Mallesh Vs. the State of Karnataka, Represented by Circle Inspector of Police

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Court : Karnataka Gulbarga

Decided On : Feb-08-2013

Judge : Anand Byrareddy

Appeal No. : Criminal Appeal No. 1582 of 2007

Appellant : Mallesh

Respondent : The State of Karnataka, Represented by Circle Inspector of Police

Judgement :

(Prayer: This Criminal Appeal is filed under Section 374 read with Section 389 of the Cr.P.C. praying to acquit the appellant on all charges levelled and framed against him in S.C.No.79/2007, by setting aside the judgment passed by the Addl. Sessions Judge and P.O., Fast Track Court-III, Raichur, in S.C.No.79/2007 dated 29.09.2007, impugned herein, and to release the appellant from judicial custody.)

1. Heard the learned counsel for the appellant and the learned Government Pleader.

2. The appellant was the accused before the Trial Court in the following background:

Lakshmi, the daughter of Pomanna and Shankaramma, had alleged that she along with her parents, were residents of Alkot Tanda, within the limits of Jalahalli Police Station, in Devadurga Taluk. The appellant was the resident of A.G. Colony and was related to Lakshmi. A.G Colony was about 2 kms from Alkot Tanda. It is claimed that during July 2006, Lakshmi was aged about 19 and during that time, her parents had gone in search of work to Pune and had left Lakshmi behind with two young children of Lakshmi's brother who, along with his wife, had also accompanied the parents of Lakshmi in search of work, to Pune. Therefore, when Lakshmi was living alone with the two children, who were school-going, she was taking care of the house as well as the cattle her family was rearing. It is claimed that on 19.10.2006, when she was herding cattle near one Yellammakatte, the appellant had come in his autorickshaw and had stopped very near her. When she questioned him as to why he was trying to almost run over her, the appellant is said to have held the hand of Lakshmi and expressed his love for her saying that he intended to marry her. At which, Lakshmi had informed him that he should speak to her parents about any such proposal for marriage, if he was interested in her. The appellant, however, is stated to have said that he would go to any length to marry her and then proceeded in his autorickshaw. It is claimed that Lakshmi was woken at midnight that night by the appellant who had come in his autorickshaw and had parked the same near the house. The appellant is said to have come into the house and had expressed that he wanted to sleep with her and that she must permit him as he intended to marry her soon. He had then started hugging and petting her. It is claimed that Lakshmi had protested that she would not encourage any sexual activity till after the marriage. But the appellant persisted and continued to pet her. It is stated that Lakshmi broke out in tears and wept expressing that she would be ruined for life if even before their marriage, she permitted sex. The appellant continuing to re-assure her that he would marry her, made further advances and had taken her by force. After having had sexual intercourse, it is claimed that the appellant had threatened her not to reveal the incident to anybody and if she did so, it would compel him to harm her. Therefore, under fear of such hurt, Lakshmi did not reveal the incident to anybody. Thereafter, it is claimed that the appellant continued to visit her once in every eight or ten days and would have sex with her though it was always under the protests

of Lakshmi.

It is claimed that Panditappa and Chappalamma who were neighbourers of Lakshmi, had witnessed the appellant visiting Lakshmi time and again. It is only in February 2007 that when her parents returned to Alkod Tanda from Pune, that Lakshmi informed them about the appellant having had sex with her on the promise of marriage, at which, the appellant was asked to marry Lakshmi, but he had refused. Therefore, Lakshmi lodged a complaint at Jalahalli Police Station on 24.02.2007. The complaint was to the following effect

KANNADAM

It is thereafter that the police have taken up the case and Lakshmi was subjected to medical examination and the appellant was prosecuted for the offences punishable under Sections 376, 506 and 417 of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC' for brevity). The appellant having pleaded not guilty and having claimed to be tried, the matter went to trial. The prosecution examined 14 witnesses and marked Exhibits P1 to P12, apart from Exhibits D1 to D5, marked for the defence. On a consideration of the evidence, the court below framed the following points for consideration:

"1. Whether prosecution proves that the accused, in the midnight intervening 19-10-2006 and 20-10-2006 in the house of complainant at Alkod tanda, committed rape on PW-3 Laxmi?

2. Does prosecution further prove that accused, after committing rape on PW-3, threatened her to cause her death with intend to cause alarm to her not to disclose the rape committed by him on her to anybody?

3. Does prosecution further and in the alternative prove that accused, by promising PW-3 Laxmi to marry her, fraudulently or dishonestly induced her to co-operate with him for sexual intercourse and did sexual intercourse with her several times and cheated her by not keeping his promise and by refusing to marry her?

4. What order?"

The Trial Court answered points 1 and 2 in the affirmative and convicted the appellant, imposing a punishment of imprisonment for 7 years and to pay a fine of Rs.11,000/- for the offence punishable under Section 376 and imprisonment for two years and a fine of Rs.1,000/- for the offence punishable under Section 506 IPC. Out of the fine amount, Rs.10,000/- was to be paid to Lakshmi as compensation. The sentences were to run concurrently. It is that which is under challenge in the present appeal.

3. The learned counsel for the appellant, while taking this Court though the record, would point out that there is no dispute as to the complainant Lakshmi being a major by age and having had a sexual relationship with the appellant over a period of several months and it is also her case that the appellant having used force on the first occasion, had threatened her with dire consequences if she revealed the incident and had thereafter continued to visit her every eight to ten days till such time that her parents returned in February 2007. Therefore, between the period July 2006 to February 2007, it is the case of the complainant that the appellant would constantly visit her and have sex, much against her will. This, on the face of it, the learned counsel would point out, is not tenable. It is not the case of the prosecution that Lakshmi was under any kind of restraint from expressing her predicament to other people in the neighbourhood or her relatives. The appellant was not a stranger and was indeed related to her. Therefore, over the several months, there was no impediment for her to have complained about the alleged rape, repeatedly committed on her, by the appellant. As candidly admitted by the complainant, it was on account of the appellant refusing to marry her, that she was inclined to file a complaint alleging the offence punishable under Section 376, apart from other allegations. The learned counsel would therefore contend that the complaint is without any basis and is filed only out of spite that the appellant had resiled from his promise to marry her. The allegation of rape therefore, is clearly an excuse to ensure that the appellant is punished without there being any crime committed. The case that can be made out if all the allegations are accepted, is that there was consensual sex over a prolonged period of time and it is only for the above reason that the case has been filed.

The learned counsel would draw attention to Section 375 IPC to substantiate the contention that it could be claimed that there was no consent only if the prosecution case can be brought under any of the ingredients of Section 375. On the admitted facts, it cannot be said that there was no consent by the complainant insofar as the continued sexual relationship was concerned. There is total absence of any semblance of a protest or resistance by the complainant when she was always free to have expressed her protest or prevented the appellant from continuing to visit her or to torment her. The learned counsel would draw attention to the fact that the complaint itself having been lodged much after the initial act of violation that is alleged, it is not surprising that there is no medical evidence whatsoever of any force or physical violence on the person of the complainant, and it is not also a case that there was any such force or violence apart from the first incident where again, there is no specific averment of any violence used except that there was resistance on her part while expressing that she would be ruined for life, if she permitted sex before their marriage. In this regard, the learned counsel would submit that the question turns around whether there was consensual sex on the part of the complainant and whether she had consented to the continued relationship. Even if the allegation that there was an element of force used by the appellant, and that he had also put her in fear of life and fear of physical harm if she revealed the incident to anyone, whether the admitted circumstances enabled the complainant to allege that there was want of consent, is amply answered by the Apex Court in the case of Uday vs. State of Karnataka (ILR 2003 KAR 2512), which has been further clarified in the case of Deelip Singh alias Dilip Kumar vs. State of Bihar ((2005)1 SCC 88) and would submit that the said judgments which have extensively reviewed the case law, would cover the case of the appellant on all fours insofar as the case of the appellant that there was consensus in the continued sexual relationship between the appellant and the complainant and therefore, the court below having held that the prosecution had established its case beyond all reasonable doubt in the face of the admitted circumstances, is not tenable and seeks that the appeal be allowed and the judgment of the court below be set-aside and the appellant acquitted.

4. On the other hand, the learned Government Pleader appearing for the State would vehemently oppose the appeal. He would seek to justify the reasoning of

the court below. He would draw attention to the background and the status of the complainant though she is projected as a major who willfully had a relationship with the appellant, he would draw attention to the complaint itself to indicate that in the very first instance, the appellant had taken advantage of the complainant knowing that she was alone at home with two very young children and they belonged to a lower strata of society, without any proper dwelling house. The house did not even have a proper door and it is this which had enabled the appellant to access the complainant in the dead of the night and force himself on her. This has been stated in so many words by the appellant. The fact that she was alone and her parents and brother were away to eke out their livelihood, is not in dispute. The appellant being closely related to the complainant and in spite of her reluctance to have sex with him, has been misled into believing that he would marry her and secondly, was in mortal fear of harm that would come to her if she complained. Therefore, the mere fact that she tolerated his visits out of fear and continued to permit him to force himself on her on every single occasion, which she has also stated in her complaint in so many words, cannot be construed as being a consensual relationship at all. He would further submit that in a case such as this, to expect marks of violence or physical injury would be illogical. Admittedly, the relationship had been forced on her over several months. The complainant who comes from a humble background with no other adult support having tolerated the appellant, being characterized as a willful and consensual sexual relationship, would result in a gross miscarriage of justice.

The appellant on the other hand, though of the same community, was an autorickshaw driver and was worldly wise and has taken complete advantage of the complainant. Therefore, the crime of rape was a continuous incident commencing in July when the appellant first took advantage of the victim and continued to abuse the complainant over several months notwithstanding that the complainant did not raise any kind of protest or complain to any person, out of fear for her life and due to the fact that the appellant was closely related to her family. Hence, he would submit that the evidence of PWs 7 and 8 who were neighbourers and have spoken about the constant visits of the appellant to the house of the complainant coupled with the complainant's testimony of the acts performed on her body by the appellant, should be sufficient to bring home the charge which the

court below has rightly accepted. It is settled law that the testimony which is not embellished with gory details of each time that there was resistance by the complainant and the appellant having forced himself on her, would not render the complaint a false and a got-up story. The plain speak or the tenor of the complaint itself would be sufficient to bring home the truth of the matter.

The learned Government Pleader would also submit that apart from putting the complainant in fear of her life, repeated assurance of marriage and of the deceptive love that the appellant claimed he had for the complainant, would not lead to a presumption that there was consent to the sexual relationship. He would submit that it was under a misconception, that the appellant may possibly marry the complainant, that she has also tolerated the continued violation. When she has proceeded under such a misconception, there is no consent at all in the eye of law and he would seek to draw sustenance from Section 90 of the IPC to substantiate this contention. It is also pointed out from the Medical Practitioner's report insofar as Lakshmi is concerned, to the effect that the finding therein that Lakshmi was used to sexual activity, would clearly point to the fact that she was abused over a period of time by the appellant. The finding of the Medical Practitioner that Lakshmi's hymen was found torn and that it was an old tear, is of little significance, as it is not necessary that the hymen should be found torn only on account of sexual activity. The absence of spermatazoa or any recent sexual activity, also would not absolve the appellant of the offence as already submitted. The violation was committed in July 2006, many months before the medical examination and it had continued over a period of time and not immediately before the medical examination. Therefore, the circumstance of the case certainly established that the appellant had committed the offence of rape in the first instance, which most certainly cannot absolve the appellant of the commission of the crime notwithstanding the defence taken that there was consensual sex over a period of time. The learned Government Pleader would also point out that the Lower Court has also arrived at a finding to this effect namely, that the incident in the first instance, namely on 19.10.2006, was an act of rape and even if there was no protest or complaint by the complainant immediately thereafter, the said act could not be condoned or the appellant would not be absolved of the crime by any subsequent consensual sex. The learned Government Pleader also places

reliance on authorities in support of the contention that there was no consent by the complainant to have sex with the appellant.

5. In the light of the above rival contentions, and on a perusal of the record, the case against the appellant rests mainly on the testimony of the complainant and partially supported by the testimony of PWs 7 and 8 who were neighbourers of the complainant and have testified to the fact that the appellant was visiting the complainant as stated by her. Though they have not stated that the complainant was living in fear or that there was any sign of violence being used against her by the appellant, the fact that the appellant was a major and that she was aged about 19 as on the date of the incident and was of reasonable mental and physical maturity in order that her parents could entrust the custody of two young children to her and leave her alone in their pursuit of labour and livelihood over several months, would indicate that she was able to take care of herself and also the children, apart from taking care of the house itself. Hence, notwithstanding her humble background and that she was alone, the circumstance whether the appellant wielded such influence over her or was in a position to put her in such mortal fear that over several months she was unable to confide in any person or to share her predicament with any other, is a circumstance which requires to be addressed. In other words, the sequence of events would give rise to a question whether there was consensual sex between the appellant and the complainant or whether the situation was one where the complainant had succumbed or submitted meekly to the acts committed on her by the appellant on account of the situation and whether this could be accepted.

6. As already pointed out by the learned counsel for the appellant, the medical report insofar as the petitoner's physical condition was concerned, there was no immediate sign of sexual assault on the complainant and this was also not capable of detection when her examination was conducted possibly days after there was any kind of sexual activity with the appellant, even according to her. Therefore, the entire finding of the Trial Court that the appellant in the first instance had used force on the complainant in having sex with her and therefore, this falls within the scope of the definition of rape and hence, the court having found that the circumstance of the case established the commission of a crime beyond all

reasonable doubt, is a question which requires to be addressed. Insofar as the allegation that in the first instance, the appellant had approached her assuring her of his deep love for her and an intention to marry her and also having intruded into her house when she was asleep in the dead of the night and then having forced himself on her, if accepted, it would certainly amount to a crime falling within the definition of 'rape'. The question then would be if on eschewing the subsequent relationship, if that act by itself was to be addressed as a crime that was committed and if the appellant were to be prosecuted, would the complaint be sustainable, given the circumstance that the complainant was free and had sufficient liberty to reveal the incident to others and bring the appellant to book notwithstanding that he was related to her, would be the other circumstance that would have to be taken into account. The consequent delay in filing a complaint in that regard, would certainly be fatal to the case, on the face of it.

In any event, to establish the act committed in the month of July 2006, on the basis of a complaint in February 2007, would be difficult to sustain. Therefore, the question whether there was consent and what would amount to consent, has come in for extensive consideration by the Apex Court in the case of Uday vs. State of Karnataka. It would be useful to refer to the said decision at some length, as it does appear that there is a similarity between the said case and the present case on hand.

In that case before the Apex Court, the prosecutrix was aged about 19. The appellant who was the accused was about 20-21 years of age at the time of the incident. The prosecutrix was studying in college and was residing with her family and the accused was a friend of her brother and residing in the neighbourhood. He was visiting the house of the prosecutrix almost every day, and she was familiar with him. The friendship grew and the accused is said to have proposed marriage. But, the prosecutrix told him that since they belonged to different castes, such a marriage was not possible. But, they had fallen in love with each other and it transpires that at midnight one day, in September, when she was up studying, the appellant sneaked up to the window of the room where she was, and spoke to her in subdued tones. He called her out and they went to his house which was under construction and the accused hugged her and petted her and had sexual

intercourse. It was claimed by the prosecutrix that she was reluctant to participate, but since there was an assurance and a promise to marry her, she had submitted to him. They continued to meet thereafter and went out frequently. The accused continued to assure her that he would marry her. Therefore, they had sex more than a dozen times, and it was at least once or twice a week. They were seen together by several persons whom she had, in the course of the trial, named and she had even been questioned by one of them as to what the relationship was, and she had confided that they were deeply in love. But, the state of affairs did not continue after she discovered that she was pregnant. In the sixth month of her pregnancy, her mother was suspicious and the entire episode was revealed. When others came to know about the affair and pregnancy, the accused was broached. He held out an assurance that he would marry the prosecutrix. In the eighth month of pregnancy, the accused had prepared her to elope with him, but he failed to turn up. Eight days later, the appellant had assured the brother of the prosecutrix that he would find a place to keep the prosecutrix till after her delivery and the completion of the construction of his house which was said to be under construction and that thereafter, he would marry her. This was not acceptable either to the prosecutrix or to her family, which angered the appellant. Thereafter, there was a quarrel between the female members of the two families, as the appellant resiled from his promise to marry. It is in that background that the case was initiated against the appellant in that case. The Supreme Court was addressing the question whether in such circumstances, the appellant had sexual intercourse with the prosecutrix, without her consent. The parallel between that decided case and the present case, is very close. In that, in the allegations in that case as well was that in the first instance, the prosecutrix was not inclined to have sexual intercourse and that she was persuaded into having sex and therefore, there was no consent.

Hence, the question addressed was, whether it could be said that sexual intercourse had taken place without the consent of the prosecutrix and therefore, the accused was guilty of the offence of rape. The Supreme Court has extracted Section 375 and Section 90 of the IPC. After taking note of the contention that in the context of Section 375 IPC, which is a special provision, the general provision, namely Section 90 of the IPC was not of much assistance to the prosecution and

as contended by the counsel for the appellant therein, Section 375 thirdly, fourthly and fifthly, exhaustively enumerated the circumstances under which the consent given by the prosecutrix is vitiated and does not amount to consent in law, and further, that one has to look to Section 375 alone for finding out whether the offence of rape had been committed. Further, it was contended that even under Section 90 of the IPC, 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 would 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. This contention was sought to be illustrated by reference to English cases where a medical man had sexual intercourse with a girl who suffered from a bona fide belief that she was being medically treated, or where under pretence of performing surgery, a surgeon had carnal intercourse with her. Attention is drawn to the meaning of 'consent' in Stroud's Judicial Dictionary (Fifth Edition).

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

The court has also noticed the reference to the case of Holman vs. R. ([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 R. 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 "that consent obtained by fraud is no 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." 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."

In People vs. Perry, 26 Cal. App. 143, it was observed: "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 Sheoji 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 no 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 Apex Court has also reiterated the view expressed in Vijayan Pillai vs. State of Kerala (1989 (2) Kerala Law Journal 234) thus:

"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 it 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.' "

Insofar as the aspect of Section 90 of the IPC is concerned, the view expressed by a Division Bench of the Calcutta High Court in Jayanti Rani Panda vs. State of West Bengal and Another : 1984 Crl. L.J. 1535, is to the following effect:

"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."

And the fact that Rao Harnarain Singh (supra) and Vijayan Pillai vs. State of Kerala (supra), having found approval by the Apex Court in the case of State of H.P. vs. Mango Ram ((2000) 7 SCC 224), is taken note of and on the facts of that case, held that the circumstances led to the conclusion that the prosecutrix had freely, voluntarily and consciously, consented to have sexual intercourse with the appellant and her consent was not on account of misconception of fact. The court also observed that, in a case of this kind, 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. The court has taken note of the circumstance that the prosecutrix in that case, already knew that the marriage with the appellant was difficult on account of caste considerations, but even then, the question remained whether the appellant knew or had reason to believe that the prosecutrix had consented to have sexual intercourse with him, only with the consequence of belief based on his promise.

7. In the present case on hand, there was a distinct belief that there would be a marriage, as the complainant herself has mentioned that when the appellant first proposed to her, she had expressed that he should seek the consent of her parents and since they were already related, there was a strong possibility of such marriage and therefore, the continued relationship over a period of time would indicate that the complainant had consented to have sexual intercourse with the appellant consciously, freely and voluntarily.

8. The Apex Court, in the judgment of Deelip Singh @ Dilip Kumar vs State Of Bihar ((2005) 1 SCC 88), while referring to Uday vs. State of Karnataka, has further clarified while quoting the following thus:

After referring to the case law on the subject, it was observed in Uday, supra at paragraph 21:

"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."

28. 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 (Cri LJ p.1538, para 7)--"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's case (ILR (1913) 36 Mad 453). 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."

After referring to the case law on the subject, it was observed that there was no evidence to establish beyond reasonable doubt that the appellant made a false or fraudulent promise to marry. There was no denial of the fact in that case that the appellant committed breach of promise to marry, for which the appellant was accountable for damages under civil law and exercising power vested in the court under Article 142 of the Constitution of India, the appellant who was prepared to pay a sum of Rs.50,000/- by way of monetary compensation, irrespective of acquittal, it was recorded that the prosecutrix was held entitled to the said sum.

9. Accordingly, in the present case on hand, given the circumstances of the case and the position of law, the finding of the court below that the appellant had committed rape on the complainant in the first instance, notwithstanding that there may have been consensual sex at later points of time, is not a finding that can be

sustained. The complainant did believe that a marriage with the appellant was a possibility. The further circumstance that appellant had been openly visiting the complainant as stated by PW-7 and PW-8 over several months, would also mean that though the appellant did consider marriage, he has resiled later either because he developed cold feet or for some other reason.

Therefore, given the state of the law, this court would, without any hesitation, hold that the prosecution has not made out a case beyond all reasonable doubt against the accused and consequently, the appeal is allowed. The judgment of the court below is set-aside. The appellant is acquitted. The fine amount deposited by the appellant is directed to be refunded.