
(2015) 08 DEL CK 0044
In the Delhi High Court
Case No : Criminal Appeal 291 of 2012

Som Dev

APPELLANT

Vs

State (NCT of Delhi)

RESPONDENT

Date of Decision : 06-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Evidence Act, 1872 — Section 3, 65B (4) (c)
Penal Code, 1860 (IPC) — Section 375, 376, 90

Citation : (2015) 8 AD 293 : (2016) CriLJ 473 : (2015) 4 JCC 2276

Hon'ble Judges : S.P. Garg, J

Bench : Single Bench

Advocate : Rebecca John, Senior Advocate and Vikas Arora, Dheeraj Manchanda, Anish Dhingra and Radhika Arora, for the Appellant; Kusum Dhalla, APP, Advocates for the Respondent

Final Decision : Disposed off

Judgement

S.P. Garg, J—Aggrieved by a judgment dated 16.02.2012 of learned Addl. Sessions Judge in Sessions Case No. 46/10 arising out of FIR No. 261/09 PS Subzi Mandi, convicting him for commission of offence under Section 376 IPC, the appellant - Som Dev has preferred the instant appeal to challenge its legality and correctness. By an order dated 18.02.2012, he was awarded RI for ten years with fine Rs. 20,000/-.

2. Briefly stated the prosecution case as projected in the charge- sheet was that on 21.05.2009 at around 04.00 p.m. at Nehru Kutiawali Gali, Malka Ganj, Delhi, the appellant committed rape upon "X" (assumed name). On 09.06.2009, an information was received at Police Control Room vide DD No. 21 (Ex.PW-5/A) at 08.50 p.m. to the effect that Const.Som Dev posted at PS Subzi Mandi was sexually abusing a girl for the last three or four months on the false promise to marry. It further informed that Insp.Veena Sharma had obtained Rs. 1 lac to suppress the complaint made to her. On receipt of DD No. 28A (Ex.PW-15/A),

PW-15 (SI Siddappa) along with Const.Sunny went to the spot i.e. 3244, Aryapura, Subzi Mandi and met the prosecutrix "X". She disowned any such call to have been made by her to the police. Subsequently, "X" went to the police station at around 10.00 p.m. and lodged complaint (Ex.PW- 1/A). It was assigned for investigation to Insp.Veena Sharma. No action was taken on the said complaint and she kept it "pending". The complaint received vide DD No. 21 (Ex.PW-5/A) was referred to PG Cell, North District for conducting enquiry. PW-5 (WSI Usha Rani) examined various individuals in the said enquiry and recorded their statements. She collected details of phone calls. Upon completion of the enquiry, she submitted her report (Ex.PW-5/F) concluding that Const.Som Dev had established physical relations with "X" on the pretext of marriage and Insp.Veena Sharma had attempted to cover up the matter. She forwarded the enquiry report to the concerned ACP. On receipt of the enquiry report, Insp.Veena Sharma made endorsement (Ex.PW-16/A) on 23.10.2009 on the complaint (Ex.PW-1/A) which was still "pending" and lodged First Information Report under Section 376 IPC. The investigation was taken over by PW-15 (SI Siddappa). "X" was medically examined. The accused was taken for medical examination on 01.12.2009 and finally arrested on 04.12.2009. Statements of witnesses conversant with facts were recorded. Upon completion of investigation, a charge-sheet was laid before the Trial Court against the appellant. The appellant was charged under Section 376 IPC to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined 16 witnesses. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. He examined DW-1 (SI Ram Pal Singh), DW-2 (Const.Sant Kumar), DW-3 (HC Ram Kishan) and DW-4 (Const.Jitender Kumar) in defence. After appreciating the evidence and considering the rival contentions of the parties, the Trial Court convicted the appellant under Section 376 IPC. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned Senior Counsel for the appellant and learned Addl. Public Prosecutor for the State and have examined the record. Learned Senior Counsel for the appellant would urge that the Trial Court did not appreciate the evidence of the material witnesses in its true and proper perspective. Various material infirmities, inconsistencies and discrepancies in the prosecution case were ignored without cogent reasons. The prosecution was unable to establish beyond doubt if the appellant had established physical relation with the prosecutrix at the residence of PW - Kanchan at Malka Ganj on 21.05.2009 at 04.00 p.m. as alleged. Kanchan in her 164 Cr.P.C. statement denied any such visit by the prosecutrix along with the appellant at her house that day. She was not produced by the prosecution for examination and her non-examination is fatal. The Trial Court without sound reasons omitted to give due weightage to defence evidence wherein it emerged that on 21.05.2009, the appellant was deputed to attend training programme at Kingsway Camp and was physically present there during the whole period. His colleagues Const.Sant Kumar (DW-2) and Const.Jitender Kumar (DW-4) were with him throughout the day and they

have spoken so. The appellant and his colleagues had left the police station to attend training at 4th Batalian, DAP vide DD NO. 13B (Ex.DW-1/1) at 06.12 a.m. and had arrived at 06.35 p.m. for which DD No. 69B (Ex.DW-1/2) came into existence. There was no question to make promise to marry the prosecutrix as the appellant was already married. X's statement has remained uncorroborated. The enormous delay in lodging the FIR has remained totally un-explained. Conversation on phone on few occasions between the appellant and the prosecutrix as friends, would not attract commission of crime under Section 376 IPC. Learned Senior Counsel for the appellant further urged that at no stage the prosecutrix claimed that telephone No. 9210687347 was in her possession and she used to converse with the appellant on that number. There was no question of the appellant impersonating himself "Rohit" as the prosecutrix had read his name on his name plate at the time of her very first visit to the police station on 22.03.2009. The complaint lodged on 09.06.2009 does not reflect if the appellant had made any "promise to marry". Reliance has been placed on Krishan Kumar Malik Vs. State of Haryana, AIR 2011 SC 2877 : (2011) 7 JT 94 : (2011) 3 RCR(Criminal) 589 : (2011) 6 SCALE 759 : (2011) 7 SCC 130 : (2011) 3 SCC(Cri) 61 : (2011) 8 SCR 774 : (2011) 7 SCR 722 : (2011) AIRSCW 4614 : (2011) AIRSCW 4118 ; "Kuldeep Tyagi vs. State", 2013 Law Suit (Del) 1077; "Manoj vs. State", 2015 Law Suit (Del) 1250 ; Uday Vs. State of Karnataka, AIR 2003 SC 1639 : (2003) CriLJ 1539 : (2003) 2 JT 243 : (2003) 2 SCALE 329 : (2003) 4 SCC 46 : (2003) 2 SCR 231 : (2003) AIRSCW 1035 : (2003) 2 Supreme 145 ; Takhaji Hiraji Vs. Thakore Kubersing Chamansing and Others, AIR 2001 SC 2328 : (2001) CriLJ 2602 : (2001) 2 Crimes 288 : (2001) 1 JT 415 Supp : (2001) 3 SCALE 589 : (2001) 6 SCC 145 : (2001) 2 UJ 865 : (2001) AIRSCW 2077 : (2001) 3 Supreme 690 & Param Hans Yadav and Sadanand Tripathi Vs. State of Bihar and Others, AIR 1987 SC 955 : (1987) CriLJ 789 : (1987) 1 Crimes 894 : (1987) 1 JT 595 : (1987) 1 SCALE 426 : (1987) 2 SCC 197 : (1987) 2 SCR 405 .

4. Refuting, the arguments, so advanced, learned Addl. Public Prosecutor would submit that no valid reasons exist to disbelieve the prosecutrix who has supported the prosecution fully and no material infirmities could be extracted despite searching cross-examination.

5. Admitted position is that the appellant was posted as Constable at PS Subzi Mandi on or before 22.03.2009. On that day, "X" had visited the police station to lodge complaint against her father. The matter was purportedly settled there. Indisputably, the appellant was present at the police station that time along with other staff. The Duty Officer took X's mobile number to contact her in case of need. Both the appellant and the prosecutrix were strangers and were not acquainted with each other before that. "X" aged around twenty and a half years was unmarried; not so-educated and had got compartment in 8th standard; it appears that she did not pursue her studies thereafter. It seems that the appellant taking advantage of the strained relations with her father opted to develop intimacy and friendship with her. On that very date i.e. 22.03.2009 after

"X" made departure from the police station, the appellant contacted "X" on her mobile No. 9210873054. Call details record (Ex.PW- 7/D) reflects that first call was made by him from his Cell No. 9212141256 at 11.04 a.m. Subsequent calls were made at 12.27; 15.28 and 20.47 hours that day. It was the beginning to have conversation with "X"; it continued uninterruptedly thereafter. After 18.04.2009, the appellant started having conversation with "X" on her another Cell No. 9210687347. Call detail chart (Ex.PW-7/D) reveals that repeated calls were made by the appellant to "X" from his mobile at all the times including office time for various duration till 25.05.2009. On 26.05.2009, 02.06.2009 and 06.06.2009 also calls were made albeit once in a day. PW-7 (M.N. Vijayan) Nodal Officer brought records of phone No. 9212141256 and 9210687347 for the period from 12.03.2009 to 10.06.2009 (Ex.PW-7/D & Ex.PW-7/G, respectively) and produced certificate under Section 65B (4) (c) of the Evidence Act (Ex.PW-7/H). Correctness and genuineness of these documents were not challenged in the cross-examination. It was informed by PW-7 that phone No. 9210687347 was allotted to one Lakshmi w/o Rajender Singh vide application form (Ex.PW-7/E). Copy of ID proof (Ex.PW-7/F) was furnished at the time of getting the said number. The appellant at no stage of trial disputed if "X" did not use Cell No. 9210687347 and he had no conversation whatsoever on that number with her. He did not claim if this particular number did not belong to "X", with whom he used to have frequent conversation. The Trial Court dealing with this aspect noted that as per application form (Ex.PW-7/E) Lakshmi was resident of House No. 3244 which was X's residence. Possibility that Lakshmi might be residing at the house of the prosecutrix and "X" using this phone could not be ruled out. Nothing was suggested to "X" in her cross-examination if she did not possess phone No. 9210687347 or that Lakshmi was not related to her. I find no substance in the appellant's contention that the calls on this number cannot be taken into consideration as it did not belong to the prosecutrix. In 313 Cr.P.C. statement, the appellant claimed that at the time of her visit on 22.03.2009 "X" had taken his phone number and had made some calls to him. There is no denial that all these calls reflected in the call detail records were not attributable to him. "X" in her complaints lodged with the police and in her Court statement emphatically pleaded that the accused developed friendship with her on phone posing himself "Rohit". It stands established that after X's visit to Police Station Subzi Mandi on 22.03.2009 for redressal of her grievance against her father, the appellant posted as Constable started contacting her on her mobile. Subsequent to that, it was a routine affair and both continued to have talks on phone. In fact, the appellant has not denied his friendship with "X". It is also not denied that they both used to meet each other on various occasions. Appellant's conduct in this regard cannot be considered fair and reasonable. On 22.03.2009, the prosecutrix had visited the Police Station to lodge complaint against her father. No record has been collected or produced to show the nature of complaint lodged by "X" and the proceedings conducted to bring an end to it. The appellant, a police official on duty, had no sound reasons to develop intimacy with the complainant / victim, an unmarried young girl having strained relations with her

family over matrimonial issue. It was not fair for him to have conversation frequently with her even at odd times without the consent, permission or knowledge of her parents. Call details chart (Ex.PW-7/D) reveals that even during office hours, the appellant used to indulge in conversation with "X". The Chart runs into 89 pages for a period of about three months showing that at most of the times, the appellant used to remain busy on phone with "X" and many others as if he had no official duty to perform.

6. Incident of rape is dated 21.05.2009 at around 04.00 p.m. To avoid his complicity, the appellant took recourse to a defence line that when the occurrence took place, he was far away on official training of handling / operating of semi and fully automatic weapons at 4th Batalian DAP Kingsway Camp and it was extremely improbable that he would have participated in the crime. He claimed that he had proceeded at 06.12 a.m. along with Const.Sant Kumar and Const.Jitender Kumar; remained there throughout the day and returned to Police Station Subzi Mandi at 06.35 p.m. ruling out any possibility to be in the company of the prosecutrix at 04.00 p.m. at Malka Ganj to have physical relations with her. When a plea of "alibi" is raised by the accused, it is for him to establish it by positive evidence. On scrutinising the statements of the witnesses, this Court finds that plea of alibi is devoid of merits. "X" in her Court statement categorically and specifically deposed that physical relations were established with her consent at her friend Kanchan's house on 21.05.2009 at 04.00 p.m. at Malka Ganj. Both of them had their mobiles that day. In the cross-examination, no suggestion was put to claim that he was away at Kingsway Camp that day and it was a remote possibility of their being together at 04.00 p.m. at the said spot. The appellant did not plead this defence during investigation to enable Investigating Officer to verify it. During the comprehensive vigilance enquiry, at no stage, the appellant asserted himself to be present at the relevant time at Kingsway Camp. PW-15 (SI Siddappa) was not confronted with any such document in the cross-examination. For the first time in 313 Cr.P.C. statement, in response to question No. 5, he came up with the plea of his being on duty / training at New Police Line, Kingsway Camp from 08.00 A.M. to 06.00 P.M. DW-1 (SI Ram Pal Singh) has proved DD No. 13B (Ex.DW-1/1) showing departure of Const.Sant Kumar, Const.Som Dev (the appellant) and HC Jitender Kumar at 06.12 a.m. to 4th Batalian DAP for training. Entry vide DD No. 69B (Ex.DW- 1/2) at 06.35 p.m., however, shows arrival of Const.Sant Kumar alone to the Police Station. In the cross-examination, there is clear admission that DD No. 69/B (Ex.DW1/2) does not record Const.Som Dev's arrival at the police station. Officer who had recorded the said entry was not examined. DW-2 (Const.Sant Kumar) and DW-4 (Const.Jitender Kumar), appellant's colleague at the said police station attempted to rescue him deposing that he was with them throughout the training period from 06.12 a.m. to 05.30 p.m. However, they were unable to explain as to why appellant's name does not find mention in the arrival entry DD No. 69B (Ex.DW-1/2). The appellant did not examine any official from New Police Lines to establish his presence throughout there. No record has

been summoned from the said institute showing if any entry was made in the attendance register (if any) maintained there to record their arrival and departure. The two places were not far away from each other and even possibility of the appellant to have visited his friend "X" at 04.00 p.m. from that place cannot be taken as remote. Contrary to that, call details record (Ex.PW-7/D) falsifies appellant's claim. On 21.05.2009, the appellant had started contacting "X" at night as depicted therein. He was in touch with her at 00.00; 00.01; 00.16; 13.17; 15.31; 15.38; 15.39; 15.52; 15.58; 16.01; 16.07; 16.09; 16.36; 17.11 & 22.49 hours that day. It is pertinent to note that both, "X" and the appellant were at the same location at the time of conversing with each other.

7. These call details reflect unequivocally that "X" and the appellant were in constant touch with each other that day. It falsifies his claim that he was on "duty". Had it been so, there was no emergency to have so many calls during the training period to "X". Besides being in touch with "X", the appellant had talked to other numbers as well. None of them was examined to prove his presence at Kingsway Camp. It was very easy for the accused to produce mobile / electronic evidence to show his location at a particular place while talking on his mobile. The defence of "alibi" deserves outright rejection. A feeble attempt has been made by the appellant to dent the prosecution version.

8. "X" was emphatic to claim that on 21.05.2009, the appellant had established physical relations with her at her friend's house at Malka Ganj at 04.00 p.m. In her complaint (Ex.PW-1/A) lodged on 09.06.2009, she admitted to have consensual sex with him at 04.00 p.m. at Kanchan's house when she was away on the roof. In her Court statement confirming the version without any variation, she deposed that on 21.05.2009 at about 04.00 p.m. she had gone to her friend Kanchan's house at Malka Ganj where the accused had made physical relations with her (Pati - Patni wala rista kayam kiya). In the cross-examination, she elaborated that from 22.03.2009 onwards, she used to remain in touch with the accused regularly and they used to talk at least once a day till 21.05.2009. On that day at around 12.45 p.m., her call to the appellant was responded immediately by him. She visited Kanchan's house for the first time at around 12.45 p.m. and thereafter, at about 04.00 p.m. She and the accused left the house at around 04.30 p.m. No specific suggestion was put to her if in between 04.00 to 04.30 p.m. the accused was present at the place of his training. She denied the suggestion that complaint was lodged to extort money from the appellant.

No valid reasons exist to suspect the prosecutrix's version in this regard. Relations between the two were cordial and they used to have constant conversation on phone. Nothing has emerged to infer if "X" had attempted to extort money from the appellant any time. No ulterior motive was assigned to her to level serious allegations of physical relations. The fact is that even after the occurrence, the prosecutrix had not approached the Police to lodge any complaint before 09.06.2009. No material exists to show if "X" ever attempted

to exploit the appellant to extract money. Information received from telephone No. 23863811 Aryapura, Subzi Mandi vide DD No. 21 (Ex.PW-5/A) and DD No. 28A (Ex.PW-15/A) about sexual abuse and inaction on complaint due to illegal gratification alerted the police machinery. SI Siddappa contacted "X" to verify the complaint. Allegedly she denied to have made such complaint. Curiously, on that very date i.e. 09.06.2009 at around 10.00 p.m. statement (Ex.PW- 1/A) came into existence. It was assigned mechanically to Insp.Veena Sharma who was accused of accepting bribe. It is unclear why SI Siddappa was ignored to carry-out further investigation. It appears that Insp.Veena Sharma was in receipt of the complaint before recording of DDs (Ex.PW-5/A and Ex.PW-15/A) and when the matter came to the notice of higher-ups, complaint (Ex.PW-1/A) was shown to have been received at 10.00 p.m. Again, no action whatsoever was taken on the said complaint. Despite specific allegations against the accused to have established physical relations on promise to marry, Insp.Veena Sharma avoided to lodge FIR and for reasons known to her kept it "pending" with her without conducting official proceedings. PW-16 (Insp.Veena Sharma) deposed that after certain enquiries conducted from the "X" and the appellant - Const.Som Dev, it came to her knowledge that both were known to each other. She admitted that there were allegations of "rape" in X's complaint. She was, however, conspicuously evasive as to why no FIR was lodged soon thereafter. She did not produce any document to show if any proper / regular enquiry was conducted by her on record. It appears that everything was in the air. Since there were allegations of bribe against Insp.Veena Sharma, the matter was referred to Vigilance Cell and detailed enquiry was conducted by PW-5 (WSI Usha Rani) who recorded statements of various relevant witnesses (Ex.PW-5/B to Ex.PW- 5/B6; Ex.PW-5/C, Ex.PW-5/C1, Ex.PW-5/C2 & Ex.PW-5/D to Ex.PW- 5/F). The appellant has not challenged their correctness. Finally, the FIR was lodged by Insp.Veena Sharma on 23.10.2009 after the enquiry went against her. Inaction on her part smacks foul play.

9. X's statements were recorded on various occasions. In her statement (Ex.PW-5/B5) to the Enquiry Officer on 23.06.2009 she accused the appellant to have made physical relation on the pretext of marriage at her friend's house on 21.05.2009 and expressed willingness to undergo medical examination. She also raised an accusing finger against her brother-in-law (Jija ji) Narinder who allegedly accepted Rs. 20,000/- from Insp.Veena Sharma. In her other statement (Ex.PW-1/B) she reiterated her version. She is consistent throughout.

10. On 09.06.2009 "X" in her complaint (Ex.PW-1/A), expressed desire to marry the accused. Unaware of the appellant's marital status, she requested Insp.Veena Sharma to solemnize her marriage with him. After receipt of complaint vide DD No. 21 (Ex.PW-5/A), no genuine investigation was carried out to investigate the allegations. PW-15 (SI Siddappa) did not verify as to, to whom telephone No. 23863811 from where the information was given belonged and where was it installed. He did not take further steps after recording the alleged statement of the prosecutrix declining to have given any such call.

11. The testimony of a victim of sexual assault has great probative value. No corroboration would be required unless there are compelling reasons which necessitate the Courts for corroboration of her statement. In the instant case indisputably, "X" and the appellant were in constant and regular touch. She did not nurture any grievance against him to falsely allege physical relations on 21.05.2009. She had absolutely no strong motive to falsely involve the appellant. No tangible reasons prevail to disbelieve her specific assertion.

12. Kanchan's role is dubious in the whole incident. She came into contact with the prosecutrix about a month prior to the incident at a sewing centre where both used to go. Her statements (Ex.PW-5/C1 and Ex.PW-5/C2) were recorded on 05.09.2009 during enquiry proceedings, wherein she admitted her acquaintance with "X" for the last about six months. She informed further that on 21.05.2009, "X" had visited her residence along with a boy Rohit whose real name was ascertained Som Dev subsequently at 04.00 p.m. Her parents were not there that time. They stayed together in a room alone in the house. In response to various questions put by Enquiry Officer, she informed that they both had visited only once on 21.05.2009 at 04.00 p.m. During investigation, her statement under Section 164 Cr.P.C. (Ex.PW-6/B) was recorded on 05.12.2009 wherein she completely exonerated the appellant and denied his visit with "X" on 21.05.2009. She claimed that at the time of X's visit for about fifteen minutes on 21.05.2009, her parents, two brothers - Sachin and Shivam were present there. She feigned ignorance of "X"s association with the appellant. The Investigating Officer did not divulge compelling circumstances to record Kanchan's statement under Section 164 Cr.P.C. Needless to say, attempt was made to collect negative evidence for appellant's benefit. Under these circumstances, her non-examination during trial is of no consequence. Her parents would not allow their minor daughter to involve in such cases.

13. Delay in lodging the FIR is inconsequential. In fact, there is no delay in putting the police machinery into motion. The appellant and "X" were on friendly terms and physical relations on 21.05.2009 were consensual. From the very inception, X's case was that she had consented for physical relations on the promise to marry. There was, thus, no occasion / reason to lodge complaint soon after establishing physical relations. "X" had no reasons to suspect that the promise held out by the appellant would not be fulfilled. She was expected to wait for his response for reasonable period. Call details record (Ex.Ex.PW-7/D) reveals that on 22.05.2009 both were in touch and the appellant had made four telephone calls to her during night time; On 23.05.2009, he made two calls at 10.50 & 11.01 hours; On 25.05.2009, six calls were made to "X" at different times of the day; the last call being at 22.37 hours. Thereafter, frequency to contact "X" decreased and on 26.05.2009, 02.06.2009 and 06.06.2009, only one call each was made. When the appellant started ignoring her calls and did not contact her, "X" immediately lodged complaint (Ex.PW- 1/A) on 09.06.2009. Even in that complaint, she desired the Investigating Officer to ask the appellant to marry her. Apparently, "X" who wanted to marry the appellant was in no haste

to lodge complaint against him. She is a victim of circumstances. Despite her lodging complaint (Ex.PW-1/A) on 09.06.2009, the Investigating Agency did not register FIR and kept it "pending". Only when vigilance enquiry found substance in the complaint, the FIR was lodged on 23.10.2009.

14. The prosecution has established beyond reasonable doubt that "consent" for physical relations was obtained on the false promise to marry. Admittedly, the appellant was already a married man, legally incapable to marry "X". Nothing has come on record if during their long conversations on phone or personal meetings, the appellant ever apprised "X" of his marital status. Needless to say, the appellant had no intention from the very inception to marry "X". She came into his contact during her visit to the police station on 22.03.2009. Soon after her departure, the appellant expressed his desire to have friendship with her by making telephone calls. It was a routine affair thereafter to have conversation / meetings on various dates. As observed above, the victim was not so- educated and was unmarried; she had somewhat strained relations with her family. Taking advantage of it, the appellant developed friendship with her. Owing to continuous pestering, "X" agreed to have physical relation with him at her friend Kanchan's house on 21.05.2009. "X" has categorically deposed that her consent for physical relation was solely on the appellant's promise to marry her. Her statement inspires confidence as being an unmarried young lady aged around twenty years, under normal circumstances, she would not give consent for sexual intercourse with the appellant who was already married. There was no other "consideration" to agree to it. The appellant was candid from the very beginning and at the time of making telephone call on 22.03.2009, concealing his real identity, he gave his name "Rohit". She further elaborated that after 4 - 5 days of the incident i.e. 26.05.2009, the accused pretended to go to Hyderabad for military training and to marry her after return. On the next day, someone informed her on phone from Hyderabad that "Rohit" had expired. On her contacting the caller, he informed that the said number was allotted to him and Rohit had expired. She further deposed that after the incident dated 21.05.2009, when she asked the accused to marry her, his response was that if she insisted on marriage, he would commit suicide. She was even informed by someone that the accused had met with an accident and was serious. Apparently, after having physical relations on the false pretext to marry, the appellant attempted to ignore and avoid her on all possible excuses. In his statements (Ex.PW-5/P3 and Ex.PW-5/P4) during enquiry proceedings, the appellant admitted that after the dispute between "X" and her father was settled, she started having conversation with him; there were three meetings which used to take place on the road outside the police station. While denying physical relations, he claimed that it was a relationship of friendship. Since "X" wanted to marry, his refusal was not liked by her and the friendship came to an end. He claimed that friendship was not over and he used to get telephone call "off" and "on". He, however, did not divulge its details.

15. The prosecutrix's case stands on different footing. Despite having friendship

with the appellant since 22.03.2009, she did not consent for physical relation before 21.05.2009. Initially, she was hesitant, later on, on repetitive persuasions, she agreed for physical relations on 21.05.2009 in lieu of inducement and promise of marriage. It was not repeated thereafter. Apparently, it is not a case where a full 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; to be considered an act of promiscuity on her part and not an act induced by misconception of facts. After losing her virginity on 21.05.2009, she insisted the appellant to fulfil his promise to marry. The so-called friendship came to an end soon thereafter as the appellant was not in a position to marry her because of his marital status. "X" had no other reasons to submit herself for physical relationship. Appellant's conduct throughout is unfair and unreasonable. He setup false plea of "alibi" on the day of incident i.e. 21.05.2009. In a case of this nature, false plea of the accused is also an incriminating circumstance against him. "X" was medically examined vide MLC (Ex.PW-12/A) on 25.11.2009. It records alleged history of sexual assault on 21.05.2009. PW-10 (Dr.Sarita) examined her on 25.11.2009 and as per her report (Ex.PW-10/A), hymen was found ruptured; vagina admitted one finger. Obviously, "X" was not previously accustomed to sex.

16. "X" an unsuspecting girl was trapped by the appellant taking undue advantage of his official position on a deceitful promise of solemnizing marriage. Court is conscious that a promise to marry without anything more will not give rise to misconception of fact within the meaning of Section 90. But a representation deliberately made by the accused with a view to elicit the consent 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 IPC. In the instant case, the victim was poor, semi-literate, rustic and unmarried young woman in need of police assistance due to strained relations with her father. The appellant, a police constable, developed friendship with her alluring to marry her. The accused had knowledge or reasons to believe that consent given by the victim was under misconception of fact. It is not one of the cases where the victim indulged in repeated sexual intercourse.

17. The law has been succinctly discussed by the Supreme Court in Deepak Gulati Vs. State of Haryana, (2013) 6 AD 233 : AIR 2013 SC 2071 : (2013) CriLJ 2990 : (2013) 2 Crimes 311 : (2013) 3 CTC 567 : (2013) 4 JCC 2680 : (2013) 9 JT 105 : (2013) 3 RCR(Criminal) 96 : (2013) 7 SCALE 383 : (2013) 7 SCC 675 as under :

XXX XXX XXX

"19. This Court considered the issue involved herein at length in the case of Uday Vs. State of Karnataka, AIR 2003 SC 1639 : (2003) CriLJ 1539 : (2003) 2 JT

243 : (2003) 2 SCALE 329 : (2003) 4 SCC 46 : (2003) 2 SCR 231 : (2003) AIRSCW 1035 : (2003) 2 Supreme 145 ; Deelip Singh @ Dilip Kumar Vs. State of Bihar, AIR 2005 SC 203 : (2004) 9 SCALE 278 : (2005) 1 SCC 88 : (2005) 1 UJ 179 : (2004) AIRSCW 6479 : (2004) 8 Supreme 266 ; Yedla Srinivasa Rao Vs. State of A.P., (2007) CLT 485 Supp : (2006) 9 SCALE 692 : (2006) 11 SCC 615 : (2006) 7 SCR 760 Supp ; and Pradeep Kumar @ Pradeep Kumar Verma Vs. State of Bihar and Another, AIR 2007 SC 3059 : (2008) 105 CLT 1 : (2007) CriLJ 4333 : (2007) 10 JT 246 : (2007) 10 SCALE 97 : (2007) 7 SCC 413 : (2007) 9 SCR 58 : (2007) AIRSCW 5532 : (2007) 5 Supreme 918 , and came to the conclusion that in the event that the accused's promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.

XXX XXX XXX

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.

22. In Deelip Singh (supra), it has been observed as under:

"19. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the

tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology."

23. This Court, while deciding Pradeep Kumar Verma (Supra), placed reliance upon the judgment of the Madras High Court delivered in N. Jaladu Re (supra), wherein it has been observed:

11. "We are of opinion that the expression "under a misconception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) states that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married..... "thus... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person "....Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90 Indian Penal Code is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence."

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at 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 Indian Penal Code 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."

XXX XXX XXX

18. In the case in hand, the prosecution has established beyond doubt that the appellant had no inclination to marry the prosecutrix from its very inception. She was under continued impression that the appellant would marry her. It is crystal clear that "consent" for sexual intercourse was obtained by the accused by

means of deception and cannot be construed to be true consent in terms of Section 90 of the IPC. The impugned judgment on conviction based upon fair appraisal of evidence warrants no intervention and is affirmed.

19. The appellant was sentenced to undergo RI for ten years with fine Rs. 20,000/-. Nominal roll dated 24.11.2014 reveals that he has already undergone two years, seven months and twenty days incarceration besides remission for seven months and sixteen days as on 22.11.2014. He is a first time offender and is not involved in any other criminal case. His overall jail conduct is satisfactory. During interim bail granted on various occasions by this Court, there are no allegations of its misuse. The appellant was a government servant. Sentence order records that he was a young man of twenty-five years. He has a wife and small children to take care of them being sole bread-earner. Taking into consideration the facts and circumstances of the case, sentence order is modified to the extent that substantive sentence shall be RI for Seven years with fine Rs. 5,000/-. Other terms and conditions of the sentence order are left undisturbed except that default sentence for non-payment of fine would be two months. The appellant shall, however, pay Rs. 75,000/- as token "compensation" to the victim. This amount shall be deposited within two weeks in the Trial Court and shall be released to the victim after due notice.

20. The appeal stands disposed of in the above terms.

21. Trial Court record be sent back immediately with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.