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# INTERPRETATION OF THE CATEGORY OF ‘CONSENT’ IN RAPE CASES

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## Introduction

Consent means wanting to engage in sexual activity. Consent means that both parties have agreed to engage in sexual behaviour with each other. Consent is asked. Consent is knowing that your partner has agreed. Consent is a yes. The word unfolds legal baggage, where even though it is straightforward- actions that indicate agreement, or an expressive agreement, somehow the legal jurisdiction of our country time and again comes up with their own ‘definition’ of consent per se. In this article, I shall be unfolding with the reader the baggage this word comes with. How a simple word with a simple definition has been misunderstood, spun around, and not accepted by the jurisdiction for its own sake.

The Indian laws have historically defined rape laws as a sexual activity that is forced upon a woman against her will by a man, this law does not apply to women who are married to men, and the principal element is no consent.<sup>1</sup>

The age of consent has had its own journey in the Indian jurisdiction, starting with the Criminal Law Amendment Act 1983; the age of consent at that time was 16 years (in there, rape was only penetration of the penis into the vagina), fast track to post 2013 amendment, the age of consent was upped to 18 years. One such case wherein, regardless of consent from the girl, the man was still imprisoned is the Satish Kumar case.<sup>2</sup> Here, the case puts forth the rape of a minor, where the girl was 16 years of age and it was held that because of her age, her consent for sexual intercourse was considered to be immaterial and inconsequential, attracting IPC Section 375 clause sixthly (point 14). The accused appealed to reduce the High Court sentencing (that is, 4 years of rigorous imprisonment under IPC Section 376), but the appeal failed and was dismissed.

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<sup>1</sup> Consent on its own gives women such great power for sexual relations; however, when the tables are turned, it appears as though women are incapable of making decisions related to sex on their own.

<sup>2</sup> Satish Kumar Jayanti Lal Dabgar v. State of Gujarat, (2015) 7 SCC 359

In criminal courts, there are two defendants on trial- one charged with rape and the other who's charged with the presumption of consent.<sup>3</sup> The presumption is of innocence until proven guilty, and for rape cases, the courts presume consent unless the victim is able to prove that she struggled, battled, fought, in some cases yelled no, and the victim was and is always more convincing if she's struggled to the point of injury. Here, what's odd is the fixation of the court on finding 'struggles marks'<sup>4</sup> on a woman's body when they should inspect the man's body. Their want of 'marks' on a woman's body is almost an acceptance of how men are stronger than women, and if there's just enough force where the woman might find herself 'locked' by him only then would the court know that yes, it was forced *physically* (only).<sup>5</sup>

The rape victims are usually unworthy of credit is the kind of thinking the Indian courts have laid down for the people if one follows the judgments. There were four kinds of corroborating evidence while determining the rape cases post 2013 amendments:

1. Class and caste
2. Prior sexual history
3. Promptness of the complaint
4. Signs of resistance on the body evidencing the crime

In the Tukaram case<sup>6</sup>, there were no marks of injury were founded on the person of the girl after the incident and their absence proves that the intercourse was a peaceful affair and the story of stiff resistance by the girl (Mathura) is all false.

In this case, Mathura comes from a lower class, she has prior sexual history (according to the court perhaps there was consent because she was habituated to sex), there was promptness to her complaint, and there were no signs of resistance on the body. The evidence

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<sup>3</sup> Kolsky, Elizabeth. "'The Body Evidencing the Crime': Rape on Trial in Colonial India, 1860-1947." *Gender & History*, vol. 22, no. 1, 2010, p. 111., <https://doi.org/10.1111/j.1468-0424.2009.01581.x>.

<sup>4</sup> Scheppelle, Kim Lane, and Susan Estrich. "The Re-Vision of Rape Law." *The University of Chicago Law Review*, vol. 54, no. 3, 1987, p. 1101., <https://doi.org/10.2307/1599836>.

<sup>5</sup> In the case of Rao Harnarain Singh Sheoji Singh v. The State AIR 1958 P & H 123 the court stated: "a mere act of helpless resignation on the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent" as understood in law." "Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves submission but the converse does not follow and a mere act of submission does not involve consent." (point 7)

<sup>6</sup> Tukaram v. State of Maharashtra, (1979) 2 SCC 143

Mathura is the girl who is said to have been sexually assaulted by Ganpat (rape) and Tukaram who fondled with her private parts afterwards. There were no marks of injury focused on the girl and their absence goes a long way to indicate that alleged intercourse was a peaceful affair and the story of stiff resistance been up at by the girl is all false (point 14). Sentences imposed by the High Court: 1 year of rigorous imprisonment (Tukaram) and 5 years of rigorous imprisonment (Ganpat). The Supreme Court overturned the judgment.

of semen that was found on the accused was claimed to be found because of other sexual relations he might've had.<sup>7</sup>

Section 54 of the Indian Evidence Law says that the past bad character of the accused is not relevant, generally speaking. Despite this section, we had section 155(4) that the general immoral character of the rape victim is admissible in court.<sup>8</sup> The trial is for a specific accusation- it's unfair to the law, and it's unfair to the person up on trial to take up past behaviour and add them to the case in hand, and let judgements be influenced by it. Why shouldn't this apply to a rape victim? And how can past sexual activities underline as if there was consent involved?

Under the Indian Penal Code (referred to as IPC hereon) lays down consent as an explanation 2 appended to section 375.<sup>9</sup> *It is very clear from one look at this definition that the law is clear with the usage of the word 'woman' and her expression of consent and not how consent is interpreted by the 'man'. It's about the communication by the woman and not the interpretation by the man.*

In the Mahmood Farooqi<sup>10</sup> case, it seems as though that the Indian Criminal law works as an instrument to regulate sexuality. The High Court judgement rewrites the definition of consent. Furthermore, in the case of Mahmood Farooqui, another corroborating evidence that seems to have come to light is the fact whether the victim knew the person beforehand or not.<sup>11</sup>

The High Court judgment seems too focused on the aspect of feeble 'no'. The contention is with what the judge said: "if you know the person, then feeble no can be

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<sup>7</sup> The Trial Court called it not rape but sex ("tissue of lies" "loose woman"). The High Court ruled it as rape not sex ("persons in authority" "strangers" "passive submission"). The Supreme Court ruled it as sex not rape ("presence of family members" "meekly followed the policeperson" "prior sexual history"). The Supreme ruled that her failure to sound an alarm during the said rape, and with there not being any injuries on her body, the policemen were left free.

<sup>8</sup> There's too much contradiction. This is the reason in Mathura case, the argument is given. We get carried away with bad character that we tend to turn trials into a popularity contest and a test of how good of a citizen are you.

<sup>9</sup> *"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"*.

<sup>10</sup> Mahmood Farooqui v. State (Govt. of NCT of Delhi), 2017 SCC OnLine Del 6378

Prosecutrix alleged that Mahmood Farooqui forced her to oral sex by going down on her without her consent. The trial court imposed 7 years of rigorous punishment with a fine of ₹50,000. The High Court overturned the judgment.

<sup>11</sup> So, even though the class of the woman is high but she's not conservative, she's not of the country so she isn't shy. The victim has had a sexual history, also, the victim used to have a romantic relationship with Farooqui. The promptness of the complaint isn't soon enough, it's late. There were no signs of resistance on the body evidencing the crime.

considered as a yes, but if you don't know the person, then it's a hard no."<sup>12</sup>

In IPC, we have a very firm line of consent. The contention is what the judge was saying. "If you know the person and there is a feeble no, then this no can be considered to be yes. But if you don't know the person, then it's a hard no." Interpersonal relationships are changed according to the judge. The resistance wasn't as strong. She accepted to go along with it. When it seemed as if it wasn't what she anticipated; she enjoyed it till a point, but the resistance wasn't as strong- so the burden was shifted to victim to prove the consent, and then later blamed. The whole judgement revolved around her character- her words were used against her.<sup>13</sup> In my opinion, the case is quite straightforward. Mahmood almost admits his fault. He's not denying at all in the email that was exchanged between them "*my sincerest apologies*".<sup>14</sup>

It's acceptable to an extent to say that the legal system has failed to understand and interpret the notion of 'consent' in rape cases. Consent should be understood uniformly and not be twisted as per the courts liking for cases, which in my view, leads to great injustice. Which is unfair to the law, and the people who have faith in the system.

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<sup>12</sup> For the standard of consent, there seems to be a certain amount of malleability as if consent can be very easily twisted around. For the court, interpersonal relationships are changed according to the judge. For the court, the resistance wasn't strong, she enjoyed it till a point, but the resistance wasn't as strong- so the burden was shifted to victim to prove the consent, and then later blamed.<sup>12</sup> The whole judgement revolved around her character- her words were used against her. The victim's candidness was used against her.

<sup>13</sup> The trial court seemed to be more sensitive with the facts as they took in consideration the fact as to how the woman was not from India, Mahmood was helping her with her research, and so there was an aspect of power dynamics involved; however in the High Court the same reasoning was twisted because she was not from our country so she is more vocal and not conservative, she would've been actually able to express herself- she should've protested more.

<sup>14</sup> The problem is – misreading the definition of consent; the judgment is a continuation, not an exception; the idea of consent is not a theological concept, its more of a geological notion. They have turned the definition around which is a false definition of consent and not at all what the IPC clearly states.

## REFERENCES

“Consent in Indian Rape Law: A Case for an Objective Standard of Determining Consent.” *OHRH*, [https://ohrh.law.ox.ac.uk/consent-in-indian-rape-law-a-case-for-an-objective-standard-of-determining-](https://ohrh.law.ox.ac.uk/consent-in-indian-rape-law-a-case-for-an-objective-standard-of-determining-consent/#:~:text=Explanation%20%20appended%20to%20section,in%20the%20specific%20sexual%20act%E2%80%9D)

[consent/#:~:text=Explanation%20%20appended%20to%20section,in%20the%20specific%20sexual%20act%E2%80%9D](https://ohrh.law.ox.ac.uk/consent-in-indian-rape-law-a-case-for-an-objective-standard-of-determining-consent/#:~:text=Explanation%20%20appended%20to%20section,in%20the%20specific%20sexual%20act%E2%80%9D).

Kolsky, Elizabeth. “‘The Body Evidencing the Crime’: Rape on Trial in Colonial India, 1860-1947.” *Gender & History*, vol. 22, no. 1, 2010, p. 111., <https://doi.org/10.1111/j.1468-0424.2009.01581.x>.

Parenthood, Planned. “What Is Sexual Consent?: Facts about Rape & Sexual Assault.” *Planned Parenthood*, <https://www.plannedparenthood.org/learn/relationships/sexual-consent>.

Scheppele, Kim Lane, and Susan Estrich. “The Re-Vision of Rape Law.” *The University of Chicago Law Review*, vol. 54, no. 3, 1987, p. 1101., <https://doi.org/10.2307/1599836>.

“What Consent Looks Like.” *RAINN*, <https://www.rainn.org/articles/what-is-consent>.

Ranchhoddas, Ratanlal, and Dhirajlal Deshavlal Thakore. *The Indian Evidence Act*. Bombay Law Reporter Office, 1919.

Lewis, Angelo J. *The Indian Penal Code*. S.n., 1870.