

HIGH COURT OF TRIPURA
AGARTALA

Crl. App(J).No.58 of 2019

Rajib Sharma, S/O Late Tapan Sharma, Betbagan, Near Assam Rifle Camp,
PS-Ambassa

-----Petitioner(s)

Versus

The State Of Tripura represented By PP

-----Respondent(s)

For the Petitioner(s)	:	Mr. S.Sarkar, Sr. Adv. Mr. S.B.Deb, Adv. Mr. A.Hoque, Adv.
For the Respondent(s)	:	Mr. Ratan Datta, PP.
Date of hearing	:	15.01.2021
Date of pronouncement	:	04.06.2021
Whether fit for reporting	:	Yes / No.

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BEFORE

HON'BLE MR. JUSTICE ARINDAM LODH
HON'BLE MR. JUSTICE S.G.CHATTOPADHYAY

JUDGMENT

[S.G.Chattopadhyay. J]

[1] The appellant has preferred this appeal against judgment and order of conviction and sentence dated 07/08/2019 delivered in case no. ST.(T-1) 31 of 2015 by the Sessions Judge of Dhalai Judicial District Ambassa whereby the appellant was convicted for having committed offence punishable under Section 376(1) IPC and sentenced to RI for 10 years and fine of Rs.20,000/- with default stipulation.

[2] Factual back ground of the case is as under:

The victim (name withheld to hide her identity) lodged the written FIR with the Officer in charge of Ambassa police station on 13/11/2014 alleging that the appellant had repeated sexual intercourse with her on the assurance of marriage as a result of which she became pregnant. When she was having 8 months' pregnancy, the appellant at the instigation of his mother, refused to maintain any relationship with her. Eventually, she delivered a female child. When she met the appellant at his home with her new born baby, the appellant and his mother ousted her from their home after committing physical assault on her. Since then she was living with her parents along with her child.

[3] Based on her FIR, Ambassa P.S. case No. 56 of 2014 under Section 376, 417 read with Section 109 IPC was registered against the appellant and his mother and the case was entrusted to Smt. Mukta Ghosh, a Sub-Inspector of Police of Ambassa police station [PW-12] for investigation. During investigation, victim gave a statement under Section 164(5) Cr.P.C [Exbt.8] before the Sub-Divisional Judicial Magistrate, Kamalpur wherein she had stated that she came to know the appellant 2 years back. He had an auto rickshaw in which he used to drop the victim at her school. Gradually they developed a relationship and the accused proposed to marry her. On his assurance of marriage, she had consented to sexual intercourse with the appellant. On several

dates thereafter, the appellant on the pretext of marriage had sexual intercourse with her as a result of which she became pregnant and delivered a female child. After the birth of the child, the appellant stopped meeting her. The victim and her mother then met the mother of the appellant and proposed for marriage between the victim and the appellant. They refused to accept the victim and her daughter. Since then, the victim had been living with her parents.

[4] The blood sample of the victim as well as the blood sample of the new born baby of her and that of the appellant were sent to the State Forensic Science Laboratory for DNA profiling which revealed that the victim was the biological mother and the appellant was the biological father of the child. In the course of her investigation, the IO also examined the material witnesses including the victim and recorded their police statement under Section 161 Cr.P.C. The charge sheet came to be filed on 01/03/2015 against the appellant and his mother for having committed offence punishable under Section 376, 417 and 323 IPC.

[5] At the commencement of trial, the learned trial court framed the following charge against the appellant:

“Firstly, You on within the intervening period from August 2011 A.D. to 04-11-2013 on several times at Raipasa in an abandoned hut under Ambassa Police Station committed rape on (name withheld to hide her identity) and that you thereby committed on offence punishable

u/s376(1) of Indian Penal Code and within the cognizance of this court.

Lastly, that you on the above mentioned date time and place, cheated (name withheld to hide her identity) to do sexual intercourse with you on false promise of marriage which she would not do, if she was not so deceived and such act caused her harm in her body, mind & reputation that you thereby committed an offence punishable u/s 417 of Indian Penal Code and within the cognizance of this court.

And I hereby direct that you be tried on the said charges.”

[6] Charge framed against the mother of the appellant was as under:

“Firstly, You on within the intervening period from August 2014 to 04-11-2013 to 04-06-2014 at any time at Bet Bagan in your residential house under Ambassa Police Station voluntarily casued hurt to (name withheld to hide her identity) and that you thereby committed an offence punishable u/s-323 of Indian Penal Code and within the cognizance of this court.

Lastly, that within the intervening period from 2011 A.D. To 04-11-2013 A.D. On several occasions at Raipasa in an abandoned hut under Ambassa Police Station, the offence of rape was committed by Sri Rajib Sharma, and that you within the intervening period from 04-11-2013 to 04-06-2014 at Bet Bagan concealed the said Sri Rajib Sharma, knowing at the time of said concealing that the said Rajib Sharma had committed the said offence of rape and that you thereby committed an offence punishable u/s-212 of Indian Penal Code and within the cognizance of this court

And I hereby direct that you be tried on the said charges.”

Both the appellant and his mother pleaded not guilty and claimed a trial.

[7] In the course of trial prosecution examined 12 witnesses in all. A brief introduction of the witnesses is as under:

PW-1 is the mother of the victim who deposed in court on 31/05/2016 and **PW-2**, Smt. Bidhanmanti Malsom, is a neighbour of the victim who deposed in court on the same day. **PW-3** Smt. Jebhari Malsom is a cousin sister of the victim. **PW-4** is the father of the victim. **PW-5**, Champa Kalai, was a hospital staff in whose presence blood sample of the appellant was collected at Ambassa District Hospital. She deposed in court on 02/06/2016. **PW-6**, Smt. Mitali Debbarma was also a hospital staff in the District Hospital at Ambassa in whose presence blood sample of the appellant was collected in Ambassa District Hospital. She testified at the court on 03/06/2016. **PW-7** was also a hospital staff in whose presence the blood samples of the victim and her daughter were collected at Ambassa District Hospital. **PW-8** is the victim herself who testified on 07/02/2017. **PW-9**, Sri Paban Thangsang Malsom is a neighbour of the victim. **PW-10** Purnachandra Kalai is also a neighbour of the victim. **PW-11** Shri Ratan Debbarma was the duty officer at Ambassa police station on 13/11/2014 when he received the written FIR of the victim. **PW-12**, Smt. Mukta Ghosh is the IO who gave evidence in court on 02/06/2018. Apart from adducing the oral testimony of the prosecution witnesses, 12 documents were exhibited by the prosecution [**Exbt.1 to Exbt.12**] in order to establish the charges against the appellant and his accused mother.

[8] After the recording of the prosecution evidence was over, the appellant and his accused mother came to be examined under Section 313 Cr.P.C. They pleaded innocence and claimed that the charges were foisted on them. The appellant stated in his reply that the victim had physical relationship with others and he was not the biological father of the child born to the victim. Though the appellant stated during his examination under Section 313, Cr.P.C that he would adduce defence witness, he did not actually adduce any evidence on his defence.

[9] Mother of the victim as PW-1 stated at the trial that her daughter consented to sexual intercourse with the appellant on account of the promises made by him to marry her and in consequence, she became pregnant. When she became pregnant, appellant refused to marry her. They also tried to persuade the mother of the appellant to agree to their marriage. But she refused. Then her daughter filed the case against the appellant and his mother.

In her cross-examination she stated that her daughter revealed the matter to her only after she became pregnant.

[10] **PW-2** Bidhanmanti Malsom, a neighbour of the victim stated that the victim had love affairs with the appellant. When she

became pregnant the appellant refused to marry her. Later a daughter was born to the victim.

In cross-examination it was suggested to her on behalf of the appellant that he had no love affair with the victim. The PW denied the suggestion.

[11] PW-3, Jebehari Malsom, a cousin sister of the victim gave same evidence and stated that she came to know from the father of the victim that the appellant was responsible for her pregnancy.

In cross-examination, the PW denied the suggestion of the appellant that he was not responsible for the pregnancy of the victim.

[12] Father of the victim has been examined as PW-4 who told the court that the appellant was a driver of an auto rickshaw in which he used to take his daughter to her school as well as to her private tutor. At that time they developed an affair. In the course of their relationship, the appellant had sexual relationship with his daughter pretending that he would marry her. As a result of such relationship, she became pregnant. The PW tried to settle the matter by getting them married but the appellant as well as his mother did not agree to the marriage between the appellant and the victim. The victim then reported the matter to police. By that time she delivered a female child.

In cross-examination, the PW stated that his daughter had relationship with the appellant for about 2 years.

[13] In her evidence **PW-5**, Champa Kalai simply stated that police collected blood sample of the appellant in her presence at Dhalai District hospital where she was a staff nurse. Same evidence was given by **PW-6** Smt. Mitali Debbarma in whose presence blood sample of the appellant was collected by police at Dhalai District hospital.

[14] **PW-7** Sanjay Datta, stated that on 16.02.2015 Dr.Smt. Anindita Karmakar collected blood sample of the victim and her daughter in presence of the PW at Dhalai District hospital and the same was seized by police by preparing seizure list [Exbt.3] in which he signed as a witness.

[15] **PW-8** is the most material witness of this case. She is the victim against whom the offence was allegedly committed. She was examined by the trial court in camera on 07.02.2017. She stated at the trial that about 3 years back, she was a student of class IX in a school in her neighbourhood (her school's name is withheld to hide her identity). The appellant, an auto driver, used to drive his vehicle in the same route. She, therefore, used to go to school as well as to her private tutor by his auto rickshaw. On a day when she was walking to her school, appellant

came with his auto rickshaw and offered a lift to her. When she boarded his vehicle, he took her into a jungle. Having made a promise to the PW that he would marry her, he committed sexual intercourse with her. Thereafter, she became pregnant. After she developed pregnancy, she informed the matter to the mother of the appellant who denied the involvement of her son. Appellant also denied his responsibility. Her mother proposed to the appellant for marrying his daughter. He did not accept the proposal. Thereafter, she gave birth to a female child in the year 2014. Soon after the appellant denied to marry her, she lodged the FIR against him. She stated that during investigation of the case police produced her at hospital where the doctor had taken her blood sample as well as the blood sample of her daughter. She also stated that police seized her original birth certificate [Exbt.7] during investigation. In her examination-in-chief, she also stated that she consented to the sexual intercourse as she believed that the appellant would marry her.

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In her cross-examination, she made the following statement:

“I lodged the case after five months of the birth of my baby. I lodged the case as he did not marry me. I had love affairs with accused Rajib. He did sexual intercourse with me taking my consent on the promise of marriage. Accused had also love with me but his mother did not like me. It is not a fact that I visited the house of accused Rajib and did not tell the incident to his mother or that I did not report my pregnancy to the accused or that he did not deny toget marry me.”

[16] **PW-9** Sri Pubantawrang Malsom stated that he had seen the victim travelling with the appellant in his auto rickshaw on several occasions. The PW could not say as to why the victim lodged complaint at the police station against the appellant.

[17] **PW-10** Purna Chandra Kalai told almost the same story. He stated that he was the Chairman of the Village Council in 2015. A 'salishi' meeting was convened at the request of the parents of the victim. But he could not attend the meeting due to preoccupation. The PW did not say anything about the relationship between the victim and appellant.

[18] **PW-11** is Ratan Debbarma, SI of Police who was the duty officer at the police station when victim lodged her FIR at Ambassa police station on 13.11.2014. As a duty officer, the PW registered the FIR [Exbt.9] as Ambassa P.S. case No.56/2014 under Sections 376, 417 and 109 of the IPC.

His cross-examination was declined on behalf of the appellant.

[19] **PW-12** Smt. Mukta Ghosh is the IO of this case. She has stated at the trial that after the case was endorsed to her for investigation, she visited the crime scene where she had drawn up a hand sketch map

of the crime scene [Exbt.10] and prepared a separate index thereof by indicating the material locations [Exbt.11]. Thereafter she seized the original birth certificate of the victim which revealed that she was born on 06.05.1996. During her investigation, she also produced the victim before the SDJM, Kamalpur where her statement under Section 164(5) Cr.P.C. was recorded. In the course of investigation DNA profiling of the blood sample collected from the appellant, the victim and the baby born to her was done at the SFSL. The forensic report [Exbt.12] confirmed that the appellant was the biological father of the child.

In her cross-examination, the PW stated that the victim had love affairs with the appellant.

[20] The appellant has challenged his conviction and sentence mainly on the following grounds:

(i) Despite serious discrepancy in the evidence of the victim prosecutrix [PW-8], the trial court has relied on her testimony to convict and sentence the appellant which is erroneous and unsustainable.

(ii) Prosecution cannot take the plea that accused committed sexual intercourse on the victim prosecutrix on false assurance of marriage because at the time of

occurrence she was at her consenting age and there is no allegation that sexual intercourse was done with her against her will.

(iii) Prosecution evidence has divulged that there were repeated events of sexual intercourse between the prosecutrix and the appellant and there was no objection / complaint from the side of the prosecutrix which is suggestive of voluntary participation in such physical relationship on the part of the prosecutrix. The trial court arrived at the conclusion of guilt of the appellant and convicted him for the offence without appreciation of evidence and laws.

[21] While arguing on behalf of the appellant, Mr.S.Sarkar, learned Sr. Advocate contended that evidence adduced on behalf of the prosecution and the whole circumstances would indicate that the prosecutrix willingly consented to having sexual intercourse with the appellant as a result of her intimacy with the appellant and love for him and not because he promised to marry her because she was well aware that they belonged to two different communities and her marriage with the appellant would be difficult on account of her caste consideration. As a result consent of the victim was a free consent. To support his

contention, Mr. Sarkar, learned Sr. Advocate has relied on the decision of the Apex Court in *Uday Vs. State of Karnataka* reported in *AIR 2003 SUPREME COURT 1639* wherein the Apex Court vide paragraph 25 of the Judgment has held as under:

“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, is 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 over come 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.”

[22] Having relied on the decision of the Apex Court in *Kaini Ranjan vs. State of Karnataka* reported in (2013) 9 SCC 113, learned Sr. Advocate contended that since the prosecutrix voluntarily participated in the physical relationship with the appellant after having fully exercised the choice between resistance and assent, it was a free consent on her part within the meaning of Section 375 IPC. In support of his contention, learned counsel has relied on paragraph 12 of the judgment of the Supreme Court in *Kaini Ranjan*(supra) wherein the Supreme Court has held as under:

“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 v. Mango Ram* (2000) 7 SCC 224]”

[23] Further contention of Mr. Sarkar, learned Sr. Advocate is that the prosecutrix in the given case had love and passion for the appellant which is admitted by her as well as by her parents. Even her neighbours witnessed her having a long association with the appellant which is suggestive of a very intimate relationship between them. Having relied on the decision of the Supreme Court in the case of *Dipak Gulati vs. State of Haryana* reported in (2013)7SCC 675, learned counsel argued that since the consent to having sexual intercourse with the appellant was given by the prosecutrix after wholly understanding the nature and consequence of such act and on account of her love and passion for the appellant, it did not amount to rape within the meaning of Section 375 IPC. Learned counsel has relied on paragraph 21 of the said judgment of the Supreme Court in *Dipak Gulati*(supra), wherein the Supreme Court has held 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 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 mis-representation 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] In this regard Mr.Sarkar, learned Sr.Advocate has also relied on the decision of the Apex Court in *Dr.Dhruvaram Murlidhar Sonar vs. State of Maharashtra and Ors.* reported in *AIR 2019 SC 327* wherein the Apex Court vide paragraph 20 of the judgment has drawn a distinction between rape and consensuous sex and held as under:

“20. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to

have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC.”

[25] Finally it was argued by Mr.Sarkar that “false promise of marriage” as alleged by the prosecution had no nexus to the consent of the prosecutrix to having sexual intercourse with the appellant because such consent was given by her as a result of her love and passion for the appellant after fully understanding the consequences of such sexual indulgence and therefore, conviction of the appellant for rape is not sustainable. To support his contention Mr.Sarkar, learned Sr.Advocate has relied on the decision of the Apex Court in *Pramod Surajbhan Pawar vs. State of Maharashtra and Anr.* reported in (2019) 9 SCC 608 wherein the Apex Court vide paragraph 18 has held as under:

“18. To summarise the legal position that emerges from the above cases, the “consent” of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the “consent” was vitiated by a “misconception of fact” arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman’s decision to engage in the sexual act.”

[26] On the premises aforesaid Mr.Sarkar, learned Sr. Advocate urged for setting aside the conviction and sentence of the appellant for commission of rape.

[27] Opposing the contention of learned counsel of the appellant, Mr. Ratan Datta, learned PP, contended that consent given by the prosecutrix was clearly vitiated by misconception in terms of Section 90 IPC because her consent was obtained by the appellant under the pretext of marriage by misconstruing his true intention to her. According to Mr.Datta, learned PP, evidently the accused had no intention of actually marrying the presecutrix. He made a false assurance to the prosecutrix that he would marry her only to indulge in sexual intercourse with her. In support of his contention Mr.Datta, learned PP has relied on the decision of the Supreme Court in State of *UP vs. Naushad* reported in *(2013) 16 SCC 651* where in the Apex Court has held as under:

“18. How is ‘consent’ defined? Section 90 of the IPC defines consent known to be given under ‘fear or misconception’ which reads as under:-

“90. Consent known to be given under fear or misconception – A consent is not such 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; (emphasis supplied)”

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

19. In the present case, the accused had sexual intercourse with the prosecutrix by giving false assurance to the prosecutrix that he would marry her. After she got pregnant, he refused to do so. From this, it is evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her, which act of the accused falls squarely under the definition of rape as he had sexual intercourse with her consent which was consent obtained under a misconception of fact as defined under Section 90 of the IPC. Thus, the alleged consent said to have been obtained by the accused was not voluntary consent and this Court is of the view that the accused indulged in sexual intercourse with the prosecutrix by misconstruing to her his true intentions. It is apparent from the evidence that the accused only wanted to indulge in sexual intercourse with her and was under no intention of actually marrying the prosecutrix. He made a false promise to her and he never aimed to marry her.

20. In the case of *Yedla Srinivas Rao v. State of A.P.*[2], with reference to similar facts, this Court in para 10 held as under:-

“10. It appears that the intention of the accused as per the testimony of PW1 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 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 persuaded 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.”

Further, in para 17 of the said judgment, this Court held that: (*Yedla Srinivasa Rao case SCC p.624*)-

“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 PW1 as well as PW6 who was functioning as 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 prosecutor that he would marry her.”

Thus, this Court held that the accused in that case was guilty of the offence of rape as he had obtained the consent of the prosecutrix fraudulently, under a misconception of fact.”

[28] It was further contended by Mr.Datta, learned PP that the consent given by the prosecutrix would not excuse the appellant from charge of rape because such consent was clearly vitiated by misconception of fact as per Section 90 IPC. According to Mr.Datta, learned PP, prosecution has successfully proved by adducing cogent evidence that from the very inception accused acted malafide and he had no intention to marry the victim which was also proved by his denial of the relationship in his examination under Section 313 Cr.P.C. Appellant even denied the paternity of the child of the victim. It is contended by learned PP that in no circumstances the prosecutrix would have given her consent to sexual intercourse had she not been misguided by the appellant with a false promise of marriage. In support of his contention learned PP has relied on the decision of the Apex Court in *Anurag Soni*

vs. State of Chattisgarh reported in (2019) 13 SCC 1 wherein the Apex Court vide paragraph 12 of the judgment has held as under:

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

[29] It was finally argued by Mr.Datta, learned PP that charge of rape has been clearly proved in the case and the appellant must face the consequence of the crime committed by him. Learned PP, therefore, urges the court for dismissal of the appeal.

[30] Having carefully perused the evidence available on record we have no hesitation to conclude that the accused developed a physical relationship with the victim as a result of which she conceived and delivered a female child. As discussed, the victim prosecutrix[PW-8] has categorically stated in her examination in chief that she lodged the FIR against the appellant after she became pregnant and the appellant refused to marry her.

In her cross-examination, she categorically stated that she developed love affairs with the appellant and consented to having sexual intercourse with the appellant because he promised to marry her. Both of her parents also gave same evidence. Her mother [PW-1] stated at the trial that her prosecutrix daughter agreed to have physical relationship with the appellant because of his assurance to marry her. The PW also took initiative to get them married. But the appellant and his mother did not agree. Father of the prosecutrix [PW-4] also supported the statement of his wife [PW-1] by saying that his daughter had love affairs with the appellant and she consented to having sexual intercourse with the appellant as a result of his promise to marry her. But the appellant refused to marry her when she became pregnant.

[31] Father of the prosecutrix also stated that he tried to settle the matter by getting them married. But the appellant and his mother turned down the proposal of their marriage. Among the other witnesses, PW-2 who is the neighbour of the victim also supported the relationship between the victim and the appellant. PW-9, another neighbour of the victim also supported their relationship by saying that he found them associating with each other on several occasions. The other PWs are official witnesses. The fact that the appellant is the biological father of the child and the prosecutrix is her biological mother also stands

established by the forensic report [Exbt.12]. Therefore, there cannot be any denial of the fact that appellant had sexual relationship with the victim. Having examined the statement of the witnesses, particularly those of the victim and her parents, it cannot be said that there was no consent on the part of the victim in her having sexual relationship with the appellant.

[32] The question which needs to be determined is whether the victim prosecutrix had a free consent to such relationship or such consent was vitiated by misconception of fact.

We have heard the arguments and counter arguments of learned advocates representing the parties.

[33] Counsel for the appellant tried to establish that the victim prosecutrix had love affair with the appellant and she gave free consent to the appellant to indulge in sexual intercourse with her as a result of her intimacy with him and love and passion for him and promise of marriage allegedly given by the accused appellant had no nexus to such relationship.

[34] As discussed, learned PP on the other hand emphasised on his argument that consent of the prosecutrix was vitiated by

misconception of fact arising out of the malafide intention of the appellant and his false promise of marriage.

[35] Learned trial court discussed the provision of Section 90 IPC and having relied on the decision of the Apex Court in the cases of **Kaini Ranjan**(supra), **Dipak Gulati** (supra), and **State of UP vs. Naushad**(supra) held that consent of the prosecutrix was vitiated by misconception of fact in terms of Section 90 IPC and charge of rape against the appellant was proved because the appellant obtained such consent of the prosecutrix for gratifying his lust under the pretext of marriage knowing it fully well that he would not marry the prosecutrix. Relevant extract of the judgment of the trial court is as under:

“29.In view of the above principle of law laid down by the Hon’ble Supreme court now it is to be seen whether the promise of marriage was false to attract the provision in section 90 of the Indian Penal Code. The prosecutrix in the present case was a student in the Dalubari High School. She used to go to her school and to house of her tutor by the auto of the accused. Her evidence and the evidence of her parents would show that she had developed love affairs with the accused Rajib Sharma. According to the evidence of the prosecutrix accused Rajib did sexual intercourse with her in the jungle giving promise of marriage. Due to such relationship she became pregnant and gave delivery of a female baby. The DNA test report [Exhibit-12] would show that the accused Rajib is the biological father of the baby of the prosecutrix. Thus it has been proved that accused had physical relationship with the prosecutrix. In the cross examination by defence she deposed that accused made intercourse taking her consent, but she gave consent due to promise of marriage. The said statement in the cross-examination of the prosecutrix has remained unchallenged in other words the defence by way of cross examination of

the prosecutrix admitted the facts of physical relationship giving promise of marriage.

30. The parents of the prosecutrix in their evidence stated that they approached accused Rajib and his mother for marriage of their daughter with accused Rajib but they refused. It is the evidence of the prosecutrix that when she became pregnant she went to accused Rajib but he denied his responsibility of her pregnancy. The DNA test report proves that he is the biological father of the baby of the prosecutrix. So he had knowledge that the prosecutrix became pregnant by him. He knowing the fact tried to avoid his responsibility for the pregnancy of the Prosecutrix. The aforesaid conduct of accused Rajib clearly established that from the very inception i.e., at the time of giving promise he knew that it was a false promise and he had no intention to marry her. The promise of marriage was given just to satisfy his lust. There is nothing in record to suggest that accused Rajib failed to keep his promise for any other reason which was beyond his control. Thus, he had obtained the consent of the Prosecutrix fraudulently, under misconception of fact.

31. 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 promise to the prosecutrix to marry her and on such false promise he had a physical relation with the prosecutrix. Therefore, her consent can be said to be a consent on misconception of fact as per Section 90 of the IPC and such a consent shall not excuse the accused from the charge of rape and offence under Section 375 of the IPC. Thus, the point No.(I) is decided affirmative in favour of the prosecution.”

[36] Prior to the amendment of Section 375 IPC w.e.f. 03.02.2013 consenting age of woman for the purpose of Section 375 IPC was 16 years which has been raised to 18 years by the Criminal Law(Amendment) Act,2013 w.e.f 03.02.2013. In order to prove the age of the victim, prosecution produced her birth certificate at the trial which is Exhibit-7. As per the birth certificate she was born on 06.05.1996. No

specific date of occurrence has been indicated by the prosecution. Prosecution has not also raised any controversy with regard to her consenting age. Therefore, we are not entering into this issue.

[37] With regard to whether consent of the victim was vitiated by misconception of fact, we are of the clear view that the trial court committed no wrong in holding that it was apparent from the conduct of the appellant that he only wanted to indulge in sexual intercourse with the victim and he had no intention of actually marrying the victim. After the victim conceived as a result of her relationship with him, she along with her parents approached him for marrying her. The appellant denied his relationship with her. Even during trial he tried to establish that he did not have any sexual relationship with the victim. During his examination under Section 313 Cr.P.C, he went to the extent of saying that the victim had relationship with others. The victim on the other hand, in her cross-examination, reaffirmed that the appellant obtained her consent on the pretext of marriage. Appellant did not deny such statement. In view of such conduct of the appellant and the evidence of the victim, the argument of learned counsel that 'assurance of marriage' has no relevance because victim was at her consenting age and she consented to sexual intercourse out of her love and passion for the appellant is not acceptable.

[38] In the case of **Uday vs. state of Karnataka**(supra) undisputedly the appellant and the prosecutrix were in deep love. The circumstances of the case revealed that their relationship was so deep that the prosecutrix did not hesitate to go out with the appellant to a lonely place even at 12 O'clock in the night. On appreciation of the peculiar circumstances of the case, the apex court held that the prosecutrix in that case *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.* (Italics supplied)

In such circumstances, promise of marriage lost relevance.

[39] The context of the present case is completely different. Victim was at her tender age when she met the appellant on her way to school. There is no evidence at all that they were in deep love. The given circumstances and evidence on record clearly indicate that appellant obtained her consent on the pretext of marriage to gratify his lust knowing it fully well that he would never marry her. He was also quite aware of the fact that the victim submitted to the allurements of marriage without fully understanding the consequence and as such her consent cannot be termed as free consent in terms of Section 90 IPC.

[40] Some of the witnesses including the victim have stated that she had love affairs with the appellant. It goes without saying that love does not imply consent for sexual intercourse. As discussed, there is no evidence to suggest that the relationship between them was so deep that the victim willingly succumbed to the temptation of having sex with the appellant. Rather, the conduct of the appellant has proved that even though he had no intention to marry her, he kept the promise of marriage alive only to obtain her consent for having sexual intercourse. His intention was, thus, clearly malafide. Such act of the appellant falls squarely under the definition of rape in terms of Section 375 IPC as he had sexual intercourse with the victim with her consent which was given under misconception of fact as defined under Section 90 IPC.

[41] In the case of **Kaini Ranjan**(supra) relied on by the counsel of the appellant, the Apex Court succinctly held that ‘consent’ is an act of reason coupled with deliberation and *whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.* (Italics supplied)

In the given context, the consent of the victim, as discussed, was clearly vitiated by allurement of marriage. In the case of **Dipak Gulati**(supra), it was held by the Apex Court that in similar circumstances accused can be convicted for rape only if the court can

come to the conclusion that intention of the accused was malafide, and that he had clandestine motives. In order to arrive at such conclusion, court must very carefully examine whether accused had actually wanted to marry the victim, or had malafide motives and had made a false promise to this effect only to satisfy his lust. Clearly in this case, the whole conduct of the appellant irresistibly lead us to conclude that he never wanted to marry the victim. After the victim approached him with her pregnancy and even after the delivery of the child he blatantly refused to have any relationship with her. It is no case of the appellant that he was unable to marry her because of any difficulty or circumstances unforeseen by him. Rather, it is clearly proved that victim would not have consented to sexual intercourse with him had she not been deceived by the appellant with false promise of marriage.

[42] Same principle was reiterated in the case of **Dr.Dhruvaram Murlidhar Sonar** (supra) wherein it was held by the Apex Court that in similar circumstances if the accused had any malafide intention and if he had clandestine motives, it would be a clear case of rape.

[43] In **Pramode Surajbhan Pawar**(supra) also, the Apex Court held that ‘consent’ in terms of Section 375, IPC must involve an active and reasoned deliberation towards the proposed sexual intercourse and to establish that consent of the victim was vitiated by misconception

of fact two propositions have to be established. One of those propositions is that promise of marriage was false and the other is that such promise had a direct nexus to the woman's decision to engage in the sexual act. In the present context both the propositions have been clearly established. Consent of the victim was vitiated by misconception of fact because promise of marriage was evidently false and the appellant had knowledge of it and it is also evident that appellant had taken her to a lonely place in his auto rickshaw on her way to school and had sexual intercourse with her after obtaining her consent on the pretext of marriage which clearly proves that promise of marriage had direct nexus to the consent of the victim. As a result, the appellant cannot derive any benefit from the judgments relied upon by him.

[44] In **UP vs. Naushad**(supra) which has been relied upon by learned PP, the accused had sexual intercourse with the prosecutrix by giving a false assurance to her that he would marry her. After she got pregnant, he refused to do so. The apex Court held that *from this it was evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her, which act of the accused falls squarely under the definition of rape as he had sexual intercourse with her consent which was consent obtained under a*

misconception of fact as defined under Section 90 of the IPC.
(Italics supplied)

Circumstances of the present case being similar, it is squarely covered by the said decision of the Apex Court. Plea of the appellant that it was a consented sexual intercourse does not survive because the consent was clearly vitiated by false promise of marriage.

[45] In **Anurag Soni**(supra), the Apex Court reiterated that promise of marriage for obtaining consent for sexual intercourse without any actual intention to marry vitiates the consent and such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 IPC and in such case consent would not excuse the offender charged under Section 376 IPC.

[46] Having applied the ratio decided by the Apex Court in the judgments cited to supra and having re-evaluated the entire evidence and the facts and circumstances of the case, we are of the considered view that the decision of the trial court with regard to the conviction and sentence of the appellant does not call for any interference in appeal.

Resultantly, the appeal stands dismissed.

[47] Before we part with the case, it would be appropriate to issue a few directions for the welfare of the child who was born to the

victim. It is reported by learned Public Prosecutor that the victim has died. Maternal grandparents of the child have been rearing her since the death of her mother. The State Government has framed 'Tripura Victim Compensation Scheme, 2018, in terms of Section 357A, Cr.P.C. for providing compensation to victims or their dependents who have suffered loss or injury as a result of crime committed to such victims. Under paragraph 5(i) of the said Scheme, victim shall be eligible for compensation if ordered by the court. 'Victim' includes her legal heir as per definition of victim provided in clause (e) of paragraph (2) of the Scheme. As per the schedule appended to the said Scheme minimum amount of compensation payable to rape victims is 3(three) lakhs. Therefore, it is directed that the Inspector General of Prisons, who operates the victim compensation fund, shall deposit minimum amount of Rs.3,00,000/-(Rupees Three lakhs) in fixed deposit in the name of the said child in a nationalised bank making her maternal grandmother as nominee. The monthly interest generated from the said deposit be withdrawn by the said maternal grandmother of the child and be spent for her welfare including her education.

[48] The Inspector General of Prisons, Tripura shall make the said deposit within a period of one month from the date of communication of this order to him with intimation to the Registry of the

High Court. Registrar General will communicate the order to him by forwarding a copy of this judgment to IG Prisons immediately.

[49] She being a child in need of care and protection within the meaning of the Juvenile Justice (Care and Protection of Children) Act, 2015, the Child Welfare Committee, Dhalai District shall discharge its responsibilities towards the child and ensure that the child gets the benefit of all beneficial schemes which she may be entitled to in respect of financial assistance, education, nutrition etc. Registrar General of this High Court shall also communicate a copy of this judgment to the Chairman, CWC, Dhalai.

In terms of the above, the appeal is disposed of. Pending application(s), if any, also stand disposed of accordingly.

Send back the LC Record.

(S.G.CHATTOPADHYAY, J) सत्यमेव जयते (ARINDAM LODH, J)