

**THE HIGH COURT OF TRIPURA
AGARTALA**

CRL. A NO.21 OF 2013

Sri Rajesh @ Bapi Saha,
S/O Sri Madhusudhan Saha,
Resident of No.2 Fulkumari,
P.O. & P.S. R.K. Pur, Udaipur,
District-Gomati Tripura.

..... Appellant

- *Vs* -

The State of Tripura

..... Respondent

**BEFORE
THE HON'BLE MR. JUSTICE S.C. DAS**

For the appellant : Mr. D. Bhattacharji, Advocate

For the respondent : Mr. R.C. Debnath, Addl. P.P.

Date of hearing : **23.06.2015**

Date of delivery of
Judgment & order : **03.07.2015**

Whether Fit for Reporting :

Yes	No
√	

JUDGMENT & ORDER

In this criminal appeal the judgment and order of conviction and sentence dated 20.09.2013 passed by learned Sessions Judge, South Tripura, Udaipur in Sessions Trial Case No.57(ST/U) of 2012 has been challenged by the appellant. Charges under Sections 376(1) and 417 of IPC were framed against the accused appellant to which he pleaded not guilty and in the trial learned Sessions Judge acquitted the accused appellant from the

charge under Section 376(1) of IPC and found him guilty of the charge under Section 417 of IPC and sentenced him to suffer R.I. for six months and to pay a fine of ₹25,000/-(rupees twenty five thousand), in default of payment of fine to suffer S.I. for three months.

Aggrieved, the accused appellant filed the present appeal.

2. Heard learned counsel, Mr. D. Bhattacharji for the appellant and learned Addl. P.P., Mr. R.C. Debnath for the State respondent.

3. Prosecution case is that accused Bapi Saha alias Rajesh, a co-villager of the informant, Smti. Chanu Das(PW1), giving false assurance of marriage pretended love with her daughter, the victim prosecutrix(name kept withheld), aged about sixteen years and at first on 17.09.2010, a day of Vijaya Dashami of Durgapuja, committed rape on the victim prosecutrix and thereafter also the accused appellant used to come to the house of the informant in the darkness of night and would take her daughter in the isolated place to the bank of the pond and committed rape on about four occasions and as a result the victim prosecutrix got pregnant and the pregnancy in the meantime matured for about three months. When the victim prosecutrix could understand that she got pregnant, she asked the accused to marry her but the accused was avoiding her saying that his parents had no consent to such

marriage and therefore he was not in a position to marry her. It is alleged by the informant that the accused with the assurance of marriage on the pretext of love committed rape on her daughter and therefore by lodging FIR on 21.02.2011 before the O/C of R.K. Pur P.S. she prayed for justice.

3.1. On the basis of the FIR R.K. Pur P.S. Case No.61 of 2011 under Sections 417 and 376 of IPC was registered and during investigation statements of the informant and the victim prosecutrix were recorded under Section 164 of CrPC before the Judicial Magistrate, First Class, Udaipur and medical examination of the victim prosecutrix was done and ultimately police submitted charge sheet against the accused for commission of offence punishable under Sections 417 and 376(1) of IPC. In the course of trial, as stated hereinbefore, charges under Sections 417 and 376(1) of IPC were framed against the accused to which he pleaded not guilty.

3.2. Prosecution examined twelve witnesses and out of them PW1 is the informant and the mother of the victim prosecutrix. PW2 is the victim prosecutrix herself and they are the only material witnesses of the case. PWs 3, 4 and 5 are the teachers of Tripura Sundari J.B. School and out of them PW5 issued a school certificate in the name of the victim prosecutrix which contains her date of birth and PWs 3 and 4 are the witnesses to the seizure list. PW6 is a Laboratory Technician of Tripura Sundari District Hospital in whose presence blood samples of the victim prosecutrix, the accused and

the child were collected for DNA test and he proved the seizure list of the collection of blood samples. PW7 is the Pathologist of Tripura Sundair District Hospital and he examined urine for HCG and vaginal swab and opined that urine HCG was positive and there were no spermatozoa in the vaginal swab. PW8 is a constable of police and is a witness to the collection of blood samples. PW9 is a Radiologist of G.B. Hospital and he has done ultrasonography and opined that the victim prosecutrix was carrying pregnancy about thirteen weeks at that time. Ossification test could not be done since the victim prosecutrix was carrying pregnancy. PW10 is the scribe of the FIR. PWs 11 and 12 are the I.O. of the case.

4. It is an undisputed fact that the victim prosecutrix was pregnant of about three/three and half months when the FIR was lodged on 21.02.2011 and during the course of investigation she delivered a female child and the unfortunate female child is living with her. Besides PWs 1 and 2 there are no other local people as a witness, examined by the prosecution, to prove the prosecution case.

5. The accused has been acquitted from the charge under Section 376(1) of IPC. No appeal preferred by the State against the finding of the learned Sessions Judge acquitting the accused from the charge under Section 376(1) of IPC. The accused appellant has

challenged the judgment and order of conviction and sentence recorded by learned Sessions Judge under Section 417 of IPC.

6. Section 417 of IPC prescribes punishment for cheating and the word, “*cheating*” is defined in Section 415 of IPC which reads as follows:

“Cheating.—Whoever, by deceiving any person fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.”

To prove the ingredients of cheating the ingredients of “*fraudulently*” or “*dishonestly*” are also required to be proved. The word, “*fraudulently*” is defined in Section 25 of IPC thus:

“25. Fraudulently—A person is said to do a thing if he does that thing with intent to defraud but not otherwise.”

The word, “*dishonestly*”, is defined in Section 24 of IPC thus:

“24. Dishonestly—Whoever does anything with the intention of causing wrongful gain to one person or

wrongful loss to another person, is said to do that thing 'dishonestly'."

7. The victim prosecutrix indisputably was an unmarried girl at the time of occurrence and as stated by her mother in the FIR she was aged about sixteen years at that time. *Exbt.4, i.e.* the school certificate issued by PW5 shows that her date of birth was 02.02.1994 and so at the relevant time of occurrence she was aged about sixteen years six months. No other age proof certificate produced. PW1 in her evidence stated that at the time of her giving evidence in the case *i.e.* on 16.04.2013 the victim prosecutrix was aged about eighteen years. The victim prosecutrix in her deposition also stated her age as eighteen years. It is, therefore, clear that the victim prosecutrix was aged more than sixteen years at the time of alleged occurrence.

8. The incident as alleged first occurred on 17.09.2010 in the evening time and it was a day of Vijaya Dashami of Durgapuja. The FIR was lodged on 21.02.2011 *i.e.* more than five months after the occurrence. The victim prosecutrix was about three/three and half months pregnant when the FIR was lodged.

8.1. In the FIR the informant *i.e.* PW1 stated that on the allurements of marriage the accused committed rape with her daughter aged about sixteen years. The accused also made pretext of love and thereafter committed rape on the victim prosecutrix as

a result of which she was pregnant of about three months. Before the date of lodging FIR for a few days the victim prosecutrix was found to remain mum and when she enquired with the victim prosecutrix, she was told the fact that the accused promising her to marry and touching the feet of Goddess Durga made a pretext of love and romance on 17.09.2010 and thereafter also in her absence the accused used to come to her house very often and had taken the victim prosecutrix to the backside of the pond in the darkness of night and raped her on four occasions consecutively and as a result she became pregnant. She also stated that her daughter, the victim prosecutrix asked the accused to marry her but the accused stated that his parents had no consent about the marriage and therefore he will not marry her.

8.2. In her statement recorded under Section 164 of CrPC she stated that on the day of Vijaya Dashami of Durgapuja at Banduar bazar the accused put vermilion on the forehead of her daughter taking it from the feet of Goddess Durga and made a pretext of love and assured that he will marry her. Thereafter, with such assurance the accused developed physical relation with her daughter and as a result her daughter became pregnant of three and half months. When her daughter informed about her pregnancy to the accused he denied the fact and expressed his ignorance.

8.3. In her deposition she stated that the victim prosecutrix is her daughter and she was aged about sixteen years at that time.

About two years ago the accused Bapi Saha visited her house and developed love affairs with her daughter. He promised to marry her daughter and had sexual intercourse. As a result her daughter became pregnant. When her daughter vomited she asked her and at that time her daughter disclosed the fact that she became pregnant due to physical relation with the accused Bapi Saha. She talked with Bapi Saha and his father Madhusudhan Saha but they refused to arrange marriage of her daughter. She tried for abortion but failed. Her daughter delivered a female child and the child is now about two years old living with them. Her daughter also talked with Bapi Saha but the accused refused and did not keep relationship with her. Since the accused refused to marry her daughter she lodged the FIR which was written by a Muhuri. She proved her signature in the FIR. She also stated that she gave statement before the Magistrate and she signed it and she proved her signature. Except suggestion there is nothing in the cross-examination.

9. PW2, the victim prosecutrix in her deposition stated that she developed relation with the accused three months ago. She used to go to the grocery shop of the accused and the accused proposed to marry her and also proposed to make love with her. She did not agree to the proposal. On the day of Bisharjan(immersion) of Durgapuja the accused put vermilion on her forehead and assured to marry her and thereafter he did bad act with her and made physical relation with her. He did such act on

five days. She became pregnant. She informed her pregnancy and asked the accused to marry her but he refused. She delivered a female child. She further stated that she did not initially inform her mother but when she became pregnant she informed her mother. She was examined medically in the course of investigation and she also gave statement before the Magistrate. She duly proved her signature and the statement recorded under Section 164 of CrPC. She studied in Tripura Sundari School and she had no income. The accused is a shopkeeper. Her child lives with her. Except suggestion and denial there is nothing in the cross-examination.

In her statement recorded under Section 164 of CrPC she stated that on the day of Vijaya Dashami of last Durgapuja when everybody was going on a procession for immersion the accused asked her to remain in the pandal and accordingly she stayed there. It was about 6.00 PM. The accused collected some vermillion from the spot where Durga idol was there and put it on her forehead and told her that he loves her and intends to marry her. Thereafter he took her forcefully to the backside of the pandal and pressed her mouth so that she could not raise cry and thereafter he forcefully raped her. Thereafter she became pregnant of three and half months. When she informed the accused he expressed his ignorance. She also stated that thereafter also on another day the accused called her to the paddy land and raped her there. Subsequently, the accused did not take care of her.

10. There are some contradictions in the statements of PWs 1 and 2 but they made a consistent statement that the accused on the pretext of love and giving assurance of marriage committed sexual intercourse with the victim prosecutrix and first on a day of Vijaya Dashami of Durgapura and thereafter on several other dates. Though in their earlier statements recorded under Section 164 of CrPC as well as in the FIR PWs 1 and 2 alleged the commission of rape but in their deposition they did not make any such statement that the accused forcefully committed rape on the victim prosecutrix. Rather in the deposition, they stated that love affairs developed between the accused and the victim prosecutrix and following the love affairs the accused proposed to marry the victim prosecutrix and thereafter developed physical relation. PW1 narrated the fact so far she learnt from PW2 *i.e.* the victim prosecutrix. So, the evidence of the victim prosecutrix is of immense importance and in her evidence she clearly stated that she developed relation with the accused and she used to visit the grocery shop of the accused. The accused proposed to marry her and also proposed to make love with her and thereafter on the day of bisharjan of Durgapuja the accused put vermilion on her forehead and with the assurance of marriage committed sexual intercourse with her and thereafter on five occasions he did such act and as a result she became pregnant. So, from the evidence of PW2 *i.e.* the victim prosecutrix it is evident that she has voluntarily undergone intercourse with the accused on the assurance of marriage.

11. Section 90 of IPC deals with the consent known to be given under fear or misconception. The provision reads as follows:

"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 ; 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."

There is no allegation that the victim prosecutrix was put under fear to have sexual intercourse with the accused. The only question is whether she was under a misconception of fact because of the assurance made by the accused. The victim prosecutrix was more than sixteen years at that relevant point of time. She was unmarried. She was not an imbecile. So, it is natural that she could understand the consequence of such premarital sex with the accused on the assurance of marriage. It is quite clear that according to the victim prosecutrix she has undergone intercourse with the accused simply on the assurance of marriage alleged to have given by the accused and as a result she got pregnant. In the FIR the informant(PW1) stated that the accused refused to marry the victim since his parents have no consent about the marriage.

So, if it was true that the accused undergone intercourse with the victim on the assurance of marriage, he could not do so because his parents did not agree with the marriage. The accused did not adduce any defence evidence. Defence case is nothing but denial of the prosecution case. In his examination under Section 313 of CrPC the accused simply denied the allegations made by the prosecution. Under such circumstances, whether the victim prosecutrix was suffered from the misconception of fact while giving consent to have sexual intercourse with the accused is a very difficult task to decide.

12. The Division of the Calcutta High Court in the case of **Jayanti Rani Panda vs. State of West Bengal & Anr.** reported in **1984 CRI. L.J. 1533** has observed:

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. 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.

13. In the case of ***Udai vs. State of Karnataka*** reported in **2003(4) SCC 46** the Supreme Court has observed:

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. 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. The court 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.

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. 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. The circumstances show 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.

Further, 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.

That apart, 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 act. 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. But in the instant case, there is doubt that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant because the prosecutrix knew that her marriage with the appellant was difficult on account of caste considerations. Further, there is no evidence to prove that 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.

The prosecutrix and the appellant 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 view of the above findings, it is not necessary to consider the question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under Section 375 fourthly and fifthly, or whether consent given under a misconception of fact contemplated by Section 90 has a wider application so as to include circumstances not enumerated in Section 375 IPC."

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. 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.

14. In the case of **Deelip Singh alias Dilip Kumar vs. State of Bihar** reported in **2005(1) SCC 88**, the accused with a promise to marry the victim girl undergone intercourse with her frequently and when she got pregnant, she asked the accused to marry her but the accused did not marry and to avoid the marriage father of the accused took him out of the village to thwart the bid of marriage. The victim girl delivered a female child, who was living with her. The Apex Court, considering the facts and circumstances, acquitted the accused but with a view to render complete justice, a compensation of ₹50,000/-, which was paid by the accused for his breach of promise to marry the victim, was accepted and paid to the victim. The Court held thus:

"The Penal Code does not define 'consent' in positive terms, but what cannot be regarded as 'consent' under the

Code is explained by Section 90 IPC.. Consent given firstly under fear of injury and secondly under a misconception of fact is not 'consent' at all. That is what is enjoined by the first part of Section 90. These two grounds specified in Section 90 are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology.

Section 90 cannot, however, be construed as an exhaustive definition of consent for the purposes of the Indian Penal Code. The normal connotation and concept of 'consent' is not intended to be excluded. Various decisions of the High Court and of this Court have not merely gone by the language of Section 90, but travelled a wider field, guided by the etymology of the word 'consent'.

As regards the factual aspect of the present case related to consent questions pertinent are:- 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 prosecutor knowing fully the nature and consequences of the act she was asked

to indulge in? 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? These are the questions which have to be answered on an analysis of the evidence. The last question raises the allied question, whether the promise to marry, if made by the accused, was false to his knowledge and belief from the very inception and it was never intended to be acted upon by him. The burden is on the prosecution to prove that there was absence of consent. Of course, the position is different if the case is covered by Section 114-A of the Evidence Act. Consent or absence of it could be gathered from the attendant circumstances. The previous or contemporaneous acts or the subsequent conduct can be legitimate guides. Whether on the basis of the evidence adduced by the prosecution, it is reasonably possible to infer the lack of consent on the part of the prosecutrix is the ultimate point to be decided.

In the present case, part from the evidence of the prosecutrix, there is no other evidence which could throw light on the point in issue. First of all, there was no forcible sexual indulgence in this case, it is clear from the evidence of the prosecutrix that the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her of the prospect of marriage with the accused. That she came to the decision to have a sexual affair only after being convinced that the accused would marry her, is quite clear from her evidence which is in tune with her earliest version in the first information report. There is nothing in her evidence to demonstrate that without any scope for deliberation, she succumbed to the psychological pressure exerted or allurements made by the accused in a weak moment. Nor does her evidence indicate that she was incapable of understanding the nature and implications of the act which she consented to. On the other hand, the scrutiny of evidence of the prosecutrix gives a contra-indication. She was fully aware of the moral quality of the act and the inherent risk involved and that she

considered the pros and cons of the act. The prospect of the marriage proposal not materialising had also entered her mind. Thus, her own evidence reveals that she took a conscious decision after active application of mind to the things that were happening.

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. 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. The prosecutrix was also too keen to marry him as she said so specifically. But there is 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 the prosecutrix 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 for which the accused is prima facie accountable for damages under civil law. Therefore, conviction and sentence under Section 376 IPC against the accused-appellant is liable to be set aside.

The expression "against the will" seems to connote that the offending act was done despite resistance and opposition of the woman. In this case the prosecutrix deposed that the first sexual intercourse took place against her will, though she became a consenting party later on in view of the accused's promise to marry her. But if the rape was committed by the accused much against her will, she would not have volunteered to submit to his wish subsequent

to the alleged first incident of rape. She admitted that the accused used to talk to her for hours together and that was within the knowledge of her parents and brother. This statement also casts an element of doubt on her version that she was subjected to sexual intercourse in spite of her resistance. Above all, the version given by her in the court is at variance with the version set out in the FIR. She categorically stated in the first information report that she "surrendered before him" in view of his repeated promises to marry. In short, her version about the first incident of rape bristles with improbabilities, improvements and exaggerations. It is a different matter that she became a consenting party under the impact of his promise to marry her. But so far as the first clause of Section 375 is concerned, it is not safe to lend credence to the version of the prosecutrix that she was subjected to rape against her will in the first instance even before the appellant held out the promise to marry.

The appellant by promising to marry the victim woman, persuaded her to have sexual relations and caused pregnancy. The reprehensible conduct of the appellant left behind him a trail of misery, ignominy and trauma. The only solace is that she married subsequently. The female child born out of the illicit relationship is now living with her married mother and she is about 14 years old now. Though there is no evidence to establish beyond reasonable doubt that the appellant made a false or fraudulent promise to marry, there can be no denial of the fact that the appellant did commit breach of the promise to marry for which the accused is prima facie accountable for damages under civil law. The appellant on being asked for his response on this aspect so as to enable the Supreme Court to pass a suitable order in exercise of power vested under Article 142 of the Constitution, informed that he is prepared to pay a sum of Rs.50,000 by way of monetary compensation irrespective of acquittal. Though the said amount is not an adequate compensation, the appellant need not be called upon to pay

more for more than one reason: firstly, the appellant has been in jail for about two years by now; secondly, the accused belongs to a backward class and his family is not affluent though they have some agricultural lands; lastly, the incident took place about 15 years back and in the supervening period, the prosecutrix as well as the appellant married and he has two children. In these circumstances, the offer of the appellant is accepted. The appellant's counsel has brought a demand draft for Rs.50,000 drawn in favour of the Chief Judicial Magistrate. The Registrar concerned of the Supreme Court shall send the draft to the CJM concerned for being credited to his account in the first instance. The CJM shall take immediate steps to summon the prosecutrix whose name and address shall be furnished by the counsel for the appellant in the course of the day to the Registrar of the Supreme Court. Out the amount of Rs.50,000, a sum of Rs.10,000 shall be paid over to the prosecutrix in cash if she makes a request and the remaining amount of Rs.40,000 shall be kept in a fixed deposit in a bank in the name of the minor girl."

15. In the case of ***K.P. Thimmappa Gowda vs. State of Karnataka***, reported in ***2011 AIR SCW 2281***, almost in a similar case, the trial court acquitted the accused but the High Court found the accused guilty of committing offence under Sections 376 and 417 of IPC, but on appeal the Apex Court considering the fact that the victim was aged above sixteen years and was a consenting party to the sexual intercourse has held that the accused was entitled to get benefit of doubt and accordingly acquitted the accused and also considering the circumstances that the accused agreed to transfer two acres of land for the breach of promise to marry the victim and she had consented to accept the same.

16. Learned Addl. P.P. referring the decision of the apex court in the case of ***State of U.P. vs. Naushad*** reported in **2014 CRI. L.J. 540** has submitted that the consent obtained with the assurance of marriage is no consent and it is a consent or misconception of fact and therefore punishment under Section 376 of IPC is maintainable.

The submission of learned Addl. P.P. is of no relevance since the accused has already been acquitted from the charge under Section 376 of IPC and no appeal is preferred by the State against the order of acquittal. In the present case we are considering the appeal filed by the accused against conviction under Section 417 of IPC and under such circumstances the decision referred by learned Addl. P.P. is simply misplaced.

17. Prosecution is to prove that the victim consented to the sexual intercourse due to misconception of fact. Here in this case PW2 simply stated that the accused proposed to marry her and proposed to make love with her, put vermilion on her forehead with the assurance of marriage and thereafter committed sexual intercourse with her and as a result of which she got pregnant. There is no statement of the victim prosecutrix that she was suffering from misconception of fact because of the assurance given by the accused. She did not make any statement that had no such assurance was given she would not have surrendered herself for the

sex with the accused. She clearly stated that she first undergone intercourse on the day of bisharjan of Durgapuja and thereafter on five occasions. Normally, an unmarried young woman would not surrender herself for such premarital sex unless there was some allurements. But it has to be proved that the victim was suffering from misconception of fact because of the allurements and otherwise no decision can be arrived that the victim was actually suffering from misconception of fact. To prove cheating prosecution has to prove that there was inducement by the accused so as to deceive the victim prosecutrix to do or not to do something. Here in this case, the accused with the assurance of marriage alleged to have committed intercourse with the victim prosecutrix and the victim prosecutrix consented to the act. Her consent being found to be not due to misconception of fact, cannot therefore be regarded as an inducement on the part of the accused with a view to deceive the victim prosecutrix.

18. Another interesting fact which is argued by learned counsel, Mr. Bhattacharji is that there was DNA test of the blood samples of the victim prosecutrix, the accused and the new born baby. PWs 6 and 8 are the witnesses to the collection of blood samples for the purpose of DNA test. The report of the DNA test of the blood samples was collected and that was also placed on record but it has not been exhibited. PW12, the I.O. of the case in cross-examination stated that DNA test report observed that the accused is not the biological father of the baby. PW12 further stated that

after receiving that report he did not further investigate the case to detect the actual father of the baby. DNA test report submitted by a scientific expert and collected in the course of investigation is admissible as a piece of evidence under Section 293 of CrPC. The prosecution ought to be fair in exhibiting the document. Defence also would take step to exhibit the document. DNA test report is found at page 38 to 40 of the L.C. record and it was submitted by the Director cum Chemical Examiner of Tripura State Forensic Science Laboratory of the Government of Tripura. The examination was conducted by Dr. S. Nath, Sr. Scientific Officer cum Assistant Chemical Examiner of the Government of Tripura, DNA Typing Division. I have gone through the report since it is a Government scientific report and automatically admissible as per Section 293 of CrPC and in the report the scientific expert concluded that the victim prosecutrix is the biological mother of Popy Saha, the baby born to the victim prosecutrix and it is further observed that Rajesh Saha alias Bapi Saha is not the biological father of the Popy Saha. This report has raised a serious doubt as to whether the baby was born because of the sexual intercourse by the accused or not. Undoubtedly, under such facts and circumstances the accused is entitled to get benefit of doubt.

19. In view of the discussions made above, I am of considered opinion, that the prosecution case is doubtful and the accused is entitled to get the benefit of doubt. Accordingly, the appeal is allowed and judgment and order of conviction and

sentence dated 20.09.2013 passed by learned Sessions Judge, South Tripura, Udaipur in Case No.S.T.57(ST/U) of 2012 is set aside. The accused appellant is acquitted from the charge and he be set at liberty forthwith.

20. Send back the L.C. records along with a copy of this judgment.

JUDGE