

Consent in Sexual Offences: A Comparative Analysis of UK and Sri Lankan Law

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Abstract

Consent is a vital element in sexual offences, acting as a crucial determinant in differentiating consensual sexual activities from illegal acts. This condition emphasises that sexual activities must entail voluntary, informed consent, so aligning with broader human rights standards of personal autonomy and the ability to make uncoerced choices. The study endeavours to provide a comparative examination of the legal framework concerning 'consent' in the UK and Sri Lanka, while critically assessing the strength of the current laws. Sexual Offences Act of 2003 in the UK employs a nuanced approach, whereas Sections 363 and 364 of the Penal Code of Sri Lanka are restricted in scope. The study reveals that UK and Sri Lankan legislation possess core similarities regarding 'consent' in sexual offences, however they diverge considerably in their different scopes. The paper examines the vitiating factors of 'consent' in detail, identifying capacity to consent, intoxication, regulations concerning minors and vulnerable individuals, such as those with mental disorders, and instances of deception as recognised by law as undermining the element of 'consent' and impacting the Defendant's culpability, despite variations in the scope addressed by different legal statutes. While the Penal Code has several useful provisions, Sri Lankan law comparably has weaker statutory safeguards and problematic exclusions. The paper concludes by suggesting that Sri Lanka needs comprehensive changes that prioritise continuous consent, establish presumptions, and recognise incapacitating situations like unconsciousness and intoxication to minimise these gaps.

Keywords: Consent in Sexual Offences; Vitiating Circumstances for 'Consent', Rape, Sexual Offences

1. Introduction

Consent is a central element in the sexual offences, serving as a critical determinant in distinguishing consensual sexual acts from criminal offenses. Both the United Kingdom (hereinafter UK) and Sri Lanka recognize the absence of consent as an essential element in most

sexual offences except in the cases of offences such as statutory rape where lack of consent is virtually irrelevant. This requirement reinforces the principle that sexual acts must involve voluntary, informed agreement thus reflecting the broader human rights norms that stress the importance of personal autonomy and the right to make uncoerced decisions regarding one's body.

Pertinently, UK through its Sexual Offences Act of 2003 and Sri Lanka through the Penal Code (Amendment) Act No. 22 of 1995 has attempted to update and strengthen their laws to suit the requirements of the modern times. Despite those efforts Sri Lankan provisions on 'Rape' has been critiqued for its insufficient acknowledgement of the concept of a woman's consent. For instance, marital rape is acknowledged only under specific conditions, implying that a married woman's consent is disregarded in sexual encounters within the marriage. Moreover, Sri Lankan law is deficient in addressing the consent of a voluntarily intoxicated woman, and suffers from inadequate emphasis in 'force,' with a limited interpretation that would only encompass financial and emotional coercion.¹ In this context, the purpose of this paper is to critically explore the understanding of the requirement of 'consent' in relation to sexual offences in the UK and Sri Lanka with a view to assessing their implications on the prosecution, the complainants of sexual offences and defendants.

Whereas 'Consent' more commonly operates as general exception under the Sri Lankan Penal Code, this paper strives to outline the role of consent as a constituent element of a sexual offences in UK and Sri Lanka. The paper will first discuss 'consent' as a constituent element in Sexual offences under Section 2 of the paper and will examine the definition of the 'consent' in Section 3. It will further evaluate circumstances vitiating consent as envisaged in the UK and Sri Lankan law, covering, capacity to consent, intoxication, provisions relating to minors, persons with unsound mind and deception. Finally, it concludes by advocating for reforms in Sri Lankan law to enhance victim protection and justice.

2. Consent as a constituent element in Sexual Offences: The UK and SL Approach

UK's Sexual Offences Act 2003² introduces a broad range of offences relating to sexual abuse of children as well as non-consensual sexual interactions among adults including rape (Section 1), assault by penetration (Section 2), sexual assault (Section 3), causing a person to engage in a sexual activity without consent (Section 4) etc. In most of these offences, except those relating to children, the fact that the complainant did not consent to the alleged sexual interaction, be it a penetration or any other touching of sexual nature, forms a key ingredient of the offence. In addition, lack of a reasonable belief that the complainant was consenting to the sexual interaction is also key element in the sexual offences in UK. For instance, Section 1 of the Sexual Offences Act 2003 provides that,

¹ Pavithra Rajendran, Butterfly Effects: Women and Criminal Law, 34 Wash. Int'l L.J. 1 (2025). Available at: <https://digitalcommons.law.uw.edu/wilj/vol34/iss2/1> (accessed on 10th June 2025)

² Sexual Offences Act 2003

A person (A) commits rape if

- a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- b) B does not consent to the penetration, and
- c) A does not reasonably believe that B consents.

It can be seen that in the above offence 'consent' forms part of both the *actus reus* (that B does not consent to the penetration) and the *mens rea* (that A does not reasonably believe that B consents) of the offence.

In Sri Lanka too 'lack of consent' is a key ingredient in sexual offences such as rape and grave sexual abuse. For instance, Section 363 of the Penal Code of Sri Lanka³ sets out rape under five specific scenarios, being sexual intercourse without consent even when the woman is his wife and is judicially separated from the man, sexual intercourse with consent where consent has been obtained by use of force or threats or intimidation or by putting her to fear of death or hurt, or while the woman is in detention etc.

Similarly, Section 365B creates the offence of grave sexual abuse and provides that any act done for sexual gratification using genitals or any other part of the human body, or any instrument on any orifice or part of the body of another person, not amounting to rape under Section 363, constitutes grave sexual abuse if it is committed (a) without the consent of the other person; (b) with the consent of the other person where the consent has been obtained by use of force, threat, or intimidation etc.⁴

It is notable that in contrast to the UK law, under the Sri Lanka law consent appears in the relevant crimes only in the form of an *actus reus* element and not in the form of a *mens rea* element, thus also limiting the judicial consideration of the accused's belief in consent.

3. Consent: Definition and Vitiating circumstances: A Critical Analysis

3.1. Definition of Consent

The concept of consent is central to distinguishing consensual sexual acts from criminal offenses under the UK Sexual Offences Act 2003 (SOA 2003). Section 74 sets out the general definition of consent for cases not specifically covered under Sections 75 and 76. Section 74 defines consent as agreement by choice, requiring both freedom and capacity to make that choice, emphasizing voluntary and informed decision-making. This statutory definition highlights the importance of autonomy in determining whether valid consent exists in situations where the presumptions of non-consent do not apply.

³ Penal Code 1883

⁴ Penal Code 1883, Section 365B

Judgements delivered both before and after the introduction of Section 74 of SOA 2003 play a crucial role in interpreting the meaning of 'consent'. In *R v Olugboja*,⁵ the court held the complainant's submission to sexual intercourse, following an earlier rape by the defendant's accomplice did not amount to consent. The Court highlighted that in cases where intercourse takes place after threats not involving violence or fear of it, the jury should be 'directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances, and in particular the events leading up to the act, and her reaction to them showing their impact on her mind'.⁶ In *R v Malone*⁷ it was held that physical resistance is not a prerequisite for proving non-consent.

In *R v Kaitamaki*,⁸ the court highlighted the need for consent to be present throughout the sexual interaction emphasizing that withdrawal of consent during an act renders its continuation unlawful. This ruling emphasizes the importance of mutual agreement and clear communication during sexual encounters, ensuring that individuals have the right to revoke consent at any time. The legal standard set by this case affirms that sexual autonomy must be respected throughout the entire act, preventing scenarios where initial consent is misinterpreted as a blanket permission.

Sections 75 and 76 of SOA 2003 address scenarios where consent is clearly absent, introducing rebuttable and conclusive presumptions of non-consent. Section 75 applies in circumstances where the complainant (C) is in fear of violence, unconscious, or otherwise incapable of consenting, creating a rebuttable presumption that shifts the burden to the defendant to prove consent. Section 76 provides conclusive presumptions in situations involving deception or intentional inducement, where consent is automatically invalidated.

In Sri Lanka, the concept of consent is not defined statutorily, despite its centrality in sexual offence laws. The Penal Code, while detailing offences like rape in Section 363, does not explicitly define consent. Instead, judicial interpretations have been pivotal in shaping the definition of consent in SL. The *Inoka Gallage v Kamal Addararachchi and Another*⁹ case serves as a landmark decision in this regard. Here, the Supreme Court of Sri Lanka emphasized that consent entails voluntary participation, as opposed to mere submission or passive acquiescence. The court adopted the reasoning in *Rao Harnarian v State*,¹⁰ which held that consent requires "*voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.*" The Supreme Court in the above case further notes that a person would lack consent due to extreme youth, unconsciousness or 'idiocy'.¹¹ Thus, it can be argued that despite the lack of a statutory

⁵ *R v Olugboja* [1982] QB 320

⁶ *ibid.*

⁷ *R v Malone* [1998] 2 Cr App R 447

⁸ *Kaitamaki v The Queen* [1985] AC 147.

⁹ *Inoka Gallage v. Kamal Addararachchi and Another* (2002), CA CASE NO. 90/97

¹⁰ *Rao Harnarayan Singh v. State* AIR 1958 P & H 123

¹¹ *Inoka Gallage v. Kamal Addararachchi and Another* (2002), CA CASE NO. 90/97

definition, 'consent' under Sri Lankan law is understood in a way that aligns closely with the principles enshrined in Section 74 of the SOA 2003.

However, Sri Lankan law does not require consent as a continuous requirement through the sexual interaction. The current legal framework focuses primarily on the presence of consent at the initiation of the act, which may fail to protect victims who decide to withdraw consent during intercourse for reasons whatsoever. This approach limits the recognition of sexual autonomy by treating consent as a static agreement, which undermines the right of individuals to change their minds after the sexual act has begun. In situations where a person expresses discomfort or requests to stop during intercourse, the absence of a continuing consent principle leaves victims vulnerable to ongoing sexual violence without legal recourse. Furthermore, this will lead to negating the very essence of consent being voluntary and contradicts with the freedom of the individuals that goes to the root of the human dignity.

3.2. Circumstances where 'Consent' is vitiated

Having examined how 'consent' is defined, this section explores into critically understanding the different circumstances in which consent (although given) could be vitiated.

3.2.1. Capacity to Consent

'*Capacity to Consent*' is one such vital determinant of the validity of consent given. Both UK and Sri Lanka law commonly recognizes the significance of *Capacity to consent* and recognizes certain circumstances as incapacitating circumstances and provide special provisions in relation to consent. In this relation, the circumstances of a complainant at the time of giving consent is crucial in determining whether a complainant had the capacity to consent and this can be seen addressed by the provisions in different degrees.

Accordingly, Section 75 of UK's SOA 2003 enables the court to presume lack of consent and lack of a reasonable belief that the Complainant was consenting in certain circumstances where it is evident that the Complainant would either lack the capacity or the freedom to agree by choice. Thus, in instances of a sexual offences under section 75, it is presumed that the complainant did not provide consent and that the defendant did not reasonably believe consent was given if (a) the conditions specified in subsection (2) were present and (b) the defendant was aware of those conditions, unless compelling evidence to the contrary is presented. The circumstances mentioned in sub-section 2 are;

- at the time of the relevant act or immediately before it, violence was being used against the Complainant or any other person, or Complainant was caused to fear that immediate violence would be used against him or another person,
- at the time of the relevant act
 - Complainant was and Defendant was not in unlawful detention,
 - Complainant was asleep or unconscious,
 - because of a physical disability Complainant was not able communicate consent or lack of consent to the Defendant,

- a substance which was capable of causing or enabling the Complainant to be stupefied or overpowered had been that administered to or caused to be taken by the Complainant, without the Complainant's consent by any person.

Section 75 creates a framework where both the *actus reus* (AR) and *mens rea* (MR) elements related to consent are presumed, incorporating what is often described as a "reverse onus" provision, which shifts the burden of proof to the Defendant. Under this framework, the prosecution does not need to directly prove that the Complainant did not consent or that the Defendant lacked a reasonable belief in consent. Instead, it must demonstrate that one of the circumstances listed in subsection (2) existed and that the Defendant was aware same. Once the prosecution establishes the same, the Defendant should rebut the presumption either by showing that the Complainant did consent or that the Defendant had a reasonable belief in consent. This highlights the non-conclusive nature of the presumption which could compel the court to re-examine the case without reliance on the presumption framework despite it could lightens the prosecution's evidential burden in certain scenarios.

The evidential presumptions established by Section 75 reflect an effort to address scenarios where complainants are particularly vulnerable, ensuring adequate legal recourse in cases where circumstantial evidence strongly indicates a lack of consent. At the same time, the rebuttable nature of these presumptions safeguards the principle of fairness, ensuring that defendants have an avenue to counter the prosecution's case and avoid wrongful convictions. This careful balancing of evidential burdens seeks to protect both complainants' sexual autonomy and defendants' rights within the criminal justice system.

Sri Lankan law too contains special provisions relating to consent in such incapacitating circumstances although it does not have any statutory provisions equivalent to Section 75 of the UK's SOA 2003. Thus, Sections 363 and 365B of the Sri Lankan Penal Code outline specific circumstances in which rape and grave sexual abuse respectively, are committed even if the complainant's consent is present, such as where the woman is in in lawful or unlawful detention, consent is obtained by use of force or intimidation or by threats of detention, or by putting in fear of death or hurt, or when the woman is of unsound mind etc.¹² Thus, it can be argued that in the circumstances mentioned in Section 363 (b) to (e) the SL law conclusively presumes lack of consent or regards consent as irrelevant thereby providing no room for the Defendant to escape liability. It is worthwhile here to note here that while under the UK law the presumptions applicable in incapacitating circumstances are rebuttable, and can be disproved by the defendant, the Sri Lankan provisions appear to be more stringent.

However, under UK's section 75 the rebuttable presumptions recognize a broader range of circumstances than under Sri Lankan law. For instance, under Section 75, the presumptions apply where the Complainant is asleep or unconscious or not able to communicate consent or lack of it due to physical disability. On the contrary, SL provisions are silent about the issue of consent like circumstances. Thus, in such cases, under Sri Lankan law, the prosecution has the burden of proving lack of consent beyond reasonable doubt, which is undoubtedly a challenging task. In

¹² Penal Code 1883 Section 363(b) to (e).

this context, it must also be noted that Sri Lankan law recommends higher penalties where the Complainant is suffering from a physical disability.¹³ However, it is noted that this aggravated sentencing holds little value in light of the difficult burden of proof that the prosecution has to discharge with no special protection offered as in the case of Section 75 of the UK law.

3.2.2. Intoxication

Intoxication is also recognized as an incapacitating circumstance under both Sri Lankan and UK legal provisions. However, on a deeper analysis, the way each jurisdiction approaches intoxication and how it affects consent appears to be different. Thus, in UK, complainants who are involuntarily intoxicated appear to be treated more favourably than those voluntarily intoxicated probably on the premise that involuntarily intoxication can support an inference of lack of consent. Accordingly, the Section 75 presumptions are applicable if, at the time of the sexual activity, a substance capable of stupefying or overpowering had been administered to the Complainant or was caused to be taken by the Complainant without his/her consent by another individual.

Where the complainant's intoxication is voluntary, Section 75 presumptions can only apply if the Complainant was unconscious due to such intoxication, and the SOA 2003 is 'silent on the impact of excessive but voluntary alcohol consumption on the ability to give consent to intercourse'¹⁴. Thus, it appears that in cases of 'excessive but voluntary alcohol consumption', the *actus reus* and *mens rea* elements relating to consent in the relevant sexual offence will have to be proved by the Prosecution beyond reasonable doubt. Therefore, it appears that complainants who are involuntarily intoxicated are favoured than those who have voluntarily intoxicated themselves.

However, UK's law recognizes that the mere fact of intoxication alone cannot negate consent, and that consent is possible even in a state of intoxication. Thus, the presumption of lack of consent that applies in cases of involuntary intoxication is a rebuttable presumption which leaves room for the Defendant to prove that the Complainant consented despite being intoxicated. Furthermore, in *R v Bree*¹⁵, the Court observed that '[i]f, through drink (or for any other reason) the Complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting... However, where the Complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape.'¹⁶ Thus, in the case of intoxication, the focus of UK law is on the Complainant's capacity to consent rather than on the source of intoxication.

In contrast, in Sri Lanka, the distinction between voluntary and involuntary intoxication is less clear. As per Section 363(c) of the Penal Code consent is vitiated if the complainant is intoxicated, provided the substance was administered by the defendant or another person. This provision has been interpreted as referring to cases of involuntary intoxication and consequently been criticized

¹³ Penal Code 1883 Section 364(2)(f)

¹⁴ *R v Bree* [2007] EWCA Crim 804 Para 24.

¹⁵ *R v Bree* [2007] EWCA Crim 804.

¹⁶ *R v Bree* [2007] EWCA Crim 804 Para 34

for being silent on the impact of voluntary intoxication on a Complainant's capacity to consent. It is argued that the Penal code's silence on the issue of voluntary intoxication fails to recognize that a person's capacity for consent can equally be impaired when they are voluntarily intoxicated also.

Although the above provision is generally interpreted referring to cases of involuntary intoxication, the language of the provision is open to alternative interpretations and an argument can be made that the Section may apply in certain cases of voluntary intoxication as well. As seen above the Section requires that the intoxicating substance be administered to the complainant by the defendant or another person. But unlike the UK provision, SL provision does not specify that this administration should be without the consent of the complainant. Voluntary intoxication can exist even where a substance is administered to a complainant by another person, for example where the complainant requests and allows another person to inject drugs to her/him. Therefore, it appears that Section 363(c) of the Penal Code can be applicable even in this type of cases. However, the Section would not become better on this alternative interpretation as it would still fail to protect a complainant who takes/administers the intoxicant themselves.¹⁷

Due to the above-mentioned issues and ambiguities, Sri Lanka needs to reform Section 363(c) to highlight that in cases of intoxication, the decisive factor is whether the complainant had the capacity to consent at the time of the relevant sexual interaction rather than whether the intoxication was voluntary or not.

3.2.3. Minors, Child Marriages & Statutory Rape

The issue of statutory rape and child marriage is deeply intertwined with the legal definitions of consent and the protections afforded to minors in different jurisdictions. In the UK, the age of consent is set at 16 years, meaning that any sexual activity with individuals under this age is classified as statutory rape, regardless of any purported consent from the minor. This legal framework reflects a strong commitment to protecting young individuals from sexual exploitation, as the law unequivocally establishes that minors cannot legally consent to sexual activities. Importantly, the UK legal system does not recognize child marriage as a defence against statutory rape; hence, any sexual relations with minors under 16 are strictly prohibited, irrespective of their marital status. This robust approach is further reinforced by case law, such as *R v. Ali and Ashraf*¹⁸ and *R v. Robinson*,¹⁹ which emphasize that apparent consent may be rendered invalid in cases of coercion or manipulation.

The relevance of *R v. Robinson*²⁰ lies in the recognition of how certain factors, such as coercion or manipulation, can invalidate apparent consent. In *Robinson*, the court clarified that the presence of coercive or exploitative circumstances—whether explicit or implied—can undermine the

¹⁷ Pavithra Rajendran, n(1).

¹⁸ *R v Ali* [2015] EWCA Crim 1279

¹⁹ *R v Robinson* | [2011] EWCA Crim 916

²⁰ *R. v. Robinson*, [1996] 1 SCR 683

autonomy of a vulnerable individual. This reasoning has important implications in the context of child marriages, where young individuals may enter into relationships or comply with sexual activity not through free and informed consent but due to societal, familial, or cultural pressures. Together with *R v. Ali and Ashraf*,²¹ these cases reinforce the principle that genuine consent must be freely given and cannot exist in situations where power imbalances, manipulation, or duress are at play.

In the context of child marriage, these cases emphasize the legal system's priority to safeguard vulnerable individuals by highlighting that consent obtained in such circumstances is inherently questionable. Therefore, the law acknowledges that young or vulnerable individuals may comply with sexual advances not out of genuine consent but due to circumstances that undermine their autonomy, thus emphasizing the importance of ensuring that consent is informed and freely given.

In contrast, Sri Lankan law under the Section 363(e) presents significant challenges regarding the protection of minors from sexual exploitation. While the age of consent is also 16 years, the legal framework includes exceptions for marital rape if the girl is over 12 years old and married to the perpetrator. This creates a troubling loophole that allows for the prosecution of statutory rape cases to be complicated by the existence of child marriages. In such instances, the legal system may fail to adequately protect married minors from sexual violence, as the law does not uniformly classify sexual relations with these individuals as statutory rape. Additionally, the influence of customary laws and religious practices further complicates the landscape, as different communities may permit child marriages under their respective personal laws, leading to inconsistencies in legal protection and enforcement.

The UK's stringent legal standards provide a comprehensive framework that safeguards children from exploitation, ensuring that marriage cannot serve as a justification for statutory rape. In contrast, the legal ambiguities and exceptions present in Sri Lankan law leave young girls vulnerable to sexual violence, undermining their rights and autonomy. By allowing child marriages and failing to prosecute statutory rape effectively, Sri Lankan law not only perpetuates outdated norms but also exposes minors to risks that could be mitigated through stronger legal protections. Thus, the need for reform in Sri Lanka is urgent, aimed at aligning legal standards with contemporary human rights principles and ensuring that all minors receive the protection they deserve against sexual exploitation.

3.2.4. Unsoundness of Mind

Moreover, UK law offers comprehensive safeguards for those with mental disorders, by limiting or nullifying the relevance of consent in such cases. The Mental Capacity Act 2005 provides a robust framework for ensuring that decisions made on behalf of individuals who lack mental capacity are in their best interest. Section 1(2) of the Act specifies that capacity cannot be presumed absent unless there is clear evidence of incapacity. Section 2 further defines 'lack of

²¹ *R v Ali* [2015] EWCA Crim 1279

capacity' as the inability to understand, retain, use, or communicate information necessary to make an informed decision. These provisions ensure that individuals with cognitive impairments are protected from exploitation, with a focus on safeguarding autonomy and dignity while preventing manipulation.

The Sexual Offences Act 2003 goes further by addressing sexual exploitation of vulnerable individuals. Sections 30 to 44 criminalizes sexual activities with a person with a mental disorder impeding consent, inducement to carrying out of any such activity and further criminalizes sexual activities between care workers and individuals in their care, regardless of any apparent consent, recognizing the inherent power imbalance in such relationships.

Section 34 renders consent irrelevant in cases involving persons with mental disorders, ensuring that they are categorically protected from sexual exploitation. Reinforcing these rules, in *R v. C*,²² the court ruled that individuals lacking capacity due to a mental disorder cannot provide valid consent to sexual activity, emphasizing that legitimate consent must be both informed and voluntary. Similarly, in *R v. D*,²³ the court reaffirmed that sexual acts involving individuals without the mental capacity to consent are criminal, regardless of any appearance of agreement. These legal frameworks collectively ensure that power imbalances, vulnerability, and manipulation are accounted for, offering robust protection to those unable to make fully autonomous decisions.

In comparison, Sri Lankan law lacks similarly comprehensive protections for vulnerable individuals, particularly in cases involving mental incapacity or care relationships. The only provision against sexual offences committed against mentally unsound persons is Section 363(c) of the Penal Code. This is because the legal framework in Sri Lanka is primarily focused on non-consensual sexual acts under the Section 363 of the Penal Code but is not designed to explicitly address the issue of capacity in a nuanced way. While provision targeting to criminalize sexual acts, Section 363, itself does not particularly refer to sexual offences committed by individuals in positions of authority—such as public officials or medical staff—the provision stipulating the punishment for sexual offences, Section 364(a) to (g) refers to specific circumstances in which the offence committed is considered to be graver and thereby stipulates more rigorous punishments. Section 364(c) & (f) respectively refers to sexual offences committed by hospital staff and sexual offences committed against a person who is physically or mentally disabled. Although the provisions do not include special prohibitions like in the case of UK, Sri Lankan provisions against sexual activity on mentally unsound persons is not completely without merit. Indeed, existing Sri Lankan law is inadequate with significant gaps found especially when compared to UK law. Thus, it requires a nuanced approach to protect the vulnerable categories in the society from the dangers of sexual offences.

3.2.5. Consent vitiated by Deception

²² *R v C* [2009] UKHL 42

²³ *R v. D* [2013] EWCA Crim 1474

Another significant concern raised in connection with sexual offences is the matter of ‘deception’ which can negate the presence of consent in the engagement of a sexual activity. Section 76 of SOA 2003 contains the conclusive presumptions applicable in cases of deception. The Section provides that if the Defendant intentionally deceived the Complainant regarding the nature or purpose of the act, or that the Defendant impersonated someone personally known to the Complainant, it is conclusively presumed that the Complainant did not consent and that the Defendant had no reasonable belief in the Complainant’s consent. Historical cases such as *R v Flattery*²⁴ and *R v Williams*²⁵ elucidate that fraud concerning the nature of a sexual act can nullify consent. In *Tabassum*,²⁶ for example, consent was obtained under the false pretence of medical examination, leading the Court to decide that the nature of the act had been fundamentally altered, rendering any consent irrelevant. Similarly, in *R v. Jheeta*²⁷, the court examined the complexities of deception not directly related to the act itself but concerning the surrounding circumstances. In this case, the Defendant had deceived the Complainant and pressured her into having sexual intercourse more frequently than she would have done otherwise, the conclusive presumption under Section 76 did not apply because there had been no deception as to the nature or purpose of sexual intercourse.

The UK courts have further held that deception, other than the types of deception falling under the purview of Section 76, too can vitiate consent. Thus, it has been held that consent is vitiated if consent for sexual intercourse is obtained by deceiving the Complainant as to the use of condoms or ejaculation. In *Assange v Swedish Prosecution Authority* ²⁸, it was held that consent was vitiated as the Defendant lied about wearing a condom while in *R(F) v DPP*²⁹ the defendant was held liable as he had lied about intending to withdraw before ejaculation. In *R v Lawrence*³⁰, however, it was held that the Defendant’s deception about having a vasectomy did not vitiate consent. The court distinguished *Lawrence* from *Assange* and *R(F)* on the basis that in the two latter cases deception related to a restriction attached to the act itself whereas in the former case, the condition related to a consequence of the act (risk of pregnancy) but does not change the nature of the act itself.

Moreover, the case of *McNally*³¹ raises further considerations regarding deception (discussed previously) in the context of gender identity. In this case, a girl posed as a boy during online interactions, leading to sexual activity without revealing her true identity. The Court recognized that this form of gender deception significantly impaired the complainant's freedom of choice, thereby questioning the validity of consent. This scenario echoes the notion that any significant deception such as falsely claiming to be HIV-negative, could similarly undermine a complainant’s informed consent, potentially categorizing the act as rape. Collectively, these cases highlight the

²⁴ *R v Flattery* (1877) 2 QBD 410

²⁵ *R v Williams* (1987) 3 [All ER](#) 411

²⁶ *R v Tabassum* [2000] 2 Cr App R 328

²⁷ *R v. Jheeta* [2007] EWCA Crim. 1699

²⁸ *Assange v Swedish Prosecution Authority* [2011] EWHC 2849

²⁹ *R(F) v DPP* [2014] QB 581, [2013] EWHC 945 (Admin)

³⁰ *R v Lawrence* [2020] EWCA Crim 971

³¹ *McNally* [2013] EWCA 1051

importance of clear, unambiguous consent in sexual relations, particularly in the face of deception and mistaken identity, and they demonstrate the evolving legal interpretations of consent within UK law.

Sri Lankan law has a comparable statutory provision in section 363(d) which provides that a man commits rape if he has sexual intercourse with a woman '*with her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is, or believed herself to be, lawfully married*'. However, it must be noted that the Sri Lankan provision is limited in scope than Section 76 SOA 2003 in that Sri Lankan provisions categorically refers to the deception of identity has to be in relation the husband. Thereby, the woman has to believe that the man is her husband but any other deception as to identity is not covered. In UK the Defendant can pretend to be anyone that the Complainant personally knows and it is not necessary for her to believe that it is her husband. This approach of the two laws reflects the different attitudes in the societies relating to sexual relations. While Sri Lanka as a country which holds conservative views about sexual relations expects the woman to have sexual relations only with her lawfully wedded husband and does not regard it as rape if a man pretends to be a woman's lover and has sexual intercourse with her, therefore, such women are not protected under Sec 363(d). However, in the case of UK the deception only needs to be in relation to a person personally known to the Complainant- be it the husband, lover, boyfriend or any one she believes to be sexually engaging with. Thus, UK law has a more liberal approach to sexual relations. Moreover, Sri Lankan provisions are further limited compared to UK, relating to the nature of the act and it applies only to the offence of 'rape'. Thus, it can be argued that under SL law lesser protection is provided to victims of deception as lack of consent has to be proved beyond reasonable doubt in most cases involving deception.

4. Conclusion

In conclusion, this comparative analysis highlights both shared principles and critical differences in the treatment of consent in sexual offenses under UK and Sri Lankan law. The primary divergence lies in the concept of continuous consent, which UK law explicitly recognizes under Section 74 of the Sexual Offences Act 2003. This provision requires consent to be active, voluntary, and ongoing throughout a sexual encounter, underscoring that any withdrawal of consent invalidates the act. Conversely, Sri Lankan law, shaped primarily through judicial interpretation considers consent valid only at the initiation of intercourse, failing to provide protection when consent is withdrawn midway.

A further disparity emerges in incapacitating circumstances that vitiate consent. UK law provides statutory presumptions of non-consent under Sections 75 and 76, covering scenarios such as unconsciousness, physical disability, and deception. It also distinguishes between voluntary and involuntary intoxication, recognizing capacity-based limitations. By contrast, Sri Lankan law under Section 363 lacks such statutory presumptions, requiring the prosecution to prove lack of consent beyond a reasonable doubt in all circumstances. While Sri Lankan law conclusively presumes non-consent when intoxicants are administered by the accused, it remains silent on

self-administered intoxication, creating ambiguity regarding capacity. Furthermore, range of incapacitating circumstances such as sleep and unconsciousness, is not covered under Sri Lanka.

In an overall evaluation, Sri Lankan law may be strict in certain narrow situations but overall offers lesser protection. While acknowledging the presence of some legal provisions under the Penal Code which is of use, Sri Lankan law also suffers from narrower statutory protections and problematic exceptions, including those relating to child marriage and deception. These shortcomings expose vulnerable individuals to exploitation and fall short of international standards that emphasize dignity, autonomy, and informed consent. To address these gaps, Sri Lanka requires comprehensive reforms that prioritize continuous consent, establish presumptions of non-consent, and recognize incapacitating circumstances such as unconsciousness and intoxication. By adopting statutory safeguards similar to those in the UK, Sri Lanka can better protect individuals' sexual autonomy and ensure robust legal protections for those at risk of abuse.

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