THE HIGH COURT OF TRIPURA
AGARTALA

CRL A (J) 23 OF 2018

1. Md. Burhan Uddin,
S/o Fakar Uddin, resident of South Kadamtala,
Ward No.4, P.S. Kadamtala,
District North Tripura.

2. Mst. Ruhela Begam,
W/o Md. Abdul Sahid of South Kadamtala,
Ward No.4, P.S. Kadamtala,
District- North Tripura.

…. **Convict-appellants**

– Vs –

The State of Tripura,

….Respondent

BEFORE
HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI
HON'BLE MR. JUSTICE ARINDAM LODH

For the appellants : Mr. A. Nandi, Advocate.

For the respondents : Mr. Sumit Debnath,
Additional Public Prosecutor.

Date of hearing : **08.06.2020**

Date of delivery of Judgment & Order : **15.06.2020**

Whether fit for reporting : YES

JUDGMENT & ORDER

(Arindam Lodh, J.)

FIR No.2015 KDL 057, dated 28.07.2015, was registered under Sections 342/376(i)/417/109/34 of the Indian Penal Code (for short,

IPC) and also under Section 4 of Protection of Children from Sexual Offences (POCSO) Act, 2012 by the Officer-in-Charge of Kadamtala Police Station in response to a complaint lodged by the prosecutrix [name withheld] against the appellants, *inter alia*, stating that one day about 5/6 months ago one Ruhela Begam, a neighbour called her to come to their house for the purpose of assisting her various activities of her daughter's marriage. She used to call her as 'chachi' [aunty]. Accordingly, she went to the house of Ruhela Begam. While she entered into the kitchen of Ruhela at about 10/10:30 O'clock in the morning she closed the door from outside. After a while, the accused Burhan Uddin of her own village all on a sudden opened the door from outside, entered into the said room and forcefully pressed her mouth with a handkerchief and committed rape upon her against her desire. Thereafter Burhan Uddin went out of the room. Just after the incident she narrated the fact to Ruhela Begam when she laid a proposal to get her married with Burhan. Ruhela Begam also told her not to divulge the incident to anyone. She further stated in the complaint that she used to pay visit to the house of Ruhela Begam off and on when Burhan Uddin had developed physical relationship with her alluring her to get married with him. She further stated that on 26.07.2015 A.D. her mother had taken her to Kadamtala Hospital for treatment when she was informed that she was carrying for 5(five) months. The matter was informed to

Burhan Uddin but he refused to marry her. Ruhela Begam also denied the entire episode that was happened with her.

2. During investigation, the statements of the prosecutrix was recorded under Section 164(5) of CrPC by a Judicial Magistrate. She was medically examined and the investigating officer recorded the statements of the available witnesses. Being prima facie satisfied, the investigating officer submitted charge-sheet against both accused Burhan Uddin and Ruhela Begam.

3. Being committed, the learned Special Judge, North Tripura District, Dharmanagar, framed charges against Burhan Uddin under Section 376(i) read with Section 34 of IPC and also under Section 5(g) of the POCSO Act,2012 read with Section 34 of IPC to which he pleaded not guilty and claimed to be tried. Ruhela Begam was also charged under Section 341/366A/376 D read with Section 34 of IPC and 5(g) of POCSO Act, read with Section 34 of IPC to which she pleaded her innocence and claimed to be tried.

4. During trial prosecution examined 9(nine) witnesses and introduced 11 nos. of documents including the statement [Exbt.2] of the victim recorded under Section 164(5) CrPC, medical examination report [Exbt.3] of the victim.

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5. The prosecutrix was examined as PW-1. She deposed that she was an educated girl and had love affairs with the appellant Burhan Uddin and accordingly she developed physical relationship with him. She stated that when Burhan Uddin refused to marry her she lodged the case. Later on, the accused-appellant Burhan Uddin married her. She further deposed that during their relationship she did not allow the appellant to commit sexual intercourse with her, however, during those days the appellant used to involve in forceful sexual intercourse with her in the house of Ruhela Begam forcefully. Later on, she deposed that on 2/3 occasions the appellant committed forceful intercourse with her. She became mother of a child who at the time of deposition was attaining 13 months old. Narrating her story further, she stated that the incident took place in the house of Ruhela Begam because during those days she used to visit her house for the purpose of works on the occasion of marriage of her daughter. Ruhela had called Burhan Uddin at her house. When Burhan Uddin entered into the hut, at that time Ruhela Begam closed the door from outside and thereafter Burhan committed forceful intercourse with her. She proved the contents of the FIR [Exbt.1]. She also deposed that she had given her statement [Exbt.2] to a Judicial Magistrate. She also produced the Photo copy of her original birth certificate. Finally, she deposed in her examination-in-chief

that at present she had no allegation against Ruhela Begam and Burhan Uddin.

5.1 Being confronted with cross-examination, the prosecutrix stated that—*"Incident took place about 5 months earlier from the date of ejahar."* She informed the matter of her pregnancy to the president of their Muslim society before lodging FIR. After the case was lodged the president, namely, Kaalam had arranged their marriage before arrest of the accused Burhan. She denied in cross-examination that she was aged about 20 years at that time. She deposed that there were many huts adjacent to the hut of Ruhela Begam but her mouth was wrapped by a handkerchief of the accused. She further stated in cross-examination that after the offence the appellant had released her but she did not raise any alarm. She admitted in cross examination that she had love affairs for about one and half years with the appellant, Burhan Uddin.

6. PW-2 Rayna Begam is the mother of the prosecutrix. She deposed that she came to know from her daughter that she was made pregnant by the appellant Burhan Uddin when she was carrying for 5(five) months. She further deposed that when the incident of pregnancy was circulated in the locality, Burhan Uddin and his parents refused to marry her daughter. They reported the matter to the local Panchayat but having

failed to reach any amicable settlement, her daughter lodged the FIR. She further deposed that after the case was lodged, marriage of her daughter was solemnized with the appellant Burhan Uddin. After two months the appellant deserted her daughter from his house. She deposed that she wanted punishment against both the appellants.

7. PW-3 is the seizure witness of the blood, saliva and semen smaples of Burhan Uddin, the appellant.

8. PW-4, a police constable is also a seizure witness of vaginal swab, blood sample, saliva sample of the victim prosecutrix.

9. PW-5 is Dr. Saptam Bhattacharjee who conducted Ultra Sonography test of the prosecutrix.

10. Pw-6 Biswajit Paul, being a Dental Surgeon after examination of the prosecutrix found that she was above 16 years of age.

11. PW-7 is a formal witness. PW-8 is the Scribe who wrote the ejahar on the basis of factual information supplied by the prosecutrix.

12. PW-9 being the O.C., Kadamtala P.S. himself took the investigation of the case and after observing the formalities, he submitted charge-sheet against the accused-appellants.

13. We have heard Mr. A. Nandi, learned counsel appearing for the appellants and Mr. S. Debnath, learned Addl. P.P. appearing for the State-respondent.

14. Mr. Nandi, learned counsel submitted that both the appellants were falsely implicated with the instant case. Both the prosecutrix and the appellant Burhan Uddin were involved in sexual intercourse out of deep love between them. The prosecutrix voluntarily consented to such physical relationship. There are no ingredients of Section 376(D)/34 of IPC to punish the appellants under these offences as returned by learned trial Judge.

15. On the other hand, Mr. S. Debnath, learned Addl. P.P. submitted that the prosecutrix in her evidence categorically stated that in pursuance of promise she surrendered herself to the desire of Burhan Uddin and the other appellant namely Ruhela Begam had actively participated to commit offences of rape.

16. On the basis of aforesaid submissions, we have examined the evidence and other materials on record. A brief summarization of the testimonies of witnesses and evidences has been made hereunder.

17. PW-1, the prosecutrix. She was very categoric to her statement that –"*I had love affairs with Burhan Uddin and accordingly, I also developed physical relationship*." The said statement amply makes it clear that she had love affairs with the appellant Burhan and out of that love affairs, she had developed physical relationship with him. She has never stated in her evidence that before their sexual intercourse, the appellant Burhan had promised to marry her and on the basis of such promise, the prosecutrix had surrendered herself to satisfy his lust. She has stated that she went to the house of Ruhela Begam where she was raped by Burhan forcefully. But immediately after the incident she did not divulge the incident to any of her close relatives including her mother. More so, it has come to the fore that she frequently used to go to the house of Ruhela Begam where she permitted the appellant to involve in sexual intercourse without any hesitation.

18. In the said circumstances, in our opinion, the facts emerged from the statement of the prosecutrix do not attract Section 376 (i) of IPC. Section 375 of IPC defines rape. The relevant portion may be reproduced herein-below:

"375.Rape—A man is said to commit "rape" if he-

* * *

Under the circumstances falling under any of the following seven descriptions—

Firstly—

Secondly—Without her consent.

* * *

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."

Section 90 of IPC may be extracted hereunder:

***"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"*

19. The Apex Court in ***Pramod Suryabhan Pawar v. State of Maharashtra & Anr.,*** reported in ***(2019) 9 SCC 608*** while discussing the issue had observed thus:- [SCC PP.616,617,618,619]

"*10.Where a woman does not "consent" to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term "consent", a "consent" based on a "misconception of fact" is not consent in the eyes of the law.*

> *11. The primary contention advanced by the complainant is that the appellant engaged in sexual relations with her on the false promise of marrying her, and therefore her "consent", being premised on a "misconception of fact" (the promise to marry), stands vitiated.*
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> *12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In Dhruvaram Sonar (2019) 18 SCC 191 which was a case involving the invoking of the jurisdiction under Section 482, this Court observed:(SCC para 15)*
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> > *"15. ... An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of."*
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> *This understanding was also emphasised in the decision of this Court in Kaini Rajan v State of Kerala (2013) 9 SCC 113: (SCC p.118, para 12)*
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> > *"12. ..."Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."*

20. In the case of ***Anurag Soni v. State of Chattisgarh***, reported in ***(2019) 13 SCC 1***, the Apex Court quite elaborately has dealt with

Section 90 of IPC and the fact of rape on the basis of misconception of facts after referring to series of cases in this regard and held thus:

> *"9. In the present case, the accused has been convicted for the offence under Section 376 of the IPC. It is the case on behalf of the appellant accused that as it is a case of a consensual sex, the Courts below have committed an error in convicting the accused for the offence under Section 376 of the IPC. Both the Courts below have accepted the case of the prosecution that the consent of the prosecutrix was given on the basis of misconception of fact and, therefore, considering Section 90 of the IPC, such a consent cannot be said to be a consent and, therefore, the accused has committed the rape as defined under Section 375 of the IPC and thereby has committed an offence under Section 376 of the IPC. Therefore, the question which has been posed before this Court is, whether in the facts and circumstances of the case and considering the evidence on record, the Courts below have committed any error in holding the accused guilty for the offence under Section 376 of the IPC?*
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> *10. While considering this appeal on merits further, some of the decisions of this Court on Section 375 and Section 90 IPC and on the consent/consensual sex are required to be referred to and considered:*
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> *10.1 In the case of Kaini Rajan v. State of Kerala (2013) 9 SCC 113, this Court has explained the essentials and parameters of the offence of rape. In the said decision, in para 12, this Court observed and held as under:(SCC p.118)*
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> > *"12. Section 375 IPC defines the expression "rape", which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as*

excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression "consent". Section 90, though, does not define "consent", but describes what is not consent. "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. (See State of H.P. v. Mango Ram (2000) 7 SCC 224"

10.2 In the case of Deepak Gulati v. State of Haryana (2013)7 SCC 675, this Court observed and held in paragraphs 21 and 24 as under:(SCC pp. 682-84)

"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 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.

* * * *

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."

10.3 In the case of Yedla Srinivasa Rao v. State of A.P.(2006) 11 SCC 615, this Court also considered the amendment made in the Indian Evidence Act – Section 114-A of the Evidence Act. In that case, the sexual intercourse was committed with the prosecutrix by the

accused. As per the prosecutrix, the accused used to come to her sister's house in between 11 a.m. and 12 noon daily and asked her for sexual intercourse with him. She refused to participate in the said act but the accused kept on persisting and persuading her. She resisted for about 3 months. On one day, the accused came to her sister's house at about 12 noon and closed the doors and had sexual intercourse forcibly, without her consent and against her will. When she asked the accused as to why he spoiled her life, he gave assurance that he would marry her and asked her not to cry, though his parents were not agreeing for the marriage. It was found that on the basis of the assurance given by the accused this process of sexual intercourse continued and he kept on assuring that he would marry her. When she became pregnant, she informed about the pregnancy to the accused. He got certain tablets for abortion but they did not work. When she was in the third month of pregnancy, she again insisted for the marriage and the accused answered that his parents are not agreeable. She deposed that had he not promised, she would not have allowed him to have sexual intercourse with her. The question was raised before the Panchayat of elders and the prosecutrix was present in the Panchayat along with her sister and brother-in-law. The accused and his father both attended the Panchayat and the accused admitted about the illegal contacts with the prosecutrix and causing pregnancy. The accused asked for two days' time for marrying the prosecutrix and the Panchayat accordingly granted time. But after the Panchayat meeting the accused absconded from the village and when the accused did not fulfill his promise which was made before the Panchayat, the prosecutrix lodged the complaint. Considering the aforesaid facts and after considering Section 90 of the IPC, this Court convicted the accused for the offence under Section 376 of the IPC. While convicting the accused, this Court in paragraphs 9, 10,15 and 16 observed and held as under:

> *"9. The question in the present case is whether this conduct of the accused apparently falls under any of*

the six descriptions of Section 375 IPC as mentioned above. It is clear that the prosecutrix had sexual intercourse with the accused on the representation made by the accused that he would marry her. This was a false promise held out by the accused. Had this promise not been given perhaps, she would not have permitted the accused to have sexual intercourse. Therefore, whether this amounts to a consent or the accused obtained a consent by playing fraud on her. Section 90 of the Penal Code says that if the consent has been given under fear of injury or a misconception of fact, such consent obtained, cannot be construed to be a valid consent. Section 90 reads as under:

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 perso**n] 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."*

10. It appears that the intention of the accused as per the testimony of PW 1 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 the 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 persuading 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. …….

* * * *

15. In this connection reference may be made to the amendment made in the Evidence Act. Section 114-A was introduced and the presumption has been raised as to the absence of consent in certain prosecutions for rape. Section 114-A reads as under:

"114-A. Presumption as to absence of consent in certain prosecutions for rape.—In a prosecution for rape under clause (a) or clause (b) or clause(c) or clause (d) or clause (e) or clause (g) of sub section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

16. If sexual intercourse has been committed by the accused and if it is proved that it was without the consent of the prosecutrix and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

Presumption has been introduced by the legislature in the Evidence Act looking to atrocities committed against women and in the instant case as per the statement of PW 1, she resisted and she did not give consent to the accused at the first instance and he committed the rape on her. The accused gave her assurance that he would marry her and continued to satisfy his lust till she became pregnant and it became clear that the accused did not wish to marry her."

10.4 In the case of State of U.P. v. Naushad (2013) 16 SCC 651, in the similar facts and circumstances of the case, this Court reversed the acquittal by the High Court and convicted the accused for the offence under Section 376 of the IPC. This Court observed and held as under:

"17. Section 376 IPC prescribes the punishment for the offence of rape. Section 375 IPC defines the offence of rape, and enumerates six descriptions of the offence. The description "secondly" speaks of rape "without her consent". Thus, sexual intercourse by a man with a woman without her consent will constitute the offence of rape. We have to examine as to whether in the present case, the accused is guilty of the act of sexual intercourse with the prosecutrix "against her consent". The prosecutrix in this case has deposed on record that the accused promised marriage with her and had sexual intercourse with her on this pretext and when she got pregnant, his family refused to marry him with her on the ground that she is of "bad character".

18. How is "consent" defined? Section 90 IPC defines consent known to be given under "fear or misconception" which reads as under:

"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;"

Thus, if consent is given by the prosecutrix under a misconception of fact, it is vitiated.

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 IPC. Thus, the alleged consent said to have been 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. ....."

10.5 Even in the case of Dr. Dhruvaram Murlidhar Sonar (2019) 18 SCC 191, upon which reliance has been placed by the learned counsel appearing on behalf of the accused, in para 23, this Court has observed that there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant 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 later falls within the ambit of cheating or deception, this Court observed and held as under:

> *"23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant 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 later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. 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 the misconception created by 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. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC."*

10.6 The High Court of Delhi in Sujit Ranjan v. State [Criminal Appeal No. 248 of 2011 decided on 27.01.2011], after referring to and considering several decisions of this Court, ultimately in paragraph 16, observed and held as under:

> *"16. Legal position which can be culled out from the judicial pronouncements referred above is that the consent given by the prosecutrix to have sexual intercourse with whom she is in love, on a promise that he would marry her on a later date, cannot be considered as given under "misconception of fact".Whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under "misconception of fact" depends on the facts of each case. While considering the question of*

consent, the Court must consider the evidence before it and the surrounding circumstances before reaching a conclusion. Evidence adduced by the prosecution has to be weighed keeping in mind that the burden is on the prosecution to prove each and every ingredient of the offence. Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had no intention to marry prosecutrix at all from inception and that promise made was false to his knowledge. The failure to keep the promise on a future uncertain date may be on account of variety of reasons and could not always amount to "misconception of fact" right from the inception."

11. So far as the decisions upon which reliance has been placed by the learned counsel appearing on behalf of the accused referred to hereinabove are concerned, the same shall not be applicable to the facts of the case on hand. In the case of Tilak Raj (2016) 2 SCC (Cri) 247, the prosecutrix was an adult and matured lady of around 40 years at the time of the incident. It was admitted by the prosecutrix in her testimony that she was in a relationship with the accused for last two years prior to the incident and he used to stay overnight at her residence. Therefore, considering the evidence as a whole, including FIR, testimony of the prosecutrix and the MLC report, this Court found that the story of the prosecutrix regarding sexual intercourse on false pretext of marrying her is concocted and not believable and on facts it was found that the act of the accused seems to be consensual. It is required to be noted that before this Court the accused was acquitted for the offence under Section 376 of the IPC, however, the High Court convicted him under Sections 417 and 506 of the IPC. Therefore, on facts, the said decision shall not be of any assistance to the appellant in the present case.

11.1 Even in the case of Deepak Gulati (supra) it was observed that the accused can be convicted for rape if the court reaches the conclusion that the intention of the

accused was mala fide, and that he had clandestine motives.

11.2 Even the decisions of this Court in Uday (2003) 4 SCC 46, Deelip Singh (2005)1 SCC 88 and Shivashankar alias Shive v. State of Karnataka (2019) 18 SCC 204 shall not be applicable to the case of the accused on hand.

12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 of the IPC and can be convicted for the offence under Section 376 of the IPC."

21. Applying the law laid down by the Apex Court in the above authorities, if we revisit the evidence of the prosecutrix then the following facts are revealed:

(1) Firstly, the prosecutrix had developed love affairs with Burhan Uddin. The houses of both the prosecutrix and Burhan Uddin are situated in close proximity to each other.

(2) Her statement to the effect that—"*I had love affairs with Burhan Uddin and accordingly I also developed physical relationship"* appears to be very significant and deciding factor of the present case as it is

apt to say that the prosecutrix was in love with Burhan Uddin and accordingly out of that love affairs, she developed physical relationship with him.

22. Here, we find that the prosecutrix used to visit the hut of Ruhela Begam off and on where she had permitted Burhan Uddin to involve in sexual intercourse with her. In our opinion, this liberty is only permitted to a person with whom one is in passionate love. She did not divulge their relationship to anyone. Even she suppressed the fact of alleged 'rape' to her mother who was never intimated about the development of their relationship on the basis of promise of marriage by the appellant. Only when she was found to be pregnant that too after 5 months, her mother took her to a hospital for her examination when her pregnancy was detected. There is no evidence that the appellant Burhan Uddin had promised to marry her before being involved in sexual intercourse.

23. In ***Promode Suryabhan (supra)***, the Supreme Court having taken into account its earlier decisions held that –

> *"18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a*

> *"misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."*

24. In the instant case, as we said earlier that there is no evidence that the prosecutrix had given consent on the basis of misconception of fact arising out of a promise to marry, to say the least, that the promise of marriage was a false promise which was given in bad faith and with no intention of being adhered to.

25. We find no nexus between any false promise made in bad faith on behalf of the appellant Burhan Uddin and development of physical relationship with the prosecutrix. It is evinced that what she subsequently termed as 'rape' that occurred for the first time at the hut of Ruhela Begam, appellant No.2, she did not disclose it to any of her relatives. In furtherance thereof, she continued her visitation to the house of Ruhela Begam on her own will only to meet Burhan Uddin and permitted him to engage in sexual act with her. In her cross-examination also, the prosecutrix has categorically stated that she had love affairs with the appellant Burhan Uddin and she has no complaint against Ruhela Begam as well as Burhan Uddin. The allegations made by prosecutrix against the appellant as prosecution tried to project the genesis of the charges belie the case that she

was deceived by the appellant's promise of marriage. As such, in the circumstances, even if the facts set out in the narration of the prosecutrix are accepted in its entirety, no offence under Section 375 of IPC was occurred.

26. For the reasons stated above, we are in total disagreement with the findings returned by the learned Special Judge, holding the appellants guilty of committing offence as aforestated.

27. Accordingly, the judgment and order of conviction and sentence dated 03.05.2018, passed in Case No. POCSO 05 of 2016 against the appellants by the learned Special Judge, North Tripura, Dharmanagar are set aside and quashed.

28. In the result, the appellants namely, Burhan Uddin and Mst. Ruhela Begam are acquitted of the charges levelled against them. They are set at liberty. The surety(s) of their bail bond also stands discharged.

The appeal accordingly stands allowed.

Send down the LCRs.

JUDGE **CHIEF JUSTICE**