

(2016) 01 CAL CK 0107
In the Calcutta High Court
Case No : CRR 704 of 2015

Puran Giri

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 14-01-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 164, Section 482
Evidence Act, 1872 — Section 114, Section 114A, Section 118
Penal Code, 1860 (IPC) — Section 342, Section 375, Section 37

Citation : (2017) 1 CalCriLR 166 : (2016) 2 CalHCN 635 : (2016) CriLJ 2475

Hon'ble Judges : Sudip Ahluwalia, J.

Bench : Single Bench

Advocate : Kallol Mondal, Krishan Ray, Amrita Chel and Rupam Gupta, for the Appellant; Amartya Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Sudip Ahluwalia, J.—1. In this Revisional application the petitioner is a Police personnel accused of offences punishable U/Ss. 417/376 of the IPC, in Sessions Case No. 9(7)13 arising out of Cossipore P.S. Case No. 29 of 2013 dated 20.02.2013, pending before the Court of the Ld. Fast Track, 2nd Court, at Sealdah.

2. His contention is that he has been falsely implicated in the case at the instance of the defacto complainant/opposite party No. 2. She had lodged the FIR against him on the allegation that he had sexual intercourse with her by promising to marry her since September, 2012. But he subsequently refused to marry her and thereby committed the aforesaid offences. Further contention of the petitioner is that the FIR itself discloses no story of any force in the matter of physical intimacy between the parties, and since the complainant was admittedly of the age of majority at the relevant time and was also gainfully employed having sufficient mental maturity, so her complaint is out and out untenable. In addition, the petitioner has mentioned that earlier also the complainant had

lodged a similar complaint against one Tapas Kumar Singha, also a Police Constable, being Jorabagan P.S. case No. 2612 of 2012 dated 22.03.2012 under identical Sections 417/376 of the IPC. As such, according to the petitioner, there is actually no truth and merit in her next FIR now lodged against him.

3. On the other hand the application is been opposed by the de-facto complainant who asserts that there is sufficient material against the petitioner warranting his Trial. A number of decisions have been cited by both sides to support their respective contentions.

4. In "Hemant Choubey v. State of M.P." reported in , 2015(1) Crimes 681 (M.P.) the High Court had quashed the proceedings under sections 417/376 of the IPC in which the accused had been similarly alleged to have had sexual intercourse with the prosecutrix on a false promise of marriage, after considering several previous decisions on this point. The discussion of the previous decisions in the High Court's decision are as follows -

"In the case of Uday v. State of Karnataka [, (2003) 2 SCC 46], Hon"ble the Apex Court has held that:--

"A. Penal Code 1860 - Ss. 375 & 90 and 376 - Rape -- "Consent" Voluntary consent or consent under misconception of fact - Determination of - Consent given by the prosecutrix to sexual intercourse with accused -appellant, with whom she was deeply in love, on a promise that he would marry her on a later date - Prosecutrix continuing to meet accused and often having sexual intercourse and becoming pregnant - Complaint lodged on (Hemant Choubey v. State of M.P.) 4 Cr.R. No. 845/2014 failure of appellant to marry her - In such case, held, the consent cannot be said to be given under misconception of fact - A false promise is not a fact within the meaning of the Penal Code - For determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, held, there is no straitjacket formula and each case has to be decided considering the evidence and surrounding circumstances of that case - Where (I) the prosecutrix (aged 19 years on the date of occurrence) had sufficient intelligence to understand the significance and moral quality of the act she was consenting to, (ii) she was conscious of the fact that her marriage with the appellant was difficult on account of caste considerations, (iii) it was difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise, and (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix, held, appellant's conviction and sentence under S. 376 IPC was liable to be set aside- Question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under S. 375 fourthly and fifthly, or whether consent given under misconception of fact contemplated by S. 90 has a wider application so as to include circumstances not enumerated in S. 375, held, not necessary to be considered herein."

9. In the case of Deelip Singh alias Dilip Kumar v. State of Bihar [, (2005) 1 SCC

88], it is held that:--

"A. Penal Code, 1860 - Ss. 375 secondly and 90 - Rape --"Without her consent" -- Meaning - Consent as explained under S. 90 relevant -- "Consent" compared with "will" and "submission"-- Consent given by a woman believing the man's promise to marry her would fall within the expression "without her consent" only if it is established that from the very inception the man never really intended to marry her and the promise was a mere hoax - Nature of consent -Questions relevant for determining - Burden on prosecution to prove absence of consent from attendant circumstances -Evidence should be scanned carefully - Past, contemporaneous and subsequent conduct are relevant - On facts, held, prosecutrix had taken a conscious decision to participate in the sexual act only on being impressed by the accused's promise to marry her - But accused's promise was not false from its inception with the intention to seduce her to sexual act - Hence cl. Secondly of S.375 not established -Instead, accused committed breach of promise for which he would be liable for (Hemant Choubey v. State of M.P.) 6 Cr. R. No. 845/2014 damages under civil law - Words and phrases - "consent"."

5. The High Court ultimately quashed the proceedings after having recorded the following observations-

"7. In the present case it is difficult to say that the petitioner knew or had reason to believe that the prosecutrix had consented to have sexual relationship with him only as the consequence of her believe based on his promise that they will get marriage in due course. From the record the same is hardly seen. On the contrary, petitioner has reason to believe that the consent given by the prosecutrix was the result of their deep love for each other.

8. In such case, the consent of the prosecutrix was obtained or given in consequence of misconception of a fact arising from his promise is difficult to impute. In any event it was not possible for the petitioner to know what was in her mind when she consented because there were more reasons than one for her consent."

6. In "Partho Pratima Phukan @ Meja v. The State of West Bengal & Anr." reported in 2008(1) CCLR(Cal) 774, on similar allegations of having committed rape upon the prosecutrix by procuring her consent on false promise(s) of marriage, another Bench of this Court had similarly quashed the proceedings with the following observations -

"8. It was next submitted that having regard to the age of the defacto complainant as well as other facts and circumstances, question of commission of offence of rape under Section 376 also could not arise. It is clear from the materials in the case diary that the complainant freely exercised a choice between the resistance and assent. It cannot be said that she did not know the consequences of the act. Since materials on record suggest that the complainant freely, voluntarily and consciously consented to having sexual intercourse with

the present petitioner, her consent could not be in consequence of any misconception of fact.

13. In such view of the matter, I am of the opinion that there is no rational justification for proceedings further with the case under reference. Accordingly, the application being C.R.R. No. 441 of 2007 be allowed. The case being B.G.R. Case No. 395 of 1999 pending before the learned Court of Additional Chief Judicial Magistrate, Alipore arising out of the Jadavpur Police Station Case No. 51 dated 30th January, 1999 under Sections 376/420 of the Indian Penal Code be quashed."

7. In "Shyamapada Tewari v. The State of West Bengal & Anr." reported in 2009(1) CCLR (Cal) 266 the accused who was similarly alleged to have committed rape by obtaining consent on false promise of marriage, was let off with the observations -

"14. In this case the victim woman is a fully-grown lady aged 34 years. There was intimacy between her and the accused. There is no mark of injury on her private parts and according to medical report she was habituated to sexual intercourse. She was quite aware of the consequence of pre-marriage sexual intercourse. She had sufficient intelligence to understand that significance and moral quality of the act she was consenting. She took the accused to the house of daughter of her maternal-uncle and voluntarily went upstairs and placed the mat on the floor. Even where she was proposed by the accused for sexual intercourse she did not resist the overtures of the accused and in fact she succumbed to them. Only she put a condition for such sexual intercourse i.e. the promise of marriage considering her future..... The victim woman willingly consented to having sexual intercourse with the accused with whom she was intimate not because he promised to marry her but because she also desired it. So, it cannot be said that the consent given by the victim woman was actuated by misconception of fact. To the contrary, the act of the victim woman is an act of promiscuity on her part and the facts and circumstances of the case before the Apex Court reported in (2007)1 SCC (Cr) at page 557 are different from the facts and circumstances of the present case and the principles laid down in that case do not help the learned Counsel for the State."

8. In "Manoj Bajpai v. State of Delhi" reported in , 2015 VIAD (Delhi) 411, , 2015 (3) JCC 1859, the Delhi High Court in quashing an FIR in which the same offences punishable under Ss. 417/376 IPC were alleged, made the following observations -

"xiv) The statement of the complainant under section 164 Cr.PC is the repetition of the FIR except some improvement that the petitioner at times indulged in sexual intercourse after giving narcotics and took objectionable photos..... Therefore, the improved allegations in the statement under Section 164 Cr.PC are false and even if the trial is directed to be proceeded with, the same would not conclude in the conviction of the accused and to proceed with the case would

be sheer abuse of process of law.

xv) It is well settled law that any subsequent statement to fill up the lacuna in the complaint made earlier cannot be a ground for proceeding with the case. It is the first version as disclosed in the complaint which is always important for adjudicating as to whether an accused has committed any offence or not.

17. In view of the same, as seen above, the first version as disclosed in the complaint made by the complainant does not disclose any offence u/s. 376 IPC. It is only subsequently in her statement u/s. 164 Cr.P.C. that the complainant has tried to take a plea that her objectionable photographs have been taken after applying narcotic drugs on her or that her consent was obtained on the promise to marry her....."

9. The complainant's side has also placed a number of decisions in opposing the Revision. The first of these happens to be "Medchl Chemicals & Pharma (P) Ltd." reported in , (2000)3 Supreme Court Cases 269, wherein it was held -

"2. Exercise of jurisdiction under the inherent power as envisaged in Section 482 of the Code to have the complaint or the charge-sheet quashed is an exception rather a rule and the case for quashing at the initial stage must have to be treated as rarest of rare so as not to scuttle the prosecution....."

14. Needless to record however and it being a settled principle of law that to exercise powers under Section 482 of the Code, the complaint in its entirety shall have to be examined on the basis of the allegation made in the complaint and the High Court at that stage has no authority or jurisdiction to go into the matter or examine its correctness. Whatever appears on the face of the complaint shall be taken into consideration without any critical examination of the same. But the offence ought to appear ex facie on the complaint....."

10. The aforesaid observations of the Supreme Court are in relation to the overall usage of inherent power by the High Court U/S. 482 Cr.PC, and are admittedly not specifically in connection with any case involving the offence of "rape". The application of the aforesaid principles in the present case is therefore to be judged in the light of the facts of the present case, and the rest of the cited case law.

11. In "Ravindra v. State of Madhya Pradesh" reported in , (2015)4 SCC 491, it was observed -

"4. After considering the evidence adduced by the parties, the High Court was of the view that it is well settled that the woman who is a victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. As a matter of fact her evidence is similar to the evidence of an injured complainant or witness....."

12. It is however noteworthy that the aforesaid observations were made in the context of a case in which the victim was raped forcibly without her consent as it

has been mentioned in Para 2 of the Judgment -

".....The factual matrix of the case is that on 24.8.1994, the complainant, Narmadabai had gone to the field of the accused, Ravindra for doing labour work. When she was plucking moong beans at about 12 o'clock, the accused Ravindra came near her, caught her hand, pushed her down and committed sexual intercourse without her consent....."

13. The accused was thereafter convicted even though it was his argument that the sample of semen found on the clothes of the victim was not sufficient to link him to the alleged offence since there was absence of spermatozoa in the vaginal smear of the victim. The conviction was nevertheless upheld and the SLP preferred by the accused was also dismissed.

14. In "Ganga Singh v. State of Madhya Pradesh" reported in , (2013)7 Supreme Court Cases 278 it was observed -

"17.....The settled position of law is that the prosecution is required to establish the guilt of the accused beyond reasonable doubt by adducing evidence. Hence, if the prosecution in a given case adduces evidence to establish the guilt of the accused beyond reasonable doubt, the court cannot acquit the accused on the ground that there are some defects in the investigation....."

15. The above decision only lays down the principle that an accused in a rape case cannot be acquitted simply because the investigation by the Police is shoddy or defective, if the prosecution can adduce evidence to establish the guilt of the accused beyond reasonable doubt notwithstanding such defects in the investigation. In the present case however there is absolutely no allegation of any defective investigation. On the contrary the matter to be considered is whether the material available is convincing enough to indicate that the consent of the victim/complainant was obtained by the alleged false promise of marriage or not. Even otherwise, in this citation, the allegation was of "forcible rape" and not "sexual intercourse by false promise of marriage" as is clear from the narration of the following facts in the judgment -

".....The facts very briefly are that the informant lodged an oral complaint on 22.12.1987 at 6.00 p.m. at Mangraoul Police Station, alleging that on 21.12.1987 at 6.30 p.m. in the evening when she had gone to the field of Tilak Singh at Naya Kunwa to answer her natural call and was coming out from the field, the appellant came and caught hold of her and fell her down gagged her mouth, lifted her petticoat and committed rape. She returned home and told her mother-in-law about the incident and on 22.12.1987 when her husband, who works on a truck, returned home, she has come to lodge the report in the police station....."

16. In "Radhu v. State of Madhya Pradesh" reported in , AIR 2007 SC (Supp) 847, the Court observed -

"5. If the victim of rape states on oath that she was forcibly subjected to

sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a "rape", if the girl is under 16 years of age....."

17. In the above case also the allegation was that the victim had been forcibly raped and there was absolutely no element of obtaining her consent to the sexual intercourse of by false promise or under any misconception of fact which is clear from the following narration in Para 2 of the Judgment -

".....In brief the prosecution case is as follows: On 28.01.1991 at about 8 p.m., prosecutrix Sumanbai, went to a shop for purchasing some groceries. On her way to the shop, Gyarsibai, a relative, invited her to come inside her house. When she entered Gyarsibai's house, her son Radhu who was in the room came out, dragged her inside the room and confined her in the room during the entire night. During the night, he sexually assaulted her by inserting his penis in her vagina twice. When she cried, Radhu gagged her mouth with a piece of cloth. Radhu freed her only the next day (Tuesday) morning....."

18. As such the aforesaid observations in this decision as well as in the earlier two citations are not basically applicable in case of the present complaint, since all these observations were essentially made in respect of situations where rape was committed altogether "forcibly", and there was absolutely no allegation of having secured the victim's consent on a false promise of marriage, or under any misconception of fact" which is the distinguishing feature in the present case.

19. In "Sudhansu Sekkar Sahoo v. State of Orissa" reported in , AIR 2003 Supreme Court 2136, the Court revisited the position of law in relation to rape cases by observing -

"9. It is true that the evidence of the prosecutrix in a rape case is to be given due weight. The sexual violence is a dehumanising act and it is an unlawful encroachment into the right to privacy and sanctity of woman. The courts also should be strict and vigilant to protect the society from such evils. It is in the interest of the society that serious crimes like rape should be effectively investigated. It is equally important that there must be fairness to all sides. In a criminal case, the court has to consider the triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public. The purpose of criminal law is to permit everyone to go about their daily lives without fear of harm to person or property.

11. It is true that the sole testimony of the victim of a sexual offence can be a basis for conviction provided it is safe, reliable and worthy of acceptance. This Court had occasion, in many cases, to consider the nature of evidence required when the conviction mainly based on the testimony of the victim of the sexual offence.

14. In *Krishan Lal v. State of Haryana*, (1980) 3 SCC 159, the victim was sleeping with her mother and other children outside her house on a hot night and the two accused persons carried her away to a nearby godown under intimidation and allegedly committed rape on the young woman. In the morning, the mother of the victim found blood on the daughter's salwar and thereupon she narrated the criminal assault of the accused on the previous night. The counsel for the accused urged that the evidence of the prosecutrix, without substantial corroboration, was inadequate to rest a conviction under Section 376 IPC. This plea was rejected and it was held by this Court as under:

"We must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out? The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value..... To forsake these vital considerations and go by the obsolescent demands for substantial corroboration is to sacrifice common sense in favour of an artificial concoction called "Judicial" probability. Indeed, the Court loses its credibility if it rebels against realism. The law court is not an unnatural world.

15. In *State of Maharashtra v. Chandraprakash Kewalchand Jain*, (1990) 1 SCC 550, a girl eloped with a 25 years old young man. They went to Bombay and got married. Thereafter they came to a place near Nagpur and checked in a lodge. The local Police Sub-Inspector came to know that the couple was staying in the said lodge and he took them to the police station where the husband was beaten up and the wife was threatened. The Sub-Inspector registered a case against the husband alleging that he was found misbehaving on a public street and put him in the lock-up. The girl was left in a hotel. It was alleged that the Sub-Inspector visited the girl's room and committed rape on her. In that case, this Court elaborately considered the question whether conviction can be based on the sole testimony of the victim of the sexual offence and held:

"Is it essential that evidence of prosecutrix should be corroborated in material particulars before the court bases a conviction on her testimony? Does the rule of prudence demand that in all cases save the rarest of rare the court should look for corroboration before acting on the evidence of the prosecutrix.

A prosecutrix of a sex offence cannot be put on par with accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact

that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix, it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness."

17. It is well settled that in rape cases the conviction can be solely based on the evidence of the victim, provided such evidence inspires confidence in the mind of the court. The victim is not treated as accomplice, but could only be characterised as injured witness. It is also reasonable to assume that no woman would falsely implicate a person in sexual offence as the honour and prestige of that woman also would be at stake. However, the evidence of the prosecution shall be cogent and convincing and if there is any supporting material likely to be available, then the rule of prudence requires that evidence of the victim may be supported by such corroborative material."

20. It is however to be noted that in the aforesaid decision the conviction of the accused/appellant under Sections 376 and 342 of the IPC had actually been aside. The decisions in "Krishnalal v. State of Haryana" and "State of Maharashtra v. Chandra" cited in the Judgment again were in relation to cases in which the victim/prosecutrix was raped forcibly and not under any false promise of marriage or misconception of victim, which is the essence of the present case. The highlighted extracts in Paras 14 and 15 of the citations go to reveal that the element of "force" and not false promise/misconception of fact for the purpose of obtaining consent for sexual intercourse was the distinguishing feature in each of those cases. As such even this decision does not apply to the facts and circumstances of the present case.

21. In "Kaini Rajan v. State of Kerala" reported in , (2013)9 SCC 113, the relevant observations were -

"14. This Court examined the scope of Section 375 IPC in a case where the facts have some resemblance with the one in hand. Reference may be made to the judgment of this Court in Deelip Singh alias Dilip Kumar v. State of Bihar ,

(2005) 1 SCC 88. In that case, this Court examined the meaning and content of the expression "without her consent" in Section 375 IPC as well as whether the consent given by woman believing the man's promise to marry her, is a consent which excludes the offence of rape. This Court endorsed the principle that a misrepresentation as regards the intention of the person seeking consent, i.e. the accused, could give rise to the misconception of fact. While applying this principle to a case arising under Section 375 IPC, this Court held that the consent given pursuant to a false representation that the accused intends to marry, could be regarded as consent given under misconception of fact. But a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90 IPC. This Court further held that: (SCC p. 104, para 28)

"28... If, on 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 the second clause of Section 375 IPC.

In the facts of that case, this Court held, that the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her of the prospect of marriage with the accused. The Court held that she came to the decision to have a sexual affair only after being convinced that the accused would marry her and it is quite clear from her evidence, which is in tune with her earlier version given in the first information report. The Court noticed that she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act."

22. It is however seen that the appellant in this cited case had been convicted of the offences under Section 376 of the IPC in spite of having been acquitted by the Trial Court of the separate offence under Section 417. The conviction was upheld by the High Court. But the Supreme Court, notwithstanding the observations quoted by the complainant, set aside the conviction by concluding that the evidence of the prosecutrix and other witnesses did cause doubt about the veracity of the allegations. The relevant observations in the concluding part of the cited Judgment in this regard are as follows -

"19. Behaviour of the parents of the prosecutrix viz. PW 3 and PW 4 also appears to be strange. In their evidence they stated that they came to know about the relations between the appellant and the prosecutrix when they found her pregnant. The prosecutrix had told them that the appellant had agreed to marry her. They knew the appellant and his family already. However, there is not even a whisper that they approached the appellant or his family members for marrying the prosecutrix. They straight away went to the police station to lodge the report, that too after the birth of the child. All these factors cast a doubt on the prosecution version. The version of the victim, in rape commands great respect and acceptability, but, if there are some circumstances which cast some doubt in

the mind of the court of the veracity of the victim's evidence, then, it is not safe to rely on the uncorroborated version of the victim of rape.

20. The trial court as well as the High Court have committed an error in holding that the accused is guilty of the offence punishable under Section 376 IPC. In such circumstances, we are inclined to allow this appeal and set aside the Conviction and sentence imposed on the appellant and order accordingly."

23. However in "Yedla Srinivasa Rao v. State Of A.P" (Appeal (crl.) 1369 of 2004), the Supreme Court upheld the appellant's conviction for the offences under Sections 376 and 417 of the IPC. In that case the accused had similarly been tried on the allegation that he had sexual intercourse with the prosecutrix on the false promise of marrying her. The relevant concluding observations of the Supreme Court in this regard are as follows -

"In this connection reference may be made to the amendment made in the Indian Evidence Act. Section 114A was introduced and the presumption has been raised as to the absence of consent in certain prosecutions for rape. Section 114A reads as under:

"Section 114A- Presumption as to the absence of consent in certain prosecutions for rape. In a prosecution for rape under Cl. (a) or Cl.(b) or Cl.(c) or Cl. (d) or Cl. (e) or Cl. (g) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the Court shall presume that she did not consent."

If sexual intercourse has been committed by the accused and if it is proved that it was without the consent of the prosecutrix and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. Presumption has been introduced by the legislature in the Evidence Act looking to atrocities committed against women and in the instant case as per the statement of PW, she resisted and she did not give consent to the accused at the first instance and he committed the rape on her. The accused gave her assurance that he would marry her and continued to satisfy his lust till she became pregnant and it became clear that the accused did not wish to marry her.

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 prosecutrix that he would marry her. Therefore, we are satisfied that the

conviction and sentence awarded to the appellant is correct and no case is made out for our interference. The appeals are dismissed."

24. There is however a subtle difference between the facts in the above case of "Yedla Srinivasa Rao v. State Of A.P", and those of the present case. It is noticed that the appellant's conviction in the aforesaid case was upheld after the Apex court had distinguished the same from the ratio earlier laid down in "Jayanti Rani Panda v. State of West Bengal & Anr." , (1984) Cri.L.J.1535. In that earlier case it had been observed that "in order to come within the meaning of misconception of fact, the fact must have an immediate relevance. It was also observed that if a fully grown up girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact and it was held that Section 90 IPC cannot be invoked unless the court can be assured that from the inception accused never intended to marry her."

25. The Supreme Court however held that the facts of "Jayanti Rani Panda" (supra) were very different from those in "Yedla Srinivasa Rao", since the prosecutrix in the earlier case was a full grown lady of 21-22 years, while the victim in "Yedla Srinivasa Rao" (supra) was a tender girl below 16 years of age in whose case therefore, the alleged consent given on the promise of marriage could not have been a valid consent in the given circumstances. The relevant observations of the Supreme Court in this regard in the judgement are set out below -

"Therefore, it depends on case to case that what is the evidence led in the matter. If it is fully grown up girl who gave the consent then it is different case but a girl whose age is very tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfil right from the beginning which is apparent from the conduct of the accused, in our opinion, Section 90 can be invoked. Therefore, so far as Jayanti Rani Panda (supra) is concerned, the prosecutrix was aged 21-22 years old. But, here in the present case the age of the girl was very tender between 15-16 years. Therefore, Jayanti Rani Panda's case is fully distinguishable on facts. It is always matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfil. If the court of facts come to the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise. Such consent cannot condone the offence."

26. This Court is now to consider whether the material on record does make out a convincing case to sustain the allegation that consent of the victim was obtained by the petitioner purely on the false promise of marrying her in future or not. For this purpose the allegations in the original FIR, and the further

material collected during investigation, most prominently being the victim's own statement under Section 164 of the Cr.P.C, apart from the Report of her Medical Examination held after registration of the FIR warrant a close consideration.

27. It is seen that in the FIR lodged on 20th of February 2013, the complainant had made these allegations -

"To, The Officer in Charge Cossipore P.S. Kolkata - 700002 Complaint against Puran Giri S/O D.N. Giri, 40A Gopal Chatterjee Road Kol-2

Dear Sir,

Please be informed the following facts and circumstances for your kind consideration and necessary action.

In course of my duty I came in contact with the person at Nabajiban Nursing Home, Cossipore through one of my friend Sabita and used to attend Puran Giri at his house mentioned above. During the course of visit the said Puran promised to marry me and by such hope he used to enjoy me since September, 2012.

Now he is denying to marry me and that he discloses he will marry a Lady of Darjeeling and such negotiation is complete and he is unable to marry me. The brother-in-law and his sister resides at the address.

I beseech your good conscience to to the needful and save from the peril."

28. As such it transpires that there was absolutely no allegation to the effect that the petitioner at any time forcibly had intercourse with the complainant. It was alleged that the accused "by such hope (the promise of marriage) he used to enjoy me since September, 2012". However in her examination under Section 164 of the CRPC, the victim gave a statement which was at a huge variance from her allegation in the FIR, and contained various new allegations, which had not been mentioned earlier, even though the facts made out therein had admittedly occurred before lodging of the FIR.

29. In her statement under Section 164, the complainant has stated that only in December 2012 the petitioner had asked her to listen to him, and after saying that had the first physical intimacy with her, which is in direct contradiction to the allegation of "enjoying her since September, 2012" as made in the FIR. It is further seen that the complainant has not stated anywhere that at any stage she resisted the sexual advances of the petitioner. On the contrary she has stated that she asked him what was the guarantee that he would marry her, to which he replied that he would introduce her to his children. Thereafter according to her his children came to his quarters in January 2013, after which she went to the quarters and got introduced to them. This clearly means that the complainant had already submitted to the sexual advances of the petitioner voluntarily even before meeting his children, which she ought to have avoided especially considering that according to her, she had already been cheated in her previous affair with another Police Constable namely Tapas Kumar Singha, who had

allegedly given a similar false promise of marriage to her on account of which she had lodged a similar criminal case against him, under the very same sections of the IPC in the Jorabagan Police Station.

30. Again according to the complainant in her examination under Section 164 of the Cr.P.C., the petitioner lastly had sex with her in his quarter on 17th February 2013, after which he allegedly told her that he would not marry her. She thereafter stated in her examination that she was kept confined in the petitioner's house with the active assistance of his sister Chinku till about midnight after which the petitioner returned from his duties and left her on the street. Again there is absolutely no allegation of any force being used against her either for having sexual intercourse by the petitioner, or even otherwise by anyone including his sister on the complainant's person. Strangely, she was medically examined three days later and stated before the Medical Officer that she was assaulted by "Chinnu Serfa, Tanma Sarfa as well as the petitioner Puran Giri (brother of Chinnu Serfa) on account of which four nail scratch marks on her left upper breast were caused. But the Medical Report also notes that there was no obvious genital external or internal injury.

31. In "State of Haryana v. Bhajan Lal" [, 1992 Supp (1) SCC 335, the Supreme Court, in enumerating the various situations in which criminal proceedings may be quashed under Section 482, had observed -

"102) In the backdrop of the interpretation of the various relevant provision of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, thought it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

1) Where the allegations made in the first information report of the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

2) (In applicable)

3) (Inapplicable)

4)(Inapplicable)

5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6)(Inapplicable)

7) Where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

In the given circumstances, the aforesaid three situations especially the fifth one would appear to be attracted in the present case.

32. Furthermore, considering that the complainant has stated many things beyond her original letter of complaint in her subsequent statement under Section 164, there is a strong resemblance to the facts and circumstance in the case of "Manoj Bajpai v. State of Delhi" cited on behalf of the petitioner in which it was noted -

"17. In view of the same, as seen above, the first version as disclosed in the complaint made by the complainant does not disclose any offence u/s. 376 IPC. It is only subsequently in her statement u/s. 164 Cr.P.C. that the complainant has tried to take a plea that her objectionable photographs have been taken after applying narcotic drugs on her or that her consent was obtained on the promise to marry her.

.....xiv) The statement of the complainant under section 164 Cr.PC is the repetition of the FIR except some improvement that the petitioner at times indulged in sexual intercourse after giving narcotics and took objectionable photos..... Therefore, the improved allegations in the statement under Section 164 Cr.PC are false and even if the trial is directed to be proceeded with, the same would not conclude in the conviction of the accused and to proceed with the case would be sheer abuse of process of law....."

33. In its revisional jurisdiction, this Court is not required to meticulously scan the evidence collected. But this much is clear from the complainant's own statement under Section 164 CRPC that she voluntarily had sex with him before satisfying herself about his sincere intention to marry her, as she admittedly did not wait to meet his children and already had sex with the petitioner either in September 2012 (according to the FIR) or otherwise in December 2012 (according to her statement under Section 164 CRPC), before the children arrived only in January 2013. In view of her own claim of having already been deceived earlier in a similar fashion by another Police Constable Tapas Kumar Singha, who had had sexual intercourse with her on the false promise of marriage, after which she implicated him in a criminal case to the knowledge of the petitioner, there would remain little doubt that she had submitted to the petitioner's sexual advances voluntarily.

34. Even the decision in "Yedla Srinivasa Rao" would not help her since she is admittedly not a tender aged girl of 16 years, but a full grown adult having crossed the age of 28 years and was also gainfully employed in the Nursing Home. In these circumstances her consent to the act of sexual intercourse cannot be said to have been obtained under any "misconception of fact". Her

case is therefore squarely covered by the following observations in "Partho Pratima Phukan @ Meja v. The State of West Bengal & Anr." (supra) -

"....It is clear from the materials in the case diary that the complainant freely exercised a choice between the resistance and assent. It cannot be said that she did not know the consequences of the act. Since materials on record suggest that the complainant freely, voluntarily and consciously consented to having sexual intercourse with the present petitioner, her consent could not be in consequence of any misconception of fact.

13. In such view of the matter, I am of the opinion that there is no rational justification for proceedings further with the case under reference. Accordingly, the application being C.R.R. No. 441 of 2007 be allowed."

35. For the aforesaid reasons, continuation of the proceedings against the petitioner in this case is not called for. Consequently further proceedings in Sessions Case number 9(7) 13 pending in the Ld. Fast Track 2nd Court, at Sealdah are now quashed. The pending application being CRAN 3102 of 2015 therefore becomes redundant and stands rejected.