Madhya Pradesh High Court
Gopal Oyan vs The State Of Madhya Pradesh on 12 May, 2022
Author: Sanjay Dwivedi

IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE SANJAY DWIVEDI
M.Cr.C. No.37322 of 2021

Between:-
Gopal Oyam, S/o Ramprasad Oyam, Aged about 33 years, R/o. Gram Thangao, P.S. Niwas, District Mandla (M.P.)
.....PETITIONER

(BY SHRI ADITYA JAIN, ADVOCATE)
AND

1. State of Madhya Pradesh, Thr: Station House Officer, Police Station Niwas, District Mandla.
2. Jyoti Saiyam, D/o Ravi Singh Saiyam, Aged about 25 years, R/o Gram Khanpura, Satlapur, Raisen (MP)
.....RESPONDENTS

(BY MS. SUPRIYA SINGH , PANEL LAWYER)

Reserved on : 21.04.2022
Delivered on : 12.05.2022

This petition coming on for hearing this day, the Court passed the following:

ORDER

This petition has been filed by the petitioner under Section 482 of Cr.P.C. for quashing the FIR No. 143/2020 dated 20.10.2020 registered at Police Station-Industrial Area, Satlapur, District Raisen for the offence punishable under Section 376(2)(n) of IPC.

2. Learned counsel for the petitioner submits that in view of contents of FIR and the statement given by the prosecutrix under Section 164 of Cr.P.C. and the fact that she has refused to get herself medically examined, it is clear that no case of Section 376 of IPC is made out against the present petitioner and as such, criminal proceedings initiated against him vide FIR No. 143/2020 are liable to be set aside.

3. As per the case of the prosecution, on 20.10.2020, the prosecutrix lodged an FIR against the present petitioner stating therein that on the false pretext of marriage, the petitioner developed physical relations with the prosecutrix against her wish. As per the prosecutrix, she was the resident

of Gram Khanpura, Police Station Satlapur, District Raisen and while studying, she developed friendship with the present petitioner through face-book and thereafter in May, 2020, the parents of the petitioner and the prosecutrix met and they agreed to get their marriage solemnized and finally the marriage was settled. Thereafter, on 16.09.2020, the petitioner came to the house of the prosecutrix at Khanpura and remained there for few days. In between the petitioner asked prosecutrix to develop physical relations and on 17.09.2020, on the assurance of marriage, he developed physical relation with the prosecutrix which was continued so many times but on 20.10.2020, the petitioner refused to marry the prosecutrix and therefore, she went to the police station with her father and lodged the FIR.

4. On the basis of the report lodged by the prosecutrix, offence has been registered against the present petitioner. Although when prosecutrix was asked to get herself medically examined, she refused to do so. The report is available on record indicating that the prosecutrix refused to get herself medically examined and thereafter, her statement under Section 164 of Cr.P.C. was recorded on the same date, i.e. 22.10.2020 in which she has very categorically admitted this fact that the present petitioner did not develop any physical relation with her though he asked her for developing physical relation but she refused and, therefore, nothing was happened. She has further admitted that from the date of developing friendship on face-book till the submission of FIR, no physical relation has been developed between them.

5. Counsel for the petitioner, therefore, submits that no case of Section 376 of IPC is made out against the petitioner and as such, the proceedings initiated against him are liable to be set aside.

6. Ms. Supriya Singh, learned counsel appearing for the respondent/State although read over the case diary but is not in a position to dispute the factual position existing in the case.

7. I have heard the arguments advanced by learned counsel for the parties and perused the record.

8. Under the similar facts and circumstances, this Court in M.Cr.C. No. 11456/2020(Madhur Baghrecha Vs. State of Madhya Pradesh) has dealt with the issue in detail considering the law laid down by the Supreme Court in cases of (2003) 4 SCC 46-Uday vs. State of Karnataka, (2019) 9 SCC 608-Pramod Suryabhan Pawar vs. State of Maharashtra and another, (2019) 18 SCC 191-Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra and others, (2020) 10 108- Maheshwar Tigga Vs. State of Jharkhand and 2021 SCC OnLine 181-Sonu alias Subhash Kumar vs. State of Uttar Pradesh and another.

9. The Supreme Court in the case of Udai (supra) has dealt with the issue in detail considering the respective provisions of IPC i.e. Section 375 of IPC and Section 90 of IPC and has observed as under:-

> "9. We may at the threshold notice the relevant provisions of the Penal Code, 1860, namely, Section 375 and Section 90 which read as follows:

"375. Rape.--A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following 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 sixteen years of age. Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

"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."

10. Learned counsel for the appellant submitted that in the context of Section 375 of the Penal Code, 1860, which is a special provision, the general provision, namely, Section 90 of the Penal Code, 1860 was not of much assistance to the prosecution. According to him, Section 375 Thirdly, Fourthly and Fifthly exhaustively enumerate the circumstances in which the consent given by the prosecutrix is vitiated and does not amount to consent in law. According to him, one has to look to Section 375 alone for finding out whether the offence of rape had been committed. Secondly, he submitted that even under Section 90 of the Penal Code the consent is vitiated only if it is given under a misconception of fact. A belief that the promise of marriage was

meant to be fulfilled is not a misconception of fact. The question of misconception of fact will arise only if the act consented to, is believed by the person consenting to be something else, and on that pretext sexual intercourse is committed. In such cases it cannot be said that she consented to sexual intercourse. He sought to illustrate this point by reference to English cases where a medical man had sexual intercourse with a girl who suffered from a bona fide belief that she was being medically treated, or where under the pretence of performing surgery a surgeon had carnal intercourse with her. In Stroud's Judicial Dictionary (5th Edn.) p. 510 "consent" has been given the following meaning:

"Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side."

It refers to the case of Holman v. R. [1970 WAR 2] wherein it was held that "there does not necessarily have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it there is consent".

Similar was the observation in R. v. Olugboja [(1981) 3 WLR 585 : (1981) 3 All ER 443 : 1982 QB 320 (CA)] wherein it was observed that "consent in rape covers states of mind ranging widely from actual desire to reluctant acquiescence, and the issue of consent should not be left to the jury without some further direction". Stephen, J. in R. v. Clarence [(1888) 22 QBD 23 : (1886-

90) All ER Rep 133 : 58 LJMC 10] observed: (All ER p. 144 C-D) "It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true."

Wills, J. observed: (All ER p. 135 I) "That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent."

11. Some of the decisions referred to in Words and Phrases, Permanent Edition, Vol. 8A at p. 205 have held "that adult female's understanding of nature and consequences of sexual act must be intelligent understanding to constitute 'consent'. Consent within penal law, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. Legal consent, which will be held sufficient in a prosecution for rape, assumes a capacity to the person consenting to understand and appreciate the nature of the act committed, its immoral character, and the probable or natural consequences which may attend it".

(See People v. Perry [26 Cal App 143] .)

12. The courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be legal consent. In Rao Harnarain Singh Sheoji Singh v. State [AIR 1958 Punj 123 : 1958 Cri LJ 563 : 59 Punj LR 519] it was observed: (AIR p. 126, para 7) "7. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, 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 freely exercised a choice between resistance and assent.

Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure."

13. The same view was expressed by the High Court of Kerala in Vijayan Pillai v. State of Kerala [(1989) 2 Ker LJ 234] . Balakrishnan, J., as he then was, observed: (Ker LJ pp. 238-39, para 10) "10. The vital question to be decided is whether the above circumstances are sufficient to spell out consent on the part of PW 1. In order to prove that there was consent on the part of the prosecutrix it must be established that she freely submitted herself while in free and unconstrained possession of her physical and mental power to act in a manner she wanted. Consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, non-resistance and passive giving in cannot be deemed to be 'consent'. Consent means active will in the mind of a person to permit the doing of the act of and knowledge of what is to be done, or of the nature of the act that is being done is essential to a consent to an act. Consent supposes a physical power to act, a moral power of acting and a serious and determined and free use of these powers. Every consent to act involves submission, but it by no means follows that a mere submission involves consent. In Jowitt's Dictionary of English Law, IInd Edn., Vol. 1 explains consent as follows:

'An act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things -- a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, mediated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.' "

14. In Anthony, In re [AIR 1960 Mad 308 : 1960 Cri LJ 927] , Ramaswami, J. in his concurring opinion fully agreed with the principle laid down in Rao Harnarain Singh case [AIR 1958 Punj 123 : 1958 Cri LJ 563 : 59 Punj LR 519] and went on to observe: (AIR pp. 311-12, para 21) "A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former."

15. The same view has been reiterated by the Punjab High Court in Arjan Ram Naurata Ram v. State [AIR 1960 Punj 303 : 1960 Cri LJ 849] , by the Rajasthan High Court in Gopi Shanker v. State of Rajasthan [AIR 1967 Raj 159 : 1967 Cri LJ 922] and by the Bombay High Court in Bhimrao Harnooji Wanjari v. State of Maharashtra [1975 Mah LJ 660] .

16. The High Court of Calcutta has also consistently taken the view that the failure to keep the promise on a future uncertain date does not always amount to misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. In Jayanti Rani Panda v. State of W.B. [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] the facts were somewhat similar. The accused was a teacher of the local village school and used to visit the residence of the prosecutrix. One day during the absence of the parents of the prosecutrix he expressed his love for her and his desire to marry her. The prosecutrix was also willing and the accused promised to marry her once he obtained the consent of his parents. Acting on such assurance the prosecutrix started cohabiting with the accused and this continued for several months during which period the accused spent several nights with her. Eventually when she conceived and insisted that the marriage should be performed as quickly as possible, the accused suggested an abortion and agreed to marry her later. Since the proposal was not acceptable to the prosecutrix, the accused disowned the promise and stopped visiting her house. A Division Bench of the Calcutta High Court noticed the provisions of Section 90 of the Penal Code, 1860 and concluded: (Cri LJ p. 1538, para 7) "The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full- grown 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. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other,

unless the Court can be assured that from the very inception the accused never really intended to marry her."

17. The same view was reiterated in Hari Majhi v. State [1990 Cri LJ 650 (Cal)] and Abhoy Pradhan v. State of W.B. [1999 Cri LJ 3534 : (1999) 3 Crimes 359 (Cal)] .

18. The impugned judgment and order in this appeal is by a learned Single Judge of the High Court of Karnataka but it appears that in a recent judgment, a Division Bench of the same High Court in State of Karnataka v. Anthonidas [ILR 2000 Kar 266] has taken the contrary view. Similar is the view of the Orissa High Court in Nilambar Goudo v. State [1982 Cri LJ NOC 172 (Ori)] .

19. Only one judgment of the Patna High Court was brought to our notice, which appears to take a contrary view. (Saleha Khatoon v. State of Bihar [1989 Cri LJ 202 : 1988 BLJR 678 (Pat)] .) However, the observations in that judgment must be understood in the facts and circumstances of that case. That was a case where the Magistrate instead of committing the case to the Court of Session for trial, on similar allegations, proceeded to try the case himself for the charge under Section 498 IPC and declined to commit the accused to the Court of Session for trial for the offence under Section 376 IPC. This order was challenged before the High Court and in those circumstances the Court held that in the facts and circumstances of the case, having regard to the narrow jurisdiction of the Magistrate under Section 209 CrPC, he was not required to balance and weigh the evidence as is done by the trial court. In the facts and circumstances of the case, he ought to have committed the case to the Court of Session for trial under Section 376 IPC. In this background the learned Judge made the following observations: (Cri LJ p. 204, para 8) "The first point which attracts my attention is the second ingredient 'without her consent'. Consent always means free will or voluntary act. In this case consent was obtained on the basis of some fraud and allurement or practising deception upon the lady on the pretext that ultimately she will be married and under that pretext she allowed Opposite Party 2 to have sexual intercourse with her. Therefore, this tainted consent or a consent of this nature which is based on deception and fraud, cannot be termed, prima facie, to conclude that it was 'with consent'. Had the lady known that ultimately she would be deserted, the facts and circumstances stated above and the materials placed would go to show that she would have refrained from giving such consent. Then a question would arise what was the purpose for which she gave consent. It was a fraud that was practised on her or she was deceived by giving false assurance. Such type of consent must be termed to be consent obtained without her consent. Consent obtained by deceitful means is no consent and comes within the ambit of ingredients of the definition of rape."

20. We may only observe that another Single Judge of the Patna High Court in Mir Wali Mohd. v. State of Bihar [1990 BBCJ 530] while quashing a charge framed under Section 376 IPC has taken the contrary view following the Calcutta High Court

judgment in Jayanti Rani Panda [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] .

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.

22. The approach to the subject of consent as indicated by the Punjab High Court in Rao Harnarain Singh [AIR 1958 Punj 123 : 1958 Cri LJ 563 : 59 Punj LR 519] and by the Kerala High Court in Vijayan Pillai [(1989) 2 Ker LJ 234] has found approval by this Court in State of H.P. v. Mango Ram [(2000) 7 SCC 224 :

2000 SCC (Cri) 1331] . Balakrishnan, J. speaking for the Court observed: (SCC pp. 230- 31, para 13) "The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. 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."

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.

24. There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her.

25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with

> whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.
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> 26. In view of our findings aforesaid, we do not consider it necessary to consider the question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under Section 375 fourthly and fifthly, or whether consent given under a misconception of fact contemplated by Section 90 has a wider application so as to include circumstances not enumerated in Section 375 IPC.

10. Further in the case of Pramod Suryabhan Pawar (supra) again the Supreme Court has considered the scope of respective provisions of Sections 375 and 90 of IPC and observed as under:-

> 9. The present proceedings concern an FIR registered against the appellant under Sections 376, 417, 504 and 506(2) IPC and Sections 3(1)(u), (w) and 3(2)(vii) of the SC/ST Act. Section 376 IPC prescribes the punishment for the offence of rape which is set out in Section 375. Section 375 prescribes seven descriptions of how the offence of rape may be committed. For the present purposes only the second such description, along with Section 90 IPC is relevant and is set out below:
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> "375. Rape.--A man is said to commit "rape" if he--
>
> *** under the circumstances falling under any of the following seven descriptions--
> Firstly.--
>
> Secondly.--Without her consent.
>
> *** Explanation 2.--Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:
>
> Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."
>
> "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"

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

11. The primary contention advanced by the complainant is that the appellant engaged in sexual relations with her on the false promise of marrying her, and therefore her "consent", being premised on a "misconception of fact" (the promise to marry), stands vitiated.

12. This Court has repeatedly held that consent with respect to Section 375 IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In Dhruvaram Sonar [Dhruvaram Murlidhar Sonar v. State of Maharashtra, (2019) 18 SCC 191 : 2018 SCC OnLine SC 3100] which was a case involving the invoking of the jurisdiction under Section 482, this Court observed : (SCC para 15) "15. ... An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of."

This understanding was also emphasised in the decision of this Court in Kaini Rajan v. State of Kerala [Kaini Rajan v. State of Kerala, (2013) 9 SCC 113 : (2013) 3 SCC (Cri) 858] : (SCC p. 118, para 12) "12. ... "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

13. This understanding of consent has also been set out in Explanation 2 of Section 375 (reproduced above). Section 3(1)(w) of the SC/ST Act also incorporates this concept of consent:

"3. (1)(w)(i) intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent;

*** 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;"

14. In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In Anurag Soni v. State of Chhattisgarh [Anurag Soni v. State of Chhattisgarh, (2019) 13 SCC 1 : 2019 SCC OnLine SC 509], this Court held : (SCC para 12) "12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 IPC and can be convicted for the offence under Section 376 IPC." Similar observations were made by this Court in Deepak Gulati v. State of Haryana [Deepak Gulati v. State of Haryana, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] (Deepak Gulati) : (SCC p. 682, para 21) "21. ... 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;"

15. In Yedla Srinivasa Rao v. State of A.P. [Yedla Srinivasa Rao v. State of A.P., (2006) 11 SCC 615 : (2007) 1 SCC (Cri) 557] the accused forcibly established sexual relations with the complainant. When she asked the accused why he had spoiled her life, he promised to marry her. On this premise, the accused repeatedly had sexual intercourse with the complainant. When the complainant became pregnant, the accused refused to marry her. When the matter was brought to the panchayat, the accused admitted to having had sexual intercourse with the complainant but subsequently absconded. Given this factual background, the Court observed : (SCC pp. 620-21, para 10) "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."

16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act. In Deepak Gulati [Deepak Gulati v. State of Haryana, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] this Court observed : (SCC pp. 682-84, paras 21 & 24) "21. ... 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.

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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, [Ed. : The matter between two asterisks has been emphasised in original.] unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her [Ed. : The matter between two asterisks has been emphasised in original.] ."

(emphasis supplied) In the aforesaid case, the Supreme Court has also taken note of the law laid down in the case of Uday (supra).

11. In the case of Dr. Dhruvaram Murlidhar Sonar (supra), the Supreme Court has not only considered the scope of Sections 375 and 90 of IPC, but, has also considered the fact as to where the powers provided under Section 482 of Cr.P.C. can be exercised by the High Court. The Supreme Court finally 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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> 24. In the instant case, it is an admitted position that the appellant was serving as a Medical Officer in the Primary Health Centre and the complainant was working as an Assistant Nurse in the same health centre and that she is a widow. It was alleged by her that the appellant informed her that he is a married man and that he has differences with his wife. Admittedly, they belong to different communities. It is also alleged that the accused/appellant needed a month's time to get their marriage registered. The complainant further states that she had fallen in love with the appellant and that she needed a companion as she was a widow. She has specifically stated that "as I was also a widow and I was also in need of a companion, I agreed to his proposal and since then we were having love affair and accordingly we started residing together. We used to reside sometimes at my home whereas sometimes at his home". Thus, they were living together, sometimes at her house and sometimes at the residence of the appellant. They were in a relationship with each other for quite some time and enjoyed each other's company. It is also clear that they had been living as such for quite some time together. When she came to know that the appellant had married some other woman, she lodged the complaint. It is not her case that the complainant has forcibly raped her. She had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit

consent and the tacit consent given by her was not the result of a misconception created in her mind. We are of the view that, even if the allegations made in the complaint are taken at their face value and accepted in their entirety, they do not make out a case against the appellant. We are also of the view that since the complainant has failed to prima facie show the commission of rape, the complaint registered under Section 376(2)(b) cannot be sustained.

25. Further, the FIR nowhere spells out any wrong committed by the appellant under Section 420 IPC or under Section 3(1)(x) of the SC/ST Act. Therefore, the High Court was not justified in rejecting the petition filed by the appellant under Section 482 CrPC.

26. In the result, the appeal succeeds and is accordingly allowed. The impugned order of the High Court dated 2-7-2018 in Dhruvaram Murlidhar Sonar v. State of Maharashtra [Dhruvaram Murlidhar Sonar v. State of Maharashtra, 2018 SCC OnLine Bom 8419] , is hereby set aside. The first information report dated 6-12-2000 filed by the complainant in the police station at Mhasawad, District Nandurbar, on the basis of which Crime No. 59 of 2000 is registered against the appellant, is hereby quashed. The charge-sheet dated 14-6-2001 filed by Mhasawad Police Station against the appellant for the offences under Sections 376(2)(b), 420 read with Section 34 IPC and Section 3(1)(x) of the SC/ST Act is also quashed.

12. In the case of Maheshwar Tigga (supra) also the Supreme Court has considered the scope of Sections 375 and 90 of IPC relying upon the law laid down in the cases of Dr. Dhruvaram Murlidhar Sonar and Pramod Suryabhan Pawar (supra) reiterating the same legal position and also observed that the proceeding under Section 482 of Cr.P.C. can be initiated for quashing the proceedings. The observation of the Supreme Court is imperative to be mentioned, which is as under:

"17. This Court recently in Dhruvaram Murlidhar Sonar v. State of Maharashtra [Dhruvaram Murlidhar Sonar v. State of Maharashtra, (2019) 18 SCC 191 : (2020) 3 SCC (Cri) 672 : AIR 2019 SC 327] and in Pramod Suryabhan Pawar v. State of Maharashtra [Pramod Suryabhan Pawar v. State of Maharashtra, (2019) 9 SCC 608 : (2019) 3 SCC (Cri) 903] arising out of an application under Section 482 CrPC in similar circumstances where the relationship originated in a love affair, developed over a period of time accompanied by physical relations, consensual in nature, but the marriage could not fructify because the parties belonged to different castes and communities, quashed the proceedings.

18. We have given our thoughtful consideration to the facts and circumstances of the present case and are of the considered opinion that the appellant did not make any false promise or intentional misrepresentation of marriage leading to establishment of physical relationship between the parties. 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."

13. In view of the aforesaid enunciation of law, it is clear that no case of Section 376 of IPC is made out against the present petitioner for the reason that the prosecutrix in her statement recorded under Section 164 Cr.P.C. has very categorically admitted that petitioner has not developed any physical relation with her and further it is clear from the documents available on record that she refused to get herself medically examined and no medical opinion is also available so as to ascertain that any physical relation has been developed between the petitioner and the prosecutrix. In absence of any such material indicating that petitioner has developed physical relation forcefully without the consent of the prosecutrix, he cannot be put to trial for an offence of Section 376 of IPC.

14. In view of the aforesaid factual situation and perusal of material available, it is clear that result of the trial is obvious and would indicate about acquittal of the petitioner, therefore, this Court has no hesitation to hold that the criminal proceedings initiated against the present petitioner vide FIR No. 143/2020 is nothing but an abuse of process of law and for ends of justice, this Court can exercise the power provided under Section 482 of Cr.P.C. by setting aside the criminal proceedings initiated against the petitioner.

15. Accordingly, the petition is hereby allowed. The FIR dated 20.10.2020 registered against the petitioner vide FIR No. 143/2020 under Section 376(2)(n) of IPC is hereby quashed and consequently the proceedings arisen out of the said FIR are also quashed.

(SANJAY DWIVEDI) JUDGE rao Digitally signed by SATYA SAI RAO SATYA DN: c=IN, o=HIGH COURT OF MADHYA PRADESH, ou=HIGH COURT OF MADHYA PRADESH, postalCode=482001, st=Madhya Pradesh, 2.5.4.20=fd8212036fdbf89fa7ca6dd1d45561a7803f38162f693a3cbabf7e416131fa7f, SAI RAO pseudonym=6D368848B6731EB999EE2C54F154A7245187F1E5, serialNumber=D71B7C71D530E3C544E8EBF848D8818167BECB37EB09E44776D0667970EED1E9, cn=SATYA SAI RAO Date: 2022.05.13 17:30:03 +05'30'