake, J.

I agree.

JUDGE OF THE COURT OF APPEAL