

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

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

The Attorney General of the  
Democratic Socialist Republic of Sri  
Lanka.

**Complainant**

**High Court of Hambantota  
Case No. 140/2009**

**Vs,**

Jayasundara Kankanampathirana  
Padmasiri

**Accused**

**And Now Between**

Jayasundara Kankanampathirana  
Padmasiri

**Accused-Appellant**

**Court of Appeal  
Case No. CA/258/2014**

**Vs,**

The Attorney General of the  
Democratic Socialist Republic of Sri  
Lanka

**Complainant-Respondent**

**Before : S. Devika de L. Tennakoon, J &  
S. Thurairaja PC, J**

**Counsel : Accused-Appellant absent and unrepresented  
Madawa Tennakoon SSC for the Complainant- Respondent**

**Order on : 11<sup>th</sup> August 2017**

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## Judgment

### **S.Thurairaja PC J**

5 The accused appellant preferred an appeal against a conviction against him under Section 364(1) of the Penal Code by the High Court judge of Hambantota. The appeal was preferred on the 16<sup>th</sup> of December 2014 at the High Court of Hambantota and the matter is referred to the Court of Appeal and listed for argument in 2015. Time to time the matter was taken up for argument and postponed for the 3<sup>rd</sup> of August 2017. On the 1<sup>st</sup> November 2016, the accused appellant was represented by  
10 a counsel and took the 3<sup>rd</sup> August 2017 as a convenient date. On the said date, the accused appellant was absent and unrepresented. Since this is one of the old matters the court called this case and called the names of accused name and his counsel. Since they were absent the court proceeded to act under Section 349(3) of the Code of Criminal Procedure Act No. 15 of 1979 as amended.

15 The Honourable Attorney General had preferred an indictment against the accused appellant under Section 364(1) of the Penal Code for committing an offence of rape of one Babyhamy Ratnayake. The incident alleged to have happened on the 18<sup>th</sup> of July 2013.

20 For the purposes of completeness, it will be appropriate to mention the facts of the case briefly. The prosecutrix who was a 61year old widow lodged a complaint at the police station of Angunakolapelassa on 19<sup>th</sup> July 2003 stating that it was the late evening of the previous day the one Padanangala Gedara Bandara attacked her by hitting her head on the floor for 4 times removed her cloths and forcefully had sexual intercourse with her. Since the police station was far away she reached the police  
25 station on the following day morning and was hospitalised for 8 days.

The trial was taken up on the 24<sup>th</sup> April 2011 and concluded on the 10<sup>th</sup> December 2014.

30 Since the accused appellant or his counsel was not present before this court we carefully considered the evidence led at the trial, the submissions made by the counsels at the High Court, judgment of the High Court and the petition of appeal.

35 There were three contradictions marked at the High Court and the appellant had taken up the defence of alibi while giving evidence were the major grounds of appeal. We went through the evidence led before the court and the judgment of the High Court judge. The learned trial judge had reasonably and sufficiently considered the contradictions marked and gave his decision on the contradictions

40 When we considered the evidence led before the High Court we find that the defence had taken up different types of defence time to time. Initially the accused suggested to the prosecutrix that her injury was due to knock down by a motor cycle and falling down. Considering the evidence of the prosecutrix, her daughter, police officer and the Judicial Medical Officer (JMO) that the injuries found on the prosecutrix were compatible with the history given by the prosecutrix and it is not just a knock down and falling. The next defence was taken as wrong identity, it is on

45 evidence that the prosecutrix and the accused appellant were possessing paddyland to each other and known for a long time. She clearly identifies the person from the inception and in the High Court. This was corroborated by her daughter and in the police investigation. The next defence taken was that the accused appellant was falsely implicated was substantially considered by the trial judge.

The important defence taken by the accused appellant, was *alibi*, of which he relies in his petition of appeal.

50 Considering the judgment and the reasoning of the learned trial judge, I find that he substantially dealt with the defence of alibi among the others. It is noted that the incident has occurred on the 18<sup>th</sup> July 2003, investigation commenced on the following day and the matter was referred to the Magistrate and a non-summary inquiry was held and finally the substantive trial was taken up at the High Court of  
55 Hambantota. The prosecutrix and the prosecuting witnesses gave evidence but the accused appellant not only failed to take up the defence of alibi but also not even suggested the same to the prosecution only at the time of giving evidence the appellant has taken up the defence of alibi but the learned trial judge considered the defence extensively and found that the defence was an aftermath consideration.

60 Since the accused appellant was not present in court we carefully considered the evidence before the High Court and the judgment of the learned trial judge we find the conviction of the accused is reasonable and based on the evidence before the trial judge, therefore we do not intend to interfere with the findings of the trial judge. We affirm the conviction.

65 The learned senior state counsel brought to the notice of the court, that the sentence imposed was the minimum and inadequate with the evidence before the trial judge therefore he pleads with the court that to consider an enhancement of the same.

We find that the prosecutrix was 61 years at the time of the incident.

70 According to the evidence of the prosecutrix, her daughter, police officer and the JMO we find that the prosecutrix had seven injuries which strongly suggestive of very heavy force used on this elderly woman. She had a black eye, scratched injuries on the neck and the thighs and contusion on her chin and the vagina. It is also noted that the injury number four described by the JMO that a fracture above the wrist on the right hand. All above injuries show a massive force used on this  
75 aged widow.

Considering the sentence described in Section 364(1) of the Penal Code that it ranges from 7 years to 20 years. Considering the facts this is not a case which falls on the minimum ambit of the sentence. I agree with the Senior State Counsel that the sentence imposed by the accused person is inadequate.

80 In **Attorney General Vs Ranasinghe and others (1993) 2 Sri.L.R 81**, the Court of Appeal discussed and set out the guideline for imposing sentence in rape cases specifically the court has defined the aggravating factors as follows;

- (a) *Use of violence over and above force is necessary to commit rape*
- (b) *Use of weapon to frighten or wound victim*

- 85 (c) *Repeating acts of rape*  
(d) *Careful planning of rape*  
(e) *Previous convictions for rape or other offences of a sexual kind*  
(f) *Extreme youth or old age of victim*  
(g) *Effect upon victim, physical or mental*  
90 (h) *Subjection of victim to further sexual indignities or perversions*

Further the court also determined that the immediate custodial sentence is warranted for the following reasons;

- (1) *to mark the gravity of the offence*  
(2) *to emphasise public disapproval*  
95 (3) *to serve as a warning to others*  
(4) *to punish the offender*  
(5) *to protect women*

In **Bandara Vs Republic of Sri Lanka (2002) 2 Sri.L.R 277**, Justice Amaratunga held:

100 *"therefore, in this case he deserves a longer period of imprisonment....  
To deliver a message to all those who have no respect for other  
persons right to life and property.... This court will never hesitate to use  
its powers under Section 336 in appropriate cases."*

105 In this case the accused appellant was convicted for rape and imposed a sentence of seven years and presently he was enlarged on bail.

Considering the nature of the offence, the way it was committed especially the force used on an elderly woman I do not think the sentence imposed is adequate. Hence the court acts under Section 336 of the Criminal Procedure Code and enhance the sentence to 12 years.

110 Considering all available materials before this court we find that there is no reason for us to interfere with the findings of the learned High Court Judge. Accordingly, we affirm the conviction.

115 The appeal is dismissed subject to the enhancement of sentence. The other conditions (namely Rs.50,000 compensation to be paid to the victim in default 10 months simple imprisonment and fine of Rs.5000 in default 3 months simple imprisonment) will remain as it is.

Subject to variation in the sentence the appeal is dismissed.

***Appeal dismissed.***

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**JUDGE OF THE COURT OF APPEAL**

**S. Devika de L. Tennakoon, J**  
I agree,

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**JUDGE OF THE COURT OF APPEAL**