

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.245 of 2022

Arising Out of PS. Case No.-258 Year-2019 Thana- SABAUR District- Bhagalpur

JITU YADAV @ JITENDRA KUMAR S/O KAILASH YADAV R/o village-
Dheema, P.S.- Sabour, District- Bhagalpur

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant : Mr. Ramakant Sharma, Senior Advocate
Mr. Sanjay Prasad, Advocate
For the Respondent : Km. Shashi Bala Verma, A.P.P.

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)

Date : 20-10-2022

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C. for brevity) challenging the judgment of conviction dated 08.02.2022 and the order of sentence dated 10.02.2022 passed by the learned Additional Sessions Judge-I, Bhagalpur, in Sessions Trial (GR) No. 131 of 2019, whereby the sole appellant has been convicted and sentenced as under: -

Convicted under Sections	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
376 of the Indian Penal Code	12 years	25,000/-	six months simple imprisonment
3(w)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act	Rigorous Imprisonment for life	25,000/-	six months simple imprisonment
3(1)(w)(i) of the Scheduled Castes and Scheduled Tribes	Three years R.I.	5,000/-	One month simple imprisonment



(Prevention of Atrocities) Act			
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2. The sentences have been ordered to run concurrently with set off under Section 428 of the Code of Criminal Procedure (Cr.P.C. for brevity) for the custody already undergone.

3. Though, this appeal was earlier placed before us for considering the appellant's prayer for his suspension of sentence and his release on bail during the pendency of the appeal, considering the short point involved in the present appeal and keeping in mind the spirit of statutory prescription under sub-section (4) of Section 374 of the Code of Criminal Procedure by an order dated 19.10.2022, the appeal was directed to be placed for final hearing today for expediting disposal of the appeal itself on merit.

4. We have heard Mr. Ramakant Sharma, learned Senior Counsel appearing on behalf of the appellant and Ms. Shashi Bala Verma, learned Additional Public Prosecutor for the State.

5. The name of the informant has been concealed in the present judgment and has been referred to as 'P.W.-5' or 'the victim'.

6. A written report of the informant dated 18.08.2019 is the basis for registration of the concerned Sabour (Goradih) P.S. Case No. 258 of 2019. It is the prosecution's case in the written



report that on 08.08.2019, at 11 pm in the night, the appellant, wielding his dominance and by giving PW-5 a false promise to marry her, took her to his (appellant's) house and established physical relationship with her. Thereafter, she (the victim) asked the appellant as to how long would he continue to have physical relationship with her by giving her false promise of marriage. In the meanwhile, upon hearing the sound of this conversation, the appellant's father Kailash Yadav, his brothers, Sagar Yadav and Sintu Yadav, woke up and using abusively the victim's caste's name questioned her presence in their house, late in the night. The victim told them that for last two years, the appellant, after having established physical relationship with her, had married her. Reacting to this, accused Kailash Yadav thrashed her because of which she fell down on the ground. Accused Sagar Yadav clasped her both the hands and Sintu Yadav forcibly put poison in her mouth. After she raised outcry, the co-villagers and the village *chowkidar* came there and took her to Mayaganj Hospital, where she was treated. She enclosed with her written statement, the documents showing the fact that she was treated in the hospital.

7. During the course of the investigation, the victim's statement was recorded under Section 164 of the Cr.P.C., which was marked as Exhibit-2 at the trial. In her statement under



Section 164 of the Cr.P.C. recorded before the Judicial Magistrate 1st Class, Bhagalpur, on 16.09.2019, the victim disclosed that she had developed a relationship with the appellant during the course of her employment in the house of the appellant Kailash Yadav as a domestic help, for last two years. The appellant would always resist the victim going to do similar household jobs in other houses and would tell her that he would marry her. She further disclosed that the appellant had married her also and taken her to his (appellant's) house, which was objected to by his family members. They called her by her caste name abusively and told her that they would not allow the victim to become a *bahu* of their house. They caused the appellant to flee from the house. They assaulted her and forced her to consume poison and threw her on the road. When the villagers awoke next morning, they informed the *Sarpanch* of the village and thereafter she was taken to Mayaganj hospital. At Mayaganj Hospital, the *Sarpanch* and the *Mukhiya* of the Gram Panchayat were present. After her treatment, she was brought to the house of one Shiv Shankar Das (PW-2), where a panchayati was held. Kailash Yadav, Sagar Yadav and Sintu Yadav again abused her and threatened her of being eliminated.

8. The police, upon completion of investigation submitted its charge-sheet on 13.02.2020 against this appellant



only, after having found no complicity of other accused persons, namely, Kailash Yadav, Sagar Yadav and Sintu Yadav, for the offences punishable under Sections 376 of the Indian Penal Code and Sections 3(1)(r)(s)(w)(i) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act ('SC/ST (PoA) Act' for short), consequent upon which the learned Special Judge, SC/ST Act took cognizance of the aforesaid offences by an order dated 06.03.2020. Charges were thereafter framed for commission of the offences punishable under Section 376 of the Indian Penal Code and Sections 3(1)(r)(s)(w)(i) and 3(2)(v) of the SC/ST (PoA) Act. Subsequently, in the light of an application filed by the prosecution under Section 216 of the Cr.P.C., charge under Section 328 of the IPC was added. The appellant pleaded not guilty of the charges framed against him and was, therefore, put to trial.

9. During the course of examination, the prosecution examined eight witnesses including the Investigating Officer as PW-6 and two Doctors as PW-7 and PW-8. As has been noted above, the victim was examined as PW-5. The husband of the victim was examined as PW-2. Co-villagers, Bijendra Kumar (PW-1), Shiv Kumar (PW-3) and Girish Yadav (PW-4) did not support



the prosecution's case and accordingly they were declared hostile at the instance of the prosecution.

10. After examination of the prosecution witnesses, the statement of the appellant was recorded under Section 313 of the Cr.P.C. explaining the circumstance appearing against the him on the basis of the evidence adduced at the trial by the prosecution. The appellant reiterated his innocence and denied the occurrence as disclosed in the prosecution's case.

11. The prosecution adduced documentary evidence also including the letter dated 25.10.2019 written by Dr. Maya Nand Jha (PW-8), who had earlier treated the victim on 09.08.2019, when she was admitted in the said private hospital as suspected case of 'celphos' poisoning. The defence did not produce any witness at the trial.

12. The trial court, upon appreciation and evaluation of the evidence adduced at the trial, acquitted the appellant of the charge of commission of offence punishable under Section 328 of the IPC and Section 3(i)(R)(S) of the SC/ST (PoA) Act giving benefit of doubt. The trial court, however, found that charge against the appellant of commission of offence punishable under Section 376 of the IPC and Section 3(1)(w)(i) and 3(2)(v) of the SC/ST (PoA) Act stood proved. After having held the appellant



guilty of the aforesaid offences, the appellant has been sentenced to imprisonment and fine by the impugned order of sentence of the trial court, as noted above.

13. The question, which arises for consideration in the present appeal, is as to whether the prosecution can be said to have proved beyond all reasonable doubt commission of offence by the appellant, punishable under Section 376 of the IPC and Section 3(1)(w)(i) and 3(2)(v) of the SC/ST (PoA) Act and whether the finding of the trial court of conviction requires interference by this Court.

14. To answer the question, we need to notice the evidences of the prosecution witnesses first, as deposed at the trial, which are as under:-

(I) PW-1 is a co-villager of the appellant and the informant/victim. He has been declared hostile at the instance of the prosecution. He had deposed that he had learnt that the victim had consumed poison because she was scolded by her husband, whereafter she was taken to hospital. He denied in his cross-examination the suggestion of the prosecution that he had given any statement to the police that the appellant and the informant had developed amorous relationship and when he was asked to marry, the appellant declined. In cross-examination on behalf of



defence, PW-1 deposed that age of the victim was 40-42 years, who had 4-5 children including a married daughter. She had grandchildren also.

(II) PW-2, the husband of the victim, deposed that the appellant by holding the victim's hand had taken her to his house. Kailash Yadav had thrashed the victim to the ground accosting her and challenging her as to how she could become a *bahu* of his house. Sagar Yadav had clasped the victim by her hands and Sintu Yadav had administered poison to her. The victim was taken to hospital as she had become unconscious. When she returned to her house after her recovery, Kailash Yadav had convened a Panchayat in which he (PW-2) was also called at 10 pm.. Kailash Yadav had assured them to give 50,000/- for bringing the appellant back, who had disappeared after the occurrence. The reason behind the occurrence, as described by PW-2, was that Kailash Yadav did not want the victim to become a *bahu* of his house. In his cross-examination, PW-2 deposed that on the date of occurrence, he was in Punjab, where he was earning his livelihood for last 10 years and would come to his house at the interval of one year-six months.

(III) PW-3 has been declared hostile. He also denied the suggestion made on behalf of the prosecution in cross-examination



that he had ever given any statement before police that this appellant and the victim were in love with each other and when the victim asked him to marry her, the appellant had declined. In his cross-examination on behalf of the defence PW-3 also deposed that compensation is given to a victim after lodging of a case under SC/ST (PoA) Act and for the same purpose, the victim had lodged the case. He also deposed that for receiving compensation money, false cases of similar nature had been registered in the village.

(IV) PW-4 also came to be declared hostile at the instance of the prosecution. He also denied the suggestion of having ever given any statement before the police that the victim and the appellant were in love.

(V) PW-5, the victim, in her deposition testified that for the last two years, the appellant had been establishing physical relationship with her. In her deposition, she fully supported the case of the prosecution as was disclosed in the FIR. She further deposed that her statement was not recorded by the police, first. In her cross-examination she deposed that she had sons and two daughters and one of the daughters was married, who had a female child. She further deposed in her cross-examination that she was fully devoted to her husband and other than her husband; she had not established relationship with anyone else. She knew the



appellant for two years and that she had served for two years in the appellant's house.

(VI) PW-6, the Investigating Officer, who proved the FIR, deposed in paragraph 7 that the statement of the victim was recorded under Section 161 of the CrPC by the Officer In-charge of Mahila P.S., Bhagalpur. In his cross-examination, he also stated that there was no reason recorded in the case diary dealing with the delay in registration of the FIR and there was no information given to the police station regarding admission of the victim in the hospital. Further, no witness had told him during the course of investigation about any voice raised by the victim at the time of commission of rape or administration of poison by the accused persons.

(VII) PW-7, who was posted as Medical Officer at Sadar Hospital, Bhagalpur, deposed that he had not found any sign of violence in the outer part of the body. The report sent by the Pathology Department, J.L.N.M.C., Bhagalpur, of the examination of the vaginal swab of the victim was not available with him. There was no sign of rape on the victim.

(VIII) PW-8 is the Doctor, who had treated the victim on 09.08.2019 when she was taken to Mayaganj Hospital. He deposed that it was a suspected case of poisoning. Evidence of PW-8 is of



not much relevance in view of the fact that the charge against the appellant of commission of offence punishable under Section 328 of the IPC has not been found to be proved beyond reasonable doubt by the trial court and the appellant has accordingly been acquitted of the said charge.

15. Mr. Rama Kant Sharma, learned Senior Counsel appearing on behalf of the appellant has argued that even if what has been alleged in the FIR is treated to be correct on its face value and the evidences adduced at the trial are accepted to be correct, no offence punishable under Section 376 of the IPC is made out. He contends that it would emerge from the evidence adduced at the trial and other materials on record that the prosecution has not been able to make out a case that the physical relationship between the appellant and the victim, if any, was established without the victim's consent. He has submitted that the statement of the victim recorded under Section 164 of the Cr.P.C. and her deposition at the trial would clearly show that the victim had not consented to physical relationship with the appellant under any misconception of the fact or false promise of marriage. He has further submitted that there would have been no question of any promise for marriage. This being an admitted fact that the victim herself was married and mature enough to understand the circumstances of



consensual physical relationship of a married woman. He has further submitted that it can be easily deduced from the evidence adduced at the trial, read in conjunction with the FIR and the statement of the victim, recorded under Section 164 of Cr.P.C., that the family members of the appellant were opposed to the illicit relationship between the appellant and the victim (PW-5) and for the said reason, all the family members were implicated in the FIR with false allegation of assault made by them and of abusing the victim taking her caste name and administering her poison.

16. Learned Additional Public Prosecutor has defended the findings recorded by the trial court and has submitted that the victim (PW-5) is a victim of circumstances and that of her status as a female belonging to Scheduled Caste, with her husband living far away from her to earn his livelihood. She has submitted that she appears to be a rustic lady who fell prey to the false assurance given by the appellant before consenting to establishing physical relationship with him. She has submitted that the victim must have apparently been under the impression that the appellant would marry her in course of time, in view of the promise given by him because of which she had consented to physical relationship. Under this misconception of fact, the victim's consent was obtained and, therefore, the moment, the appellant declined to



marry her, necessary ingredients of Section 376 of the IPC came into play. She, accordingly, contends that the finding recorded by the trial court does not suffer from any legal infirmity requiring this Court's interference. She has also submitted that the trial court has rightly held the appellant guilty of the offence punishable under Sections 3(1)(w)(i) and 3(2)(v) of the SC/ST (PoA) Act in view of the appellant's conviction for commission of the offence punishable under 376 of the IPC.

17. Learned counsel appearing on behalf of the informant has also submitted on the same lines as of the learned Additional Public Prosecutor that the trial court has rightly recorded the judgment of conviction and passed the order of sentence upon due appreciation, evaluation and scrutiny of the evidence adduced at the trial.

18. We have perused the impugned judgment and order of the trial court. We have duly scrutinized the evidence adduced at the trial. We have given our thoughtful consideration to the rival submissions made on behalf of the parties. We must, at the very outset, point out that there is no evidence adduced at the trial to establish beyond all reasonable doubt that the appellant had, in fact, established physical relationship with PW-5/the victim, other than the evidence of PW-5 herself. None of the witnesses have



supported the prosecution's case that the appellant and the informant were in relationship for two years as alleged by the victim in her FIR, stated in her statement made under Section 164 of the Cr.P.C., and her evidence adduced at the trial.

19. We have already noted the deposition of the prosecution's witnesses 1, 3 and 4, who have been declared hostile. The husband of the victim is not a witness to any occurrence as, according to him; he was in Punjab when the occurrence had taken place. He has categorically deposed in his evidence that refusal by Kailash Yadav (a co-accused) to accept the victim as a *Bahu* of his house was the reason why the occurrence had taken place. Evidence of PW-2 does not support the prosecution's case that the appellant had established physical relationship with the victim or that he had given any false assurance to her to marry her.

20. PW-5 in her examination-in-chief has though deposed that the appellant had been establishing sexual relationship with her for last two years and that on the date of occurrence also, the appellant and the informant had established such relationship, there is no whisper in her evidence that the appellant had either used any force or had enticed the victim on false promise to allow him to establish physical relationship with



her. It also emerges from her evidence that when the said relationship was objected to by the family members of the appellant, PW-5 had told the family members of the appellant that the appellant had brought her to marry her. Thereafter she was assaulted by Kailash Yadav and other family members. Her evidence indicates that she was already married. Peculiarly, in Para 6 of her evidence, she deposed that she had not established any relationship with any person other than her husband.

Section 375 of the IPC defines 'rape' as under: -

"Section 375 of the Indian Penal Code defines 'rape' as under: -

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

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or



(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

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

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.



Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

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.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape].]”

21. On bare reading of the definition of rape prescribed under Section 375 of the IPC, it can be seen that the acts falling under sub-section (a), (b), (c) and (d) of Section 375 of the Indian Penal Code will constitute an offence only if the same falls in any of the seven descriptions mentioned therein. There does not appear to be any controversy over the fact that the victim was already married having children, with her husband alive. She was not a minor. We can unhesitatingly conclude that the case of the



prosecution does not lie in third, fourth, fifth and sixth of the descriptions present under Section 375 of the IPC. Further, seventh description also does not apply in the present case as it is not a case where the victim was unable to communicate her consent to the appellant for sexual intercourse. The first description under Section 375 of the IPC also does not come into play in the present case as it is not the prosecution's case that sexual intercourse, if any, was against the will of PW-5. The second description, i.e., 'without her consent' is the only aspect, which is to be seen for reaching a conclusion as to whether a case is made out, in the facts and circumstances of the present case, of commission of rape within the meaning of Section 375 of the IPC. Explanation 2 of section 375 of the IPC gives the definition of 'consent', which means an unequivocal voluntary agreement by which the woman by words, gestures or formal or informal communication, communicates willingness to participate in the specific sexual act. It can be easily deduced from the evidence on record including testimony of the victim herself that her consent for the sexual act was unequivocal and voluntary agreement to come within the meaning of 'consent' under explanation-2 of Section 375 of the IPC.



22. A question would arise as to whether Section 90 of the IPC can come into play in the facts and circumstances of the case, as noted above, to arrive at a finding that the consent given by PW-5 was under a ‘misconception of fact’ on a false promise of marriage.

23. Section 90 of the IPC 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 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.*

24. A question of giving false promise of marriage to the victim (PW-5) would have arisen had she been not married. As on the date of occurrence, her husband was admittedly alive. It is difficult to accept the contention of the learned Additional Public



Prosecutor that the victim was so rustic as not to understand the very system of marriage. In any event, her evidence is not against the appellant of having declined to marry her after having given her false promise. She had rather complains against the family members of the appellant of maltreating her and of being opposed to the idea of allowing her to become a *bahu* of their family.

25. It is true that the expression ‘under a misconception of fact’ used under Section 90 of the IPC would include a consent obtained by misrepresentation. A misrepresentation can be regarded as leading to a misconception of fact. [See. ***Deelip Singh v. State of Bihar***, reported in **(2005) 1 SCC 88**, paragraph 26].

26. We at this stage need to notice relevant Supreme Court’s decisions to reach a conclusion as to whether the consent by the victim, in the present set of facts for sexual intercourse, can be said to have been given under misconception of fact or obtained by the appellant by misrepresentation. In case of ***Uday v. State of Karnataka***, reported in **(2003) 4 SCC 46**, the Supreme Court has held in paragraph 21 as under: -

“21. It therefore appears that the consensus of judicial opinion is in favour of the view that the 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. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.”

27. The Supreme Court explaining the above mentioned passage in case of **Uday** (supra) has laid down in case of **Deelip Singh** (supra) as under in paragraph 28: -

“28. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to “misconception of fact” within the meaning of Section 90, it needs to be



clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the 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 Section 375 clause secondly. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Rani Panda [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] which was approvingly referred to in Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri) 775 : (2003) 2 Scale 329] . The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end (Cri LJ p. 1538, para 7) — “unless the court can be assured that from the very inception the accused never really intended to marry her”. (emphasis supplied) In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the



Madras High Court in Jaladu case [ILR (1913) 36 Mad 453 : 15 Cri LJ 24] (vide passage quoted supra). By making the solitary observation that “a false promise is not a fact within the meaning of the Code”, it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no straitjacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri) 775 : (2003) 2 Scale 329] as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out.

28. The law as laid down by the Supreme Court in the cases of **Uday** (supra) and **Deelip Singh** (supra) lead us to examine as to whether the ‘consent’ said to have been given by PW-5 as per the case of the prosecution can be considered to be under a misconception of fact. In the present case, we find that knowing well that PW-5/victim could not marry the appellant; she consented to a sexual relationship with him. She apparently made



a reasoned choice to act, understanding well the significance flowing from the said action. The Supreme Court, in case of ***Dhruvaram Murlidhar Sonar v. State of Maharashtra***, reported in **(2019) 18 SCC 191**, has in no uncertain terms held that an inference as to consent can be drawn based on evidence or probabilities of a case. 'Consent', the Supreme Court has stated, is also said to be an act of reason coupled with deliberations and denotes an active will in the mind of a person to permit the doing of an act complained of.

29. In case of ***Kaini Rajan v. State of Kerala***, reported in **(2013) 9 SCC 113**, the Supreme Court has held that the 'consent', for the purpose of Section 375 of the IPC, 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 the resistance and assent.

30. The Court in case of ***Kaini Rajan*** (supra) has ruled as under: -

'.....whether there was a consent or not, is to be ascertained only on careful study of all relevant circumstances'.



31. Further, the expression ‘consent’ has also been explained under Section 3 of SC/ST (PoA) Act, which reads as under: -

“Explanation.—For the purposes of sub-clause (i), the expression “consent” means an unequivocal voluntary agreement when the person by words, gestures, or any form of non-verbal communication, communicates willingness to participate in the specific act:

Provided that a woman belonging to a Scheduled Caste or a Scheduled Tribe who does not offer physical resistance to any act of a sexual nature is not by reason only of that fact, is to be regarded as consenting to the sexual activity:

Provided further that a woman's sexual history, including with the offender shall not imply consent or mitigate the offence;”

32. Dealing with the explanation of ‘consent’ falling under Section 375 of the IPC, Section 3(1)(w)(i) of the SC/ST (PoA) Act read with Section 90 of the IPC, in the background of the allegation of consent of sexual act based on false promise to marry, the Supreme Court in case of ***Pramod Suryabhan Pawar v. State of Maharashtra***, reported in (2019) 9 SCC 608, has held that consent of a woman with respect to Section 375 of the IPC must involve an active and reasoned deliberation towards the



proposed act. To establish whether the ‘consent’ is vitiated by an ‘misconception of fact’ arising out of a promise to marry, two propositions must be established. Firstly, the promise of marriage must have been a false promise, given in bad faith with no intention of being adhered to at the time it was given. Secondly, 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.

33. While summarising the legal position on the issue in case *Pramod Suryabhan Pawar* (supra) in paragraph 18, the Supreme Court has noticed the previous Supreme Court’s decisions in case of *Anurag Soni v. State of Chhattisgarh*, reported in (2019) 13 SCC 1 (paragraph 12), *Deepak Gulati v. State of Haryana*, reported in (2013) 7 SCC 675 (paragraphs 21 and 24), *Yedla Srinivasa Rao v. State of A.P.*, reported in (2006) 11 SCC 615 (paragraph 10) and *Uday* (supra).

34. A three-Judge bench of the Supreme Court had yet another occasion to consider the scope of the expression ‘consent’ with reference to Section 375 of the IPC read with Section 90 thereof in case of *Maheshwar Tigga v. State of Jharkhand*, reported in (2020) 10 SCC 108. In that case, the victim had alleged that his modesty was outraged at the point of a knife by the accused and he had since been promising to marry her and on that



pretext, continued to establish physical relationship with her as husband and wife. As the accused in that case was going to solemnize marriage with another girl, she got registered an FIR making allegation of establishing physical relationship on false promise of marriage. The Supreme Court, after having examined the extant statutory provisions and precedents, held in paragraph 18, relevant portion of which reads as under: -

“18.The prosecutrix was herself aware of the obstacles in their relationship because of different religious beliefs. An engagement ceremony was also held in the solemn belief that the societal obstacles would be overcome, but unfortunately differences also arose whether the marriage was to solemnised in the church or in a temple and ultimately failed. It is not possible to hold on the evidence available that the appellant right from the inception did not intend to marry the prosecutrix ever and had fraudulently misrepresented only in order to establish physical relation with her. The prosecutrix in her letters acknowledged that the appellant's family was always very nice to her.”

34. In the present case, upon scrutiny of the evidence adduced at the trial, as noted above, we are of the view that here is a case where PW-5 herself could not have married the appellant, she being already married woman with her husband (PW-2).



Curiously enough, during the course of her cross-examination, she deposed that she had no physical relationship with any person other than her husband. Any physical relationship, which she allowed to be established with her was certainly with her active understanding of circumstances, actions, significance and consequences of the proposed act. She knew that she being a married woman, the appellant could not marry her. In any case, she understood the social fabric and non acceptance of the family members of the appellant belonging to a different caste to accept her as their *Bahu*. Her presence in the night at 11:00 pm in a village in the house of the appellant was objected to by the father and brothers of the appellant. Apparently, that was the reason why P.W.-5 accused father Kailash Yadav and brothers Sagar Yadav and Sintu Yadav of having administered her poison constituting an offence punishable under Section 328 of the IPC. After investigation, the police did not find any material to connect Kailash Yadav, Sagar Yadav and Sintu Yadav with consumption of 'Celphos', a poisonous substance, and accordingly no charge-sheet was filed against them. Surprisingly, for no apparent reasons, at the trial, charge for commission of offence punishable under Section 328 of the IPC was added against this appellant, though



there was no iota of material against this appellant of having administered poison.

35. Be that as it may, in our considered opinion, no offence punishable under Section 376 of the IPC can be said to have been established against the appellant based on the evidence adduced at the trial. If there was any sexual act between the appellant and P.W.-5, the same cannot be said to be without her consent to make out a case of rape, defined under Section 375 of the IPC. Accordingly, the conviction of the appellant under Section 376 of the IPC as recorded by the trial court, being unsustainable, is hereby set aside.

36. Now, coming to the appellant's conviction under Section 3(1)(w)(i) of the SC/ST (PoA) Act, for the same reason, as discussed hereinabove, the appellant's conviction cannot be sustained, as the act, alleged against the appellant, cannot be considered to be without "the recipient's (victim's) consent".

37. Coming now to the appellant's conviction under Section 3(2)(v) of the SC/ST (PoA) Act, the said provision reads as under :-

“(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property &[knowing that such



person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member], shall be punishable with imprisonment for life and with fine;”

38. Since, we have acquitted the appellant of the offence punishable under Section 376 of the IPC, the conviction of the appellant under Section 3(2)(v) of the SC/ST (PoA) Act becomes redundant and inoperative.

39. In view of the aforesaid discussions and reasons, we are of the view that the appellant's conviction for the offences punishable under Section 376 of the Indian Penal Code is not sustainable. Further, the conviction for the offences punishable under Sections 3(1)(w)(i) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act can also be not sustained.

40. Consequently, the impugned judgment of conviction and order of sentence dated 08.02.2022/10.02.2022 passed by the Additional Sessions Judge-1, Bhagalpur, in Case No. ST(GR)131/2019, arising out of Sabour (Goradih) P.S. Case No. 258/2019 is accordingly set aside. Resultantly, the appellant stands acquitted of the charges under Section 376 of the Indian Penal Code and Sections 3(1)(w)(i) and 3(2)(v) of the SC/ST Act.

41. The appeal is thus allowed.



42. The appellant is in custody. Let him be released forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J)

Pawan/-

AFR/NAFR	NAFR
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