

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision : 9th February, 2009

+ **CRL. APPEAL NO.389/2008**

ASHOK RAI @ AMIT	 Appellant
Through:	Mr.K.B.Andley, Sr. Advocate with Mr.M.L.Yadav, Advocate and Mr.M.Shamikh, Advocate.
versus	
STATE	 Respondent
Through:	Mr.Pawan Sharma, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **PRADEEP NANDRAJOG, J.** (Oral)

1. Heard learned counsel for the parties.
2. Sunita aged 21 years committed suicide by consuming sulphas tablets on 14.4.2003.
3. She was taken to the hospital from her house by her brother Ashok Kumar PW-5, at around 11.00 PM the preceding day, i.e. the intervening night of 14.4.2003 and 15.4.2003.
4. A suicide note Ex.PW-4/G was found and opined by Narender Singh PW-11, Government Examiner of Questioned Documents as also Vinod Kumar PW-13, Deputy Government Examiner of Questioned Documents as being in the hand of the

deceased.

5. The suicide note reads as under:-

"I, Sunita Verma used to take tuitions in chemistry from Amit. Since I had taken late admission some part of the course was missed and in order to complete the course Amit used to take extra classes for me. I was afraid of Amit from the very beginning and used to feel hesitant while speaking before him. While taking extra classes Amit told me to speak freely on all the issues and should treat him as a friend. He told me to come to his house and take notes from him which would help me at the examination. I went to his house with my friend and he gave me some books and notes. He called me again to his house to give me notes. He gave me some sweets saying that it was Prasad. When I ate the sweets I don't know what happened to me because I felt extremely good pertaining to whatever he said. After that he said that he wanted to make friends with me. On his calling me to his house I went there as he spoke very sweetly with me. He said that we could become good friends and much more. I don't know what spell he had cast on me because I started doing everything as per his asking. He established physical relations with me and I did not realize what I was doing. He said that we should not commit a mistake. One day he gave me 'Mala-D' tablets. I knew why the tablets had to be taken and hence got stunned on seeing the tablets. I asked him why was he giving the tablets because he had told me that we would not do wrong acts. He enticed me with a promise of marriage.

I was so trapped by him that neither was I in a position to do anything against him or tell anyone else of the same. Time passed and the relations continued. Soon his behavior changed and he started harassing me. Threatening to defame me he compelled me to submit my body before another person as he had to seek some favour from that person. Therefore, I had to attend to that person and make him happy otherwise Amit would have defamed and ruined me. I am harassed by his atrocities. Amit,

whose real name is Ashok Kumar Rai is a devil and not a human being. He has spoiled me. Amit has ruined me. Amit has not left me in a position to show my face to the society. Amit has made life hell for me. Therefore, I have no option but to embrace death. Therefore, being harassed by the atrocities of Amit and to save myself from being defamed I am committing suicide. It is only Amit who is responsible for my death.”

6. Ashok Kumar PW-5, the brother of the deceased who had removed her to the hospital at around 11.00 PM on 14.4.2003 deposed that when he saw his sister vomiting all of a sudden and on his asking told him that she has consumed sulphas tablets, he asked the reason thereof, upon which she told him that Amit @Ashok Rai had developed intimacy with her and had been giving her Mala-D tablets. He deposed that she told him that when she refused to have physical relations with him he threatened to defame her. He deposed that his sister had told him that she was left with no alternative but to take her life.

7. The doctor namely Dr.Gaurav Vinod Jain PW-9, who conducted the post-mortem of Sunita recorded that vagina of the deceased admitted three fingers comfortably and the hymen showed old healed tears.

8. We eschew reference to the testimony of other

witnesses for the reason the facts relating to the registration of the FIR and that the deceased taking tuitions from the appellant are not in dispute. That she died as a result of having consumed sulphas tablets is also not in dispute.

9. The focus of the trial was the conduct of the appellant; to be gathered with reference to the suicide note of Sunita; namely whether the consent of Sunita to have sex with the appellant was a result of a misconception of facts and whether the appellant knew or had reasons to believe that the consent was given in consequence of misconception. Further, whether the appellant had abetted the suicide.

10. Holding that the suicide note evidenced that the appellant gave a false promise of marrying Sunita, her consent to have sex with him was a result of inducement, the consequence is a finding returned by the learned Trial Judge that the appellant is guilty of raping Sunita.

11. For unexplainable reasons, the learned Trial Judge has also convicted the appellant for the offence punishable under Section 306 IPC i.e. the abetment of suicide.

12. Pertaining to the conviction for the offence punishable under Section 306 IPC, suffice would it be to state

that a charge of abetment to succeed would require the proof of some participative acts to facilitate the suicide by the person committing the suicide.

13. There is no evidence that the appellant gave the sulphas tablets to Sunita. There is no evidence that he facilitated or helped Sunita in what she did.

14. Thus, the finding returned by the learned Trial Judge holding the appellant guilty for the offence punishable under Section 306 IPC is set aside.

15. Pertaining to whether the consent given by Sunita to have sexual intercourse with the appellant is a result of an inducement by the appellant and at the time of the inducement the appellant was having no intention to marry Sunita needs consideration.

16. Now, as per the suicide note the inducement for submitting herself to the appellant was the promise by the appellant to marry.

17. We note that Sunita was aged about 21 years at the relevant time. The appellant was aged about 29 years.

18. Both of them were young.

19. It often becomes difficult to ascertain the intention of

a young couple who chose to have physical relations; namely whether being in love with each other they do the act which by conservative standards would not be acceptable to the society, or whether the girl consented to submit herself on the promise by the partner that he would marry her.

20. In both situations the problem is that the intention of the girl would be impossible to be found. Thus, law required the Court to consider the mental condition of the boy at the time when he made the promise for marriage.

21. If the conduct shows that he had no intention of honouring his promise at the time when the promise was made, it would be a case of inducing consent on a misconception of a fact.

22. Section 90 of the Indian Penal Code reads as under:-

“90. Consent known to be given under fear or misconception. – A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in the consequence of such fear or misconception; or

Consent of insane person. – if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child. – unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”

23. Indeed, Section 90 has two parts. The first part refers to the consent of the person giving the consent. The second part refers to the intention of the person who is the beneficiary of the consent.

24. In the decision reported as 1984 Crl.Law Journal 1535 Jayanti Rany Panda vs. State of West Bengal & Anr. in para 7 the law was stated as under:-

“7. In support of the contention Mr.Hait contended that a misconception as to the intention of the person in stating the purpose for which the consent is asked is a misrepresentation of a statement of fact within the meaning of Section 3 of the Evidence Act, and a consent given on a misrepresentation of fact is one given under misconception of fact within the meaning of Section 90 of the Indian Penal Code. In support of this contention, reliance was placed in the case of Emperor v. Soma, 36 Ind Cas 850 : 18 Cri LJ 18 (Lah). That was a case where the question of consent in the context of an allegation of kidnapping of a minor girl came for consideration. It was held in the facts of that case that the intention of the accused was to marry the girl to one Dayaram and she obtained Mr.Kujan’s consent to the taking away of the girl by misrepresenting her intention. Therefore the point that was decided in that case was that at the time when the offence was committed by taking away the girl, there was a positive misrepresentation of fact, viz., the representation as to the intention regarding the purpose of taking away. In the instant case before us the ‘facts cannot be placed as high as that. 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 that if she had really been assured of marriage by the accused who was visiting her house and in whose promise she had faith, 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 complaint 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 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. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her."

25. The afore-noted decision was cited with approval by the Supreme Court in the decision reported as 2003 (4) SCC 46

Uday vs. State of Karnataka.

26. However, in Uday's case (supra) law was stated in the following words:-

“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 straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.”

27. The observations in para 21 in Uday's case (supra) came up for consideration before the Supreme Court subsequently in the decision reported as 2005 (1) SCC 88 Deelip Singh vs. State of Bihar.

28. Before noting the clarificatory observations of the Supreme Court in Deelip Singh's case (supra) pertaining to the

wide observations in para 21 in Uday's case (supra), we must note that in para 24 in Uday's case (supra), the Supreme Court has noted a categorical finding of fact, being that: *there is no evidence to prove that the appellant never intended to marry.*

29. In Deelip Singh's case (supra) after noting para 21 in Uday's case (supra); the first two sentences thereof were clarified by the Supreme Court in para 28 of the decision which reads as under:-

"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 which was approvingly referred to in Uday case. 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* case (vide passage quoted supra). By making the solitary observation that “a false promise is not a fact within the meaning of the Code”, it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no straitjacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in *Uday* case as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused’s intention to marry cannot be ruled out.”

30. It would be of importance to note that in *Deelip Singh’s* case (supra) the Supreme Court noted that even in *Uday’s* case (supra) the Supreme Court had noted with approval the enunciation of the law in the *Jayanti Rani Panda’s* case (supra).

31. Indeed, in *Deelip Singh’s* case (supra), the Supreme Court noted that the focus of the attention of the Court has to be the mental condition of the accused and on the issue whether from the very inception the accused never really intended to marry the girl.

32. Learned counsel for the appellant does not dispute

the aforesaid proposition of law as finally crystallized with a clarification in Deelip Singh's case (supra). But urges that a meaningful reading of the suicide note shows that Sunita was conscious of the moral consequence of her conduct and was aware of what she was doing. Counsel urges that in the suicide note Sunita has written: *one day he gave me Mala-D tablets. I knew why the tablets had to be taken and hence got stunned on seeing the tablets.*

33. Learned counsel further urges that Sunita has written in the suicide note that when the appellant established physical relationship with her she did not realize what she was doing. Learned senior counsel urges that this second statement of facts shows that Sunita was so deeply in love with the appellant that she became blind to her acts. Thus, counsel urges that keeping in view the age of the two, the possibility of Sunita, being madly in love with the appellant, voluntarily and with free consent having physical relationship with the appellant cannot be ruled out.

34. With respect to the first statement in the suicide note, learned counsel urges that the same evidenced that Sunita knew the consequences of having physical relationship, viz. she

may get pregnant and to avoid the pregnancy was required to take Mala-D tablets. Counsel urges that the same shows the frequency with which she was having sex with the appellant; a fact confirmed by her post-mortem report which establishes that Sunita was habituated to sex.

35. Learned counsel for the State urges that a meaningful reading of the suicide note would show that at the first instance the appellant gave some stupefying drug to Sunita and under the influence of the stupefying drug she did not realize what she was doing and having later on realized what had happened to her, consented to the overtures of the appellant on the promise of marriage. Learned counsel draws our attention to the statement of fact penned by Sunita to the effect that the appellant enticed her with promise of marriage.

36. The question would be: Whether the appellant never ever intended to marry Sunita and obtained her consent by deceiving her with a promise of marrying her. That the appellant was never intending from the very beginning to honour his promise of marrying Sunita is evidenced, urges learned counsel for the State, from the fact penned in the suicide note that the appellant had pestered Sunita to have sex

with some other person from whom he had to seek a favour and that not so doing, Sunita was threatened to be defamed and life was made miserable for her.

37. The suicide note has to be read as a whole. The emotions of the deceased had to be segregated vis-à-vis the statement of fact noted in the suicide note, which, needless to state have influenced the emotions of Sunita.

38. A perusal of the suicide note shows that Sunita was lured to the house of the appellant on the pretext of helping her in extra classes. She was coaxed into friendship and something more. Obviously, the something more has to be a promise of a matrimonial bond. She was given a stupefying drug and under influence thereof indulged in a promiscuous relationship. Sweet talk continued between the two thereafter. Needless to state, the two continued to enjoy the bodies of each other till Sunita realized that the appellant was misusing her.

39. We find that Sunita had categorically mentioned about a promise of marriage and the conduct of the appellant in not honouring the same requiring her to submit herself to a person from whom the appellant had to seek a favour.

40. The suicide note establishes that the intention of the

appellant was to use the unfortunate girl and never marry her.

41. We concur with the view taken by the learned Trial Judge that consent of Sunita was obtained under a promise of marriage and that the intention of the appellant from the very beginning was not to marry Sunita. The proposed matrimonial bond was nothing but a bait to obtain Sunita's consent to have physical relationship with the appellant.

42. A last submission made by learned counsel for the appellant pertaining to the sentence needs to be noted and dealt with.

43. Learned Trial Judge has imposed a sentence of life with fine of Rs.5,000/- for the offence punishable under Section 376 IPC.

44. We note that Sunita was aged 21 years and the appellant was aged 29 years when they indulged in a promiscuous relationship.

45. At the age of 21, Sunita was mature enough to understand the moral worth of her acts. She was conscious that by having repeated sex with the appellant she could become pregnant and hence the appellant had told her to take Mala-D tablets.

46. There is some participative act committed by Sunita. It is not a case where the appellant forced herself on Sunita. There is no evidence that the appellant compelled Sunita to have sex with the other person. We note that the Sunita has only written that the appellant was compelling her to have sex with a third person. She has not written that she was actually made to have sex with a third person.

47. Considering the totality of the circumstances and noting that the appellant has suffered incarceration for 5 years and 6 months and would be entitled to remissions on account of his good conduct in jail; noting further that the appellant has redeemed himself in jail evidenced by the fact that he took his civil services examinations and qualified for being appointed to the Indian Administrative Services; we are of the opinion that the custodial sentence already suffered by the appellant would meet the ends of justice as a requisite punishment.

48. The appeal stands disposed of setting aside the conviction of the appellant for the offences punishable under Section 306 IPC. The conviction is sustained for the offences punishable under Section 376 IPC, but the sentence is reduced to already undergone period. We note that the fine imposed has

already been paid by the appellant.

49. The appellant be set free if not required in any other case.

50. Copy of this order be supplied dasti to learned counsel for the appellant.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

FEBRUARY 09, 2009

Dharmender