

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.324 of 2015

Arising Out of PS.Case No. -83 Year- 2003 Thana -KADWA District- KATIHAR

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1. Dinesh Yadav @ Chamcham Yadav Son of Baldev Yadav Resident of village -
Kursel, P.S. Kadwa, District - Katihar

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Sandeep Patil, Advocate.

For the Respondent/s : Smt. Abha Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 08-08-2017

Appellant Dinesh Yadav @ Chamcham Yadav has been found guilty for an offence punishable under Section 376 IPC and sentenced to undergo RI for 8 years as well as to pay fine of Rs. 5,000/- in default thereof, to undergo imprisonment of 6 months additionally vide judgment of conviction and order of sentence dated 05.05.2015 passed by the Additional Sessions Judge-3rd, Katihar in Sessions Trial No. 52/2004.

2. Victim PW-4 (name withheld) filed a complaint petition no. 1098/2003 against Dinesh Yadav @ Chamcham Yadav, Baldeo Yadav, Kaili Devi and Raju Ghosh showing the date of occurrence from six months prior to 06.04.2003 disclosing the place of occurrence as house of complainant as well as accused putting an allegation that complainant happens to be poor lady and survives over wages having earned over manual work. About six months ago,



accused Dinesh engaged her for cleaning his cow-shed whereupon she had gone there. During course thereof, Dinesh committed rape, in spite of her protest whereupon became adamant to report police. The accused Dinesh Yadav consoled her and said that he is going to marry with her. The accused continued with the aforesaid activity persuading her that he would marry with her. As a result of which, she became pregnant and at the time of filing of complaint, her pregnancy was 4-5 months old. She disclosed the same to Dinesh Yadav and through him his parents also knew whereupon his parents got him absconded. At the other end, his parents Baldeo Yadav and Kaili Devi along with Raju Ghosh came to her place and directed her to terminate the pregnancy otherwise, threatened of dire consequences. In the aforesaid background, on 04.06.2006 at about 6.00 PM, accused, Baldeo Yadav and Kaili Devi along with Raju Ghosh made house trespass, assaulted her parents. During course thereof, they also directed that complainant should abort the pregnancy, otherwise they will not allow them to remain in the village. Villagers were also informed having no fruitful results. In spite of informing police on 08.06.2003, police did not take any kind of action whereupon, complaint petition has been filed. Furthermore, it has been asserted that she is carrying pregnancy that of Dinesh Yadav. Jagarnath Prasad, Phul Kumar Poddar, Raghunath Mandal, Basudeo Mandal,



Pirthi Poddar, Raghunath Poddar, Harendra Poddar and Lakkhi Poddar have been cited as witness.

3. The learned Magistrate directed the PS concerned to register a case and investigate the same in accordance with Section 156(3) CrPC whereupon Kadwa PS Case No. 83/2003 was registered followed with an investigation and after concluding the same, charge-sheet was submitted facilitating the trial, which met with ultimate result, subject matter of the instant appeal.

4. The defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is of complete denial.

5. It is further pleaded that the accused has got land dispute with Phul Kumar Poddar who became instrumental in getting this case filed.

6. In order to substantiate its case, prosecution had examined altogether 10 PWs out of whom PW-1, Raghunath Poddar, PW-2, Sorila Devi, mother of victim, PW-3 Phul Kumar Poddar PW-4, Tetari Devi, PW-5, Dr. Sheela Gupta, PW-6, Jagarnath Das, PW-7, Bhogan Mandal, PW-8, Raghunath Mandal, PW-9, Tulsi Pd. Sah and PW-10, Basudeo Mandal as well as had also exhibited Injury report as Ext-1.

7. Defence had also examined DW-1, Md. Yunus,



Advocate and had exhibited an application as well as signature of the appellant over the same as Ext-A, Ext-A/1.

8. It has been submitted on behalf of the appellant that the learned lower court had scrutinized as well as appreciated the evidence available on the record contrary to the proposition of law, on account thereof, the findings so recorded by the learned lower court is not at all valid, legal as well as tenable. In order to justify the same, it has been submitted that the occurrence as alleged happens to be imaginary, because of the fact that as per prosecution case, the whole event continued for months together and so, it was very difficult to accept that it was without consent as the conduct of victim, the appellant would have been properly perceived by her parents, neighbours, as allowing the appellant to continue with sexual indulgence suggest the parties to be lovelorn. Furthermore, it has also been submitted that right from inception of the prosecution, it is evident that the victim was major one and so, she was well aware of the fact that in case of meeting of two adults of opposite sex under physical intimacy would result in such kind of result including pregnancy and so, being a major allowing the situation to continue speaks itself an event of consent whereupon, the finding recorded by the learned lower court happens to be irruptive one.

9. It has further been submitted that none of the



witnesses are eyewitness to occurrence and considering the delay in institution of this case and further, having appearance of PW-3, Phul Kumar Poddar with whom appellant has got land dispute is indicative of the fact that he happens to be instrumental in getting this case out of personal grudge and vendetta. Apart from this, it is also evident that the victim was well aware of the fact that she as well as appellant belongs to two different caste apart from being co-villagers and so, marriage was not at all possible, even then, indulging herself maintaining physical intimacy speaks otherwise which, subsequently, been misutilized by way of institution of this case at the instance of PW-3.

10. Furthermore, it has also been submitted that even considering the version of the prosecution, though not admitted, but for argument's sake it happens to be breach of promise and for that Section 417 of the IPC would be attracted and the same happens to be the finding recorded by the Hon'ble Apex Court times without number. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court happens to be bad, illegal and in likewise manner, the sentence being arbitrary.

11. On the other hand, learned APP while refuting the submissions made on behalf of appellant, has submitted that from the facts of the case, it is apparent that appellant succeeded in getting



consent in deceptive manner in order to screen himself, who firstly committed rape and then, continued with said act on the false promise of marriage which he was knowing since before that he was not going to marry as was already married, as well as being co-villager as well as representing two different community. So, the lower Court rightly held that there was deception as well as misrepresentation at the end of accused/appellant while entering into physical relationship with the victim, PW-4, whereupon conviction and sentence recorded by learned lower court happens to be based upon sound legal principle. As such, the judgment impugned does not warrant any interference.

12. During course of appreciation of the evidence having adduced on behalf of prosecution, first of all, evidence of PW-5, the Doctor is to be taken. She had examined victim, PW-4 on 16.07.2003. From her evidence it is evident that she found the victim pregnant of 28-30 weeks. In the aforesaid background, no definite opinion regarding rape was given. She had not found external as well as internal injuries over the victim. In likewise manner, also found hymen old torn. Vaginal canal loose admitting two fingers easily. However, her age was not at all ascertained save and except presence of 32 teeth as found by the dental doctor. Ossification test was not done. During cross-examination, she was confined with regard to presence of 3rd molar teeth whereupon she opined that the aforesaid event is found



completed within 17-25 years and so, on query, she had opined that she might be above 20 years of age although, as stated above, the victim was not put under ossification test, nor being status of PW-5 as Gynecologist, was incompetent to assert the same.

13. From her evidence it is apparent that she found the victim (PW-4) pregnant and the pregnancy was in between 28-30 weeks which has not been challenged at the end of the defence.

14. In the aforesaid background, now the evidence of the victim, PW-4 is to be seen. During her examination-in-chief, she had stated that the occurrence is about 2 years ago. On that day, she was engaged by Dinesh Yadav to clean his cow-shed. While she was there, Dinesh committed rape as a result of which, she became pregnant. When her parents knew about the same, they convened a Panchayati but did not materialize. She had not accepted dictat of accused to abort and continued with pregnancy, as a result of which she begot a son who is along with her. She has further stated that Dinesh Yadav raped her thrice or forth time. Baldeo Yadav, Kaili Devi and Raju Ghosh had assaulted her parents in order to force them to terminate the pregnancy. She had gone to the police station but police did not record whereupon she filed a complaint case. Identified the accused in dock.

15. During cross-examination at para-7, she had stated



that she was married since before the time of occurrence. She had disclosed to her lawyer that she happens to be married. However, she had not disclosed the name of her husband in the complaint petition. In para-8, she had stated that after 5 months of occurrence, she had gone to police station for lodging of a case along with her mother, younger brother, Choukidar carrying an application which was prepared at the dictation of her mother but she is unable to say about the writer of the application. Police had not registered a case over the aforesaid application nor inquired anything from her. In para-10, she had disclosed that she had not narrated the incident to her husband who is staying at Delhi. She had stated that the accused Dinesh had raped her 3-4 times but she is unable to say the date and month. In para-12, she had stated that Dinesh had got four cattles. Who was cleaning his cow-shed now-a-days, she is unable to say. At the time when Dinesh taken her away for cleaning the cow-shed none was present. Dinesh caught hold of her hand and took her away to clean the cattle-shed. She raised alarm attracting 8-10 persons. In para-13, she had stated that after taking her inside the cattle-shed, he disclosed that as her husband deserted her whereupon he will marry with her in any circumstance and under aforesaid promiscuous event, he succeeded to develop physical intimacy under free will. In para-14, she had stated that she is unable to say the date and time of Panchayati



but during course thereof, some sort of document was prepared which, she had not filed. In para-15, she had stated that Phul Kumar Poddar is known to her. She had also admitted litigation in between Dinesh and Phul Kumar Poddar. She had further stated that her mother happens to be beggar. Her father is old and infirm. She denied the suggestion that at the instance of Phul Poddar she had instituted this case.

16. PW-1 is Raghunath Poddar, cousin brother of PW-4, the victim. He had deposed that the occurrence is about 1 ½ years ago. Accused Dinesh took away the victim on the pretext of cleaning of cow-shed where, she was raped as a result of which, she became pregnant whereupon, Panchayati was convened. Parents of Dinesh removed him. Raghunath Mandal, Bado Mandal, Nagarnath Mandal, Tulsi Sah, Chhagan Mandal, Phul Kumar Poddar and others have participated therein. The aforesaid Panchayati did not yield whereupon, victim had gone to lodge a case at police station but as the same was not registered, on account thereof, the case was filed in the court. During cross-examination at para-6, he had stated that this case has been filed by the victim as well as her father. On account of discloser having made by the victim, he came to know regarding the occurrence about 1 ½ years ago but he is unable to say the exact date as he happens to be simpleton. Panchayati was also convened but he is unable to disclose the exact date. He had also put his LTI. Panchayati



was held thrice. In para-8, he had stated that he happens to be cousin brother of the victim and so he is full aware with the occurrence. In para-9, he had further stated that the accused persons were pressurizing the victim to abort. He had further stated that he came to know about the occurrence from the victim. He denied the suggestion that being cousin of the victim, he has falsely deposed.

17. PW-2 is mother of the victim. She had stated that she had married her daughter about 3 years ago. Thereafter, her husband had gone to Delhi leaving her. Her daughter lives along with her and do manual work for her survival. Occurrence is about 1 ½ years ago. Dinesh Yadav, on the pretext of cleaning of cow-shed, taken away her daughter and raped her as a result of which she became pregnant. There was Panchayati which did not materialize. Then thereafter, case has been instituted by her daughter. She had begotten a son who is living with her. During cross-examination at para-5, she had stated that husband of her daughter deserted her saying characterless. None of the family members of her son-in-law visits. Sometimes her daughter begs. Sometimes, her daughter earns Rs. 200 to 300 from the menial work. Phul Kumar Poddar is her neighbour who is a witness of this case. In para-7, she had stated that there happens to be land dispute amongst Phul Poddar as well as Dinesh. She had further stated that Phul Poddar had come to Court. In para-8, she had stated that on



the day of filing of the case, she along with victim as well as Phul Kumar had come to court. In para-9, she had stated that her daughter disclosed regarding rape after 4-5 months. Then thereafter, she came to institute a case. No document has been created with regard to Panchayati. Then had denied the suggestion that her daughter was indulged in sin activity and taking advantageous position at the instance of Phul Poddar, this case has been instituted.

18. PW-3 is Phul Kumar Poddar who had deposed that about 1 ½ years ago the victim, her father and her mother came to him. On query, the victim had disclosed that about 5-6 months ago Dinesh Yadav engaged her for cleaning the cow-shed, where he committed rape. He further disclosed that in case of alarm, she will be murdered. If you keep silence, then he will marry and on that very score, he continued in raping her as a result of which she became pregnant. He had advised for convening Panchyati. On 04.06.2003, there was uproar at the house of victim whereupon he had gone there and seen Baldeo Yadav, Kaili Devi and Raju Ghosh engaged in assaulting the parents of the victim and directed the victim to abort otherwise, she will be assaulted and will be ousted from the village. He intervened and anyhow pacified the situation. Panchayati was convened whereunder parents of Dinesh accepted their faults and further offered to pay Rs. 10,000/- for abortion, on the other hand,



Punches insisted for marriage. Parents of Dinesh did not accept the same. Victim had begotten a son. Victim used to maintain herself by doing menial work. He was present in the Panchayati. During cross-examination at para-7, he had stated that he was present at Panchayati. At para-8 and 9, there happens to be contradiction. In para-10, he had admitted that the victim happens to be of his caste. He had further admitted that no document was prepared with regard to Panchayati. In para-11, he had disclosed that two sittings of Panchayati had held at the house of Baldeo Yadav while one sitting at the house of victim. In para-12, he had disclosed that the victim happens to be married. Her marriage solemnized about three years ago. That means to say, 1 ½ years prior to the date of occurrence. Her husband had gone to work about a year ago. 2-3 months after the occurrence, husband of victim had come to his place but had not visited the place of victim. In para-14, he had stated that Sasuralwala of victim had not participated in the Panchayati. In para-15, he had stated that Baldeo had launched a case against him one month after the occurrence. He had denied the suggestion that Dinesh is not father of the boy rather his father happens to be husband of the victim.

19. PW-6 and 8 had disowned to know about the occurrence whereupon, they were declared hostile.

20. PW-7 had stated that the victim became pregnant at



the end of Dinesh Yadav. Panchayati was held on that very score. Parents of Dinesh facilitated Dinesh to leave the place. Baldeo and Kaili Devi participated during course of Panchayati but declined to obey the dictum of the Panchayati. On 04.06.2003, Baldeo Yadav, Kaili Devi and Raju Ghosh directed the victim to abort which she declined. She had begotten a child. During cross-examination, he had stated that after marriage, victim had gone to her Sasural where she stayed for 5-6 months. On the eve of Raksha Bandhan, her husband accompanied her to her Naiher and then gone to Delhi. He had further stated in para-7 that he is not an eyewitness to occurrence rather he was one of the members of Panchayati. It was resolved in Panchayati that marriage should be solemnized but the parents of Dinesh Yadav were adamant to disobey the same, whereupon the case has been instituted.

21. PW-9 had stated that it was disclosed by the victim that Dinesh Yadav had raped her when she had gone to clean the cowshed of Dinesh Yadav having engaged therefor. Subsequently thereof, Dinesh Yadav allured her that he will marry and then he continued with the aforesaid activity as a result of which she became pregnant. Subsequently thereof, Panchayati was convened. He was also one of the participants. As the parents of Dinesh did not accede to oblige the resolution of Panchayati, then there after a case has been instituted.



During cross-examination, he had stated that he is unable to say the date of occurrence. He had further stated that the victim was already married since before the occurrence. However, she was staying at her Maika. He had denied the suggestion that son had been begotten out of wedlock.

22. PW-10 had stated that he was one of the members of the Panchayati. It was resolved that as Dinesh Yadav had raped the victim, Dinesh should marry but, his parents did not accede, whereupon, a case has been instituted. Victim had begotten a child. During cross-examination, he had stated that he had participated in the Panchayati as requested by father of the victim. Also named so many persons who have participated during Panchayati.

23. DW-1, an Advocate has been examined on behalf of defence to say that one petition was filed on 04.08.2003 at the end of Daresh Poddar over which both the parties had put their LTI. Exhibited.

24. None other than PW-4, victim is an eyewitness to the occurrence. However, pregnancy of victim, PW-4 has consistently been substantiated and is found admitted at the end of appellant also having a suggestion that the aforesaid son was begotten out of wedlock though suggest to other PWs and not to victim. Further there happens to be consistent evidence on that very score that about 1 and ½ years ago, from the date of occurrence, she



was deserted by her husband. No cross-examination has been made, neither any kind of evidence had been adduced on behalf of appellant to controvert the same. Now coming to the activities of the respective parties, it is evident from the evidence of PW-4, that she was raped at the first occasion when she had gone to clean cow-shed on being engaged by the appellant and on that very moment, she was persuaded to keep mum with an allurements at the end of appellant to marry and in the aforesaid background, he continued with physical intimacy, subsequently, leading to pregnancy. So, with regard to subsequent event, it could be on the pretext of an offer having at the end of the appellant to marry. So far, occurrence is concerned, there happens to be a specific disclosure at the end of the victim that she was raped by the appellant while she had gone to clean his cow-shed on having been engaged by him. No cross-examination at the end of appellant has been made on that very score.

25. In this regard, Section 114A of the Evidence Act is also to be taken into consideration whereunder a presumption has been allowed in favour of victim when she declines the theme of consent. The aforesaid presumption happens to be rebuttable in nature and for that, obligation goes upon the accused to discharge it properly. The first instance of rape in the cow-shed of appellant should have been properly explained at the end of appellant in such a manner



which could have exposed status of the victim to be a consenting party. Mere presence of PW-3 who has not been cross-examined on the point of land dispute persisting since before, although admitted by PW-2 will not make the situation at ease because of the fact that appellant did not succeed in dismantling the evidence of the victim. More particularly, during course of cross-examination, PW-4 had stated that Dinesh Yadav had committed rape three or four times but she is unable to disclose the exact date, month. In para-22, she had further stated that Dinesh had offered that as she had been deserted by her husband, he would marry with her and in the aforesaid background, they developed intimate relationship. So, with regard to subsequent event, it may be breach of promise, may be punishable under Section 417 IPC but so far first occurrence of rape is concerned, that remained intact. So far, the status of illiterate, rustic and simpleton witnesses are concerned, some sort of infirmity is bound to occur when they are confronted with a person having legal acumen, during course of cross-examination. Admittedly, the parties continued till its exposure by way of pregnancy and so, there was delay on that very score.

26. In *State of Himachal Pradesh v. Sanjay Kumar* as reported in **2017 Cr.L.J. 1443**, it has been held as follows:-

“24. When the matter is examined in the



aforesaid perspective, which in the opinion of this Court is the right perspective, reluctance on the part of the prosecutrix in not narrating the incident to anybody for a period of three years and not sharing the same event with her mother, is clearly understandable. We would like to extract the following passage from the judgment of this Court in *Tulshidas Kanolkar v. State of Goa*[(2003)8 SCC 590]:

“5. We shall first deal with the question of delay. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the



mere delay in lodging of the first information report does not in any way render the prosecution version brittle.”

25. In *Karnel Singh v. State of Madhya Pradesh*[(1995) 5 SCC 518], this Court observed that:

“7...The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false...”

26. Likewise, in *State of Punjab v. Gurmit Singh & Ors.*[(1996) 2 SCC 384], it was observed:

“8...The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged...”



27. In the same judgment the status of victim of rape as well as reliability of his evidence has properly been discussed under para-31 which is as follows:-

“After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim



of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance {See *Bhupinder Sharma v. State of Himachal Pradesh*[(2003) 8 SCC 551]}. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.”

28. Promiscuous indulgence under physical intimacy on the pretext of offer to marry, has to be considered in the background of intention of the parties. In case, it happens to be deceptive approach of the accused who was knowing since before that he is not going to marry, then in that circumstance, the aforesaid event would cast the liability, which, the accused has to explain.

29. In *Yedla Srinivasa Rao v. State of A.P.* as reported in (2006) 11 SCC, 615 it has been held as follows:-

“10. It appears that the intention of the accused as per the testimony of PW1 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 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 persuaded 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. In this connection, reference may be made to a decision of the Calcutta High Court in the case of [Jayanti Rani Panda v. State of West Bengal & Anr.](#), (1984) Cri.L.J.1535. In that case it was observed that in order to come within the meaning of misconception of fact, the fact must have an immediate relevance. It was also observed that if a fully grown up 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 and it was held that [Section 90](#) IPC cannot be invoked unless the court can be assured that from the inception accused never intended to marry her.



Therefore, it depends on case to case that what is the evidence led in the matter. If it is fully grown up girl who gave the consent then it is different case but a girl whose age is very tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfil right from the beginning which is apparent from the conduct of the accused, in our opinion, [Section 90](#) can be invoked. Therefore, so far as Jayanti Rani Panda (supra) is concerned, the prosecutrix was aged 21-22 years old. But, here in the present case the age of the girl was very tender between 15-16 years. Therefore, Jayanti Rani Panda's case is fully distinguishable on facts. It is always matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfil. If the court of facts come to the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise. Such consent cannot condone the offence. Reliance can also be made in the case of Emperor v. Mussammat Soma reported in (1917) CrL. Law Journal Reports 18 (Vol.18). In that case the question of consent arose in the context of an allegation of kidnapping of a minor girl. It was held that the intention of the accused was to marry the girl to one



Dayaram and she obtained Kujan's consent to take away the girl by misrepresenting her intention. In that context it was held that at the time of taking away the girl there was a positive misrepresentation i.e. taking the girls to the temple at Jawala Mukhi and thereafter they halted for the night in Kutiya (hut) some three miles distance from Pragpur and met Daya Ram, Bhag Mal and Musammat Mansa and Musammat Sarasti was forced into marrying Daya Ram. This act was found to be act of kidnapping without consent. But, in the instant case, a girl though aged 16 years was persuaded to sexual intercourse with the assurance of marriage which the accused never intended to fulfil and it was totally under misconception on the part of the victim that the accused is likely to marry her, therefore, she submitted to the lust of the accused. Such fraudulent consent cannot be said to be a consent so as to condone the offence of the accused. Our attention was also invited to the decision of this Court in the case of [Deelip Singh Alias Dilip Kumar v. State of Bihar](#), [2005] 1 SCC 88 wherein this Court took the view that prosecutrix had taken a conscious decision to participate in the sexual act only on being impressed by the accused who promised to marry her. But accused's promise was not false from its inception with the intention to seduce her to sexual act. Therefore, this case is fully distinguished from the facts as this Court found that the accused promise was not false from its inception. But in the present case we found that first accused committed rape on victim against her will and consent



but subsequently, he held out a hope of marrying her and continued to satisfy his lust. Therefore, it is apparent in this case that the accused had no intention to marry and it became further evident when Panchayat was convened and he admitted that he had committed sexual intercourse with the victim and also assured her to marry within 2 days but did not turn up to fulfil his promise before the Panchayat. This conduct of the accused stands out to hold him guilty. What is a voluntary consent and what is not a voluntary consent depends on the facts of each case. In order to appreciate the testimony, one has to see the factors like the age of the girl, her education and her status in the society and likewise the social status of the boy. If the attending circumstances lead to the conclusion that it was not only the accused but prosecutrix was also equally keen, then in that case the offence is condoned. But in case a poor girl placed in a peculiar circumstance where her father has died and she does not understand what the consequences may result for indulging into such acts and when the accused promised to marry but he never intended to marry right from the beginning then the consent of the girl is of no consequence and falls in the second category as enumerated in [Section 375](#) -"without her consent". A consent obtained by misconception while playing a fraud is not a consent.

11. ***

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14. ***



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16. ***

17. In the present case in view of the facts as mentioned above we are satisfied that the consent which had been obtained by the accused was not a voluntary one which was given by her under misconception of fact that the accused would marry her but this is not a consent in law. This is more evident from the testimony of PW1 as well as PW6 who was functioning as Panchayat where the accused admitted that he had committed sexual intercourse and promised to marry her but he absconded despite the promise made before the Panchayat. That shows that the accused had no intention to marry her right from the beginning and committed sexual intercourse totally under the misconception of fact by prosecutrix that he would marry her. Therefore, we are satisfied that the conviction and sentence awarded to the appellant is correct and no case is made out for our interference. The appeals are dismissed.”

30. In *State of U.P. v. Naushad* reported in *AIR 2014 SC 384*, it has been held under para-12 and 13 which are as follows:-

12. The answer to point no.3 is pertaining to the question of sentence awarded by the trial court to the accused. The trial court has justified in awarding of maximum sentence of life imprisonment to the accused under [Section 376](#) of the IPC on the ground that the facts of this case are of a



very grave nature. The accused being related to the prosecution used to often visit her house and took undue advantage of this relationship and kept the prosecutrix under the misconception that he would marry her and committed rape on her for more than two years thereby making her pregnant. In such circumstances, the trial court held that it would be justifiable to award the maximum sentence to the accused. We, therefore, hold that the trial court was correct in awarding the maximum sentence of life imprisonment to the accused as he has committed a breach of the trust that the prosecutrix had in him, especially due to the fact that they were related to each other. He thus invaded her person, by indulging in sexual intercourse with her, in order to appease his lust, all the time knowing that he would not marry her. He committed an act of brazen fraud leading her to believe that he would marry her.

13. A woman's body is not a man's plaything and he cannot take advantage of it in order to satisfy his lust and desires by fooling a woman into consenting to sexual intercourse simply because he wants to indulge in it. The accused in this case has committed the vile act of rape and deserves to be suitably punished for it.

31. After analyzing as well as crystallizing the legal principle as referred hereinabove, it has become crystal clear that consent is the theme which accused has to prove, as the court has to presume in light of Section 114A of the Evidence Act, contrary to it,



having at the end of victim, positive assertion that there was no consent.

32. Consent is not defined under IPC, specifically Section 375 IPC did not. However, Section 90 of the IPC deals with consent, but also did not define what constitute consent, rather it categorizes what did not constitute consent whereunder consent given by the prosecutrix under misconception of fact, would not constitute a valid consent. Moreover, obligation goes upon the accused and it is accused who has to discharge the burden in terms of Section 114A of the Evidence Act.

33. So far facts of the present case is concerned, appellant had vehemently denied the allegation without any alternative option. He had carried the same during course of his statement recorded under Section 313 CrPC and so, tried to illude.

34. It is true that like any other criminal trial, the trial of rape case has also to carry in same way having an obligation at the end of prosecution to support its case beyond reasonable doubt, but once it is supported, the onus shifts upon the accused which has to be discharged under theme of preponderance of probability.

35. Therefore, the evidence of prosecutrix, PW-4 explains substantiating the activity of appellant would have been explained at least under banner of consent, but the reason best known



to the appellant, never it been suggested nor properly pleaded. However, court delved over the same and found appellant happens to be married since before having children. The vagrancy of victim, PW-4 who was deserted, being hand to mouth virtually, had been exploited at his end and even knowing since before that he was already married having children, being of two different castes, co-villager, would not marry and even then, allured by way of offering false promise of marriage which he carried under mephitic intention and continued in sexual indulgence, is a circumstance which is found duly cared by the principle so laid down by the Hon'ble Apex Court as referred herein above.

36. In *Deepak Gulati v. State of Haryana* reported in **2013 Cr.L.J 2990**

15. [Section 114-A](#) of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Act 1872') provides, that if the prosecutrix deposes that she did not give her consent, then the Court shall presume that she did not in fact, give such consent. The facts of the instant case do not warrant that the provisions of [Section 114-A](#) of the Act 1872 be pressed into service. Hence, the sole question involved herein is whether her consent had been obtained on the false promise of marriage. Thus, the provisions of [Sections 417](#), [375](#) and [376](#) IPC have to be taken into consideration, alongwith the provisions of [Section 90](#) of the Act 1872. [Section 90](#) of the Act 1872



provides, that any consent given under a misconception of fact, would not be considered as valid consent, so far as the provisions of [Section 375](#) IPC are concerned, and thus, such a physical relationship would tantamount to committing rape.

16. This Court considered the issue involved herein at length in the case of [Uday v. State of Karnataka](#), AIR 2003 SC 1639; [Deelip Singh @ Dilip Kumar v. State of Bihar](#), AIR 2005 SC 203; [Yedla Srinivasa Rao v. State of A.P.](#), (2006) 11 SCC 615; and [Pradeep Kumar Verma v. State of Bihar & Anr.](#), AIR 2007 SC 3059, and came to the conclusion that in the event that the accused's promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.

17. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a



higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.

18. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was



unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

19. In Deelip Singh (supra), it has been observed as under:

“20. 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.”

20. This Court, while deciding Pradeep Kumar Verma (Supra), placed reliance upon the judgment of the Madras High Court delivered in N. Jaladu, Re ILR (1913) 36



Mad 453, wherein it has been observed:

“We are of opinion that the expression “under a misconception of fact” is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) states that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married..... “thus ... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person”. ... Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of [Section 90](#) IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence.”

21. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The “failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence



available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance.” [Section 90](#) IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.

37. In *State of Himachal Pradesh v. Shree Kant Shekari* reported in *AIR 2004 SC 4404*, it has been held:-

Even otherwise the High Court seems to have fallen in grave error in coming to the conclusion that the victim has not shown that the act was not done with her consent. It was not for the victim to show that there was no consent. Factually also the conclusion is erroneous right from the beginning that is from the stage when the FIR was lodged and in her evidence there was a categorical statement that the rape was forcibly done notwithstanding protest by the victim. The High Court was therefore wrong in putting burden on the victim to show that there was no consent. The question of consent is really a matter of defence by the accused and it was for him to place materials to show that there was consent. It is significant to note that during cross examination and the statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code') plea of consent was not taken or pleaded. In fact in the statement under Section 313 of the Code the plea was



complete denial and false implication.

38. Consequent thereupon, appeal sans merit and is, accordingly, dismissed.

39. Appellant is under custody which he will remain till saturation of the sentence.

(Aditya Kumar Trivedi, J)

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