

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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

**Court of Appeal Case No.**

1. Herath Mudiyanselage Wijeyawardena

**CA/HCC/0117/2025**

alias Kalu Malli alias Hemachandra

**High Court of Ampara**

2. Ranbanda Dewayalage Lakshmi

**Case No. HC-AMP/2252/22**

Chandralatha

3. Kadathalawe Madushika Kumari

**ACCUSED**

**AND NOW BETWEEN**

Herath Mudiyanselage Wijeyawardena  
alias Kalu Malli alias Hemachandra

**ACCUSED-APPELLANT**

**Vs.**

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

**COMPLAINANT-RESPONDENT**

**BEFORE** : **P. Kumararatnam, J.**  
**R. P. Hettiarachchi, J.**

**COUNSEL** : **Isuru Somadasa for the Appellant.**  
**Yuhan Abeywickrama, DSG, for the Respondent.**

**ARGUED ON** : **06/11/2025**

**DECIDED ON** : **19/01/2026**

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**JUDGMENT**

**P. Kumararatnam, J.**

The above-named Accused-Appellant (hereinafter referred to as the Appellant) with the second and the third Accused were indicted by the Attorney General in the High Court of Ampara on the following charges:

1. That between 2012 January 1<sup>st</sup> and December 31<sup>st</sup> the 2A procured Rambanda Dewayalage Samanthika Kumari, who was under the age of 16 years, to have sexual intercourse with the 1A, and is guilty of committing an offence punishable under section 360A (1) of the Penal Code as amended by Act No. 22 of 1995.
2. That the 1A committed the rape of Rambanda Dewayalage Samanthika Kumari, and is guilty of committing an offence punishable under section 364 (2) of the Penal Code as amended by Act No. 22 of 1995.
3. That the 2A abetted the 1A to commit the offence mentioned in count 2, and is guilty of committing an offence punishable under section 364 (2) of the Penal Code as amended by Act No. 22 of 1995 read with S.102.
4. That the 3A abetted the 1A to commit the above-mentioned count 2, and is guilty of committing an offence punishable under section 364 (2) of the Penal Code as amended by Act No. 22 of 1995 read with S.102.
5. That between 2012 January 1<sup>st</sup> and December 31<sup>st</sup>, on an instance other than count 2, the 1A committed the rape of Rambanda Dewayalage Samanthika Kumari at Dehiattakandiya, and is guilty of committing an offence punishable under section 364(2) of the Penal Code as amended by Act No. 22 of 1995.
6. That between 2012 January 1<sup>st</sup> and December 31<sup>st</sup>, on an instance other than count 2 & 5, the 1A committed the rape of Rambanda Dewayalage Samanthika Kumari at Dehiattakandiya, and is guilty of committing an offence punishable under section 364(2) of the Penal Code as amended by Act No. 22 of 1995.

After the trial, the Appellant was convicted for count number five and six.

For count number five the Appellant was sentenced to 10 years Rigorous Imprisonment. Additionally, a fine of Rs.25,000/ was imposed with a default sentence of 06 months rigorous imprisonment.

For the sixth count the Appellant was sentenced to 10 years Rigorous Imprisonment. Additionally, a fine of Rs.25,000/- was imposed with a default sentence of 06 months rigorous imprisonment.

Further, a sum of Rs.500,000/- was ordered as compensation with a default term of 24 months simple imprisonment.

The learned High Court Judge had ordered the sentence imposed on count number five and six to run concurrently with each other.

The Appellant was acquitted from counts 1 to 4 and the 2<sup>nd</sup> and 3<sup>rd</sup> Accused had been acquitted from their respective charges.

Being aggrieved by the aforesaid conviction and sentence, the Appellant preferred this appeal to this court.

The learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence. Also, at the time of argument the Appellant was connected via the Zoom platform from prison.

**The Counsel for the Appellant advanced the following grounds of appeal:**

1. The prosecution has failed to establish specific date and time of the offence and thereby has failed to prove their case beyond reasonable doubt.
2. The story of the prosecutrix is highly improbable.
3. The prosecution has failed to give reasons for the inordinate delay in making the first complaint to the police and thereby raises a serious doubt on the prosecutrix's story.

**Background of the case**

In this case until the prosecutrix was 11 years old, she had lived with her father and her siblings at Siyambalangamuwa, as her mother who is the second Accused in this case, had lived separately at Dehiaththakandiya. In

the year 2011, her mother, the 2<sup>nd</sup> Accused, had removed her and her sister from her father and taken them to Dehiaththakandiya, to the house of a person called 'Mahatun Bappa'. Five people had been living in Mahatun Bappa's house including the daughter of Mahatun namely, 'Madhu.' She was married to a person called 'Kalu Aiya' who also lived in the house. Madhu was named as the 3<sup>rd</sup> Accused in the indictment. According to the victim, one day she was taken to the house of the mother of Kalu Aiya by her mother who was named the 2<sup>nd</sup> Accused in the indictment.

At Kalu Aiya's house, the brother of Kalu Aiya namely, Kalu Malli alias Hemachandra, who is the Appellant in this case, had raped the victim who was only 11 years old at that time. According to the victim, the 3<sup>rd</sup> Accused had insisted the victim to start a love affair with the Appellant. Her mother 2<sup>nd</sup> Accused was also associated with the 3<sup>rd</sup> Accused in this regard.

Thereafter, the victim was taken to the house of the Appellant where she had sexual intercourse multiple times on the promise that the Appellant would marry her. As the time passed, the Appellant started to ignore her and the victim had left the Appellant's house and returned to Mahatun Bappa's house. Upon her return, Mahatun also raped the victim. Further, using this opportunity, the husband of the 3<sup>rd</sup> Accused also had sexual intercourse with her. Although, the Appellant and Mahatun were called with similar names, she identified the Appellant as the perpetrator in the court.

The victim had lodged her complaint about three years after the incident. Giving reasons for the delay, the victim had said that she was not believed by anybody and that she was scared to make a complaint to the police. Further, the Appellant had also threatened her not to divulge this incident to anybody. According to her, the incident had occurred either in the year 2011 or 2012. After living with the Appellant for four months, the 3<sup>rd</sup> Accused had accompanied the victim to get a pill, which was a mode of birth control.

Further, she revealed that her brother had raped her when she was 8 years old. Due to this incident, she had gone to Dehiaththakandiya to live with her mother.

PW9, the JMO who examined the victim, stated that the victim was subjected to repeated vaginal penetration. The victim had given a consistent history to the JMO.

After the closing of the prosecution case, the defence was called and the Appellant had made a dock statement and closed his case. He admits that he had visited the house of his aunt.

Under the first ground of appeal, the Appellant contended that the prosecution has failed to establish the specific date and time of the offence and thereby has failed to prove their case beyond reasonable doubt.

The learned Counsel for the Appellant, highlighting a certain portion of the evidence given by the victim, submitted that the victim had failed to mention the date of the offence correctly.

It is not disputed that the complaint to the police was made about three years after the incident. The reasons for the delay were that she was not believed by anybody initially. Therefore, she was scared to lodge a complaint to the police. Secondly, she was threatened by the Appellant. Due to her tender age and the education standard, she could not remember the date of the offence clearly. But she gave evidence regarding the incident without hesitation.

In **Bhoginbhai Hirjibhai v. State of Gujarat** (1983) the court held further:

*“In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters.”*

*“It is unrealistic to expect a witness to be a human tape recorder.”*

In **R. v. Dossi** 13 Cr. App. R. 158 the court held that:

*"A date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided that there is no prejudice below) where it is clear on the evidence that if the offence was committed at all, it was committed on the day other than that specified."*

In the case of **CA/HCC/0431/2019** decided on 02.12.2022, it was held by his Lordship Justice Priyantha Fernando that:

*"Child victims in sexual crimes of this nature, are often reluctant to inform their parents or guardians about the abuse immediately unless they are compelled to do so. Most importantly, one cannot expect a child of tender age to keep a record of the exact date on which he/she was abused or raped, unless there is some special significance on the date in which the abuse took place."*

As the Appellant had been given sufficient notice regarding the date of offence and since plausible evidence was led through witnesses regarding the date, I conclude that no prejudice or failure of justice was caused to the Appellant. Hence, this ground of appeal has no merit.

As the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal are interconnected, both grounds will be considered together hereinafter.

In a criminal case, the prosecution is responsible for proving the defendant's guilt to the jury and demonstrating that a conviction is justified. The phrase "beyond a reasonable doubt" means that the evidence and arguments presented by the prosecution must be so strong and convincing that any rational person would accept the defendant's guilt as fact. This standard ensures that no reasonable uncertainty remains before a conviction is made.

In the case of **State of Andra Pradesh v. Garigula Satya Vani Murthy** AIR 1997 SC 1588, it was held that:

*“...the courts are expected to show great responsibility while trying an accused on a charge of rape. They must deal with such cases with utmost sensitivity.”*

The victim was only 12-14 years old when she was raped. She had given evidence about the incident accurately without any contradictions or omissions.

It is well settled law that if an accused person is engaging a defence or taking up a certain position, that that position must be put to the witnesses and when they are giving evidence.

In **Sarwan Singh v. State of Punjab** [2002] AIR Supreme Court iii 3652 at 36755,3656, it was observed;

*“It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted.”*

This case was cited with approval in the case of **Boby Mathew v. State of Karnataka** [2004] 3 Cri.L.J. 3003.

In the case of **Himachal Pradesh v Thakur Dass** at 1983 V.D. Misra CJ held:

*“Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed.”*

Further, in the case of **Vide Motilal v State of Madya Pradesh**, it was held that:

*“Absence of cross examination of prosecution witnesses of certain facts leads to the inference of admission of that fact.”*

The prosecutrix in her evidence admitted and clearly stated how she was raped by the Appellant. Once she was taken to a family planning clinic and a pill was inserted in to her hand. This was done four months after the rape. Although the Counsel for the Appellant contended that this led to the victim to implicate the Appellant in this case, the victim had never mentioned that she had any animosity with the Appellant over this incident.

In **State of Punjab v. Gurmit Singh [1996] 2 SCC 384** it was held that:

*"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour...."*

In **Sarath Menikpura v. Attorney General**, CA/HCC/61/20, Decided On 27.06.2024, Wickum A. Kalurachchi, J held that;

*"Delay in making a complaint about an offence committed against a child is different. In the case at hand, the victim girl kept silent without informing anybody about the rape or sexual harassment committed by her father for three and a half years. A child's reason for silence has been explained in the Crown Court Compendium Part I (published in May 2016 - page 10-22), as follows:*

*"Experience has shown that children may not speak out about something that has happened to them for a number of reasons. A child may*

- be confused about what has happened or about whether or not to speak out; blame him/ herself for what has happened or be afraid that he/ she will be blamed for it and punished;*
- be afraid of the consequences of speaking about it, either for him/ herself and/ or for another member of the family;*
- may feel that s/ he may not be believed;*

- may have been told to say nothing and threatened with the consequences of doing so;
- may be embarrassed because s/he did not appreciate at the time that what was happening was wrong, or because s/he enjoyed some of the aspects of the attention they were getting;
- simply blank what happened out and get on with their lives until the point comes when they feel ready or the need to speak out {e.g. for the sake of a younger child who s/ he feels may be at risk};
- may feel conflicted: loving the abuser but hating the abuse."

In addition, in, **The Crown Court Bench Book** (published in March 2010 - at page 367) it is stated as follows:

"Children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realise that what they are describing is, by adult standards, bad or, in their perception, naughty."

Further, in the case of **Daradagamage Chandraratne Jayawardane alias Shantha v. The Attorney General** - Court of Appeal case No. CA/85/2013, decided on 25.05.2018, it was observed:

"Time and again courts have discussed the acceptance of evidence of children of tender ages. Our judges are not there to test the memory of the witness, they are expected to find actual fact and the truth. Witnesses are human beings; they are not memory machines nor robots to repeat the

*incident as it was. Further, the natural behaviour of human beings is to forget incidents, especially sad memories. No one wants to re-visit painful moments and keep detailed memories with them. We are also mindful most of our courts with due respect, are not child friendly.”*

In this case the victim had given plausible reasons as to why she lodged her complaint after about three years of the incident. Her evidence did not contain a single contradiction or omission. She had vividly given evidence regarding the ordeal she encountered in the hands of the Appellant.

When an accused is facing a serious criminal charge it is essential that every point in favour of the accused, though it may seem trivial, is placed before the Judge. It may well be that all such matters, if so, placed before the judge may create a reasonable doubt, the benefit of which should accrue to the accused.

In this case the learned High Court Judge had considered the evidence given by the prosecutrix and the defence and had arrived at the conclusion that the evidence given by the prosecutrix is convincing and reliable and therefore, the prosecution had proved the case beyond a reasonable doubt.

After careful perusal of the evidence presented during the trial, I am of the view that the evidence presented by the prosecution is not tainted with any serious shortcomings or ambiguity. Therefore, it is safe to act on such evidence of the prosecution against the Appellant.

As discussed under the grounds of appeal advanced by the Appellant, the prosecution had adduced strong and incriminating evidence against the Appellant. The learned High Court Judge had accurately analyzed all the evidence presented by both parties to arrive at the conclusion that the prosecution has indeed proved the case beyond a reasonable doubt.

As the learned High Court Judge had rightly convicted the Appellant for the charge levelled against him in the indictment, I affirm the conviction and dismiss the Appeal of the Appellant.

The Registrar is directed to send this judgment to High Court of Polonnaruwa along with the original case record.

**JUDGE OF THE COURT OF APPEAL**

**R. P. Hettiarachchi, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**