HIGH COURT OF MADRAS

BENCH - THE HONOURABLE MR. JUSTICE M.DHANDAPANI

Date of Decision: June 21, 2024

CRL. A. NO. 548 OF 2021

APPELLANT: Rahul Gandhi …..Appellant

VERSUS

RESPONDENT: The State, rep. By its Inspector of Police, All Women Police Station, Kallakuruchi District. …..Respondent

Legislation:

Sections 376, 417, 294(b), 352, and 506(i) of the Indian Penal Code (IPC)

Section 313 of the Code of Criminal Procedure (Cr.P.C.)

Indian Evidence Act, 1872

Subject: Criminal appeal against conviction and sentence passed by the Sessions Judge, Mahila Fast Track Court, Villupuram, in S.C. No.13 of 2021 for charges under Sections 376, 417, 294(b), 352, and 506(i) IPC. The case involves the alleged sexual assault of the prosecutrix (P.W.1) by the appellant under the false promise of marriage, resulting in multiple acts of sexual intercourse.

Headnotes:

Criminal Law – Rape and Cheating – Appellant convicted for rape under the pretext of false promise of marriage – Trial court's judgment affirmed by High Court – Appellant argued that the prosecutrix knew he was married and that her consent was not obtained under misconception – High Court emphasized the absence of evidence proving misconception or coercion [Paras 1-14].

Consent under Section 90 IPC – Misconception of Fact – Court highlighted that prosecutrix knew about appellant's marital status – Consent given by prosecutrix for sexual intercourse not influenced by a promise of marriage – Section 90 not applicable [Paras 33-48].

Evidentiary Standards – Witness Testimony – Court examined contradictions and interpolations in testimonies of P.W.1 and other prosecution witnesses – Noted discrepancies undermining reliability of evidence – Medical examination showed no signs of force or violence [Paras 37-47, 62-64].

Delay in Lodging Complaint – Explained in Context – Court acknowledged cultural and social hesitation in reporting sexual offences – Delay of five days in lodging FIR considered reasonable in context – However, investigation deemed shoddy and delayed without reasonable cause [Paras 66-74].

Decision: Appeal allowed – Conviction and sentence set aside – Appellant acquitted of all charges – Bail bonds cancelled [Paras 74-74].

Referred Cases:

- Uday v. State of Karnataka (2003) 4 SCC 46
- State of H.P. v. Mango Ram (2000) CriLJ 4027
- Jayanti Rani Panda v. State of West Bengal and Anr. (1983) Cal HC
- People v. Perry, 26 Cal. App. 143
- Rao Harnarain Singh v. State, Punjab HC
- Vijayan Pillai @ Babu v. State of Kerala (1989) Kerala HC
- In re Anthony alias Bakthavatsalu, Madras HC
- Shambhu Nath Mehra v. The State of Ajmer, AIR 1956 SC 404

Representing Advocates:

For Appellant: Mr. R.Karthik

For Respondents: Mrs. G.V.Kasthuri, APP

JUDGMENT

The conviction and sentence imposed on the appellant by the learned Sessions Judge, Mahila Fast Track Court, Villupuram, in S.C. No.13 of 2021 vide order dated 18.10.2021 is put in issue by the appellant, who was arrayed as A-1 by filing the present appeal.

2. The appellant, who was arrayed as A-1, along with three other accused, who were arrayed as A-2 to A-4, were jointly tried for the following charges :-

S. No.	Array of Accused	Section of Offence Charged
1	A-1	376 & 417 IPC
2	A-2 to A-4	294 (b), 352 & 506 (i) IPC

3. Upon completion of trial, while the trial court found A-1 guilty of the offence u/s 375 and 376 r/w 90 and 417 IPC and convicted him for the said offences, however A-1 was sentenced to rigorous imprisonment for a period of 10 years together with a fine of Rs.25,000/-, in default to undergo three months simple imprisonment, but no separate imprisonment was imposed on A-1 for the offence u/s 417 IPC. A-2 and A-4 were acquitted of the charges framed against them. The charge against A-3 stood abated, as she died pending trial. The fine amount to be paid by A-1 was ordered to be given to the prosecutrix for her sustenance and further the District Legal Services Authority was directed to take steps for getting necessary aid from A-1 and give the same to the victim/prosecutrix for leading her life. Aggrieved by the aforesaid conviction and sentence, A-1 has filed the present appeal.

4. Shorn of unnecessary details, the case as put forth by the prosecution is as under :-

P.W.1 is the affected woman; P.W.2 is the father of P.W.1 and P.W.s 3 to 5 are relatives of P.W.1. A-1 is alleged to have been in love with P.W.1. A-2, A-3 and A-4 are the father, mother and brother of A-1.

5. The allegation levelled against A-1 is that A-1 and P.W.1 were in love with each other over the last three years. On 1.12.2019, at about 7.00 p.m., A-1 had taken P.W.1 to to the place in the fields (Kattukottagai) belonging to him and after luring P.W.1 with the promise of marriage, had forcefully had physical relationship with P.W.1. Thereafter, on 7.12.2019, at about 7.00 p.m., A-1 had called upon P.W.1 to come to the very same place and had physical relationship with her. When P.W.1 asked A-1 to marry her, A-1 refused to marry her and abused her in offensive and filthy language and had further told that he wanted only to have physical relationship with her and had moved with her only for the said purpose and not for the purpose of marrying her.

6. It is the further case of the prosecution that P.W.1 informing about the same to P.W.2, her father, on 8.12.2019 at about 8.00 a.m., P.W.s 1 and 2 accompanied by their relatives had gone to the house of A-1, where they wer confronted with A-2 to A-4 and when they informed them about what had happened and asked them to give A-1 in marriage to P.W.1, A-2 to A-4 abused them in filthy language and threatened them that they will do away with them and chased them away from their house.

7. It is the further case of the prosecution that thereafter on 11.12.2019, at about 10.00 a.m., P.W.1, along with the panchayatadars of the village went to the house of A-1 for the purpose of getting justice, A-2 to A-4, verbally abused all of them and slapping P.W.1 on her cheek and threatening her, drove all of them from their house. Therefore, P.W.1 lodged the complaint, Ex.P-1 with the Kallakurichi All Women Police Station.

8. P.W.1 appeared before the Kallukurichi Police Station and gave complaint, Ex.P-1 before one Sivasankari, Police Constable No.983, who registered the said complaint in CSR No.499/2019 on 12.12.2019 for the offences u/s 417, 376, 294 (b), 352 and 506 (i) IPC.

9. P.W.14, the Inspector of Police, upon noticing the registration of CSR No.499/2019 on 22.1.2020, took up the same for investigation by registering the FIR in Crime No.2/2020. Taking up investigation, P.W.14, went to the scene of occurrence on 23.1.2020 at about 9.00 a.m. and in the presence of P.W.6 and other witnesses, observed the scene of occurrence and prepared observation mahazar, Ex.P-10 and drew rough sketch, Ex.P-11. On the same day, P.W.14 examined P.W.s 1 to 6 and one Ponnusamy and recorded their statements. On the same day, P.W.14 sent P.W.1 along with P.W.12 for the purpose of medical examination. On 24.1.2020, P.W.14 examined P.W.12 and P.W.10, the doctor, who examined P.W.1 and recorded their statements. P.W.14, thereafter, issued requisition letter for recording the statement of P.W.1 u/s 164 Cr.P.C. and, accordingly, on 6.3.2020, the statement of P.W.1 was recorded u/s 164 Cr.P.C. On 7.9.2020, at about 10.15 a.m., near Kallakurichi AKT School, in the presence of witnesses, P.W.14 arrested A-1, upon A-1 being identified by witnesses and at that time, P.W.1 voluntarily came forward to give a confession statement, which was recorded in the

presence of P.W.s 8 and 9, which was thereafter forwarded to the Court and A-1 was sent to the Court for judicial remand. On 22.9.2020, P.W.14 gave requisition for conducting medical examination on A-1 and on production of A-1, P.W.13 conducted medical examination on A-1 and issued Ex.P-8. P.W.14 further examined P.W.s 11 and 13 and recorded their statements. Upon completing investigation, P.W.14 filed the final report against A-1 to A-4 u/s 376, 294 (b), 352 and 506 (i) IPC.

10. To establish the charges levelled against A-1 to A-4, the prosecution examined P.W.s 1 to 14 and marked Exs.P-1 to P-11. On completion of the evidence on the side of the prosecution, the accused were questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against them in the evidence tendered by the prosecution witnesses. They denied all the incriminating circumstances. On the side of the defence, neither any oral evidence was adduced nor any documents were marked.

11. The trial court, on consideration of oral and documentary evidence and other materials, while convicted and sentenced A-1 for the offence u/s Sections 375/376 and 417 IPC, however, acquitted A-2 and A-4 of the charges levelled against them. Insofar as A-3 is concerned, pending trial, A-3 died and, therefore, the charges against A-3 stood abated. Aggrieved by the said conviction and sentence, the present appeal has been filed by the appellant/A-1. Insofar as the acquittal of A-2 & A-4, the prosecution has not filed any appeal.

12. Learned counsel appearing for the appellant submitted that the court below has not considered the evidence in proper perspective and had rendered an erroneous finding fastening the guilt on the appellant, which is arbitrary, illegal and unreasonable. It is the further submission of the learned counsel that the version of P.W.1 is wholly unconvincing and does not deserve acceptance, as it is the case of P.W.1 that she was in love with A-1 since the last three years, yet for the first time on 1.12.2019, P.W.1 alleges that A-1 promised to marry her and had sexual intercourse at about 7.00 p.m. and, thereafter, he again had sexual intercourse on 7.12.2019 at about the very same time as on 1.12.2019, but when P.W.1 asked A-1 to marry her, he refused and even intimidated P.W.1 by calling her with her caste name.

Though such an allegation has been levelled against A-1 by P.W.1, yet, after five days of the occurrence, P.W.1, accompanied by her family members had gone to the police station and lodged the complaint, Ex.P-1. Therefore, the genesis of P.W.1 and the incident as alleged in Ex.P-1 are doubtful.

13. It is the further submission of the learned counsel that though it is the allegation of P.W.1 that no one other than P.W.1 and A-1 were aware of the physical relationship between P.W.1 and A-1, however, her evidence runs contra to the deposition of P.W.s 3 and 4. It is the further submission of the learned counsel that the above evidence of P.W.1 coupled with the delay in lodging Ex.P1, complaint, that too after five days from the date, P.W.1 alleges to have informed of the same to P.W.2, coupled with the contra evidence of P.W.s 3 and 4 reveal that the complaint has been engineered in such a fashion so as to implicate A-1 in the commission of an offence, which is not substantiated by any proper materials. However, without considering the aforesaid contradictions in the evidence and also the delay in lodging the FIR, the court below has accepted the version of P.W.1 to hold the appellant guilty, which is grossly erroneous and deserves interference.

14. It is the further submission of the learned counsel that the complaint, Ex.P-1 is alleged to have been lodged on 12.12.2019, yet no action was taken by P.W.14 on the said complaint till 22.01.2020, for a period of about 40 days. No reason has been attributed for the delay in taking up the investigation, when the offence alleged is a major offence. However, this crucial fact has not been considered by the trial court.

15. It is the further submission of the learned counsel that the witnesses examined by the prosecution are interested witnesses, viz., P.W.s 1 to 9 and inspite of the fact that both P.W.1 and A-1 belonged to the same village, yet no independent witness has been examined by the prosecution for which there is no reasonable explanation offered by the prosecution. The non-examination of any independent witness strikes at the root of the prosecution case.

16. It is the further submission of the learned counsel that though it is the case of the prosecution that P.W.1 and A-1 were in love with each other

for over three years, yet the promise of marriage, as alleged by P.W.1 is alleged to have been made for the first time on 01.12.2019, when sexual intercourse for the first time has been alleged to have been perpetrated on P.W.1 by A-1. When P.W.1 and A-1 are alleged to have been in love for more than three years, the offence of rape would not stand attracted, moreso, when the ingredients of rape as provided for u/s 375 IPC are not made out.

17. Further, it is the submission of the learned counsel that even without the appellant admitting the allegation, it is even the case of the prosecution that sexual intercourse, as alleged, has been committed only upon the consent extended by P.W.1 and, therefore, Section 90 IPC would not stand attracted as the consent was not out of fear or misconception of fact. Therefore, the ingredients of Section 375 and consequential Section 376 IPC would not stand attracted. However, the court below has not properly adverted to the provisions of Section 90, 375 and 376 IPC while appreciating the same and, therefore, the findings recorded is wholly misplaced and not supported by proper evidence and the same deserves interference at the hands of this Court.

18. It is the further submission of the learned counsel that it is even the deposition of P.W.1 as also the other witnesses, that P.W.1 and A-1 are residents of the same village and residing in nearby houses and that she is also aware of the marriage of A-1 and he being the father of a child, yet it is the case of P.W.1 that A-1 and P.W.1 were in love with each other and that A-1 had promised to marry her is wholly an acceptable piece of evidence, as even a girl of normal intellect would not be ready and willing to be in relationship, more particularly physical relationship with a married man and, therefore, the evidence of P.W.1 does require to be looked into with greater caution.

19. It is the further submission of the learned counsel that the consent of P.W.1 is writ large by her deposition in cross examination, where she has deposed that she knew that A-1 was married and was having a child even before the act of sexual intercourse alleged to have been committed by A-1 on P.W.1.This clearly show that the offence, as alleged, would not fall with the parameters of rape, as provided for u/s 375 IPC. It is the further submission

of the learned counsel that the consent is also evident from the fact that there were no injuries found on the body of P.W.1 nor was there any injuries related to sexual intercourse, which clearly establish that P.W.1 had also acceded to the act of A-1 and, therefore, Sections 375 and 90 IPC would not stand attracted. However, the said pertinent fact has not been properly considered by the court below, while appreciating the case of the appellant.

20. It is the further submission of the learned counsel that the deposition of the prosecution witnesses, viz., P.W.s 1 to 5 galore with very many contradictions and their depositions are not trustworthy so as to fasten the guilt on the appellant and, therefore, the conviction and sentence recorded by the court below deserves to be interfered with.

21. Per contra, learned Addl. Public Prosecutor appearing for the respondent submits that merely because there is delay in taking up investigation cannot be the basis to doubt the veracity of P.W.s 1 to 5 when the said witnesses, in unison, had spoken about the complicity of A-1 in the commission of the offence.

22. It is the further submission of the learned Addl. Public Prosecutor that contradictions in the evidence of P.W.s 1 to 5 are trivial contradictions, which does not affect the substratum of the prosecution case and considering that P.W.s 1 to 5 are rustic villagers, the said contradictions cannot form the basis for negativing their deposition as one not trustworthy. It is the further submission of the learned Addl. Public Prosecutor that P.W.s 1 to 5 had no axe to grind against the accused and, therefore, there was no necessity for them to fasten the offence on the accused and the accused having not come out with any possible defence, the contradictions in the evidence cannot be the basis to give the benefit of doubt to the appellant.

23. It is the further submission of the learned Addl. Public Prosecutor that Section 90 IPC relates to consent, which is given under fear or misconception and in the present case, it squarely stands attracted as P.W.1 was on a misconception that she would be married by A-1 and the act of A-1 luring P.W.1 with the promise of marriage had led P.W.1 to a misconception so as to submit herself to the veiled promises of A-1 and,

therefore, the consent given by P.W.1 cannot be deemed to be a consent given with clear mind and without any misconceived ideas.

24. It is the further submission of the learned Addl. Public Prosecutor that the delay in P.W.1 lodging the complaint cannot be put against the prosecution, as persons belonging to a village, the prosecution witnesses would be more circumspect in coming to a police station and would try to sort out the differences and problems within themselves through the elders of the family and only in the event of the outcome not conducive to both sides, P.W.1 had taken the courage to come and lay the complaint before the respondent. In such a scenario, the delay of about 5 days in lodging the complaint, Ex.P-1 cannot be put against the prosecution. All the aforesaid facts and evidences on record have been properly considered by the court below while returning a finding of guilt against the appellant and the same does not require any interference at the hands of this Court.

25. This Court gave its careful consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record as also the evidence of all the witnesses.

26. Crimes against women are on the increase in the society. The safety of women in today's context is in jeopardy and with the outburst of social media, the lures to which the women folk are put into is unquantifiable. But that would not negate the chance of women also being oppressors at times. Only in this context, the Courts, while generally accepts the deposition of women as gospel truth, as they would not come out and depose about they having been wrongfully utilised, however, also with a microscope analyses her evidence to find out that innocent men are not subjected to unnecessary persecution.

27. However, it cannot be lost sight of that under the pretext of false promises, women are wrongly utilised in various acts, including the act of eternal submission to satisfy the carnal and physical desires of the opposite gender, even with their consent and in many cases against their wish, either by sugar coated words or by brute force. But not always, it is to be stated that, it is only the male who misuse the women folk, but in the legal

conundrum, vicious persons belonging to the female folk, do misuse the law to their advantage and, therefore, in cases of such nature, the duty cast on the court is two-fold, not only to see that women are not misused but equally, the law is not misused against the male folk as well.

28. However, it is to be kept in mind that in the Indian cultural heritage, women folk do not come out in the open to claim that they have been sexually assaulted or misused physically by the male folk for the reason that the scar of the said act would be on the said woman throughout her life. Therefore, many a times, the women folk do not come out to speak about the attack faced by them physically from the male folk, be it with their consent or without their consent and, therefore, the courts have to look at a case in this backdrop by giving a soft touch to the evidence of the prosecutrix by premising that women would not be the aggressor against male. But while looking at the evidence, it is also the duty of the court to see that an innocent male also is not subjected to the vagaries of the women folk for reasons other than what is projected before the court. Therefore, the courts are to separate the grain from the chaff while analysing the evidence placed before it so that just and proper justice is rendered to the innocent person.

29. In the case on hand, the appellant, while denying the sexual intercourse he is alleged to have had with P.W.1, however, without admitting, contended that even otherwise, the act of A-1, if held to be true, will not fall within the four corners of rape, as the sexual intercourse alleged, has been had with the consent of P.W.1, she having voluntarily subjected herself and, therefore, the ingredients of Section 375 IPC are not attracted to the case on hand. To appreciate the aforesaid submission, reference can be had to Section 375 IPC, which provides the as under :-

*"**375. Rape —** A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—*

First — Against her will.

Secondly — Without her consent.

Thirdly — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly — With or without her consent, when she is under eighteen years of age.

Seventhly – When she is unable to communicate consent.

Explanation 1 — For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2 – 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:

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

Exception 1 – A medical procedure or intervention shall not constitute rape.

Exception 2 – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

30. Only if any of the aforesaid acts are established to have been committed by a person, the offence of rape could be held to have been committed against the victim so as to attract the punishment codified for rape u/s 376 IPC.

31. It is the further stand of the appellant that the consent given by P.W.1 could not be treated to be a misconception or one given under fear of injury so as to attract Section 90 IPC and for better appreciation, the same is quoted hereunder:-

"***90. Consent known to be given under fear or misconception*** *— A consent is not such a consent as it 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;*

* * * * * * *"

32. From Section 90 IPC, it transpires, that the consent cannot be construed to be a consent, if such 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. Therefore, to attract the offence u/s 90 IPC against A-1, it is paramount for the prosecution to establish that A-1 was aware or had reason to believe that the consent was given by P.W.1 as a consequence of fear of injury or misconception of fact and in the absence of the same being established, the offence u/s 375 IPC cannot be said to have been committed, that too without the fulfilment of the ingredients mentioned u/s 375 IPC.

33. Therefore, this Court is entrusted with the task of finding out whether the consent as claimed could be treated to be a consent given in consequence of fear of injury or a misconception of fact so as to draw A-1 into the fold of commission of rape u/s 375 IPC.

34. Before proceeding to address the same, the issue of misconception of fact and what would constitute misconception of fact in a case where consent is claimed, has been exhaustively dealt with by the Apex Court in the case of ***Uday – Vs – State of Karnataka (2003 (4) SCC 46)***, wherein the Apex Court held as under :-

11. Some of the decisions referred to in Words and Phrases - - Permanent Edition Volume 8A at page 205 have held "that adult female's understanding of nature and consequences of sexual act must be intelligent understanding to constitute 'consent'. Consent within penal law, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. Legal consent, which will be held sufficient in a prosecution for

rape, assumes a capacity to the person consenting to understand and appreciate the nature of the act committed, its immoral character, and the probable or natural consequences which may attend it. (See: People v. Perry, 26 Cal. App. 143).

12. The Courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be legal consent. In Rao Harnarain Singh v. State, it was observed:-

"A mere act of helpless resignation in the face of inevitable compulsion, acquiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law. Consent, on the part of a woman as a defence to an allegation of a rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.

Submission of her body under the influence of fear or terror is not consent. There is a different between consent and submission. Every consent involves a submission but the converse does now follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure."

13. The same view was expressed by the High Court of Kerala in Vijayan Pillai @ Babu v. State of Kerala: MANU/KE/0655/1989 : 1989 (2) K.L.J. 234. Balakrishnan, J., as he then was, observed:-

"10. The vital question to be decided is whether the above circumstances are sufficient to spell out consent on the part of PW.1. In order to prove that there was consent on the part of the prosecutrix it must be established that she freely submitted herself while in free and unconstrained position of

her physical and mental power to act in a manner she wanted. Consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, non resistance and passive giving in cannot be deemed to be "consent". Consent means active will in the mind of a person to permit the doing of the act of and knowledge of what is to be done, or of the nature of the act that is being done is essential to a consent to an act. Consent supposes a physical power to act, a moral power of acting and a serious and determined and free use of these powers. ***Every consent to act involves submission, but is by no means follows that a mere submission involves consent****. In Jowitt's Dictionary of English Law II Edn. Vol. 1 explains consent as follows:*

"An act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things - a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, mediated imposition, circumvention, surprise or under influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind."

14. In re Anthony alias Bakthavatsalu, Ramaswami, J. in his concurring opinion fully agreed with the principle laid down in Rao Harnarain Singh's case (supra) and went on to observe:-

"A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammeled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former."

* * * * * * *

The High Court of Calcutta has also consistently taken the view that the failure to keep the promise on a future uncertain date does not always amount to misconception of fact at the inception of the act itself. In order to come within the meaning of

misconception of fact, the fact must have an immediate relevance. In Jayanti Rani Panda v. State of West Bengal and Anr.: MANU/WB/0299/1983 the facts were somewhat similar. The accused was a teacher of the local village school and used to visit the residence of the prosecutrix. One day during the absence of the parents of the prosecutrix he expressed his love for her and his desire to marry her. The prosecutrix was also willing and the accused promised to marry her once he obtained the consent of his parents. Acting on such assurance the prosecutrix started cohabiting with the accused and his continued for several months during which period the accused spent several nights with her. Eventually when she conceived and insisted that the marriage should be performed as quickly as possible, the accused suggested an abortion and agreed to marry her later. Since the proposal was not acceptable to the prosecutrix, the accused disowned the promise and stopped visiting her house. A Division Bench of the Calcutta High Court noticed the provisions of Section 90 of the Indian Penal Code and concluded:-

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continue to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her."

21. ***It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact***. *A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.*

22. *The approach to the subject of consent as indicated by the Punjab High Court in Rao Har Narain Singh (supra) and by the Kerala High Court in Vijayan Pillai (supra) has found approval by this Court in State of H.P. v. Mango Ram MANU/SC/0527/2000 : 2000 CriLJ 4027 Balakrishnan, J. speaking for the Court observed:-*

> *"The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. 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."*

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*26. There is yet another difficulty which faces the prosecution in this case**. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception**. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, is permitted only to a person with whom one is in deep love. 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. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are over come with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this*

case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired in. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."
(Emphasis Supplied)

35. From the aforesaid decision of the Apex Court, it clearly transpires that for application of Section 90 IPC, two conditions must be fulfilled. Firstly it should be shown that the consent was given under a misconception of fact; secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception.

36. Keeping the provision of Section 90 and 375 IPC in mind, as also the ratio laid down in decision of the Apex Court in *Uday case (supra)*, with regard to misconception of fact this Court would now proceed to analyse the evidence of the witnesses to find out whether consent was actually given by P.W.1 or is there anything underlying in the evidence of the witnesses, which discloses that such consent was on the basis of misconception so as to render the consent not a consent.

37. The deposition of seven witnesses, viz., P.W.s 1 to 5, 10 and P.W.14 are crucial for considering the case of the prosecution, as the other witnesses are either mahazar witnesses or police personnel, who had accompanied A-1 and P.W.1 for physical examination.

38. P.W.1 is the prosecutrix on the basis of whose complaint, Ex.P-1, the criminal machinery was set in motion. A perusal of the deposition of P.W.1 in chief reveals that P.W.1 and A-1 were alleged to have been in love with each other for the past three years prior to 1.12.2019, the date on which the alleged sexual intercourse had taken place for the very first time. It is the deposition of P.W.1 that on 1.12.2019, A-1 had asked P.W.1 to come to the scene of

occurrence and she had gone to the said place and at the scene of occurrence, inspite of her protest, A-1 forced P.W.1 to have sexual intercourse with him. It is the further deposition of P.W.1 that the said sexual intercourse was on the basis of the promise made by A-1 that he will marry P.W.1. It is the further deposition of P.W.1 that when she enquired A-1 about when he will marry her, A-1 castigated P.W.1 and abused her in filthy language. It is the further deposition of P.W.1 that after the said incident, A-1 had called P.W.1 to come to the very same place for five days and both of them had sexual intercourse. It is the further deposition of P.W.1 that on 7.12.2019 when P.W.1 once again asked A-1 to marry her, A-1 is alleged to have stated that he did not love her with the intention of marrying her, but had only intended to have sexual intimacy with her.

39. It is the further deposition of P.W.1 that when she went to the house of A-1 and confronted the other accused, viz., A-2 to A-4, the father, mother and brother of A-1, and informed them about the physical relationship between A-1 and P.W.1 and sought their help for A-1 to marry her, all the other accused abused her in filthy language and drove her from their residence. P.W.1 went to her house and informed about the occurrence to her father, viz., P.W.2 and P.W.2, along with his relatives, went to the house of the accused seeking the marriage of A-1 and P.W.1, the accused did not respond properly and abused them. Thereafter, P.W.2 and other elders of the village went for a panchayat on 11.12.2019 to the house of the accused and when the accused did not heed to the talks of marriage, complaint, Ex.P-1 was lodged against the accused by P.W.1 before the respondent police.

40. It is the further deposition of P.W.1 in chief that as the panchayat did not result in fruitful result, P.W.1 preferred the typed complaint, Ex.P-1, in which she had signed and upon being called to give a statement u/s 164 Cr.P.C., before the Magistrate, P.W.1 appeared before the Magistrate and gave her sworn statement, Ex.P-2, which statement was recorded after about 40 days. **There is no quarrel about the fact that the statement of P.W.1 is in consonance with her deposition before the Court.**

41. In her deposition in cross, P.W.1 had deposed that the house of P.W.1 and A-1 are close-by each other in the same street. P.W.1 had further deposed that she is aware of the marriage of A-1 to one Dhanalakshmi belonging to the same village and out of the said wedlock, a child was also

born is also known to P.W.1. P.W.1 has further deposed in cross, to a specific question, as to the alleged intimacy with A-1 being illegal as she knew about the marriage of A-1, she has given a specific answer deposing that during 2017 when love is alleged to have blossomed between A-1 and P.W.1, A-1 was not married. **However, P.W.1 had not clearly spelt out as to when the marriage of A-1 with the said Dhanalakshmi took place. But her evidence is to the effect that A-1 was married even before her alleged sexual intercourse with A-1.** P.W.1 has further deposed in cross that upon the family of A-1 refusing for the marriage between A-1 and P.W.1, P.W.1 went to the police station after 7.00 p.m. and lodged the complaint on 12.12.2019. It is the further deposition of P.W.1 in cross that she was examined only on the date of giving complaint, viz., 12.12.2019 and she was not examined thereafter.

42. P.W.2, the father of P.W.1 had deposed that he was not aware of the relationship between A-1 and P.W.1. It is the deposition of P.W.2 that he came to know about the relationship between P.W.1 and A-2 only when P.W.1 asked him to accompany her to the police station to give a complaint. It is the further deposition of P.W.1 that as the efforts of the elders of the family in the panchayat did not result in any response from the accused, Ex.P-1, the complaint, was lodged by P.W.1. **However, when the complaint was given and when panchayat of the prosecutrix party and accused party was convened and discussion was had has not been clearly deposed by P.W.2, though he is the father of P.W.1.**

1P.W.3 is a relative of P.W.1 and he has deposed that he knows both A-1 and P.W.1. P.W.3 has further deposed that A-1 and P.W.1 were often seen talking with each other and that he had rebuked P.W.1 and A-1 for behaving in that fashion. P.W.3 had further gone on to depose in chief that he knows that A- and P.W.1 were having physical relationship with each other and when A-1 **refused to marry P.W.1, inspite of the efforts during the panchayat, though A-2 to A-4 initially asked for sometime, but thereafter they refused for the marriage.**

P.W.3 had deposed that he was present when the complaint, Ex.P-1 was given by P.W.1 and that the said complaint Ex.P-1 was given at about 8.00 a.m., but the date on which it was given has not been specifically spoken to by P.W.3.

44. P.W.4 had deposed that he is related to P.W.1. P.W.4 also, in line with the deposition of P.W.3, had spoken about his knowledge about the relationship of P.W.1 and A-1. In fact, the deposition of **P.W.4 goes one step further, where he had deposed that when he enquired about the relationship, P.W.1 had initially deposed that they were moving just casually, however, at a later point of time, P.W.1 had informed P.W.4 that as A-1 had promised to marry her, they were even having sexual relationship. However, there is no clear deposition as to when A-1 and P.W.1 had sexual relationship. In fact, it is the deposition of P.W.4 that even during enquiry by P.W.14, he had divulged the aforesaid details, including the sexual relationship between P.W.1 and A-1. But curiously, there is no whisper about it in the evidence of P.W.14.**

45. P.W.5, yet another witness, who is related to P.W.1, had deposed in chief that P.W.1 had informed her that A-1, though promised to marry her, yet is refusing to marry her and, therefore, P.W.5 accompanied by others, went to the house of the accused for holding a panchayat at about 7.00 a.m. However, the date on which the panchayat was convened is not spoken to by P.W.5. It is the further deposition of P.W.5 in cross that upon the accused refusing for marriage of A-1 and P.W.1, complaint was lodged with the respondent. It is the further deposition of P.W.5 that for more than one month, they were going to the police station for registering the complaint.

46. P.W.10 is the doctor, who had examined P.W.1 on 24.1.2020 upon requisition by P.W.14, the investigating officer. P.W.10 had deposed that P.W.1, upon enquiry, had informed that she knew A-1 for the past three years **and that for the past one month they were having sexual intercourse**. P.W.10 had further deposed that P.W.1 was calm, composed, well in her senses and was clear about the surroundings. It is the further deposition of P.W.10 in chief that upon examination, she did not find any external injuries on the body of P.W.1 and that she did not find any evidence of violence being used on P.W.1 and that P.W.1 had lost her virginity, but she was not pregnant and had accordingly issued Ex.P-7, her medical opinion.

47. P.W.14 is the investigation officer, who had investigated the offence. **Despite the fact that the complaint was lodged on 12.12.2019, yet, the complaint was registered only on 22.1.2020 and investigation was taken up after about 40 days. However, there is no plausible and**

reasonable explanation offered by the investigation officer for the said delay, except saying that she was on bandobast duty. It is to be pointed out that the complaint had been lodged before the All Women Police Station, yet the police authorities had scant regard for the allegations made by P.W.1 and had taken their sweet little time to register the complaint and take up investigation. It is the categorical deposition of P.W.14 that though on the very date when the complaint was registered as CSR, the same had come to her knowledge, yet investigation was taken up only after 40 days.

48. Turning back to the deposition of P.W.14, the investigation officer had deposed that upon taking up investigation, she had referred P.W.1 for medical examination on 24.1.2020 and obtained Ex.P-7 and, thereafter, had her statement recorded u/s 164 Cr.P.C. on 6.3.2020. P.W.14 had further deposed that A-1 and P.W.1 had sexual intercourse on two occasions as is revealed in the complaint. Further, it is the categorical deposition of P.W.14 in cross that he did not examine any independent witnesses, who were of prominence in the village, but had examined only the witnesses related to the case. To a pointed question by the defence in cross, P.W.14 had deposed that he was not aware that P.W.s 2 to 5 were relatives of P.W.1 and, therefore, he did not examine any independent witness. It is also evident that to a pointed question by the defence in cross, P.W.14 had deposed that he was not aware of A-1 being married and having a child aged 1 ½ years. P.W.14 also feigned ignorance about the status of A-1 being married despite the fact that P.W.1 had spoken about A-1 being married even in her deposition in court. However, P.W.14 has categorically stated that he is not aware about the marital status of A-1. P.W.14 has not deposed anything about P.W.3 or P.W.4 divulging about the relationship of P.W.1 and A-1, inclusive of their sexual relationship during their enquiry.

49. As the evidence of the aforesaid witnesses stands such, a careful analysis of the said evidence clearly reveal that there are not only glaring discrepancies and contradictions in the said depositions, but there are interpolations in the evidence of the witnesses. Further, none of the two limbs of Section 90 are fulfilled by the prosecution to prove that the act of A-1 falls within the periphery of Section 90 IPC and that the consent given by P.W.1 was on misconception of fact.

50. While it is the categorical deposition of P.W.1 that she informed her father about her sexual relationship with A-1 only after A-1 castigated and abused her in filthy language after having repeated sexual intercourse with her, yet in the entirety of her deposition, either in chief or in cross, she has not whispered about any of the villagers knowing about her relationship, both her love relationship and sexual relationship with A-1. In fact, it is the deposition of P.W.1 that there are three ways from her house to the alleged place of occurrence and that she used the lane on the back side of her house to reach the alleged place of occurrence and enroute, there are only one or two houses and the rest are forest type lands.

51. However, it is the evidence of P.W.s 3 and 4, who are related to P.W.1, they have categorically deposed in chief that they knew about A-1 and P.W.1 being in love with each other and they have also seen them together and both P.W.s 3 and 4 have gone further and deposed in chief that P.W.1 had informed them that she had sexual intercourse with A-1. However, the said evidence of P.W.s 3 and 4 with regard to their knowledge is not supported by the evidence of P.W.1 and, in fact, the evidence of P.W.1 runs counter to the said deposition of P.W.s 2 and 3. Further, there is no whisper about the same in the evidence of P.W.14, the investigating officer. On a holistic consideration of the entire gamut of evidence, it could be held without a trace of ambiguity that the evidence of P.W.s 3 and 4 is interpolated to suit the convenience of the prosecution case. In fact, P.W.1 is related to P.W.4 in the capacity of daughter, even as per the deposition of P.W.4, as P.W.4 being in related as brother of P.W.2. If really, P.W.s 3 and 4 were in the knowledge about the sexual relationship of A-1 and P.W.1, definitely P.W.s 3 and 4 would have divulged the said relationship to P.W.2, the father of P.W.1. Yet neither P.W.3 nor P.W.4 had informed P.W.2, the father of
P.W.1 about the sexual relationship of P.W.1 and A-1. This casts a serious doubt on the evidence of P.W.s 3 and 4 and renders their evidence untrustworthy.

52. Returning back to the evidence of P.W.1, the case of sexual intercourse of A-1 with P.W.1 is premised on the alleged promise made by A-1 to P.W.1 that he will marry her. It is the deposition of P.W.1 that P.W.1 and A-1 were in love with each other since 2017. In fact, it is the categorical deposition of P.W.1 that prior to 1.12.2019, there was no sexual relationship

between P.W.1 and A-1. It is the specific deposition of P.W.1 that on 1.12.2019, A-1 had asked P.W.1 to come to the place of occurrence and upon promise of marrying P.W.1, A-1, inspite of the resistance from P.W.1 had sexual intercourse with P.W.1. It is the further deposition of P.W.1 that after the sexual intercourse when P.W.1 asked A-1 as to when he will marry her, A-1 had castigated P.W.1 and abused her in filthy language. It is the further deposition of P.W.1 that even after the said incident of sexual intercourse on 1.12.2019 and the castigation and abuse meted out to her, A-1 had called upon P.W.1 to come to the very same place for five days and had sexual intercourse multiple times with P.W.1, the last of which was on 7.12.2019.
In fact, it is the further deposition of P.W.1 that on 7.12.2019, when P.W.1 enquired A-1 as to when he will marry her, A-1 had stated that he had moved along with P.W.1 only for the purpose of having sexual intercourse and not for the purpose of marriage.

53. It is only thereafter P.W.1 had informed P.W.2 and, thereafter, the elders of the family had convened a panchayat with the accused. However, as stated above, inspite of the deposition of P.W.s 3 and 4 about their knowledge of love and sexual relationship between A-1 and P.W.1, they had not brought it to the knowledge of P.W.2 before the same was alleged to have been divulged to P.W.2 by P.W.1 on 7.12.2019. Further, none of the witnesses have spoken about the marital status of A-1, prior to the point of time when he had sexual intercourse with P.W.1. However, as stated above, there is an admission by P.W.1 in cross that she knew that A-1 was married and was having a child and that he was not married at the time when they fell in love with each other during 2017.

54. Returning back to the evidence of P.W.1, it further transpires that the houses of both P.W.1 and A-1 are nearby in the same street. It is the further deposition of P.W.1 that she is aware of the marriage of A-1 with one Dhanalakshmi and out of the wedlock one female child was born to A-1. It is the further deposition of P.W.1, in cross, to a specific question, that even after knowing that A-1 was married and had a child through the marriage, P.W.1 had the alleged sexual intercourse with A-1 to which P.W.1 had answered that during
2017, viz., the time when the alleged love was brewing between A-1 and P.W.1, A-1 was not married.

55. It is to be pointed out here that the specific date when the marriage of

A-1 took place has not been spoken to by P.W.1 nor by any of the witnesses, Moreso, the investigation officer, P.W.14, is also oblivious of the marriage of A-1, yet, has conducted an investigation and filed a final report. Though P.W.1 had stated that the houses of both P.W.1 and A-1 are in the same street, yet the date of marriage of A-1 has not been spoken to by P.W.1. Further, it is the admitted case that all the witnesses were of the same village and knew each other, yet, P.W.s 3 and 4 have not spoken about the marriage of A-1. In fact there is no iota of evidence submitted by the prosecution through the evidence of P.W.s 1 to 5 to establish that when the occurrence took place, A-1 was not married. In fact, no attempt had been made by P.W.14 to ascertain the date on which A-1 got married However, it is evident from the deposition of P.W.1 that during 2017, when A-1 and P.W.1 were alleged to have fallen in love, A-1 was not married, which leads to the direct inference that when A-1 is alleged to have had sexual intercourse with P.W.1, he was married.

56. In the light of the specific evidence of P.W.1 that A-1 was not married when they are both alleged to have fell in love with each other, the only logical inference that could be drawn from the said evidence is that prior to 1.12.2019, the date of the first alleged sexual relationship, A-1 was a married man and the same was also within the knowledge of P.W.1. Such being the admitted position, could the act of A-1, as alleged by P.W.1 attract the offence u/s 90 IPC deserves to be looked into.

57. Section 90 IPC, as stated above, takes within its fold two conditions. Firstly, the consent of P.W.1 for sexual intercourse was given under misconception and secondly that A-1, while obtaining the consent, knew or had reason to believe that the consent given by P.W.1 was given in consequence of such misconception.

58. In this regard, as discussed above, the deposition of P.W.1 clearly reveals that before the date of the first sexual intercourse of A-1 with P.W.1, which is alleged to be on 1.12.2019, she was very well aware of the fact that A-1 was married. Therefore, such being the case, the misconception of promise of marriage would not be a possibility and the same could not be

brought within misconception for P.W.1 to misconstrue the same, as A-1 was well married at the crucial point of time and, therefore, the promise of marriage could not reach its logical end. Therefore, there would have been no misconception on the part of P.W.1 with regard to the promise of marriage with A-1 as her marriage with A-1 cannot go through as A-1 was already a married man. Therefore, it is clear that P.W.1 could not have had any misconception with regard to the marriage.

59. Coming to the second condition provided for u/s 90, that A-1 knew or had reason to believe that the consent given by P.W.1 was given in consequence of such misconception. As stated above, the marriage of A-1 before the alleged sexual intercourse is an admitted fact, which stands admitted through the evidence of P.W.1 and in the aforesaid scenario, the promise of marriage alleged to have been made by A-1 resulting in consent by P.W.1 could not have been on the basis of misconception.

60. When P.W.1 knew that A-1 was already married, there could have been no misconception on the part of P.W.1 with regard to her marriage with A-1 on the basis of the alleged promise, which alone was the reason she consented to have sexual intercourse with A-1. On the crucial date, it was well within the knowledge of P.W.1 that the promise of marriage, which A-1 is alleged to have made during the period of their alleged love and thereafter, even before the sexual intercourse, could not fructify as he was already married and had begotten a child. Further, there is no material to infer that A-1 knew or believed that P.W.1 was submitting herself to sexual intercourse only on a misconception that A-1 will marry her on the basis of the promise made to her. Therefore, there could have been no misconception in this case, either for P.W.1 or for A-1 to believe that P.W.1 was under misconception of marriage with him, on account of his alleged promise and the twin conditions laid down u/s 90 IPC with regard to the tests for determining the consent given goes against the prosecution. Therefore, the prosecution has miserably failed to establish that the consent given by P.W.1 was not consent within the meaning of law.

61. As discussed above, though A-1 and P.W.1 were alleged to have been in a love relationship since 2017, but there has not been any

allegation with regard to sexual relationship between A-1 and P.W.1 prior to 1.12.2019 and the evidence of P.W.1 is clear on this aspect. It has not been proved that on 1.12.2019, the date when the first alleged sexual intercourse took place between A-1 and P.W.1, A-1 was not married and, therefore, on misconception based on promise of marriage, P.W.1 had consented for sexual intercourse with A-1.

62. Further, one other aspect which stares writ large on the deposition of P.W.1 is the fact that though P.W.1 is stated to have resisted the advances of A-1 towards sexual intercourse, however, she yielded and, therefore, there was no consent. However, the said deposition is highly farfetched and cannot be countenanced for the reason that P.W.10, the doctor, who examined P.W.1 had deposed that there were no injuries denoting violence being perpetrated on P.W.1 at the time of sexual intercourse. Further, one other aspect, which has a greater bearing is that P.W.1 had admitted to P.W.10, the doctor, during her examination that though she knew A-1 for over three years, however, only over the past one month, they were having sexual intercourse.

63. However, the question that looms large is whether the appellant knew or had reason to believe that P.W.1 had consented to having sexual intercourse with him only as a consequence of her belief, based on his alleged promise that he will marry her in due course. There is hardly any evidence to prove the same and coupled with the fact that A-1 was already married and a female child was also born, the allegation levelled by the prosecutrix against A-1 is not substantiated either through oral evidence. It is to be pointed out that every consent to an act involves submission, but by no means follows that mere submission involves consent.

64. Further, to bring the offence within the meaning of rape, the ingredients shown u/s 375 IPC should be fulfilled. However, in the present case, after the alleged sexual intercourse on 1.12.2019, even according to the deposition of P.W.1, A-1 and P.W.1 had sexual intercourse multiple times, the last of which was on 7.12.2019. Therefore, it can safely be concluded that P.W.1 was a willing and consenting party to the act of sexual intercourse and, therefore, it would not attract Section 375 IPC. True it is that every

consent to act involves submission, but it by no means follows that a mere submission involves consent. In the present case, it is to be pointed out that the submission is based on the consent, which is voluntary and taken by P.W.1, who was well within her faculties to weigh the pros and cons of such an act, as the said act on 1.12.2019 is not an isolated act, but it had continued for multiple times even according to P.W.1.

65. Further, the deposition of the P.W.s 3 & 4, which clearly contradict P.W.1 with regard to the love affair between A-1 and P.W.1 and her sexual relationship being secret, also renders the prosecution case doubtful. Coupled with the statement of P.W.1 to the doctor, P.W.10 that she had frequent sexual relationship with A-1 only one month prior to her examination by the doctor, though they were alleged to be in love with each other, clearly establishes the fact that P.W.1 is not under any misconception and that A-1 cannot also be held to have misused the prosecutrix under the pretext of promise of marriage which led to her consent, as she had been a willing party to sexual intercourse multiple times, which denote implied and explicit consent by P.W.1. Therefore, the act of A-1, as alleged, would not fall within the parameters of rape, as provided for u/s 375 IPC so as to attract the punishment u/s 376 IPC.

66. One other aspect, which is highlighted by the appellant is the delay in lodging the complaint. Though the last of the physical relationship is alleged to have been on 7.12.2019, yet, after five days, the complaint was lodged on 12.12.2019 and, therefore, according to the appellant, the delay is fatal as it has not been properly explained.

67. It is to be pointed out that in cases of this nature, where the virtue of a lady is at stake, normally persons around her would be more circumspect in approaching the law enforcing agency and would try to sort out the issues amongst themselves along with the opposite party and only in cases where consensus could not be reached, resort will be made for remedy through the law enforcing agency.

68. In this case as well, the family of the prosecutrix had resorted to similar procedures of having an in-house discussion and in the absence of

consensus, had taken up the issue before the respondent. Therefore, the delay in lodging the complaint, in cases of this nature, unless it is too enormous, cannot be the basis to question the bona fides of the complaint. Therefore, the delay in lodging the complaint cannot be put against the prosecution.

69. However, one aspect which renders the complaint itself an interpolated one is the fact that while P.W.1 claims that the prosecutrix party met the accused at their residence at 7.00 p.m. and since the talks did not fructify positively, the complaint was lodged thereafter and once again, the next day, the panchayatadars went to the house of the appellant seeking marriage of A-1 with P.W.1, however, P.W.3 has deposed that the prosecutrix party went to the house of the accused at 8.00 a.m. Curiously, none of the witness have deposed about the date on which the complaint had been given. Further, there is contradiction with regard to the time when the complaint was given. However, the complaint reveals that it was laid before the law enforcing agency on 12.12.2019 at about 1.00 p.m. Therefore, the evidence as a whole bristles with very many contradictions and interpolations as interpolations would have been the result of the discussions, which the prosecutrix party had before lodging the complaint.

70. Further, as stated above, the prosecutrix having given consent for the alleged sexual intercourse, and there being no misconception of fact as the prosecutrix knew very well before having sexual intercourse that A-1 was married, the promise of marriage, alleged to have been made by A-1 has led to the misconception cannot be accepted. Further, it is clear through the deposition of P.W.1 that P.W.1 and A-1 were allegedly in love with each other since 2017 and till 1.12.2019, there was no physical relationship in the form of sexual intercourse solicited by A-1 from P.W.1. Such being the case, had there not been any consent, the prosecutrix would not have gone to a secluded place, that too at about 7.00 p.m. in the later part of the evening to meet A-1 shielding herself from the eyes of the public by taking a secluded route. Even if A-1 had lured her on the promise of marriage, even after the very first instance the appellant having abused her and had let her know that he will not marry her, however, the prosecutrix alleges to have had sexual intercourse thereafter with A-1 multiple times during the course of the very same week, which clearly shows that the prosecutrix willingly consented to

having the alleged sexual intercourse not because of the alleged promise of marriage, but for reasons other than that. That could be the only inference that could be drawn from the deposition of P.W.1 as also the other witnesses, who have been examined on behalf of the prosecution.

71. The evidence as a whole indicates that there was no resistance by the prosecutrix and there was voluntary participation by P.W.1 for the sexual act. 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 also having fully exercised the choice between resistance and consent, all the evidence in the present case, presented by the prosecution only tends to lead to the conclusion that the consent given is not only based on intelligent exercise of knowledge, but also fully appreciating the significance and understanding the moral quality of the act. Therefore, now the prosecutrix cannot turn back and claim that the consent was only predicated upon the promise of marriage, which cannot be held to be a misconception, as already the appellant was a married man and was also the father of a child. Therefore in the absence of any resistance and also in the absence of any force or violence being brought on P.W.1, as could be evidenced from the materials available on record, both oral and medical, the only conclusion that could be arrived at is that the sexual act was in pursuance of a consent, which was voluntary and in a free and unconstrained possession of her physical and moral power and, therefore, the act, as alleged would not fall within the contours of rape as defined u/s 375 IPC. However, the court below lost sight of the rudimentary principle governing the matter of rape and gone ahead to convict the appellant on the strength of the gospel that Indian women do not lie in such matters, which cannot be sustained, as the facts surrounding each and every case and the evidence available ought to form the basis of arriving at a finding and the surrounding scenario cannot be the basis to render a finding.

72. Further, it is to be pointed out that the investigation conducted in this case is a shoddy investigation. Though the complaint was lodged on 12.12.2019, yet the investigation was taken up only on 22.1.2020, after a lapse of almost 40 days. Though P.W.14, the investigating officer, in her deposition had deposed that she knew about the registration of the CSR, however, did not show any interest in taking up investigation and after a lapse of 40 days investigation had been taken up. Further the enquiry of the

witnesses is also sham and no independent witness has been examined, though P.W.14 feigns ignorance that she was not aware that P.W.s 1 to 5 are related. Further, all the facets of investigation, right from enquiry upto the arrest of the accused and recording of confession statement and also the filing of final report reveals a lot about the manner in which the investigation was conducted. The manner in which investigation has been conducted by P.W.14 deserves a lot to be said, but judicial etiquette stops this Court from putting anything further to paper.

73. Merely because steps were taken to record the statement of P.W.1 u/s 164 Cr.P.C., and that the said statement is in consonance with her deposition in court alone cannot form the basis for convicting the appellant as all the parameters laid down in the provisions of the Code should be satisfied so as to fasten the guilt on the appellant. However, without any iota of evidence, as a result of shoddy investigation, the appellant has been shown to be the aggressor. In the absence of any shred of evidence, which points to his guilt, which squarely falls within the provisions of Section 375 IPC, the allegation levelled against the appellant cannot be countenanced and, therefore, the findings recorded against the appellant by the court below deserves to be interfered with.

74. For all the reasons aforesaid, the appeal must succeed and, accordingly, this criminal appeal is allowed. The impugned judgment and order of conviction and sentence imposed on the appellant for the offence punishable u/s 375/376 and 417 IPC are set aside and the appellant stands acquitted of the charges. Since the sentence imposed on the appellant was suspended pending consideration of the appeal, bail bonds executed by the appellant shall stand cancelled.