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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 28/09/2018****Judgment Delivered on : 10/10/2018****Criminal Appeal No. 1270 of 2014**

Anurag Soni S/o Pramod Soni age 30 years occupatin R/o vllage Kharod P.S. Shivrinarayan, District Janjgir Champa, Chhattisgarh, Tahsil Shivrinarayan, Revenue District Janjgir-Champa, Chhattisgarh.

---- Appellant**Versus**

State Of Chhattisgarh through Police Station Malkharoda, District Janjgir-Champa, Chhattisgarh.

---- Respondent

For Appellant	:	Shri Surendra Singh, Senior Advocate with Shri Goutam Khetrapal and Shri Anusueya Rajput, Advocates.
For Respondent/ State	:	Shri Ashok Swarnakar, P.L.
For the Objector	:	Smt. Meena Shastri, Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV JUDGMENT**

(1) Challenge in this appeal is to the judgment of conviction and order of sentence dated 4.12.2014 passed by Learned First Additional District Sessions Judge, Sakti, District Janjgir-Champa, Chhattisgarh in Sessions Trial No. 201 of 2013 whereby and whereunder the learned First Additional Sessions Judge has convicted the appellant for the offence under Section 376(1) of the IPC and sentenced him to undergo rigorous imprisonment for 10 years and to pay fine of ₹50,000/-, in default of payment of fine, to further undergo additional rigorous imprisonment for 6 months.

(2) Conviction is impugned on the ground that without there being any iota of evidence, the trial Court has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

(3) As per case of the prosecution, in brief, the appellant and the prosecutrix get acquainted in the year 2009. It is said that they fell in love and then a proposal of marriage was sent by the appellant to the family of the prosecutrix. At the time of incident, the appellant was posted as Junior Resident Doctor in Government Hospital, Malkharauda and the prosecutrix was studying in B. Pharmacy in Bhilai and staying there. It is alleged that on 28.4.2013, the appellant expressed his wish telephonically to meet with the prosecutrix. Responding to that, the prosecutrix went to the place of the appellant on 29.4.2013 by train, where the appellant received her at Railway Station Sakti and took her to his place of residence in Malkharauda. During her stay in the house of the appellant from 2:00 pm on 29.4.2013 to 3:00 pm on 30.4.2013, they had physical relation thrice. It is alleged that the prosecutrix refused to have physical relation, but then the appellant allured her with a promise to marry and had physical relation with her. Thereafter, the prosecutrix went back to her place. The prosecutrix called the appellant number of times asking him about the marriage and since he did not reply positively, then she informed about the incident to her family members on 6.5.2013. The family members of the prosecutrix negotiated with the family members of the appellant. On 23.5.2013, the appellant expressed his willingness to marry the prosecutrix and a social function was scheduled on 30.5.2013, which did not take place. Again the family

members of both the parties had talks, in which the marriage was negotiated and a social function was scheduled on 10.6.2013, which was again not held and further, the social event was fixed for 20.6.2013. On 20.6.2013, the appellant telephonically informed the prosecutrix that he is already married. Hence, a written complaint Ex. P/3 was given by the prosecutrix (PW-3) in police station Malkharauda on 21.6.2013, on the basis of which, the FIR Ex.P/4 was lodged.

(4) Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short 'the Code'). The investigation was carried out and on completion of the same, the charge-sheet was filed before the concerned Court.

(5) During trial, the Court below framed the charge under Section 376(1) of the IPC. The appellant denied the charge and prayed for trial. The prosecution examined 13 witnesses to prove the guilt of the appellant. Three witnesses were examined in defence. Statement of the appellant was recorded under Section 313 of the Cr.P.C. wherein the appellant denied the circumstances appearing against him and pleaded innocence and false implication in the crime in question. The appellant had made a statement that his marriage was already fixed with Priyanka Soni and this was in the knowledge of the prosecutrix, even then, the prosecutrix and her family members continued to pressurize the appellant to marry the prosecutrix and then, he married with Priyanka Soni on 10.6.2013 in Arya Samaj. For that reason, a false FIR has been lodged.

(6) After affording opportunity of hearing to both the parties, learned trial Judge convicted and sentenced the appellant as aforementioned.

(7) I have heard learned counsel for the parties, perused the judgment impugned and records of the Court below.

(8) Learned Senior counsel appearing on behalf of the appellant submits that the appellant has been erroneously convicted by the trial Court without there being any evidence of the prosecution beyond reasonable doubt. The prosecutrix is a 25 years old adult woman. She had willingly come to the place of the appellant on 29.4.2013 where she stayed and willingly had physical relation with the appellant. The prosecutrix had opportunity to walk out and raise alarm but she did not do so whereas, when she left for her place at Bhilai on 30.4.2013 she stayed in Bilaspur with her friend, where she did not inform her about the incident and she had opportunity to go to meet her parents in Koni at Bilaspur, but she did not do so. With some deliberations, she made disclosure about the incident to her parents on 9.5.2013 and then after inordinate delay a written complaint was given on 21.6.2013 which raises serious doubts on the conduct of the prosecutrix herself. The prosecutrix was previously acquainted with the appellant and she had visited the appellant earlier on one occasion before she came to the appellant's place on 29.4.2013, which she has admitted in her cross-examination in paragraph 15. The conduct of the prosecutrix itself discloses, that she herself had a desire to meet the appellant physically because of which, she stayed with the appellant. It is further submitted that ongoing through the whole statement of the prosecutrix (PW-3), it is clear that the

prosecutrix had equal desire to have physical relation with the appellant. Hence, for these reasons, the appellant cannot be held responsible for the incident that took place.

(9) Learned Senior counsel placed reliance on the judgment of the Supreme Court in the case of **Uday vs. State of Karnataka** reported in **(2003) 4 SCC 46**, in which it was held that 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. It was also held in that judgment in paragraph 25 that 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. Hence, it is submitted that this is what had happened in this case as well. Apart from that, it was preplanned by both i.e. the appellant and the prosecutrix to meet and have physical relationship. Reliance has also been placed on the judgment in the case of **Rajesh Patel vs. State of Jharkhand** reported in **AIR 2013 SC 1497**, in which the Hon'ble Supreme Court has held that the prosecutrix herself has gone to the house of the appellant and the contention urged on behalf the appellant/ accused that it was consensual sex with the prosecutrix is to be believed. This circumstance is present in this case as well. Hence, it is prayed that on these grounds, the appeal may be allowed and the appellant may be acquitted of the charges framed against him.

(10) Per contra, learned counsel for the Respondent/ State opposed the prayer and submissions. It is submitted that the appellant had taken advantage of his acquaintance with the prosecutrix and it was on his request that the prosecutrix has visited him in his place where the things happened unexpectedly and without the consent of the prosecutrix, as she continuously refused to have physical relation and the appellant made a fake promise the prosecutrix that he will marry her soon. Hence, it is a case where the appellant has used his influence over the prosecutrix to get her consent by deceit. Apart from prosecutrix (PW-3), the other witnesses have also supported the case by giving statement, that the appellant had fraudulently obtained the consent of the prosecutrix for having physical relation. Further, the fraud of the appellant is disclosed on the basis of the statement of Priyanka Soni (PW-13), who is the wife of the appellant. She stated that from about one year prior to the marriage that took place on 10.6.2013, the negotiations were going on. Hence, under these circumstances, it is further made clear that the appellant had no intention to marry the prosecutrix, even then he promised to marry her to get her consent for physical relation. Hence, it is a case in which the consent of the prosecutrix was obtained under misconception of fact because of which, the conviction against the appellant does not suffer from any infirmity. Hence, no ground is made out for interference in the impugned judgment.

(11) Learned counsel for the objector after adopting the arguments advanced by counsel for the State, submits that the consent has been defined under Section 90 of the IPC and this provision can be invoked

and considered for finding out about the consent of prosecutrix. The facts and circumstances themselves show that the prosecutrix had given consent only for the reason that the appellant had promised to marry her. This situation of consent continued up till 20.6.2013, on which date the appellant clearly disclosed that he was already married and he does not want to marry the prosecutrix, which has clarified that the consent of the prosecutrix was obtained under a misconception of fact and fraudulently; and immediately thereafter the prosecutrix has lodged FIR on the very next day i.e. 21.6.2013. Hence, there is no delay in lodging of FIR. Reliance has been placed on the judgment of Supreme Court in the case of **Yedla Srinivasa Rao vs. State of A.P.** reported in **(2006) 11 SCC 615**, in which it was held that consent obtained by accused on promise to marry the prosecutrix which he never intended, is a consent given under misconception of fact, and not a consent. Learned counsel for the objector also relied upon the judgment of **Karthi alias Karthick vs. State (represented by Inspector of Police, Tamil Nadu)** reported in **(2013) 12 SCC 710**, in which the accused after having physical relation with the prosecutrix with a promise to marry, finally declines to marry her and subsequent to that, the prosecutrix immediately informed about the entire episode to her family and the FIR was lodged. It is further submitted that in the case of **State of Uttar Pradesh vs. Naushad** reported in **(2013) 16 SCC 651**, in which it was held that the accused himself committed a breach of trust of the prosecutrix and in such case it can be held that it is not a consent as defined under Section 90 of the IPC. Hence, it is prayed that the appeal of the appellant be dismissed.

(12) In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution.

(13) The prosecutrix (PW-3) is the key witness in this case. She has stated that she got acquainted with the appellant in the year 2009, then they started meeting each other and had family relation and subsequently they both fell in love. The appellant then proposed to marry the prosecutrix, which was known to the family members of both the parties. This situation continued and then on a phone call made by the appellant, the prosecutrix acceded to his request and went to the place of the appellant on 29.4.2013, by train to Sakti station, where the appellant had come to fetch her and then the prosecutrix went to the house of the appellant. She further stated that she stayed with the appellant from 29.4.2013 to 30.4.2013 till 3:00 pm; during that time the appellant allured her with a promise to marry and had physical relation with her, though the prosecutrix was refusing to have physical relation. She has stated that on 30.4.2013, she came to Bilaspur and stayed a night in her friend's house and then went back to Bhilai on 1.5.2013. She did not inform about the incident to her parents, for the reason that the appellant had asked her not to disclose about the incident to her family members, but later the prosecutrix informed about the incident to her mother on 6.5.2013. Thereafter, the family members of both the parties started negotiating with each other. The family members of the appellant had given assurance, that the marriage will be solemnized and a social function was fixed for 30.5.2013 which could not be held because the appellant had gone somewhere without informing to anybody. An intimation was given regarding this incident to the Mahila Thana,

Bilaspur. Again the negotiations went on and then on 20.6.2013, the appellant informed telephonically the prosecutrix that he has already married the girl of his liking. On the very next day, a written complaint was given in police station Malkharauda.

(14) In cross-examination, the prosecutrix (PW-3) has reiterated all the statements that she had given in examination-in-chief. She has also admitted that on one earlier occasion also she had visited the place of the appellant. She has further stated that she had kept denying for physical relation at the time of incident. She never attempted to raise alarm in the house of the appellant. She has stated that when she came to Bilaspur she did not inform about the incident to her friend Mallika Humne. She has clearly denied that she had knowledge that the appellant had been in love with a girl Priyanka Soni (PW-13) and wanted to marry her.

(15) Pritam Soni (PW-1) is the elder brother of the prosecutrix. He has stated that on 9.5.2013 he was informed about the incident by his father and brother Pankaj Soni (PW-8) and then he tried to negotiate the marriage of the prosecutrix with the appellant. He has given the details of the talks with the family members of the appellant and thereafter, when the appellant informed that he married some other girl, the FIR was lodged. His statement has remained unrebutted in his cross-examination. Manik Chand (PW-2) is a witness of the negotiation of marriage in this case. He has similarly stated as Pritam Soni (PW-1). Amrit Lal (PW-7) is the father of the prosecutrix. He has stated that he was informed about the incident on 6.5.2013 and he stated about the

development of negotiations. Thereafter, the negotiations ended without any result and a complaint was given on 21.6.2013. Pankaj Soni (PW-8) is the brother of the prosecutrix who has also similarly stated about the negotiations that took place.

(16) Dr. C.K. Singh (PW-5) examined the prosecutrix on 22.6.2013 and she has not given any opinion regarding the commission of offence of rape in her report Ex. P/7. The medical examination report cannot be said to be of much value as this examination has taken place after sufficient delay of more than 1 ½ months. Hence, in such a case, the prosecution depends only on the evidence of the prosecutrix. Another doctor Dr. P.C. Jain (PW-9) examined the prosecutrix on 24.6.2013 and vide her report, she has stated that the prosecutrix was habitual in sexual intercourse, however, this doctor has not given any opinion regarding the commission of offence of rape, for the reason that there is no possibility to give any such opinion after passing of so much time since the date of incident. Further, it is a case of submission of the prosecutrix for sex, in which the consent is disputed.

(17) Sub-Inspector, S.P. Singh (PW-11) stated about receiving the written complaint and lodging of the FIR and about conducting the investigation in this case regarding which there is no specific change in his cross-examination. Similarly, Inspector Sheetal Sidar (PW-12) has also done some part of investigation in this case. Priyanka Soni (PW-13) is an important witness of the prosecution who has stated that since about one year prior to 10.6.2013, the negotiations of marriage of the appellant with this witness was going on and ultimately the marriage took

place on 10.6.2013 in which the family members of both the sides were present. She has stated that on 12.2.2013, the appellant had arranged a party on the occasion of her birthday, in which the prosecutrix was also present. In cross-examination, she has admitted that the prosecutrix had knowledge that the appellant was going to marry her.

(18) Defense witness, Umashankar Sahu (DW-1) has stated that he was present in the birthday party of Priyanka Soni (PW-13) where the appellant had introduced Priyanka Soni (PW-13) to his friends stating that he is going to marry that girl. This witness has not given any statement about the presence of prosecutrix (PW-3) in that party.

(19) Dr. Naresh Sahu (DW-2) has also similarly stated without mentioning the presence of the prosecutrix in that party. Anjulata Yadav (DW-3) has stated that in her knowledge she never saw the appellant meeting with any girl in his house which is only a statement of denial. Similarly, the statement given by other witnesses is also not significance as they have stated about the presence of the prosecutrix in the birthday of Priyanka Soni (PW-13).

(20) Even if the defense version is accepted as it is, that some negotiation was going on for marriage with Priyanka Soni (PW-13) and the prosecutrix was informed about the same, but the fact is that the prosecutrix (PW-3) has given a statement before the Court that when the appellant called on 28.4.2013, he said that he wanted to talk to her about their marriage and then the appellant had assured her that he would

marry her, when he wanted to have physical relation with her. This would go to show that the appellant was between two negotiations. Firstly, the negotiation of marriage with the prosecutrix (PW-3) and the secondly, negotiation of marriage with Priyanka Soni (PW-13) and by this act and conduct, the appellant made the prosecutrix to believe, that he has made a choice of marrying the prosecutrix, which creates a different scenario. Hence, the knowledge of the prosecutrix (PW-3) about the negotiation of the marriage of the appellant with Priyanka Soni (PW-13) has no consequence. Rest of the facts are clear that there is evidence about the negotiation that went on between the family members of the prosecutrix with the family members of the appellant for a long time about 1 ½ months and then ultimately the negotiation failed, when the appellant informed that he has already married Priyanka Soni (PW-13).

(21) The specific circumstances in this case is this according to the evidence that the prosecutrix had indulged with the physical relation with the appellant only once. Hence, she did not continue with that relation in the remaining times to go.

(22) In the case of **Deepak Gulati vs. State of Haryana** reported in **(2013) 7 SCC 675**, the Supreme Court observed in paragraphs 21 and 23 as under:

'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 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.'

23. This Court, while deciding **Pradeep Kumar vs. State of Bihar** reported in **(2007) 7 SCC 413**, placed reliance upon the judgment of the Madras High Court delivered in N. Jaladu, in ILR (1913) 36 Mad 453, wherein it has been observed:

'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 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.'

(23) In the case of **State of Uttar Pradesh vs. Naushad** reported in **(2013) 16 SCC 651**, the Supreme Court observed in paragraphs 19 and 20 as under:

'19. In the present case, the accused had sexual intercourse with the prosecutrix by giving false assurance to the prosecutrix that he would marry her. After she got pregnant, he refused to do so. From this, it is evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her, which act of the accused falls squarely under the definition of rape as he had sexual intercourse with her consent which was consent obtained under a misconception of fact as defined under [Section 90](#) of the IPC. Thus, the alleged consent said to have obtained by the accused was not voluntary consent and this Court is of the view that the accused indulged in sexual intercourse with the prosecutrix by misconstruing to her his true intentions. It is apparent from the evidence that the accused only wanted to indulge in sexual intercourse with her and was under no intention of actually marrying the prosecutrix. He made a false promise to her and he never aimed to marry her.'

20. In the case of [Yedla Srinivas Rao v. State of A.P.](#) (supra), with reference to similar facts, this Court in para 10 held as under:-

'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.'

Further, in para 17 of the said judgment, this Court held that:-

'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 the 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 prosecutor that he would marry her.'

Thus, this Court held that the accused in that case was guilty of the offence of rape as he had obtained the consent of the prosecutrix fraudulently, under a misconception of fact.

(24) At the cost of repetition, the facts of this case are discussed again. It is clear from the evidence present that the prosecutrix indulged in physical relation with the applicant only once and when she could not get any confirmation regarding the promise of marriage made by the appellant she disclosed about the incident to her parents on 6.5.2013 and thereafter, the parents of both the parties negotiated with each other. It appears that the appellant had other designs and he wanted to marry Priyanka Soni (PW-13) because of which, the negotiations could not finalize and during the pendency of the negotiations, the appellant has married Priyanka Soni (PW-13).

(25) The appellant himself never intended to marry her. Hence, it is a case in which the prosecutrix has submitted her physically to the appellant and given consent for physical relation because there existed the possibility of marriage with the appellant. Further the manner in which the negotiations ended clearly make out that the appellant had no intention to marry the prosecutrix as the marriage negotiation was kept in-abeyance till he married Priyanka Soni (PW-13).

(26) Hence, after due consideration, I am of this view that it is a clear case of consent obtained for physical relation from the prosecutrix by the appellant by mis-representation which amounts to misconception of fact.

Thus, it was not a consent within the meaning of Section 90 of the IPC. Hence, on the basis of this finding it is apparent that the offence under Section 376 of the IPC is clearly made out in this case, because of which there appears to be no merit in this appeal. Resultantly, this appeal is dismissed.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE