



### CONSENT UNDER BNS [SECTIONS 25-28 & 30]

The term 'consent' is not defined in BNS. The law related to consent is based on maxim **volenti non fit injuria i.e. he who consents suffers no harm**. Man is best judge of himself and no man will consent to what he considers injurious to his interest.

The section 28 does not define 'consent' but describes what is not consent. **This section says that consent is not a true consent if it is given—**

- by a person under fear of injury and the person obtaining the consent knows or has reason to believe this.
- by a person under a misconception of fact;
- by a person of unsound mind and who is unable to understand the nature and consequence of that to which, he gives his consent.
- by a person who is intoxicated.
- by a person under twelve years of age.
- Consent is an act of reason, accompanied with deliberation, the mind weighing as in balance, the good and evil on each side.

#### **Consent as defence**

Section 25 of BNS gives immunity to a person from criminal prosecution on the ground of consent in general. Sections 26, 27 and 30 extend protection in those cases only where the harm is caused in good faith during the course of doing an act for the benefit of consenting party.

Following are the cases in which the consent of the harmed or his guardian exempts **the person inflicting the harm from criminal liabilities:**

(a) Consent given by an adult person (18 years of age) to any harm against himself (which is not intentionally cause grievous hurt or murder). Good faith and benefit are not required as essentials. **E.x:** Wrestling fight. Section **25**.

(b) Consent given 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.x:** Medical treatment involving a surgical procedure. This defence is available under Section **26**. The school teacher is protected by this section.

(c) Consent given by the guardian of child (12 years of age) /person of unsound mind for the benefit of child. **E.x:** Surgical operation of child. Section - **27**.

(d) Lastly, defence is also available under Section **30** by virtue of which an act done for the benefit of a person **who cannot give consent** due to impossibility or incapacity. This section (30) deals with the cases of emergency and presumes **implied consent** in 2 categories:

- ❖ When it is impossible to obtain consent because the person who could accord consent
- ❖ When it is not articulated or expressed.

**E.x 1 :** 'X' drops the child to save his life from fire.

**E.x 2 :** A has performed immediate operation of a child despite his objection but in good faith as there was no time to obtain consent of guardian. So, he has committed no offence.

**Note: Mere pecuniary (monetary) benefit is not benefit** within the meaning, of sections 26, 27 and 30.

The benefit of **Sec-27/30** cannot be claimed in four situation covered under the four provisos -

- ❖ Intentional causing of death or attempt to cause death – **Ex.** Father, in good faith, kills his own daughter from falling into the hands of dacoits – no immunity since the act is intentional and illegal.
- ❖ Consent to the doing of anything likely to cause death **for a purpose** other than prevention of death or grievous hurt .
- ❖ Causing or attempting to cause grievous hurt except for preventing death or grievous hurt or infirmity. **Ex.** Causing grievous hurt to a child under Sec-117(1) of BNS.
- ❖ Abetment to commission of any offence. **Ex.** Father intending monetary benefit to the child of 15 years, abets B to commit rape on the child. Neither father nor B could be within the exception.

### Section 25

Consent (express or implied) given by a person to any harm against himself. Good faith and benefit are not required as essentials. Consent may reduce the gravity of offence or mitigate the rigor of the punishment. **E.x.** Wrestling fight.

### Section 26

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.x.** medical treatment involving a surgical procedure.

**Section 28** describes invalid consent.

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### Section 27

Consent given by the guardian of child or unsound mind person for his benefit. The defence does not extend to 4 exceptional circumstances. **E.x:** Surgical operation of child

### Section 30

Act done for the benefit of a person who cannot give consent (implied) due to impossibility or incapacity. The defence does not extend to 4 exceptional circumstances. **E.x.** 'X' drops the child to save his life from fire.

## **Consent Vs Submission**

There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere submission involves consent. Mere submission by one who does not know the nature of the act done cannot be said to be consent.

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 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 section 69 of BNS held proper. 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 (marriage bond), the consent in such a case cannot be said to be given under fear or misconception of fact.

### **Consent on false pretext of marriage**

In **Anurag Soni Vs. State of Chhattisgarh, AIR 2019 SC 1857**, a deliberate representation by the accused with a view to eliciting (to obtain sth) the assent of his victim without having any intention or inclination to marry her vitiates the consent. Hence, consent for sexual intercourse induced by the promise of marriage is not true consent, if it is proved that the accused from the very inception (starting point) of making the promise had no intention to marry her.

### **Queen Vs. Poonai Fattemah (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.

### **Bishambher Vs. Roomal AIR 1951 (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 (Now 115(2)) and 506(351(2)&(3) of the Penal Code read with section 114. Allowing the pleas of defence to the accused under sections 81(Now section 19) and 87(Now section 25), 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 who is affected agrees to it; but there are many acts the commission of which in the circumstances mentioned in the section (87(Now section 25),) may not amount to an offence."

### **Master chastising pupil**

In **Ambika S. Nagal Vs State of Himachal Pradesh, 2020** SCC, the High Court held that "whenever a ward is sent to school, the parents must have said to give an implied consent on their ward being subjected to punishment and discipline." This Judgment was rendered in spite of the pupil succumbing to his injuries. In a case against the State of Kerala, the Kerala High Court in [WP (Crl.) No. 220 of 2014 titled **Rajan Vs Sub-Inspector of Police** upheld the infliction of Corporal punishment holding that it was beneficial to the child even in cases where the consequences were extreme, as the teacher has a judging authority whether or not to inflict the punishment.

### **Consent obtained by mala fide intention**

In **Dhruvaram Murlidhar Sonar Vs. State of Maharashtra, AIR 2019 SC 327**, consent for sexual intercourse obtained by mala fide promise to marry with clandestine motive for eliciting assent for sex, however, amounts to cheating or deception that leads to misconception of fact.

### **Consent : deliberate choice of victim**

In **Maheshwar Tigga Vs. The State of Jharkhand, AIR 2020 SC 4535**, the Supreme Court in a recent judgment reiterated that under Section 90 IPC, (Now Section 24 of BNS) a consent given under misconception of fact is no consent in the eyes of law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of 4 years. Therefore, court has acquitted a man accused of raping a woman on the pretext of marriage. The consent of the prosecutrix was a conscious and deliberate choice, not an involuntary action.