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The Role of a Woman’s Moral Character in Indian Courts

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The objective of this research is to understand how the moral character of a woman plays an important role in the court proceedings, how the victim is torn open and presented to the judge, broken by the defence enough so that she loses her confidence. We will understand why this malpractice from the FIR phase to the trial phase needs to be taken out, and how the victim should be protected instead of mercilessly attacking her moral character when she is already in distress. Various landmark and infamous judgements are given on cases of rape against women in the last few decades have been analysed. A sequence of presenting the cases has been followed, starting with facts of the case, followed by the underlying issues to tackle by the court, a judgement given, and finally the opinions about the case. Later, the victim’s mental state throughout the trials is discussed, and how she is required to be protected instead of her moral character being hauled into the proceedings without any relevance to the case.

Keywords: *morality, character, court proceedings, victim, crimes against women.*

INTRODUCTION

“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.”

Only by studying the position women have in the process of production and the influence they exert over the resources of production can we gain a thorough knowledge of the real essence of

women's position in society. Women's role in modern India is a bit of a conundrum. On the one hand, she is at the pinnacle of achievement, but on the other, she is oblivious to the violence perpetrated against her by her close ones and friends. In comparison to previous generations, modern women have accomplished a great deal, however, they yet have a significant way to go. Their route is strewn with stumbling stones. The women have exited the haven of their homes and are now fully armoured with their abilities on the battleground of life. All Indian women are guaranteed:

- **Article 14:** The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.¹
- **Article 15(1):** The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them.²
- **Article 15(3):** Nothing in this article shall prevent the State from making any special provision for women and children.³
- **Article 16(1):** There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.⁴
- **Article 16(2):** No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence, or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.⁵
- **Article 39(d):** The State shall direct its policy towards securing that there is equal pay for equal work for both men and women.⁶
- **Article 42:** The State shall make provisions for securing just and humane conditions of work and for maternity relief.⁷
- **Article 51A(e):** It shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious,

¹ Constitution of India 1950, art. 14

² Constitution of India 1950, art. 15(1)

³ Constitution of India 1950, art. 15(3)

⁴ Constitution of India 1950, art. 16(1)

⁵ Constitution of India 1950, art. 16(2)

⁶ Constitution of India 1950, art. 39(d)

⁷ Constitution of India 1950, art. 42

linguistic, and regional or sectional diversities; to renounce practices derogatory to the dignity of women.⁸

BACKGROUND

Although we have progressed a lot yet there are circumstances where we need to improve. One such case is: bringing the moral character of women in rape cases and marital rape cases. Rape was once thought to be a theft of sexual property, with the woman serving as the "property" and her spouse or father as the master. For rape, the punishment might include death or compensation paid to the male guardian based on the worth of the "property" - a virgin becoming more expensive than one who isn't.

While laws no longer regard women as man's property, marital rape is still legal in many nations, including India. The inference is that when a woman marries, she surrenders her physical and mental integrity to her husband, becoming his sexual property. Even in developed societies where marital rape is addressed, there are ideas about a woman's past conduct that mitigate the severity of rape. In many nations, the victim's "innocence" may be questioned by the authorities, who may even deny filing a case. Preventing from talking about a victim's character was advocated in a report by the Law Commission, a body constituted by the Indian government, as early as 1980. It's only now, three decades later, that it was implemented because of widespread outcry. Victims of rape were tormented and ridiculed by the policemen and the courts throughout this time.

A heinous gang rape in Delhi drew worldwide attention to India's sexual assault crisis.⁹ Statements like "A girl is far more responsible for rape than a boy because a decent girl won't roam around at 9 p.m." "Housework and housekeeping are for girls," he claimed, "not roaming in discos and bars at night doing wrong things, wearing wrong clothes. About 20 per cent of girls are good." "If women are not good," he said, "men have a right to teach them a lesson by raping them." What makes these remarks particularly shocking isn't simply the rapist's

⁸ Constitution of India Constitution of India 1950, art. 51A(e)

⁹Amanda Taub, 'She should just be silent' (*Vox*, 5 March 2015)

<<https://www.vox.com/2015/3/5/8156881/india-rape>> accessed 01 December 2022

insensitivity and victim-blaming, but rather the extent to which they represent sentiments that are all too ubiquitous in India, as well as are crucial to the country's atmosphere of hatred toward females and, frequently, tolerance for crimes towards women.

Nowadays, culturally modernising factors are encouraging more Indian women to engage in non-traditional behaviours such as dating, postponing marriage, and seeking jobs, rendering women "deserving" of rape. Not only are victims placed at blame and rapists redeemed, but facets of India's judicial process and police department also assist this perspective of rape, which for social conservatives is all about executing their requirements that females should play their "proper" responsibility in the typical family framework, that happens to be subjugation.

The mere evidence of suspected having a bad character is not a material fact under Section 54 of the IEA unless there is proof that the individual might have good conduct, which in some cases becomes significant.¹⁰ This type of evidence is immaterial and can't be presented either by the prosecutor or the defendant. Section 155(4) of the "Indian Evidence Act" states "when a man is prosecuted for rape or an attempt to ravish, he may impeach the credibility of the prosecutrix by showing that she was generally immoral." Moreover, Section 164 "allows the counsel for the accused to shake the credit of a witness by injuring his character."¹¹ It is both incorrect and sexist to presume that a female's permission may be inferred merely since she had several partners or had been in many engagements. Section 155(4) thus falsely presumes that a woman of immoral character will always assent to sexual acts. "The Criminal Laws (Amendment) Act, 2018", was passed by the Indian government to address the flaw in the existing rape law. The Government followed the suggestions of the Law Commission's 172nd Report, by repealing Section 155(4) of the Indian Evidence Act and replacing it with Section 53, that is, "in cases of sexual offences involving the victim's consent, evidence of the victim's character as to her previous sexual experience would not be relevant to the issue of such consent or consent quality." Furthermore, Section 146 of the Indian Evidence Act was revised,

¹⁰ Jitmanyu Satpati, 'Character Evidence in Criminal Trials' (*iPleaders*, 15 October 2019) <<https://blog.iplayers.in/character-evidence-criminal-trials/>> accessed 02 December 2022

¹¹ The Indian Evidence (Amendment) Act 2002

and a proviso was introduced, “making it illegal to ask the prosecutrix questions about her general moral character during cross-examination.”¹²

CASE LAWS

Bhanwari Devi v State of Rajasthan (2011)

Facts:

Bhanwari Devi is an Indian social worker from Bhatari, Rajasthan, who was gang raped in 1992 by men angered by her efforts to prevent child marriage in their family. Her subsequent treatment by the police, and court acquittal of the accused, attracted widespread national and international media attention and became a landmark episode in India's women's rights movement. One family which had arranged a marriage was that of Ram Karan Gurjar, who had planned to marry off his nine-month-old daughter. Bhanwari made attempts to persuade the family against carrying out their wedding plans. Since many Gujar families seemed determined to go ahead with child marriages, the Sub-Divisional Officer (SDO) and the Deputy Superintendent of Police (DSP) started making rounds of the village.

On 5 May, the day of Akha Teej, the Deputy Superintendent of Police (DSP) and SDO went to Bhatari village to stop the marriage of Ram Karan Gurjar's infant daughter. While they succeeded in preventing the marriage from taking place on the day of Akha Teej, the marriage took place at 2 a.m. the next day. No police action was taken against this. However, the villagers associated the police visits with Bhanwari Devi's efforts. This resulted in a social and economic boycott of Bhanwari and her family. Bhanwari was forced to leave her job when her employer was roughed up, while her husband was beaten up by another Gujar. According to Bhanwari Devi, at dusk on 22 September 1992, while her husband and she were working in their field, five men from the dominant and affluent Gurjar caste from her village attacked her husband with

¹² 172nd Law Commission, *Law Commission recommends Stringent Laws to Prevent Sexual Abuse against Youngsters* (Law Com No 172, 2002)

sticks, leaving him unconscious. In her complaint with the police, she named the five men who took turns in raping her.¹³

Judgement:

Bhanwari Devi contacted Ms. Sharma to talk about the gang rape. Devi began her never-ending fight for truth only with aid of her spouse and Ms. Sharma. She first disclosed the occurrence to the policeman in her neighbourhood, whereupon she was asked to give a forensic test to prove the rape. Even though the legal system demands a forensic test of a sexual assault victim 24 hours after the crime, Devi's forensic test took place 52 hours following the gang rape due to flaws in India's legal system. The Indian judiciary, too, failed to deliver justice let alone a fair trial for Devi. The court in the case of Devi changed its decision 5 times, and the 6th judge decided in favour of 5 accused, freeing them of the accusations. Interestingly, once the verdict was announced, the then MLA staged a triumph parade, with the women's section of his group joining in and branding Devi a phoney. This occurrence is not only horrible for a supporter of a just community, but it also demonstrates how the top half of communities in India are primarily worried about and governed by politics. All this is pretty evident from the judgement passed by the judges.

- It is not possible in Indian culture that a man who has taken a vow to protect his wife, in front of the Holy fire, just stands and watches his wife being raped, when only two men, almost twice his age, were holding him.
- There are three brothers and an uncle among the accused, so, it is preposterous to believe that an uncle and his nephew would commit rape together.
- Bhanwari Devi neither immediately informed anyone (for instance, her in-laws) about the rape nor did she immediately file an FIR for the same.
- Among the accused is a Brahmin while the rest are Gurjars. Since gangs in rural areas are rarely multicast, the charge that members of two different castes acted together is highly improbable.

¹³ *Bhanwari Devi v State of Rajasthan* (2011) SCC Online SC 613

- The Indian rural society could not have sunk so low that a villager would lose all his senses of age and caste and pounce upon a woman like a wolf.
- Since Bhanwari Devi is a Dalit woman and all the accused men belong to upper castes, it is ludicrous to believe that the latter would ignore the caste hierarchy and put themselves at risk of being polluted by coming in contact with the former, let alone rape her.¹⁴

Opinion:

The remarks reflect the intricate relationship that exists among Indian society, class, law framework, hegemony, and the government. Furthermore, the fact that these were the primary justifications for the Judge ruling the accused innocent indicates how the class structure controls the Indian legal system. Even though there was insufficient proof to verify Devi's narrative because her medical exam was performed 52 hours after the rape, declaring an alleged rapist innocent based on the justifications mentioned previously reflects the prejudices of our judicial process. It's worth noting that Bhanwari Devi was recognised internationally and received remuneration of 10,000 rupees from then-Prime Minister Narasimha Rao. In other words, despite Prime Minister Rao's faith in Bhawani, the nation's legal system questions her story and has not yet granted her the justice for which she has battled for almost her whole life. The biggest irony is that it is thanks to Devi that India now has the "Vishakha Guidelines," which protect women at work from sexual misbehaviour. And although Devi has yet to receive a fair trial for herself, her endeavours have culminated in the "Vishakha Guidelines" providing justice to countless females.

After studying Devi's rape case, one can conclude that Hindu tradition in India not only controls other faiths, but also the nation's legal and political institutions. Being a Dalit woman in India is one of the worst things that can happen to you since you are oppressed by almost everyone. Furthermore, if a Dalit woman seeks to rise above her social level, she is harshly punished since her efforts are viewed as a challenge to the higher castes' authority and honour, as well as the

¹⁴ Isha Sharma, 'Bhanwari Devi Rape Case: A Brief Reflection' (2018) 4 Social Science Review 22, 24

gendered society. What's interesting here is how society's political and judicial systems prioritise the dignity of the upper castes over the justice of a victim of a heinous crime.

Tukaram & Ors. v State of Maharashtra (1972)

Facts:¹⁵

An orphan at an early age, Mathura shared a home with her brother Gama. She was a labourer in Nunshi's house. She got close to Ashok, the son of Nunshi's sister while working together, and they ultimately decided to get married. Gama reported Mathura's kidnapping to the Desaijunj Police Station on March 26, 1972. The head constable, Baburao, took note of this information and subsequently brought Mathura, as well as Ashok, Nunshi, and other family members, to the police station. The relevant statements were recorded, and the Head Constable instructed Gama to bring a copy of the documents regarding Mathura's birth date to record in the relevant register and left thereafter. The appellants, Tukaram and Ganpat, were both present at the police station at that time.

The group was proceeding to leave when one of the appellants Ganpat asked Mathura to wait behind and sent the rest out. He then proceeded to take her to the washroom and rape her. The second appellant Tukaram also tried to rape her but failed due to his intoxicated condition. Mathura later narrated the incident to her relatives. On being examined by Dr Shastrakar, it was found that she was around 14-16 years of age and that she had already been accustomed to intercourse. There were no injuries on her body.

Issue:

Was there any form of consent given by Mathura? Is Mathura being accustomed to intercourse relevant to the case?

¹⁵ Indian Penal Code 1860, s 375(6)

Judgement:¹⁶

1. Sessions Court

The Sessions Judge concluded that because Mathura was "accustomed to sex" and convinced Ganpat to satisfy her sexual hunger, her consent was a choice, and hence this was "consensual sexual intercourse" rather than rape. Sexual intercourse with a woman under the age of 16 is considered rape under Section 375(6) of the Indian Penal Code, whether with or without her agreement.¹⁷ However, when confronted with proof indicating Mathura was between the ages of 14 and 16, the Sessions Judge ruled that the evidence was insufficient.

2. Bombay High Court

The High Court found that because the appellants were strangers to Mathura and her brother had recently reported them to the same police station, Mathura had no chance of approaching them. She secretly consented due to the fear of harm, the High Court further found, because the appellants occupied positions of authority and any objection may put her or her relatives in jeopardy. The appellants' confinement of Mathura to the police station while she immediately informed her family of the incident shows a blatant lack of consent. When it came to Mathura's age, the Court agreed with the Sessions Judge that it was incorrect. The High Court found both appellants guilty and sentenced them to five years and one year in jail, respectively.

3. Supreme Court of India

Because Mathura "consented to the behaviour" and "no evidence of injury" were observed on her body, the Supreme Court agreed with the Sessions Judge that this was an instance of consensual sexual intercourse. While the Court utilised Section 375(3) of the IPC to establish that she did not object when she was taken away from her family, it was ruled that her acquiescence was not coerced.¹⁸ The court reasoned that if Mathura could have changed the accused from Tukaram to Ganpat, as she did by neglecting to name the rapist in her initial statement, she may

¹⁶ *Tukaram v State of Maharashtra* (1979) 2 SCC 143

¹⁷ Indian Penal Code 1860, s 375(6)

¹⁸ Indian Penal Code 1860, s 375(3)

have lied throughout the trial. The Supreme Court overturned the verdict and acquitted the appellants, ruling that the alleged intercourse was voluntary.

Opinion:

Section 375 of IPC: A man is said to commit rape who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

- Against her will.
- Without her consent.
- With her consent, but when consent has been obtained by putting her in fear of death or hurt.
- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is a man to whom she is or believes herself to be lawfully married.
- With or without her consent, when she is under sixteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.¹⁹

Sessions Court: Mathura was "a horrible liar whose evidence was filled with untruth and improbabilities," the Sessions Judge claimed. Mathura is given a role by the Sessions Judge's misogynistic tone, which implies that she must make up a story to seem "virtuous" in front of her spouse.

Bombay High Court: The Court concurred on the inaccuracy of Mathura's age. But why wasn't any further examination into her age ordered?

¹⁹ Indian Penal Code 1860, s 375

Supreme Court of India: The absence of opposition has been equated with agreement by this Court. Even if Mathura tried to resist, it would be futile in the face of two powerful constables. As a result, she is unable to withstand damage to her body. Without a doubt, the Courts are convinced that Mathura did not request help. Every door was locked when Mathura was assaulted. Even if she had yelled for help, she might not have been heard. What would the Court rule if the victim had been verbally abused? Instead of deciding the case based on the evidence, the court frequently referred to the victim as promiscuous without offering any evidence to back this accusation. Even though Mathura had never seen the appellants before and was unable to see their features properly due to the darkness, the court found her to be lying and proclaimed her to be a liar.

B. Bharwada Bhoginbhai Hirjibhai v State of Gujarat (1983)

Facts:²⁰

On September 7, 1975, in Gandhinagar, two young girls, aged 10 or 12 years, went to the appellant's house to meet his daughter of roughly the same age as them, who was their friend. The appellant urged them to come in, saying that she was at home, though, in fact, she was not. When they got inside, the appellant shut the door and undressed in front of both females. He requested one of the females to do an immoral act, and she began weeping and managed to flee. The other girl could not escape and was sexually assaulted by the appellant. She was traumatized, crying as she went out, but she could not narrate the incident to her parents as both were out of town.

The parents of the girls intended to conceal the matter. However, the locals somehow learned about the occurrence, which made the problem come out. Kundanben, a social worker for women, took up the cause. She called on the appellant at his house in front of 500 women in the locality and requested the appellant to apologize publicly. The appellant, however, refused to apologize. Thereupon a police complaint was lodged on 19 September 1975. Upon the medical

²⁰ *Bharwada Bhoginbhai Hirjibhai v State of Gujarat (1983) SCR (3) 280*

examination of the assaulted girl, there was evidence revealing an attempt to commit rape on her a few days back.

Issue:

Was the reasoning behind the judgement delivered by the Courts as progressive as it claimed to be at its time? To what extent is corroboration of a rape victim's statement essential to press charges against the appellant?

Judgement:

1. Sessions Court: The appellant was convicted guilty of sexual assault on two young girls by the Sessions Judge. The appellant was found guilty of rape, improper imprisonment, and insulting a woman's modesty.

2. High Court: The High Court upheld the conviction of the appellant under Sec. 342 of the Indian Penal Code for wrongful confinement²¹ and under Sec. 354 of the Indian Penal Code for outraging the modesty of the two girls²². But concerning charges of rape on one of the girls, the High Court concluded that the offence of attempt to commit rape was established by evidence, instead of rape, appropriately convicting the appellant under Sec. 376²³ read with Sec. 511²⁴ of the Indian Penal Code. Both the Sessions Court and the High Court accepted the evidence, finding the appellant guilty of sexual assault with both girls in the way described by the prosecution.

Opinion:

The appellant was correctly convicted, but the logic behind the decision is more troublesome. The Courts held that failing to act on a sexual assault victim's testimony in the lack of corroboration constitutes adding insult to injury, particularly in the Indian setting. Corroboration refers to supporting the statements made by backing them up with evidence.

²¹ Indian Penal Code 1860, s 342

²² Indian Penal Code 1860, s 354

²³ Indian Penal Code 1860, s 376

²⁴ Indian Penal Code 1860, s 511

What makes it insulting for an Indian woman, is the fact that she would rarely make any such false allegations, as she is aware of how much it could damage her personally as well as publicly. Great shame can be brought upon her and her family if she were to make such allegations. Also, the Courts support the argument that the conviction of rapists must be increased if they went for virgin unmarried girls, with the logic stating that losing her virginity might bring upon a woman the greatest shame to her chastity and scars her forever.

CONCLUSION

Because we live in a male-dominated society, the people's caste, class, religious background, or region they come from is information about who they are. One cannot be objective till one recognise their subjectivity. When they recognise their subjectivity, then at least one can be conscious of that subjectivity and try to rise above it. But when one denies that subjectivity, they will be giving a judgement only from that perspective.

Let us take the infamous *Tukaram* case. In the Indian Evidence Act, you could take the prior sexual history of the woman into consideration in a rape trial. And since the woman was habituated to sex, the presumption is, a woman who has been intimate before will be intimate with random men after that as well. And therefore, in a lot of rape cases, the only thing that the defence lawyer had to try and prove is the promiscuousness of the woman, which is why after the criminal law amendments resulting from the Mathura rape case, the prior sexual history of a woman cannot be brought into a rape trial. Though of course, they still do try to do it, the judge can stop them and should stop them.

Then you have the *Bhoginbhai Hirjibhai* case which comes from Gujarat, which has a good result in terms of conviction. But the reasoning was problematic. The reasoning was that Indian women do not lie about rape, Indian women conform to tradition, and the good Indian woman would rather die than be raped. And on the other side of the spectrum, you have Westernised women, they were called "loose women" in the reasoning.

So, the *Bhoginbhai* case resulted in convictions, but the reasoning reflected how judges see it, which is the reason why then the public prosecutor will tell the prosecutrix that when she is

going to give her witness in the court, she is not supposed to look confident. If she doesn't look like she is destroyed, then the judge will presume that since the woman seems fine, she might not have been raped at all. Of course, not all judges are like that, but there might be enough problematic ones. Whether it is a divorce petition, a maintenance petition, a rape case, or a dowry death case, courts tend to doubt a woman's moral character, and it is always attacked. This has become so universal, whatever else she may or may not be, this becomes the first thing to tarnish a woman. Unfortunately, the whole trial procedure is loaded against women. Some biases still prevail, both in the minds of the judges and of the defence lawyers. They call their procedure "breaking the witness". In this procedure, they ask humiliating questions, they ask irrelevant questions, to confuse the victim about her morality, about various other conduct of hers, which are not linked to the case at all. But it is raised because the judges allow it- they don't stop the prosecutor from asking such questions. And the victim feels very lost in this entire thing.

If you see this very high-profile case of rape by Bishop Franco Mulakkal, the woman who has filed the complaint is a 45-year-old nun. Immediately after the complaint was filed, they first put out a story that because some of the favour that she asked was not conceded to, she manipulated and filed this complaint. And from there followed various stories that attacked the woman's moral character, further showing what the victim has to go through if she comes out to file a case. Fortunately, for this nun, there is a lot of support from various Christian organisations. But in an ordinary case, this is sufficient to break her confidence in the trial. So, unless we monitor this system, it will go on functioning like this. There must be a very strong mechanism to follow what exactly transpires in court, to get a conviction. And we don't have that- we have never focussed on it. We are not focussing on the simple measures to protect the victim, from the FIR stage to the trial stage, and thereafter.