

- (ii) illicit intercourse, or
- (iii) any unlawful and immoral purpose.

**[s 373.2] Explanation I.—**

In order that the presumption under this Explanation should take effect, it is necessary that the accused should be a prostitute or should be keeping or managing a brothel at the time he or she obtains possession of a girl.<sup>1169.</sup>

**[s 373.3] 'Person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person, etc.'—**

The age-limit was raised to 18 years by Act V of 1924.

The introduction of the words 'at any age' indicates that the offence is committed even if the employment of the person for immoral purpose is to take place after the completion of eighteen years, that is, at any time.

The words 'illicit intercourse' are explained in Explanation 2 to section 372. See comment on section 372.

<sup>1167.</sup> Subs. by Act 18 of 1924, sec. 2, for certain words.

<sup>1168.</sup> Ins. by Act 18 of 1924, sec. 4.

<sup>1169.</sup> *Banubai Irani*, (1942) 45 Bom LR 281 (FB).

## THE INDIAN PENAL CODE

### CHAPTER XVI OF OFFENCES AFFECTING THE HUMAN BODY OF OFFENCES AFFECTING LIFE

#### Of Kidnapping, Abduction, Slavery and Forced Labour

**[s 374] Unlawful compulsory labour.**

**Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.**

#### **COMMENT.—**

This section is intended to put a stop to the practice of forced labour. It requires—

- (1) Unlawful compulsion of any person.
- (2) The unlawful compulsion must be to labour against the will of that person.

This section is aimed at the abuses arising from forced labour which *ryots* were in former times compelled to render to great landholders.

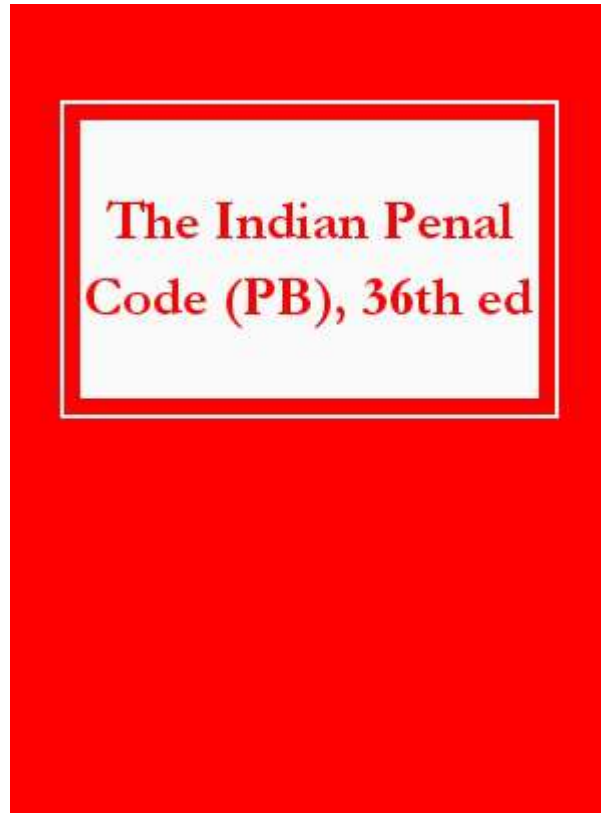
Where the accused induced the complainants who, he alleged, were indebted to him in various sums of money, to consent to live on his premises and to work off their debts and the complainants were to, and did in fact, receive no pay, but were fed by the accused as his servants, and he insisted on their working for him, and punished them by beating them if they did not do so, it was held that he was not guilty under this section though his act came within section 352. <sup>1170.</sup>

Imposition of hard labour on persons undergoing imprisonment is legal. They can be compelled to do hard labour. <sup>1171.</sup>

<sup>1170.</sup> *Madan Mohan Biswas*, (1892) 19 Cal 572 .

<sup>1171.</sup> *State of Gujarat v Hon'ble High Court of Gujarat*, 1998 Cr LJ 4561 : AIR 1998 SC 3164 [LNIND 1998 SC 920] .

## The Indian Penal Code (PB), 36th ed



Ratanlal & Dhirajlal: Indian Penal Code (PB) / 1173. Subs. by the Criminal Law (Amendment) Act, 2013 (13 of 2013), section 9 (w.e.f. 3 February 2013). Prior to substitution by section 9 of the Criminal Law (Amendment) Act, 2013 (w.e.f. 3 February 2013), section 375 stood as: [s 375] Rape.—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:— First.—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. State Amendments Manipur.—The following amendments were made by Act 30 of 1950 (prior to Act 43 of 1983). (a) in clause fifthly for the word

“sixteen” substitute the word “fourteen” and (b) in the Exception, for the word “fifteen” substitute the word “thirteen”. [s 375] Rape.

Currency Date: 28 April 2020

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## THE INDIAN PENAL CODE

### CHAPTER XVI OF OFFENCES AFFECTING THE HUMAN BODY OF OFFENCES AFFECTING LIFE

#### **1172.**[Sexual Offences]

#### **1173.**[s 375] Rape.

A man is said to commit "rape" if he —

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person;

under the circumstances falling under any of the following seven descriptions:  
—

*First.*—Against her will.

*Secondly.*—Without her consent.

*Thirdly.*—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

*Fourthly.*—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

*Fifthly.*—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

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

*Seventhly.*—When she is unable to communicate consent.

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

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

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

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

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

## COMMENTS.—

The chapter sub-heading itself was changed from 'Of rape' to 'Sexual Offences' by Act 43 of 1983. The definition of rape has undergone a major change in admitting non-penile penetration also but it continues to be gender-specific as committed against a female. Earlier, a public interest litigation in *Sakshi v UOI*,<sup>1174</sup> seeking for a declaration to treat non-penile penetration also to be treated as rape failed when the Supreme Court declined the relief but the Court's exhortation to alter the definition paved way for the change of law.

[s 375.1] **The Criminal Law (Amendment) Act, 2013**

Based on the recommendations made by the Justice Verma Committee, the [Criminal Law \(Amendment\) Act, 2013](#), came into force with effect from 3 February 2013. The [Criminal Law \(Amendment\) Act, 2013](#) made amendments to the [Cr PC, 1973](#), [Indian Evidence Act, 1872](#) and the [IPC, 1860](#). The [Criminal Law \(Amendment\) Act, 2013](#) expanded the definition of rape and substituted new sections for old sections such as sections 370, 375, 376, 376A, 376B, 376C and 376D. The [Criminal Law \(Amendment\) Act, 2013](#) also amended existing sections as well as created new offences in the [IPC, 1860](#), such as:

- Public servant disobeying direction under law (section 166A)
- Punishment for non-treatment of victim (section 166B)
- Voluntarily causing grievous hurt by use of acid, etc. (section 326A)
- Voluntarily throwing or attempting to throw acid (section 326B)
- Sexual harassment and punishment for sexual harassment (section 354A)
- Assault or use of criminal force to woman with intent to disrobe (section 354B)
- Voyeurism (section 354C)
- Stalking (section 354D)
- Punishment for repeat offenders (section 376E)

The altered definition increasing the age of consent to 18 is also significant for it makes any form of penetration as set out under the section with any girl less than 18 years of age to constitute rape. In a matrimonial setting, it would not have resulted in rape if the woman was still less than 18 and above 15 so long as there was consent by virtue of Exception 2 contained in the section. But the decision of the Supreme Court in

*Independent Thought v UOI*,<sup>1175</sup> has held the provision to be unconstitutional in so far it relates to girl between ages 15 to 18. Now the Exception 2 has to be read as 'Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age is not rape'.

Rape is violative of victim's fundamental right under [Article 21 of the Constitution](#). It is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.<sup>1176</sup>

[s 375.2] **First clause—Against her will.—In a case decided prior to the enactment of the Criminal Law (Amendment) Act, 2013,**

the prosecutrix stated that first offending act was done despite her resistance but subsequently she became a consenting party because of repeated promises of marriage. In the FIR she stated that she surrendered before him even at the time of the first act because of the promises of marriage. The Court held that her version was not reliable and found that the charge against the accused did not stand established.<sup>1177</sup>

[s 375.3] **Second clause—Without consent.—**

It must be said that now in a custodial rape if the girl says that she did not give consent, the Court shall presume that she did not consent<sup>1178</sup>. (vide [section 114A Indian Evidence Act, 1872](#)).

[s 375.4] **Consent on promise of marriage.—**

Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and the Court must very carefully examine whether the accused had actually wanted to marry the victim, or had *mala fide* motive, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the Court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the Court reaches a conclusion that the intention of the accused was *mala fide*, and that he had clandestine motives.<sup>1179</sup> Where a man and woman were living together, sometimes at her house and sometimes at the residence of the man and when the evidence suggested that it was not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent not borne out of any misconception created in her mind, complaint under this section will be untenable.<sup>1180</sup> In the event that the accused's promise is not false and has not been made with the

sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only hold that the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.<sup>1181.</sup>

**[s 375.5] Consent.—Meaning.—**

[IPC, 1860](#) does not define consent in positive terms. But what cannot be regarded as consent is explained by section 90 which reads as 'consent given first under fear of injury and second under a misconception of fact is not consent at all'. There are two grounds specified in section 90 which are analogous to coercion and mistake of fact. The factors set out in first part of section 90 are from the point of view of the victim and second part of section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the Court has to see whether the person giving the consent has given it under fear or misconception of fact and the Court should also be satisfied that the person doing the act, i.e., the alleged offender is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of section 90 which is couched in negative terminology. As observed in *Deelip Singh @ Dilip Kumar v State of Bihar*,<sup>1182.</sup> section 90 cannot be considered as an exhaustive definition of consent for the purposes of [IPC, 1860](#). The normal connotation and concept of consent is not intended to be excluded.<sup>1183.</sup> Submission of the body under the fear or terror cannot be construed as a consented sexual act. Consent for the purpose of section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.<sup>1184.</sup> The consent does not merely mean hesitation or reluctance or a 'No' to any sexual advances but has to be an affirmative one in clear terms. Consent has to be categorical, unequivocal, voluntary and could be given by words, gestures or any form of verbal or non-verbal communication signifying willingness to participate in specific sexual act. Woman who does not physically resist act of rape shall not by that reason only be regarded as having consented to such sexual activity. In normal parlance, consent would mean voluntary agreement of complainant to engage in sexual activity without being abused or exploited by coercion or threats. Normal rule is that consent has to be given and it cannot be assumed.<sup>1185.</sup>

**[s 375.6] [Section 114A of Indian Evidence Act, 1872](#).—**

India [Evidence Act, 1872](#) was amended by the [Criminal Law Amendment Act, 1983](#) and section 114A was incorporated which imposed the burden of proving "consent" upon the accused in the cases of aggravated rape. This was an exception of the general rule of presumption of innocence of the accused. By the [Criminal Law Amendment Act, 2013](#) the old section was substituted on the recommendation of Justice Verma Commission which reads as a follows;—

*[114A] Presumption as to absence of consent in certain prosecution for rape*

*In a prosecution for rape under clause(a), clause(b), clause(c), clause(d), clause(e), clause(f), clause(g), clause(g), clause(h), clause(i), clause(j), clause(k), clause(l), clause(m), clause(n), of sub-section (2) of section 376, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she or he did not consent.*



**[s 375.7] Will and Consent.—**

In *Dileep Singh v State of Bihar*,<sup>1186</sup> the Supreme Court observed that:

though will and consent often interlace and an act done against the will of the person can be said to be an act done without consent, the [Indian Penal Code](#) categorizes these two expressions under separate heads in order to be as comprehensive as possible.

In the facts of the case what is crucial to be considered is whether first clause or second clause of [section 375 IPC, 1860](#) is attracted. The expressions 'against her will' and 'without her consent' may overlap sometimes but surely the two expressions in first and second clause have different connotation and dimension. The expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression 'without her consent' would comprehend an act of reason accompanied by deliberation.<sup>1187</sup>

**Supreme Court Guidelines to Prevent Child Sexual Abuse**

(1) The persons in charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails, etc., or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping utmost secrecy to the nearest SJPU or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow up action casting no stigma to the child or to the family members.

(2) Media personals, persons in charge of Hotel, lodge, hospital, clubs, studios, photograph facilities have to duly comply with the provision of section 20 of the Act 32 of 2012 and provide information to the SJPU, or local police. Media has to strictly comply with section 23 of the Act as well.

(3) Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, come across any act of sexual abuse, have a duty to bring to the notice of the Juvenile Justice Board/SJPU or local police and they in turn be in touch with the competent authority and take appropriate action.

(4) Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.

(5) Hospitals, whether Government or privately-owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest JJ Board/SJPU and the JJ Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of child.

(6) The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.

(7) Complaints, if any, received by NCPCR, SCPCR, Child Welfare Committee (CWC) and Child Helpline, NGO's or Women's Organizations, etc., they may take further follow up action in consultation with the nearest JJ Board, SJPU or local police in accordance with law.

(8) The Central Government and the State Governments are directed to constitute SJPU's in all the Districts, if not already constituted and they have to take prompt and effective action in consultation with JJ Board to take care of child and protect the child and also take appropriate steps against the perpetrator of the crime.

(9) The Central Government and every State Government should take all measures as provided under section 43 of the [The Protection of Children from Sexual Offences Act, 2012](#) (Act 32/2012) to give wide publicity of the provisions of the Act through media including television, radio and print media, at regular intervals, to make the general public, children as well as their parents and guardians, aware of the provisions of the Act.

[*Shankar Kisanrao Khade v State of Maharashtra*.<sup>1188</sup>.]

**[s 375.8] Consent of woman of Scheduled Caste or Tribe.—**

In *Re Director General of Prosecution*,<sup>1189</sup>. it was held that the consent given by a woman of Scheduled Castes or Scheduled Tribe community for sexual intercourse to one who was in a position to dominate her was no defence to a charge under section 375.

The [Scheduled Castes and Scheduled Tribes \(Prevention of Atrocities\) Act, 1989](#) specified the sessions Court as a special Court under the Act. It was held that the trial of the offence of rape by such a Court was not without jurisdiction. The sessions Court remained the same Court even after its specification as a special Court. Setting aside of conviction on the technical ground of want of jurisdiction which was raised after the trial was over was not proper.<sup>1190</sup>.

**[s 375.9] No consent.—**

Where physical contact with the accused in the nature of a kiss or a hug was being accepted by the prosecutrix without any protest, such past conduct will definitely not amount to consent as for every sexual act, every time, consent is a must.<sup>1191</sup>. Where the accused took away the prosecutrix to offer prayers to a deity, stayed in a 'dharamshala' for the night and had sex with her threatening her that the police were nearby, it was held that the prosecutrix could not be described as an accomplice merely because she did not raise alarm and the accused was liable to be convicted under section 376.<sup>1192</sup>.

Where a blind helpless young girl was raped by the accused, it was held that expression "consent" cannot be equated to inability to resist out of helplessness and absence of injuries on the victim also does not by itself amount to consent by her.<sup>1193</sup>. Section 375, as amended by the [Criminal Law \(Amendment\) Act, 2013](#), lays down a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

**[s 375.10] Third and Fourth clauses—Passive non-resistance or consent obtained by fraud.—**

If a girl does not resist intercourse in consequence of misapprehension this does not amount to a consent on her part. Where a medical man, to whom a girl of fourteen years of age was sent for professional advice, had criminal connection with her, she making no resistance from a *bona fide* belief that he was treating her medically, it was