

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.195 of 2010**

Laxmikanth, S/o. Ram Kumar Jaiswal, aged about 25 years, R/o.
Village Chichgohana, Police Station Marwahi, Distt. Bilaspur
(CG)

---- Appellant

Versus

State of Chhattisgarh, Through Police Station Marwahi, Distt.
Bilaspur (Chhattisgarh)

---- Respondent

For the appellant : Shri RN Jha, Advocate
For the respondent/State : Shri Ramakant Pandey, Panel Lawyer

Hon'ble Shri Justice Ram Prasanna Sharma**Judgment On Board****10.9.2018.**

1. This appeal is directed against the judgment of conviction and order of sentence dated 26.02.2010 passed by Additional Sessions Judge (FTC), Pendra Road, Distt. Bilaspur in Session Case No.58/2009 wherein the said Court convicted the appellant for the commission of offence under Section 376(1) of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for seven years and to pay fine of Rs.5000/- with default stipulation.

2. As per the prosecution case, prosecutrix (PW-1) was living in the company of her parents and the appellant allured her to marry with him and on this misconception of facts committed sexual intercourse with her which is not consented as per Section 90 of the IPC.

3. Learned counsel for the appellant submits as under:

(i) It is not proved that the appellant had not given his consent to marry with the prosecutrix at all and therefore, question of misconception of facts does not arise.

(ii) The prosecutrix is a major and had sufficient intelligence to understand the significance and moral quality of the act, therefore, she is a consenting party in maintaining the physical relation.

4. On the other hand, learned counsel for the State submits that the finding arrived at by the trial Court is based on proper marshaling of the evidence which is not liable to be interfered with.

5. I have heard learned counsel for the parties and perused the material available on record.

6. To substantiate the charges, the prosecution has examined as many as seven witnesses. Prosecutrix (PW-1) is the star witness and other witnesses are either hearsay witnesses or assisted the prosecution during the course of investigation after registration of FIR.

7. As per the version of the prosecutrix, on the promise of marriage, she accompanied with the appellant and stayed with him for eight days and made physical relation with him. The matter was reported only when the appellant did not marry the prosecutrix, otherwise the matter would not have been reported.

8. Now the point for consideration before this Court is whether the consent given by the prosecutrix for maintaining physical

relation is in misconception of facts or it is a consent without misconception of facts. From the evidence of the prosecutrix it is evident that she had not informed her parents namely Ashok Kumar Rai (PW-2) father of the prosecutrix and Rajkumari Rai (PW-3) mother of the prosecutrix regarding promise of marriage. In normal course, marriage is solemnized by the consent of parents of both the side. Therefore, conduct of the prosecutrix regarding not informing the promise to her parents is unnatural. In absence of information to the parents, act of the prosecutrix to accompany with the appellant is her independent act and again her conduct is willful conduct in maintaining physical relation with the appellant. The prosecutrix had option to resist physical relation before the marriage, but she assented for physical relation before marriage.

9. Looking to the entire facts and circumstances of the case, it is doubtful whether the consent was given in misconception of facts. When the family members of both the sides have no information about their relation it was not possible by the family members of the both the sides to solemnize the marriage. Without taking any course by either side to perform marriage it is a case where the prosecutrix had assented for physical relationship knowing that no process is on for their marriage. Therefore, staying with the appellant for 8 days without resistance was a choice of the prosecutrix between the resistance and assent. Therefore, it may be a case of free and voluntarily consent for maintaining physical relation and the same is no

offence because physical relation maintained by two major is not within the purview of rape as defined under Section 375 IPC.

10. Looking to the facts and circumstances of the case, finding arrived at by the trial Court is not sustainable.

11. Accordingly, the appeal is allowed. Conviction and sentence passed by the trial Court is set aside. The appellant is acquitted of the charge under Section 376(1) IPC. The appellant is reported to be on bail. His bail bonds shall remain operative for a further period of six months from today in terms of Section 437A of the CrPC.

**Sd/-
(Ram Prasanna Sharma)
JUDGE**