

**SCOPE OF "CONSENT" UNDER SECTION 376 I.P.C. VIS-À-VIS  
SECTION 90 I.P.C.**

By

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A question of considerable importance of frequent occurrence arises whether the consent given by a woman of above 18 years age who is otherwise having sufficient intelligence with regard to consequences of sex can be considered as consent with meaning of Section 376 I.P.C. In other words, where the victim above the age of 18 years gives her consent, such a consent cannot be considered as misconception of fact under Section 90 of I.P.C. as suggested or observed by Supreme Court in decision reported in *S.C. Yedla Srinivasarao v. State of Andhra Pradesh*, 2007 (1) ALT (Cr.) 61, irrespective of the consent is otherwise free.

The importance of the authority is no doubt of far-reaching. It is not within my province to offer any comment on the proposition laid therein but with all my humanity I may submit that the views expressed wherein do not end the conflict once for all in view of the other authorities available on the subject which leads to a different conclusion.

It is desirable and profitable the Supreme Court in the above decision rightly observed in Paragraph 9 "It depends on case to case that what is the evidence led in the matter. If it is fully grown up girl who gave consent then it is different case but a girl whose age is very tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfil right from the beginning which is apparent from the conduct of the accused. In our opinion Section 90 can be invoked. Therefore, so far as *Jayanti Rami Panda's* case concerned,

the prosecutrix was aged 21-22 years old. But here in the present case the age of the girl was very tender between 15-16 years", incidentally observed the consent would be misconception if, it attracts Section 90 IPC which is to be considered as exception to the free consent.

It is thus evident the entire stress of the Supreme Court is regard to the age of the victim and her intellectual capacities of realizing the consequences of sex which rules out Section 90 IPC. While considering the consent of the victim age and her intellectual capacities are the paramount considerations for considering such consent comes under Section 90 IPC.

This incidental observation of the Supreme Court with respect to Section 90 IPC alone is being considered leaving the main observations with regard to age of the victim of above 18 years, the statutory age as per Section 375(6) IPC and her intellectual capacities of realizing consequences of sex. It appears this erroneous approach is mooted at several levels that any consent given by the woman is one attracting Section 90 IPC with due respect this approach is erroneous.

As a foot note event at the risk of repetition, a conjoint reading of Section 90 IPC and Section 376 IPC makes it clear a free consent subject to the above limitations of age and intellectual capacities, the consent given by victim does not attract the offence under Section 376 IPC. Far from this authority which is unfortunately misinterpreted there are other decisions of the various High

Courts and also Apex Court focusing on free consent which does not amount to an offence under Section 376 IPC which are delineated as follows.

*Sudhmay Nath alias Bachhu v. State of West Bengal*,  
1999 Cri. LJ 4482 (Cal).

held that Rape-Proof-Accused alleged to have allured prosecutrix that he would marry her and had sexual intercourse with her-Medial evidence showing that prosecutrix was above 16 years of age at the time of incident-Evidence of father of prosecutrix regarding her age corroborated with medical evidence-Prosecutrix consenting to act of sexual intercourse fully knowing nature and implicating of such act-Conviction of accused for offence of rape, not proper.

*Udav v. State of Karnataka*, 2003 Cri. LJ 1539  
(SC)

Rape-Defence of prosecutrix that she gave consent under misconception of fact-Tenability-accused expressed love and promised to marry prosecutrix on later date-prosecutrix aware of fact that they belonged to different castes and proposal of their marriage will be opposed by their family members-As yet, prosecutrix consented cohabiting With accused continuously and becomes pregnant-Consent given by prosecutrix to sexual intercourse cannot be said to be given under misconception of fact *i.e.*, promise to marry but because she also desired for it - False promise is not a fact-Accused acquitted.

*Salagala Prabhudas v. State rep. by P.P.H/c of A.P.*, 2007 (3) ALT (Cri.) 21 (AP)

Held that having intercourse with a girl, promising to marry her and later refusing to marry does not attract Section 376 I.P.C.

*K.P. Thimmappa Gowda v. State of Karnataka*,  
2011 (2) ALT (Cri.) 303 (SC).

Held that-Rathanamma herself stated that she had sex with appellant on several occasions-No offence under Section 376 IPC because sex with a woman above 16 years of age with her consent is not rape”

*Jayanthi Rani Panda v. State of W.B.*, 1984  
Cri. LJ 1535

Observed that in order to within the meaning of misconception of fact, the fact must have an immediate relevance. If a fully grown up girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact and Section 90 cannot be invoked.

*Deelip Singh @ Deelip Kumar v. State of Bihar*,  
AIR 2005 SC 203

Girl above 16 years-raped with her consent even before promise to marry was given-consent by victim girl cannot be said to be given on misconception under Section 90 IPC.

It is therefore appears the consensus of judicial opinion is in favour of the view that If a fully grown up girl above the statutory age of 18 years, consents to the act of sexual intercourse on a promise of marriage or any inducement and continues to indulge in such activity, it is an act of promiscuity on her part and not an act induced by misconception of fact and Section 90 cannot be invoked. The cumulative effect of the series of decisions on this subject confirms the view of the writer and bestowing careful thought of considerable industry, it is suggested the decision of Supreme Court referred to is well considered focusing on free consent of the victim subject to limitations prescribed thereunder, which unfortunately misinterpreted.