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Sexual Offences: Critical analysis of section 375 of the Indian Penal Code

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As per the data issued by the National Crime Records Bureau (NCRB) with respect to sexual offences against women and girls in the year 2020, 3.71 lakh cases were reported and registered under the provisions of sexual offences, i.e., an average of 988 women and girls registered a complaint of sexual assault, rape, etc. each day in the year 2020. The data was less in the year of a pandemic as compared to the year 2019 by approximately one lakh. However, the cause is not the decrease in the incidents of the crimes but the restriction of the movement due to nationwide lockdown. In India, the Constitutional Provisions has provided various means and methods to empower and place women in an equal state that of men. The oppression of women from the medieval era to the modern world has meagerly changed the outlook of the male-dominated society. The discrimination, violence, and atrocities against women are the everyday appalling state of affairs in the world. The offences affecting the human body, such as murder, assault, etc., may be committed against the women but not particularly be classified as a crime against the women. The crime against women is essentially those which are committed not against the person in general, but the ordeal to which only a woman can be subjected. This paper has analyzed the provisions of the penal law that are formulated to safeguard the offences against women with specific reference to the offence of rape and their effectiveness to the objective of the legislation. We have collectively tried to revisit the judicial precedents, which have to a great extent aided in the interpretation of the law in the interest of the fraternity. Lastly, parting with the effectiveness and loopholes, a relevant suggestion is given.

Keywords: *rape law, consent, stupefying, passive non-resistance, marital rape.*

INTRODUCTION

In History, beyond what is traceable, women were scantily recognized as individual people with free thoughts and liberty to do as they embrace. In India classically, unmarried girls are presumed to follow as their patriarchal family please, and the post-marriage as per the husband's wish and wants. At such an instance, the scope of the Personal Life and Liberty as guaranteed by Art. 21 of the Constitution.¹ remains similar to that of an oasis in the barren deserts. Similarly, the Right to Equality is envisaged under Art. 14² is a part of the golden triangle to the civil liberties as held in *Maneka Gandhi vs Union of India*³. Nonetheless, the scope of this research is limited to the protection of the law guaranteed by the legislation to curb the social evil of the society in the form of sexual offences against women. Treating women as material undermines the human right of the person as an individual⁴.

In the year 1833, when the First Law Commission was appointed to formulate the penal laws for India, chaired by Thomas Babington Macaulay, it took three years to prepare the first draft; however, it was sent for reconsideration.⁵ It was only in its third draft that the Indian Penal Code was accepted in the year 1856 and later was enacted vide the Act No.45 of 1860 by the Imperial Legislative Council in the year 1860⁶.

Rape as a crime was described under Sec.375 of the Indian Penal Code, 1860, which reads as "*A man is said to commit "rape"..... has sexual intercourse with a woman under the circumstances falling under any of the six following descriptions.*"⁷" Section 375 is the substantive law to establish the commencement of sexual intercourse between male and female, wherein will and consent

¹ Constitution of India, art 21

² Constitution of India, art 14

³ *Maneka Gandhi v Union of India*, 1978 AIR 597

⁴ U N General Assembly, *Declaration on the Elimination of Violence against Women*, Res 48/104, art 4, (20/12/1993) <<https://www.ohchr.org/en/professionalinterest/pages/violenceagainstwomen.aspx>> accessed 13 October 2021

⁵ *Ibid*

⁶ Indian Penal Code 1860

⁷ Indian Penal Code 1860, s 375

of the woman to such intercourse was not freely or voluntarily given, or given under deception, or in the wake of fear to oneself or someone, the woman has an interest.

The word "Rape" originated from the Latin word "rapio", which implies the seizure⁸. Accordingly, the term rape means forcible seizure, which is also an essential ingredient in constituting an offence under the provision of rape. In layman terms, it can be understood as an act of intercourse without her free consent or by force, fear or deception.⁹ It does not require the full penetration of the object or penis into the Vagina of the victim or the compulsory ejaculation of the semen but can also be merely penetration between the thighs held together as held by the division bench of Kerala High Court presided by Justice. K. Vinod Chandran and Justice. Ziyad Rahman, in the case of *Santhosh vs State of Kerala*¹⁰. For satisfying the conduct of manner to make a person liable under the provision, it is imperative to understand what essential elements are to be considered while adjudicating the matter of rape. And to scrutinize the provisions in light of the exceptions to Section 375.¹¹

SEXUAL OFFENCES: SECTION 375 - RAPE

Section 375 of IPC talks about the sexual offence "rape". The section states that a man is said to commit "rape" if he –

- a) penetrates his penis, to any extent, into the mouth, Vagina, urethra or anus of a woman or makes her do so with him or any other person or¹²,
- b) Inserts to any extent, any object or a part of the body, not being the penis, into the Vagina, the urethra or anus of a woman or make her do so with him or any other person or¹³,

⁸ Dr Pratima Devi, *Offence of Rape: Survival Issues* (2018) 7 Paripex- Indian Journal of Research 10

⁹ *Ibid*

¹⁰ *Santhosh v State of Kerala* 2021 SCC Online Ker 2967

¹¹ *Ibid*

¹² Criminal Law (Amendment) Act 2013, s 9

¹³ *Ibid*

- c) Manipulates any part of the body of a woman so as to cause penetration into the Vagina, urethra, anus or any part of body such woman or makes her do so with him or any other person or¹⁴,
- d) Applies his mouth to the Vagina, anus, urethra of a woman or makes her do so with him or any other person¹⁵.

Under the circumstances to that fall with an ambit of the above discussed essentials, below are the seven litmus tests for classifying an act as a rape:

- **Against Her Will**

The word 'will' infers the reasoning of the mind that controls whether there is a willingness to do any act or not. In *State of Maharashtra vs Prakash 1992*¹⁶ A police officer and a businessman put the husband of the victim in unlawful custody and obtained the victim's consent to have sexual intercourse with her. The court held that the consent given by the woman is not valid as a person of her interest was put under the fear of hurt or death. Accordingly, the police officer and businessman were held liable for committing the rape. It is imperative to understand that there is a fine line between 'against her will' and 'without her consent'. If an act is done against the will, then it is also considered to be done without the consent of a person. But an act done without consent doesn't necessarily mean that it is done against the will.¹⁷

In *State of Uttar Pradesh vs Chhotey Lal (2011)*¹⁸ the court held that the elements "against her will" and "without her consent" might be a task to differentiate, but they have different implications and extents. The expression of 'against her will' would mean that the act done by a man was despite the woman's resistance.¹⁹ On the other hand 'without her consent would mean that the act is done forcefully. The same rule was also primarily observed by the Apex

¹⁴ *Ibid*

¹⁵ *Ibid*

¹⁶ *State of Maharashtra v Prakash* AIR 1992 SC 1275

¹⁷ *Ibid*

¹⁸ *State of Uttar Pradesh v Chhotey Lal*, Criminal Appeal No 769/2006

¹⁹ *Ibid*

Court in *Dileep Singh vs the State of Bihar*²⁰ that the two expressions may overlap sometimes, but they have different connotations and dimensions.

- **Without Her Consent**

Consent refers to an act done by a person with a free state of mind. It means to give approval. According to section 375 of IPC, consent means when a woman by communication, verbally or non -verbally, gives consent or shows a will in doing a specific act²¹. To prove that the consent was given, it is necessary that the person has given consent and has free choice and accepted it voluntarily.

The capacity to give consent is only vested with -

1. A person with a sound mind.
2. A person who has attained the age of majority.²²

In the case of *Rajkishore Shrivastava vs the State of MP*²³, the Madhya Pradesh high court held that acquiring the consent of a prosecutrix to get involved in sexual activity by making a false promise of re-employment cannot be considered as 'free consent'. The facts of the case were such that, A woman started working as the receptionist of the applicant's hospital. On the promise of giving her a job, the applicant sexually violated her multiple times and also pressured her to have sexual intercourse with other people as well. When the woman disagreed with the offer of the applicant, he fired her from the job. When she threatened to tell the applicant's wife regarding everything, he gave an application against the woman in his defence. The bench further interpreted that the woman was the consenting party over here, and if she continues to remain in a sexual relationship with the applicant even after the termination, then it cannot be said that consent was obtained by the mistake of fact.²⁴

²⁰ *Deelip Singh@ Dilip Kumar v State of Bihar* AIR 2007 SC 3059

²¹ Ratanlal & Dhirajlal's, *The Indian Penal Code* (K Kannan & Anjana Prakash, 36th edn, 2019) 636

²² *Ibid*

²³ *Rajkishore Shrivastava v State of MP*, M Cr C No 38456/2021

²⁴ *Ibid*

Section 90 of IPC states "that consent 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 doing the act knows or has reason to believe that the consent was given in consequence of such fear or misconception."²⁵ Hence it is clear that the consent is given by the woman in the case of *Rajkishore Shrivastava vs the State of MP*²⁶ cannot be considered as free consent. According to this interpretation, the application of the applicant was dismissed.

- **With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.**

Where a man has sexual intercourse with a woman with her consent and consent to such intercourse has been obtained by putting her or any person in whom she is interested in fear of death or of hurt, he is guilty under the third clause of committing a rape. The clause thirdly states, "the prosecution must have to prove that the offender had put either the victim or any person in whom she is interested in fear either of death or of hurt or apprehension of the death or hurt.

One of the cases where this clause was evoked with admirable results was that of *State of Maharashtra vs Prakash*²⁷. In this case, the Supreme Court rightly held that where a police constable and a businessman had sexual intercourse with a helpless woman by beating her husband and threatening to put him under the police remand, this act may fall well within the ambit and scope of the said clause. The contention that the victim had wilfully consented to intercourse is ruled out. For the offence, it is not necessary that there should be the actual use of force; a threat of use of force is enough.²⁸

- **With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married**

²⁵ Indian Penal Code 1860, s 90

²⁶ *Ibid*

²⁷ *State of Maharashtra v Prakash* AIR 1992 SC 1275

²⁸ *Ibid*

The clause fourthly of section 375 IPC reads, “*With her consent when the man knows that he is not her husband and that her consent has been given because she believes that he man to whom she is or believes herself to be lawfully married*”. In simple terms, this section means that if a woman’s consent to the act of sexual intercourse has been obtained by her making her believe that such intercourse is with her lawfully wedded husband, then such consent is no consent, and such person is liable under the proviso. Nevertheless, if a man also has such an intuition that he is indeed married to the woman with whom is he constituting the physical relations, such an act would not constitute rape. Thus this is one of the clauses under the rape law which explicitly deal with the concept of *mens rea* when it talks about knowledge of the fact that he is not her husband.

*Dileep Singh vs the State of Bihar*²⁹, the accused and the victim were neighbours and eventually fell in love; the accused forced the girl for sexual intercourse on a promise of marriage. The girl’s parents came to know about her physical relationship with her neighbour when she became pregnant. The contention of the accused was that he had never forced the victim to have sexual intercourse and that the intercourse was consensual.³⁰ The court observed that the consent of the girl for sexual intercourse was obtained by fraud on the pretext to marry her. Hence, the consent which is obtained by fraud committed with the victim is no consent.

Even though the rape laws in India have been reformed over time, the occurrences of rape keep increasing every year.

- **With her consent when at the time of giving consent,**
 - a) by reason of unsoundness of mind or
 - b) intoxication or
 - c) the administration by him personally or through another of any stupefying or unwholesome substance,

she is unable to understand the nature and consequences of that to which she gives consent.

²⁹ *Deelip Singh@ Dilip Kumar v State of Bihar* AIR 2007 SC 3059

³⁰ *Ibid*

As consent is the key element in the adjudicating over the matter of rape cases, there are instances wherein the due consent was taken by way of words, gestures or any other form of verbal or non-verbal way of communication. However, such consent shall not be lawful consent as per the general exception envisaged under Sec. 90 of the Indian Penal Code which reads as, "Consent of insane person- If the consent to any act is given by a person who, from the unsoundness of the mind, or intoxication, or for any such reason that the person is not able to understand the consequences of the act to which the consent is given, is no consent³¹.

- By Reason of Unsoundness of Mind

In *Tulsidas Kanolkar vs The State of Goa*³², the victim girl was mentally impaired, hence, not capable of giving consent to the sexual intercourse being unable to understand the ramifications of such an act as per the definition of Sec.90 of IPC. The accused took undue advantage of her mental state and had sexual intercourse, wherein she became pregnant. The court rightly held that the accused evidently took advantage of the girl being mentally retarded and helpless. The question of the veracity of the consent does not arise by the very fact that the girl was not in the state to give consent for such an act. In the light of the observation, the accused was held liable.³³

- Intoxication

Consent obtained under the intoxicated state of a person implies that at the time of the granting the consent, the person was not in a state to make the rationale decision, and in light of Sec. 90 of the Indian Penal Code, Consent of a person who by reason of intoxication is not in a state to understand the consequences of the act to which it consented, shall be no consent.³⁴

In *R vs Bree*³⁵, the defendant and the victim were considerably drunk, and the victim recalls her poor memory of having sexual intercourse with the defendant. Herein, the victim

³¹ Indian Penal Code 1860, s 90

³² *Tulsidas Kanolkar v The State of Goa*, Appeal (crl) 298/2003

³³ *Ibid*

³⁴ *Ibid*

³⁵ *R v Bree* [2007] EWCA Crim 256[a]

contended that, although she had not said "no" to the act, the same was not with her consent. Whereas, the accused contended that he had reason to believe the consent of the victim as she herself undressed and appeared to be in the conscious state and willfully engaged in the sexual intercourse. The court in the present case held that "*In a situation when a person loses their capacity to consent to an act for a reason being intoxication, they indeed cannot consent. When a person who has had a lot to drink is consenting to sexual intercourse, then the intercourse is in accordance with her consent. Whereas, after consumption of the alcohol, she is not consenting to intercourse, the same does not bear the consent of her*".³⁶

The element of consent implies the person's mental awareness of the consequences of the act to which she consents. It is well established that a person of unsound mind does not possess the ability to make the rationale decisions.³⁷ And consent to the sexual intercourse is which may have a plethora of ramifications, shall bear the consent of the parties to the act of intercourse. Similarly, an intoxicated person is temporarily deemed unfit to make a rationale consent for the reason of consumption of alcohol or any such intoxicated substance, even if it is voluntary consumption³⁸.

- **With or Without the consent of a girl who is under eighteen years of age.**

Consent of the minor is not valid consent as per Sec.90. of the IPC, is not consent intended by the code. The act of the submission to the other person cannot be termed to be the consent of a person for the submission. The act with the consent of the party may constitute the submission but, merely submission to an act does not necessarily imply the consent³⁹. The definition as it stands makes the penetration of any kind to the girl having age less than eighteen years an offence, disregard of her consent or will.

However, the *Exception 2* to the Sec.375 states that it is legal to have non-consensual sexual intercourse with a wife who is 15 years of age or above⁴⁰. This exception provides a defence to

³⁶ *Ibid*

³⁷ *Tulsidas Kanolkar v The State of Goa*, Appeal (crl) 298/2003

³⁸ *R v Bree* (n 35)

³⁹ *Ratanlal & Dhirajlal's* (n 21)

⁴⁰ Indian Penal Code 1860, s 375, exception 2

husbands to have non-consensual sexual intercourse with their wives. Even though most countries recognize sexual intercourse with a wife without her consent as rape. In India, it is excluded from the definition of rape.⁴¹

In the *Independent Thought vs Union of India*⁴² the petitioner challenged the legality and constitutionality validity of *exception 2* of section 375. It was contended that such exception is violative to the provisions of POSCO act, 2012 that states the age of consent as 18 years, also that *exception 2* is contrary to the rights vested under article 21 of the Constitution of India⁴³. A division bench held that "*exception 2 of the code clearly discriminate on the ground of the marital state of the person without any reasonable nexus. It is seemingly the violation of the bodily integrity, dignity and reproductive choice of the girl child, i.e., the violation of Art.21. As by the legislation provided, the marriage of the minor or a girl under the age of eighteen is illegal, recognizing the exception to allow the non-consensual sexual intercourse of the same is unreasonable, unjust, unfair and violative of the rights of the girl child*".⁴⁴ Accordingly, the age for the exception to the consent for the sexual intercourse was increased to eighteen years⁴⁵. The Apex Court in a matter of *Harpal Singh & Ors. vs State of Himachal Pradesh*⁴⁶ Held that sexual intercourse with the minor is enough to establish the offence under Sec.375 of the Indian Penal Code, and consent to the same stand immaterial for a reason that consent by the minor is no consent.⁴⁷

- **When she is unable to communicate the consent**

The consent to sexual intercourse as defined under section 375 states an unequivocal voluntary agreement when a woman, by the mode of words, gesture or any form of verbal or non-verbal communication, communicates the willingness to participate in the specific sexual act. As the clause seventhly states, " a man is said to commit the rape if women are unable to communicate the consent". In a broad sense, the situation may refer to the space to communicate and an

⁴¹ *Ibid*

⁴² *Independent Thought v Union of India* AIR 2017 SC 4904

⁴³ Constitution of India, art 21

⁴⁴ *Ibid*

⁴⁵ *Independent Thought v Union of India* (n 28)

⁴⁶ *Harpal Singh & Ors v State of Himachal Pradesh* AIR 1981 SC 361

⁴⁷ *Ibid*

opportunity to be heard. Therefore, the woman is deemed unable to communicate the consent. This clause assures the space and time of forming and communicating the consent of a specific sexual act to the women and that they are not disregarded of the desires, hence, the unequivocal voluntary agreement.⁴⁸

CONCLUSION

Consent to an act is an essential element *vis-à-vis* to the *mens rea*, mental state of the person to engage in the commencement of an act implies their voluntarily submitted to the act. However, the condition otherwise to the submission does not necessarily imply the consensual act. The consent and will are two litmus tests under section 375. Will is the desire towards an act but does not subscribe to the conformity to the consent. Whereas consent is to consciously make a choice to agree or not to agree⁴⁹. Therefore, an act with the consent may lack in satisfying the will of the person to such an act viz. the sexual intercourse.

Rape, if it was not to be classified as a crime *per se*, is absolutely a violation of the fundamental rights enshrined under Art. 21 of the Constitution. It is not only a vicious act to life and liberty, but then to a great extent, infringes the right to a dignified life. The contemporary society looks upon the victim of rape with pettiness and sexism that hinders and defiles the soul of a helpless female.⁵⁰ Rape is the most lethal blow to the supreme honour of women leading not just to bodily harm but to destroy the psychological state of women.⁵¹ There have been instances wherein the court considered the contention of the accused in regards to the victim being used to sexual intercourse with other men or with himself, or that there has been a physical relationship of women with him in the past. Such contentions are an antithesis to the element of consent obtained from the female to indulge in the act. As held in *Mahmood Farooqui vs State*⁵² “past conduct will definitely not amount to the consent as for sexual activity; every time, consent is a must”.

⁴⁸ *Ibid*

⁴⁹ P H Pendharkar, ‘Consent Under Section 375 IPC: Stripping the Myths’ (2019) ILI Law Review 140

⁵⁰ Ratanlal & Dhirajlal’s (n 21)

⁵¹ *Ibid*

⁵² *Mohammad Farooqui v State* 2018 Cr LJ 3457 (Del)

As discussed above, merely volunteer submission to the act does not plausibly construct the consent to the consequences of such an act. One of the major contention in defence of the sexual offences is the "Passive Non-Resistance" by the women to sexual intercourse. The submission can also be made under the apprehension or threat to harm or cause death to herself or to the kin of the women, but such intercourse cannot be termed as done with the consent of the women. The same was upheld in the case of *State of HP v. Mange Ram*.⁵³ Where the prosecutrix did not passively restrict the sexual intercourse under the apprehension of fear and terror.⁵⁴

In our opinion, the Right to Choice is equivalent to the willing consent of a person is enshrined under Art.21 of the Constitution, making an absurd exception (*as like an exception 2 to section 375*) to the penal laws in regard to the non-consensual sexual intercourse of the person(s) shall also be treated tantamount to the Constitution of rape. Rape is not just physical harm to the body but also the ravaging consequences on the psychological state of women. Further, the "Voluntarily acceptance" to the marriage does not make the "Voluntary Agreement" to be subjected to sexual intercourse without prior consent. Despite the judgement in the matter of *Nimeshbhai Bharatbhai Desai vs the State of Gujarat*⁵⁵ wherein the Gujarat High Court observed that "*it has been long time to jettison the notion of "implied consent" in the marriage. The law must also uphold the bodily autonomy of all women, irrespective of their marital status*". It is evident that such an omission in part of legislation to acknowledge the marital rape has left the women with meagre weapons to safeguard their dignity.⁵⁶

In *Suchitra Srivastava vs Chandigarh Administration*⁵⁷, the Apex Court distinctly observed that the right to make a choice about one sexual activity is very much embedded in the scope of the right to personal liberty, privacy, dignity and bodily integrity enshrined in Art. 21 of the Constitution.⁵⁸

⁵³ *State of HP v Mange Ram* AIR 2000 SC 2798

⁵⁴ *Ibid*

⁵⁵ *Nimeshbhai Bharatbhai Desai v State of Gujarat* R/ CR.MA/26957/2017

⁵⁶ *Ibid*

⁵⁷ *Suchitra Srivastava v Chandigarh Administration* Civil Appeal No 5845/2009

⁵⁸ *Ibid*

When the matter in hand is in regard to privacy, the strongest judicial precedent is laid in the case of *Justice K.S. Puttuswamy (Retd.) vs Union of India*⁵⁹, wherein the Nine Judges bench of the Apex Court, in a unanimous verdict, upheld the right to privacy as an integrated part of the fundamental right. The right to privacy vests the right to make the decision in regards to one's sexual relations. And the forceful penetration as per the standing definition shall also include the throttling hindrance of the married women to recognize them as human than merely as goods of sexual pleasure.⁶⁰

⁵⁹ *Justice K S Puttuswamy v Union of India* Writ Petition (Civil) No 494 of 2012

⁶⁰ *Ibid*