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AN ANALYSIS OF CONSENT AS A DEFENCE

UNDER INDIAN PENAL CODE

INTRODUCTION TO THE STUDY

At first, we should try understanding the definition of Consent “Consent means something that is done deliberately and by free will, it is an occurrence of wills.”¹ It involves the deliberate use of knowledge and intelligence of said moral and physical effect of the act.

In the case, Dilip Kumar V State of Bihar², it was clearly stated that free consent cannot be used as defense by stating “consent obtained by intimidation, force, mediated imposition, circumvention, surprise or undue influence, therefore is a mere delusion and not a deliberate and free act of mind”³. So, the point raised in this case was, if a submission lacks knowledge, then that would not hold to be valid consent.

Under the Indian Penal Code, there are in total two kinds of consent which are being used. First is consent of victim which may or may not exonerate the accused from criminal liability. (Relevant Sections 87-92, 497, 361, 362, 375, 376 D, 383-498, 82-83, 84-86, 312-316, exception 5 to SECTION 300, 305, 306 of IPC).

Second is consent of co-accused which may inflict equal punishment under joint liability (Sections 34-38, 114, 149, 396 460 of IPC) or may be punished with unequal punishment (Sections 107, 120A, 121A, 128, 130, SECTION 134, 136, 154- 158, 197, 212, 213, 215-219, 221-223, 225A, 242-243, SECTION 411-414, 475 of IPC).

¹ 12 PSA PILLAI, CRIMINAL LAW, 121

² Dilip Kumar v. State of Bihar, AIR 2005 SC 203.

Consent in the criminal law (section 90 of the Indian Penal Code, 1860). The very valid consent should be given by an adult who is of unsound mind. Also, the consent must be given after reasonable reasoning of the facts and the circumstances. Consent should be given in presence of witnesses and preferably in written format. All the components of valid consent are applicable and allowed even for the consent in the Criminal law. According to the criminal law, it is an offence to cause any grievous hurt or death even if the person's consent to suffer is taken.

All these points are kept in mind while the case of organ transplantation, the donor may have given his consent under some pressures by his family members, social or financial conditions. In such cases, if there is an express will of the donor, hence his body is the very property of his legal heirs and their consent is to be taken into consideration after him.

SECTION 87 ACT NOT INTENDED AND NOT KNOWN LIKELY TO CAUSE DEATH OR GRIEVOUS HURT, DONE BY CONSENT

Section 87 of the Indian Penal Code, 1860 says that-

“Act not intended and not known to be likely to cause death or grievous hurt, done by consent. Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer which is likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or to be intended by the doer to cause, to any person, above 18 years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to that risk of harm.”⁴

Illustration- A and B agree to play Rugby together for enjoyment. This agreement also includes consent of each other to suffer any hurt while playing. In course of the play if without any foul play, A causes while playing fairly cause harm to B. such harm would not lead to any offence. As it is absolute and unconditional restriction. Implied consent can be inferred by the facts and the circumstances of the particular facts of the case, and it is not compulsory for the general rule to be present in this regard.

This section of Indian Penal Code is based on the principle ‘volenti non fit injuria’ which literally means the one who consents suffers no injury. The very policy and idea behind this whole concept, everyone is the best judge of his or her own interest, and hence no one consents to what he contemplates injuries to his very own interest. It is important that the person who is giving consent should be above eighteen years of age and should have full knowledge of the act which he is going to do or have done. This section does not give immunity to acts which are done

⁴ Indian Penal Code, 1860, §87

intentionally causing of grievous hurt, or where the person or the doer has complete knowledge that death or grievous hurt is likely to result or happen in future to one giving consent.

The case of *The Queen v. Poonai Fattemah*⁵, the accused who professed to be snake- charmer, induced to make it believe to the deceased and stated that he would protect the deceased from any harm caused by the snake bite or so. The deceased gets bitten by the snake which leads to death of the deceased. The defense of the consent gets rejected in this case.

SECTION 88 ACT NOT INTENDED TO CAUSE DEATH, DONE BY CONSENT IN GOOD FAITH FOR PERSON'S BENEFIT.

Section 88 of Indian Penal Code, 1860 states that-

*“Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.”*⁶

Illustration- A, a surgeon knowing that a particular operation is tend to cause death of Z, who is suffering a lot of pain. A performs operation on Z in a good faith so as to benefit Z, with z's consent. A won't be held liable in this case if Z dies while the course of operation or so. Hence the act was not known or not intended to be cause death of a particular person, done and taken under the good faith with consent of the person whom harm is caused for his or her benefit is not an offence.

*P. Rathinam vs Union of India*⁷ on 26 april, 1994, the Hon'ble Supreme Court held that section 309 was unconstitutional in nature because it violates article 14 and 21 of Indian constitution. The question which was raised in this case was if a person wants to end his or her life and permits somebody to kill him or her, in this case the killer may be held liable and responsible for the offence of murder.

SECTION 89 ACT DONE IN GOOD FAITH FOR BENEFIT OF CHILD OR INSANE PERSON, BY OR BY CONSENT OF GUARDIAN. PROVISOS.

This section along with section 88 and 92 of the code deals with the basic acts done for the benefit of the other person. The section 93 deals with the communication made for benefit of a person. The very said authors of this code observed that:

⁵The Queen v. Poonai Fattemah (12 W.R., Crim. Rul., 7) citation

⁶ Indian penal Code, 1860, §88.

⁷P. Rathinam vs Union of India 1994 AIR 1844, 1994 SCC (3) 394

“A crazy person might be in a state which makes it legitimate that he ought to be placed into a straight petticoat. A kid may meet with a mishap which may render the removal of an appendage essential. In any case, to put a straight petticoat on a man without his assent is, under our definition, to submit an attack. To amputate an appendage is, according to us, deliberately to cause appalling hurt, and as sharp instruments are utilized, is an exceptionally reformatory offense. We have hence given by Clause 71 (this segment the assent of the watchman of a sufferer who is a baby or who is of unsound personality will, all things considered, have the impact which the assent of the sufferer would have if the sufferer were of ready age and sound personality.”⁸

For example- Acting in the good faith towards his child, without taking the consent of the child, approves his child to go through a stone cut surgery. Knowing this operation would cause child’s death but does not intending for the death of the child. So, a falls completely under exception as his one motive and objective was to cure the child.

According to the third proviso of this section is that this exception shall not extend to voluntary causing of grievous hurt or to attempting to cause grievous hurt unless the sole purpose of the doer is to prevent the death or any grievous hurt or to cure any grievous disease.

According to this act, the protection under this section is only available only when the act is done for the benefit of the other person whose age is under twelve years of age, or any person who is of unsound mind. The expression of the word good faith is more elaborated in section 52 of this Indian Penal Code, 1860.

K.A. Abdul Vahid Vs State of Kerala⁹, The issue raised in this particular case was- when a teacher beats a student with a cane as he showed disobedience to the rules. Hence, whether he would be proceeded against the provisions of Indian Penal code, 1860 is the questions.

SECTION 90 CONSENT KNOWN TO BE GIVEN UNDER FEAR

Section 90 of Indian Penal Code, 1860 talks about Consent being used as a defense and definition of consent says that-

“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 consequence of

⁸ Observations made by authors derived from section 88/ 92/ 93

⁹ K.A. Abdul Vahid Vs State of Kerala (2005) Cr.L.J. 2054 (Ker)

such fear or misconception; or 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 unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age”¹⁰.

Basically, the whole definition of consent in section 90 has been defined negatively, as a consent is not such consent as what is intended in this particular section. Here in the first part of the definition it is clearly stated that if consent is given by person under fear of injury or fear of misconception of fact and if the person doing the act knows or has reason to believe that the consent was given under any of these conditions. Hence, in this first part of the definition FEAR OF INJURY AND MISCONCEPTION OF FACTS makes the consent illegal.

Under the second part of the definition there is three categories of people who are unable to understand the nature and consequences of the act consented. These three categories are as follows CONSENT BY PERSON OF UNSOUND MIND, CONSENT BY INTOXICATED PERSON AND CONSENT BY INFANTS.

In the case of Jakir Ali vs State of Assam¹¹, Tthe facts of the cases were as it was proved that the beyond the doubt that the accused had sexual intercourse with victim with the false promise of marriage. It was held by the Gauhati High Court that the submission of body by a woman under fear or misconception cannot be taken as a consent’ hence conviction of accused under section 376 and 417 of Indian Penal Code was proper and just.

SECTION 92 ACT DONE IN GOOD FAITH FOR BENEFIT OF A PERSON WITHOUT CONSENT.

Section 92 of Indian penal code, 1860 along with section 88 and 89 of the code, deals with act done for benefit of others which states that-

“Act done in good faith for benefit of a person without consent.—Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person’s consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit: Provisos—Provided—

(First) — That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

¹⁰ Indian penal Code, 1860, §90

¹¹Jakir Ali vs State of Assam 2007 CriLJ 1615, 2007 (3) GLT 497

(Secondly) — That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

(Thirdly) — That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

(Fourthly) — This exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.”¹²

Ingredients to section 92 of Indian Penal Code, 1860

1. The act must be done for the benefit of the other person to whom the harm is caused only.
2. The act must be done in only good faith.
3. The circumstances should be that it should be impossible to taken the consent of the person.

CONCLUSION/ SUGGESTION

To summarize, it would seem, by all accounts, to be a reasonable articulation that the law here isn't straightforwardly intrigued by real or actual consent. It concerns itself or maybe with an investigation into the condition of learning of the person in question furthermore, passes judgment on the respondent as needs be. If the knowledge is insufficient or incomplete by misinformation or misconception of facts, the defense fails. However, willingness of the victim may approve under the law as he sees the law by his perception.

Thus, there are as a result just two different ways for the state to conquer the issue of consent, either by demonstrating a mind which didn't act at all on the issue with respect to which it is affirmed to have picked, or a mind which acted in conditions demonstrating that no decision was made on the circumstance truly included.

In both the end is the equivalent, by explaining and thereby all overcoming alleged consent by which the defendant is trying to immune or excuse himself into.

¹² Indian penal Code, 1860, §92