

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

In the matter of an Appeal
Against an order of the High
Court under Sec. 331 of the
Code of Criminal Procedure
Act No. 15 of 1979 and in terms of
the Constitution of the Democratic
Socialist Republic of Sri Lanka.

The Hon. Attorney General

Attorney General's Department,

Colombo 12.

Complainant

Vs

Yahalawatte Wilbert
Madawatte, Palawela, Udaniiriella
Ratnapura

Accused

C. A. Case No. : 241/2013

H. C. Ratnapura Case No. : 75 /2010

And now between

The Hon. Attorney General

Attorney General's Department,
Colombo 12.

Complainant -Appellant

Vs

Yahalawatte Wilbert
Madawatte, Palawela, Udaniriella
Ratnapura.

Accused-Respondent

BEFORE : P. R. Walgama, J &
K. K. Wickramasinghe, J

COUNSEL : Miss Ayesha Jinasena Senior DSG for the Complainant Appellant.
AAL Dr. Ranjith Fernando for the Accused-Respondent.

ARGUED ON : 10th January 2017

WRITTEN SUBMISSIONS FILED ON: 22/03/2017

DECIDED ON : 9th June 2017

K. K. WICKRAMASINGHE, J.

The Accused Respondent (herein after referred to as the Accused) was indicted in the High Court of Ratnapura on the following charge:-

On or between 1st of January 2004 to 24th May 2004 in Palawela, Udaniriella, within the jurisdiction of this court the accused committed rape on one Yamanthalage Chaturika Madushani who was under the age of 16 years an offence punishable under section 364 (2)(e) of the Penal Code as amended by Act No.22 of 1995.

Being aggrieved by the said conviction and sentence, complainant appellant preferred the instant appeal to this court on **inadequacy and the illegality of the sentence.**

The indictment was read over to the Accused Respondent and the trial was commenced before the high court judge. The evidence of the victim Cahturika Madushani commenced on 23/10/2013. The indictment was amended to read under section 365 B of the Penal Code as amended by the learned state counsel with permission of court before the examination in chief

was concluded. The accused pleaded guilty to the amended indictment. There after the learned high court Judge of Ratnapura found the appellant guilty of the amended charge levelled against him. Accordingly, on 26th October 2013, accused accused was convicted and sentenced to a term of 10 months rigorous imprisonment and a fine of Rs. 500.00 with a default sentence of 1week period of imprisonment. Furthermore compensation amounting to Rs. 50,000 was ordered to be paid to the prosecutrix (victim) and as default ordered it to be recovered as a fine. If that is also defaulted then another period of 1 year period of imprisonment was imposed.

Counsel for the accused respondent contended that the petition of appeal is filed out of time.

Section 321 of the Code of Criminal Procedure act No.15 of 1979 stipulates that the appeal must prefer within **14 days** of the Judgement. Further states that the day on which the judgement was pronounced shall be included, but all public holidays shall be excluded. When perusing the official calendar it is evident that 24th of October happened to be a public holiday.

As per **section 2 of the Holidays Act No. 29 of 1971**, every Sunday is considered to be a public holiday. According to section 3(a) of the said act, the days specified in the first schedule are also considered as Public Holidays. Accordingly **Deepawali Festival** day has been declared to be a public holiday. Since 2nd November 2013 had been declared as the day of **Deepawali Festival**, that date and Sundays should be excluded. The 14th day of the period was fallen on the 9th of November which was a Saturday.

According to **section 321(2) of the Code of Criminal Procedure act No.15 of 1979** states that *"If the time for preferring petition of appeal expires on a day on which the office of the count is closed the appeal shall be deemed in time if such petition be preferred on the first day next thereafter on which such office is open"*

Therefore, 9th November being a Saturday the appeal had been lodged on the first working day 11th November 2013. Page 161 of the high court brief reveals that in fact the state counsel had filed this appeal and the registrar also had date stamped the same. Thus it is abundantly clear that the instant appeal has filed well within the time period of 14 days.

Facts of the case:-

The prosecutrix(victim) was living with her grandmother, which was at the close vicinity of the house of the accused. The accused was 62 years of age with 5 children who were elder to the victim. He was the younger brother of the victim's maternal grandfather. During the period of the incident, the victim used to visit the house of the accused at any time of the day even alone. The accused also used to visit her. The accused and his wife used to send the (prosecutrix) victim to the boutique when needed. On the day of the incident, the accused appellant had

called the victim to his house informing that he wanted to send her to the boutique. When she went, she was taken to the kitchen and the accused had asked her to lean against "Mirisgala" and molested her.

The parents of the victim were not living with her and the accused was living close vicinity. Since the accused was her grandfather's brother whom she used to trust she use to visit his house frequently. At the time the accused got down the victim to his house, the other inmates of the house were not available and therefore there was no body to rescue her.

Before giving evidence the victim had cried before the trial judge and the trial judge had ample opportunity to observe the witness and thereby to understand the mental trauma she had undergone. It was revealed that she had to change her residence after the incident.

As grounds of appeal the learned Senior DSG contended that the sentence imposed by the learned high court judge is highly inadequate and does not commensurate with the gravity of the offence as the learned trial judge had failed to consider the following ;

- (1)The tender age of the prosecutrix(victim)
- (2)The age of the accused
- (3)The accused enjoyed a position of trust
- (4) The preparation of modus operandi of the accused
- (5) The mental trauma under gone by the victim
- (6) Influence exerted by the accused and his party attempting to hush up the crime
- (7)The child had been adequately descriptive in proving a charge under section 365 B
- (8) The illegality of the sentence

In this instant case, the incident had taken place at the time the victim was studying in grade 3 and she was only 8 years old. According to submissions of the learned counsel for the appellant at the time of the trial the accused was 71 years of age. All these facts were brought to the notice of court by both parties. Therefore the learned trial judge ought to have considered the tender age of the victim.

In the case of **AG Vs Hewa Walimunige Gunasena CA(PHC) APN 110/2012 decided on 12/2/2014**, it was held that, *"A person indicted of an offence of child abuse does not deserve any sympathy.....Therefore I hold there were sufficient grounds for imposing a custodial*

sentence to the accused to prevent the commission of further offences".in the above stated case, Court of Appeal considered the age gap of the parties among other things and enhanced the punishment imposed on the accused respondent.

AG Vs Ranasinghe (1993) 2SLR 81 CA it was held that;

"An offence of Rape calls for an immediate custodial sentence. Reasons are:

To mark the gravity of the offence

To emphasize public disapproval

To serve as a warning to others

To punish the offender

To protect women

Aggravating factors would be;

Use of violence over and above force necessary to commit rape

Use of weapon to frighten or wound the victim.

Repeating acts of rape.

Careful planning of rape.

Previous convictions for rape or other offences of a sexual kind.

Extreme youth or old age of victim.

Effect upon victim, physical or mental.

Subjection of victim to further sexual indignities or perversion"s.

In the case of **AG Vs H.N.de Silva 1 (1956) 57 NLR 121 AT page 124**, it was held *"In assessing the punishment that should be passed on an offender, a judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A judge should in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the offence as it appears from the nature of act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also have regard the effect of the punishments as a deterrent and consider what extent it will be effective".*

In this instant case, it is pertinent to note that the trial judge has not considered the mental trauma undergone by the victim. Further it was revealed that the accused had warned the victim not to divulge the incident to anybody. The son of the accused had told the victim's uncle not to complain to the police. The victim in her evidence had clearly explained that the penis of the accused had touched her private parts which lasted for few minutes.

The learned DSG brought all these facts to the attention of this court and we are mindful of the same. In Judgements such as **Pepper Vs Hart (1993) 1All E R 42, Manawadu Vs AG (1987) 2 SLR 30, De Silva Vs Jeyaraj Fernandopulle & Others etc.** it has been held that the Hansard is the official publication of parliament and that is published to keep the public informed of what takes place in parliament thus, the parliament debates reported in Hansard could be referred to in order to facilitate the interpretation of a statute.

Realizing the rising crime rate involved in violence against women and children the Amendment to the Penal Code was brought in by Act no 22 of 1995. By introducing this section legislature intent to prevent and protect the vulnerable sector of the society namely women and children.

State of Karnataka Vs Krishnappa air (2000) 1470 SC held that the courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases..

Therefore considering all above and also giving our minds to the present age of the accused respondent we impose him the minimum punishment of 7 years RI and order him to pay a compensation of Rs.50, 000 to the victim with a default sentence of 1 year RI and a fine of Rs.1000 with a default sentence of 6 months.

The Appeal is allowed.

Judge of the Court of Appeal

P.R.Walgama, J

I Agree

Judge of the Court of Appeal