

An Analysis of Consent as A Defence Under Indian Penal Code

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1 INTRODUCTION

Consent means a person agrees to the act of another person after knowing the consequences of the act. Consent given by a person may either be express or implied. Implied Consent can be inferred from one's conduct /actions or nature of the operation. Concept of consent is based on the legal maxim *volenti non fit injuria* which means harm caused with the consent cannot be considered as an injury and it does not amount to an offence. Consent plays a very important role in determining the criminal liability of a person. The main objective of including consent as an exception under Indian Penal Code is that it is pre assumed that when an adult consents to a certain act he is also consenting to the harm which might be caused as a result of that particular act and thus it does not constitute any offence. The word consent is however not separately defined under Indian Penal Code; there are some specific sections like section 87,88,89, and 92 which talk about consent as an exception under IPC. Apart from the sections mentions above the researcher will also be referring to section 90, 91 and section 375 which also has a lot to do with the current research topic as these sections talk about some other important and relevant aspects of consent like what forms a valid consent, when sexual intercourse amounts to rape and under what circumstances an act constitutes an offence despite of the fact that the other party has given his consent for the same. Sections 87-89 and 92 of IPC talks about consent as a defence under Indian Penal Code and the criminal liability of a person. Section 88,89 and 92 protect the interest of doctors, philanthropist etc. against the acts which are done for the benefit of any person with or without the consent of a person. Section 87 of IPC saves the person from the criminal liability on the ground of consent as a general exception, on the other hand section 88,89

and 92 gives immunity to those persons whose act(s) caused harm to other person but that act was actually done for the benefit of that person, that means the harm caused to the person is unintentional. Section 90 of IPC covers those aspects that does not amount to a valid consent. Section 90 lays down four situations under which the consent given by a person is not considered as a valid consent. Section 91 states the exclusion of those acts which are offences independently of harm caused.¹ Consent is also an important element when it comes to sexual intercourse with a women. If a man has sexual intercourse with a women without her consent or against her will it will constitute rape. Section 375 talks about the same and it lays down 6 grounds when sexual intercourse constitutes a rape. The researcher in the later part of the paper will discusses all the relevant the sections in regard to consent as an exception under Indian Penal Code in detail for the purpose of conducting relevant research and in order to provide a better and clear understanding to all its readers as well.

2 RESEARCH OBJECTIVES

The objectives of this research are as follows-

- To understand when a person can claim protection of consent as an exception under IPC.
- To understand under what circumstances a person is not saved from the criminal liability.
- To understand when a consent given by women for sexual intercourse amounts to rape and when it does not amount to rape.

3 RESEARCH METHODOLOGY

There are mainly two types of research methodologies namely Doctrinal and Non- Doctrinal used for

¹ Indian Penal Code, 1860, § 91

conducting research work. Doctrinal method of research mainly emphasis on conducting research by analysing the materials available i.e. the primary sources of data; statutes, acts, laws and rules or the secondary sources of data i.e. published articles, journals, research papers and newspapers etc. while non- doctrinal research requires the researchers to undergo field work for the purpose of research. To understand consent as a defence under Indian Penal Code and for conducting valuable and meaningful research the researcher is required to follow doctrinal method of research.

4 RESEARCH QUESTIONS

The current research paper will answer the following questions-

1. Explain how consent plays a role in determining the liability of a person?
2. Which all sections of Indian Penal Code explain consent as a defence?
3. What constitutes the basis for a valid consent?
4. Explain the circumstances under which consent is not considered as an exception under Indian Penal Code?

5 LITERATURE REVIEW

Literature review is one of the main aspects involved in the research paper. The researcher in this paper has reviewed various works from different books, articles, research papers and journals etc. The researcher while doing research reviewed a research paper which talked about consent under section 375 of IPC. The research paper discussed the aspects where sexual intercourse was there without the consent or against the will. The paper also discussed the myth of willingness in consent and voluntary and unequivocal agreement. The researcher also discussed kinds of consent and section 90 along with section 375 in detail.² The researcher referred another research paper for conducting appropriate research. The author in the paper discussed in detail about the High Court

judgment in the case of Mahmood Farooqui. The paper also talked about a brief history of consent debate in India, affirmative consent and the doctrine of feeble No.³ There is an article which the researcher has reviewed for the purpose to carry out effective research, it talks about the current standard of consent in Indian law and contextualizing rape culture. The paper author of the paper also discussed the statutory reforms of the standards of consent.⁴ Researcher reviewed another paper that talks about the rationale of doctrine of consent. The paper also emphasis on section 88 of IPC and talks about some areas of uncertainty too.⁵

6.CONSENT AS AN EXCEPTION UNDER INDIAN PENAL CODE

6.1 SECTION 87

Section 87 refers to the consented acts which did not intent to cause death or grievous hurt to any person. It states that nothing is an offence just by the reason of harm which might be caused, if it is not intended and is not known by the person to cause or likely to cause death or grievous hurt to any person who has attained the age of majority and who has consented to suffer the harm or by the reason of any harm which might be known by doer to likely cause to such a person who has given his consent to take the risk of that harm; irrespective of the fact whether the consent was express or implied.⁶ For example P and Q agrees to fence for amusement with each other. So, while entering into this agreement there is an implied consent from both the parties to suffer any harm which might be caused in the absence of any foul play. So where both the parties are playing a fair game and one of them is injured in that case it constitutes no offence. Essentials of section 87-

- The act done must be without any intention and knowledge to cause death or grievous hurt
- The act must be done to a person who has attained the age of majority i.e. who is above eighteen years of age

² P.H. Pendharkar, *Consent Under Section 375 IPC: Stripping The Myths*, ILI LAW REVIEW 98 (2019)

³ Anant Prakash Narayan, *Delhi High Court's Judgment of Mahmood Farooqui v. State (Govt of NCT of Delhi and Debate of Consent in the Rape Case: An Analysis*, 12 NUALS L.J 157 (2018)

⁴ Anupriya Dhonchak, *Standard of Consent in Rape Law in India: Towards an Affirmative Standard*, 34 BERKELEY J GENDER L & JUST. 29 (2019)

⁵ K.L. Koh, *Doctrine of Consent In Criminal Law*, 9 MALAYA LAW REVIEW 181 (1967)

⁶ Indian Penal Code, 1860, § 87

- The person must have given his consent
- The consent given should be for the purpose of suffering that harm

6.2 SECTION 88

Section 88 deals with those acts which are done in good faith for the benefit of a person for which the person consents to take the risk of the harm that might be caused are not offences. It states that nothing is an offence just by the reason of harm which might be caused, if it is not intended and is not known by the doer to cause or likely to cause death of any person for whose benefit that act was done, in good faith and who has consented to suffer the harm irrespective of the fact whether the consent was express or implied.⁷

Essentials of section 88-

- The act done must be without any intention to cause death of a person.
- Act must be done in good faith.
- Act must be done for benefit of the person.
- The person must have consented to suffer the harm which might be caused as a result of that act.

6.3 SECTION 89

Section 89 deals with those acts which are done for the benefit of a child or insane person in good faith either by the guardian himself or by some other person with his consent. It states that nothing amounts to an offence just by the reason of any harm which might be caused or intended and known by the doer to be caused or likely to be caused to that person, if the act is done with the consent (either express or implied) of his guardian or any other person having the lawful charge, in good faith for the benefit of that person who is below the age of twelve years or for the person who is of unsound mind.⁸

6.4 SECTION 92

Section 92 deals with those acts which are done for the benefit of a person in good faith without the person's consent. It states that nothing amounts to an offence just by the reason of any harm which might be caused to that person for whose benefit the act is done in good faith, even without the consent of that person if the situation is such that it is not possible for the person to

give his consent or the person is incapable of giving his consent and that person also does not have any guardian or any other person in his lawful charge from whom it is possible to take consent in time for the act being done.⁹

Essentials of section 92-

- Act done must be for the benefit of that person who has suffered the harm.
- Act must be done in good faith.
- The situation must be such that it was impossible to take the consent of that person.

6.5 PROVISIONS GIVEN UNDER SECTION 89 AND 92

Section 89 and 92 are subjected to the following four provisions-

- First provision states that if any person intentionally causes or attempts to cause death of a person that person will not be given protection under this section.
- As per the second provision if any person does any act of which he has the knowledge that it will likely cause death for any other purpose other than curing some grievous disease or infirmity or the prevention of death or grievous hurt then in that case this section will not protect that person.
- The third provision says that if any person voluntarily causes or attempts to cause grievous hurt to any other person then that person will not be given protection under this section, unless the purpose of that person was to cure some grievous disease or infirmity or to prevent death or hurt.
- The fourth provision says this section shall not be applicable to the abetment of any offence, to the committing of which offence this section will not extend.

6.6 GROUNDS THAT DECLARES A GIVEN CONSENT AS VALID

SECTION 90

Section 90¹⁰ defines what does not constitute a valid consent-

A consent is not considered as a valid consent if;

⁷ Indian Penal Code, 1860, § 88

⁸ Indian Penal Code, 1860, § 89

⁹ Indian Penal Code, 1860, § 92

¹⁰ Indian Penal Code, 1860, § 90

1. Such consent is given by the person under fear of some injury.
2. The consent is given under the misconception of some facts and the person obtaining the consent is aware of the same or has a reason to believe the same.
3. The consent is given by a person who is not of sound mind.
4. The consent is given by a child who is below the age of 12 years.
5. The consent is given by an intoxicated person.

A consent is called a valid consent only if its is given out of free will and section 14 of Indian contract act lays down some grounds that forms the basis of a free consent. Consent is considered as a free consent if it is not hampered by coercion, undue influence or misrepresentation of facts¹¹ and the person giving is the consent must be in the right state of mind to analyse the situation and understand to the consequences of the act which he is consenting for.

7. CONSENT WHEN NOT DEALT AS AN EXCEPTION UNDER INDIAN PENAL CODE

7.1 SECTION 91

Section 91 talks about the cases where despite of the fact that the person consented for an act, it amounts to an offence not because of the reason that harm is caused but because of the reason that the act is illegal. This section also makes it clear that the exceptions given under section 87, 88 and 89 of Indian Penal Code is not applicable to acts which are considered as offences independently of any harm which might be caused or intended to be caused or is likely known to be caused to the person consenting for the same or on whose behalf the consent is given.¹² The acts done against public safety, public moral or any act of public nuisance falls within the ambit of section 91 and are the examples of offences irrespective of the harm being caused.

7.2 SECTION 375

Section 375 of Indian Penal Code gives the definition of rape. this section lays down certain grounds under which sexual intercourse between a man and a woman amounts to rape.

Penetration is sufficient constitute sexual intercourse amounting to the offence of rape¹³. A man is said to commit rape if he has sexual intercourse with a women under any of the circumstances mentioned below-

1. Against the will of the women
2. Without the consent of the women
3. If her consent is not a free consent, if its influenced by fear of hurting her or causing her death or of any other person in whom she is interested in.
4. When she gives her consent under the impression that he is another man to whom she is or believes herself to be married lawfully, but the man is aware of that he is not her husband.
5. When she gives her consent, but she was not in a sound state of mind or was intoxicated while she was consenting for the same as a result of which she was not able to understand the nature and consequences of the act of the same.
6. With or without the consent of the women below the age of sixteen years of age.

Exception- There is an exception to this, if a man has sexual intercourse with a woman under any of the grounds mentioned above; provided that woman is his wife and is not below the age of fifteen years in that case it does not amounts to the offence of rape.

CASE ANALYSIS

TUNDA VS. REX

In this case two of the friends participated in wrestling match and one of them suffered injuries and died. later a suit was instituted against the other person under section 304 A of IPC. In this case high court upheld that both the parties agreed for wrestling match and themselves consented to suffer injuries. since both the parties played a fair game and there was no foul play, so it was held that the case falls section 87 of IPC and thus the other party was freed from the criminal liability.¹⁴

DR R.P. DHANDA VS. BHURELAL

In this case criminal proceedings were instituted against the doctor who performed a surgery for cataract which resulted in the loss of his eyesight. the doctor took the defence under section 88 of IPC. High

¹¹ Indian Contract Act, 1872, § 14

¹² Indian Penal Code, 1860, § 91

¹³ Indian Penal Code, 1860, § 375

¹⁴ Tunda vs. Rex, AIR 1950 Allah 95

Court while delivering the judgment upheld that since the doctor took the patient's consent and did the surgery in good faith with proper care and caution as per the Indian Medical system thus, he is not liable for the harm caused to the patient.¹⁵

K.A ABDUL VAHID VS. STATE OF KERALA

in this case the question that was raised before the Kerala High Court was the case where a schoolteacher hits the student with a cane who disobeyed the rules will the teacher be prosecuted for the same under Indian Penal Code. the court in this case said that the scenario of a schoolteacher hitting a child for disobeying the rules falls under section 89 of IPC. Thus, the teacher will be given protection under section 86 of Indian Penal Code. the court justified the same by saying when a child is admitted to the school the guardian gives an implied consent to the school authorities for any such act. further the court stated that the teacher was acting in good faith and hence the teacher will not be prosecuted under IPC.¹⁶

SUKAROO KAVIRAJ VS. THE EMPRESS

In this case Mr Kaviraj who was a qualified doctor performed an operation for internal piles. He gave a cut on the vital part of body with an ordinary knife as a result of which the patient suffered bleeding and he died. In this case the doctor was not given protection under section 88 of Indian Penal Code. The court while delivering the judgment also held Mr Kaviraj liable for the death of the patient as his act was not justified as he did not act in good faith. Further the court also said that it was a negligent act done on part of the doctor and thus he is not entitled to seek protection under section 88 of IPC.¹⁷

UDAY VS. STATE OF KARNATAKA

In this case the accused expressed his love for the women (prosecutrix) and promised to marry her on some future date. The women was aware of the fact that both of them belonged to different castes and their families would oppose their marriage. despite of this the women started cohabiting with the accused and

became pregnant. later the accused delayed the marriage, and the women logged an FIR against him for the offence of rape.

The court in this case held that the victim had sufficient knowledge and intelligence to understand the moral quality of the act which she consented to and that is the reason she kept it a secret for long. Thus, taking into consideration all the facts the court further said that she freely, voluntarily and consciously gave her consent for having sexual intercourse with the accused and moreover her consent was not a result of any misconception. Thus, the court stated that it cannot be said that the women consented for the act under misconception of facts and thus the accused was not held liable for the offence of rape.¹⁸

RAO HARNARAIN SINGH SHEOJI SINGH VS. STATE

In this case the accused who was an advocate and a public prosecutor, forced his tenant to fulfil carnal lust of Rao Harnarian and his friends by giving his wife. Thereafter the entire night the men ravished her which immediately lead to the death of his wife. The accused then stated that it was a consented act and the victim and his husband gave their consent for the same and hence they should not be held liable.

The court stated that women gave her consent to the accused for the sake of her husband's safety as they threatened him and hence it was not a free consent. The court further held all the parties liable for committing the offence of rape.¹⁹

CONCLUSION

The researcher by way of this researcher paper wanted all its reader to understand the entire concept of consent under Indian Penal Code. While carrying out the research on the current topic the researcher also got a clear idea understanding of when can consent be taken up as a defence. The researcher also understood that the criminal liability of a person basically depends on the facts and circumstances of a case and the liability varies from case to case. Although consent is

¹⁵ Dr R.P. Dhanda vs. Bhurelal, 1987 Cri LJ 1316 MP

¹⁶ K.A Abdul Vahid vs. State of Kerala, (2005) Cr. L.J. 2054 Ker

¹⁷ Sukaroo Kaviraj vs. The Empress, (1887) ILR 14 Cal 566

¹⁸ Uday vs. State of Karnataka, (2003) SC

¹⁹ Rao Harnarain Singh Sheoji Singh vs. State, AIR 1958 P H 123, Cri LJ 563

a valid ground of to seek protection against the criminal charges which are being imposed on a person but it does not mean absolute submission to any harmful act.