

THE LABYRINTH OF RAPE BY FALSE PROMISE OF MARRIAGE: A CRITICAL ANALYSIS

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Abstract

For decades now, the Indian judiciary has recognized that sex obtained by deception amounts to rape. The focus of deceptive sex, however, is concentrated on false promise of marriage. The significance of the institution of marriage in India and its ability to grant legitimacy to sexual relationships in our social context, rightly justify the special focus. The courts need to be appreciated for correctly acknowledging the complexities that surround the cases of rape by false promise of marriage. However, the judgments on the offence are marked by several flaws. These flaws are reflected in the form of unsound reasoning and unpalatable observations. These errors have not been rectified by the Supreme Court in its judgments. Consequently, decisions of various High Courts are replete with markers of unfairness. This paper attempts to highlight the factors courts account for while deciding such cases. These factors are critically analyzed to bring to the fore the need of urgent correction,

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especially due to changes in the Indian social terrain. It is proposed that the considerations reflecting legitimate concerns need to be preserved whereas the flawed logic and opinions need to be weeded out. This will ensure that the law on intercourse obtained by false promise of marriage meets the touchstones of justice and fairness.

I. INTRODUCTION

Sex obtained without consent is rape and consent obtained by fraud or deception is no consent. Therefore, sexual intercourse for which a woman's consent is obtained by deception should be rape.¹ Scholars from around the world combine these two basic tenets of law to advocate for more stringent penal provisions for those guilty of rape-by-deception, as they prefer to call it. In India, the focus is on rape by false promise of marriage, an indigenous species belonging to the genus of rape-by-deception. The special position of the institution of marriage in India and the air of awkwardness that surrounds matters like pre-marital sex in the Indian society result in tougher dealings for the courts.

The Indian judiciary has encountered cases of rape by fraud of marriage for decades now. *Anurag Soni v. State of Chhattisgarh* ("*Anurag Soni*"),² a very recent case, sparked the need for more intensive research on the issue. This article is an attempt to address such need. The press conveniently reported that the apex court held

¹Jed Rubinfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 THE YALE LAW JOURNAL 1372, 1376 (2013).

²2019 SCC OnLine SC 509.

that sex on false promise of marriage is rape.³ An analysis of the offence reveals that the matter is much more complex, and this generic statement highlights a miniscule figment of the germane legal context.

This article seeks to throw light on various aspects of rape by false promise of marriage. Part II discusses the status quo of the offence and extracts the key considerations for the courts to decide the guilt or innocence of the accused. The research relies on judgments of the Supreme Court and of various High Courts that are either very recent or have been relied or cited in decisions of the apex court. A critical analysis of the flaws in the reasoning of the courts follows in Part III. The courts may not have based their judgment solely on these flaws, but these errors have indeed unfairly favoured the accused. Unpalatable observations have downgraded the quality of judgments that would have otherwise set the right standards for similar cases. This part does not question the correctness of the judgments regarding either conviction or acquittal as that would require accounting for many more aspects of law. There is, rather, a simple extraction and critical analysis of some key problems in the decisions. The criticism majorly targets, *inter alia*, three errors: consideration of age and education of the prosecutrix, equation of desire with consent and, strict adherence to Section 90 of the Indian Penal Code. Part IV covers the proper course for better dissemination of justice in the future. An urgent need to rectify the errors emerges from the gradual acknowledgement of live-in relationships and recognition of casual sex in the Indian society, which complicates the matter to another level. A brief conclusion, in Part V, sums up the gist of the article.

³*Sex on false promise of marriage is rape: Supreme Court*, THE HINDU, (Last visited on Apr. 13, 2019, 11:40 PM), <https://www.thehindu.com/news/national/sex-on-false-promise-of-marriage-is-rape-supreme-court/article26831183.ece>; *Sex on False Promise of Marriage Is Rape: Supreme Court*, NDTV, (Last visited on Apr. 15, 2019, 11:40 PM), <https://www.ndtv.com/india-news/sex-on-false-promise-of-marriage-is-rape-supreme-court-2023409>.

II. THE FACTORS CONSIDERED BY COURTS IN DECIDING CASES OF RAPE BY FALSE PROMISE OF MARRIAGE

Anurag Soni is a case with an uncomplicated factual nexus. The accused proposed to marry the prosecutrix and had sexual intercourse with her. She initially objected to intercourse but consented on the assurance of marriage. It was revealed later that he already had plans to marry another girl, and this was known to his family as well. He kept the prosecutrix in dark about his intention of marrying another girl. The apex court held that consent was given under misconception of fact and does not amount to a valid consent under Section 90 of the Indian Penal Code. The accused had no intention to marry the prosecutrix right from the inception. He only had mala fide motives of using her to satisfy his lust. But for the promise, she would not have consented. This is a clear case of cheating and deception. The accused was proven to have had sexual intercourse without her consent and, hence, was convicted of rape under clause secondly of Section 375.⁴

The judgment call was relatively easier for the court. It was a lucid case of luring a woman into bed by giving her false assurance of marriage. Sufficient evidence was on record to show that the accused had already planned his marriage with another girl. This made it, prima facie, evident that there was no intention to marry the prosecutrix from the initial stage. This judgment, however, reflects only a small part of the rape-by-deception law in India. The current position of law on these cases is a product of multiple rationales that emanate from decisions of the Supreme Court and various High Courts on similar, but more complex cases.

A number of factors have been accounted by courts that are of major importance while deciding cases of the kind. These have shaped the reasoning of judgments of the Supreme Court and the High Courts

⁴*Anurag Soni*, *supra* note 2.

over the years. These subjective considerations make the matter far more complex than other cases of rape. Proving the guilt of the accused beyond reasonable doubt becomes an unrealistic task for the prosecution owing to massive scope of defences available to the accused. There exists a labyrinth of subjective considerations, that are, more often than not, beyond evidentiary bound.

A. Intention of the Accused from the Initial Stage

The offence is complete only when the accused had no intention or inclination to marry the prosecutrix right from the beginning.⁵ Promise being a hoax from the very starting point of interaction with the prosecutrix is a sine qua non of the offence. Guilt cannot be established when the accused actually intended to marry but could not do so because of factors beyond his control.⁶ These factors can range right from opposition against marriage by his family members⁷ to lack of monetary resources for the ceremony of marriage.⁸ The falsity of the promise can be established only when proved that the idea of not keeping it was firmly rooted in the accused's mind.

The law does not take into account breach of promise at a later date when the evidence does not suggest beyond reasonable doubt that the promise was not intended to be fulfilled from the beginning.⁹ Subsequent failure to marry is not taken to imply that the assurance was made with the knowledge of it being false.

⁵*Id.*, ¶39; *State of Uttar Pradesh v. Naushad*, (2013) 16 SCC 651, ¶19; *Deelip Singh v. State of Bihar*, (2005) 1 SCC 88, ¶42; *Uday v. State of Karnataka*, (2003) 4 SCC 46, ¶24; *Jayanti Rani Panda v. State of West Bengal*, 1984 Cri LJ 1535, ¶7.

⁶*Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675, ¶21.

⁷*Uday*, *supra* note 5, ¶25; *Abhoy Pradhan v. State of West Bengal*, 1999 SCC OnLine Cal 99, ¶16.

⁸*Titun Kumar Banik v. State of Tripura*, 2014 SCC OnLine Tri 647, ¶7.

⁹*Dhruvaram Murlidhar Sonar v. State of Maharashtra*, 2018 SCC OnLine SC 3100, ¶23; *Deepak*, *supra* note 6, ¶21; *Deelip*, *supra* note 5, ¶46; *Abhoy*, *supra* note 7, ¶16.

Conviction for rape is the simple end result when the promise was made only to obtain sex. The consent obtained for such act(s) of sexual intercourse is vitiated by fraud and is considered to be no consent at all.¹⁰ When the hope of marriage is used as a trap to lure a woman into bed for satisfaction of lust, the accused is not allowed to escape unpunished. The dishonesty in his intentions is often reflected by his behavior subsequent to him being confronted by the prosecutrix to fulfil his promise. Often the accused either outrightly refuses to marry or absconds after giving further assurances.¹¹ Disowning the woman right after getting the knowledge of her pregnancy is also not very uncommon.¹²

Certain legitimate and pragmatic issues also contribute in ascertaining whether the intentions of the accused were malicious. The issue of compatibility is of most significance. It is quite probable in such cases that the promise was initially made with true intentions of fulfilling it but the accused in the course of his relationship realizes that the marriage may fail sooner or later due to incompatibility between the two. This concern was discussed very recently by the Telangana High Court in *Safdar Abbas Zaidi v. State of Telangana*.¹³ The court observed that a party may choose to withdraw from a relationship due to physical, emotional or psychological incompatibility. Under such circumstances, they cannot be compelled to marry just because they have had a sexual relationship.¹⁴ A sexual relationship may gradually dry out because of lack of physical or psychological comfort between the couple. In such situations, marriage cannot be imposed on either of the parties as it is a matter of choice based on an individual's

¹⁰*Tekan v. State of Madhya Pradesh*, (2016) 4 SCC 461, ¶4; *Naushad*, *supra* note 5, ¶22; *Yedla Srinivasa Rao v. State of Andhra Pradesh*, (2006) 11 SCC 615, ¶17.

¹¹*Yedla*, *supra* note 10, ¶2.

¹²*Naushad*, *supra* note 5, ¶2; *Yedla*, *supra* note 10, ¶2.

¹³2018 SCC OnLine Hid 179, ¶11.

¹⁴*Id.*

notions of suitability.¹⁵ The courts have, therefore, an extra burden of being wary about not construing such withdrawal from a sexual relationship as a false promise of marriage.

The issue of incompatibility was not addressed in earlier related cases of the offence but raises a genuine issue. It becomes all the more relevant when the law today acknowledges live in relationships¹⁶ that may be devoid of any long-term commitments. This brings into picture another challenge for cases of rape by false promise of marriage. It provides an unchecked defence to the accused to plead that he backed out of his promise because of the realization of unsuitability between them. This leaves very little scope for the prosecution to proceed with the charges of cheating, let alone rape. The victim may become an easy target for the accused to prove his incompatibility, on either physical or psychological bases.

Caution is also practised in cases where the frustration of a break-up vents out as allegations of rape by false promise of marriage. It has been held that if a man refuses to marry after a break-up, the frustration of the broken relationship, where sexual intercourse was also involved, cannot be converted into the offence of rape.¹⁷ The prosecution is again hamstrung in such cases as the law has neither the means nor the authority to delve into the real reasons behind the relationship failure. This failure may very well be induced by the accused after his purpose of obtaining intercourse by deceit had materialized. This gives him the power to guise his malicious exit from the sexual relationship as a result of natural course of events that tore the relationship apart. The victim may be rendered helpless and may become a mere spectator of the accused's concocted story.

¹⁵Mahesh Balkrishna Dandane v. State of Maharashtra, 2014 SCC OnLineBom 348, ¶8.

¹⁶Mahesh, *supra* note 15, ¶6.

¹⁷Tejas Udaykumar Sarvaiya v. State of Maharashtra, 2016 SCC OnLineBom 6347, ¶10.

A case may also track its origin to the fallout of a mutual plan of marriage getting frustrated.¹⁸ The frustration may be brought about by harsh conditions for marriage being imposed by either of the parties that may not at all be amenable to the other party. The courts have to be very careful to avoid misconstruction of the consequent allegations as fitting case of false promise of marriage.

B. The Personality of the Prosecutrix

The age and education of a woman are held to be very relevant in deciding not only the culpability of the accused but also the voluntariness of the prosecutrix in such acts.¹⁹ A major and educated woman is supposed to know the nature and quality of the act and hence her participation in sexual intercourse is not to be taken to be completely obtained by fraud.²⁰ She should know the consequences of having pre-marital sex.²¹ She is presumed to possess sufficient intelligence to ascertain the moral quality of the act and the consent given by her on a promise of marriage is given only after due deliberation on the pros and cons of indulgence in sexual intercourse before marriage.²² Her age and education status make her capable of understanding the implications of the act and, hence, play a vital role in condoning the act of the accused. The law does not consider a major girl studying in college or pursuing her profession vulnerable to

¹⁸Nandan Sadanand Bendarkar v. State of Maharashtra, 2015 SCC OnLineBom 2044, ¶17.

¹⁹Tilak Raj v. State of Himachal Pradesh, (2016) 4 SCC 140, ¶16; Deepak, *supra* note 6, ¶26; Yedla, *supra* note 10, ¶10; Kunal Mandaliya v. State of Maharashtra, 2016 SCC OnLineBom 10600, ¶6; Hemant Choubey v. State of M.P., 2014 SCC OnLine MP 8193; State v. Ashish Kumar, 2013 SCC OnLine Del 5182, ¶12; Sujit Ranjan v. State, 2011 SCC OnLine Del 429, ¶17.

²⁰Deepak, *supra* note 6, ¶26; Tejas, *supra* note 17, ¶7; Hemant, *supra* note 19.

²¹Kunal, *supra* note 19, ¶6; Mahesh, *supra* note 15, ¶6; Sujit Ranjan, *supra* note 19, ¶17.

²²Diptesh Roy v. State of West Bengal, 2015 SCC OnLine Cal 8375, ¶8; Ashish, *supra* note 19, ¶24.

rape by false promise of marriage. If in such cases the offence has to be made out, then special circumstances may have to be proved.²³

The social background of the prosecutrix and the accused are also considered before concluding the guilt.²⁴ If the partners belonged to different religions or castes, then the improbability of their marriage is presumed to have been in the knowledge of the prosecutrix. If she, nevertheless, engages in sex with the accused then it is considered a reprehensible act on her part.²⁵ The very idea of unfavourable prospects of marriage being in the imagination of the prosecutrix tend to weaken the credibility of her allegations of rape in such cases. So, if she was aware of the differences between the communities of the two or the heavy resistance she may receive from her parents for the marriage, the prosecutrix cannot be said to be deceived into having intercourse on pretext of marriage.²⁶

Courts across India have also observed that if a fully grown-up woman consents to sex before marriage and engages in it on a regular basis then it proves promiscuity on her part and the promise has no significant impact on her consent.²⁷ She willingly and voluntarily consents to sexual intercourse as it was desired by her. She seeks pleasure as much as the accused and, therefore, plays an equal role in the act.²⁸

²³Tejas, *supra* note 17, ¶9.

²⁴Yedla, *supra* note 10, ¶10.

²⁵Deelip, *supra* note 5, ¶41; Uday, *supra* note 5, ¶25; Angad v. State of Maharashtra, 2018 SCC OnLine Bom 277, ¶35; Hemant, *supra* note 19; P. Govindan v. State, 2008 SCC OnLine Mad 470, ¶19.

²⁶*Id.*

²⁷Shyamapada Tewari v. State of West Bengal, 2009 (1) CCLR (Cal) 266, ¶14; Govindan, *supra* note 25, ¶20; Jayanti, *supra* note 5, ¶7.

²⁸Yedla, *supra* note 10, ¶10.

C. The Materiality of the Promise in her Consent

After a multitude of wide-ranging impediments arises another complexity that intensifies the labyrinth of rape by false promise of marriage. If at all the prosecution succeeds in proving beyond reasonable doubt all the above-mentioned factors against the accused, the court may put another burden on its shoulders, i.e., to prove that the consent for sexual intercourse was given solely on the basis of the promise made or assurance given by the accused and so did the accused know or believe.²⁹

The consent for intercourse may arise out of natural love and affection. The promise may not at all be material to her consent. The existence of evidence to prove that had there been no promise of marriage, she had not consented, becomes a requisite to establish the offence.³⁰ In some cases the accused may not have knowledge or reason to believe that the consent was only a consequence of her belief in his promise. He may firmly hold that consent was a result of her deep love for him. In such a case, courts negate the establishment of rape.³¹

The net resultant of a successful prosecution, achieved after the establishment of the three requisites, is conviction under clause second of Section 375 read with Section 90 of the Indian Penal Code. Relevant part of Section 90 reads as –

“90. Consent known to be 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

²⁹Dhruvaram, *supra* note 9, ¶23; Deepak, *supra* note 6, ¶21; Uday, *supra* note 5, ¶25; Kunal, *supra* note 19, ¶6; Hemant, *supra* note 19; S. Albert v. State, 2009 SCC OnLine Mad 382, ¶22; Govindan, *supra* note 25, ¶21.

³⁰*Id.*

³¹Deepak, *supra* note 6, ¶21; Hemant, *supra* note 19; Sujit Ranjan, *supra* note 19, ¶17.

*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;*³²

Consent obtained for sexual intercourse by deception is tainted by misconception of fact and has no value or meaning in the eyes of law. Such act of intercourse is deemed to be without the consent of the prosecutrix and is termed as rape under clause secondly of Section 375. But what amounts to misconception of fact under Section 90 is far from settled.³³

In *Re: N. Jaladuand Anr.*,³⁴ it was held that the expression ‘under the misconception of fact’ is broad enough to include all cases where consent is obtained by misrepresentation. The court further clarified that though in the law of contracts the consent obtained by fraud has only the effect of being voidable, in criminal law it cannot be effected to justify what would otherwise be an offence.³⁵ In *Jayanti Rani Panda v. State of West Bengal*, the scope of Section 90 was narrowed to cases where from the very inception the accused had no intention to marry.³⁶ In subsequent cases, the Supreme Court has rightly acknowledged the two limbs of the Section; consent obtained by misconception of fact and the knowledge or reason to believe that such is the nature of consent. The prosecution faces the heavy burden of not only proving that consent was a result of misconception of fact

³²Penal Code, 1860 § 90.

³³See Surya Bala & Rahul Saha, *Make No Promises and Tell Me No Lies: A Critique of Deelip Singh v. State of Bihar AIR 2005 SC 203*, 1 NUJS L. REV. 149 (2008).

³⁴1911 SCC OnLine Mad 3.

³⁵*Id.*, ¶5.

³⁶Jayanti, *supra* note 5, ¶7.

but also that the accused knew or had reason to believe that so was the case.³⁷

III. FLAWED REASONING AND DEMEANING OBSERVATIONS: A CRITICAL ANALYSIS

By not letting deceptive sex go unpunished and taking cognizance of it as the offence of rape, the Indian courts acknowledge the seriousness of the harm caused to the victims in such cases. Sex-by-deception causes grave trauma to the victim and may cause a lifelong disability to become intimate ever again. The victim faces long term psychological damage after discovering the truth which may engender a fear of men in her.³⁸ The breach of trust and the consequent violation of body and dignity may cause deep depression, sleeplessness, loss of appetite and frequent panic attacks.³⁹ The trail of misery and ignominy may adversely affect her mental health on a constant basis.⁴⁰ Loss of self-esteem and a tortured conscience also aggravate the situation.⁴¹

Indian law has evolved to focus on rape by false promise of marriage among a long list of offences falling under the category of rape-by-deception. This is partly because of the culture and psyche of the Indian society and partly because adherence to antiquated notions of a woman's sexuality. In a country where marriage even today seems to

³⁷Pradeep Kumar v. State of Bihar and Anr., (2007) 7 SCC 413, ¶9; Deelip, *supra* note 5, ¶39; Uday, *supra* note 5, ¶25.

³⁸Jennifer Temkin, *Towards a Modern Law of Rape*, 45 THE MODERN LAW REVIEW 399, 403 (1982).

³⁹Patricia J. Falk, *Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking about the Riddle of Rape-by-Fraud*, 123 THE YALE LAW JOURNAL 353, 361 (2013).

⁴⁰Deelip, *supra* note 5, ¶46.

⁴¹Joel Feinberg, *Victims' Excuses: The Case of Fraudulently Procured Consent*, 96(2) ETHICS 330, 337 (1986).

grant legitimacy to sexual relationships, a promise of marriage proves to be extremely material to a woman's consent for intercourse. Pre-marital sex is still a matter of censure in our society. Our society still carries a baggage of different notions of morality where sex before marriage is still a hush-hush issue.⁴² The rumors of pre-marital sex very much carry the force to mar the virtue of a woman. Women deposing that they had not consented to sex but for the promise of marriage, is not rare in these cases.⁴³ Accused may convince the woman of the moral correctness of the act by highlighting their future as husband and wife.

Undoubtedly, marriage is central to rape-by-deception in India. The courts' conservative notions about a woman's sexuality have a major role in this significance and further explain their aloofness to other categories of deceptive sex. A woman who consents to pre-marital sex on a false promise of marriage is presumed to value her sexuality more than those who may agree to it on other considerations. A woman trading sex for any less a consideration is held not to be a possessor of virtue that the law of rape intends to protect.⁴⁴ Marriage is a considerably huge inducement and a woman falling prey to such a trap is worthier of judicial safeguards. Such anachronistic conservative notions are unfortunately still a part the sphere of rape law despite legislative reforms.

Nevertheless, the Indian law has to be appreciated for accurately recognizing the need to have penal provisions for deceptive sex with special emphasis on marriage. But the end results are case laws that are a mire of flawed reasoning and derogatory observations. Such

⁴²Safdar, *supra* note 13, ¶11.

⁴³Karthi v. State, (2013) 12 SCC 710, ¶3; Sujit Kumar Pati v. Smt. Atasi Singha Mahapatra, 2008 SCC OnLine Cal 274, ¶2.

⁴⁴*Cf.* Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 19 (2014) (quotes Jeffrie Murphy, who states that rape-by-fraud is considered less worthy of social intervention based on the way a woman values her sexuality).

deviation is in discord with the high standards that the Indian judiciary has set in the context of rape law. The Courts have failed to either acknowledge or rectify the grave errors of law made by their earlier decisions. The High Courts, even after correctly acquitting the accused based on discrepancies in evidence, have gone on to produce illogical and unpalatable observations. The overall process of establishing the innocence of the accused is founded on unsound grounds. The immense burden on the prosecution is a perverse product of considerations that originate from little reason.

*A. Focus on Age and Education and Difference in Castes of the
Prosecutrix and the accused*

The most prominent flaw is the illogical focus on the age and education of the prosecutrix.⁴⁵ As discussed above, a major and educated girl is presumed to understand the moral quality and implications of pre-marital sex. What flows from this presumption is that a fully-grown educated woman is hardly susceptible to fraud of false promise of marriage and the subsequent acts of deceptive sexual intercourse. The consent of such a woman, in the eyes of law, cannot be tampered by simply a promise or an assurance of marriage. The reasoning of courts behind what age and education bring to the table in such cases needs to be analyzed.

It is correct that a minor or an illiterate woman is much more vulnerable to getting lured into bed on the pretext of marriage on a future date. They become easy targets for the perpetrators owing to lesser exposure to the harsh reality of deception being a common weapon for executing both body and property offences. Their beliefs are easier to mold as per the malicious intentions of the perpetrator. On the other hand, the mental and psychological resources possessed by a major or an educated girl are likely to diminish malleability of

⁴⁵*Supra* note 19.

her beliefs. Her knowledge and exposure are advantageous in reinforcing her defences against like deceptions but to hold it as a canon gives the impression that these women are impervious to such false promises. The courts, unfortunately, do hold it as a standard rule, a rule that comes to no terms with the reality.

May it be a 19-year old high school student⁴⁶ or 28-year old doctor,⁴⁷ marriage will be perceived by both to legitimize their sexual relationship. May it be a 19-year old college student⁴⁸ or a 20-year old employee in a multinational⁴⁹ or a 25-year old lecturer,⁵⁰ it cannot be conclusively held as a fact that their consent is not likely to be vitiated by a false promise of marriage. Age and status of education are indeed markers of a fortified understanding of the intricacies of human interaction, but it cannot be denied that offences deploying deception are rife even against the better qualified and experienced people. Fraud is well-equipped to penetrate the psychological fortifications of even the modern pragmatic person. Therefore, a major and educated woman should not be taken to be protected from fraud that uses her body for satisfaction of lust. A promise of marriage is capable of tainting her consent. Age and education may help little when she is maliciously trapped in a dexterously woven web of sugar-coated lies.

One should always be cautious in drawing comparisons or analogies between offences against property and those against human body, especially that of rape.⁵¹ But in confronting the logically depleted observations of courts regarding the age and education of the

⁴⁶Deepak, *supra* note 6.

⁴⁷Tejas, *supra* note 17.

⁴⁸Uday, *supra* note 5.

⁴⁹Ashish, *supra* note 19.

⁵⁰Kunal, *supra* note 19.

⁵¹Victor Tadros, *Rape without Consent*, 26Oxford Journal of Legal Studies 515, 538 (2006); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 146 (1998).

prosecutrix, some comparison may be extremely relevant. In criminal law, deception is the crux of the offence of cheating. In the law of contracts, the parallel is the provision regarding fraud. Even a superficial analysis of the provisions reveals that the focus in deciding the guilt or liability of a party is on their acts and not on the personal status of the complainant. There exists no presupposition that a better experienced or qualified person is less vulnerable to the harms of deception. 'What was done' is more important than 'who was affected' in these cases. Drawing a comparison, there is no justification whatsoever to have a different stance when it comes to cases of rape by false promise of marriage.⁵² To hold that a major and educated girl is capable of understanding the nature and implication of pre-marital sex is not convincing at all to hold that fraud of marriage cannot vitiate her consent given for that very act of intercourse.⁵³ Concentrating attention on other factors related to conduct of the accused is likely to result in decisions founded on sounder grounds.

The knowledge of difference between the caste or community of the two is also taken as a pointer of voluntariness of the prosecutrix.⁵⁴ Courts have held on ample occasions that if the woman had a belief of the prospects of marriage not materializing then deception cannot be said to be alter her consent for sex.⁵⁵ There exists a presumption that marriage between such a couple is improbable because of social sanctions and therefore the consent for intercourse cannot be based on promise of marriage. But this presumption is in stark contradiction with other judgments of the courts that emphasize on an individual's

⁵²*Cf.* Falk, *supra* note 51, at 147-48 (draws analogy to property offences to argue that rape law must be extended to cases of deceptive sex).

⁵³*Cf.* Falk, *supra* note 51, at 163 ("The third category, false promises, affects voluntariness because the victim does not assume the risk of default; these should be actionable as rape or gross sexual imposition if they are coercive enough.").

⁵⁴*Supra* note 25.

⁵⁵*Id.*

autonomy to choose her life partner irrespective of barriers of religion, caste or class.⁵⁶ The law today gives the individual the liberty to fearlessly choose her partner in the aegis of special statutes for this purpose.⁵⁷ On the contrary, to hold that differences in caste must deter a woman to believe in her marriage with another, is an assault on a woman's freedom to make her own decisions. This is just another example of the law unjustly providing the accused the opportunity to avail the benefit of doubt.

B. Desire of the Prosecutrix to have Sex

The desire of the prosecutrix to have sexual intercourse condones the act of fraud by the accused.⁵⁸ If the girl is equally keen on engaging in a sexual relationship before marriage and does so on a false promise of marriage, the offence is held to lose its gravity.⁵⁹ The participation in such cases is voluntary. This conclusion is based on the premise that deceptive sex is wanted sex. The courts hold that women in such cases, nevertheless, desire sex as against cases of violent rape where sex is imposed on them. Equating desire with consent leads to a number of perverse outcomes.⁶⁰

Without any hint of doubt, violent rapes where intercourse is imposed on the victim against her will are a notch ahead not only in their seriousness but also the threat, they pose to the society at large. The quantum of harm caused to the victim is more devastating and the chances of recovery are lesser than that in cases of rape-by-deception.⁶¹ The *actus reus* in such scenarios is not only limited to sexual gratification but accompanies violence of a dehumanizing

⁵⁶Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368; Shakti Vahini v. Union of India, (2018) 7 SCC 192.

⁵⁷Special Marriage Act, 1954.

⁵⁸Yedla, *supra* note 10, ¶10; Uday, *supra* note 5, ¶25.

⁵⁹*Id.*

⁶⁰Rubinfeld, *supra* note 1, at 1404-05.

⁶¹Falk, *supra* note 51, at 144.

magnitude. However, violence and deceit both violate a woman's voluntariness for the act.⁶² Force is used in the former whereas lies are used in the latter to make a mockery of consent.⁶³ On the face of it, a case where sex is welcome by the woman may not seem to be able to match the gravity of forceful sex. After all, the woman desired sex and the only wrong done is just some tampering with her consent. Her needs are fulfilled by only giving a false promise.⁶⁴ The difference between violent rape and rape by false promise of marriage may seem to be that of one between harm and non-benefit.

The major flaw in this argument lies in the equation of consent with physical desirability of sex.⁶⁵ It is erroneous to hold that consent can be presumed if a woman desires physical pleasure derived from sex.⁶⁶ It leads to the absurdity that when a woman desires the pleasure of sex and it is duly provided by the accused, she consents to the act. The existence or showcase of desire cannot avail the accused of the license to satisfy the desire by deceit. The accused cannot be allowed to deploy false promise of marriage to obtain consent solely because the woman was equally interested in having sex. The consent put forth is based on the hope of marriage in the near future and not because an opportunity for having intercourse was sensed. The act of sexual intercourse not being forced on the prosecutrix against her will, coupled with desire on her part that stems from tainted consent, cannot give a court the liberty to mark it as an act of promiscuity on her part.⁶⁷

⁶²Feinberg, *supra* note 41, at 339.

⁶³Falk, *supra* note 39, at 360.

⁶⁴*See* Temkin, *supra* note 38, at 405 ("However reprehensible his conduct, it is sexual intercourse with him that he offers her. He has not deprived her of the right to choose whether to have intercourse with him or not.")

⁶⁵Rubinfeld, *supra* note 1, at 1404-05.

⁶⁶*Id.*

⁶⁷But see Shyamapada, *supra* note 27, ¶14.

Furthermore, violation of consent in rape by fraud cases, because of presence of desire, cannot be allowed to be pigeonholed to the offence of cheating.⁶⁸ There is a simultaneous violation of dignity,⁶⁹ bodily integrity⁷⁰ and, most importantly, sexual autonomy⁷¹ of the victim. Sexual autonomy gives a person, *inter alia*, the freedom to decide when, where and with whom she wants to have intercourse with, if she desires it in the first place.⁷² Undermining sexual autonomy need not require violence or threat of violence.⁷³ A promise of marriage is, in most cases, extremely material to her consent. It plays a vital role in the exercise of her sexual autonomy. So, when a woman consents to sexual intercourse on being lied about her future as the perpetrator's wife, it is probable that the false promise was the only propeller of her seemingly free consent. There is a strong chance that she had not consented had she known that her partner is not her husband to be. Her keenness on having sex may very well be a product of the lies and even if not so, the violation of her sexual autonomy is inevitable. Equating consent with desire to condone the acts of the accused also belittles the concept of sexual autonomy, which is indispensable to rape law across the globe.

The acts of the accused are condoned also when the consent for intercourse arose out of love or passion of the prosecutrix and not solely from the promise of marriage.⁷⁴ But the aspect that has been neglected by the judiciary is that this very love or passion may be a product of clever lies used to manufacture such emotions on part of

⁶⁸*Contra Bala & Saha, supra* note 33, at 150, 151.

⁶⁹McJunkin, *supra* note 44.

⁷⁰Temkin, *supra* note 38, at 400; Falk, *supra* note 51, at 144.

⁷¹Stephen J. Schullhofer, *Taking Sexual Autonomy Seriously: Rape Law and beyond*, 11 LAW AND PHILOSOPHY 35, (1992).

⁷²Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 639 (2005); Temkin, *supra* note 38, at 401.

⁷³Tadros, *supra* note 51, at 516.

⁷⁴*Supra* note 31.

the prosecutrix, the promise of marriage being one of them. The accused may have been weaving a web from the beginning the culmination of which might be the promise of marriage. The consent that may prima facie seem to be a result of genuine feelings may be a product of a calculated deceptive plan. It is conceded that the law has neither the authority nor the resources to look so deep into emotions to reach any meaningful conclusion. However, there are cases where the behavior and conduct of the accused starkly show that there could not have been any other motive but satisfaction of lust. This may be reflected in his conduct when he completely disowns or abandons the prosecutrix after pregnancy.⁷⁵ In such cases, the courts should reject the defence of consent arising out of feelings of the prosecutrix.

C. Strict Adherence to Section 90

Another obstacle hindering cogent reasoning to back the decision is undue adherence to Section 90 for concluding the guilt or innocence. The dearth of a lucid explanation of the expression ‘misconception of fact’ should not be allowed to thwart the process of securing justice. The different pre-requisites attached to ‘misconception of fact’ are marked by insufficient support by sound reason. The current picture is painted by a *mélange* of definitions that suited the fancies of the courts.⁷⁶

The central issue of contention is whether a promise can be a fact under Section 90, or likewise, whether a false promise can be a misconception of fact.⁷⁷ Most judgments hold that simply a promise

⁷⁵See Naushad, *supra* note 5, ¶19 (The court held that the accused abandoning the prosecutrix after her pregnancy shows that he had no intention of marrying her).

⁷⁶See *In re N. Jaladu*, all cases of misrepresentation were included in misconception of fact. In *Jayanti*, it was held that for misconception, the fact must be of immediate relevance. In *Uday*, it was held that the promise must be hoax from the beginning to come under misconception of fact. In *Pradeep*, it was held that a promise to marry without anything more cannot amount to misconception of fact.

⁷⁷*Bala & Saha*, *supra* note 33, at 150.

without anything more does not amount a misconception of fact. More recent cases reflect on the two limbs of the Section. Here again, to establish whether the prosecutrix was tricked by the promise, factors like the age and education of the prosecutrix and desire on her part are given prime importance. To support the application of the second limb, courts try to ascertain whether the accused had knowledge or reason to believe that the consent for sex was given solely on the basis of the promise of marriage and was not a result of love and affection between the couple.⁷⁸

While factors like age, education and desire are wrong considerations, ascertaining knowledge or belief on the accused's part is unrealistically difficult too. The accused always gets the option to plead that he believed the consent was out of love between the two. But here again, in concord with the mindset of our society, a girl may put love and pre-marital sex on very different pedestals. While she may have a love affair, the very promise of marriage may very well turn out to be a deal maker for giving consent for sexual intercourse. It gets practically very difficult to find if consent was a result of love affair or solely the promise of marriage. A construction of meaningful consent with flimsy foundations as these makes the perfect recipe for delivery of gross injustice.

Section 90 does not define consent but defines in a limited sense what is not a valid consent.⁷⁹ Consent, being a term having a broad spectrum of meaning, needs to be looked at expansively in rape cases. It is not necessary to narrowly construct the contours of a valid consent around this section only. In *Deelip Singh v. State of Bihar*, the Supreme Court observed that Section 90 cannot be construed as providing an exhaustive definition of consent for matters of criminal law. It further stated that many decisions of courts have gone past the

⁷⁸*Supra* note 37.

⁷⁹*Kaini Rajan v. State of Kerala*, (2013) 9 SCC 113, ¶12.

language of Section 90 and are based on the wider meaning guided by the etymology of the word ‘consent’.⁸⁰ This observation, unfortunately, was not adopted by courts in their reasoning with the only exception of *Karthi v. State* where no reference, whatsoever, was made to Section 90 and the judgment was based on common notions of a valid consent.⁸¹

A reasonable distance from the section will allow courts to embark on a more expansive construction of the requisites of a valid consent. Such interpretations will suit the cases of rape by false promise of marriage where subjective considerations are fairly dominant. To earmark valid consent only for the test of Section 90, especially in cases with paucity of objective evidence, is unsuitable for the factual nexus of cases of rape by false promise of marriage. The complexities that surround valid consent in cases of deceptive sex cannot be addressed by strict adherence to the simple formula incorporated in Section 90.

IV. THE CHALLENGES AND THE COURSE AHEAD

The layers of subjectivity that surround issues like emotions, feelings, marriage, promises, sex and, most importantly, consent, demand the courts to be cautious while proceeding in the sphere of deceptive sex. Evidence to prove guilt beyond reasonable doubt is rare and circumstantial evidence is heavily relied on. Very correctly, there exist a number of checks in place to minimize the scope of frivolous litigation but there is a lot more to account for and even more to dump out of the judicial understanding of rape-by-fraud.

⁸⁰Deelip, *supra*note 5, ¶23.

⁸¹Karthi, *supra* note 43.

The mechanism to negate guilt unless nefarious intention of the accused is proven, is founded on sound justifications. If the accused intended to use the prosecutrix only as an object for satisfaction of his lust, then there remains no doubt about his conviction for rape. However, to prove such guilt is a gargantuan task. A chain of defences is rightly available to the accused which is necessary to ensure the meaningful exercise of freedom of choice on his part.

There exist numerous possibilities. The accused might have really intended to marry but could not really execute his plans because of stern opposition by his family, a change in plans regarding his career, or any other factors beyond his control. This change of events is what demarcates false promise from a breach of promise. This demarcation is fundamental in establishing guilt. As rightly identified in more recent cases, marriage is matter of personal choice. During the course of the relationship a person may find his partner physically, mentally or psychologically incompatible and, hence, unsuitable as a partner for the rest of his life. In these cases, too, the breach of promise of marriage given at the initial stage should and does not attract criminal sanctions.

Cases of malicious prosecution emanating from the fallout of a break-up are also not very uncommon. Cases where false allegations of rape are deployed after a mutual cessation of sexual relationship frequently come to court.⁸² The plans of marriage may also get frustrated by imposition of unreasonable condition by side of the prosecutrix.⁸³ In all these cases, marriage cannot be imposed on the accused. The acts of sexual intercourse by mutual consent do not, by any stretch of imagination, amount to rape.

⁸²Tejas, *supra* note 17, ¶8.

⁸³Nandan, *supra* note 18, ¶17.

Apart from all the checks in place, more complexities are introduced as the Indian society opens up on and recognizes the trend of live-in relationships. These relationships are often devoid of long-term commitments and casual sex may be frequently engaged in. It is to be further realized that lies are becoming more common in the modern-day social exchange process. The promise of marriage may be casually hurled at to enhance one's prospects of sexual intercourse without attaching any significance to it.⁸⁴ The nature of the relationship and the delivery and frequency of promise may become relevant in such situations. Criminalizing such a lie as rape may have destructive consequences.

A further dive into the materiality of the promise in altering the consent for sexual intercourse raises multiple other technicalities. All these concerns combined hold firm roots in reason. But the unsound reasoning of the courts coupled with appalling observations regarding age and education of the prosecutrix, desire on her part and the use of Section 90 need to be gradually trashed. These elements make more cumbersome the already uphill task of the prosecution. The wariness of the courts is justified in cases of rape by false promise of marriage, but this caution should not result in iniquitous burden on prosecution's shoulders. The victims should not be denied justice by favouring the accused massively in the garb of presence of reasonable doubt. The courts themselves are observed of creating doubt by their own notions of pre-marital sex and a woman's virtue. There remains a big responsibility on the judiciary to shed off these remnants of ancient conservative thinking that are vehemently rebutted by the relatively modern concepts of sexual autonomy and the like. The violation of a woman's consent by false promise of marriage and consequent infringement of her sexual autonomy, need to be taken

⁸⁴See William D. Marelich, Jessica Lundquist, Kimberly Painter and Mindy B. Mechanic, *Sexual Deception as a Social-Exchange Process: Development of a Behavior-Based Sexual Deception Scale*, 45 THE JOURNAL OF SEX RESEARCH 27, (2008).

more seriously. Such acts of obtaining sex by manipulating her consent by deception fall nothing short of being called rape under the Indian penal provisions. The duty of the judiciary to grapple with the intricacies of such cases without its preconceived notions, if fulfilled, will better secure the ends of justice.

Rape is a serious offence. It cannot be denied that the layman perceives it to be a violent act. He believes use of force to be an indispensable element of the offence. Though neither Section 375 nor the judiciary now attribute use of force to the offence of rape, there exists a general concern that extending the contours of rape to the sphere of deceptive sex may diminish the seriousness of the offence.⁸⁵ Further, there is a general belief that deceptive sex is not as dehumanizing and harmful as violent rape. There may therefore arise a suggestion to put the cases of rape by false promise of marriage under the umbrella of a minor or relatively less severe sexual offence.⁸⁶ This may be in comparison with the penal provisions of other jurisdictions around the globe. A number of factors should prevent such a change in the Indian context.

The institution of marriage holds position of a different level in the Indian society. As already discussed, pre-marital sex is not considered appropriate by a significant number. The people who do not consider it as a taboo also preclude it from being a part of their social conversations. Above all, the majority considers marriage to give legitimacy to pre-marital sex and sex in general. Incidents of elders of a village or the panchayats suggesting and even imposing marriage to

⁸⁵Falk, *supra* note 51, at 143. (“A second potential cost of expanding rape law to encompass fraud and coercion cases is the trivialization of violent rape by comparison. Many commentators argue that an experiential or qualitative difference exists between violent and nonviolent rape, one that may be invalidated or obscured by expansion of rape law to include both forms.”).

⁸⁶Tadros, *supra* note 51, at 540; Schullhofer, *supra* note 71, at 36; Bala & Saha, *supra* note 33.

reduce the ignominy of pre-marital sex, are not unheard of.⁸⁷ These segments of reality do play a big role in deciding a woman's consent for sexual intercourse before marriage. This social reality makes much easier for a man to manufacture consent by using false promises or assurances of marriage. The materiality of marriage in a woman's consent and their vulnerability as easy targets for satisfaction of lust, directly oppose the proposal for a minor sexual offence.

The scope of rape-by-deception expands even to cases of deception relating to identity of the perpetrator in some other jurisdictions,⁸⁸ in addition to the universally penalized cases of rape by impersonation as husband and false medical treatment.⁸⁹ Rape-by-fraud cases in India are concentrated on false promise of marriage. With other cases of rape-by-deception not holding relevance in India, the idea of introducing another sexual offence does not seem pragmatic. Also, the seriousness of rape by false promise of marriage should not be downplayed. The acts of intercourse are as much without the consent of the victim as in cases where force is used. The consent obtained is as good as no consent. The quantum of harm may be, as conceded, lesser than that in violent rapes. The court may tackle this by lowering the quantum of punishment in such cases, if it feels the need, but naming these acts as anything other than rape will weaken the cause that seeks to protect women from being played with as objects used for sexual gratification. Narrowing the scope of rape law will protect a host of behaviours that are equally blameworthy and intolerable.⁹⁰ For necessary reiteration, sex obtained by false promise of marriage is

⁸⁷Yedla, *supra* note 10, ¶2; Naushad, *supra* note 5, ¶8.

⁸⁸See Falk, *supra* note 51; Rubinfeld, *supra* note 1. (Deception may be regarding the accused's nationality, religion, sex, age etc.). See also Aeyal Gross, *Rape by Deception and the Policing of Gender and Nationality Borders*, 24 *Tul. J. L. & Sexuality* 1, (2015).

⁸⁹Rubinfeld, *supra* note 1, at 1397; Corey Rayburn Young, *Rape Law Fundamentals*, 27 *YALE J.L. & FEMINISM* 1, 13 (2015).

⁹⁰Falk, *supra* note 51, at 359.

without valid consent and sex without a woman's valid consent is rape.

V. CONCLUSION

The substantive rape law in our criminal statute books is ill equipped to cater to the many cases of rape-by-deception and much is left to the judiciary to decide, based on the facts and circumstances of each case. Section 375 contemplates deceptive sex only to the extent of rape by impersonation as husband, which is an impractical and unlikely mode of deploying deception in the modern world. It is time that the rape law is upgraded to account for the many forms of rape that result from nefarious non-violent tactics. Such an upgrade should not strictly confine itself to rape by false promise of marriage but must also cater to the more nuanced deceptions that are likely to become as deprave and blameworthy with the fusion of western ideas in our society.

Till the legislature adds to the law of rape to make it wholesome, the courts need to alter the rape-by-deception jurisprudence and fill in the void meaningfully. The judgments delivered by the courts become all the more important because of the subjectivity that surrounds the various components of rape-by-deception. Much depends on the way the judiciary grapples with issues like a woman's sexuality, her consent and her psychology. The antiquated notions of morality that have crept into the jurisprudence need to be discarded. It is absolutely essential to incorporate the concept of sexual autonomy, in its truest sense, in the rationales that circumscribe the meaning of a valid consent. The harms of rape by false promise of marriage must not be undervalued and its repercussions on the micro and macro level must be further examined. There is an urgent need to begin a more detailed legal and social discourse on different aspects of deceptive sex and their interaction with the social conditions in India. Ignorance to this

pertinent issue may normalize a range of conduct that assails the dignity of a woman.