NAIM AHAMED

v.

STATE (NCT OF DELHI)

(Criminal Appeal No. 257 of 2023)

JANUARY 30, 2023

[AJAY RASTOGI AND BELA M. TRIVEDI*, JJ.]

Penal Code, 1860 – ss.375, 376 – Conviction u/s.376, when not justified – Plea of the respondents was that the prosecutrix gave her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her but subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause- Secondly of s.375 – Held: In the present case, the prosecutrix who herself was a married woman having three children, could not be said to have acted under the alleged false promise given by the appellant-accused or under the misconception of fact while giving the consent to have sexual relationship with the appellant – She continued to have such relationship with him at least for about five years till she gave complaint in the year 2015 – Prosecutrix was matured and intelligent enough to understand the significance and the consequences of the moral or immoral quality of act she was consenting to – Till the time she was impregnated by the appellant in the year 2011 and she gave birth to a male child, she did not have any complaint against the appellant of him having given false promise to marry her or having cheated her – She continued to live with the accused even after she came to know in 2012 that he was married and had children also – She even obtained divorce from her husband by mutual consent in 2014, leaving her three children with her husband – It was only in the year 2015 when some disputes must have taken place between them, that she filed the complaint – On facts, it could not be said by any stretch of imagination that the prosecutrix gave her consent for the sexual relationship with the appellant under the misconception of fact, so as to hold him guilty of having committed rape within the meaning of s.375 – Appellant acquitted – Impugned judgments and orders passed by the High Court and Sessions Court are set aside – However, the direction for payment of compensation to the prosecutrix remains unchanged – Evidence Act, 1872 – s.114A.

Penal Code, 1860 – ss.90, 375 – Held: The expression "misconception of fact" contained in s.90 is required to be appreciated in the light of the Clauses contained in s.375, more particularly the Clauses-

* Author

Thirdly, Fourthly and Fifthly thereof, when the accused is charged for the offence of 'rape' – Circumstances described in the said three Clauses are wider than the expression "misconception of fact", as contemplated in s.90.

Penal Code, 1860 – ss.375, 376 – False Promise and Committing Breach of Promise – Difference between – Held: In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceited her by giving a false promise to marry her only with a view to satisfy his lust – However, in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise – Thus, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence u/s.376 – Each case would depend upon its proved facts before the court.

Code of Criminal Procedure, 1973 – ss.276, 277 – Held: The evidence of the witness has to be recorded in the language of the court or in the language of the witness as may be practicable and then get it translated in the language of the court for forming part of the record – However, recording of evidence of the witness in the translated form in English language only, though the witness gives evidence in the language of the court, or in his/her own vernacular language, is not permissible – Text and tenor of the evidence and the demeanor of a witness in the court could be appreciated in the best manner only when the evidence is recorded in the language of the witness – Even otherwise, when a question arises as to what exactly the witness had stated in his/her evidence, it is the original deposition of the witness which has to be taken into account and not the translated memorandum in English prepared by the Presiding Judge – All courts while recording the evidence of the witnesses, shall duly comply with the provisions of s.277.

Deelip Singh alias Dilip Kumar vs. State of Bihar **(2005) 1 SCC 88;** *Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra and Others* **(2019) 18 SCC 191;** *Uday vs. State of Karnataka* **(2003) 4 SCC 46;** *Deepak Gulati vs. State of Haryana* **(2013) 7 SCC 675 – relied on.**

Prashant Bharti vs. State (NCT of Delhi) **(2013) 9 SCC 293 – referred to.**

NAIM AHAMED v. STATE (NCT OF DELHI)

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.257 of 2023.

From the Judgment and Order dated 30.09.2016 of the High Court of Delhi at New Delhi in CRLA No.46 of 2016.

Ms. Indira Jaisingh, Sr. Adv. (AC), Parasnath Singh, Srisatya Mohanty, Ravinder Singh, Ms. Raveesha Gupta, Ms. Mantika Haryani, Sanjeev Kaushik, Shreyas Awasthi, Devvrat Singh, Rohin Bhatt, Ms. Muskan Surana, Ms. Astha Sharma, Advs.

Raj Kishor Choudhary, Shakeel Ahmed, Anupam Bhati, Rizwan Ahmed, Amir Kaleem, Vikramjeet Singh Ranga, Nakul Chaudhary, Waseem Akhatar Khan, Advs. for the Appellant.

K. L. Janjani, Ketan Paul, Mohd. Akhil, Ms. Deepabali Dutta, T. S. Sabarish, Gurmeet Singh Makker, Advs. for the Respondent.

The Judgment of the Court was delivered by

BELA M. TRIVEDI, J.

1. Leave granted.

2. The appeal filed by the appellant-accused is directed against the judgment and order dated 30.09.2016 passed by the High Court of Delhi in Criminal Appeal No.46/2016, whereby the High Court while disposing of the appeal has modified the judgment and order dated 27.11.2015 passed by the Additional Sessions Judge, Special Fast Track Court, Dwarka Courts, New Delhi (hereinafter referred to as the Sessions Court) in Sessions Case No. 67/2015.

3. The Sessions Court while holding the appellant-accused guilty for the offence under Section 376 of IPC had sentenced him to undergo rigorous imprisonment for a period of 10 years and pay fine of Rs.50,000/-, in default thereof to suffer further imprisonment for a period of one year. The Sessions Court had also directed the appellant to pay compensation of Rs.5,00,000/- to the prosecutrix to enable her to maintain herself as well as the minor child. The High Court in the appeal filed by the appellant, modified the order of sentence passed by the Sessions Court, by reducing the substantive sentence to 7 years with fine of Rs.5,000/- and confirmed the direction with regard to the payment of compensation to the prosecutrix. It is stated that the appellant has paid the amount of compensation of Rs.5,00,000/- to the prosecutrix as directed by the High Court.

4. The case of the prosecution as laid before the Sessions Court was that the prosecutrix was residing in a tenanted premises at C-1/3/5, Sanjay Enclave, Uttam Nagar, Delhi with her husband and three children in the year 2009. The accused was also residing in a tenanted premises which was situated in front of her house. On 21.03.2015, the prosecutrix lodged a complaint against the accused alleging *inter alia* that the accused was persuading her by stating that her husband was not earning sufficient income and that he (the accused) had a good job and he would maintain her according to his status. The accused also assured her that he would solemnize marriage (nikah) with her. Thereafter, the accused with an intention to have illicit intercourse with her, used to call her at various places, as a result thereof, she was impregnated in the year 2011. She further alleged that the accused persuaded the prosecutrix that after the delivery of child, he would marry her. He also assured her that he was not a married man and after the marriage, he would take her to his native place. In the year 2012, the accused enticed her away in another rented premises at Kapashera Border Nathu Mal Building and continued to have illicit relationship with her. After sometime the accused vacated the said rented premises with a false excuse that his parents were severely ill and he had to visit his native place. He told the prosecutrix to take shelter in a shelter home along with the minor child Naman. He also forced her to take divorce from her husband. The prosecutrix had further alleged in the complaint that the accused had lied to her that he had gone to his native place, but in fact he had not gone, which she came to know when she visited the call center where the accused was working. When she made hue and cry at his place of working, he assured her that he would soon marry her. In the year 2012, she visited the native place of the accused and came to know that he was already married and had children also. The parents of the accused refused to keep her there. Thereafter, also the accused kept on assuring her to marry her but did not marry. Hence, the complaint was filed. The said complaint was registered as the FIR No.412/2015 at Police Station Bindapur, District South West, Delhi on 21.03.2015 against the accused for the offence under Section 376 of the Indian Penal Code.

5. After the examination of eleven witnesses by the prosecution, the incriminating evidence was brought to the notice of the accused for the purpose of explanation under Section 313 of Cr.PC, however

the accused denied the allegations levelled against him and further stated that he was having consensual physical relations with the prosecutrix and that she was aware that he was a married person having children, and that she had also met his wife at his house. He had also stated that he was providing financial help to the prosecutrix regularly, and when he refused to fulfil her demand of Rs.1.5 lakh to Rs.2 lakhs, she lodged a false case against him. The Sessions Court after appreciating the evidence on record convicted and sentenced the appellant-accused as stated hereinabove.

6. The Learned counsel appearing for the appellant vehemently submitted that the Sessions Court and the High Court had failed to appreciate the evidence in the right perspective, and convicted the appellant under Section 376 IPC, which has resulted into gross miscarriage of justice. Pressing into service Section 375 read with Section 90 of IPC, he submitted that the prosecutrix having admitted in her evidence that she was a consenting party to the sexual relationship with the appellant since 2009-2010, and that it continued even after the delivery of the child in 2011, till filing of the complaint in 2015, it could not be said by any stretch of imagination that the appellant-accused had committed rape within the meaning of Clause-Secondly of Section 375 read with Section 90 of IPC. According to him, the very fact that the prosecutrix had lodged the complaint in March 2015 after she gave birth to the child in November 2011, and after she visited his native place in 2012, reflected her intention to misuse the process of law by making false allegations against the accused and to grab money from him. He further submitted that even as per her own story, the appellant had not disowned the responsibility of the child born from his loin and she continued to have relationship with the accused for about four years after the birth of the child. It was only when the accused refused to fulfill her demand of paying huge amount to her, she filed the complaint. The learned counsel has relied upon the decisions of this Court in case of ***Deelip Singh alias Dilip Kumar vs. State of Bihar***[1]; in case of ***Prashant Bharti vs. State(NCT of Delhi)***[2]***,*** andin case of ***Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra and Others***[3] to buttress his submission

1 (2005) 1 SCC 88
2 (2013) 9 SCC 293
3 (2019) 18 SCC 191

that the consensual sexual relationship which if continued between the parties for quite a long time, in the instant case for about five years, could not be said to have continued under the 'misconception of fact' under Section 90 and could not be said to be 'rape' under Section 375 IPC.

7. Sh. K.L Janjani, learned counsel appearing for the respondent-State however submitted that the Sessions Court and the High Court having concurrently recorded findings of facts against the appellant-accused, holding him guilty under Section 376 IPC, this Court should not interfere with the same. According to him, even otherwise, the prosecution had proved beyond doubt that the appellant-accused had lured the prosecutrix to have sexual relationship with him by giving her a false promise that he would marry her, however, he committed breach of the promise after she delivered the child, which clearly proved that her consent was obtained by the appellant under the misconception of fact.

8. Since the prosecutrix was not being represented by any lawyer, though served, the court had appointed Ms. Indira Jaising, Senior Advocate as an Amicus Curiae to assist the Court on her behalf. She in addition to her written submissions, further submitted that there was a clear distinction between 'rape' and 'consensual sex', and that the Court was required to carefully examine as to whether the accused had with malafide motives made false promise of marriage or it was a mere breach of promise by the accused. According to her, the courts below had rightly appreciated the evidence of the prosecutrix for arriving at the conclusion that the consent of the prosecutrix to have sexual relationship with the accused was under the misconception of fact under Section 90 of the IPC and therefore the case of the prosecutrix fell under the Clause - Secondly of Section 375 IPC. Ms. Indira Jaising has also relied upon various decisions of this Court in support of her submissions.

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

"90. Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or

has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

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

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

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

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

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

under the circumstances falling under any of the following seven descriptions:-

First- Against her will.

Secondly- Without her consent.

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

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

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

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

Seventhly- when she is unable to communicate consent.

Explanation 1- For the purposes of this section, "vagina" shall also include *labia majora*.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

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

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

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

11. It cannot be gainsaid that a consent given by a person would not be a consent as intended by any Section of the Indian Penal Code, if such consent was given by the person under the fear of injury, or under a misconception of fact as contemplated in Section 90 IPC. Further, Section 375 also describes certain acts which if committed by the accused under the circumstances mentioned therein, as the

commission of 'Rape', even though committed with the consent of the prosecutrix. In our opinion, the expression "misconception of fact" contained in Section 90 IPC is also required to be appreciated in the light of the Clauses – contained in Section 375 IPC, more particularly the Clauses - Thirdly, Fourthly and Fifthly thereof, when the accused is charged for the offence of 'rape'. The circumstances described in the said three Clauses are wider than the expression "misconception of fact", as contemplated in Section 90 of IPC. Section 375 describes seven circumstances under which the 'rape' could be said to have been committed. As per the Clause - Thirdly, a rape could be said to have been committed, even with her consent, when the consent of the prosecutrix is obtained by putting her or any person in whom she is interested in fear of death or of hurt. As per the Clause - Fourthly, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; and as per the Clause - Fifthly, with her consent when at the time of giving the consent, the prosecutrix by reason of unsoundness of mind or intoxication or the administration of stupefying or unwholesome substance by the accused or through another, she is unable to understand the nature and consequences of that to which she gives consent. Thus, apart from the prosecutrix being under the misconception of fact as contemplated in Section 90, her consent would be treated as 'no consent' if she had given her consent under any of the circumstances mentioned in Section 375 of IPC.

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

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

14. In ***Uday vs. State of Karnataka***[4], the prosecutrix aged about 19 years had given her consent for having a sexual intercourse with the accused with whom she was deeply in love, and it was alleged by the prosecution that the prosecutrix continued to meet the accused as the accused had given her a promise to marry her on a later date. The prosecutrix became pregnant and the complaint was lodged on failure of the accused to marry her. This Court while holding that under the circumstances, the consent could not be said to have been given under a misconception of fact under section 90 of IPC, held in para 21 and 23 as under :-

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the 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.

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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

4 (2003) 4 SCC 46

bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

15. In ***Deelip Singh alias Dilip Kumar Vs. State of Bihar*** (supra), this Court after discussing various earlier decisions of this Court and other High Courts, further explained the observations made in ***Uday case*** *(supra)* and observed as under:-

"28. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause secondly. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Rani Panda [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] which was approvingly referred to in Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri) 775 : (2003) 2 Scale 329] . The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end (Cri LJ p. 1538, para 7) — "unless the court can be assured that from the very inception the accused never really intended to marry her". (emphasis supplied) In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant

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

16. In ***Deepak Gulati vs. State of Haryana***[5], this Court gave one more dimension of the word 'consent' by distinguishing 'Rape' and 'consensual sex' and observed as under:

"21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an 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

5 (2013) 7 SCC 675

account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

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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, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her".

17. Again in ***Dr. Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and others*** (supra), this Court interpreting the Section 90 and the Clause – Secondly in Section 375 of IPC, observed as under: -

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

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

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

19. After duly examining the record in the light of the submissions made by the learned counsels for the parties, following facts have emerged: -

(i) Prosecutrix was a married woman having three children.

(ii) Accused was staying in a tenanted premises situated in front of the house of the prosecutrix.

(iii) Though initially hesitant, the prosecutrix developed liking for the accused, and both started having sexual relationship with each other.

(iv) The prosecutrix delivered a male child on 28/10/2011 from the loin of the accused.

(v) The prosecutrix went to the native place of the accused in 2012 and came to know that he was a married man having children.

(vi) The prosecutrix still continued to live with the accused in separate premises.

(vii) The prosecutrix and her husband took divorce by mutual consent in 2014 and thereafter prosecutrix permanently left her three children with her husband.

(viii) The prosecutrix lodged the complaint on 21st March, 2015 alleging that she had consented for sexual relationship with

the accused as the accused had promised her to marry and subsequently did not marry.

20. The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause – Secondly of Section 375 IPC. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceited the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376. As stated earlier, each case would depend upon its proved facts before the court.

21. In the instant case, the prosecutrix who herself was a married woman having three children, could not be said to have acted under the alleged false promise given by the appellant or under the misconception of fact while giving the consent to have sexual relationship with the appellant. Undisputedly, she continued to have such relationship with him at least for about five years till she gave complaint in the year 2015. Even if the allegations made by her in her deposition before the court, are taken on their face value, then also to construe such allegations as 'rape' by the appellant, would be stretching the case too far. The prosecutrix being a married woman and the mother of three children was matured and intelligent enough to understand the significance and the consequences of the moral or immoral quality of act she was consenting to. Even otherwise, if her entire conduct during the course of such relationship with the accused, is closely seen, it appears that she had betrayed her husband and three children by having relationship with the accused, for whom she had developed liking for him. She had gone to stay with him

during the subsistence of her marriage with her husband, to live a better life with the accused. Till the time she was impregnated by the accused in the year 2011, and she gave birth to a male child through the loin of the accused, she did not have any complaint against the accused of he having given false promise to marry her or having cheated her. She also visited the native place of the accused in the year 2012 and came to know that he was a married man having children also, still she continued to live with the accused at another premises without any grievance. She even obtained divorce from her husband by mutual consent in 2014, leaving her three children with her husband. It was only in the year 2015 when some disputes must have taken place between them, that she filed the present complaint. The accused in his further statement recorded under Section 313 of Cr.P.C. had stated that she had filed the complaint as he refused to fulfill her demand to pay her huge amount. Thus, having regard to the facts and circumstances of the case, it could not be said by any stretch of imagination that the prosecutrix had given her consent for the sexual relationship with the appellant under the misconception of fact, so as to hold the appellant guilty of having committed rape within the meaning of Section 375 of IPC.

22. In that view of the matter, the accused deserves to be acquitted from the charges levelled against him. Of course, the direction for payment of compensation given by the courts below shall remain unchanged as the appellant had accepted the responsibility of the child, and has also paid the amount of compensation to the prosecutrix.

23. At this juncture, it may be noted that during the course of hearing it was brought to the notice of the Court that the deposition of the prosecutrix was recorded by the trial court in English language though she had deposed in her vernacular language. In this regard, a reference of Section 276 and Section 277 of Cr.P.C. needs to be made, which reads as under: -

"276 (1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding Judge himself or by his dictation in open Court or, under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down,

or cause to be taken down, any part of such evidence in the form of question and answer.]

(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record.

277. Language of record of evidence. In every case where evidence is taken down under section 275 or section 276, -

(a) if the witness gives evidence in the language of the Court, it shall be taken down in that language;

(b) if he gives evidence in any other language, it may, if practicable, be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the Court shall be prepared as the examination of the witness proceeds, signed by the Magistrate or presiding Judge, and shall form part of the record;

(c) where under clause (b) evidence is taken down in a language other than the language of the Court, a true translation thereof in the language of the Court shall be prepared as soon as practicable, signed by the Magistrate or presiding Judge, and shall form part of the record: Provided that when under clause (b) evidence is taken down in English and a translation thereof in the language of the Court is not required by any of the parties, the Court may dispense with such translation".

24. We are apprised that in some of the trial courts the depositions of the witnesses are not being recorded in their language and are being recorded in English language only, as may be translated by the Presiding officer. In our opinion, the evidence of the witness has to be taken down in the language of the court as required under Section 277 Cr.P.C. If the witness gives evidence in the language of the court, it has to be taken down in that language only. If the witness gives evidence in any other language, it may, if practicable, be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the court may be prepared. It is only when the witness gives evidence in English and is taken down as such, and a translation thereof in the language of the court is not required by any of the parties, then the court may dispense with such translation. If the witness gives evidence in the language other than the language of the court, a true translation thereof in the language of the court has to be prepared as soon as practicable.

25. The evidence of the witness has to be recorded in the language of the court or in the language of the witness as may be practicable and then get it translated in the language of the court for forming part of the record. However, recording of evidence of the witness in the translated form in English language only, though the witness gives evidence in the language of the court, or in his/her own vernacular language, is not permissible. As such, the text and tenor of the evidence and the demeanor of a witness in the court could be appreciated in the best manner only when the evidence is recorded in the language of the witness. Even otherwise, when a question arises as to what exactly the witness had stated in his/her evidence, it is the original deposition of the witness which has to be taken into account and not the translated memorandum in English prepared by the Presiding Judge. It is therefore directed that all courts while recording the evidence of the witnesses, shall duly comply with the provisions of Section 277 of Cr.PC.

26. For the reasons stated above, the impugned judgments and orders passed by the High Court and the Sessions Court are set aside, except the direction for the payment of compensation to the prosecutrix. The appellant-accused is acquitted from the charges levelled against him and is directed to be set free forthwith. The appeal stands allowed accordingly.

Headnotes prepared by: Divya Pandey
(*Assisted by:* Bhavyata Kapoor and
Roopanshi Virang, LCRAs)

Result of the case: Appeal allowed.