

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 629 OF 2019

(Arising out of SLP(Criminal) No.618/2019)

Anurag Soni

...Appellant

Versus

State of Chhattisgarh

...Respondent

J U D G M E N T

M.R. SHAH, J.

The application for impleadment of the prosecutrix is allowed, in terms of the prayer made.

1.1 Leave granted.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 10.10.2018 passed by the High Court

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VISHAL ANAND
Date: 2019.10.10
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of Chhattisgarh at Bilaspur in Criminal Appeal No. 1270/2014,

by which the High Court has dismissed the said appeal preferred

by the appellant herein – the original accused and has confirmed the judgment and order of conviction passed by the learned trial Court convicting the original accused for the offence under Section 376(1) of the IPC and sentencing him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.50,000/-, in default of payment of fine, to further undergo additional rigorous imprisonment for six months, the original accused has preferred the present appeal.

3. The prosecution case in brief was that the prosecutrix was the resident of Koni, Bilaspur, District Bilaspur. Prosecutrix was familiar with the accused since 2009 and there was love affair between them. The appellant had even proposed her for marriage and this fact was within the knowledge of their respective family members. At the time of incident, accused was posted as Junior Doctor in the government hospital of Maalkharoda and at that time the prosecutrix was doing her studies of Pharmacy in Bhilai. On 28.4.2013 the accused expressed his desire to the prosecutrix that he wanted to meet her and accordingly on 29.4.2013 at 7.25 a.m. the prosecutrix boarded Durg Danapur Express train and reached Sakti railway station from where the accused took her on a motorcycle to his

house situated at Maalkharoda and there she stayed from 2 pm of 29.4.2013 to 3 p.m. of 30.4.2013 and during this period despite refusal of the prosecutrix the accused established physical relation with her on the pretext of marrying her. On 30.4.2013 the accused asked the prosecutrix to leave by saying that on 1st or 2nd May he will talk to his parents about their marriage and he will soon marry with her. On 30.4.2013 at about 6 in the evening accused Anurag Soni and the prosecutrix reached Bilaspur by train and from where their friend namely Umashankar took them on a motorcycle to the house of Mallika Humne, friend of prosecutrix, where the accused dropped her and went back. Next morning accused dropped the prosecutrix at Railway Station, Bilaspur from where she boarded train for Bhilai (Durg). Accused asked the prosecutrix not to tell about the incident to anyone and as a result of which the prosecutrix did not disclose the incident to anyone, but from 2.5.2013 to 5.5.2013 the prosecutrix had repeatedly asked from the accused about the marriage and when she did not receive any reply from the accused, on 6.5.2013, she informed her family members about the incident and then the family members of the prosecutrix had gone to the house of accused at village Kharod

and informed his family members about the incident whereupon the family members of accused had said that now marriage of accused and prosecutrix was the only option available. In the meantime, members of both the families used to visit house of each other, however, after keeping the prosecutrix and her family members in dark for about two months, the accused had refused to marry the prosecutrix and performed marriage with another girl and then on 21.6.2013 the prosecutrix submitted written report (Ex. P-3) in the police station Maalkharoda in respect of rape committed by the accused upon her on the pretext of marriage based on which FIR (Ex.P-4) for the offence under Section 376 of IPC was registered against the accused.

3.1 That during the course of investigation, the investigating officer recorded the statement of concerned witnesses including the prosecutrix. The investigating officer collected the medical evidence and other evidence. The accused was arrested. After completion of the entire investigation, a charge sheet was filed against the accused for the offence punishable under Section 376 of the IPC.

3.2 That the learned magistrate committed the case to the learned Sessions Court, which was numbered as Sessions Trial No. 201/2013. That the learned Sessions Court framed the charge against the accused for the offence under Section 376 of the IPC. The accused denied the charge so framed and claimed trial, and therefore he came to be tried by the learned Sessions Court for the aforesaid offence.

3.3 The prosecution in support of its case examined as many as 13 witnesses including the prosecutrix (PW3) as under:

1.	Pritam Soni	PW1
2.	Manikchand	PW2
3.	Prosecutrix	PW3
4.	Patwari Ghanshyam	PW4
5.	Dr. C.K. Singh	PW5
6.	Dr. K.L. Oraon	PW6
7.	Amritlal	PW7
8.	Pankaj Soni	PW8
9.	Dr. P.C. Jain	PW9
10.	Constable Jawaharlal	PW10
11.	Sub-Inspector S.P. Singh	PW11
12.	Inspector Sheetal Sidar	PW12
13.	Srimati Priyanka Soni	PW13

3.4 After the closing pursis were submitted by the prosecution, three witnesses were examined on behalf of the accused in defence. The statement of appellant-accused was

recorded under Section 313 of the Cr.P.C. wherein he denied the circumstances appearing against him and pleaded innocence and false implication. As per the accused his marriage was already fixed with one Priyanka Soni and this was in the knowledge of the prosecutrix, even then the prosecutrix and her family members continued to pressurise him to marry the prosecutrix, and then he married with Priyanka Soni on 10.06.2013 in Arya Samaj. Therefore, it was the case on behalf of the accused that a false FIR was lodged against him.

4. That on appreciation of evidence, the learned Sessions Court observed and held that the prosecutrix gave consent for sexual intercourse on a misrepresentation of fact and the promise by the accused that he would marry the prosecutrix and therefore the said consent cannot be said to be a consent and therefore the accused committed the offence under Section 376 of the IPC. Thereupon, the learned Sessions Court convicted the accused for the offence under Section 376 of the IPC and sentenced him to undergo 10 years rigorous imprisonment.

5. Feeling aggrieved and dissatisfied with the judgment and order of conviction and sentence passed by the learned

Sessions Court, the accused preferred appeal before the High Court. By the impugned judgment and order, the High Court has dismissed the appeal and has confirmed the judgment and order passed by the learned Sessions Court convicting the accused for the offence under Section 376 of the IPC.

6. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court dismissing the appeal and confirming the conviction and sentence of the accused for the offence under Section 376 of the IPC, the original accused has preferred the present appeal.

6.1 Shri S. Nagamuthu, learned Senior Advocate has appeared on behalf of the accused and Shri Pranav Sachdeva and Shri Praveen Chaturvedi, learned advocates have appeared on behalf of the State as well as the original complainant – prosecutrix respectively.

6.2 Shri Nagamuthu, learned Senior Advocate appearing on behalf of the accused has vehemently submitted that in the facts and circumstances of the case, both the courts below have materially erred in convicting the accused for the offence under Section 376 of the IPC. It is further submitted that while

convicting the accused for the offence under Section 376 of the IPC and while holding that the accused committed the rape under Section 375 of the IPC, the courts below have not at all considered Section 90 of the IPC and Section 114-A of the Evidence Act in its true perspective.

6.3 It is further submitted by the learned Senior Advocate appearing on behalf of the accused that in the present case as such the prosecutrix was in love with the accused and she wanted to marry the accused. It is submitted that it was the specific case on behalf of the accused, so stated in his 313 statement, that as such the prosecutrix and her family members were in the knowledge that the marriage of the appellant is already fixed with Priyanka Soni and even then the prosecutrix and her family members continued to pressurise the accused to marry the prosecutrix.

6.4 It is further submitted by the learned Senior Advocate appearing on behalf of the accused that even assuming that the accused gave promise to the prosecutrix to marry and thereafter the accused did not marry the prosecutrix, the same can be said

to be a 'breach of promise' and cannot be said to be a rape under Section 375 of the IPC.

6.5 In support of his submissions, Shri S. Nagamuthu, learned Senior Advocate has heavily relied upon the following decisions of this Court; Dr. Dhruvaram Murlidhar Sonar v. The State of Maharashtra (2019) SCC Online 3100; Tilak Raj v. State of Himachal Pradesh (2016) 4 SCC 140; Deepak Gulati v. State of Haryana (2013) 7 SCC 675; Uday v. State of Karnataka (2003) 4 SCC 46; Deelip Singh v. State of Bihar (2005) 1 SCC 88; and Shivashankar alias Shiva v. State of Karnataka (2018) SCC Online SC 3106.

6.6 Therefore, Shri S. Nagamuthu, learned senior counsel appearing on behalf of the accused, has submitted that in fact thereafter the accused has married one Priyanka Soni and even the prosecutrix also got married.

6.7 Making the above submissions and relying upon the above decisions, it is prayed to allow the present appeal and quash and set aside the conviction and sentence of the appellant-accused for the offence under Section 376 of the IPC.

7. The present appeal is vehemently opposed by the learned advocates appearing on behalf of the State as well as the original complainant – prosecutrix.

7.1 It is vehemently submitted by the learned advocates appearing on behalf of the State as well as the prosecutrix that the present case is not a case of mere breach of promise to marry, as contended by the learned Senior Advocate appearing on behalf of the accused. It is submitted that in the present case, from the very beginning and from the inception, the intention of the accused was not to marry with the prosecutrix and he was to marry one another lady Priyanka Soni. It is submitted that despite the above he called the prosecutrix at his residence and by giving promise that he would marry, he had a sexual intercourse with the prosecutrix. It is submitted that, in fact, the prosecutrix initially objected to have any sexual intercourse, however, as the accused gave assurance and promise that he would marry, the prosecutrix gave consent. It is submitted that as the consent was obtained by the accused on misconception of fact and therefore the same cannot be said to be a consent even considering Section 90 of the IPC, and the

consent was on misconception of fact, both the courts below have rightly held the accused guilty for the offence under Section 376 of the IPC.

7.2 It is further submitted by the learned advocates appearing on behalf of the State as well as the prosecutrix that even the conduct on the part of the accused which is born out from the record that when the parents of the accused and the prosecutrix subsequently met to fix the marriage, instead of remaining present the accused ran away. It is submitted that it has come in evidence that the accused was already to marry one another lady Priyanka Soni and therefore there was no intention on the part of the accused from the very inception not to marry the prosecutrix and despite the same by giving false promise to marry, he obtained the consent of the prosecutrix and had a sexual intercourse. It is submitted that therefore in the facts and circumstances of the case, it has been established and proved beyond doubt that the consent given by the prosecutrix was on misconception of fact and therefore the same cannot be said to be a consent and therefore the appellant-accused is rightly convicted under Section 376 of the IPC.

7.3 Learned advocates appearing on behalf of the respondent-State as well as the original complainant – prosecutrix have relied upon certain decisions of this Court on Section 375 of the IPC, Section 90 of the IPC and on consent on misconception of fact and on consensual sex, which will be referred to and considered hereinafter.

7.4 Now so far as the reliance placed on the decisions of this Court, relied upon by the learned counsel appearing on behalf of the accused, referred to hereinabove, learned advocates appearing on behalf of the State as well as the original complainant – prosecutrix have submitted that none of the aforesaid decisions shall be applicable to the facts of the case on hand. It is submitted that even some of the observations made by this Court in the aforesaid decisions, relied upon by the learned senior counsel appearing on behalf of the accused, would be applicable in favour of the prosecutrix, more particularly, para 20 of *Dhruvaram Murlidhar Sonar (supra)*, para 21 of *Deepak Gulati (supra)*; and paras 21 and 23 in the case of *Uday (supra)*.

7.5 Making the above submissions and relying upon the above decisions, it is prayed to dismiss the present appeal.

8. Heard learned counsel appearing on behalf of the respective parties at length.

9. In the present case, the accused has been convicted for the offence under Section 376 of the IPC. It is the case on behalf of the appellant-accused that as it is a case of a consensual sex, the Courts below have committed an error in convicting the accused for the offence under Section 376 of the IPC. Both the Courts below have accepted the case of the prosecution that the consent of the prosecutrix was given on the basis of misconception of fact and, therefore, considering Section 90 of the IPC, such a consent cannot be said to be a consent and, therefore, the accused has committed the rape as defined under Section 375 of the IPC and thereby has committed an offence under Section 376 of the IPC. Therefore, the question which has been posed before this Court is, whether in the facts and circumstances of the case and considering the evidence on record, the Courts below have committed any error in holding the accused guilty for the offence under Section 376 of the IPC?

10. While considering this appeal on merits further, some of the decisions of this Court on Section 375 and Section 90 of

the IPC and on the consent/consensual sex are required to be referred to and considered:

10.1 In the case of ***Kaini Rajan v. State of Kerala*** (2013) 9 SCC 113, this Court has explained the essentials and parameters of the offence of rape. In the said decision, in para 12, this Court observed and held as under:

“**12.** Section 375 IPC defines the expression “rape”, which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression “against her will” means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. “Consent” is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression “consent”. Section 90, though, does not define “consent”, but describes what is not consent. “Consent”, for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. (See ***State of H.P. v. Mango Ram*** (2000) 7 SCC 224”

10.2 In the case of ***Deepak Gulati v. State of Haryana*** (2013) 7 SCC 675, this Court observed and held in paragraphs 21 and 24 as under:

“21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, 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 is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the

initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The “failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term “misconception of fact”, the fact must have an immediate relevance”. Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.”

10.3 In the case of ***Yedla Srinivasa Rao v. State of A.P.*** (2006) 11 SCC 615, this Court also considered the amendment made in the Indian Evidence Act – Section 114-A of the Evidence Act. In that case, the sexual intercourse was committed with the prosecutrix by the accused. As per the prosecutrix, the accused used to come to her sister's house in between 11 a.m. and 12 noon daily and asked her for sexual intercourse with him. She refused to participate in the said act but the accused kept on persisting and persuading her. She resisted for about 3 months. On one day, the accused came to her sister's house at about 12 noon and closed the doors and

had sexual intercourse forcibly, without her consent and against her will. When she asked the accused as to why he spoiled her life, he gave assurance that he would marry her and asked her not to cry, though his parents were not agreeing for the marriage. It was found that on the basis of the assurance given by the accused this process of sexual intercourse continued and he kept on assuring that he would marry her. When she became pregnant, she informed about the pregnancy to the accused. He got certain tablets for abortion but they did not work. When she was in the third month of pregnancy, she again insisted for the marriage and the accused answered that his parents are not agreeable. She deposed that had he not promised, she would not have allowed him to have sexual intercourse with her. The question was raised before the Panchayat of elders and the prosecutrix was present in the Panchayat along with her sister and brother-in-law. The accused and his father both attended the Panchayat and the accused admitted about the illegal contacts with the prosecutrix and causing pregnancy.

The accused asked for two days' time for marrying the prosecutrix and the Panchayat accordingly granted time. But after the Panchayat meeting the accused absconded from the village and when the accused did not fulfil his promise which was made before the Panchayat, the prosecutrix lodged the complaint. Considering the aforesaid facts and after considering Section 90 of the IPC, this Court convicted the accused for the offence under Section 376 of the IPC. While convicting the accused, this Court in paragraphs 9, 10, 15 and 16 observed and held as under:

“9. The question in the present case is whether this conduct of the accused apparently falls under any of the six descriptions of Section 375 IPC as mentioned above. It is clear that the prosecutrix had sexual intercourse with the accused on the representation made by the accused that he would marry her. This was a false promise held out by the accused. Had this promise not been given perhaps, she would not have permitted the accused to have sexual intercourse. Therefore, whether this amounts to a consent or the accused obtained a consent by playing fraud on her. Section 90 of the Penal Code says that if the consent has been given under fear of injury or a misconception of fact, such consent obtained, cannot be construed to be a valid consent. Section 90 reads as under:

“90. *Consent known to be given under fear or misconception.*—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 fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

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

[*Consent of child*] unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”

10. It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent.

15. In this connection reference may be made to the amendment made in the Evidence Act. Section 114-A was introduced and the presumption has been raised as to the absence of consent in certain prosecutions for rape. Section 114-A reads as under:

“114-A. *Presumption as to absence of consent in certain prosecutions for rape.*—In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of subsection (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.”

16. If sexual intercourse has been committed by the accused and if it is proved that it was without the consent of the prosecutrix and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. Presumption has been introduced by the legislature in the Evidence Act looking to atrocities committed against women and in the instant case as per the statement of PW 1, she resisted and she did not give consent to the accused at the first instance and he committed the rape on her. The accused gave her assurance that he would marry her and continued to satisfy his lust till she became pregnant and it became clear that the accused did not wish to marry her.”

10.4 In the case of ***State of U.P. v. Naushad*** (2013) 16 SCC 651, in the similar facts and circumstances of the case, this

Court reversed the acquittal by the High Court and convicted the accused for the offence under Section 376 of the IPC. This Court observed and held as under:

“**17.** Section 376 IPC prescribes the punishment for the offence of rape. Section 375 IPC defines the offence of rape, and enumerates six descriptions of the offence. The description “secondly” speaks of rape “without her consent”. Thus, sexual intercourse by a man with a woman without her consent will constitute the offence of rape. We have to examine as to whether in the present case, the accused is guilty of the act of sexual intercourse with the prosecutrix “against her consent”. The prosecutrix in this case has deposed on record that the accused promised marriage with her and had sexual intercourse with her on this pretext and when she got pregnant, his family refused to marry him with her on the ground that she is of “bad character”.

18. How is “consent” defined? Section 90 IPC defines consent known to be given under “fear or misconception” which reads as under:

“90. Consent known to be given under fear or misconception.—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 fear of *injury*, or under a *misconception of fact*, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;”

(emphasis supplied)

Thus, if consent is given by the prosecutrix under a misconception of fact, it is vitiated.

19. In the present case, the accused had sexual intercourse with the prosecutrix by giving false assurance to the prosecutrix that he would marry her. After she got pregnant, he refused to do so. From this, it is evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her, which act of the accused falls squarely under the definition of rape as he had sexual intercourse with her consent which was consent obtained under a misconception of fact as defined under Section 90 IPC. Thus, the alleged consent said to have been obtained by the accused was not voluntary consent and this Court is of the view that the accused indulged in sexual intercourse with the prosecutrix by misconstruing to her his true intentions. It is apparent from the evidence that the accused only wanted to indulge in sexual intercourse with her and was under no intention of actually marrying the prosecutrix.”

10.5 Even in the case of ***Dr. Dhruvaram Murlidhar Sonar*** (supra), upon which reliance has been placed by the learned counsel appearing on behalf of the accused, in paragraph 23, this Court has observed that there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant 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 later falls within the ambit of cheating or deception, this Court observed and held as under:

“**23.** Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant 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 later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. 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 the misconception created by 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. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC.”

10.6 The High Court of Delhi in ***Sujit Ranjan v. State*** [Criminal Appeal No. 248 of 2011 decided on 27.01.2011], after referring to and considering several decisions of this Court, ultimately in paragraph 16, observed and held as under:

“16. Legal position which can be culled out from the judicial pronouncements referred above is that the consent given by the prosecutrix to have sexual intercourse with whom she is in love, on a promise that he would marry her on a later date, cannot be considered as given under "misconception of fact". Whether consent given by the prosecutrix to sexual

intercourse is voluntary or whether it is given under "misconception of fact" depends on the facts of each case. While considering the question of consent, the Court must consider the evidence before it and the surrounding circumstances before reaching a conclusion. Evidence adduced by the prosecution has to be weighed keeping in mind that the burden is on the prosecution to prove each and every ingredient of the offence. Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had no intention to marry prosecutrix at all from inception and that promise made was false to his knowledge. The failure to keep the promise on a future uncertain date may be on account of variety of reasons and could not always amount to "misconception of fact" right from the inception."

11. So far as the decisions upon which reliance has been placed by the learned counsel appearing on behalf of the accused referred to hereinabove are concerned, the same shall not be applicable to the facts of the case on hand. In the case of **Tilak Raj** (supra), the prosecutrix was an adult and matured lady of around 40 years at the time of the incident. It was admitted by the prosecutrix in her testimony that she was in a relationship with the accused for last two years prior to the incident and he used to stay overnight at her residence. Therefore, considering the evidence as a whole, including FIR, testimony of the prosecutrix and the MLC report, this Court found that the story of the prosecutrix regarding sexual intercourse on false pretext of

marrying her is concocted and not believable and on facts it was found that the act of the accused seems to be consensual. It is required to be noted that before this Court the accused was acquitted for the offence under Section 376 of the IPC, however, the High Court convicted him under Sections 417 and 506 of the IPC. Therefore, on facts, the said decision shall not be of any assistance to the appellant in the present case.

11.1 Even in the case of **Deepak Gulati** (supra) it was observed that the accused can be convicted for rape if the court reaches the conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

11.2 Even the decisions of this Court in **Uday** (supra), **Deelip Singh** (supra) and **Shivashankar alias Shive v. State of Karnataka** (2108) SCC Online 3106 shall not be applicable to the case of the accused on hand.

12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by

the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 of the IPC and can be convicted for the offence under Section 376 of the IPC.

13. Applying the law laid down by this Court in the aforesaid decisions, the following facts emerging from the evidence on record are required to be considered:

(i) That the family of the prosecutrix and the accused were known to each other and, therefore, even the prosecutrix and the accused were known to each other;

(ii) That though the accused was to marry another girl – Priyanka Soni, the accused continued to talk of marriage with the prosecutrix and continued to give the promise that he will marry the prosecutrix;

(iii) That on 28.04.2013 the appellant expressed his wish telephonically to meet with the prosecutrix and responding to that the prosecutrix went to the place of the accused on 29.04.2013 by train, where the accused received her at the

railway station Sakti and took her to his place of residence in Malkharauda;

(iv) That during her stay at the house of the accused from 2.00 pm on 29.04.2013 to 3.00 pm on 30.04.2013, they had physical relation thrice;

(v) That as per the case of the prosecutrix, the prosecutrix initially refused to have physical relation, but then the appellant allured her with a promise to marry and had physical relation with her;

(vi) That, thereafter the prosecutrix called the accused number of times asking him about the marriage, however, the accused did not reply positively;

(vii) That thereafter the prosecutrix informed about the incident to her family members on 06.05.2013;

(viii) That the family members of the prosecutrix negotiated with the family members of the accused;

(ix) That on 23.05.2013, the appellant expressed his willingness to marry the prosecutrix and a social function was scheduled on 30.05.2013, which did not take place;

(x) That, again the family members of both the parties had talks, in which the marriage was negotiated and a social function

was scheduled on 10.06.2013, which was again not held and further, the social event was fixed for 20.06.2013;

(xi) That on 20.06.2013, the appellant telephonically informed the prosecutrix that he has already married;

(xii) That, Priyanka Soni PW-13, who is the wife of the accused stated that one year prior to the marriage that took place on 10.06.2013, the negotiations were going on; and

(xiii) That the accused married Priyanka Soni on 10.06.2013 in Arya Samaj, even prior to the social function for the marriage of the accused the prosecutrix was scheduled on 10.06.2013 and even thereafter the social event was fixed for 20.06.2013.

14. Considering the aforesaid facts and circumstances of the case and the evidence on record, the prosecution has been successful in proving the case that from the very beginning the accused never intended to marry the prosecutrix; he gave false promises/promise to the prosecutrix to marry her and on such false promise he had a physical relation with the prosecutrix; the prosecutrix initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on

misconception of fact as per Section 90 of the IPC and such a consent shall not excuse the accused from the charge of rape and offence under Section 375 of the IPC. Though, in Section 313 statement, the accused came up with a case that the prosecutrix and his family members were in knowledge that his marriage was already fixed with Priyanka Soni, even then, the prosecutrix and her family members continued to pressurise the accused to marry the prosecutrix, it is required to be noted that first of all the same is not proved by the accused. Even otherwise, considering the circumstances and evidence on record, referred to hereinabove, such a story is not believable. The prosecutrix, in the present case, was an educated girl studying in B. Pharmacy. Therefore, it is not believable that despite having knowledge that that appellant's marriage is fixed with another lady – Priyanka Soni, she and her family members would continue to pressurise the accused to marry and the prosecutrix will give the consent for physical relation. In the deposition, the prosecutrix specifically stated that initially she did not give her consent for physical relationship, however, on the appellant's promise that he would marry her and relying upon such promise, she consented for physical relationship with the appellant-

accused. Even considering Section 114-A of the Indian Evidence Act, which has been inserted subsequently, there is a presumption and the court shall presume that she gave the consent for the physical relationship with the accused relying upon the promise by the accused that he will marry her. As observed hereinabove, from the very inception, the promise given by the accused to marry the prosecutrix was a false promise and from the very beginning there was no intention of the accused to marry the prosecutrix as his marriage with Priyanka Soni was already fixed long back and, despite the same, he continued to give promise/false promise and alluded the prosecutrix to give her consent for the physical relationship. Therefore, considering the aforesaid facts and circumstances of the case and considering the law laid down by this Court in the aforesaid decisions, we are of the opinion that both the Courts below have rightly held that the consent given by the prosecutrix was on misconception of fact and, therefore, the same cannot be said to be a consent so as to excuse the accused for the charge of rape as defined under Section 375 of the IPC. Both the Courts below have rightly convicted the accused for the offence under Section 376 of the IPC.

15. Now, so far as the submission on behalf of the accused-appellant that the accused had marriage with Priyanka Soni on 10.06.2013 and even the prosecutrix has also married and, therefore, the accused may not be convicted is concerned, the same cannot be accepted. The prosecution has been successful by leading cogent evidence that from the very inspection the accused had no intention to marry the victim and that he had mala fide motives and had made false promise only to satisfy the lust. But for the false promise by the accused to marry the prosecutrix, the prosecutrix would not have given the consent to have the physical relationship. It was a clear case of cheating and deception.

As observed hereinabove, the consent given by the prosecutrix was on misconception of fact. Such incidents are on increase now-a-days. Such offences are against the society. Rape is the most morally and physically reprehensible crime in a society, an assault on the body, mind and privacy of the victim. As observed by this Court in a catena of decisions, while a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By

no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, the rape tantamounts to a serious blow to the supreme honour of a woman, and offends both her esteem and dignity. Therefore, merely because the accused had married with another lady and/or even the prosecutrix has subsequently married, is no ground not to convict the appellant-accused for the offence punishable under Section 376 of the IPC. The appellant-accused must face the consequences of the crime committed by him.

16. In view of the above and for the reasons stated above, we are of the opinion that both the Courts below have rightly convicted the appellant-accused under Section 376 of the IPC. We also maintain the conviction of the appellant-accused under Section 376 of the IPC. However, in the facts and circumstances of the case and the request made by the learned counsel appearing on behalf of the appellant-accused, the sentence of 10 years' RI awarded by the courts below is hereby reduced to seven years RI, the minimum which was prescribed at the relevant time of commission of offence under Section 376 of the IPC.

Consequently, the present appeal is partly allowed to the aforesaid modification in the sentence only.

.....J.
[L. NAGESWARA RAO]

New Delhi;
April 09, 2019.

.....J.
[M. R. SHAH]