

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

In the matter of an appeal in terms of
the section 331 of the Code of Criminal
Procedure Act No. 15 of 1979 and in
terms of Article 138 of the Constitution
of the Democratic Socialist Republic of
Sri Lanka.

Molligoda Liyanage Thilakaratne

Accused-Appellant.

Vs –

C.A.No.105/ 2010.

H.C. Ratnapura No.177/2007

Hon. Attorney General
Attorney General's Department
Colombo 12

Respondent.

BEFORE

: M.M.A. Gaffoor J. and
K.K. Wickremasinghe, J.

COUNSEL : Dr. Ranjit Fernando for the Accused-Appellant.
Dappula de Livera SASG for the Respondent.

ARGUED ON : 30/05/2016

DECIDED ON : 12/9/2017

WRITTEN SUBMISSIONS
FILED ON : **Accused-Appellant filed on 22/6/2017**
Respondent filed on 01/6/2017

M.M.A. Gaffoor J.

Heard both counsel in support of their respective cases. Accused-appellant in this case was indicted for the offence of rape. The count being committing rape on the woman under sixteen years of age and the woman stands toward the man in any of the degree of relationships enumerated in Section 364A.

The offence of rape was committed on the said Molligoda Liyanage Madumali who was under sixteen years of age at the time of the incident,

which is punishable under Section 364 (3) of the Penal Code as amended by the Act No.22 of 1995.

After the indictment was read accused pleaded not guilty. The prosecution to prove the case led the evidence of several witnesses including the victim, Divisional Secretary, JMO and the Investigating officers evidence.

After the conclusion of the prosecution case accused opted to give evidence on oath. For the defense accused-appellant, his wife, mother of the accused-appellant and a police officer had been called to give evidence.

Accused-Appellant gave evidence denying his involvement. After the prosecution and the defense submissions the learned High Court Judge fixed the case for judgment.

After trial, the learned High Court Judge found the accused guilty of the charge leveled against him.

The learned High Court Judge convicted and sentenced the Accused on 14/05/2010.

Before the sentence was passed the learned High Court Judge gave the option of making submissions with regard to the sentence. After considering the submissions, the learned High Court Judge, impose a term of 15 years Rigorous Imprisonment with a fine of Rs 10,000/- and a default term of one year. Further the accused-appellant was ordered to pay a sum of Rs. 100,000/- as compensation to the victim with a default terms of one year Rigorous Imprisonment.

According to the evidence led at the trial, mother of the victim had left the house and father being the sole breadwinner was out of the house owing to this work. Victim with her siblings used to sleep in the house alone. Accused was a frequent visitor to the house of the victim. One night accused had come to victim's house when her father was not at home. Accused had taken the victim out of the house and stripped her and forcibly committed rape on her. After the 1st incident Accused had repeated the same offence several times. Victim although had told her grandmother, grandmother had not taken any step. The incident had come to light only when the Divisional Secretary got to know the incident and reported the matter to the police in the area. After receiving information police had

commenced their investigation. Victim had been produced before the JMO who had examined her. JMO says inter labial penetration cannot be excluded.

The defence version is that since accused and his brother (Victim's father) are angry with each other, that this is a false complaint.

When this matter came up for argument the counsel for the accused-appellant took up the position that, the charge framed in the indictment is contrary to Section 165 of the Criminal Procedure Code.

When this Court perused the indictment the number of dates mentioned in the indictment exceeded one year.

The indictment in this case doesn't comply, with Section 165 (2) of the Criminal Procedure Code. The Criminal Procedure Code has specifically stated under Section 165 (2) "provided that the time included between the first and the last of such dates shall not exceeded one year". In this case the indictment should have been amended at the outset or before

the judgment was passed. Neither has happened. Therefore, we hold that the indictment is bad in law.

But when we peruse the evidence led at the trial we are of the view that victim should not suffer for the mistake of someone else.

In view of the legal objection taken by the counsel for the accused-appellant that the indictment is bad in law, this Court uphold the said legal objection of the learned Counsel for the defence.

Hence we order that the judgment of the learned High Court Judge of Rathnapura dated 14.05.2010 be set aside, and a fresh trial *de novo* be held by the learned High Court Judge.

We further direct the learned high Court Judge of Rathnapura to give priority and hear this case day to day and expeditiously dispose of the same.

The Registrar is directed to issue a copy of this order to the Learned High Court Judge of Rathnapura.

Subject to the above direction we set aside the conviction and sentence.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe,J.

I agree.

JUDGE OF THE COURT OF APPEAL