

# Indic Legal Law Journal

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## **THE DEFENCE OF CONSENT: MISCARRIAGE OF CRIMINAL JUSTICE?**

Consent has many facets. It has always played a major role in civil as well as criminal law. In olden times, a man and his family's life and liberty were considered as his belongings, so, he could consent to any injury to himself or his family for any pecuniary compensation. In Roman law also there is a maxim -“Volenti Non Fit injuria”<sup>1</sup>, was a valid principle in the early 16<sup>th</sup> century, so individuals were free to consent to almost everything, as a result, no suit could be brought against the wrongdoer. As many changes had been brought by the legislators in the statutes, so in modern times, has law placed any limits on the degree of harm to which the victim could consent?

For constituting any crime, two major elements are needed, i.e., mens rea (guilty intent) and actus reus (guilty act), so a person will be liable for a criminal act he has done, if he has the intention and knowledge of doing it and knows the consequences of such an act, but does the defence of consent operates to defeat the element of actus reus of a crime, rendering such action lawful as opposed to unlawful?

### **MEANING OF CONSENT**

Under the Indian Contract Act, 1872, when two or more persons agree on the same thing they are said to give consent and free consent should not be caused by coercion,<sup>2</sup> Undue Influence<sup>3</sup>,

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<sup>1</sup> “Which means a person is not harmed unless he consents to it”.

<sup>2</sup> The Indian Contract Act, 1872, No.9, Acts of Parliament, 1872, s.15.

<sup>3</sup> The Indian Contract Act, 1872, No.9, Acts of Parliament, 1872, s.16.

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Fraud<sup>4</sup>, Misrepresentation<sup>5</sup> or mistake<sup>6,7</sup>. But under criminal law, the term consent actively expresses the “intention of a person”. The term consent has not been defined anywhere in the Indian Penal Code, but in the laymen’s language, it means, to agree or give permission to do something. So consent is a cogitative act of reason which means that it is a free consent given by a rational and sensible person under the positive operation of the mind. It may be different from mere submission, mere approbation, or subsequent approval. It was observed by Coleridge J. in an English case, R v. Day<sup>8</sup>:

*“There is a difference between consent and submission; every consent involves submission; but it by no means follows that a mere submission involves consent; it would be too much to say that an adult submitting quietly for an outrage was not consenting; on the other hand, the mere submission of a child, when he was under the fear of strong man and acted upon, can by no means be taken to be such a consent.”*

Consent may be express as well as implied. Express consent means to permit in writing or verbally, while on the other hand implied consent means to obtain consent by the acts or conduct of a person.

## **CONSENT AS A DEFENCE IN IPC**

Sections 87 to 92 of the Indian Penal Code, 1860 lay down principles to ascertain whether the harm caused by the individual with the consent of another individual should be punished for the interest of the society or not. These sections deal with situations under which the consent may be, express or implied, to suffer the risk of injury. There are certain circumstances stated under Section 90 of IPC, which render consent invalid<sup>9</sup> ;

- Consent obtained under fear or misconception- if consent is given by a person under any fear of injury or misconception of facts and the person doing the act knows that the consent was obtained under the fear or misconception, and then the consent would be invalid. For instance, a husband decided to end his life and discussed it with his wife. So, they both decided together to die, accordingly, the husband killed his wife and was arrested before

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<sup>4</sup> The Indian Contract Act, 1872, No.9, Acts of Parliament, 1872, s.17.

<sup>5</sup> The Indian Contract Act, 1872, No.9, Acts of Parliament, 1872, s.18.

<sup>6</sup> The Indian Contract Act, 1872, No.9, Acts of Parliament, 1872, s.20.

<sup>7</sup> The Indian Contract Act, 1872, No.9, Acts of Parliament, 1872, s.14.

<sup>8</sup> R v. Day, 9 C. E.R., 722 (1841).

<sup>9</sup> The Indian Penal Code, 1860, No.45, Acts of Parliament, 1860, s.90.

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he could kill himself. Now he took the plea of consent but later it was held that his wife did not give consent under the fear of injury or misconception of fact, hence he would not be held liable for the murder of his wife.<sup>10</sup>

- Consent of Insane person- If consent is given by a person who by his unsoundness of mind or intoxication is unable to understand the nature and consequence of the act to which he gave his consent, the consent would be invalid.
- Consent of Child- if consent is given by a child who is under 12 years of age and unable to understand the nature and consequences of the consented act, then the consent obtained is not true consent.

Under section 87 of IPC<sup>11</sup>, an act is not an offence if it was not intended and not known by the doer to be likely to cause death or grievous hurt to the Person who consented for the act, thus this exception extends to those acts also where death or grievous hurt was caused without the intention of the doer, but a person cannot give his consent to incur the risk of death but if death is caused by such consent then it amounts to culpable homicide, but not murder.<sup>12</sup>

Section 88 of IPC<sup>13</sup>, states that an act is not an offence if it was done in good faith for the benefit of the person concerned and without the intention to cause the death of the person who consented the act. Section 89 of IPC<sup>14</sup>, deals with children under the age of 12 years or an insane person who is incapable of understanding the nature or consequences of the act and does not have a legal capacity to give consent, thus their guardians have a lawful charge upon them, to give consent on their behalf for any act, but that should be done in good faith by the doer. Such exception might sometimes result in unlawful acts, so the legislature had created certain provisos to it:

1. The act shall not extend to intentional causing of death, or attempting to cause death
2. This exception is not applicable to situations where the person doing any act has knowledge that such act is likely to cause death, unless it is done for the prevention of death or grievous hurt, or curing any infirmity.

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<sup>10</sup>Dasrath Paswan v. State of Bihar, (1958) A.I.R., PAT 190, (1958) (6) B.L.J.R. 60.

<sup>11</sup> The Indian Penal Code, 1860, No.45, Acts of Parliament, 1860, s.87.

<sup>12</sup> The Indian Penal Code, 1860, No.45, Acts of Parliament, 1860, s. 300, exception 5.

<sup>13</sup> The Indian Penal Code, 1860, No.45, Acts of Parliament, 1860, s.88.

<sup>14</sup> The Indian Penal Code, 1860, No.45, Acts of Parliament, 1860, s.89.

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3. It is also not applicable to the voluntarily causing grievous hurt or attempted to cause grievous hurt unless done for the prevention of death or grievous hurt or curing any grievous disease.
4. It is also not applicable to the abetment of any offence.

It might sometimes happen that people use the defence of consent as an excuse to flee from the charges of the act they caused, but there are certain conditions laid down under sections 87,88,89 and 90;

- The person injured has consented for the risk
- The consent must neither have been made expressly nor implied.
- The consent must not have been given under any fear of injury or misconception of facts
- The person must not be under the age of 12 years and must not be insane and if he is, then his guardian who has his legal capacity might consent for his act.
- The doer did not obtain consent, intending to cause death, or grievous hurt.

There are various situations where consent need not be obtained such as the situation of medical emergencies, immigrants, new admission to prison, the person handling food items or dairy products, etc.

## **LANDMARK JUDGEMENTS**

### ➤ **SUKARAO KOBIRAJ v. THE EMPRESS<sup>15</sup>**

- In this case, the appellant, Mr.Kobiraj who is a qualified doctor performed a dangerous operation of piles by cutting out internal piles which resulted in the death of the patient as he stopped the consequent bleeding.
- He was prosecuted for his negligent act and the court held him liable as he did not operate the patient in good faith.

### ➤ **JAYANTI RANI PANDA v. STATE OF WEST BENGAL<sup>16</sup>**

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<sup>15</sup> Sukarao Kobiraj v. The Empress, (1887) I.L.R. 14 Cal 566.

<sup>16</sup> Jayanti Rani Panda v. State of West Bengal, (1984) Cri.L.J. 1535

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- In this case, the petitioner lodged a complaint alleging rape against the accused, who was a teacher of the village local school. He used to visit her residence and one day, when her parents were not at home he expressed his feelings for her, and promised to marry her soon. Upon this promise, they developed a sexual relationship; the complainant conceived and pressurized him to marry her.
- The accused proposed abortion of the child, but the complainant did not agree to undergo an abortion, and the accused rejected his promise and never visited her house again.
- The complainant filed a rape case against him but the court found the accused not liable under section 90 because the complainant has given her free consent to develop a sexual relationship and also prosecution was not able to prove beyond reasonable doubt that the accused did not have any intention to marry when he made sexual contacts with her.

## **CONCLUSION**

Maintaining law and order is the prima facie duty of the State, so any person who causes injury is liable and punished under the criminal law, to provide justice to the victim in the interest of the society but in cases where the doer unintentionally performs an act in the good faith, with or without the consent of the person harmed then such act cannot amount to offence and doer cannot be held guilty because it will be exempted under the defence of consent.

Consent can also be used as an excuse and prevent the person from incurring his criminal liability but in cases of serious bodily injuries, criminal law does not validate consent as a defence and does not exempt the wrongdoer from being criminally liable for the interest of the society.