

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.2509 of 2017

Arising Out of PS.Case No. -450 Year- 2005 Thana -
KHAZANIHAT District- PURNIA

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Om Prakash Mishra son of Sri Saroj Kumar Mishra, @ Saroj Kumar Mishra, Resident of Village- Court Station, P.S. K.Hat, District- Purnea.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate
	:	Mr. Arun Kumar Pandey, Advocate
	:	Mr. Swati Sinha, Advocate
For the Informant	:	Mr. Vikramdeo Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
CAV JUDGMENT

Date: 29-03-2018

The appellant/Om Prakash Mishra has been convicted under Section 376 I.P.C by judgment dated 12.06.2017 passed in Sessions Trial No. 1542 of 2010, arising out of K. Hat P.S. Case No. 450 of 2005 dated 30.12.2005 by the learned 2nd Additional District & Sessions Judge, Purnea and by order dated 17.06.2017, he has been sentenced to undergo rigorous imprisonment for seven years, to pay a fine of Rs. 25,000/- and in default of payment of fine, to further suffer simple imprisonment for one year. The amount of fine realized from the appellant has been directed to be paid to the victim.

2. The appellant was made accused in this case on the



basis of the F.I.R lodged by the victim (P.W. 3) which was lodged on 30.12.2005. In the F.I.R, she has alleged that she was being subjected to rape by the informant for about four years on the false assurance of marriage. It was further stated by her that about 2-3 days prior to lodging of the F.I.R, the appellant had married another girl, despite the family members of the appellant as well as of the girl knowing fully well that the prosecutrix was having relationship with the appellant. She has stated that in the four years of relationship with the appellant, she became pregnant twice but was forcibly made to abort. She has stated that she is desirous of getting into matrimonial relationship with the appellant and in case he refuses to do so, the family members of the appellant and the girl with whom he has married, would be held responsible for the consequences. On the basis of the aforesaid written report lodged by P.W. 3, K. Hat P.S. Case No. 450 of 2005 dated 30.12.2005 was instituted for investigation for the offence under Section 376 I.P.C.

3. The police, after investigation submitted charge-sheet under Section 376 I.P.C. However, charges were framed against the appellant under Sections 376 and 417 of the I.P.C.

4. The Trial Court, after examining six witnesses on behalf of the prosecution and three on behalf of the defence, acquitted the appellant under Section 417 I.P.C but convicted him under Section 376 I.P.C. and sentenced him as aforesaid.



5. At the trial, Amit Kumar and Banwari Mehta who have been examined as P.Ws. 1 and 2 have not supported the prosecution version and have been declared hostile.

6. The Investigating Officer of this case has also not been examined because of his death.

7. One Pramila Ramani, who is maternal grand-mother of Puja, with whom the appellant is said to have married, has been examined as P.W. 5. She has only deposed that the father of the victim worked as her Clerk and after the death of the mother of the victim, she had been residing in her house and the appellant as well as his sister always came to her house to meet her. The prosecutrix, on being asked by her about the relationship with the appellant, told her that she is going to marry him. However, she has specifically deposed before the Trial Court that during the period that the victim had been residing in her house, she had never complained against the appellant.

8. Dr. Tripti Sinha, Medical Officer (P.W. 4) who has examined the victim on 30.12.2005 has deposed that the victim had given her history of being in relationship with somebody for the last five years and had sexual intercourse with him. The last sexual encounter, as narrated by the victim, had taken place about 10-12 days prior to lodging of the F.I.R. The victim had also told her that the person with whom she was in sexual



relationship, married another girl on 27.12.2005 whereafter she had filed a police case on 30.12.2005. The last menstrual period of the victim was stated to be on 11th December, 2005. The age of the victim was assessed to be between 17-18 years by P.W. 4 but no sign of any sexual intercourse was found by her.

9. What is evident from the deposition of the witnesses aforesaid and particularly P.W. 4 is that no sign of earlier pregnancy and abortion or any recent sexual intercourse was found. The victim (P.W. 3) had stated before the doctor also that the police case was lodged by her only after the appellant had married another lady and that she was in relationship with the appellant. What also becomes evident from the deposition of P.W. 5 is that no complaint ever was made by the victim/prosecutrix during the period of relationship.

10. Thus, the only/solitary evidence with respect to rape for four years is through the mouth of the victim/prosecutrix (P.W. 3) herself. It would only be apposite in the aforesaid circumstances to examine and scrutinize, with all circumspection, the deposition of P.W. 3 to ascertain whether she was subjected to rape for the last four years against her will, in the first instance and thereafter, with her consent but the consent having been given only on the basis of the misconception that the appellant would marry her later, which he did not.



11. P.W. 3 has deposed that the occurrence is of the period between 2001 to 2005. On 25.01.2001, P.W. 3/victim had gone to the house of her friend/Mamta Kumari, who is the sister of the appellant. When she called out Mamta Kumari from the gate of her residence, the appellant came out and told her that Mamta Kumari was in the bathroom. He asked her to sit in the room. After about five minutes, the appellant came again and closed the door from inside. When P.W. 3 wanted to know the reason for closing the door, she was gagged, thrown on the ground and raped. She started crying, on which the appellant told her that it would only bring bad name to her and promised to marry her later. Hearing this, P.W. 3 kept quiet. After about some time, she came out of the room to go to her house when she met her friend/Mamta Kumari (sister of the appellant) and the mother of the appellant, who were coming from outside. Seeing them, P.W. 3 started crying. She was asked by Mamta Kumari and her mother the reason for her being upset. She narrated about the occurrence to them. Hearing the aforesaid story, the mother of the appellant expressed that if the appellant had done this to her, he would be forced to marry her. At that time, the appellant also expressed his willingness to marry P.W. 3. The mother of the appellant made her understand that she would also co-operate in getting her married to the appellant but only after the marriage of her daughter/Mamta Kumari, who had



become of marriageable age. She was also asked by the mother of the appellant not to disclose about the occurrence to anybody as it would bring bad name to her reputation as also to the reputation of the family of the appellant. Thereafter, the appellant, at an interval of about 15-20 days, always visited her house and maintained physical relationship with her.

12. After about 6-7 months of this relationship having been established, she met with an accident in which one of her legs was fractured. She was in the hospital for about 6-7 months and during that period the appellant took good care of her but continued to have sexual relationship with her even during that period. This made her believe that he would marry her. She became pregnant after some time but was forcibly made to eat medicines for abortion. The relationship but continued. The appellant kept on visiting her in the night and started blackmailing her as well. She became pregnant again but on the second occasion also, she was convinced by the appellant for abortion. She was taken to a temple where the appellant swore that he would marry her. She has identified her photograph with the appellant in a temple. The name of the medicines which she consumed for abortion and the letters written by the appellant to her which proved that she was subjected to rape on a misconception of fact were also identified by her.

13. In her cross examination, P.W. 3 has admitted that



these facts were not stated by her in the F.I.R. She has further stated that till about 2005, her father was alive. She had two other sisters but no brother. Prior to the occurrence, her mother had died. In the house where P.W. 3 was first raped, the appellant lived with his three sisters, three brothers and parents. She had visited the house of the appellant to give new year greetings to her friend/Mamta Kumari/sister of the appellant. At the time when she was raped in the first instance, she was not asked by the appellant to disrobe and was straightway subjected to sexual intercourse. She could not raise alarm because she had been gagged by the appellant.

14. During her cross examination, she was asked whether she knew Dost Mohammad. She answered in the negative but admitted that she knew one Chhotu, who was a friend of her brother-in-law. A photograph of her with Chhotu was shown to her to which she replied before the Court that the photograph was not taken along with her and that it was a framed/procured photograph. She has also admitted in her cross-examination that she used to sleep in the night in the house of Pramila Ramani (P.W. 5) along with her sister. There were three rooms in the house of Pramila Ramani (P.W. 5) and she along with her sister occupied one room.

15. From the deposition of P.W. 3, the following facts emerge indisputably:



16. Prior to her first meeting with the appellant, she did not have any relationship with him. On the first day that she met the appellant, she was raped in the house of the appellant but she did not raise any alarm. The reason assigned for not raising the alarm at the time of occurrence was that she was gagged by the appellant. She did not try to come out of the room after the act was over but stayed for some time in the house. She came out of the house sometimes later, only to meet the mother and sister of the appellant who were coming back home. She made them know about the occurrence. On the assurance of the appellant as well as his mother that the appellant would marry her later, she agreed not to report about the occurrence to anybody, much less her sister with whom she resided in the house of P.W. 5. She permitted the appellant to establish physical relationship with her at the interval of 15-20 days and even during the period that she was treated for fracture of one of her legs. The appellant had taken good care of her during the period of treatment. Twice, she became pregnant but on the asking/insistence of the appellant, she agreed for abortion and finally, she filed a case only after 2-3 days of the appellant having married another woman.

17. These admitted set of facts create a doubt whether at all, the first act of rape as alleged by the victim is correct. This is because there is no reference of any earlier relationship



between the victim and the appellant. In that event, if the victim was subjected to forceful rape, it is difficult to believe that after the rape, a mere promise of marrying her later would satisfy her and no complaint would be made by her at any quarter. If she was subjected to rape without her will, she, as a part of natural conduct of any person, would have tried to come out of the room. It cannot be doubted that rape is one of the most reprehensible crimes in the society, because it casts an impact not only on the body of the victim but also on her mind. She is rendered degraded and defiled, leaving a permanent scar on her mind and body. She does not remain a mere injured witness or an accomplice. The mindset of a person subjected to rape is absolutely different. Before P.W. 3 was promised and assured of help by the mother of the appellant, it was only a promise of the appellant that he would marry her which made her keep quite. She stayed back in the house for some time and thereafter came out to go to her home. This causes a serious doubt about the correctness of the version given by P.W. 3 about her first being raped against her will and without her consent by the appellant.

18. What further flummoxes this Court is that the appellant was permitted to establish sexual relationship with her after the first encounter, at a interval of 15-20 days continuously for about four years and also during the period when she was under treatment in hospital. This also clearly gives an impression



that there was no protest on the part of P.W. 3 or any attempt on her part to prevent the appellant from being physically intimate. This obviously is possible if the relationship is consented.

19. What is to be seen in the present context is whether the consent was on the misconception of the fact that the appellant would later marry her. "Consent" is an act of reason, accompanied by deliberation. The mind of the person giving consent for sexual act weighs, as if, on a balance: the good and evil on each side. A distinction therefore has clearly been made between rape and consensual sex.

20. However, it need be examined with extreme caution and circumspection whether in this case the consent was given on a misconception of fact. In this context, it would be only desirable to refer to Section 90 of the Indian Penal Code which defines as to what would not be a consent. Section 90 reads as follows:-

"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.”

21. On a plain reading of this Section, it becomes very clear that though consent has not been defined but what is not a consent has been explained. The victim as well as perpetrator of the crime, both, are required to know that the consent was given in consequence of any misconception.

22. There is a distinction between making a false promise for marriage which could come under the category of misconception in the mind of the victim and a breach of promise or non-fulfillment of the promise. If the promise made by the perpetrator of the crime is false from the beginning, any consent by the victim would be of no consequence. If the promise to marry is not fulfilled for reasons other than the deliberate act of the offender in not keeping up the promise after satisfying his bodily lust, it would not fall within the definition of rape as defined under Section 375 of the I.P.C. But the converse would not be true. If a false promise is made for obtaining the consent, it is rape simpliciter.



23. Section 375 of the I.P.C. defines rape. A man is said to commit rape if he subjects the victim to different acts as defined in the Section, against her will or without her consent or with her consent when the same has been obtained by putting her or any person in whom she is interested in fear of death or of hurt or with her consent when the offender knows that he is not her husband and the consent is given because the victim believes that the offender is lawfully married to her, or with her consent when she is not capable of giving such consent because of unsoundness of mind or intoxication or when she is under 18 years of age and unable to communicate consent.

24. The provision spells out conditions under which the consent would not exclude the offence of rape. What is to be noted is that if an act is committed against the will of a person, it pre-supposes that it did not have the consent of the victim. However, a separate category has been carved out where "against the will" and "without her consent" have been enumerated separately. This is only, to my mind, for being very specific and comprehensive.

25. In the present case, the factual aspects have already been enumerated. What is to be seen is whether it was a case of abject submission of victim (P.W. 3) in face of an allurement made by the appellant that he would marry her later. Whether such an allurement was only for the purposes of



beguiling the victim or was it a genuine promise of marriage by convincing the victim to take a conscious decision for permitting sexual act. Whether this tacit consent by the victim was a result of misconception created in her mind about the intentions of the appellant to marry her. These are questions which can only be answered on the basis of an analysis of the deposition of the victim and other materials brought before the Trial Court.

26. The main question to be seen is whether the promise made by the appellant was a false one only to goad the victim into subjecting herself to any sexual act.

27. From the evidence on record, what becomes very clear is that the victim stayed in the house of P.W. 5 along with her sister. The relationship with the appellant continued for a long time i.e. for four years during which period, the appellant visited the house of the prosecutrix and made her open the gate in the night. It is not possible that this kind of relationship would remain unnoticed. The victim has indicated about this relationship to the land-lady who had pointly asked her about her relationship with the appellant. P.W. 5 was informed by the victim that the appellant would marry her.

28. Seeing these facts in the background of the appellant having been taken good care of her during her post-operative days in hospital, further gives an inkling that the relationship was not superficial but there was every intention of



the appellant to marry her. The appellant appears to be in love with the victim.

29. This Court has also, out of the anxiety to discern whether the promise made by the appellant was a false one or genuine, gone through the letters, purportedly written by the appellant to the victim. The letters reveal that the relationship had become very serious and it was not possible for the appellant to have lived his life without the victim. One of the letters also indicate that a plan was hatched for eloping together. The aforesaid letters (Ext No. 2) only indicate that the marriage could not take place because of the opposition of the mother of the appellant.

30. However, these letters would be of no avail if it is found that first sexual intercourse between the appellant and the victim had taken place when the victim was not of age i.e. below the age of 18 years.

31. The records reveal that no attempt was made by the prosecution to prove that in the first instance when the victim was subjected to rape, she was less than 18 years of age. The only evidence of age before the Trial Court or before this Court is the assessment of the age of the victim as 17-18 years on 30.12.2005 when she was examined by P.W. 4. This was after four years of the relationship between the appellant and the victim. If the outer limit of the age assessed by the P.W. 4



(Doctor) is taken as the reference point, the victim would definitely be much less than 18 years of age in the year 2001. Since the allegation of rape in the first instance i.e. in the first meeting of the appellant with the victim, is found to be doubtful, it cannot be said with certainty that she was subjected to rape against her will when the victim was not of the age of giving consent.

32. In this background, the reference point would only be the statement of the victim that the last sexual encounter was about 10-12 days prior to lodging of the case. In that event, the victim would not be of a minor age and would be capable of giving consent. The evidence, part of which has already been dealt with, viz. that the victim became pregnant twice, also appears to be doubtful and not worthy of reliance for the reason that (a) no document has been provided to show that the victim was administered medicines for abortion (b) no oral or documentary evidence regarding her treatment at Diwakar hospital has been brought on record and (c) the victim had not intimated two abortions to the Medical Officer (P.W. 4) and (d) the report of P.W. 4 does not indicate any sign of sexual intercourse or previous abortions.

33. These facts coupled with the fact situation that the present case has been lodged only after the appellant performed marriage with another women, further establishes that the case



has been lodged because of the appellant not having married the victim. Even in the F.I.R, P.W. 3 has disclosed her mindset that she wants to enter into matrimonial relationship with the appellant and should it not happen, the consequences and the responsibility shall fall on the family members of the appellant and the woman with whom he has married. This clearly means that she is ready to settle the case if she is married to the appellant.

34. Section 114 of the Evidence Act, 1872 reads as follows:-

"114. Court may presume existence of certain facts.-*The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

35. This Section provides that if the prosecutrix deposes that she did not give consent, the Court shall presume that she did not in fact give such consent.

36. No discussion over this issue is necessary in the present set of facts.

37. Hence, the sole question now remains whether the consent had been obtained on the false promise of marriage.

38. In the case of **Deepak Gulati Vs. State of Haryana (2013) 7 SCC 675**, it is held as follows :-



"19. This Court considered the issue involved herein at length in Uday v. State of Karnataka, Deelip Singh v. State of Bihar, Yedla Srinivasa Rao v. State of A.P. and Pradeep Kumar v. State of Bihar 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.

20. 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.

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



not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

22. In Deelip Singh it has been observed as under: (SCC p. 99, para 19)

"19. 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 or 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."

23. This Court, while deciding Pradeep Kumar, placed reliance upon the judgment of the Madras High Court in N. Jaladu, In re, wherein it has been observed: (Pradeep Kumar case, SCC pp. 418-19, para 11)

"11. '26... ".....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 causes 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.” (N. Jaladu, In re case, ILR pp. 456-57)’ (Deelip Singh case, SCC pp. 101-02, para 26)”

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

39. In the case of **Kaini Rajan Vs. State of Kerala**



(2013) 9 SCC 113, the Hon'ble Supreme Court again held as follows:-

"14. This Court examined the scope of Section 375 IPC in a case where the facts have some resemblance with the one in hand. Reference may be made to the judgment of this Court in Deelip Singh v. State of Bihar. In that case, this Court examined the meaning and content of the expression "without her consent" in Section 375 IPC as well as whether the consent given by a woman believing the man's promise to marry her, is a consent which excludes the offence of rape. This Court endorsed the principle that a misrepresentation as regards the intention of the person seeking consent i.e. the accused, could give rise to the misconception of fact. While applying this principle to a case arising under Section 375 IPC, this Court held that the consent given pursuant to a false representation that the accused intends to marry could be regarded as consent given under misconception of fact. But a promise to marry without anything more will not give rise to 'misconception of fact' within the meaning of Section 90 IPC. This Court further held that: (SCC p. 104, para 28)

"28.....If on facts it is established that at the very



inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of [the second clause of Section 375 IPC]

In the facts of that case, this Court held, 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. The Court held that she came to the decision to have a sexual affair only after being convinced that the accused would marry her and it is quite clear from her evidence, which is in tune with her earlier version given in the first information report. The Court noticed that 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.

15. In Ramdas v. State of Maharashtra this Court held that: (SCC p. 179, para 23)

"23.....the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt



over her veracity.”

16. Vijayan v. State of Kerala was a case where the complaint was made by the prosecutrix after the alleged commission of rape on her by the accused. At the time of making the case, the prosecutrix was pregnant for about seven months. This Court did not press reliance on the sole testimony of the prosecutrix. The Court noticed that flow that no DNA test was conducted to find out whether the child was born out of the said incident and the accused was responsible for the said child.

17. K.P. Thimmappa Gowda v. State of Karnataka was a case where the accused had assured the prosecutrix that he would marry her and had sexual affair, which was repeated on several occasions as well. But he did not marry and she became pregnant. That was a case where there was delay of eight months in filing the complaint. The accused was given the benefit of doubt holding that it would not be possible to conclude that the alleged sexual act was committed without the consent of the prosecutrix.”

40. Thus, this Court is of the view that the allegation of rape in the year 2001 could not be established because of the doubtful circumstances, specially the conduct of the victim. The fact that the relationship was established thereafter continuously



for four years is an evidence of fact that the later sexual acts were with the consent of the victim. The evidence about the appellant having served the victim during her troubled days and continuing with the relationship demonstrates that there was a real intention of the appellant to marry the victim. Epistolary messages, brought on record at the instance of the victim reaffirm the aforesaid fact viz. that the appellant and the victim were in absolute love; one of such letters even depicting a plan to elope. Thus, it cannot be said that the intention of the appellant was to satisfy his body lust by giving a false hope of marriage to the victim. The marriage may or may not have taken place because of other circumstances which are not clearly known. In that event, if according to the victim, the relationship continued for four years, it would be difficult to presume that it was without the consent and against her will.

41. Under such circumstances stated above, it is also difficult for this Court to presume that the appellant had made a false promise to the victim that he would marry her and that the consent was obtained on such misconception. For not keeping his promise to marry the victim, the appellant can certainly not be convicted and sentenced for rape.

42. In view of the above mentioned discussion, I am of the considered opinion that the appellant, who has already remained in custody for quite some time, is entitled to the



benefit of doubt.

43. Accordingly, the judgment of conviction dated 12.06.2017 and order of sentence dated 17.06.2017 passed by the learned 2nd Additional District & Sessions Judge, Purnea in Sessions Trial No. 1542 of 2010, arising out of K. Hat P.S. Case No. 450 of 2005 are set aside.

44. The appeal succeeds.

45. The appellant is in jail. He is directed to be released forthwith from Jail, if not wanted in any other case.

46. A copy of the judgment be transmitted to the Superintendent of Jail for information, compliance and needful action.

(Ashutosh Kumar, J)

Shageer/-

AFR/NAFR	AFR
CAV DATE	22/03/2018
Uploading Date	29/03/2018
Transmission Date	29/03/2018

