IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SC Appeal No. 159/23

SC.SPL.LA.No: SC/SPL/LA/06/23

Court of Appeal No. CA/HCC/55/2022

HC Colombo Case No. 553/18

Attorney General,
Attorney-General's Department,
Hultsdorp,
Colombo 12

COMPLAINANT

- VS -

Wickramathilake Don Susantha Kumara,
No.45, Kala Wewa,
Wijithapura, Anuradhapura.

ACCUSED

AND BETWEEN

Attorney – General
Attorney-General's Department,
Hultsdorp,
Colombo 12

COMPLAINANT – APPELLANT

- VS -

Wickramathilake Don Susantha
Kumara
No.45, Kala Wewa,
Wijithapura, Anuradhapura

ACCUSED – RESPONDENT

AND NOW BETWEEN

Attorney – General
Attorney-General's Department,
Hultsdorp,
Colombo 12

COMPLAINANT – APPELLANT – PETITIONER – APPELLANT

- VS -

Wickramathilake Don Susantha
Kumara
No.45, Kala Wewa,
Wijithapura, Anuradhapura

ACCUSED – RESPONDENT – RESPONDENT – RESPONDENT

Before : E. A. G. R. Amarasekara, J.
A.L. Shiran Gooneratne, J.
Janak De Silva, J.

Counsel : Ayesha Jinasena, SASG with M. Azeez, SC for the Complainant – Appellant – Appellant.

Mohan Weerakoon, PC with Sandamali Peiris for the Accused – Respondent – Respondent.

Argued on : 27.02.2024

Decided on : 13.06.2025

E. A. G. R. Amarasekara, J.

This Appeal has been made by the Complainant – Appellant – Petitioner – Appellant, the Attorney General of the Republic of Sri Lanka (Hereinafter sometimes referred to as "Prosecution" or "Appellant"), against the Judgment of the Court of Appeal in Appeal No. CA/HCC/55/2022. Accused – Respondent – Respondent – Respondent, Wickramathilake Don Susantha Kumara, is an expatriate workman in the Republic of Korea deported to Sri Lanka on 26.07.2017 (Hereinafter sometimes referred to as "Accused"). He was the accused in High Court Colombo Case No. 553/18 where he was accused of committing sexual harassment to one Jeong Eun-Hui, an 18-year-old female undergraduate at the University of Keimyung, (Hereinafter sometimes referred to as "Jeong" or "Victim of the accident") by removing her underwear, which is an offence under Section 345 of the Penal Code as amended by Act No. 22 of 1995.

The learned High Court Judge in High Court of Colombo Case No. 553/18, by his Order dated 10.12.2021, held that the Prosecution had not established a case for the Accused to answer and thereby, acquitted the Accused without calling for his defence. Being aggrieved by the said

Order, the Appellant appealed to the Court of Appeal for which the above Case No. CA/HCC/55/2022 was given. The learned Court of Appeal Judges, whilst not approving some of the observations made by the learned High Court Judge and also not agreeing with some of findings in the Order of the learned High Court Judge, agreed with the conclusion of the learned High Court Judge to acquit the Accused without calling his defence. Thus, the Appellant filed the Special Leave to Appeal Application No. SC.SPL.LA.No: SC/SPL/LA/06/23 in this Court and when it was supported, this Court granted leave on the following questions of law found under paragraph 45(a), (b) and (c) of the Petition dated 05.01.2023 - vide minutes dated 24.10.2023.

a) Did the Courts below err in law by their failure to correctly appreciate and apply Section 200(1) of the Code of Criminal Procedure Act, No. 15 of 1979?

b) Did the Courts below err in law by their failure to evaluate the available evidence in light of the admissions of the Respondent to draw a reasonable inference on application of the principles in relation to the evaluation of the circumstantial evidence?

c) Did the Courts below err in law by their failure to appreciate that an explanation was clearly warranted from the Respondent in light of the highly incriminating items of evidence available against the Respondent [on the basis of DNA evidence] on proper application of Section 200(1) of the Code of Criminal Procedure?

Further, as per minutes dated 27.02.2024, another question of law was allowed:

e. *Whether the learned High Court Judge was correct in law since the main ingredient namely, the absence of consent is not being proved by the prosecution?*

Even though it is apparent from the aforesaid Order that the learned High Court Judge had included certain extreme hypothetical or imaginary examples to indicate that the circumstantial evidence proved does not lead to the sole inference that the accused is guilty, the basis of his Order seems to be that, since there was no direct evidence, if any inference of guilt of the Accused is to be made based on the circumstantial evidence, such an inference must be the one and only irresistible and inescapable inference. In this regard, the learned High Court Judge has referred to **Don Sunny v. Attorney-General (Amarapala Murder Case) [1998] 2 Sri**

L.R. 01, which held that when a charge is sought to be proved by circumstantial evidence, the proved items of circumstantial evidence, when taken together, must irresistibly point towards the fact that the accused committed the offence. It was further held: "*Therefore, if upon a consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that accused committed the offence then they can be found guilty. That is not all, the prosecution must prove that no one else other than the accused had the opportunity of committing the offence. Therefore, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence*" - at Pg 6- 7.

The learned High Court Judge had also referred to the decision in **Kusumadasa v. State (2011) 1 Sri L.R. 240** which held: "*Applying the principles laid down in the above judicial decisions*[1]*, I hold that in a case of circumstantial evidence if proved facts are consistent with the innocence of the accused, he must be acquitted. Further if the proved facts are not consistent with the guilt of the accused, he must be acquitted. I have earlier pointed out that some proved facts are consistent with the innocence of the accused and also not consistent with the guilt of the accused. Therefore the appellant should be acquitted."*

While stating that the only incriminating evidence against the accused is the DNA Report compiled from the traces of semen found on the panty and girdle, which tallies with the DNA profile of the Accused, the learned High Court Judge at the end of his Order had stated that evidence at its highest can only create suspicion against the accused. The learned High Court Judge had expressed his view that the Prosecution fell well short of the degree of proof required in a case solely dependent on circumstantial evidence to establish the standard of inference to prove the guilt of the Accused.

Irrespective of any shortcomings in the reasoning of the learned High Court Judge, it is clear that it was his view that the inferences that can be drawn on proved circumstantial evidence were not consistent with the guilt of the Accused and the guilt of the Accused is not the only inference that can be drawn from the circumstantial evidence and that the Prosecution failed in proving its case and therefore it is not necessary to call for the defence in terms of Section 200

[1] Referring to the decisions in King v Abeywickrama 44 N L R 254, King v Appuhamy 46 N L R 128, Podisingho v King 55 N L R 49, Emperor v Browning 1918-18 Cr LJ 482, and Don Sunny v AG (1998) 2 Sri L R 1

of the Code of Criminal Procedure Act. With regard to the burden of proof in a criminal case, the learned High Court Judge has cited **Ajith v Attorney General (2014) 1 Sri L R 408** where it was stated: "*In criminal cases the burden of proof remains the same. Even if the Accused remains silent or has given evidence on oath or a dock statement will not alter the burden of proof for the prosecution*."

The learned Court of Appeal Judges in their Judgment has been more concerned with the fundamental thing in proving an offence, namely that the contents of the charge and elements of the offence. The learned Court of Appeal Judges observed that the charge states of a causing sexual harassment by removing the undergarments of the Victim of the Accident and there is no evidence to establish that. The learned Court of Appeal Judges have also pointed out that there must be some evidence on each element of the offence to call for defence, thereby indicating that if one element is not established, there is no need to call for defence. In this regard, the learned Court of Appeal Judges, while referring to **Sunil and Another v The Attorney-General (1986) 1 Sri L R 230,** has highlighted that to prove sexual offences, such as one that falls under Section 345, between man and a woman over the age of 18 (except for unnatural sexual acts, incest), lack of consent has to be proved as an element. Thus, the learned Court of Appeal Judges indicate that it is the burden of the Prosecution to prove the lack of consent of the Victim but it has not been established. It is also highlighted that as per the charge, two main elements have to be established, namely;

1. The Accused removed the Victim's undergarments
2. It was by using criminal force

In the absence of evidence to establish that the Accused removed the Victim's undergarments, the learned Court of Appeal Judges opined that use of criminal force does not arise.

The learned Court of Appeal Judges have cited **Harold Rex Jansen v. Hon. Attorney General (2014) C.A. Application No. 151/13** where it was held that a High Court Judge is empowered to acquit an accused under Section 200(1) of Code of Criminal Procedure when the evidence fails to establish the commission of the offence. Thus, the basis for the Court of Appeal seems to be the failure of the Prosecution to establish the elements of the charge and the offence.

If the view expressed by the learned Court of Appeal Judges is acceptable, it is not necessary to evaluate the learned High Court Judge's Order in detail as the correctness of Court of Appeal

Judgment is sufficient to confirm the conclusion of the learned High Court Judge not to call for defence.

However, it appears that the learned High Court Judges concentration was more on the aspect of criminal force. This would have happened due to the nature of the charge framed. The Charge complained of an act of removing underpants which needs a physical force used against the purported Victim of the crime. As per the interpretation contained in Section 341 of the Penal Code for the term 'Criminal Force', it is apparent that lack of consent of the purported victim is a must. As per the interpretation given to the word 'Assault' in Section 342 of the Penal Code, it is clear that the 'gesture or preparation' of the perpetrator must give the impression that he is about to use 'Criminal Force' against the victim of the crime. Thus, it also refers to something that would happen against the consent of the purported victim. What is more important is the two words 'annoyance or harassment' found in Section 345 of the Penal Code, of which section the relevant portion is quoted below in this Judgment. These two words innately indicate that the offensive act has to be done against the consent or wishes or likings or expectations (hereinafter these mental elements will be referred to as 'against the consent or wishes' or 'without the consent or wishes' or by using similar terms) of the purported victim. Thus, there is always a mental element involved in proving the offence contained in Section 345 of the Penal Code. If the alleged offense contains a mental element, it has to be proved by the Prosecution. The learned SASG attempts to contend that the concept of '*volenti non fit injuria'* contained in Section 80 of the Penal Code under the General Exceptions applies, and, as per Section 105 of the Evidence Ordinance, it is the Accused who must prove that there was consent. However, it applies to situations where the party who suffers harm has given consent, expressly or impliedly, to suffer such harm. However, when the elements of the offence contain a mental element, as the offense has to be proved by the Prosecution, that mental element also has to be proved by the Prosecution. To call for defense, as the learned SASG contends, at least there must be a prima facie case placed before the Judge including facts relevant to such mental elements before the Judge. If mere presence of semen on a dress is sufficient to prove a sexual offence, no sexual relationship is safe before law.

The factual matrix indicates that Jeong, the Victim of the Accident, was student studying at Keimyung University. She was last seen leaving the said University premises at about 10.30 pm on 16.10.1998 where a function took place and she consumed alcohol. Later, her body was found on Guma Expressway about 300 hundred meters away from the Nam Daegu interchange,

on the lane running from Daegu to Masan, on the early morning of 17.10.1998. Her death was due to a Motor Traffic accident that happened on the expressway and the cause of death was a rupture of the brain. Even though her body was clothed, her under garments were not found on the body and later on the same day, those undergarments, namely underpants with a sanitary pad attached to it and a girdle, were found about 100 meters away from the place of the accident. DNA analysis confirmed that the blood on the sanitary pad matched with the Victim of the accident, Jeong. Further, expert evidence confirmed the presence of semen on the underpants and girdle, which was established to be the semen of the accused by DNA analysis.

It is not in dispute that Jeong died as a result of the said accident, and there was no direct evidence or eye witness to establish any sexual act of the Accused with Jeong, the Deceased. Further, there was no evidence of any communication, either through a phone or any other mode, made by Jeong, the Deceased or the Victim of the accident, prior to her death, indicating any sexual harassment. There were 157 proposed agreed facts at the Trial, and the Accused, through his Counsel, admitted all but except item 50 and matters incidental to that item. Thus, the learned High Court Judge correctly recorded all those proposed agreed facts as admissions except item 50 and 51 which are interrelated. Even those admitted facts do not suggest that the Accused removed the undergarments of Jeong nor that, irrespective of removing her under garments, he engaged in any sexual act against the consent or wishes of the Deceased, Jeong. I do not think, this will be changed even when one considers item 50 and 51 which were not considered as admitted facts. Recovery of the undergarments with semen of the Accused, away from the Deceased's dead body, does not suggest that those undergarments were removed by the Accused.

As correctly observed by the learned High Court Judge, there was no other evidence to connect the Accused to the incident other than the DNA evidence found on the undergarments of the Deceased. The fact that the Accused's working place is in the same area does not suggest that he removed the Deceased's undergarments as stated in the charge sheet where it is the mode of commission of the offence nor it suggests any sexual act against the consent or wishes of the Deceased.

Mere presence of the Accused's semen by any stretch of imagination cannot establish that the Accused removed the Deceased's undergarments, and, even if it is assumed that he removed the undergarments that it was against her consent or wishes. The charge was under Section 345

of the Penal Code as amended by the Act no.22 of 1995, the relevant part of which reads as follows:

"*Whoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person, commits the offence of sexual harassment …*"

Can the mere presence of semen of the Accused on the undergarment establish assault or criminal force? The answer should be in the Negative. It needs some more facts to be proved. On the other hand, harassment and annoyance contemplated in the said Section cannot be established unless it is established that it was done without consent or against the wishes of the person who was subjected to the offense. Mere presence of semen does not establish a prima facie case against the Accused that it is a result of an act done against the Deceased's consent or wishes.

As stated in **Ajith v Attorney General** (supra), the burden of proving the offence is always on the prosecution.

I would prefer to consider the possible inferences that can be made based on the presence of Accused's semen on the undergarments of the Deceased, Jeong. In my view, the possible inference would be that ejaculation of the Accused's semen happened in very close proximity to the undergarments of the Deceased, Jeong, or that those undergarments were used to wipe away the semen of the Accused by someone; it may be the Accused or the Deceased or someone else. However, this does not establish that there was sexual assault, criminal force, or that the sexual act or advance was against her consent or wishes. Without those being established, there cannot be a prima facie case to call for defence.

As suggested by the Prosecution, it could have happened against the consent or wishes of the Deceased or by using criminal force, but at the same time it could have happened as a consensual act. The Prosecution has not been able to place any reliable evidence to vitiate the possibility of the latter, namely the consent or willingness of the Deceased.

The learned SASG contended that as per Section 106 of the Evidence Ordinance when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

In the matter at hand, the specific knowledge was with the Deceased. Unfortunately, she is no more. It is only when from her side it is shown that there was no consent or willingness, it falls upon the Accused to show that there was consent or willingness and how he perceived such consent or willingness. Even to effectively suggest that there was consent or willingness in cross examination, she was not available for the trial due to her death by the accident.

I would now refer to the Medical Examination Report marked P3 with the Petition to this Court. It clearly shows that no sperm was found in the vaginal fluid samples. Thus, it excludes any vaginal intercourse. After recording his findings as to the injuries found on the Deceased's body, under the topic interpretation, the medical examiner has described the cause of death, but after that, he has included the following paragraph.

"*In addition, given that JEONG left her friend and headed home at 23.40 on October 16, 1998; crossed the expressway; tried to go in the opposite direction of her house with a blood alcohol concentration of 0.13% which had little influence on the body movements, this accident far from typical pedestrian vehicle accidents.* ***The above facts suggest JEONG was fleeing from a life-threatening situation before the accident. To ascertain this, further investigation is necessary*****."** **(emphasis in bold letters by me).**

I cannot find what is his expertise to express the last highlighted sentence in the quoted paragraph as it is an evaluation of facts which has to be done by a Court. On the other hand, the opinion expressed there as to the life-threatening situation seems to be mere surmise and conjecture. He himself says that to ascertain that further investigation is necessary. I do not see any evidence that suggest any life-threatening incident causing her to flee. It is true that one may become hysterical and lose constant awareness after a criminal attack such as rape or an attempted rape. At the same time, one may lose constant awareness to meet with an accident due to overwhelming happiness. A Criminal Court cannot base its decision on what is surmise and conjecture.

Section 200(1) Code of Criminal Procedure states : "*When the case for the prosecution is closed, if the Judge wholly discredits the evidence on the part of the prosecution or is of opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offence of which he might be convicted on such indictment, he*

shall record verdict of acquittal ; if however the Judge considers that there are grounds for proceeding with the trial he shall call upon the accused for his defence."

It is the view of this Court that the Prosecution failed to establish a prima facie case as the evidence led at the Trial fails to establish the commission of the offence charged against the Accused in the indictment or of any other offence of which he might be convicted on such indictment as it cannot be inferred as per the evidence led that it was the Accused who removed the undergarments of the Deceased as stated in the charge indicating the mode of commission of the offence as well as, irrespective of the removal of the undergarment, it cannot be inferred that the semen of the Accused came in contact with the undergarments of the Deceased without her consent or against her wishes or willingness. Thus, the learned high Court Judge's decision not to call defence is correct and approval of that decision by the Court of Appeal is also correct.

I do not think that there was any issue with regard to the number of witnesses called or reliability of the witnesses called as indirectly contended by the learned SASG. Even the **R-v-Galbraith (1981) 73 Cr. App. R124** cited by the learned SASG, states that when there is no evidence that the crime alleged has been committed by the accused the Judge has to stop the case. Even as per the Sri Lankan case **Attorney-General v Baranage (2003) 1 Sri L R 340,** before calling for the defence, the Judge is entitled to consider the probability of the prosecution case, the weight of evidence and the reasonable inferences to be drawn from the proven facts. After considering them, if the Judge sees that there is no prima facie case to call the defence, calling defence becomes a futile exercise as he cannot rely on the Prosecution's case as to the proof of the charge.

It is not the function of a Criminal Court to call for defence to fill the gaps of the Prosecution. The charge has to be proved by the Prosecution, and to call for defence, there must be prima facie case for the prosecution. In the matter at hand, as discussed above, the Prosecution failed to prove the contents of the charge as well as the lack of consent or willingness of the Deceased for the alleged sexual act.

As per the reasons discussed above, I answer the questions of law (a), (b), and (c) mentioned above in the negative and the question of law (e) in the affirmative.

Hence this appeal is dismissed. No costs.

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Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

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Judge of the Supreme Court

Janak De Silva, J.

I agree.

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Judge of the Supreme Court