

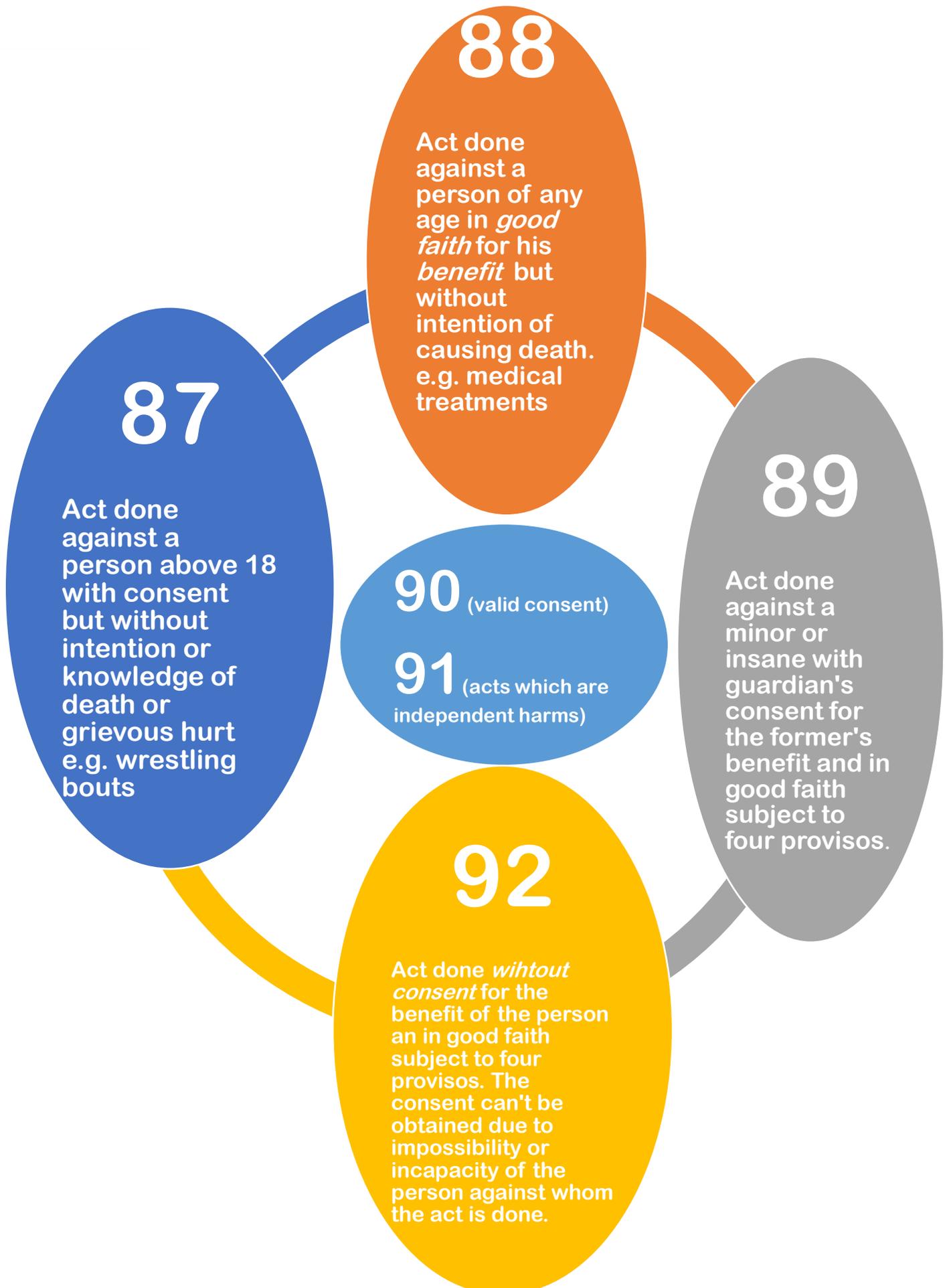
DEFENCE OF CONSENT

The defence of consent is based on the Roman Law maxim *volenti non fit injuria* which means that where person has given consent to suffer a harm or risk, he cannot complain of any injury that flows therefrom. Although mens rea in such cases may be present in the form of intention or knowledge, the same is compounded by the **consent** of the person who has suffered the harm. The consenting victim may have consented to the act in question either expressly, by words, or impliedly, through conduct. Consent is a defence to, in theory at least, all non- fatal offences and even homicides. The law rests on the policy that principle of individual autonomy proceeds on the premise that every person is the best judge of his own interests and in no circumstance will he/she consent to what he/she considers injurious to his personal interest.

This defence of is based on the idea that if competent adults voluntarily consented to crimes against themselves and knew what they were consenting to, the harm emanating from the act so caused in consequence of the consent cannot invite criminal charges against the doer of the act. The heart of the defence is the high value placed on individual autonomy in a free society. If mentally competent adults want to be crime victims, so the argument for the justification of consent goes. However, an apparent consent is invalid where the person giving it is so young, intoxicated or mentally disordered or retarded that his knowledge or understanding is such that he is unable to make a rational decision whether or not to consent. In such special cases, if the situation demands, the consent must be obtained from the guardian or any other person with the lawful charge of such incompetent person.

Defence of consent in Indian Penal Code, 1860

Intro: Consent plays a very important role in fixing the liability in criminal law for the reason that consent has role of exonerating or extenuating a person from the criminal liability. Sections 87-92 of the Indian Penal Code provide for and incorporate those circumstances under which the harm caused to the consenting individuals may be compounded or condoned. The actual provisions which recognise 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. An adult person may consent to any harm against himself (which is not though grievous hurt or murder) {**Section 87**}. Similarly any act resulting in harm may be done against a consenting person, in absence of an intention to cause death, if the act is done for the benefit of the person consenting and in good faith {**Section 88**}. And in case the person against whom the act sought to done which might result in an incidental harm, is incapable of giving consent by reason of unsoundness of mind or infancy, the consent may be given by the guardian of such person or any other person having the lawful charge of the person, provided the act was done in good faith and for the benefit of such insane or minor {**Section 89**}. In such a case the act may be done either by the guardian himself or by any other person with the consent of such guardian or person having the lawful charge. In extraordinary circumstances a person might be incapable of giving the consent (e.g. a person in coma, or an unconscious person) and it may further be impossible to obtain the requisite consent from the guardian or other person with lawful charge of such person without a delay which otherwise would defeat the purpose of the act, sought to be done for the benefit of such person, the requirement of consent can be done away with—those cases are the instances act done in absence of consent {**Section 92**}. These all provisions of the consent are guided by Section 90, Section 91 and Explanation of Section 92. The following diagrams are intended to provide lucidity and clarity regarding the scheme of provisions as incorporated in the Indian Penal Code, 1860.



Section 87

Consent given by a person above 18 years devoid of intention or knowledge of Death/Grievous hurt. Good faith and benefit are not required as essentials e.g. fencing for amusement.

Section 88

Consent given by any person for an act done in good faith for his benefit. But such act must not be done with intention of causing death, though such knowledge may be present e.g. medical treatment involving a surgical procedure.

***Section 90 (invalid consent)**

***Section 91 (acts which are crimes separate from the harm which was consented to)**

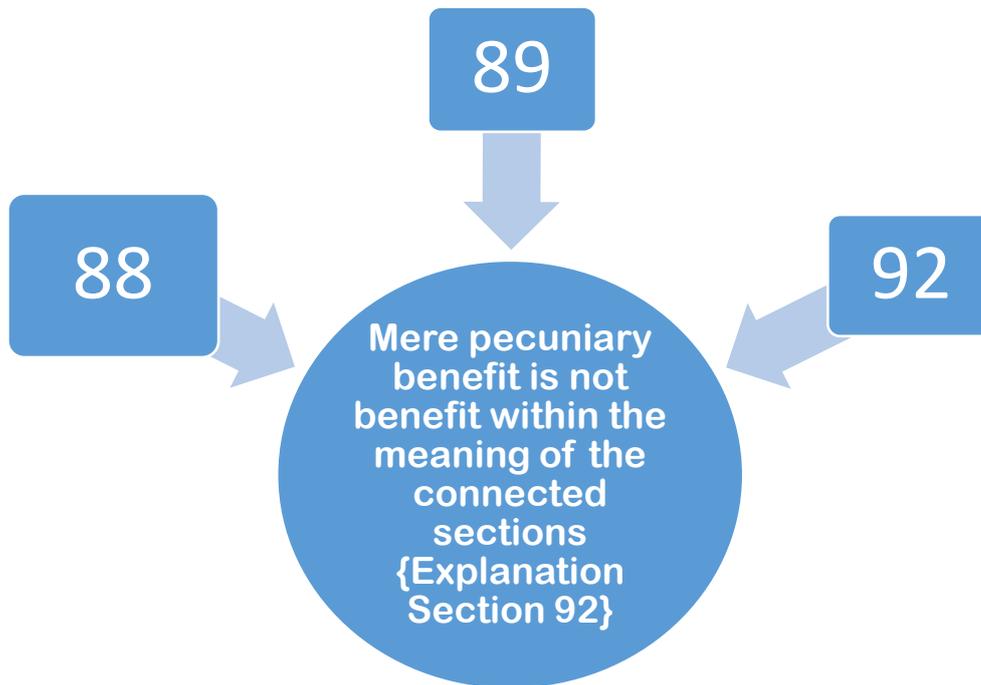
***Explanation to Section 92 (meaning of "benefit")**

Section 89

Consent given by a guardian or other person having the lawful charge of a minor or insane for the benefit. The defence does not extend to *four* exceptional circumstances.

Section 92

Act done for the benefit of a person who cannot give consent due to impossibility or incapacity. The defence does not extend to *four* exceptional circumstances.



KEYWORDS and Key Concepts:

1. **Good faith:** “good faith” as an essential element of the act done with the consent of the victim is not required only in section 87 of the four sections laying down the provisions as aforesaid, the other three being sections 88, 89 and 92.
2. **Benefit:** The requirement of the act to be done for the **benefit** of the person (victim) or any other person on whose behalf the consent was given by the guardian or other person having the lawful charge of such person has been mentioned only in sections 88, 89 and 92. As the case of section 87 requires stands peculiar, it does not require such element. (as in case of a minor or insane under section 89 the consent is given by another person. But the benefit intended must be of the person of on whose behalf the consent was given and not a personal benefit of the guardian, etc.) This word is further qualified by the Explanation to section 92 which provides that such a benefit must not exclusively a pecuniary (monetary) benefit. E.g. A agrees with B to suffer the harm of operating upon A and taking out his kidney for a certain pecuniary consideration. B cannot be allowed to plead the defence of consent on the ground that such an act was intended to benefit A.
3. **Consent:** the word “consent” is the crux and gist of all these provisions. The Penal Code does not define the word consent anywhere. However, the most important

provision regarding this is section 90 which qualifies this word for the purpose of the entire Code and not only for the purpose of the defence of consent or Chapter IV. Consent must not be vitiated by any of the following factors:

- a. Fear of injury.
- b. Misconception/mistake of fact.
- c. Insanity.
- d. Intoxication
- e. Minority (a child below 12 years for the purpose of this section)

In case of (a) and (b) above it is also required that the person doing the act (accused) either knew or had reason to believe that the consent was given in consequence of the fear of an injury or misconception of a fact. Similarly, consent by an insane or intoxicated person under the section is not regarded per se invalid. It is not valid only if such a person is unable to understand the nature and consequence of the act to which he is consenting.

The consent, required by sections 87, 88 and 89 may either be express (manifest by the words) or implied (by the conduct of the person). There are instances wherein the requirement of consent can be done away in entirety. Such instances have been covered under section 92.

- 4. Acts involving both harm out of consent and acts which are offences:** This has been covered in section 91. Such acts shall be regarded as distinct acts, hence offences, severable from the act involving the defence of consent. In other words the defence of consent (under sections 87, 88 and 89) shall be available only to the act over which the element of consent extends. And the other part shall be deemed to form a distinct act and an offence. E.g.

A consents for the surgery and amputation of his infected arm with **B**, a surgeon. He was wearing a wrist watch or a golden bangle in that hand. **B** amputates the arm but keeps the watch/ring dishonestly. He cannot claim protection under the defence of consent for the latter act which may amount to theft or breach of trust.

5. Overview of the Provisions:

Section 87 is age-specific and hence requires the consent for the harm to be given by a person above 18 years of age. Such an act may be done with mens rea in the form of knowledge or intention to cause any harm to the person giving consent to take the risk of such harm. However, this does not extend to four types of mens reas:

- i. Intention of causing death.
- ii. Intention of causing grievous hurt.
- iii. Knowledge of causing death.
- iv. Knowledge of causing grievous hurt.

Section 88 covers those cases in which any harm may be intended or known to be likely by the doer of the act and thus caused to a person who has given the consent to suffer such harm or the risk thereof. However, this excludes only one form of mens rea i.e. intention of causing death. This section requires “**benefit**” and “**good faith**” as essentials of the defence. In this case, the person must give the consent (express or implied) himself and the same cannot be given by another on his/her behalf.

Section 89 is class-specific section which pertains to circumstances wherein the harm may be done against a person who is either minor (below 12 years) or insane. In such a case the consent may be given by the guardian of the person or, in absence of a guardian, by a person having the lawful charge of such minor or insane, as the case may be. Needless to repeat that in such a case the act in question may either be done by the guardian personally, or by any other person to whom the guardian or the other person with lawful charge gives the consent (e.g. by a doctor who may, in good faith, use forceful or coercive methods to treat an insane person). The act must be done in good faith and for the benefit of the minor or insane.

Section 92 is a situation-specific provision which extends to those cases in which the situation is so grave that the requirement of consent would defeat the purpose or object of the **benefit** for which the act is intended to be done; and hence the consent is done away with. The circumstances in such cases are of such a nature that either it is impossible for the person to signify the consent or that he is incapable of giving such consent. Furthermore, it is also that such a person either has no guardian or other person to consent on his/her behalf or if there is a guardian the consent cannot be obtained in a reasonable **time** thereby defeating the intended benefit. E.g. emergency cases of fire or accident.

Exceptions to Section 89 and 92:

These two provisions are further not applicable in **four** extraordinary circumstances which are almost similar in both the sections:

- a. Intentional causing of death or attempt to cause death.

- b. Act done with the knowledge that it is likely to cause death. However, if that act is done with such a knowledge but for the purpose of preventing death or grievous hurt or curing of any grievous disease or infirmity, the defence under either of the sections can be availed.
- c. Acts involving voluntary causing of grievous hurt (Section 89)/ hurt (Section 92) or attempts to cause such unless done for the purpose of preventing death or grievous hurt or for curing grievous disease or infirmity (Section 89)/death or hurt (Section 92).
- d. These defence are also not available in case of the abetment of any offence the commission of which would not attract them. That is to say an abettor cannot succeed in pleading these defences if the act/offence is of such a nature that its commission would not attract defence of consent under these provisions.

Leading/Decided Cases:

1. Queen v. Poonai Fattemah 12 W.R. Crim. Rul., 7 (**Snake Charmer's Case**)
The accused, professing to be a snake charmer, persuaded the deceased to allow himself to be bitten by a poisonous snake under the impression of a belief that he possessed the powers to protect him from the bite which he could not subsequently. It was held that the deceased's consent did not excuse the accused from criminal liability.
2. Bishambher v. Roomal AIR 1951 All 500 (**Face Blackening Case**)
The accused, in this case, were members of a self-constituted panchayat who, in order to save the complainant from the attack of a furious mob (of 200 people) on account of him having made indecent assault on a chamar girl, blackened his face, tonsured his head and gave him a shoe-beating with the consent of the complainant (Bishambhar) made in writing by affixation of his signatures. Following this the complainant made a complaint against the accused who were charged under sections 323 and 506 of the Penal Code read with section 114. Allowing the pleas of defence to the accused under sections 81 and 87, the court observed, "It is true that if an act is unlawful in the sense of being in itself a criminal act, it cannot be rendered lawful because the person to whose detriment it is done consents to it; but there are many acts the commission of which in the circumstances mentioned in the section (87) may not amount to an offence."
3. Dr. R.P Dhanda V. Bhurelal, 1987 Cri. L J 1316 (M.P) (**Cataract Surgery Case**)
The appellant, a medical doctor, performed an eye operation for cataract with patient's consent which resulted in a failure leading to the loss of the eyesight of the complainant

who sought the accused to be tried under sections 338 and 420 of the Penal Code. The doctor was protected under the defence provided under section 88 as he acted in good faith. The Court observed, “When an operation of cataract is performed by a duly qualified doctor in the recognised Indian method of treatment with the consent of the patient and in good faith for his benefit but the operation is unsuccessful and the patient loses sight, it is not permissible to hold that the accused is guilty...From the mere fact that the operation was unsuccessful, it cannot be held that there was rashness or negligence so as to give rise to criminal liability.”

Conclusion: Although consent serves as a valid ground of defence to a criminal charge, consent does not mean absolute submission to any harmful act whatsoever. Therefore, consent must be valid and in order to be so, it must not be intertwined with the factors vitiating it. As such, if the he accused had sexual intercourse with the victim on a false promise of marriage the courts have held that submission of the body by a woman under fear or misconception of fact cannot be construed as consent and so conviction of the accused under sections 376 and 417 of the Indian Penal Code held proper¹. However, if the prosecutrix herself starts to cohabit with the accused owing to the reason that the respective families did not agree to their nuptial knot, the consent in such a case cannot be said to be given under fear or misconception of fact². Under English law, piercing, tattooing, etc. have been held to be acts which fall within the sweep of the defence of consent.³

Note: The above material is not intended for research purposes or references. It has been developed as a reading material for the students of law owing to the lockdown due to the global pandemic spread. The students are advised to look up for text books as well and also go religiously through the provisions in the bare act throwing heavy weight behind and placing due attention on the illustrations appended thereto.

Feedback for corrections may be mailed at mrasool100@gmail.com

{We will meet again}

¹ Jakir Ali v. State of Assam 2007 Cri. L J 1615 (Guwahati)

² Udaya v. State of Karnataka 2003 Cri. L J 1539 (S.C)

³ R v. Wilson (1996) 2 Cr. App 24