CHAPTER-VIII

CONCLUSION AND SUGGESTIONS
Consent has been defined negatively in Section 90 of I.P.C. as a consent is not such a consent as is intended by any Section of this Code, if the consent is given by a person under fear of injury or under a misconception of fact and if the person doing the act knows, or has reason to believe that the consent was given in consequence of such fear or misconception. Hence in this part of Section 90 (hereinafter called the first part) the FEAR OF INJURY and MISOCNCEPTION OF FACT make the consent illegal.

Under the second part of the Section 90 there are three categories of persons who are considered as unable to give proper consent for want of non-mentality. In other words there are the persons who are unable to understand the nature and consequence of the act consented. These three categories are viz. CONSENT BY PERSON OF UNSOUND MIND; CONSENT BY INTOXICATED PERSON AND CONSENT BY INFANTS (i.e. under 12 years of age).

What we find in Section 90 of IPC is that consent has not been defined as such rather type of consent i.e. legal concept (i.e. desired by the Indian Penal Code) has been defined indirectly or we may called negatively. The Section 90 could not express that when a person will be deemed to have consented an act? When his willingness will amount to consent?

There are many words of mental attitude such as VOLITION, WILL, MOTIVE, INTENTION, KNOWLEDGE all indicate some mental bent of mind to do something but exact degree of mental level constituting consent has not been told in Section 90 of I.P.C. Before study of the concept of consent statutorily, we may assure the nature of consent up to the extent that consent is the level of expression of the completeness of the intention to do an act from
where if a person retreats, it will be called revocation of consent. In other words suppose intention is the wheel, then consent is the top point of wheel.

Now under I.P.C., there are two types of consent used. First is consent of victim which may or may not exonerate the accused from criminal liability. (Relevant Sections 87-92, 497, 361, 362, 375, 376 D, 383-498, 82-83, 84-86, 312-316, exception 5 to SECTION 300, 305, 306 of IPC). Second is consent of co-accused which may inflict equal punishment under joint liability (Sections 34-38, 114, 149, 396 460 of IPC) or may be punished with unequal punishment (Sections 107, 120A, 121A, 128, 130, SECTION 134, 136, 154-158, 197, 212, 213, 215-219, 221-223, 225A, 242-243, SECTION 411-414, 475 of IPC).

Now what is consent, we shall have to take the access of Section 13 of the contract act which enumerates as under:

"Two or more persons are said to consent when they agree upon the same thing in the same sense."

This definition gives the real meaning of consent according to which two persons are called at the mental level of consent when both stand at equal footing for doing any act. In other words both have passed from initial desire of volition to the immense desire to fulfil without any laxity which is a level of mental agreement. Second test is both are willing to do the agreed act in the same sense. It means there is no second lien of operation. There is no deviation from the way agreed upon for completion of the design.

Section 14 of Indian Contract Act is also synonym to Section 90 of IPC in context of a valid consent. Section 14 contains the word FREE CONSENT which is almost the same (valid consent) consent as desired by the IPC. The word ‘coercion’ used in Section 14 of contract act is almost same with the word fear of injury in Section 90. Hence the word ‘misrepresentation’ used in
Section 14 is almost similar to misconception of fact used in Section 90 of I.P.C. If we see the deep meaning of coercion in Section 14 of the Contract Act, we find that the words of this Section are far wider than anything in the English authorities; it must be assumed that this was intended. As the definition stands the coercion invalidating a contract need not proceed from a party to the contract or be immediately directed against a person whom it is intended to cause to enter into the contract or any member of his household, or affect his property, or be specifically to his prejudice. In England the topic of "duress" at Common Law has been almost rendered obsolete, partly by the general improvement in manners and morals, and partly by the development of equitable jurisdiction and under the head of Undue Influence detaining property is not duress.

**Act forbidden by the Penal Code:** The words "act forbidden by the Indian Penal Code" make it necessary for the Court to decide in a civil action, if that branch of the Section is relied on, whether the alleged act of coercion is such as to amount to an offence. The mere fact that an agreement to refer matters in dispute to arbitration was entered into during the pendency, and in fear, of criminal proceedings is not sufficient to avoid the agreement on the ground of "coercion," though the agreement may be void as opposed to public policy within the meaning of Section 23. It must further be shown that the complainant or some other person on his behalf took advantage of the state of mind of the accused to apply pressure upon him to procure his consent. So if a false charge of criminal trespass is brought against a person and he is coerced into agreeing to give half of his house to the complainant the agreement will not be enforced.

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3. 22 All. p. 227, citing Jones v. Merionethshire Building Society (1893) 1 Ch. 173.
In a Madras case the question arose whether if a person held out a threat of committing suicide to his wife and son if they refused to execute a release in his favour, and the wife and son in consequence of that threat executed the release, the release could be said to have been obtained by coercion within the meaning of this Section. Wallis, C.J., and Seshagiri Aiyar, J., answered the question in the affirmative, holding in effect that though a threat to commit suicide was not punishable under the Indian Penal Code, it must be deemed to be forbidden, as an attempt to commit suicide was punishable under the Code (Section 309). Oldfield, J., answered the question in the negative on the ground that the present Section should be construed strictly, and that an act that was not punishable under the Penal Code could not be said to be forbidden by that Code. That view seems to be correct. A penal code forbids only what it declares punishable.

A demand by workers under the Industrial Dispute Act backed by a threat of strike being not illegal, the threat of strike would not amount to coercion.

Unlawful detaining of property: A refusal on the part of a mortgagee to convey the equity of redemption except on certain terms is not an unlawful detaining or threatening to detain any property within the meaning of this Section.

However, refusal by the outgoing agent, whose term expired, to hand over the account books to the new incoming agent until the principal gave him a complete release would amount to 'coercion'.

Causing any person to enter into an agreement: In Kannaya Lal v. National Bank of India the Privy Council has laid down that the word

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5 Amircijii v. Seshama (1917) 41 Mad. 33.
7 Bengal Stone Co. Ltd. v. Joseph Hyam (1918) 27 Cal. LJ 78, 80-82.
8 Muthiah Chettiar v. Karupan Chetti (1927) 50 Mad. 786.
'coercion' in Section 72 is not controlled by the definition given in Section 15 and it is used there in a general sense and it is not necessary that coercion should have been used for bringing about a contract between the parties.9

Now we see the similar meaning of 'misconception' of fact used in Section 90 of IPC with 'misrepresentation' used in Section 14 of the contract Act.

Misrepresentation of fact of law:- It used to be said in English books that misrepresentation which renders a contract voidable must be of fact; but there does not seem to be really any dogmatic rule as to representations of law. The question would seem on principle to the whether the assertion in question was a mere statement of opinion or a positive assurance–especially if it came from a person better qualified to know–that the law is so and so. It seems probable in England, and there is no doubt here that at any rate deliberate misrepresentation in matter of law is a cause for avoiding a contract. Where a clause of re-entry contained in a Kabuliyat (counterpart of a lease) was represented by a zamindar’s agent as a mere penalty clause, the Judicial Committee held that the misrepresentation was such as vitiated the contract, and the zamindar’s suit was dismissed.10

Where an executing party to a deed signed the deed upon a representation that the deed will not be enforced, there is a mistake as to be substance of the agreement, apart from the question that there was no consensus of mind.11

Fraud and misrepresentation distinguished :- The principal difference between ‘fraud’ and misrepresentation’ is that in the one case the person making the suggestion does not believe it to be true and in the other he

believes it to be true, though in both cases, it is a misstatement of fact which
misleads the promisor.12 ‘Intention to deceive’ is essential in fraud, while that
is not necessary in ‘misrepresentation.’ Although in both the cases, the
contract can be avoided, in case of misrepresentation or a fraudulent silence,
the contract cannot be avoided if the party whose consent was so caused had
the means of discovering the truth with ordinary diligence.

When we focus on ‘consent’ by co-accused, it is the *mens rea* which
we are to search. Hence consent derives its ill-will from the word ‘intention’.
Therefore consent is specie and intention is genesis. In other words consent is
a type of intention or *mens rea*. When an intention (*mens rea*) is expressed by
an accused before his co-accused in the form of a offer when it is accepted and
answered in positive to do an act offered, it becomes the stage of agreement
between the two persons. Such consent may be express or implied consent.
Now because the consent has its source from intention, therefore it is
necessary here to study the *mens rea* and its different types so that we can
acknowledge the real and exact meaning of the concept of consent embodied
in I.P.C. The general doctrine of *mens rea* in England suffered a temporary
eclipse, because in many statutory offences it was not taken into consideration.
Therefore a reputed author, Dr. Stallybrass, had to entitle his article as
“Eclipse of Mens Rea” in 193613 In this learned article, after a long survey of
the decided cases, he arrived at two tentative conclusions: *first*, in cases of
common law offences, under the earlier statutes, the maxim of *mens rea* still
applies; *secondly*, in cases of modern statutory offences the maxim has no
general application and the statutes are to be regarded as themselves
prescribing the mental element which is prerequisite to a conviction. However,
both these conclusions are open to certain objections. As to the first,

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13 (1936) 52 L.Q.R. 60.
Christians (and now also the Hindus) from Mohammedans in respect of their views relating to polygamy. It has been truly said that there is nothing absolutely good and nothing absolutely bad in this world.19

Applicability of Mens Rea to Indian Penal Laws: It has been said that the general doctrine of mens rea is not of very great importance in our country where the law is codified and the offences are carefully defined so as to include mens rea in the definition itself. The Indian Penal Code gives full effect to this doctrine of mens rea in two ways. In the first place the chapter on “General Exceptions,” which controls all the offences not only defined in the Indian Penal Code but also those described and punished under special and local laws,20 deals with general conditions which negative mens rea and thereby exclude criminal responsibility. This is how the Indian Penal Code negatively gives effect to this doctrine of mens rea, because under these exceptions a large number of cases have been excluded, where there is an absence of evil intent in one form or another. In the second place, every offence in the Indian Penal Code is carefully defined so as to include the precise evil intent which is the essence of a particular offence. The evil intent is generally indicated by the use of such words as “intentionally,” “voluntarily,”

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19 Huda, pp. 187-8; see also Kenny, Outlines of Criminals Law (17th Ed.), p. 26. “Ethical reprobation of homicide, homosexuality, libel, adultery, bigamy and slave trading, to take a few examples, in not the same in all countries, and indeed may vary from Section to Section of the people in the same country.”

20 Vide Section 6 I.P.C. which lays down: “Throughout this definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled ‘General Exceptions,’ though those exceptions are not repeated in Sections, penal provisions or illustration.” Also see Section 40 I.P.C.: except in the chapter and sub-Section 2 and 3 of this Section the word “offence” denotes a thing made punishable by this code.

In Chapter IV (general exceptions), “... the word ‘offence’ denotes a thing punishable under this code or under any special or local law as hereinafter defined.”

Section 41: A special law is a law applicable to a particular subject; for example, Excise Act, Cattle Trespass Act, etc.

Section 42: A local law is a law applicable only to a particular part of India.
“fraudulently,” “dishonestly,” “wantonly,” and so on. By the use of these words, the Indian Penal Code gives effect to the doctrine of mens rea positively.

The Indian Penal Code defines offences with great care and precision and the chapter on “General Exceptions” very comprehensively defines cases where mens rea is non-existent and therefore there is no criminal responsibility. Therefore, according to the older view, it has been suggested, that the general doctrine of mens rea is not applicable to the penal law in our country. However, even when the law is codified, the application of the doctrine may, sometimes, be found useful in remedying defective and incomplete definitions or at any rate in interpreting them. Setalvad\(^{21}\) in this connection observes:

> What the Indian courts seem to have done is to incorporate into the common law crimes the mens rea needed for that particular crime, so that the guilty intention is generally to be gathered not from the common law but from the statue itself. This may be regarded as the modification of the common law worked into the Code by Macaulay and his colleagues to make it suit Indian conditions. By adopting this course they have also avoided the doubt and obscurity which have not infrequently arisen in regard to the mens rea required for certain common law crimes like homicide, assault and false imprisonment. It has been pointed out that the English system, in which changes in the law are made gradually by judicial decisions, has often created a situation in which old and new doctrines have been employed in the course of the same period according as the judges are

\(^{21}\) M.C. Setalvad, The Common Law in India, p. 139.
Dr. Stallybrass himself is of opinion that it is difficult to determine when a statute is of sufficient antiquity for his rule to apply. As regard the second conclusion, the modern tendency of the decisions of the courts is to hold a contrary view, as we shall see in the sequel. However, the eclipse of the doctrine of *mens rea* to a certain extent is visible in some of the decisions that we have mentioned above.

The modern trends of *mens rea* indicates clearly that the doctrine has revived with greater vigour after a temporary phase of eclipse, if it may be so called. Lord Goddard C.J. was the first to resurrect it and to make it applicable not only to common law offences but also to all statutory offences, unless it was ruled out specifically in the statute itself. He\(^4\) observed very clearly:

> The general rule applicable to criminal cases is *actus non facit reum nisi mens sit rea*... It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind, that unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the Court should no find a man guilty of an offence against the criminal law unless he has a guilty mind.

How reluctant the court is to exclude *mens rea* is strikingly illustrated in *Hardin v. Price*.\(^5\) In this case the appellant had been convicted by the magistrate for having failed to report an accident which he was required to do under Section 22(2) of the Road Traffic Act, 1930, which laid down that if any part of the vehicle collides with another the driver should report the accident. The present case his trailer collided with another motor car. The conviction was quashed on appeal by the Division Court on the ground that the Road

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Traffic Act, 1930, must be read as implying _mens rea_ as a constituent of the offence.

'Mala in se' and 'Mala Prohibita'. As we have noticed above, a distinction between an act which is _malum in se_ and an act that in _malum prohibitum_ was drawn by Bramwell J. in _R. v. Prince_. This distinction is known and recognised in America, where crimes have been divided according to their nature into (a) crimes which are intrinsically immoral or wrong in themselves (_malum in se_) such as murder, rape, arson, burglary, larceny, breach of peace, forgery and the like; and (b) crimes which comprise those acts which in the absence of statute will not be considered as immoral (_malum prohibitum_), as no moral turpitude is attached to them. Instances of such acts are statutes prohibiting the enhancement of rents, removal of foodgrains and the like. Such acts are made offences in modern times to solve the house problem, food scarcity, and so on. Huda observes:

The distinction, though in many ways convenient and even just, is open to the objection that there is no clear line of demarcation between the two classes of acts and it is not easy to say whether a particular act lies on one side of the line or the other. Our ideas of right and wrong are often the result of early training and environments. Acts are often singled out for punishment on mere considerations of polices which may vary in different countries and at different times. The Spartans anxious to rear up a race of heroes, the old Rajputs with their peculiar notions about caste and purity of blood saw nothing wrong in infanticide. Compare again the wide gulf that separates the

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16 (1875) L.R. 2 C.C.R. 154.
17 Blackstone also was a convinced exponent of this classification of offences.
inclined one way or the other giving rise to conflicting principles with puzzling results. Such uncertainty cannot exist in India as the necessary guilty mind is indicated in the statutory definitions of the crimes.

Mayne has also observed: “Under the penal code such a maxim is wholly out of place.” So has observed Gour and Ratan Lal.

In modern times, however, a change is noticeable ever since Lord Chief Justice Goddard made his famous observation in *Brend v. Wood* to the effect that:

*It is, in my opinion, of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of the offence against the criminal law unless he has a guilty mind.*

This statement of law was approved of by the Privy Council in *Shrivivas Mal v. Emp.* In this case the accused was prosecuted for infringing a rule under the Defence of India Act 1939. He was a wholesale licensee for distributing salt in a district to the various retail dealers at the controlled rates, after making due entries in the prescribed coupons. The clerk of the accused had infringed the rule under the Act and the master was really unaware of these actual infringements. The Privy Council acquitted the first accused holding that the rule in question does not belong to the category of rules under which offences can be committed without a guilty mind. Similarly, in *Emp. v. I.S.*

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24 Ratan Lal, Law of Crimes (19th Ed.), p. 148. “The maxim *octus no facit reum nisi mens sit rea has*, however, no application to the offences under the code.”
26 I.L.R. (1947) 26 Pat. 460 (P.C.)
Macmull, the accused was charged for the technical offence committed under the Motor Spirit Rationing Order 1944. He was the master of another accused who had supplied four gallons of petrol to a bogus customer without obtaining coupons in violation of the above mentioned order. The prosecution case was that since the accused was the master of the real culprit and as he was the supplier, although he had no knowledge and therefore no *mens rea* yet in law, he was still liable. The Bombay High Court refused to accept that contention and acquitted the accused, which was approved of by the Privy Council. The Supreme Court of India in *R. Hari Prasad Rao v. State*, has approved of the well-known observations of Lord Chief Justice Goddard quoted above. In this case two persons, a master and a servant, were prosecuted under Clauses 20 and 27 of the Motor Spirit Rationing Order 1941 for the actual infringement of the rules by his servants. The master was the owner of two petrol pumps in Guntur, which were left in charge of his servant. The servant supplied motor spirit without coupons in some cases and in others he took advance coupons from car-owners without supplying the spirit, which were strictly prohibited. The Supreme Court of India held that in these circumstances the master cannot be vicariously held liable, especially when he was absent at the time of the delivery of the spirit. However, the conviction of the master was upheld by the Supreme Court for non-endorsement on the coupons by his servant, which was required by the rules, as that rule was mandatory and absolute and was made punishable without *mens rea*. Thus, we find that under the Penal Code or under the penal statutes in our country, this general doctrine of *mens rea* does apply and is often made use of in interpreting the codified penal law, whenever the definition of the offence is defective or incomplete or it is not expressly

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28 1951 SCJ 296: AIR 1951 SC 204 See also *Bhola Prasad Lal v. The King*, AIR 1949 Cal. 348; *State v. Shiv Pd. Jaiswal* AIR 1946 All 610.
excluded by the terms of the statute itself. However, with regard to the prohibitory statutes which are really not criminal but which are made penal in the interests of the public, unless the qualifying words like “knowingly,” “wilfully,” etc. are used, the prosecution need only prove the prohibited act, and the accused in order to earn an acquittal must bring himself within the statutory defence; on the other hand, if the qualifying words are used, the prosecution must prove all those elements either by direct or circumstantial evidence.

After studying the place of mens rea in IPC, we came to know that without mens rea there is no criminal except the offences of strict liability and mens rea has been reflected with many words. It is also seen that consent of victim can exonerate the alleged accused under Sections 87-92, 497 of the Indian Penal Code.

Section 90 of IPC itself invalidates the consent affected by fear of injury or misconception of fact or if the consent is given by persons unable to give valid consent.

Fear of Injury :- According to Section 44 of the Code the word ‘injury’ denotes any harm whatever illegally caused to any person in body, mind, reputation or property. Consequently, consent given under fear of injury is not limited to physical injury even though in most of the cases which come up before the Courts the question of consent given under fear of physical injury is involved. In Dasrath Paswan v. State, the accused was quite upset mentally after having failed in the High School examination for three years in a row. He told his wife, a literate woman of about nineteen years, that he wanted to die. The wife asked him to kill her first and then kill himself. The accused killed her and then before he could kill himself, he was arrested. The Supreme Court

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29 AIR 1958 Pat. 190.
held that the deceased wife had given her free consent to be killed by her husband and, therefore, the accused was guilty of culpable homicide not amounting to murder only under Section 304, Part I and not of murder under Section 302 of the Code, A lenient view was taken and he was sentenced to five years’ rigorous imprisonment.

Misconception of fact: In Poonai Pattemah v. Emp. the deceased allowed himself to be bitten by a snake on the misconception created in his mind by the accused that the accused had power to cure him and that the deceased would not die. It was held that the deceased had consented to be bitten by a snake under a misconception of fact and that the accused also knew or had reason to believe that the consent had been given by the deceased under such misconception. Consequently, it was not a valid consent under this Section.

On the other hand in Jayanti Rani Panda v. State, the question was as to whether the accused had raped the complainant. The accused was a frequent visitor to the house of the complainant. In course of time the accused and the complainant prosecutrix felt attracted towards each other. The accused gave the impression that he would soon marry her. Sexual relations developed between them. When she became pregnant she insisted that the accused should marry her immediately whereas the accused advised abortion for which she was not prepared. It was held that the accused was not guilty of rape as the prosecutrix had given her consent freely for the series of sexual intercourses with him and Section 90 could not be held to be applicable until it could be established beyond reasonable doubt that right from the beginning of the sexual contact between the two the accused had no intention to marry her.

Consent and submission: Consent and submission are distinct. Every consent may involve a submission but submission may not always involve

30 (1969)12 R (Cr) 7.
31 1984 Cr LJ 1535 (Cal).
consent. The matter was looked into by the Punjab High Court in the case of *Rao Harnarain v. State*. Under pressure from one of the accused who was an advocate and additional public prosecutor, a husband was induced to provide his wife to satisfy the lust of the advocate and his friends. They ravished the woman during the night as a result of which she died. Some neighbours had heard shrieks of the deceased during the night. The Court held the accused guilty of rape. Distinguishing between consent and submission the Court observed:

“A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be held to be ‘consent’ as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.

“Submission for her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one’s will or pleasure.”

**Misconception of both the parties:** An honest misconception on the part of both the parties may not invalidate the consent. In a case the private parts of

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32 AIR 1958 Punj. 123.
33 Ibid at p. 126.
the deceased were cut by the accused eunuchs as a result of which the deceased died. It was proved that the accused eunuchs had performed similar acts in the past and they never knew that the practice of emasculation was against the law. The accused were held liable for culpable homicide not amounting to murder, and not murder, or the ground that they had acted with free consent of the deceased who was a man of full age and had submitted himself for the act voluntarily.  

Under chapter second we studied the consent exonerating from the criminal liability under Sections 87, 88, 89, 92, 497 of IPC and Plea Bargain under Sections 265A- 265L of Cr. P.C., 1873.

After studying Sections 87-92 the true meaning of consent appeared.

**Consent as a defence to criminality** :- Consent, as already seen, has the effect of exonerating or extenuating a criminal act in the following cases:

(a) Harm short of grievous hurt may be caused by consent in any case;
(b) Even harm resulting in death may be caused, if it was not so intended, but was intended for his benefit; and in such case, even consent (Section 92) is unnecessary where it is not possible.

But these Sections evidently refer only to the operation of consent on personal injuries. They have no reference to offences relating to property, and sexual relations. But consent plays an equally important part in these cases, and the present discussion will not be complete without reference to them. It may then be generally stated that, in addition to the two cases above set out, there are other cases in which consent is either a material element in the composition of the crime, or has the effect of neutralizing it. Theft and rape may be given as examples of the former, and adultery of the latter. There are other offences, such as wrongful confinement, in which consent is an essential ingredient.

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34 Eoboohm Hirjah v. Emp., (1866)5 WR (Cr) 7.
Consent, moreover, plays a conspicuous part not only in determining the nature of the offence, but also in justification of an act otherwise criminal. It is a ground of mitigation even in the case of homicide. And as consent may be either express or implied, the subject assumes a degree of complexity into which it is useful to inquire.

In the first place, therefore, what is consent? It is undoubtedly the concurrence of wills. But besides concurrence of wills, its chief essential constituent is consciousness or knowledge of the act consented to. So on a charge of indecent assault on a body of eight years the Court told the jury that "knowledge of what is to be done, or of the nature of the act that is being done, is essential to consent to the act". So where a person consented to the performance of a surgical operation upon himself with great reluctance, the only information communicated to him being that if he submitted to it, he would be cured, the Court held that a person could hardly be said to accept a risk of which he was not aware, and that, therefore, there was no case for exceptional treatment unless it were shown that the patient was aware of the risk and accepted it. So in another case the fact that the force applied was a form of initiation to a voluntary society, which the party assaulted had agreed to join, was held to be no defence if he did not know before hand that that was part of the ceremony. Knowledge of the act and its probable consequences is; therefore, the first requisite of consent. And since there can be no knowledge without consciousness, it follows that consent without consciousness is impossible. So sexual intercourse with a female put under chloroform or rendered otherwise unconscious is rape, the question of consent being

35 Lock, 12 Cox. C.C. 244.
37 Bell v. Hensly, Jones 131; State v. Williams, 75 M.C. 134.
38 Section 90 post and Comm.
immaterial. So where in such a case the consent was obtained by fraud, misrepresentation or coercion, the result was held to be the same as if there never had been any consent. The consent required is therefore free consent, or the free exercise of the will of conscious agent. Where, therefore, a child just above ten years of age yielded to her father there was held to be no consent, for as Lush, J., told the jury: "Consent means consent of will; and if the child (just above ten years of age) submitted under the influence of terror or because she felt herself in the power of the man, her father, there was no real consent."

Sir James Stephen defines consent in criminal law to mean "a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents". And he goes on to add that "consent is said to be given freely when it is not procured by force, fraud or threats of whatever nature". This view has become established in America where Orton, J., enunciated the principle as follows: "When the mind is subjugated as well as the body, so that the power of volition and the mental capacity either to consent or dissent is gone, then the act may be said to be against the will", and so also it may be said to be without consent. But when the mind is left free to exercise the will and to consent or dissent, then by consent responsibility for the act is incurred: where there is no such mental capacity, the quality of the act is indifferent, there can be no consent or dissent, and consequently no responsibility. The physical power may be overcome and the utmost resistance be unavailing yet the mind may remain

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59 Camplin, 1 Cox. C. C. 229; Ryan, 2 Cox. C.C. 115; Dee, 15 Cox. C.C. 579.
40 Case, 4 Cox, C.C. 229; Flattery, 13 Cox. C.C. 338; Dee, 15 Cox. C.C. 579.
41 Woodhurst, 12 Cox. C.C. 443; Dee, supra.
42 Woodhurst, 12 Cox. C.C. 443.
43 Dig. of Cr. Law, Art. 224.
44 Ibid.
free to approve or disapprove, consent or dissent." Of course, consent may be free, but it may have been brought about by fraud, misrepresentation or coercion. A person may have consented to a game with a sword in ignorance of the fact that it was tipped with poison; the wife may consent to intercourse with her husband in ignorance of the fact that he was suffering from a foul disease. In both of which cases the effect is the same as if there had never been any consent at all.

**Implied consent** :- But so long as there is consent, and the consent is free, it is not necessary that it should be express or articulate. For it may be implied or given by implication, or inferred by conduct. So there may be and are cases in which silence implies consent. A modest girl may even signify her consent to her lover's proposal by "No" uttered so as to denote a modest but real "Yes": *Nonquod dictum, sed quod factum in jure imspicitur.* So where a customer enters a tradesmen's shop and picks up goods exhibited for sale, there is implied consent (a) to enter, (b) to handle goods, and (c) to appropriate them at the stated or reasonable price. So again, where a person has been a welcome visitor in the past, he may well assume consent to his continued visits, unless he has had reason to believe otherwise. The term "implied consent" is then, so far as regards the criminal law, used to signify either (a) consent by acts and conduct, or (b) consent presumed though never given or in any way signified. The examples above given illustrate the first sense: Illus. (m) appended to Section 378 of the Code may fifthly illustrate the other sense. "A being on friendly terms with Z, goes into Z's library in Z's absence takes away a book without Z's express consent for the purpose merely of reading it, and with the

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45 Whittaker v. State, 50 Wis. 518.
46 Clarence, 23 Q. B.D. 58.
intention of returning it. Here it is probable that A may have conceived that he had his implied consent to use Z’s book. If this was A’s impression, A has not committed theft.” Why not? Because A had Z’s implied consent to enter his library, and take on loan any book he required therefrom, in this case “implied consent” was only a fiction. It was really no consent at all, but only the probability of obtaining one in other words, in imputing consent to Z in the case supposed, the law presumes consent because, having regard to human conduct and probabilities, it was highly probable, indeed, so probable that its existence may be assumed. It is, however, an assumption all the same, and as such, a fiction, and being a fiction, its scope must be narrowly watched. For while it is true that there are facts which have to be assumed in human conduct, it is also true that human conduct is not invariable, and does not present uniformity. It must, therefore, be clearly established, by evidence from which the Court may be entitled to say that either the consent was not given owing to accidental causes or that it was given by act or conduct or the only way in which it could have been given.

The question whether there was such a consent in a given case is therefore a question of fact dependent upon the circumstances of each case. A large number of cases are to be found in the reports in which the only phase of the question illustrated is that which relates the consent to sexual intercourse. In such a case express consent is seldom to be looked for, and the only consent possible is implied consent which may be inferred from non-resistance and previous intimacy. It is sometimes said that the resistance required to overcome the imputation of consent must be to the utmost of her power, but there is neither reason nor authority in support of this view. For a woman may find resistance unavailing and even more harmful, and she may therefore not

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49 People v. Morrison, 1 Parker Cr. R. 625; People v. Dohring, 59 N.Y. 374.
resist more than is essential to express her entire disapproval. And, indeed, more may not always be possible, for the woman may be paralysed from fear and terrorised into submission, or she may have been overpowered by actual force, or by the number of accomplices, or from her own want of strength.

Of course, consent cannot be inferred from mere passivity without something more. For a person may be aware of a plot to commit crime, and he may take no action to defeat it. He may be quiescent and passive but he can be held to have acquiesced in the nefarious act? It is said that the mere fact that facilities for the commission of an offence are afforded is no indication of consent. But one fails to see why it is not. Of course, if the facilities were afforded for detection of the offence, there is an explanation which is inconsistent with the presumption of consent. But without anything to suggest a definite intention, the usual indicia will undoubtedly lead to the usual inference. Suppose, for instance, that expecting a burglary a person puts out the lights, the question whether the person was or was not privy to the burglary depends upon.

Sports and pastimes:- The question whether harm caused in a game is or is not justifiable does not depend merely upon consent, but upon the lawfulness of the game. If the game was unlawful which means if it was one against public morality or public policy, then the hurt caused therein even by consent is punishable; or in other words consent is no defence to an illegal act, when it is both illegal and injurious to the public. So where persons, engaged in prize-fights which are illegal, commit assault upon each other they are punishable in spite of their consent. But hurt legitimately caused in mainly sports and pastimes entered into for health or recreation, such as fencing, boxing,

50 Hallett, 9 C. & P. 751.
51 1 Wharton's Criminal Law, 164.
52 Murphy 6 C. & P. 103; Boulter v. Clarke, 1 Buller's N.P. 16; Mathew v. Ollerton, Comp. 218; Perkins, 4 C & P. 537; Lewis, 1 C. & K. 498; Coney, 8 Q.B.D. 534 at p. 549.
football, single-sticks, wrestling by consent, playing at cudgels, fencing, archery and the like is justifiable in accordance with the rule here enunciated. But the reason that hurt is justifiable even in these games is because the causing of hurt is inevitable but is not the primary object of the game. If, therefore, the game is made a pretext for causing hurt, it becomes the primary object, and it is not then justifiable, since it is necessary that even in a legitimate game, proper caution and perfect fairplay should guide both parties.

Manly sports and pastimes are encouraged because they afford healthy exercise and develop a martial spirit, and they are not illegal merely because they expose the participants to some risk of harm. But the law can tolerate no contents in which the risk of harm is out of all proportion to the advantage derived from the game. And this is specially the case where persons employ deadly weapons of where the game is played in a manner involving the breach of peace. It is for this reason that prize-fights are condemned. Indeed, it may be laid down as the one test of legality in such cases that, if bodily harm is not the motive on either side, the game is legal. But its legality will be seriously shaken if the weapons employed are deadly or dangerous, or the game is played from mercenary motives and draws a large crowd, or being in itself a perfectly fair game, persons engaged therein do not observe its rules, but whether through Section 88 particularly directs that the act should have been committed for benefit of the person.

**Act must be beneficial** :- The first condition postulated is that the act done must be beneficial and as has been explained elsewhere, the 'benefit' here contemplated is not a "mere pecuniary benefit," which implies that it may be a pecuniary benefit if it is also a benefit of some other kind, as, for instance, it may be for the benefit of his life, health or body. He may expect a legacy if he

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53 Perkins, 4 C. & P. 537.
54 Section 92, Expl.
lives up to a certain age. It may then be also for his pecuniary benefit. But if the harm cause only a pecuniary benefit, it is not a benefit within the comprehension of the rule. For instance, a person may desire, as did the beggar mentioned by Lord Coke, to amputate his arm so as to be able to beg successfully. The harm contemplated would have conferred a mere pecuniary benefit of the sufferer, but that benefit would be the result of imposture. So there is a class of persons in this country who get themselves emasculated with a view to obtaining service in a harem or to follow the occupation of “nautch girls”. If, therefore, a person engages another to emasculate him, the question may be whether the performance of such operation would be legal. It was so held in a case. It is also necessary to know the meaning of consent of guardian under S. 89.

Consent by guardian :- This Section extends the exception to harm caused either by the guardian himself or by another with his consent. It recognises the power of parental discipline over children below 12 years of age, for it permits a guardian to chastise his ward for his benefit. The schoolmaster or other persons in loco parentis would be excepted for the same reason. The limit within which a person in authority may legitimately chastise another has been already discussed. All such cases are as much excepted under this Section, as on the ground of general policy. The question if and how far the husband is protected by the rule here enacted is perhaps not difficult to answer, as the Section does not save any class of persons below 12 years of age. It may then be predicated as regards the husband’s right of correction that he, being the guardian of his minor wife, is not precluded from administering correction. Section 92 even authorises to do an act without consent but under specified emergent situations.

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55 Babulan Hijrah, 5 W.R. 7.
Beneficial act without consent :- This Section deals with those cases in which the exigency of the case requires prompt assistance, in which the formality of consent might delay the benefit till it is too late. The acts authorised without consent are therefore only such acts as from their urgency call for immediate relief, in which no one will think of pausing for consent before rendering assistance. Indeed, in such cases the dictates of humanity prescribe a rule far higher than the one recognised by the criminal law. For who will think of asking consent to justify an interference in a quarrel between two persons and would it be wrongful confinement if the timely interference of a stranger prevents the combatants from coming to blows? These are trivial cases which may be excused under Sec. 95, but nevertheless they illustrate the first principle in the law of consent which underlies civil as well as criminal law. For civil law as much welcomes the presence of a stranger as the Section under discussion. In both the cardinal rule to be observed is that (i) his interference was necessary; (ii) that it was beneficial; and (iii) that it was made when consent was unavailable. As regards scope of consent in Adultery (S. 497) we find that consent or connivance of the husband can exonerate the accused from criminal liability absolutely.

Connivance :- Connivance is the willing consent to a conjugal offence or a culpable acquiescence in the course of conduct reasonably likely to lead to the offence being committed. It is an act of the mind. It implies knowledge and acquiescence. According to the Allahabad High Court, connivance is a figurative expression meaning a voluntary blindness to some present act or conduct, to something going on before the eyes or something which is known

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56 E. g., See. 69, Indian Contract Act (Act IX of 1872); Sec. 95, Transfer of Property Act (Act IV of 1882).
to be going on without any protest or desire to disturb or interfere with it.\(^{58}\)

Where the woman has been abandoned by her husband an inference of connivance cannot be drawn by a Court of law.\(^{59}\) In a case the husband was driven out from his house by his wife and the accused lived with her. The husband, though saw this but filed complaint only after 18 months since cohabitation commenced. The delay in filing complaint was not explained by the husband, therefore, his act was held amounting to connivance.\(^{60}\)

**Wife is not punishable as abettor** :- Under Section 497, wife is not punishable as abettor because authors of the Code were of the view that Indian society is of different kind which may well lead a man to pause before he determines to punish the infidelity of wives.\(^{61}\) But the reason given by the authors of the Code for not punishing the wife has been criticised. Where woman has abetted adultery she should be punished like a man.

In *Smt. Sowmithri Vishnu v. Union of India and another*,\(^{62}\) it was contended that Section 497 is violative of Arts. 14 and 15 of the Constitution on the ground that it makes an irrational classification between men and women in that,

(1) it confers upon the husband the right to prosecute the adulteror but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery;

(2) it does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and

(3) it does not take in cases where the husband has sexual relations with an unmarried woman with the result that the husbands have, as it were, a

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\(^{60}\) Ibid.

\(^{61}\) Moti R.P. 175.

\(^{62}\) 1985 Cr. L.J. 1302 (S.C.)
free licence under the law to have extra marital relationship with unmarried woman.

But the Supreme Court rejected these arguments and held that it cannot be said that in defining the offence of adultery so as to restrict the class of offender to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is seducer and not the woman. The Court further observed that this position may have undergone some change over the years, that women may have started seducing men but it is for the legislature to take note of this transformation and amend Section 497 appropriately.

It was further contended that since Section 497 does not contain provision for hearing wife, therefore, it is violative of Article 21 of the Constitution i.e. freedom of personal liberty. In connection with this question the Court observed that this Section is not violative of Article 21 because, although this Section does not contain provision for hearing of married woman with whom the accused is alleged to have committed adultery but if she makes an application in the trial court that she should be given opportunity of being heard, she would be given that opportunity. Neither substantive nor adjective criminal law bars the Court from affording a hearing to a party which is likely to be adversely affected by the decision of the court directly or indirectly.

The criminal law Amendment act 2005 inserted some new Sections viz 265 A – 265 L in Cr. P.C. 1973 for giving place to ‘consent’ for settling the criminal cases on mere agreement arrived at on the basis of sweet and valid consent of contesting parties. Chapter third titled as act consented under fear of injury or misconception of fact. In this chapter it is shown that whenever if consent is affected by either fear of injury or misconception, it is not such a consent as desired by I.P.C. Following Sections of I.P.C. viz S. 94, 361-262,
The defence provided under this Section is also known as the defence of compulsion, or of duress or of coercion. At the outset the Section exempts from its purview the cases of murder and offences against the State punishable with death. Consequently, this defence is not available where a murder or an offence against the State punishable by death has been committed under compulsion. The Section says that except these cases, when something is done by a person who is compelled to do it by threats, which, at the time of doing it, causes a reasonable apprehension in the mind of the doer that if he does not do it instant death to him may result, his act does not amount to an offence. The proviso clause under this Section states that this defence is not available where the accused has done the act of his own accord by placing himself in such a situation by which he became subject to such constraint or from a reasonable apprehension of harm to himself short of instant death, he has placed himself in such a situation. The first explanation attached to the Section states that if a person joins a gang of dacoits of his own accord knowing their character, or lie does so under a threat of being beaten, this defence will not be available to him. The second explanation appended to the Section says, on the other hand, that if a person is seized by a gang of dacoits and is forced under threat of instant death to do something, such as a smith under such circumstances compelled to take his tools and to force open the door of a house for the dacoits to enter and plunder it, his act does not amount to a crime.

The basis of the principle under this Section is the famous maxim ‘acta ne invito factus est mens actus’ which means an act which is done by me against my will is not my act. The defence is not available in murder cases because of the principle ‘to save one’s own life no one is entitled to take
another's life'. Similarly, the defence is not available in cases of offences against the State punishable with death because of the principle that State has to protect the interest of the community at large and consequently has a right to effect its own preservation.

**Murder** :- Murder is defined under Section 300 of the Code. The defence of coercion under this Section is not available to a person who commits murder under fear of instant death. Any other offence (except offences relating to State punishable with death) including culpable homicide not amounting to murder committed under threat of instant death is protected. It has been held\textsuperscript{63} that abetment of murder begin different from murder, a person charged with having abetted a murder is entitled to the benefit of this section if he has been compelled to abet murder under fear of instant death.

**Offences against the State punishable with death** :- The Section does not protect a person who commits offences against the State punishable with death even though committed under fear of instant death. Sections 121 to 130 of the Code relate to offences against the State but punishment of death in such cases has been provided only under Section 121 and consequently the defence of coercion is not available when the act of the accused falls under Section 121 of the Code. There are three kinds of offences provided under Section 121 – waging war against the Government of India, attempting to wage such war and abetting waging of such war. A person is not protected under Section 94 of the code if he commits either of these three offences even under fear of instant death.

**Instant death** :- For this Section to apply it is necessary to prove the existence of fear of instant death. Any other kind of fear, including fear of distant and not instant death, does not provide any protection under this Section. For

\textsuperscript{63} *Kari Mansukh v. Emp.*, AIR 1937 Nag 254. See *Umadasi Dasi v. Emp.*, AIR 1924 Cal 1031.
instance, if A threatens B that he would kill him in a week's time unless he steals Z's car by then, and B steals the car, B is not protected under this Section.

The Indian Penal Code (Amendment) Bill, 1972 vide clause 31 had recommended the widening of the scope of Section 94 of the Code by including within it the threat of instant death or instant grievous bodily harm either to that person or to any near relative of that person present when the threats are made. The Bill sought to include parent, grand parent, spouse, son, daughter, sister, brother, son-in-law, daughter-in-law and grand children within the expression 'near relative.' The Bill, however, never saw the light of the day.

In kidnapping (Section 361) and Abduction (Section 362) the consent is meaningless due to effected by entire or use of force or deceit.

**Taking and enticing**: There is an essential distinction between taking and enticing. The mental attitude of the minor is immaterial in the case of taking. The word 'take' means 'to cause to go', 'to cause to go', 'to escort' or 'to get into possession'. When an accused takes a minor with him, whether he or she is willing or not, the act of taking is complete and the condition is satisfied. However the word 'entice', as stated in the preceding paragraph, involves an idea of inducement or allurement by existing hope or desire in the other. One does not entice another unless the latter attempts to do a thing which she or he would not otherwise do.\(^64\) The Supreme Court, in *Varadarajan v. State of Madras*,\(^65\) envisaged circumstances in which the two words 'take' and 'entice', though not synonymous, may be regarded as meaning the same thing for the purpose of Section 361. In *Thakorlal D Vadama v. State of Gujarat*,\(^66\) the

\(^{64}\) *Re Khalandar Sahab* 56 Cr LJ 581.
\(^{65}\) AIR 1965 SC 942.
\(^{66}\) 1973 Cr. L.J. 1541.
Supreme Court observed that the two words 'takes' and 'entices', as used in Section 361, IPC, are intended to be read together so that each takes, to some extent, its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement, emanating from the accused, then the latter cannot be considered to have committed the offence, as defined in Section 361, IPC. However if the accused has laid a foundation by inducement, allurement or threat, etc, and if this can be considered to have influenced the minor or weighed with her in leaving her guardian’s custody or keeping and going to the accused, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he has, at an earlier stage, solicited or induced her, in any manner, to leave her father’s protection by conveying or indicating an encouraging suggestion that he would give her shelter, then the mere circumstance, that his act was not the immediate cause of her leaving her parental home or guardian’s custody, would not absolve him. The question would truly fall for determination on the facts and circumstances of each case.

Guardian's consent :- In order to attract this Section, the taking of the minor or person of unsound mind from the custody of the lawful guardian must be without the consent of such guardian.

It is for the prosecution to prove want of consent of guardian and it is not for the accused to prove consent of guardian. Under sec., 105, Evidence Act, when the accused pleads any general exception, special exception or proviso, he has to establish the same. This is not a case of General Exception falling under Chapter IV, Penal Code. When the offence itself is defined, each and every part constituting the offence has to be established by the
prosecution. Want of consent does not come under a special exception or a proviso. Therefore, sec. 105 of the Evidence Act, is not applicable.67

The consent may be implied and need not be express.68 However, a consent given on a misrepresentation of a fact is one given under a misconception of fact within the meaning of Section 90 Penal Code, and as such is not useful as a consent under the Penal Code.69 A misrepresentation as to the intention of a person (in stating the purpose for which the consent is asked) is a misrepresentation of a “fact” within the meaning of Section 3 of the Evidence Act.70

‘By force or deceitful means’ :- Where no force or deceit is practised on the person abducted, a conviction cannot stand.71 The force or fraud must have been practised upon the person.72 Actual force is required and not show or threat of force.73 Where the deceased on being persuaded by the accused appellant had gone inside his house and returned properly dressed to accompany them to the place where they wanted to take him in a jeep, it could not be said that the deceased was abducted.74

“To induce” means “to lead into”; it connoted a leading of the women in some direction in which she would not otherwise have gone. There must be a change of mind caused by an external pressure of some kind.75

The expression “deceitful means” is wide enough to include the inducing of a girl to leave her father-in-law’s house on a pretext. “Deceit”,
according to its plain dictionary meaning, signifies anything intended to mislead another. It is a matter of intention, and even if the promise held out by the accused was fulfilled by him, the question is whether he was acting in a bona fide manner. An orphan girl about seventeen years of age was brought up by A as his own daughter. The accused, A’s neighbour induced her to leave home on the pretext that he would either marry her himself or get her married. He did neither but debauched her himself and handed her over to a friend of his who also proceeded to have connection with her. It was held that the expression ‘deceitful means’ is wide enough to include the inducing of a girl to leave her guardian’s house by means of a representation that the person to whom she went would either marry her himself or arrange for her marriage and that the accused was guilty of this offence.

As regards scope of consent in Rape cases. There are many words which vitiate the valid consent such as against her will, without her consent etc.

**Consent in Rape**: A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of physical and moral power to act in a manner she wants. Consent implies the exercise of a free and untrammeled right to forbid or withhold what is being consented to; it is always a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former. Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence based on the knowledge of the significance

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76 Phoola 1980 Cri LJ (NOC) 42 (Raj).
77 Mahbub (1907)4 ALJ 482 : (1905) 6 Cri LJ 9; Ramjilal AIR 1951 Raj 33: (1951) 52 Cri LJ 217 (Raj); Khima (1954) SLR 329.
78 Rao Haranarain Singh v. State 1958 Cr LJ 563, AIR 1958 Punj 123, 126 (an attractive girl of 19, under pressure of her lowly-placed husband, obliged to surrender her chastity to third person); Arjan Ram Naurata Ram v. State 1960 Cr LJ 849, AIR 1960 Punj 303; Re Antohny 1960 Cr LJ 927, AIR 1960 Mad 308 (rape on a girl aged about 7½ years); Joseph v. State of Kerala 1961 Ker LT 933, (1962)2 Cr LJ 668 (overpowering the woman and threatening to kill her). See also Koli Tapu Dharonshti v. State AIR 1955 Sau 96 (story of prosecution improbable so that sexual intercourse must have been with her consent).
and moral quality of the act, but also after having freely exercised a choice between resistance and assent.\textsuperscript{79} It must be an act of reason, accompanied with deliberation, after the mind has weighed, as in a balance, the good and evil on each side with the existing capacity and power to withdraw the assent according to one’s will or pleasure.\textsuperscript{80} Consent, that the law requires to negative rape, is free and conscious permission. The act of sexual intercourse must be contemporaneous with the consent.\textsuperscript{81}

Is unable to put up resistance, consent cannot be inferred. Similarly, any request for money, from the accused, by the woman, subsequent to her rape, would not mean the consent of the woman.\textsuperscript{82} The fact, that the victim of the alleged rape was virgo intact up to the date of the occurrence, is proof that the sexual intercourse was without her consent.\textsuperscript{83}

If there is no evidence, on the record, of any struggle, having taken place, nor are there any marks of injuries found on the person, either of the complainant or of the accused, it cannot be said that the accused had connection with the woman without her consent.\textsuperscript{84} If the evidence of the prosecutrix herself shows that she was a girl of easy virtues and that, though she was raped, one after another, by as many as five persons within less than twenty-four hours, yet she never complained to any one, it can be concluded that those, who had sexual intercourse with her, had it with her consent.\textsuperscript{85} The circumstances, that a girl of more than sixteen years left her house without any compulsion, journeyed with the accused from place to place, was literate and

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\item \textsuperscript{81} Jarnail Singh v. State of Rajasthan 1972 Cr LJ 824, 828 (Raj), AIR 1972 Raj LW 18 (if the woman consents prior to penetration, no matter how tidily and reluctantly and no matter how much force had been used, the act is not r).
\item \textsuperscript{82} Thingom Shashikumar v. Manipur Administration (1963) 2 Cr LJ 562.
\item \textsuperscript{83} Sultan v. Emperor 1925 Lah 613, 614, 26 Cr LJ 1188.
\item \textsuperscript{84} Mahla Ram v. Crown 25 Cr LJ 74, 1924 Lah 669, 670; Pultan v. State 1971 AWR (HC) 635.
\item \textsuperscript{85} Krishna Kumar v. State of Madhya Pradesh 1962 Jab LJ 825, (1963)1 Cr LJ 686.
\end{itemize}
could write letters, but did not write to, or communicate with, her people, and never complained to any of the people, whom she met of any ill-treatment by the accused, indicate that if there was any sexual intercourse, it was with her consent.\textsuperscript{86} Where a grown-up girl (aged about eighteen) submitted to being carried about and raped, without protesting, specially when she, according to her own story, was every now and then left by herself by the accused, it was held that she must be held to have been a consenting party in the elopement.\textsuperscript{87}

A woman, who is in a state of insensibility, arising from sleep, liquor, drugs or hypnotism, is incapable of giving her consent; so also a woman who suffers from feebleness of intellect or other defect of mind.\textsuperscript{88}

The essence of the offence is that the connection takes place without the consent of the woman. Non consent is, therefore, the gist of the offence and the five clauses set out the circumstances in which the law holds that there is no consent. If there be no consent or the sexual intercourse is against the will of the girl, the age of the girl is immaterial of the offence of rape.\textsuperscript{89}

**Act without consent, against the will-distinction**

The expression ‘against her will’ imports that the act is done in spite of the opposition of the person to the doing of the act whereas ‘without her consent’ imports only a passive attitude without active opposition. The Penal Code draws a distinction between an act, which is done against the will, and an act, done without the consent, of a person. Every act done against the will of a person is done without his consent, but an act done without the consent of a

\textsuperscript{86} Bhishnath Prasad v. Emperor 48 Cr LJ 542, 1948 Oudh 1, 3; Tukaram v. State of Maharashtra 1978 Cr LJ 1864, AIR 1979 SC 185, 189.


\textsuperscript{89} Kamakhya Prasad Agarwalla v. State 1957 Cr LJ 353, AIR 1957 Assam 39, 43; Dolgobinda Rath v. State 1958 Cr LJ 1211, AIR 1958 Ori 224, 227 (girl not more than 14 years of age).
person is not necessarily against the will of that person, which expression imports that the act is done in spite of the opposition of the person to the doing of it.  

Consent obtained by fraud: A consent obtained by fraud would be a consent under a misconception of fact and as such would not amount to 'consent'. (Section 90). The appellant, who was engaged to give lessons in singing and voice production to a girl of sixteen years of age, had sexual intercourse with her under the pretence that her breathing was not quite right and that he had to perform an operation to enable her to produce her voice properly. The girl submitted to what was done under the belief, wilfully and fraudulently induced by the appellant, that she was being medically and surgically treated by the appellant and not with any intention that he should have sexual intercourse with her. It was held that the appellant was properly convicted of rape.

Fear of injury mentioned in extortion also invalidates the consent.

'Puts any Person in Fear': The main feature of the offence of extortion, which distinguishes it from cheating, theft, etc, by which the property is dishonestly obtained, is the intimidation by which the person extorts property from another. The kind of fear which will bring a case within the definition of this Section, must be of a nature to operate on a man of reasonably sound, or ordinarily firm mind. Where money was obtained by the accused by giving false representation to the effect that they held a warrant, signed by the magistrate, authorising them to make a distress upon the goods of the prosecutor for arrears of rent, it was held that if a man is induced to part with property through fear or alarm, he is no longer acting as a free agent if the

90 Kalilur Rahman v. Emperor 1933 Rang 98, 101 (FB), 34 Cr L J 693.
91 King v. Williams (1923) 1 KB 340.
92 R. v. Tomilirson (1885) 1 QB 706, 710.
threatened violence, whether to person or property, is of a character to produce, in a reasonable mind, some degree of alarm of fear. The essential factor is that it should be of a nature and extent to unsettle the mind of the person, on whom it operates, and take away, from his act, that element of free and voluntary action which alone constitutes consent. The element of extortion was held to be lacking in a case where some persuasion to the members of the governing body of an institution, who were hard run were made to obtain an order to the effect that the earlier order of suspension of the head of the institution be rescinded.

Merely because the accused was the Chief Minister at the relevant time and the sugar co-operative society had some of its grievances pending consideration before the government, and pressure was brought about to make the donations promising consideration of such grievances possibly by way of reciprocity, it could not be said that the ingredients of the offence of extortion had been made out. The accused were charged with the offence of conspiracy to extort money under fear of injury. The material witness died before commencement of investigation. The prosecution failed to conduct an identification parade. In the absence of evidence either oral or documentary or circumstantial commit to conclude that the accused entered into a criminal conspiracy to commit the alleged offences, the acquittal of the accused recorded by the High Court cannot be interfered with under Art 136 of the Constitution by the Supreme Court.

Injury: ‘Injury’, as is defined in Section 44, IPC, is not confined to physical injury. Injury for purposes of this Section and Section 385 may take any of

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the forms of harm to a person's body, mind, reputation or property, caused illegally. So long as there is nothing illegal about the act of the person obtaining property, the offence would not be one of extortion. Where a junior vakil, in the absence of his senior, who had instructed him to simply apply for adjournment, took advantage of the occasion and obtained a bond for thirty rupees for conducting the case, it was held that the threat was only the non-rendering of service as a vakil, and this act, being clearly not an offence and not forbidden by law, did not amount to extortion.98 Where the owners of trespassing cattle paid a penalty to a private person under the influence of threat that the cattle would be impounded if the payment was refused, it was held that the charges were paid under a threat of what was a lawful proceeding and the offence of extortion was not made out.99 A nikah khawan is not bound to read the nikah for a person unless he chooses to do so. He might demand any fee that he likes. There is no law forbidding him to do so and the case does not fall under this Section by his refusal to read the nikah.100 Where possession of the property (bullocks) is taken peacefully without the use of any force or threat, and without resistance and objection to the taking possession of the property, there would be no offence of extortion even if the accused obtains the signature of the owner upon a receipt showing that they were sold to the accused by threatening the owner. The offence of extortion might, however, be said to have been committee in obtaining the signature upon the receipt.101 Consent existing in Sections 493-496 and 498 (i.e. offences relating to marriage is not a valid consent because the alleged consent is affected by deceit or concealment of the fact of former marriage or fraud in marital

98 1 Weir 438 (1); Habibul Razaq v. Emperor AIR 1924 All 197, 25 Cr. LJ 961.
99 1 Weir 438 (2); Re Pethiredla Virappa 1 Weir 440.
100 Nizam Din v. Crown AIR 1924 Lah 162, 24 Cr LJ 958; Laxmi Dhar v. Rex AIR 1951 Ajmer 64(2), 52 Cr LJ 873; Tanumal v. Emperor AIR 1944 Sind 203; Re Darswami Iyer Air 1925 Mad. 480, 26 Cr LJ 755; Re Mantri Pragada AIR 1919 Mad 959, 19 Cr LJ 445.
101 Mangal Singh v. Rex AIR 1949 All 599, 50 Cr LJ 923.
ceremony or enticing. In all these offences the required consent as per IPC is not available.

**Deception in marriage**: This Section punishes the offence committed, when a man, either married or unmarried, induces a woman to become as he thinks his wife, but in reality his concubine. The form of the marriage ceremony depends on the race or religion to which the person entering into the marriage belongs. When races are mixed, as in India, and religion may be changed or dispensed, this offence may be committed by a person falsely causing a woman to believe that he is of the same race or creed as herself and thus inducing her to contract a marriage, in reality unlawful, but which according to the law under which she lives, is valid. Suppose a person half English, half Asiatic by blood, calls himself a Mohammedan or Hindu and by his deception causes a Mohammedan or a Hindu woman to go through the ceremony of marriage, in a form which she deems valid and to cohabit with him, he has committed this offence.\(^{102}\)

**Mens rea**: Section 494 makes no reference to intention, knowledge, fraud or deceit but constitutes the mere contracting of the second marriage a crime. It would seem anyhow that in the absence of words in the statute dispensing with proof of mens rea it should be held that the crime can be committed only intentionally or recklessly. So if a person charged with bigamy believed that he was legally free to marry again it cannot be said that the crime was committed either intentionally or recklessly. Thus were the 1st accused took learned opinion that she could effectively divorce the complainant and went through the formalities thereof, she then gave notice to the complainant, waited for some time and then married the third person, it was held that there could be no criminal knowledge that her first marriage with the complainant

\(^{102}\) Margan and Macpherson's penal Code p. 432.
was subsisting when she entered into the second marriage and so the accused were not guilty of offence under Section 494.103

**Punishments** :- Section 495 is an aggravated form of the offence of bigamy. In case the second marriage is solemnised with concealment of the former marriage from a person with whom a subsequent marriage is contracted, the punishment may extend up to 10 years of imprisonment of either description and fine. The offence is non-cognizable, bailable, non-compoundable and triable by a Magistrate of first class.

When a woman contracted a second marriage within six months after co-habitation with her first husband without disclosing the fact of the former marriage to her second husband, she was held liable to the enhanced punishment under this Section.104

A minor girl was remarried during the lifetime of her husband. The marriage was arranged by her mother. It was held that the child had not attained sufficient maturity of understanding to judge the nature and consequences of her conduct on the occasion of the second marriage and so the accused is not liable under this Section.105

**Mock Marriage** :- This Section seeks to punish fraudulent or mock marriages. The accused here knows that no valid marriage will be effected but still goes through some form of marriage dishonestly and with a fraudulent intent. In other words, to constitute the offence under this Section the prosecution must prove that the accused knew that there was no valid marriage, and he had gone through a show of marriage with a fraudulent or ulterior motive.106 But if the accused intends to perform a valid marriage and honestly goes through the

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104 Enai bebee, (1885) 4 WR Cr. 25.
105 Godi, (1896) Cr C No. 55 of 1896 Unreported (Cr C 876).
106 Kshitsh Chandra Chakrabority v. Emperor, AIR 1937 Cal 214.
necessary ceremonies during the lifetime of the other spouse it will be an act of bigamy punishable under Section 494 I.P.C.

Takes, entices of detains any woman :- Taking does not mean taking by force. It implies use of physical, or moral influence by the accused to induce the wife to leave her husband. There must be some influence operating on the woman or co-operating with her inclination at the time the final step is taken by the woman or causing separation from her husband. Taking a woman with the consent of her husband or of the person who has the care of her is not taking under this Section. The fact that the woman accompanied the accused of her own free will does not diminish the criminality of the act.

A person is said to have enticed a woman when he persuaded her to leave her husband’s house. Thus the act of enticement involves some active persuasion or use of moral force by accused so that woman may leave her husband or the person having the charge of her care, of her own. For an offence under this Section taking or enticing away of wife is not necessary. If the accused has concealed or detained her with intent that she may have illicit intercourse with another person, he would be guilty under this Section.

With a woman willingly accompanies the accused, this fact will not diminish the criminality of the accused if other ingredients of the offence are proved.

Under chapter four titled as consent not exonerating from criminal liability reason being the consented person is suffering from non-mentality (i.e. unable to understand the nature and consequence of the act). The cases of

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necessary ceremonies during the lifetime of the other spouse it will be an act of bigamy punishable under Section 494 I.P.C.

107 Mahadev Rama, (1942) 45 Bom. L.R. 295.


110 (1962)2 Cr. L.J. 159.

111 Narayan Chandra Das v. Kamalakshya Das and another, 1984 Cr. L.J. (N.O.C.) 101 (Cal.)
non mentality are infancy (Sections 82-83), unsound mind (Section 84) intoxicated (Sections 85-86).

Section 82 deals with offences by a child under seven years of age and confers an absolute immunity from criminal liability in the case of such a child. When the age of the offender is above seven but below 12 the absolute exemption contained in Section 82 becomes a qualified exemption. Beyond the age of 12 there is no immunity from criminal liability, even if the offender is the person of undeveloped understanding and not capable of understanding the nature and consequences of his act. However, the tenderness of the age of the offender can be taken into consideration in awarding sentence.

**Sufficient maturity of understanding:** "Where the accused is above seven years of age and under twelve, the incapacity to commit an offence only arises where the child has not attained sufficient maturity, etc., and such non-attainment would have apparently to be specially pleaded and proved, like the incapacity of a person who, at the time of doing an act charged as an offence, was alleged to have been of unsound mind. The Legislature is manifestly referring in Section 83.... To an exceptional immaturity of intellect."

A child under 12 years is presumed not to have reached the age of discretion and to be *doli incapax*; but this presumption may be rebutted by strong and cogent evidence of a mischievous discretion, for the capacity to commit crime, do evil and contract guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment.

What Section 83, Penal Code, contemplates is that the child should not know the natural and physical consequences of his conduct.

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114 *Per Jackson, J., in Lukhini Agradanini*, (1874) 22 WR (Cr) 27, 28.
When however, the accused picked up his knife and advanced towards the deceased with a threatening gesture, saying that he would cut him to bits, and did actually cut him, his entire action can only lead to one inference, namely, that he did what he intended to do and that he knew all the time that a blow inflicted with kathi would effectuate his intention, and, therefore, the accused would be guilty under Section 302, Penal Code.116

The accused persons who were first offenders and below 12 years of age had broken open the locks on two premises and had gone inside for the purpose of committing theft. From one of the premises they actually stole one seer of pulses. The second shop happened to be a ‘butcher and they could get nothing from there. It was held, that the very act of the boys in breaking open the locks indicated that they were not suffering from immaturity of understanding.117

Unsoundness of Mind : insanity – Meaning :- Unsoundness of mind is commonly termed insanity and according to medical science, is a disorder of the mind which impairs the mental faculties of a man. In other words, insanity is another name for mental abnormality due to various factors and exists in various degrees. Insanity is popularly denoted by idiocy, madness, to describe mental derangement, mental disorder and all the other forms of mental abnormality known to medical science. Thus an uncontrollable impulse driving a man to kill or wound would come within the scope118 of the medical dentition of insanity. However, the legal concept of insanity differs markedly from the medical concept. Insanity in law means a disorder of the mind which impairs the cognitive faculty, i.e., the reasoning capacity of a man, to such an extent as to render him incapable of understanding the consequences of his

116 Ulla Mahapatra v. The King 1950 Orissa 261.
117 Abdul Sattar and another v. The Crown 50 Cr LJ 336.
actions. It excludes from its purview insanity which could be engendered by
emotional or volitional factors. In other words, every aberrative act performed
by a person of otherwise enlightened understanding cannot exempt him from
criminal responsibility; it is only insanity of a particular or appropriate kind
which is regarded as insanity in law, and which will excuse a man from
criminal liability.

**Legal insanity and medical insanity**: It is settled law that a distinction must
be drawn between legal insanity and medical insanity. Whatever may be the
controversy about the M. Naghton Rules, Section 84 of the Penal Code is very
clear and it requires that degree of infirmity of the mind which renders a
person incapable of knowing the nature of his act. Whatever may be the nature
of insanity or delusion, so long as unsoundness of mind is not such as to render
him incapable of knowing the nature of his act or incapable of knowing that he
is doing what is either wrong or contrary to law, he cannot be excused.\(^{119}\)

Insanity is different from eccentricity or strange behaviour. Eccentricity
or strange behaviour or a mental upset not amounting to insanity as known to
the law, would not absolve a person from the consequences of his act.

The court must concern itself with the state of mind of the accused at
the time of his act. It is not every person suffering from mental disease who
can avoid responsibility for an offence by invoking the plea of insanity. Legal
insanity is not medical insanity and must be confused with medical insanity. It
is only the legal and not the medical aspect of the question that the court is
concerned with.\(^{120}\)

The mere fact that on former occasions the accused had been
occasionally subject to insane delusions or had suffered from derangement of
mind and subsequently he had behaved like a mentally deficient person is per

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\(^{119}\) *Barelal v. State* 1960 Cr LJ 480.

\(^{120}\) *Kesheorao v. State of Maharashtra* 1979 Cr LJ 403.
se insufficient to bring his case within the exemption. The antecedent and subsequent conduct of the man is relevant only to show what the state of his mind was at the time when the act was committed. In other words, so far as sec. 84 is concerned, the Court is only concerned with the state of mind of the accused at the time of the act.

It is only that unsoundness of mind which materially impairs the cognitive faculty of the mind that can form a ground for exemption from criminal liability. The nature and the extent of the unsoundness of mind required must reach that stage as would make the offender incapable of knowing the nature of his act or that he is doing what is either wrong or contrary to law.

**State of intoxication:** There are, of course, many varying degrees of drunkenness, which culminate in a state in which the person becomes incapable of knowing the nature of any act. The words “state of intoxication” in Sec. 86 can only mean intoxication which renders a person incapable of knowing the nature of the act in question or that he is doing what is either wrong or contrary to law when he commits it. It would be extremely dangerous to extend the protection afforded by Section 86, Penal Code, to persons who commit serious offences under the influence of liquor in varying stages and differentiate culpability in their favour as opposed to similar offences by perfectly sober person.121

The state of intoxication envisaged in Sec. 86 in not in any way different from that contemplated in the preceding Section. Both Sections 85 and 86, I.P.C.; lay down the law relating to drunkenness as bearing on the wrongful acts committed by persons, the difference between the two Sections being with regard to consequences depending upon whether the drunkenness is

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voluntary or involuntary. The absence of qualifying words in Sec. 86 cannot lead to the inference that even if the insobriety is not such as to impair the reason of the offender the requisite intent cannot be presumed. It is an ordinary rule that every man is presumed to intend the consequences of his acts, but this presumption can be rebutted by showing that the person concerned could not have formed the intent by reason of his drunkenness. To be a sufficient answer to a charge of a crime case involving a specific intent it should be established not merely that the offender had consumed liquor but that as a result of it his mind at the time in question was so obscure that he was incapable of roaming the requisite intention.122

Chapter fifth depicts that there are some acts which are independently an offence therefore even if consent is given by victim or any other person still the doer is liable for criminal liability (SECTION 91), similarly the acts done not for saving the life of a woman are also offences (SECTION 312-316) of IPC. If the act is an offence independently of the harm which it has caused then the doer will not be protected by the given consent. For example causing miscarriage, public nuisance, offences against public safety, morals etc. This Section is infact an exception to the general exceptions contained in Sections 87, 88 and 89 of the code. The principle underlying this Section according to Huda is that "consent may wife off an injury to the consenting party but if the gravamen of the offence is not the injury to the consenting party but something else, the consent can have no effect on the offence. In the illustration attached with this Section causing a miscarriage is not an injury to the woman alone but is an offence against the life of the child as well. The mother's consent, therefore, would not condone the offence, where an offence is purely a public offence no question of consent arise.123

123 Huda, S: The Principles of the law of crimes in British India, p. 338; See also Ademma, (1886) ILR 9 Mad. 369.
Under this chapter, there are another batch of Sections (312-316) where consent do not exonerate the accused if the act done was not in the welfare of the woman.

As regards Section 312 consent is no defence to illegal miscarriage. Voluntarily causing a woman with a child to miscarry is an offence if such miscarriage is not caused in good faith for the purpose of saving the life of the woman; and the offence is liable to additional punishment if the woman is quick with the child. The Explanation added to the Section, points that a woman who causes herself to miscarry, is within the purview of the Section. The Section only applies to a 'woman with child', i.e., a pregnant woman, at the relevant time. If she is pregnant and the means used do not succeed, the accused can only be convicted, under Section 511 IPC for an attempt.

**Miscarriage, Abortion and Premature Labour** :- The term 'miscarriage' is not defined in the Penal Code. In its popular sense, it is synonymous with abortion,\(^{124}\) and consists in the explosion of the embryo or foetus, i.e., the immature product of conception. The stage, to which pregnancy has advanced and the form, which the ovum or embryo may have assumed, are immaterial.\(^{125}\) In Modi’s Medical jurisprudence (at page 325), it is stated thus:

Legally, miscarriage means the premature expulsion of the product of conception, an ovum or a foetus, form the uterus, at any period before the full term is reached. Medically, three distinct terms, i.e., abortion, miscarriage and premature labour, are used to denote the explosion of a fetus at different stages of gestation. Thus, the term abortion’ is used only when an ovum is expelled within the first three months of pregnancy, before the placenta is formed ‘Miscarriage’ is used when a fetus is

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\(^{124}\) _Meeru Bhatia Prasad (Dr.) v. State_ 2002 Cr LJ 1674 (Del).
\(^{125}\) _Empress v. Bandi Ademma_ ILR 9 Mad 369.
expelled from the fourth to the seventh month of gestation, before it is viable, while 'premature labour' is the delivery of a viable child possibly capable of being reared, before it has become fully mature.

At page 303, it is stated that children, born at or after 210 days or seven calendar months of uterine life, are viable, i.e., are born alive and are capable of being reared. Similarly, where the pregnancy has advanced beyond seven months, the act of doctors and nurses, who facilitate or accelerate delivery cannot be treated as offences under the Section, only because the delivery otherwise would have been delayed and particularly when the child is born alive and no injury is caused to the mother or the child. If, therefore, the period is completed, i.e., the child is fully grown, the offence of causing miscarriage cannot be effected; an attempt to bring about a miscarriage, in such a case, would be punishable under s 511.

Medical Termination of Pregnancy Act, 1971 :- To soften the rigours of the law of abortion contained in the Indian Penal Code, the Medical Termination of Pregnancy Act, 1971 was passed. It is a small Act consisting of only eight Sections.

The object of the Act, besides being the elimination of the high incidence of illegal abortions, is perhaps to confer on the woman the right to privacy, which includes the right to space and to limit pregnancies (i.e., whether or not to bear children),

But in India, the right of get abortion is not a general or independent right. Under this Act few situations has been mentioned in which abortion is allowed such as

126 Re Malayara Seethu AIR 1955 Mys 27, 29, 56 Cr LJ 372.
127 R. v. Arunja Bewta 19 Wr (Cr) 32.
128 The U.S. Supreme Court in two landmark decisions, Roe v. Wade, 41 USLW 4213 (1973), 410 US 113 (1973) and Dev. v. Bolton, 41 USLW 4233 (1973) has upheld the right of a woman to an abortion for the first three months is pregnancy as being an element in the right of privacy.
(i) A risk to the life of a pregnant women or
(ii) Risk of grave injury to her physical or mental health or
(iii) If pregnancy caused by rape or
(iv) If child born will suffer physical or mental abnormalities or
(v) Failure of any contraceptive method to limit the number of children or
(vi) Risk to the health of a pregnant woman by reason of her actual or reasonably foreseeable environment. Therefore, more consent of the woman does not exonerates the doctor and the woman from criminal liability under SECTION 312 of I.P.C.

Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 :- The determination of the sex of the foetus leading to female foeticide is a blatant violation of human rights and insult to the dignity and status of the women. Taking note of the gravity of the problem, the Parliament passed the Pre-natal Diagnostic techniques (Regulation and Prevention, of Misuse) Act 57 of 1994.

But still if the consenting lady is desirous to knew the sex of the foetus, the act is itself an offence. In fact the Act was passed with the object that whenever any genetic or metabolic or chromosomal or sex linked disorders appear to the doctor he can check up the baby in the womb in any period of pregnancy, even sex can be checked up. But this Act prohibits the detection of sex of the baby to avoid female foeticide. Therefore if lady consents to know the sex of the child, still the doctor and lady is guilty of the offence under SECTION 312 of IPC. Therefore today toe test of sex of a baby (in pregnancy) is absolutely prohibited except for statutory permissions.

Miscarriage without woman's consent :- Sections 313 to 316 of the Penal Code provide for enhanced punishment in cases of aggravating nature of the
offence of miscarriage. Section 313, I.P.C. penalises voluntarily causing miscarriage of a woman with child.

In *Moideenkutty Haji v. Kunhikaya*, the Kerala High Court held that an offence under Section 313, I.P.C. could not be made out, where the only allegation in the complaint was that on hearing that the woman was pregnant the accused took her to a doctor, who terminated her pregnancy and there was no case that it was without her consent. On the contrary, the averment showed that the woman willingly submitted herself to abortion and even thereafter had sexual intercourse with the accused and there was nothing to show that abortion was at the instance of the accused. Further, it was not clear from the allegation whether he was only accompanying the lady at her request and whether he even made a request to the doctor to have the abortion done. Finally, the doctor who conducted the abortion was not made an accused, which showed that she had no complaint against him.

Section 314 punishes for causing the death of the woman by doing an illegal act, known to be dangerous to her life with intent to cause miscarriage. It is immaterial whether by that act miscarriage was or was not, in fact, caused. However, what is important is that the act must be the proximate cause of the death.

If the act was with the consent of the woman, the accused is made punishable with imprisonment which may extend to ten years. However, if the act is done without her consent, the accused is made punishable either with imprisonment for life, or with punishment stated in the first part of the Section.

Where medicine was administered in the womb of a woman with child to induce abortion and there was enough medical evidence to prove that the woman died due to shock and severe clostridia infection producing jaundice as

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129 AIR 1987 Ker. 184 (F.B.).
a result of the medicine, it was held that the offence was proved and that non-
reservation of uterus and its fluid for chemical analysis did not at all create any
suspicion about the cause of death.\footnote{130}

Section 315 covers the cases of infanticides. The offence which this Section
punishes is the injury to the child’s life. Section 315 makes any act done with
intent to prevent a child from being born alive or to cause it to die after birth
punishable with imprisonment which may extend to ten years of either
description i.e., simple or grievous, or with fine, or with both, unless the act is
done in good faith for the purpose of saving the life of the mother.

Section 316 deals with the offence of causing death of unborn children when
they are in the advanced stage of pregnancy beyond the stage of quickening
i.e., when death is caused after the ‘quickening’ but before the birth of the
child. The principle laid down in Section 301 is applied here. The offence of
culpable homicide applicable to a living person (victim) would be applied in
this case where the sufferer is a quick unborn child whose death is caused by
any act or omission of the nature which would have caused the death of a
living person as mentioned above.

Therefore under study of Sections 312-316 we came to the conclusion
that miscarriage is allowed only under statutory limits otherwise it would be an
offence even if such act has been committed with consent.

In chapter six another dimension of consent has been discussed where
consent mitigates the criminal liability yet does not exonerate fully. Here the
relevant provisions are exception 5 to Section 300 of I.P.C.

\textbf{Exception 5 to Section 300} :- The infliction of harm without the consent of
the sufferer falls under the general Exception, contained in Sections 87 to 93
of this Code. But under those Sections, death cannot be consented to, either

\footnote{130} V. Manick Pillai v. State 1972 Cr LJ 1488 : 1972 Mad. LW (Cr) 141.
expressly or by implication. Refer to Sections 87, 88, 89 and 92. Under Section 87, even a person above the age of eighteen years is precluded from giving a valid consent to an act, intended to cause, or which is known to the doer to be likely to cause death or grievous hurt. Such a consent will not, therefore, prevent the act from being a crime, but this Exception provides that, in such a case, the person, who kills the consenting party, shall be guilty of culpable homicide not amounting to murder, and not of murder. Where a man of full age (i.e. above 18 years) submits himself to emasculation, performed neither by a skilful hand, nor in the least dangerous way and dies from the injury, the persons concerned in the act are guilty of culpable homicide not amounting to murder by virtue of this Exception.  

It may be noted that exception 5 to Section 300, IPC, must receive a very strict and not a liberal interpretation and in applying the said exception the act alleged to be consented to or authorised by the victim must be considered by very close scrutiny. Thus where the sessions court and the High Court had correctly appreciated evidence adduced in the case and had come to the finding that the husband had planned to murder the wife and in execution of the said plan had murdered the wife and thereafter tried to commit suicide, the conviction of the husband under Section 302 and Section 309, IPC, was upheld by the Apex Court.

This Exception applies to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be likely to be the result; but it does not refer to the running of a risk of death from something, which a man intends to avert, if he can possibly do so, even by causing the death of the person from whom the danger

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131 Queen v. Baboolan Hijrah 5 WR 7(Cr).
133 Ibid.
is to be anticipated. In a Lahore case, the accused killed his step-father, who was an infirm old man, with his consent in order to involve some of their enemies in trouble by charging them with murder. It was held that the case was covered by this Exception. The Exception cannot be applied unless the person killed had the full knowledge of the facts and was determined to suffer or to take the risk of death and unless this determination existed at the moment of his death. The question of whether there was such consent is a question of fact to be decided on the circumstances of each case. In Full Bench case of Empress v. Nayamuddin, Pigot J, delivering the majority judgment, observed:

... the exception should be considered in applying it first, with reference to the act, consented to or authorised, and next with reference to the person or persons authorised. And, I think that, as to each of these, some degree of particularity at least should appear upon the facts proved before the exception can be said to apply. The consent may be inferred from circumstances and does not absolutely need to be established by actual proof of express consent.

A man, who by concert with his adversary, goes out armed with a deadly weapon to fight that adversary, who is also armed with a deadly weapon, must be taken to be aware that he runs the risk of losing his life and, as he voluntarily puts himself in that positional he must be taken to consent to incur the risk. In such a case, the circumstances do show a distant act of the mind of each combatant with respect to the other and in concert with him of willingness to encounter and suffer such know and anticipated acts of violence from that other as he cannot defend himself from. But to include such a case

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134 Empress v. Rohimuddin ILR 5 Cal 31, 34.
136 Empress v. Nayamuddin ILR 18 Cal 484 (FB); Po Set v. Emperor 1 Cr LJ 345.
137 ILR 18 Cal 484, 490.
138 Shamshere Khan v. Empress ILR 6 Cal 154, 158.
within this Exception is rather to strain the terms of it. At any rate, there is a
distinction between such a case and one in which the members of two riotous
assemblies, who agree to fight together and some of whom, on each side, are,
to the knowledge of all the members, armed with deadly weapons. From a
mere agreement to fight, such a consent, as a contemplated by this Exception,
cannot be imputed, to each member of the two mobs, to suffer death or take
the risk of death at the hands of any one of the armed members of the other
mob, by means of whichever of such deadly weapons, used in whatever way
that person may please and be able, to inflict.\textsuperscript{139} The same reasoning would
apply to cases of dueling.\textsuperscript{140}

\textbf{Dasrath Paswan} :- In \textit{Dasrath Paswan v. State of Bihar},\textsuperscript{141} the accused was a
student of class X. He had failed at the annual examination for three years in
succession. The accused was very much upset and depressed at these failures.
He took his last failure so much to heart that he decided to end his life and
informed his wife, an illiterate woman of about 19 years of age, of his
decision. His wife asked him first to kill her and then kill himself. In
accordance with the pact the accused killed his wife first, but was arrested
before he could kill himself.

Held, that the deceased was above the age of 18 years and that she had
suffered death with her own consent. The deceased did not give the consent
under the fear of injury, nor under a misconception of fact, but voluntarily, and
so the case would fall under Exception 5 to Section 300, I.P.C. Such cases in
common law will fall under the “suicide pact”, and it shall be manslaughter
and not murder.\textsuperscript{142}

\textsuperscript{139} \textit{Empress v. Nayamuddin} ILR 18 Cal 484 (FB), dissenting from \textit{Shamsheer Khan v
Empress} ILR 6 Cal 154.

\textsuperscript{140} \textit{Po Set v. Emperor} 11 Cr. LJ 345.

\textsuperscript{141} AIR 1958 SC 190 see Smith J.C., Mercy killing, justification and Excuse in Criminal
Law, 40\textsuperscript{th} Series, The Hamlyn Lectures (1989) 79-82.

\textsuperscript{142} Sections 4(3) and 4(1) of the Homicide Act, 1957.
The fifth exception, which is the last one under this Section, where culpable homicide is not murder is when the person whose death is caused is more than eighteen years old and he suffers death or takes the risk of death with his own consent. The illustration attached to this exception is a negative illustration which illustrates a situation where the consent given is not valid. This, therefore, goes contrary to the spirit of appending illustrations to provisions. The idea behind appending illustrations in certain provisions of a statue is to illustrate clearly as to what has been said in the provision, and in this respect an illustration generally is positive in nature which is not the case as far as this particular illustration is concerned. The specific case covered by this illustration is in reality an offence punishable under Section 305 of the Code.

The authors of the Code made the following observations about this exception:143

In the first place, the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes, it is the effect of a strong sense of religious duty, sometimes a strong sense of honour, not infrequently of humanity. The soldier who, at the entreaty of a wounded comrade, puts that comrade out of pain, the friend who supplies laudanum to a person suffering the torment of a lingering disease, the freedman who in ancient times held out the sword that his master might fall on it, the high born native of India who stabs the females of his family at their own entreaty in order to save them from the licentiousness of a band of

marauders would, except in Christian societies, scarcely be thought culpable, and even in Christian societies would not be regarded by the public, and ought not to be treated by the law, as assassins.

Where certain snake-charmers, by professing that they were experts in curing cases of snake bites, persuaded certain persons to come forward and allow themselves to be bitten by snakes, and three of such persons died, it was held that this exception would be available to them and they would be liable only for culpable homicide not amounting to murder.\textsuperscript{144} Where the accused husband was repeatedly requested by his wife to kill her as she could not bear the death of her child, and the accused killed her one night when she was asleep, this exception was held to be attracted.\textsuperscript{145} Where the accused persuaded a sati to rescind a pyre after she had climbed down from it first, and got the pyre to be lighted as a result of which she was burnt to death, it was held that he was entitled to the benefit of this exception.\textsuperscript{146}

In \textit{Rajinder Kumar Sharma v. State},\textsuperscript{147} the deceased only tried to persuade the accused to take his meals when the accused, armed with a gun, threatened to shoot him if he came forward. The Delhi High Court held that there being no strained relations between the accused and the deceased, who was the employer of the accused, the deceased could not have foreseen that the accused would behave like a brute and would kill him. Hence he could not be said to have taken risk of death with his own consent under exception 5 to Section 300 of the Code.

The Netherlands and Belgium have recognised euthanasia already and there is a probability that in the near future a few more countries will follow suit.

\textsuperscript{144} Poonai Fattin mah v. Emp., (1869) 12 WR (Cr) 7.

\textsuperscript{145} Anunto Surnagat v. Emp., (1866)6 WR (Cr) 57.

\textsuperscript{146} Sahebloll Reetlol v. Emp., (1863) 1 RJPJ 174.

\textsuperscript{147} 1996 Cr.U 2810 (Del).
There are other Sections dealing with mitigating of criminal liability on account of consent given for the offence such as Sections 305 and 306. Under these Section some act is abetted to be committed where the victim gives consent but if such consent is given by a child under 18 years or any insane person or delirious person or any idiot or intoxicated person, there will be no mitigation (SECTION 305) but if such consent has been given by an adult person, the criminal liability of abettor will be mitigated (SECTION 306). The offence of committing suicide itself is, obviously, unpunishable, but its abetment is punishable under this Section and an attempt to commit suicide is punishable under s 309. The abetment of suicide by persons of immature years, or of impaired mental powers, is more severely punished under this Section than in the case of normal type of persons. Mayne observes that suicide is the only offence for which it is impossible to punish the principal offender. He is already beyond the reach of human law; those; who instigate him, or help him in the act, remain. Where two persons agree to commit suicide together, but if the means employed only take effect upon one, the survivor is held guilty of murder. A person, who takes an active part in the suicide of another, by actually shooting him, or administering poison to him, would commit culpable homicide not amounting to murder under Exception 5 to Section 300, IPC, if the person, being over eighteen years of age, gave such consent as defined by Section 90. If he was younger than eighteen, or if his consent did not come within the purview of s 90, he would be guilty of murder. If, however, he did not actually cause the death, but abetted it within the meaning of Section 107, he would be punishable under Section 305 or 306, as the person, actually committing suicide, was, or was not, capable of giving consent.

150 Mayne's Criminal Law, p. 675.
Even after effacement of s 309 from the statute as being violative of art 21 of the Constitution by the Supreme Court,\textsuperscript{151} would not affect the charge of abetment of suicide punishable under Sections 305 and 306, IPC.\textsuperscript{152}

This and the next Section apply only when suicide has been committed. They do not apply to cases of attempted suicide.

**Constitutional validity** :- Section 306 enacts a distinct offence which is capable of existence independent of Section 309. Even where punishment for attempt to commit suicide is not considered desirable, its abetment is made penal. Such offences are punishable for cogent reasons in the interest of society. Section 306 can therefore survive independent of Section 309, IPC, and cannot be held unconstitutional.\textsuperscript{153}

**Suicide by young brides** :- Where it is the definite case of the prosecution that the bride committed suicide and the cause of her death was torture for non-payment of a part of dowry by her father, the date and time of such torture had not been disclosed, the court held that the question of proximity need not be hard pressed when the death had taken place within a period of 7 months from the date of her marriage and the witnesses visited her within this period.

It was held that though such a test is in appropriate circumstances always called for, it has also to be kept in mind that a test of proximity cannot be reduced to a cut and dried formula. From the statement of the witnesses, it was apparent that some cruelty in whatever manner was perpetrated upon the deceased on account of non-payment of a part of the dowry and once it was held that cruelty in any form was present from the accused before the suicide

\textsuperscript{151} Rethinam Nagbhusan Patnaik v. Union of India 1994(2) RCR 564, JT 1994(3) SC 392.

\textsuperscript{152} Subendran v. State of Kerala 1995(1) RCR 399; Naresh Marotrao Sakhrre v. Union of India & Ors. 1995 CJ 96 (Bom.) (DB).

by the deceased within a period of 5 months from the date of her marriage, Section 113A of the Evidence Act shifts the burden on the accused to rebut the presumption that the suicide has been abetted by her husband or his relatives.\(^{154}\)

A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life quite common to the society to which the victim belonged, the conscience of the court should not be satisfied for basing a finding that the accused charged for abetting the offence of suicide should be found guilty.\(^{155}\)

Where the deceased was pregnant but was turned out of the matrimonial house and she went to her parents and stayed with them for about three months but was taken back by her husband but ten days thereafter she committed suicide, the Court held her husband guilty of the offence.\(^{156}\)

**Euthanasia – Legal position in India** :- Suicide by its very nature is an act of self-killing or self-destruction, an act of terminating one's own act and without the aid or assistance of any other human agency. Euthanasia or mercy-killing on the other hand means and implies the intervention of other human agency to end a life. Mercy-killing is not covered by the provisions of Section 309. The two concepts are both factually and legally distinct. Euthanasia or mercy-killing is nothing but homicide whatever the circumstances in which it is effected.\(^{157}\)

Protagonism of euthanasia on the view that existence in Persistent Vegetative state (PVS) is not a benefit to the patient of a terminal illness being

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\(^{154}\) *Nidhan Biswas* 2006 Cri LJ 2329 (Gau); *Sohebrao* 2006 Cri LJ 2381 (SC), *Surender* 2007 Cri LJ 779 (SC).

\(^{155}\) *Ramesh Kumar* 2001 Cri LJ 4724 (SC).

\(^{156}\) *Surender* 2007 Cri LJ 779 (SC).

\(^{157}\) *Naresh Marotrao Sakhre v. Union of India* 1995 Cr IJ 96 (Bom).
unrelated to the principle of ‘sanctity of life’ or the ‘right to live with dignity’ is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of ‘right to life’ therein includes the ‘right to die’. The ‘right to life’ including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life upped the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. However, the ‘right to die’ with dignity at the end of life is ebbing out. However, the ‘right to die’ with dignity at the end of life is not to be confused or equated with the ‘right to die’ an unnatural death curtailing the natural span of life.  

A question may arise, in the context of a dying man who is terminally ill or in a PVS that he may be promoted to terminated it by a premature extinction of this life in those circumstances. This category of cases may fall within the ambit of the ‘right to die’ with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life, but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to included there in the right to curtail the natural span of life.  

Only the cases of voluntary euthanasia (where the patient consents to death) that would attract exception 5 to Section 300. Cases of non-voluntary

\[\text{158} \quad \text{Gyan Kaur v. State of Punjab AIR 1996 SC 946, 1996 Cr LJ 1660 (SC).} \]
\[\text{159} \quad \text{Ibid.} \]
and involuntary euthanasia would be struck by proviso 1 to Section 92, IPC and thus, be rendered illegal.

The law in India is also very clear on the aspect of assisted suicide. Abetment of suicide is an offence expressly punishable under Sections 305 and 306, IPC.

Moreover, after the decision of a five judge bench of the Supreme Court in *Gian Kaur v. State of Punjab*, it is well settled that the ‘right to life’ guaranteed by Article 21 of the Constitution does not include the ‘right to die’. The court held that Article 21 is a provision guaranteeing protection of life and personal property and by no stretch of the imagination can extinction of life be read to be include in the protection of life.

Chapter seventh describes the consent by Accessories before, at and after the crime. This chapter has been divided into two parts. First part relates to such co-accuseds who will be liable for joint liability (or group liability or liability for illegal combination) because each accused has consented to commit crime in the same way (Sections 34-38, 114, 149, 396, 460) hereinafter called accessories at the crime.

The second part covers those offences where the co-accuseds, yet not participated in commission of the crime but have either abetted or conspirated for the same. In other words both side have consented vice versa to commit the crime. (These offences are called inchoate or preliminary offence) hereinafter called Accessories before the crime. This second part also covers harbourers and other co-accuseds who give consent to help the actual wrong doer after committing the crime hereinafter called Accessories after the crime (Relevant Sections are 107, 120A, 131A, 128, 130, 134, 136, 154-158, 197, 212, 213, 215-219, 221-223, 225A, 242-243, 411-414, 475 of IPC). Under Sections 34

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160 Ibid.
161 Shriyans Kas’iwal ‘Should euthanasia be legalised in India? 2002 Cr. LJ (Journal) 209.
& 149 common intention and common object are related to consent of all parties with or without prior meeting of mind.

**Distinction between Common intention and Common object:** It was held in *Chittarmal v. State of Rajasthan*,\(^{162}\) that Section 34 as well as Section 149 deal with liability for constructive criminality i.e., vicarious liability of a person for acts of others. Both the Sections deal with combinations of persons who become punishable as sharers in an offence." Thus they have a certain resemblance and may, to some extent, overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of minds, while common object does not necessarily require proof of prior meeting of minds or pre-concert. Though there is substantial difference between the two Sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter: whether such a recourse can be had or not must depend on the facts of each case. The non-applicability of Section 149 is, therefore, no bar in convicting the accused under Section 302 read with Section 34, Indian Penal Code, if the evidence discloses commission of an offence in furtherance of the common intention of them all.

(i) The basis of liability under Section 34 is the existence of common intention animating the accused persons.

\(^{162}\) 2003 *Cri L.J.* 889 (S.C.).
Liability under Section 149 is based on the existence of common object or knowledge of the probability of the commission of the offence i.e. natural consequences as the accused knew to be likely to be committed.

(ii) Common intention within the meaning of Section 34 is undefined and unlimited.
    Common object is defined and is limited to the five unlawful objects stated in Section 141 of the Code.

(iii) Criminal act under Section 34 must be done in furtherance of common intention.
    Criminal act under Section 149 must be done in prosecution of the common object or it would be sufficient if the members of the unlawful assembly knew that offence was likely to be committed.

(iv) Some act howsoever small or insignificant must be done by every person accused of the commission of an offence i.e., active participation in commission of crime is necessary for application of Section 34.
    Merely membership of the unlawful assembly at the time of commission of crime would be sufficient for application of Section 149. Active participation in commission of crime is not necessary.

Under Section 114 of IPC abettor has consented to be present at the commission of crime which conduct holds him jointly liable.

An abettor is punishable for the offence of abetment and not for the offence abetted. However, Section 114 provides an exception to the same. Under Section 114 if the abettor is present, and the offence abetted is committed by the principal offender, the abettor himself will be deemed, by fiction of law, to have committed the offence. Thus Section 114 has the

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effect of making the principal offender and the abettor, the principal offenders and consequently by application of Section 114, cases of abetment in which the abettor is present at the commission of the crime are brought within the fold of Section 34.164

Sections 34 and 114 are intended to provide for cases in which the exact share of each criminal engaged in a joint crime cannot be ascertained,165 so that where two persons jointly commit a crime it should be possible to punish both of them without the necessity of establishing the exact role played by each of them, whether it be as principal offender or as abettor.

Under Section 396 of IPC there is an example of joint liability each one is vicariously liable for the act done by other. The Section clearly enumerates that if any one of the five or more persons who are conjointly committing dacoit, commits murder in so committing dacoity everyone of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for term which may extend to ten years and shall also be liable to fine. Under Section 460 of IPC the offence is based on joint liability because each and every-one accused has consented to commit the crime. The Section covers the case where all persons jointly concerned in lurking house-trespass or house breaking by night punishable where death or grievous hurt caused by one of them. The co-extensive and constructive liability of persons jointly concerned in committing the crime is dealt with under this Section. The word ‘at the time of committing of’ is very important as while running away if the offender causes grievous hurt, he will not be punishable under this Section.166 In second part of this chapter we come to the conclusion that in

166 Muhammad, (1921) 2 Lah. 342.
cases where Accessories before the crime and after the crime are involved, certainly they are presumed to have been consented for the act to be done statutorily. Their willingness to commit the crime means they have consented to do the act for either abetting the crime or in harbouring the real wrongdoer. Under Section 107 (Abetment by conspiracy) two or more persons become agree to commit a crime. It means all have consented to commit the crime. Such crime is called inchoate crime (i.e. preliminary crime).

**Abetment by conspiracy** :- An abettor may engage with one or more person or persons in any conspiracy for the doing of something in which case he not only investigates but conspires to commit a crime, an act punishable under Section 120-B. Conspiracy consists in combination and agreement by persons to do some illegal act or to effect a legal purpose by illegal means. In order to constitute the offence of abetment by conspiracy there must be a combining together of two or more persons in the conspiracy and an act or illegal omission must take place in pursuance of that conspiracy and in order to the doing of that thing. It is not necessary that the act abetted should be committed, or that the effect requires to constitute the offence should be caused. It is also not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. A mere conspiracy does not amount to abetment. If conspirators are detected before they do more than their discussed plans, with a general intention to commit an offence they are not liable as abettors. In a case of abetment by conspiracy it is immaterial that the persons conspiring together actually carry out the object of conspiracy.

**Distinction between abetment and conspiracy**:- the distinction between the offence of abetment under the second clause of Section 107 and that of

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167 Khatil, 28 Cat 797.
criminal conspiracy under Section 120-A is this. In the former offense a mere combination of persons or agreement between them is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence, the mere agreement is enough, if the agreement is to commit an offense.\(^{169}\)

It is very difficult to obtain direct evidence of conspiracy which is generally inferred from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them. In order to constitute the offense of abetment by conspiracy there must be a combining together of two or more persons in the conspiracy and an act or illegal omission must take place in pursuance of that conspiracy and in order to the doing of that thing. It has been held by the Supreme Court in *Haradhan Chakraborty v. Union of India*,\(^ {170}\) that where a person is charged with the offense of abetment of conspiracy of commission of the offence of theft by his officer and the substantive offence against the principal offender is not established the alleged abettor has also to be acquitted. Under Section 120A the criminal conspiracy has been defined. It is also an inchoate or preliminary crime under which two or more persons have consented fully to commit the crime. This stage is called agreement.

**Distinction between offence of abetment by conspiracy and offence of criminal conspiracy** :- The gist of the offence of criminal conspiracy is in the agreement to do an illegal act or an act which is not illegal by illegal means. When the agreement is to commit an offence, the agreement itself becomes the offence of criminal conspiracy. Where, however, the agreement is to do an illegal act which is not an offence or an act which is not illegal by illegal mean, some act besides the agreement is necessary. Therefore, the distinction


between the offence of abetment by conspiracy and the offence of criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this. For abetment by conspiracy mere agreement is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for. But in the offence of criminal conspiracy the very agreement or plot is an act in itself and is the gist of the offence. Put very briefly, the distinction between the offence of abetment under the second clause of Section 107 and that of criminal conspiracy under Section 120A is this. In the former offence a mere combination of persons or agreement between them is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence the mere agreement is enough, if the agreement is to commit an offence.171

There is another batch of Sections (Sections 121A, 124, 128, 130) where co-accused is liable because he has consented to commit the crime mentioned in the above Sections. Under Section 121A punishment is provided for the persons who make conspiracy to commit offence punishable under Section 121 (i.e. waging or attempting to wage were or abetting to wage war against Govt. of India. Likewise under Section 128 public servants are punished who are voluntarily allowing prisoner of State or of war to escape. Also under Section 130 Aiding, escape of rescuing or harbouring such prisoner is punishable.

Under Section 134 Abetment of any assault which has been committed is punished. It means there were at least two persons but of which the abetted person had committed the act abetted. In other words he had consented in response to the abetted act with the same ideology, Section 136 deals with

harbouring deserters who have fled from Army, navy or Air force and the harbourer knowingly, harbours then it is punishable act because the harbourer has consented to take the risk of providing help to the deserter. Section 154 deals punishes that owner or occupier of land who has consented for assembly of unlawful Assembly on his land knowingly that such persons are members of unlawful assembly.

The very greatest caution is required before proceedings are started against a person under Section 154 of the Penal Code.\textsuperscript{172}

The responsibility under Section 154 of the Penal Code must depend upon the fact of the person who caused the riot being himself the person who has an interest in the land or an agent or manager of such person; and one of the facts to be proved is whose agent or manager the person who fermented the riot is.

The person who is responsible for the appointment of the agent or manager is the person liable under Section 154 if the agent or manager gets up the riot.

The there are more persons than one, responsible for the appointment of the agent or manager, they must be considered to be jointly liable, although separate sentences have to be passed against each of them.\textsuperscript{173} Whereas Section 155 punishes that person for whose benefit the riot is committed. And Section 156 holds responsibility of agent or occupier for whose benefit riot is committed because knowingly they consented to.

Section 157, Penal Code, refers to some unlawful assembly in the future and provides for an occurrence which may happen, not which has happened. Where the accused was charged for having harboured certain persons who were alleged to have formed an unlawful assembly in the past for

\textsuperscript{172} \textit{Nripendra Bhushan Ray v. Govinda Bandhu Majumdar} 25 Cr LJ 1258.
\textsuperscript{173} \textit{Siva Sundari Chowdhurani v. Emperor} 13 Cr LJ 221.
the commission of an offence, it was held that the accused could not be convicted under Section 157.174

Section 157 of the Penal Code is of a wider application. It provides for an occurrence that may happen and makes the harbouring, receiving or assembling of persons who are likely to be engaged in any unlawful assembly, an offence. It contemplates the imminence of an unlawful assembly and the proof of facts which in law would go to constitute an unlawful assembly.

Where a Magistrate only found that “what the accused has been doing is collecting and harbouring men for the purpose of committing a riot should he find it to his interest to do so”, and there was no finding that there had been any unlawful assembly, composed of persons said to have been hired by the accused and in the course of which some offence had been committed for which the accused would have been responsible equally with those who were members of that unlawful assembly, nor that an unlawful assembly made up of the elements provided for by Section 141 of the Penal Code was in the contemplation of the accused, it was held that the accused could not be convicted of having committed offence under Sections 150 and 157 of the Penal Code.

Section 158 punishes those who have consented to take part in an unlawful assembly or riot being hired. There are another batch of Sections relating to offences relating to false evidence (Sections 197, 212, 213, 215-219, 221-222, 225A of IPC). Section 197 punishes that person who issues or signs or false certificate. Having knowledge about false certificates makes criminally liable because even after knowledge he consented to make such certificate.

174 Radharaman Saha v. Emperor Cr LJ. 62.
'Knowing or believing it to be false in any material point' – Meaning of:-

For a conviction under this Section, the certificate must be false on a material point, and the person issuing or signing it, must do so knowing or believing that the certificate is false on a material point. In the absence of such knowledge or belief, a person cannot be convicted of this offence or its abetment.\(^{175}\) It may be noted that under Section 79 of the Evidence Act, there is a presumption of the genuineness of a certificate issued by an officer of the government but that presumption does not extend to its truth or falsity.

Section 212 deals with harbouring offender. Under this Section a harbourer gives his consent to take the risk of harbour.

This Section is similar to accessory after the fact, as provided under the English law. It fixes criminal liability on those who harbour an offender, on the principle that it is the duty of every citizen to assist and not to thwart public justice of the vengeance of the law.\(^{176}\)

The Section applies to giving shelter or concealing a person whom the accused knows, or has reason to believe, to be an offender, with the intention of screening him from punishment. The punishment varies depending upon the nature and gravity of the offence committed and the person harboured.\(^{177}\)

Whereas Section 213 punishes that person who after taking gift has consented to screen an offender from punishment simultaneously, Section 215 punishes that person who takes gift and gives his consent to help to the aggrieved in recovering of the stolen property etc.

Section 216 punishes that person who has consented to harbour a person who has escaped from custody or whose apprehension has been ordered. Section 217 punishes that public servant who has consented to save

\(^{175}\) Queen v. Hassamuldeen 3 WR 37.


\(^{177}\) Tahsildar Singh v. State of Uttar Pradesh, AIR 1958 All 214.
person from punishment or property from forfeiture. Whereas Section 218
prescribes penalty for a public servant framing in correct record to save person
from punishment or property from forfeiture. Section 219 provides punishment
to the public servant who has consented to make report corruptly in judicial
proceedings.

Section 221 punishes that public servant who has consented to
intentional omission to apprehend on the part of public servant bound to
apprehend. Section 222 deals with such public servant who does intentional
omission to apprehend who is bound to apprehend person under sentence or
lawfully committed. Similarly Section 225A punishes that public servant who
does omission to apprehend or sufferance of escape in cases not otherwise
provided for. Consent is also found in cases where a person is in possession of
counterfeit coin who knew it be counterfeit when he became possessed
thereof. (Section 242 of IPC) and whose such counterfeit coin is ‘Indian Coin’
he is punished under Section 243. Because the possessor has knowledge still
he has consented to possess means he is co-accused with the dealer of
counterfeit coin. Under Section 411 a person gives consent to receive stolen
property.

‘Knowing or having reason to believe the same to be stolen property’:-
The offence made punishable is not the receiving of stolen property from any
particular person, but the receiving of such property knowing it to be stolen.
“The word ‘believe’... is a very much stronger word than ‘suspect’, and it
involves the necessity of showing that the circumstances were such that a
reasonable man must have felt convinced in his mind that the property with
which he was dealing must be stolen property.” “It was not sufficient [in such
a case] to show that the accused was careless, or that he had reason to suspect
that the property was stolen or that he did not make sufficient enquiry to
ascertain whether it had been honestly acquired."\(^{178}\) Whereas Section punishes the person who dishonestly receiving stolen property in the commission of a dacoity. Section 413 provides penalty for who is habitual in dealing with stolen property Section 414 punishes that person who is found assisting in concealment of stolen property.

After doing study of the topic in hand to research it is concluded that consent is of two types in IPC. First is consent of victim which can exonerate in some cases or does not exonerate in few cases or mitigates the criminal liability of accused in the given circumstances.

Second type is consent of co-accused which makes joint liability or group liability. Also where co-accused has been abettor or conspirator or harbourer, still there is criminal liability all co-accused but all will be punished with unequal punishments.

Consent is specie of intention whereas intention is genesis. The formation of second type of consent can be described in this way. When one person puts his intention in the form of an offer before another person to do an illegal act in which such another person is asked to join the hands, in response to that offer if such another person gives the answer in affirmative, it amounts to giving the consent. When both are agree to do an act it is presumed that both have mutually consented to do the act or this stage can be described as agreement has taken place to do an illegal act in I.P.C.

Consent of the victim which if given as valid consent (or free consent) will exonerate the person from criminal liability or can mitigate the criminal liability and if given under fear of injury or under misconception of fact, it does not exonerate the accused from criminal liability.

After going through the research following suggestions appeared —

Suggestions
1. Section 90 should be redefined in positive manner as—

“Definition of consent” — When two or more persons agreed upon the same thing in the same sense, they will be presumed to have consented to do an act or omission agreed provided that such consent should not have been adversely affected by —

(i) Fear of injury or
(ii) Misconception of fact or
(iii) When due to insanity or intoxication or age oldness he was unable to understand the nature and consequence of that to which he gave consent or
(iv) Infancy, when consent was given by a child under 12 years of age unless the contrary appears from the context or
(v) Undue influence or
(vi) Fraud or
(vii) Mistake of fact.”

2. Age oldness should be recognised as adversely affecting factor to the valid consent.

3. Undue influence should be considered the adversely affecting factor invalidating a legal consent.

4. Fraud should be treated as invalidating the legal consent as it cheats the mind of consenting person.

5. Mistake of fact should be treated as misguiding the consenting party while taking any decision on any question therefore consent affected adversely by mistake of fact should be treated as invalid consent.
6. Ambiguity in consent should be treated as absence of consent.
7. Consent should be deemed to be continue unless it is revoked. Revocation should not be treated revocation of consent per-se. (i.e. from the very beginning) rather it should be interpreted according to the contents of revocation.
8. Implied consent should be construed equivalent to express consent in all respects i.e. in toto.
9. If a person who has consented once, later on if he retreats from his statement, the principle of estoppel should be applied.
10. Under adultery (Section 497) the accused should be punished with lesser punishment being abetted by the wife or the accused should not be punished at all if the act was committed with sweet consent of the wife. Because the law of land is when sexual intercourse is committed with an adult unmarried lady with her consent is no offence (who is living under guardianship of her parents). Then why the consent of a adult married lady is negated (who is living under the guardianship of her husband).
11. If under Adultery, the Adulterer is punished, then the wife (being consenting party) should also been punished as an abettor because her consent is not suffered by any lacuna. Why the wife is not considered equal human being as a man or why a married woman is still considered an object of exploitation or why an adult wife considered a baby of immature mind? How a ceremony of marriage can vitiate a valid consent?
12. Under the offence of Rape (Section 375), as per clause sixth, when consent of a girl under 16 years of age is not a valid consent, how it becomes a valid consent under 15 years of age in case of intercourse by a husband (see
Exception to Section 375) Therefore this exception should be amended with 16 years in place of 15 years of age.

13. In exception to Section 375, word consent is missing. According to which a husband can have intercourse with his wife even against her will as considering her chattel. Therefore intercourse by husband with his wife against her will should be amounted to rape reason being she might have been married by her parents against her will or without her consent under any kind of greed or coercion.

14. Under Bigamy (Section 494). If a husband with free consent of his wife, (wife being suffering with paralysis living as bed-ridden) marries with another lady. So that such second wife can serve better the first wife. Subsequently first wife should not be allowed to take action against her husband under Section 494 I.P.C. because under Section 494 the first wife can give consent for second marriage as the word “marriage against her consent” is missing in Section 494. First wife can give consent for second marriage because under Section 494 the first wife is ‘considered the only aggrieved party and no body other than first wife can take action against her husband in case of bigamy.

15. Consent of a female has a changing validity. It is suggested that stable value should be given to the consent of a female equivalent to a male citizen. In other words equal human rights be given to a female. This suggestion is put because of following prevailing anomalies –

(i) intercourse with female under 16 years of age with her consent – amounts to rape (see sixth clause to Section 375).
(ii) intercourse with female – under 16 years of age – without her consent – amounts no rape (see Exception to Section 375)
(iii) intercourse with female — above 16 years of age — with her consent — amounts no rape being a valid consent (see Sixth clause to Section 375)
(iv) intercourse with female — above 18 years of age — with her consent — amounts adultery (see Section 497)
(v) intercourse with female — above 18 years of age — with her consent — amounting as not a valid consent (see Section 497.