

Delhi District Court

State vs Libin P. S/O Balan P. on 10 June, 2016

IN THE COURT OF SMT. SARITA BIRBAL, ADDITIONAL
SESSIONS JUDGE, (SPECIAL FAST TRACK COURT), EAST,
NORTH EAST & SHAHDARA DISTRICTS, KARKARDOOMA
COURTS, DELHI.

SC No.1235/2016

FIR No.793/13

PS: Shakarpur

U/S: 376(2)(n)/380/411 IPC

Date of assignment : 03.01.2014

Date on which arguments

were heard : 09.06.2016

Date of judgment : 10.06.2016

State

Versus

Libin P. S/o Balan P.

R/o J-54, IIIrd Floor, Gali No. 02,

Laxmi Nagar, Delhi.

Permanent Address:

Kunchi Paranbath House,

Diamond Mukku, P.O.- Kadirpur,

District- Kannur,

Kerala - 670642.

JUDGMENT

1. The chargesheet avers that on 27.08.2013 the prosecutrix (PW1- her name is not being mentioned in this judgment to protect her identity) filed a complaint at police station Shakarpur against the accused. The prosecutrix in her complaint (Ex.PW1/A) alleged as follows:-

(i) The prosecutrix was earlier a resident of Kerala. In 2002, she completed her course in nursing and came to Delhi in search of a suitable job. In 2003 she joined a nursing home at East Delhi (name of the nursing home is withheld to protect the identity of the prosecutrix). She had been residing at Laxmi Nagar for the last six or seven years. Six or seven days prior to the filing of the SC No.1235/16 State Vs. Libin P. Page no. 1 of 30 present complaint, she had shifted to Nirman Vihar.

(ii) At the nursing home, the prosecutrix met Nisha who is the wife of accused Libin. Nisha was also working as a Nurse at that nursing home. The prosecutrix through Nisha met the accused. Nisha and the accused were often having disputes and Nisha used to make phone calls to the prosecutrix asking her to come to their house to resolve the disputes.

(iii) The accused told the prosecutrix that as he was not having cordial relations with his wife Nisha, he will divorce her. The accused started meeting the prosecutrix. He expressed his love for the prosecutrix and told her that he has already filed the case for divorce and will marry her. The prosecutrix rejected the advances of the accused and also told him that she did not want to marry him. In spite of her saying no, the accused continued meeting the prosecutrix. In May 2013, the accused took the prosecutrix to a hotel at Pahar Ganj where he by force made physical relations with her on promise of marriage. At that time, the prosecutrix told the accused that she will file a police complaint against him. On this the accused begged for mercy and again told her that he will marry

her after obtaining divorce from his wife Nisha.

(iv) The accused made physical relations with her at Metro Inn Guest House at Pahar Ganj and at his office at Barakhamba Road on this false promise of marriage. On 24.08.2013 at about 10:00 PM, the accused came to her house and again made physical relations with her on false promise of SC No.1235/16 State Vs. Libin P. Page no. 2 of 30 marriage.

(v) On 25.08.2013, the prosecutrix saw a receipt from Muthoot Finance in possession of the accused. At that time, the accused told her that he had taken her gold bangle, gold chain, some certificates and Rs.15,000/- cash from her house as he was in need of money. The accused also told the prosecutrix that he had pledged her gold articles with Muthoot Finance. On this a quarrel took place between the prosecutrix and the accused. The accused told the prosecutrix that he does not want to have any relations with her nor he will marry her.

(vi) The prosecutrix alleged that the accused had made physical relations with her on the basis of false promise of marriage and against her wish and requested that action be taken against him.

2. On the basis of above complaint, the present FIR under sections 376/380 IPC was got registered at police station Shakarpur. On 27.08.2013, the prosecutrix was got examined at LBS Hospital. Statement of the prosecutrix was got recorded under section 164 Cr.P.C. on 24.09.2013. The accused was taken in custody and he was also got medically examined at LBS Hospital on 17.09.2013. The site plan of the guest house where the alleged incident of rape took place was prepared at the instance of the prosecutrix. Certain documents i.e. the photocopies of licence, reception-register and ID cards were seized by the police officials from the guest house. The gold chain and the gold SC No.1235/16 State Vs. Libin P. Page no. 3 of 30 bangle of the prosecutrix alongwith loan documents were seized from Muthoot Finance Ltd. Thereafter, section 411 IPC was added to the FIR. On 27.11.2013, the Test Identification Parade of the recovered articles i.e the gold chain and gold bangle was got conducted by the learned Metropolitan Magistrate wherein the prosecutrix identified her gold articles.

3. After completion of investigation, the prosecution filed the present chargesheet under sections 376/380/411 IPC against the accused.

4. Since the major offence in this case was triable by the court of Sessions, vide order dated 21.12.2013, the learned Metropolitan Magistrate committed the case to the Court of Sessions and on allocation this case was assigned to this court.

5. Vide order dated 13.02.2014, a charge under sections 376(2)(n)/380/411 IPC was framed against the accused to which he pleaded not guilty and claimed trial.

6. In support of its case, the prosecution has examined nineteen witnesses.

7. PW2-Dr. Shiwali, Senior resident, LBS Hospital deposed that she had examined the prosecutrix on 27.08.2013. The samples collected from her body during medical examination SC No.1235/16

State Vs. Libin P. Page no. 4 of 30 and her clothes were sealed and handed over to the police official. This witness proved the MLC of the prosecutrix as Ex. PW1/C.

8. PW3-Head Constable Hem Chand deposed that he had recorded the present FIR Ex.PW3/A on 27.08.2013 at police station Shakarpur. He had also made kayami vide DD No.52A (Ex.PW3/B) and endorsement on the rukka and proved the same as Ex.PW3/C.

9. PW4-Sh. R. Prem Chandran, Assistant Accountant from Muthoot Finance Ltd., Connaught Place deposed that on 22.11.2013 vide receipt of notice from the Investigating Officer, he alongwith his authority letter, original gold loan account form and enclosures by accused Libin and gold ornaments came to police station Shakarpur. The articles and documents were seized and sealed by the police official at the police station vide seizure memo Ex.PW4/A. This witness proved the gold loan form submitted by the accused as Ex.PW4/B.

10. PW5-Sh. Girish Chand Pathak deposed that he was working as the Manager at Metro Inn Guest House at Pahar Ganj. This witness deposed that he had handed over the photocopies of licence of the guest house, reception register and ID cards of the prosecutrix and the accused which were seized by the Investigating Officer vide seizure memo Ex.PW1/H. He further deposed that on 19.08.2013 the accused and the prosecutrix SC No.1235/16 State Vs. Libin P. Page no. 5 of 30 came at the guest house and stayed in room no. 105. This witness proved the payment receipt issued by the guest house as Ex.P2. During cross examination this witness stated that he does not know as to who had booked the room on 19.08.2013.

11. PW6-Woman Constable Neeraj deposed that on 27.08.2013 she alongwith the Investigating Officer had taken the prosecutrix to LBS Hospital for her medical examination. After examination of the prosecutrix, the doctor handed over two sealed pullandas (packets) alongwith the sample seal to the Investigating Officer which were seized vide seizure memo Ex.PW6/A.

12. PW7-Sh. Jobin K. S. is a salesman at a jewellery shop namely Malabar Fashion Jewellery at New Delhi. He deposed that on 21.05.2013 the prosecutrix purchased one gold bangle and one gold ring for a total sum of Rs.24,400/- from his shop. PW8- Sinu Jacob is the manager of the said shop and proved the receipt of the gold articles as Ex.PW7/A.

13. PW9- Constable Nagender deposed that on 17.09.2013 he alongwith SI Pinki Rana and the prosecutrix took the accused in custody from his office of Matrabhumi Channel at Barakhamba Road vide arrest memo Ex.PW1/J. On personal search of the accused, one loan receipt of Muthoot Finance was recovered from his purse. The accused was also taken to his house and the accused got recovered one loan receipt of SC No.1235/16 State Vs. Libin P. Page no. 6 of 30 Rs.27,000/- of Muthoot Finance lying under mattress of his bed. The same was seized vide seizure memo Ex.PW9/B. This witness proved the receipt as Ex.P10. On 21.11.2013 this witness again accompanied Investigating Officer SI Pinki Rana and the prosecutrix to the guest house at Pahar Ganj and the copies of the relevant documents were seized at that guest house by the Investigating Officer. This witness was cross examined on behalf of the accused and he denied that the documents have been planted by the Investigating Officer.

14. PW11-Constable Surender had deposited the sealed parcels alongwith the sample seal at FSL Rohini for chemical analysis on 21.10.2013.
15. PW12-Constable Gaurav deposed that on 27.08.2013 the Duty Officer handed over a copy of FIR and original rukka which he further handed over to Investigating Officer at LBS Hospital.
16. PW13-Constable Rakesh had accompanied the Investigating Officer to Malabar Fashion Jewelleary shop on 09.12.2013.
17. PW14-Constable Jai Prakash deposed that on 10.12.2013 MHC (M) handed over him two sealed pullandas alongwith two sample seals for depositing the same at FSL Rohini SC No.1235/16 State Vs. Libin P. Page no. 7 of 30 and he deposited the sealed pullandas at FSL Rohini.
18. PW15-Constable Narender deposed that on 22.11.2013, R. Prem Chandran from Muthoot Finance came to police station Shakarpur and produced the relevant loan documents and gold ornaments which were seized by the Investigating Officer vide seizure memo Ex.PW4/A.
19. PW16-Ms. Babita Puniya, the learned Metropolitan Magistrate had recorded the statement of the prosecutrix under section 164 Cr.P.C. Ex.PW1/I. This witness also proved the relevant endorsement and documents as Ex.PW16/A to PW16/F.
20. PW17-Dr. Virender, Medical Officer from LBS Hospital deposed that on 17.09.2013 he had examined the accused vide MLC Ex.PW17/A. After examination, this witness had opined that there was nothing to suggest that the accused was not capable to perform sexual activity.
21. PW18-SI Pinki Rana is the Investigating Officer. She deposed that on 27.08.2013 she had recorded the statement of the prosecutrix Ex.PW1/A and got the present FIR registered. The prosecutrix was got medically examined at LBS Hospital. This witness alongwith the prosecutrix and Constable Narender took the accused in custody on 17.09.2013 from his office at Barakhamba Road. The accused was also got examined at LBS SC No.1235/16 State Vs. Libin P. Page no. 8 of 30 Hospital. The Investigating Officer went to the house of the accused alongwith the accused and he got recovered a loan receipt of Muthoot Finance regarding the gold chain of the prosecutrix. The samples and clothes of the prosecutrix and the samples of the accused were sent to FSL Rohini for chemical analysis. On 21.11.2013, this witness alongwith the prosecutrix and Constable Nagender went to Metro Inn Guest House at Pahar Ganj and seized the documents regarding visit of the prosecutrix and the accused to that guest house on 19.08.2013. On 22.11.2013, this witness seized the loan documents and the ornaments of the prosecutrix from Muthoot Finance Ltd. On 25.11.2013, a Test Identification Parade of the gold chain and gold bangle was conducted by the learned Metropolitan Magistrate vide proceedings Ex.PW1/M. This witness on 26.11.2013 after taking permission from the learned Metropolitan Magistrate obtained specimen signatures of the accused on five pages which were attested by the learned Metropolitan Magistrate and the said pages collectively are Ex.PW18/D. On 10.12.2013, the documents were sent to FSL, Rohini. The FSL report dated 25.06.2014 regarding clothes and samples of the prosecutrix and the samples of the accused is Ex.PW18/F and the other FSL report dated 19.02.2016 regarding comparison of

handwriting of the accused is Ex.PW18/G. During cross examination this witness denied that the black pajami Ex.P5 is a planted evidence which actually belongs to the wife of the accused.

SC No.1235/16 State Vs. Libin P. Page no. 9 of 30

22. PW-19 HC Devi Sharan is the MHC (M) of the police station and he proved the entry Ex.PW19/A to Ex.PW19/C regarding deposit of the articles and the documents connected with this case in police station malkhana.

23. The prosecutrix has been examined as PW-1. She deposed that in year 2002 she shifted to Delhi after completion of her nursing course. She stayed for sometime at the hostel of the nursing home where she was working as a nurse. Thereafter, she shifted to Laxmi Nagar at a rented house. While she was at the nursing home she got introduced to Nisha who is the wife of the accused. Nisha was also working as a nurse in that nursing home and both of them became friends. The prosecutrix left the job at that nursing home and joined a hospital but their friendship continued. Nisha started living with the accused and they have one son out of their relationship. Nisha used to call the prosecutrix whenever she had a quarrel with the accused. Nisha had suspicions about the accused on account of one girl. Later on the accused told her that he wanted to divorce his wife Nisha and a divorce case is pending at Kerala. The accused told the prosecutrix that he loves her and will marry her after getting divorce. The prosecutrix refused to marry the accused as the accused was a married person having a child. However, she developed sympathy for him as his wife was having an affair with another man. The accused called the prosecutrix at the guest house at Pahar Ganj to discuss the issue of his divorce. At that SC No.1235/16 State Vs. Libin P. Page no. 10 of 30 time, the accused made physical relations with her against her wish. On this the prosecutrix told the accused that she will file a complaint against him on which the accused apologised for his act. After some days the accused came to the room of the prosecutrix and stayed with her for sometime. Next day the prosecutrix met the accused near India Gate and she saw a receipt of mortgage of gold ornaments. The prosecutrix came back and found that her gold ornaments were missing from her house. She confronted the accused who told her that he was in need of money for the divorce case with his wife and thus he had taken her gold articles. Once the accused made physical relations with her at his office at Barakhamba Road against her will. She had gone to the office of the accused and told the office staff about taking of her gold ornaments by the accused.

24. The prosecutrix proved her complaint Ex.PW1/A and her MLC as EX.PW1/C. She proved certain seizure memos made during investigation. The prosecutrix proved the receipt of loan from Muthoot Finance of Rs.12,000/- as Ex.P1, receipt from the guest house at Pahar Ganj as Ex.P2 and cash receipt of purchase of bangle as Ex.P3. The prosecutrix proved her statement under section 164 Cr.P.C. as Ex.PW1/I. She proved her clothes which were seized at the time of her medical examination i.e. white shirt as Ex.P4, black pajami as Ex.P5, brassier as Ex.PW6 and underwear as Ex.P7. She proved her gold chain as Ex.P8 and gold bangle as Ex.P9. The prosecutrix proved the Test SC No.1235/16 State Vs. Libin P. Page no. 11 of 30 Identification Parade proceedings regarding those gold articles as Ex.PW1/M.

25. The prosecutrix was cross examined at length. During her cross examination the prosecutrix admitted that she is a divorcee. The prosecutrix denied that black colour pajami Ex.P5 belongs to the wife of the accused. She admitted that she knew that the accused is a married person. She denied that the accused never called her at any guest house. She denied that the accused never made sexual relations with her.

26. In his statement under section 313 Cr.P.C., the accused stated that he is innocent and has been falsely implicated in the present case. He stated that there was enmity between his wife and the prosecutrix as it was on the complaint of his wife that job of the prosecutrix at the nursing home got terminated. He also stated that the documents on judicial record are manipulated documents.

27. Accused opted to lead defence evidence

28. DW-1 Sh. Balram was working in the same TV channel as the accused. He deposed that on 25.08.2013 at about 6:00 PM the prosecutrix was at their office. The accused and prosecutrix were discussing about release of her ornaments which were lying mortgaged with Muthoot Finance. The accused was asking for SC No.1235/16 State Vs. Libin P. Page no. 12 of 30 money for repayment of loan to Muthoot Finance from the prosecutrix. He also deposed that the area of their office premise is very small and rape is not possible therein. This witness was cross examined on behalf of the State and he denied that he had made an incorrect statement.

29. DW2-Nisha is the wife of the accused. DW2 deposed that she got married with the accused on 25.05.2008 and she has one son out of that wedlock. The prosecutrix was her friend. There was some dispute between this witness and the prosecutrix regarding a committee amount of Rs.35,000/- which the prosecutrix had to pay to this witness. DW-2 had also made a complaint to the management of nursing home due to which the prosecutrix was dismissed from the services at that nursing home. DW-2 had also made a complaint to the police against the prosecutrix. DW-2 deposed that pajami Ex.P5 belongs to her and she had handed over the same to the police officials. This witness was cross examined on behalf of the State and she denied that she had made an incorrect statement in an attempt to save her husband.

30. I have heard Sh. Kamal Akhtar, learned Addl. Public Prosecutor and Sh. Bal Kishan, learned Advocate for the accused.

31. Accused is facing trial for commission of offences punishable under sections 376(2)(n)/380/411 IPC.

SC No.1235/16 State Vs. Libin P. Page no. 13 of 30 Charge under section 376(2)(n) IPC

32. As per the case of prosecution the accused made physical relations with the prosecutrix two times. the accused had sexual intercourse with the prosecutrix at a Guest House at Pahar Ganj in May 2013. Thereafter on 25.08.2013, the accused had sexual intercourse with the prosecutrix at his office at Barakhamba Road. At that time the accused was working with a Malyalam TV Channel Matrabhumi.

33. The prosecutrix during her evidence stated that the accused had acts of sexual intercourse with her on those dates. The accused during cross examination of the prosecutrix and in his statement under section 313 Cr.P.C. has denied having physical relations with the prosecutrix. However, I am of the opinion that the material on record shows that the accused had acts of sexual intercourse with the prosecutrix. The FSL report dated 25.06.2014 (Ex.PW18/F) shows that human semen was detected on the pajami Ex.P5 of the prosecutrix. DNA Test confirmed that alleles in the blood sample of the accused are accounted for in the alleles in the semen on the pajami (Ex.P5). Presence of semen of the accused on the pajami of the prosecutrix gives strong support to the statement of the prosecutrix that the accused made physical relations with her. Moreover, as discussed hereinafter the evidence on record also shows that the accused and the prosecutrix SC No.1235/16 State Vs. Libin P. Page no. 14 of 30 checked in Metro Inn Guest House at Pahar Ganj on 19.08.2014 at 4:00 AM as husband and wife and lived in the same room for one day.

34. During cross examination of the prosecutrix and the Investigating Officer it was suggested that the pajami in issue (Ex.P5) belongs to the wife of the accused and this evidence has been planted on the accused by the Investigating Officer. To the same effect is the statement of DW2 i.e. the wife of the accused. I find no substance in this contention. The pajami Ex.P5 was collected at the hospital, sealed in a packet and then handed over to the Investigating Officer. That packet was deposited at FSL Rohini. FSL report Ex.PW18/F shows that the pajami was part of the packet made and sealed at the hospital at the time of medical examination of the prosecutrix which was handed over to the police officials and was delivered as such to FSL Rohini. This pajami alongwith the samples collected from the body of the prosecutrix and the accused were sent for forensic analysis to FSL Rohini. The wife of the accused was not in connivance with the prosecutrix and there was no reason for the wife of the accused to handover her own pajami to the police officials having semen stains to support the case of the prosecution. This defence of the accused is clearly an afterthought. Even otherwise, there is evidence of 19.08.2014 of Metro Inn Guest House.

35. The issue that arises before this court is as to whether SC No.1235/16 State Vs. Libin P. Page no. 15 of 30 the physical relations between the prosecutrix and the accused were made with the consent of the prosecutrix?

36. In a recent judgment reported as Garvit Indora vs. State, NCT of Delhi [2015 (3) JCC 1681], the Hon'ble Delhi High Court referred to the case law on this subject and observed that settled legal position is that conviction can be based upon the sole testimony of prosecutrix provided it is reliable and is of sterling quality.

37. In Abbas Ahmed Choudhury v. State of Assam (2010) 12 SCC 115, the Hon'ble Supreme Court observed as follows:

"Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully."

38. In Hemraj vs. State of Haryana [(2014) 2 SCC 395], the Hon'ble Supreme Court held as follows:

"In a case involving charge of rape the evidence of the prosecutrix is most vital. If it is found credible, if it inspires total confidence, it can be relied upon even sans corroboration. The court may, however, if it is hesitant to place implicit reliance on it, look into other evidence to lend assurance to it short of corroboration required in the case of an accomplice. (see State of Maharashtra v.

SC No.1235/16 State Vs. Libin P. Page no. 16 of 30 Chandraprakash Kewalchand Jain) Such weight is given to the prosecutrix's evidence because her evidence is on a par with the evidence of an injured witness which seldom fails to inspire confidence. Having placed the prosecutrix's evidence on such a high pedestal, it is the duty of the court to scrutinise it carefully, because in a given case on that lone evidence a man can be sentenced to life imprisonment. The court must, therefore, with its rich experience evaluate such evidence with care and circumspection and only after its conscience is satisfied about its creditworthiness rely upon it."

39. Coming back to the facts of this case, it is seen that the deposition of the prosecutrix on the aspect of her consent has been contradictory. In her examination in chief, the prosecutrix deposed that the accused made physical relations with her on two occasions i.e. in May, 2013 and August, 2013 and on both occasions the physical relations were made by use of force and without her consent. At the same time she stated that she desired to marry the accused. In her cross examination dated 03.12.2014, the prosecutrix stated that the accused made physical relations with her on promise of marriage after getting divorce from his wife. In other words, the prosecutrix stated that she had given consent for sexual intercourse but the consent was obtained by exercise of deception by the accused. This contradiction persists throughout the deposition of the prosecutrix.

SC No.1235/16 State Vs. Libin P. Page no. 17 of 30

40. The prosecutrix during her medical examination vide MLC Ex.PW1/C had represented herself to be an unmarried girl though documents on record would show that the prosecutrix was married earlier but her marriage ended by the decree of divorce dated 06.12.2011 passed on mutual consent by the Family Court at Kottayam, Kerala.

41. As per the prosecutrix, the physical relations between her and the accused were made for the first time in May, 2013 at a guest house at Pahar Ganj. The prosecutrix in her examination in chief did not specify the date of May 2013 though in her cross examination stated that it may have been 20.05.2013. The prosecutrix did not make any complaint against the accused after this incident and the present complaint was filed only on 27.08.2013. It is not doubt true that in cases involving allegations of rape, a small delay in registration of FIR is of little significance but delay of three months is a substantial delay and may indicate an afterthought. The prosecutrix has not given any justifiable explanation as to why she chose to go to the guest house to meet the accused. If she wanted to discuss the issue of divorce of the accused, she was not required to go to a room in the guest house. The prosecution has not led any evidence to show that the accused had checked in any guest house at Pahar Ganj in May, 2013.

42. There is evidence on record to show that the SC No.1235/16 State Vs. Libin P. Page no. 18 of 30 prosecutrix and the accused had checked in at Metro Inn Guest House at Pahar Ganj on 19.08.2013 at 4:00 AM in their own names. At the time of check in, the prosecutrix was shown as the wife of the accused. Evidence also shows that at that time the prosecutrix had submitted her own ID proof namely the photocopy of her passport. The original receipt for payment of money to the guest house was handed over by the prosecutrix to the Investigating Officer during investigation. The prosecutrix and the accused both were residents of Delhi and there was no need for them to hire a hotel room at Delhi except to have sexual relations. This evidence is clear indication of consent on the part of the prosecutrix. The prosecutrix was about 29 years of age. She was an educated and a working woman.

43. Insofar as the incident dated 25.08.2013 is concerned, the fact that the accused and the prosecutrix had checked in at the guest house and lived in the same room just a few days before 25.08.2013 shows that the accused and the prosecutrix at that time were making physical relations with the consent of the prosecutrix. In the circumstances, it would be difficult to accept the case of prosecution that the accused made physical relations with the prosecutrix by use of force and without her consent.

44. The prosecution has also alleged that the prosecutrix permitted the accused to have physical relations with her on his promise that the accused would divorce his wife and marry her.

SC No.1235/16 State Vs. Libin P. Page no. 19 of 30

45. In Uday vs. State of Karnataka (AIR 2003 SC 1639) after referring the previous cases on the subject, the Hon'ble Supreme Court held as follows:

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

46. In Deelip Singh @ Dilip Kumar vs. State of Bihar [(2005) 1 SCC 88], the Hon'ble Supreme Court explained the SC No.1235/16 State Vs. Libin P. Page no. 20 of 30 above observations in Uday Kumar's case (supra) as follows:

"29. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to 'misconception of fact' within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of section 375 clause secondly. This is what in fact was stressed by the Division Bench of Calcutta High Court in the case of Jayanti Rani Panda, supra which was approvingly referred to in Uday's case, (supra). The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end- "unless the Court can be assured that from the very inception, the accused never really intended to marry her". In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu's case, SC No.1235/16 State Vs. Libin P. Page no. 21 of 30 supra (vide passage quoted supra). By making the solitary observation that "a false promise is not a fact within the meaning of the Code", it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no strait jacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday's case as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out". (underline added)

47. In Deelip Singh's case (supra), the Hon'ble Supreme Court while acquitting the accused in the facts of that case held that the predominant reason which weighed with the prosecutrix in agreeing for sexual intimacy with the accused was the hope generated in her of the prospect of marriage with the accused. Moreover, 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 Hon'ble Court also 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 her acts.

SC No.1235/16 State Vs. Libin P. Page no. 22 of 30

48. The prosecutrix has not disputed that she was aware of the fact that the accused was a married person and had a child out of that wedlock. The prosecutrix and the wife of the accused were part of

the nursing staff of the same nursing home and the wife of the accused was a friend of the prosecutrix. It was through the wife of the accused that she met the accused. It is nowhere the case of the prosecution that wife of the accused had promised the prosecutrix to divorce her husband. The prosecutrix in past herself had suffered matrimonial litigation and she would have been aware of the position that divorce without mutual consent may or may not be granted and even divorce by mutual consent takes time. The consent given initially can be withdrawn at a later stage. In such circumstances, no question of inducement based on promise of marriage would arise. Reference can be made to the judgment reported as Prashant Bharti vs. State (NCT of Delhi) [2013 (9) SCC 293], wherein the Hon'ble Supreme Court while quashing a complaint alleging commission of an offence under section 376 IPC at the very inception held as follows:

"It is apparent from irrefutable evidence, that during the dates under reference and for a period of more than one year and eight months thereafter, she had remained married to Lalji Porwal. In such a fact situation, the assertion made by the complainant / prosecutrix, that the appellant-accused had physical relations with her, on the assurance that he would marry her, is per se false and as such unacceptable. She, more than anybody else, SC No.1235/16 State Vs. Libin P. Page no. 23 of 30 was clearly aware of the fact that she had a subsisting valid marriage with Lalji Porwal. Accordingly, there was no question of anyone being in a position to induce her into a physical relationship under an assurance of marriage. If the judgment and decree dated 23.09.2008 produced before us by the complainant/prosecutrix herself is taken into consideration alongwith the factual position depicted in the supplementary statement dated 21.02.2007, it would clearly emerge, that the complainant/prosecutrix was in a relationship of adultery on 23.12.2006, 25.12.2006 and 01.01.2007 with the appellant-accused, while she was validly married to her previous husband Lalji Porwal. In the aforesaid view of the matter, we are satisfied that the assertion made by the complainant / prosecutrix, that she was induced to a physical relationship by Prashant Bharti, the appellant-

accused, on the basis of a promise to marry her, stands irrefutably falsified." (emphasis added) It is no doubt true that the judgment in Prashant Bharti's case (supra) was dealing with a situation where the prosecutrix was a married woman but the proposition laid down by the Hon'ble Supreme Court in above case would apply to the present case where the accused was a married person and that fact was within the knowledge of the prosecutrix. The prosecutrix has not given any reason as to why she did not find out from the wife of the accused who was her friend as to whether she was willing to divorce her husband for the prosecutrix or for any other reason.

SC No.1235/16 State Vs. Libin P. Page no. 24 of 30

49. Even otherwise, I am of the opinion that the evidence on record shows that the physical relations between the prosecutrix and the accused were based on free and voluntary consent of the prosecutrix arrived at with full knowledge of all relevant facts. A woman may agree to have physical relationship for her love for the accused or on account of passion. The prosecutrix was a mature, educated and working woman. There is nothing to substantiate that there was any matrimonial

dispute between the accused and his wife. The wife of the accused has supported him even during this trial. If there was a dispute, the prosecutrix herself was the cause of that dispute. It is possible that at some stage the prosecutrix and the accused may have discussed the future of their extra marital relationship. At best, the prosecutrix may have entertained some hope that the accused would divorce his wife and marry her. Physical relations between the accused and the prosecutrix were not based on alleged promise of marriage alone.

50. In the case of Gaurav Maggo vs. State [judgment dated 29.05.2015 passed in Crl. A. No. 369/14], the Hon'ble Delhi High Court while acquitting the accused observed that if a fully grown up lady consents to the act of sexual intercourse on a promise to marry and continues to indulge in such activity for long, it is an act of promiscuity on her part and not an act induced by misconception of fact. In the same case the Hon'ble Delhi High SC No.1235/16 State Vs. Libin P. Page no. 25 of 30 court recalled the following observations of the Apex Court in the case of Vinod Kumar vs. State of Kerala [2014 (5) SCC 678]:

"The Appellant is not an innocent man inasmuch as he had willy-nilly entered into a relationship with the prosecutrix, in violation of his matrimonial vows and his paternal duties and responsibilities. If he has suffered incarceration for an offence for which he is not culpable, he should realize that retribution in another form has duly visited him. It can only be hoped that his wife Chitrlekha will find in herself the fortitude to forgive so that their family may be united again and may rediscover happiness, as avowedly the prosecutrix has found."

51. These observations are applicable in the present case also.

52. I am of the opinion that the case of the prosecution has substantial infirmities. The prosecution has failed to establish its charge under section 376 (2)(n) IPC against the accused. Thus, the charge under section 376(2)(n) IPC against the accused must fail.

Charge under 380/411 IPC

53. The case of prosecution is that the accused had stolen one gold bangle and one gold chain of the prosecutrix and mortgaged the same to Muthoot Finance for loans of Rs.12,000/-

SC No.1235/16 State Vs. Libin P. Page no. 26 of 30 and Rs.27,000/- on 17.07.2013 and 14.08.2013. The documents relating to the execution of mortgages in favour of Muthoot Finance by the accused are on judicial record. The accused during cross examination of the prosecutrix did not dispute that the gold articles were owned by the prosecutrix and it was he who had mortgaged (pledged) those gold articles to the Muthoot Finance . During cross examination of the PW18 Investigating Officer it was suggested on behalf of the accused that gold ornaments were mortgaged by the accused as the prosecutrix was in need of some money. FSL report dated 19.02.2016 (Ex.PW18/G) shows that signatures on the loan documents are that of the accused. The gold articles were identified by the prosecutrix during Test Identification Parade of the articles held on 27.11.2013 vide proceedings Ex.PW1/M before the learned Metropolitan Magistrate. In the circumstances it stands established

that two subject matter gold articles i.e. the chain and bangle were owned by the prosecutrix but were mortgaged by the accused.

54. The issue that arises for consideration by this court is whether the accused took the articles without the consent of the prosecutrix and the acts of mortgage on the part of the accused were without the consent of the prosecutrix?

55. In her complaint Ex. PW1/A the prosecutrix had stated that the accused had come to her house on 24.08.2013. On 25.08.2013 he told her that he had taken her gold articles and SC No.1235/16 State Vs. Libin P. Page no. 27 of 30 cash which were mortgaged by him for filing a divorce case against his wife. The material on record would show that the articles were mortgaged on 17.07.2013 and 14.08.2013. The prosecutrix during her cross-examination dated 07.11.2014 admitted that even earlier she had mortgaged her gold chain with Muthoot Finance and that mortgage was executed through the wife of the accused. Thus the acts of mortgage of gold ornaments by the accused parse would be no ground to infer that the gold ornaments were stolen by the accused.

56. The conduct of the accused in mortgaging the gold articles to a known financing firm Muthoot Finance through documentary transaction would support his contention that the transaction were not based on theft. Had the articles been stolen articles, the accused would have sold the articles outright in the market without leaving a documentary trail of the transaction. Moreover, the prosecutrix as per her own deposition was aware of the fact that her gold articles were missing on 24.08.2013. However on 25.08.2013 the prosecutrix accompanied the accused to his office at Barakhambha Road. This conduct of the prosecutrix also negates her allegation that the accused had committed theft of her articles.

57. In the circumstances, I am of the opinion that some doubt remains that the ornaments were handed over by the prosecutrix to the accused of her own volition for mortgaging the SC No.1235/16 State Vs. Libin P. Page no. 28 of 30 same for some reason and the same were not stolen by the accused. May be at a later stage there was some dispute but that would not rise to criminal liability. Thus, I am of the opinion that the prosecution has failed to prove that the accused had committed the offences punishable under sections 380/411 IPC beyond reasonable doubt.

58. It is also the case of prosecution that the accused had stolen certain identification documents and Rs.15,000/- in cash of the prosecutrix. There is no worthwhile evidence to substantiate this allegation of the prosecutrix.

59. In view of above, this court holds that the prosecution has not been able to prove its case against the accused under sections 376(2)(n)/380/411 IPC. Thus, accused Libin. P is acquitted of the charge of having committed offences punishable under sections 376(2)(n)/380/411 IPC.

60. In compliance of the provisions of section 437A Cr.P.C and directions of this court, the accused has already submitted his personal bond and surety bond for a sum of Rs.30,000/- each.

61. Since the ornaments belonged to the prosecutrix, she can retain the same which were handed over to her on superdari basis vide order dated 02.12.2013 passed by the learned Metropolitan Magistrate and deal with them as her own property. In SC No.1235/16 State Vs. Libin P. Page no. 29 of 30 the event, the finance company has any claim on account of the loan transactions, that can be enforced against the accused if permissible in law. The finance company had no privity of contract with the prosecutrix.

62. File be consigned to record room after necessary compliance.

Announced in the open court on 10.06.2016 (SARITA BIRBAL) Additional Sessions Judge, (SFTC), East, Karkardooma Courts, Delhi.

SC No.1235/16 State Vs. Libin P. Page no. 30 of 30