

**LEGAL PERPLEXITY OF PROVING “CONSENT” IN SEXUAL OFFENCES:
SECTION 376(2) VIS-A-VIS SECTION 376C UNDER THE INDIAN PENAL CODE**

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ABSTRACT

Rape as a crime is heinous and it is severer, when the woman is raped by a person whom she trusted or whom she had fiduciary relationship (hereinafter ‘acquaintance rape’). Section 376 (2) and section 376C IPC, both holistically deal with ‘sexual offence by abuse of authority’. The thin line difference between these two sections is the “consent” of the victim. If there is lack of consent, then it is rape under section 376(2), otherwise, it is deemed to be consensual sexual intercourse under section 376C. Meaning thereby, whoever “abuses the position or fiduciary relationship to induce or seduce any woman” is interpreted as consensual sexual intercourse. This legal perplexity was evident in the cases of *Bishop Franco* or *Mahmood Farooqui* or *Swami Chinmayanand* or *Tarun Tejpal*, wherein culprits were in dominant position however it was difficult to establish if the offence would fall under 376 (2) or 376C of IPC. Hence, the amendment of section 376C is indispensable if not - there lies a possibility of acquaintance rape and perpetrator would plead as being seduced or induced and get benefit of section 376C and thus escape from the liability of rape.

Keywords: rape, authority, woman, consent, sexual offence

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I. Introduction

THE COMMON law definition of rape as “carnal knowledge, of a woman, not the man’s wife, forcibly and against her will,” dominated tincture of a patriarchal existence in which women were deemed as ‘property’.¹ Though the definition of rape was modified, when most of the common law nations including India had drafted its own substantive penal law, the underlying patriarchal orientation still lingered.² Accordingly, the assumption has always been when the man engages in

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¹ Patricia J. Falk, “Rape by Fraud and Rape by Coercion”, 64 *Brooklyn Law Review* 45 (1998).

² Jessica Taylor, *Why Women Are Blamed For Everything: Exposing the Culture of Victim-Blaming* (Little Brown Book Group , NY, 2020).

sex even if the woman says no - since she does not fight - it cannot be the rape.³ This “inbuilt social norm that let sexual violence to be normalized and justified” has been influencing the criminal justice system as well. The meticulous examination of definition of rape under section 375 Indian Penal Code, 1860⁴ (hereinafter referred to as ‘IPC’), shows that it is primarily the ‘consent’ that differentiates rape from consensual sex.⁵ Of this, making consent the determinable factor in rape does little good; if proving the absence thereof – beyond a reasonable doubt, no less – is all but impossible. Indeed, as a defense in rape, the accused takes the plea of “reasonable belief of consent” which entails the claim that the victim’s behavior, constituted consent. Following this, the victim's behavior would be projected so as to depict consent from a reasonable man’s point justifying the acts of the accused.

To understand it better, let’s get into the factual matrix of the infamous case of *State v. Rusk*.⁶ The victim and a female friend were in a bar, wherein the accused *Mr. Rusk* came and spent time talking to both of the women, and eventually requested a ride home from the victim. As her friend appeared to know him, the victim consented and left the bar with him after midnight, making it clear that “I’m just giving a ride home, you know, as a friend, not anything to be, you know, thought of other than a ride.” The victim drove him to a part of town she did not know, and he invited her to come up to his apartment, an offer she refused repeatedly. *Rusk* then leaned over and took her keys from the ignition and insisted she went up to his apartment. Frightened, she did so. The victim again requested to leave, at which point *Rusk* pulled her onto the bed and undressed her. Lying in a stranger’s bed in an unfamiliar part of town with her car keys still in *Rusk’s* possession, the victim begged to be allowed to leave. *Rusk* refused, and the victim began to cry. At that point, *Rusk* began to choke the victim lightly with his hands, and she said, “If I do what you want, will you let me go?” Saying yes, *Rusk* made her perform oral sex on him, and then engaged in vaginal intercourse. *Rusk* then returned her car keys and permitted her to go. After the matter got reported and later when the accused, *Rusk* being convicted by the trial court, “his conviction was reversed by the Maryland Court of Special Appeals contesting that the victim did not resist”. This decision was in turn reversed by the Maryland Court of Appeals and the holding rested squarely on “the admitted mild choking that occurred in *Rusk’s* apartment.” From this decision, it is clear that the court did not accept the fear instilled by *Rusk* taking the victim’s car keys, combined with her

³ Danielle Cusmano, “Rape Culture Rooted in Patriarchy, Media Portrayal, and Victim Blaming” 12 *Writing Across the Curriculum* 30 (2018) .

⁴ The Indian Penal Code, 1860 (Act 45 of 1860).

⁵ *Supra* note 5, s.375 Explanation II.

⁶ *State v. Rusk* 289 Md. 230, 424 A.2d 720 (1981).

repeated refusals to go to his apartment and the total strangeness of the neighborhood to justify the victim's non-resistance but the 'choking' proof. The judgment in this case had brought in debates upon the definition of 'consent' under rape penal law then, and today in the State of Maryland, sexual crime of rape is broken down into two degrees on the basis of an "explicit" NO and "implicit" NO under "without the consent."⁷ The reason for explaining this case judgment is to lay emphasis on the blurring lines of consent under section 376(2) of IPC which lays down "rape by a person in authority" and 376 C of IPC, that deals with "sexual intercourse by a person in authority." Here, person in authority when carried onto sexual relations can justify the act as consensual, which in fact may be "submission under threat." There exist grey areas when interpreting these sections, moreover when any offence under any of this section reaches at court of law, "consent" and "submission" could just be misinterpreted.⁸

In explaining these legal issues, this article is divided into three parts- the introductory part dealt with the nature of consent under section 375 prior to and post the amendment of 2013. In the second part, jurisprudential aspects of consent are examined, after which the judicial interpretations of consent are analyzed. In the third part, legal conundrums of "abuse of authority" would be probed and thus put across the question that if section 376C of the IPC is a vaguely worded provision, that reinforces rape myths and disadvantages affected women.

II. Consent: Force-Resistance Conundrum in Sexual Offences

"The thing is, most of the time when you're coming pretty close to doing it with a girl, she keeps telling you to stop...Most guys don't, because women say usually no at the first move...And, you never know whether they really want you to stop, or whether they're just scared as hell, or whether they're just telling you to stop so that if you do go through with it, the blame'll be on you, not them..."

J.D. Salinger⁹

⁷ Maryland Code Criminal Law, 2010, ss. 3-303 & 3-304.

⁸ Compare the judgments - *Malya Gavit v. State of Maharashtra* cited in (2010) SCC Bom 1879. and *Kamalanantha v. State of Tamil Nadu* cited in (2005) 5 SCC 194. In both these cases- as indicated as facts- both the victims had refused to engage in sex with the accused who was powerful and was in authority; however eventually surrendered and submitted to sexual intercourse. Yet, see the difference in reasoning- when in one case it was treated as rape, in the other case, it did not convict the culprit.

⁹ J.D. Salinger, *The Catcher in the Rye* (Little, Brown and Company, New York, 1951) This quoted contemplation is of Holden Caulfield (the character in this novel) published in 1951, then captured the expectations about sex between men and women that prevailed into and beyond American adolescents.

In order to prove rape under section 375 of IPC (prior to 2013 amendment), the prosecution had to establish four elements beyond a reasonable doubt, these were, sexual intercourse, lack of consent, force or threat of force, and *mens rea*. The sexual intercourse then required “penis penetration” of the vagina, the lack of consent along with threat or force and *mens rea*, were to be established along with victim’s physical resistance upon the assailant. Though the definition got amended post the *Nirbhaya* incident¹⁰ by way of 2013 amendment, wherein every forms of sexual penetration carried out by assailant became rape. The interpretation of consent did not have much changes despite the term having been defined under explanation 2 of section 375.¹¹ The Indian judiciary still gives benefit of doubt to the accused unless it is proved that women unequivocally rejected sexual advances.¹² The proof of withdrawing consent to sexual contact is very hard to be convinced. “No means no”, though is the principle imbibed in the definition of consent under Explanation 2 of section 375, in the court of law, the deemed measure of whether the victim “consented to sexual intercourse” is on “the degree of resistance”. The court’s decision exonerating men charged of rape for the lack of proof of the victim’s unwillingness shows that affirmative consent is the accepted legal standard in India.¹³ Proof of the required elements of force means women's physical resistance upon the man’s advances. Without the evidence of her “utmost resistance,” “earnest resistance,” or at least “reasonable resistance,” the prosecution would fail to establish either or both of the required elements¹⁴, making it difficult to almost impossible to get a rape conviction.

¹⁰ *Mukesh v NCT of Delhi* (2017) 6 SCC 1.

¹¹ *Supra* note 6.

¹² *Mahmood Farooqui v. State* (Govt. of NCT of Delhi) 2018 Cri LJ 3457

The court characterized the following response of the complainant as a “feeble no” that did not adequately express her unwillingness. See para 2.

¹³ The attributes of Section 375, any of the below has to be proved. The 2013 Amendment Act added four specific sexual acts to section 375 of the IPC, 1860 making it even more challenging for the defence to escape the liability of the offence. These acts are:

- a. “Penetration of penis into the vagina, mouth, urethra or anus.”
- b. “Inserting any object or any part of the body (for example finger, iron rod in case of *Nirbhaya* rape case) into the vagina, urethra, or anus.”
- c. “manipulation of any part of the body of a woman so as to cause such woman penetration into the vagina, urethra, anus or any part of body of such woman”
- d. “Application of male’s mouth to the vagina, anus, and urethra of the woman.”

The added provisions to section 375 not only made attempt punishable but it also made abetment of those specific sexual acts as punishable. It made abetment punishable by adding “or makes her to do so with him or any other person” to A to D provisions of section 375. Though these provisions do not explicitly talk about abetment but the authors argue that by using “or makes her to do so with any other person” it takes us to this understanding that the provisions punish both the abettor as well as the one who commits this offence. Further, the amendment defined “consent” under explanation 2 of section 375 added a proviso which clearly stated that:

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

¹⁴ *Imshad v. State of U.P.*, 2020 SCC OnLine All 756.

This ‘factual’ aspects of consent is evidently looked upon in cases of rape by acquaintance. There lies the myth that a woman who is with an acquainted person needs to prove physical resistance, the onus then is upon the woman to turn up as “sterling witness”.¹⁵ Societal norm is such that women could be passive in sexual situations and let the male take the lead.¹⁶ Thrusting upon such stereotyped thoughts, absence of physical injuries negate rape charges. Legally, the elements for rape by a stranger and rape by an acquaintance, both are the same, that being, penetration by force in the absence of consent by the woman, as per the definition.¹⁷ However in practice, it is difficult to prove “acquaintance” rape compared to “stranger” rape. The verbal resistance or uttering of “no” or crying or other passive responses have often not been proved beyond reasonable doubt to make the accused culprit. In such a social environment, the difficulty arises more to prove if rape is committed by anyone with whom the victim had dependency by way of power or in fiduciary relationships.

To make it complex, “sex by abuse of authority” has been recognized in dual ways under IPC. One under the sub-clauses of Section 376 (2) if proved as non-consensual¹⁸ and under section 376C if proved consensual¹⁹. Interestingly, if proved to be consensual it is termed as ‘sex by abuse of authority’ and squarely falls under Section 376 C, and it does not come under the definition of what is considered as “traditional rape”. Nevertheless the fact is, any such act that is violating a woman’s sexual autonomy is rape. Moreover, the “checklists” to frame a case under section 376 C are still unclear because the means to “induce” or “seduce” are undefined. This sheds light on the discrepancies between the policies formulated for the protection of women and their

¹⁵ *Vikas Garg v. State of Haryana* 2017 (4) RCR (Cri) 924 (OP Jindal University case), the court stated “...It is therefore quite possible to commit legally the offence of rape when woman was very comfortable”. The court even went on to say - “she was stimulating; or she gave the signals or she was wearing lewd clothes that deemed to be the invitation”.

¹⁶ John Gray, *Men Are from Mars, Women Are from Venus: The Classic Guide to Understanding the Opposite Sex* (Harper Paperbacks, 2012).

¹⁷ *State of Kerala, represented by the Dy. S.P., Vaikom v. Bishop Franco Mulakkal* Judgment by the sessions Court on 14th January 2022, available at https://www.livelaw.in/pdf_upload/bishop-franco-mulakkal-case-judgment-407656.pdf (last visited on Feb. 7, 2023).

¹⁸ Preeti Pratishruti Dash “Feminism and Its Discontents: Punishing Sexual Violence in India” *Indian Journal of Gender Studies* 17 (2021).

Section 376 (2) is the higher degree of rape compared to 376 (1) though both comes under the ambit of punishment for rape offence. Section 376 (2) is known by the name “aggravated rape” since it is done by people in authority.

¹⁹ Section 376 C of IPC criminalizes sexual intercourse by a person in authority.

It states that anybody in a position of authority or fiduciary relationship, who “abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine”.

implementation and explains how often have such ambiguities tend to favour the accused more than the victims of sexual violence.

III. Judicial interpretation of consent: Section 376 (2) *vis-a-vis* Section 376 C

The Criminal Amendment Act, 2013²⁰ not only amended IPC but also made significant and noteworthy changes to the Indian Evidence Act, 1872²¹ and Code of Criminal Procedure, 1973.²² Through this amendment Act, two key provisions were incorporated into the Indian Evidence Act, first, section 53A²³ that explicitly disapproved the practice of questioning the victim about the previous sexual experience and about the character of the victim. Further, section 114 A,²⁴ regarding consent, that where the sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

The Criminal Amendment Act, 2013 though did not make the offence gender-neutral yet the changes brought in by the amendment are progressive and stringent in its form. It made it very challenging and difficult for the defense to escape the liability of the offence. The new provisions incorporated in the statutes are progressive but despite these provisions in *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*²⁵ the court acquitted *Mahmood Farooqui* who was earlier convicted for the offence of rape under section 376 of IPC.

The acquittal was on the ground of ‘benefit of doubt’ that *Mahmood Farooqui* at that time did not have the cognitive ability to understand what the woman wanted to communicate because of his bipolar disorder. By and large this judgment does not stand true to the foundational changes brought in by the amendments of 2013. In fact, a huge disharmony exists between these amendments and this judgment that justice still wears a pale look. This eighty two page judgment challenged all the advancement and evolution of rape laws in the country in various ways.²⁶ The

²⁰ The Criminal Law (Amendment) Act, 2013 (Act 13 of 2013).

²¹ The Indian Evidence Act, 1872 (Act 1 of 1872).

²² The Criminal Law (Amendment) Bill, 2013, available at [https://prsindia.org/files/bills_acts/bills_parliament/2013/Criminal_Law_\(A\),_2013.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2013/Criminal_Law_(A),_2013.pdf) (last visited on Feb. 04, 2023).

²³ *Supra* note 22, s. 53 A.

²⁴ *Supra* note 22, s. 114 A.

²⁵ *Supra* note 11.

²⁶ Anant Prakash Narayan, “Delhi High Court’s Judgment of *Mahmood Farooqui v. State (Govt of NCT of Delhi)* and Debate of Consent in the Rape Cases: An Analysis”, 12 *NUALS Law Journal* 156 (2018).

Criminal Amendment Act, 2013 though clearly defined “consent” under section 375 Explanation 2, wherein the affirmative consent standard, there exists a presumption that a woman did not give consent unless and until she is asked and a woman clearly says ‘yes’ for the sexual intercourse.²⁷ The understanding of the affirmative model of consent is that it imposes the burden of understanding or getting the consent of a woman on man but unfortunately the judgment worked diametrically opposite to this model and it held that the woman's hesitation or reluctance and 'no' are not sufficient to constitute her unwillingness to man.²⁸ The statements in the judgment are contrary to the affirmative model embodied by the definition of the consent under section 375 and it further puts all the advancement in laws regarding the consent of a woman in danger. The previous judgments of the Supreme Court has given us a clear precedent that if a woman submits herself to a man, it does not by default means that she gave consent for the sexual intercourse and if we interpret the definition of consent as given under section 375, it outrightly rejected submission as a part of consent.²⁹ The failure on the part of the court to implement the added provisions and taking into account the past physical history of the victim despite the law saying that “the prior relationship should not have any effect on the consent of the woman” is inaccurate.³⁰ Same goes with the observations in *Tarun Tejpal v. State of Goa*³¹, the elaborate 527 pages judgment coloured by prejudice and patriarchy and majorly focused on victim blaming. The court made several digressive findings about the survivor’s past action and character holding and stated that “the victim’s narrative is of extreme implausibility, it is not possible to believe that she, a woman who is aware of laws, intelligent, alert and physically fit (yoga trainer) would not push or ward off the accused if she got pushed against the wall.”³² The bench’s vilification of the survivor went on to the extent that it stated that “if the prosecutrix had held her jaw closed, how would it be possible for the accused to put his tongue into her mouth? If the prosecutrix pushed the accused

²⁷ Nicholas J. Little, “From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law”, 58 *Vanderbilt Law Review* 1321 (2005).

²⁸ James B. Danford, “An Airliner and Perhaps a Lawyer's License Disappear”, 28 *Georgetown Journal of Legal Ethics* 487 (2015).

²⁹ *Rao Harnarain Singh Sheoji Singh v. The State*, AIR 1958 PH 123.

³⁰ Indian Evidence Act, Sec. 53A. As per the demands of the anti-rape movement that the sexual autonomy of the woman should be respected and the past sexual history of the woman should not be on trial, the parliament in 2002 amended the Indian Evidence Act, 1872, added section 146 and repealed section 155 (4). The inclusion of Section 146 meant that during the trial of rape the question related to the general immoral character of prosecutrix shall not be allowed.

³¹ *Tarun Tejpal v. State of Goa*, CRLMP, 11605-11606/2014. The incident took place in 2013 whereby the accused’s colleague, a young woman had alleged that he sexually assaulted her in a five-star hotel in Goa, by forcing himself onto her in a lift.

³² *Id.* at 32, p.no. 275, para 172.

instinctively and reflexively, why wouldn't she push the accused before he kissed her."³³ The engrossed Victorian model of morality by the court in this judgment evidently reinforced such regressive misogynistic beliefs holding that the "survivor had indulged in flirtatious behaviour in the past" and that it would, therefore, mean that "she could not be eligible to be a survivor of sexual violence."³⁴

Having meticulously gone through the judgment of *Bishop Franco Mulakkal*,³⁵ it can be found that the observations are largely based on inferences such as the "inconsistent, delayed, uncorroborated and motivated testimony of the victim at the court" and the "lack of digital evidence submitted" and these are tested in the light of section 375, IPC.³⁶ The FIR and chargesheet mentioned rape and when the crime was not proved beyond reasonable doubt, the accused was acquitted, why the court didn't look at aspect of section 376 C, IPC?

Section 376C and its Intricacies

Power imbalances carried into sexual relations leading to "unwilling consent during intercourse" is termed as "sex by abuse of authority" (hereinafter, "SAA"). Like everywhere in the world, in India as well, this is a common and under-reported phenomenon. In fiduciary relationships, there is a level of trust and respect in the influencing figure, for example, doctor-patient, teacher-student, employer-employee, etc. In such relationships, "illegitimate pressures" are experienced by women that in turn compromises their decision. The one being subordinate in the relationship knows that immense pressure and influence that is exercised by the fiduciary and simply saying "no" would cost them or impact them, therefore, unwillingly so, in a fear of retaliation women submit.

³³ *Supra* note 28 at 190-193, para 101,102 and 103

³⁴ *Ibid* at 281, para 177

³⁵ *Supra* note 18.

³⁶ See, Sessions Case No. 457/2019.

The elements of “abuse of authority” has been recognized under several sub-clauses of clause 2 of section 376³⁷ and the same applies to section 376C³⁸ of the IPC. They are:

- Police officer
- Public servant
- Member of armed forces
- Management or the staff of a jail, remand home or other place of custody established by or under any law or a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution
- The management or on the staff of a hospital

³⁷ Section 376 (2) in The Indian Penal Code

(2) Whoever,—

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2.—“Women's or children's institution” means an institution, whether called an orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children. Explanation 3.—“Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.]

³⁸ Section 376 C - Sexual intercourse by person in authority

Whoever, being—

in a position of authority or in a fiduciary relationship; or a public servant; or superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than 5 years, but which may extend to ten years, and shall also be liable to fine.

Explanations : In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375. For the purposes of this section, Explanation 1 to section 375 shall also be applicable.

“Superintendent”, in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

The expressions “hospital” and “women's or children's institution” shall respectively have the same meaning as in Explanation to sub-section (2) of section 376.

- Relative, guardian or teacher of, or a person in a position of trust or authority towards the woman
- Anyone being in a position of control or dominance over a woman

As enlisted above, several fiduciary relationships are put forward in section 376(2) and the same are present in section 376C but the existence of section 376C discredits victims of such instances. Explanation 2 of section 375 portrays consent as “willingness” to perform sexual intercourse thereby rendering both “will” and “consent” as important ingredients as deciding factors whether an offence amounts to rape or not. Through judicial pronouncements, it has been clarified in many landmark judgments that intercourse must be consensual and have active participation. There should be a will and not merely submission. The problem arises when one sees section 376C where the word “consent” is nowhere to be found, rather words like “induce” or “seduce” have been mentioned. The reader will notice that “volitional consent” and “consent obtained by seducing or inducing” are diametrically opposite concepts. This further indicates that consent obtained by way of free will, reason, and deliberation has been separated from consent obtained by seducing or inducing.

Using such terms is a way to show an apparent consent by which fiduciary rapists can avoid conviction. In cases where the weaker party is unwillingly participating just to save her life or career from being sabotaged by the authoritative figure, the notional/apparent consent provides a clear route for fiduciary-rapists to exploit their authority to importune non-consensual sex. Section 376C gives a way to the authority to exploit his fiduciary for sexual intercourse without her consent or against her will and still, he is not liable for rape but abuse of authority. It provides an avenue for fiduciary-rapists to exploit their authority to solicit non-consensual sex. The interpretation of this section creates a loophole because, under this section, the offence does not amount to rape, then what to prove, inducement or consent.

That being said, it further brings us to one fundamental question i.e., on which grounds does a case come under section 376 clause 2 or section 376C. Both of these sections talk about non-consensual intercourse committed on a woman in a fiduciary relationship. However, the grounds are not clearly defined and just an offence going from section 376(2) to section 376C alters the punishment substantially. Under the former, the punishment goes from ten years to life imprisonment and the latter is punishable for five to ten years. The latter in a way is providing protection to fiduciary rapists rather than protecting the victims of the gruesome crime.

Rather than looking at the apparent “yes”, the court must scrutinize the reason behind why the woman had to consent to it. The ‘constructive force’ the fiduciary used to overwhelm the victim is ignored by section 376C. The fiduciary in such cases is conscious of his actions but proceeds to manipulate/coerce the victim anyway. Unfortunately, as already read in the *Farooqi*³⁹ case, the Court considered a feeble no or passive resistance by a woman as consent. It is very common for a woman to have a “frozen fright” response. The existence of this section is exceptionally problematic for women as they have to live with the trauma of an unrecognized rape. There is no clear indication as to what “induce” or “seduce” means, the terms are too vague and can be manipulated by the defence attorney in the favour of his client. Apparent consent given by a woman should not hold as much importance as her willingness to participate in the act itself. The legislature and the Court fail to recognize the authority a fiduciary holds over the woman. Sex by abuse of authority does not come under the definition of what is considered “traditional rape”, but the fact is any such act that is violating a woman’s sexual autonomy is rape. The burden on the prosecutrix is immense in such cases where it has to be proved that ‘greater than normal’ force was used.

Further, the two recent cases of *Chinmayanand*⁴⁰ and *Gopal Kanda*,⁴¹ wherein in the former the BJP minister was allegedly charged for the offence of rape of a 23-year-old law student and the latter in which former Haryana minister was charged for the offence of rape of an air hostess, in both, the accused were not convicted and *Chinmayanand* was also granted bail by the High Court. The author argues when the ingredients of rape are being fulfilled under section 376 (2) i.e., when sexual intercourse is done by a person in authority using and abusing it, that tantamounts to rape then the court should not be reluctant in convicting the persons for the offence of rape. Sex by abuse of authority tantamount to rape as it is not a consensual act wherein the volitional conduct of the other person is a cornerstone of the act. The presence of section 376C creates a bulwark and takes all the advancement back made in the rape laws of our country since the 1983 amendments and further it gives legal backing to the persons in authority or fiduciary relationships to commit the offence of rape yet escape the liability for it.

³⁹ *Supra* note 13.

⁴⁰ S. Shukla, “*Filmed, Blackmailed, Raped’: Student’s Charge Against BJP’s Chinmayanand.*” *NDTV.com.*, 2019., available at: <https://www.ndtv.com/india-news/chinmayanand-rape-case-filmed-blackmailed-raped-students-charge-against-bjp-leader-2098953> (last visited on Feb. 7, 2023).

⁴¹ Editorial, “*Geetika Sharma case: High Court quashes rape, unnatural offence charges against Gopal Kanda.*” *ndtv.com* (2013), available at: <https://www.ndtv.com/delhi-news/geetika-sharma-case-high-court-quashes-rape-unnatural-offence-charges-against-gopal-kanda-529501> (last visited on Feb. 7, 2023).

Further, by charging and convicting persons under section 376C, it could be claimed that section 376 C's rationale parallels negligent homicide, which attracts lesser punishment, because there was no intention, except for recklessness in committing the act. This analogy is problematic as it is relatively difficult to murder someone and make it 'look' like negligent homicide.⁴² With section 376C, however, it is possible to rape someone with the intention penalized under section 376, and yet escape liability for rape. As aforementioned, changes must be made in order to improve this section in a way that it protects victims rather than fiduciary rapists. The rationale behind this suggestion is to ensure that fiduciaries are deterred 'completely' from indulging in sexual acts which attract higher suspicions of abuse. The dilemma of consent with respect to section 376C might get diluted if the changes are brought into section 376C.

IV. Conclusion

It is evident that section 376 C is one such section wherein authority in question can take it as defence when alleged rape is not proved, but sexual intercourse is proved. If sex with consent is not rape, but "intercourse" if proved, it is necessary to test it under 376 C even if FIR or complaint had not mentioned on consensual relation. In every case of sexual offences wherein power and dependency are seen, there shall be a presumption of 'abuse of authority' and the burden of proof should lie on the accused to disprove the same. Bringing in women's character, her way of dressing, her motives, her prior relations, her dealings before and after the crime should not be even considered. Reliance should be placed on to see if the statements are such that she could be a sterling witness, for which essentials and checklists need to be developed on legal grounds and not on cultural or social grounds.

Hence, evidently it needs a proper differentiation or *intelligible differentia* between Section 376 (2) and 376 C of IPC. There lies ample legislative gap and the sooner this be resolved. A passive submission due to coercion or manipulation should not be the grounds to assume consent, other factors like who initiated the sexual overtures or what degree of trust or authority is involved should be considered. Sexual abuse by authority is often unreported in India because of the very reason that the women in question is seen differently as a rape victim and woman who "induced" and then filed the case under Section 376 C. The very fact that any woman pleading sexual abuse in a fiduciary relationship is measured from a stereotyping angle. With the prevalent social

⁴² K.Rai, "Section 376C of the IPC and Sex by Abuse of Authority" *Socio-legal review* (2020), available at <https://www.sociolegalreview.com/post/section-376c-of-the-ipc-and-sex-by-abuse-of-authority> (last visited on Feb. 7, 2023).

scenario, the cases can wrongfully be transferred from Section 376(2) to Section 376C to save the image of the authority in question.

In the wake of the “Me Too movement”, there has been a conscious shift in the court's jurisprudence — as seen in *Priya Ramani v. MJ Akbar*⁴³, wherein the judge actively recognized the survivor's right to approach the court even after the lapse of a decade, in matters of sexual abuse. The decision was progressive for many reasons, primarily since it chose to address the mental trauma that survivors face under such circumstances, giving them sufficient time in approaching the court.

The focus of the law should not be any former relationship between the man and the woman, alternatively, it must be centered on “whether she wanted the particular act of sex on that particular occasion with that particular man”. Objectively if assessed, the definition of rape is uncomplicated today. Any sexual invasion of the body by force or incursion into the private personal inner-space without consent constitutes a “deliberate violation of emotional, physical and rational integrity” and is thus a hostile, degrading act. In such an instance, how it happened, by whom it happened, the proximity between assaulter and her, if the assaulter had previously dated her etc are immaterial. Hence, the fundamental objective behind this paper is to disseminate the message that “If a law is brought with a view to introduce social change and still stands futile, that means, there are factors that are visibly dominating its regulation - be it culture or politics or conditioning or custom - and these factors are detrimental for social engineering of law.”⁴⁴

⁴³ *Mobashar Jawed Akbar v . Priya Ramani* Complaint Case No. 05/2019. The judgment was delivered on 17 February, 2021.

⁴⁴ Hans Haferkamp and Neil J. Smelser (Ed.) *Social Change and Modernity* (University of California Press, Berkeley,1992)