Rewriting *Uday v. State of Karnataka*: An Anti-Caste Reckoning of Consent in 'Promise to Marry' Cases

By *Nikita Sonavane*[*]

Uday v. State of Karnataka
Criminal Appeal No. 336 of 1996

2003 4 SCC 46

Delivered on: February 19, 2003

Nikita Sonavane, J. *(dissenting)*

1. The matter before us arises under Article 136 and relates to the conviction of the accused-appellant Uday. This appeal by special leave is directed against the judgment and order of the High Court of Karnataka at Bangalore dated 20th April, 1995 in Criminal Appeal No. 428 of 1992 whereby the High Court while dismissing the appeal and upholding the conviction of the appellant under Section 376 of the Indian Penal Code (IPC), reduced the sentence to two years rigorous imprisonment and a fine of Rs.5000/- and in default, to undergo further rigorous imprisonment for 6 months. Earlier, the Sessions Judge, Karwar before whom the appellant was tried in Sessions Case No.16/90, by his judgment and order dated 27th November, 1992 sentenced the appellant to seven years rigorous imprisonment under Section 376 of the IPC and a fine of Rs.20,000/- and in default, to undergo further rigorous imprisonment for six months. He also directed that out of the fine, if realised, a sum of Rs.10,000/- be given to the prosecutrix/complainant.

2. I have had the privilege of reading the drafts of the judgment of my colleagues, B. Singh, J. and Santosh Hegde, J. I would like to respectfully disagree with their verdict to acquit the accused-appellant under Section 376 and 90 of the IPC. Having carefully read the judgement of my colleagues, I am inclined to record a separate verdict while dealing with the propositions canvassed before us.

3. The Trial court and the High Court have concurrently held that though the prosecutrix had consented to sexual intercourse with the appellant, the consent was obtained by fraud and deception inasmuch as the appellant induced her to consent on the promise that he shall marry her. It was under such misconception that for several months thereafter, the prosecutrix, who claimed to be deeply in love with the accused, continued to have sexual intercourse with him till it was discovered that she was pregnant. When the appellant did

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not agree to the performance of marriage, at that stage, the complainant lodged a report in the police station pursuant to which investigation was taken up and the appellant was put up for trial before the Sessions Judge, Karwar.

4. The Sessions Judge, accepting the evidence of the prosecutrix, concluded that though she had consented to sexual intercourse with the appellant, that consent was not consent within the meaning of clause two of Section 375 IPC having regard to Section 90. According to the Session judge, consent was obtained by making a false promise of marriage and, therefore, it was a consent obtained by fraud and misrepresentation. The Sessions judge, therefore, held that in the facts and circumstances of the case, the appellant had sexual intercourse with the prosecutrix without her consent and was, therefore, guilty of the offence of rape, punishable under Section 376 of the Indian Penal Code. The High Court in appeal affirmed the finding of the trial court substantially for the same reasons.

The Facts

5. The prosecutrix was aged about 19 years on the date of occurrence i.e. in the last week of August, 1988 or the first week of September, 1988. The appellant also was about 20-21 years of age when the incident took place. There is, therefore, no dispute that the prosecutrix was above the age of 16 on the date of occurrence.

6. The prosecutrix was in college and residing with her parents and siblings. In her deposition, she stated that the appellant was her elder brother's friend. The appellant resided in the same neighbourhood, and frequently visited the prosecutrix's house. During this period, a friendship developed between the prosecutrix and the appellant.

7. The prosecutrix and the appellant belong to different castes. The prosecutrix is a member of the Goundar caste which has been listed as one of the Other Backward Classes (OBC) in Tamil Nadu. Various caste and ethnic groups like the Goundars were included in the OBC category on account of their social and educational backwardness following the Mandal Commission report, 1980. The appellant belongs to the Daivadnya Brahmin caste, which is a subset of the Hindu Brahmin caste. Brahmins are first and highest of the four hierarchically organised *varnas* in the caste system. The Daivadnya Brahmin is a predominant caste group in the states of Karnataka, Goa and Maharashtra. Therefore, there is a significant power differential in the caste backgrounds of the appellant and the prosecutrix.

8. In August or September, 1988, at about midnight, when the prosecutrix was studying, the appellant came to the window of her room and asked to talk to her. Given the nature of their relationship, she accompanied him and thereafter they went to the place where the house of the appellant was under construction. He initiated sexual intercourse with the prosecutrix. She was not willing to have sexual intercourse, but consented ultimately because of the appellant's promise of marriage. They continued to meet thereafter and engaged in sexual intercourse leading to the prosecutrix becoming pregnant. During this period as well, the appellant continued to assure the prosecutrix that he would marry her.

9. Whenever the prosecutrix raised the issue of marriage with the appellant, he assured that he would marry her after completion of the construction of his house, and that it would be a registered marriage. The appellant also insisted that the prosecutrix let their relationship remain clandestine. This continued till the prosecutrix conceived, and was eventually compelled to disclose everything to her mother during the second trimester. Gradually her other family members found out about the pregnancy and the prosecutrix's brother asked the appellant if he would marry her.

10. The appellant told him that he would marry her, but this fact should not be revealed to his (appellant's) parents. In the eight month of pregnancy, the appellant asked the prosecutrix to elope with him, and it was planned that they would leave early in the morning. The appellant did not show up at the decided time. Later, the appellant's cousin informed the prosecutrix that the appellant had gone out of town.

11. Eight days later when the appellant returned, the prosecutrix's brother again asked the appellant as to whether he would marry her. The appellant told her brother that he would bear her maintenance expenses after her delivery and he would marry her after the completion of the construction of his house. This suggestion was not acceptable to the prosecutrix and her brother which angered the appellant. Next day when her brother wanted to meet the appellant, he refused to meet him. Since the appellant did not marry her as promised, the prosecutrix lodged an FIR with the police on 12th May, 1989. Subsequently, she delivered a child on 29th May, 1989.

The Relevant Law

12. The relevant provisions and statutes for the present appeals are Section 376 read with Section 90 of the IPC. While engaging with particular sections and questions of law, I would like to delineate certain broad issues where my reading of the law would differ from my colleagues. These issues would be firstly, the interpretation of consent under Section 375. Secondly, factors relevant for the interpretation of Section 90, and finally, characterisation of the prosecutrix.

13. Section 375 of the IPC defines the offence of rape as below:

> *"A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—*
> *(First) — Against her will.*
> *(Secondly) —Without her consent.*
> *(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.*
> *(Fourthly) —With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

14. According to Section 90 of the IPC:

"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 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."

Issue(s)/Points of Intervention

Definitions of Consent

15. Consent (rather the absence of it) forms the fulcrum of the offence of rape.

16. The second clause in Section 375 deals with the scenarios where sexual intercourse is termed to be rape when it is 'without the consent' of the woman. My colleagues rely on various definitions of consent in paragraphs 10 to 15 of their opinion.

17. In *Rao Harnarain Singh v. State*[AIR 1958 P&H 123], it was observed:

"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 not consent. There is a difference between consent and submission. 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. ***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."*

18. In *Anthony alias Bakthavatsalu v. State* [AIR 1960 Mad 308], Ramaswami, J., in his concurring opinion, fully agreed with the principle laid down in Rao Harnarain Singh's case and went on to observe:

> *"A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wants**. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former**."*

19. The High Court of Kerala observed in *Vijayan Pillai @ Babu v. State of Kerala* [1989 (2) K.L.J 234], that:

> *"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 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. Consent to an act involves submission, but by no means follows that a mere submission involves consent."*

20. Jowitt's Dictionary of English Law, also relied on by my colleagues, defines consent as including "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**."

21. While the jurisprudence around consent formulated by this Court in its initial years is valuable, the definition of consent has evolved over a period of time. In its 172nd Report, the Law Commission of India defined consent as 'unequivocal voluntary agreement'.

22. In its recommendation to the 172nd Law Commission, the NGO Sakshi relied on the following definition of consent: "consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; **it always is a voluntary, and conscious acceptance of what is proposed to be done by another and concurred in by the former**."

> *23. All definitions of consent relied on by my colleagues as well as recent formulations of the same require consent to be voluntary coupled with full knowledge of the act to be done, and not acquiescence to it.*

24. Feminist scholars argue that the context in which the relevant behaviour or utterance occurs is crucial for the determination of consent. For instance, if a woman says "yes" or even feigns sexual enthusiasm in order to keep a knife-wielding attacker from becoming angry and hurting or killing her, it would be absurd to regard her behaviour or utterance as consent (or at least as meaningful consent). The question is, what other contextual constraints and pressures may also undermine the validity of a woman's (apparent) consent. To put the point another way, having granted that "no" always means no, we must recognize that, in some cases, "yes" also means no.[1]

25. My colleagues in their opinion agree that there is no straight jacket formula for determining whether consent to sexual intercourse is voluntary, or whether it is given under a misconception of fact. Consent can be perused from the facts and circumstances of a case.

26. It is important to interpret consent given by the prosecutrix in this case in light of these aforementioned definitions.

Dynamics of an inter-caste relationship

27. In their majority opinion my colleagues state that:

> *"The prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant.* ***She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members.*** *She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to."*

28. The appellant was a family friend of the prosecutrix. He resided in the same neighbourhood, visited the prosecutrix's house almost every day, talked to her, along with other members of the family. A friendship developed between them and one day, the appellant proposed marriage. The appellant was already a friend, someone who the prosecutrix trusted at the time he promised to marry, given the nature of the relationship. Thus the appellant could be said to be involved in a fiduciary relationship with the prosecutrix.

29. The prosecutrix was not willing to engage sexually with the appellant when their relationship transformed into romance. However, given the circumstances, she consented to the sexual intercourse because the appellant had promised to marry her.

30. It is important to locate the dynamics of a heterosexual intimate partner relationship against the background of a caste-based patriarchal society like India. The power dynamics between the appellant and prosecutrix are compounded due to differences in their 'higher' and 'lower' caste location(s). The Constitution along with laws such as the Scheduled

1 *S. J. Schulhofer*, Unwanted Sex: The Culture of Intimidation and the Failure of Law, Cambridge 1998; *Keith Burgess-Jackson*, Rape: A Philosophical Investigation, Aldershot 1996, pp. 91-106.

Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989[2], recognises violence, that has been historically inflicted by the dominant oppressor castes on the Scheduled Castes (Dalits), Scheduled Tribes (Adivasis) and sexual violence against women from non-dominant castes is an oft used tool of caste oppression that has been criminalised under the Act. Yet this constitutionally recognised understanding of caste based sexual violence is absent from the majority opinion.

31. Goundars have been listed as an OBC group in Tamil Nadu, owing to their backward social and economic status in the State as a Shudra[3] caste, and belong to the larger political category of Bahujan[4] in India. It is important to view the relationship between the prosecutrix and the appellant in light of the dynamic between dominant and Bahujan caste groups. In India, women involved in inter-caste relationships grapple with constraints on their sexual autonomy imposed by the intersection of their caste and gender identities. My colleagues do not take into account the structures of dominance that pervade an inter-caste heterosexual relationship**.**

32. Brahminical Patriarchy refers to a particular form of patriarchy in societies organised on the basis of caste resting on controlling the sexualities of women. It ensures that women belonging to Dalit, Bahujan castes, Adivasi and ethnic groups are accorded with "less honour and dignity" deeming them to be more sexually accessible than women belonging to dominant castes.[5] Therefore, in a caste-based society, any discourse on consent needs to be cognizant of the contextual nuances of the 'graded patriarchy' emerging from the intersection of caste and gender.

33. It is clear from the circumstances that the accused utilised the position of trust he enjoyed by virtue of being a family friend, and subsequently a romantic partner. Throughout the course of their relationship, the appellant continued to assure the prosecutrix of marriage in order to establish a sexual relationship with her.

34. Following the amendments to the IPC in 1983, brought about in the aftermath of the rape of an Adivasi woman in police custody, the law now recognises the exploitation of a fiduciary power in relationships amounting to rape under Section 376B,[6] and Section 376C[7]. This sets a precedent to interpret clause two of Section 375[8] in this light particularly in cases of rape by intimate partner and acquaintance.

2 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.

3 The Shudra varna was the lowest of the four 'major' varnas (caste based occupational stratification) and was assigned the duty of working hard in all the productive domains that would serve the three varnas above it in the hierarchy.

4 This term was coined by Manyavar Kanshi Ram, founder of Bahujan Samaj Party. He used the Pali word 'Bahujan' meaning 'Majority' to unite and mobilise Indian minorities under one banner including marginalised caste, tribes, other backward class, Muslims and other religious minorities.

5 *Uma Chakravarti*, Gendering Caste: Through a Feminist Lens, New Delhi 2002, pp 13.

6 S. 376B, Indian Penal Code 1860.

7 S. 376C, Indian Penal Code 1860.

8 S. 375, Indian Penal Code 1860.

35. In their opinion, my colleagues adopt an extremely parochial view of inter-caste relationships. They state that "she (the prosecutrix) must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

36. While my learned colleagues attribute the impossibility of marriage between the appellant and the prosecutrix, to the endogamous caste system that prohibits inter-caste marriages thereby reifying the institution of caste while also penalising the prosecutrix for not adhering to caste norms.

37. My learned colleagues rely upon the inability of the prosecutrix in recognizing the difference in her and the accused's caste, while judging credibility of the promise of marriage made to her has been relied upon as evidence of her participation in the sexual act as 'voluntary and deliberate'. Interestingly, the responsibility of non-compliance with casteist norms is never attributed to the appellant, who consistently promised marriage to the prosecutrix despite being bound by the same endogamous constraints that the prosecutrix purportedly seems to be bound by as per the majority opinion.

38. The subject of inter-caste relationships was debated at length by the Constituent Assembly during the discussion on the Hindu Code:

> *"Today we recognise that caste shall go and therefore, all these provisions that are laid down here in this Bill relating to inter-caste marriage need not raise any opposition at all. There is no doubt whatsoever that there is a very large body—if not an overwhelming body—of public opinion in favour of abolition of caste. Otherwise, what are all these provisions that we have laid down in the Constitution? Caste shall go. If we take that position then there is nothing objectionable so far as those provisions are concerned which relate to inter-caste marriage."*

39. Dr. B.R Ambedkar in his seminal speech on the 'Annihilation of Caste'[9] specifically addresses the significance of inter caste relationships:

> *"I am convinced that the real remedy is inter-marriage. Fusion of blood can alone create the feeling of being kith and kin, and unless this feeling of kinship, of being kindred, becomes paramount, the separatist feeling—the feeling of being aliens—created by Caste will not vanish."*

40. My colleagues do not engage with the anti-caste legacies, resistance and Constitutional commitment to inter-caste marriages while pronouncing caste to be a legitimate barrier to marriage.

9 *B. R. Ambedkar*, Annihilation of Caste: an Undelivered Speech, New Delhi 1990, p. 5.

Veracity of the promise

41. It is crucial to examine the veracity of the promise made, to understand its influence on the prosecutrix's grant of consent.

42. There are two primary factors that create a misconception of fact as per section 90 leading to the prosecutrix's consent being vitiated. 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 majority opinion held that "we have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant." My colleagues have failed to take the following factors into account that vitiate the prosecutrix's grant of consent.

43. The prosecutrix said in her statement that she was unwilling to engage with the appellant sexually, but he persuaded her promising marriage. Whenever she talked to the appellant about getting married, he assured her that he would marry her after completion of the construction of the house, and that it would be a registered marriage. This state of affairs continued till she discovered that she was pregnant.

44. My colleagues rely on the judgment by the Calcutta High Court in *Jayanti Rani Panda v. State of West Bengal* [1984 Cri LJ 1535], in their majority opinion. In this case a Division Bench of the Calcutta High Court interpreted Section 90 of the IPC as below:

> *"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. 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."*

45. The High Court holds that a fact must have 'immediate relevance' to the grant of consent for it to be included within the scope of Section 90. It is apparent from the facts of this case that the prosecutrix consented to sexual intercourse with appellant on the basis of the promise of marriage. She was unwilling to engage sexually with him, but the appellant repeatedly assured her that they would get married. All instances of sexual intercourse between them were a result of the constant reassurances by the appellant of such a promise of marriage leading up to the pregnancy. Therefore, it is evident from the facts of this case that the promise of marriage is a fact that has 'immediate relevance' to the grant of consent by the prosecutrix. The appellant was fully aware that the prosecutrix agreed to sexual intercourse only due to such a promise. He kept reassuring her throughout the course

of their relationship that he would marry her. While ensuring that the prosecutrix would continue to keep their relationship a secret even after she became pregnant.

46. Criminal law scholars Prof Andrew Ashworth and Jeremy Horder in their book 'Principles of Criminal Law'[10] state that "the essence of the principle of mens rea is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences." They also add that "the notion of choice is not an abstract phenomenon, but should in principle be linked to the circumstances or consequences specified in the definition of each crime."

47. The element of intention or the mens rea of the appellant can be gauged from the circumstances of the case. The Calcutta High Court sets an impossibly high and unnecessary burden on the prosecution to prove the absence of intention to marry since the inception of the relationship. The lack of the appellant's intention to marry can be sufficiently established through the facts of the case whereby he continued to dodge the prosecutrix about the marriage. This is sufficient to prove that he wanted to deceive the prosecutrix into having sex with him.

48. This view has also been espoused by the Patna High Court in the case of *Saleha Khatoon v. State of Bihar* [1989 Cri LJ 202].. In this case it was held that

> *"consent was obtained on the basis of some fraud and allurement or practising deception upon the lady on the pretext that ultimately she will be married and under that pretext she allowed opposite party No. 2 to have sexual intercourse with her. Therefore, this tainted consent or consent of this nature which is based on deception and fraud, cannot be termed, prima facie, to conclude that it was 'with consent'. Had the lady known that ultimately she would be deserted, the facts and circumstances stated above and the materials placed would go to show that she would have refrained from giving such consent. Then a question would arise what was the purpose for which she gave consent, it was fraud that was practised on her or she was deceived by giving false assurance. Such type of consent must be termed to be consent obtained without her consent. Consent obtained by deceitful means is no consent and comes within the ambit of ingredients of the definition of rape."*

49. The Calcutta High Court judgment which the majority opinion primarily relies on, characterises the prosecutrix as 'promiscuous' owing to her sexual involvement with the appellant in that case. We must be careful about not relying on opinions that seek to assassinate the characters of the survivors of sexual violence.

50. The Indian Evidence (Amendment) Act, 2002[11] recently deleted Section 146 of the Evidence Act that forbade the asking of "questions as to the general immoral character of the prosecutrix in the cross-examination of the prosecutrix in cases of rape or attempt to

10 *Andrew Ashworth / Jeremy Horder*, Principles of Criminal Law, Oxford 2013, p 10.

11 Indian Evidence Act 1872.

commit rape." Further, clause (4) of Section 155 of the Evidence Act (which permits the person accused of rape or attempt to ravish to prove that the prosecutrix was of generally immoral character) has been deleted by the recent amendment.

51. The elimination of these provisions by the legislature from statute has been a necessary step in this direction.

52. PW 4 Vanamala in her statement states that she saw the prosecutrix in the company of the appellant soon after the first instance of sexual intercourse between the prosecutrix and the appellant. On inquiring about the nature of their relationship, the prosecutrix told her that she and the appellant were in love with each other and he had promised to marry her. She further states in her testimony that the prosecutrix asked her to not disclose this to anybody as the appellant said that he would harm himself if this were made public.

53. It is important to note that the appellant continued to engage with the prosecutrix sexually by repeatedly assuring her that they would get married soon. He also ensured that their relationship remained clandestine by threatening to take his own life. In light of the facts of the case, this can be construed as emotional manipulation to continue his sexual engagement with the prosecutrix.

54. The appellant continued to assure the prosecutrix about his intention to marry her even after she became pregnant. The suspicion of her mother was aroused during the 6th month of pregnancy and she was, therefore, compelled to disclose everything to her mother. She told the appellant about her having disclosed everything to her mother, and the appellant again assured her that he would take her to some other place and get married. Gradually when others came to know about the affair and her pregnancy, her brother, PW 3 enquired of the appellant as to whether he would marry her. The appellant told her brother that he would marry her, but this fact should not be revealed to his (appellant's) parents.

55. Despite being well-aware of the fact that the prosecutrix's consent to sexual intercourse rested completely on the promise of marriage made by the appellant to her, he continued to assure her from the beginning of their relationship leading up to her pregnancy and her brother's consequent involvement. Thus, it can be gauged from the circumstances that the appellant never had any intention of marrying the prosecutrix.

56. It is well settled law as laid down by this Court in *State of Punjab v. Gurmit Singh and others* [(1996) 2 SCC 384], that "if the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations." This position has been reiterated by the Court in several other judgments [*State of Rajasthan v. N.K* [(2000) 5 SCC 30]; *State of Himachal Pradesh v. Lekh Raj and another* [(2000) 1 SCC 247]; *Madan Gopal Kakkad v. Naval Dubey and another* [(1992) 3 SCC 204]].

57. In *State of Himachal Pradesh v. Gian Chand*[(2001) 6 SCC 71], on a review of decisions of this Court, it was held that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc., if the same is found to be natural, trustworthy and worth being relied upon.

58. In this case, apart from the testimony of the prosecutrix, there is ample corroborative evidence in the form of the testimonies of PW 2, PW 3 and PW 4 which shows that the appellant did not have the consent to sexual intercourse as he had defaulted on the promise that he had made to her.

Consent and intimate partner relationships

59. The aspect of 'voluntariness' is a crucial aspect of consent. The exercise of such voluntary consent needs to be viewed in light of the circumstances in which it is given. In this case, the appellant utilised the power enjoyed by him by virtue of being a family friend and more importantly as a man involved in a heterosexual romantic relationship with the prosecutrix. The intersectionality of gender and caste in this relationship is crucial in determining the grant of consent in this case. My colleagues do not account for this power dynamic in their determination of consent.

60. The majority opinion holds that:

> *"when two young persons are madly in love, that they promise to each other several times that come what may, they will get married… In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it."*

61. Desire cannot be considered to be synonymous with consent. The prosecutrix may have been desirous of engaging sexually with the appellant, but that does not imply that she consented to sexual intercourse with the appellant. Romantic relationships cannot be presumed to create an automatic presumption of consent. My colleagues make the mistake of interpreting desiring sex with a romantic partner as being synonymous with consenting to sex.

62. By contrast, a woman who is deceived to believe that she is having sex with her husband is considered rape. As laid down in clause four of Section 375, when a woman has sex with a man "when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married" is considered to be an act of rape. Therefore, a situation where a false belief of such marriage is created is grave enough to vitiate consent. This is also an

acknowledgment of the role of the institution of marriage in determining consent to sexual intercourse in India.

63. I concur with my colleagues that no straight jacket formula can be laid down for the determination of consent. Also, that consent must be determined based on the facts of each case. However, the majority opinion does not engage with the facts of this case especially within the context in which they have emerged.

64. Through a thorough perusal of the facts and circumstances, it is evident that the appellant misused his fiduciary position to deceive the prosecutrix in order to have sexual intercourse with her. Existence of an inter-caste romantic relationship does not raise the presumption of a valid consent. It is crucial to take into account not just the facts and circumstances of a particular case, but also the fraught social context in which women operate in order to make decisions.

65. Through their judgments, Courts must look to further the jurisprudential discourse on consent. A discourse that is derived from a rich contextual analysis especially in the case of heterosexual intimate partner relationships. Heterosexual intimate partner relationships (marital and non-marital) particularly inter-caste relationships give rise to power dynamics that requires a careful examination of both the gendered and caste context of such a relationship.

66. Given that the legal standard for determining sexual violence is still consent, it is necessary to move beyond the binary of yes and no in understanding consent. In cases where prima facie it seems like the prosecutrix has said yes, it becomes the responsibility of the Court to then examine the circumstances under which the prosecutrix has said yes.

Scope of interference under Article 136

67. The scope of its interference under Article 136 has been expounded by this Court in its decisions. It is a well settled position that the power of this Court under Article 136 of the Constitution could be exercised even in cases of concurrent findings of fact, but in criminal appeals this Court does not interfere with the concurrent findings of the fact save in exceptional circumstances. This view has been expressed and reiterated by this Court in several judgments [*Madras v. A. Vaidyanatha Iyer* [1958 SCR 580]; *Balak Ram v. State of UP* [(1975) 3 SCC 219]; *Arunachalam v. P. S. R. Sadhanantham* [AIR 1979 SC 1284]].

68. On the question of appraisal of evidence under Article 136, this Court in *State of U.P. v. Babul Nath* [(1994) 6 SCC 2], this Court, while considering the scope of Article 136 as to when this Court is entitled to upset the findings of fact, observed as follows:

> *"At the very outset we may mention that in an appeal under Article 136 of the Constitution this Court does not normally reappraise the evidence by itself and go into the question of credibility of the witnesses and the assessment of the evidence by the High Court is accepted by the Supreme Court as final unless, of course, the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of*

> *the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."*

69. My colleagues in their opinion make no mention of the 'exceptional circumstances' that merit interference with concurrent findings recorded by the Trial Court and the High Court under Article 136. Neither do they mention any evidentiary or procedural lapses that would merit such interference. Therefore, there is no adherence to judicial precedent formulated by larger benches of this Court. Judgments, even if not written for posterity, require judges to discharge the burden of upholding judicial precedent which the majority opinion fails to do.

70. Even if one were to argue that it is not solely incumbent upon the judiciary to subvert all forms of oppressive social hierarchies, it is constitutional responsibility to not perpetuate them. The Constitution of India categorically forbids all forms of caste discrimination. It is, therefore, crucial to uphold constitutional morality in every judgment delivered by this Court.

Conclusion

71. It is also amply clear from the facts and circumstances of this case that the appellant did intend to marry the prosecutrix and continued to engage with the prosecutrix sexually by promising to marry her. Given these aforementioned factors, in my opinion, this appeal deserves to be dismissed and conviction by the High Court under Section 375 and Section 90 of the IPC deserves to be upheld.

72. There is one question that remains unaddressed in this case and several other cases of rape resulting in pregnancy. In cases of rape especially those resulting in pregnancy, the provision for providing compensation is crucial. The following principles for providing such compensation have been laid down in the Delhi Domestic Working Women's Forum case:

> *"It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India, to set up a Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment. Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of the child but if this occurred as a result of the rape."*

73. The decision in *Bodhisattwa Gautam v. Miss Subhra Chakraborty* [AIR 1996 SC 922], further laid down that based on principles set out in *Delhi Domestic Working Women's Forum*, the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offences of rape which, as pointed out above is an

offence against basic human rights as also the Fundamental Right of Personal Liberty and Life.

74. The Central Government must expedite the process of drafting, and implementing a scheme for awarding compensation to survivors of sexual violence through the Constitution of a Criminal Injuries Compensation Board.

75. Order for granting compensation to survivors in such cases could be considered under Section 357 (b) of CrPC until such a scheme is formulated.