

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE SANJAY DWIVEDI

ON THE 27TH OF JUNE, 2024

M.Cr.C. No.31926 OF 2019

ABHISHEK ARJARIYA

Vs.

THE STATE OF MADHYA PRADESH & ANOTHER

.....
Shri Rahul Deshmukh – Advocate for the petitioner.

Smt. Shraddha Tiwari – Panel Lawyer for respondent No.1/State.

Shri Vivek Agrawal – Advocate for respondent No.2.
.....

Reserved on : 29.05.2024

Delivered on : 27.06.2024

ORDER

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioner is seeking quashing of FIR dated 19.05.2019 registered against him vide Crime No.649/2019 at Police Station Piplani, District Bhopal for the offence punishable under Section 376(2)(n) and 506 of the Indian Penal Code.

2. The learned counsel appearing for the petitioner has submitted that though the challan has been filed, but according to him, the case of 376 is not made out against the petitioner. He has submitted that the incident narrated by the complainant before the police and even considering the contents of FIR, it is clear that the alleged offence does

not fall within the definition of rape as defined under Section 375 of IPC and as such, the FIR lodged against the petitioner is liable to be quashed.

The main contention of learned counsel for the petitioner is that not only in the statement of 161 but also in 164 of Cr.P.C., the prosecutrix has admitted that when physical relation developed between her and the petitioner, she was married and having one child and that relationship was continued for years together and in February, 2019, she got divorce from her husband and, therefore, according to him, as per the law laid down by the Supreme Court and also by this Court in number of cases, the said conduct of the petitioner does not fall within the definition of rape and as such, case of 376 is not made out. He has relied upon a decision of the Supreme Court reported in **2024 SCC OnLine SC 241 (XXXX ... Appellant Vs. State of Madhya Pradesh and another)** and also upon a case reported in **I.L.R.[2018] M.P. 203 (Anant Vijay Soni Vs. State of M.P. & anr.)** and the order passed by this Court in **W.P. No.18064 of 2022 (Nishant Jain Vs. State of Madhya Pradesh and another)** dated 07.10.2023.

3. On the other hand, Smt. Shraddha Tiwari, learned Panel Lawyer appearing for the respondent/State has submitted that as per the statement of the prosecutrix, it is clear that physical relations were developed by the petitioner with her on a false pretext of marriage and merely because she was a married lady, does not mean that the case of rape is not made out. She has pointed out that as per the statement of the prosecutrix, she became pregnant due to physical relations with the petitioner and as such, she has submitted that the petition is misconceived and deserves to be dismissed.

4. Shri Vivek Agrawal, learned counsel appearing for respondent No.2/complainant has supported the submissions made by the counsel for the State and submitted that the date of divorce is not available with him, therefore, it is impossible to say as to when she got divorce from her husband. He has placed reliance upon the judgments reported in **AIR 2018 SC 1923 (Munshiram v. State of Rajasthan and Anr. etc.), (2019) 9 SCC 608 (Prmod Suryabhan Pawar Vs. State of Maharashtra)** and the order passed by this Court in **M.Cr.C. No.12272 of 2017 (Sandeep and others Vs. Neelam and another)**.

5. Although, the counsel for the petitioner has submitted that in the statement of 164, the prosecutrix herself has stated that she got decree of divorce with her husband in the month of February, 2019 only and as such, he has submitted that the physical relationship developed between the prosecutrix and the petitioner in the year 2012 was continued till registration of FIR and as such, the offence of 376 has falsely been registered against the petitioner. He has submitted that it was a case of consensual relationship and looking to the fact that the prosecutrix and the petitioner were major and they were in relationship for a considerable period, no case of 376 is made out against the petitioner.

6. I have heard the rival submissions made by learned counsel for the parties and perused the record.

7. From a bare perusal of FIR, it is clear that the prosecutrix herself has alleged that the present petitioner since last 8 years on a false promise of marriage developed physical relations and as such exploited her. She has also alleged that 8 years prior to the date of registration of FIR, she came into the contact of petitioner through facebook and she

met to the petitioner at Bhopal where he was residing and then he developed physical relation with her giving false assurance of marriage. The FIR also contained that the petitioner promised the prosecutrix for getting married with her after the marriage of his sister, but somehow he left the prosecutrix at Chhatarpur and then she came to know that the petitioner is entering into marriage with some other girl. This act of the petitioner culminated into registration of FIR i.e. Crime No.649/2019 at Police Station Piplani, District Bhopal.

8. In the statement of 161, the prosecutrix has stated that through facebook she came into the contact of petitioner and thereafter relationship developed between them and almost 8 years prior to the date of registration of FIR, when she used to reside at Lucknow with her husband, but since her husband was ill-treating her and he was habitual drinker, then physical relations were developed with the petitioner as he assured that he would marry with prosecutrix and then on the promise made by the petitioner, she came to Bhopal in the month of September, 2012 and thereafter in January, 2019 she divorced her husband. The statement of 164 of the prosecutrix was almost same. It is admitted by the prosecutrix in her 164 statement that before getting divorce from her husband, she started living at Bhopal with the petitioner and they used to live like husband and wife. In 164 statement, the prosecutrix has also admitted that she got divorce from her husband only in the month of February, 2019 and then only she came to know that the petitioner was getting married with some other girl.

9. Considering the factual position as has been admitted by the prosecutrix herself, it is clear that there was long physical relations between the petitioner and the prosecutrix. It is also clear that on the

date when they came into the contact with each other and physical relations developed between them, the prosecutrix was a married lady and on a call made by the petitioner, she came to Bhopal.

10. In view of the legal position as has been laid down by the Supreme Court in a case reported in **2023 SCC OnLine SC 89 [Naim Ahamed Vs. State (NCT of Delhi)]**, in which, the prosecutrix and accused were residing in a tenanted premise in the same building and physical relations developed between them, the accused was persuading her stating that her husband was not earning sufficient income and accused had a good job and he assured her that he would maintain her according to his status and he also assured her that he would solemnize marriage with her and thereafter the accused with an intention to have illicit intercourse used to call her on various places, as a result thereof, she was impregnated by the accused in the year 2011 and she gave birth to a male child. The accused also assured 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 and continued to have illicit relationship with her, but giving a false excuse to the prosecutrix, he left her, then she had no other option but to take shelter in a shelter home along with her minor child. The Supreme Court after considering the factual aspect of the matter has observed as under:-

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 Penal Code, 1860, 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 judgments 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.

X

X

X

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 deceived 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.

11. The Supreme Court in a case reported in **(2019) 18 SCC 191 (Dr. Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and others)** has 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.

12. In case of **XXX Appellant Vs. State of Madhya Pradesh and another** (supra), in which, the counsel for the petitioner has placed reliance, the Supreme Court has observed as under:-

11. From the contents of the complaint, on the basis of which FIR was got registered and the statement got recorded by the complainant, it is evident that there was no promise to marry initially when the relations between the parties started in the year 2017. In any case, even on the dates when the complainant alleges that the parties had physical relations, she was already married. She falsely claimed that divorce from her earlier marriage took place on 10-12-2018. However, the fact remains that decree of divorce was passed only on 13-1-2021. It is not a case where the complainant was of an immature age who could not foresee her welfare and take right decision. She was a grown up lady about ten years elder to the appellant. She was matured and intelligent enough to understand the consequences of the moral and immoral acts for which she consented during subsistence of her earlier marriage. In fact, it was a case of betraying her husband. It is the admitted case of the prosecutrix that even after the appellant shifted to Maharashtra for his job, he used to come and stay with the family and they were living as husband and wife. It was also the stand taken by the appellant that he had advanced loan of Rs 1,00,000 to the prosecutrix through banking channel which was not returned back.

12. Similar issue was considered by this Court in Naim Ahamed case [Naim Ahamed v. State (NCT of Delhi), (2023) 15 SCC 385 : 2023 SCC OnLine SC 89] on almost identical facts where the prosecutrix herself was already a married woman having three children. The complaint of alleged rape on false promise of marriage was made five years after they had started having relations. She even got pregnant from the loins of the accused. Therein she got divorce from her existing marriage much after the relations between the parties started. This Court found that there cannot be any stretch of imagination that the prosecutrix had given her consent for sexual relationship under misconception. The accused was not held to be guilty. Relevant para 22 thereof is extracted below:

“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 loins 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 313CrPC had stated that she had filed the complaint as he refused to fulfil 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 375IPC.”

13. The aforesaid arguments squarely cover the legal issue raised by the appellant.

14. For the reasons mentioned above, the impugned order [Vinod Gupta v. State of M.P., 2022 SCC OnLine MP 1837] passed by the High Court is set aside. FIR No. 52 dated 11-12-2020, registered under Sections 376(2)(n) and 506IPC at Police Station Mahila Thana, District Satna (M.P.) and all subsequent proceedings thereto are quashed.

13. Further, in a case of **Nishant Jain** (supra), this Court in similar

circumstances has observed as under:-

13. Considering the aforesaid, this Court has no hesitation to quash the proceedings when Court comes to the conclusion that a person is being harassed by implicating him in a case of false promise of marriage because for the complainant/prosecutrix, it is very easy to say when a male comes in her connection and relationship developed between them and that culminated into physical relation only because he has promised to get married to her.

14. In the present case, as per the existing facts, promise was made by the petitioner as per the statement of the complainant/respondent No.2 and he failed to fulfill that promise, both the complainant and the petitioner got married to somewhere else, but a complaint was made by the complainant. Even after marriage, both were in physical relationship. The complainant was already married, despite that she was accepting the assurance of marriage from the petitioner and was continued with him in physical relationship. As narrated by the complainant, she came into contact with the petitioner only in the year 2015, whereas as per the statement and material produced, they were knowing each other much prior to year 2015. In a suit filed by the complainant, she has not only claimed permanent injunction, but also claimed decree that the petitioner be directed to clear the installments and execute the sale-deed of the house in the name of complainant, it shows that the complainant was after the property of the petitioner. The background of the complainant is also not clean. She was facing a criminal case of fraud in which her husband is convicted.

15. The Supreme Court in number of cases has observed that on the basis of promise of marriage if prosecutrix remained in relationship with the same person for long and not raising any objection, the same would not amount to commission of rape. The Supreme Court in a case reported in **2023 SCC OnLine SC 89 [Naim Ahamed Vs. State (NCT of Delhi)]**, has observed as under:-

“**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 deceived 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.”

16. Further, in case of **Dr. Dhruvram Murlidhar Sonar Vs. State of Maharashtra and others** reported in **(2019) 18 SCC 191**, the Supreme Court has 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.”

17. Thus, I am of the opinion that under the existing facts and circumstances of case, in view of the law laid down by the Supreme Court in the abovesaid cases, such prosecution which is apparently malicious, cannot be permitted to be continued. As such, the FIR registered vide Crime No.263/2022 is quashed. The proceedings of sessions trial initiated in pursuance to the charge sheet No.264/22 are also quashed.

14. However, the case on which the counsel for the respondent has placed reliance i.e. **Munshiram** (supra), is not applicable in the existing facts of the present case because in that case the offence of 306 of IPC was registered and the petition filed for quashing of FIR under Section 482 of Cr.P.C. before the High Court. The FIR was quashed by the High

Court, but the Supreme Court has observed that the power provided under Section 482 of Cr.P.C. has been exercised by the High Court prematurely because the investigation was being done and before completing the investigation, the FIR has been quashed. But, here in this case, the investigation is already over and the charge-sheet has already been filed and it is a case of 376 of IPC, therefore, the facts of that case are not similar to the case in hand and as such, the said case is not applicable.

15. Likewise, in a case of **Pramod Suryabhan Pawar** (supra), the Supreme Court has considered Section 90 of IPC and taking note of the definition of consent has observed that the consent based on misconception of fact is not a consent in eye of law. It is also observed by the Supreme Court that if a woman is engaged in sexual relations on a false promise of marriage, her consent is based on misconception of fact and that is not the consent in the eye of law and that physical relationship would amount to rape. But here in this case, the facts are altogether different because on the date of developing physical relationship, the prosecutrix was a married lady and surrendering before the petitioner on a false promise of marriage does not fall within the definition of consent obtained on misconception of fact. Here it is a case that on the date of developing physical relation, the question of promise of marriage does not arise that too with a married lady as she was continued in relationship with the petitioner for a long period of 8 years and thereafter she got decree of divorce from her husband. Therefore, the case on which the respondents have placed reliance has no relevance with the case in hand.

16. Considering the judgment of the Supreme Court and also of the

High Court, in which the petitioner has placed reliance, it is clear that the prosecutrix on the date of developing physical relations with the petitioner was a married lady and physical relations developed between them in the-then existing facts can be considered that it was consensual relationship. There was no consent obtained by the accused/petitioner on the basis of misconception of fact. Accordingly, the offence of 376 is not made out in view of the judgment of the Supreme Court. Therefore, this Court is of the considered opinion that it is fit case, in which the FIR can be quashed on the ground that if the facts mentioned in the FIR are considered to be true at their face value even though the offence of 376 is not made out because the existing facts do not fulfill the requirement of Section 375 of IPC so also the requirement of Section 90 of IPC of consent.

17. *Ex consequentia*, the FIR registered against the petitioner vide Crime No.649/2019 at Police Station Piplani, District Bhopal is quashed. The proceedings initiated in pursuance to the said FIR shall also stand quashed.

18. With the aforesaid observations, the petition filed by the petitioner is **allowed**.

(SANJAY DWIVEDI)
JUDGE