



## **Thesis on**

**Relevancy of character as Evidence and Judicial Approach  
towards Rape victims**

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## **Abstract**

In Bangladesh a numerous number of crimes has been committing every day among them most heinous crime is rape. Rape is a total attack upon the person which affects physical, psychological and social well being. Physically there is immediate danger of injury, mutilation or death. It is increasing day by day in spite of having specific laws regarding this. In reality, even in court after become a victim of rape, victim has to prove that she has a good character and incident occurred against her will and without consent which indicated absolute burden of prove lied them. In stead of burden of prove a provision inserted in section 155(4) of Evidence Act, 1872 'when a man is prosecuted for rape or an attempt to ravish; it may be shown that the prosecutrix was of generally immoral character. As per such laws it can be said that Licentious", "hired" or "unchaste" women, prostitutes, or women used to sexual relations cannot be raped. Which clearly indicates that a complex situation has been made through this provision. Moreover, Court also taken the character as evidence of rape victim into serious consideration which may resulted them acquittal. In this circumstances a question can raise the relevancy of this provision under Eviden Act, 1872 and validity under Bangladesh Constitution.

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# Chapter I: Introduction

## 1.1 Introductory Statement:

The penal code, 1860 was enacted which deals with criminal offence and to adduce evidence to prove a case Evidence Act, 1872 were also enacted. In Bangladesh a numerous number of crimes has been committing every day among them most heinous crime is rape. Rape is a total attack upon the person which affects physical, psychological and social well being. Physically there is immediate danger of injury, mutilation or death. It is increasing day by day in spite of have specific laws regarding this. A number of suicidal incidents is being held for the consequences of rape.

Moreover, many women after being raped decide not to report it because of the social stigma and as in practice it takes a long way to get the justice through the judicial process even after being raped, they are not in a position to go to the court to remind the incident again. The society even family cannot accept them properly. As a victim they did get the support properly even in the court because in court they need to prove her case beyond reasonable doubt. In this regards the accused get the benefit as they need not to prove anything, they just deny the incident. Moreover, getting this opportunity they ask about the character of victim as permits by law section 155(4) of evidence Act, 1872 so that the prosecution can not prove her case beyond reasonable doubt. Consequently, it has been created a great loophole for those criminals who raised a question about the immoral character of victim and judges take this issue into consideration seriously which may have a possibility to acquittal or minimize the punishment.

Rape victim always under fear to lose their dignity or reputation as the law allowed the defense to use evidence of the victims past sexual behavior and raise a question about immoral character of victim which also discouraging them from reporting the crime to the police. In that circumstance it has been created a debate issue throughout the country. Feminists, legal scholars, criticized the traditional rape laws which erected major barriers to successful prosecution of rape cases. It is now a matter of question to get rid of from that drying situation. Defence lawyers asked indecent and disgraceful questions to the rape victims under section 155(4) of Evidence Act, 1872 to prove that the women had immoral characters. If they can prove that woman was of immoral character then there might have possibility to be acquittal.

In the case *State vs Sri Pintu Pal*,<sup>1</sup> filed in 2010 under the Women and Child Repression Prevention Act 2000, the accused was acquitted as the complainant was a domestic help and considered to be of "easy virtue". The judgment read, "The plaintiff woman is of easy virtue so her dignity is low. As a result, this accusation is not believable; court did not find any clear evidence to place their trust on the accusation brought by this woman of easy virtue." Here the judgment was given based on the character of woman. Thus, in that critical situation or circumstances what should be done to solve the issue.

The aim of this coursework is to identify the relevancy of Section 155(4) of evidence Act,1872 and applicability of that Section with section 375 of penal code,1860 and Constitution of Bangladesh and to find out the judicial approach to interpretation of victim's character in rape cases.

## **1.2 Methodology:**

The research is be based primarily on qualitative assessment of existing information, using primary sources such as legislation and case law, and secondary sources such as journals, textbooks and government reports. The current law, and cases pertaining to it, will be critically explored, in order to determine the relevancy of section 155(4) of Evidence Act, 1872 read with section 375 of Penal Code, 1860. Then the law will then be critically analysed, drawing upon various viewpoints set forth in existing literature and textbooks. The information collected from primary and secondary resources will held to develop arguments as to the relevancy of character in prosecuting allegation of rape.

## **Chapter II: Definition**

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<sup>1</sup> 30 BLD (AD) 2010 page 220

## 2.1 Definition of Rape in Bangladesh

In Bangladesh, a couple of laws prohibit rape. The definition of ‘Rape’ in the context of current legal framework in Bangladesh is as following:

- The Penal Code, Act of. XLV of 1860 (Section 375)
- The Prevention of Oppression against Woman and Children Act, 2000 (Section 9)

According to the **Section 375 of the penal code**, “A man is said to commit “rape” except in the hereinafter cases, has sexual intercourse with a woman under circumstances falling under any of the following five descriptions:

- Firstly: Against her will.
- Secondly: Without her consent.
- Thirdly: With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.
- Fourthly: 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 another man to whom she is or believes herself to be lawfully married.
- Fifthly: With or without her consent, when she is under fourteen years of age.

Exception: Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape. This above-mentioned section also includes in its explanation that “Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape”.<sup>2</sup>

Moreover, according to **Section 9** of the *Nari O Shishu Nirjatan Daman Ain (The Prevention of Oppression against Women and Children Special Act 2000)*, it states as follows

- Whoever, to satisfy his sexual urge illegally, touches the sexual organ or other organ of a woman or a child with any organ of his body or with any substance, his act shall be said to be sexual oppression.
- Whoever, to satisfy his sexual urge illegally, assaults a woman sexually or makes any indecent gesture, his act shall be deemed to be sexual oppression.<sup>3</sup>

It is clear from the definition under section 375 of penal code,1860 and section 9 of Nari O Shishu Nirjatan Daman Ain 2000 that if sexual intercourse is occurred without the consent or

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<sup>2</sup> Section 375 The Penal Code 1860 (Act XLV of 1860)

<sup>3</sup> Section 9, (The Prevention of Oppression against Women and Children Special Act 2000)

against her will then it said to commit rape. Consent regarding rape is emphasized not only in Bangladesh but also in international arena. The definition of rape is almost similar to the international level.

## 2.2 Definition of rape in International perspective

The recognition of rape as an international crime would therefore suggest that the harm of rape has been acknowledged. A definition of rape has, however, been a late concern of international law, with the first efforts made by the *ad hoc* tribunals, followed by regional human rights courts and UN treaty bodies.<sup>4</sup>

In ***Furundzija case 1998*** the ICTY defined rape in a different manner and marked the first deviation from *Akayesu*. It stated that rape constituted:

- the sexual penetration, however slight;
- of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
- of the mouth of the victim by the penis of the perpetrator;
- by coercion or force or threat of force against the victim or a third person.<sup>5</sup>

In later case-law in the ***Kunarac case in 2001*** Rape was defined,

- the sexual activity is accompanied by force or threat of force to the victim or a third party;
- the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
- the sexual activity occurs without the consent of the victim.<sup>6</sup>

The International Criminal Tribunal for Rwanda in the ***Akayesu case in 1998*** It defined rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.<sup>7</sup>

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<sup>4</sup> Defining rape in international criminal law (<http://www.lawphdconference.ed.ac.uk/2014/11/19/defining-rape-in-international-criminal-law-conceptualising-the-harm/>) Accessed in 22 february, 2019

<sup>5</sup> *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, ICTY, 10 December 1998, para. 185.

<sup>6</sup> *Prosecutor v. Dragoljub Kunarac*, International Criminal Tribunal for the former Yugoslavia, 22 February 2001. Para. 442

<sup>7</sup> *The Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda, 2 September 1998, Para 688



It appears from the definition of rape under national laws such as penal code, 1860 as well as Nari O Shishu Nirjatan Daman Ain 2000 and international level that when the act committed without the consent and against her will said to commit rape. Nowhere is written down in our national law or any principal established that easy virtue or habituated sexual women can not be a victim of rape. Section 375 of penal code itself specify that whether there is any consent on the part of victim or not.

## **Chapter III: Relevancy of Character as Evidence under Evidence Act, 1872**

### **3.1 The practical scenario**

It is often seen that the rape victims prefer to remain silent in court because the rape trials which commonly allow in-depth and often irrelevant scrutiny of a rape victim's "character" and past sexual life in open sessions. It discourages them from proceeding any further with the case.

Therefore, the accused successfully escapes from the case by using of defence weapon "character" as evidence. In Bangladesh there is no changes is made in the Code of Criminal Procedure 1898 for cases of rape or other sexual offences.

### **3.2 Legal procedure to prove a rape case**

By analyzing section 375 of penal code as well as section 9 of *Nari O Shishu Nirjatan Daman Ain* we found that to commit a rape there must be without consent and against her will at the time of occurrence. Now as we know after committing the rape, we need to follow the procedure to prove a rape case in a court. Prosecutor needs to produce evidences under Evidence Act, 1872 to prove her case. As we already know in criminal cases burden of prove lies on prosecutor under section 101 of evidence Act, 1872. This means that in order to convict someone of a crime, it is necessary that the prosecutor prove that the accused committed each and every element of the charged offense beyond a reasonable doubt. If the prosecutor fails to prove just one element of the offense at trial, then a judge must find the defendant not guilty. It is also well settle principle that In case *Roni Ahmed Liton vs The State*,<sup>8</sup> it was held that the accused is entitled to benefit of doubt not as a matter of grace but as of right because prosecution has not proved its case beyond reasonable doubt.

However, there is a significant barrier to prove a rape case. Section 155 (4) of the Evidence Act, 1872 contains the provision sanctioning admission of character as evidence in rape prosecutions. It says "when a man is prosecuted for rape or an attempt to ravish; it may be shown that the prosecutrix was of generally immoral character". Immoral character means that she is habituated with sexual intercourse or prostitute. In that case prosecutor has to face more difficulties such as firstly burden of proof lies on it, secondly 155(4) creates a barrier to prove such case. In Bangladesh from centuries it is practicing in court that to prove a rape case prosecution firstly need to prove herself as good character because law permits to raise a question regarding the character of victim. Prosecutor has to face this difficulty to prove the case beyond reasonable doubt.

### **3.3 Relevancy of Section 155(4) of Evidence Act**

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<sup>8</sup>29 BLD (HCD) 386

In rape cases not focusing on the consent as given or not defined by section 375 of penal code rather focus on the women's character and by doing this the case shift into another side. Moreover, in that case victims has to face first physical tortured by accused then get mentally tortured when her character is in question.

This section is totally irrelevant and illogicality, the motto of law is to protect the rights, create equality. But here this section defends the offender. There is no way to ask victims past sexual life. But this section has created this unwanted situation for the victim. "The inclusion of character Evidence is humiliating and degrading for victim and also entirely irrelevant."<sup>9</sup>

Secondly, by the definition it crystal clear that to prove a rape case we need to prove that whether it was done with consent or against her will or not at the time of occurrence. Even nowhere is written down that if there is easy virtue or habituated sexual intercourse then it cannot be said that rape has not been occurred. So, it is clear that there is no relevancy to ask question regarding the victim character under section 155(4) of the Evidence Act, 1872. It is necessary to focus on the particular point that whether victim was given the consent or not.

Thirdly, this section is 150 years old. This section creates a complex situation in present circumstances. "This section allows the defense counsel in a rape case to show that the victim was of generally immoral character in order to impeach her creditworthiness in a court. While it is understandable that the burden of proving the offence of rape rests with the prosecution and the presumption of innocence lies in favor of accused, it is utterly degrading and humiliating for the victim. On the basis of anyone's past we can't go to the conclusion that she is liable in the proceedings. Thus, there is no relevancy of section 155(4) in any way.

### **3.4 Are there any loopholes of section 155(4) of Evidence Act?**

When the section itself is a questionable, then we can easily realize the how much applicability it has in terms of rape cases. Not only has that it made our judiciary questionable but also in our social culture victims feel insecure to go to the court to get justice. In this provision it has increased the insecurity. A rape victim has to face mental trauma and if she has to face offensive question in an open court trial, then how can we ensure the justice? Our judiciary system has so many problems. People in general have countless objections against law and law enforcement

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<sup>9</sup> "Use of Character Evidence In Rape Prosecution", Fatama Sultana Suvra, < file:///D:/CN-Character-Evidence.pdf> accessed 20 February 2019

agencies. Even the violence against women is increasing.<sup>10</sup> But they don't get their justice they required. Even 5 years old girl child couldn't get rid from this heinous crime. Sometimes society raises question regarding the dress up of victim. In this kind of social mentality and barrier most of the time girls do not disclose the fact. And if they have courage to inform the law enforcing agencies, they ended up by facing the most unexpected provisions of law. Indirectly our laws discourage us to get justice.

“We have seen a lot of these in a number of cases where the social media population actively delved into the issue to vilify the victims rather than focusing on the criminals. It diverts the spotlight away from the rape and onto the victim. This section allows the rapist to be admonished of his crimes if his lawyers get to prove the victim had prior consensual sexual relations. This section in the wording can be also interpreted in the sense that only chaste women can be raped. This gives the idea that women who are of questionable morals doesn't need to give consent.”<sup>11</sup>.

Moreover, getting this opportunity, they ask about the character of victim as permits by law section 155(4) of evidence Act, 1872 so that the prosecution cannot prove her case beyond reasonable doubt. Consequently, it has been created a great loophole for those criminals who raised a question about the immoral character of victim and judges take this issue into consideration seriously which may have a possibility to acquittal or minimize the punishment.

In addition to, sometimes our media expose the picture of rape victim. This is the bindings of getting justice. She has been trolled by the society. In these circumstances a strong law is needed to take action against electronic and print media.

### **3.5 Applicability of Character as Evidence in Rape Cases in Bangladesh**

In Bangladesh, Section 155(4) of the Evidence Act 1872 allows the defence counsel in a rape case to show that the victim was of generally immoral character in order to impeach her creditworthiness in a court.<sup>12</sup> This provision actively deters survivors from reporting rape. When a woman who is seeking justice for the violation of her rights, she is compelled to prove her

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<sup>10</sup>[https://www.academia.edu/32807259/Rape\\_in\\_Bangladesh\\_2001-2016\\_WHO\\_ARE\\_RAPED\\_BY\\_WHOM](https://www.academia.edu/32807259/Rape_in_Bangladesh_2001-2016_WHO_ARE_RAPED_BY_WHOM)<accessed 24 on February, 2019

<sup>11</sup> “Fault in our laws: Analyzing the legal aftermath of rape in Bangladesh, Jalal Uddin Ahmed, <http://www.observerbd.com/details.php?id=83818><accessed on 25 February, 2019

<sup>12</sup> Anam Hossain, Character assassination of rape victims, (The Daily Star, May 16, 2017), <<http://www.thedailystar.net/law-our-rights/law-analysis/character-assassination-rape-victims-1405843>>, accessed on 25 February, 2019

'good character' in order to secure justice. This burden placed upon a rape complainant discriminates against her in two ways: I) by subjecting women to a double standard based on their gender and ii) such a burden is not placed upon a complainant in any criminal offence other than rape.<sup>13</sup>

Section 155(4) of the Evidence Act 1872 is in direct contradiction with the Constitution and with international human rights treaties such as Convention on the Elimination of All forms of Discrimination Against Women (CEDAW). In its Article 1, the convention defined “discrimination against women” and identified different features under this terminology. In the 2nd article, it recommends the state parties to incorporate equality of women and men within the legislation and in the legal parameters.<sup>14</sup> As section 155(4) allows the defense to show the past sexual history of prosecutor which has no relevancy in rape case therefore, it creates a discrimination against woman and contradicts with the treaty that man and women are not equal within the law. Moreover, a woman’s sexual history in no way impacts on her ability to consent to or refuse sexual activity of any kind.<sup>15</sup> In our Bangladesh constitution called supreme law ensured fundamental rights for all citizens. Article 27 deals with equality before law and 28 no discrimination by virtue of race, sex, gender etc. as well as article 43 right to privacy. By taking the issue of character and interpret in such a way it also violates the fundamental rights of citizens guaranteed by Constitution. It also violates the article 32 of the constitution where stipulates that right to life and personal liberty where it is curtailed by questioning the character of victim. Thus, it is crystal clear from the above discussion that section 155(4) of evidence Act, 1872 has no relevancy even made a conflicting issue with the constitution of Peoples Republic of Bangladesh.

Though Bangladesh inserted this provision in Evidence Act but if we see the other developing countries like India, Canada, Australia, USA, Singapore they have already taken the responsibility regarding this critical issue for ensuring justice and equality. This character evidence is prohibited

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<sup>13</sup> Ishita Dutta, A “rape shield” law for Bangladesh, The Daily Star, June 16, 2015, <<http://www.thedailystar.net/op-ed/%E2%80%9Crape-shield%E2%80%9D-law-bangladesh-97516>>, accessed on 25 February, 2019

<sup>14</sup> 07-02-18-6-34-862-4th-CGS-Peace%20Report-Final.pdf

<sup>15</sup> “Use of Character Evidence in Rape Prosecutions in Bangladesh”, (the Bangladesh Legal Aid and Services Trust (BLAST), 5 June, 2016), <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKewj1ntCS7pfXAhWBgI8KHRzRDLYQFggrMAE&url=https%3A%2F%2Fwww.blast.org.bd%2Fcontent%2Fevents%2FCN-Character-Evidence.pdf&usg=AOvVaw0hst2AdxHx5feezcowy14i>>, accessed on 25<sup>th</sup> February, 2019

in india even there are some countries like Canada where they made rape shield laws for protection the rape victim rights.

## **Chapter IV: Applicability of character as Evidences in other Countries**

### **4.1 Application of Evidence Law in rape cases in the light of other countries**

#### **4.1.1 India**

In India, before amending, section 155(4) of the Evidence Act allows the victim to be questioned of her past sexual history- which the defense uses to humiliate the victim in the

Courtroom. But India made an amendment which came into force on January 1, 2003, omitted section 155 sub clause 4 and added a provision, section 146 IEA(4). According to this provision "In a prosecution for an offence under section 376, 376A, 376B, 376C or 376D or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to her general immoral character, or as to her previous sexual experience with any person for proving such consent or the quality of consent".<sup>16</sup> Moreover, The Supreme Court has in the case of *State of Maharashtra Vs. Madhukar N. Gardikar*<sup>17</sup>, held that "the unchastity of a woman does not make her open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate her person against her wish. She is equally entitled to the protection of law. Therefore merely because she is of easy virtue, her evidence cannot be thrown overboard. This paved the way for an end to unwarranted attacks on the past sexual acts of the victim of rape."<sup>18</sup>

#### 4.1.2 Canada

The rape shield provisions in Canadian law are governed under S. 276, 276.1, and 276.2 of The Criminal Code. In 1992, BILL C-49 was passed into law to amend s. 276. The section governs the admissibility of evidence of all sexual activity, including that between the complainant and accused.

The law places the onus on the defence to demonstrate that the proposed evidence pertains to specific instances of the complainant's sexual activity. The judge must determine whether the

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<sup>16</sup> Section 146 (4) Indian Evidence (Amendment) Act, 2002

<sup>17</sup> AIR 1991 SC 207

<sup>18</sup> N Jagadeesh, Legal changes towards justice for sexual assault victims, Indian Journal of Medical Ethics, <<http://ijme.in/articles/legal-changes-towards-justice-for-sexual-assault-victims/?galley=html>>, accessed on 1 March 2019

evidence has significant probative value not outweighed by its prejudicial effects, taking into account the need to remove discriminatory biases from the trial process and the need to protect the complainant's dignity and privacy, among other factors. This legislation seeks to balance the accused's rights with those of the complainant. It also endeavours to protect society's interests in encouraging the reporting of sexual assaults.<sup>19</sup>

#### 4.1.3 Singapore

Section 157 (d) of the Evidence Act, 1893 says that, when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.”

But later on, in 2012 this section was repealed to protect the public interests:

- It is based on the outmoded concept that only “chaste” women should be afforded legal protection
- The moral or immoral behavior of a woman in general has no logical link to her credibility or to the question of whether she consented to sexual intercourse in the specific case
- Admitting evidence of a complainant's prior sexual conduct can be extremely prejudicial to her and create an unfair bias against her in the court's decision-making process
- It entrenches the risk of public humiliation to and scrutiny of a victim's behaviour and deters rape reporting, which is already very low It is in the public interest to
- It codifies victim-blaming
- All or most other common law jurisdictions have already repealed this law.<sup>20</sup>

#### 4.1.4 Australia:

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<sup>19</sup> Norton Rose Fulbright, “CHARACTER EVIDENCE IN RAPE TRIALS A Comparative Study of Rape Shield Laws and the Admissibility of Character Evidence in Rape Case”, January 2015, Bangladesh Legal Aid and Services Trust (BLAST), <[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0ahUKEwjQr\\_TWYzFXAhUMKY8KHXT1A\\_EQFghJMAQ&url=https%3A%2F%2Fwww.trust.org%2FcontentAsset%2Fraw-data%2F7c70a653-6c85-4734-981b-72a1de7db614%2Ffile&usg=AOvVaw1bS1X8b9bSUqppIniyd3T2](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0ahUKEwjQr_TWYzFXAhUMKY8KHXT1A_EQFghJMAQ&url=https%3A%2F%2Fwww.trust.org%2FcontentAsset%2Fraw-data%2F7c70a653-6c85-4734-981b-72a1de7db614%2Ffile&usg=AOvVaw1bS1X8b9bSUqppIniyd3T2)>, accessed on 3<sup>rd</sup> March, 2019

<sup>20</sup> Section 157(d) of Evidence Act: Repeal it, (Association of Women for Action and Research, November 1st, 2011), <<http://www.aware.org.sg/2011/11/section-157d-of-evidence-act-repeal-it/>>, accessed on 5 March, 2019



In [Australia](#), all states and mainland territories have rape shield laws that limit the admission of evidence in criminal proceedings where someone is charged with a sexual offence. The principal aims of these laws are to:

- prohibit the admission of evidence of a complainant's sexual reputation;
- prevent the use of sexual history evidence to establish the complainant as a 'type' of person who is more likely to consent to sexual activity; and
- Excluded the use of a complainant's sexual history as an indicator of the complainant's truthfulness.<sup>21</sup>

#### **4.1.5 USA:**

According to Rule 412 of Article 4 of the Federal Rules of Evidence says that, the following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

- Evidence offered to prove that a victim engaged in other sexual behavior; or
- Evidence offered to prove a victim's sexual predisposition.

But criminal cases the court may admit the following evidence:

- Evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
- evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
- Evidence whose exclusion would violate the defendant's constitutional rights.<sup>22</sup>

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<sup>21</sup> "Matters outside the Uniform Evidence Acts", (Australian Law Reform Commission, 17 August 2010), <<https://www.alrc.gov.au/publications/20.%20Matters%20Outside%20the%20Uniform%20Evidence%20Acts/rape-shield-laws>>, accessed on 5 March, 2019

<sup>22</sup> Legal Information Institute, Federal Rules of Evidence, <[https://www.law.cornell.edu/rules/fre/rule\\_412](https://www.law.cornell.edu/rules/fre/rule_412)>, accessed on 6 March, 2019

Therefore, from the above discussion it appears that most of the developing countries like India, Canada, Singapore, Australia, US Aalready amend the provision to protect the rape victim as well as ensure justice. Moreover, they inserted rape shields law specifying not to humiliated to the rape victim again in the trail process. This clearly shows that they have taken responsibility quickly to ensure justice in this regard. But Bangladesh still is in complex situation and neither amend the law nor took the responsibility regarding this issue.

## **Chapter IV: Judicial Approach towards Rape victims' Character**

### **5.1 Judicial approach**

The Judiciary of Bangladesh or Judicial system of Bangladesh is based on the Constitution and the laws are enacted by the legislature and interpreted by the higher courts. Judiciary is known as the independent wing of government. They can interpret the various provisions of legislation for ensuring justice. On being asked in Parliament, the minister said from January 2014 to December

2017, a total of 17,289 cases of women and child rapes were recorded throughout the country. The total number of victims in those cases was 17,389, of which 13,861 were women and 3,528 children. He said during the period, 673 people were convicted and sentenced in 3,430 cases disposed of by the courts with 17 death penalties, 80 life imprisonments and 576 in different prison terms.<sup>23</sup> Moreover, 75% of the alleged rapists get acquitted by presenting evidence under section 155(4) of the Evidence Act.<sup>24</sup> If we look deeply into those cases we found that the court took the character of the victim into serious consideration which resulted in the acquittal or mitigation of the punishment of the accused where the victim does not get proper justice.

The admissibility of such "character evidence" is extremely humiliating to a rape victim. Her moral character is irrelevant in deciding whether she had given consent to the sexual intercourse or not. There are often cases where a victim's testimony is discredited in courts. Even though there had been a non-consensual intercourse, on the premise that she is a "woman of easy virtue". A question can be asked that what makes a woman to be "of easy virtue"? "It is again determined by the stereotypical ideas surrounding a rape victim which are mere manifestations of patriarchal social practices and customs, often relating "bad character" with lack of education, lack of "social status", and mostly with past sexual life of the victim."<sup>25</sup>

In the famous case *State vs. Sri Pintu Pal*,<sup>26</sup> filed under the Women and Child Repression Prevention Act 2000, the brief facts of the case are that on 25.06.2002 at 16.10 hours Chandan Adikari as informant lodged FIR with Manda police station against the appellant Pintu Pal alleging that on 19.06.2002 at 3.00 P.M her daughter Jhorna Rani aged about 17 years went to the land and all on a sudden the appellant forcibly took her in his dwelling hut and committed rape on her. The complainant was a maid servant of the accused. But in that case the accused was acquitted as the complainant was a domestic help and considered to be of "easy virtue". In the judgment it was found that the plaintiff woman is of easy virtue so her dignity is low. As a result,

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<sup>23</sup><https://bdnews24.com/bangladesh/2018/02/19/bangladesh-sees-more-than-17000-rape-cases-registered-in-four-years> <accessed on 7 March, 2019>

<sup>24</sup> <https://www.dhakatribune.com/uncategorized/2014/08/17/century-old-evidence-law-favours-rapists> <accessed on 7 March, 2019>

<sup>25</sup> Yasmin, T. (2018, July 08). Proving 'good character' in a rape trial. Retrieved from <<https://www.thedailystar.net/opinion/perspective/proving-good-character-rape-trial-1601536>> accessed 20 March 2019

<sup>26</sup> 30 BLD (AD) 2010 page 220

this accusation is not believable; court did not find any clear evidence to place their trust on the accusation brought by this woman of easy virtue.

Even if by using the section 144(4) of the evidence Act, in case of divorce, multiple married woman, or who has childred considered as easy virtue and consequently accused are acquitted. In the case of *The state vs Shahin*,<sup>27</sup> state filed the case against Shahin in 2008. The fact that Victim of that case stayed with her grandmother in the local hotel. After that accused took the victim from the hotel with the assistance of other 2 accused raped her. But surprisingly it was held that victim is a adult woman who has married twice as a result her character has no value and her dignity is law.

In another case *State vs Abdul Majid*,<sup>28</sup> was filed in 2008 where accused got acquitted. In that case victim was a divorcee who has a daughter. Divorcee was raped by her neighbor in her own house when she slept. When accused try to flew away from the house and by hearing the shout of the victim, victims brother and villagers caught the accused. It was held that "The plaintiff is habituated to sex so it was not possible to obtain any evidence of rape. The victim is of 'immoral' character and involved in different unsocial and unethical activities." The accused was acquitted.

From the above decisions of the court it appears that court took the character of victim into serious consideration which resulted the acquittal of accused. From the above scenario we have also seen that the case diverted into another point because according to section 375 of penal code itself define for comminig a rape it must be without consent and against her will at the time of occurrence but because of section 155(4) of evidence Act it only took serious consideration of character of the victim which resulted them acquitted. Moreover, In case *Joynal Abedin Vs The State*,<sup>29</sup> it was held that accused may show that complainant is unchaste. If he can prove once then complain regarding rape will be disbelieveable. Undoubtedly, this is the prejudicial Act over the victim. They did not get the proper justice because in case of rape victim it should only focus on the section 375 of penal code to prove a rape case. Many cases by using Section 155(4) implies that a character less woman, ranted woman, prostitute, habituated sex, divorcee, easy virtue, unchastity, woman can not be reaped. It was also held that from the mere fact that medical

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<sup>27</sup>28 BLD (HCD) 2008 page 41

<sup>28</sup> 21 BLC (2008)

<sup>29</sup> 3 BLD 1983 108

evidence showed that some person had sexual intercourse with the woman and that too not in the normal way, one cannot conclude that such intercourse was committed without her consent,<sup>30</sup>This this discriminatory and prejudicial Act which has been done against them. In addition to, there is a myth in the society that only chaste women can be raped otherwise not. Even in Court at the trial process victim has to prove that she is unmarried, educated, chastity, higher dignity holder to prove her rape cases. In case *Samundar Khan vs The State*,<sup>31</sup> it was held that it was necessary to have important evidence to prove a rape case, as the complainant was a profession of prostitution at the same time. In that case it was not trustworthy that intercourse was held without her consent. A few victim can succeed at the trial process in spite of facing the barrier of section 155(4) to prove that she has been raped. While she is educated, unmarried, chastity, belong from reputed family. In the case of *Fatema Begum daughter of Azizer Rahman vs Aminur Rahman son Afser Ali and others*,<sup>32</sup> brief fact is that a case filed against Afser Ali and others for gang raped of a unmarried college student in 2005 under section 9(3), 30 of Nari O-Shishu Nirjaton Daman Ain, 2000. Afser Ali and others took the girl forcibly outside of home and raped her. It was held that victim herself has deposited before the tribunal narrating the incident of rape on her and also naming the rapists. The victim is an unmarried college student and comes from a respectable family. She has given testimony before the tribunal outraging her own modesty and honour which are dearest to an unmarried girl. We find no reason to disbelieve the testimony of this victim. Modesty and honour is the big asset for an unmarried girl.

Learned Advocate in favour of victim proved that there is no scope to raise question about the character of victim because she was a unmarried, educated and comes from a respectable family. In that case 5 person convicted and 3 others got acquittal because lack of proof. Again a question can be raised by following the judgment of that case that is modesty and honour valuable or big asset for only the respectable family, unmarried girls? Then if lower family, uneducated, unmodesty, married women is raped then it cannot be held that they are not raped. It is same for the maid servant who are being raped by the owner. By following this concept judges dismissed the rape case which is prejudicial act over them.

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<sup>30</sup> AIR 1955 NUC 9 Trav-co) 3464 (DB)

<sup>31</sup> 15 DLR (WP) 115

<sup>32</sup> 25 BLD (2005) 342

Moreover, in the case of *Abdus Subhan vs The state*,<sup>33</sup> In that case accused took the victim into a Hotel by saying that he will help to get the relief. After that raped her in the Hotel. After hearing hue and cry of victim, hotel boy and manager rescued her. It was held that victim is a hopeless who bound to tell the true story which has been done with her. If she could file false allegation then she will lose dignity in village as raped thus there it was a true story and false case has not been filed. Accused has been convicted.

However, it has become a regular tendency of accused to misrepresent the woman by saying that he will marry her and take the consent and make a sexual relation with the woman, after that refused to marry her. Though in Bangladesh perspective, it is said to be raped but by using section 155(4) of the Evidence Act, 1872, discharge the existing laws. In the case *K. Hossain vs The state*,<sup>34</sup> in that case accused is a neighbor and relative of victim. By making a false married story he done physical relation with the victim consequently victim become pregnant. Accused tried many time to spoilt the womb child. It was held that by knowing the hopeless situation mature victim gave the consent of accused's proposal. After that accused received such opportunity and such indication of victim made a absolute consent. Thus, this case is not trible under the law. In spite of proof of father of womb child, accused got acquittal from the rape case.

Thus, it is crystal clear from the above judgment that court did not give justice to those rape victim who claims. Judges took the character of victim into serious consideration and subsequently accused got acquittal which amounts to prejudicial acts over them which should not be done for ensuring justice. But Indian court correctly mentioned it In the case of *State of U.P. v Pappu Yunus*,<sup>35</sup> the court said that "even assuming that the victim was previously accustomed sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give license to any person to rape her. It is the accused who was on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behavior earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone

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<sup>33</sup> 54 DLR (2002)

<sup>34</sup> 61 DLR (2009) 505

<sup>35</sup> AIR 2005 SC 1248

and everyone. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional.”Moreover, In the case of *Narender Kumar v State*,<sup>36</sup> the court dealt with a case where the allegation was that the victim of rape herself was an unchaste woman, and a woman of easy virtue. The court held that so far as the prosecutrix is concerned, mere statement of prosecutrix herself is enough to record a conviction, when her evidence is read in its totality and found to be worth reliance. The Court held that “In view of the provisions of sections 53 and 54 of the Evidence Act 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all.”

Though, the Indian court mentioned it correctly that victim was previously accustomed sexual intercourse is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of but our judicial body can not reach them. Which indicates clearly that we are in backward circumstances. It was also held that from the mere fact that the woman did not bear the best character, it cannot be inferred that she was a consenting party.

By analyzing the decisions of the above cases it appears that though the Indian court correctly mentioned that we should focus on the victims consent at the time of rape not the character but our court failed to give proper justice in the above reported cases.

## **Chapter VI: Conclusion**

### **6.1 Conclusion**

By analyzing the definition of rape not only in national laws such as penal code, 1860 and Nari O Shishu Nirjatan Daman Ain, 2000 but also in international level it is crystal clear that when the sexual intercourse occurred without her consent or against her will then it said to commit rape. To prove a rape case it needs to corroborate with evidences and burden of proof lies on

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<sup>36</sup> 15 AIR 2005 SC 1248 16 NCT of Delhi, MANU/SC/0481/2012 14

prosecutor. However, Section 155(4) of the Evidence Act of 1872 contains the provision sanctioning admission of character evidence in rape prosecutions. It says defense may produce evidence that the prosecutrix was of generally immoral character. This provision creates a loophole for the accused to be acquitted. Statements on the survivor's alleged character are taken into serious consideration by the courts. Any suggestion that the victim is "of easy virtue" may result in an acquittal for the defendant even if the court has found that non-consensual intercourse occurred. I have already mentioned some leading cases in my thesis paper where court took the character into serious consideration which resulted in their acquittal. This is a clear prejudicial act over them because a woman's sexual history in no way impacts on her ability to consent to or refuse sexual activity of any kind. While focusing only on the character of the victim, the proper trial of the rape cases is not taken place. It is a matter of argument that rape has no logical relation with the good or bad character of the victim. To prove the rape, it is important to prove that whether the consent of the victim is present or not. But by this section it is indirectly meant "Licentious", "hired" or "unchaste" women, prostitutes, or women used to sexual relations cannot be raped which is discrimination against women. Moreover, it is in direct contradiction with the Constitution and with international human rights treaties such as CEDAW. Thus, there is no relevancy of character as evidence in rape cases. In addition to, I have also correctly mentioned some developing countries such as India, Canada, Singapore, Australia, USA where they have already implemented such provision for ensuring justice and equality. Thus, it is crystal clear from the above discussion that there is no left over or alternative way other than to repeal the section 155(4) of the Evidence Act which has no relevancy in rape cases and add a provision in section 146 of Evidence Act, 1872 like The Indian Evidence (Amendment) Act of 2002 for ensuring justice and equality.

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