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CONSENT OR COERCION: UNVEILING THE REALITY OF RAPE AND FALSE MARRIAGE

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ABSTRACT

Rape is not a crime against Women but against the whole Society. Rape directly affects the autonomy of women. Rape infringes many fundamental Right of women, i.e. Right to Privacy, Right to Life, etc. Sexual Intercourse on the pretext of marriage is a concept that has been decided by the Court a decade ago, but there is no law related to it at present in India. Parliament passes a bill of BNS (Bharatiya Nyaya Sanhita), BNSS (Bharatiya Nagarik Suraksha Sanhita) and BSA (Bharatiya Sakshya Adhiniyam). Sec 69 of BNS talks about Sexual Intercourse on pretext of Marriage. Testimony of the Victim plays a very crucial role in Cases of Rape and Sexual Intercourse on the pretext of Marriage which can be used without Corroboration. That's why it is said by the Court that "THE RULE OF CORROBORATION IS NOT A RULE OF LAW BUT A RULE OF PRUDENCE". In case of Rape, circumstantial Evidence plays a very crucial role. In Medical Examination of the Victim, Intact or torn Hymen is not taken into consideration for determining the offence of Rape and Virginity. Two -Finger test is declared Unconstitutional as this is not Scientific technique and infringes the Right to Privacy of the Women. It is not necessary that the if Hymen is intact then rape not committed and if torn then only rape is committed. This test is also known as the "test the laxity of the vagina". This test measures the habituated of Sexual intercourse. Zero FIR is one of the foremost provision that was included after the Nirbhaya case in 2013. In this article, the Crucial aspects of Rape and Sexual intercourse on the Pretext of Marriage with case laws discussed in the very elaborate way. This article helps to clear many misconceptions related to the Rape and Sexual Intercourse on the Pretext of marriage.

INTRODUCTION

Rape is one of the brutal and heinous Crime in society which is explained in Section 375 of Indian Penal Code and Section 63 of Bharatiya Nyaya Sanhita. The Crime of Rape is one of those offence whose affect is directly on Women. Rape in simple words means the penetration of the penis to any extent into vagina of a Women. That's definitely does not matter that to what extent penetration is there, if there is **slightest penetration then also that act amounts to Rape**. That's why word "to any extent" used in the definition of Rape under IPC and BNS. At present the cases of Sexual intercourse on the pretext of Marriage is increasing day by day and it arises as one of the biggest puzzler in modern day society. There is no Express provision for Sexual intercourse on the pretext of Marriage is there in IPC and that's the reason to introduce the new Section 69 in the BHARATIYA NYAYA SANHITA(BNS). In this article all the different aspects of sexual intercourse on the pretext of Marriage is discussed in detailed manner.

STATUTORY MANDATES

Section 375 of IPC and Section 63 of BNS define the criteria on the basis of which the person convicted for Rape.

SECTION 63 of BNS¹ (SECTION 375 of IPC)

"Rape- A man is said to commit "rape" if he--

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (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 makes her to do so with him or any other person; or
- (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 of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First. Against her will.

Secondly. Without her consent.

¹ Bharatiya Nyaya Sanhita, sec.63.

Thirdly. 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.

Fourthly. 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.

Fifthly. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or 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.

Sixthly. With or without her consent, when she is under eighteen years of age.

Seventhly. When she is unable to communicate consent.

Explanation 1. For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. A medical procedure or intervention shall not constitute rape.

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

WHAT IS CONSENT

SECTION 28² OF BNS (SEC 90 OF IPC)- “A consent is not such a consent as is intended by any section of this Sanhita –

- a) 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
- b) if the consent is given by a person who, from mental illness, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or
- c) unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age”

In Section 28 (a) two condition must be fulfilled for its application. Firstly, Consent is given

² Bharatiya Nyaya Sanhita, sec.28.

by a person under fear of injury or misconception of fact. Secondly, it must be proved that the person doing the act knows or has reason to believe that the consent was given in consequence of such fear or misconception. This section apply to those cases where the consent is taken by the other person in misconception of fact.

Now other question arises that when to take Consent?

The answer of this Question is that the consent should be taken by the Person prior to sexual intercourse. Consent obtained after the sexual intercourse is **NO CONSENT** at all.

“Every act done “against the will “of a woman is done ‘without her consent but an act done ‘without the consent’ of a woman is not necessarily” against her will”³

Saleha Khatoon v. State of Bihar and Ors.⁴ “The Hon’ble Mr. Justice L.P.N. Shahdeo, Patna High Court held that consent obtained on the basis of fraud or consent which is based upon deception cannot be termed as consent.”

Sex workers are adults who consensually give sexual services in exchange for money or goods. Consent plays a major role in the sex workers profession, a person incapable to perform sexual intercourse without the consent of the sex Worker/ Prostitution. So, to have sexual intercourse with any Women consent played a very major role.

“If the woman was willing to allow sexual intercourse with her for money consideration, the fact that the consideration was found to be fictitious would not vitiate the consent”.⁵

The Plea of the respondent that the hymen of women is intact, so no criminal charges of Rape is not tenable.

FALSE MARRIAGE

In India, Sexual intercourse on the pretext of false Marriage amounts to Rape in IPC but in BNS it is not come under Rape but as a Separate offence under Section 69. If some person commits sexual intercourse with other person with the consent that he will marry her, but in reality he doesn’t have any intention to marry from very beginning, and try to misrepresent that girl only to satisfy his lust. That person will be charged for rape under **Section 376 read with Section 90 of the IPC and Section 69 under BNS**. Under BNS, convict charged for maximum of 10 years imprisonment and fine under Section 69 of BNS.

³ Prof. S.N. Mishra, Indian Penal Code 743 (Central Law Publication 2023).

⁴ Saleha Khatoon v. State of Bihar and Ors, 1979 SCR(3) 169.

⁵ Moti Ram, AIR 1954 Nag. 922.

SECTION 69 OF BNS⁶

“Whoever, by deceitful means or making the promise to marry to a woman without any intention of fulfilling the same, and has sexual intercourse with her, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Explanation- “deceitful means” shall include the false promise of employment or promotion, inducement or marrying after suppressing identity.”

Sexual offences include Deceit and false promise of Marriage, which is one of the biggest problem in the legal System. Whoever by deceitful means or false promise to marry committed sexual intercourse without intention to execute its promise to marry and only want to satisfy his lust. Intercourse on genuine promise of Marriage is Consensual Sex.

ESSENTIALS OF SECTION 69 OF BNS

1. Deceitful means or by making promise to marry
2. Without intention
3. Sexual intercourse
4. Such sexual intercourse not amounting to rape

PUNISHMENT – 10 YEAR & FINE

Under IPC there is no specific provision for Sexual Intercourse on False pretext of Marriage and that’s why this type of case is come under Section 375 read with Sec 90.

False marriage- It is given with the intention that it will be broken in future.

Breach of promise- It is made in good faith but subsequently not full filled.

For example, in **R. v. Flattery**⁷, “a nineteen-year-old girl consulted the accused, a doctor, for treatment for an illness. And the accused, on the pretext of giving her surgical treatment, had carnal intercourse. The victim having submitted herself on the genuine belief that she was being treated, the accused was held guilty of rape.”

Similarly, in **R. v. Williams**⁸, “when the accused, who was engaged by the victim to give her lessons in singing, had sexual intercourse with the victim on the pretext that he had to perform an operation on her to produce her voice properly. Thus, the victim having submitted herself

⁶ Bharatiya Nyaya Sanhita, sec.69.

⁷R. v. Flattery [L.R.] 2 Q.B.D. 410.

⁸ R. v. Williams [1923] 1 K.B. 340.

on this premise but without any intention of having sexual intercourse, the King's Bench upheld the conviction of rape.”

CORROBORATION OF EVIDENCE

For conviction of rape **corroboration is not necessary**. The victim of Rape don't want to defame his family and degrade her sanctity by false allegation of Rape against any other person. The crime of Rape degrades the personality of victim and start feeling ousted from the society because of the behaviour and act of the Society. No women want to tarnish her life by making the false allegation. So, if a case of rape came before the court then court should accept it as true not fabricated. In certain circumstances court also takes medical evidence as corroboration.

If a false allegation is made by the Victim then in that case if the Victim is Unmarried then she will face problem in future to get marry. If the victim is married then she will ousted from the society and leaves a permanent scar on image of victim. Therefore, if this is a situation then no women want to put the false allegation of Rape to destroy her Life.

In some cases respondent pleads that Victim is not Virgin or have done sexual intercourse before that also, but this reasoning doesn't give the license to offender to commit Sexual intercourse without her Consent.

Rafique v State of U.P⁹ - Krishna Iyer, J. said, “A sensitised judge who sees the totality of the circumstances would nor reject the testimony of the rape victims unless there are very strong circumstances initially against its veracity. Therefore, it is not always necessary that the testimony of the victim be corroborated by some other evidence before the accused can be convicted.”

State of H.P. v Raghubir Singh¹⁰- “Convincing and trustworthy testimony of the prosecutrix corroborated by medical evidence and testimony of other prosecution witnesses, conviction is maintainable.”

In case of **Krishna Lal v State of Haryana**¹¹ – “Krishna Iyer J. observed: “**A Socially sensitised judge ia a better statutory armour against gender outrage than long clauses of a complex section with all the protections writ into.**”

⁹ Rafique v. State of U.P (1980), 4 SCC 262.

¹⁰State of H.P. v. Raghubir Singh (1993), 2 SCC 622.

¹¹ Krishna Lal v. State of Haryana (1980), 3 SCC 150.

Gajanand v State of Gujrat¹² – “The accused can be convicted on the lone testimony of the prosecutrix without Corroboration.”

In **Imrat Lal v State of M.P.**¹³- “The rule of corroboration is not a rule of law but only a rule of Prudence.”

DYING DECLARATION (Section 26¹⁴ of BSA)

The Statement made by person as to the cause of his Death whether the person who made them was or was not, at the time when they were made, under expectation of death. **Conviction can be granted on sole basis of Dying Declaration.**

SHALL PRESUME (Section 120¹⁵ of BSA)

In prosecution for Rape under sub section (2) of Section 64 of BNS, where sexual intercourse is proved and question is whether she gave her consent or not and if women give evidence that she did not consented for Sexual intercourse then court shall presume that she did not give Consent. Then burden to prove is shifted on accused to prove that Sexual intercourse is done with mutual Consent.

ACCOMPLICE

“In a case of rape, the victim is not treated as an accomplice. Evidence of the victim is to be treated almost like the evidence of an accomplice requiring corroboration.”¹⁶

Aman Kumar v. State of Haryana¹⁷- “It is well settled that a prosecutrix complaining or having been a victim of the offence of rape is not an accomplice after the crime.”

CONVICTION BASED ON CIRCUMSTANTIAL OR DIRECT EVIDENCE

DIRECT EVIDENCE

Direct evidence is evidence that directly proves that a offence is committed or not without inference/ presumption from the fact. Direct evidence include the Video Record, written Confession, audio recording and Eye witness testimony. This type of Evidence is More reliable than the Circumstantial Evidence.

¹² Gajanand v. State of Gujrat, 1987 Cr Lj 374 (Guj).

¹³ Imrat Lal v. State of M.P., 1987 Cr LJ 557 (MP).

¹⁴ Bharatiya Sakshya Adhinyam, sec.26.

¹⁵ Bharatiya Sakshya Adhinyam, sec.120.

¹⁶ Prof. S.N. Mishra, Indian Penal Code 749 (Central Law Publication 2023).

¹⁷ Aman Kumar v. State of Haryana, 2004 Cr LJ 1399 (SC).

CIRCUMSTANTIAL EVIDENCE

Circumstantial Evidence is also known as Indirect Evidence. In this case, the person can not prove anything directly by help of audio, video Record, eye witness etc. Circumstantial Evidence is that type of Evidence in which Inference/ presumption is taken to connect the Evidence from Fact or Conclusion. It is less reliable than the Direct Evidence but is used as an Evidence where Direct Evidence is not present.

In the case of Rape or Sexual intercourse on pretext of Marriage, **Circumstantial Evidence is one of the essential Evidence to prove the charge of Rape on the offender**, because in this type of Crime, the offence is committed under the four wall or some remote area or area where public access is not there and that's why there is no chance or very minimal chance to get the Direct evidence to prove this type of Crime. In this Cases we have other option that is Circumstantial Evidence, by which we can prove through the inference, assumption or circumstances of the Case.

State of U.P. v Desh Raj¹⁸- "It was held that Circumstantial Evidence clearly point to the guilt of the accused."

MEDICAL EXAMINATION OF VICTIM OF RAPE (SECTION 184 OF BNSS/ SECTION 164A OF CrPC)

Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.¹⁹

Medical Report plays a salient role in the offence of Rape. That's why this provision talk about the medical Examination of the Victim by the Registered medical practitioner. This

¹⁸State of U.P. v. Desh Raj, 2006 Cr Lj 2018 (SC).

¹⁹ Bharatiya Nagarik Suraksha Sanhita, Sec.184.

examination is done in Government or Local Hospital. If victim is child then Consent is given by their Parents/Guardian is valid. Examination should be done within 24 hour from the information received by the authority. If it is done after that time frame then in that case there is a chances that the evidence like DNA, HAIR SAMPLES, SEMEN ,SALIVA, CELL PARTICLES etc. are washed away or reduces its reliability. These evidences is there in natural form only till 24 hour after that evidences start to deteriorate. If the medical Examination is done after some days then in that case, there is high chances of acquittal of offender and if medical Examination is done under the time frame then there is high probability that offender will be convicted on the basis of Medical Evidence. But this definitely not means that the only on Sole basis the offender will be convicted or acquitted.

ZERO FIR

The FIR is filed by the victim in the Police Station where the act is committed irrespective of the Jurisdiction and then transfer that FIR to their police Station of Original Jurisdiction. And then the investigation commences after FIR transferred to the Original Jurisdiction. This scenario of Zero FIR started after the Nirbhaya Gang Rape that puts the obligation on the Police officer to file FIR no matter that Rape case belongs to other Jurisdiction. Zero FIR is a one of the most substantial Provision in India but not used efficiently because lack of awareness in People and Police officer. Now there is need to introduce this provision to larger extent so that everyone got to know about this and avail this remedy through Conference, Seminar, Workshop etc.

Under **Section 173²⁰ of BNSS** it is mentioned “**IRRESPECTIVE OF THE AREA**” which means that any person can give information of cognizable Cases either in Oral or by electronic means to officer in charge of Police Station and that’s not matter that in what jurisdiction crime is committed.

If Sexual offence is committed or attempted against women (**Section 64 to 71 & 74 to 79 & 124 of BSA**) then such information shall be recorded by a women police officer not Male police officer.

Sexual violence is, disturbingly, a growing trend in India. According to the data compiled by

²⁰ Bharatiya Nagarik Suraksha Sanhita, Sec.173.

National Crimes Records Bureau (NCRB), *“4,15,786 rape cases were reported across India between 2001 and 2017. On average, 67 women were raped every day across the country during these 17 years, or, in other words, about three women had been raped every hour.”*²¹

MEDICAL EXAMINATION

This is a general assumption of the people that if Hymen is torn then rape is committed otherwise not. But this is a big misconception in Peoples related to this offence of Rape. There is cases where hymen remain intact and rape was committed by the offender and on the other side there are cases where hymen torn but Rape not committed. So, assumption related to Hymen is totally wrong. The shape of **Hymen** is irrelevant because Hymen can be torn due to the Cycling, exercise, Masturbation etc. What are relevant during the Medical Examination is to examine the fresh tear, Bleeding etc.

Two Finger Test is strictly prohibited and declared unconstitutional in India in 2013. Two Finger test means that the registered medical Practitioner insert two finger into vagina of the women to find out that whether the vagina is intact or torn. It was used to find out Whether women are habitual of Sexual intercourse or not. If yes, then Hymen is torn and not then that will remain intact but this concept is totally misguided and erroneous as it is not Scientific. There are many cases where the vagina is torn without sexual intercourse due to exercise, Cycling and masturbation etc. and many cases in which it will remain intact after sexual intercourse also. This is totally depend on the person to person and this concept is not scientific. This method violates the Right to Privacy of the Victim and also physical and Mental Integrity. Two -finger test is declared unconstitutional by the Supreme Court because it is unscientific. This Technique is still used in South Asian Countries. In the case of Rape, the sexual history of Women is immaterial.

WORLD HEALTH ORGANIZATION said that while dealing with the Sexual offences and Rape, Two Finger test is not Scientific.

²¹ D. Rai, *Sexual violence pandemic in India : Rape cases doubled in last 17 years*, India Today (13/12/2019), available at <https://www.indiatoday.in/diu/story/sexual-violence-pandemic-india-rape-cases-doubled-seventeen-years-1628143-2019-12-13>, last seen on 25/03/2024

CONCLUSION

Rape is one of the heinous Crime in the whole World, which is continuously increasing day by day. The reason is different for different people, but the main reason for this is liberal punishment which is provided by the court to the Convicts. If Court wants to reduce the number and intensity of cases, then Court should provide the strict punishment which creates deterrence in the Society. Otherwise, the rate of rape is continuously increasing in the Society without trepidation in the Society. Counsel of the victim (Prosecution) must present enough evidence to prove it beyond a reasonable doubt. The Confession of the victim should not necessarily be corroborated with evidence, in certain cases Medical Evidence is Required. In case of Rape, Circumstantial Evidence plays a very important Role to prove the Crime beyond reasonable doubt. Intact/raptured Hymen didn't play a very crucial role in determining the Rape.

