

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

**Court of Appeal Case No : CA HC /159/2014**

Ponnaiya Karthikaysu  
12 Cross Street  
Iruddipuram,  
Batticaloa

**Petitioner**

**Vs.**

Hon Attorney General.  
Attorney General's Department,  
Colombo 12.

**Respondents**

**C. A. No. 159/ 2014**

**H. C. Batticaloa Case No. 2410 / 2006**

**BEFORE** : S. Devika de L. Tennekoon , J  
S. Thurairaja P. C. J

**COUNSEL** : T. Fernando for the 1st Accused – Appellant.  
Indika Mallawarachchi for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup>  
Accused – Appellants.  
P. Kumararatnam, DSG for AG.

**ARGUED &**

**DECIDED ON** : 31.10.2017  
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**S. Thurairaja P. C. J**

Heard the submissions of the 1<sup>st</sup> Accused Appellant and the Counsel for the 2<sup>nd</sup> 3<sup>rd</sup> & 4<sup>th</sup> Accused Appellants and the Learned Deputy Solicitor General. Counsel for the accused Appellant frames 6 grounds of appeal, and made submissions on those grounds of appeal. We consider all these grounds of appeal very carefully.

1. Has the Judge has misdirected herself in identifying the Penal Section in the first ground. As per the indictment the Tamil and the Sinhala indictments submitted to the Court stipulates that the 1<sup>st</sup> Accused

Appellant was charged under Section 354 of the Penal Code. But the Learned High Court Judge has misconceived and took it as Section 357 of the Penal Code. These Sections are completely different to each other and the ingredients also differs.

2. The Second ground of appeal is that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused Appellants were convicted for both charges. In fact as per the indictment the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused Appellants were not indicted under Section 354. It shocks the conscious of the Court that the Learned trial Judge has convicted the Accused Appellants for an offence, on which they are not even charged. We appreciate the Learned Deputy Solicitor General for maintaining the highest tradition of the Attorney – General Department and conceive the fact that conviction under Count No. 01 is patently wrong.
3. The Learned High Court Judge had found the Accused Appellants guilty under Section 364 – (2) (e) and imposed a sentence of 7 years (under Section 362 – (2) (e)). This is again an error on the face of record.
4. As we stated in many Judgments the Accused Appellants has a right to know the exact Section that he is charged and exact Section that he is convicted and that is a golden norm. Anything deviating from the norm is frowned upon by the Appellate Court. In this case the Accused Appellant was

not given their due rights and entitlements enshrined under the constitution and relevant laws. Further the Learned Trial Judge has considered wrong Section in the body of the Judgment. She has discussed Section 264 (2) (e) for grave sexual abuse and 364 (2) (g) for gang rape. The Attorney General after considering all the material before him has preferred an indictment under Section 364 (2) (e) of the Penal Code. Under those circumstances, we could not find single reason for the Learned High Court Judge to discuss a gang rape. This is a wrong legal concept, misconceived in the minds of the Judge. This is further exposed in passing the sentence because under Section 364 (2) (e) statute carries a mandatory sentence of 10 years Rigorous Imprisonment. And for Grave Sexual abuse the minimum sentence is 7 years. Here the Judge is giving less than the minimum mandatory sentence shows that she had misconceived the law and the facts in this case.

Considering the error, we intend to send the case for retrial. But considering facts discussed above, we find that the evidence will not bring a conviction home for the prosecution. This factor also conceded by the Learned Deputy Solicitor General. Therefore considering all material before us, we find that there is no substantive admissible evidence led before the Court. Therefore, we allow the appeal and acquit 1<sup>st</sup> to 4<sup>th</sup> Accused Appellants.

The Registrar is hereby directed to forward this Case Record to the Registrar,  
High Court of Batticaloa forthwith.

JUDGE OF THE COURT OF APPEAL

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

I agree

JUDGE OF THE COURT OF APPEAL

YD/-