CASE NO.:
Appeal (crl.) 44 of 2004

PETITIONER:
Deelip Singh @ Dilip Kumar

RESPONDENT:
State of Bihar

DATE OF JUDGMENT: 03/11/2004

BENCH:
P. VENKATARAMA REDDI & P.P. NAOLEKAR

JUDGMENT:
JUDGMENT

P. Venkatarama Reddi, J.

The appellant has been charged and convicted under Section 376 IPC for committing rape of a minor girl (figured as PW12 in this case) in the month of February, 1988. The IIIrd Additional Sessions Judge of Katihar sentenced him to rigorous imprisonment for a period of ten years. On appeal, the High Court upheld the conviction but modified the sentence to seven years. Aggrieved thereby, the present appeal is filed by the accused.

Facts:

The victim girl lodged a complaint to the police on 29.11.1988 i.e., long after the alleged act of rape. By the date of the report, she was pregnant by six months. Broadly, the version of the victim girl was that she and the accused were neighbours and fell in love with each other and one day, the accused forcibly raped her and later consoled her saying that he would marry her, that she succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her and therefore continued to have sex on several occasions. After she became pregnant, she revealed the matter to her parents. Even thereafter the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl but the accused avoided to marry her and his father took him out of the village to thwart the bid to marry. The efforts made by the father to establish the marital tie failed and therefore she was constrained to file the complaint after waiting for sometime.

The prosecution adduced evidence in the form of school certificate and medical expert’s opinion to establish that by the date of the commission of criminal act, the victim girl was aged less than 16 years in which case her consent becomes immaterial. It is on this aspect the attention was focussed more by the prosecution.

The trial Court accepted the prosecution case in this regard and found that the girl was aged less than 16 years at the relevant point of time. The High Court affirmed this finding. The trial Court also recorded an alternative finding that she was forcibly raped on the first occasion and after that incident the accused went on making false promises to marry her. It was therefore held that either there was no consent or the consent was involuntary. Thus, according to the trial Court, it was a case of having sexual intercourse against the will of the victim girl or without her consent. If

so, irrespective of the age of the girl, the offence is deemed to be committed. As regards this latter aspect, the High Court did not enter into any discussion.

Before proceeding to discuss the crucial points, it would be apposite to refer to the contents of the report given by the victim girl to the officer-in-charge of Manihari police station on the basis of which the FIR (Ext.1) was registered on 25.10.1988. At this stage, we would like to observe that her version as per the deposition given in the Court was somewhat different, especially in regard to the manner in which the sexual relationship was developed and the first sexual act was resorted to. To the extent necessary, this aspect will be referred to at a later stage. The following is the substance of the report (marked as Ext. 3/2) given to the police on 25.10.1988:

The informant and the accused were neighbours. The accused, by his gestures and behaviour, tried to seduce her. Whenever there was opportunity, he used to come to her house and used to cut jokes and have fun with her in spite of her protests. On one occasion, a watch was given to her as a gift. The accused went on telling that he wanted to marry her but she expressed her disinclination. However, one day, she yielded to the persuasion of the accused and had sexual contact with the accused and the same has been going on from the month of February, 1988. The accused allured her with promise of marriage and continued to have intercourse with her on account of which she conceived. During the second or third month of pregnancy, she informed her parents about it. Her father talked to the accused and asked him to marry his daughter. The accused accepted before the villagers that he was responsible for the pregnancy and he was ready to marry her. However, the father of the accused did not agree and proclaimed that the marriage will not take place under any circumstances. The efforts made by her father by convening a panchayat etc., did not yield any result. Later on, the informant came to know that the father of the accused Gopi Singh with the help of other villagers took away the accused to an unknown place. Thereafter, she was advised to file the case by her father and other elders. On the registration of the case, the charge sheet was filed not only against the present appellant but also his father and others who were alleged to have abducted the accused to prevent the marriage. However, no charge was framed against them. The appellant is the sole accused who faced the trial.

The victim girl was sent for medical examination to CAS, Sadar Hospital, Katihar on 28.11.1988. PW14\027the Doctor who along with other doctors examined her, deposed that by the date of examination, she had pregnancy of six months duration. The main purpose of sending her for medical examination appears to be to assess her age. PW14 gave the opinion, on the basis of his own examination and the examination of the Dental Surgeon and the X-rays taken by the Radiologist that her age was between 16 and 17 years. The Investigating Officer has not been examined in this case.

Age of victim:

The question of age of the victim girl is the first and foremost aspect that needs to be considered in the present appeal. On this question we are unable to concur with the finding of the trial Court as affirmed by the High Court. In our view, the finding as reached by the trial Court is based on no evidence or evidence which is doubtful. The prosecution wanted to prove her age by filing the school transfer certificate through PW13. The certificate is Ext. P4.

It was purportedly issued by the Headmaster of the Primary/ Secondary School, Nawabganj. Her date of birth, as recorded in the admission register, is stated to be 4.2.1974. The date of admission is mentioned as 22.2.1980 and the date of leaving the school as 31.12.1981. It is mentioned in column 5 that the admission was given on the basis of declaration of the father i.e. PW11. By the time she left the school, she passed II Class. The date of issuance of the certificate was 7.1.1991 i.e. after the trial commenced. No explanation is forthcoming as to why the Investigation Officer did not obtain the certificate in the course of investigation and why the certificate was not produced by the father of the girl (PW11). Apparently, the age was given on the basis of the declaration made by the father. If so, the father was the best witness to speak about her age. However, he did not say a word about her age.

If this certificate had been filed beforehand or if PW11 had said anything about her age, the defence counsel would have been in a position to question the father about the correctness of his declaration. That is one aspect. The other and more important aspect is that the certificate (Ext.P4) has no evidentiary value inasmuch as it is not properly proved by a witness who is competent to speak to the relevant facts connected with the issuance and custody of the certificate. The Headmaster or the staff of the school has not been examined.

The two witnesses examined to prove this document are PWs 13 and 15, whose evidence, in our view, is really worthless. The certificate was produced by PW13, who is said to be a clerk in Court (Mujeeb). It was marked subject to objection raised by the defence. Who applied for it and how he came in possession of it has not been explained. Though he stated in the chief examination that the certificate was issued by the Headmaster of Nawabganj School, in cross-examination, he frankly stated that he could not say whose signature was there on the certificate. He further stated that he had never gone to the school.

PW15\027an Advocate’s clerk, is another witness examined by prosecution to prove Ext.4. He stated in the chief-examination that the school leaving certificate related to victim girl and it was in the handwriting of the Headmaster Akhileshwar Thakur. In cross-examination, he admitted that he did not see the certificate earlier and he met the Headmaster of the school 10 or 15 years back. He also stated that the signature was illegible. Thus the evidence of PWs 13 & 15 does not throw any light on the authenticity or the genuineness of the certificate. Obviously, they did not have any knowledge of the issuance of the certificate. The original register was not before the Court. The certificates have not come from proper custody. In the circumstances, the certificate should have been eschewed from consideration. However the trial Court and the High Court acted on it without demur and rested their conclusions on this document. If we exclude Ext.P4 from consideration, the Court is left with the evidence of the Medical Officer, PW14, according to whose assessment the age of the girl was 16-17 years. The defence is entitled to rely on the higher side of the age given by the Doctor. If so, the victim girl would be aged more than 16 years when the alleged offence took place in February, 1988. At the time of examination in the Court, it appears that the Court assessed the age as 17, without any further elaboration. It is not safe to rely on such estimate.

For all these reasons we are of the view that the finding that the victim girl was less than 16 years of age on

the date of the first sexual intercourse which the appellant had committed, cannot be sustained. If so, Clause sixthly of Section 375 which says\027"with or without her consent, when she is under 16 years of age", is not attracted.

Whether accused guilty under clause first of Section 375:

The next question is whether the appellant had sexual intercourse with the victim girl against her will (vide first Clause of Section 375). The expression 'against the will' seems to connote that the offending act was done despite resistance and opposition of the woman. On this aspect, the trial court did believe the version of the informant\027victim without much of discussion. In reaching this factual finding, the trial Court failed to analyse and evaluate the evidence of PW12\027the victim girl. The High Court merely affirmed the trial Court's finding on this paint. We should, therefore, scrutinize her evidence and examine whether it would, beyond reasonable doubt, lead to the conclusion of the accused having had sexual contact against her will. Though in the FIR, the version of forcible sexual intercourse has not been put forward, in the deposition before the Court, PW12 tried to build up this plea. According to PW12, the first act of rape took place in the wheat field of her father. This is how she described the incident:

"In the field, once getting a chance, Dilip Singh forcibly raped me. Dilip Singh told, 'you marry me', when I was weeping. He said weeping is useless and we shall marry. He promised me of marriage and raped me several times."

She then stated that after she became pregnant, she revealed to her mother about the rape. Later on, the accused became ready to marry her but his father and others took him away from the village. She also stated that the accused time and again told her that they will have a 'court marriage' (means, registered marriage). In substance, what she deposed was that the first sexual intercourse took place against her will, though she became a consenting party later on. The first thing to be noticed is that in the report which she admittedly gave to the police, this version was not given by her and she did not complain of forcible rape. That apart, the version of rape in the wheat field seems to be highly doubtful when tested in the light of her statements in the cross-examination. She stated in paragraph 14 that "one day, while talking, he pulled me down and forcibly raped me. This incident occurred at 12.00 in the night". That means, according to her version, the first incident of rape took place on the wheat field at 12.00 in the midnight. It is highly doubtful whether they would go to the wheat fields at that hour. Moreover, in cross-examination, she makes a further improvement by stating that at the time of first incident of rape at midnight, when she started shouting, the accused gagged her mouth. One more thing which affects the credibility of her version is her statement in the cross-examination that when the accused kept on making gestures, she went to the house of the accused and lodged her protest with his Bhabi. It is most unlikely that such unwilling person will go to a secluded place in the company of the accused at an odd time in the night and take the risk of being sexually assaulted. In any case, if the rape was committed by the accused much against her will, she would not have volunteered to submit to his wish subsequent to the alleged first incident of rape. She admitted that the accused used to talk to her for hours together and that was within the knowledge of her parents and brother. This statement also casts an element of doubt on her version that she was subjected to sexual intercourse in spite of her resistance. Above all, the version given by her

in the Court is at variance with the version set out in the FIR. As already noticed, she categorically stated in the first information report that she 'surrendered before him' in view of his repeated promises to marry. In short, her version about the first incident of rape bristles with improbabilities, improvements and exaggerations. It is a different matter that she became a consenting party under the impact of his promise to marry her. That aspect, we will examine later. But, what we would like to point out at this juncture is, it is not safe to lend credence to the version of PW12 that she was subjected to rape against her will in the first instance even before the appellant held out the promise to marry. We cannot, therefore, uphold the finding of the trial Court that the girl was raped forcibly on the first occasion and that the talk of marriage emerged only later. The finding of the trial Court in this respect is wholly unsustainable.
Whether clause secondly (without consent) is attracted:

The last question which calls for consideration is whether the accused is guilty of having sexual intercourse with PW12 'without her consent' (vide Clause secondly of Section 375 IPC). Though will and consent often interlace and an act done against the will of a person can be said to be an act done without consent, the Indian Penal Code categorizes these two expressions under separate heads in order to be as comprehensive as possible.
What then is the meaning and content of the expression 'without her consent'? Whether the consent given by a woman believing the man's promise to marry her is a consent which excludes the offence of rape? These are the questions which have come up for debate directly or incidentally.
The concept and dimensions of 'consent' in the context of Section 375 IPC has been viewed from different angles. The decided cases on the issue reveal different approaches which may not necessarily be dichotomous. Of course, the ultimate conclusion depends on the facts of each case.
Indian Penal Code does not define 'consent' in positive terms, but what cannot be regarded as 'consent' under the Code is explained by Section 90. Section 90 reads as follows:
"90. Consent known to be given under fear or misconception\027A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows or has reason to believe, that the consent was given in consequence of such fear or misconception; \005"

Consent given firstly under fear of injury and secondly under a misconception of fact is not 'consent' at all. That is what is enjoined by the first part of Section 90. These two grounds specified in Section 90 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 the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too 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 had given it under fear of injury 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. Section 90 cannot, however be construed as an exhaustive definition of consent for the purposes of the Indian Penal Code. The normal connotation and concept of 'consent' is not intended to be excluded. Various decisions of the High Court and of this Court have not merely gone by the language of Section 90, but travelled a wider field, guided by the etymology of the word 'consent'.
In most of the decisions in which the meaning of the expression 'consent' under the Indian Penal Code was discussed, reference was made to the passages occurring in Stroud's Judicial Dictionary, Jowitt's Dictionary on English Law, Words & Phrases\027Permanent Edition 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:
"\005Consent supposes three things\027a 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 Words & Phrases\027Permanent Edition, Volume 8A, the following passages culled out from certain old decisions of the American Courts are found:
"\005\005.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. \005"

It was observed by B.P. Singh, J. speaking for the Court in Uday Vs. State of Karnataka [2003 (2) Scale 329], "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". There is a good analysis of the expression 'consent' in the context of Section 375 IPC by Tekchand, J. in Rao Harnarain Singh Vs. State [AIR 1958 Punjab 123]. The learned Judge had evidently drawn inspiration from the above passages in the law dictionaries. The observation of the learned Judge that "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", is quite apposite. The said proposition is virtually a repetition of what was said by Coleridge, J. in Regina vs Day in 1841 as quoted in Words and Phrases (Permanent Edition) at page 205. The following remarks in Harnarain's case 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."

The passages occurring in the above decision were either verbatim quoted with approval or in condensed form in the subsequent decisions: vide In Re : Anthony [AIR 1960 Madras 308], Gopi Shankar Vs. State [AIR 1967 Raj. 159], Bhimrao Vs. State of Maharashtra [1975 Mah. L.J. 660], Vijayan Pillai Vs. State of Kerala [1989 (2) K.L.J. 234]. All these decisions have been considered in a recent pronouncement of this Court in Uday Vs. State of Karnataka. 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 (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. Vs. Mango Ram [(2000) 7 SCC 224]. K.G. Balakrishnan, J. speaking for the Court stated thus:

"Submission of the body under the fear or 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."

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.

We shall turn our attention to the cases which dealt with the specific phraseology of Section 90, IPC. We have an illuminating decision of the Madras High Court rendered in 1913 in Re: N. Jaladu [ILR 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 17, 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, Volume 9, page 623. In Stephen's Digest of the Criminal Law of England (sixth edition, page 217), the learned author says with reference to the law relating to "abduction of girls under sixteen" "thus \005\005\005\005\005.. 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." \005\005\005\005.. 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."

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 Bombay High Court in Purshottam Mahadev vs. State of Bombay [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. 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, we have the decision of Division Bench of Calcutta High Court in Jayanti Rani Panda vs. State of West Bengal [1984 Crl.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 (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 \005\005\005\005\005\005\005\005\005. 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:
"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." (emphasis supplied)

The learned Judges referred to the decision of Chancery Court in Edgomgtpm vs. Fotz,airoce (1885) 29 Ch.D 459 and observed thus:
"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 a misstatement as to that becomes relevant. In the absence of such evidence Sec. 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, supra at paragraph 21:
"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 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 the 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\027"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, 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.

Having discussed the legal aspects bearing on the interpretation of the term 'consent' with special reference to Section 90 IPC, we must now turn our attention to the factual aspects of the case related to consent.

Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in? Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her? These are the questions which have to be answered on an analysis of the evidence. The last question raises the allied question, whether the promise to marry, if made by the accused, was false to his knowledge and belief from the very inception and it was never intended to be acted upon by him. As pointed out by this Court in Uday's case the burden is on the prosecution to prove that there was absence of consent. Of course, the position is different if the case is covered by Section 114-A of Evidence Act. Consent or absence of it could be gathered from the attendant circumstances. The previous or contemporaneous

acts or the subsequent conduct can be legitimate guides.

Whether on the basis of the evidence adduced by the prosecution, it is reasonably possible to infer the lack of consent on the part of the prosecutrix is the ultimate point to be decided.

A close scrutiny of evidence of the prosecutrix\027PW12 is what is called for, there being no other evidence in the case which could throw light on the point at issue. First, we must exclude from consideration that part of her version which accuses the appellant of forcible sexual indulgence on the first occasion. We have already discussed this aspect and rejected her version as unreliable. Therefore, we have to address ourselves to the twin questions (1) whether there was voluntary participation in the sexual act quite mindful and conscious of what she was doing and its possible consequences and (2) whether the victim girl was misled by the false promise of the accused to marry her and therefore agreed to have sexual contact with him. In a way, these two two aspects overlap and are interconnected.

Coming to the first question, it is not easy to find a dividing line between submission and consent - a distinction which was pointed out by Coleridge J., reiterated by Tekchand J. in the Punjab decision and further reiterated by this Court in the two decisions referred to supra, except in the situation contemplated by clause fifthly of Section 375. Yet, the evidence has to be carefully scanned. It is fairly clear from the evidence of the victim\027PW12 that the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her about the prospect of marriage with the accused. That she came to the decision to have a sexual affair only after being convinced that the accused would marry her, is quite clear from her evidence which is in tune with her earliest version in the first information report. There is nothing in her evidence to demonstrate that without any scope for deliberation, she succumbed to the psychological pressure exerted or allurements made by the accused in a weak moment. Nor does her evidence indicate that she was incapable of understanding the nature and implications of the act which she consented to. On the other hand, the scrutiny of evidence of PW12 gives a contra indication. According to PW12, she did not like accused making passionate gestures and therefore, she went to the house of the accused and made a complaint to his 'Bhabhi'. Though she promised to restrain him, the accused continued to do so. Her further version is that she was not willing to marry the accused; even then the accused used to come to the courtyard of her house many a time and it was within the knowledge of her parents and brother that the accused used to talk to her for hours. She used to accompany him whenever he wanted. Another statement of significance is that she tried to resist the talk of marriage by telling the accused that marriage was not possible because they belonged to different castes. However, she agreed to marry him after she was raped and under the impression that he would marry, she did not complain to anybody. These statements do indicate 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 the act. The prospect of the marriage proposal not materializing had also entered her mind. Thus, her own evidence reveals that she took a conscious decision after active application of mind to the things that were happening. Incidentally, we may point out that the awareness of the prosecutrix that the marriage may not take place at all in view of the caste barrier was an

important factor that weighed with the learned Judges in Uday's case in holding that her participation in the sexual act was voluntary and deliberate.

The remaining question is whether on the basis of the evidence on record, is it reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry? We have no doubt that the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. PW12 was also too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of PW-12 that 'later on', the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialize on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in Uday's case at paragraph 24 comes to the aid of the appellant.

We reach the ultimate conclusion that the findings of the trial court as affirmed by the High Court are either perverse or vitiated by non-consideration of material evidence and relevant factors emerging from the prosecution evidence. We cannot, therefore, sustain the conviction.

In the result, the conviction and sentence is set aside and the appeal is allowed.

With this verdict, the appellant, no doubt extricates himself from the clutches of the penal law by getting the benefit of doubt on charge levelled against him. But, we cannot ignore the reprehensible conduct of the appellant, who by promising to marry the victim woman, persuaded her to have sexual relations and caused pregnancy. The act of the accused left behind her a trail of misery, ignominy and trauma. The only solace is that she married subsequently. We are informed that the female child born out of the illicit relationship is now living with her married mother and she is about 14 year old now. Though there is no evidence to establish beyond reasonable doubt that the appellant made a false or fraudulent promise to marry, there can be no denial of the fact that the appellant did commit breach of the promise to marry, for which the accused is prima facie accountable for damages under civil law. When we apprised the appellant's counsel of our prima facie view point on this aspect and elicited his response on passing a suitable order in exercise of power vested in this Court under Article 142 of the Constitution, the learned counsel took time to get instructions. We are now informed that the appellant is prepared to pay a sum of Rs.50,000 by way of monetary compensation irrespective of acquittal. Though the said amount is not an adequate compensation, we are not inclined to call upon the appellant to pay more for more than one reason: firstly, the appellant has been in jail for about two years by now; secondly, we are informed that the accused belongs to a backward class and his family is not affluent though they have some agricultural lands; lastly, the incident took place about 15 years back and in the supervening period, the prosecutrix as well as the appellant

married and we are told that he has two children. In these circumstances, we accept the offer of the appellant.

The appellant's counsel has brought a Demand Draft for Rs.50,000 drawn in favour of the Chief Judicial Magistrate, Sahibganj. The Draft is handed over just now to the Court Officer. The concerned Registrar of this Court shall send the Draft to the C.J.M., Sahibganj for being credited to his account in the first instance. The C.J.M. shall take immediate steps to summon the prosecutrix whose name and address shall be furnished by the counsel for the appellant in the course of the day to the Registrar of this Court. Out of the amount of Rs.50,000, a sum of Rs.10,000 shall be paid over to the prosecutrix in cash if she makes a request and the remaining amount of Rs.40,000 shall be kept in a fixed deposit in a Bank in the name of the minor girl namely Miss Sangeeta Kumari with the prosecutrix as her guardian. The accrued interest shall be paid to the prosecutrix once in two years. The amount of Rs. 40,000/- with remaining interest thereon shall be disbursed to the girl after she attains the majority by getting an account opened in a Bank in her name. However, for the purpose of meeting the imminent needs of the minor girl, the C.J.M. can permit the amount to be paid over to the guardian (prosecutrix) either partly or in whole depending on the genuine and reasonable requirements concerning the maintenance of the child. The C.J.M. shall submit a report to the Registrar of this Court on the action taken in this regard within two months.

A translated copy of the part of the judgment starting from page 37 shall be furnished to the prosecutrix by the CJM. The CJM may appoint a counsel under the legal aid scheme to assist the prosecutrix and the girl whenever necessary in connection with the implementation of this order.

Accordingly, the order is passed in the interests of justice in exercise of powers vested in this Court under Article 142 of the Constitution.