

It a crime against the
person of



**ASSIGN
BUSTER**

It is ' the ravishment of a woman without consent, by force, fear or fraud', or ' the carnal knowledge of a woman by force against her will'.

Sexual intercourse with the consent of a girl below the age of sixteen years also amounts to rape. Ordinarily, rape is violation, with violence of the private person of a woman – an outrage by all canons. It is an unlawful sexual intercourse by a man with his own wife below the age of fifteen or with any girl below the age of sixteen, or with any other woman above sixteen without her free consent, against her will or with consent obtained under certain unlawful circumstances. Rape is not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to life contained in Article 21 of the Constitution. The Criminal Law (Amendment) Act, 1983, besides substituting Sections 375 and 376 for the old sections, has added Sections 376- A to 376-D.

Section 375 of the Indian Penal Code states that: " A man is said to commit " rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:- Firstly:- Against her will. Secondly:- Without her consent. 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 sixteen years of age. Explanation:- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception:- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. Ingredients of the offence of Rape: The following are the essential ingredients of the offence of rape: 1. There must be sexual intercourse with a woman by a man; 2. Such a sexual intercourse should be under any of the following circumstances: i) Against her will, ii) Without her consent, iii) With consent obtained under fear of death or hurt, iv) With consent given under misconception of fact that the man is her husband but the man knows that he is not her husband, v) Consent given by reason of unsoundness of mind, intoxication or under influence of any stupefying or unwholesome substance, vi) With a woman under 16 years of age with or without consent.

Under the Criminal Law (Amendment) Act, 1983, Section 375 inserted a new clause fifthly dealing with consent by reason of unsoundness of mind or intoxication, besides addition of words “ or any person in whom she is interested” in clause thirdly; and thus the scope of Section 375 IPC has been widened. Sexual intercourse by Penetration: Rape, in essence, involves a coercive non-consensual, sexual intercourse with a woman ‘ without her

<https://assignbuster.com/it-a-crime-against-the-person-of/>

consent' or ' against her will'. A non-consensual ' sexual intercourse' is the crux of the offence of rape. It postulates, sexual connection, by force or threat or deceit, between a man and his victim. Section 375 uses the expression ' sexual intercourse' but the said expression has not been defined. The general meaning of the words ' sexual intercourse' is heterosexual intercourse involving penetration of the vagina by the penis. By virtue of explanation to Section 375, mere slightest or partial penetration of the male organ within the labia majora or the vulva or pudenda is sufficient to constitute ' sexual intercourse'.

The depth of penetration is immaterial. The slightest degree of penetration is enough. Penetration, not ejaculation, is the sine qua non for the offence of rape. It is not necessary to prove the completion of sexual intercourse by the emission of semen. Intercourse is deemed complete upon proof of penetration only. In *State of Uttar Pradesh v. Babulnath* [(1994) 6 SCC 29], the Supreme Court observed the following essential ingredients of rape: “ From the explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of Indian Penal Code, 1860 nor the explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix.

In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without

any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of Indian Penal Code, 1860. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genital or leaving any seminal stains. Against her will: The first clause of Section 375 operates where the woman is in possession of her sense and reason and is capable of exercising her own volition. The word 'will' means the faculty or power of the mind by which we determine either to do or not to do something. 'Will' implies consciousness, cognition and mental determination. The expression 'against her will' imports that the act is done in spite of the opposition of the woman to the doing of it when she is conscious. A person who ravishes a woman who is asleep, and therefore unconscious, would be having sexual intercourse with her against her will.

He will, therefore, be guilty of rape, though the woman may on waking up consent to the act already consummated. Taylor in his work 'Medical Jurisprudence' records the case of a girl, aged 18, who consulted a therapeutic magnetizer as to her health. She visited him daily for some days. Four-and-a-half months afterwards she discovered that she was pregnant, on which she complained to the authorities against the magnetizer. They directed her for medical examination, and then medical inspectors were satisfied that the pregnancy did not extend further back than the period mentioned by her.

They reported that a person in magnetic sleep is insensible to every kind of torture and sexual intercourse might then take place with a young woman without the participation of her will and without her being conscious of the

act, and consequently, without her being able to resist the act consummated on her. Without her consent: A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

The Code draws a distinction between an act done ' against the will' and an act done ' without the consent' of a person. Every act done ' against will' of a person is an act done ' without the consent' of a person but an act done ' without the consent' of a person is not necessarily done against his will', which expression imports that the act is done in spite of the opposition of the person to the doing of it. When there is resistance by the woman it is the indication that there is no consent. However, submission without resistance does not necessarily tantamount to consent. Submission to an act of carnal intercourse by a quack doctor on the faith of his statement that he was performing a surgical operation was held not to amount to consent and he was convicted of rape. There can be no consent when the woman raped is in a state of insensibility and unable to exercise any judgment.

Such would be the case where a woman is raped when she is asleep or is insensible due to hypnotism or drink or drugs or other means adopted. It is no defence that the woman consented after the act. Consent as a defence to an allegation of rape requires voluntary participation, not only after the exercise of intelligence based on the knowledge of the act, after having freely exercised the choice between resistance and assent. So a helpless

resignation in the face of inevitable compulsion or passively giving in is no consent. Consent obtained under fear of death or hurt: Clause (3) of Section 375 stipulates that consent obtained by putting the woman or any person in whom she is interested, in fear of death or of hurt is not consent and hence the act would amount to rape.

In *State of Maharashtra v. Prakash* [AIR 1922 SC 1275], the accused, a police constable, who was deputed for bandobust duty, along with a businessman raped the victim, a poor rustic villager by threatening her that her husband would be placed in custody. The Bombay High Court acquitted the accused on the ground that the prosecutrix was a willing partner in the act of sexual intercourse, in view of the fact that there were no marks of violence on her body. On appeal, the Supreme Court observed that at the relevant point in time, the constable was in uniform and was on bandobust duty. The woman was threatened that her husband would be arrested. So, it was a case where she had surrendered herself involuntarily under duress and threat held out by the accused. The Supreme Court held this case would fall under clause (3) of Section 375, IPC. The accused were convicted to rigorous imprisonment for three years.

Misconception of facts: Clause (4) deals with a rapist who knows that he is not his victim's husband and also knows that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. By virtue of clause (4) of Section 375, consent obtained by fraud is no consent. For instance, if a girl gives her consent for sexual intercourse to a professional singer teacher on the assumption that he, through sexual intercourse, is treating her breathing to enable her to sing

properly; or if a woman consents for sexual contact under the belief that he is her lawfully married husband, then such consent is not a valid consent under law. To attract the provisions of clause (4) of Section 375, it is necessary to prove that the consent was given by the prosecutrix under belief that the accused was another person to whom she believed herself to be married. When consent is given by her for sexual intercourse in the belief that she had been married to the accused, the clause is not attracted.

Consent for sexual intercourse obtained by a false promise to marry is not a true consent, if it is proved that the accused from the very inception of making the promise had no intention to marry her. However, a promise to marry after consensual sexual intercourse does not absolve the perpetrator from liability. His subsequent promise to marry is of no consequence.

Consent of an insane or intoxicated woman: Clause (5) of Section 375, which was inserted by the Amendment Act of 1983, negates the consent of the woman for the purpose of the offence of rape, if the woman is unsound mind, or is of under the influence of intoxication at the relevant time, such consent will not be considered as a valid defence and the accused will be held liable for the offence. In *Tulshidas Kanolkar v.*

State of Goa [AIR 2004 SC 978], wherein the accused ravished a mentally-challenged girl on occasions more than one that resulted in her pregnancy, the apex court held that consent given by mentally challenged girl cannot be said to be 'consent' for sexual intercourse as she is incapable of understanding the consequences of her consent, she being incapable of giving consent from defect of understanding. It also ruled that a rapist by sexually assaulting a mentally under-developed girl not only physically

ravishes her but also exploits her mental non-development and helplessness. In *Bhoari v. State of Rajasthan* [(1952) Raj.

LW 255], it was held that sexual intercourse with a woman, whom the accused made quite drunk cannot be said to be intercourse with consent. Consent of a woman under 16 years of age: The age limit in clause (6) of Section 375 was raised to sixteen years by an amendment of the Act in 1949. Till 1983, this clause was numbered as (5) and by the Amendment Act, 1983 renumbered as (6) after inserting the new clause relating to consent of woman of unsound mind etc., is no consent as clause (5). Clause (6) provides that sexual intercourse with a woman under 16 years of age will amount to rape, whether it is done with or without her consent. This is because the consent of a minor is no consent. In *Harpal Singh v.*

State of Himachal Pradesh [AIR 1981 SC 361], it was contended that the prosecutrix was used to sexual intercourse with consent and no injury was detected on the private parts of the girl. However, the Supreme Court held that once it was proved that the girl was below 16 years of age, the question of consent becomes wholly irrelevant. In *Mana Ramachandra Jadhav v. State of Maharashtra* [1984 Cr. LJ 852 (Bom)], the prosecutrix left her mother's house and joined the accused because her mother has turned down the proposal of her marriage with the accused on the ground that she was too young. While she was with the accused he had sexual intercourse with her against her will. The act of intercourse with the prosecutrix will be covered by clause (6) of Section 375 of the Code.

Marital Rape: The exception to Section 375 states that non-consensual sexual intercourse by a man with his own wife, if she is over 15 years, does not amount to rape. It, thus, keeps outside the ambit of 'rape' a coercive and non-consensual sexual intercourse by a 'husband' with his wife (above 15 years of age) and thereby allows a 'husband' to exercise, with impunity, his marital right of (non-consensual or undesired) intercourse with his wife. It is believed that the husband's immunity for marital rape is premised on the assumption that a woman gives forever her consent to the husband for sexual intercourse. It also aims at the preservation of family institution by ruling out the possibility of false, fabricated and motivated complaints of rape by wife against her husband and the pragmatic procedural difficulties that might arise in such a legal proceeding. The question of consent to the act done does not arise where the girl is married to a man. But, in such a case, a certain amount of force may be justified on the ground of her previous consent to marriage. Where a husband had intercourse with his wife without her consent after a petition for divorce had been presented by her, it was held that the wife's implied consent to marital intercourse not having been revoked by act of the parties or by an act of the court, the husband could not be held guilty of rape. However, on two occasions, a husband can be convicted for the offence of rape, and such occasions are:—

- i) If a husband commits intercourse with her own wife, who is living separately from him, it is a rape;
- ii) If a husband commits intercourse with his own wife, who is under the age of fifteen years, it becomes rape.