CASE NO.:
Appeal (crl.) 336 of 1996

PETITIONER:
Uday

RESPONDENT:
State of Karnataka

DATE OF JUDGMENT: 19/02/2003

BENCH:
N. SANTOSH HEGDE & B.P. SINGH

JUDGMENT:

J U D G M E N T

B.P. Singh, J.

This appeal by special leave is directed against the judgment and order of the High Court of Karnataka at Bangalore dated 20th April, 1995 in Criminal Appeal No. 428 of 1992 whereby the High Court while dismissing the appeal and upholding the conviction of the appellant under Section 376 of the Indian Penal Code reduced the sentence to two years rigorous imprisonment and a fine of Rs.5000/- and in default, to undergo further rigorous imprisonment for 6 months. Earlier the Sessions Judge, Karwar before whom the appellant was tried in Sessions Case No.16/90, by his judgment and order dated 27th November, 1992 sentenced the appellant to seven years rigorous imprisonment under Section 376 of the Indian Penal Code and a fine of Rs.20,000/- and in default, to undergo further rigorous imprisonment for six months. He also directed that out of the fine, if realized, a sum of Rs.10,000/- be given to the prosecutrix/complainant. The trial court as well as the High Court have concurrently held that though the prosecutrix had consented to sexual intercourse with the appellant, the consent was obtained by fraud and deception inasmuch as the appellant induced her to consent on the promise that he shall marry her. It was under such mis-conception that for several months thereafter the prosecutrix, who claimed to be deeply in love with the accused, continued to have sexual intercourse with him till it was discovered that she was pregnant. When the appellant did not agree to the performance of the marriage, at that stage, the complainant lodged a report in the police station pursuant to which investigation was taken up and the appellant put up for trial before the Sessions Judge, Karwar.

It is not in dispute that the prosecutrix, PW-1 was aged about 19 years on the date of occurrence i.e. in the last week of August, 1988 or the first week of September, 1988. She deposed that her date of birth was 6th August, 1969. The appellant also was a young man of about 20-21 years of age when the occurrence took place, as he claimed to be 25 years of age in the year 1992 when he was examined under Section 313 of the Code of Criminal Procedure. There is, therefore, no dispute that the prosecutrix was above the age of 16 on the date of occurrence. The prosecutrix was studying in a college and residing with her parents, brothers and sisters in Majali Gaongeri. In her deposition, she stated that the appellant was a friend of her elder brother Jagdish, PW.3. The appellant resided in the neighbourhood and used to frequently visit her house almost daily and used to talk to her also, apart from other members of the family. A friendship developed between them and one day, the appellant proposed to her to marry him. The

prosecutrix told him that since they belong to different castes such a marriage was not possible. The prosecutrix is a native of Tamilnadu and belongs to the Goundar community, while the appellant claims to be a Daivanya Brahim. However, it is not disputed that they fell in love with each other, but the prosecutrix avoided talking to the appellant in presence of her parents.

In the last week of August, 1988 or first week of September, 1988 at about 12 O' clock in the night when she was studying, the appellant came to the window of the room and called her out to talk to her. Since she was deeply in love with him, she responded to his invitation and thereafter they went to the place where the house of the appellant was under construction. The appellant talked to her and thereafter kissed her and embraced her and promised to marry her. He also had sexual intercourse with her. She was not willing to have sexual intercourse, but in the circumstances she consented to the sexual intercourse because the accused had promised to marry her. They continued to meet thereafter and went out frequently. During this period as well, the appellant had stated many times that he would marry her. She also admits that she had sexual intercourse with him about 15-20 times and that they used to have sexual intercourse once or twice a week. She also admits that they were both noticed together by several persons whom she has named in her deposition. When one Vanamala, who had noticed her, questioned her about the affair, she had told her that they were madly in love with each other and that the appellant had promised to marry her. She also requested her not to reveal this fact to anyone.

According to the prosecutrix whenever she talked to the appellant about the marriage, he assured her that he would marry her after completion of the construction of the house, and that it would be a registered marriage. This state of affairs continued till she discovered that she was pregnant. She told the appellant about the pregnancy but he assured her that she should not worry and that he will marry her after sometime. The suspicion of her mother was aroused during the 6th month of pregnancy and she was, therefore, compelled to disclose everything to her mother. She told the appellant about her having disclosed everything to her mother, and the appellant again assured her that he would take her to some other place and get married. Gradually when others came to know about the affair and her pregnancy, her brother, PW.3 enquired of the appellant as to whether he would marry her. The appellant told her brother that he would marry her, but this fact should not be revealed to his (Appellant's) parents. In the 8th month of pregnancy the appellant asked her to be ready to go with him and it was planned that they would leave early in the morning. The appellant did not turn up but the cousin of the appellant informed her that the appellant had gone to Sangli. Eight days later when the appellant returned from Sangli, her brother again asked the appellant as to whether he would marry her. The appellant told her brother to keep her at some other place and that he would bear her maintenance expenses and after her delivery and completion of the construction of his house, he would marry her. This suggestion was not acceptable to the prosecutrix and her brother and this angered the appellant. Next day when her brother wanted to meet the appellant he did not come out of his house. Thereafter followed a quarrel between female members of the two families. Since the appellant did not marry her as promised, she lodged the complaint with the police on 12th May, 1989 which was recorded by PW.10, PSI. She gave birth to a child on 29th May, 1989. On 13th May, 1989 she was examined by the doctor, PW.14 who gave the opinion that the prosecutrix was about 18-20 years of age. In cross-examination questions were put to her about her intimacy with other boys which she denied.

PW.2, the mother of the prosecutrix and PW.3, the brother of the prosecutrix, were examined, apart from other witnesses, to prove the case of the prosecution.

The defence of the appellant was one of outright denial.

The Sessions Judge accepting the evidence of the prosecutrix concluded that though she had consented to have sexual intercourse with the appellant, that consent was not consent within the meaning of Section 375 Secondly IPC having regard to Section 90. According to him the consent was obtained by making a false promise of marriage and, therefore, it was a consent obtained by fraud and mis-representation. He, therefore, held that in the facts and circumstances of the case, the appellant had sexual intercourse with the prosecutrix without her consent and was, therefore, guilty of the offence of rape punishable under Section 376 of the Indian Penal Code.

The High Court in appeal affirmed the finding of the trial court substantially for the same reasons.

We may at the threshold notice the relevant provisions of the Indian Penal Code, namely Section 375 and Section 90 which read as follows :-

"375. Rape. - A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following 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 sixteen years of age.

Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the

offence of rape.

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

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 of 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."

Learned counsel for the appellant submitted that in the context of Section 375 of the Indian Penal Code, which is a special provision, the general provision namely Section 90 of the Indian Penal Code was not of much assistance to the prosecution. According to him Section 375 Thirdly, Fourthly and Fifthly exhaustively enumerate the circumstances in which the consent given by the prosecutrix is vitiated and does not amount to consent in law. According to him one has to look to Section 375 alone for finding out whether the offence of rape had been committed. Secondly, he submitted that even under Section 90 of the Indian Penal Code the consent is vitiated only if it is given under a misconception of fact. A belief that the promise of marriage was meant to be fulfilled is not a misconception of fact. The question of misconception of fact will arise only if the act consented to, is believed by the person consenting to be something else, and on that pretext sexual intercourse is committed. In such cases it cannot be said that she consented to sexual intercourse. He sought to illustrate this point by reference to English cases where a medical man had sexual intercourse with a girl who suffered from a bonafide belief that she was being medically treated, or where under pretence of performing surgery a surgeon had carnal intercourse with her. In Stroud's Judicial Dictionary (Fifth Edition) page 510 "consent" has been given the following meaning:-

"Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side."

It refers to the case of Holman vs. The Queen : [1970] W.A.R. 2 wherein it was held that "there does not necessarily have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it there is consent' ". Similar was the observation in R. vs. Olugboja : [1981] 3 W.L.R. 585 wherein it was observed that "consent in rape covers states of mind ranging widely from actual desire to reluctant acquiescence, and the issue

of consent should not be left to the jury without some further direction". Stephen, J. in Queen vs. Clarence : (1888) 22 QBD 23 observed - "It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true." Wills, J. observed "the consent obtained by fraud is not consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent."

Some of the decisions referred to in Words and Phrases Permanent Edition Volume 8A at page 205 have held "that adult female's understanding of nature and consequences of sexual act must be intelligent understanding to constitute 'consent'. Consent within penal law, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. Legal consent, which will be held sufficient in a prosecution for rape, assumes a capacity to the person consenting to understand and appreciate the nature of the act committed, its immoral character, and the probable or natural consequences which may attend it. (See : People vs. Perry, 26 Cal. App. 143).

The Courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be legal consent. In Rao Harnarain Singh vs. State : AIR 1958 Punjab 123 it was observed :-

" A mere act of helpless resignation in the face of inevitable compulsion, acquiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law. Consent, on the part of a woman as a defence to an allegation of a rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.

Submission of her body under the influence of fear or terror is not consent. There is a difference between consent and submission. Every consent involves a submission but the converse does now follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure."

The same view was expressed by the High Court of Kerala in Vijayan Pillai @ Babu vs. State of Kerala : 1989 (2) K.L.J. 234. Balakrishnan, J., as he then was, observed :-

"10. The vital question to be decided is whether the above circumstances are sufficient to spell out consent on the part of PW.1. In order to prove that

there was consent on the part of the prosecutrix it must be established that she freely submitted herself while in free and unconstrained position of her physical and mental power to act in a manner she wanted. Consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, non resistance and passive giving in cannot be deemed to be "consent". Consent means active will in the mind of a person to permit the doing of the act of and knowledge of what is to be done, or of the nature of the act that is being done is essential to a consent to an act. Consent supposes a physical power to act, a moral power of acting and a serious and determined and free use of these powers. Every consent to act involves submission, but is by no means follows that a mere submission involves consent. In Jowitt's Dictionary of English Law II Edn. Vol. 1 explains consent as follows :

' An act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things - a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, mediated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.' "

In re Anthony alias Bakthavatsalu : AIR 1960 Madras 308, Ramaswami, J. in his concurring opinion fully agreed with the principle laid down in Rao Harnarain Singh's case (supra) and went on to observe :-

"A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammeled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former."

The same view has been reiterated by the Punjab High Court in Arjan Ram vs. The State : AIR 1960 Punjab 303 by the Rajasthan High Court in Gopi Shankar vs. State : AIR 1967 Raj. 159 and by the Bombay High Court in Bhimrao Harnooji Wanjari vs. State of Mahrashtra : 1975 Mah. L.J. 660.

The High Court of Calcutta has also consistently taken the view that the failure to keep the promise on a future uncertain date does not always amount to misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. In Jayanti Rani Panda vs. State of West Bengal and another : 1984 Crl. L.J. 1535 the facts were somewhat similar. The accused was a teacher of the local village school and used to visit the residence of the prosecutrix. One day during the absence of the

parents of the prosecutrix he expressed his love for her and his desire to marry her. The prosecutrix was also willing and the accused promised to marry her once he obtained the consent of his parents. Acting on such assurance the prosecutrix started cohabiting with the accused and this continued for several months during which period the accused spent several nights with her. Eventually when she conceived and insisted that the marriage should be performed as quickly as possible, the accused suggested an abortion and agreed to marry her later. Since the proposal was not acceptable to the prosecutrix, the accused disowned the promise and stopped visiting her house. A Division Bench of the Calcutta High Court noticed the provisions of Section 90 of the Indian Penal Code and concluded :-

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. S. 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her."

The same view was reiterated in Hari Majhi vs. The State : 1990 Crl. L.J. 650 and Abhoy Pradhan vs. State of West Bengal : 1999 Crl. L.J. 3534.

The impugned judgment and order in this appeal is by a learned Single Judge of the High Court of Karnataka but it appears that in a recent judgment, a Division Bench of the same High Court in State of Karnataka vs. Anthonidas : ILR 2000 Kar. 266 has taken the contrary view. Similar is the view of the Orissa High Court in Nilambar Goudo vs. The State and another : 1982 Crl. L. J. NOC 172 (Orissa)

Only one judgment of the Patna High Court was brought to our notice, which appears to take a contrary view. (Saleha Khatoon vs. State of Bihar and another : 1989 Crl. L.J. 202). However, the observations in that judgment must be understood in the facts and circumstances of that case. That was a case where the Magistrate instead of committing the case to the Court of Sessions for trial, on similar allegations, proceeded to try the case himself for the charge under Section 498 IPC and declined to commit the accused to the Court of Sessions for trial for the offence under Section 376 IPC. This order was challenged before the High Court and in those circumstances the Court held that in the facts and circumstances of the case, having regard to the narrow jurisdiction of the Magistrate under Section 209 Cr. P.C., he was not required to balance and weigh the evidence as is done by the trial court. In the facts and circumstances of the case he ought to have committed

the case to the Court of Sessions for trial under Section 376 IPC. In this background the learned Judge made the following observations :-

"The first point which attracts my attention is the second ingredient 'without her consent'. Consent always means free will or voluntary act. In this case consent was obtained on the basis of some fraud and allurment or practicing deception upon the lady on the pretext that ultimately she will be married and under that pretext she allowed opposite party No.2 to have sexual intercourse with her. Therefore, this tainted consent or a consent of this nature which is based on deception and fraud, cannot be termed, prima facie, to conclude that it was 'with consent'. Had the lady known that ultimately she would be deserted, the facts and circumstances stated above and the materials placed would go to show that she would have refrained from giving such consent. Then a question would arise what was the purpose for which she gave consent. It was a fraud that was practiced on her or she was deceived by giving false assurance. Such type of consent must be termed to be consent obtained without her consent. Consent obtained by deceitful means is no consent and comes within the ambit of the ingredients of definition of rape."

We may only observe that another Single Judge of the Patna High Court in 1990 BBCJ 530 while quashing a charge framed under Section 376 IPC has taken the contrary view following the Calcutta High Court judgment in Jayanti Rani Panda (supra).

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

The approach to the subject of consent as indicated by the Punjab High Court in Rao Har Narain Singh (supra) and by the Kerala High Court in Vijayan Pillai (supra) has found approval by this Court in State of H.P. vs. Mango Ram (2000) 7 SCC 224. Balakrishnan, J. speaking for the Court observed :-

"The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror

cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to it. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.

There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her.

There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the

prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, is permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are over come with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

In view of our findings aforesaid, we do not consider it necessary to consider the question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under Section 375 Fourthly and Fifthly, or whether consent given under misconception of fact contemplated by Section 90 has a wider application so as to include circumstances not enumerated in Section 375 IPC.

In the result, this appeal must succeed, and is accordingly allowed. The impugned judgment and order convicting and sentencing the appellant for the offence punishable under Section 376 IPC is set aside, and the appellant stands acquitted of the charge. Since the appellant was granted exemption from surrendering when the special leave was granted, no further order for his release is necessary.