

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

C.R.A. 572 of 2018

Mantasir Alam @ Muntasir Alam

-versus-

The State of West Bengal

For the Appellant	: Mr. Niladri Sekhar Ghosh, Adv., Mr. M.N. Chowdhury, Adv., Ms. Priyanka Saha, Adv., Ms. Laboni Sikdar, Adv., Mr. Souvik Das, Adv.
For the State-Respondent	: Mrs. Rituparna De Ghosh, Adv., Mr. Saibal Krishna Dasgupta, Adv.

Reserved On : **27.10.2025**

Judgement On : **16.12.2025**

Tirthankar Ghosh, J. :-

The present appeal has been instituted challenging the judgment and order of conviction and sentence dated 27.08.2018 & 30.08.2018 passed by the learned Additional District & Sessions Judge, 2nd Court, Islampur, Uttar Dinajpur in Sessions Trial No. 37(3)17 arising out of Goalpokher Police Station Case No. 495 of 2015 dated 23.10.2015, wherein the learned Trial Court was pleased to hold the appellant guilty for commission of offences under Section 376 of the Indian Penal Code, convict him and sentenced him to suffer Rigorous Imprisonment for 7 (Seven) years and to pay fine of

Rs.20,000/- in default to suffer further Rigorous Imprisonment for a period of 6 (six) months.

Goalpokher Police Station Case No. 495 of 2015 dated 23.10.2015 was registered for investigation, following an information being furnished by the victim with the Officer-in-Charge of Goalpokher Police Station, District Uttar Dinajpur. The allegations made in the written complaint were to the effect that the accused Mantasir Alam, residing approximately within a distance of 100 meters from the victim's house and frequently visiting her house, entered her house on 22.05.2015 at about 4.00 P.M. in the afternoon, and finding her alone gagged her mouth with an evil intention forcibly took her to the bedroom, where he raped her against her will. The informant/complainant started crying, when to pacify her accused promised to marry her swearing upon the Quran Sharif. Relying upon assurances of the accused, she often had been to the bamboo grove located to the north of her house, where she cohabited with him as repeatedly the accused promised to marry her. In due course, she conceived and on 17.08.2015 when she disclosed about her pregnancy, accused promised to marry her and informed her that his parents asked her to visit their residence. Accordingly, she had been to the house of the accused on 13.09.2015 at about 10.00 A.M. and saw that the accused and his family members were present. Accused represented that owing to her pregnancy it was not possible for him to marry her and insisted that she should undergo abortion. She declined such proposal when accused caught hold of her and forcibly tried to administer some poisonous liquid. She managed to escape

from the said place and disclosed the entire incident to her relatives leading to which a shalish was held on 18.10.2015, where the accused and his relations were directed to be present. At the shalish, accused accepted his conduct and consented to fix the marriage on 20.10.2015. Nevertheless, the other accused persons entered into a conspiracy and assisted the accused to flee away from their residence. The informant therefore prayed to the Police Officer to take steps against the accused and his relations.

Following receipt of such information, investigation commenced and on conclusion of investigation, charge-sheet was submitted under Section 448/376/506 of the Indian Penal Code against the present appellant only. The case was thereafter committed to the Court of Sessions where charges were framed against the accused/appellant under the same provisions. The contents of the charge were read over to the accused to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 14 (fourteen) witnesses which included P.W.1 Dr. Sujit Kumar Saha, doctor who examined the accused/appellant; P.W.2 victim 'X'; P.W.3 Nisha Rai, attached to Goalpokher Police Station; P.W.4 Santi Singha, Civic Volunteer attached to Goalpokher Police Station; P.W.5 Anjuna Khatun, Civil Volunteer attached to Goalpokher Police Station; P.W.6 'Z' father of the victim; P.W.7 'Y' mother of the victim; P.W.8 'A' grandfather of the victim; P.W.9 Nur Hussain, co-villager; P.W.10 Mohobul Hussain, co-villager; P.W.11 Dr. Sukumar Roy, doctor who examined the victim; P.W.12 Nur Md.,

co-villager; P.W.13 Samarendra Nath Saha, Investigating Officer of the case; P.W.14 Sahid Hussain, scribe of the FIR.

P.W.1 Dr. Sujit Kumar Saha, is a Medical Officer who was serving as Medical Officer during the relevant point of time at Islampur Sub-Divisional Hospital. He deposed that on 19.11.2015 a patient namely, Mantasir Alam was brought before him for medical examination, who was identified by Sub-Inspector of Police. He examined the patient and opined that the individual was physically capable of performing sex. Accordingly, he prepared a medical report, he identified the report which was drafted by him. The same was admitted in evidence.

P.W.2 is 'X', the victim lady who deposed that she lodged the complaint against the accused/appellant together with Eltab Hossain, Mansuri Begam and three others. She identified the accused in Court and stated that he was a co-villager and had visiting terms. She stated that two years ago at about 4.00 P.M. when she was alone at her residence, accused entered her house, forcibly took her in the bedroom and against her will had sexual intercourse with her. Following such act, he cautioned her not to divulge the same and promised to marry her. As a consequence of the incident, she became pregnant. After about two months later when the accused asked her to meet him at a particular place, she refused to go and meet him. However, she informed about her pregnancy to the accused. Although, the accused initially assured that he would marry her however, in due course he started avoiding her and ultimately, refused to marry her. She gave birth to a female child presently aged about one year and three months. She stated that when

she was pregnant, she disclosed the incident to her parents, who reported the issue to the villagers, when the villagers convened a shalish meeting. The accused and his parents did not attend the meeting and left the village. As the accused ultimately did not marry her, she was compelled to lodge complaint before the Police Authorities. She deposed that the complaint was drafted by the clerk of an advocate as per her instructions, and she affixed her thumb impression on the complaint after hearing the contents of the complaint from the said person. She was thereafter taken to the Hospital by the police for her medical examination both at Islampur Hospital as well as North Bengal Medical College, Siliguri.

P.W. 3, Nisha Rai is a Constable of Goalpokher Police Station, she deposed that on 24.10.2015 acting under instructions of SI Samarendranath Saha, she took the victim girl to the Islampur Sub-Divisional Hospital for medical examination, where she identified the victim girl to the doctor. After examining the victim, doctor handed over two sealed glass containers, containing the vaginal swab of the victim girl along with custody of the victim girl, to her. She thereafter returned to the Police Station and delivered both the victim girl along with the said two sealed bottles to SI Samarendranath Saha. The said two bottles were seized by the Sub-Inspector of Police by preparing a seizure list and she signed the same. Her signature on the carbon copy of the seizure list was admitted in evidence. She further deposed that on 29.10.2015 pursuant to the direction of the Officer, she accompanied the victim girl to North Bengal Medical College & Hospital, Siliguri for her medical checkup.

P.W.4 Santi Singha, Civic Volunteer attached to the Goalpokher Police Station deposed that on 24.10.2015 she was serving at Goalpokher Police Station, and on that date, she signed the seizure list in which two sealed bottles were produced by another lady constable. She identified her signature on the carbon copy of the seizure list which was admitted in evidence.

P.W.5 is Anjuna Khatun, Civic Volunteer attached to Goalpokher Police Station who deposed that on 24.10.2015 while serving at the Police Station, on that date, she signed the seizure list prepared by Sub-Inspector Samarendranath Saha in respect of two sealed bottles produced by another lady constable. She identified her signature in the carbon copy of the seizure list which was admitted in evidence.

P.W.6 'Y', father of the victim girl deposed that complainant 'X' was his daughter. According to him, the incident took place about two years two months ago, at about 4.00 P.M., at his residence when his daughter was alone. The accused taking advantage of his daughter being alone, entered their house and raped her. When his daughter resisted, accused assured of marrying her and persuaded her not to reveal the incident to others. Following the incident, accused continued to meet with his daughter and maintained physical relationship with her, which resulted in her pregnancy. When his daughter informed of pregnancy to the accused and requested to marry her, the accused replied that, according to Quran, marriage could not be solemnized during pregnancy and advised her to approach his parents. His daughter met the parents of the accused and disclosed her pregnancy,

when father of the accused asked his daughter to terminate the pregnancy. His daughter refused to terminate her pregnancy when parents of the accused forcibly attempted to administer her some medicine. However, his daughter managed to escape and after returning home narrated the incident to her mother who in turn informed him about the entire incident. He reported the incident to the local Panchayat who decided to convene a meeting. However, in the meeting, the accused and his parents did not participate which compelled his daughter to inform the Police Station. Subsequently, his daughter gave birth to a female child who is presently 18 months old. His daughter along with her child is staying with him. His daughter also instituted another proceeding against the accused seeking maintenance for her child from the accused. The witness identified the accused in the Court.

P.W.7 'Z' is the mother of the victim girl, who deposed that the incident took place more than two years ago. On the relevant day, her daughter was alone at home and at around 4.00 P.M. the accused entered their residence and finding her alone, raped her. When her daughter resisted, accused assured to marry her and instructed her not to reveal the incident to anyone. Thereafter, on several occasions the accused called her daughter and took her to isolated places for having sexual relation. As a consequence of such physical relationship, her daughter became pregnant, when she requested the accused to marry her. Accused insisted her to first terminate her pregnancy as it would not be possible for him to marry her at that time. The accused thereafter advised her daughter to approach his parents.

Accordingly, her daughter visited their residence to meet his parents and disclosed her pregnancy. The parents of the accused also asked her to terminate her pregnancy, which she refused, when the parents of the accused tried to administer some medicine to her for the purpose of abortion. Her daughter, however, managed to escape and after returning home narrated the incident to her. She informed her husband about the incident, whereupon a shalish was convened at their village. However, the accused and his parents did not attend the said meeting when the Panchayat Members prepared a document about the said shalish/meeting which was signed by all the persons present in the meeting. Thereafter, her daughter lodged complaint with the police authorities. In due course, her daughter gave birth to a female child who is residing with them. Her daughter is still unmarried. She identified the accused in Court.

P.W.8 'A' is the grandfather of the victim who deposed similarly as P.W.7. He stated that the accused after committing forcible sex with his grand-daughter, promised to marry her, and on such assurance continued physical relationship. The witness also deposed in respect of the incident at the house of the accused as also the shalish which was held. He identified the accused in Court.

P.W.9 is Nur Hussain, a co-villager who deposed similarly as P.W.7 and P.W.8.

P.W.10 Mohobul Hussain, is a co-villager who deposed that he was acquainted with the victim as well as the accused who are his co-villagers

and proceeded to state that about two years ago, father of the victim came to his house and stated that his daughter got pregnant at the instance of the accused. He advised the father of the victim to apprise the villagers, whereupon a meeting was held at the village. He was present at the said meeting along with the Panchayat Member and other villagers. Although the accused and the parents of the accused were called but the accused did not attend the meeting, and only his father attended the meeting and sought eight days' time. After eight days, another meeting was convened but neither the accused nor any of his parents participated in the meeting, when the Panchayat Members prepared a document and asked the victim and her parents to initiate legal action against the accused. Later, he came to know that victim gave birth to a female child. He identified the accused in Court.

P.W.11 is Dr. Sukumar Roy, Medical Officer attached to Islampur Sub-Divisional hospital who examined the victim 'X' aged about 23 years and was identified by the Lady Constable P.W.3. The victim was examined in presence of staff nurse of the Hospital and on examination he found the victim girl to be pregnant for approximately 24 weeks. He advised her for undergoing USG of pelvic organs and x-ray for ossification test. He stated that in the opinion column of the medical report he noted that whether the victim had been raped would require corroboration of investigation reports and circumstantial evidences. He identified the signature in the said report along with its contents, which was admitted in evidence.

P.W.12 is Nur Md. who deposed that he knew the victim who belonged to his village and filed a complaint at Goalpokher Police Station.

Additionally, he deposed that he was present at the meeting held on 18.10.2015, where a decision was taken by the villagers who assembled there. The persons present there prepared a resolution where he signed, the same was identified by him which was appearing as serial no. 66. The resolution which was recorded in the said shalish including his signature at serial no.66 was identified by him and was admitted in evidence.

P.W. 13 is Samarendra Nath Saha, Sub-Inspector of Police attached to Islampur Police Station who deposed that on 23.10.2015 he was posted at Goalpokher Police Station. On that date, the Officer-in-Charge of Goalpokher Police Station received the complaint from P.W.2. Another Sub-Inspector namely, Abhijit Dutta prepared the formal FIR and registered Goalpokher P.S. Case No. 495 of 2015 dated 23.10.2015 under the relevant provisions of Indian Penal Code. He identified the signature of the said Abhijit Dutta as well as copy of the formal FIR which was admitted in evidence. He was entrusted to investigate the said case and after taking charge of the investigation, he visited the place of occurrence, prepared rough sketch map with index. He identified the said documents which were admitted in evidence. He also arranged for medical examination of the victim girl at Islampur Sub-Divisional Hospital and subsequently, collected the medical report. Thereafter, he submitted charge-sheet before the Court.

P.W.14 is Sahid Hussain, a Clerk of Islampur Court who deposed that he drafted the letter of complaint as per instructions of P.W.2. He identified the complaint which was written by him and confirmed his signature in the said complaint, which was admitted in evidence.

Learned advocate appearing for the appellant argued that the evidence adduced in the present case demonstrates that there existed consent of the victim in the relationship and she being a major was capable of understanding the consequences of her actions. As such, the accusations of rape which have been sought to be established by the prosecution are unfounded. It was contended that the relationship between the appellant and the victim/complainant continued for a considerable period of time and difficulties arose only when the victim became pregnant. The subsequent events were not within the control of the appellant. The reasons for which marriage could not be solemnized cannot be solely attributed to the appellant, therefore, the charges under sections 376/506 of the Indian Penal Code as such are not attracted. The investigating agency in the present case failed to conduct any DNA test of the new born child and so no presumption can be drawn that the appellant is the father of the child. Rest of the witnesses on whom the prosecution has relied upon except P.W. 2 are all hearsay evidences and there being delay in lodging the complaint itself indicates that the criminal case was fabricated for falsely implicating the accused/appellant who is innocent of the charges and has been facing the ordeal of a criminal trial for the last 10 years. The evidence of the victim and the independent witnesses not being acceptable in the eye of law, there is no scope for convicting the appellant. As such, the judgment and order of conviction and sentence passed by the Learned Trial Court calls for interference by this Court and is liable to be set aside.

Learned advocate for the State on the other hand, submitted that the settled principle of law is that conviction can be based on the sole testimony of the prosecutrix provided it is reliable and trustworthy. In the present case, the prosecutrix has been consistent in her narration of events and other witnesses have corroborated her. It was urged that there was no element of consent of the prosecutrix and the appellant forced himself on her and in order to shield himself, promised to marry her. This was specifically deposed by P.W. 2 in her examination-in-chief and in cross-examination, she remained unshaken and as her version was consistent, the same cannot be disregarded. The plea advanced by the accused/appellant that the marriage was contingent upon with a condition precedent for abortion of the child on religious grounds is nothing but a ploy of disowning the relationship as well as the child. Firstly, there was no consent on the part of the complainant, the facts would go to show that the accused forced himself and in order to shield himself, promised to marry her, thereafter, when the complainant became pregnant, the appellant refused to marry her. The complainant not only carried the pregnancy but she also gave birth to a female child. As such, the offence complained of has been proved beyond reasonable doubt and no interference is called for by this Court in respect of the finding of guilt arrived at by the Learned Trial Court.

I have taken into account the submissions advanced by the learned advocate appearing on behalf of the appellant as well as that of the State together with the evidence on record. Before proceeding further, I am of the

opinion that the principles laid down by the Hon'ble Supreme Court in some of the judgments require consideration, which dealt with similar set of circumstances.

In *Yedla Srinivasa Rao v. State of A.P.*, reported in (2006) 11 SCC 615, paragraphs 10,11, 15-17 are relevant for the present case which is set out hereunder:

*“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. In this connection, reference may be made to a decision of the Calcutta High Court in *Jayanti Rani Panda v. State of W.B.* [1984 Cri LJ 1535 (Cal)] In that case it was observed that in order to come within the meaning of misconception of fact, the fact must have an immediate relevance. It was also observed that if a fully grown-up girl consents to the act of sexual intercourse on a*

promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity on her part and not an act induced by misconception of fact and it was held that Section 90 IPC cannot be invoked unless the court can be assured that from the inception the accused never intended to marry her. Therefore, it depends on case to case that what is the evidence led in the matter. If it is a fully grown-up girl who gave the consent then it is a different case but a girl whose age is very tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfil right from the beginning which is apparent from the conduct of the accused, in our opinion, Section 90 can be invoked. Therefore, so far as Jayanti Rani Panda [1984 Cri LJ 1535 (Cal)] is concerned, the prosecutrix was aged 21-22 years old. But, here in the present case the age of the girl was very tender between 15-16 years. Therefore, Jayanti Rani Panda case [1984 Cri LJ 1535 (Cal)] is fully distinguishable on facts. It is always a matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfil. If the court of facts comes to the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise. Such consent cannot condone the offence. Reliance can also be placed on Emperor v. Soma [(1917) 18 Cri LJ 18 : 36 IC 850] . In that case the question of consent arose in the context of an allegation of kidnapping of a minor girl. It was held that the intention of the accused was to marry the girl to one Daya Ram and she obtained Kujan's consent to take away the girl by misrepresenting her intention. In that context it was held that at the time of taking away the girl there was a positive misrepresentation i.e. taking the girls to the temple at Jawala Mukhi and thereafter

they halted for the night in kutiya (hut), some three miles distance from Praggur and met Daya Ram, Bhag Mal and Musammat Mansa and Musammat Sarasti was forced into marrying Daya Ram. This act was found to be an act of kidnapping without consent. But, in the instant case, a girl though aged 16 years was persuaded to sexual intercourse with the assurance of marriage which the accused never intended to fulfil and it was totally under misconception on the part of the victim that the accused was likely to marry her, therefore, she submitted to the lust of the accused. Such fraudulent consent cannot be said to be a consent so as to condone the offence of the accused. Our attention was also invited to the decision of this Court in Deelip Singh v. State of Bihar [(2005) 1 SCC 88 : 2005 SCC (Cri) 253] wherein this Court took the view that the prosecutrix had taken a conscious decision to participate in the sexual act only on being impressed by the accused who promised to marry her. But the accused's promise was not false from its inception with the intention to seduce her to sexual act. Therefore, this case is fully distinguished from the facts as this Court found that the accused's promise was not false from its inception. But in the present case we found that the first accused committed rape on the victim against her will and consent but subsequently, he held out a hope of marrying her and continued to satisfy his lust. Therefore, it is apparent in this case that the accused had no intention to marry and it became further evident when the panchayat was convened and he admitted that he had committed sexual intercourse with the victim and also assured to marry her within 2 days but did not turn up to fulfil his promise before the panchayat. This conduct of the accused stands out to hold him guilty. What is a voluntary consent and what is not a voluntary consent depends on the facts of each case. In order to appreciate the testimony, one has to see the factors like the age of the girl, her education and her status in the society and likewise the social status of the boy. If the attending circumstances lead to the

conclusion that it was not only the accused but the prosecutrix was also equally keen, then in that case the offence is condoned. But in case a poor girl placed in a peculiar circumstance where her father has died and she does not understand what consequences may result from indulging into such acts and when the accused promised to marry her but he never intended to marry her right from the beginning then the consent of the girl is of no consequence and falls in the second category as enumerated in Section 375 — “without her consent”. A consent obtained by misconception while playing a fraud is not a consent.

11. *In this connection our attention was also invited to the decision of this Court in Uday v. State of Karnataka [(2003) 4 SCC 46 : 2003 SCC (Cri) 775] . In this case also this Court held that for determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, no straitjacket formula can be laid down but the following factors stand out: (i) where a girl was of 19 years of age and had sufficient intelligence to understand the significance and moral quality of the act she was consenting to; (ii) she was conscious of the fact that her marriage was difficult on account of caste considerations; (iii) it was difficult to impute to the appellant, knowledge that the prosecutrix had consented in consequence of a misconception of the fact arising from his promise, and (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix. On the basis of the above factors, this Court did not feel persuaded to hold that consent was obtained by misconception of facts on the part of the victim. But as already mentioned above, in the present case we are satisfied that looking to the antecedent and subsequent events that the accused never intended to fulfil the promise of marriage, this was not a case where the accused was deeply in love. In the present case in our hand the accused persuaded her for a couple of months but she resisted it throughout. But, on one day he came to the house of her sister and closed the doors and committed forcible sexual intercourse against her will and consent, holding out a promise for marriage and continued to satisfy his lust. Therefore, this case stands entirely on*

a different footing. We may add a word of caution that the court of fact while appreciating evidence in such cases should closely scrutinise evidence while taking into consideration the factors like the age of the girl, her education, her social status and likewise the social status of the boy.

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 Penal Code, 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.*

17. *In the present case, in view of the facts as mentioned above we are satisfied that the consent which had been obtained by the accused was not a voluntary one which was given by her under misconception of fact that the accused would marry her but this is not a consent in law. This is more evident from the testimony of PW 1 as well as PW 6 who was functioning as the panchayat where the accused admitted that he had committed sexual intercourse and*

promised to marry her but he absconded despite the promise made before the panchayat. That shows that the accused had no intention to marry her right from the beginning and committed sexual intercourse totally under the misconception of fact by the prosecutrix that he would marry her. Therefore, we are satisfied that the conviction and sentence awarded to the appellant is correct and no case is made out for our interference. The appeals are dismissed.”

The following paragraphs of *Anurag Soni v. State of Chhattisgarh*, reported in (2019) 13 SCC 1 are relevant which are reproduced below:

“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.

10.1. *In Kaini Rajan v. State of Kerala [Kaini Rajan v. State of Kerala, (2013) 9 SCC 113 : (2013) 3 SCC (Cri) 858] , 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)*

“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 [State of H.P. v. Mango Ram, (2000) 7 SCC 224 : 2000 SCC (Cri) 1331].)”

10.2. *In Deepak Gulati v. State of Haryana [Deepak Gulati v. State of Haryana, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] , this Court observed and held in paras 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.”

(emphasis in original)

14. *Considering the aforesaid facts and circumstances of the case and the evidence on record, the prosecution has been successful in proving the case that from the very beginning the accused never intended to marry the prosecutrix; he gave false promises/promise to the prosecutrix to marry her and on such false promise he had physical relation with the prosecutrix; the prosecutrix initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on misconception of fact as per Section 90 IPC and such a consent shall not excuse the accused from the charge of rape and offence under Section 375 IPC.*

17. *Therefore, considering the aforesaid facts and circumstances of the case and considering the law laid down by this Court in the aforesaid decisions, we are of the opinion that both the courts below have rightly held that the consent given by the prosecutrix was on misconception of fact and, therefore, the same cannot be said to be a consent so as to excuse the accused for the charge of rape as defined under Section 375 IPC. Both the courts below have rightly convicted the accused for the offence under Section 376 IPC.*

19. *As observed hereinabove, the consent given by the prosecutrix was on misconception of fact. Such incidents are on increase nowadays. Such offences are against the society. Rape is the most morally and physically reprehensible crime in a society, an assault on the body, mind and privacy of the victim. As observed by this Court in a catena of decisions, while a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape*

tantamounts to a serious blow to the supreme honour of a woman, and offends both her esteem and dignity. Therefore, merely because the accused had married with another lady and/or even the prosecutrix has subsequently married, is no ground not to convict the appellant-accused for the offence punishable under Section 376 IPC. The appellant-accused must face the consequences of the crime committed by him.

20. *In view of the above and for the reasons stated above, we are of the opinion that both the courts below have rightly convicted the appellant-accused under Section 376 IPC. We also maintain the conviction of the appellant-accused under Section 376 IPC. However, in the facts and circumstances of the case and the request made by the learned counsel appearing on behalf of the appellant-accused, the sentence of 10 years' RI awarded by the courts below is hereby reduced to seven years' RI, the minimum which was prescribed at the relevant time of commission of offence under Section 376 IPC. Consequently, the present appeal is partly allowed to the aforesaid modification in the sentence only."*

On an assessment of the evidence which has emerged during the trial and bearing in mind the principles set out by the Hon'ble Apex Court, I find that it is evident that the accused forced himself initially, and after committing the offence in order to shield himself, promised to marry the victim and when she became pregnant, on various pretext ignored her. The facts thus, clearly establish that from the very inception, the accused did not have the intention to marry the complainant but on false pretext engaged in physical relationship with the victim.

Guided on the aforesaid factual and legal parameters, I am of the opinion that there is no scope for interference in the judgment and order of conviction and sentence passed by the Learned Trial Court.

As such the order of conviction and sentence passed in ST No. 37(3)17, SC No. 38/2017 arising out of PS Case No. 495 of 2015 is upheld.

As such C.R.A. No. 572 of 2018 is dismissed.

Pending connected applications, if any, are also disposed of.

Department is directed to send back the Trial Court Records immediately. A copy of the judgment be forwarded to the learned Trial Court immediately for compliance regarding the directions given above.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Tirthankar Ghosh, J.)