



Crl.A.(MD) No.184 of 2020

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA
and
THE HONOURABLE MR.JUSTICE K.RAJASEKAR

Crl.A.(MD) No.184 of 2020

M.Balamurugan

... Appellant

-vs-

State through the Inspector of Police
All Women Police Station
Tuticorin, Tuticorin District
(Crime No.53/2015)

... Respondent

PRAYER: Appeal filed under Section 374(2) of the Code of Criminal Procedure against the Judgment dated 15.11.2019, in S.C.No.324 of 2016, on the file of the Fast Track Mahila Court, Thoothukudi.

For Appellant : Mr.KA.Ramakrishnan

For Respondent : Mr.R.Meenakshi Sundaram
Additional Public Prosecutor



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J U D G M E N T

(Delivered by A.D.JAGADISH CHANDIRA, J.)

This criminal appeal is filed against the judgment and order dated 15.11.2019, in S.C.No.324 of 2016, on the file of the Fast Track Mahila Court, Thoothukudi.

2. The Trial Court framed two charges against the appellant, as detailed below:

Charge	Penal Provisions
1	376(2)(l) I.P.C.
2	506(i) I.P.C.

3. By judgment and order dated 15.11.2019, the Trial Court convicted the appellant and sentenced him, as detailed below:-

Section of Law	Sentence of imprisonment	Fine amount
376(2)(l) I.P.C.	To undergo imprisonment for life	Rs.5000/- in default to undergo rigorous imprisonment for six (6) months.
506(i) I.P.C.	To undergo two (2) years rigorous imprisonment.	Nil
The sentences shall run concurrently.		



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The period of sentence already undergone was directed to be set off under Section 428 of the Code of Criminal Procedure.

4. The prosecution case is as under:

4.1. The prosecutrix / P.W.1, a deaf and dumb girl aged about 26 years and the accused are close relatives known to each other and residents of Chottainthoppu, Thoothukudi District. Karuppasamy / *de facto* complainant (P.W.2) is the father of P.W.1. In such circumstances, during the year 2015, two months prior to Deepavali Festival, on a day at 11.30 a.m., the victim girl (P.W.1), as usual, had gone to fetch water from a common well situated near the house of the accused. At that time, the accused dragged the victim girl (P.W.1) by holding her hand and took her into his house and after disrobing her groped her breasts, kissed her and thereafter had committed rape on her. Even thereafter, 2-3 times, the accused had committed rape on her and had on the threat of harming her and her family members, asked her not to disclose the same to anyone.



4.2. Later, on 11.11.2015, the victim girl (P.W.1) had vomited and fainted and she was taken to a hospital and she was found to be pregnant. When her father Karuppasamy (P.W.2) had beaten her and enquired, she had, by gestures informed him that the accused, who is a close relative, had disrobed her and raped her and that he is responsible for the pregnancy. P.W.2, thereafter, had preferred a complaint (Ex.P2) before Jeyanthi (P.W.12), Sub Inspector of Police.

4.3. Based on the complaint, PW12 had registered a First Information Report (Ex.P13) in Crime No.53 of 2015, under Sections 376(2)(l) and 506(i) I.P.C., and forwarded the same to the Judicial Magistrate Court No.I, Thoothukudi as well as to her higher officials and thereafter, she had handed over the case files to Prema (P.W.13), Inspector of Police(In-charge), for investigation.

4.4. Prema (P.W.13) had examined Karuppasamy (P.W.2) and Kalyani (P.W.3), the parents of the victim girl (P.W.1) and gone to the place of occurrence on 14.11.2015 at 17.00



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hours and prepared Observation Mahazar (Ex.P6) and Rough Sketch (Ex.P14) in the presence of the witnesses Jeyalani (P.W.5) and Thangamariappan (not examined) and since, the victim girl (P.W.1) was a deaf and dumb girl, she had enquired her through Suba (P.W.4), a Specially Trained Teacher and recorded the statement of the victim girl (P.W.1). On 14.11.2015, after obtaining orders from the Court under EX P11, she had sent the victim for Medical Examination through Tmt.Ajitha (P.W.10) through Memo Ex.P10 to Dr.Rajakumari (P.W.9.) PW9, after examining the victim, collected the vaginal smear of the victim and handed over the same to PW10 and issued Accident Register Ex.P9. On the same day, P.W.13 had arrested the accused at 18.00 hours and thereupon the accused had given a confession statement (Ex.P15) in the presence of the witnesses, namely, Karthik (P.W.6) and Mayakrishnan (not examined) and thereafter, brought the accused to the Police Station for remanding him to judicial custody.

4.5. Thereafter, Maria Rosely (P.W.14), regular Inspector of Police, had taken up the case for investigation. P.W. 14 had once again examined the witnesses and on 25.11.2015



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had taken custody of the accused and sent him for medical examination through Thomas Xavier (P.W.8), Constable and Vairamuthammal, a Woman Constable (not examined) along with the requisition Ex.P7 and Dr.Pratahaban, P.W.7 conducted medical examination on the accused on the same day and issued the Certificate Ex.P8. Subsequently, P.W.14 gave a requisition to learned Judicial Magistrate No.II, Thoothukudi, seeking permission to record the statement of the victim girl Ex.P1 and the Statement of the defacto complainant Ex.P3 under Section 164 Cr.P.C., and after sending a request Ex.P5 to the Special School, recorded the statement of the victim girl (P.W.1) with the help of Suba (P.W.4), a Specially Trained Teacher. On 29.11.2015, she had examined Thomas Xavier (P.W.8) and Vairamuthammal (not examined) and thereafter had sent the vaginal smear taken from the victim girl to the Regional Forensic Science Lab, Tirunelveli through PW10 and she obtained the Chemical Analysis Report Ex.P12 from the Forensic Assistant Mrs.Balamurugan (PW11) on 18.12.2015. On 28-12-2015 she had examined the witnesses Arumugapandian and Ranjith Kumar and also examined Dr.Pradhapan (P.W.7)



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and recorded their statements. On 15.01.2016, she recorded the further statements of Karuppasamy (P.W.2), victim girl (P.W.1), Kalyani (P.W.3), Suba (P.W.4), Special Teacher), Dr.Rajakumari (P.W.9), who conducted medical examination for the victim girl (P.W.1) and Mrs. Balamurugan (P.W.11), Forensic Scientific Assistant.

4.6. After examining various witnesses and collecting reports from the experts, the Investigating Officer completed the investigation and filed a final report in P.R.C.No. 24 of 2016, before the learned Judicial Magistrate No.I, Thoothukudi, under Sections 376(2)(I) and 506(i) I.P.C. against the appellant.

5. On appearance of the appellant, the provisions of Section 207 of the Code of Criminal Procedure were complied with and the case was committed to the Court of Sessions, Thoothukudi, in S.C.No.324 of 2016 and it was made over to the Fast Track Mahila Court, Thoothukudi, for trial. The Trial Court framed charges against the accused, as detailed in Paragraph No. 2, supra.



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6. When questioned, the appellant pleaded "not guilty". To prove the case, the prosecution examined fourteen witnesses and marked fifteen exhibits. When the appellant was questioned under Section 313 of the Code of Criminal Procedure on the incriminating circumstances appearing against him, he denied the charges. No witness was examined from the side of the accused nor any document was marked.

7. The Trial Court, after considering the evidence on record and hearing either side, by judgment and order dated 15.11.2019, convicted and sentenced the accused, as referred to above. Challenging the above said conviction and sentence, the accused has filed the present appeal.

8. The submissions of the learned counsel for the appellant are as under:-

The appellant and the victim girl (P.W.1) Aged 26 years are close relatives known to each other and a case of consensual relationship between them had been projected as a case of rape and a false complaint (Ex.P2) had been given to the respondent – Police by the father of the victim girl. The entire evidence on record would disclose that the victim girl (P.W.1) is a



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literate and the consent to physical relationship by the prosecutrix was conscious, and an informed choice was made by her after due deliberation and it had been spread over several times and she had not preferred a complaint and the complaint (Ex.P2) was given by her father Karuppasamy (P.W.2) only after coming to know of the pregnancy of PW1. It is the admitted case of PW1 that she would not have preferred the complaint if she had not become pregnant. A reading of the evidence of the victim girl (P.W.1) would show that she and the accused are close relatives known to each other and they were in an affair and that she was interested in him and she had voluntarily come to the house of the accused and they had indulged in consensual relationship several times and only after she was found to be pregnant, PW2 her father had beaten her and enquired her and after her disclosure about the relationship, the complaint (Ex.P2) had been given. It is also admitted by the victim that if she had not become pregnant she would not have disclosed the same to any one. Further it could not be said by any stretch of imagination that the appellant accused had committed rape under the circumstances falling under the seven descriptions within the meaning of Section 375 read with Section 90 of IPC. Though a presumption of absence of consent is available against the accused under Section 114A of the Indian Evidence Act, 1872, a bounden duty is cast on the prosecution to prove that



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the victim girl (P.W.1) had been subjected to rape and that it was against her will, without her consent or that it was with her consent which had been obtained by putting her or any person in whom she is interested, in fear of death or hurt. The evidence of the prosecutrix (P.W.1) that the appellant obtained her consent for the first time by putting her under fear cannot be believed to be true and her evidence is unreliable and not worthy of credence. Further, the medical evidence does not support the case of the prosecution that there was a rape. The Trial Court, without proper appreciation of evidence on record, had erred in finding the accused guilty and convicting him and thereby the judgment of the Trial Court is liable to be set aside.

9. The submissions of Mr.R.Meenakshi Sundaram, learned Additional Public Prosecutor, appearing for the respondent – Police are as under:-

The victim girl (P.W.1) is a deaf and dumb girl aged 26 years. The accused, taking advantage of the relationship with the victim girl and her disability, had dragged her into her house by holding her hands and after disrobing her and groping her had committed rape on her. Thereafter, on two to three occasion, the accused had called the victim girl (P.W.1) to his house and committed rape on her by and by putting her and her relatives under fear



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of hurt threatened her not to disclose the same to anyone, and later she was found to be pregnant and based on the complaint (Ex.P2) given by her father (P.W.2), the case came to be registered. Since the victim girl (P.W.1) is deaf and dumb, the services of Suba (P.W.4), Specially Trained Teacher, had been utilized to record the statement of the victim girl (P.W.1) during investigation and also her evidence before the Trial Court. Further, the evidence of the victim girl (P.W.1) is cogent and clear and that consent had been obtained from her under threat and in such circumstances there is a presumption raised against the accused under Sec 114-A of the Evidence Act that the victim had not given her consent and a burden is cast on the accused to rebut the presumption. The prosecution has proved its case beyond all reasonable doubts and the Trial Court, finding that the victim had not consented, has rightly found the appellant guilty and convicted him and thereby the appeal is liable to be dismissed.

10. Heard Mr.KA.Ramakrishnan, learned counsel appearing for the appellant and Mr.R.Meenakshi Sundaram, learned Additional Public Prosecutor appearing for the respondent and carefully perused the materials available on record.



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11. The case of the prosecution is that the accused committed rape on the victim girl against her will by obtaining her consent under threat of putting her and her family members in the fear of death or hurt, whereas it is the case of the accused that the relationship between the appellant and the victim girl was a consensual one and she was a consenting partner and that the complaint was not given by the victim and it was given only by the father of the victim that too only after he came to know about the pregnancy of the victim/his daughter and that it is also admitted by the victim that she would not have preferred the complaint if she had not become pregnant. Though there is a presumption against the accused under Section 114A of the Indian Evidence Act, 1872, the Hon'ble Apex Court in several judgements relating to cases of this nature concerning rape, consent and presumption falling under Sec 114-A of the Indian Evidence Act, has held that the best guidance to the judicial mind while considering the question of consent is to consider the evidence before it and the surrounding circumstances before reaching a conclusion and that there cannot be a straight jacket formula for determining the question of consent.

12. In this regard, in **Nazim Ahamed Vs State (NCT Delhi) 2023 SCC OnLine SC 89**, the Apex Court, after referring to and analysing several



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earlier decisions, has, in detail, elucidated the legal principles regarding appreciation of evidence regarding presumption as to consent in cases of rape.

The relevant paragraphs are extracted hereunder:-

"9. For the better appreciation of the submissions made by the learned counsels for the parties, the relevant provisions contained in Section 90 and Section 375 of IPC, are reproduced below:—

“90. Consent known to be given under fear or misconception.—A consent is not such a consent as it 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,



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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.

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.



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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.



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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.”

10. It would be germane to note that the basic principles of criminal jurisprudence warrant that the prosecution has to prove the guilt of the accused beyond reasonable doubt by leading cogent evidence, however, considering the ethos and culture of the Indian Society, and considering the rising graph of the commission of the social crime - ‘Rape’, the courts have been permitted to raise a legal presumption as contained in Section 114A of the [Indian Evidence Act](#). As per Section 114A, a presumption could be raised as to the absence of consent in certain cases pertaining to Rape. As per the said provision, if sexual intercourse by the accused is proved and the question arises as to whether it was without the consent of the woman alleged to have been raped, and if she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

11. It cannot be gainsaid that a consent given by a person would not be a consent as intended by any Section of the [Penal Code, 1860](#), if such consent was given by the person under the fear of injury, or under a misconception of fact as contemplated in Section 90 [IPC](#). Further, Section 375 also describes certain acts which if committed by the accused under the circumstances mentioned therein, as the commission of ‘Rape’, even though committed with the consent of the prosecutrix. In our opinion, the expression “misconception of fact” contained in Section 90 [IPC](#) is also required to be appreciated in the light of the Clauses - contained in Section 375 [IPC](#), more particularly the Clauses - Thirdly, Fourthly and Fifthly thereof, when the accused is charged



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for the offence of 'rape'. The circumstances described in the said three Clauses are wider than the expression "misconception of fact", as contemplated in Section 90 of IPC. Section 375 describes seven circumstances under which the 'rape' could be said to have been committed. As per the Clause - Thirdly, a rape could be said to have been committed, even with her consent, when the consent of the prosecutrix is obtained by putting her or any person in whom she is interested in fear of death or of hurt. As per the Clause - 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; and as per the Clause - Fifthly, with her consent when at the time of giving the consent, the prosecutrix by reason of unsoundness of mind or intoxication or the administration of stupefying or unwholesome substance by the accused or through another, she is unable to understand the nature and consequences of that to which she gives consent. Thus, apart from the prosecutrix being under the misconception of fact as contemplated in Section 90, her consent would be treated as 'no consent' if she had given her consent under any of the circumstances mentioned in Section 375 of IPC.

12. The exposition of law in this regard is discernible in various decisions of this Court, however the application of such law or of such decisions would depend upon the proved facts in each case, known as legal evidence. The ratio laid down in the judgments or the law declared by this Court do provide the guidelines to the judicial mind of the courts to decide the cases on hand, but the courts while applying the law also have to consider the evidence before them and the surrounding circumstances under which the alleged offences are committed by the accused.



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13. A reference of some of the decisions of this Court dealing with the different dimensions and angles of the word ‘consent’ in the context of Section 90 and Section 375 would be beneficial for deciding this appeal.

14. In *Uday v. State of Karnataka*, the prosecutrix aged about 19 years had given her consent for having a sexual intercourse with the accused with whom she was deeply in love, and it was alleged by the prosecution that the prosecutrix continued to meet the accused as the accused had given her a promise to marry her on a later date. The prosecutrix became pregnant and the complaint was lodged on failure of the accused to marry her. This Court while holding that under the circumstances, the consent could not be said to have been given under a misconception of fact under section 90 of IPC, held in para 21 and 23 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



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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.

22. -xxx- xx -

23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.”

15. In *Deelip Singh alias Dilip Kumar v. State of Bihar* (supra), this Court after discussing various earlier decisions of this Court and



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other High Courts, further explained the observations made in *Uday case* (supra) and observed as under:—

“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



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(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.”

16. In *Deepak Gulati v. State of Haryana*, this Court gave one more dimension of the word ‘consent’ by distinguishing ‘Rape’ and ‘consensual sex’ and observed 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



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early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

22. xxxxx

23. xxxxx

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



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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”.

17. Again in *Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra* (supra), this Court interpreting the Section 90 and the Clause - Secondly in Section 375 of IPC, observed 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 latter 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 IPC.”



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18. Now, in the instant case, having regard to the statutory provisions and their interpretations by this Court in various judgments, one may be tempted to hold the appellant-accused guilty of the offence under Section 376 IPC as has been done by the Sessions Court and the High Court, however, on the closer scrutiny of the evidence on record, we find that it was fallacy on the part of the courts below to hold the appellant guilty under Section 376 IPC.”

13. Admittedly, the victim girl (P.W.1) is aged about 26 years and a relative of the accused hailing from the same locality and they are known to each other. The evidence of P.W.1 would disclose that though she is a deaf and dumb girl, she is capable of reading and writing and it has also been admitted by Karuppasamy (P.W.2), father of the victim girl (P.W.1) and Prema (P.W.13), Investigating Officer that the victim girl (P.W.1) had studied up to ninth standard and she is a literate. Whiles, her keeping silence without lodging any complaint with the police after the occurrence or even after it came to light vitiates the case of the prosecution.



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14. Now, on coming to the evidence of the victim girl (P.W.1), she has deposed that on 11.11.2015, she was feeling giddiness and she had vomited and that her father Karuppasamy (P.W.2) had taken her to the hospital and during examination, it was found that she was pregnant and that when her parents (P.Ws.2 and 3) had enquired, she had informed them that the accused had sexual intercourse with her on several times. When they had enquired her why she had not disclosed earlier she had told them that the incident had happened two months ago and since the accused had threatened her that if she discloses the same to anyone he would kill the family members, she had not disclosed the same and that the accused had taken her to his house and committed sexual intercourse on compulsion under threat and only after she disclosed the same to her father in the hospital, her parents came to know of the pregnancy and her father (P.W.2) had given a complaint (Ex.P2) and she had given a statement before the Magistrate. However, in her cross-examination, she had admitted that the accused is related to them and the accused was living with his wife and that his parents were living in the house opposite to the house of the accused and that she and her parents would often go to the house of the parents of the accused and chat with them and that the wife of the accused used to be in the house all the time. She had further deposed that the common well was about



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500 feet away from the house of the accused and that there are about 13 houses in between the common well and the house of the accused. Though she had denied writing love letters to the accused, she had admitted that the accused used to write love letters to her, and that she had not disclosed the same to her parents (P.Ws.2 and 3). She had also deposed that the accused used to call her neighbour over phone to ask her to come to his house and that she used to go to his house. She had further deposed that when she had gone alone to the well, the accused came there and followed her and that when the accused had committed sexual intercourse, his wife was not at home and that she did not raise any hue and cry and that her dresses did not get torn. She has also admitted that she had not disclosed anything about the incident either to the wife of the accused or to his parents and only at the hospital she had disclosed the same to her father by gestures and that her father (P.W.2) had given the complaint to the police only in order to arrange marriage between her and the accused and she had also admitted that if she had not fallen unconscious, she would not have disclosed about the incident to anyone. She further admitted that two persons had seen her going to the house of the accused and that she had not informed anything to them and that she fell unconscious after two months of the incident. At this stage, it would be beneficial to refer the relevant portion of her cross-examination,



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WEB COPY which is extracted hereunder:

“நான் அவரது வீட்டிற்கு சென்றதை 2 நபர்கள் பார்த்தார்கள். அவர்களிடம் நான் சொல்லவில்லை. சம்பவம் நடந்து எத்தனை மாதம் கழித்து மயங்கி விழுந்தேன் என்றால் 2 மாதம் கழித்து நான் மயங்கி விழுந்தேன். நான் மயங்கி விழவில்லை என்றால் இதுபற்றி வேறு யாரிடமும் நடந்தது பற்றி கூறியிருக்க மாட்டேன் என்றால் சரிதான்.”

15. We also find that though the victim PW1 being a literate, the complaint (Ex.P2) was not given by her (P.W.1) and it was given by her father (P.W.2). P.W.2 had deposed that his daughter (P.W.1) had not informed about the incident, since the accused had threatened her not to disclose about the incident to anybody by putting her under threat. The evidence of P.W.3, mother of the victim girl (P.W.1) corroborates the evidence of P.W.2. Suba (P.W.4), (a Specially Trained Teacher), is stated to have assisted the prosecution while recording the statement of the victim girl (P.W.1) and recording her statement under Section 164 Cr.P.C. and evidence before the Trial Court. A perusal of the records shows that at the time of recording the evidence, Neither PW1 nor P.W.4 had not been administered oath as required under Section 119 of the Indian Evidence Act, 1872.



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16. In this regard, in **State of Rajasthan vs. Darshan Singh**, reported in **(2012) 5 SCC 789**, the Apex Court has observed as follows:

“26.The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs and not the interpretation of signs.

27. In Meesala Ramakrishnan v. State of A.P., (1994) 4 SCC 182, this Court has considered the evidentiary value of a dying declaration recorded by means of signs and nods of a person who is not in a



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position to speak for any reason and held that the same amounts to a verbal statement and, thus, is relevant and admissible. The Court further clarified that 'verbal' statement does not amount to 'oral' statement. In view of the provisions of Section 119 of the Evidence Act, the only requirement is that witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods or head are admissible and such nods and gestures are not only admissible but possess evidentiary value.

28. Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing if literate or through signs and gestures if he is unable to read and write. A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the



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intended message.

To sum up, a deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.”

17. In this case, neither PW1 nor PW4, the specially trained teacher, who is the interpreter, had not been administered oath, which vitiates the case of the prosecution.

18. On analysing the evidence of the victim girl (P.W.1), this Court finds that she would not have given the complaint and only on the compulsion of her father (P.W.2), after the pregnancy came to light, complaint (Ex.P2) came to be given.



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19. Further, the evidence of Dr.Rajakumari (P.W.9) shows that she had taken ultra scan for the victim girl (P.W.1) and found her to be pregnant by 4 to 5 weeks and that she had not seen any external injuries on the body of the victim girl (P.W.1). The relevant portion of the evidence of PW9 is extracted hereunder for ready reference:-

" என்பவருக்கு நான் சிகிச்சை அளித்து அவர் பலமுறை உடலுறவு கொண்டதற்கான அறிகுறிகள் தெரிந்தன. தன்னை கட்டாயப்படுத்தியோ வற்புறுத்தியோ உடலுறவு கொண்டதாக சொன்னாரா என்றால் அவருக்கு வெளிப்புற காயங்கள் எதுவும் காணப்படவில்லை."

20. From the law enunciated in the judgments cited supra, it is clear that 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. The facts of the case reveals that it is not a case of obtaining the consent by putting her or any person in whom she is interested, in fear of death or of hurt. In the instant case, the prosecutrix, though a deaf



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and dumb, was a grown-up girl aged 26 years having studied upto 9th Standard. She and her family members and the family members of the accused are known to each other and she is also aware that the accused is a married man. She had sufficient intelligence to understand the significance and moral quality of the act for which she was consenting or rather keeping silent. She had not resisted to the overtures of the accused, and in fact succumbed to them. She, thus, freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly, when she was conscious of the fact that the accused was a married man. Further, she had also admitted to the fact that she would not have given the complaint if she had not become pregnant and that she had not informed about the act to anyone for two months after the incident and that the complaint had been given by her father only after he found out that his daughter was pregnant and only after the talks for marriage failed to fructify. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact. The other evidence including the medical evidence does not support the case of rape or forceful sexual intercourse. The trial court, without proper appreciation of evidence, had found the accused guilty and convicted him and



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thereby the judgment deserves to be set aside.

21. In fine, the criminal appeal is allowed; the conviction and sentence imposed on the appellant, by judgment and order dated 15.11.2019, in S.C.No.324 of 2016, on the file of the Fast Track Mahila Court, Thoothukudi, are set aside and the appellant is acquitted of the charges framed against him. Bail bond and sureties executed by the appellant shall stand terminated. Fine amount, if any, paid by the appellant shall be refunded to him.

[A.D.J.C., J.] [K.R.S., J.]

18.04.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes / No

krk / ssk
To:

- 1.The Sessions Judge,
Fast Track Mahila Court,
Thoothukudi.
- 2.The Inspector of Police,
All Women Police Station,
Tuticorin, Tuticorin District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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4. The Record Keeper,
Vernacular Records Section,
Madurai Bench of Madras High Court,
Madurai.



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A.D.JAGADISH CHANDIRA, J.
AND
K.RAJASEKAR, J.

krk/ssk

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