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# ANALYSIS OF CONSENT AS A DEFENCE UNDER THE INDIAN PENAL CODE

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## 1.1 INTRODUCTION

The Indian Penal Code is the approved criminal code of India. It intends to cover all aspects of criminal law. Consent is usually a deliberate act and is exercised by free will. It entails a calculated thought process by using one's intelligence based on knowledge of the act's importance and moral consequences. It is made up of three elements: physical strength, mental strength, and the ability to employ them freely.

The defence of consent is largely founded on the legal maxim "Volenti Non-fit Injuria". It means when a person consents to be harmed or exposed to a risk, he cannot sue for any injury that results from that agreement. The victim who agreed may have explicitly agreed to the action in question in words, or implicitly agreed through the action. Consent, at least in theory, is a defence against all non-fatal crimes and even murders.

Consent plays a very crucial role in establishing the liability in all criminal cases. Whether to lessen the seriousness of an offence depends on consent. "The actual provisions which recognize this defence in various forms are sections 87, 88, 89 and 92; while as section 90, section 91 and explanation to section 92 provide for the principles guiding these provisions."<sup>1</sup>

This defence is that if a knowledgeable adult voluntarily agrees to a crime against himself and knows that they have agreed, the harm resulting from the Act in this way as a result of the consent is a criminal liability to the perpetrator. At the center of the defence is the high value that accompanies the autonomy of an individual in a free society. If a mentally competent adult wants to be a victim of a crime, the argument agrees to justify consent. However, false consent makes a reasonable decision as to whether or not to consent-based on knowledge and understanding because the person giving it is very young, drunk, mentally late, or late. If it cannot be done, it will be invalid. In such special cases, if required in the circumstances, it is

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<sup>1</sup> *Defence of Consent*, Law University of Kashmir, <http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/DEFENCE%20OF%20CONSENT.pdf> (Last Visited 13<sup>th</sup> November, 2021 6:00 PM)

necessary to obtain the consent of another person who has been legally prosecuted against a guardian or such an incompetent person.

## 1.2 LITERATURE REVIEW

1) Consent as a defence under IPC an article by Sushant Agrawal<sup>2</sup> is a detailed account of types of consent, the scope of Section 89<sup>3</sup> under IPC. The Author has also explained landmark judgements. Moreover he has in detail explained the circumstances under which no benefit can be claimed under Section 89. However, the research is restricted to Section 89. The writer has not mentioned the other Sections which deal with the same in the Indian Penal Code.

2) An article titled Consent Defence in Criminal Cases<sup>4</sup> contains a detailed account of consent in bodily harm, consent in rape or sexual assault, and the essential ingredients to establish consent. However, the article does not cover the scope and limitations of Section 89.

3) Consent as a general exception – Section 87 to 89 IPC<sup>5</sup> is a detailed account of Section 87, 88 and 89 of the Indian Penal Code. The article analyses each Section in detail and the use of illustrations to explain every Section makes the Article more interesting and effective to read. The article contains a brief with regards to when consent is not a defence under the Indian Penal Code.

4) Consent and will with emphasis on section 375 of IPC an article by Darshit Vora<sup>6</sup> focuses on consent as a defence in the Indian Penal code with specific reference to the Section 375<sup>7</sup>. The writer discusses in detail the types of consent and draws a difference between consent and will. The use of case laws and illustrations makes the article more interesting and effective to read.

## 1.3 OBJECTIVES OF THE STUDY

The following are the objectives of this study:

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<sup>2</sup> Sushant Agarwal, Consent As a Defence Under IPC, I Pleaders, <https://blog.ipleaders.in/consent-as-a-defence-under-i-p-c/>, (Last Visited 12<sup>th</sup> November, 2021 7:00 PM)

<sup>3</sup> § 89 Indian Penal Code (Act No. 45 of 1860)

<sup>4</sup> Supra Note 1

<sup>5</sup> *Consent as a general exception – Section 87 to 89 IPC*, Writing Law, <https://www.writinglaw.com/consent-as-general-exception-ipc/> (Last Visited 10<sup>th</sup> November, 2021 6:00 PM)

<sup>6</sup> Darshit Vora, Consent and will in emphasis with section 375 of IPC, I Pleaders, <https://blog.ipleaders.in/consent-will-emphasis-section-375-ipc/> (Last Visited 11<sup>th</sup> November, 2021 6:00 PM)

<sup>7</sup> § 375 Indian Penal Code (Act No. 45 of 1860)

- 1) To know about the significance of defence of consent with regards to the Indian Penal Code.
- 2) To understand the conditions needed to plead the defence of consent.
- 3) To understand the scope and limitations of Section 89 of the IPC.
- 4) To study consent under Section 375 of the IPC and the amendment made to the same.
- 5) Exceptions to the word consent under Section 87, 89 and 92<sup>8</sup>.

#### **1.4 RESEARCH QUESTION**

- 1) What is the significance of consent as a defence in terms of the Indian Penal Code?
- 2) Do the terms consent and submission mean the same?
- 3) Can consent as a defence be pleaded in all circumstances?
- 4) What are the essentials to plead to consent as a defence?
- 5) Are there any exceptions to the word consent?

### **2. TYPES OF CONSENT AND THE CONDITION NEEDED TO PLEAD CONSENT**

#### **2.1 TYPES OF CONSENT**

The question of consent arises only when consent has been given in criminal law, the term explicit consent means something that is essentially valid in writing or orally, but implicit consent proves that implicit consent has been made through the actions or acts performed by a person. It's difficult, but the general time implicit consent is limited. For example, for a subscription to any membership, the term begins on the day the subscription is received.

#### **2.2 CONDITIONS NEEDED TO PLEAD THE DEFENCE OF CONSENT**

Section 87, 88, 89 and 90 of the Code deal with several conditions that are necessary to plead consent as a defence. These conditions are enumerated below:

- 1) A person who has consented to the risk.

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<sup>8</sup> § 87, 89 and 92 Indian Penal Code (Act No. 45 of 1860)

2) The person must be at least 12 years old unless the context indicates the opposite and should not be crazy. In that case, the consent of the legal guardian or its responsible person must be obtained.

4) Consent can be given without fear or misunderstanding of the facts.

5) This consent must be given explicitly or implicitly.

6) Consent is not intended to cause death or serious injury.

### **3. SECTION 375 AND THE AMENDMENT MADE TO THE SAME**

#### **3.1 CONSENT UNDER SECTION 375 OF THE INDIAN PENAL CODE**

According to Section 375 of the Indian Penal Code, it is defined as "unambiguous voluntary consent" when a woman expresses her willingness to commit a performance by communication, whether verbal or nonverbal.

Under Section 90 of the IPC, it is clear that consent cannot be explained as consent within the meaning of the section, especially if consent is given by a person under "misrepresentation of facts", that is if consent is given. is. Under misunderstanding, it is not called actual consent and is not legally considered.

Consent can fall under rape under the following circumstances:

I. if the act is carried out according to her will.

II. if the act is carried out without her consent.

III. If done with her consent regardless of whether the consent she obtained was enforced or she is gives in for fear of death or injury,

IV. She believes she is legally married to another person, given her consent by her and given her consent, not her husband.

V. When giving consent, the person must not be confused, intoxicated, or permitted at the time such consent is given, either personally or through media or addiction. Otherwise, we do not understand the nature of behaviour and its consequences. She agrees too.

VI. If the person is not yet 16 years old, with or without her consent. For example; Penetration is sufficient to establish sexual intercourse that can lead to rape.

### **3.2 AMENDMENT MADE TO SECTION 375**

This section has been modified in accordance with the 2013 Criminal Code Act (Amendment). This change, commonly known as the Nirbhaya Act, was subsequently submitted by Parliament to amend Article 375. One of the main reasons for the change was to remove the ambiguity that existed under the old law and provide severe penalties for performing certain performances of sexual activity. During the amendment, the law was extended by adding a definition of penile penetration into the vagina, anus, mouth, urethra, or any object or body part introduced into a female, previously by others. Applied to their body parts from what was performed) led to sexual assault. Therefore, female use of the mouth or contact with intimate areas was also considered and reported as sexual coercion.

## **4. SECTIONS 87,88, 89 AND 92 AND THE SCOPE OF SECTION 89**

### **4.1 EXCEPTIONS TO THE WORD CONSENT UNDER SECTION 87 TO SECTION 89 AND SECTION 92**

Section 87 of the Indian Penal Code lays down that any act performed with the intention or knowledge that it can cause death or grievous hurt and which takes place with the consent will not be constituted as an offence if the person giving the consent which may be implied or expressed and is above the age of 18 years and has endured the harm.

Section 88 states that for any act which has been performed with good faith for a person's well being with his consent which may be expressed or implied, then such performance of the act will not constitute an offence if the act causes or is likely to cause harm to a person.<sup>9</sup>

Section 92<sup>10</sup> lays down that any act which is done without the consent then the performance of that particular act is in good faith or for the well being of the person and that the person for whom such act is been done is either unable to understand or incapable to give consent or the guardian cannot take the consent of such person in question.

### **4.2 SECTION 89 OF THE INDIAN PENAL CODE AND THE SCOPE**

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<sup>9</sup> Supra Note, 2

<sup>10</sup> § 92 Indian Penal Code (Act No. 45 of 1860)

According to this Section any act performed by a person which is likely to harm or which can cause harm to a child under the age of 12 years or to an insane person, done with the consent (express or implied) of the guardian or with good faith or for the benefit of the child or insane person then it will not be constituted as the offence.<sup>11</sup>

Section 89 of the IPC deals with children under the age of 12 and persons with mental illness who do not have the legal ability to give consent because they do not comprehend the exact nature and the consequences of their behavior. Therefore, a legal guardian or legally responsible person will give consent on their behalf. The perpetrator must necessarily act in good faith for the benefit of the injured party.

## 5. LANDMARK JUDGEMENTS

Following are some landmark judgements :

### 1) **Dasrath Paswan vs State**<sup>12</sup>

This case related to the accused who failed in his examination for three consecutive years. After being frustrated by these failures he decided to end his life. His wife asked him to kill her first and then end his life. However, after killing his wife he got arrested before he could end himself. However, he could not be held liable as his wife had not given consent under any pressure or fear.

### 2) **Poonai Fattmah v. Emp. (1869)**<sup>13</sup>

The perpetrator, a snake charmer, convinced the victim to be bitten by a snake in this instance. He had persuaded him, as well as reassuring him that the accusers were capable of protecting him from harm. The deceased gave his agreement in this instance because he believed the accused could cure snake bites. As a result, the accused was found guilty because he lacked the legal right to defend himself based on the deceased's consent.

### 3) **Rao Harnarain Singh Sheoji Singh v. State (1957)**<sup>14</sup>

The preceding case distinguishes between permission and submission: The defendant worked

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<sup>11</sup> § 89 Indian Penal Code ( Act No. 45 of 1860)

<sup>12</sup> Dasrath Paswan vs State AIR 1958 Pat 190

<sup>13</sup> Poonai Fattmah v. Emp. (1880) ILR 5 Cal 351

<sup>14</sup> Rao Harnarain Singh Sheoji Singh v. State AIR 1958 P H 123

as an attorney and as an Additional Public Prosecutor. He forced his tenant to offer his wife to gratify Rao Harnarain's and his friends' carnal lust. She dies instantly as a result of being ravished all night. When he was prosecuted, the suspect argued that "because the husband gave his consent and the wife came on her own, he should not be held guilty. " All consent entails submission, but not all submissions entail consent," the court concluded. The deceased had made her submission in front of the accused in this case. Furthermore, the husband was threatened with serious repercussions. Harn was found guilty by the court.

4) In the case of **Jayanti Rani Panda v. State**<sup>15</sup> the accused who was a teacher often visited the complainant's house. In due course, they fell in love and had also promised to marry each other. Due to this, a sexual relationship evolved between the two. The applicant became pregnant and was compelled to get married soon. When her applicant refused to agree to her abortion, the defendant refused his promise and ceased visiting her home.

A rape proceeding has been filed against the defendant. The court did not apply Article 90 because the defendant voluntarily agreed to many sexual relationships, and the public prosecutor's office cannot undoubtedly prove that the defendant made unintentional sexual contact. The court did not consider the defendant to be liable of marriage.

5) In the case of **Bishambher v. Roomal**<sup>16</sup>, the complainant had molested a girl. Two hundred people assembled to punish him. Three localities intervened to find an alternate way. The crowd gathered in front of the Panchayat, when the plaintiffs agreed to obey the Panchayat's decision. Panchayat ordered the plaintiff to tour the village with a dark face. All interveners were arrested and prosecuted under IPC sections 323 and 502. The court found that the defendant was entitled to seeking benefit under Section 87 of the IPC by acting in good faith without any criminal purposes to avoid the grave consequences of the applicant's previous actions.

6) In the case of **Udaya v. State of Karnataka**<sup>17</sup>, the public prosecutor's office gave the petitioner consent to sexual intercourse. Defendant Udaya expressed his love and is said to have promised to marry the prosecutor at a later date. She consciously started living with him

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<sup>15</sup> Jayanti Rani Panda v. State, 1984 CriLJ 1535

<sup>16</sup> Bishambher v. Roomal AIR 1951 All 500

<sup>17</sup> Udaya v. State of Karnataka (Cri.) No.393 of 2020

and she became pregnant. The defendant was then charged with rape when prosecutors alleged that she agreed on the false assumption that defendant Udaya would marry her.

The prosecution knew they both belonged to different castes, and the proposal was rejected by the family, denying this claim that defendant Udaya was not responsible for the rape crime, but she consciously started living with the defendant and became pregnant. Consent to a sexual intercourse, as in this case, cannot be based on a misunderstanding of facts. The false promise of marriage is not a fact in the criminal sense.

### **5.1 ANALYSIS OF CASE LAW UNDER SECTION 493/496<sup>18</sup>**

#### **1) In the case of Sri Parag Buragohain v Sri Jintu Buragohain<sup>19</sup>**

Sri Jintu Buragohian was accused of entering into a false deed and marrying the daughter of the complainant. The complainant also stated that the accused had induced his daughter to believe that his daughter was legally married to him and that in the performance of the marriage he ordered her to undergo sexual intercourse with her.

When they were residing together the accused left her without informing. Moreover, it was found that the accused had deliberately entered into marriage with his daughter only to perform sexual intercourse. The accused was granted bail. Formal charges were framed under Section 493/496 of the Indian Penal Code.

When talking about this particular case, because the estimates apply to the entire case, section 496 of the IPC is due to insufficient evidence being created by the plaintiffs who marry the accused who illegally committed marriage abuse.

Therefore, the prosecutor immediately sentenced to imprisonment under Section 493/496 of the IPC in light of the above discussion because he did not prove the accused beyond suspicion.

#### **2) In the case of Sukaroo Kaviraj V The Empress 1887<sup>20</sup>**

A qualified doctor operated on his patient. The patient was suffering from internal piles. The doctor operated the vital organ with just an ordinary knife. The patient in question died of heavy bleeding after surgery. After the decision, the cause of death was prematurely and

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<sup>18</sup> §493/496 Indian Penal Code (Act No. 45 of 1860)

<sup>19</sup> Sri Parag Buragohain v Sri Jintu Buragohain 1957

<sup>20</sup> Sukaroo Kaviraj V The Empress 1887 (1887) ILR 14 Cal 566



negligently committed. The court ruled that Mr Scallou was responsible for his death because he did not act in good faith.

## **6. CONCLUSION**

From the above analysis, it can be concluded that consent can be used as a defence mechanism. However, in certain situations, consent and submission play their respective roles, and implicit or explicit consent has its perspective. Sections 87, 88, 89 and 92 are closely related Indian Criminal Code. Section 357 of the Criminal Code expresses the importance of consent, while Section 90 is convenient. Criminal liability can be specifically considered under the concept of consent, depending on the facts and circumstances of each individual case. With specific reference to Section 375 of the Indian Penal Code, it has a proper definition of consent. Whereas, the will is not yet clearly defined. Consent and will are not properly defined, so they are interpreted as the same, and therefore the court's decision is ambiguous and does not provide the victim with proper justice. Therefore, there exists an urgent need to pronounce a formal definition of a will under Indian criminal law. Section 375 of Indian Penal Code is one of the most debated sections as the changes introduced in India in recent years have increased the number of rape cases and brought about significant changes to this section, but there are still many. It can be concluded that Consent can be used as a defence but not in all cases. There is a clear classification between submission and consent.

## **REFERENCES**

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