

86. Offence requiring a particular intent or knowledge committed by one who is intoxicated.—In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

SYNOPSIS

- | | |
|-------------------------------|------------------------------|
| 1. Scope. | 5. Burden of proof. |
| 2. Intoxication and insanity. | 6. Sentences. |
| 3. Involuntary intoxication. | 7. Right of private defence. |
| 4. Voluntary intoxication. | 8. Use of hemp. |

1. Scope. Section 86 provides that, in cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will. This section deals with cases in which, by reason of intoxication, a person is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. In these cases, the accused will not be criminally liable provided that the thing which intoxicated the accused was administered to him without his knowledge or against his will. The reading of s. 85 and 86 together makes it clear that section 86 is an exception to section 85. Section 85 covers all offences. That is why, it became necessary to enact section 86 to take care of offences requiring a particular intent or knowledge on the part of the intoxicated offender. The section takes care of such offences and states that if intoxication is involuntary, neither knowledge nor intention in committing the offence will be presumed. If, however, it is voluntary only knowledge of the offence on the part of the offender will be presumed but not intention in committing it. That is what section 86 means and no more, as compared to section 85. The degree of intoxication demanded by both the sections however remains the same. This construction of section 86 must follow by reading it as an exception to section 86. Even otherwise, it is not possible to construe the said section to mean that it permits intoxication of a lesser degree. Apart from the difficulty defining such degree of intoxication, it will open a door for imponderable problems leading to untold and unhealthy consequences. [1987 Cri. LJ 1416 (Bom)] Under both the sections, the defence that the alleged criminal act was done under the influence of intoxication will not be available if the intoxication was "voluntary" i.e., was the result of the accused's own voluntary act. [(1978) 45 Cut LT 533] The presumption u/s. 86 that the voluntary drunkard who commits an offence has the same knowledge as he would have had if he had no been intoxicated gives rise to a further presumption that he intended the ordinary and natural consequences of his act. [(1912) 13 Cri LJ 864 (FB) (Upp Bur)] Even where the offence is one which requires a particular intention to constitute the offence, such intention can be inferred u/s. 86 in the case of a voluntary drunkard by applying the presumption that he acted with the same knowledge as he would have acted with, if he had not been drunk. [AIR 1953 Mad 827] Even voluntary drunkenness will be a defence to a criminal charge where the offence is one which requires a particular knowledge or intention and the accused as incapable, by reason of his drunkenness, of having such knowledge or forming such intention. [AIR 1939 Mad. 407] Criminal charge for an offence requiring a particular knowledge or intention. For voluntary intoxication to be a defence the intoxication must have rendered accused incapable of having the requisite knowledge or intention. Mere fact that intoxication had made the accused excitable and predisposed to violence will not be sufficient to entitle him to the benefit. [AIR 1957 All 667]

2. Intoxication and insanity. Although intoxication may resemble insanity, it is not the same as insanity and offence committed by a person while in a state of intoxication should be dealt with u/ss. 85 and 86, and not u/s. 84. [1920 App Cas 479] Where the incapacity to understand the nature of the act or to have the particular knowledge or to form the particular intent necessary to constitute the offence is the result of an inherent defect or infirmity of the mind, s.

intoxicated as to be besides his mind altogether, the rule that man is presumed to intend the natural consequences of his act could be applied to accused also. [1986 Cri LJ 739 (DB) (Bom)] Where the statement in dying declaration showed that the accused after consuming liquor scolded his wife and then poured kerosene on her and set fire, and that act of accused was repeated once again when the deceased-wife put off flames and tried to run away, it could be said that the mental faculties of the accused were not so completely dominated by intoxication. [1995 Cri LJ 689 (DB) (AP)] The presumption that in spite of intoxication the accused intended the natural consequences of his act, cannot be rebutted by merely showing that the intoxication had made him excitable and predisposed to violence. [AIR 1957 All 667]

5. Burden of proof. The burden of proof of involuntary intoxication which made the accused incapable of knowing what he was doing or that he was doing what was wrong or contrary to law, is on accused. [1978 Cut LR (Cri) 202]

6. Sentences. Although voluntary intoxication is no defence to a criminal charge, such intoxication may be taken into consideration along with other facts and circumstances of the case in determining the appropriate sentence to be passed. [ILR (1956) Trav-Co 658] If the accused did the act while in a state of voluntary intoxication, he will be presumed to have known that it was so imminently dangerous that it must in all probability, cause death, and if the presumption is not rebutted, the accused will be held guilty of murder. [AIR 1953 Raj 40]

7. Right of private defence. The right of private defence against attacks by persons in a state of intoxication is not in any way different from the right against attacks by other persons. [AIR 1927 Rang 121]

8. Use of hemp. Hemp acts on the brain, causing usually excitement followed by narcotics. If the drug is taken in small doses the effect produced is slight, consisting merely of some pleasurable stimulation of the higher centers. This in no way affects the individual's appreciation the consequences of his acts. In large doses, hemp, like *datura*, causes a temporary insanity associated with hallucinations under the influence of which a person may be violent even to the extent of committing homicide. [AIR 1939 Cal 244 (DB)]

87. Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death, or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Illustration

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

88. Act not intended to cause death, done by consent in good faith for person's benefit.—Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent whether express or implied, to suffer that harm, or to the risk of that harm.

Illustration

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

[S. 89] 226] If the boy is under 12 years of age, the consent of the legal guardian of the boy may be assumed in cases where corporal punishment is inflicted by teacher in good faith and s. 89 may be held to apply. [1963 MPLJ (Notes) 172] The chastisement must be inflicted with due care and attention, having regard to the safety and health of the child or pupil and where the teacher has not observed these precautions and has acted recklessly, he would not be entitled to the protection of these sections. [1963 MPLJ (Notes) 172; AIR 1962 Mad 216] Corporal punishment inflicted on a schoolboy under 12 years of age by his teacher in good faith in the interest of school discipline will directly come u/s. 89 so as to protect the teacher from criminal liability for his act. The principle of the section can be extended to older children by virtue of s. 88. [1963 MPLJ (Notes) 172] Where by virtue of ss. 88 and 89, a school-master inflicting corporal punishment on a school boy in good faith in the interest of school discipline, is protected from criminal liability for his act, he will not be regarded as having incurred such liability merely because he exceeded the limit laid down by the administrative or executive instructions issued by the Education Department of the Government. [AIR 965 Cal 32]

7. **Burden of proof.** Under Article 121, of the Qanun-e-Shahadat Order, 1984 the burden of proof is on the accused to prove his defence under this section. In discharging his burden accused should prove that the patient on whom he operated knew the risk he was running in consenting to the operation by a *Kabiraj* uneducated in the practice of surgery. [(1887) ILR 14 Cal. 566]

89. Act done in good faith for benefit of child or insane person, by or by consent of guardian.—Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind by or by consent either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:

Provided: First. That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Secondly. That this exception shall not extend to the doing of anything which person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt; or the curing of any grievous disease or infirmity;

Thirdly. That this exception shall not extend to the voluntary causing of grievous hurt or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt or the curing of any grievous disease or infirmity;

Fourthly. That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration

A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing to be likely that the operation will cause the child's death, but not intending to cause the child's death A is within the exception, inasmuch as his object was the cure of the child.

SYNOPSIS

1. Scope.
2. Good faith.
3. Infliction of corporal punishment by teacher.
4. Burden of proof.

1. **Scope.** Section 89, Pakistan Penal Code, recognizes parental authority under children below 12 years of age and empowers the guardian or other person similarly situated to inflict harm either himself, or consent to its infliction by another, but it requires that the infliction of harm shall, as in other cases, be:-

4. **Burden of proof.** Under Article 121, of the Qanun-e-Shahadat Order, 1984 the burden of proof is on the accused to prove his defence under this section. In discharging his burden accused should prove that the patient on whom he operated knew the risk he was running in consenting to the operation by a *Kabiraj* uneducated in the practice of surgery. [(1887) ILR 14 Cal. 566]

90. Consent known to be given under fear or misconception.—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; or

Consent of insane person.—If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.—Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

SYNOPSIS

- | | |
|---------------------------------|----------------------|
| 1. Scope. | 3. Consent by idiot. |
| 2. Consent under misconception. | 4. Question of fact. |

1. Scope. Section 90 of the Penal Code, deals with consent is given by a person under fear of injury or under a misconception of fact. It provides that 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; it further provide that consent if given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; is not consent in the eye of law. So far as consent of child is consent the section provides that unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age. Section 90, stipulation three ingredients:-

- i) The consent must not be given under fear of injury or under a misconception of fact;
- ii) The consent must an act of consciousness;
- iii) Mere submission is not consent.

"Consent" under this section is the act of a man in his character of a rational and intelligent being, not in that of an animal. It must proceed from the will, not when such will is acting without the control of reason, as in idiocy or drunkenness, but the will sufficiently enlightened by the intellect to make such consent the act of a rational being. [(1884) 15 Cox Cr C 579] It must be result of exercise of judgment and the deliberate and free act of mind. A mere knowledge of the risk involved in the matter will not amount to consent. However, it may be expressed or employed. [(1891) ILR 18 Cal 484 (DB)] Mere submission is not consent. [(1872) 12 Cox Cr C 180] A person who is asleep or unconscious when an act is done to him cannot be held to consent to such act. [(1878) 14 Cox Cr C 115] Mere submission does not amount to consent. [(1841) 178 ER 1026] Mere non-resistance is not consent. [(1877) 13 Cox Cr C 388] The consent of the husband of a woman to the infliction of injury on her for the exorcism of the Devil supposed to dwell in her will not legalize the harm inflicted. [AIR 1935 All 282 (283)] Mere consent to a surgical operation without realizing the harm or risk of harm, which the operation involved, is no "consent" within the meaning of this section. [AIR 1915 Bom 101 (102)]

91. Exclusion of acts which are offences independently of harm caused.—The exception in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause to the person given the consent, or on whose behalf the consent is given.

Illustration

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

NOTES

Scope. Section 91 of the Penal Code provides that exceptions enlisted in Ss. 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause. The provisions of Ss. 87, 88 and 89 of the Code are based on the principle that free consent exonerates the wrong doer if the harm is short of death or grievous hurt, if not wrapped in malice. As illustrated in s. 87 where A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence, similarly according to illustration as created to s. 88. A, a surgeon, knowing that a particular operation is likely to cause the death of Z who suffers under the painful complaint, but not intending to cause Z's death, and intending, in good faith Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence. Likewise per illustration to s. 89, where A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child. From the above the following principle can be deducted:-

- (i) That the harm to be caused should be short of death or grievous hurt;
- (ii) If the harm is likely to cause the death, it should be in good faith and for the benefit of the person harmed;
- (iii) The power of parental discipline over children below 12 of age permitting guardian to chastise his ward for his benefit recognized.

The present section 91 explains that the exceptions above said would not extend to the acts which are offences independently of any harm which they may cause. Miscarriage (unless caused in good faith) is an independent offence u/s. 338-B, Pakistan Penal Code. Therefore, if miscarriage is caused except in good faith, even with the consent of the woman would be an offence. However, word 'harm' in this section means physical injury. [AIR 1966 S.C. 1773]

92. Act done in good faith for benefit of a person without consent.—¹⁴ Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit:

Provisos. *Firstly.* That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly. That this exception shall not extend to the doing of any thing which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly. That this exception shall not extend to the voluntary causing of hurt or the attempting to cause hurt for any purpose other than the preventing of death or hurt;

Fourthly. That this exception shall not extend to the abetment of any offence to the committing of which offence it would not extend.

Illustrations

(a) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A not intending Z's death but in good faith for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(b) Z is carried by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z and in good faith intending Z's benefit A's ball gives Z a mortal wound. A has committed no offence.

(c) A, surgeon, sees a child suffer an accident which is likely to prove fatal less an operation be immediately performed. There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

(d) A is in a house which is on fire, with Z, a child. People below hold out a blanket. A drops the child from the housetop, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here even if the child is killed by the fall, A has committed no offence.

Explanation. Mere pecuniary benefit is not benefit within meaning of sections 88, 89 and 92.

SYNOPSIS

1. Person submitting to physical harm.

2. "Pecuniary benefit".

1. Person submitting to physical harm. Section 92, deals with act done in good faith for the benefit of a person even without his consent. It provides that nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit. The justification as provided by the Draft Committee is given as under:

"There yet remains a kindred class of cases which are by no means of a rare occurrence e.g., a person falls down in an apoplectic fit. Bleeding alone can save him and he is unable to be bled. The surgeon who bleeds him commits an act falling under the definition of an offence. The surgeon is not the patient's guardian, and has no authority from any such guardian; yet it is evident that the surgeon ought not to be punished. Again, a house is on fire. A person snatches up a child too young to understand the danger, and flings it from the house-top, with a faint hope that it may be caught by a blanket below but with the knowledge that it is highly probable that it will be dashed to pieces. Here though the child may be killed by the fall though the person who threw it down knew that it would very probably be killed, and although he was not the child's parent or guardian, he ought not to be punished. In these examples there is what may be called a temporary guardianship, justified by the exigency of the case and by the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary magistracy with which the law invests every person who is present when a great crime is committed or when the public peace is concerned. To act done in the exercise of this temporary guardianship, we extend by Cl. 72 (now 92), a protection very similar to that which we have given to the acts of regular guardian."

1 [Note B, Reprint, p. 109].

Both under this section and u/s. 88 and 89, the accused, in order to get the benefit of the sections, must show that he acted in good faith and with due care and attention. Where a person submits to physical harm being inflicted on him in consideration of a monetary benefit, it cannot be said that the harm inflicted for his benefit and the persons who inflicted the harm will not be protected under this section. [(1866) 5 Suth WR (Cr) 7 (DB)] Where the devil dancers thought that a woman was incapable of giving consent for exorcising the devil and branded her with hot irons without obtaining her consent. It was held that s. 92 did not apply as the woman did not give her consent though the devil dancers believed that it was impossible for her to signify consent because she was possessed by devil. [AIR 1935 All 282] Where a wealthy zamindar kept his brother in chains because he suffered from violent fits of insanity it was held that although M was subject to fits of violent insanity nevertheless he had lucid intervals. As the accused could easily procure medical attendance he cannot be said to have acted with due care and attention in chaining up his brother. [AIR 1923 All. 546]

2. "Pecuniary benefit". The explanation to s. 92 of the Code coupled with s. 88, does not justify the performance of a dangerous surgical operation by an unskilled person although it is not intended to cause death, for the mere pecuniary benefit of the person voluntarily submitted to it. [(1866) 5 WRC (Cr) 7]

93. Communication made in good faith.—No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person. 16

Illustration

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

NOTES

Scope. Section 93, protects any communication made in good faith, even if it proved, fatal to the person informed. To illustrate, if a surgeon, in good faith, communicates to a patient his opinion that he cannot live or survive. The patient dies in consequence of the shock. The surgeon has committed no offence, though he knew it to be likely that the communication might cause the patient's death. Two ingredients comes out as essentials to protect a person under this section.

Firstly, the information must be made in good faith;

Secondly, it must be made for the benefit of that person. Which includes both personal or pecuniary benefit.

The word "benefit" has been here used undoubtedly in its wide sense as including both personal or pecuniary benefit where death is inevitable, it will be to the patient's pecuniary benefit that he should be warned of it betimes, so that he may have time to settle up disputes which may avert the ruin of his fortune. Such a communication may even be for the personal benefit of the patient if it induces him to submit to a treatment of the last resort. [(1746) 18 St. Cr. 391]

94. Act to which a person is compelled by threats.—Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to the person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

5. **Explanation (2).** It is a question of fact depending on the circumstances and evidence in each case, whether a person was forced by threat of instant death by a gang of dacoits to commit an offence within the meaning of Explanation 2. Where there is no proof that a person was so forced to join a gang of robbers or dacoits but was involved in a crime committed by such gang, the Explanation 2 will not apply. [(1904) 1 Cri LJ 282]

6. **Burden of proof.** Under Article 121, of the Qanun-e-Shahadat Order, 1984, the burden of proving that the accused was compelled under threat of instant death to commit the offence and hence was not liable to punishment by force of this section, is on the accused. [AIR 1925 All 315]

7. **Right of self defence.** Person beaten severely with *lathis* on the suspicion of being thief, can exercise right of self-defence. [PLD 1966 S.C. 432] Person injured have right of self defence a step higher. [NLR 1994 Cri. 75] Plea can be supported from circumstances. [1994 SCMR 1733] Chastity of a woman at stake, right of self defence not only available to victimized lady but also to her husband. [1993 P.Cr.L.J. 557] Person can defend his property. [1993 P.Cr.L.J. 2231] Right of self defence cannot justifiably claimed by aggressor/offender who has committed non-bailable offence. [1993 P.Cr.L.J. 255]

95. **Act causing slight harm.**—Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

SYNOPSIS

1. Act causing slight harm.
2. "Harm".
3. Vulgar abuse.
4. Sentences.
5. Offence under other laws.

1. **Act causing slight harm.** Man is a social animal. He is to live in the society. Where he must suffer some inconvenience and transgressions without which indeed no living is possible. He will have to share the noise and smoke of the vehicles playing around. It will be an idle travesty of law to deal with such delinquencies as of they are crimes. Section 95 of the Penal Code deals with an act causing slight harm. Which is not worth complain. It provides that nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm. Even the intentional causing of 'harm' specified in this section is excused because of its triviality. [1992 P.Cr.L.J. 1766] Men living in society must suffer some inconveniences, without which no society is possible. Public servants charged with the responsibility of removing public grievances are all the more expected to make allowance for and not to overtly react to a display of anger and even petty transgression on the part of an aggrieved member of the public. The Penal Code has by its section 95 exempted such incidents from being treated as an offence. [PLD 1976 Lah 144] It is common experience that men living in society must suffer some inconveniences and transgressions without which no society is possible. That being so, it would be travesty of law to deal with such trivial matters as if they were crimes. It is because of this the law rightly exempted such trivial actions from the category of crimes. A close examination of the provisions of this section shows that even the intentional causing of harm specified in this section is excused because of its triviality. The word "harm" no doubt means injury of any kind, including injury to mind, body or property. It provides that in the normal circumstance even if the injury to mind, body or property is caused and if the harm is so trivial, no person of ordinary sense and temper would complain of it. [(1970) 2 Cr.L.J. 1188]

The section is intended to provide for those cases which, though from the imperfections of language, fall within the letter of the Penal law are yet not within its spirit and are all over the world considered by the public and are for the most part dealt with by the