

IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE ACHAL KUMAR PALIWAL

ON THE 3rd OF MARCH, 2025

CRIMINAL REVISION No. 3248 OF 2021

AJAY KUMAR CHOUDHARY
Versus
STATE OF MADHYA PRADESH

Appearance:

Shri Sourabh Singh Thakur - Advocate for the applicant.

Shri Ramanuj Choubey -P.L. appearing on behalf of respondent/State.

ORDER

With the consent of learned counsel for the parties heard finally at motion stage.

2. Present criminal revision petition has been filed under Section 397/401 of Cr.P.C. assailing order dated 05.10.2021 whereby charge under Section 376(2)(n) and 376 of IPC has been framed against present applicant.

3. Learned counsel for the applicant submits that in the instant case, alleged incident is said to have occurred from 08.03.2020 to 25.02.2021 and FIR has been lodged on 5.04.2021. It is also urged that prosecutrix is a guest teacher aged 24 years. Learned counsel for the applicant also submits that applicant was ready to marry prosecutrix but when family members of prosecutrix went to meet maternal uncle and

aunt of applicant for discussing the issue, at that time, some dispute took place between the parties and thereafter, maternal uncle and aunt of applicant refused to marry applicant with prosecutrix. It is also urged that parents of applicant are not alive.

4. Learned counsel for the applicant has also referred to last 4-5 lines of para 1 of prosecutrix's statement recorded under Section 164 of Cr.P.C. as well as statements of prosecution witnesses recorded under Section 161 of Cr.P.C. to submit that in the instant case, even *prima facie*, it cannot be said that applicant established physical relation with prosecutrix on false pretext of marriage. Initially, both the parties were ready to solemnize marriage but later on account of some dispute between the parties, marriage could not be solemnized.

5. Further, after relying upon **Dr.Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and Other, AIR 2019 SC 327, Naim Ahamed Vs. State (NCT of Delhi), (2023) AIR (SC) Cri 1003, Pramod Suryabhan Pawar Vs. State of Maharashtra and Another, (2019) 9 SCC 608, Maheshwar Tigga Vs. State of Jharkhand, (2020) 10 SCC 108** and order passed by Co-ordinate Bench in **MCRC No.1071 of 2023** (Ashish Mishra @ Shivam Mishra Vs. State of M.P. and Another) on 16.08.2024, **MCRC No.42118 of 2022** (Gaurav singh Chadhar Vs. State of M.P. and Others) on 24.01.2023 and **CRA No.12295/2022** (Sunit Mishra Vs. State of M.P.) on 09.02.2023, it is urged that in the instant case, even *prima facie* offence under Sections 376(2)(n) and 376 of IPC is not made out. Learned Trial Court has erred in framing charges against applicant

under Sections 376(2)(n) and 376 of IPC. Hence, petition filed by the petitioner be allowed and petitioner be discharged.

6. Learned counsel for the respondent/State has submitted that there is sufficient material on record to frame charges under Section 376(2)(n) and 376 of IPC against applicant. Hence, revision petition filed by the applicant be dismissed.

7. Heard. Perused of record of the case.

Analysis and Findings :-

8. Perusal of record of the case as well as submissions of learned counsel for the parties reveals that primarily two legal issues are involved in the case i.e. what is the criteria/what are the parameters for framing of charge/discharge of accused and to decide as to whether consent of prosecutrix was free or was obtained under misconception of fact i.e. on false pretext of marriage. Hence, before adverting to the issue involved in the case, it would be appropriate to refer principles of law with respect to aforesaid legal issues.

Legal principles applicable in regard to framing of charge/ discharge :-

9. Hon'ble apex court in **M.E. Shivalingamurthy Vs. Central Bureau of Investigation, (2020) 2 SCC 768**, after referring to **(2011) 14 SCC 608, State of A.P. V. Obulapuram Mining Co. (P) Ltd., (2010) 2 SCC 398, P. Vijayan V. State of**

Kerala, (2005) 1 SCC 568, State of Orissa V. Debendra Nath Padhi. (2002) 2 SCC 135, Dilawar Balu Kurane v. State of Maharashtra, (1995) 4 SCC 181, State of J & K V. Sudarshan Chakkar, (1979) 3 SCC 4, Union of India Vs. Prafulla Samal, has held as under:-

*“17. This is an area covered by a large body of case law. We refer to a recent judgment which has referred to the earlier decisions, viz., **P. Vijayan v. State of Kerala and another (2010) 2 SCC 398** and discern the following principles:*

17.1. If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the Trial Judge would be empowered to discharge the accused.

17.2. The Trial Judge is not a mere Post Office to frame the charge at the instance of the prosecution.

17.3. The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the Police or the documents produced before the Court.

17.4. If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, “cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial”.

17.5. It is open to the accused to explain away the materials giving rise to the grave suspicion.

17.6. The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

17.7. At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true. viii. There must exist some materials for entertaining the strong suspicion

which can form the basis for drawing up a charge and refusing to discharge the accused.

17.8. There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

*18. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 of the Cr.PC (See **State of J & K v. Sudershan Chakkar (1995) 4 SCC**). The expression, “the record of the case”, used in Section 227 of the Cr.PC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the 3 AIR 1995 SC 1954 charge. At the stage of framing of the*

*charge, the submission of the accused is to be confined to the material produced by the Police (See **State of Orissa v. Debendra Nath Padhi (2005) 1 SCC 568**).*

28. It is here that again it becomes necessary that we remind ourselves of the contours of the jurisdiction under Section 227 of the Cr.PC. The principle established is to take the materials produced by the prosecution, both in the form of oral statements and also documentary material, and act upon it without it been subjected to questioning through cross-examination and everything assumed in favour of the prosecution, if a scenario emerges where no offence, as alleged, is made out against the accused, it, undoubtedly, would ensure to the benefit of the accused warranting the Trial Court to discharge the accused.

29. It is not open to the accused to rely on material by way of defence and persuade the court to discharge him.

30. However, what is the meaning of the expression “materials on the basis of which grave suspicion is aroused in the mind of the court’s”, which is not explained away? Can the accused explain away the material only with reference to the materials produced by the prosecution? Can the accused rely upon material which he chooses to produce at the stage?

31. In view of the decisions of this Court that the accused can only rely on the materials which are produced by the prosecution, it must be understood that the grave suspicion,

if it is established on the materials, should be explained away only in terms of the materials made available by the prosecution. No doubt, the accused may appeal to the broad probabilities to the case to persuade the court to discharge him.”

10. Recently also, Hon’ble Apex Court in **Ram Prakash Chadha Vs. State of Uttar Pradesh, (2024) 10 SCC 651**, after referring earlier pronouncement on the issue, has laid down the principles that need to be kept in mind for discharge or framing of charge. The Hon’ble Apex Court in **Ram Prakash Chadha** (supra) has observed and held as under :

3.-----, we should bear in mind that exercise of power under Section 227CrPC, is legally permissible only by considering “the record of the case and the documents submitted therewith”. Therefore, necessarily, the question is what is the meaning of the expression “*the record of the case and documents submitted therewith*”? According to us, it refers only to the materials produced by the prosecution and not by the accused. A three-Judge Bench of this Court considered this question in **State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568**. It was held that the said expression as postulated in Section 227CrPC, relates to the case and the documents referred to under Section 209CrPC.

16. We have already considered the meaning of the expression “*the record of the case and the documents submitted therewith*” relying on the decision in **State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568** only to reassure as to what are the materials falling under the said expression and thus,

available for consideration of an application filed for discharge under Section 227 of CrPC. In the light of the same, there cannot be any doubt with respect to the position that at the stage of consideration of such an application for discharge, defence case or material, if produced at all by the accused, cannot be looked at all. Once “the record of the case and the documents submitted therewith” are before the Court they alone can be looked into for considering the application for discharge and thereafter if it considers that there is no sufficient ground for proceeding against the accused concerned then he shall be discharged after recording reasons therefor. In that regard, it is only appropriate to consider the authorities dealing with the question as to what exactly is the scope of consideration and what should be the manner of consideration while exercising such power.

18. In the decision in *State of T.N. v. N. Suresh Rajan, (2014) 11 SCC 709* this Court held that at a stage of consideration of an application for discharge, the Court has to proceed with an assumption that the materials brought on record by the prosecution are true, and evaluate the materials to find out whether the facts taken at their face value disclose the existence of the ingredients constituting the offence. At this stage, only the probative value of the materials has to be gone into and the court is not expected to go deep into the matter to hold a mini-trial.

20. We are in agreement with the said view taken by the High Court. At the same time, we would add that the strong suspicion in order to be sufficient to frame a charge should be based on the material brought on record by the prosecution and should not be based on supposition, suspicions and conjectures. In other words, in order to be a basis to frame charge the strong suspicion should be the one emerging from the materials on record brought by the prosecution.

21. In the decision in *Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia, (1989) 1 SCC 715*, this Court held that the word “ground” in Section 227CrPC, did not mean a ground for conviction, but a ground for putting the accused on trial.

22. In *P. Vijayan v. State of Kerala, (2010) 2 SCC 398*, after extracting Section 227CrPC, this Court in paras 10 and 11 held thus: (SCC pp. 401-402)

“10. ... If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be

empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words “not sufficient ground for proceeding against the accused” clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.”

24. In the light of the decisions referred supra, it is thus obvious that it will be within the jurisdiction of the Court concerned to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused concerned has been made out. We are of the considered view that a caution has to be sounded for the reason that the chances of going beyond the permissible jurisdiction under Section 227CrPC, and entering into the scope of power under Section 232CrPC, cannot be ruled out as such instances are aplenty. In this context, it is relevant to refer to a decision of this Court in ***Om Parkash Sharma v. CBI, (2000) 5 SCC 679***. Taking note of the language of Section 227 CrPC, is in negative terminology and that the language in Section 232CrPC, is in the positive terminology and considering this distinction between the two, this Court held that it would not be open to the Court while considering an application under Section 227CrPC, to weigh the pros and cons of the evidence alleged improbability and then proceed to discharge the accused holding that the statements existing in the case therein are unreliable. It is held that doing so would be practically acting under Section 232CrPC, even though the said stage has not reached. In short, though it is permissible to sift and weigh the materials for the limited purpose of finding out whether or not a prima facie case is made out against the accused, on appreciation of the

admissibility and the evidentiary value such materials brought on record by the prosecution is impermissible as it would amount to denial of opportunity to the prosecution to prove them appropriately at the appropriate stage besides amounting to exercise of the power coupled with obligation under Section 232CrPC, available only after taking the evidence for the prosecution and examining the accused.

25. Even after referring to the aforesaid decisions, we think it absolutely appropriate to refer to a decision of the Madhya Pradesh High Court in ***Kaushalya Devi v. State of M.P.*, 2003 SCC OnLine MP 672**, It was held in the said case that if there is no legal evidence, then framing of charge would be groundless and compelling the accused to face the trial is contrary to the procedure offending Article 21 of the Constitution of India. While agreeing with the view, we make it clear that the expression “legal evidence” has to be construed only as evidence disclosing prima facie case, “the record of the case and the documents submitted therewith”.

26. The stage of Section 227CrPC, is equally crucial and determinative to both the prosecution and the accused, we will dilate the issue further. In this context, certain other aspects also require consideration. It cannot be said that Section 227CrPC, is couched in negative terminology without a purpose. Charge-sheet is a misnomer for the final report filed under Section 173(2)CrPC, which is not a negative report and one that carries an accusation against the accused concerned of having committed the offence(s) mentioned therein.

27. In cases, where it appears that the said offence(s) is one triable exclusively by the Court of Session, the Magistrate shall have to commit the case to the Court of Session concerned following the prescribed procedures under CrPC. In such cases, though it carries an accusation as aforementioned still legislature thought it appropriate to provide an inviolable right as a precious safeguard for the accused, a pre-battle protection under Section 227CrPC. Though this provision is couched in negative it obligated the court concerned to unfailingly consider the record of the case and document submitted therewith and also to hear the submissions of the accused and the prosecution in that behalf to arrive at a conclusion as to whether or not sufficient ground for proceeding against the accused is available there under. Certainly, if the answer of such consideration is in the negative, the court is bound to discharge the accused and to record reasons therefor. The corollary is that the question of framing the

charge would arise only in a case where the court upon such exercise satisfies itself about the prima facie case revealing from “*the record of the case and the documents submitted therewith*” against the accused concerned. In short, it can be said in that view of the matter that the intention embedded is to ensure that an accused will be made to stand the ordeal of trial only if “*the record of the case and the documents submitted therewith*” discloses ground for proceeding against him. When that be so, in a case where an application is filed for discharge under Section 227CrPC, it is an irrecusable duty and obligation of the Court to apply its mind and answer to it regarding the existence of or otherwise, of ground for proceeding against the accused, by confining such consideration based only on the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution in that behalf. To wit, such conclusion on existence or otherwise of ground to proceed against the accused concerned should not be and could not be based on mere suppositions or suspicions or conjectures, especially not founded upon material available before the Court. We are not oblivious of the fact that normally, the Court is to record his reasons only for discharging an accused at the stage of Section 227 CrPC. However, when an application for discharge is filed under Section 227 CrPC, the Court concerned is bound to disclose the reason(s), though, not in detail, for finding sufficient ground for rejecting the application or in other words, for finding prima facie case, as it will enable the superior court to examine the challenge against the order of rejection.”

Legal principles pertaining to as to whether consent given by prosecutrix is free or under misconception of fact i.e. on false pretext of marriage :-

11. Above issue has been dealt by Hon’ble Apex Court in a number of pronouncements. Hon’ble Apex in **Pramod Suryabhan Pawar Vs. State of Maharashtra and Another, (2019) 9 SCC 608**, after discussing the issue, has held as under :-

“10. Where a woman does not “consent” to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90

does not define the term “consent”, a “consent” based on a “misconception of fact” is not consent in the eye of the law.

11. The primary contention advanced by the complainant is that the appellant engaged in sexual relations with her on the false promise of marrying her, and therefore her “consent”, being premised on a “misconception of fact” (the promise to marry), stands vitiated.

12. This Court has repeatedly held that consent with respect to Section 375 IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In *Dhruvaram Murlidhar Sonar v. State of Maharashtra*, (2019) 18 SCC 191, which was a case involving the invoking of the jurisdiction under Section 482, this Court observed : (SCC para 15)

“15. ... 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 mind of a person to permit the doing of the act complained of.”

This understanding was also emphasised in the decision of this Court in *Kaini Rajan v. State of Kerala*, (2013) 9 SCC 113 : (SCC p. 118, para 12)

“12. ... “Consent”, for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.”

14. In the present case, the “misconception of fact” alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In *Anurag Soni v. State of Chhattisgarh*, (2019) 13 SCC 1 : (SCC para 12)

“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 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 Sections 375 IPC and can be convicted for the offence under Section 376 IPC.”

Similar observations were made by this Court in ***Deepak Gulati v. State of Haryana, (2013) 7 SCC 675*** : (SCC p. 682, para 21)

“21. ... 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;”

15. In *Yedla Srinivasa Rao v. State of A.P., (2006) 11 SCC 615* : the accused forcibly established sexual relations with the complainant. When she asked the accused why he had spoiled her life, he promised to marry her. On this premise, the accused repeatedly had sexual intercourse with the complainant. When the complainant became pregnant, the accused refused to marry her. When the matter was brought to the panchayat, the accused admitted to having had sexual intercourse with the complainant but subsequently absconded. Given this factual background, the Court observed : (SCC pp. 620-21, para 10)

“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.”

16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a “misconception of fact” that vitiates the woman's “consent”. On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The “consent” of a woman under Section 375 is vitiated on the ground of a “misconception of fact” where such misconception was the basis for her choosing to engage in the said act. In ***Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675**, this Court observed : (SCC pp. 682-84, paras 21 & 24)

“21. ... 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.

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, [Ed. : The matter between two asterisks has been emphasised in original.] *unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her* [Ed. : The matter between two asterisks has been emphasised in original.] .”

(emphasis supplied)

17. In *Uday v. State of Karnataka, (2003) 4 SCC 46*, the complainant was a college-going student when the accused promised to marry her. In the complainant's statement, she admitted that she was aware that there would be significant opposition from both the complainant's and accused's families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The Court observed that in these circumstances the accused's promise to marry the complainant was not of immediate relevance to the complainant's decision to engage in sexual intercourse with the accused, which was motivated by other factors : (SCC p. 58, para 25)

“25. 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, are 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."

(emphasis supplied)

18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

12. Similarly Hon'ble Apex Court in **Dr.Dhruvarma Murlidhar Sonar Vs. State of Maharashtra and Others, (2019) 18 SCC 191**, has also discussed the issue and has held as under :

"15. Section 375 defines the offence of rape and enumerates six descriptions of the offence. 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 the 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, or 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 mind of a person to permit the doing of the act complained of.

16. Section 90 IPC defines "consent" known to be given under fear or misconception:

"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;"

17. Thus, Section 90 though does not define "consent", but describes what is not "consent". Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. 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 after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances.

18. In *Uday v. State of Karnataka*, (2003) 4 SCC 46, this Court was considering a case where the prosecutrix, aged about 19 years, had given consent to sexual intercourse with the accused with whom she was deeply in love, on a promise that he would marry her on a later date. The prosecutrix continued to meet the accused and often had sexual intercourse and became pregnant. A complaint was lodged on failure of the accused to marry her. It was held that consent cannot be said to be given under a misconception of fact. It was held thus : (SCC pp. 56-57, paras 21 & 23)

"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

straitjacket 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.

23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.”

19. In *Deelip Singh v. State of Bihar*, (2005) 1 SCC 88, the Court framed the following two questions relating to consent : (SCC p. 104, para 30)

(1) Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in?

(2) Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her?

In this case, the girl lodged a complaint with the police stating that she and the accused were neighbours and they fell in love with each other. One day in February 1988, the accused forcibly raped her and later consoled her by saying that he would marry her. She succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her, and therefore continued to have sex on several occasions. After she became pregnant, she revealed the matter to her parents. Even thereafter, the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl, but the accused avoided marrying her and his father took him out of the village to thwart the bid to marry. The efforts made by the father of the girl to establish the marital tie failed. Therefore, she was constrained to file the complaint after waiting for some time.²⁰ With this factual background, the Court held that the girl had taken a conscious decision, after active application of mind to the events that had transpired. It was further held that at best, it is a case of breach of promise to marry rather than a case of false promise to marry, for which the accused is *prima facie* accountable for damages under civil law. It was held thus : ***Deelip Singh v. State of Bihar, (2005) 1 SCC 88*** , SCC p. 106, para 35)

“35. The remaining question is whether on the basis of the evidence on record, it is reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry. We have no doubt that the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. PW 12 was also too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of PW 12 that “later on”, the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialise

on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in *Uday v. State of Karnataka*, (2003) 4 SCC 46 at para 24 come to the aid of the appellant.”

21. In *Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675 , the Court has drawn a distinction between rape and consensual sex. This is a case of a prosecutrix aged 19 years at the time of the incident. She had an inclination towards the accused. The accused had been giving her assurances of the fact that he would get married to her. The prosecutrix, therefore, left her home voluntarily and of her own free will to go with the accused to get married to him. She called the accused on a phone number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived, she went with him to a place called Karna Lake where they indulged in sexual intercourse. She did not raise any objection at that stage and made no complaints to anyone. Thereafter, she went to Kurukshetra with the accused, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the accused. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the accused at Birla Mandir there. Thereafter, she even proceeded with the accused to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married at the court in Ambala. At the bus station, the accused was arrested by the police. The Court held that the physical relationship between the parties had clearly developed with the consent of the prosecutrix as there was neither a case of any resistance nor had she raised any complaint anywhere at any time, despite the fact that she had been living with the accused for several days and had travelled with him from one place to another. The Court further held that it is not possible to apprehend the circumstances in which a charge of deceit/rape can be levelled against the accused.

22. Recently, this Court, in *Shivashankar v. State of Karnataka*, (2019) 18 SCC 204, disposed of on 6-4-2018, has observed that it is difficult to hold that sexual intercourse in the course of a relationship which has continued for eight years is “rape”, especially in the face of the complainant's own allegation that they lived

together as man and wife. It was held as under : [***Shivashankar v. State of Karnataka, (2019) 18 SCC 204***], SCC p. 205, para 4)

“4. In the facts and circumstances of the present case, it is difficult to sustain the charges levelled against the appellant who may have possibly, made a false promise of marriage to the complainant. It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as “rape” especially in the face of the complainant's own allegation that they lived together as man and wife.”

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 latter 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 IPC.”

13. Recently, three Judges Bench of Hon’ble Apex court in ***Maheshwar Tigga Vs. State of Jharkhand, (2020) 10 SCC 108***, after referring and relying upon earlier pronouncement, has held as under :

“**13.** The question for our consideration is whether the prosecutrix consented to the physical relationship under any misconception of fact with regard to the promise of marriage by the appellant or was her consent based on a fraudulent

misrepresentation of marriage which the appellant never intended to keep since the very inception of the relationship. If we reach the conclusion that he intentionally made a fraudulent misrepresentation from the very inception and the prosecutrix gave her consent on a misconception of fact, the offence of rape under Section 375 IPC is clearly made out. It is not possible to hold in the nature of evidence on record that the appellant obtained her consent at the inception by putting her under any fear. Under Section 90 IPC a consent given under fear of injury is not a consent in the eye of the law. In the facts of the present case, we are not persuaded to accept the solitary statement of the prosecutrix that at the time of the first alleged offence her consent was obtained under fear of injury.

14. Under Section 90 IPC, a consent given under a misconception of fact is no consent in the eye of the law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest. The prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family members with regard to the relationship, and beatings given to her.

15. In *Uday v. State of Karnataka*, (2003) 4 SCC 46, the appellant and the prosecutrix resided in the same neighbourhood. As they belonged to different castes, a matrimonial relationship could not fructify even while physical relations continued between them on the understanding and assurance of marriage. This Court observed as follows : (SCC pp. 56-57, para 21)

“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 straitjacket 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.”

16. The appellant, before the High Court, relied upon *Kaini Rajan v. State of Kerala*, (2013) 9 SCC 113 in his defence. The facts were akin to the present case. The physical relationship between the parties was established on the foundation of a promise to marry. This Court set aside the conviction under Section 376 IPC also noticing *K.P. Thimmappa Gowda v. State of Karnataka*, (2011) 14 SCC 475. Unfortunately, the High Court did not even consider it necessary to deal with the same much less distinguish it, if it was possible. It is indeed unfortunate that despite a judicial precedent of a superior court having been cited, the High Court after mere recitation of the facts and the respective arguments, cryptically in one paragraph opined that in the nature of the evidence, the letters, the photograph of the appellant with the prosecutrix and the statement of the appellant under Section 313 CrPC, his conviction and sentence required no interference.

17. This Court recently in *Dhruvaram Murlidhar Sonar v. State of Maharashtra*, (2019) 18 SCC 191 and in *Pramod Suryabhan Pawar v. State of Maharashtra*, (2019) 9 SCC 608, arising out of an application under Section 482 CrPC in similar circumstances where the relationship originated in a love affair, developed over a period of time accompanied by physical relations, consensual in nature, but the marriage could not fructify because the parties belonged to different castes and communities, quashed the proceedings.

18. We have given our thoughtful consideration to the facts and circumstances of the present case and are of the considered opinion that the appellant did not make any false promise or intentional misrepresentation of marriage leading to establishment of physical relationship between the parties. The prosecutrix was herself aware of the obstacles in their relationship because of different religious beliefs. An engagement ceremony was also held in the solemn belief that the societal obstacles would be overcome, but unfortunately differences also arose whether the marriage was to solemnised in the church or in a temple and

ultimately failed. It is not possible to hold on the evidence available that the appellant right from the inception did not intend to marry the prosecutrix ever and had fraudulently misrepresented only in order to establish physical relation with her. The prosecutrix in her letters acknowledged that the appellant's family was always very nice to her.”

14. Likewise, in the case of **Sonu alias Subhash Kumar Vs. State of Uttar Pradesh and Another, (2021) 18 SCC 517**, the Hon’ble Apex Court has observed as under:-

“10. Bearing in mind the tests which have been enunciated in the above decision [**Pramod Suryabhan Pawar v. State of Maharashtra, (2019) 9 SCC 608**], we are of the view that even assuming that all the allegations in the FIR are correct for the purposes of considering the application for quashing under Section 482 CrPC, no offence has been established. There is no allegation to the effect that the promise to marry given to the second respondent was false at the inception. On the contrary, it would appear from the contents of the FIR that there was a subsequent refusal on the part of the appellant to marry the second respondent which gave rise to the registration of the FIR. On these facts, we are of the view that the High Court was in error in declining to entertain the petition under Section 482CrPC on the basis that it was only the evidence at trial which would lead to a determination as to whether an offence was established.”

15. The Hon’ble Apex Court in the case of **Uday Vs. State of Karnataka, (2003) 4 SCC 46**, has dealt with the issue in detail considering the respective provisions of IPC i.e. Section 375 and Section 90 of IPC and has observed as under :

“9. We may at the threshold notice the relevant provisions of the Penal Code, 1860, namely, Section 375 and Section 90 which read as follows:

“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 sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

“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. Learned counsel for the appellant submitted that in the context of Section 375 of the Penal Code, 1860, which is a special provision, the general provision, namely, Section 90 of the Penal Code, 1860 was not of much assistance to the prosecution. According to him, Section 375 Thirdly, Fourthly and Fifthly exhaustively enumerate the circumstances in which the consent given by the prosecutrix is vitiated and does not amount to consent in law. According to him, one has to look to Section 375 alone for finding out whether the offence of rape had been committed. Secondly, he submitted that even under Section 90 of the Penal Code, 1860 the consent is vitiated only if it is given under a misconception of fact. A belief that the promise of marriage was meant to be fulfilled is not a misconception of fact. The question of misconception of fact will arise only if the act consented to, is believed by the person consenting to be something else, and on that pretext sexual intercourse is committed. In such cases it cannot be said that she consented to sexual intercourse. He sought to illustrate this point by reference to English cases where a medical man had sexual intercourse with a girl who suffered from a bona fide belief that she was being medically treated, or where under the pretence of performing surgery a surgeon had carnal intercourse with her. In *Stroud's Judicial Dictionary* (5th Edn.) p. 510 "consent" has been given the following meaning:

"Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side."

It refers to the case of *Holman v. R.* [1970 WAR 2] wherein it was held that

"there does not necessarily have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it there is consent".

Similar was the observation in *R. v. Olugboja* [(1981) 3 WLR 585 : (1981) 3 All ER 443 : 1982 QB 320 (CA)] wherein it was observed that "consent in rape covers states of mind ranging widely from actual desire to reluctant acquiescence, and the issue of consent should not be left to the jury without some further direction". Stephen, J. in *R. v. Clarence* [(1888) 22 QBD 23 : (1886-90) All ER Rep 133 : 58 LJMC 10] observed: (All ER p. 144 C-D)

“It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true.”

Wills, J. observed: (All ER p. 135 I)

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

11. Some of the decisions referred to in *Words and Phrases*, Permanent Edition, Vol. 8A at p. 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 Sheoji Singh v. State* **Punj 123 : 1958 Cri LJ 563** : 59 Punj LR 519] it was observed: (AIR p. 126, para 7)

“7. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, 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 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 no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not 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 v. State of Kerala* [(1989) 2 Ker LJ 234] . Balakrishnan, J., as he then was, observed: (Ker LJ pp. 238-39, para 10)

“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 possession 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 it by no means follows that a mere submission involves consent. In *Jowitt's Dictionary of English Law*, 11th 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 undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.’ ”

14. In *Anthony, In re* [AIR 1960 Mad 308 : 1960 Cri LJ 927] , Ramaswami, J. in his concurring opinion fully agreed with the principle laid down in *Rao Harnarain Singh case* [AIR 1958 Punj 123 : 1958 Cri LJ 563 : 59 Punj LR 519] and went on to observe: (AIR pp. 311-12, para 21)

“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 untrammelled 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.”

16. 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 W.B.* [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] 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 this 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 Penal Code, 1860 and concluded: (Cri LJ p. 1538, para 7)

“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 continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 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 straitjacket 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 Harnarain Singh* [AIR 1958 Punj 123 : 1958 Cri LJ 563 : 59 Punj LR 519]** and by the **Kerala High Court in *Vijayan Pillai* [(1989) 2 Ker LJ 234]** has found approval by this Court in ***State of H.P. v. Mango Ram* [(2000) 7 SCC 224 : 2000 SCC (Cri) 1331]**. Balakrishnan, J. speaking for the Court observed: (SCC pp. 230-31, para 13)

“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.”

23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.

24. There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her.

25. 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, are 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 overcome 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 it. 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.”

Factual analysis of the case :-

16. Now, in the light of principles of law enunciated in aforesaid pronouncements, facts of the case would be examined and considered. But for the same, it would be appropriate to reproduce written report filed by the prosecutrix and statements of prosecutrix recorded under Section 164 and 161 of Cr.P.C. which are as follows :

Written report

प्रार्थिया का लिखित आवेदन

“सेवा में,

श्रीमान थाना प्रभारी महोदय,

थाना राजेन्द्रग्राम जिला अनूपपुर (म.प्र.)

विषय – फरियादिया के साथ अजय चौधरी निवासी रूंगटा कालोनी बुढार के द्वारा शादी का झांसा देकर बलात्कार करने के सम्बन्ध में ।

महोदय,

निवेदन है कि मैं प्रार्थिया उम्र 24 वर्ष, प्राथमिक विद्यालय में अतिथि शिक्षक हूँ वर्ष 2019 में मेरी जान पहचान अजय चौधरी निवासी रूंगटा कालोनी बुढार के साथ हुई थी। जिसके बाद अजय चौधरी द्वारा बोला गया कि मैं तुम्हें पत्नी बनाकर रखूंगा कहकर शादी का झांसा देकर मेरे घर हर्षवाह में मेरे साथ बार-बार शारीरिक सम्बन्ध बनाता रहा, बाद में मैं अजय चौधरी को शादी करने के लिये बोली तो अजय चौधरी शादी करने से इनकार कर दिया और मेरे से बिना बताये दूसरी शादी कर रहा है। अतः श्रीमान जी से निवेदन है कि अजय चौधरी के विरुद्ध उचित कार्यवाही की जाये।

प्रार्थिया

.....

उम्र 24 वर्ष ”

Statement of prosecutrix recorded under Section 164 of Cr.P.C. :

“01. मैं अपने माता-पिता एवं दादी के साथ ग्राममें रहती हूँ । मैं प्राथमिक विद्यालय में अतिथि शिक्षक के रूप में कार्यरत हूँ। मैं अभियुक्त अजय चौधरी को जानती हूँ जो एस.ई.सी.एल. धनपुरी में गार्ड के रूप में कार्यरत है । वर्ष 2019 में अजय चौधरी निवासी रूंगटा कालोनी बुढार से विवाह के सम्बन्ध में बात चीत हुई थी तथा मेरे परिवार वालों ने उससे मेरा विवाह करने का निश्चय किया था, जिस कारण से अजय चौधरी मुझसे मिलने मेरे घर आता जाता था। वर्ष 2019 से वर्ष 2021 के बीच अजय चौधरी मुझसे मिलने मेरे घर लगभग 15-20 बार आया था और वह हमेशा शाम को आता था और रात में वह ड्यूटी होने के कारण वापस चला जाता था। वह आखरी बार मुझसे मिलने दिनांक 25.02.21 को आया था । जब जब अजय चौधरी मुझसे मिलने मेरे घर हर्षवाह आता था, तब हर बार उसके और मेरे मध्य शारीरिक सम्बन्ध स्थापित हुये थे। उक्त शारीरिक सम्बन्ध स्थापित करते वक्त मेरी सहमति नहीं रहती थी, परन्तु अजय चौधरी जबरजस्ती करता था। अजय चौधरी ने जब प्रथम बार मेरे साथ माह मार्च वर्ष 2020 को जबरजस्ती शारीरिक सम्बन्ध स्थापित किये थे, जिसके बारे में मैंने अपने माता पिता से शिकायत की थी, जिन्होंने उसे खूब डांटा था। उसके बाद भी अजय चौधरी मेरे घर आता जाता रहता था और मुझसे कहता था कि “ तू मेरी पत्नी है और मैं तुझसे ही शादी करूंगा”। शारीरिक सम्बन्ध स्थापित करते वक्त मेरे घर में माता जी और दीदी जी घर पर ही रहते थे, परन्तु पिता जी घर से बाहर गये रहते थे। इसके बाद दिनांक 26.03.21 को मेरे पिता विवाह के सम्बन्ध में बात करने अजय चौधरी के मामा-मामी से मिलने ग्राम बटुरा तहसील बुढार गये थे, जिस पर अजय चौधरी के मामा-मामी ने मेरे पिता के साथ अभद्र व्यवहार किया एवं गाली गालौच की तथा यह कहते हुये मेरे पिता जी को भगा दिया कि वह अनूपपुर की लडकी के साथ अजय का विवाह करवायेंगे । अजय चौधरी मुझसे शादी करना चाहता है, परन्तु उसके मामा-मामी और मौसी उसे मुझसे शादी करने नहीं दे रहें हैं।”

Statement of prosecutrix recorded under Section 161 of Cr.P.C. :

“01. मैं उपरोक्त पते में रहती हूँ । ग्राम में प्राथमिक शाला में अतिथि शिक्षक के रूप में वर्तमान कार्यरत हूँ। अजय चौधरी को मैं जानती पहचानती हूँ जो एस.ई.सी.एल. धनपुरी में गार्ड के रूप में कार्यरत है । सन 2019 में अजय चौधरी निवासी रूंगटा कालोनी के साथ शादी तय हुई थी जो दोनों परिवारों में मेरी शादी व अजय की शादी से खुश थे। अजय चौधरी मुझसे मिलने मेरे घर हर्षवाह आता जाता था। सन 2019 से वर्ष 2021 के मध्य अजय चौधरी मेरे घर मेरे से मिलने कई बार आता जाता रहता था। जब अजय चौधरी मेरे से मिलने मेरे घर हर्षवाह में घर आता था और मेरे से बोलता था कि हमारी शादी होने वाली है कहकर मेरे से बिना मर्जी के मेरे से शारीरिक सम्बन्ध बनाता था। उस समय मेरे घर में उसकी मां व दादी रहते थे लेकिन उसको यह पता था कि अजय चौधरी शादी की बात चीत करने घर आता था लेकिन मांव दादी को यह नहीं पता था कि अजय चौधरी मेरे से जबरजस्ती शारीरिक सम्बन्ध बनाता था, अजय चौधरी बोलता था कि अगर तुम मेरे साथ शारीरिक सम्बन्ध नहीं बनाओगी तो मैं तेरे से शादी करने से मना कर दूंगा

जिससे तुम्हारे घर की बदनामी होगी और बोलता था कि घर में किसी को मत बताना नहीं तो मैं शादी नहीं करूंगा कहता था। जिसके कारण मैं अपने मां, दादी व पिता जी को घटना की बात नहीं बताती थी। इसके बाद दिनांक 26.03.21 को मेरे पिता अजय चौधरी के घर ग्राम समरा कालोनी विवाह के सम्बन्ध में बात करने गये थे तब अजय चौधरी शादी करने से इंकार कर दिया और अजय चौधरी के मामा-मामी और मौसी भी शादी से इंकार कर दिये तब मैं अपने माता पिता को घटना बतायी थी तब मैं दिनांक 05.04.21 को अपने माता पिता के साथ आकर अजय चौधरी के विरुद्ध थाना में रिपोर्ट दर्ज करायी थी। मेरी मां व दादीको मेरे हुये बलात्कार के सम्बन्ध में पहले से मालुम नहीं था जब मैं घटना की बात मां व दादी को बतायी थी तब उनको घटना की जानकारी मिली थी। यही मेरा कथन है।”

17. Thus, perusal of aforesaid written report filed by prosecutrix as well as statements recorded under Sections 161 and 164 of Cr.P.C. of prosecutrix, reveals following facts/allegations mentioned therein that are relevant for present purpose and they are as follows :-

“(i) that, At relevant point of time, prosecutrix was aged 22-24 years;

(ii) that, At the relevant point of time, prosecutrix was working as Guest teacher in Primary School;

(iii) that, incident is said to have occurred from 2019 to 2021 and prosecutrix filed written report on 05.04.2021;

(iv) that, in written report, it is only mentioned that applicant established physical relation with prosecutrix repeatedly on false pretext of marriage;

(v) that, In prosecutrix’s statement recorded under Section 164 of Cr.P.C., it is mentioned that in the year 2019, talks were held with respect to solemnization of marriage of prosecutrix with applicant Ajay Choudhary and family members of

prosecutrix had decided to solemnize marriage of prosecutrix with applicant and on account of which applicant used to come to prosecutrix's house to meet her;

(vi) that, similarly, in prosecutrix's statement recorded under Section 161 of Cr.P.C., it is mentioned that in the year 2019, prosecutrix's marriage was fixed with applicant and both the families were happy with prosecutrix and applicant's marriage and on account of which applicant used to come to the house of prosecutrix to meet her;

(vii) that, in statement of prosecutrix recorded under Section 161 as well as 164 of Cr.P.C., it is mentioned that in between 2019 to 2021, applicant had come multiple times (15-20 times) to meet prosecutrix at her house;

(viii) that, in prosecutrix's statement recorded under Section 161 and 164 of Cr.P.C., it is mentioned that applicant used to establish physical relation with prosecutrix forcibly and without her consent;

(ix) that aforesaid facts are not mentioned in written report filed by prosecutrix i.e. applicant used to establish physical relation with prosecutrix forcibly and without her consent;

(x) that, it is also evident from prosecutrix's statement recorded under Section 161 as well as 164

of Cr.P.C. that physical relations between prosecutrix and applicant have been established at the house of prosecutrix and at that time, prosecutrix's mother and grand-mother were always present in the house;

(xi) that, it is apparent from written report filed by the prosecutrix as well as statement of prosecutrix's recorded under Section 161 and 164 of Cr.P.C., that prosecutrix did not make any complaint to her mother/grand-mother about that applicant has established physical relation with his forcibly and without her consent;"

(xi) that, further, from prosecutrix's statement recorded under Section 164 of Cr.P.C., it is evident that applicant Ajay Choudhary intends/wishes to marry prosecutrix but his maternal uncle and aunt/Mausi are not permitting him to marry with prosecutrix;

(xii) that, further, from the prosecutrix's statement recorded under Sections 161 and 164 of Cr.P.C., it appears that on 26.03.2021, when prosecutrix's father had gone to meet applicant's maternal uncle and aunt to discuss the matter about marriage, than, some dispute took place between maternal uncle and aunt and prosecutrix's father and thereafter, maternal uncle and aunt of applicant refused to marry applicant with prosecutrix."

Final Conclusions :-

18. Thus, if facts/allegations, as mentioned in the preceding para, are examined and considered conjointly/cumulatively in the light of principles of law as discussed in the foregoing paras, in this Court's considered opinion, even if the allegations as mentioned in the preceding para are taken at their face value and accepted in their entirety, they do not make out the case against applicant and it cannot be said that the promise made by the applicant to marry was false.

19. Further, it is not a case of passive submission in the face of any psychological pressure exerted and there was tacit consent and the tacit consent given by prosecutrix was not the result of any misconception created in her mind. It is apparent that prosecutrix had taken a decision after active application of mind to the things that had happened. In the facts and circumstances of the case, it cannot be said that applicant established physical relation with prosecutrix on false pretext of marriage.

20. Further, having regard to overall facts and circumstances of the case, *prima facie*, it cannot be said that applicant established physical relation with prosecutrix forcibly and without her consent. Hence, in this Court's considered opinion, material ingredients, for constituting the offence of rape are missing in the present case.

21. Resultantly, in view of aforesaid, in this Court's considered opinion, there is no sufficient grounds/material to *prima facie* proceed further against the applicant and frame charges under section 376(2)(n) and 376 of IPC. *Prima facie* evidence collected

during investigating against applicant & filed with the charge-sheet do not make out ingredients necessary to constitute offence under Section 376(2)(n) and 376 of IPC. Learned trial Court has committed material/grave illegality in framing charge under Section 376(2)(n) and 376 of IPC against the applicant.

22. Hence, in view of discussion in the foregoing paras & for the reasons stated as above, instant criminal revision is allowed and the impugned order dated 05.10.2021 passed in S.T. No.81/2021 by Additional Sessions Judge, Rajendragram District -Anuppur, being illegal/incorrect is hereby set aside & applicant is discharged with respect to charge/offence under section 376(2)(n) and 376 of IPC.

23. Accordingly, this criminal revision is **disposed off**.

(ACHAL KUMAR PALIWAL)
JUDGE