

# ● PROMISE TO MARRY AND RAPE: A PLEA FOR CONSTRUCTING NON - CONSENT



**Akhilendra Kumar Pandey\***

## **Abstract**

*Rape violates the dignity and privacy of woman. The element of 'non - consent' on the part of the woman is central to rape. This non - consent is shown by the fact that woman resisted the sexual intercourse. The provisions relating to consent contained in the Indian Penal Code is in negative terms and the existing law of consent, reflecting the masculine perception of non - consent, is based on element of coercion or mistake along with the knowledge on the part of the accused that such consent was given either because of fear of injury or mistake. It does not represent the woman's experience and understanding. Where the accused made promise to marry and obtained the consent of woman for sexual intercourse and subsequently refused to marry her, may or may not be an offence of rape depending upon the fact whether the accused from the inception did not intend to marry or because of subsequent eventualities he could not marry. This approach of defining 'non - consent' does not adequately represent the women's perception particularly when her capacity to consent is emotionally overpowered by the promise of marriage. An attempt has been made to incorporate woman's understanding about non - consent in such cases and, in order to do justice it is desirable that the institutionalized sources of women oppression be eliminated.*

## **Key words**

*Rape - Promise to marry - Sexual intercourse - Refusal to marry - Consent or non - consent -- Sexual intercourse by deceitfully inducing the woman to believe marriage - concealment of fact - offence relating to marriage or rape.*

## **I. Introduction**

Rape is not only a sexual crime rather it involves aggression leading to oppression of woman. It leaves the woman under state of psychological trauma besides the social stigma. The social stigma which the victim of rape carries with her during entire life has an irreversible devastating effect. Such a woman needs the protection of law. Unfortunately, the social and legal setup does not address this problem effectively. Rape is defined in such a manner that the non - consent on the part of woman is an essential ingredient. Usually, the fact of non - consent is legally established when the woman resists against the sexual intercourse. There might be a situation where a woman submits herself on the basis of a false promise of marriage made by the man who subsequently denies marrying the woman. Law does not consider such act to be in its ambit unless it could also be established by the prosecution that such a man had no intention of marrying her since the inception of the promise. In other words, it

\* Associate Professor, Faculty of Law, Banaras Hindu University, Varanasi - 221005



is established at the time of promise to marry, the accused did not intend to marry. The purpose of this paper is to discuss the response of law in those cases where woman submits herself on a promise to marry and thereafter the man does not keep the promise and refuses to marry her. The woman under such circumstances, though feels her dignity to be outraged by being cheated but the law refuses to hold the man criminally responsible for committing the offence of rape on the ground that such an act was done with the consent of woman and the consent of the victim exculpates the accused.

## II. Iris Marion Young's Version on Oppression

Women are not born but they are made. While sex is biologically determined, the gender is a social and cultural construct. Law is one of the cultural instruments. Through its precepts and instrumentalities, law constructs woman. Feminism is political, philosophical and cultural concept. It is a method - a technique of objectivity in epistemological, psychological and social as well as legal terms.<sup>1</sup> Though there are many versions of legal feminism but all claim that the modern jurisprudence is 'masculine'. The values, the dangers, the fundamental contradictions that characterize women's lives are not reflected at any level of legal doctrines and principles.<sup>2</sup> Law permits terrorization and sexualization of female body, the feminists claim.<sup>3</sup>

The liberal feminists lay emphasis on 'sameness' and argue that women are rights bearing autonomous human beings and thus they are no different from men. Such an assimilative theory of equality is likely to give benefit to women only if they acted like men. But there are other feminists who have focused on 'difference'. Detecting a "different voice" Gilligan has drawn attention to a contrast between 'ethics of justice and right' and 'ethics of care and relationship'. This distinction is gender related; while the former category of ethics is associated with male thinking processes and the latter is with female thinking process.<sup>4</sup> Young suggests that 'social justice means the elimination of institutionalized domination and oppression'.<sup>5</sup> According to Young, there are five faces of oppression: exploitation marginalization, powerlessness, cultural imperialism and violence. While exploitation, marginalization and powerlessness are matter concerning the power in relation to others, cultural imperialism is experience, values, goals and culture of dominant group as norm creating and violence is a social practice depriving the oppressed of freedom and dignity.

In order to understand exploitation, Young substitutes 'classes' of Marx with 'gender'. The central insight expressed in the concept of exploitation is that this oppression occurs through a steady process of transfer of the results of the labour of one social group to benefit another. The injustice of class division does not consist only in the distributive fact that some people have great wealth while most people have little. Exploitation, in fact, according to Young, enacts structural relation between social

<sup>1</sup> Ann Scale, *The Emergence of Feminist Jurisprudence: An Essay* (1986) Yale L J 1373

<sup>2</sup> *Jurisprudence and Gender* (1988) 55 Uni. Chi L. Rev. 1

<sup>3</sup> See, Marry Joe Frug, *A Postmodern Feminist Legal Manifesto (Unfinished Draft)* (1992) 105 Harv. L.Rev. 1045

<sup>4</sup> Gilligan, Carol, In *A Different Voice* (1982) as discussed in Freeman, M. D. A., *Lloyd's Introduction to Jurisprudence*, 7th Edn. (2001) Sweet & Maxwell, London.

<sup>5</sup> Young, Iris Marion, *Justice and the Politics of Difference*, (1990) Princeton University Press, New Jersey, at 15





groups. The injustices of exploitation cannot be eliminated by redistribution of goods because as long as institutionalized practices and structural relations remain unaltered, the process of transfer will re - create an unequal distribution of benefits. To bring justice where there is exploitation requires reorganization of institutions and practice of decision making.<sup>6</sup> To Young marginalization is, perhaps, the most dangerous form of oppression. A whole category of people is expelled from useful participation in social life and, thus, potentially subjected to severe material deprivation and even extermination. Material deprivation may be addressed by redistributive social policies but having shelter and food may not eliminate marginalization. One may have sufficient means to live a comfortable life but remain oppressed, because injustice in the form of marginalization would remain to exist in the form of uselessness, boredom and lack of self respect.<sup>7</sup> Powerlessness is such a social situation that allows persons to develop little opportunity to develop and exercise skills. Powerlessness is lack of autonomy, little creativity or judgment. Powerlessness lacks the authority, status and sense of self.<sup>8</sup> Cultural imperialism is experiencing the dominant meanings of society held by one group and the other group is compelled to accept such meaning as valid. It is universalization of experience and meaning held by dominant group and to establish these experiences as norms and, consequently the difference between man and woman is reconstructed. Cultural imperialism involves the paradox of experiencing oneself as invisible at the same time that one is marked out as different.<sup>9</sup> Violence is a systemic social practice which constantly puts the oppressed in state of fear and thereby deprives them of their freedom and dignity.<sup>10</sup> All these forms of oppression, particularly oppression by cultural imperialism, finds sizeable space in our existing law defining non - consent under the Penal Code.

### III. Meaning of Consent and Non - Consent

Sexual intercourse without consent or against will of the woman creates criminal liability. On various occasion the courts have referred to legal dictionaries in order to cull out the meaning of word 'consent' Consent is, in fact, 'an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side.'<sup>11</sup> According to Jowitt, 'consent supposes three things a physical power, a mental power and a free and serious use of them. Hence, it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of mind.'<sup>12</sup> According to Black's law Dictionary, consent is agreement, approval or permission as to some act or purpose especially given voluntarily by a competent person.<sup>13</sup> The meaning of consent in sexual intercourse, the following idea may be delineated:

adult female understanding of nature and consequences of sexual act must be intelligent understanding to constitute consent...Consent within penal law,

<sup>6</sup> Id. pp. 49-53

<sup>7</sup> Id. at 55

<sup>8</sup> Id. pp. 56 -58

<sup>9</sup> Id. pp. 58 -61

<sup>10</sup> Id. at 62

<sup>11</sup> See, Stroud's Judicial Dictionary of Words and Phrases, 7th Edn. (2005) Vol. I at 509

<sup>12</sup> Jowitt's Dictionary of English Law, 2nd Edn. (1977) Vol. I at 422

<sup>13</sup> Black's Law Dictionary, 9th Edn. (2009) at 346

defining rape, requires exercise of intelligence base on knowledge of its significance and moral quality and there must be a choice between resistance and assent...<sup>14</sup>

In America, to constitute consent adult females understanding of nature and consequences of sexual act must be intelligent understanding is to be established. Consent within penal law, defining rape, thus, requires exercise of intelligence based on knowledge of significance and moral quality and there must be a choice between resistance and consent. In *R. v Day*<sup>15</sup> the Court pointed out that consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in face of inevitable compulsion, non-resistance and passive giving in cannot be deemed to be consent. In view of the meaning given in various dictionaries consent is valid when it is free from force. This meaning may be said to be the meaning given by the dominant group of the society and accepted as a norm for all and which may be regarded as oppressive.

A misrepresentation as regards the intention of the person seeking consent could give rise to the mis - conception of fact. The Madras High Court in *re N. Jaladu*<sup>16</sup> where the accused had obtained the consent of the girl's guardian by falsely representing that the object of taking the girl was for participating in a festival and when the festival was over the accused took the girl to a temple and married there against her will. The question arose whether the guardian gave consent under mis - conception of fact. Holding that the consent was given under the mis - conception of fact, the court observed:

The expression "under a mis - conception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation may be regarded as leading to a mis - conception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) illustrates that a person has a certain intention is treated as a fact. So, the fact which were made to entertain a mis - conception was the fact that the second accused intended the girl to get the girl married... thus if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such person... the effect of Section 90, IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence.<sup>17</sup>

The Bombay High Court in *Parashottam Mahadev v. State*<sup>18</sup> applied the test laid down in *re Jaladu* case<sup>19</sup> held that consent given in pursuant to a false representation that the accused intends to marry could be regarded as consent given under mis - conception of fact. The Punjab High Court in *Rao Harnarain Singh Sheoji Singh v. State*<sup>20</sup> observed that:

there is a difference between consent and submission and every consent involves a submission but converse does not follow and a mere act of submission does not involve consent.

<sup>14</sup> Words and Phrases, Permanent Edition (1951) Vol. 8 A, pp. 217 -218

<sup>15</sup> (1841)173 E R 1026 per Coleridge, J.

<sup>16</sup> ILR (1913) 36 Mad 453. The Supreme Court referred to this judgment in *Pradeep Kumar Verma v. State of Bihar* AIR 2007 SC 3059; See also *Emperor v. Soma* 18 Cri L J 18 (Lah)

<sup>17</sup> ILR (1913) 36 Mad 453 at per Sundara Ayyar, J.

<sup>18</sup> AIR 1963 Bom. 74

<sup>19</sup> Supra

<sup>20</sup> AIR 1957 Punj 123 per Tekchand, J.





The scheme of Section 90 of the Indian Penal Code is couched in negative terminology. In *Deelip Singh v. State of Bihar*<sup>21</sup>, the issue before the court was whether the consent given by a woman believing the man's promise to marry her is a consent to exclude the offence of rape. In this case, the victim and the accused were neighbours and one day the accused forcibly raped her. The accused later on consoled her that he would marry her and consequently she succumbed to entreaties of the accused to have sexual relationship with him. On the promise to marry she had sexual intercourse on several occasions and became pregnant. She disclosed the fact of her pregnancy to the accused but he avoided to marry her. The victim lodged a complaint long after the act of rape. While convicting the accused, the trial court recorded that she was forcibly raped on first occasion and after that incident the accused went on to make false promise to marry her. Under the circumstances, the trial court came to the conclusion that either there was no consent or the consent was involuntary and thus irrespective of age of the victim the offence of rape was committed by the accused. The trial court convicted and the High Court reducing the sentence, maintained the conviction. The Supreme Court acquitting the accused, observed:

The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too should have the knowledge or has reason to believe that the consent was given by victim in consequence of fear of injury or mis - conception of fact. Thus, the second part lays knowledge emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or mis - conception of fact and the court should also be satisfied that the person doing the act, i.e., the alleged offender, is conscious of the fact or should have reason to think that but for fear or mis - conception, the consent would not have been given.<sup>22</sup>

The second limb of Section 90 of the Penal Code requiring knowledge or having reason to believe that the consent was given under fear of injury or mis - conception shows that the law has accepted the meaning given by dominant group and has ignored the woman's experience and understanding on the subject.

#### **IV. Communicative Sexuality: Towards a Probable Solution**

Lack of consent is central to the offence of rape. In criminal justice process the state of mind, conduct, words and action before, during and after the commission of offence, of the victim is vital. The essence of consent is free agreement. Consent incorporates the idea of free and voluntary agreement between two parties engaged in sexual intercourse which means that sexual encounter should involve communication of desires, likes and dislikes in absence of force, fraud or coercion. Such an approach would afford people's respect of autonomy and sexual integrity.

The idea of communicative sexuality is based on mutuality which involves agreement and exchange. The communicative sexuality is not based on the notion that one of the partners of sexual intercourse desires sex and other simply submits to it. Instead, it is based on the conception that both the partners of sexual intercourse desire the

<sup>21</sup> AIR 2005 SC 203

<sup>22</sup> Id at 205-206 per Venkatarama Reddi, J.

act and also communicate their desire as well. Lois Pineau, one of the proponents of communicative sexuality argues:

Communicative sexual partners will not overwhelm each other with the barrage of their desire . . . a person engaged in communicative sexuality will be most concerned with the mutuality of desires.<sup>23</sup>

It is said that with the introduction of 'communicative sexuality' and the concept of 'free agreement' there would be a significant change in the trial of rape cases as it intends to shift the focus of rape trial away from complainant to the action of the accused. The focus would shift from the conduct of prosecutrix's whether she resisted or not, or whether or not she was in fearful or intimidated state of mind to the accused what action did the accused take to ensure that there was free agreement to sexual intercourse. The principle of communicative sexuality may to some extent answer the problem of non - consent in the problem at hand. There may not be doubt that the communicative sexuality will shift the attention towards the action etc. of the accused from that of the victim but it may fail to take into account of how consent is constructed in rape cases and how the behaviour of woman, her body and language are used to undermine her claim of non - consent. Such an approach of communicative sexuality may be free from doubt where the woman receives injury and her deposition is required to be corroborated by other evidences but in other cases problem may remain unresolved. The complainant's behaviour will continue to be the subject of detailed scrutiny by the defence in order to ascertain whether there was agreement, the nature and content of that agreement and whether there was any ambiguity in what the complainant said and did. Thus, the offence of rape so long it is defined on the basis of non - consent will continue to focus on the victim's state of mind and the consent obtained by the accused for sexual intercourse on the promise of marriage will continue to be constructed against the woman. Therefore, there is a need to recognize the difference that the consent given by a woman to the accused for sexual intercourse under a promise to marry cannot be compared with that of other consent required elsewhere in the criminal law because the promise to marry is such a promise to a women in general that they are swayed by emotion and the reasoning capacity is eclipsed for some time and therefore consent which is given subsequent upon the promise of marriage may not be treated as a valid consent for the purpose.

## **V. False Promise to Marry and Breach of the Promise to Marry: Judicial Perception**

In cases where the woman has given consent for sexual intercourse on the basis of promise to marry, the courts have drawn distinction between false promise to marry and mere breach of promise to marry. There is a clear distinction between rape and consensual sex and in a case where there is promise of marriage, the Court must very carefully examine whether the accused had actually wanted to marry the victim, or had made mal fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between mere breach of a promise and not fulfilling a false promise. In *Deepak Gulati v. State of Haryana*<sup>24</sup> the appellant and the prosecutrix, aged about 19 years and student of plus 2 had known each other for some time. The appellant had

<sup>23</sup> Pineau, Lois, *Date Rape: A Feminist Analysis* (1989) 8 Law & Philosophy 217 at 236 as referred by Philip N.S. Rumney in his article *The Review of Sex Offences and Rape Reform: Another False Dawn* (2001) 64 Mod. L. R. 890 at 899

<sup>24</sup> AIR 2013 SC 2071





been meeting the prosecutrix in an attempt to develop intimacy with her. The appellant induced her to go with him to get married and she agreed. The accused had sexual intercourse against her wishes and the appellant while staying with the relatives for 3-4 days committed rape upon her and the prosecutrix was, ultimately, thrown out by the appellant. Even thereafter the appellant allured her to go with him for marriage and to which she agreed to accompany the appellant to get married in the court. The father of the prosecutrix lodged an FIR with the police under Sections 365 and 366 of the Indian Penal Code. However, after the statement of the prosecutrix charges under sections 365 and 376 IPC were framed against the accused. The Court of Sessions convicted the appellant. Aggrieved by the judgment, the appellant preferred appeal in the High Court which was dismissed. The prosecutrix had deposed that the appellant had asked her to have physical relationship with him but she had not agreed to do so before marriage. At the time of sexual intercourse she neither raised any objection nor any hue and cry. The prosecutrix did not mention this incident to any one instead accompanied the appellant to his relative and stayed there for 3-4 days. She continued to stay with the relatives of the appellants and was raped there. The appellant continued to postpone their marriage on one pretext or the other. On one day, ultimately, she was thrown out of the house. From the fact it is clear that the prosecutrix had never raised any grievance and, in fact, had submitted herself to the will of the appellant possibly in lieu of his promise to marry her. The question involved was whether her consent was obtained on a false promise of marriage. The court observed:

There must be adequate evidence to show that at the relevant time, i.e., at initial stage itself, the accused had no intention to whatsoever of keeping his promise to marry the victim.<sup>25</sup>

Under Section 90 of the Penal Code the consent under the circumstances cannot be said to be hit by mis - conception of fact, the court held. The Court further pointed out that:

There may, of course, be circumstances, when a person having best of intentions is unable to marry the victim owing to various unavoidable circumstances. The failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to mis - conception of fact. In order to come within the meaning of the term 'mis - conception of fact', the fact must have an immediate relevance. Section 90, IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten liability on the other, unless the court is assured of the fact from the very beginning, the accused had never really intended to marry her.<sup>26</sup>

The Supreme Court in *Deepak Gulati case* explaining the consent, observed:

Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and ... the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mal fide motives, and had made a false promise to this effect only to satisfy his lust, as the later falls in the category of cheating or deception.<sup>27</sup>

<sup>25</sup> *Deepak Gulati v. State of Haryana* AIR 2013 SC 2071 at 2077

<sup>26</sup> *Id.* at 2077 per Chauhan B.S., J.

<sup>27</sup> *Id.* at 2076

The court has brought the element of intention in the offence of rape where the accused had sexual intercourse after making a promise to marry the victim. The accused can be convicted for rape only when the intention of the accused was *malafide* and he had clandestine motives. In pointing out the distinction between the mere breach of a promise and not fulfilling a false promise, the Court has emphasized upon at an early stage when the act was done. It has observed:

The court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a cause where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of mis-representation made to her by the accused, or where the accused on account of circumstances, which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so.<sup>28</sup>

In *Deelip Singh v. State of Bihar*,<sup>29</sup> the Court drew a distinction between false and fraudulent promise to marry and mere breach of the promise to marry and awarded damages of Rs. 50,000/- to the victim. In this case, the victim lodged a complaint to the police long after the alleged act of rape and on the date of report the victim was pregnant by six months. However, in this case the court did not find force in the argument that a promise to marry could never amount to mis - conception of fact. It was held that a promise to marry without anything more will not give rise to 'mis - conception of fact'. It needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the fact it is established that at the very inception of making of promise, the accused really did not entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, then consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause secondly.

The court also pointed out that there could be no strait-jacket formula for determining whether consent given by the prosecutrix to sexual intercourse was voluntary, or whether it was given under a mis - conception of fact. Before reaching to a conclusion, while considering a question of consent, the court must in each case consider the evidence before it and the surrounding circumstances.

In *Uday v. State of Karnataka*,<sup>30</sup> the court observed 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 mis - conception of fact. A false promise is not a fact within the meaning of the Code.

In *Pradeep Kumar v. State of Bihar*,<sup>31</sup> the report was lodged alleging that the accused made sexual relationship on a promise that he would marry the informant. The informant was taken to a temple where in presence of deity he accepted her to be his wife and an agreement of marriage was entered into. In the meantime, the accused was to get married with another woman. The accused having later denied the fact of marriage and any physical relationship, the report was lodged and the appellant/ accused was charged, *inter alia*, under Section 376 of the Penal Code. The

<sup>28</sup> Ibid.

<sup>29</sup> AIR 2005 SC 203

<sup>30</sup> AIR 2003 SC 1639

<sup>31</sup> AIR 2007 SC 3059





appellant/accused filed an application for discharge. The trial court rejected the application and observed that the poor victim was put under mis - conception of fact as promise to marry her by the accused and the accused made sexual intercourse with her. The accused had done such act with other girls also. Further, the accused had entered into an agreement for marriage with the victim. From the case diary it was clear that the accused took consent of the victim on a false promise of marriage. Hence, the consent was not with free will or voluntary act. The trial court under the circumstances found that there was sufficient ground for framing charge against the accused. The order of framing of charge was challenged before the High Court and it was rejected on the ground that there was sufficient material against the accused showing his complicity in the crime. On appeal to the Supreme, it was argued on behalf of the accused, first, that he had physical relationships with her consent and, secondly, as she contended that the accused married her in a temple, the question of any offence punishable under Section 376 of the Penal Code did not arise. While it was argued on behalf of the State that prima facie the case was not covered under Section 376 rather it was a case covered under Sections 415 and 493 of the Penal Code, the argument on behalf of the informant was since on the pretext of marriage and by cheating the victim the accused had made physical relationship with her, it could not be said that there was an element of consent and thus Section 376 of the Penal Code was rightly applied.

On the sole testimony of the victim of rape where promise to marry has been an element would not be sufficient to convict the accused. In *Vijayan v. State of Kerala*<sup>32</sup>, the prosecutrix, aged about 17 years and a member of Scheduled Caste community, was a neighbor of the accused appellant. The prosecutrix in her testimony stated that when no one was in the house, the accused approached the prosecutrix and asked for water. The prosecutrix went to kitchen to fetch water and the accused followed her to the kitchen, caught hold of her hand and despite her resistance removed her night dress and indulged in sexual intercourse. After the act, the accused consoled the prosecutrix by saying that she should not worry as he would marry her. The prosecutrix neither made a complaint to her parents nor to the police as the accused held a promise to marry her. She was carrying a child of 7 months, she protested and also requested the accused to marry her but the accused declined the request. The prosecutrix thereupon filed a complaint and the police registered the case under Section 376 of the Indian Penal Code. The prosecutrix later on delivered a child. The trial court and the High Court convicted the accused for offence of rape. On appeal to the Supreme Court, it was held that the conviction of the accused could not be sustained and appeal was allowed. The Supreme Court observed:

In cases where the sole testimony of the prosecutrix is available, it is very dangerous to convict the accused, especially when the prosecutrix could venture to wait for 7 months for filing the FIR for rape. This leaves the accused totally defenceless. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the prosecutrix so as to show the sign of rape. If the prosecutrix has willingly submitted herself to sexual intercourse and waited for 7 months for filing the FIR it will be very hazardous to the convict on such sole oral testimony. Moreover, no DNA test was conducted to find out whether the child was born out of the said incident of rape and the accused appellant was

<sup>32</sup> Cri App. No. 1110 of 2008 (Arising out of SLP (Cri) No. 7042 of 2007) : Manu/SC/8652/2008 decided on 16.7.2008



responsible for the said child. In the face of lack of any other evidence, it is unsafe to convict the accused.<sup>33</sup>

In *Zinder Ali v. State of W.B.*<sup>34</sup> the appellant was trying to marry with the prosecutrix. On the day of incident when the prosecutrix was returning from her work, the accused taking advantage of dark caught her and committed rape. The accused after this incident threatened to kill the victim woman. Thereafter, also the accused committed forcible rape with the prosecutrix for 2 or 3 days and falsely assured her he would marry her. The accused however refused to marry and therefore the prosecutrix informed the matter to her family members and neighbours. A meeting in the village was convened and it was decided that the accused should marry the prosecutrix but he refused to marry her. There was nothing to suggest that there was any love affair with the accused. Then a complaint was filed before the magistrate and case was registered with the police. The accused was charge sheeted for offence, inter alia, under Section 376 and 417 of the Penal Code. The accused stated that he was falsely implicated as he had refused to marry the prosecutrix. The Court of Sessions rejected the defence and concluded that offences of rape and cheating were proved against the accused. The accused preferred an appeal before the High Court and the same was rejected. Ultimately, the appeal by Special Leave was filed before the Supreme Court. It was argued on behalf of the accused that the victim was a grown up lady and the sexual intercourse was with her consent. Further, as there were no injury on the person of the prosecutrix suggested that the prosecutrix had surrendered to the advances made by the accused and engaged herself in the intercourse as per her will and moreover, the prosecutrix herself wanted to marry her and when the accused refused to marry her, he was falsely implicated. The Supreme Court found the accused guilty of rape not on the ground of non - consent by promise to marry the prosecutrix but the very first act of sexual intercourse was without the consent. The Court brushing aside the charge of cheating, observed:

...the version that he gave a marriage promise, would really go against the prosecution, whereby, it would mean that the subsequent acts were done with the consent of the girl on account of the promise of marriage. We do not think that such could be the approach. After all, if the promise of marriage was given and the girl had succumbed on that account, may not amount to cheating. Besides this, the girl has very specifically stated that even subsequently, she was ravished against her wishes. Therefore, the theory of promise of marriage and the consent for sexual intercourse will wither away.<sup>35</sup>

In *K.P Thimmappa Gowda v. State of Karnataka*<sup>36</sup> the prosecution story was that the appellant raped a lady of aged about 18 years but assured that he would marry her and asked her to keep quiet. Subsequently also the appellant had sexual relationship several times. The woman became pregnant and the appellant refused to marry her. The accused married another woman. The victim woman delivered a female child just few days after the lodging of the report with the police under Section 376 of the Penal Code. In trial court the woman admitted the fact she had sexual intercourse with the appellant several times and it was considered by the trial court that as the woman was above 16 years of age and was a consenting party thus offence of rape was not made out against the appellant. The High Court on appeal reversed the

<sup>33</sup> Id at para 5 per Mathur and Dalveer Bhandari, JJ.

<sup>34</sup> AIR 2009 SC 1467

<sup>35</sup> Id at 1470 per Sirpurkar, J.

<sup>36</sup> AIR 2011 SC 2564 per Makandey Katju and Mrs. Gyan Sudha Misra, JJ.





finding of the trial court and the appellant guilty of rape. The High Court observed that as the accused had given an impression that he would honour his promise of marrying her, thus the lady did not disclose the fact to anyone including her mother. The Supreme Court gave benefit of doubt as the prosecution could not be said to have been able to prove the case beyond reasonable doubt. The Supreme Court pointed thus pointed out that a view was reasonably possible that the victim woman had sex with the appellant with her consent. The appellant in this case had filed an affidavit to the effect that he would transfer two acres of land due to breach of promise to marry and she has given consent to accept the same. Under the circumstances, the appellant was directed to transfer the land within three months.

In *Jayanti Rani Panda v. State of West Bengal*,<sup>37</sup> the complainant leveled the allegation that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on the belief that the accused would really marry her. The accused subsequently refused to marry when the complainant became pregnant. The court insisted that as there was no evidence at that time the accused had no intention of keeping his promise to marry and thus he could not be held liable if he could not respect his promise subsequently. The court observed:

The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to mis - conception of fact at the inception of the act itself. In order to come within the meaning of mis - conception of fact, the Fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a mis - conception of fact. ... If a full grown girl 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 mis - conception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other unless the Court can be assured that from the very inception the accused never really intended to marry her.<sup>38</sup>

In *Jayanti Rani Panda case*, the court referred to the decision of Chancery Court in *Edgington v. Fitzmaurice*<sup>39</sup> where it was observed that to bring a case under mis - conception of fact, 'there must be mis - statement of existing fact.' The Calcutta High Court observed that a mis - statement of the intention of the defendant in doing a particular act may be misstatement of fact and if the plaintiff was misled by it and an action of deceit may be founded on it.

Submission of the body under the fear or terror cannot be construed as a consented sexual act.<sup>40</sup> Consent for the purpose of Section 375 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 fully exercised the choice between resistance and assent. The insistence of the court on reason and rationality when a woman is overwhelmed by emotion arising out of promise to marry does not represent the woman's perception of consent and non - consent.

<sup>37</sup> 1984 Cri L J 1535

<sup>38</sup> Id. at

<sup>39</sup> (1885) 29 Ch D 459

<sup>40</sup> State of H. P. v. Mango Ram AIR 2000 SC 2798 per Balakrishnan, J.

In *Uday v. State of Karnataka*,<sup>41</sup> the Court further added that before reaching to a conclusion on the issue of consent, because each case has its own peculiar fact which may have a bearing on the question whether the consent was voluntary, or was given under mis-conception 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 ingredients of the offence, absence of consent being one of them.<sup>42</sup>

In order to hold the accused guilty of rape, the court is laying emphasis that the accused cannot be held guilty unless it could be assured that from the very inception the accused never really intended to marry her. It is thus difficult to hold a person guilty of rape where the accused initially intended to marry but could not marry her for certain reasons. In *Pradeep Kumar case*,<sup>43</sup> the Supreme further clarified the observation made in *Uday case*<sup>44</sup> by observing that:

While we reiterate that a promise to marry without anything more will not give rise to mis-conception of fact within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused to with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of making of the promise, the accused really did not entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375.<sup>45</sup>

The judicial approach on the question of non-consent in order to create liability for rape thus depends upon the evidence whether there was something more, other than mere promise to marry the woman, otherwise the court in such cases also has relied upon force or coercion to hold a case for non-consent. In few cases, the court has even directed the accused to pay compensation to the victim woman.<sup>46</sup>

## **VI. Rape and Offences against Marriage:**

Where the woman has given consent under belief that she was married to the accused while in fact the marriage was deceitful or under misrepresentation, in such cases also the court did not infer the case of rape instead has held such cases to be covered under Chapter XX of the Indian Penal Code dealing with the offences against marriage.

In *Mahesh Kumar Dhawan v. State of M.P.*,<sup>47</sup> the complainant made a written complaint alleging that her marriage was solemnized with the petitioner in March 2007. Till April 2007 they resided in Gwalior City and the petitioner made physical relation with the complainant. Both of them went to Dubai and when they were in Dubai, the complainant found some documents in the bag of the petitioner and thereby she came to know that the petitioner was already married and had 15 years old son. The complainant alleged in her complaint that the petitioner committed

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<sup>41</sup> AIR 2003 SC 1639

<sup>42</sup> Ibid.

<sup>43</sup> AIR 2007 SC 3059

<sup>44</sup> Supra Note 41

<sup>45</sup> AIR 2007 SC at 3064

<sup>46</sup> See, *Deelip Singh v. State of Bihar*, Supra

<sup>47</sup> 2012 Cri. L. J. 1639 (M.P)





cheating and suppressed the fact with regard to his earlier marriage and the petitioner committed sexual intercourse under a deceitful belief. The complainant came back to Delhi and called to first wife of the petitioner. It was also alleged that the petitioner had threatened the complainant that her father, mother and the brother would be killed if she told anything about it. On the basis of complaint an FIR was registered against the petitioner for offences punishable under Sections 498-A, 504, 493, 495 and 376 of the Indian Penal Code. The police submitted charge sheet before the competent Magistrate. The complainant made allegation of fraud played by the petitioner by suppressing the fact of earlier marriage and made physical relationship under a belief that she was a legally wedded wife of the petitioner. The petitioner aggrieved by the criminal proceeding against him filed a petition before the High Court for invoking the inherent jurisdiction under Section 482 of the Criminal Procedure Code to quash the FIR and criminal proceeding. One of the arguments taken by the petitioner was as the complainant was married to the petitioner the offence under Section 376 could not be made out. The court observed:

the bodily relationship or sexual intercourse by a husband with his second wife falls in the category of offence under Section 493 and 494 of IPC and it cannot be treated as rape as defined in Section 375 of IPC. It is an independent offence, the cognizance of which can be taken by the court on the basis of complaint filed by the complainant herself, therefore, the offence punishable under Section 376 is also not made out as the alleged act of sexual intercourse by the petitioner with the complainant may fall within the category of Section 493 and 495 of IPC but not in the category of rape as defined in Section 376 of IPC and made punishable under Section 376 of IPC, therefore, the cognizance of Section 376 of IPC is also against the settled principle of law.<sup>48</sup>

The Court quashing the FIR and criminal proceeding against the petitioner further observed:

So far as the offence punishable under Section 376 of the IPC is concerned, the alleged intercourse was the result of marriage of complainant with the petitioner, therefore, firstly intercourse with wife does not fall in the category of rape, secondly, if the intercourse has been committed under suppression of fact of first marriage, it may fall under the category of offence punishable under Section 493 and 495 of IPC and does not fall under the category of offence punishable under Section 376 of IPC.<sup>49</sup>

In this case court appears to agree that offence under Section 493 and 495 of the IPC<sup>50</sup> could be made out against the accused but as there was no complaint from the complainant's side and the police had filed charge sheet thus the power of the court to take cognizance was barred by virtue of Section 198 of the Criminal Procedure

<sup>48</sup> Id at 1642

<sup>49</sup> Id at 1644

<sup>50</sup> Section 493 of IPC reads: **Cohabitation caused by a man deceitfully inducing a belief of lawful marriage** - Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished...

Section 495 of IPC reads: **Same offence with concealment of former marriage from person with whom subsequent marriage is contracted** - Whoever, commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished ...



Code.<sup>51</sup> It may be submitted that paradoxically the law is in search of marriage where in fact there was no marriage. It, thus, suggests that since law is made by male, thus, it has masculine perception.

## VII. Conclusion

The prosecution has to face a difficulty in establishing the case where the woman submits herself on the promise given by the accused that he would marry her. For proving non - consent on the part of the woman, the court relies on the principle of resistance. The case where a woman submits herself on the basis of promise to the accused cannot be covered under the existing scheme of consent given in negative terms under Section 90 of the Penal Code. Such a provision is beneficial to man and goes against the woman. The court has treated only those cases of promise denying the consent which were found to be fraudulent from the inception. The difference between breach of promise and false promise delineated by the court is more favourable to man than the woman. Usually there happens to be no evidence to prove conclusively that the accused never intended to marry from the very beginning. It may be possible that the accused wanted to marry the woman but was not able to muster enough courage to disclose his intention to his family members despite the woman reposed full faith in the accused. The matter becomes further complicated where the woman becomes pregnant and she discloses the fact after sometime. Further, where an accused marries by resorting to deceitful means and the woman submits herself under a belief that she was lawfully married wife of such accused has also not been regarded as an offence of marriage on the ground that it was not a case of non - consent; instead it was a case covered under Section 493 of the Indian Penal Code. Similarly, where the accused concealed the fact of first marriage and has sexual intercourse with such woman from whom the fact of former marriage was concealed, such sexual intercourse has also not been brought within the meaning of rape on the same ground of non - consent. All these are suggestive of the fact that law still feels that the fact of non - consent in order to bring the conduct within the purview of rape involves forceful resistance on the part of woman and the law has failed to visualize the fact that there can be offence of rape where the faculty of reason of woman was eclipsed under the psychological and emotional force that woman could not exercise her intellect rather reposed her confidence and faith in accuse.

The existing law on consent incorporated in Section 90 of the Indian Penal Code represents the masculine understanding and does not take into account the woman's perception. It may be, thus, suggested that the sexual intercourse done with the consent of woman but obtained on the basis of promise to marry should also be brought within the ambit of offence of rape under the Indian Penal Code. Similarly, the consent of woman obtained by deceit and thereby causing her to believe that she was married also may be brought in public domain and not to confine it in private domain and should not be dealt under the chapter dealing with the offence against marriage because this chapter may be attracted in its true spirit only when there was marriage. It is, thus, submitted that to improve the disadvantageous status of woman, the law should be suitably altered in such a way that law does not appear to be oppressive in its character. Thus, there is a need to bring the issue of consent of

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<sup>51</sup> Section 198 of Cr. P.C. reads: Prosecution for offence against marriage - No court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code except upon the complaint made by some person aggrieved by the offence.





woman for sexual intercourse under a promise of marriage as a case of non - consent in those cases where the man later on refuses to marry. Similarly, consent of woman obtained by inducing the woman by causing her to believe deceitfully that she was married to the accused may be brought in public domain and not to confine it in private domain lest the law should be oppressive.