

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

Appeal in the terms of Section 331 of
Criminal Procedure Code.

The Democratic Socialists Republic of
Sri Lanka

COMPLAINANT

Vs

Hewa Pasgodage Premathilaka

Horawela

Walasmulla.

ACCUSED

Case No. CA 13/2017

HC (Tangalle) Case No. 22/2012

AND NOW BETWEEN

Hewa Pasgodage Premathilake

Horawela

Walasmulla.

ACCUSED – APPELLANT

Vs

Hon. Attorney General

Attorney General's Department

Colombo. 12.

COMPLAINANT – RESPONDENT

BEFORE

: Deepali Wijesundera J.

: L.U. Jayasuriya J.

COUNSEL

: Kaushalya Abeyratne Dias for the
Accused – Appellant

Dileepa Peiris D.S.G. for the
Attorney General

ARGUED ON

: 28th November, 2017

DECIDED ON

: 14th December, 2017

L.U. Jayasuriya J.

The accused appellant was indicted in the High Court of Tangalle under the following counts.

1. That during the period from 1st February to 26th March, 2004 the appellant committed rape on Hewa Pasgodage Sandya Kumari who was below 16 years of age, an offence punishable under Section 364 (3) of the Penal Code as amended.
2. That during the same period except the occasion referred to in count No. 1, the appellant committed rape on Hewa Pasgodage Sandya Kumari, an offence punishable under Section 364 (3) of the Penal Code as amended.

After trial the appellant was convicted on the first count and imposed a sentence of 10 years RI and a fine of Rs. 5,000/= carrying a default term of 3 months. He was acquitted on the second count. This appeal is from the said conviction and the sentence.

The story of the prosecution is that on the day in question, while the victim (who has 10 years old at the time of the incident) was attending to her school work, the appellant placed the victim on a bed after carrying her and raped her.

After the case for the prosecution was concluded the appellant has made a dock statement, and has denied his involvement to the incident. The learned counsel for the appellant argued that the prosecution had not established the date of offence

On a perusal of the evidence of the victim we find that the learned Stated Counsel has not ascertained the date of the offence. Even a police constable prosecuting in the Magistrate's Court knows that the prosecution should establish the date of offence but the State Counsel was so negligent and has failed to ascertain the date of the offence.

We find that the learned High Court Judge too has acted as a sleeping umpire and was not mindful of the fact that it was her duty to pose relevant questions under Section 165 of the Evidence Ordinance.

The defence has marked a number of contradictions which had not been adequately considered by the learned High Court Judge which go to the root of the case.

The victim in her evidence stated that the incident happened around 2 p.m. but in her statement to the police she has stated that this happened in the night. In her statement to the police she has stated that he was raped at the "පොල්මණ්ඩිය කැලේ" after removing her clothes and the learned High Court Judge has not considered this contradiction per se. In her evidence she said that she bled after the act of rape but the medical evidence shows that there were no signs of rape.

For the foregoing reasons I decide to set aside the conviction and sentence dated 02.03.2017 and proceed to acquit the appellant on the first count.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL