

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

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

Complainant

CA 133/2013

Vs.

H.C. Chillaw – HC:59/2002

Warnakulasooriya Migel Kuttilage
Thushara Emmanuwel Chaminda

Accused

AND NOW BETWEEN

Warnakulasooriya Migel Kuttilage
Thushara Emmanuwel Chaminda

Accused – Appellant

Vs.

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

Complainant – Respondent

BEFORE: P. R. WALGAMA J. P/CA

S. DEVIKA DE LIVERA TENNEKOON J.

COUNSEL:

**Accused – Appellant – Dharshana
Kuruppu with Chinthaka Udadeniyya
Complainant – Respondent – SSC
H. I. Peiris**

WRITTEN SUBMISSIONS –

Plaintiff – Respondent - 21.03.2017

Defendant – Appellant – 10.10.2016

DECIDED ON:

06.06.2017

S. DEVIKA DE LIVERA TENNEKOON J.

The Accused Appellant (hereinafter referred to as the Appellant) was indicted for the offence of rape punishable under Section 364(2) (e) of the Penal Code and after the conclusion of the trial the Appellant was convicted and sentenced to a term of 12 years rigorous imprisonment with a fine of Rs. 50,000/- in default of which 6 months simple imprisonment was imposed. Further a sum of Rs. 200,000/- was awarded as compensation to the prosecutrix.

The learned Counsel for the Appellant has taken up a preliminary objection stating that the Appellant was denied representation in absentia which he submits is contrary to Article 13(3) of the Constitution and Section 241(2) of the Criminal Procedure Code Act. The Appellant contests the order of the

learned High Court judge dated 18.03.2005 refusing the Attorney-at-Law to appear on behalf of the absconding accused and the subsequent judgment dated 16.05.2013.

As correctly submitted learned State Counsel the learned High Court Judge has not refused the application made by the said Attorney-at-Law but has decided to consider the application after issuing summons through the Interpol on the overseas address indicated by the Appellant on the letter of authority given to the said Attorney-at-Law since the authenticity of the document was in question.

It is clear that the Appellant could have moved to revise the said order dated 18.03.2005 but did not do so. Trial commenced in the original Court on 17.10.2009 over four years since the above order was made and as submitted by the learned Counsel for the State the Appellant failed to take the necessary steps as prescribed by law to set aside and / or vary the said order.

The learned Counsel for the Appellant relies on the case of CA (PHC) APN 46/2011 in which Sisira de Abrew J has deliberated on the right of an accused to be represented in trial. It is clear however that the said case must be distinguished from the instant appeal as the impugned order in the said case was before the final judgment of the case. The case bearing No. 240/2010 relied on by the Appellant must also be distinguished from the instant application based on facts. Further, I concur with the submissions of the learned Counsel for the State that the learned High Court Judge has by order dated 18.03.2005 recognized the Appellants right to be represented by an Attorney-at-Law at trial.

This Court finds that the maxim 'Vigilantibus Non Dormientibus Jura Subveniunt' which means "the laws assist those who are vigilant, not those who sleep over their rights" is applicable in the instant case and as such the said preliminary objection is dismissed.

Preliminary objection dismissed.

Judge of the Court of Appeal

P. R. WALGAMA JP/CA

I Agree.

Judge of the Court ~~of~~ Appeal