



‘THE PROMISE OF MARRIAGE’*

Abstract

The Indian Penal Code provides a detailed definition of rape in S. 375. However, this provision has been read with S. 90 of the Code to create the offence of rape on the fraudulent promise of marriage. Recent pronouncements by the Bombay High Court have diverged from the precedent of the Supreme Court in deciding such cases. This paper argues that they have reached the right decision for all the wrong reasons, exposing perverse logic and inexplicable inconsistencies. The purpose of this note is to make an argument for scrapping this judicial creation because it is unwieldy, and represents a morality that is both foreign and antiquated.

Introduction

Recent pronouncements of the High Court of Bombay, dealing with rape on the fraudulent promise to marry, expose disturbing inconsistency, and perverse logic in judicial reasoning. But they also raise important questions about the rationale and utility of such criminalisation.

The Relevance of Consent

Our understanding of consent tends to vary based on circumstances. In law, it is universally accepted now that consent ought to be *real*, given without fear, force or threat of any kind. It ought also to be *informed*, and not be based in misconception or a mistaken of fact. In criminal law, consent can often be the bright-line between many a lawful and criminal act. For instance, entering someone’s house, investing somebody’s money in a scheme, taking someone’s car, or having sex with an adult, are all lawful acts if they are done with the consent and permission of the other, and punishable as crimes if not. S. 90, Indian Penal Code (hereafter ‘IPC’) embodies the principle that the existence of consent is not enough. It must be without fear or misconception. Thus, if I consent to someone taking my possessions because they are holding a gun to my head, it is robbery,¹ even though I might have *said* ‘yes’. If I consent to someone entering my house because I think she’s the plumber, but it turns out she isn’t, and has in fact come to steal my diamonds, the act would amount to criminal trespass,² even though I opened the door, let her in, and maybe even made her a cup of coffee. *However*, if someone consents to have sex with me because I promise to marry them, though I never intended to do so, an examination of High Court and Supreme Court judgements from India would suggest that it *may* or *may not* be rape.

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¹ S. 390, Indian Penal Code, 1860.

² S. 441, Indian Penal Code, 1860.

Before I delve into the problematic landscape of judicial decision making on this subject, it would be prudent to examine the idea of ‘sex by fraud’. When a man induces a woman³ to have sex with him (a man induces a woman to invest in a Ponzi scheme), based on a fraudulent⁴ promise to marry her (based on a fraudulent promise of returns), her consent to the sex (the handing over of her money) is vitiated by his fraud. This is because her sexual (financial) autonomy, and her ability, to actually and freely decide whom she wants to have sex with (where she wants to invest her money), is taken away from her because of the *lie*.⁵

Statutory Treatment

The idea of sex by fraud is reflected in S. 375, *fourthly*, IPC, which provides that a man who intentionally induces a woman to consent to have sex with him by impersonating her husband, knowing that she would not have done so but for the impersonation, commits **rape**. This rationale, however, does not explicitly extend to other forms of impersonation, for instance, if a man has sex with a woman while pretending to be her pen pal, whom she has never seen before, but believes herself to be in love with. Arguably, this is because the concern of the Judaeo-Christian ethic underlying the IPC was to protect the innocent girl who thought she was having legitimate, marital sex, rather than the sexual autonomy of the woman who was having non-marital sex.⁶ Other forms of ‘deception’ may potentially be read into the second clause of S. 375, by reading it with S.90, since consent given under a misconception would not be *real* consent. Courts have repeatedly accepted this possibility in cases where consent to sexual intercourse is obtained *vide* a fraudulent promise to marry.⁷

Judicial Treatment

The standard of ‘consent’ applied in cases where rape by a fraudulent promise of marriage is alleged is highly problematic, because it often falls back on the idea that in the absence of an overt threat or use of force, it is upto the woman to show that her consent was not, in fact, real. This means that the focus of the trial becomes the intention of the victim, and not that of the perpetrator.⁸ Recently in *Akshay Manoj Jaisinghania v. The State of Maharashtra*,⁹ the Bombay High Court held that when consent is obtained by fraud, it would amount to rape, but only in certain circumstances, for instance, when the promise to marry is made to an illiterate girl. When the girl is a major, and is educated, however, “she is supposed to be fully aware of the consequences of having sex with a man before marriage.” In *Patil v. State of Maharashtra*,¹⁰ which had similar facts, bail was granted on the ground that the prosecutrix was 24 years old when she had filed the FIR. Similarly, the Madras High Court, in *Karthik Theodre v. State*,¹¹ went into a detailed examination of the manner in which the prosecutrix acted: her decision to move in with the accused after they had been betrothed, the fact that she had sex with him multiple times for the period of nearly two years while they lived together, and so on. Even though the charge of rape was based on the allegation that consent had been obtained on the false promise to marry, the court made no effort to look into whether the accused had ever intended to marry the prosecutrix at all. The focus of the court is conspicuous in the following observation:

³ The terms man and woman have been used to correspond with the gender specific treatment of sex crimes in the IPC.

⁴ S. 25, Indian Penal Code, 1860.

⁵ Jed Rubenfeld, *The Riddle of Sexual Autonomy*, 122 Yale L.J. 1372, 1402-03 (2012-2013).

⁶ *Id* at 1402.

⁷ See, *Dileep Singh v. State of Bihar* (2005) 1 SCC 88 (Supreme Court of India).

⁸ Victor Tadros, *Rape Without Consent*, 26(3) Oxford J.L.S. 515, 517 (Autumn, 2006).

⁹ *Akshay Manoj Jaisinghania v. The State of Maharashtra*, A.B.A. No. 2221 of 2016, decided on 9.1.2017 (High Court of Bombay).

¹⁰ *Patil v. State of Maharashtra*, Bail Application No. 1036 of 2015, decided on 3.8.2015 (High Court of Bombay).

¹¹ *Karthik Theodre v. State*, 2015(2) Crimes 435 (High Court of Madras).

The next question that nags my mind is, when the prosecutrix is an Indian girl of Tamil origin, why should she leave her parents immediately after the betrothal to have a shared household with the accused even before the wedding? Of course, live in relationship is neither an offence in India nor in Australia, but it is definitely considered as a social taboo in India unlike in Australia. It is not her case that she wanted to have a rehearsal for a post marriage celibate life like Ramakrishna Paramahansa and Saradha Devi and that all her dreams of blossoming into a Saradha Devi was spoiled by the accused by subjecting her to coitus.

On the other end of the spectrum lies *Tekan v. State of Madhya Pradesh (Now Chhatisgarh)*,¹² where the issue was substantially similar, the conviction of the accused was affirmed on the ground that the prosecutrix was an illiterate, blind girl, albeit an adult. From these judgements, it would appear that the court is more concerned with the circumstances and the intention of the woman, than with examining the intentions of the accused. The burden is not on him, regardless of his age, position or qualification, to not make a fraudulent promise. It is placed on her, as an educated, adult woman, to not be defrauded.

This is a retrograde standard built on perverse logic and indefensible classification. Consider a parallel with the effect of administration of an unwholesome substance.¹³ It is rape to have sex with a woman who, by virtue of an unwholesome substance being administered to her, becomes *incapable* of consenting. If the standard set by the aforementioned decisions were to be applied to such a situation, we would find the court saying that an adult, educated girl at a party ought to know that the drink a man buys her could be spiked with a date-rape drug, and therefore, if she has sex with him under the effect of the said drug, the responsibility would be hers alone. I can imagine that comparing a lie to a stupefying or unwholesome substance might not be palatable. I agree that the incapacity created in the latter case is greater, but I contend that the *principle* is the same.

Consider another example. An adult, educated man is induced into handing over his money to another man, who promises to invest it in a profitable scheme. The latter man never intended to invest the money anywhere, and only said it to con the former man of his savings. Would it not be ludicrous if the judge, during trial, said that the victim, being an adult, educated man ought to have known the consequences of investing his money, instead of looking at whether the latter man had intended to defraud him? An objection to this analogy might be that a person does not ordinarily want to give his money, whereas it is normal for a person to want to have sex. However, the objection would be flawed, because the analogy *is not* between giving away one's money and having sex. It is between giving away one's money to a particular person, and having sex with a particular person. Thus, the question that needs to be asked is, would the former man have given his money to this particular man, had it not been for the inducement? And similarly, would the woman have had sex with this particular man, had it not been for the inducement?

In my opinion, however, an even graver problem plagues the aforementioned judgements. The ridiculous conflation of literacy or education with sexual awareness and desire, and of illiteracy with the lack thereof. There is nothing to support such an association, except the idyllic notion of 'Bharat' (our villages and semi-rural areas) being a realm of Biblical innocence, in contrast with 'India' (our metropolitan cities and urban centres) as a hub of western-influenced temptation and debauchery. This is especially since the Indian education system doesn't even

¹² *Tekan v. State of Madhya Pradesh (Now Chhatisgarh)*, 2016 (2) SCC 753 (Supreme Court of India).

¹³ S. 375, *fifthly*, Indian Penal Code, 1860.

touch upon sex education. In effect, therefore, this division of womankind into two classes is paternalistic, but more importantly, arbitrary and unreasonable.

A further problem with this line of reasoning is that it is in direct contravention of the decision of the Supreme Court in *Uday v. State of Karnataka*.¹⁴ This case, upon evaluating the weight of judicial precedent, had laid down the parameters for judging cases under S. 90 read with S. 375. “Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception.” The problem with this approach, I posit, lies in making the distinction between an innocent breach of the promise to marry, and a promise to marry which was fraudulent to begin with. The willingness to fulfil a promise to marry cannot be adequately demonstrated by any gesture short of an actual attempt to perform the marriage, evidenced, say, by making an appointment at the office of the registrar. But what of the determined conman who takes these steps to build his defence, but cancels at the last minute, citing a lack of compatibility, or a similar, seemingly innocent reason? Human relationships are complicated, and *not even the Devil knows the mind of man*.

Thus Far and No Further

The recent pronouncements of the Bombay High Court, however flawed in their reasoning, raise pertinent issues that the law, the judiciary, and we as a society, must consider. In *Balkrishna Dandane v. State of Maharashtra*,¹⁵ for instance, the court proposed that consent may be said to be fraudulently obtained when the accused hides his identity, or impersonates another (see the pen-pal hypothetical above), or when a married man promises an unmarried girl that he would marry her. The same observations were repeated in *Akshay Manoj Jaisinghanian v. The State of Maharashtra*.¹⁶ Notwithstanding the lack of nuance in the examples, the observation begs the question, where do we draw the line? If a parallel is drawn to cheating, then lies about his educational qualification, his income, his lineage, his employment, or anything else that could potentially induce a woman to have sex with a man, ought to be considered rape, provided the element of fraud is proved. For, how are these instances materially different from ‘impersonating another’, given that the offence of cheating by impersonation is complete, regardless of whether the impersonated individual is real or imaginary?¹⁷ It has been argued that this line of reasoning leads down a slippery slope.¹⁸ Would wearing a certain brand of perfume, which the man knows would attract the woman, and effectively hide his repulsive body odour, fall into this category? Would wearing make up to hide a hideous scar qualify? What about plastic surgery? These questions are nigh well impossible to answer because of the *culture* of lies that is so intrinsic to human courtship.¹⁹

Embedded in culture or not, there is no doubt that these are lies, which if spoken with a fraudulent intention, would technically vitiate consent. Possibly, they appear ridiculous to us because they are superficial, and we make the moral judgement that ‘these are not the right reasons to have sex’. But then, is the promise of marriage the ‘right reason’ to have sex? Or does it seem acceptable because it makes the woman innocent, agreeable to having sex with a man she believes to be her prospective husband, as opposed to guilty, and desirous of having sex with a man she believes to be a millionaire? I am inclined to say, the latter, since there is

¹⁴ *Uday v. State of Karnataka* 2003 (4) SCC 46 (Supreme Court of India).

¹⁵ *Balkrishna Dandane v. State of Maharashtra*, A.B.A. No. 27 of 2014, decided on 12.3.2014 (High Court of Bombay).

¹⁶ *Akshay Manoj Jaisinghanian v. The State of Maharashtra*, A.B.A. No. 2221 of 2016, decided on 9.1.2017 (High Court of Bombay).

¹⁷ S. 416, Indian Penal Code, 1860.

¹⁸ Rubinfeld, *Supra* note 6 at 1416.

¹⁹ *Id.*

no harm caused by such a promise, which could not also be caused by a lie about one's financial status, one's identity, or the way one smells.

Conclusion

If the above assessment is accurate, such a reading of the law is Victorian at best, and patronising and discriminatory at worst. Evidently, the Judaeo-Christian morality inherited from our colonial masters not only governs our legislations, but also shapes judicial reasoning. Logical consistency and the liberal ideal of the autonomy of the individual would require that if courts cannot judge the culpability of a man who fraudulently induces a woman to consent to have sex with him by lying about his monthly income, they must abandon the 'fraudulent promise to marry' ground as well. Practically, this can be done if S. 375 is interpreted as a special provision, which exclusively lays down the conditions in which consent, though given, would be considered invalid or vitiated. In such a scenario, S. 90, being a generally worded provision, would be irrelevant to S. 375.²⁰ All women would then be responsible for the faith they repose in the promises or the puffery of the men they consent to have sex with. It cannot be ignored, of course, that since such lies *do* vitiate consent, they could cause a number of the damaging effects of rape, such as humiliation, and degradation, in addition to the curtailment of sexual autonomy caused by the fraud *ipso facto*. But, this is not a problem criminalisation can solve, not least because of the difficulty of actually determining whether a man who made a promise to marry *intended* to keep it. It is a larger, cultural problem that must be addressed by making sex less of a taboo. This would remove the incentive of men, to make fraudulent promises of marriage to induce women to consent to sex, and of women in turn, to seek to ground their consent to sex in the prospect of marriage.

²⁰ This argument was made in *Uday v. State of Karnataka*, 2003 (4) SCC 46 at para 10. However, the court did not rule on its accuracy. The approach thereafter has been to read S. 375 with S. 90, IPC.