

# ABOLITION OF CHARACTER ASSASSINATION OF VICTIMS IN MATTERS CONCERNING SEXUAL OFFENCES IN INDIA

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## Abstract

*A country's growth depends on its people. The term 'people' includes both men and women of that particular society. Therefore, discrimination against anyone leads to very big hindrance in the overall growth of the nation. A patriarchal society, which only believes in the good of its men, forget that non-upliftment of a major portion of their population, i.e. women, will not only lead to an immense stagnancy in the growth factor but can lead to an overall downfall of the society. Since time immemorial, society has always seen women as someone not having capabilities similar to that of men. They have been ill-treated and have also been prevented from enjoying equal rights as that of their counterpart. This problem not only extends to the national territorial limits but has also got an international presence. Such a mindset is still prevalent in many societies. Time and again, people have been proved wrong due to the outstanding advancements made by the most significant group of our population. Respecting the choices made by women and not judging them based on such choices is very important. Their character is not defined by their way of life. People fail to understand that everyone has the right to choose his or her way of life which most of the times is taken away from women. Their character is assassinated based on their choices. This leads to injustice towards them, more so, when they are victims of sexual offences. This paper deals with the amendments made to the Indian Evidence Act, 1872, the Indian Penal Code, 1860 & the Code of Criminal Procedure, 1973 concerning character evidence and how these amendments have played a major role towards the elimination of discrimination against women.*

**Keywords** – Patriarchal Society, time immemorial, equal rights, character evidence, assassination.

## Introduction

The character of a person in a matter, whether civil or criminal plays a very major role and the intensity of the role is higher in criminal matters. Since time immemorial, the conduct and character of a person involved in a conflict have been of utmost importance in determining the actual aspects of that matter. This leads to a shift in concentration from the merits of the case to the less relevant and in many cases irrelevant aspect of character evidence. With time, many jurists have complained that judging a matter based on the character of either the victim or the accused deviates the concentration from the actual facts of the matter. Both Common Law, as well as the Indian Law, fails to provide an accurate definition of the term 'Character evidence'. In the Indian context, character evidence is dealt with under sections 52 to 55 of the Indian Evidence Act, 1872. To understand the meaning of the term one has to have a clear picture of the word 'character'. According to various dictionaries around the globe, the definition of character of a person can be narrowed down into the following points:

- A set of qualities in a person that makes him/her different from others.
- A particular quality of a person as described by others.
- The difference in the behavior of a person from that of others especially in a way that is interesting.

Normally, in any case, it is only the character of the accused which is considered to be relevant and is given a high degree of importance by the Judiciary. Although, the relevancy concerning the issue of the case has to be established separately. However, there was an exception made to this rule whereby the character of the victim was taken into consideration in determining the issue concerning the consent of the victim or the quality of that consent in matters related to outraging the modesty of a woman and sexual offences. The victim, who already had to go through a lot of trauma, was again made to face irrelevant questions by the investigators trying to assassinate her character to change the direction of the case.

## Sexual Offences under the Indian Penal Code

Sexual offences against women have been dealt with under sections 354, section 354A-D, section 376 and section 376A-E of the IPC [1]. The motive behind enacting section 354 of the Indian Penal Code, 1860 was to safeguard a woman against improper assault and protect her morality. The constituents or the ingredients which determine outraging a woman's modesty is nowhere defined. It differs according to the facts and circumstances of a particular case and according to the present moral, social and legal ethics of the country. In the case of *Pandurang Mahale v. State of Maharashtra* [2], the term modesty had been dealt with as a virtue attached to a female owing to her gender. Even if modesty is likely to be outraged due to any act then the same shall also constitute an offence. A clear definition of modesty had been given in the case of *Ramkripal v. State of MP* [3] whereby the apex court held: "The essence of a woman's modesty is her gender. The act of pulling a woman, removing her saree, coupled with a request for sexual intercourse... would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence." Sections 354A, 354B, 354C and 354D [4] had been incorporated by the Criminal Law (Amendment) Act 2013, which has added various spectrums to the concept of outraging a women's modesty such as sexual harassment, assaulting a woman with the motive to disrobe, voyeurism and stalking. A major change was brought about by amendment concerning the punishment for rape whereby the punishment was to be given based on the gravity of the offence committed. Earlier, section 376 only dealt with the punishment of rape whereby a punishment for a period of maximum 7 years along with fine could be imposed. However, it was with the amendment that various avenues to section 376 were incorporated and the punishment was to be awarded based on the severity of those avenues on a case to case basis. Section 376A, 376B, 376C, 376D and 376E was added to give a broader view to the aspect of rape [5]. Punishments were laid down for causing death or resulting in a persistent vegetative state of the victim, sexual intercourse by a husband with his wife during separation, sexual intercourse by a person holding certain authority for example like that of a fiduciary relationship, gang rape and repeat offenders.

## Relevance of Character of Victim Before 2013

Earlier, the character of a victim was taken into consideration while determining cases regarding sexual offences against women. One of the biggest examples is the case of *Tukaram and anr v. State of Maharashtra* [6] which is commonly referred to as the Mathura rape case. Mathura, a girl aged between 14-16 years, was raped brutally by a police officer Ganpat when the little girl was in custody in the police station. Attempted rape was also inflicted upon her by Tukaram, the other police officer present in that particular station. However, it was held by the session's court that there was no question of rape as Mathura's consent was voluntary since previously; she had developed sexual relations with another man named Ashok whom she had decided to marry. Her character was questioned and it was opined that since she was familiar with sexual intercourse her consent was voluntary and therefore it could not be said that she was raped under the given circumstances. The view of the lower court itself gave an idea as to how the little young girl was being denied justice just based on her choice. The Bombay High Court, however, reversed the judgments of the lower court and gave a decision in favour of Mathura elaborating the difference between passive submission and consent. The court said that in the present case there was a passive submission by the victim due to serious threats and the same cannot be considered to be intercourse with the presence of consent. Ganpat and Tukaram both were police officers and therefore they held a position of authority. It was natural for Mathura to passively submit herself to them out of fear and that cannot be considered to be consent. The biggest disappointment lied in the judgments pronounced by the Apex Court. It was very much disheartening to see the highest court of the land upholding the judgments passed by the Sessions Court whereby Justice Jaswant Singh, Kailasam and Koshal reversed the High Court judgments in their ruling and acquitted the policemen. The character of the victim was assassinated by stating that since she was already into sexual relationships before the incidence of rape, she was the one to provide an incentive to the policemen to have sexual intercourse with her. It was a clear example of denial of justice to the victim based on illogical and baseless reasoning.

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<sup>1</sup> The Indian Penal Code, 1860 (Act 45 of 1860).

<sup>2</sup> AIR 2004 SC 1677.

It was considered by the court that Mathura was so much habituated to sexual intercourse that she could not let go off one chance of doing it. Therefore, without paying any heed to the merits of the case, it was the character of the victim which was continuously questioned and attacked. It was hard to believe that this heinous character assassination was made by the Hon'ble apex court which is considered to be the epitome body for providing justice to the people. The Supreme Court cleared the policemen stating that it was a 'peaceful affair' due to the presence of the consent of both the parties. This unreasonable judgment of the apex court led to huge protests among the masses which ultimately led to the enactment of the Criminal Law (Amendment) Act of 1983. Section 114A of the Evidence Act [7] was amended and it was laid down that it shall be presumed by any court dealing with a case of a sexual offence against women victim did not have consent. Section 376 of the IPC [8] was also amended whereby custodial rape was made punishable with punishment up to a period of 7 years. The burden of proving the same was also shifted from the victim to the offender once it was established that sexual intercourse had taken place. The character assassination of a victim while questioning her in the process of cross-examination also increases the mental agony and pain of the victim. The amendments made in the Mathura case did not help the cause as the murder of the character of a victim in a case concerning sexual offence was done during cross-examination so that the victim is frightened & embarrassed and the complete truth is not revealed. In many cases, this was used as armour to safeguard the culprits from any kind of punishment. Though in cases like *Sakshi v. Union of India and ors.* [9] The court laid measures to curb this menace but still an alteration of the provisions was required to completely stop the process. Earlier the law was such that during cross-examination a victim could be put to any questions. Her past relationships and her past sexual encounters were put before her as questions, thereby leading to severe emotional strain. Though the protection against these types of questions during the process of cross-examination was provided by the Indian Evidence (Amendment) Act, 2002, the same was not complete as the ambit of rape was very much constrained. The provisions had to undergo another amendment to incorporate the broader aspects of rape enacted by the 2013 Amendment. However, even after so many changes made to various acts and countless steps taken to make the system proper, it was seen in the Nirbhaya case [10] of 2012 wherein a Delhi Girl, who was a 23-year-old physiotherapy intern was brutally gang-raped by 5 men in a moving bus out of which one was a juvenile. It was very much unfortunate to witness that even after such a huge time gap the victim still had to go through character assassination. In the 21st century, when women are busy creating new records and doing better than their male counterparts in many aspects, the mind stops functioning when you see this kind of character assassination of a victim of a sexual offence who already had to undergo so much. The modern and western lifestyle of the victim and the fact that she was an independent professional were considered to be 'invitations' for raping her. This time around, the murder of the character of the victim citing the unjustifiable reasons was mainly done by the media and political debates. Majority of the members of the society were cruel enough to justify the injustice faced by the victim based on the choices made by her. It failed to understand that the evil of rape did not occur due to the choices made by the victim but it occurred due to the mindset of the culprits which were filled with all kinds of garbage and filth. These protests and mass uprisings led to the passing of the Criminal Law (Amendment) Act, 2013 whereby section 53A was added under the topic of character evidence in the Evidence Act, the proviso to section 146 was also substituted in the Act and it was stated that evidence of the character of the victim regarding the person's previous sexual experience shall not be considered to be relevant and during the process of cross-examination. [11] The victim cannot be made to face questions regarding her previous sexual experience and general immoral character to determine whether she consented or not. This was a major change which was brought about to curb the menace of character assassination prevalent in the system and because of which the focus of the case always shifted from the merits of the case.

### **Changes Made Via 2013 Amendment and Present Scenario**

The three major changes brought about, pertaining to the relevance of the character of the women in

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<sup>3</sup> (2007) 11 SCC 265.

<sup>4</sup> Supra note 1.

<sup>5</sup> Ibid.

<sup>6</sup> 1979 (2) SCC 143.

case of a sexual offence were the inscription of section 53 A, amendment made to section 114 A and the amendment made to section 146 in the Indian Evidence Act, 1872.[12] The major revolution was brought about by the incorporation of section 53A which formulated that in cases of sexual offences, where the consent of the victim is in issue, the previous sexual experiences of the victim with any other person shall not be taken into consideration in determining such consent or quality of such consent. Generally, in criminal cases, it is the character of the accused which is considered to be relevant under section 53 of the Indian Evidence Act, 1872 to conclude a matter. However, section 53A which was incorporated through the 2013 amendment specifically deals with the character of the victim and the fact that it would not play any role whatsoever in determining whether the victim had given her consent in cases of sexual offences. Whether the victim is married or non-married, whether the victim has been into any previous sexual relationships or not, etc. won't be a determining factor when the issue regarding her consent in a given case concerning sexual offence is being looked into. The entire purpose of this particular incorporation is to prevent the character assassination of the victim which was visible in several cases. When the character of a female, who has been a victim of such a horrendous crime, is further murdered during the investigation process as well as during the judicial process, it becomes much more traumatizing for the person at the receiving end which leads to the victim getting highly scared & embarrassed. The existing scenario defeated the purpose of justice as the merits of the case were not looked into. Moreover, proper and complete truth could not be deciphered as the person who could reveal the same had to face utmost mental agony and emotional pain which prevented her from revealing the same. Section 53A also laid the inception of the arena that while determining whether the victim had consented to sexual intercourse or not, the fact that the victim might have had consensual sex with the accused before the commitment of the offence will also not play any role. A girl might have consensual intercourse with a person for the first time but on the second time, she may not give her consent. The consent at the first instance cannot be considered to be consent in the second instance too.

The second vital change brought about was the substitution of section 114A with a new one whereby in rape matters, falling under the ambit of clauses a to n of section 376(2) of the Indian Penal Code, 1860, the court was mandated to presume the absence of consent of the victim. This implied that the history of the personal life of the victim cannot influence the decision of the court on the issue of consent of the victim in any given case. The third and final change was the inscription of a new section of 146 whereby it is provided that the act of collecting evidence regarding the general immoral character or previous sexual encounters of the victim to establish the consent of the victim is not permissible at all. Similarly, the act of asking questions regarding the previous sexual experiences to the victim is also disallowed to determine the issue of consent as all these leads to embarrassment for the victim and she is mentally traumatized which prevents the truth from being revealed.

Some major changes were also brought about in the Indian Penal Code, 1860 which ensures that the victim does not have to go through the trauma of character assassination after the horrendous incident has already occurred with her. Previously the scenario was very much prevalent whereby the public servants denied recording the First Information Report in specified crimes against women including rape based on the mere fact that the victim has the habit and want of getting into sexual relationships depending upon her past private life. According to the Amendments made in the year 2013, section 166A has been added to the Indian Penal Code, 1860 which penalizes the public servants who refuse to record the first information report in specified crimes against women including rape based on any fact whatsoever. In this amendment, the term 'consent' was also given a proper definition by adding an explanation to section 375 of the Indian Penal Code, 1860. The term is defined as an unequivocal voluntary agreement which signifies the willingness of the women by the use of words, gestures, any form of verbal or non-verbal communications to participating in the sexual intercourse. The definition makes the fact crystal clear that a woman's silence cannot be considered to be a yes. The punishment was also included for the rape conducted by a man on his wife during the period of separation which was previously missing and which denotes that previous sexual encounters with that man will not stop the wife from getting justice for the act committed by the man during separation.

The various provisions regarding the processes of recording the first information report,

<sup>7</sup> The Indian Evidence Act, 1872 (Act 1 of 1872).

<sup>8</sup> Supra note 5.

<sup>9</sup> (2004) 5 SCC 518.

<sup>10</sup> (2017) 3 SCC 717

recording of the statement of the victim by the judicial magistrate, when the crime is committed by a public servant and provisions for free medical help by public/private hospitals under the Code of Criminal Procedure, 1973 was also amended to make things much easier for the victim. These changes were to make sure that the victim does not face any kind of character assassination after she had to go through so much. These steps were very much necessary to eliminate the discrimination which was rampant against the victims and survivors of sexual offences based on their previous choices made in life concerning their private life. It goes against the ethics to assassinate the character of a woman, who has undergone so much and deny her justice just based on the fact that she had decided to live her life at her own will and way.

The consent of a female cannot be construed to be present in a case of sexual offences even if the female is a sex worker. This is a very important fact which can be very well interpreted from the changes brought about by the amendments made in the year 2013. The various process of cross-examination, recording of a first information report, recording of statements of the victim, etc. shall be same even if the victim's profession is that of a sex worker. Working as a sex worker is not a tag that automatically signifies or denotes consent when such an act is committed.

## Conclusion

Even after so many changes brought about in the criminal justice system, the discrimination against the women at the receiving end of the sexual offences is not completely eradicated from the society. People need to understand that our constitution guarantees us the right to live our lives in our own way, provided that in doing so we do not hamper the rights of the others. This is similar for both the genders of the population of the country. The way of living in one's way also implies that the person has the right to choose what he or she wants. While the male counterpart of the society is not discriminated based on their choices made, it is a very astonishing fact that the female counterparts are always hunted down by making such discriminations. The patriarchal mindset of the people stops them from acknowledging the fact that a woman can lead her life in her own terms and she has all the capabilities to do so in an independent manner.

When a woman faces the horrendous crime of rape or when her modesty is outraged by any means it leaves a dent on her mind and soul along with the wounds on her body. Some of them get so frightened and embarrassed about the fact as to how society will treat them, they even tend to end their lives through various means. Her way of life and her choices are held responsible for the heinous acts inflicted upon them. People forget that it is not due to the choice of a female that she has to face such a thing but it is the backward and vulgar mindset of the wrongdoers due to which the act has occurred. Instead of encouraging the females to fight back, our society says a thing which makes the victim feel as if the horrendous crime took place just because of her own fault which includes her choices and her way of lifestyle.

Earlier, this discrimination was also done by the highest court of the land and in doing so the victim was denied justice as can be seen from the Mathura rape case and many such cases. The police, who are supposed to be the guardians of law, do not back away from conducting such discriminations when their main job during such a situation is to see that the victim is guaranteed complete justice. Before the 2013 alterations, the complete system was so against the victim that in many cases there was a failure to get hold of the correct facts which made sure that the wrongdoers are not punished properly and in certain cases are not punished at all. Lastly, no amendment can make sure that such kind of discrimination is eliminated until and unless the people of the society at large understand the fact that it is not the choice of any woman but the mindset of the culprits which give rise to such horrendous crimes. The backing of the society and the media is very much essential to revive the confidence in the survivors/victims so that they pick themselves up from such a mental state of shock and trauma and make sure that their right to justice prevails. They should be made to feel that their choices, their previous sexual encounters, their way of life, their dressing style etc. are not responsible for the crime which has dented their life. Until and unless this is not ensured, the present system of justice cannot work to its full potential.

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<sup>11</sup> Supra. Note 7.

<sup>12</sup> Ibid.