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The concept of 'Rape': Views and counterviews

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Abstract

The lodging on FIR by Dy. S.P. Kaimur (Bihar) against her S.P. alleging rape on false promise of marriage and also another incident, whereby an assistant Professor of JNU lodged FIR against her research scholar for refusing to marry breaching his promise after physical relations, have aroused a heated debate among all. 'Rape' or 'Sexual assault' is one of the most serious crimes against individual and society. 'Rape' is usually known as the ravishment of women, with or without, her consent, having by force or fear or fraud, or the carnal exploitation of a woman. 'Consent' is one of most important ingredients of sexual exploitation. If a girl of tender age gives consent on being misled by the accused, then it is not a valid consent. Even a woman of easy virtue or a prostitute cannot be subjected to sexual inter course against her wishes because a woman is not a vulnerable object to be exploited by everyone and anyone. 'Consent' given by a minor girl cannot be treated as a valid consent as she does not have the understanding of wrong done with her. Likewise, a mentally retarded girl cannot give her consent as she cannot distinguished between the right and the wrong and also did not understand the moral quality of the act. Conflicting opinion on the point of 'consent' is creating serious confusion in the mind of all concerned. Andhra Pradesh High Court has ruled that in case a girl has given consent on a false promise of marriage, then it would not be a valid consent. But Hon'ble Calcutta High Court and Bombay High Court has given a contrary opinion on the point. So, a concrete judicial opinion on the point is urgently needed, It would really be travesty of justice if the plea of rape of such educated and major woman is accepted who voluntarily enters into sex then cry of rape.

Keywords: Rape, Consent, Crime.

1. Introduction

The expression 'Rape' is defined under Section 376 of Indian Penal Code (IPC). 'Rape' or 'Sexual assault' is considered to be one of the most serious crimes against society as well as individuals. 'Rape' is the ravishment of women, with or without, her consent, by force; fear or fraud or the carnal knowledge of a women against her will. ^[1] The provisions of 376-A, IPC is attracted in the case of intercourse by a man committed by a public servant with women in custody. The sexual assault of a Student in school campus by a teacher of course attracts offence under Section 376-B of Indian Penal Code. ^[2] The provision also comes into play when intercourse is made by Superintendent of jail, remand home etc. The provisions of Section 376-C of Indian Penal Code is attracted in case of intercourse by manager etc. of a hospital with any woman admitted or working in that hospital. There cannot be any charge of rape or gang-rape against any women but if there are sufficient material she can be charged for abetment of rape or gang-rape as the case may be. ^[3] The essential ingredients of Section 376 are as follows:

- (i) Accused had sexual intercourse with a woman;
- (ii) Such sexual intercourse was under any one of six circumstances enumerated in Section 375 of the Indian Penal Code; or
- (iii) The accused had sexual intercourse with his own wife when she was under age of 15 years of age.

When a police officer committed rape on a woman—

- (i) within the limits of the police station to which he has been appointed;
- (ii) in the premises of any station house whether or not situated in the police station to which he is appointed;

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(iii) When the woman raped was in his custody or in the custody of his subordinates.

When the accused is a public servant and had sexual intercourse with a woman in his custody or in the custody of a person who is his subordinate to whom and the accused did so taking advantage of his position of a public servant.

Where the accused is in the management or on the staff of a hospital and had sexual intercourses with a woman who was in his custody or in the hospital and the accused committed offence taking the advantage of his position.

Where the accused is in the management or on the staff of a jail, remand home, other case home or any school (institutions where women and childrens are kept under certain law in force for the time being) and the accused committed the offence taking the advantage of his position.

When the woman was pregnant and while committing the rape the accused was aware of the fact.^[4]

When a woman was under 12 years of age whether she was the wife or not of the accused.

In case of gang-rape–

- (i) the accused was a member of the gang;
- (ii) he did so in furtherance of the common intention of the gang; and
- (iii) The accused had the common intention to commit rape on the victim accused.

The measurement of punishment in a case of rape cannot depend upon the social status of the victim or the accused but it depend upon the conduct of the accused, the state and age of the victim and the gravity of Criminal act.^[5]

2. Various Situations

The 'consent' given or 'not given' is a very important factor in the offence of rape. A consent obtained by misconception while playing fraud is no consent in the eye of law. If a girl of tender age gives her consent on being misled by the accused who held out a false promise of marriage, it would be no consent. But the matter would be otherwise when the consent, under such circumstance, is given by a fully grown-up and educated woman.^[6]

The submission of the body under the fear of terror cannot be construed as a consensual sexual act. Consent for the purpose of Section 375 requires voluntary participation, which has to be ascertained only on a careful study of all relevant circumstances.^[7]

The consent given by a minor cannot be treated a valid consent as she does have the understanding wrong done with her.^[8] Likewise, the mentally retarded children cannot give consent as she could not distinguish between the right and the wrong and did not understand the moral quality of the act.^[9]

According to the law, even if the victim of rape in a given case has been promiscuous in her sexual behaviour earlier, yet she has right to refuse to submit herself to sexual intercourse to anyone because she is not a venerable object or a pray for being sexually assaulted by anyone and everyone.^[10] The absence of injury on the victim of rape did not mean that she had given consent to sexual intercourse.^[11]

The offence of rape cannot be compounded.^[12] When a man allegedly kidnapped and raped a minor girl but subsequently married her, such marriage does not minimize the offence and the offence cannot be compounded on the ground of marriage under the provisions of Section 320 of Criminal Procedure Code and therefore the trial shall continue.^[13]

3. Case Studies

A female Dy. S.P. posted at Bhabua under Kaimur district in Bihar alleged her S.P. for establishing physical relation on a false promise of marriage. An FIR was lodged against the accused S.P. for the charges of rape and outraging modesty of women at Bhabua Police Station.^[14]

In an another incident, an assistant professor of Jawahar Lal Nehru University alleged his research scholar, working for his Ph.D. under her Supervision, for rape as the scholar refused to marry her after a year long live-in-relation and physical contacts on promise of marriage.^[15]

4. Consent: Difference of Opinion

If a woman gives her consent for sexual intercourse on the *bona fide* assumption that a medical practitioner is medically treating her by intercourse, such consent is not a valid consent in law as such consent was obtained by fraud.^[16]

The Hon'ble Andhra Pradesh High Court has ruled that in case an educated and adult girl has given her consent for sexual intercourse on the false promise of marriage, then such consent cannot be treated as a valid consent.^[17]

Contrary views, however, were expressed by Hon'ble Calcutta High Court in '*Hari Manjhi-V-State of West Bengal*'^[18] and the Court held that the sexual intercourse with a girl above 16 years, who voluntarily agrees for sexual intercourse on assurance of marriage, does not amount to rape. The High Courts of Karnataka and Chattisgrah have also ruled that if a fully grown up girl consents to sexual intercourse on a promise of marriage and continued to be indulged in such activity until she became pregnant, it is an act of proximity on her part and no rape held can be said to be committed.^[19] Similar view was the expressed by Hon'ble Patna High Court in '*Kuber Chandra Das-V-State of Bihar*'^[20], and Hon'ble Apex Court in '*Pradeep Kumar Verma-V-State of Bihar*'^[21] also.

In a recent pronouncement Hon'ble Bombay High Court has also ruled in '*Mahesh Balkrishna Dandade-V-State of Maharashtra*'^[22], that every breach of promise of marriage is not a 'rape' because now-a-days keeping a sexual relationship while having an affairs or before marriage is not shocking as it was earlier. "A couple may decide to experience sex even while in love affairs. Today especially in metros like Mumbai and Pune, Society is becoming more and more permissive", said Justice Mridula Bhatkar. The Judge further said, "Though unlike western countries, we have social taboo and are hesitant to accept free sexual relationship between unmarried couples or youngsters as their basic biological need; the Court cannot be oblivious to a fact of changing behavioural norms and pattern between man and woman relationship is society".^[23]

The judge further said, "Today the law acknowledges live-in-relationship. The law also acknowledges a woman's right to be a mother or woman's right to say us to motherhood. Thus, having sexual relationship with a man whether in her conscious decision or not is to be tested independently depending on the facts and circumstances of each and every case and no straight jacket formula or any kind of labeling can be adopted." [24]

The Bombay High Court, however, held that in case an uneducated poor girl being induced into a sexual relationship after promise of marriage, or when man suppresses his first marriage to have sexual relation with a girl-there circumstance would be an offence under Section 376 of Indian Penal Code. The situation, of course, would be different in the case of educated couple of cities who in love may be having sexual relationship and realize sometimes thereafter that they are not compatible and thereafter love between the parties is lost and their relationship dries gradually then earlier physical relationship cannot be said as rape. [25] A marriage cannot be imposed under such circumstances. A Session Court recently acquitted a man of charges of rape under the pretext of marriage on the ground that a woman can cry rape after several consensual sex. [26]

5. Conclusion

There can be no denying of the fact every woman has legal right to maintain her physical status. Even a woman of easy virtue or a prostitute cannot be compelled to undergo-the-sexual intercourse against her wishes. An educated adult woman cannot be permitted to undergo sexual intercourse in anticipation of certain advantages, such as marriage, promotion in service, monetary benefits etc., and then turn around to blame a sexual exploitation amounting to rape. The law must be strict for those who exploit uneducated rural women, minor girls mentally retarded girls etc. for carnal pleasure amounting to rape.

6. End Notes:

1. Bhupendra Sharma-V-State of U.P. = AIR 2003 SC 4684.
2. Omkar Pd. Verma-V-State of M.P. = 2007 (4) BBCJ 23.
3. Priya Patel-V-State = (2006) 6 SCC 263.
4. Justice S.R. Roy & S.P Sen Gupta: **Criminal Major Acts**; (Kamal Law House, Kolkatta, 2008)
5. Dinesh-V-State = (2006) 3 SCC 771.
6. Yedla Srinivasa-V-State = (2006) 11 SCC 615.
7. State-V-Mango Ram = 2000 7 SCC 224.
8. State of U.P.-V-Amar Singh = 2006 Cr LJ 1041.
9. Khoja Ram-V-State = 2006 Cr LJ 2003.
10. Ram Lal-V-State = 2006 Cr LJ 253.
11. Kallen Shankar-V-State = 2004 Cr. L.J 3270
12. Rabi Narayan-V-State of Orissa = 2004 Cr LJ 3645.
13. Rajendra Kumar-V-State = 2003 Cr LJ 490.
14. Hindustan, Dec. 31, 2014.
15. The Times of India, February, 26, 2015.
16. Krishna Raj-V-State = (1969) Mys. L.J 304.
17. Addepalli Settibabu-V-State of A.P. = 1994 Cr LJ 1420 (AP); Kondapali-V-State of A.P. = 1999 Cr LJ 1928.

18. Hari Manjhi-V-State of W.B. = 1990 Cr LJ 560 (Cal.); M.C. Prasanam-V-State= 1999 Cr LJ 998 (col).
19. Monayya-V-State of Karnataka= 2001 (1) Crimes 227; Ramlal-V-State= 2010 (1) Crimes 326 (Chatt.)
20. Kuber Chand Das-V-State of Bihar = 2004 (3) BBCJ 129.
21. Pradeep Kumar Verma-V-State of Bihar [2007 AIR SCW 5532]; Jamnalal-V-State of M.P. = 2002 (2) MP 169.
22. Mahesh Balkrishna Dandane-V-State of Maharashtra= 2014 (4) Crimes 37 (Bom.)
23. Ibid.
24. The Times of India; December 28, 2014.
25. Ibid.
26. The Times of India; December 31, 2014.

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5. Dubey RK, Pandey, Jitendra. **Civil Liberties under Indian Constitution**; [Deep & Deep Publication, New Delhi,] 1990.
6. Dr. Sudha Malhotra. **Human Rights: Emerging Issues**; [Kilaso Books, New Delhi,] 2000.