

Consent and Good Faith

(A) Section 87: Consent

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 to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen 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 take the risk of that harm.

Illustration

‘A’ and ‘Z’ agree to face with each other for amusement. This agreement implies the consent of each to suffer any harm, which, in the course of such fencing may be caused without foul play; and if ‘A’, while playing fairly, hurts ‘Z’, ‘A’ commits no offence.

This section is based on the Roman law maxim *‘Volenti non fit injuria’* which means he who consents to an act has no right to claim damages for the injury caused to him by that act. Though this principle applies to civil cases but it has also been adopted in the penal code in Section 87.

(i) Principle

Consent plays a very important role in criminal law. It has the effect of exonerating or extenuating a criminal act.

Section 87 gives immunity to a man from criminal prosecution on the ground of consent in general. The policy behind exemption from criminal responsibility in such cases is based on the principle that a man is the best judge of his own interest and that no man will consent to what he considers injurious of his own interest, and if a man suffer harm voluntarily, he cannot complain of it, when it comes about.

(ii) Ingredients

Under this section any harm other than death or grievous hurt even though intended or known by the doer to be likely to be caused will not be an offence under the following conditions.

(1) Harm is Caused to any Person with his Consent

Every man is free to suffer any injury to his person or property. Therefore, if he consents to the injury being done by another, the doer commits no offence. However, this section does not permit a man to consent to anything intended, or known to be likely to cause his own death or grievous hurt. For e.g. if 'Z' chooses to sell his teeth to a dentist, and permits the dentist to pull them out the dentist ought not to be punished for injuring Z's person.

(2) If act is done neither with the intention of causing death or grievous hurt nor the knowledge that it is likely to cause death or grievous hurt.

It is important to note that immunity granted under Section 87 will not justify causing of death a grievous bodily injury or any harm which is known by the doer to be likely to cause death or grievous hurt.

The restriction is absolute and unconditional. Consent may reduce the gravity of the offence and may go to mitigate the rigours of punishment.

For e.g. in a demonstration 'B' shoots through the lemon placed on A's head, which results in his death, then 'B' shall only be punished for culpable homicide not amounting to murder.

Consent is a good defence to sex offences in general. But if once it is proved in a case of rape that the age of the girl in question was below 18 years, her consent becomes wholly irrelevant and the accused is liable for the offence as if no consent were obtained.

As regards offences against property, consent of the owner of the property is complete defence both for civil and criminal actions.

(3) Person giving consent is above 18 years of age

'Consent' as a defence extends only to injuries caused to the person (i.e. bodily injury) and as such a person suffering the injury must have given consent. The section applies only to consent given by a person above the age of 18 years, therefore the protection under this section does not extend to consent obtained from a person who is below 18 years of age and has acted thereupon.

(4) Consent Given may be Expressed or Implied

Consent may be expressed or implied. The question whether there was consent in a given case is a question of fact dependent upon the circumstances of each case. An implied consent may be inferred from the conduct of a man, the nature of the operation and the like. For instance, when a man takes part in a lawful game, for e.g. boxing, it is obvious that by participation in the game, he has given his implied consent to the infliction upon him of a certain amount of bodily injury implicit in the game. But if the bodily injury is inflicted in violation of the rules of the game, the man causing injury will be criminally responsible for it, and the consent is deemed to have been withdrawn ab initio i.e. from the very beginning.

(ii) Case Study

Tunda vs Rex AIR 1950 All 95(UP)

The accused and the deceased were friends participating in a friendly wrestling match during which the deceased got seriously injured on the skull and died. The court found no foul play or deliberate attempt on the part of the accused to cause injury to the deceased and therefore, he was not held liable for any offence, being protected under Section 87 IPC.

In Poonam Fatteman Vs Emperor (1869) 12 WR (Cr) 7

The accused, a snake charmer, induced the deceased to believe that he had power to protect him from any harm caused by snakebite. The deceased having believed it to be true, allowed himself to be bitten by a snake as a result of which he died.

Disallowing the defence of consent to the accused, the court convicted him for culpable homicide under Section 304 IPC.

In Bishambhar vs Roomla AIR 1951 All 500

The complainant molested a harijan girl, where upon about 200 villagers gathered with lathis to punish him. However upon intervention of three elderly persons of the village, the matter was taken to a self-constituted panchayat. The panchayat decided that the complainant's face is blackened and he be paraded through the village after a shoe beating. The complainant had consented in writing to submit to the decision of the panchayat unconditionally. On criminal proceedings being instituted against the members of the panchayat, the court held that the accused (panchayat) had acted bonafide without any criminal intent in order to save the complainant from more severe consequences (many harijans had

gathered with arms to take revenge against the compliance) with the complainant's written consent, they were protected under Sections 81 and 87, IPC.

(B) Section 88: Good Faith

Act not intended to cause death, done by consent in good faith for person's benefit:

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.

Illustration

'A', a surgeon, knowing that a particular operation is likely to cause the death of 'Z', who suffers under a painful complaint, but not intending to cause Z's death; and intending, in good faith Z's benefit, performs that operation on 'Z', with Z's consent 'A' has committed no offence.

The rule is that consent can never justify an intentional causing of death. But a person for whose benefit an act is done may consent that another shall do that act even if death may probably ensue although the doer never intends death. For instance, where a person consents to be operated for a disease or ailment, which has proved fatal in most-cases, and there upon the surgeon performs the operation and the patient dies, the surgeon cannot be punished as he is protected under this section.

Similarly, where a person is attacked by a wild animal and he shouts for help and asks his friend standing nearby to fire at the animal in order to scare it and the friend does so, though he knows that firing is likely to cause the death of the friend

who is in danger, he shall be protected under Section 88 as the firing was done in good faith to save the life of the friend who was in danger of being killed by the wild beast.

(i) Principle

Section 88 grants immunity to doctors against surgical operations and like persons from punishment for all acts, which may cause any harm except that of causing death intentionally provided the act is done, in good faith for the benefit of the consenting party. A person acting for the benefit of another is given a greater latitude than is allowed to one acting merely with consent.

(ii) Ingredients

This section provides that the doer of an act will not be liable even though he causes the harm resulting in death intentionally or knowing that the act is harmful if

(1) The Act done is for the benefit of the person who suffers injury

In order that the defence under this section may be availed it is necessary to show that the act was done for the benefit of the person. Mere pecuniary benefit is not a benefit within the meaning of this section.

(2) Such an act is done with the consent whether express or implied, of the person to suffer that harm or to take the risk of that harm

In order to avail the protection under this section, the doer of the act must prove that he did the act in good faith for the benefit of the person with his consent, express or implied. But consent must be a valid consent. It must have been lawfully obtained consent. A person who is capable in law of giving a valid consent must have given consent. Persons above 12 years are considered to be capable of giving consent this section.

- (3) The act is done in good faith. Act, which results in harm or injury must be one done in good faith i.e., it should not be an act done without due care and attention. What is required under this section is due care and attention and not necessarily special skill and knowledge. The expression 'good faith' as explained under Section 52 IPC.
- (4) Act is done without intention to cause death though it might have been done with the intention of causing such harm as may result in death.

Under this section the wrongdoer is protected even though he has done the act with the intention of causing harm including grievous hurt but not death. The defence is available because the act is done in good faith and for the benefit of the victim.

(iii) Section 88 vs Section 87

Section 88 differs from Section 87 in two important ways.

- (1) Under Section 88 any harm except death may be inflicted under section 87 any harm other than death and grievous hurt may be inflicted.
- (2) In Section 88 the age of the person consenting is not mentioned whereas under Section 87, the age is above 18 years.

(iv) Case Study

G.B. Bhatge Vs Emperor AIR 1949 Bom. 226

The teacher punished a student of 15 years of age for his misconduct and gave 5 or 6 cane-strokes. He was not held guilty of offence under Section 323 (causing, voluntary hurt), as he had acted in good faith for the benefit of the boy and maintenance of discipline in the school. The act of the teacher was protected under Section 88 of IPC. However, had the boy been above 18 years of age, the act of the teacher would have been protected under Section 87 of IPC.

Sukaroo Kaviraj Vs Emperor (1887) 14 Cal 566

In this case an unqualified medical practitioner operated a patient for internal piles by an ordinary knife with the consent of the patient and in result, the patient died, he was denied protection under Section 88 and was convicted for the offence of culpable homicide not amounting to murder. The court held that the act of the accused cannot be said to be done in good faith and therefore he was not protected under this section.