

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

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

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

**Complainant**

**Court of Appeal  
Case No. 54/2015**

**Vs,**

Ratnayake Mudiyanseelage Bandula  
Pathmakeerthi alias Suddu Aiya

**Accused**

**And Now Between**

Ratnayake Mudiyanseelage Bandula  
Pathmakeerthi alias Suddu Aiya

**Accused-Appellant**

**High Court of Badulla  
Case No. 31/2011**

**Vs,**

The Attorney General of the Democratic  
Socialist Republic of Sri Lanka

**Complainant-Respondent**

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

**Counsel : Daya Guruge with Ms. K. Sivapathasundaram for the Accused-  
Appellant  
Dilan Ratnayake DSG for the Complainant-Respondent**

**Judgment on : 09<sup>th</sup> February 2018**

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## Judgment

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

The Accused Appellant (hereinafter sometimes referred to as the appellant) was indicted by the Attorney General before the High Court of Badulla as follows;

First Count – During the period between 1<sup>st</sup> July and 25<sup>th</sup> October 2006, kidnapped a child named Ratnayake Mudiyansele Visaka Indanee Ratnayake, who is less than 16 years from the custody of Ratnayake Mudiyansele Jayasundara, which is Punishable under section 354 of the Penal code.

Second Count – During the period and the same cause of transaction stated above the accused had committed an offence of Rape on the child above mentioned. Which is punishable under section 364 (2) (e) of the penal code.

Third Count – On or about 26<sup>th</sup> October 2006 committed an offence of Rape on the sad child, punishable under section 364 (2) (e) of the Penal Code.

After the trial the Learned Trial Judge found the appellant guilty to the first count. Regarding the Second and third count he observed that there is no evidence of penetration hence acting under sections 177 and 178 of the Code of Criminal Procedure Act (CCPA) and convicted the appellant under section 365A (2) b (**sic**) of the penal code. And sentenced as follows;

First Count – 18 months Rigorous Imprisonment and a fine of Rupees 2500/- in default 6 months simple imprisonment.

Second Count – 8 years Rigorous imprisonment and a fine of Rupees 5000/- in default 6 months simple imprisonment.

Third Count - - 8 years Rigorous imprisonment and a fine of Rupees 5000/- in default 6 months simple imprisonment.

In addition to above the appellant also ordered to pay a compensation of Rupees 100,000/- to the victim child and in default 1-year rigorous imprisonment.

Further the Trial Judge had ordered the sentences passed on 2<sup>nd</sup> and 3<sup>rd</sup> counts to implement concurrently.

Being aggrieved with the said order the appellant had preferred an appeal to the Court of Appeal and submitted following ground of Appeal:

The appellant was convicted on a different offence which is irregular and error in Law.

The appellant was not given adequate opportunity to defend himself on a charge on which he was convicted.

The learned Deputy Solicitor General (DSG) submits that the Appellant had not denied Committing an offence in his dock statement, hence he be convicted for attempted Rape. He invites the court to use the powers under sections 328 (b) (i) and 335(2)(b) of the CCPA

It will be appropriate to reproduce the relevant sections in the Penal Code for easy reference.

Section 364 Punishment for rape reads as follows;

**Section 364** (1) *Whoever commits rape shall, except, in the cases provided for in subsections (2) and (3), be punished with rigorous Imprisonment for a term not less than seven years and not exceeding twenty years and with fine, and shall in addition be ordered to pay compensation of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to each person.*

2) Whoever-

(a) being a public officer or person in a position of authority, takes advantage of his official position, and commits rape on a woman in his official custody or wrongfully restrains and commits rape on a woman;

(b) being on the management, or on the staff of a remand home or other place of custody, established by or under law, or of a women's or children's institution, takes advantage of his position and commits rape on any woman in mate of such remand home, place of custody or institution;

(c) being on the management or staff of a hospital, takes advantage of his position and commits rape on a woman in that hospital;

(d) commits rape on a woman knowing her to be pregnant;

(e) commits rape on a woman under eighteen years of age;

(f) commits rape on a woman who is mentally or physically disabled;

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term not test than ten years and not exceeding twenty years and with fine and shall in addition be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person;

.....

.....

(3) Whoever commits rape on a woman under sixteen years of age and the woman stands towards the man in any of the degrees of relationships enumerated in section 364A shall on conviction be punished with rigorous

*imprisonment, for a term not less than fifteen years and not exceeding twenty years and with fine.*

*(4) Where any person fails to pay the compensation, he is ordered to pay under subsection (1) or subsection (2), he shall, in addition to the imprisonment imposed on him under subsection (1) or subsection (2) be punished with a further term of imprisonment of either description for a term which may extend up to two years.*

Section 365A Acts of gross indecency between persons, reads as follows.

*Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts procure the commission by any person of, any act of gross indecency with another person, shall he guilty of an offence, and shall be punished with imprisonment of either description, for a term which may extend to two years or with fine or with both and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person.*

It is noted from the judgment that the Judge of the High Court had found the accused appellant guilty under section 365A(2)B, There is no section in the Penal Code as such therefore the conviction is bad in Law.

When passing the sentence, the Judge of the trial Court had sentenced the Appellant under section 365B (2) (b) of the Penal code.

The learned trial Judge strengthens his point to convict under a different section under sections 177 and 178 of the CCPA.

Section 177 reads as follows;

*If in the case mentioned in section 176 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.*

Section 176 reads as follows:

*If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial and in a trial before the High Court may be included in one and the same indictment; or may be charged with having committed one of the said offences without specifying which one.*

Section 178 reads as follows;

*(1) When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence and such combination is proved but the remaining particulars are not proved he may be convicted of the minor offence though he was not charged with such offence.*

*(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence he may be convicted of the minor offence although he was not charged with it and although jurisdiction to try such minor offence is exclusively vested in some other court.*

*(3) Anything in this section shall not be deemed to authorize a conviction for any offence referred to in section 135 when a complaint has not been made as required by that section.*

The Counsel for the appellant submits that the offence on which the appellant was convicted is a cognate offence hence the appellant was not told of the amendment and he was not given an opportunity to defend himself.

The Learned DSG invites this Court to consider the evidence and find the appellant guilty for attempted rape.

On the face of the Judgment and the sentence the appellant was convicted under a non-existing section (Law). But the sentencing is on a section which is available in the Penal Code. Presuming there is a typographical error, can the judge convict a person on a different cognate offence.

Our criminal law is well established in recognizing the right of the accused and ensured of a fair trial under the Supreme Law namely the Constitution. When a person is charged, it is mandatory to provide him with clear charge sheet under a valid law.

When a person is charged he should be aware of the charge and the ingredients of the charge then only he can prepare for his defence. When a person is charged for Rape he cannot be convicted for Grave Sexual offence, because ingredients are different to each other. If he is convicted that will attack the root of the concept of fair trial enshrined by the Constitution.

In **Mohamed Aboobakar Ibrahim vs AG** (CA No. 191/2002 decided on 12-08-2016) Gaffoor J, in an identical case held that

*"Therefore, I am inclined to the view that none of these sections in the Criminal Procedure Code with regard to framing of charge of Grave sexual abuse giving him the opportunity to defend himself on that charge. Instead the Judge has at the conclusion of his Judgment arrived at a decision to convict him for grave sexual abuse instead of rape."*

The Learned DSG invites us to apply the provisions of Section 328(b) and 335 (2)(b) of the CCPA. Considering the above case and the circumstances of this case we do not

think by any means the legislators had foreseen to include this situation. This is a fatal error hence this cannot be 'covered up' under the said provisions.

The learned DSG also invites us to convict the appellant for attempted Rape. Considering all available materials, we find that the appellant had gone through the trial. This is not a case where the Court of Appeal sitting on Appeal would do the work of the Trial Judge.

In **CA Appeal No. 34-35/2005** Decided on 03-04-2007 W.L.R. Silva. J held that:

*"One cannot expect the Court of Appeal to re-write the judgments when the judgment pronounced by the learned High Court Judge is a nullity."*

Considering the first count, it is not challenged by both parties and we find that the Learned Trial Judge is justified in convicting the appellant under section 354 of the penal code. Therefore, we affirm the conviction and the sentence on the first count. Considering the fact that the appellant was incarcerated from the date of conviction, we direct the Prison authorities to implement the sentence from the date of conviction, namely 24-04-2015.

Regarding the Second and the Third counts in the indictment we find the findings of the Learned Trial Judge is unacceptable, hence we acquit the appellant on those two counts.

**Appeal partly allowed.**

**JUDGE OF THE COURT OF APPEAL**

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

**JUDGE OF THE COURT OF APPEAL**