CHAPTER-III

CONSENT NOT EXONERATING FROM THE CRIMINAL LIABILITY (Type-One)
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(Act consented Under (Fear of Injury or Misconception of Fact)

Introduction

Consent is just opposite to the concepts of fear of injury and misconception because consent is the expression of intention upon a particular question assuming that the question is asked under normal circumstances under bonafide intention. But if consent is taken in answer to fear of injury or misconception then it is not a legal consent rather such consent is as if there is no consent because the will of the consented party is either obeying the dictate of the aggressor under fear of injury or operating under misconception of fact.

Act to which a person is compelled by threats (Section 94), the consented party works under compulsion or duress or it can be called under fear of injury therefore if any aggressor takes the consent of the fearful person for doing any illegal act, does not exonerate the accused from criminal liability.

Similarly, in cases of kidnapping and abduction (Sections 361-362) the consent is effected either by force (i.e. fear of injury) or by deceitful means (i.e. misconception of facts) therefore it is not a real consent.

In rape cases (Sections 375-376D) the consent of the victim if taken, is given in either of the circumstances i.e. against her will (i.e. fear of injury) or under deception (i.e. misconception of fact). Hence it is also not a legal consent as desired by Section 90 of I.P.C. therefore, consent taken in rape cases does not exonerate the accused.
In extortion (Section 383) the victim is put under fear of injury so that he may be consented to deliver the property. Hence the consent embodied in extortion does not exempt the accused from criminal liability.

Lastly, the consent taken in marital offences (Sections 493-496, 498) is based on deceitful means hence it is also not a legal consent, therefore does not exonerate the accused from criminal liability.

Section 90 – Consent known to be given under fear or misconception.—A consent is not such a consent as is in ended by any section of this Code, if the consent is given by a person under fear of injury, or 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: or

Consent of insane person.—If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.—Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Scope and Object

This sections does not define 'consent' but describes the nature of 'consent' as the term is used in the Penal Code. ‘Two or more persons are said to consent when they agree upon the same thing in the same sense'. Sir James Stephen defined consent in criminal law to mean ‘a consent freely given by a rational and sober person so situated a to be able to form a rational opinion upon the matter to which he consents'. And he goes on to add that ‘consent is said to be given freely when it is not procured by force, fraud or threats of whatever nature'. The object and effect of this section obviously is not to lay down that a child under 12 years of age is in fact incapable of

1 Indian contract Act. s 13.
2 Stephen's Digest of Criminal Law, art 224.
expressing or withholding his or her consent to an act, but to provide that where the consent of a person may afford a defence to a criminal charge such consent must be a real consent, not vitiated by immaturity, fear or fraud. Further, in the Penal Code a distinction is drawn between an act which is done 'against the will' and an act done 'without the consent' of a person. Every act done 'against the will' of a person, no doubt, is done 'without his consent', but an act done 'without the consent' of a person is not necessarily 'against his will', which expression, imports that the act is done in spite of the opposition of the person to the doing of it. Where a husband being in sore distress desiring to commit suicide, his wife asked him to first kill her and then to kill himself, and he accordingly killed her but was caught before he killed himself, it was held that the consent of the wife was a consent within the meaning of Exception 5 to Section 300, IPC. Though given under peculiar circumstances it did not fall under any of the exceptions provided by this section and is a valid consent under the section.

**Fear of Injury**

The word 'injury' denotes any harm whatever, illegally caused to any person in body, mind, reputation or property. For the meaning of 'illegal' see Section 43 of the Code. 'Fear or injury' means fear of an injury other than that which, it is supposed, will be the result of the proposed course of action. A proposes to engage in a boxing match with B, B refused. A threatens to flog B with a stick, for being a coward, if he will not consent, B consents. In the course of the match A gives B a blow which causes him a 'black eye'. 'B's consent' not being a true one. A is not exempted from having caused B hurt. The offence

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3 Section 375 *R v Fletcher* (1859) 8 Cox CC 131, 7 WR 20.
4 *Khallilur Rahman v Emperor* AIR 1933 Rang 98, 101 (FB).
5 *Dasrath Paswan v State of Bihar* AIR 1958 Pat 190; *Queen v Anunto Rumagat* 6 WR (Cr.) 57.
6 Section 44, IPC.
of rape may be committed, though the woman at last yielded to the violence, if her consent was forced by fear of death or by duress. If non-resistance on the part of a prosecutrix proceeds merely from her being overpowered by actual force, or from her not being able, for want of strength, to resist any longer, or from the number of persons attacking her she considered resistance dangerous, and absolutely useless, the crime is complete.\(^7\)

**Misconception of Fact**

Consent given under a misconception of fact is no consent.\(^9\) In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. If a girl allows a person to have sexual intercourse with her on his promise that he would marry her, and, subsequently, he fails to keep his promise, it cannot be said that she consented for sexual intercourse under a misconception of fact. The matter would have been different if her consent was obtained by creating a belief in her that they are already married. In such a case, the consent can be said to result from a misconception of fact.\(^10\) Where consent to remove timber was given on the understanding that the timber to be removed is timber covered by a license when in fact it was timber not covered by a license at all, there is no consent as is meant by Section 378, IPC and the removal of the timber is theft.\(^11\) Where the accused, a snake-charmer, persuaded the deceased to allow themselves to be bitten by a poisonous snake inducing them to believe that he had power to protect them from harm, the consent having been founded on misconception of fact, and the accused knowing that the consent was given in consequence of such misconception the

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\(^7\) Hawk C 41, s 6; 1 East PC 444; Bhimrao Haroonooji Wanjori v State of Maharashtra 1975 Mah LJ 660 (DB).

\(^8\) R v Hallett (1941) 9 C&P 748; R v Jones (1861) 4 LT 154 (NS).


\(^11\) Maung Ba Cit v Emperor AIR 1930 Rang 114, 121.
accused was not protected by it. It has been held that the expression 'under a misconception of fact' is broad enough to include all cases where the consent is obtained by misrepresentation leading to a misconception of the facts with reference to which the consent is given, and that a consent given on a misrepresentation of a fact, is not useful as a consent under the Penal Code. A misrepresentation as to the intention of a person (in stating the purpose for which the consent is asked) is a misrepresentation of a 'fact' within the meaning of Section 3 of the Evidence Act. But it is difficult to say that any misrepresentation of fact inducing a consent would result in that consent not being a consent within the meaning of Section 378, IPC for in that case it is difficult to see what distinction can be drawn between the offence of theft and claiming property dishonestly by means of cheating. Even if the consent was given under a misconception of fact, if the doer of the act did not know, or had a reason to believe, that the consent was given in consequence of the misconception, the consent would be valid and protect the doer of the act. when a full grown girl consented to sexual intercourse on a promise of marriage and continued to indulge in such act till pregnancy, it was held that consent on the part of the girl was not induced under misconception of fact.

In a Burma case, the deceased, a middle-aged man, believed himself to have been rendered da-proof by charms and asked the accused to try a da on his arm. The accused believed in the presence of the deceased and inflicted a blow with a da with a moderate force with the result that the arteries were cut and the deceased bled to death. Here the deceased gave his consent to be cut under a misconception of fact erroneously believing that he was immune to do

12 Queen v Ponai Fattemah 12 WR (Cr) 7.
13 Re N Jalada, AIR 1914 Mad 49, 50, 15 Cr Lj 24; R v Hanmanda (1877) 1 ILR Bom 610; Pursbottom Mahadev v State (1963) 1 Cr LJ 573, 575, AIR 1963 Bom 74.
14 Re N Jalada AIR 1914 Mad 49, 50, 36 ILR Mad 453, 456; followed in Emperor v Sona AIR 1916 Lah 414.
15 Maung Ba Chit v Emperor AIR 1930 Rang 114, 120.
cuts. But it could not be said that the accused knew of the misconception or had reason to believe that the deceased was mistaken in thinking himself invulnerable. It was held that he was protected by Sections 87 and 90 of the IPC.\textsuperscript{17}

In order then that there should be such consent, the mind must have materials to work upon. In the first place it must have knowledge or consciousness of the act contented to.\textsuperscript{18} A person consenting under a 'misconception of fact' cannot be said to consent within the meaning of the section. Such misconception may arise from fraud or a misrepresentation of fact.\textsuperscript{19} Suppose, for instance, that a person is told by a medical man that a certain drug, if taken internally would cure him of his ailment. He believes him and consents to take the drug which was poison and dies. Here his consent cannot be availed of because it was given under a misconception of fact. Similarly, where the accused who professed to be snake-charmer persuaded the deceased to allow them to be bitten by a poisonous snake, inducing them to believe that they had power to protect them from harm, there was consent, but it was given under a misconception of facts, that is, in the belief that the accused had power by charms to quire snake-bites and the accused know that the consent was given under such misconception. It was, therefore, not such a consent as is here understood.\textsuperscript{20} So there have been several cases in which women consented to the connection on the assurance of their medical men that it was part of the treatment, and as such, necessary for the cure, in all of which cases consent could not be used to exculpate the criminal.\textsuperscript{21} In such a case it may be said in the words of Wilde, C.J., that "she consented to one thing; he did another materially different on which she had been prevented by his fraud from exercising her judgment and will."\textsuperscript{22}

\textsuperscript{17} \textit{Nga Shew Kin v Emperor} AIR 1930 Rang 114, 120.
\textsuperscript{18} Lock, 12 Cox 244; Nagwa Shwe Kin, 8 L.B.R. 166: 30 I.C. 133.
\textsuperscript{19} Jaladu, I.L.R. 36 Mad, 453 at pp. 456 and 457; Soma, (1916) P.R. (Cr.) 17: Mg Ba Chit, I.L.R. 7 Rang. 821 at pp. 836 and 837.
\textsuperscript{20} Ponnai Fatteman, 12 W.R. 7.
\textsuperscript{21} Flattery, 2 Q.B.D. 410; Young, 14 Cox. C.C. 14.
\textsuperscript{22} Case, 1 Dent. C.C. 580 at p. 582, cited with approval per Mellor, J., in Flattery 2 Q.B.D. 410 at p. 413.
Where a person consents to a thing on the assumption of facts which in fact did not exist, the result is the same as if on the true facts there never had been any consent. Field, J., in one case said: "The actual circumstances were that the prisoner, knowing he had a foul and infectious disease upon him and that the infection of his wife would be the natural and reasonable consequence of intercourse, solicited intercourse. He also knew that his wife consented to it in ignorance of his condition. Under these circumstances, I think, that her consent to the intercourse in fact was given upon the implied condition that, to the knowledge of the prisoner, the nature of the intercourse was that to which she had bound herself to consent and had been accustomed to consent, i.e. a natural and healthy connection. But the intercourse which the prisoner imposed upon his wife was of a different nature, one which, in all probability, would communicate to her a foul disease, to which, the jury have found, that she would not have consented. Had she known the state of his health. It seems to me, therefore, to follow, that the mere consent of the prisoner's wife to an act, innocent in itself, and in no way injurious to her, was no consent at all to what the prisoner did, and, moreover that he obtained such consent as she gave by willfully suppressing the fact that he was suffering from disease.... The result, therefore, at which I have arrived, is that there was no consent in fact by the prisoner's wife to the prisoner's act of intercourse because although he knew yet his wife did not know, and he willfully left her in ignorance as to the real nature and character of that act."23 Where consent is obtained by duress, fraud, or misrepresentation, there is not even the freedom of will necessary for consent.24

Of course, it is not necessary that the misconception of facts should have been brought about by the accused. All that is necessary is that he must know or have reason to believe, that the consent was given under the misconception of facts. If, therefore, there be a misconception of facts

23 Clarance, 22 A.B.D. 58.
24 Sanders, 8 C. & P. 265.
unknown to the accused, the result so far as he is concerned is the same, as if
there had been no misconception at all. The deceased believed that he had
been made invulnerable by charms. He invited the accused to try his cia (a
stick with a blade about a foot and a half long) on him and he struck him with
it with a moderate force with the result that the arteries were cut and the
deceased bled to death. The accused, an ignorant youth of 19, had probably
believed in the alleged immunity of the deceased, he was consequently
acquitted, the Court holding him protected both by Section 87 and this
section.25

Where the deceased, a literate young woman of nineteen years, and her
husband, the accused, entered into a pact that the husband should kill the wife
first and then take his life out of disgust caused by his repeated failures at the
annual examination for Class X, the deceased did not give consent under fear
of injury or a misconception of fact and, therefore, he was guilty not under
Section 302 but under the first part of Section 304.26

The fear of injury or threatening vitiates the consent. Such ideology has
been reiterated in the recent amendments in IPC Cr.P.C. establishing that a
false evidence given under threat will not be considered a legal evidence
because in such cases a witness gives consent of giving false evidence due to
fear of injury.

Recent Amendment to the Indian Penal Code27

Insertion of new section 195A.—After Section 195 of the Indian Penal Code
(45of 1860), the following section shall be inserted, namely:-

“195A. [Threatening any person to give false evidence].—Whoever
threatens another with any injury to his person, reputation or property or to the
person or reputation of any one in whom that person is interested. With intent
to cause that person to give false evidence shall be punished with

25 Nagwa Shew Kin, 8 L.B.R. 166 : 30 I.C. 133.
imprisonment of either description for term which may extend to seven years, or with fine, or with both:

and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years. The person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.”

Recent Amendment to the Cr. P.C. 1973²⁸

Amendment of the First Schedule.—In the First Schedule to the Code of Criminal Procedure, under the leading “1.—OFFENCES UNDER THE INDAIN PENAL CODE.”—

(a) after the entries relating to section 195, the following entries shall be inserted, namely:--

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Consent Under Threats (Compulsion)

Consent and compulsion are two opposite concepts as the consent is the willing state of mind to do an act whereas under compulsion the victim gives

consent unwillingly. In other words Compulsion is propelled by fear of injury. Hence such consent affected by compulsion or duress do not exonerate from criminal liability.

**Duress or Compulsion**

Kenny\textsuperscript{29} observes:

Compulsion can take other forms than physical force; but in whatever forms it appears the courts have been indisposed to admit that it can be a defence for any crime committed through yielding to it and the law of the matter is both meager and vague. It can best be considered under the heads of obedience to orders, marital coercion. Duress per minas and necessity.

**Obedience to Orders.** The obedience to orders must be of the orders coming from the superior. In this connection a distinction may be drawn between, \textit{first}, an act done in obedience to the commands of law itself which will, therefore, mean an obedience of the law, the execution of public justice and, therefore, shall not constitute an \textit{actus reus}, and, secondly, an act done by a person under orders of a superior, to whom he is subordinate by status or by contract such as a ministerial officer, executing the orders of a superior.

Herein, will be covered all the acts done by the executive officers. How far are these officers, judicial or executive, exempted from criminal responsibility, we have already discussed earlier in this chapter under the title “Executive and Judicial Acts” where under we have also discussed the Indian law as contained in Sections 76 and 79 of the Penal Code.

It may be observed, however, that the modern view that has developed even since the celebrated trials of war crimes at Nuremberg and Tokyo is that the defence of superior orders would not succeed in all cases except to a very

\textsuperscript{29} Kenny, Outline of Criminal Law (17\textsuperscript{th} Ed.), p. 61.
limited extent. How far his view will be accepted by our courts is yet to be seen, because of the statutory recognition given under our law to this excuse, which we have discussed before.

Marital Coercion. Marital coercion was a defence recognized under English law in offences other than treason or murder. Committed by a wife in the presence of her husband. In other words, a woman charged with any offence other than treason or murder was *prima facie* presumed to have committed the offence under his coercion and so she could plead in her defence that she committed the offence in the presence and under the coercion of her husband. The prosecution was required to negative the presumptive coercion in all such cases. But in modern times Section 47 of the Criminal Justice Act, 1925, has abolished this defence.

(i) Extent of this Defence. The defence was technically called a defence of private subjection, but it never afforded an exemption to a servant or a child who committed a crime at the instigation of a master or a parent. Only in case of conjugal subjection it could amount to a defence at common law. Thus, if a wife committed an ordinary felony in her husband's actual presence, the common law raised a *prima facie* presumption that she had committed it under such a compulsion which entitled her to be acquitted, even though there may be no proof of actual intimidation by him. But if the crime was committed by her not in her husband's actual presence, his previous orders or threats afforded her no defence. This artificial presumption did not apply in major offences. It applied only to misdemeanours, except those that were connected with household management, because in those matters, the wife was assumed

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30 In early English law this defence was recognized in all crimes, but then Bacon excepts treason (Maxim 57); Hale exempted treason, murder, and homicide (1 Hale P.C. 45, 47); Blackstone excepts treason and mala in se, ass murder and the like. (IV) Blackstone, *Commentaries*, 29. All these exceptions are due to the odious character and dangerous consequences of their crimes.
to be the person chiefly active. In other words, this presumption extended only to felonies, like burglary, larceny, forgery, but not to murder or treason. Then again, this presumption was rebuttable by proof that the wife took so active a part in the crime as to show that her will acted independently of her husband's. 

(ii) Reason of this Defence. The reason of this privilege of the wife has a curious history behind it. Benefit of clergy, that is the right of any man who could read and write to escape capital punishment, was denied to women until 1962. Hence, whenever a man and his wife were charged with jointly committing any felony, the man if he could make semblance of a reading could get off, while the woman, though probably the less guilty of the two, would be sentenced to death. This injustice was sought to be evaded by the establishment of this artificial presumption of conjugal subjection. This "melancholy rule of law," as Stephen calls it, "was at last all too late put to rest by Section 47 of the Criminal Justice Act," as we have noticed above, which came into force on June 1, 1926. The modern American Law is summed up by Burdick, thus:

This common law rule was laid down in an age when men had a greater authority and power over their wives, persons and property than in modern times. The present-day statutes giving control of their property to married women, and their equality with their husbands in civil and political rights make such a rule no longer necessary or reasonable. Consequently, the tendency of modern decisions is to do away with such presumption and to hold a married woman responsible for a crime committed in the presence of her husband unless she can show actual coercion by him in some jurisdictions the presumption has been abolished by statute.31

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Yet, there are some cases in which even an act itself, otherwise criminal, that has been done by the wife, will not be *actus reus* (or Illegal) because of its connection with the relationship between herself and her husband. For example, a husband and a wife cannot be convicted of a criminal conspiracy, if they were the only parties to it.\(^32\) But under the Indian law, they may be punishable as such. Then again, if a husband who has committed a crime is received and sheltered by his wife, she will not be regarded by law as an accessory, after the fact, to a felony committed by the husband. This exemption is granted to her under our penal law\(^33\) in Section 216 which lays down that the penalty for harboring offenders "does not extend to the case in which the harbourer is the husband or wife of the offender." So also, neither spouse can prosecute the other for a private libel even if they are living apart\(^34\) under the English law.

**Duress per Minas and Necessity.** Necessity as a defence in criminal law has been discussed already. Under Indian law how far it goes to exempt a person from criminal responsibility is provided for under Section 81 of the Penal Code. Now we shall discuss duress per minas or compulsion by threats as a defence, that has been provided for under Section 94 of the Penal Code, which reads thus:

> Except murder, and offences against the state punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of

\(^{32}\) *Mawji v. R.* (1957) A.C. 126.

\(^{33}\) Such is the common law also, for the law recognizes that it is her marital duty to harbour her husband

\(^{34}\) *R. V. Lord Mayor of London* (1886) 16 Q.B.D. 772.
instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1: A person, who of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits knowing their character, in not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2: A person seized by a gang of dacoits, and forced by threat of instant death, to do a thing which is an offence by law, for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder, is entitled to the benefit of this section.

(i) General Principles. Mayne\textsuperscript{35} observes:

Compulsion it of two sorts: it either arises from the act of an authority, which rightly or wrongly has for the time being superseded the government of the country, or from the acts of private persons who, without any show of legality, proceed in open defiance of the law. Section 94 appears to refer exclusively to the latter class of cases. There are obvious reasons why a code, which assumes the continuance of law and tribunals, should take no notice of a state of things in which both have ceased to exist.

Duress per minas is very rare defence. It is based on the principle that "an act done by me against my will is not my act." in other words, the act done must be an involuntary act. But where an act is not voluntary, not be caused another uses his limbs for the commission of a crime and the man so used is the mere

\textsuperscript{35} Mayne, \textit{Criminal Law}, p. 199.
passive instrument, but because of mental compulsion, the doctrine has to be applied with certain qualifications. For instance, a catches hold of B and snatches all the money is this pocket and says: "I will not return you the money unless you pick the pocket of C." B Picks the pocket of C in order to get back his money. Here there is mental compulsion, but it is not of a kind which the law considers to be sufficient to excuse him from criminal responsibility the law on the subject of compulsion by threats is enunciated by Stephen thus:

An act which if done willingly would make a person a principles a the second degree and an aider and abettor in a crime may be innocent if the crime is committed by a number of offenders, and if the act is done only because during the whole of the time in which it was being done, the person who does it is compelled to do it by threats on the part of the offenders instantly to kill him or to do in grievous bodily harm if he refuses; but threats of future injury or the command of any one not the husband of the offender do not excuse and offence.

Stephen observes that it is singular that the law on the subject should be so very meager and that it would seem that in all common law cases the fact that a crime is done unwillingly and in order to avoid injury ought to affect rather the punishment than the guilt.

Hale observed:

If a man be menaced with death, unless he will commit an act of treason, murder, or robbers, the fear of death will not excuse him if he commit the act, for the law hath provided a sufficient

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37 Hale P.C. 434.
remedy against such rears by applying himself to the courts and officers of justice for a writ of de Securitate Pacis.

Stephen thinks this reasoning of Hale to be weak, because in most of the cases in which death or bodily harm would be used to compel a person to commit a crime, there would be no time or opportunity to take recourse to the protection of the law. However, the principle laid down by Hale may be defended on grounds of expediency. Stephen\textsuperscript{38} observes:

Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty, and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, if you do it I will hang you. Is the law to withdraw its threat if some one says, if you do not do it I will shoot you? Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is of course a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminal could confer impunity upon their agents by threatening them with death or violence if they refuse to execute their commands. If impunity could be so secured, a wide door would be open to collusion, and encouragement would be given to associations of malefactors, secret or otherwise.

(ii) \textit{When Compulsion is no Defence}. Section 94 of the Penal Code enunciates the law under which it recognizes compulsion as a defence to criminality. It

states clearly that to amount of compulsion can justify murder and offences against the state, punishable with death. As regards murder, the law, in other words, says: "If you have a choice between your death and the death of an innocent person, you must choose the former. In other words, you cannot save your life by killing another innocent person." As regards the offences against the state punishable with death, it is the right of the state to ensure its own safety by enacting deterrent punishment, so that if a person wages war against the Government of India, though under compulsion, he cannot be exempted from criminal responsibility on the ground that he joined the rebels under compulsion. The English law on the subject has long been settled and is different. In 1746, McGrowther was tried for high treason for having joined the Duke of Perth in arms against the King. In his defence, he contended that being a tenant of the Duke he had been compelled by him to join, the rebel army which had threatened to burn his house and property and that several of Duke's men had come to him and threatened him with destruction and bound him with cords till he consented to serve in the rebel army. Lee C.J. observed:

The only force that doth excuse is force upon the person and present fear of death, and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defence, to show an actual force, and that he quitted the service as soon as the could.

In other words, English law permits a man to save his life at the expense of the state but under the Indian law this is not possible, as the words of Section 94 of the Penal Code are perfectly clear that in murder and offences against the state punishable with death, which fall under Section 300 and 121 of the Penal

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39 McGrowther (1746) 18 St. Tr. 301, 393-4; followed in Aung Ha, 9 Rang. 404, 33 Cr. L.J. 205.
Code, no amount of compulsion will exempt from criminal responsibility. In such offences, compulsion may not even go to mitigate the offence.\textsuperscript{40}

Compulsion by threats may exonerate the person, provided "the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint."\textsuperscript{41} In other words, if the accused of his own accord places himself in a situation by which he becomes subject to threats of another person, whatever be the nature of such threats, he would not be protected by Section 94.\textsuperscript{42} The authors\textsuperscript{43} of this code, as regards this proviso, observed:

We cannot count on the fear, which a man may entertain, of being brought to the gallows at some distant time, as sufficient to overcome the fear of instant death, but the fear of remote punishment may often overcome the motives which induce a man to league himself with lawless companions, in whose society no person who shrinks from any atrocity that they may command can be certain of his life. Nothing is more usual than for pirates, gang-robbers and rioters to excuse their crimes by declaring that they were in dread of their associates and durst not act otherwise. Nor is it by any means improbable that his may often be true. Nay, it is not improbable that crew of pirates and gangs of robbers may have committed crimes which everyone among them was unwilling to commit, under the influence of mutual fear, but we think it clear that this circumstance ought not to exempt them from the full severity of the law.

\textsuperscript{40} Itwa Munda (1938) Pat. 258.
\textsuperscript{41} Proviso to Section 94, I.P.C.
\textsuperscript{42} Santlaydo (1933) Rang. 204; 35 Cr. L.J. 262.
\textsuperscript{43} Note B, Reprint, p. 112.
Therefore, no man from a fear of consequences to himself has a right to be a party to a crime perpetrated on mankind.44

Section 94 lays down that there should be a reasonable apprehension45 of instant death in order to claim the benefit of the section. In other words, nothing short of apprehension of instant death can be pleaded in defence. Whether the criminal act done by a person was the result of such a fear is a question of fact which depends on the circumstances of each case. Dr Gour46 has suggested that in order to justify an act under this section, three essential points must be established, namely, (a) that the person did not voluntarily expose himself to the constraints: (b) that the fear which prompted his action was the fear of instant death; and (c) that the act itself was done at a time when he was left with no option but to do it or die.

(iii) When Compulsion is a Defence. As we have seen above, Section 94 lays down that with exception of murder and offences against the state, punishable with death, any other offence is excusable if it is committed under fear of instant death. But such a fear must be present at the time of doing the act. if it preceded the doing of the act, it would be inferred that it ceased to exercise the influence which entitles the doer to claim a protection under this section. Thus the defence set up by the accused in a case of perjury that he falsely in criminated a person for murder, because he was tortured by the police for this purpose, was rejected by the court, because the accused at the time of making the statement were under no compulsion to make them which they did and which would have the effect of sending an innocent man to the gallows.47 In another case48 it was held that the witnesses, who in order to

45 The fear must be a reasonable one; as an American judge puts it, it must be “such a fear as a man of ordinary fortitude and courage might justly yield to.” Per Washington J. in U.S. v. Haskell, 26 Fed. Cas. 207.
47 Sonno, 10 W.R. 48.
48 Magan Lal, 14 Bombay 115.
avoid a financial loss or personal torture had offered and given bribes to a public servant, were abettors to an offence of taking illegal gratification. So also, in “Devji Govindhi,” it was held that a policeman is no more justified in torturing a man to death, simply because he had been ordered to do so by his superiors, than a robber can justify his act on the plea that he had to obey his fellow-confederates. The principle established by these cases is that no man from a fear of consequences to himself short of apprehension of immediate death arising from threat of injury has a right to make himself a party to committing mischief on mankind.  

(a) Illustrative English Cases. It may be observed that there are very few cases decided on compulsion by threats under the Indian law as also under the English law. In R.V. Tyler and Price, Lord Denman C.J. Observed:

It cannot be too often repeated that the apprehension of personal danger does not furnish any excuse for assisting in doing an act which is illegal.

But although this case may be an authority for the proposition that nothing short of force making the act in question that of someone other than the accused is a defence to a charge of murder, Lord Denman’s remark, as an author has observed, was probably much too wide. In a more recent English case, Lord Goddard C.J. observed:

There is very little learning to be found in any of the books on cases on the subject of duress, and it is by no means certain how far the doctrine extends, though we have the authority both of Hale and Fitz-James Stephen that, while it does not apply to treason, murder and some other felonies, it dies apply to misdemeanors.

49 20 Bombay 215.
50 Killikyaranara 91912) M.W.N. 1108; 19 I.C. 207.
51 (1838) 8 C and P. 616.
52 Cross and Jones. Introduction to Criminal Law, p. 73.
Undoubtedly, these remarks of the learned Chief Justice were in the nature of *obiter dicta*, but as we have observed above there is direct authority on the proposition that *duress per manas* may be a defence in some cases, for instance, continuing threat of death could be a defence to treason.\(^{54}\) So also it was held in another case that duress was a defence to a charge of malicious damage. In both these cases the threats against the accused were made by a number of person; this may be necessary in a treason case, but it may not be necessary in the other case where the threat by only one person may be sufficient to excuse the offender.

Under the Indian law, as we have seen already, no amount of compulsion may excuse an offender to commit treason, yet he may be excused if he were to commit any offence, other than murder or treason punishable with death, under fear of instant death. In a recent case\(^{55}\) where the evidence showed that the accused continued to be under the threat of instant death not only when he held the legs of the deceased but also when he helped the murderers in removing the body and concealing it, despite the accused’s failure to mention in his statement that he protested against conveying the body and was again threatened with death, the court held that it was reasonable to hold that his conduct in removing the body was also on account of his fear of instant death at the hands of the murderers if he refused to do so. So also, where a person commits the offence of abetment of murder by holding the legs of the deceased under threat of being killed himself for non-compliance, it was held that he is protected under Section 94.\(^{56}\) So also, where a servant removed the dead body of the deceased under coercion by his master, it was

\(^{54}\) *McGrowther’s case* (1746) Foster 13.


\(^{56}\) *Uma Dasl Devi v. Emp.*, I.L.R. 52 Cal. 112.
held that he committed no offence as his act of removing the dead body was protected under the provision of this section.\textsuperscript{57}

There are two explanations appended to this section. Explanation 1 lays down the fact that a man who of his own accord or by reason of the threat of being beaten joins a gang of dacoits, knowing fully well their character, is not entitled to the protection of this section, if he is compelled by his associates.

**Consent in Kidnapping and Abduction**

When consent has been taken of Guardian with misconception and boy or girl is carried away from the lawful custody, still it is termed as kidnapping. Furthermore, if by force a person is compelled or by any deceitful means a person is to go from any place is called abduction. Here consent of the abducted person is illegal being affected by fear of injury or misconception of fact. Now we will study kidnapping and abduction in detail to know the real scope of consent embodied in these offences.

**Section 361. Kidnapping from lawful guardianship** --Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind. Without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

*Explanation.*—The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

*Exception.*—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who

\textsuperscript{57} R. V. Ram Avtar, A.I.R. 1925 All. 315.
in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

This section defines the offence of kidnapping from lawful guardianship. It says that whoever either takes or entices away any minor who is under sixteen years of age if a male, and is under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of that lawful guardian, is said to kidnap such minor or person from lawful guardianship. The explanation attached to the section says that the words 'lawful guardian' in this section includes any person who is lawfully entrusted with the care of custody of such minor or other person. In addition to this, there is an exception too attached to the section which states that this provision does not apply to the act of any person who believes in good faith that he is the father of an illegitimate child, or who believes in good that he has a legal right to the lawful custody of such child. But in either of the above mentioned cases the act on his part should not be committed for either an immoral or an unlawful purpose.

The offender must either take or entice a person. The victim must be under the age of sixteen years if he is a male, under the age of eighteen years if she is a female, or of any age if he or she is of unsound mind. The taking or enticement must be out of the keeping of the lawful guardian of the victim. The lawful guardian of the victim must not have given his or her consent for the taking or enticement. The explanation under the section gives an inclusive explanation, and not an exhaustive definition, of the expression lawful guardian by stating that the expression includes any person to whom the care or custody of such minor or person of unsound mind has been lawfully entrusted. The exception provided under the section specifically states that any
person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child cannot be held guilty of this offence even if his act falls under the language of this section, unless it is proved that he committed such act either for an immoral or for an unlawful purpose.

The object of the section is to protect the interests of children and persons of unsound mind from undesirable and improper activities by others against them, as well as to protect the rights of parents and other guardians having lawful charge or custody of such children or persons. Initially the age of a minor male child was mentioned in the section as fourteen years and that of a minor female child as sixteen years. But the same were raised to sixteen and eighteen years respectively by the Indian Penal Code and the Code of Criminal Procedure (Amendment) Act, 1949, and the amendment came into force with effect from July 15, 1949.

**Takes or Entices.**—There must be proof of taking or enticing. Taking means physical taking. It may not be by force, actual or constructive. To take means to cause to go, to escort or to get into possession, and it includes inducing the victim to leave. The offender must take some active part in the leaving of the victim. It is not necessary that the offender must himself go to fetch the victim; his earlier act of inducing or soliciting the victim may also amount to taking if there exists a causal relationship between the earlier act and the ultimate result of the victim going to the offender. Persuasion by the accused which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section. Except the act of

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59 State v. Raja Ram, AIR 1973 SC 819.
physical taking nothing more, like trespass, or anything of that nature, need be proved.

Enticing need not be confined to a single form of allurement. It may not always be distribution of sweets or money only. It may even by an offer of sexual relations.\(^{60}\) It is an act on the part of the offender by which the victim is induced to go to the offender by himself or herself. Force or fraud may not be present always in taking or enticement.

Taking is different from enticing. The mind of the minor is of no consequence in the former; the minor may be a willing party or may not be so. But enticing involves an idea of inducement by exciting hope or desire in the other on the basis of which the victim does something which he or she would not have done in the absence of the enticement. The Supreme Court is of the view\(^{61}\) that the two words 'takes' and 'entices' are intended to be read together so that each takes to some extent its colour and content from the other. If the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined is section 361. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then \textit{prima facie} it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating or encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not he immediate cause of her leaving her

\(^{60}\) See \textit{Dowood Sahab v. State}, 1954 Mad WN 389, where the minor girl's infatuation with the accused was such that the went going to him for sexual intercourse for about a year it was held to be no defence.

parental home or guardian's custody would constitute no valid defence and would not absolve him.

**Keeping.**—The word 'keeping' in this section means that the minor or the person of unsound mind is under the control or protection of the lawful guardian. It must be seen that the latter has an overall charge over the former. The keeping of the lawful guardian continues even when the minor or such person has moved out of the home temporarily. Keeping of the lawful guardian does not depend on the distance the victim has been taken to by the offender. If the minor has been taken away for even a short distance of twenty or thirty yards by the offender, it would amount to taking her out of the lawful guardian's keeping and if other essentials of the offence are present, this offence would be held to be committed.\(^6^2\) Similarly, the duration of the detention is also immaterial and the victim would be presumed to be under the keeping of her lawful guardian even if she has been taken away for a short or long duration and then left.

The word 'keeping' has been deliberately preferred over the word 'possession' which is connected with inanimate objects. Keeping is compatible with independence of action and movement in the object kept. It implies neither apprehension, nor detention but rather maintenance, protection and control, manifested not by continual action but as available on necessity arising. This relation between the minor and the guardian is not dissolved so long as the minor can at will take advantage of it and place herself within the sphere of its operation.\(^6^3\) Use of word 'keeping' in section 361 shows that the section is designed to protect the sacred right of the guardians with respect to their minor wards.\(^6^4\)

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\(^6^3\) See *Emp. V. Jetha*, 1904 Cr. LJ 931 (Bom).

Lawful guardian.—The expression ‘lawful guardian’ has been preferred to the words ‘legal guardian’. The former is much wider in its ambit. Any person who has been lawful entrusted with the care or custody of a minor or a person of unsound mind is a lawful guardian. A relationship of a guardian and word established by lawful and legitimate means would mean that the guardian is a lawful guardian. It has been observed\(^65\) that the explanation is not intended to limit the protection which the section gives to parents and minors; it is intended to extend that protection by including in the expression ‘lawful guardian’ any person lawfully entrusted with the care or custody of the minor. The fact that a father allows his child in custody of a servant or friend, for a limited purpose and time, cannot determine her father’s rights as guardian or his legal possession for the purposes of the criminal law. If the facts are consistent with the father’s legal possession of the minor, the minor must be held to be in the father’s possession or keeping even though the actual physical possession should be temporarily with a friend or other person. Under this section a \textit{de facto} guardianship is sufficient to hold that the guardian is a lawful guardian.

Explanation.—The explanation gives an extended meaning to the expression ‘lawful guardian’ and it includes any person lawfully entrusted with the care or custody of such minor or other person. The word ‘entrusted’ means giving, handing over, or confiding of something by one person to another. The person entrusting reposes a confidence in the other. Nothing of this may be in writing as far as section 361 of the Code is concerned. There must be a person who reposes the confidence, another in whom the confidence is reposed, and a minor or a person of unsound mind who is the subject matter of the trust. A person is lawfully entrusted with the care or custody of a minor if he has

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acquired control over him or her lawfully and in such circumstances as would imply trust even though he may not have been formally entrusted with the same by a third person. The entrustment may be inferred from a well-defined and consistent course of conduct of the parties and the surrounding circumstances of the case.

Consent necessary.—The question of consent is an important question, for it legalizes an act otherwise unwarrantable and illegal. The consent required must be of the lawful guardian of the minor the latter’s consent is, of course, inoperative but it may be express or implied, though it must be antecedent to the commission of the offence. Proof of previous seduction with the connivance of the lawful guardian (e.g. mother) is strong evidence of a subsequent seduction being with the consent of the guardian. Enough has been already said before as to the nature of the consent which is a justification for an act otherwise illegal and criminal (see Sec. 90). The consent here required is then a free consent given by the guardian without fear or misconception of facts, not wrung out of him by intimidation or coercion. Such consent necessarily implies knowledge of the destination of the minor and the purpose for which it is being taken away from the guardian. If a person takes a child for tuition, and then gives it away in marriage, the consent would rather aggravate than exculpate the crime. The question, what would be the effect of a consent given for an immoral or unlawful purpose, or for a purpose beyond the scope of the guardian’s authority, may raise complicated issues.


69 Abdul Rahman v. Emperor. I.L.R. 38 All. 664.
But it is intimately connected with the subject. In the case of temporary guardians. The question of consent is limited by their authority. But in case of a natural guardian, the solution of the question depends upon other considerations.

Suppose, for example, the case of a female Hindu guardian, who is entitled to the custody of a child. Now, under Hindu law, the right to dispose of a minor Hindu girl in marriage does not go with the right of guardianship for it is a right which belongs to the paternal relatives, though it is, of course, a right which, like the patria potestas of Civil law, must not be used atrociously but benignly. It is right for the benefit of the minor and not for the profits of the relations. They may sue the guardian of the person of the minor for hurrying on a marriage if not to the interest of the minor. On the other hand, they must consult the wishes of such guardian as to the suitability of a match. Where, therefore, the accused, paternal agnates empowered to marry a minor girl under the guardianship of a female acting under the will of her mother, hurriedly and forcibly attempted to marry her off to a person of their own choice and in order to defeat a previous betrothal and the consequent marriage, it was held that the accused were guilty of this offence. If the guardian had consented to the marriage, without the knowledge of the paternal relations, the question of criminality would have been one of intention and good faith. So where the accused. A Hindu girl, left her husband’s house, taking her daughter for the express purpose of marrying her, without his consent, to the brother of A, another accused in pursuance of a previous arrangement between her and that A, it was held that the mother was guilty of kidnapping and was guilty of abetting her offence.

70 Maharamee Ram. v. Maharamee Sooth. 7 W.R. (Cr.) 323.
71 Kashi Chunder Sen v. Emperor. I.L.R. 8 Cal. 266.
72 Mahakor. 9 (1895) Unrep. Cr. C. 820.
73 Prankrishna Sarma v. Emperor. I.L.R. 8 Cal. 969.
The pledging of a minor girl to secure a loan is not a legal contract and may not be enforced in a Court of law. But, if the minor is retained in the custody of the creditor with the consent of the lawful guardian. The creditor would not be guilty of kidnapping. It does not matter whether the consent is given for consideration or not. If, after having obtained custody of the minor in a lawful manner with the consent of the lawful guardian, the minor is married or disposed of in such a manner as to make it impossible for the lawful guardian to get back the custody of the minor, an offence under Sec. 361. would be committed and the temporary guardian doing such act would be liable under Section 363, but so long as nothing is done which would render the restoration or exercise of the custody of the minor impossible. The mere fact of the temporary guardian transferring the guardianship to another by pawning her would not constitute an offence.74

Consent of the prosecutrix, relevancy of.—Consent in cases under Section 361. When the prosecutrix is certainly a minor has no relevancy: of course, it may be a ground for reduction of sentence.75

The fact that the prosecutrix had agreed to accompany the accused does not take the case out of the purview of the offence of kidnapping from the lawful guardianship as contemplated by Section 361, I.P.C. It is only the guardian’s consent which takes the case out of its purview. It is not necessary that taking or entiting must be shown to have been by means of force or fraud. Persuasion by the accused which creates a willingness on the part of the prosecutrix to be taken out of the keeping of the lawful guardian would be sufficient to attract the penal section.76

76 Rasool v. State 1976 Cr. L.J. 363 at pp. 365 (All.).
‘Without the Consent of Such Guardian’ As Under Section 90

The consent required is of the lawful guardian, and not of the minor kidnapped, at the time of taking or enticing. It may be express or implied, but it must be given prior to the taking or enticing. A subsequent consent of ratification cannot take the case out of the purview of this section. Where a Mohammedan girl of ten or eleven years of age was married without the consent of her lawful guardian under the Mohammedan Law, but with the full approval of the minor’s mother, it was held that the accused were guilty under Section 366.

A consent given under a misconception of fact, as where it is obtained by fraud, is not a true consent. Consent must be a voluntary consent.

S. 362 Abduction

“By force”.—In view of the definition of the definition embodied in Section 362, I.P.C. word “force” used therein connotes the actual force and not merely a threat of force. It would be an offence to carry away a grown up human by force against her own will. But the completed offence must be distinguished from attempt. Where, for example, the accused had lifted a woman in order to

77 Chathan Kunjukunju v State AIR 1959 Ker 197, 1959 Cr Lj 716; Queen v Bhugee Ahur 2 WR (Cr) 5; Queen v Koordon Sing 3 WR (Cr.) 15; Empress v Sokee 7 WR (Cr) 36; Queen v Gooroodas Rajbansee 4 WR (Cr) 7; Fatima v McCormick 6 Bur LT 21 (FB).
79 Abdul Rahman v Emperor 5 Bur LT 157.
80 Ovati Mia v Naib Ali AIR 1952 Tri 27; 1953 Cr LJ 73 I LR 31 All 448; Abdul Rahman v Emperor 14 Cr LJ 109.
81 Ahmed Bepari v Emperor AIR 1925 Cal 578, 26 Cr LJ 290.
carry her away, but on her giving an alarm they dropped her and ran away. The court held it to be only an attempt and punishable as such.83

"By deceitful means".—The expression “deceitful means” is wide enough to include the inducing of a girl to leave her guardian’s house on a pretext.84 That term implies the use of misrepresentation by act or conduct.

"To go from any place".—An abducted woman managed to effect escape one afternoon and was going to police station. She met the accused who persuaded her to go home with him saying he was a police constable and would escort her to the thana. He took her to his house led her into a kotha. On payment of Rs. 600 the girl was handed back to her mother. Held, that when the appellant met the girl she had ceased to be a kidnapped woman in the strict sense. She was then a free agent but she would not have gone with the appellant but for his false representation being a police constable and the inducement held out by him that he would take her to the police station. His action therefore amounted to abduction as defined in Section 362. I.P.C. Held, further that he intended to and, and actually did, by confining her wrongfully while he negotiated with her relatives for the payment of a sum of Rs. 600 which was structurally her ransom. His act, therefore, falls under Section 365, I.P.C.85

Consent.—It need scarcely be added that subsequent consent abandons abduction, though not kidnapping; but the consent must be free not itself induced by fraud. But while kidnapping is of itself an offence. Therefore abduction as such is not.

Intent.—In order to be punishable it must be accompanied by a mens rea described in Sections 364-366 and Section 367.

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Abetment.—From the very definition of abduction as given in this section it follows that a married woman cannot abet her abduction. 86

American law.—Statutes prohibiting the taking of a child from its parents or the taking of such child with her consent or designed for the protection of the child’s presents. 87 The various enactments forbidding the taking of a female under a designated age for the purpose of prostitution or taking such female from parents for prostitution are designed to protect young females, to save the members of her family from sorrow and disgrace, and to inflict punishment on debased persons who engage in the baneful pernicious practice enticing females to houses of prostitution. 88

Where the statute prohibits the taking or enticing of a female for a particular purpose or renders punishable the taking of a female from the lawful custody of her guardian or without such guardian’s consent the gist of the offence is the taking of the female, or the taking of such female from its lawful custodian 89 and the means by which accused takes the female may consequently be immaterial. 90

Accused need not employ force or actual violence in order that his act constitutes a taking under these statutes. 91 While of course there must be a taking or detention, and from the custody or the lawful guardian where such taking is the gist of the offence, a person commits the offence if he takes the

86 Natha Singh. 11 P. R. 1813 Cr.
89 State v. Corrigan. 171 S. W. 51: 262 Mo. 195.
female or takes her from her guardian for a prohibited purpose by means of some device or by enticement or persuasion.  

Consent in Sexual Offences  
Now we will discuss the relevance of consent in rape, unnatural offence etc. As per definition of rape, (Section 375) consent given under fear of injury or misconception is not a proper consent. Also consent under Sections 376A-376D is not a proper or legal consent because due to influence of marital relation and official influence the illegal consent is given by the victim. Consent under Section 377 is also not a free consent reason being given under influence of fear of injury or under misconception or against rule of nature. Now we will discuss the real scope of consent in offences related to sex. Section 375 of IPC enumerates rape as under-

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, be 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.

_Amendment._—The age limit was raised to fourteen years in clause (5) and to
thirteen in the Exception to the section by Act XXIX of 1925, Section 2. The
proviso to Section 376 was also added by Section 3 of the same Act. The age
limit was again raised to sixteen years in clause (5) and to fifteen years in the
Exception by the Code of Criminal Procedure (Amendment) Act, 1949 (Act
XLII of 1949). The words "imprisonment for life" were substituted for the
words "transportation for life" by Act XXVI of 1955, Section 117 and
Schedule. Sections 375 and 376 were substituted in their present form by the
Criminal Law (Amendment) Act, 1983 (43 of 1983) w.e.f. 25 December,
1983.

Sections 376A to 376D were inserted by the Criminal Law

_Ana\logous law._—Section 114A of the Evidence Act as inserted by the
Criminal Law (Amendment) Act, 1983 (Act XLIII of 1983) raises a
presumption as to absence of consent in cases of custodial rape, rape on
pregnant woman and in case of gang rape. Section 228A of the Indian Penal
Code as added by the Amendment Act of 1983 prohibits disclosure of identity
of victims in rape cases as also publication of proceedings before a court
without previous permission of such court. Sub-section (2) or Section 327 of
the Code of Criminal Procedure, 1973 as introduced by the same Amendment Act permits the court to conduct rape cases in camera.

**Rape: Meaning:** “Rape” is the act of physically forcing a woman to have sexual intercourse: an act of sexual intercourse that is forced upon a woman against her will.93 “Statutory rape” is a sexual intercourse with a girl under the age of consent, which age varies in different States from ten to eighteen years.94

The offence of rape in its simplest term is ‘the ravishment of a woman, without her consent, by force, fear or fraud’, or as ‘the carnal knowledge of a woman by force against

Second clause: ‘Without her consent’.—(a) **Consent: Meaning.**—Consent is an act of reason coupled with deliberation, after the mind has weighed the good and evil on each side in a balanced manner. Consent denotes an active will in the mind of a person to permit the doing of the act complained of.95

(c) **Prior consent.**—Consent of the woman should have been obtained prior to the act. It is no defence that the woman consented after the act.96 The consent of a woman to sexual intercourse obtained by putting her in fear of death or of hurt is no defence to an accused person for an offence under this section. As a general proposition it is not true either in fact or in law that consent obtained by fraud is no consent at all.97

The fact that the girl was virgo intacta up to the date of the occurrence. Is very strong proof against the intercourse having taken place with the consent of the girl.98

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95 Vijayan Pillal (1990) 1 Crimes 261 (Ker); Hamarain Singh AIR 1958 Pun 133: 1958 Cri LJ 563 (Pun).
96 1 Hawk PC c 16, section 7, p. 122.
98 Sultan (1925) 26 Cri LJ 1488 (Lah).
(d) *Presumption as to consent.*—Consent or absence of it is generally gathered from the attendant circumstances. The circumstances that the girl was taken to the forest and kept throughout the night strongly suggests that the prosecutrix was not a consenting party. Where the girl was overpowered by holding her hands by another person during sexual intercourse, it would negative her being a consenting party. Similarly, where the prosecutrix and her cousin sister, who was also with her at the time of the incident, were found crying together immediately after the incident, it would rule out the possibility of her consent.

A sleeping person can never consent. Where, therefore, a man had connection with a woman while she was asleep, he was held to have committed rape. If a person having close touch with the family and acting almost like a father induces the girl to accompany him on the pretext that her father was ill and she was required to visit him and on the way during night time she is made a victim of sexual assault, it may be that she might have not resisted or might have even passively suffered the assault, it would amount to obtaining consent by deception and not free consent.

Consent given by woman of unsound mind is of no avail (Section 90). Where, therefore, a man had carnal knowledge of a girl of imbecile mind, and the jury found that it was without her consent, she being incapable of giving consent from defect of understanding, it was held that his act amounted to rape. But there must be evidence that the connection was against the will or without the consent of the woman. However, if the girl was in such a state

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99 *Babu* 1984 Cri LJ (NOC) 74 (Raj).
100 *Vinod Kuanr* 1987 Cri LJ 1541 (MP).
101 Ibid.
102 *Mayers* (1872) 12 Cox 311; *Young* (1878) 14 Cox 114.
103 *Gajanand Maganlal Mehta* 1987 Cri LJ 374 (GUj).
104 *Fletcher* (1859) 8 Cox 131; *Pressy* (1867) 10 Cox 635.
105 *Fletcher* (1866) LR 1 CCR 39.
of idiocy as to be incapable of expressing either consent or dissent, and the accused had connection with her consent, he ought to be convicted.\footnote{106}

Similarly, consent given by an intoxicated woman is of no avail. Where the accused made a girl of thirteen years quite drunk, and whilst she was insensible violated her person, he was held to have committed rape.\footnote{107} When an accused person is charged with the commission of rape on a grown up woman, it is for the prosecution to prove that sexual intercourse was without the consent or against the will of the woman. It is not necessary for the defence to prove that sexual intercourse was with the consent of the woman.\footnote{108} A suggestion that while the miscreants were bringing the woman back after committing rape she had demanded money, even if true, would not mean her consent.\footnote{109}

\textit{(e) Presumption as to absence of consent.}—The Criminal Law (Amendment) Act. 1983 (43 of 1983) has inserted Section 114A in the Evidence Act with effect from 25 December, 1983 which provides that in a prosecution for rape under 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 she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.\footnote{110}

\textit{(g) Helpless submission.}—A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in,
when volitional faculty is either crowded by fear or vitiated by duress cannot be deemed to be "consent", as understood in law. Consent on the part of a woman, as a defence to an allegation of rape, 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 the resistance and assent.\textsuperscript{111} Submission of the body under the influence of fear or terror is no consent. There is subtle difference between consent and submission. Every consent involves submission but the converse does not involve consent. Consent of the girl in order to relieve an act of a criminal character. Like rape must be an act of reason, accompanied with deliberation, after the mind had weighed as in a balance between the good and the evil. It is always a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.\textsuperscript{112} The consent or compulsion is to be judged on a careful consideration and scrutiny of the evidence of the victim and from other corroborative evidence, if available and the attendant circumstances preceding, accompanying or following the acts of sexual intercourse.\textsuperscript{113} It is not easy to find a dividing line between submission and consent. Yet, the evidence has to be carefully scanned.\textsuperscript{114}  

(h) Consent by fraud.—Stephen, J, in \textit{Queen v Clarence}\textsuperscript{115} said: "It seems to me that the proposition that fraud vitiates consent in criminal matters


\textsuperscript{113} Bijay Kumar Mohapatra 1982 Cri LJ 2162 (Ori); \textit{Nlambor Goudo} 1982 Cri LJ (NOC) 172 (Ori).  


\textsuperscript{115} (1888) 22 QBD 23, 43, 44: 16 Cox. 511.
is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not in ended to be fulfilled ... the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act."

If a girl does not resist intercourse in consequence of misapprehension, this will 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 held that he could be convicted of rape. Similarly, where the accused professed to give medical advice for money, and a girl of nineteen consulted him with respect to illness from which she was suffering, and he advised that a surgical operation should be performed and, under pretence of performing it, had carnal intercourse with her it was held that he was guilty of rape. The accused, who was engaged to give lessons in singing and voice production to a girl of sixteen years of age, had sexual intercourse with her under the pretence that her breathing was not quite right and that be had to perform an operation to enable her to produce her voice properly. The girl submitted to what was done under the belief, willfully and fraudulently induced by the accused, that she was being medically and

116 William (1850) 4 Cox. 220. 
117 Flattery (1877) 2 QBD 410.
surgically treated by the accused and not with any intention that he should have sexual intercourse with her. It was held that the accused was guilty of rape.\textsuperscript{118}

"That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent."\textsuperscript{119}

\textbf{(i) Misconception of fact.}\textemdash If a full grown girl consent 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. Section 90 of Penal Code cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her.\textsuperscript{120}

There is no strait-jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of facts. It must also weigh the evidence keeping in view the

\begin{itemize}
\item \textsuperscript{118} Williams (1923) 1 KB 340.
\item \textsuperscript{119} Clarence (1888) 22 QBD 23, 27 (Per Wills. J).
\item \textsuperscript{120} Uday 2003 Cri LJ 153 (SC); AIR 2003 SC 1339; (2003) 4 SCC 46; (2003) 2 Crimes 176 (SC); (2003) 2 JT 243; Jayanti Rani Panda 1914 Cri LJ 1535 ICal; Lakshmana Naik 2004 Cri LJ 3913 (Kar); Maranchandra Paul 1997 Cri LJ 715 (Gau); Sunil Vishnu Salve 2006 Cri LJ 587 (Bom).
\end{itemize}
fact that the burden is on the prosecution to prove each and every ingredient of
the offence, absence of consent being one of them.

In *Mange Ram*[^121^], the Court observed that 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.

In the instant case, the prosecutrix was a grown up girl studying in a
college. She was deeply in love with the appellant. She was, however, aware
of the fact that since they belonged to different castes, marriage was not
possibly. She had sufficient intelligence to understand the significance and
moral quality of the act she was consenting to. That is why she kept it a secret
as long as she could. Despite this she did not resist the overtures of the
appellant and freely, voluntarily and consciously consented to having sexual
intercourse with him. It was held that her consent was not in consequence of
any misconception of fact. The prosecutrix willingly consented to having
sexual intercourse with the appellant with whom she was deeply in love, not
because he promised to marry her, but because she desired it.[^122^]

Decision of the Division bench of the Calcutta High Court in *Jayanti Rani Panda*[^123^], is one of the cases referred to by the Supreme Court in *Uday*[^124^] approvingly. It was reiterated that the consensus of judicial opinion is in
favour of the view that the consent given by the prosecutrix to sexual
intercourse with person with whom she is deeply in love on a promise that he


(SC); (2003) 2 JT 243.

[^123^]: 1984 Cri LJ 1535 (Cal).

would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. It was added that there is no strait-jacket formula for determining whether consent given by the prosecutrix to sexual intercourses is voluntary, or whether it is given under a misconception of fact.

In a very recent case, Deelip Singh\textsuperscript{125}, it has been further clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clauses secondly. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Rani Panda. The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end unless the Court can be assured that from the very inception the accused never really intended to marry her. The burden is on the prosecution to prove that there was absence of consent or absence of it could be gathered from the attendant circumstances. The previous or absence of it could be gathered from the attendant circumstances. The previous or contemporaneous acts or the subsequent conduct can be legitimate guides.\textsuperscript{126}

A minor girl allured and falsely assured by the accused for marriage was kept under psychological pressure exerted by the accused and under such allurement of marriage, out of passive submission, marriage pretended to have been performed before the portrait of ‘Goddess Kali’, subsequent conduct of


the accused and his family members resiling from assurance of actual marriage reveal that the consent of the victim was obtained by deceitful manner tantamounting lack of her consent proving the guilt against the accused.\footnote{Santosh Sirha 2007 Cri LJ 7 (Gau).}

The Criminal Law Amendment Act 2005 (Amendment in Cr. P.C. about Rape)

Section 53A examination of person accused of rape by medical partitioned, Section 54 Examination of arrested person by medical practitioner at the request of the arrested person and Section 164A medical examination of the victim of rape inserted in the criminal procedure code 1973 so that justice in Rape cases may be Provided up to the expectations.

Latest Case on Consent (Year 2008)

In \textit{Inqbal v. State} of Kerala, AIR 2008 SC 288, the Supreme Court Judge Consisting of Dr. Arijit Pasayat and P. Sathasivan J.J. Held that Clause "sixthly clearly stipulates that sexual intercourse with a woman with her or without her consent when she is under 16 years of age. Amounts to rape. The evidence on record clearly establishes that the victim was less than 16 years of age and therefore. The conviction for offences punishable under Section 376 IPC cannot be faulted.

The residual question is of applicability of Section 366A IPC. In order to attract Section 366A IPC. essential ingredients are (1) that the accused induced a girl: (2) that the person induced was a girl under the age of eighteen years; (3) that the accused has induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse: (4) such intercourse must be with a person other than the accused: (5) that the inducement caused the girl to go from any place or to do any act.

In the instant case, the admitted case of the prosecution is that girl had left in the company of the accused of her own will and that she was not forced
to sexual intercourse with any person other than the accused. The admitted case is that she had sexual intercourse with the accused for which, considering her age, conviction under Section 376, IPC has been maintained. Since the essential ingredients that the intercourse must be with a person other than the accused has not been established. Section 366A has no application.

In the result. The conviction for offence punishable under Section 366A. IPC is set aside while the conviction and sentence imposed in respect of offence punishable under Section 376, IPC is maintained.

The appeal is allowed to the aforesaid extent.

Third clause: Consent obtained under fear of death or hurt.—The mere fact that a woman submits through fear does not take the offence out of the category of rape.128

The fear must be of death or hurt. The fear which this clause speaks of is negatived by the circumstance that the girl is said to have been taken away by the police constable right from her near and dear ones at a point of time when they were all leaving the police station together. Her failure to appeal to her companions and her conduct in meekly following the constable and allowing him to satisfy his lust in full makes it clear that the consent in question was not a consent which could be brushed aside as 'passive submission'. Further, absence of any marks of injury on the prosecutrix would show that the sexual intercourse was a peaceful affair with no resistance on her part.129

In Tukaram,130 (generally known as Mathura case), Mathura and her husband Ashok were called at police station at night hours. Police constable

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128 Akbar Katioo (1864) 1 WR (Cr) 21: State v Mange Ram, supra.
Ganpat took Mathura behind the police station and committed sexual intercourse with her. Tukaram was drunk.

Fourth clause: Where consent is given under the belief that the ravisher is husband.—Where the consent is given by the woman under the belief that the person having sexual intercourse with her is a man to whom she has been married whereas in fact it is not so, the section is attracted and the accused is guilty under this section for an offence of rape.

Fifth clause: Consent by a person of unsound mind, under intoxication, etc.—By the Criminal Law (Amendment) Act, 1983 (Act XLIII of 1983), Sections 375 and 376 have been substituted. The first four clauses of Section 375 have been retained as they were. Clause “Fifthly” has been renumbered as “Sixthly” and a new clause “Fifthly” has been introduced. This clause applies to cases where sexual intercourse has been committed with the consent of the woman but at the time of giving consent the woman is unable to understand the nature and consequence of such act by reason of unsoundness of mind or intoxication or the administration by the accused personally or through another of any stupefying or unwholesome substance. In all these cases, sexual intercourse would amount to rape irrespective of consent by the victim.

Sixth clause: Victim below the statutory age.—The age-limit was raised from ten to twelve years by the Indian Criminal Law Amendment Act (X of 1891) for the following reasons: “The limit at which the age of consent is now fixed (i.e., ten years) favours the premature consummation by adult husbands of marriages with children who have not reached the age of puberty, and is thus, in the unanimous opinion of medical authorities, productive of
grievous suffering and permanent injury to child-wives and of physical deterioration in the community to which they belong.”

It was raised from twelve to fourteen years by the Indian Penal Code (Amendment) Act (XXIX of 1925), Section 2, for the following reason: “Books of medical jurisprudence establish the fact that the age of puberty in India is attained by a girl upon her reaching the age of fourteen. Even though puberty may be reached at the age, it is obviously that girls are unfit for sexual cohabitation till they are older and more developed in physique and strength. The appalling infant mortality in the country is partially ascribed to early marriages and the consummation which follows with immature girls. It is, therefore, not only for the protection of minor girls as also of their progeny that the age of consent should be raised to at least fourteen years.”

By raising this limit female children are protected (a) from premature cohabitation, from immature prostitution.

The age limit has finally been raised to sixteen years by Act XLII of 1949. Therefore, consent of prosecutrix is no defence if the victim has been proved to be under sixteen years of age.

Section 377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

131 Statement of Objects and Reasons to Bill No. 3 of 1891, Gazette of India, 1891, Part V, p. 5.
132 Statement of Objects and Reasons to Bill No. 12 of 1924, Gazette of India, 1924, Part V, p 49.
133 Hurree Mohum Mythée (1890) 18 Cal 49.
Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

This section is intended to punish certain unnatural offences like sodomy, buggery and bestiality. The offence consists in having carnal knowledge against the order of nature by a person with a man, or in the same unnatural manner with a woman, or by a man or woman in any manner with an animal.

In *Fazel Rab Chodhary v. State of Bihar*, the accused was charged for committing an unnatural offence upon a young boy. In view of the fact that no force was used, the sentence of three years imprisonment was reduced to six months. It was held that in judging the depravity of the action for determining quantum of sentence, all aspects of the matter having a bearing on the question of nature of offence must be considered.

In *Brother John Antony v. State*, the petitioner a sub-warden of a Boarding Home was alleged to have committed unnatural offence with he inmates. The acts committed by the petitioner fell in two categories, namely – (1) insertion of the penis into the mouth of the victim boy and doing the act of in carnal intercourse upto the point of ejaculation of semen into the mouth; and (2) manipulation and movement of the penis of the petitioner whilst being held by the victim boys in such a way as to create an orifice like thing for making the manipulated movements of insertion and withdrawal upto the point of ejaculation of semen.

It was held that both the above categories of act fall within sweep of unnatural carnal offences under Section 377. As far the second category is concerned in the process of such manipulation, the visiting male organ is enveloped at least partially by organism visited, namely, the hands which held...
tight the penis. The sexual appetite was thus quenched by the ejaculation of semen into the hands of the victims.

Consent in Extortion

Although the victim delivers property or valuable security by his/her hands. In other words victim consented to deliver property but under fear of injury threatened. Therefore such consent is also not a legal consent as desired by Section 90 of I.P.C. Now we will study here the true scope of consent in Extortion (Sections 383-389) Section 383 Contains the following features-

Exortion.—Whoever intentionally puts any person in fear of any injury to that person, or to any other and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security. Commits "extortion".

What is Extortion?—The offence of exterior is the outcome of a judicial refinement which regards criminality from he three-fold stand points of intention, act and effect and in which it is graduated according to the degree of mental malignity manifested by the act and effect no less than by the determination of the mind of the offender directed against the wrongful seizure of property. That the seizure is wrongful in each offence against property goes without saying; that the offender is in each case punishable follows as a matter of course. But it is evident that the degree of punishment in each case cannot and should not be identical. It is, indeed, here that the work of science beings, each offence being placed in its true perspective according to the degree of the culpability. Judged no less by the degree of mental wickedness of the offender than by the menace to the security and peace of people directly and indirectly, affected by the crime.
The offence of extortion has, therefore, a clearly logical place in the law of offence. And, as here defined, its essential ingredients are; (i) intentional, (ii) intimidation or putting person in fear of injury, (iii) inducing, (iv) delivery of property.

"Intentional".—In the first place, then, extortion must intimidate and his intimidation must be intentional. The word "intentional" would exclude cases of pure theft in which the mere presence of the thief may create alarm in the mind of the person whose property is threatened. Such a case would be dealt with as theft and not extortion though in consequence of the alarm the person may himself deliver up his property. The gist of this crime is not only the fear caused, but the fear intended to be caused, but for which the act cases to be extortion, whatever another offence it might be.

"Puts any person in fear of any injury".—The intimidation here must consist of putting any person in fear of any injury to that or any other person. As such, and apart from the object aimed at, the act would constitute the offence of criminal intimidation which is elsewhere defined by the Code to be threatening another "with any 'injury to his person, reputation or property or to the person or reputation of anyone in whom that person is interested with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat". This is probably a more exhaustive statement of the "injury" which is otherwise sufficiently defined in Section 44. The mode of putting any person in fear of injury must necessarily vary with the nature and plasticity of the other's mind. For instance, a person may threaten another with the practice of magic or charms, and thereby induce him to deliver property which he would not otherwise deliver. But in this case there may at times be a very thin line dividing this offence from that of cheating.

137 Section 503.
The injury contemplated by this section must be one which the accused can himself inflict or cause to be inflicted. A mere threat at large that if a debt is not paid, then by the operation of divine laws, by the working out of destiny or karma displeasure will fall upon the debtor, is not sufficient to attract the provisions of Sections 383, 385 or 508 of this Code.138

"Dishonestly Induces".—For, in such cases the improper threat of prosecution may constitute a legal “injury”, but mere threat of such an injury does not amount to extortion unless it induced another person to deliver any property. And the threat was given dishonestly. The word “dishonestly” has been defined before.139 The question then reduces itself to this; (a) did the accused intentionally intimidate; (b) did the intimidation relate to the doing of an illegal harm; (c) did he intentionally adopt this means to secure a gain for himself; and (d) were the means adopted unlawful, and the demand made illegal. There can be no dishonesty where the accused believes in the righteousness of his demand. So where the accused who were toll gate keepers demanded tolls from carts which the cart men refused to pay, and left their carts to the gate, taking away their bullocks, it was held that the element of dishonesty being wanting, the accused would not be convicted of extortion.140

The question of dishonesty would arise where the demand is made not as a claim of right, and if it was bona fide there can be no extortion, for the essential element of dishonesty is then wanting.141

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139 Section 24.

140 Paditi Chenchu, (1882) 1 Weir 440.

141 So in England the demand must be without reasonable and probable cause. Miard. I.C x 22: Chalmers. 10 Cox. 450, which are held to apply to the prisoner’s mind when the demand is made and not to the truth or falsity of the accusation; Hamilton. 1 C.& F. 212; Gradener 1 C. & P. 479: Cracknell, 10 Cox, 408: Richards. 11 Cox. 43; In Chaturbhuj 1.1. R. $5 All 137; Harmant Rao, 75 I.C. (Nag.) 764. It was held that compelling merchants by means of picketing to sign pledges not to import foreign cloth and realizing fines for trading in foreign cloth by means of picketing constituted extortion. Sedu quaere: where is the dishonesty.
Responsible for the conduct of the case, and had then at a critical time made a demand which the client could not resist. As the relationship between counsel and client is not that of a principal and agent and as the fee paid to him is not mercies but an honorarium, his case would in this respect appear to be exceptional.

**Inducement necessary.**—Again, a mere demand however illegal and dishonestly made, is not necessarily extortionate, unless the defendant uses fear as a weapon of persuasion and inducement to secure delivery of the property.\(^{142}\) The inducement may be express or implies.\(^{143}\) But it must be so implied as to leave no reasonable doubt that the real intention was to extort. In other words while the delivery of money must be unerringly traced to the threat, as an effect to its cause it is not necessary that the threat and its consequential demand should be implicit and leave nothing to the understanding.\(^{144}\)

Induced the parents to part with their money.\(^{145}\) But, if they had such power, the offence would probably have been doubtful. Justifying a conviction under either Sections 161 or 384.

**"To deliver any property".**—In order to make out a case under Section 383. I.P.C., it is necessary for the prosecution to prove that the victim was put in fear of injury to himself or to others, and was thereby dishonestly indeed to deliver papers containing his thumb impressions. Where the only finding of the Court was that the accused forcibly took thumb impressions of the victim, it was held that from this it could not be inferred that the accused necessarily induced the victim to deliver papers with his thumb impression (papers which could no doubt be converted into valuable securities) and, therefore the

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143 Hickman R.&.M.C.C. 34: Jackson. 1 Leach 267.
144 Ameer Abbas Ali. 18 W.R. 17.
offence of the execution was not established against the accused. In Ramyad Singh v. Emperor. The victim was tied up on refusing to give his thumb-impression on a piece of paper. He then consented to put his thumb-impression on that piece of paper, and it was by that fear that he was found to have been induced to put his thumb-impression on the paper. The conviction under Sec. 384 was, therefore, upheld. But this is contrasted with the case which had come in Kapildeo Singh v. Emperor, where the finding of fact was that, helped by two others, the petitioner took by force the thumb impression of the victim – the man was thrown on the ground, his mouth and eyes tied with a gamcha, his left hand pulled out and the thumb put into a kajrauta and then impression of that thumb taken on certain papers. It was held that in the circumstances there was no inducing the victim to deliver the pieces of paper with his thumb impressions.

The word “property” as used in the definition of extortion in Sec. 383 of the Penal Code is not defined. Property, therefore, can be understood in a wide sense. Understood in a wide sense, letters such as those written by abducted person while in confinement would constitute property in the hands of abductors and, therefore, it can be reasonably argued that the wrongful confinement of the abducted person and obtaining letters from him by Raju and his four associates under the threat to kill him constituted dacoity.

Valuable Security.—Notwithstanding the fact that a relinquishment deed is unregistered the deed purports to be a valuable security within the meaning of this section. Hence, where the accused obtained illegally from the

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146 Criminal Revn. No. 125 of 1931.
147 Criminal Revn. No. 420 of 1930, decided on 15th August, 1930.
150 Perm Narain v. Mahant Nageshwar Das 5 K.L.R. (All Outh) 49.
complainant a deed of relinquishment in respect of the latter's property by means of threats, he is within the mischief of this section.\textsuperscript{151}

Consent in Marital Offences

When Cohabitation is caused by a man deceitfully (Section 493) or if by misconception of fact consent is taken from former spouse (Section 494) or if by misconception of fact consent is taken by second spouse (Section 495) with concealment of former marriage or if consent is taken under fraudulent ceremony (Section 496) or if a married lady is enticed for taking away (Section 498) all are the example of illegal consent which is not a proper consent as intended by Section 90 of the Indian penal code 1860. Therefore such consent does not exonerate the accused against any act done under such consent which is apparently affected by either fear of injury or misconception of fact now we will study various marital affiances herewith-

Section 493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.—Every man who by deceit caused any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Essence of the offence.—It will be noticed that the essence of the offence under this section consists in the practice of deception by a man on a woman, in consequence of which she is led to believe that she is lawfully married to him, even though, in fact, they are not lawfully married. To prove deception it must be conclusively established that the petitioner either dishonestly or fraudulently concealed certain facts, or made a false statement knowing it to be false.

\textsuperscript{151} Ibid.
Where the entire evidence of the prosecution was consistent with the view that both parties thought that the ceremonies performed would suffice to constitute a valid marriage, the element of deception was wanting in the case.\footnote{Raghunath Padhy v. State, 1956 Cut. I T. 503 at pp. 504, 505: A.I.R. 1957 Orissa 198; 1957 Cr. L.J. 989: State of Gujarat v. Batuk Hiralal Mehta, 1974 Guj. L.J. 391.}

In most of the cases brought by neglected wives against their husbands under Section 125 of the Criminal Procedure Code the usual plea taken is a denial of the marriage; and merely because of the subsequent desertion and denial of marriage it cannot be held in all those cases that the husbands were guilty under Section 493, I.P.C. It must be further established that deception was practiced prior to the performance of the ceremonies leading to the marriage.\footnote{Raghunath Padhy v. State, 1956 Cut. L.J. 503 at. P. 505.}

Cohabitation by deceitful assurance of marriage.—Of course, the section only punishes an act where such deception is practiced before she consents to have sexual intercourse with him. If therefore, a man marries a woman in the \textit{bona fide} belief that the marriage is effective, and afterwards discovers some flaw rendering it inoperative after which he continues to cohabit with her, he could not be said to have had sexual intercourse after causing belief in her marriage by deceit. In one sense it would be so, because any sexual intercourse had with her after the man is made aware of the invalidity of her marriage would answer all the requirements of this section, but it scarcely appears to have been its intention. If that were, indeed, the case, the accused would have to be punished separately for each individual act of intercourse, which is, of course, absurd.

It would seem that one essential distinguishing feature of this offence as compared to Section 496 is that the accused cohabits or has sexual
intercourse with the woman. The collocation of the two terms “cohabit” and “have sexual intercourse” would, at the first blush, seem to suggest that the former is used in a sense as distinct from the latter. But it is not so, for though the word “cohabit” literally means no more than “to live together”, still the word has come to mean cohabitation as husband and wife, and accompanied by sexual intercourse.

Section 494. Marrying again during life-time of husband of wife.—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction.

Nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

“The law of England on the subject of bigamy appears to us to be in some cases too severe, and in others too lenient. It seems to bear a close analogy to the law of perjury. The English law on these two subjects has been framed less for the purpose of preventing people from injuring each other, than

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154 Section 198. Cr. P.C.
for the purpose of preventing the profanation of a religious ceremony. It, therefore, makes no distinction between perjury which is intended to destroy the life of the innocent, and perjury which is intended to save the innocent; between bigamy which produces the most frightful suffering to individuals and bigamy which produce no suffering to individuals, at all. We have proceeded on a different principle. While we admit that the profanation of a ceremony so important to society as that of marriage is a great evil, we cannot but think that evil immensely aggravated when the profanation is made the means of tricking an innocent woman into the most miserable of all situations. We have, therefore, proposed that a man who deceives a woman into believing herself his lawful wife when he knows that she is not so and he induces her under that persuasion, to cohabit with him, should be punished with great severity.

"There are reasons similar, but not exactly the same for punishing a woman who deceives a man into contracting with her a marriage which she knows to invalid. For this offence we propose a punishment which, for reasons too obvious to require explanation, is much less severe than that which we have provided for a similar deception practiced by a man on a woman."  

The authors of the Code intended to punish with greater severity only the man who deceived a woman. But the section as it stands applies to either party.

Concealment of fact of first marriage when contracting second. — A woman, who does not use all reasonable means in her power to inform herself of the fact of her first husband's alleged demise, and contracts a second marriage with sixteen months after cohabitation with her first husband, without disclosing the fact of the former marriage to her second husband, is liable to enhanced punishment under this section. 

155 Note Q, pp 171, 172.
156 Enai Beebee (1865) 4 WR (Cr) 25.
By mere association of the accused persons, who are charged for an offence of abetment of the principal offender, in the absence of any material to show that there was an instigation by the petitioner or that there was any intention either in aiding or in commission of the offence, it cannot be said that they have committed an offence of abetment.\textsuperscript{157} Where the mother and the brother of the first accused, in a case under Section 495 for the offence of bigamy, were merely passive witnesses of the second marriage, they could not be held guilty of abetment of the offence. But the first accused and his father who had secured a false certificate from the village Munsif to the effect that the first accused was not married previously and produced the certificate to the temple authority where the second marriage was performed were guilty of the offence under Section 495 and Sections 495/109, respectively. The sentence of six months rigorous imprisonment was upheld.\textsuperscript{158}

\textbf{A Hindu contracting a second marriage after embracing Islam is guilty of bigamy – s 494 of the Indian Penal Code 1860—Supreme Court (2000)}

\textit{Lily Thomas v Union of India}\textsuperscript{159}

\textbf{Justice Sethi observed:}

The judgment in \textit{Sarla Mudgal’s case}\textsuperscript{160} was sought to be reviewed, set aside, modified and quashed by way of the present review petition and writ petitions filed by various persons, and Jamiat-Ulemi Hind and another.\textsuperscript{161} It was contended that the

\textsuperscript{157} \textit{Muthammai v Maruthathal} 1981 Cri LJ 833 (Mad): 1981 Mad LW (Cr) 80: 1981 MLJ (Cr) 287 in a prosecution under section 494/107.


\textsuperscript{159} AIR 2000 SC 1650.

\textsuperscript{160} AIR 1995 SC 1534.

\textsuperscript{161} WP No 509 of 1992. Sushmita Ghosh, wife of GC Ghosh (Mohd Karim Ghazi) filed a writ petition [WP(C) No. 509 of 1992]) before the Supreme Court stating that she was married to GC Ghosh in accordance with the Hindu rites on 10 May 1984. Around 1 April 1992, respondent no 3 asked the petitioner for divorce by mutual consent as he had embraced Islam so that he may remarry and in fact he had already fixed to marry one Vinita Gupta respondent no 3. Petitioner further stated that respondent no 3 had converted to Islam solely for the purpose of re-marrying and had no real faith in Islam. He did not practice the Muslim rites as prescribed nor did he change his name or religion in official documents. That the petitioner asserts her fundamental rights guaranteed by art 15(1) not to be discriminated against on the ground of religion and sex alone.
aforesaid judgment was contrary to the fundamental right to life and liberty and right to freedom of religion as enshrined in Articles 20, 21, 25 and 26 of the Constitution. However, the court refused to change its opinion and held that review petition was without any substance and was liable to be dismissed.

Affirming its earlier judgment, the court observed that the change of religion did not dissolve the marriage performed under Hindu Marriage Act 1955. A second marriage during the lifetime of the spouse would be void under Sections 11 and 17 of the Hindu Marriage Act 1955 besides being an offence of bigamy under Section 494, IPC.

Section 495. Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.—Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Again, the section punishes for a concealment of the fact of the former marriage, only when that marriage offers an impediment to the validity of the subsequent marriage. Consequently, a person belonging to a polygamous race, such as, for instance a Mohammedan would, ordinarily, be under no obligation to inform the fact of his previous marriage to his subsequent spouse though in such a case he may incur other penalty for his non-disclosure. Suppose, for instance, a Mohammedan married man conceals not only the fact of his marriage, but also his caste, from a person in a place where he is unknown and

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162 Hindu Marriage Act 1955, Section 11 reads: Any marriage solemnized after the commencement of this Act shall be null and void clauses (i), (iv) and (v) of Section 5 if it contravenes any one of the conditions specified.

163 Ibid, Section 17 reads: Any marriage between two Hindus is void if at the date of such marriage either party had a husband or wife living and the provisions of Sections 494 and 495 of the Indian Penal Code 1860 shall apply.
where he contracts a Christian marriage with a Christian woman from whom he conceals both his religion, as well as his previous marriage. His second marriage is, of course, void, and he could not, therefore, be punished under this section. But it does not thence follow that he may not then be punished for cheating, or under the provisions of the next section.

The question what amounts to the concealment of the fact of the former marriage is evidently a question of fact. For there may be as such concealment by making a misleading statement as by not making any statement at all. For instance, A may say to B to whom he is engaged to contract a second marriage: “I was married to C but I am now a widower”; the fact being that C was still alive though A had separated from her, and in fact C had not been heard of for seven years. Could A be convicted of this offence? It is clear that his liability under the last section depends upon whether his statement is sufficient to bring his case within the exception to that section. But if it is not, then he may be convicted under that section, though he could not be under this section because he had not concealed the fact of his previous marriage, and it is all that is necessary to save his case from his penalty. In other words, this section must be restricted only to cases where there has been no mention made at all of the fact of the previous marriage, the last section alone being applicable to other cases where that fact is mentioned but explained away.

Section 496. Marriage ceremony fraudulently gone through without lawful marriage.—Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a terms which may extend to seven years, and shall also be liable to fine.

Fraudulent mock-marriage.—The mischief which this section is intended to reach is that which debases the sanctity of the marriage oath for the purpose of
dishonesty or fraud. Ordinarily, such deception would be practiced upon an innocent person who is induced under the make believe of a marriage to establish conjugal relationship. But the fraud may be collateral to the marriage and both parties may be privy to it, as in the case where a legacy is payable to A on her marriage to B, to which both A and B are averse, but who go through a form to satisfy the executor that they are duly married, which they are not and whereupon A recovers the legacy payable to her. So a person may go through the form of marriage with an heiress with the single purpose of robbing her, in which case he would be guilty of this offence if the ceremony he goes through has not had the effect of lawfully marrying them which he knew.

Section 498. Enticing or taking away or detaining with criminal intent a married woman.—Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Such taking, entic ing, concealing or detaining must be with intent that she may have illicit intercourse with any person.164 'Takes or entices away any woman'.—The expression "takes or entices away" does not include taking of a woman with the consent of the person who has the care of her.165 "Taking" does not mean taking by force and means

164 Alamgir AIR 1959 SC 436, 439: 1959 Cri LJ 527 (SC); Ganesh Ram AIR 1920 Pat 522: (1920) 21 Cri LJ 139 (Pat).
something different from enticing. If the accused personally and actively assists the wife to get away from her husband's house or form the custody of any person who was taking care of her on behalf of the husband, this would amount to taking.\textsuperscript{167} There must be some influence emanating from the accused and operating on the woman or co-operating with her inclination – some act or assistance – in order to constitute taking.\textsuperscript{168} ‘Taking away’ of a married woman implies that there is some influence, physical or moral, brought to bear by the accused to induce the wife to leave her husband. There must be some influence operating on the woman, or co-operating with her inclination at the time the final step is taken which causes a severance of the woman from her husband, for the purpose of causing such step to be taken.\textsuperscript{169} All that is required is that if any person “takes away” another man’s wife with the intent that she may have illicit intercourse with him, then the offence is completed. The word ‘takes’ must be given a meaning somewhat similar to the word ‘entices’ which follows it. If the accused persuaded the woman to leave her husband’s house, the act would amount to enticement. If the accused arranged any conveyance for the woman, the act would amount to taking away the woman from the husband’s house.\textsuperscript{170} ‘Enticing’ implies some blandishment or coaxing. It is the taking or enticing of the wife from the husband of the person having the care of her on behalf of the husband for the illicit purpose that constitutes the offence. It is nonetheless taking, although the advances and solicitations proceeded from the woman and the accused had for some time

\textsuperscript{165} Jnanendra Nath Dey v Dshitish Chandra Dey AIR 1935 Cal 677: (1936) 37 Cri LJ 28 (Cal).
\textsuperscript{166} Ibid.
\textsuperscript{167} Ibid.
\textsuperscript{168} Ibid.
\textsuperscript{169} Mahadeo Rama AIR 1943 Bom 179: (1943)44 Cri LJ 584 (Bom); Akkiraya Sanyasi AIR 1950 Mad 213: (1950) 51 Cri LJ 228 (Mad); Ramaswami v Raju AIR 1953 Mad 333: 1953 Cri LJ 607 (Mad).
\textsuperscript{170} Chhotey Lal (1955) ALJ 894.
refused to yield to her request. The fact that the woman accompanied the accused of her own free will does not diminish the criminality of the act. If in point of fact the husband had, previously to the accused's alleged act of taking or enticing away the woman, turned his wife out of his house, it cannot be said that, under such circumstances, she was taken from her husband within the meaning of the section.

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171 Kumarasami (1865) 2 MHC 331: 1 Weir 569.
172 Jan Mahomed (1902) 4 Bom LJ 435; Jnanenara Nath Dey v Khitish Chandra Dey AIR 1935 Cal 677; (1936) 37 Cri LJ 28 (Cal); Parappa Sildram Dolarati v Dundawwa 1982 MLJ (Cr) 56 (Karn); 1980 Cri LJ (NOC) 101 (Karn); Ram Narain 1982 Cri LJ (NOC) 179 (All) 1982 UP Cr LJ 313; Narayan Chandra Das v Kamalakshya Das 1984 Cri LJ (NOC) 101 (Cal).