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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with section 15(a)(i) of the Judicature Act No. 02 of 1978

Hon. Attorney General

**Complainant**

**C.A. Case No. HCC-0055/22**

**High Court of Colombo**

**Case No. 553/2018**

**Vs.**

Wickeremathilake Don Susantha Kumara

**Accused**

**AND NOW BETWEEN**

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

**Complainant-Appellant**

**Vs.**

Wickeremathilake Don Susantha Kumara

**Accused-Respondent**

**BEFORE : K. PRIYANTHA FERNANDO, J (P/CA)**

**WICKUM A. KALUARACHCHI, J**

**COUNSEL :** Janaka Bandara, DSG with Malik Azeez, SC and Deshan Aluwihare, SC for the Complainant-Appellant.

Mohan Weerakoon, PC with Nuwan De Alwis and Sandamalee Perera for the Accused-Respondent.

**WRITTEN SUBMISSIONS**

**TENDERED ON :** 19.08.2022 (On behalf of the Appellant)

(written submissions were not filed on behalf of the respondent)

**ARGUED ON :** 01.11.2022

**DECIDED ON :** 24.11.2022

**WICKUM A. KALUARACHCHI, J.**

The accused-appellant was indicted in the High Court of Colombo for committing sexual harassment of Jeong Eun Hui by removing her undergarments, on or about the 17th of October 1998, within the Dalseo Police precinct of the Daegu province of the Republic of Korea, an offence punishable under Section 345 of the Penal Code.

According to the charge, the crime has been committed in Korea. This case was heard in the High Court of Colombo, Sri Lanka on the directions given by the Honourable Chief Justice in terms of section 9(2)(b) of the Judicature Act. The indictment was filed 20 years after the incident.

Prior to the hearing, written submissions were filed only on behalf of the appellant. At the hearing, the learned Deputy Solicitor General for the complainant-appellant and the learned President's Counsel for the accused-respondent made oral submissions.

The prosecution presented the following evidence in the High Court trial:

Jeong Eun Hui was a university student at Keimyung University. She was last seen leaving the university premises around 10.30 p.m. on 16.10.1998. Thereafter, her body was found on the Guma Expressway about 300 meters away from the Namdaegu interchange, on the lane running from Daegu to Masan, in the early morning of 17.10.1998. She died as a result of a motor traffic accident that occurred on the expressway that caused a rapture of the brain. Her body was clothed at the time it was found; however, her undergarments were not found on the body. Underpants with a sanitary pad and a girdle were found on the expressway on the same day about 100 meters away from the place of the accident. DNA analysis confirmed that the blood on the sanitary pad attached to the underpants matched with the Jeong Eun Hui. Further, the analysis also confirmed the presence of semen on the underpants and the girdle. DNA analysis established that the semen belongs to the accused- respondent.

As the victim died as a result of this unfortunate motor traffic accident, she could not give evidence in the High Court trial. There were no eyewitnesses to this incident. Therefore, there was no other evidence to connect the respondent to this incident except the DNA evidence found in the undergarment of the victim.

Considering the aforesaid circumstances, the learned High Court Judge acquitted the accused-appellant after the prosecution case,

acting in terms of Section 200(1) of the Code of Criminal Procedure Act (CCPA). It is against that acquittal that the Honourable Attorney General preferred this appeal.

The learned Deputy Solicitor General for the appellant based his arguments on the ground that the learned trial judge had misinterpreted the scope and application of section 200(1) of the CCPA. The learned DSG contended, citing the decision of Attorney General V. Baranage, that the learned trial Judge should have called for defence because a reasonable inference could be drawn from the proven facts that the respondent committed sexual harassment to the victim by using criminal force. He contended that acquitting the respondent without calling the defence is an erroneous order. The substance of his argument was that the victim's subsequent acts of climbing a high ground and entering the expressway with undergarments in hand infers that the respondent had used criminal force on her during the sexual act done a short while ago. Furthermore, he contended that the presence of semen on her underwear proves that the respondent engaged in a sexual act with her. Taking all these items of evidence together, the learned DSG contended that the offence of sexual harassment in terms of section 345 of the Penal Code has been constituted. While admitting that there is a possibility of drawing some other inferences, the learned DSG argued that the learned High Court Judge should have called for defence because the inference of guilt to the charge specified in the indictment could also be inferred from this evidence.

The learned President's Counsel for the respondent contended in reply that the respondent was indicted for committing sexual harassment by removing the undergarments of Jeong Eun Hui, however, there is no evidence whatsoever that the respondent removed her undergarments. The learned DSG stated in his submissions that she

had worn jeans without undergarments at the time her body was found. The learned President's Counsel contended that her undergarments could not be removed without removing the jeans she wore. In addition, the learned President's Counsel raised an issue as to how the respondent's semen came to her underpants if he had removed her underpants and committed a sexual act.

In the case of The Attorney General V. Baranage – (2003) 1 Sri L.R. 340, the relevant portion pertaining to the argument advanced by the learned DSG appears as follows:
"*In a trial by a judge without a jury, the judge is the trier of facts and as such at the end of the prosecution case in order to decide whether he should call upon the accused for his defence, he is entitled to consider such matters as the credibility of the witnesses, the probability of the prosecution case, the weight of evidence and the reasonable inferences to be drawn from the proven facts.*"

The contention of the learned DSG was that on the proven facts of the case, a reasonable inference could be drawn that the appellant used criminal force and sexually harassed her. The position taken up by the learned DSG was that after the sexual harassment, she ran away to the expressway with her underpants in hand and that is why her underpants was found on the expressway about 100 meters away from the place of the accident.

At the stage of deciding whether the accused should be called upon for his defence, it is not necessary to consider whether there is evidence to prove the charge beyond a reasonable doubt. However, at the very least, there must be some evidence on each element of the offence to call the defence, because an offence would not be constituted if there is no evidence of one of the basic elements required to prove the charge.

The burden of the prosecution to prove the lack of consent in a rape case has been discussed in Sunil and Another V. The Attorney General - (1986) 1 Sri L.R. 230 as follows:

"*The burden of proving absence of consent on the part of the complainant where the charge is one of rape or abduction is always on the prosecution and never shifts.*"

It was also stated in the said judgment that "*I find that the learned trial Judge has taken pains to exhort the jury adequately that the burden of proving the case, particularly, the ingredient of absence of consent on the part of the complainant, was on prosecution and the prosecution alone, and that this burden never shifted to the accused.*"

Hence, it is apparent even in proving other sexual offences, the accused has no burden to establish consent. The prosecution should prove the lack of consent beyond reasonable doubt. According to section 345 of the Penal Code, assault or use of criminal force is the central element in establishing the offence of sexual harassment. Without establishing the said element, the offence of sexual harassment under Section 345 of the Penal Code could not be established because having some sort of sexual act with consent, between a woman and a man over the age of 18 is not an offence, except for the offensive sexual acts such as unnatural sex, incest, and other offensive sexual acts described in the Penal Code.

According to the charge, the respondent committed sexual harassment by removing her undergarments. Hence, two main elements necessary to establish the charge are:

1. The respondent removed her undergarments.
2. The respondent removed undergarments by using criminal force.

There was no evidence whatsoever that the respondent removed her undergarments. Also, there is no proven fact to draw a reasonable inference that the respondent removed her undergarments. So, there is no evidence whatsoever to establish the first element. In the absence of evidence that the respondent did the act described in the charge, the question of whether the act was done by using criminal force does not arise.

Be that as it may, it is apparent that the act described in the charge was not the act that caused the semen to be on her underpants, because having the respondent's semen in her underpants does not infer in any manner that the respondent removed her underpants. If the respondent had removed her underpants as described in the charge and engaged in some other sexual act, a question arises as to how the semen got into her underpants, which he had taken off. Having semen on her underpants infer the possibility of doing a sexual act without removing her underpants if he did any. This is a possible assumption. Assumptions have no relevance in dealing with criminal charges. In fact, the reason for assuming this possibility in this case is to show that the finding of her underwear on the expressway containing his semen does not raise a reasonable inference that the respondent committed the offence described in the charge, and under the above circumstances, it is more possible to infer that he did not remove her undergarments.

Anyhow, her subsequent act of rushing to the expressway with the underpants that contained the semen of the respondent in her hand, does not infer in any manner that the respondent removed her underpants by using criminal force. In the circumstances, it is apparent that there is no evidence that the respondent removed her undergarments and there is no evidence that the respondent used criminal force in removing her undergarments. In the absence of

evidence to establish the main ingredients of the offence, the prosecution has failed to establish the commission of the offence described in the indictment.

In the case of Harold Rex Jansen V. Hon. Attorney General – C.A. Application No 151/13, decided on 26.02.2014 it was held that a High Court Judge is empowered to acquit an accused under section 200(1) when the evidence fails to establish the commission of the offence.

The necessity for the accused to give an explanation arises only if the prosecution establishes the commission of the offence specified in the indictment. As explained previously, the prosecution in this case failed to adduce any evidence that the accused-respondent committed the offensive sexual act described in the charge. Also, the prosecution failed to adduce any evidence regarding an assault or any criminal force used by the respondent. In the absence of evidence regarding the aforesaid elements of the charge, the commission of the offence set out in the indictment has not been established. Accordingly, the respondent in the instant action is entitled to be acquitted without the defence being called, as the accused-respondent had no case to meet.

It is to be noted at this juncture that the learned High Court Judge in his order has gone beyond the required limits in observing the possibility of involvement of someone other than the accused in this incident. I do not agree with some of his findings. However, for the reasons stated in this judgment, I hold that the conclusion of the learned High Court Judge to acquit the accused-respondent without calling the defence is correct.

Accordingly, I find no reason to interfere with the order dated 10.12.2021.

The appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

K. Priyantha Fernando, J (P/CA)

I agree.

**JUDGE OF THE COURT OF APPEAL**