

## **Constructive rape.**

Sayak Chaudhuri \*

### **Abstract.**

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The consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Indian Penal Code.<sup>1</sup> Though the courts have agreed with the view, it is important that there is no strait-jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.<sup>2</sup>

The facts in the cases are more or less similar to the extent that they involve a promise of marriage and incident(s) of sexual intercourse between the prosecutrix and the accused. Subsequently the prosecutrix is left in the lurch and thereafter alleges that her consent to the act of sexual intercourse was given on the premise that the accused would marry her later, but the accused did not marry her. In such a situation the prosecution contends that the consent was based on a misconception of fact, and thus will not qualify as consent, and thus, the accused should be punished for the offence of rape as defined in S. 375<sup>3</sup>.

All the high courts and the Supreme Court, except the Bihar high court in one instance,<sup>4</sup> are of the opinion that such a set of facts shall not amount to rape as defined in the code. What the prosecution did in many of the cases, was to read S. 375 along with S. 90 of the code,<sup>5</sup> and thus contend that the consent obtained by

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\* The author is a student of The West Bengal National University of Juridical Sciences, India.

<sup>1</sup> See Ss. 90, 375, 376, I. P. C.

<sup>2</sup> *Uday v. State of Karnataka*, 2003 Cri LJ 1539 (Karnataka), pp. 1545-1546.

<sup>3</sup> Second clause: - "Secondly – Without her consent"

<sup>4</sup> *Saleha Khatoon v. State of Bihar*, 1989 Cri LJ 202 (Patna)

<sup>5</sup> S. 90. Consent known to be given under fear or misconception: - A consent is not such a consent as is intended by any section of this code, if the consent is given by a person under fear of injury, or under misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or  
Consent of insane person. – If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

the accused from the prosecutrix was not a consent, and thus the accused, by virtue of having had sexual intercourse with the prosecutrix without the consent of the latter, had committed the offence of rape.

## Objective

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Women are known to seldom express their thoughts in matters of sexual intimacy overtly. They usually leave it to tacit understanding. Thus consent in these cases is a matter of inference to be drawn from the evidence of previous or contemporaneous acts, conduct and other surrounding circumstances. Thus some amount of resistance may be expected, which may be accounted for by “maiden modesty” even where the women are most anxious for the connection.<sup>6</sup>

Consent or absence of it is generally gathered from the surrounding circumstances.<sup>7</sup> Thus the entire hullabaloo surrounding the consent boils down to the question of the presence or absence of the desire of the prosecutrix to engage in sexual intercourse with the accused, at that point of time. However, for the purposes of qualifying a (subsequently unfulfilled) promise of marriage as a means of obtaining consent by dishonest means or through a misconception of fact, the question to be answered is whether the consent was given *because* marriage was promised; in other words, if the prosecutrix would have refused in the absence of such promise.

It is submitted that provisions as under Ss. 376, 498A, 304B, I. P. C. and 125, Cr. P. C. have become tools in the hands of women. As the burden of proof under these sections lie on the accused to prove himself (or themselves) innocent of the charge framed, many men find themselves at the mercy of the legal system, and the women, protected though they are by the law, institutionally, it leads to an abuse and a misuse of the protective sections. There have been innumerable cases, at the grass-root levels of the judiciary, where a girl, in order to compel the boy to marry her, had resorted to framing charges against him, under Ss. 375/90, whereupon the usual judicial tendency is to look upon the accused as the predator, who used his false charm upon the girl, to fulfil his perverse desires. Though the higher courts, and some of the lower ones, now view these instances as motivated, and prejudiced against the accused, such allegations cause a much greater harm to the image and social reputation, of the accused. Thus, it is felt by the writer, that such tendencies should be minimized, and the courts should look to objectively (and perhaps thus, conclusively) evaluate such claims and adjudicate properly for the interests of justice.

Therefore, this study is an attempt to objectify the evaluation in cases of rape in general, and “promise of marriage and rape” in particular.

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Consent of child. – Unless the contrary appears from the context, if the consent is given by a person under twelve years of age.

<sup>6</sup> *Gopi Shanker v. State of Rajasthan*, 1967 Cri LJ 922 (Raj)

<sup>7</sup> *Vinod Kumar*, 1987 Cri LJ 1541 (MP)

## **Introduction, what is rape.**

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Rape is defined as “the ravishment of a woman, without her consent, by force, fear or fraud”,<sup>8</sup> or as “the carnal knowledge of a woman by force against her will”.<sup>9</sup> It is the act of physically forcing the woman to engage in sexual intercourse, or, intercourse against her will.<sup>10</sup> The Webster’s Dictionary defines “statutory rape” as intercourse with a girl below the age of consent, which varies from 10-18 years.<sup>11</sup> It is the violation of the person of a woman, and has been described as an ‘outrage’ by the Supreme Court.<sup>12</sup> In Indian law, rape comprises sexual intercourse with a woman without her consent or intercourse when she is unable to render consent, because of unsoundness of mind or immaturity.<sup>13</sup> Apparently, *mens reus* is not required.<sup>14</sup> Therefore, at the core of the offence is the lack of consent of the prosecutrix, and the six clauses stipulated in S. 375, I. P. C., enumerate circumstances where consent is lacking.<sup>15</sup>

### Penetration is sufficient to constitute rape

Penetration is necessary and sufficient to constitute rape.<sup>16</sup> Seminal emission is not necessary.<sup>17</sup> Insertion or thrust of male organ between the thighs kept tight, amounts to penetration sufficient to constitute rape.<sup>18</sup> Complete penetration is not necessary, and only a slight penetration is sufficient.<sup>19</sup> Moreover, signs of injury on the body of the prosecutrix are not necessary.<sup>20</sup>

### Evidence of penetration

Medical evidence of semen being present on the clothes of the prosecutrix and/or accused cannot be used for prosecution if actual penetration is not established.<sup>21</sup>

### Burden of proof

The earlier rule was that the *onus probandi* of proving rape lies on prosecution. According to case law, it is for the prosecution to prove that the intercourse was committed without the consent of the woman, and not for the defence to prove that consent was present.<sup>22</sup> However, after the Criminal Law (Amendment) Act of 1983, whereby S. 114A was inserted in the Indian Evidence Act, the courts

<sup>8</sup> Mozley & Whiteley’s Law Dictionary, 7<sup>th</sup> Edition (1962)

<sup>9</sup> Wharton’s Law Lexicon, 14<sup>th</sup> Edition

<sup>10</sup> See: *Concise Oxford Dictionary* (1990), p. 993; *Random House Dictionary* (1972), p. 1094; *Webster’s Encyclopaedic Unabridged Dictionary* (1994), p. 1191

<sup>11</sup> *Webster’s Encyclopaedic Unabridged Dictionary* (1994), p. 1390

<sup>12</sup> *Phul Singh v. State of Haryana*, AIR 1980 SC 249

<sup>13</sup> *Empress v. Thuree Mohun Mythre*, ILR 1918 Cal 49

<sup>14</sup> *Ibid.*

<sup>15</sup> See: R. A. Nelson, Vol. III, p. 3626

<sup>16</sup> See: Explanation, S. 375

<sup>17</sup> *Queen v. Marsden*, 1821 QBD 149. Also see: *Daji Ghadge v. State of Maharashtra*, 1980 Cri LJ 1380 (Bom), p. 1386

<sup>18</sup> *State v. Gobindan*, 1969 Cri LJ 818

<sup>19</sup> See: *N. R. Narayanaswami Pillai*, AIR 1960 Mad 298

<sup>20</sup> *Ghanshyam Misra*, AIR 1957 Ori 78

<sup>21</sup> *Jagannath*, AIR 1952 Raj 153

<sup>22</sup> *Bharat Prabha Ruba*, (1961) 2 GLR 256

generally tend to presume absence of consent at the beginning.<sup>23</sup> Thus where it is proved that sexual intercourse is proved and the question is whether there was consent or not, and she states in her evidence before the court that she did not consent, then it shall be presumed that she did not consent.<sup>24</sup> Thus the burden lies on the defence to prove presence of consent, it is submitted.

First clause – “against her will” and second clause – “without her consent”

The expression “against her will” implies that the act is done notwithstanding the opposition of the woman, who is in full possession of her senses.<sup>25</sup> It must be against her will when it takes place, or, that cessation of genuine resistance at the time of penetration shall not amount to acquiescence.<sup>26</sup> There is however, a distinction between intercourse performed with the person, against her will, and that performed, without her consent. As noted by the High Court of Yangon (then Rangoon), every act done against the will of a person is done without the consent of that person, but every act done without the consent is not necessarily done against the will of the person.<sup>27</sup>

What is consent?<sup>28</sup>

Consent is an act of reason coupled with deliberation, after the mind has weighed the good and evil on each side in a balanced manner, and it denotes an active decision in the mind of the person to permit the doing of the act complained of.<sup>29</sup>

Third, fourth, fifth and sixth clauses

The third, fourth and fifth clauses serve to nullify the consent because of the prosecutrix’s inability to consent, or form a rational decision.<sup>30</sup> The sixth clause nullifies consent because of the prosecutrix’s incapacity to consent arising out of immaturity.<sup>31</sup>

Third clause – “Fear of death or of hurt”

Submission of her body by the prosecutrix, under fear, is not the same as consent.<sup>32</sup>

<sup>23</sup> S. 114A, Indian Evidence Act, 1872, inserted by Criminal Law (Amendment) Act, 1983: - **Presumption as to absence of consent in certain prosecutions for rape.** – In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) of clause (e) of clause (g) of sub-section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and if she states in her evidence before the court that she did not consent, the court shall presume that she not consent.

<sup>24</sup> *Bodhisattwa Gautam v. State*, AIR 1996 SC 922; *State of Punjab v. Gurmit Singh*, AIR 1996 SC 1393

<sup>25</sup> *Rao Harnarain Singh Sheoji Singh v. State of Punjab*, AIR 1958 Pun 133

<sup>26</sup> *Ibid.*

<sup>27</sup> *Khalilur Rehman v. Emperor*, AIR 1933 Rang 98, p. 101. Also see: *Indan Singh v. State of Rajasthan*, 1977 Cri LJ 556 (Raj)

<sup>28</sup> **Note:** - This is the subject of Chapter 2

<sup>29</sup> *Vijayan Pillai alias Babu v. State of Kerala*, 1989 Cri LJ NOC 202

<sup>30</sup> See: “What is Consent?”

<sup>31</sup> See: *Samuel John*, AIR 1935 All 935

<sup>32</sup> *Gopi Shanker v. State of Rajasthan*, AIR 1967 Raj 159; Also see: *Motiram Krishnarao v. State of Madhya Pradesh*, AIR 1955 Nag 121 and *Joseph v. State of Kerala*, 1962 Cri LJ 668

*Gopi Shanker*: - A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be consent as understood by law.<sup>33</sup>

However, to vitiate the consent the threat or fear should be shown to be sufficient to the extent that it coerced the prosecutrix into submission, or giving involuntary consent.<sup>34</sup> But when the prosecutrix engages in sexual intercourse to obtain a favour from the accused,<sup>35</sup> it was held that she agreed to allow intercourse for a price, and thus her consent was valid.<sup>36</sup>

#### Fourth clause – Impersonation as her husband

*Krishnaraj*: - The accused, a married person, performed marriage ceremonies with the prosecutrix and led her to believe that they were legally wedded, and on that basis, she allowed him for intercourse, which went on over a period. The accused was held guilty as her consent was vitiated by misconception of fact as under the 4<sup>th</sup> clause.<sup>37</sup>

#### Fifth clause – Inability to render consent

A woman, who is in a state of insensibility, arising from sleep, liquor, drugs or hypnotism, is incapable of giving her consent; so also a woman who suffers from feebleness of intellect or other defect of mind.<sup>38</sup> A girl lacking in the ability to comprehend the nature of the act and its effect upon her interests may express consent or keep from expressing objection due to disability, but it shall be vitiated by the sole fact that she was, legally, unable to render consent because of her disability.<sup>39</sup>

#### Sixth clause – statutory age<sup>40</sup>

Consent is no defence when the prosecutrix is below the statutory age,<sup>41</sup> but it does not apply when the accused and prosecutrix are husband and wife, where

<sup>33</sup> *Ibid.* Also see: *Harnarain Singh, Supra*; *Bhimrao Harnooji Wanjari v. State of Maharashtra*, 1975 Mah LJ 660

<sup>34</sup> *Sarangthem Ibochouba Singh v. Manipur Administration*, 1972 Cri LJ 395 (Man), p. 398

<sup>35</sup> See: *Ibid.*, where the prosecutrix agreed to engage in intercourse with the accused so that she would not be arrested in pursuance to an arrest warrant, which the accused told her of, but which was fictitious. It is submitted that although it is good in law, at the time of giving consent the prosecutrix did not know whether it was fictitious, and thus her consent was given under misconception of fact, and in order to save herself, under duress, and thus, submitted, it is not a valid consent.

<sup>36</sup> *Ibid.*

<sup>37</sup> *A. Krishnaraj v. State of Mysore*, (1969) 1 Mys LJ 304. Also see: *Kartick Kundu v. State of West Bengal*, 1967 Cri LJ 1411 (Cal)

<sup>38</sup> *Rao Harnarain Singh, Supra.*

<sup>39</sup> *R. v. Fletcher*, (1859) Bell 63, p. 70

<sup>40</sup> *Webster's Encyclopaedic Unabridged Dictionary* (1994), p. 1390

<sup>41</sup> *Re, Anthony*, AIR 1960 Mad 308. Also see: *Baru v. Rakesh*, 1980 All LJ 428, p. 431; *Duli Chand v. State of Ajmer*, AIR 1952 Ajmer 54, where the prosecutrix was 10 years old; *Harpal Singh v. State of Himachal Pradesh*, AIR 1981 SC 361; *Mohiuddin v. Emperor*, AIR 1930 Cal 437, where the prosecutrix was aged 14; *Abdul v. Emperor*, AIR 1932 All 580, p. 581; *Emperor v. Qudrat*, AIR 1939 All 708; *Emperor v. Asadali*, 1929 Cri LJ 12 (Pat); *Pabananda Bennia v. State of Orissa*, (1965) 70 JD 183, where the girl was 16 but

the statutory age is fifteen.<sup>42</sup> The statutory age clause has been included for protecting young girls from premature sexual exploitation, cohabitation and prostitution, as they are unable, by reason of their immaturity, to comprehend the nature of the act and its effects upon their interests.<sup>43</sup> For girls below the statutory age, resistance, like consent, is not of any significance.<sup>44</sup>

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willing party; *Kartick Kundu v. State of West Bengal*, 1967 Cri LJ 1411 (Cal); *Shabir Rashid v. State of Delhi*, 1969 Cri LJ 1282 (Del), where the girl was 13½ years old.

<sup>42</sup> *Empress v. Thuree Mohun Mythre*, ILR 1918 Cal 49

<sup>43</sup> *Ibid.* Also see: *Rao Harnarain Singh*, *Supra*.

<sup>44</sup> *Re, Anthony*, AIR 1960 Mad 308

## What is consent

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### What is consent?

Consent is an act of reason coupled with deliberation, after the mind has weighed the good and evil on each side in a balanced manner, and it denotes an active decision in the mind of the person to permit the doing of the act complained of.<sup>45</sup> A mere act of helpless resignation against inevitable compulsion... or passive submission, when decision-making abilities are affected by fear, duress, desperation, or an inability of comprehension, or of forming a rational opinion of – (a) the nature of the act, and (b) its effects upon her interests, is not a valid consent.<sup>46</sup>

*Gopi Shanker*: - Consent must be an act of reason, accompanied with deliberation, after the mind has weighed, as in a balance, the good and evil on each side with the existing capacity and power to withdraw the assent according to one's will or pleasure.<sup>47</sup>

*Jarnail Singh*: - Consent, that the law requires to negative rape, is free and conscious permission. The act of sexual intercourse must be contemporaneous with the consent.<sup>48</sup>

### Consent withdrawn before the act or given after the act is immaterial

The act of sexual intercourse must be “against her will” or “without her consent” at the time of commission. So consent given but withdrawn before the commission is no consent, and similarly, consent given only after the act, and not before, is not held as consent in law.<sup>49</sup>

### Distinction between submission and consent

Every act done against the will of a person is done without the consent of that person, but every act done without the consent is not necessarily done against the will of the person.<sup>50</sup> Submission by a girl of her body under fear or terror is no consent.<sup>51</sup> Therefore, allowing sexual intercourse out of pressure or coercion does not amount to consent as defined by the courts and as required by the law.

### When consent is presumed to be given

The question of consent is the most important point of consideration in cases of rape. The consent may be explicit or tacit. Cases of express consent are extremely rare, and unless the woman in question is exceptionally depraved, or is a

<sup>45</sup> *Vijayan Pillai alias Babu v. State of Kerala*, 1989 Cri LJ NOC 202

<sup>46</sup> *Harnarain Singh, Supra; Arjan Ram Nawrata Ram v. State of Punjab*, AIR 1960 Pun 303

<sup>47</sup> *Gopi Shanker v. State of Rajasthan*, AIR 1967 Raj 159

<sup>48</sup> *Jarnail Singh v. State of Rajasthan*, AIR 1972 Raj 18

<sup>49</sup> 1 Hawk PC, c. 16, 47; *Empress v. Akbar Kazee*, 1 WR (Cr) 11

<sup>50</sup> See: Chapter 1.1, *Supra*

<sup>51</sup> *Re, Anthony*, AIR 1960 Mad 308

prostitute, it is not in the nature of women to express such explicit consent.<sup>52</sup> In such cases, therefore, consent is a matter of interpreting the conduct of the prosecutrix, before, during and after the act concerned.<sup>53</sup> However, it should be remembered that women possess a natural tendency to simulate reluctance, in keeping with maiden modesty, even when they are “most anxious for the connection”.<sup>54</sup>

*Dharam Dass*: - The prosecutrix stayed with the accused at his house for about a week without disclosing the fact to anybody else, even without being under threat or duress. It was held that she being not a minor, she was a consenting party.<sup>55</sup>

*Biram Soren*: - The prosecutrix did not tell anyone about the accused. It was revealed only after the doctor found that there was profuse bleeding from her private parts and that it was due to intercourse. Moreover, the F. I. R. was also lodged after ten days without any satisfactory explanation, and the prosecutrix being an adult, she was, from the surrounding circumstances,<sup>56</sup> held to be a consenting party.<sup>57</sup>

In *State v. Bharat*, the mother of the prosecutrix came into the house and found the accused and the prosecutrix in close physical juxtaposition and engaged in sexual intercourse. No injuries were found on the body of the prosecutrix to show that there was any resistance. As such the court held that it was no instance of rape.<sup>58</sup>

#### Prolonged cohabitation to raise presumption of consent

In *Nilambar Gouda*, the accused and prosecutrix were in love and they stayed together for a long time without disclosing the fact to anybody. The court held that the prosecutrix had given consent, either explicitly or implied, and thus the facts and circumstance proceed to the inference that there was consent on the part of the prosecutrix.<sup>59</sup>

#### Misconception of fact (promise of marriage) shall not amount to rape<sup>60</sup>

In *Jayanti Rani*, the prosecutrix consented to the act of sexual intercourse on the promise of marriage and continued to indulge in the act till she became pregnant. Subsequently the promise was reneged. The prosecution alleged that the consent was given on a misconception of fact, the fact being the marriage of the prosecutrix to the accused. The court held that such a promise cannot be a

<sup>52</sup> *Gopi Shanker, Supra.*

<sup>53</sup> *Ibid.*

<sup>54</sup> See: *Ibid.*

<sup>55</sup> *State of Himachal Pradesh v. Dharam Dass*, 1922 Cri LJ 1758 (HP)

<sup>56</sup> The term “surrounding circumstances” was used by the court in the case of *Gopi Shanker v. State of Rajasthan*, AIR 1967 Raj 159

<sup>57</sup> *State of West Bengal v. Biram Soren*, 1992 Cri LJ 1666 (Cal)

<sup>58</sup> *State of Madhya Pradesh v. Bharat*, 1992 Cri LJ 3218 (MP)

<sup>59</sup> *Nilambar Gouda v. State of Orissa*, 1982 Cri LJ (NOC) 172 (Ori)

<sup>60</sup> See: Chapter 3



misconception of fact, and continuing to indulge in intercourse until pregnancy, when the girl was scared off, is an act of promiscuity.<sup>61</sup>

Absence of injury on the body of the prosecutrix shall raise presumption of consent

It is the standard judicial opinion that absence of injuries should not raise a presumption of consent.<sup>62</sup> However, when in the instant case the act was committed on rough and uneven ground, it was held that in such case there would be injuries on the body of the prosecutrix if she had tried to resist, not by the assailant, but by thrashing about on the ground. In the absence of injuries in such a case, it was held that the prosecutrix had given consent.<sup>63</sup>

Moreover, if the girl is used to sexual intercourse, and to add to it there are no violence indications, or injuries, it would not raise a presumption, but the inclination would be towards the fact that the prosecutrix had given consent.<sup>64</sup>

Therefore, absence of injuries and inviting conduct on the part of the prosecutrix would tend, in the opinion of the courts, in favour of presence of consent.<sup>65</sup>

Prolonged forcible intercourse shall raise presumption of consent

Prolonged forcible intercourse is not possible without injury on the person of the prosecutrix.<sup>66</sup> This was also the case in *Beli Singh*, where the accused was found with the prosecutrix (married) in a room, where they were engaged in an act of sexual intercourse, claimed as prolonged intercourse. There were no signs of injury on the body of the prosecutrix, and the court held that there was consent on the part of the woman, and the allegation of rape was because the woman only wanted to maintain the sanctity of her reputation.<sup>67</sup>

When consent held as non-consent

Consent given by intoxicated woman is no consent

Where the accused made the prosecutrix consume alcohol, and when she was drunk, committed intercourse upon her, he was held to have committed the act of rape upon her.<sup>68</sup>

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<sup>61</sup> *Jayanti Rani Panda v. State of West Bengal*, 1984 Cri LJ 1535 (Cal). Also see: *A Quinelo alias Robert Fernandes v. State of Maharashtra*, 2002 Cri LJ 3007 (Bom); *Juntu Das v. State of Assam*, 2003 Cri LJ 1411 (Gau). If a full grown woman consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity on her part and not an act induced by misconception of fact.

<sup>62</sup> *Indan Singh v. State of Rajasthan*, 1977 Cri LJ 556 (Raj)

<sup>63</sup> *Ibid.*, p. 559

<sup>64</sup> See: *Abdullah v. State*, 1974 All Cr C 34

<sup>65</sup> See: *Sudharshan v. State*, 1958 MPLJ (Notes) 120; *Jhalkan v. State*, 1959 MPLJ (Notes) 196; *Amir-uddin v. Emperor*, 1925 Cri LJ 1200; *Nasrullah v. Emperor*, 1935 Cri LJ 498

<sup>66</sup> *Jaideep Singh v. State*, 1953 Raj LW 243

<sup>67</sup> *Beli Singh v. Emperor*, 1927 Lah 858 (1)

<sup>68</sup> *Camplin*, (1845) 1 Cox 220; *Ryan*, (1846) 2 Cox 115

Consent given under fear, is no consent

The accused went with the prosecutrix in order to offer prayers to a deity. Thereafter they stayed at a dharamshala and the accused, in the night, engaged in sexual intercourse with the prosecutrix, threatening her that the police were nearby, and on her refusal, she might come to harm. It was held that her consent was obtained under fear, and thus, not a consent at all.<sup>69</sup>

Consent given under promise of marriage<sup>70</sup>

There are divergent opinions on this aspect of rape law. In most cases the courts have held, where the facts comprised a promise of marriage and consent to intercourse, that the consent *should not be deemed to be given on the promise*, and thus, the consent being valid in law, should be allowed to prevail and the accused allowed to be acquitted. However, there were cases like *Dayaram v. State of Madhya Pradesh*,<sup>71</sup> *Saleha Khatoon v. State of Bihar*<sup>72</sup> and *Bodhisattwa Gautam v. State*,<sup>73</sup> where the respective courts have observed such a consent, or a consent given under such conditions and circumstances as circumscribed in the above situations, to be consent, given under misconception of fact, and indeed in some of the cases section 90 of the Penal Code was brought in, to extend the definition of consent beyond the restrictive interpretations thereof included in Ss. 375 & 376, and in the above-mentioned cases the courts preferred to note such consent as given under misconception of fact, to be, vide S. 90 of the Code, to be void insofar as consent for the offence of rape is required to be. The purpose of such decisions have been to extend the meaning of 'consent' as required in the clauses, concerned, of and in the sections that pertain to rape, in the Code, as not only consent according to the restrictive interpretation, but also that consent given under misconception of fact, and thus, S. 90, may also be included as an explanation to the term 'consent' to the provisions in Ss. 375 & 376, it is submitted herein.

Consent given under the belief that the man was her husband, is no consent (for the man)

If the consent is given under the impression that the ravisher was the husband, while it is not so, the consent becomes non-functional and thus, vitiated, and therefore the offence of rape is made out.<sup>74</sup>

Consent given by girl below 16 is no consent in law

When the girl is below 16 years of age the question of consent shall not arise from the very beginning.<sup>75</sup> Even when the girl had given consent, but by the very fact that consent, given by a girl below the age of 16, is not recognised in law, the

<sup>69</sup> *State of Orissa v. Gangadhar Behuria*, 1992 Cri LJ 3814

<sup>70</sup> See Chapter 3

<sup>71</sup> 1992 Cri LJ 3154 (MP)

<sup>72</sup> 1989 Cri LJ 202 (Pat)

<sup>73</sup> AIR 1996 SC 922

<sup>74</sup> *Tukaram v. State of Maharashtra*, AIR 1979 SC 185, p. 189

<sup>75</sup> See: 1929 Cri LJ 12; *Duli Chand v. State*, 1952 Cri LJ 1575

consent shall be held as though the girl had not given any consent.<sup>76</sup> As a matter of course, when consent is not claimed by the defence, the age of the girl becomes immaterial.<sup>77</sup>

#### Consent to be gathered from the surrounding circumstances

In *Babu*, the prosecutrix was taken by the accused, alone, to a forest where she was kept all night without, and it gave rise to presumption of absence of consent.<sup>78</sup> Where a girl is physically restrained by holding her hands behind her back, above her head, or she is pinned down, it shall naturally suggest that the girl tried to resist, and as such shall give rise to presumption of non-consent.<sup>79</sup> Where the prosecutrix and her cousin sister, were found immediately after the incident, crying together, it would rule out the possibility of her consent.<sup>80</sup>

#### Consent given by woman of unsound mind is of no avail

Where a man engaged in intercourse with an imbecile woman, the court held that there was no consent as the woman was incapable of giving consent. As she could not give consent, there was no consent given, and the act, as such, amounted to rape.<sup>81</sup> But it must be proved that there was – (a) penetration, and (b) that it was without the consent of the woman.<sup>82</sup> If the woman is unable to give consent, therefore, there is no consent, and thus the act should amount to rape.<sup>83</sup>

#### Sleeping person can never consent

Where the accused engaged in intercourse with the prosecutrix in her sleep, it was held that there was no consent on her part.<sup>84</sup>

#### Fiduciary relationship to mitigate consent

Where the accused was almost like a father figure to the prosecutrix, and he induced her to travel with him on the pretext that her father was ill and she was required to visit him, and en route engaged in sexual intercourse, it was held that her consent, if any, was out of inability to object because of the fiduciary relationship between the prosecutrix and accused, and as such, her true consent was lacking therein.<sup>85</sup>

#### Presumption of absence of consent

Unless the women are prostitutes or otherwise depraved, they tend to refrain from openly expressing their willingness, and so the consent is expressed through subtler methods and generally is implied rather than overt.<sup>86</sup> Therefore, consent

<sup>76</sup> *Samuel John*, AIR 1935 All 935

<sup>77</sup> *Kamakhya Prasad v. State*, AIR 1957 Ass 39

<sup>78</sup> *Babu*, 1984 Cri LJ (NOC) 74 (Raj)

<sup>79</sup> *Vinod Kumar*, 1987 Cri LJ 1541 (MP)

<sup>80</sup> *Ibid.*

<sup>81</sup> *Fletcher*, (1859) 8 Cox 131; *Pressy*, (1867) 10 Cox 635

<sup>82</sup> *Fletcher*, (1866) LR 1 CCR 39

<sup>83</sup> *Baratt*, (1873) LR 2 CCR 81; *Ryan*, (1846) 2 Cox 115

<sup>84</sup> *Mayers*, (1872) 12 Cox 311; *Young*, (1878) 14 Cox 114

<sup>85</sup> *Gajanand Maganlal Mehta v. State of Gujarat*, 1987 Cri LJ 374 (Guj)

<sup>86</sup> *Bhonri v. State*, (1953) 4 Raj LW 225

of the lack of it should be gathered from the surrounding circumstances.<sup>87</sup> Where the prosecutrix was taken to a forest and kept there the whole night it was presumed that there was no consent.<sup>88</sup> Where the girl was overpowered by another person by pinning her down and holding her hands, it was presumed that she gave no consent.<sup>89</sup> When the prosecutrix and her cousin sister, who was with her at the time of the incident, were found crying together immediately after the incident, it was again presumed that she didn't give any consent.<sup>90</sup>

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<sup>87</sup> *Gopi Shanker v. State of Rajasthan*, AIR 1967 Raj 159

<sup>88</sup> *Babu v. State*, 1984 Cri LJ (NOC) 74 (Raj)

<sup>89</sup> *Vinod Kumar v. State of M. P.*, 1987 Cri LJ 1541 (MP)

<sup>90</sup> *Ibid.*

## **How is consent given on a promise of marriage construed**

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By and large courts have held that consent given on the basis of a subsequently unfulfilled promise of marriage, even if the promise is made fraudulently, doesn't amount to rape. For example, in *Uday*<sup>91</sup> it was argued by the prosecution that consent was obtained on misconception of fact.<sup>92</sup> The court observed that Indian courts have generally accepted that helpless resignation before inevitable compulsion,<sup>93</sup> doesn't amount to consent. However, in *Jayanti Rani Panda*<sup>94</sup> the court observed –

*“Failure to keep the promise at a future uncertain date... does not always amount to misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance”.*

However, it is submitted that the court misinterpreted the thrust of the prosecution's argument when it said that if an adult girl consents to an act of intercourse and continues till she conceives it is an act of promiscuity and not of innocence being cheated;<sup>95</sup> the defence of section 90 cannot be used by her to make someone else liable.

In *Deelip Singh v. State of Bihar*,<sup>96</sup> the accused was charged with rape under section 376, I. P. C. The prosecution's story comprised that the accused raped the prosecutrix, whereafter he promised to marry her and believing on this promise of his, she agreed to indulge in sexual relations with him. She conceived, and informed her parents of the fact. She still continued in the company of the accused, and her parents and others were under the impression that the accused would marry her, but suddenly he started avoiding her and ultimately his father took him out of the village to an undisclosed location to thwart off pressure for the marriage. The story did not stand test and the facts as emerged in the supreme court were that the accused and the prosecutrix used to know each other for a long time. Apparently, there was no forceful rape, but it appeared from the contentions that the prosecutrix had voluntarily indulged in sexual activity with the accused. It was further contended by the prosecution that the accused had

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<sup>91</sup> AIR 2003 SC 1639

<sup>92</sup> Section 90, I. P. C. **Consent known to be given under fear or misconception.** *A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or*

**Consent of insane person** – *if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or*  
**Consent of child** – *unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age*

<sup>93</sup> *Harnarain Singh*, 1958 Cri LJ 563, para. 7

<sup>94</sup> 1984 Cri LJ 1535 (Cal)

<sup>95</sup> *Ibid.*, para. 7

<sup>96</sup> Cri. Appeal No. 44/2004, date of judgement, 3/11/2004. Judgement text available with Judis, at <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=26590>

promised to marry her and on this promise she had consented to the intercourse. The court held that there was voluntary participation and the issue is whether her consent was based on the promise of marriage. It was decided that the prosecutrix herself had doubts to the possibility of marriage as she frequently had misgivings about whether they would be able to get married notwithstanding their caste distinctions. Moreover, she had also admitted that the accused later on was eager to marry her, but due to his father, could not. The court drew a parallel with *Uday (Supra.)* and held that at the most the accused could be liable for breach of contract<sup>97</sup> under civil law, but not for rape or false promise...<sup>98</sup> *Abhay Pradhan v. State of West Bengal*,<sup>99</sup> was a case of opposition from parents. The prosecutrix worked as maid in the accused's house. One day the accused forcibly got intimate with her and raped her after forcing her on the bed and gagging her mouth with cloth, and assured her that he would marry her, because of which (the assurance) she agreed to indulge in sexual activity every so often. When she conceived he gave her some medication that destroyed her foetus. Later on when the accused produced her before his parents both of them were expelled from the house, and the prosecutrix later learnt that the accused's parents were trying to arrange his marriage somewhere else. The court observed that the case is not within S. 90 as the accused intended to marry her but the same wasn't brought to fruition on account of such vehement opposition on the part of his parents.<sup>100</sup>

Similarly in *Gurmit Singh*<sup>101</sup> the victim was a school-girl who had her exams that day. She was abducted *en route* to her exam centre, was raped and dropped near her school the following morning, whereupon she appeared for that day's paper and only after returning home did she tell anyone. Further, she couldn't identify the car in which she was transported... so the trial court essentially disbelieved her story, and also called her character into question. The supreme court agreed that there had been an offence, but as the cause of action was more than 11 years ago, the accuseds weren't involved in any other offence thereafter, and in the likelihood that they had settled down in life by the time the judgement was delivered, the court reduced the punishment to five years' rigorous imprisonment and fine of 5,000 rupees.

However, in *Saleha Khatoon*,<sup>102</sup> where it also was a case of consent to sexual intercourse being obtained by practising fraud or deception, the court considered the issue that the woman had given consent because she was promised marriage;

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<sup>97</sup> The advantages of this approach is that it may be used to impose punitive damages on the accused, which would serve as a deterrent.

<sup>98</sup> But the accused himself agreed to give Rs. 50,000/- as compensation which the court forwarded to the Chief J. M. of the prosecutrix's area, with elaborate instructions to pay 10,000 to the prosecutrix and save the rest for the child born out of the incident. The prosecutrix being married the learned Judge also allowed for withdrawal on account of other monetary requirements of the prosecutrix and/or daughter, from the C. J. J.

<sup>99</sup> 1999 Cri LJ 3534

<sup>100</sup> See *Deelip Singh, Supra.*, where distinction between "false promise" and "breach of [genuine] promise" was made

<sup>101</sup> AIR 1996 SC 1393

<sup>102</sup> *Saleha Khatoon v. State of Bihar*, 1989 Cri LJ 202 (Pat), Para. 8

that is there was no such promise or assurance, she wouldn't in all probability have given consent, which led the court to find the accused guilty of rape under Section 376/90, I. P. C.

The Supreme Court outlines the reasoning for all the cases except *Gurmit Singh*<sup>103</sup> and *Saleha Khatoon*,<sup>104</sup> in Para. 25 of *Uday v. State of Karnataka*.<sup>105</sup> It said that in most of these cases the accused and the prosecutrix are in love. They indulge in sexual activity, not out of a sudden promise, but because they are in love and thus wish to embark upon a physical relationship. Under these circumstances, in many cases, the prosecutrix had known that marriage between them would be exceedingly difficult, if not impossible. Such was the case in *Uday (Ibid.)* and *Deelip Singh (Supra.)*. In such a situation it would not be proper to lay the whole blame on the accused's shoulder, thereby absolving the prosecutrix, who is not without any active role in the drama, of all guilt. Thus the courts have on various instances, taken minutely divergent points, but generally accepted as the incident to be a non-offence, under rape.

### **Pointers for the court**

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The researcher found that there were typically two contentions against the accused, by the prosecution. Firstly, the accused had falsely induced her to give consent, on a false promise. Secondly, the accused had not performed his promise. Under this circumstance, the issue is whether the act of intercourse becomes an offence at the time of commission, at the time of taking consent or when the accused is called upon to perform the promise, but breaches it. Since the offence of rape is essentially of penetration without the girl's consent, her wish and other clauses in Section 375, I. P. C. being essentially want of true and valid consent, it is the submission of the researcher that the main act is committed at the time of penetration. But is the penetration an offence in itself? It is submitted, that at the time of penetration the act is not an offence as the girl had expressed a consent that was valid at the time of penetration. Thus, the act is not rape.

But the Supreme Court in *Uday (Supra.)* ruled that the meaning of "consent" extends to beyond Section 375, and Section 90 "misconception" is very well included in the meaning of "absence of consent". But the Supreme Court in these cases decided not to convict as the prosecutrix had consented not because of the promise but because she was in love with the accused and she had wanted to enjoy the forbidden pleasures of intercourse. However, it is not to say that sexual intercourse given on a false promise of marriage shall not be rape; according to the Supreme Court, it may.

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<sup>103</sup> *Supra.*, n. 94

<sup>104</sup> *Supra.*, n. 95

<sup>105</sup> AIR 2003 SC 1639, p. 1647, Para. 25

The researcher found the following issues that were pertinent in the above study

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- (a) Was there a promise?
- (b) Was the promise in good faith or was it only to secure the consent?
- (c) Did the girl sincerely believe that she and the boy would be able to get married in the near future?
- (d) Did the boy have an honest belief that the girl was consenting only upon his promise?
- (e) Was the girl's consent only because of the marriage?

Submitted, that if the last issue is answered in the affirmative, then the accused should be convicted, but in other cases, the court would have to make a careful study of the relation between the two and the surrounding circumstances, along with the above issues, to arrive at a reasonable answer.