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Email –

[editor@ijlra.com](mailto:editor@ijlra.com)

Website – [www.ijlra.com](http://www.ijlra.com)



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# **CHARACTER EVIDENCE AND ITS EVIDENTIARY VALUE AND MORAL IMPLICATIONS IN RAPE CASES**

**By: Abhishek. A & Srijita. C**

## **Abstract**

Character Evidence is a tool commonly used by advocates during trials, particularly in rape cases. This evidence is often used to paint the accused in such a manner that it is highly unlikely or even more likely that the accused has committed the offence. On the other hand it is also used to tarnish the image of the prosecutrix, in order to make it appear that the allegations leveled against the accused are false or true.

The objectives of this paper to ascertain the role of character evidence from the perspective of the accused, analyse the evidentiary value character evidence presents in the trial of a rape case and determine whether an acquittal or conviction may be granted on the basis of character evidence of the accused. The paper further seeks to determine the importance of character evidence of the victim in the trial of a rape and understand the extent, scope and value of such evidence.

This paper shall study the role that is played by character evidence in rape cases. It adopts a descriptive approach with respect to describing what constitutes the term 'character', how the usage has been prescribed by the statute and courts of law and lastly the manner in which character evidence has been utilised.

In addition to the above, the paper further adopts a critical analysis approach to evaluate the evidentiary value and moral implications associated with the usage of character evidence through the course of rape cases.

## **1. Introduction**

Character may be defined as the aggregate of traits and moral qualities which belong to and

distinguish a person, i.e. the general result of an individual's distinguishing attributes. It differs from reputation and disposition.<sup>1</sup> Unlike character, which is a quality that is based on the individual solely, reputation is based on what others think of a person and it is constituted by public opinion.<sup>2</sup> Disposition may be defined as the natural tendency and temperament of an individual. Disposition is permanent and it respects the whole frame and texture of the mind. While an individual's character may be ascertained by reputation and disposition, character comprises reputation and disposition, but it is not defined solely by the two.

When evidence regarding an individual's character is submitted at a trial, where the individual is either the prosecutrix or the accused, in order to showcase the individual's credibility it may be deemed to character evidence.

The role of character evidence in trials is murky on its best day. Character evidence is weak evidence, where the accused is judged on the basis of his character as to the likelihood that he would or would not commit a crime.<sup>3</sup> This raises numerous questions as there is no hard and fast method to ascertain the character of an individual completely. There have been numerous instances where an individual who was thought to be an upstanding member of society has been the perpetrator of heinous crimes, just as there are instances where individuals of bad reputation have been found innocent of crimes they are usually suspected of having committed.

Character evidence is not given a great amount of evidentiary value. Generally it is accepted that the character evidence presented cannot outweigh the positive evidence presented before the court in regard to guilt.<sup>4</sup> Further character evidence carries with it the possibility of influencing minds of people at large and may hamper the conduct of a fair trial.

It is in light of this that the laws under the Indian Evidence Act have been established. Section 52 of the Act deals with the application of character evidence in civil cases, and it is generally held to be inadmissible. Sections 53, 53A, 54 and 55 deal with character evidence in criminal cases and in general. A basic summary of the laws on the matter are as follows: 1) Evidence of good

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<sup>1</sup> Ronald J. Hof, Character Evidence, 21 Loy. L. Rev. 405 (1975).

<sup>2</sup> Vol 2, Woodroffe and Amir Ali, Law of Evidence Lexis Nexis 2396 ( 21<sup>st</sup> ed Shakil Ahmed Khan, 2020).

<sup>3</sup> Vol 2, Batuk Lal, The Law of Evidence (In India, Pakistan, Bangladesh, Sri Lanka and Malaysia) 1598 (6th ed. 2015).

<sup>4</sup> Id.

character is admissible – it is considered in order to ascertain whether guilt may be established beyond reasonable doubt; 2) Evidence of the character of the victim – evidence of the person's previous sexual experience with any person cannot be taken into account regarding issue of consent or quality of consent; 3) Evidence of previous bad character – generally not admissible, the law operates on presuming an individual as innocent and providing the benefit of doubt. However it is admissible in certain instances, such as when the character of the person is a fact in issue or when it is presented as a reply to evidence submitted proving the good character of the individual. 4) Evidence submitted must be regarding general character, reputation and disposition, specific acts or incidents of character are not admissible.<sup>5</sup>

The role of character evidence changes when it comes to the trial of a rape case. This is due to the nature of the offence being committed. In India, two issues at the forefront of the mind of the court is 1) whether there was sexual intercourse and 2) whether there was consent. Character evidence is utilised to a great extent in the trial of a rape case to ascertain the credibility of the statements of the accused and the victim regarding the matter of consent.<sup>6</sup> Therefore the role and importance of character evidence increases in these trials increases. This study aims to study the position of law in India regarding the scope and extent of character evidence in rape cases in addition to studying the moral dilemma presented by it.

## **2. Character Evidence of the Accused**

Character Evidence of the Accused is a double edged sword. As per the Indian Evidence Act, with the most recent amendments, character evidence of the accused is not permissible if it relates to previous bad character. Evidence relating to general good character and disposition is permissible. The rationale behind the same is to ensure that prejudice cannot be placed in the mind of the court and to ascertain whether guilt can be established beyond reasonable doubt.

The part where character evidence turns into a double edged sword is that when an individual provides evidence regarding their “good character”, the opposition is entitled to submit evidence of the accused's bad character in rebuttal.<sup>7</sup>

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<sup>5</sup> Batuk Lal, Law of Evidence 411 (22nd ed., Dr. Surendra Sahai Srivastava 2018).

<sup>6</sup> Woodroffe & Amir Ali, supra, 2399.

<sup>7</sup> Vol 2, Woodroffe and Amir Ali, Law of Evidence Lexis Nexis 2397 ( 21<sup>st</sup> ed Shakil Ahmed Khan, 2020).

Therefore a common trend in rape cases amongst the accused is to avoid the admittance of character evidence on their behalf entirely. This is done mainly to ensure that evidence regarding an individual's past would not be brought up, if there was something murky. Moreover, the submission of character evidence has little to no weightage for the most part during the conduct of the proceedings, particularly in the trial of a rape case.

In a rape case, the two factors that are taken into consideration are whether sexual intercourse between the accused and victim occurred and whether there was consent. With the evolution of forensic science and its integration into the criminal justice system, the first question can be answered easily. Forensic science, despite being only corroboratory evidence, is definite. It can establish whether there was sexual intercourse or contact with respect to the victim, and if the circumstances allow for it, it can place the accused in the vicinity. This can be done by way of tears in clothing, scratches, bruises, blood stains and presence of semen etc.

### **2.1.Establishment of sexual intercourse**

The character of an individual has little to no value in the establishment of sexual intercourse. Furthermore, it is not the duty of the accused to prove that he did not have sexual intercourse, all he must do is to deny it. It is the duty of the prosecution to prove that sexual intercourse had occurred between the accused and the victim. This is in pursuance of the principles established in the Indian Evidence Act: i) Proved ii) Disproved and iii) Not Proved.

In the establishment of sexual intercourse, the character of the individual has little to no value, as character evidence is by nature very weak evidence. Character evidence cannot outweigh positive evidence. Therefore when evidence, such as forensic evidence, exists and can prove that sexual intercourse has occurred, the purpose of character evidence is lost. If there existed a table of hierarchy in pursuance of the "Best Evidence Rule" enshrined in the Indian Evidence Act, character evidence would be towards the end of the table owing to its fickle nature and unreliability.

Unless the accused is of the nature of an individual who has sworn chastity or undertaken a



similar vow, the admittance of character evidence of the accused in relation to denying sexual intercourse is of little to no value. Even if one were to admit character evidence, it does not necessarily absolve the accused of any guilt, nor does it prove beyond reasonable doubt that the accused did not have sexual intercourse with the victim.

In relation to the first question required to be determined by the trial court in a rape case, there exist far stronger defences, namely: Denial.

The burden rests upon the prosecution to establish sexual intercourse. The work of the accused therefore is to cast doubts and point out missing links and gaps in the chain that the prosecution attempts to build that ultimately points towards the accused. This can be done by discrediting the evidence presented that place the accused at the scene of the offence. If the accused is capable of providing evidence that he was present elsewhere at the time at which the crime occurred, he can prove beyond reasonable doubt that he is not guilty of the offence.

Therefore such defences must be relied upon at this stage in a criminal trial for rape. Character evidence at this stage of the trial has little and less to offer. Evidence far more valuable and stronger than character evidence is likely to be admitted at this stage in the trial and therefore it must not be relied upon. It can be summarily stated that character evidence has no role to play in this aspect.

## **2.2. Establishment of Consent**

In the establishment of consent in a rape case, the common perception is that character evidence plays a large role in ascertaining whether consent was provided by the prosecutrix to the accused. The statement that character evidence can lead to ascertaining consent is based on the rationale that consent is subject and depends on the mental state of an individual, with regards to which character evidence would be capable of providing insight.

However this is when one refers to character evidence from the perspective of the victim or the prosecutrix. The role of character evidence on the part of the accused however is completely

different.

The purpose of character evidence on the part of the accused, as per the Indian Evidence Act was to ascertain guilt beyond reasonable doubt. To show that such a crime would be highly irregular for them to commit and thus they are unlikely to do so.<sup>8</sup>

It is generally believed that providing good character evidence would aid one in casting doubts when trying to ascertain guilt beyond reasonable doubt. However this is an idealistic and naïve approach with respect to practice in a court of law.

The Indian Evidence Act provides for the admittance of bad character evidence by the prosecution for the purposes of rebuttal to good character evidence produced on the behalf of the accused. Therefore trying to provide character evidence in a courtroom is a double edged sword without a hilt. It may work in your favour but it leaves you open and vulnerable to attack from the prosecution.

Furthermore it is important to note, character evidence is weak evidence. It is not substantive. An acquittal nor a conviction can be gained by the usage of character evidence. Character evidence is only relied upon when substantive pieces of evidence are not sufficient to ascertain guilt beyond reasonable doubt or for the court to get a bit of direction with how to proceed. Even then, character evidence offers little help.

With respect to character evidence of the accused, the question arises, how do we prove innocence in the case of a false allegation? How does one defend oneself from accusations of rape? Is one's character and conduct not sufficient to protect them?

Sir Matthew Hale's seventeenth century opinion that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent", perfectly summarises the position of the accused when charged with the offence of rape.

With respect to this it is stated that while it is difficult to defend against allegations of rape, one's

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<sup>8</sup> Batuk Lal, Law of Evidence 411 (22nd ed., Dr. Surendra Sahai Srivastava 2018).

character does not make it easier. If anything it increases the possibility of making one's defence more difficult.

The principle, "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"<sup>9</sup>, must be noted at this point.

Whether an individual is of a good character or not is immaterial. Similarly, whether the individual is an upstanding member of society or not, has no effect on a criminal trial for rape. An individual could have been a person of good general reputation and disposition and still commit a crime. One merely needs to look at the cases of Weinstein, Shiney Ahuja and the Boston Catholic Priest Case. If good character alone was sufficient, the crime of rape would never occur amongst those who worked white collar jobs and were educated. The ultimate failure of character evidence can be seen in the case of Bhagwan Swarup v. State of Maharashtra<sup>10</sup> where even the testimony of Jawaharlal Nehru could not protect the accused.

Returning to the original question, does character evidence establish consent? The answer is no. It merely showcases the mental state and attitude of the accused. While it may be stated that the victim's attitude and consent may be inferred and established by understanding the mental state of the accused, it is a vague connection being built upon an even more vague connection, and will not hold much weight in a court of law.

In practice, few to none provide evidence of good character to protect oneself from an allegation of rape. It is preferred by defendant counsels to question the character of the victim and establish consent through her "loose character" than provide for the good character of their client and protect the same.

If one were to look at the cases of Raja v. State of Karnataka<sup>11</sup> and Raju v. State of M.P.<sup>12</sup>, where false allegations were made, even in these instances the character of the accused was not put forth before the court. The falseness of the allegations put forth was proved by way of disproving

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<sup>9</sup> Avilash Kumbhar, Bad Character of the Accused, Academia (4/3/20, 17:13)  
[https://www.academia.edu/8132651/Evidence\\_of\\_Bad\\_Character\\_of\\_the\\_Accused](https://www.academia.edu/8132651/Evidence_of_Bad_Character_of_the_Accused)

<sup>10</sup> Bhagwan Swarup v. State of Maharashtra AIR 1965 SC 982.

<sup>11</sup> Raja v. State of Karnataka (2016) 10 SCC 506.

<sup>12</sup> Raju v. State of M.P. (2008) 15 SCC 133.

the facts and pointing out fallacies in the arguments of the prosecution.

The practices adopted in the aforementioned cases have proved fruitful for the accused. While it can be stated that the accused were fortunate and it cannot be applied in every case, the possibility of fortune resulting in an acquittal stands greater than the possibility of achieving an acquittal by way of providing character evidence.

Thus it stands that character evidence in a court of law on behalf of the accused has little to no role to play. It is not utilised in practice by defence counsels and is not inquired into by the courts of law either.

### **3. Character Evidence of the Victim**

Character evidence of the victim or prosecutrix in a trial of a rape case is a highly controversial point in law. When one often refers to character evidence, it usually is synonymous with the victim's past sexual history.

It is a common tactic amongst defence counsels to slander the character of the prosecutrix or question the same, in order to portray the prosecutrix as a woman of "loose character". This is done in order to show that the likelihood of consent being provided by the prosecutrix to the accused is larger. It is along the lines of "she has consented to it prior, and indulged in similar activities, who is to say she didn't do it this time?"

By utilising this tactic, the defence counsels try to show that their client is the victim of a false allegation and try to gain sympathy while attempting to humiliate, embarrass and destroy the victim's character.

However again, at this point it is important to remember the principle, "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"<sup>13</sup>.

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<sup>13</sup> Avilash Kumbhar, Bad Character of the Accused, Academia (4/3/20, 17:13)  
[https://www.academia.edu/8132651/Evidence\\_of\\_Bad\\_Character\\_of\\_the\\_Accused](https://www.academia.edu/8132651/Evidence_of_Bad_Character_of_the_Accused)

From the above principle it flows that the past activities of an individual are irrelevant to the matter at hand, for you are not prosecuting the individual or having them on trial for being the individual they are, but rather for that particular act that was committed or omitted, which is being challenged in court.

Therefore, whatever the prosecutrix may or may not have done in the past is highly irrelevant. Even if the prosecutrix had an intimate relationship with the accused, it does not necessitate that she consented to the act for which the crime of rape is being alleged.

It is important to remember that the act is being challenged, and therefore it is important to ascertain whether or not consent was given for that act in particular.

The recent Criminal Law Amendment saw to the insertion of Section 53A into the Indian Evidence Act. This new section reads as follows,

“In a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, “section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person’s previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent”<sup>14</sup>

As per this new section, the sexual history of the prosecutrix is not relevant in the event of a crime against a woman taking place. This is a step forward from the perspective of Indian Legislation as it not only protects the interests and integrity of an individual who has possibly been subjected to one of the most heinous crimes but also saves the precious time of the court from entertaining frivolous questions that serve no purpose aside from belittling the prosecutrix.

This view has been supported by the Supreme Court on numerous occasions, both before and after the criminal law amendment, as can be seen by the Supreme Court in 2004 in the case of,

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<sup>14</sup> Indian Evidence Act 1872, Act 1 of 1872, Section 53A.

State of U.P v. Pappu<sup>15</sup>, where the court stated that even assuming that the prosecutrix was previously accustomed to sexual intercourse, it cannot be a ground to absolve the accused from the charge of rape. Consent must be given for that particular act or occasion.

Character evidence offers little to no insight regarding the consent of the prosecutrix. Furthermore, there is other evidence which is far more conclusive in nature, abundant and easier to obtain. Such alternative forms of evidence ought to be relied upon.

If one were to look into the case of Raja v. State of Karnataka<sup>16</sup>, it was found that despite the woman being found of loose character, it was not the basis of the acquittal. The acquittal was based on the fact that the statement of the prosecutrix during the complaint and during the deposition before the court did not match. Her subsequent conduct and demeanour were taken into account as well.

While the aforementioned case may not be the most suitable, it clearly highlights the fact that even in instances where the character of the prosecutrix may be questionable, it has little to no bearing on the outcome of the trial. These points were further emphasised by the Supreme Court in the cases of Lillu v. State of Haryana<sup>17</sup>, State of Punjab v. Gurmit Singh<sup>18</sup> and State of U.P v. Munshi<sup>19</sup>.

In light of the above, it may be stated that while character evidence of the victim plays a larger role than that of the accused, as the counsel for the accused often prey upon the character of the victim, character evidence as a whole plays a very small and minute role in the trial of rape cases.

#### **4. Critical Analysis of the Evidentiary Value of Character Evidence in Rape Cases.**

This chapter shall focus on critically analysing the value of Character Evidence in rape cases.

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<sup>15</sup> State of U.P v. Pappu (2005) 3 SCC 594.

<sup>16</sup> Raja v. State of Karnataka (2016) 10 SCC 506.

<sup>17</sup> Lillu v. State of Haryana (2013) 14 SCC 643.

<sup>18</sup> State of Punjab v. Gurmit Singh (1996) 2 SCC 384.

<sup>19</sup> State of U.P v. Munshi ((2008) 9 SCC 390.

The most important question at this stage of the study is to determine whether introducing character evidence would serve any significant purpose in determining the outcome of the trial and in whose favour it would weigh.

Given the current position of law in India, as showcased in Chapter 2 and 3 with respect to the accused and the victim respectively, it can be stated that character evidence would help neither party.

Character evidence of the accused serves no purpose. While there is scope for the same, it is not utilised in practice, therefore the scope and extent of usage for the same diminishes. This only serves to prove that the evidentiary value of character evidence from the perspective of the accused holds no significance.

Arriving at the point of character evidence of the victim or prosecutrix, we must take into consideration, who uses character evidence? Character evidence is mostly used as a weapon against the victim to portray her poorly so as to prove consent and acquit the accused. It is possible that the victim may use character evidence of good character to rebut whatever has been put forth by the accused, but to attempt a rebuttal of character evidence using character evidence serves no purpose nor does it make any sense. If an individual wished to win against character evidence produced, they merely need to show positive or substantive evidence against the same and the point raised by the party providing character evidence is rendered useless.

Therefore it is highly unlikely that the victim would utilise character evidence either. Therefore the scope for character evidence is limited and has diminished even more with the insertion of Section 53A of the Indian Evidence Act and the principles adhered to by the judiciary with respect to rape cases. Atleast with respect to the sexual history of the prosecutrix.

However this does not mean character evidence as a whole has been eliminated. Despite the efforts of the members of the bar to make sexual activities a part of one's character, it remains outside. If it plays a part in the formation of an individual's character, it only occupies a small role.

In the case of a false complaint, an individual who is habituated to lying or fabricating stories or falsely implicating other individuals in offenses that they do not commit would be an interesting piece of character evidence to submit. If character evidence regarding the reliability of the statements made by the prosecutrix were submitted, the role of character evidence in a rape case would increase exponentially for such evidence would certainly provide insight into the attitude and mental state of the prosecutrix, thereby allowing the court to ascertain consent, but also possibly corroborate with the statements provided by the accused on his behalf regarding his innocence.

However this must be used in care. Merely because the accused may be a story teller or habitual liar, it does not necessitate that when she alleges rape that it has to be false. To treat a case on such a basis would only result in miscarriage of justice, one akin to what happened at the end of the story where the boy who cried wolf. When the wolf actually attacked the sheep and the boy shouted for help, no one was there to aid him. Such a situation must not be permitted.

Therefore character evidence must be treated with care. It is a double edged sword without a hilt and could prove to be useful to carry out justice while at the same time it could lead to the miscarriage of justice.

However it is important to point out that falseness in statements made or any other part of the proceedings could be determined by way of scrutiny. It is not necessary to solely depend upon character evidence for the same. While this may make it more difficult for the accused to prove his case, the resulting evidence are far more substantive and conclusive in comparison to character evidence.

## **5. Conclusion**

Character Evidence is generally synonymous with sexual history or activeness of the prosecutrix, when spoken in context with rape cases. It is an unfortunate consequence relating to decades of practice by members of the bar.



It is necessary and extremely important to note that the ambit of character evidence is far wider than the scope it has been limited to by lawyers with respect to rape cases. If allowed, character evidence could play a far more important and substantive role.

However as a result of practices, character evidence has been limited to the constraints imposed upon it by practice and it occupies a very minute role in the determination of a trial related to a rape case in terms of evidentiary value.

Character evidence is not strong evidence. Neither is it conclusive. It cannot be solely relied upon as it is very fickle. Character evidence of the accused is hardly ever used in practice and when used against the victim it is often limited to an unfortunate role of referring to the victim's past sexual history.

Recent developments have shown that character evidence in relation to sexual history have been held irrelevant in numerous countries including India and Pakistan. However there are other countries such as Canada and Singapore which permit the admissibility of the same, but only if certain criteria are fulfilled and the court must approve the same.

The admissibility of character evidence may differ across the globe, but one factor remains constant, and that is with respect to the evidentiary value it possesses.

All across the globe, character evidence is only utilised as a last resort and reliance upon it is minimal, if at all done. Character evidence by way of scope is limited and evidentiary value, near insignificant and has a very small role in criminal cases such as rape. If the past practices with respect to character evidence and rape cases continue, character evidence may no longer be used in the foreseeable future for the lack of evidentiary value they bring to the table.