

WHAT HOLDS MORE VALIDITY – WOMEN'S CONSENT OR HER CHARACTER?

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ABSTRACT

Character evidence plays a huge role in ascertaining whether consent was given to the accused in rape cases. Wigmore says character evidence on the part of the accused is to ascertain guilt beyond a reasonable doubt. She says the law in India allows a rape complainant to be accused of having an immoral character. When the talk is of criminal cases, though the character is treated to be admissible as evidence in rape cases, the court must not highlight the past or reputation of one or make it the deciding factor of society's future. Character evidence or such things should only be permitted till it does not snatch somebody's basic rights or fundamental rights. Also, some studies show that whether being a criminal or a civil case, a character sometimes acts as weak evidence before the Hon'ble Court of Law. In cases like the rape cases, the biological evidence should be served as the best evidence to know the authenticity of the case and not the character which relates to the past. Evidence of a person's character or a trait of his character is not admissible to prove that he acted in conformity therewith on a particular occasion.

Journal of Legal Research and Juridical Sciences

Keywords: Rape, Character Evidence, Consent, Cases.

It has been always ironic in India that, where on the one hand a man goes to the temple, worships the goddess, and then rapes or sexually abuses a woman on the other hand. However, Rape trends are not only for India, it's always been a worldwide atrocity. After hearing about the case of a 16-year-old UK girl who was brutally gang-raped in a metaverse virtual reality game, it is clear that rape causes more than just physical harm to victims it also leaves behind a vital psychological and mental impact.

Rape is a crime that occurs when a woman is compelled to have sexual intercourse against her consent, the major reasons behind such same situations are minor age, mental health conditions,

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mental impairment, intoxication, unconsciousness, or dishonesty. When discussing rape victims, women already have a lot on their plate. In inquiries, medical examinations, and giving testimony, everywhere the character of women is questioned and brought up by every defense lawyer. The accused attempts to establish that it was mutual and that the woman was of a loose character engaged in regular sex. But "The business of the court is to try the case and not the man and a very bad man may have a very righteous cause." - Wigmore¹

It has also been observed that women refuse to come forward with an accusation of rape as it not only destroys their public image but crucially also because they do not want to narrate the harrowing experience in a manner of a trial or otherwise. Another matter of concern from the victim's point of view is that the question of her character is called upon by the court and society, such a problem was elucidated through the 84th Law Commission of India Report, wherein the report called into question how a woman's immoral character/sexual history, acts as a determinate source for ascertaining the veracity of her entire testimony whereas the man's sexual history or character is not called into question and is also further protected by the virtue of Section 54. The Indian Judiciary and statute tending to be patriarchal is a matter that has been brought about in the Law Commission Reports but to no avail.² Still, in many cases, judges have considered while examining the medical report of the victim that she was involved in or does regular sexual intercourse and thus put it under section 155(4) of the Evidence Act.³

When we talk about Character evidence, it is one of the most fragile areas of evidence law. The court's duty is, to consider all relevant facts in an unbiased manner, apply the law, and render a verdict. However, details about the accused's overall personality and behavior can often be crucial in both interpreting the accused's behavior and determining the verdict in cases where the evidence alone might influence the decision.

Character evidence plays a huge role in ascertaining whether consent was provided by the prosecutrix to the accused, mostly it is a common perception in rape cases. The statement that character evidence can lead to ascertaining consent is based on the rationale that consent is subject and depends on the mental state of an individual, about which character evidence would

¹ Krishna Lohia, "The evidence of 'character' in the court of 'law'" < [The evidence of 'character' in the court of 'law' \(legalserviceindia.com\)](#)> accessed 19/01/2024

² Stevewaugh "Consent or Character? Consent In Rape Cases Overridden by The Victims Character: An Inherent Approach by The India Courts Through an Evidence Law Perspective" < [Consent Or Character? Consent In Rape Cases Overridden By The Victims Character: An Inherent Approach By The India Courts Through An Evidence Law Perspective \(legalserviceindia.com\)](#)> accessed 21/01/2024

³ Ibid, *Virender Singh v State of Haryana* (2007) Cri LJ 2459

be capable of providing insight. However, this is when one refers to character evidence from the perspective of the victim or the prosecutrix. The role of character evidence on the part of the accused however is completely different. The purpose of character evidence on the part of the accused, as per The Evidence Act is to ascertain guilt beyond reasonable doubt. To show that such a crime would be highly irregular for them to commit and thus they are unlikely to do so.⁴

The primary law regarding the admissibility of evidence in judicial proceedings is the Evidence Act 1872." According to Section 5 of the Evidence Act, only facts deemed "relevant" and the existence or nonexistence of issues-related facts may be the subject of evidence in any suit or procedure. During cross-examination, three sorts of inquiries are permitted under Section 146 of the Evidence Act. To confirm a witness's reliability, Section 146(3) permits the insertion of questions that could damage the witness's reputation.

Further, Section 155(4) of the Evidence Act allows character testimony regarding a rape complainant to be admitted if they were of a "generally immoral character." This section outlines four circumstances in which a witness's credibility may be called into question. The judge will then have to determine whether the evidence establishes the rape complainant's "moral" or "immoral" character because there exists not a statute of what a "generally immoral character" is. This provision can be used by the defense to introduce proof of character against any complainants of rape. Thus, even if Section 155(4) is removed, character evidence may still be used against rape complainants under Section 146(3).

Furthermore, since "attempt to ravish" is not an official crime, it might be suggested that by incorporating this term, Section 155(4) may legitimately apply to offenses other than rape, such as "sexual oppression," in addition to the crime of "attempt to rape." Section 155 addresses three additional circumstances in which a witness may be deemed untrustworthy: when other witnesses regard the person who testified as "unworthy of credit," when the witness has accepted an illicit payment or other influence bribery, and when the witness has previously made disputed claims.

⁴ Abhishek. A & Srijita. C, 'Character Evidence and its Evidentiary Value and Moral Implications in Rape Cases' (2022) Volume 2 (Issue6), International Journal For Legal Research & Analysis <[https://www.ijlra.com/paper-details.php?isuurl=character-evidence-and-its-evidentiary-value-and-moral-implications-in-rape-cases-by-abhishek-a-srijita-c->](https://www.ijlra.com/paper-details.php?isuurl=character-evidence-and-its-evidentiary-value-and-moral-implications-in-rape-cases-by-abhishek-a-srijita-c-) accessed 19/01/2024

Thus, Section 155(4) may inadvertently create an unfavorable assumption against rape victims by grouping them with eyewitnesses of this kind who have purportedly done nothing to warrant being viewed as untrustworthy. The "good character" of the person being charged is relevant under Section 53 of the Evidence Act, whereas their "bad character" is immaterial under Section 54. Evidence of their "bad character" is only going to be pertinent in response, that is, if the person in question was shown to have "good character" by the defense under Section 53.

Stated differently, Section 155(4) allows the rape victim to use negative character evidence against the person charged even though she is the one looking for justice for the offense. This means that the law currently views minus personality evidence to be meaningless and unlawful for the person being charged.

The Evidence Act contains certain protections that, in principle, ought to apply to victims of sexual assault who are harassed by defense attorneys in court. These include Section 150 notification of lawyers who ask questions "without reasonable grounds" to the competent body that has jurisdiction over them, and Section 152 prohibition of inquiries "intended to insult or annoy" that are "needlessly insulting in the form." these protections have provided little to no reprieve to rape victims and complainants due to the application of Section 155(4) and the lack of explicit rape-shield laws.

There is no doubt that victims of rape are particularly vulnerable. "In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings", as giving evidence in court constitutes a traumatic experience, often even worse than the rape itself.⁵

Indian courts have always expressed stereotyped characteristics that a 'moral woman' is to possess and have also held that if a woman was not to act within the stereotyped character of a moral Indian woman they ought to have consented to the sexual intercourse. Such a practice of courts cannot be deemed as an archaic practice and courts have acquitted the accused in recent times as well.

A recent judgment by the Karnataka High Court⁶ held that there exists no reason as to why the woman went to her office at 11 p.m. The fact she had not objected to drinking alcohol and let the man stay with her till morning were acts that were unbecoming of an Indian woman which

⁵ By admin 'In-Court Measures for Rape Victims in India' Journal of Legal Research and Juridical Sciences<[IN-COURT MEASURES FOR RAPE VICTIMS IN INDIA - JLRJS](#)> accessed 19/01/2024

⁶ *Rakesh B v State of Karnataka* (2020) SCC 844

led the court to the conclusion that the woman had consented to the sexual intercourse. Courts have also been given such immense powers as per Section 114 of the Indian Evidence Act to 'presume the existence of any fact which it thinks likely to have happened' and use such a measure to ascertain that a woman of immoral character is presumed to have consented to the sexual intercourse.⁷

Even in many cases of rape when the person who was assaulted is no more alive to attest to her alleged immorality no effort is made to spare them. It also demonstrates how widespread by using their character as evidence they dehumanize the rape victims. In the case of *Uzzal alias Hossain vs. State*⁸, four men were accused of gang-raping a teenage girl and photographed the incident. Several witnesses deposed that the day after the girl's father went to the house of the accused to 'beg' for the return of the photographs, the accused and their family members came to the girl's house, rebuked the father by suggesting his daughter was of 'immoral character' and threatened that if he took legal action then his daughter's 'obscene photographs would be pasted at all the street corners'. The next day, the girl committed suicide 'to preserve her self-esteem by ingesting poison, which her family alleged resulted from the men's refusal to return the photographs. The defense suggested that she committed suicide not because she was raped but 'due to family reasons' and because she was of 'immoral character'. They alleged that the girl 'had an affair with a boy' in the village and because the father 'refused to give her marriage to him she committed suicide'. The trial court convicted the men under Section 9(2) of the *Nari O Shishu Nirjatan Daman Ain 2000* ('the 2000 Act') which deals with rape causing death, However, the HCD modified the conviction to one of Section 9(1) finding that there was no causal link of the suicide to the rape. This case illustrates how the character assassination of the rape victim begins socialized and is then transported to the courtroom.⁹

In *Mahmood Farooqui v. State (GNCTD)*¹⁰, one of the reasons that the prosecutrix was disbelieved was because she had kissed and hugged the accused earlier. In *Farooqui*, the Court

⁷ By Stevewaugh 'Consent or Character? Consent In Rape Cases Overridden By The Victims Character: An Inherent Approach By The India Courts Through An Evidence Law Perspective' < [Consent Or Character? Consent In Rape Cases Overridden By The Victims Character: An Inherent Approach By The India Courts Through An Evidence Law Perspective \(legalserviceindia.com\)](#)> accessed 15/01/2024

⁸ *Uzzal alias Hossain V State* 13 BLC (HCD) (2008) 53

⁹ Taqbir Huda, 'Between 'Virtue' and 'Immorality': Why Character Evidence Must Be Prohibited in Rape Cases' (November 2019)

<https://www.researchgate.net/publication/349821809_Between_'Virtue'_and_'Immorality'_Why_Character_Evidence_Must_Be_Prohibited_in_Rape_Cases> accessed 15/01/2024

¹⁰ *Mahmood Farooqui V State (Govt of NCT Of DELHI)*, CRL.A.944/2016

< <https://indiankanoon.org/doc/160377045/>> accessed 15/01/2024

choose to focus on the part of the message sent by the prosecutrix after the rape that said “I do love you and wish you well”, and ignored the rest of the lengthy message that recorded the reiteration of her lack of consent and disappointment in him. Moreover, the case serves as an example of how the archaic standards judges have for our Indian women are even worse in effect when extended to a prosecutrix that is not Indian, since they actively dismiss contextualization.¹¹

If we compare typical Indian women with Western women, we know that "Indian women's" personalities are different from those of "Western" women, who are cunning regarding the same in the Supreme Court's decision in the Hirjibhai case ¹²outlined the justification for believing rape victims that Indian women are inherently "purer" is related to the Karnataka High Court's conclusion that "our women" ought to react a specific way in situations involving rape.

In Rohit Chauhan's case¹³, the Delhi High Court highlighted the differences between Indian and Western women and explained why it is wrong to believe a woman who resembles a Western woman. The Court observed, “Here is a complainant who appears to be quite an ultra-modern lady with an open outlook towards life, enjoying alcohol in the company of men She does not appear to be such a vulnerable lady that she would not raise her voice on being immensely exploited over such a long period of time.”

Given these points, the woman's consent should only be taken into light and not her character as such. Even a cult or a prostitute has her will and consent to have sexual intercourse with anybody whether that person is known or not known to her. When the talk is of criminal cases, though the character is treated to be admissible as evidence in rape cases, the court must not highlight the past or reputation of one or make it the deciding factor of society's future. Character evidence or such things should only be permitted till it does not snatch somebody's basic rights or fundamental rights. Also, some studies show that whether being a criminal or a civil case, a character sometimes acts as weak evidence before the Hon'ble Court of Law. In cases like the rape cases, the biological evidence should be served as the best evidence to know

¹¹ Savyasachi Rawat 'The "ideal" rape victim in the eyes of the courts' (08 Jul 2020) <<https://www.barandbench.com/columns/the-ideal-rape-victim-in-the-eyes-of-the-court>> accessed 15/01/2024

¹² *Bharwada Bhoginbhai Hirjibhai V State of Gujarat*, 24/05/1983 AIR 753 <<https://indiankanoon.org/doc/207774/>> accessed 18/01/2024

¹³ *Rohit Chauhan v State NCT Of Delhi*, 22 May 2013, BAIL APPLN. 311/2013 <<https://indiankanoon.org/doc/169131497/>> accessed 18/01/2024

the authenticity of the case and not the character which relates to the past. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.¹⁴



¹⁴ John Rubin, UNC School of Government 'What's Your Theory of Admissibility: Character Evidence, Habit, and Prior Conduct' (April 2010) < [RubinCharacterEvidenceHandout.pdf \(unc.edu\)](#)> accessed 26/01/2024