A PRADEEP KUMAR @ PRADEEP KUMAR VERMA

v.

STATE OF BIHAR AND ANR.

AUGUST 17, 2007

B [DR. ARIJIT PASAYAT AND D.K. JAIN, JJ.]

Penal Code, 1860—ss. 90, 375, 376 and 406—Allegation of physical relations by accused with the victim on promise to marry her—Charges u/ ss. 376 and 406—Application against framing of charges dismissed summarily by High Court—On appeal, held: Promise to marry without anything more will not give rise to "misconception of fact" within the meaning of s. 90— But a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention to marry her, will vitiate the consent and the accused will come within the ambit of s. 375—Such intention is to be elicited from the facts of the case—ss. 376 and 406 **prima facie** *do not appear to have any application in the present case—Matter remitted to High Court for fresh consideration.*

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Words and Phrases—'Consent'—Meaning of in the context of s. 90 IPC.

E **Respondent No. 2 lodged an FIR alleging that appellant-accused had sexual relations with her on an assurance that he would marry her. Later he also accepted her before Deity and entered into an agreement of marriage. Thereafter he had intentions to marry another lady. Charge-sheet was filed against the accused u/ss 376 and 406 IPC. He filed application for discharge, but the same was rejected and charges were framed. The application challenging framing of charges, was dismissed summarily by High Court. Hence the present appeal.**

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Appellant-accused contended that s. 376 IPC was not applicable because the physical relations were on the consent of the respondent, and that s. 406 was not applicable as there was no allegation of any entrustment of any property.

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Respondent-State contended that though *prima facie* ss. 376 and 406 were not applicable, but the case is covered u/ss. 415 and 493 IPC; but there was no scope for interference, as the charges can be altered during trial.

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Disposing of the appeal and remitting the matter to High Court, the Court

HELD: 1. There are two grounds specified in Section 90 IPC, which are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries. The factors set out in first part of Section 90 are from the point of view of the victim and second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. The Court has to see whether the person giving the consent has given it under fear or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology.

[Para 9] [62-H; 63-A-C]

Deelip Singh @ Dilip Kumar **v.** *State of Bihar,* **[2005] 1 SCC 88;** *Uday* **v.** *State of Karnataka,* **[2003] 4 SCC 46;** *Rao Harnarain Singh Sheoji Singh* **v.** *State,* **AIR (1958) Punj 123; In Re AIR 1960 Madras 308,** *Gopi Shanker* **v.** *State of Rajasthan,* **AIR (1967) Rajasthan 159;** *Bhimrao* **v.** *State of Maharashtra,* **(1975) Mah.LJ 660;** *Vijayan Pillai* **v.** *State of Kerala,* **(1989) 2 KLJ 234;** *State of H.P.* **v.** *Mango Ram,* **[2000] 7 SCC 224; N. Jaladu, Re ILR (1913) 36 Madras 453 and** *Parshottain Mahadev* **v.** *State,* **AIR (1963) Bombay 74, referred to.**

R. **v.** *Day,* **173 E.R. 1026 in 1841, referred to.**

Stroud's Judicial Dictionary; Jowitt's Dictionary on English Law, Words and Phrases, Permanent Edn. Vol.; 8-A, **referred to.**

2. Though a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90 IPC, but 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 second.

[Para 20] [68-D-F]

Uday **v.** *State of Karnataka,* **[2003] 4 SCC 46, relied on.**

Jayanti Rani Panda **v.** *State of WB,* **(1984) Cr.L.J. 1535, referred to.**

3. Sections 376 and 406 *prima facie* **do not appear to have any application. The stage of analyzing the factual materials was yet to be undertaken. But if on a bare reading of the FIR, it shows that no offence had been made out for proceeding, situation would be different. It would have been proper for the High Court to deal with the matter elaborately.**

[Paras 8 and 21] [62-E; 69-C-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1086 of 2007.

From the Judgment and Order dated 6.2.2006 of the High Court of Judicature at Patna in Criminal Misc. No. 35900/2005.

Akhilesh Kumar Pandey, Sudarshan Saran, Shefali Jain and Ranjana Narayan for the Appellant.

Varinder Kumar Sharma, Gopal Singh, Manish Kumar, Anukul Raj, Rituraj Biswas, Yugal Kishor Prasad and B.S. Rajesh Agrajit for the Respondents.

The Judgment of the Court was delivered

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Patna High Court calling in question correctness of the judgment of the Additional Sessions Judge, Fast Track Court No.III, Buxar, in Sessions Trial No.280 of 2004, whereby the application filed by the appellant for discharge was rejected.

3. A brief reference to the factual aspects would suffice.

Respondent No.2 lodged the First Information Report (in short the 'FIR') alleging that with an assurance that the accused-appellant would marry her,

he had sexual relationship with her. When this went on for some time, the informant had been taken to a temple where in the presence of deity he accepted her to be his wife and there was an agreement of marriage entered into. Alleging that the accused was likely to get married with some other lady, an FIR was lodged. Investigation was undertaken and statement of the informant was recorded under Section 164 of the Code of Criminal Procedure, 1973 (in short the 'Code') wherein it was accepted that first with a promise of marriage, the accused had physical relationship with the informant and then, had married her. Since the accused disowned having ever married the informant and much less having ever had any physical relationship with her, she was forced to file the FIR. After investigation, charge sheet was filed wherein it was indicated an offence punishable under Sections 376 and 406 of IPC was made out. An application was filed by the present appellant before the trial Court for discharge in terms of Section 227 of the Code. By order dated 21.7.2005 the same was rejected. It was *inter alia* noted as follows:

> "....As a matter of fact the poor victim Binita Kumari was put under misconception of fact as promise to marry her by the accused and in this light the accused has done sexual intercourse with her. The accused had done such act with other girls also and further the accused has made a Akrarnama for marriage with the victim. The love letters and Akrarnama photocopy are also with the case diary and the same are on the record. From the case diary it is also clear that the accused has taken consent of the victim girl on a false promise of marriage and further a Akrarnama is also made here. Hence the consent is not with free will or voluntary act. Hence there are sufficient grounds for framing charge against the accused person."

4. Charges were framed for offences punishable under Sections 376 and 406 of IPC. As noted above, the order was challenged before the High Court which rejected the application in summary manner holding as follows:

> "The learned Judge finding sufficient material showing petitioner's complicity in the crime rejected his prayer for discharge.
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> I do not find any error in the same. Application stands dismissed."

5. Learned counsel for the appellant submitted that the trial Court failed to notice that the lady accepted that whatever physical relationships were there were with her consent. According to her, she was married to the accused. That being so, the question of any offence punishable under Section 376 IPC

A does not arise.

6. Further, the ingredients of Section 406 IPC have absolutely no application. Even a bare reading of the statement recorded under Section 164 of the Code shows that Section 406 has no application. Section 406 IPC relates to punishment for criminal breach of trust. The expression "criminal
B breach of trust" is defined in Section 405. The same relates to only entrustment of property or dominion over the property. There is no allegation of any entrustment of any property in this case and therefore Section 406 does not apply to this case. The High Court should not have rejected the application summarily without even dealing with the submissions made by the appellant.

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7. Learned counsel for the State submitted that though *prima facie* Sections 376 and 406 do not appear to have any application, yet the case is one which is covered by other Sections like 415 and 493 IPC. Learned counsel for the informant submitted that since on the pretext of marriage and by cheating the victim the accused had physical relationship with her, it cannot
D be said that there is element of consent and Section 376 has rightly been applied. Both learned counsel for the State and the informant stated that the charges can be altered during the trial and there is no scope for interference. It would not be appropriate to express any view with regard to acceptability or otherwise of the submissions made by the appellant.

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8. As rightly submitted by learned counsel for the State, Sections 376 and 406 *prima facie* do not appear to have any application. It would have been appropriate for the High Court to deal with various submissions and consider their acceptability. That apparently has not been done. This is not a case where the application should have been dismissed in a summary
F manner.

9. The crucial expression in Section 375 which defines 'rape' as "against her will". It seems to connote that the offending act was despite resistance and opposition of the woman. IPC does not define "consent" in positive terms. But what cannot be regarded as 'consent' is explained by Section 90
G which reads as follows:

> "consent given firstly under fear of injury and secondly under a misconception of fact is not consent at all."

That is what is explained in first part of Section 90. There are two grounds
H specified in Section 90 which are analogous to coercion and mistake of fact

which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries. The factors set out in first part of Section 90 are from the point of view of the victim and second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the Court has to see whether the person giving the consent has given it under fear or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology. As observed by this Court in *Deelip Singh @ Dilip Kumar* v. *State of Bihar,* [2005] 1 SCC 88, Section 90 cannot be considered as an exhaustive definition of consent for the purposes of IPC. The normal connotation and concept of consent is not intended to be excluded.

10. In most of the decisions in which the meaning of the expression "consent" under the IPC was discussed, reference was made to the passages occurring in Stroud's Judicial Dictionary, Jowitt's Dictionary on English Law, Words and Phrases, Permanent Edn. and other legal dictionaries. Stroud defines consent as "an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side". Jowitt, while employing the same language added the following:

> "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, meditated 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."

11. In Words and Phrases, Permanent Edn., Vol. 8-A, the following passages culled out from certain old decisions of the American courts are found:

> "....adult female's understanding of nature and consequences of sexual act must be intelligent understanding to constitute 'consent'.

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> 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..."

12. It was observed in *Uday* v. *State of Karnataka,* [2003] 4 SCC 46 as under:

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> "12. 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."

13. There is a good analysis of the expression "consent" in the context C of Section 375 IPC in *Rao Harnarain Singh Sheoji Singh* v. *State.* AIR (1958) Punj 123. The learned Judge had evidently drawn inspiration from the above passages in the law dictionaries. The observation of the learned Judge is as follows:

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> "there is a difference between consent and submission and every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent"

14. The said proposition is virtually a repetition of what was said by Coleridge, J. in *R.* v. *Day* (173 E.R. 1026) in 1841 as quoted in Words and E Phrases (Permanent Edn.) at p. 205. The following remarks in *Harnarain's* case (supra) are also pertinent:

> "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."

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15. The passages occurring in the above decision were either verbatim quoted with approval or in condensed form in the subsequent decisions: *vide* Anthony, In Re (AIR 1960 Madras 308), *Gopi Shanker* v. *State of Rajasthan,* AIR (1967) Rajasthan 159, *Bhimrao* v. *State of Maharashtra,* (1975) Mah.LJ 660 and *Vijayan Pillai* v. *State of Kerala,* (1989) 2 KLJ 234. All these decisions G have been considered in *Uday's* case (supra). The enunciation of law on the meaning and content of the expression "consent" in the context of penal law as elucidated by Tekchand, J. in *Harnarain's* case (supra) (which in turn was based on the above extracts from law dictionaries) has found its echo in the three-Judge Bench decision of this Court in *State of H.P.* v. *Mango Ram,* H [2000] 7 SCC 224. It was observed as follows:

> "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."

16. On the facts, it was held that there was resistance by the prosecutrix and there was no voluntary participation in the sexual act. That case would, therefore, fall more appropriately within clause first of Section 375.

17. It would be appropriate to deal with the specific phraseology of Section 90 IPC. We have an illuminating decision of the Madras High Court rendered in 1913 in N. Jaladu, Re (ILR (1913) 36 Madras 453) in which a Division Bench of that Court considered the scope and amplitude of the expression "misconception of fact" occurring in Section 90 in the context of the offence of kidnapping under Section 361 IPC. The 2nd accused in that case obtained the consent of the girl's guardian by falsely representing that the object of taking her was for participating in a festival. However, after the festival was over, the 2nd accused took her to a temple in another village and married her to the 1st accused against her will. The question arose whether the guardian gave consent under a misconception of fact. While holding that there was no consent, Sundara Ayyar, J. speaking for the Bench observed thus:

> "We are of opinion that the expression 'under a misconception of fact' is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married. In considering a similar statute, it was held in England in *R.* v. *Hopkins* (1842) Car & M 254) that a consent obtained by fraud would not be sufficient to justify the taking of a minor. See also Halsbury's Laws of England, Vol. 9, p. 623. In Stephen's Digest of the Criminal Law of England (6th Edn.,p. 217) the learned author says with reference to the law relating to 'abduction of girls

A under sixteen' 'thus ... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person' Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90 IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence."

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18. This decision is an authority for the proposition that a misrepresentation as regards the intention of the person seeking consent i.e. the accused, could give rise to the misconception of fact. This view of the Madras High Court was accepted by a Division Bench of the Bombay High Court in *Parshottain Mahadev* v. *State,* AIR (1963) Bombay 74). Applying that principle to a case arising under Section 375, consent given pursuant to a false representation that the accused intends to marry, could be regarded as consent given under misconception of fact.

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D 19. On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could be regarded as consent for the purpose of Section 375 IPC, was dealt with by a Division Bench of the Calcutta High Court in *Jayanti Rani Panda* v. *State of WB* (1984 Cr.L.J. 1535). The relevant passage in this case has been cited in several other decisions. This is one of the cases referred to by this Court in *Uday's* case (supra) approvingly. Without going into the details of that case, the crux of the case can be discerned from the following summary given at para 7:

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> "Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is ... why should she keep it a secret from her parents if really she had belief in that promise. Assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. It may be that subsequently when the girl conceived the accused might have felt otherwise. But even then the case in the petition of complainant is that the accused did not till then back out. Therefore it cannot be said that till then the accused had no intention of marrying the complainant even if he had held out any promise at all as alleged."

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H The discussion that follows the above passage is important and is extracted

hereunder: A

> "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 B 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 C activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 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." D

(emphasis supplied)

The learned Judges referred to the decision of the Chancery Court in *Edgington* v. *Fitzmaurice,* (1885) (29) Ch.D.459 and observed :

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> "This decision lays down that a misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it. The particular observation at p. 483 runs to the following effect: 'There must be a misstatement of an existing fact.' Therefore, in order to amount to a misstatement of fact the existing state of things and F a misstatement as to that becomes relevant. In the absence of such evidence Section 90 cannot be called in aid in support of the contention that the consent of the complainant was obtained on a misconception of fact."

After referring to the case-law on the subject, it was observed in *Uday's* case G (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 H

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 straitjacket 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".

20. 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 second. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of *Jayanti Rani Panda's* case (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". (emphasis supplied) 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 case* (*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 straitjacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday 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.

21. These aspects have been elaborately dealt with in *Deelip Singh's* case (supra). The stage of analyzing the factual materials was yet to be undertaken. But as rightly contended by the appellant if on a bare reading of the FIR, it shows that no offence had been made out for proceeding situation would be different. It would have been proper for the High Court as noted above to deal with the matter elaborately. That apparently has not been done. Therefore, without expressing any opinion on the merits of the case, we set aside the order of the High Court and remit the matter to it for fresh consideration.

22. The appeal is disposed of accordingly.

K.K.T. Appeal disposed of.