

# SUPREME COURT OF INDIA

Pradeep Kumar @ Pradeep Kumar Verma

Vs.

State of Bihar

SLP (Crl.) No. 3072 of 2006

(Dr. Arijit Pasayat and D.K. Jain JJ.)

17.08.2007

## JUDGMENT

**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 Akarnama for marriage with the victim. The love letters and Akarnama 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 Akarnama 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 petitioners complicity in the crime rejected his prayer for discharge.

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 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 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.

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 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.

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 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 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 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 *Strouds Judicial Dictionary*, *Jowitts 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 females 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

12. It was observed in *Uday v. State of Karnataka* (2003 (4) SCC 46) as under:

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 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:

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 Phrases (Permanent Edn.)* at p. 205. The following

remarks in Harnarains 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.

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 have been considered in Udays 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 Harnarains 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 (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 girls 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 Halsburys Laws of England, Vol. 9, p.

623. In Stephens 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 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.

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.

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 *Udays* 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:

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. The discussion that follows the above passage is important and is extracted hereunder: