

Admissibility of Character in Rape Cases: A Claw that Slaps Justice

MD. Shohidul Islam Hero

Student of LL.B. (Hons), 3rd Year, Department of Law, University of Chittagong.

Abstract:

Like other sub continental countries, rape has become an epidemic in Bangladesh. Many of the news of these rapes go unpublished. Many of the victims do not get a chance to invoke justice. However, those who take shelter under law, don't get the proper justice rather they go through 'unscientific' test, procrastinated lodging complaints and humiliating cross-examination in the court room. In the final phase the accused comes out hailing the victim as immoral. Section 155(4) and 146 of the Evidence Act, 1872 are the focused point of this paper. By these sections Court can consider the past sexual history of the victim and her character as admissible. Her consent many times neglected where she may do that immoral act with her consent with whom she likes. For that she can't be said as a 'loose character'. These relic forms of British law have not yet been reformed where UK and Indian legal system, which have influenced us heavily, have changed these provisions many times ago. In a recent judgment Supreme Court invalidated two-finger test but unfortunately the Court kept out of discussing about the character.

Introduction:

Women are perhaps the most helpless creatures in the world. All through their life they have to struggle with several difficulties for which their mind is set up. Through their life many storms blow. Most of the women especially impoverished in rural area, go through child sex during their minority, eve-teasing in their puberty, rape and gang rape at before or after marriage and dowry in post nuptial stage. Among these, rape has become a common crime in our society. Each and every day in every daily there can be found several rape incidents. Many of them go unpublished. If any victim is much determined to crave remedy then for several reasons accused comes out hailing, Section 155(4) of the Evidence Act, 1872 is the focused sections which is the barrier of getting remedy. It tells, "... [W]hen a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of immoral character."

This section validates raising question on victim's immoral character and her past sexual history and implies that she has to prove his chastity in the open court, which is apparently ludicrous. Again, section 146 of the same Act kept pace with the previous section by which the accused's lawyer can raise question about her character in the cross examination. It says, "When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked questions which tend -to shake his credit, by injuring his character ...". And again section 53 interestingly can favor the accused as it says, "In criminal proceedings the fact that the person accused is of a good character is relevant." To rob Peter and to pay Paul!

On Records:

A total of 1050 women were raped in the year 2016 throughout the country including 44 murdered after rape and 166 were gang raped.¹ Ain O Salish Kendra (ASK) in its annual report, it said that a total of 659 were raped in the year 2016 and again 818 women were raped in the year of 2017 among which 47 were killed after rape and 11 committed suicide and three among 13 were killed while protesting.² In a report of The Prothom Alo, it said that only 3% got punished among 4277 suits in 6 crimes including rape³ where the main cause is the unavailability of evidences or the absence of witnesses during the trial. This daily did a research of 7864 cases filed in the *Nari O Shishu Nirjatan Daman Tribunal* for the last 15 years where it showed 55% got acquitted without being convicted, 41% got exempted from the conviction. Among the 7864 suits filed in the last 15 years 4585 were rape cases, 856 were gang rape, 61 were murder after rape.⁴ Not unexpectedly, 88 women were raped only in the month of March, 2018 including 12 gang rapes, and 3 were murder after rape.⁵

Post Rape Incidents:

After brutal rape, once she is determined to seek remedy then she must go through some process where she becomes re-victimized. For this, many women think of remaining silent better than to go through the hectic steps of lodging FIR, medical examination. If she gets passed in these two stages, then the court welcomes her in a viva-voce in the court room which is the most embarrassing and humiliating.

In the first step, she must satisfy the police officer in charge. She needs to describe all the things she went through. She gets traumatized in the meantime and it becomes impossible to describe those horrible incidents to another male. If the accused is politically big fish or any influential person's son, then the police usually don't take the complaints of the victims rather the accused wants to reconcile the matter by giving simple compensation in village council which is opposed to the philosophy of criminal justice. If the complaint is lodged lately where she was not sure to invoke remedy, police disbelieves her and procrastinate to take the complaint.

Secondly, as soon as the FIR is lodged she needs to be examined by the medical doctor. The so called two-finger test is another horrendous experience for her. After examining, the respective doctor submits the report which is much important to prove or disprove the fact in the court. But ironically, in most cases they submit the wrong information by being influenced. Examining by a male doctor often discourages the victims. But the problem is somewhere else. If the victim is tested after a long period, then the sign of rape and physical intercourse gets passed out of sight.

11050 women raped in 2016, Available: www.thedailystar.net/country/1050-women-raped-2016-1342177

2Human rights remain at alarming level: Report, Available: www.thedailystar.net/country/818-women-rape-across-bangladesh-bd-2017-ain-o-salish-kendra-ask-annual-report-1512859

3Nari O Shishu Nirjatoner Bichar: Saja Poristhiti, The Prothom Alo, 18thMarch, 2018, p.1.

4Nari O Shishura Bichar Pai Na, The Prothom Alo, 8thMarch, 2018, p.1.

5March e Dhorshoner Ghotona 88ti, The ProthomAlo,6th April, 2018, p.3.

The third stage is one of the most traumatic, embarrassing and humiliating stage for any woman who just recovered from earlier peril. This can be divided in two parts; consent and character.

Consent:

In the rape case by and large, the accused is the sole witness. So, there must be lack of evidences. In that case court has to rely on the circumstantial evidences like the untidy condition of the place where the rape was occurred by scuffling, any physical injury or mark in the body of the accused. But in all cases there may not be physical injury. There an option is created to regard that the victim had consented. The women or child may be weak or dazed or shocked to resist the rapist⁶ or the place where rape was committed was such kind of place where it was impossible for the victim to resist or where the place was secluded, there if she resisted then nothing would happen. In that case she can't help conceding with the fact. During the time of rape, she may be senseless or fainted, and then no mark can be found in the medical test which seems the consent given by the victim. Again if test is taken after a long time then also the mark may be lost or vanished. In India, The Criminal Law (Amendment) Act, 1983 introduced a new provision where it tells that when a woman tells to the court that she did not consent and the court shall regard that she did not consent.⁷

However, when a woman consented in a previous time does not mean that she will be giving consent to the same person in the future. It should be noted that consent is to a person in a specific circumstance, and not to a circumstance only or a person only. Thus in a fact where a woman had sexual intercourse with her consent with a man in a house, does not mean that whenever she is found in that place she will consent again.⁸

Character:

Generally, the burden of proof lies on the party who brings the allegation. In adversarial process of legal system, it is the duty of the prosecution to prove the fact. So, the defence lawyer can rule out the case for prosecution as a cock and bull story and hence unworthy of credence.⁹ Section 155(4) legalizes the rape in most cases and helps accused to come out from the ambit of accusation and allegation. For this section the lawyers of the accused get chance to raise irrelevant question on her character and her past sexual history in the open trial. In a wide interpretation of this section, it means, if anyone rapes a "loose character" or a prostitute without her consent then the accused can say that she is immoral under this section. This is a calumny to them and is a process to seal them as vicious and immoral for which many more people can engage with them physical intercourse without their consent. If she is actually a loose character or a prostitute, then how statutory laws can let the accused rape her (loose character) without her consent and let the accused go scot free? Isn't it a violation of

6 Available: http://shodhganga.inflibnet.ac.in/bitstream/10603/106700/1/11/11_chapter%206.pdf

7 Ibid, pp. 296-297

8 Poornima Hatti and M.P. Karthik, Past Sexual History: Exploding the Myth, Student Advocate, 2001, p. 176, Available: <http://docs.manupatra.in/newslines/articles/Upload/5E33B48C-7665-4D44-BA96->

9 Supra Note 6, p. 293.

dignity of women? Isn't it against of right to life enshrined in the constitution?¹⁰ What's about her consent? The big question arises now; can anyone of us later make a physical intercourse without the consent of amoral character to satisfy our natural but immoral lust? Section 155(4) says yes. During trial one can object that she is of immoral and loose character. Section 146(3) also encourages the section 155(4). The accused stands in a better position in this respect as his bad character cannot be questioned by virtue of section 53.¹¹ This section talks in favor of the accused. So, now the question is that if good character can save the accused why doesn't the victim? While a previous relationship of the victim with the accused could be relevant in determining whether or not this particular instance was rape, the same could not be said of the victim's possible relationships with other man. If a girl is in love with a person and gives consent to a sexual intercourse with her lover, it does not mean that she is of immoral character and would give consent to any other person.¹² Doing intercourse with lover may be immoral but it is with consent and affection but in a later rape case with the same girl, her previous intercourse can't be relevant.

Admissibility of Character and Past Sexual History:

Generally, character is a relevant issue in the criminal justice. Character, past history and personality are the yardstick of credibility of a person. But it is being misused in rape cases despite the victims are of moral character. Many countries are enacting rape shield laws. But we are still following those litters of British era. Question should only be asked on past sexual history and character by seeking permission of judge. If judge thinks it proper, then he will permit. But morality differs and varies from place to place and person to person. If a girl is franker to the people and she is not conservative, then people raise their fingers to her. This sort of conservativeness can't deprive her to get justice. Even after rape they ask, why did she go there alone? Her attire and behavior was right or not? Does it take one to make a quarrel? That means all slur hit to the girl.¹³ In a later case the past sexual history can never be relevant. A fresh consent must be acquired. Consent does not mean consent forever. The Hon'ble Supreme Court held that if the accused is a prostitute then she will have to come carrying strong evidences. Her oral evidence shall not carry much worth.¹⁴ So, now if a prostitute has been raped in where she is the sole witness then will she be deprived from justice? Society created her as a prostitute and society uses her as a prostitute and again society rapeshes but society doesn't ensure justice just because she is prostitute.

Interpretation in Relation to Character from Two-Finger Test:

In Bangladesh, to understand the injury and scuffling, the medical doctor tests the vagina, possibility of entrance in the vagina and hymen by their two fingers, widely called two fingers test. Test creates opportunity to give idea about the character of the victim. If it seems to be wide and possible to penetration easily then the doctors reach a decision about the

¹⁰The Constitution of the People's Republic of Bangladesh, Article 32.

¹¹Supra Note 6, p. 303.

¹²Supra Note 6, p.304.

¹³Faruqe Wasif, 'Meyetaroi To Dosh' Bolbar Age Vabun, The Prothom Alo, 31st Match, p.10.

¹⁴ 15 DLR (WP) 115

character of the victim. But in case of matured, adult, married, who is used to intercourse or who has conceived multiple times, the vagina might be that kind of and the sign of scuffling cannot be found usually. There the test fails. Again, if the test is done lately, body and clothes washed or not preserved, the sign can be removed. DNA sign can also be removed sometimes.¹⁵ It is written many times, in the medical report that "the woman is used to sexual intercourse" and once in a baby girl's report it was written that "the hymen was previously detached."¹⁶ That means she is previously immoral! This kind of fanciful interpretation leads to question about her past sexual history and morality where if she would intercourse previously, it could be with consent. This barbarous and ancient method of test has been prohibited by the apex court in *BLAST and Others vs Bangladesh and Others* [Case No: W.P. No. 10663/2013]. The Court said that this test has no scientific, legal merit and evidential value.¹⁷ It also ruled that the lawyers cannot ask any question to the rape victims during the trial proceedings so that their dignity is hampered.¹⁸ Unfortunately, the court missed admissibility of character and past sexual history and hence section 155(4) as question on character and dignity are not same while former one derives from statute. Though the full judgment has not been published yet.

Post Rape Scenario:

As the victim is the sole witness in a rape case, so previously, the conviction would be based on the sole reliability of the testimony of a victim. That is perhaps the sole purpose to include section 155(4) in the Evidence Act, 1872. But it creates a negative impression in the society. People even lost faith in justice as it takes 8-10 years to get remedy. In the meantime, time runs and so the grievances of the victims. Victim becomes traumatized and mentally disordered. She is isolated from society and family and often abandoned. It becomes a huge burden for her where the accused is leading his life head high by taking the bail. People from society start raising their fingers. If they do not possess money, then they have no hope. Often, the public prosecutors are corrupted. Again, they have to face in the court an embarrassing situation in times of cross examination. They have to reiterate the whole story where the judges, accused and the spectators enjoy the entertainment from the recitation. This is second rape not in solitarily but in openly in public. It must also be remembered that the prosecutrix had gone a traumatic experience and if she is made to repeat again and again in an unfamiliar circumstance then nothing shall come out or if comes out then she will try to hide something not unexpectedly as it is her, only her personal matter. She may feel shy also for which the judges may think that she had consented either or she is twisting the fact. People don't wish to marry a rape victim. Some girls even embrace death. However, the last phase is for the accused many times as the records tell. He gets the benefit of doubt for insufficient evidences. The court also doesn't want to convict the accused only depending upon circumstantial evidence and assertion of the victim.

15Daktari Porikkhai Dhorshoner Proman, The Prothom Alo, 19th April, 2018, p.5

16Kurratul-Ain-Tahmina and Asaduzzaman, Dhorshoner Bichar Chaile Poda Poda Boirita, The Prothom Alo, 19th April, 2018, p.1.

17HC bans degrading 'two-finger test' for rape victims, The Daily Star, 12th, April, 2018. Available:<https://www.thedailystar.net/country/hc-bans-controversial-two-finger-test-1561813>

18ibid

On the Question of False Allegation:

Question of false charge or allegation appears from the critics and members of patriarchal society. True in some cases but to expect it from our society is nothing but a worthless thinking. People mostly, here in our society are poor. They can't even bear the expenses to go through a regular trial. So, isn't it absurd thinking to expect a false allegation from prosecutrix thinking to make fallen a peace loving in a trap! It can only be expected in western countries where one has an option to say that the prosecutrix had an ill motive and brought the suit to jeopardize him. But in this country not many of them come under the shelter of law. Victims many times burke the matter of rape not to be looked down upon in the society. In *Bechu V. King* the former Chief Justice of Calcutta High Court observed, "[P]ersonally I think there is little danger of false charge of rape being made by parents of any little girl. The consequences of such a charge are disastrous. In many cases, the little girl becomes an outcast and her chances of ultimate marriage are either completely ruined or very seriously affected. I must confess that after sitting on the bench nearly fifteen years in five provinces I have yet to come across a case where a false charge of this nature was made and the falsity thereof clearly established."¹⁹

Reformation Done in Several Countries:

Section 155(4) is a relic from British colonial period. UK and Indian legal systems, which heavily influence the legal system of Bangladesh, have repealed this provision already. Again Australia, Canada, USA, South Africa, Scotland, Singapore have carried out rigorous law reform process to protect victims of rape case from being questioned about their character and past sexual history.²⁰ But there is no change in Bangladesh and Pakistan. The Youth Justice and Criminal Evidence Act, 1999 in its section 41 imposed a blanket prohibition in UK on use of evidence regarding the past sexual history of prosecutrix with the accused or others. The Act allowed this to be raised only by seeking permission of the court.²¹ Further, "sexual behavior" has been defined so widely that even the evidence of mere flirting shall offer maximum protection to the victim.²² In India, under section 228(A) of Indian Penal Code 1860, disclosing the identity of rape victim is a punishable offence except in very limited circumstances.²³ Following the movement of Mathura Case²⁴ the Indian government undertook a wide change in rape shield laws. Section 155(4) was deleted by Indian Evidence (Amendment) Act 2002 and added a provision in section 146 in the same Act. It asserts now that it is not be permissible to put questions in cross examination of the prosecutrix about her general moral character.²⁵ The Federal Rule of Evidence 412 was enacted in USA on

19Supra Note 6, p. 316

20Anam Hossain, Character Assassination, Available: www.thedailystar.net/law-our-rights/lawanalysis/character-assassination-rape-victims-1405843

21Ishita Dutta, A "Rape Shield" Law for Bangladesh, Available: [www.thedailystar.net/op-ed/"rape-shield"-law-bangladesh-97516](http://www.thedailystar.net/op-ed/)

22ibid

23ibid

24Tukaram V. State of Maharashtra, AIR 1979 (SC) 185

25N Jagadeesh, 'Legal Changes Towards Justice for Sexual Assault Victims', Indian Journal of Medical Ethics, Vol. VII No 2 April – June 2010, p. 109

30th October 1978 which prohibits the introduction at trial of reputation or opinion evidence of a rape victim's sexual history subject to three exceptions.²⁶

Reforms Needed:

To make the rape shield laws more powerful and up to date; and to ensure justice following recommendations can be counted.

- The main culprit section 155(4) must be deleted from the Evidence Act, 1872. It should be ensured by creating a new provision that the question about the past sexual history can only be asked by seeking permission from the judge.
- Section 146(3) of the same Act must be amended in the manner that it cannot be applied in the rape case to lower the character of the rape victims.
- The provision of relevancy of previous good character as lies in section 53 must be amended and can't be applied in favor of anyone accused of rape.
- Specialist and trained female doctors should be appointed for medical test and the test must be done as soon as the complaint is lodged to the Police Officer.
- A female police officer can be appointed to lodge the complaint or FIR of a rape case and for the convenience of asking the needed questions.
- The hearing of the rape case must be conducted in camera. Irrelevant questions can't be asked in the cross examination and it should be without mental agony.
- Government can fix a time within which the hearing and the conviction must be finished for a rape case. Why not within 7 sitting?²⁷ Special tribunal should be established only for the rape cases to give remedy early.

Concluding Remarks:

Rape has turned into an epidemic now. Only the record of March 2018 where 88 women had been raped in this month, demonstrates the depth of it. If it cannot be stopped then our social structure shall fall down. Effective law can be a solution in this regard. Government has been able to stop acid throwing and many alike only because of flawless and effective laws. Rape also can be stopped in this way.²⁸ Further, 155(4) of Evidence Act is based on a number of misconception and moral constructions. The section effectively assumes that woman with past sexual history is immoral which is surely patriarchal and illogical.²⁹ But there is no scope without changing above discussed provision. As early discussed, this law was enacted from the perspective of British culture. And now government is taking several steps to remove those. Finally, it is to be mentioned that many women were raped in our liberation war and many fought against it, sacrificed themselves for the country and our country's spirit of liberation means spirit against rape.³⁰ So, now it is to see that how much faith our government and people have in the true spirit of liberation.

²⁶Supra Note 6, p. 307.

²⁷ Professor Zakir Hossain, 'Nobin Boron O Biday Songbordhona- 2018' A Lecture in the Department of Law, CU

²⁸ibid

²⁹Supra Note 8, p.182.

³⁰Supra Note, 13