



# FALSE PROMISE TO MARRY AND OTHER FORMS OF SEX BY DECEPTION IN INDIA AND SINGAPORE

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**Abstract** – Dishonesty is unfortunately a sad fact of life in human relationships. When a woman is duped by a man into having sex by lies and deception, what should the response of the criminal law be? Is it rape or just a game of seduction or something in between? This article sets out and evaluates the different approaches taken by India and Singapore in cases of sex by deception. It suggests that the approach adopted in Singapore could be a model for criminal law reform in this contentious area.

## I. INTRODUCTION

At first glance, one may think that there should be much in common in terms of the criminal law in India and Singapore. The three main statutes in this area of law in Singapore – the Penal Code,<sup>1</sup> the Evidence Act,<sup>2</sup> and the Criminal Procedure Code<sup>3</sup> – are, after all, based on their Indian counterparts, which were shortly enacted after they were passed in India. Both Asian countries inherited the common law system after gaining independence from the British; Indian criminal law cases are regularly cited in the Singapore courts even to this day.<sup>4</sup>

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<sup>1</sup> The Indian Penal Code ('IPC') was adopted almost verbatim in Singapore as the Singapore Penal Code ('SPC') in 1871. When neither IPC nor SPC is used, the provision is common to both Penal Codes.

<sup>2</sup> The Indian Evidence Act was also adopted by Singapore almost verbatim in 1893.

<sup>3</sup> The Singapore Criminal Procedure Code of 1900 was drafted by a committee appointed for this purpose but it was modelled on the Indian counterpart in many respects. All three laws were passed when Singapore was still under colonial rule as part of the Straits Settlements, see Phang, 'Of Codes and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore' (1989) 31 *Malaya Law Review* 46.

<sup>4</sup> See Mohamed Faizal, 'Criminal Law: It's a Not-So-Authochronous-World After All?' in Goh and Tan (eds), *Singapore Law: 50 Years in the Making* (Academy Publishing, 2015).

However, one area in which there has been a great divergence is in how ‘sex by deception’ has been treated in both countries.<sup>5</sup> In the case of India, most of these scenarios involve failed ‘promise to marry’ cases, but they are not so limited in other jurisdictions, including in Singapore. This suggests that other deceptive tactics for obtaining sex may be brought before the Indian courts in the future.

In this article, I shall explain how the divergence in approach to ‘sex by deception’<sup>6</sup> came about between India and Singapore, and the new offences that Singapore has penalised to deal with this issue. Although there are some links between the approach in Singapore and the English common law, the current law in Singapore is significantly different from the English law. The approach adopted in Singapore may be of interest to India, should there be a desire for law reform in this area.

## II. SEX BY DECEPTION

‘Sex by deception’ refers to a situation where sex is obtained by one party by inducing a false belief in the other party on some material matter. At the outset, it must be made clear that this article assumes that deceptive sex scenarios occur between mentally competent and sober adults in a non-violent way, and that there are no issues of exploitation of vulnerability in the relationships or where a power imbalance exists between the parties.<sup>7</sup> The issue that is confronted squarely is therefore where *V* gives *apparent* consent to sexual intercourse with *D*, later claims that there was no true consent because of the deception used by *D*.

A typical example of deceptive sex encountered in India is where a woman claims that she gave consent to sexual intercourse on the misrepresentation

<sup>5</sup> There is a growing body of literature in this area. For a survey of the law in Hong Kong, Taiwan, Thailand and Singapore, see Chen, ‘Lying about God (and Love?) to Get Laid: The Case Study of Criminalising Sex under Religious False Pretense in Hong Kong’ (2018) 51 *Cornell International Law Journal* 553; Chen, ‘Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape by Religious Fraud in Taiwan’ (2018) 13(2) *National Taiwan University Law Review* 183; Chen and Triratpan, ‘Black Magic, Sex Rituals and the Law: A Case Study of Sexual Assault by Religious Fraud in Thailand’ (2020) 37(1) *UCLA Pacific Basin Law Journal* 25; Chen, ‘Fraudulent Sex Criminalisation in Singapore: Haphazard Evolution and Accidental Success’ (2020) *Singapore Journal of Legal Studies* 479.

<sup>6</sup> The term ‘fraudulent sex’ has also been used.

<sup>7</sup> The minimum age of sexual consent is 18 years in India (s 375 IPC) and 16 years in Singapore (s 376A SPC). Situations of vulnerability are covered by ss 376 and 376C IPC, and the presumption of no consent in s 114A Indian Evidence Act. Where there is coercion, consent may be vitiated by ‘fear of injury’ under s 90. Similarly, consent is also vitiated if *V* is intoxicated such that *V* is unable to understand the nature and consequence of that to which *V* gives consent. In the case of Singapore, see also ss 376AA SPC (exploitative sexual penetration of minor of or above 16 but below 18 years of age), s 376B SPC (commercial sex with a minor under 18 years old) and s 376F SPC (procurement of sexual activity with person with mental disability).

given by *D* that he would marry her, in spite of him having no intention of doing so from the start.<sup>8</sup> In a study of rape cases decided by the trial courts in Delhi between 2013 and 2018, it was found that 430 out of 1635 cases, that is 26.3% of rape cases involved such ‘promise to marry’ incidents.<sup>9</sup>

An example of deceptive sex from Singapore occurred in *Wong Tian Jun De Beers v Public Prosecutor* (*‘De Beers’*).<sup>10</sup> *D* perpetrated an elaborate scam where he falsely represented that he was an agent for ‘sugar daddies’, who procured ‘sugar babes’ for wealthy clients, who would pay them large sums of money for their services. In order to evaluate the suitability of the victims for this arrangement, *D* asked a number of victims to perform sexual acts, including penile-vaginal sex, with him as well as send him nude photos of themselves, and record their sexual acts.

In both India and Singapore, penile penetration without a woman’s<sup>11</sup> consent will amount to rape. Such ‘non-consent’ need not be result of fear or use of force. The victims in *De Beers* certainly knew the sexual nature of the acts and the identity of the person with whom they were engaging in those acts. However, there was also no doubt in the victims’ minds that they had been tricked and that they would not have had sex with him otherwise. This brings us to the question – Is there a limit to lies and deceptive conduct in sexual relations? If the limit is breached, should the moral wrong be a matter for civil<sup>12</sup> or criminal

<sup>8</sup> There used to be an offence in the UK ‘for a person to procure a woman, by false pretences or false representations, to have unlawful sexual intercourse’ under the Sexual Offences Act 1956 (c 69) (UK), s 3, to deal with situations which are not considered serious enough for rape. In *R. v Williams* [1898] 62 JP 310, *D* was indicted under this provision where he told *V* that he was single and would marry her even though he was already married. This offence was deleted by the Sexual Offences Act 2003 (c 42) (UK).

<sup>9</sup> Dash, ‘Rape Adjudication in India in the Aftermath of Criminal Law Amendment Act, 2013: Findings from Trial Courts of Delhi’ (2020) 4(2) *Indian Law Review* 244. A similar percentage (28.9%) was also found by Garg, ‘Consent, Conjugal and Crime: Hegemonic Constructions of Rape Laws in India’ (2019) 28(6) *Social & Legal Studies* 737. It was reported that there were 10,068 cases of rape by ‘known persons on promise to marry the victim’ in 2016 by Pandey, ‘Why India sees sex on false promise of marriage as rape’ *BBC News (Delhi)*, 19 April 2019).

<sup>10</sup> [2021] SGHC 273. *D* was not charged with rape but with cheating, criminal intimidation, and making an obscene film, to which he pleaded guilty to all ten charges with another twenty-six charges taken into consideration for sentencing.

<sup>11</sup> The key offence under consideration is rape under s 375. This is still a gendered offence in India where only a man can commit rape on a woman. In Singapore, rape can be committed by a man on either a woman or a man. It is assumed in this article that the offender is a man and the victim, a woman.

<sup>12</sup> In *Deelip Singh v State of Bihar* (2005) 1 SCC 88 : AIR 2005 SC 203 [39], the Supreme Court of India did not find *D* guilty of rape by giving him the benefit of doubt, but found his conduct ‘reprehensible’ by promising to marry *V* and making her pregnant. *D* left ‘a trail of misery, ignominy and trauma.’ The Court was minded to make an order under art 142 of the Constitution of India for *D* to pay damages but accepted *D*’s voluntary offer of Rs 50,000 for monetary compensation instead considering the circumstances.

law? If it is the latter, should it be rape –<sup>13</sup> one of the most serious offences in the criminal law – or something much less in terms of severity?

### III. RAPE AND SECTION 90 OF THE PENAL CODE

Theorists broadly conceive of rape as a wrong based on a violation of either *V*'s sexual autonomy or her bodily integrity. 'Sexual autonomy' means 'not only the right to decide whether to engage in sexual activities, but also the right to decide whom one will have sexual activity with, where and when one will have it, and under what circumstances.'<sup>14</sup> The underlying question is whether *V* was denied the opportunity to choose whether to have sexual intercourse or not because what was done was different from what *V* consented to. Additionally, an alternative conception of rape is that it is an invasion of *V*'s bodily integrity as it involved *D* imposing his wishes on her. As such, *D* will commit an offence unless he has a good reason to act in that way, such as by having *V*'s consent to the sexual intercourse.<sup>15</sup>

Irrespective of which conception of rape is taken, consent plays a pivotal role in drawing the boundaries of the offence. In simplistic terms, sexual intercourse without consent is rape. Although there is no definition of what amounts to consent in the Indian Penal Code ('IPC'), it is clear that its drafters intended that consent must be informed and freely given. Consent given as a result of deception fails this test and is therefore invalid. In the words of the drafters:

We conceive the general to be, that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undecieved, has given a free and intelligent consent to suffer that harm or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life is concerned.<sup>16</sup>

<sup>13</sup> The issue of consent is also relevant to other sexual offences. This article focuses on rape because of its seriousness as well as its use in Indian case law in deceptive sex scenarios.

<sup>14</sup> Green, 'Lies, Rape, and Statutory Rape' in Sarat (ed), *Law and Lies: Deception and Truth-Telling in the American Legal System* (Cambridge University Press, 2015) 208. See also Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) *Oxford Journal of Legal Studies* 82. The Singapore Court of Appeal in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 [46] recognised the principle of sexual autonomy involving 'the right to choose whether or not to participate in sexual activity' and said that this choice must be respected.

<sup>15</sup> Herring, 'Rape and the Definition of Consent' (2014) 26 *National Law School of India Review* 62.

<sup>16</sup> Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners* (Pelham Richardson, 1838) Note B, 79. See also the understanding of consent as requiring 'voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent' adopted by the Supreme Court of India in *Kaini*

The drafters' understanding of consent is embodied in Section 90 which in part states when is apparent consent deemed to be negated:

A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person...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...misconception.<sup>17</sup>

A plain reading of the words 'misconception of fact' is broad enough to encompass all kinds of cases where consent is obtained by misrepresentation.<sup>18</sup>

Furthermore, Section 375 Explanation 2 of the IPC provides that 'Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act'.<sup>19</sup>

Moreover, in *Public Prosecutor v Chong Chee Boon Kenneth*, the Singapore High Court pointed out that:

[T]he essential elements which would make up valid consent are fundamentally similar irrespective of whether the court is dealing with sexual or non-sexual offences...There must not be any fact which calls into question whether consent was given voluntarily. In this regard, the presence of any of the vitiating factors in S 90 of the Penal Code would be *prima facie* evidence of the lack of voluntariness.<sup>20</sup>

The operation of consent under the IPC is therefore in the form of a 'but for' approach. Hence, as long as *D*'s deception had a material influence on securing *V*'s decision, there would not be valid consent due to the deception.<sup>21</sup>

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*Rajan v State of Kerala* (2013) 9 SCC 113 [12]. In *Pram Nair v Public Prosecutor* [2017] SGCA 56 [93], the Singapore Court of Appeal came to the same conclusion by citing the definition of consent in *Ratanlal & Dhirajlal's Law of Crimes* (26th edn, Bharat Law House 2007) 2061.

<sup>17</sup> The provision in Singapore is the same except that it is divided into sub sections.

<sup>18</sup> See *N. Jaladu, In re* 1911 SCC OnLine Mad 3: AIR 1914 Mad 49 which has been repeatedly cited by the Indian courts. This approach is diametrically opposite to that of the English common law where only mistakes about the nature of the act and identity of the partner will vitiate sexual consent, *R. v Clarence* [LR] 22 QBD 23, 27. But see *Motiram Krishnarao v State of M.P.* 1953 SCC OnLine MP 94 : AIR 1955 Nag 121 [5] where *Clarence* was cited and it was said that consent obtained by fraud is still valid.

<sup>19</sup> The SPC does not contain this Explanation.

<sup>20</sup> [2021] 5 SLR 1434 [40].

<sup>21</sup> An example of when the 'but for' test is not satisfied is where *V* alleges that she gave consent to sex based on *D*'s promise to marry her but *V* was already married at the time, see *Prashant Bharti v State (NCT of Delhi)* (2013) 9 SCC 293.

The resulting sexual intercourse without *V*'s consent would be rape.<sup>22</sup> *V*'s reliance on *D*'s lie cannot be objected to on the basis that it was on a trivial matter or was an unreasonable fantasy on the part of *V*.<sup>23</sup> It is a matter solely for *V* to decide on what is important to her.<sup>24</sup>

The 'but for' approach can be seen in operation from Indian case laws in two ways. First, cases where sexual intercourse was obtained by a 'false promise to marry' are distinguished from cases involving a 'breach of promise to marry'. The former can be rape so long as the promise has a 'direct nexus' to *V*'s decision, but the latter will not be considered rape.

In *Pramod Suryabhan Pawar v State of Maharashtra*, the Supreme Court of India explained the legal principle as follows:

[T]he 'consent' of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the 'consent' was vitiated by a 'misconception of fact' arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in sexual act.<sup>25</sup>

On the other hand, if the accused's promise '...has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape'.<sup>26</sup>

The Court further clarified the distinction as follows:

<sup>22</sup> Herring, 'Mistaken Sex' (2005) Criminal Law Review 511 supports this approach. Cf Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 412 Journal of Criminal Law 416; Gross, 'Rape, Moralism, and Human Rights' (2007) Criminal Law Review 220.

<sup>23</sup> On the other hand, a matter may be of fundamental importance to a reasonable person but unless *V* views it as important, a deception about it will not be relevant to deciding if *V* had been deceived by it.

<sup>24</sup> It has been pointed out that the defence of consent in the Penal Code was heavily influenced by individualistic concerns that the criminal law should intervene only where there is harm to others, which is unlike the moralistic and paternalistic nature of the English common law. See Yeo, Morgan and Chan, *Criminal Law in Malaysia and Singapore* (3rd edn, LexisNexis 2018) [19.7] and [19.8].

<sup>25</sup> (2019) 9 SCC 608 [18].

<sup>26</sup> *Deepak Gulati v State of Haryana* (2013) 7 SCC 675; AIR 2013 SC 2071 [16]. See also *Udayv State of Karnataka* (2003) 4 SCC 46; *Deelip Singh v State of Bihar* (n 12); *State of U.P. v Naushad* (2013) 16 SCC 651; AIR 2014 SC 384; *Maheshwar Tigga v State of Jharkhand* (2020) 10 SCC 108; *Anurag Soni v State of Chhattisgarh* (2019) 13 SCC 1.

There is a distinction between breach of promise, and not fulfilling a false promise. Thus, the court must examine whether ... the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so.<sup>27</sup>

The second way in which the ‘but for’ approach can be seen is how Indian case laws have favored the use of the general ‘misconception of fact’ clause in Section 90 and ignored the restrictive clause ‘fourthly’ in Section 375 IPC.<sup>28</sup> The latter stipulates that the sexual act will be rape even if it is done with V’s 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’.<sup>29</sup> A misconception of fact which does not fall within this clause can still be found to have vitiated consent via Section 90 IPC.

The only limitation to Section 90 is that D must know or have reason to believe that V’s consent was given in consequence of a misconception of fact. Even if D denies knowledge of the basis on which V gave consent, the court may find that objectively D had sufficient cause to know it.<sup>30</sup> Hence, a court would put itself in D’s position to ask what factors V considered important in deciding whether to have sex with D and whether this state of affairs ought to be obvious to D. The exact requirements will of course depend on the context of the case.

The simple ‘but for’ approach is far clearer and more coherent than attempting to draw lines between different types of deception as to which of them would suffice to vitiate consent and which would not.<sup>31</sup> However, the approach fails to recognise that there could be an endless range of issues that people in

<sup>27</sup> *Ibid* [18].

<sup>28</sup> A similar clause existed in s 375 SPC but this was deleted in 2007 by the Penal Code (Amendment) Act (Act 51 of 2007).

<sup>29</sup> Clauses ‘thirdly’ and ‘fifthly’ to s 375 also overlap with s 90. It may be contended that s 90 should not apply because it is a general provision that is ousted by the specific provisions in s 375. In *Uday v State of Karnataka* (n 26) [27], the Supreme Court of India declined to decide on this point since it found that the prosecutrix’s consent had not been vitiated. Cf with the view expressed in *G. Achyut Kumar v State of Odisha* 2020 SCC OnLine Ori 417 : (2020) 212 AIC 880 [13] set out in the text accompanying note 77.

<sup>30</sup> S 26 defines ‘reason to believe’ as ‘has sufficient cause to believe that thing’.

<sup>31</sup> See for example the statement made in *R v McNally* [2014] QB 593 : [2014] 2 WLR 200 [25] without any elaboration that ‘some deceptions (such as, for example, in relation to wealth) would obviously not be sufficient to vitiate consent’. It may be asked what makes it ‘obvious’ that this should be the case?



a sexual relationship lie about. These could include marital intentions, fidelity, use of birth control, desire for children, sexual orientation, marital status, state of finances, having a sexually transmitted disease, professional and educational qualifications, age, religion, and even caste and birth gender.<sup>32</sup> Without any limit to the types of misconception of fact that will negate consent, a purely idiosyncratic condition imposed by *V* which *D* either knows about or has reason to believe its significance to *V* will automatically negate consent. Should every lie told in seduction have the potential for criminalization?

In Singapore, a Penal Code Review Committee was convened to recommend reforms to the Singapore Penal Code ('SPC'). In its report presented to the Singapore Government in 2018, the committee opined that 'it is not desirable as a matter of policy to allow *all and any* misconceptions of fact to vitiate consent'.<sup>33</sup>

A case decided in Singapore in 2000 had already sought to limit the types of deception that would vitiate sexual consent. The case followed the English common law approach that only a mistake as to the nature of the act or the identity of the other person will vitiate sexual consent.<sup>34</sup> In *Siew Yit Beng v Public Prosecutor*,<sup>35</sup> *D* was convicted of giving false information to the police

<sup>32</sup> For examples from England where the courts have come to different conclusions, see *R. v Linekar* [1995] QB 250; [1995] 2 WLR 237 (deception that *D* would pay for the sexual service); *R. v B* [2007] 1 WLR 1567 (deception about *D*'s HIV status); *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) (deception about *D* wearing a condom during sexual intercourse); *R. v Director of Public Prosecutions* [2014] QB 581; [2014] 2 WLR 190 (deception about *D* withdrawing his penis before ejaculation); *R. v McNally* (n 31) (deception about *D*'s birth gender); *R. v Director of Public Prosecutions* [2019] 2 WLR 722 (deception as to *D*'s occupation); *R. v Lawrance* [2020] 1 WLR 5025 (deception about *D* having had a vasectomy).

<sup>33</sup> Penal Code Review Committee Report (2018), 254 (original emphasis).

<sup>34</sup> The case of *R. v Flattery* [LR] 2 QBD 410 was cited where *D* engaged in sexual intercourse on the pretext of performing a surgical operation.

<sup>35</sup> [2000] 2 SLR(R) 785. The status of the case is actually uncertain for two reasons. First, in the earlier decision of *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316, *D* tricked a 'naive and gullible' young woman into having sexual intercourse by being told that she needed to cleanse her vagina of poison. *V* also performed fellatio on *D* because she was told that he needed to replenish his energy after the sexual intercourse. The Singapore Court of Appeal was 'utterly amazed' that the Prosecution conceded that *V*'s consent to fellatio was not vitiated (see [12], [33] and [34]). The Prosecution had withdrawn rape charges against *D* (see [10]) and proceeded with charges of 'unnatural offence' under s 377 which do not require proof of lack of consent. However, there does not appear to be any mistake on the part of the Prosecution if the English common law approach is adopted. *V* was not mistaken about what she was doing or the identity of *D*. *V* was only mistaken about the *purpose* of the sexual intercourse (as a form of medical treatment) and fellatio (to revitalize *D*) which would not have vitiated consent. Hence, the comment from the Singapore Court of Appeal, a higher court than the court in *Siew Yit Beng*, suggests a wider approach to consent than the English common law. Secondly, *Siew Yit Beng* had not been cited in later cases to limit the types of misconception of fact that can vitiate consent. In *Public Prosecutor v Lim Cher Foong* [2016] SGDC 6, *D* had anal sex with *V* on the pretext that it was to pass his energy or 'chi' to him. Since *V* was aware that it was anal intercourse but was only deceived as to the need for such



that she had been raped by her physician. She claimed that her physician had refused to treat her unless she agreed to have sexual intercourse with him. She argued that her consent was vitiated by a misconception of fact that he would cure her thereafter. However, since she had no misconception regarding the nature of the act of sexual intercourse, the court upheld her conviction because her consent had not been vitiated and her allegation of rape was therefore false.

The Penal Code Review Committee agreed with the approach taken in *Siew Yit Beng* that ‘not all misconceptions can vitiate consent’.<sup>36</sup> It recommended maintaining the status quo by allowing case laws to determine the scope of Section 90 and ‘the judicious exercise of prosecutorial discretion in not pursuing trivial forms of deceptions/misconceptions under serious offences (such as rape)’.<sup>37</sup> As against this recommendation, it is submitted that there would be difficulty in relying on prosecutorial discretion in this way because not only could there be a lack of public agreement about what types of deception are trivial or not, but this solution may also lead to uncertainty over when prosecution would be proceeded with.<sup>38</sup>

#### IV. OFFENCE OF CHEATING AS AN ALTERNATIVE

Even though the offence of cheating is situated in Chapter XVII of the IPC and the SPC, it is not restricted to offences where there is delivery or retention of property. The offence can be used as an alternative charge in cases of deceptive sex if *D* intentionally tricked *V* into doing or omitting to do anything that *V* would not do or omit to do otherwise, which causes or is likely to cause damage or harm to *V* in body, mind, reputation or property.<sup>39</sup>

In *Bipul Medhi v State of Assam*,<sup>40</sup> *D* had an affair with *V* for 2½ years based on his promise to marry her. The court was clear that this can be a case of cheating under Section 417 IPC if the elements of the offence were satisfied. According to Ansari J:

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conduct, application of *Siew Yit Beng* would not negate consent since the misconception would be on the purpose of the act rather than the nature of the act. But the Singapore District Court applied s 90 and convicted *D* of sexual penetration without *V*'s consent under s 376A SPC. Similarly, in *Wong Tian Jun De Beers v Public Prosecutor* (n 10), the facts of which happened before the amendments to SPC came into force and are given in the text at note 10, the court commented *obiter* that there was no sexual consent by applying s 90's misconception of fact without even mentioning *Siew Yit Beng*. However, the court inconsistently opined that deceiving a sex worker that she will be paid for her services will not vitiate consent (see [36]).

<sup>36</sup> Penal Code Review Committee Report (2018), 254 (original emphasis).

<sup>37</sup> *Ibid* 255.

<sup>38</sup> Prosecutors may also not enjoy the same degree of control over the criminal process in India.

<sup>39</sup> In Singapore, by an amendment made in 2007 to s 415 SPC, the damage or harm can be to ‘any person’ instead of only to the person deceived.

<sup>40</sup> 2006 SCC OnLine Gau 67: 2008 Cri LJ 1099.

[W]hen an accused, not intending to marry a woman, induces the woman, so deceived, to have sexual intercourse with him or induces such a woman to omit from resisting the act of sexual intercourse by him with her, the act of the accused of having sexual intercourse with such a woman would amount to offence of cheating if the act of the woman in letting such a man have sexual intercourse with her or the act of the woman in omitting to resist the act of sexual intercourse by such a man with her causes or is likely to cause damage or harm to the person of such a woman, her mind or reputation.<sup>41</sup>

Two points can be made about cheating and rape. First, the maximum punishment for cheating pales in comparison with that for rape.<sup>42</sup> The Singapore High Court in *De Beers* pointed out that ‘the offence of cheating *simpliciter* did not appear to fully reflect the grievous bodily intrusion experienced by the victims’.<sup>43</sup> This is even though the maximum sentence for cheating *simpliciter* in Singapore was raised in 2007 from 1 year to 3 years.<sup>44</sup>

Secondly, if it cannot be proven that *V* was induced by the deception to have sexual intercourse with *D*, it will not be a case of rape and similarly, cheating cannot be satisfied too.<sup>45</sup> However, in *Mir Wali Mohammad v State of Bihar*, it was held that even though rape was not made out, it could still be a case of cheating because ‘by holding out the false promise of marriage the petitioner fraudulently induced the complainant to have sexual intercourse with him and but for this false promise she would not have consented to have sexual intercourse with him’.<sup>46</sup> This reasoning is questionable, but perhaps it was an understandable compromise in order to not have *D* face a charge of rape which can be punished with life imprisonment.

A better approach is that stated by *Ravi v State*:

Insofar as the offence under Section 417, IPC, is concerned, the act of deception played by the accused to get consent was

<sup>41</sup> *Ibid* [38].

<sup>42</sup> See table 1 below. In *Bipul Medhi v State of Assam* (n 40), the trial court imposed imprisonment for six months and a fine of Rs 1,000 only for a conviction under s 417 IPC. In comparison, in *State of U.P. v Naushad* (n 26), a sentence of life imprisonment was imposed for s 376 IPC.

<sup>43</sup> *Wong Tian Jun De Beers v Public Prosecutor* (n 10).

<sup>44</sup> By the Penal Code (Amendment) Act 2007 (Act 51 of 2007). The maximum sentence of imprisonment for one year still applies to s 417 IPC.

<sup>45</sup> See *Hari Majhi v State* 1989 SCC OnLine Cal 255 :1990 Cri LJ 650; *Tilak Raj v State of H.P.* (2016) 4 SCC 140.

<sup>46</sup> 1990 SCC OnLine Pat 168 :(1990) 2 PLJR 375 [6]. See also *Yedla Srinivasa Rao v State of A.P.* (2006) 11 SCC 615 where the Supreme Court of India upheld the conviction and sentence for rape and cheating on the same facts.

for sexual intercourse and thus cheating is part of the offence under Section 376, IPC. Therefore, when there is a conviction recorded for the offence under Section 376, IPC, there cannot be any separate conviction under Section 417, IPC.<sup>47</sup>

In other words, the offences of rape and cheating are alternatives in deceptive sex situations. Either offence can succeed if its ingredients are proven to the required standard, but they cannot be used together on the same set of facts.

## V. AMENDMENTS TO THE SINGAPORE PENAL CODE

When the Bill to amend the SPC was presented in the Parliament in 2019,<sup>48</sup> a new Section 377CB was introduced to limit the types of misconceptions of fact that would vitiate consent in sexual offences. This was despite the view of the Penal Code Review Committee that ‘it was not possible to list exhaustively all the types of misconceptions of fact that would vitiate consent’ in sexual offences.<sup>49</sup> In addition, two new offences were created to deal with certain scenarios of deceptive sex.

Section 377CB SPC which is entitled ‘Consent given under misconception in sexual offences’ reads:

- (1) Despite section 90(a)(ii), a consent for the purposes of an act which is the physical element of a sexual offence is not a consent given by a person under a misconception of fact only if it is directly related to –
  - (a) the nature of the act, namely that it is not of a sexual nature;
  - (b) the purpose of the act, namely that it is not for a sexual purpose; or
  - (c) the identity of the person doing the act,

and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such misconception.

The term ‘sexual’ in this provision is satisfied if it is sexual in its nature, or by the circumstances or the purpose of any person in relation to it, or both.<sup>50</sup>

<sup>47</sup> 2010 Cri LJ 3493 [22]

<sup>48</sup> The Bill was eventually passed as the Criminal Law Reform Act 2019 (Act 15 of 2019).

<sup>49</sup> Penal Code Review Committee Report (2018), 255.

<sup>50</sup> SPC, ss 377CB (2) and 377C (3). The offence of outrage of modesty in s 354 may be argued to be a ‘sexual offence’ on this basis if *D*’s purpose in committing it is to obtain sexual

The term 'sexual offence' is defined to mean 'any offence where the physical element of the offence...involves an act of a sexual nature'. It is not limited to offences such as rape only.<sup>51</sup>

Four illustrations are given for Section 377CB SPC to show its operation:

- (a) *A* deceives *B* into allowing him to penetrate her vagina by inducing the misconception that he is extracting an evil spirit from *B*'s body. *B* believes *A* and thinks that what she has consented to is a procedure to extract an evil spirit, not sexual intercourse. *B* has given her consent under a misconception as to the sexual nature of the act. *B*'s apparent consent is therefore not a valid consent.
- (b) *A* deceives *B* into believing that he can heal *B*'s chronic disease by treatment involving sexual penetration. *B* gives her consent under the misconception that the act is treatment for a health purpose and not for a sexual purpose. *B*'s apparent consent is therefore not a valid consent.
- (c) *A* deceives *B* into believing that *A* is her husband. *A* is an imposter. *B* consents to sexual intercourse with *A* because she believes *A* is her husband. *B*'s consent is given under a misconception of the identity of *A* and is therefore not a valid consent.
- (d) *A* deceives *B* into believing that *A* is an influential movie director. *A* is in fact only an administrative assistant to that movie director. *B* consents to sexual intercourse with *A* because she believes *A* is that movie director. *B*'s misconception is as to *A*'s attributes and not of *A*'s identity. *B*'s consent is therefore a valid consent.

Although Section 377CB SPC is narrower than Section 90 and it limits the circumstances in which a misconception of fact will vitiate consent in sexual offences,<sup>52</sup> it is broader than the English common law position since it allows for mistakes about the *purpose* of the act to vitiate consent.<sup>53</sup> For example, consent can be vitiated if *V* believed that the act had a medical, instead of a sexual, purpose. However, this would not make a difference to cases like *De Beers* and *Siew Yit Beng* if their facts were to occur now because the victims

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gratification.

<sup>51</sup> SPC, s 377CB (2).

<sup>52</sup> This intent is clear from the provision because it disallows references to misconception of fact in s 90 and states that the given circumstances vitiate consent 'only if it is directly related to' the nature or purpose of the act, or the identity of the person doing the act.

<sup>53</sup> Cf *Papadimitropoulos v R.* (1957) 98 CLR 249.

did not make a mistake about the sexual nature or purpose of the act, or the identity of the person they were having sex with.

The Singapore provision is narrower than the current English law position where there exists a general definition of consent. Additionally, the latter also contains conclusive presumptions that there is no consent if *V* was deceived as to the nature or purpose of the act, or the identity of the person doing the act.<sup>54</sup> Under English law, a court could find, using the general definition of consent, that consent has been vitiated even though the deception did not involve the nature or sexual purpose of the act, or *D*'s identity.<sup>55</sup> In the case of Singapore, there is no such general definition of consent in the SPC. Hence, unlike in England, it will not be possible to argue that *V*'s consent had been vitiated if *D* lied about his birth gender,<sup>56</sup> occupation as an undercover police officer,<sup>57</sup> or intention to withdraw before ejaculation<sup>58</sup> because these do not go to the nature and purpose of the act or the person doing the act as required by Section 377CB SPC.

However, some types of deception are criminalised if they fall within two new offences introduced to the SPC in 2019. The first offence, entitled 'Procurement of sexual activity by deception or false representation' is spelt out in s 376H SPC:

- (1) Any person (*A*) shall be guilty of an offence if –
- (a) *A* intentionally touches another person (*B*) or intentionally incites *B* to touch *A* or *B* or another person;
  - (b) the touching is sexual and *B* consents to the touching;
  - (c) *A* fraudulently obtains *B*'s consent by means of deception or false representation practiced or made by *A* for that purpose;
  - (d) the deception or false representation mentioned in paragraph (c) relates to –
    - (i) the use or manner of use of any sexually protective measure; or
    - (ii) whether *A* or another person whom *B* is incited to touch is suffering from or is a carrier of a sexually transmitted disease; and

<sup>54</sup> Sexual Offences Act 2003 (c 42) (UK), ss 74 and 76.

<sup>55</sup> See *R. v Jheeta* [2008] 1 WLR 2582; *Assange v Swedish Prosecution Authority* (n 32); *R. v Director of Public Prosecutions* [2014] (n 32).

<sup>56</sup> *R. v McNally* (n 31).

<sup>57</sup> *R. v Director of Public Prosecutions* [2019] (n 32).

<sup>58</sup> *R. v Director of Public Prosecutions* [2014] (n 32).

(e) *A* knows or has reason to believe that the consent was given in consequence of such deception or false representation.

(2) A person who is guilty of an offence under subsection (1) shall –

(a) in the case where the sexual touching mentioned in that subsection involved –

(i) penetration of the vagina or anus (as the case may be) with a part of the body or anything else; or

(ii) penetration of the mouth with the penis,

be punished on conviction with imprisonment for a term which may extend to 10 years, or with fine, or with caning, or with any combination of such punishments; and

(b) in any other case, be punished on conviction with imprisonment for a term which may extend to 2 years, or with fine, or with both.

(3) For the purposes of subsection (1) –

(a) a person makes a false representation if it is untrue or misleading, and that person knows that it is, or might be, untrue or misleading;

(b) a representation may be express or implied; and

(c) a ‘sexually protective measure’ means –

(i) where *B* is female, a device, drug or medical procedure to prevent pregnancy or sexually transmitted diseases as a result of sexual intercourse; or

(ii) where *B* is male, a device, drug or medical procedure to prevent sexually transmitted diseases as a result of sexual intercourse.

The second offence, entitled ‘Dishonestly or fraudulently obtaining services’, is spelt out in Section 420A SPC:

(1) A person shall be guilty of an offence if he obtains services for himself or another person dishonestly or fraudulently and –

(a) the services are made available on the basis that payment has been, is being or will be made for or in respect of them;

- (b) the person obtains the services without any payment having been made for or in respect of them or without payment having been made in full; and
  - (c) when the person obtains the services –
    - (i) the person knows that they are being made available on the basis mentioned in paragraph (a) or that they might be; and
    - (ii) the person intends that payment will not be made or will not be made in full.
- (2) A person who is guilty of an offence under subsection (1) shall on conviction be liable to imprisonment for a term not exceeding 10 years, or to fine, or to both.

Section 420A SPC will cover the situation such as the one that arose in the English case of *R. v Linekar*<sup>59</sup> where *D* had obtained the services of a sex worker by falsely promising to pay for her services. This situation is also covered by the offence of cheating since *D* has deceived *V* and intentionally induced her to do something that she would not have done otherwise. However, the new offence avoids possible debates about whether a sex worker had suffered damage or harm in body, mind, reputation, or property by not being paid. Under Section 420A SPC, *D*'s conviction is straightforward: *D* had dishonestly obtained *V*'s sexual services, knowing that he should pay for this service.

Two comments may be made about the progressive nature of these new offences in Singapore, insofar as they make it easier to secure convictions and consequently afford greater protection to victims of sexual offences by deception.<sup>60</sup> First, they lower the degree of certainty that is required to be proved by the Prosecution. For Section 376H SPC, *D* makes a false representation if he 'knows that it is, or *might be*, untrue or misleading'. Similarly, in Section 420A SPC, it is sufficient if *D* thinks that the services 'might be' for a payment.

Secondly, Section 376H(3)(b) SPC states explicitly that the representation may be 'express or implied'. This will hopefully forestall arguments about whether deceptions need to be active or not. The wording of Section 90

<sup>59</sup> *R. v Linekar* (n 32).

<sup>60</sup> It should be noted that the general terms 'dishonestly' and 'fraudulently' used in these new offences were also amended in 2019 so that they can easily apply to the new scenarios. Under the new definition of 'dishonestly' in s 24 SPC, an alternative limb was added such that there does not have to be any property gain or loss if 'that act done by *A* is dishonest by the ordinary standards of reasonable and honest persons and *A* knows that that act is dishonest by such standards'. 'Fraudulently' in s 25 SPC is now defined as 'if *A* does that act with intent to deceive another person (*B*) and by means of such deception, that an advantage should accrue to *A* or another person or detriment should befall *B* or another person (other than *A*), regardless of whether such advantage or detriment is temporary or permanent'.



suggests that both active and passive deceptions are covered since consent can be vitiated if *D* knows or has reason to believe that consent was given as a consequence of a misconception of fact. This means that *D* is under an obligation to correct *V*'s misconception if he either knows or should know about it. It would also be far too uncertain if liability were dependent on whether *V* had expressly asked *D* about a certain matter. Hence, the offence in Section 376H SPC is in alignment with this understanding.

However, one flaw with this Section is that there is no explanation why the definition of a 'sexually protective measure' in s 376H(3)(c) SPC should be defined differently for women and men. Measures to prevent pregnancy are included for women only but not for men. Hence, a woman who tells a man that she cannot become pregnant because she had undergone a medical procedure might be guilty of an offence under this section, but not a man who tells a woman the same thing. Similarly, a man who tells a woman that he will wear a condom during sex but either does not do so or takes it off during sex, will also not have committed an offence under this section. This is because a vasectomy and the use of a condom are arguably both meant to prevent pregnancy rather than disease.

## VI. ASSESSING THE APPROACHES

Table 1 below summarises the different offences in India and Singapore that have been discussed in this article and their maximum penalties for non-aggravated forms of these offences.

Table 1: Offences in India and Singapore discussed in this article

India	Singapore
Cheating: imprisonment of up to 1 year and/or fine (s 417)	Cheating: imprisonment of up to 3 years and/or fine (s 417)
Rape (non-aggravated): mandatory imprisonment (minimum 10 years, maximum life). Also liable to a fine (s 376(1))	Rape (non-aggravated): mandatory imprisonment (maximum 20 years). Also liable to a fine or caning (s 375(2))
	Procurement of sexual activity by deception or false representation (where there is penetration): imprisonment of up to 10 years or fine or caning, or any combination of such punishments (s 376H(2)(a))

India	Singapore
	Obtaining services dishonestly or fraudulently: imprisonment of up to 10 years and/or fine (s 420A(2))

As can be seen from the table, there is a huge gap in India between the penalties for cheating (maximum imprisonment of 1 year) and non-aggravated rape (maximum of life imprisonment, minimum imprisonment of 10 years), as compared to Singapore.<sup>61</sup> While the penalty for cheating in Singapore has increased to a maximum imprisonment sentence of 3 years, there is still a remaining gap with non-aggravated rape, albeit one which is slightly smaller than that in India. However, this gap is partially filled in Singapore with the new offences under Sections 376H and 420A which are punishable with imprisonment of up to 10 years.

It may be argued that a more protective stance is adopted in India by punishing rogues with rape who have persuaded their victims to have sex with them. However, this comes at the cost of huge interference in intimate relationships by the criminal law. How much information *D* shares, or withholds, about his private life will no longer be determined by the parties, but by the State in determining if *V* has made an informed decision. A rape conviction, even in deceptive sex cases, can be punished with life imprisonment. Would that be too high a price to demand in order to have people being truthful in their sexual encounters?

Another problem appears in the form of courts having to assess if *V* would have behaved differently had she known the truth. In cases of deceptive sex, it often boils down to a case of ‘he says, she says’ and *V*’s testimony may not be the most reliable considering how things have turned out in hindsight. Regret, humiliation, or disappointment over a bad judgment should not negate consent that had been given at the time of the sexual act.<sup>62</sup> Admittedly, similar evidential issues will arise in the case of the new offences created in Singapore, but the risks of error will be less because of the lower maximum sentencing for these offences as compared to rape.

<sup>61</sup> If there is cheating which induces delivery of property, an aggravated charge under s 420 IPC is possible. This is punishable with up to 7 years imprisonment in India which narrows the gap with non-aggravated rape considerably. However, this alternative cheating charge is only possible if it is supported by the evidence in the case.

<sup>62</sup> As Indian society values virginity of women before marriage, it is difficult for a woman who has had pre-marital sex with another person to subsequently find a life partner. In such cases, women may file rape charges for ‘strategic reasons as it is more respectable to be a victim of rape than to have given consent to pre-marital sex’, Dash (n 9) 254. See also Sujay, *Premarital sexual behaviour among unmarried college students of Gujarat, India* (Health and Population Innovation Fellowship Working Paper no 9, New Delhi: Population Council).

The court's assessment of a case will also depend on how it characterizes *V*'s poor choices which can come close to shifting the blame to *V* for being duped despite the manipulative part played by *D*. Take, for example, the following judicial statements which have been made for rejecting *D*'s conviction for rape in some past Indian cases on an alleged false promise to marry:

If a full-grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact.<sup>63</sup>

[T]he prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. ... It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night.<sup>64</sup>

There was nothing in [the prosecutrix's] evidence to demonstrate that ... she succumbed to the psychological pressure exerted or allurements made by the accused in a weak moment. ...she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act she took a conscious decision after active application of mind to the things that were happening.<sup>65</sup>

Therefore, there is a danger of unpredictable judgments and judges substituting their own views about the acceptability of the parties' actions, instead of assessing the matter from *V*'s point of view. The risk of having their testimony disbelieved along with the insensitive treatment and shame that comes with it may dissuade women from making a rape report.<sup>66</sup>

Furthermore, since it is the Prosecution's burden to show that there was no valid consent to the sexual intercourse, the Prosecution must prove beyond a reasonable doubt that *D* had no intention to marry *V* at all from the inception.<sup>67</sup> This will be a difficult task. *D* might allege that he wanted to marry

<sup>63</sup> *Jayanti Rani Panda v State* 1983 SCC OnLine Cal 98 :1984 Cri LJ 1535 [7].

<sup>64</sup> *Uday v State of Karnataka* (n 26) [24], [26].

<sup>65</sup> *Deelip Singh v State of Bihar* (n 12) [34], [35].

<sup>66</sup> 'Majority of Rape Cases Go Unreported: MPs' *The Hindu* (27 August 2013) <<https://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/majority-of-rape-cases-go-unreported-mps/article5063089.ece>> accessed 8 October 2022; 'India Sees 88 Rape Cases a Day; Conviction Rate below 30%' *The Times of India* (7 October 2020) <<https://timesofindia.indiatimes.com/india/india-sees-88-rape-cases-a-day-but-conviction-rate-below-30/articleshow/78526440.cms>> accessed 8 October 2022.

<sup>67</sup> See *Uday v State of Karnataka* (n 26) [22], [25]; *Deelip Singh v State of Bihar* (n 12) [36], [39].

*V* at the beginning but was prevented from doing so by family opposition or that things got complicated when *V* became pregnant. *D* might also argue that *V* had other reasons for her to consent to have sex apart from his promise of marriage. As such, *D* did not know and had no reason to believe that consent was given based on his promise of marriage.<sup>68</sup> The need for care in deciding such cases was noted by the Supreme Court of India in *Deepak Gulati v State of Haryana*:

There is a clear distinction between rape and consensual sex and ... the court must very carefully examine whether the accused had actually wanted to marry the victim or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted of rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.<sup>69</sup>

The alternative approach which has been adopted in Singapore is to place a limit on the types of deception that vitiate consent for the offence of rape.<sup>70</sup> It is only in cases of a mistake by *V* as to the nature or purpose of the sexual act or the identity of the person doing the act that will constitute rape. The line separating deceptions that amount to rape and those which do not is that in the latter category, the victim had chosen to engage in sexual intercourse with a

<sup>68</sup> *D* may have even engineered the situation such that the relationship becomes unworkable. The following anecdote was recounted by one of the survey respondents in Sujay (n 62) 28:

[M]y friend told me that her boyfriend was going to marry her and that's why she agreed to his repeated request to have sex with him but after her boyfriend had sex with her, he started to fight with her and would find fault with everything she wore or did. Ultimately, my friend got fed up and ended the relationship. After sometime through a common friend we got to know that boy's behaviour was intentional because he did not want to marry a girl who agreed to have sex.

<sup>69</sup> *Deepak Gulati v State of Haryana* (n 26) [18].

<sup>70</sup> Another possible approach is to have a list of circumstances which will not amount to consent but at the same time enact a definition of what consent involves. See for example Sexual Offences Act 2003 (c 42) (UK), ss 74 and 76 (UK); Crimes Act 1958 (Victoria), s 36; Crimes Act 1900 (New South Wales), s 61HE. Under this approach, consent could still be vitiated in situations which do not fall within the list if they do not meet the definition of consent. This non-exhaustive approach appears to be a good compromise, but it suffers from the defects of uncertainty which the Singapore approach seeks to avoid.

person, knowing of the nature and purpose of such conduct and the identity of that person, but did so for reasons which are deemed less worthy of the same protection as afforded to rape victims.

A cautious approach is taken in Singapore in drawing the limits of serious criminal liability. Some types of deception can still amount to a lesser offence. If the deception involves the risk of a sexually transmitted disease, deception by a woman that she will not get pregnant, or by obtaining sexual services without payment, the offences under Sections 376H and 420A SPC are committed instead. Other forms of deception which do not fall within these offences could be treated as cheating where they attract far lower sentences or just as a sad fact of life that people are not always honest and that it is not possible for the criminal law to protect persons from all such acts of exploitation.

## VII. CONCLUSION

One commentator has noted that:

[T]he questions of whether and how deceptive sex...ought to be criminalised have arisen across a number of jurisdictions, where they have elicited a variety of different responses. Courts and commentators disagree not only about which deceptions ought potentially to lead to criminal liability but also about which category of offence best fits the defendant's conduct.<sup>71</sup>

Which kinds of deceptive sex should be criminalised will naturally turn on how such behaviour is viewed by that particular society.<sup>72</sup> Even though the conviction rate in false promise to marry cases in India is exceedingly low,<sup>73</sup> there can still be fears of over-criminalisation from the combined operation of the simple yet principled notion of rape being non-consensual sexual penetration and the wide range of factors which can negate consent. Such fears are not unjustified considering the number of such cases brought before the courts<sup>74</sup>

<sup>71</sup> Kennedy, 'Criminalising Deceptive Sex: Sex, Identity and Recognition' (2021) 41 *Legal Studies* 91, 91.

<sup>72</sup> Garg (n 9) points out that promise to marry cases are imbued with a particular understanding of marriage in India that is shaped by socioeconomic stratifications along caste, religious, ethnic and linguistic lines. The law of rape appears to be neutral but is not so in practice.

<sup>73</sup> Data from two studies show conviction rates of 4.4% and 1.3% respectively in alleged false promise to marry cases. See Dash (n 9) 253–254; Garg, (n 9), 744.

<sup>74</sup> Concerns have been raised about false charges of rape being filed, see '53.2 Per Cent Rape Cases Filed Between April 2013-July 2014 False, says DCW' (*India Today*, 29 December 2014) <<https://www.indiatoday.in/india/north/story/false-rape-cases-in-delhi-delhi-commission-of-women-233222-2014-12-29>> accessed 8 October 2022; 'False Rape Cases a Tragedy of Justice, Says Bombay High Court' *The (Times of India)*, 29 February 2016 <<https://timesofindia.indiatimes.com/city/mumbai/false-rape-cases-a-tragedy-of-justice-says-bombay-high-court/articleshow/51182160.cms>> accessed 8 October 2022.

and the penalties that have been imposed in successful prosecutions.<sup>75</sup> The approach taken in Singapore is that only a very limited set of circumstances will negate consent in rape cases even if the deception is a ‘but for’ reason for V’s consent. Specific and lesser offences are created instead to reflect the fair labelling of D’s deceitful conduct.

The problems besetting the current law of India pertaining to deception in sexual offences was the subject of a recent comment by the Orissa High Court in *G. Achyut Kumar v State of Odisha*.<sup>76</sup> The court noted that while the vulnerability of women in India should be taken seriously, more refined tools should be considered in criminalising cases of deceptive sex to keep up-to-date with changes in society:

[W] here both persons, out of their own sweet will and choice, develop consensual physical relationship but when the relationship gets sour for some reasons, the women use the law as a lethal weapon for vengeance and personal vendetta. They, out of anger or frustration, tend to convert such consensual acts as incidents of rape. This misuse defeats the very purpose of law. ...The rape laws should not be used to regulate intimate relationships, especially in cases where women have agency and are entering a relationship by choice. It is also equally disturbing, many of the complaints come from socially disadvantaged and poor segment of the society, rural areas, who are often lured into sex by men on false promises of marriage and then dumped as soon as they get pregnant. The rape law often fails to capture their plight the automatic extension of provisions of Section 90 of IPC to determine the effect of a consent under Section 375 of IPC deserves a serious relook. The law holding that false promise to marriage amounts to rape appears erroneous. ... Since the framers of law have specifically provided the circumstances when ‘consent’ amounts to ‘no consent’ in terms of Section 375 of IPC, hence consent for the sexual act on the pretext of marriage is not one of the circumstances mentioned under Section 375 of IPC.<sup>77</sup>

<sup>75</sup> For example, life imprisonment was imposed in *State of U.P. v Naushad* (n 26); 10 years’ imprisonment in *Santosh Sinha v State of Tripura* 2006 SCC OnLine Gau 101: 2007 Cri LJ 7 and *Swapan Chatterjee v State of W.B.* 2008 SCC OnLine Cal 404 :2009 Cri LJ 16; and 7 years’ imprisonment in *Deepak Gulati v State of Haryana* (n 26).

<sup>76</sup> *G. Achyut Kumar v State of Odisha* (n 29).

<sup>77</sup> *Ibid* [11], [13]. Similar sentiments have been expressed by other courts, see for example *Rohit Chauhan v State (NCT of Delhi)* 2013 SCC OnLine Del 2106 : (2013) 200 DLT 380; *Kapil Dhar v State* (2016) 1 JKJ 195; *Geeta Sharma v State (NCT of Delhi)* 2017 SCC OnLine Del 9313 : (2017) 241 DLT 716; *Vinod Kumar v State* (2019)3 JKJ 356; *Rinku Pradhan v State of Odisha* 2021 SCC OnLine Ori 200 : (2021) 221 AIC 536.

A possible solution is to adopt the approach taken by Singapore of limiting the types of deception that would negate sexual consent, and creating separate offences (including one for false promises to marry) which will not carry the same punishment or stigma as rape.