

REFLECTIONS ON THE PERCEPTION OF 'CONSENT' IN RAPE CASES

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Introduction

Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent female, it leaves behind a traumatic experience. Therefore, victims of sex crime are to be recognised as well as treated with dignity and respect but not as an accomplice in the crime. The traditional criminal law fails to provide adequate justice to women in the true sense of term. In order to reduce violence against women and children the legislature from time to time enacted new laws apart from Penal Code. These are Dowry Prohibition Act (Act XXV of 1980), and the Cruelty to Women (Deterrent Punishment Ordinance, 1983 (Ordinance LX of 1983). The Cruelty to Women (Deterrent Punishment) Ordinance, 1983 was repealed by *Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995*. Thereafter *Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995* was repealed by the enactment of *Nari-O-Shishu Nirjatan Domon (Bishesh Bidhan) Ain, 2000*. (Women and Children Prevention of Repression (Special Provision) Act, 2000). An amendment Act was also passed in 2003 titled *Nari-O-Shishu Nirjatan Domon (Bishesh Bidhan) (Shonshodhan) Ain, 2003*. The purpose of these special laws is to provide security and safety of women through enforcement but these fell short of women's perspectives, interests and experiences because of built-in traditional patriarchal values. However, there is a shift in the present judicial attitude, as there is some examples of apparent readiness to deal with cases of sexual crime with utmost sensitivity and to interpret the provision of law with great importance to the changing social and cultural context. It is said that a socially sensitized judge is better statutory armour in case of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.¹ This article analyses the judicial activism in the field while examining the provisions of rape as provided in the Penal Code and the *Nari-O-Shishu Nirjatan Domon (Bishesh Bidhan) Ain, 2000* as a discourse for reconceptualisation and reform of the law relating to rape.

1. *State of AP V Bodem Sundara Rao* (1995) 6 SCC 230

Analysis of rape under Penal Code

Sex urge is a basic fact of all human life, the expression of which in the human society has always been sought to be controlled and channelised through various social devices, like religion, moral tenets and laws. These devices have acted to restrict sexual activity within certain well-defined areas of law for the protection of society.² Rape is typically defined as intercourse committed forcibly and against the will of the victim. To put simplest definition of rape is having sexual intercourse with a woman or girl without her consent.³ The word 'rape' literally means forcible seizure and that element is the characteristic feature of the offence. In section 375 of the Penal Code rape is defined as:

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

- First** : Against her will.
- Secondly** : Without her consent.
- Thirdly** : Without 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 sixteen years of age.

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

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

The criticisms that are highlighted about rape law in Bangladesh are similar to those highlighted in other countries with the adversarial legal systems. These include: the difficulties in proving non-consent; cross-examinations; rape myths and the use of sexual history evidence in court. In order to secure a conviction for rape it is necessary to prove not only

2. See Siddique, Ahmad, *Criminology, Problems and Perspectives*, Eastern, Book Company, Lucknow, 4th edition, 2001, p. 411.

3. Wasim Miah & Others V The State, 12 BLT (HCD) 2004, pp 40-50 at p 47.

that the accused committed an act that meets the legal definition of rape i.e. actus reus but also that the accused knew that the victim was not consenting, i.e. mens rea. The *actus reus* relates to a lack of consent. Baird highlights that there are generally three lines of defence used in rape cases; that intercourse never took place, that it took place but not by the accused or that it took place but that the victim consented to it or that the accused believed that the victim consented to it.⁴ The root of the 'consent' problem lies with the requirement of the prosecution to prove the absence of consent (rather than requiring the defence to prove that they had taken steps to ascertain consent), and in many ways this problem is unique to rape cases. If, for example, a person reported that their car had been stolen it would not be necessary to prove that it had been taken without their consent. Similarly, if an individual were physically assaulted, for example punched in the face, they would rarely be asked if they agreed to be punched in the face. A further problem in rape cases is that the only direct witness is likely to be the rape victim, which means that cases often come down to one person's word against the other. If the accused says that the victim consented and the victim says she did not consent then it is difficult to validate either person's statement of act. The nature of the sexual crime is such that it is unlikely that there would be a third party available to directly corroborate either statement.⁵

The Court's analysis of 'consent' is in the shape of voluntary participation not only after the exercise of intelligence based on the knowledge of significance and moral quality of the act but after having fully exercised the choice between the resistance and assent.⁶ Thus a woman is said to consent only when she freely agrees to submit herself while in free and unconstrained possession of physical and moral power to act in a manner she wanted. In another case the High Court of Rajasthan in India similarly observed:

Certainly consent is no defence, if the victim has been proved to be under 16 years of age. If she be 16 of age or above, her consent cannot be presumed; an inference as to consent can be drawn if only based on evidence and probabilities of the case. The victim of rape stating on oath said that she was forcibly subjected to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other

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4. Baird, V. (1999) Changes to section 2 of *Sexual Offences Act 1976*, *Medicine, Science and the Law*, 39 (3), pp 198-208.
 5. Wesmarland, Nicole; *Rape Law Reform in England and Wales*, *School for Policy Studies Working Paper Series* Number 7. www.bristol.ac.uk/sps
 6. State of HP v Mange Ram, 2000 (2) Supreme (Crl) 102

testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable.⁷

Similarly the High Court Division of the Supreme Court of Bangladesh in an appeal against the judgement of acquittal passed by the *Nari-O-Shishu Nirjatan Domon (Bishesh Bidhan) Ain*, 2000 (section 9(3)) held:

The victim herself has deposed before the tribunal narrating the incident of rape on her and also naming the rapists. Her testimony has not been shaken by grueling cross-examination. There is no reason also for her to falsely implicate the accused persons in this case. This victim is an unmarried college student and comes of 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. Her testimony inspires confidence in our mind and we find her testimony reliable... she must not be denied justice for minor defects in the prosecution of the case. The acquittal of rapists in spite of victim's unimpeachable and reliable testimony is not only a great injustice to the victim but it also harms the whole society.⁸

The High Courts of India and High Court Division of the Supreme Court of Bangladesh did not lean in favour of acquittal by giving weight to insignificant circumstances or by resorting to technicalities or by assuming doubts regarding consent and giving benefit of doubt in favour of the accused. 'Non-consent' is not a mere act of helpless resignation but also the inevitable compulsion, acquiescence and non-resistance. In other words consent involves submission but mere act of submission does not involve consent therefore, surrender of body cannot be equated with the desire or will.

Similarly, 'failure to resist' or 'absence of mark of violence' does not necessarily tantamount to consent. The court ought to take certain factors into consideration relevant to the victim where she failed to resist. The inability to resist may be due to extreme youth, being overpowered by actual force used, want of strength or attack by number of men indicating uselessness of resistance, unconsciousness or deep sleep. Therefore, 'failure to resist' or 'the absence of marks of violence' on the private part or elsewhere on the person of the victim cannot be treated as necessary ingredients of the crime.

7. *State of Rajasthan v Noore Khan* 2000 (1) Supreme (Cr) 312

8. *Fatema Begum v Aminur Rahman and others* 11 MLR (HC) 2006 pp 23-38 at 37 and at p 38

The High Court Division of the Supreme Court of Bangladesh in a case under *Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain* (XVIII of 1995) held:

In absence of evidence to the contrary the only inference that can be drawn is that the victim, a helpless, village woman is telling the truth about her shameful ordeal in the hands of the accused behind locked door of the Hotel Al Quddus on the night of the occurrence. She has nothing to gain by making false statements about subjecting herself to ignominy and embarrassment of being raped by the accused.⁹

The fact of the case shows that the court relied on the statement of the victim, an adult married woman who was allowed to go with the accused by the husband in good faith to Rajbari for collecting charitable relief money from the office of the Deputy Commissioner Rajbari. When they reached the Rajbari the accused told the victim in the evening that the money will be paid the following day by the Deputy Commissioner's Office and that they have to stay over night. The accused then took the victim to a residential hotel where he introduced himself as the husband of the victim and rented a room and in the mid night raped the victim. The court weighed the testimony of the victim that she did not scream and shout at the night of the occurrence, in fear of the accused, lead one to believe that, in fact, she did not shout and create any commotion on the night of the occurrence.¹⁰

However, in another case the High Court Division of the Supreme Court of Bangladesh displayed a traditional attitude in its judgement:

Absence of marks of violence on the body of the victim itself proves that the prosecution case is false. In case of rape it is the duty of the prosecution to produce wearing apparels of the victim to show marks of stain in order to establish claim of rape. If the statement of victim does not tally with the sketch-map, it creates doubt about the place of occurrence.¹¹

The principle that the 'prosecution must prove beyond all reasonable doubt' forms the foundation of the criminal jurisprudence, but this technicalities of the law should not allow the accused to take advantage where none existed. In the above case the court required the prosecution to prove 'utmost resistance' or at least 'reasonable resistance' on the part

9. *Abdus Sobhan Biswas v State* 54 DLR (2002) pp.556-560 at 560.

10. *Ibid* at p.560

11. *Abdul (Md) Hakim v The State* BCR 2004 HCD p. 98.

of the victim. The facts of each rape cases ought to be looked into in the light of peculiar circumstances rather than giving importance to the factors like resistance, conduct of the victim and corroboration.

In case of rape like any other criminal offences intention of the accused becomes important to draw an inference as to the commission of the offence. In a recent case the High Court Division emphasized on the intention rather than the act of commission. The court held¹²:

The culprit first intends to commit the offence and then makes preparation for committing it and thereafter attempts to commit the offence itself. If the attempt succeeds, he commits the offence itself but if he fails due to the reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when preparations are complete and the culprit commence to do an act with the necessary intention, he commences his attempt which is a step toward commission of the offence.

The court further held:

An attempt is an act done in part execution of a criminal design, amounting to more than mere preparation but falling short of actual consummation. An attempt may thus be defined as an act, which if not prevented would have resulted in the full consummation of the act attempted. In the present case, we have found that the accused made victim Mazeda Khatum nude by removing her payjama and made a determined attempt to ravish victim Majeda. The definite attempt of the accused could not be successful only because of the strong resistance put up by the victim and the timely approach of the inmates of the house to the scene of the occurrence, which compelled the accused to run away, leaving his mission incomplete.¹³

The court was right in its decision that it was an attempt to commit rape. Therefore, it can be said that when a rape did not succeed because there was no consummation, it is still a case of attempt to commit rape under the Penal Code or sexual oppression under *Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain, 2000*. The relevant section of the Penal Code and *Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain, 2000* did not take into consideration possible offences like; aiding, abetting, counseling and procuring, incitement to rape and conspiracy to commit rape.

The definition of rape also includes sexual intercourse by impersonation. It may occur when a man has sexual intercourse without consent of the

12. *Md Abdur Razzaque v The State*, 24 BLD (HCD) 2004, pp14-18 at p.18.

13. *Ibid.* at p.18.

woman when the man knows that he is not her husband and she consents because she believes him to be lawfully her married husband. This provision considers 'consent' to be 'no consent' which is obtained through false pretence. The purpose of this clause is to protect a married woman's chastity.

The Penal Code does not use the terminology sexual harassment or violence, however sexual oppression has been incorporated in the *Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain*, 2000 as amended in 2003. In the Penal Code any act committed against the nature is punishable under section 377. The act against nature means sexual activities of abnormal nature outside marital relationship. The section is intended to punish the offence of sodomy, buggery and bestiality.¹⁴ The legal protection to sexual activity is not determined by whether it is happening in private or in public but whether it meets the traditional standards of morality.¹⁵ In England under Sexual Offences Act, 1967 buggery is no longer an offence if buggery is committed in private between two consenting adult and above the age of 21. Section 377 of the Penal Code does not clarify whether it is an offence if the unnatural sexual activities are committed between two consenting adult.

Marital Rape

The traditional idea is that it is impossible for a man to rape his wife and that somehow, in taking marriage vows woman has accepted that they have no say over her own body and sexuality. Basically this vow is a denial of her right to say 'no'. It is still prevalent notion amongst *wives* as much as amongst the *husbands*. Some women believe that only stranger rape is a 'real rape' and other women see sex in marriage as an obligation and define forced sex as a 'wifely duty' and not rape.¹⁶ Marital rape is most likely to occur in relationships characterized by other forms of violence. Researchers argue that marital rape is 'just one' extension of domestic violence.¹⁷ It is to be understood in the context of an abusive relationship, that is, in the context of emotional and possibly physical abuse. Finkelhor & Yllo viewed that women who are raped by their

14. Ratanlal and Dhirajlal, 1997, *The Indian Penal Code*, 28th Edition, Wadhawa and Company, Nagpur, p.1967.

15. *Ibid* at p.145

16. Bergen, R. K. (1996) *Wife Rape: Understanding the Response of Survivors and Service Providers*. Thousand Oaks, CA: Sage

17. Johnson, I & Sigler, R (1997) *Forced Sexual Intercourse in Intimate Relationships*. Brookfield, VT: Dartmouth/Ashgate p. 22

partners are also battered. In 'battering rapes' women experience both physical and sexual violence in the relationship.¹⁸

There is a debate that marital rape should not be subsumed under the heading of domestic violence because doing so in the past has led to rape in marriage being overlooked as a distinctive problem.¹⁹ In reality some women are raped by their husbands but do not experience other forms of violence, but some researcher reiterated that marital rape has been conducted with battered women. Husbands often rape their wives when they are asleep, or use coercion, verbal threats, physical violence, or weapons to force their wives to have sex.²⁰ Finkelhor and Yllo have called "force-only rape" husbands use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships.²¹

Marital rape was only made a criminal offence in England in 1991, until then it was considered impossible for a man to rape or sexually assault his wife.²² It had previously been judged in common law that married women had no capability or authority to 'not consent':

'The sexual communication between them is by virtue of the irrevocable privilege conferred once for all on the husband at the time of the marriage ...'.²³

Under the Penal Code in Bangladesh a husband cannot be convicted of rape of his wife, when the wife is above sixteen years of age. Thus, if a wife is above sixteen then forcible intercourse or intercourse without her consent is not rape. The law presumes that on marriage the wife consents to the husband's exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsists between them.

However, the "consent" as discussed earlier in this paper means consent only when the woman freely agrees to submit herself while in free and

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18. Finkelhor, D & Yllo, K (1985), *License to Rape: Sexual abuse of wives*. New York: Holt, Rinehart, & Winston.
 19. Russell, D.E.H (1990). *Rape in Marriage*, New, Macmillan Press. See also Bergen, R. K. (1996) *Wife Rape: Understanding the Response of Survivors and Service Providers*. Thousand Oaks, CA: Sage
 20. Browne, A (1987) *When Battered Women Kill*. New York: The Free Press
 21. Finkelhor, D & Yllo, K (1985), *License to Rape: Sexual abuse of wives*. New York: Holt, Rinehart, & Winston.
 22. Hidden Hurt: Domestic Abuse Information, www.hiddenhurt.co.uk/article/marital_rape.htm.
 23. (R v Clarence, 1888), 22 QBD. 22.

unconstrained possession of physical and moral power to act in a manner she wanted. While sex is a normal concomitant of marriage, use of violence or force in sexual intercourse is an offence against the dignity of a woman's body and emotions whether in marriage or out of marriage.²⁴ The husband's violent or nonconsensual act of intercourse should entitle a wife to bring an action for criminal assault or injury or matrimonial relief should be incorporated as a principle of liability of spousal rape in our Penal Code.

Analysis of rape under *Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain, 2000*

Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain, 2000 is a protective legislation for the women and children. This Act deals with the major offences that are committed against women such as: rape, sexual assault, abduction, kidnapping, trafficking, torture for dowry etc. Rape is the focus of our discussion here and therefore other offences are not considered in this article.

Section 9 of this Act retained the definition of rape as provided for in the Penal Code and it only provides stringent punishment for rape, gang rape and custodial rape. The section provides as follows:

Punishment for rape and death caused due to rape

If any man commits rape to any woman or child shall be punishable with rigorous imprisonment for life and in addition, shall be liable to fine.

Explanation: If any man not being lawfully married to any woman above sixteen years of age have sexual intercourse without her consent or consent obtained by force or inducement or person having sexual intercourse with any woman under sixteen years of age with consent or without consent, then he will be said to commit rape to such woman.

- (2) Whoever causes death to any woman or child while rape being committed or any other act which causes death after the commission of the rape, shall be punished with death or rigorous imprisonment for life and in addition, shall be liable for fine to the extent of taka one lakh.
- (3) If a group of person causes death or hurt to any woman or child while rape being committed, all such person will be punished with death or rigorous imprisonment for life and in addition, shall be liable to fine to the extent of taka one lakh.

24. Saxena, Shobha, 1995, *Crimes Against Women and Protective Laws*, Deep and Deep Publications, New Delhi, pp. 82

- (4) Whoever
- a) causes death or hurt to any woman or child after committing rape, shall be punished with rigorous imprisonment for life and in addition shall be liable to fine.
 - b) attempts to commit rape to any woman or child shall be punished with rigorous imprisonment for term not exceeding ten years but not less than five years and in addition, shall be liable to fine.
- (5) If any woman is raped while in police custody, then in whose custody such rape was committed, such person or persons who were indirectly liable for custody, each of such person, if otherwise not proved, for failure of custody, shall be punished with rigorous imprisonment for a term not exceeding ten year but not less than five and in addition, shall be liable to fine not exceeding taka ten thousand.

As per the Statutory explanation of section 9 the words 'without consent' means consent obtained by force or inducement. The recent amendment to the Act also failed as the corresponding provision of the Penal Code to include other circumstances exhibiting lack of consent like, inability to resist due to factors like insanity, involuntary intoxication, unconsciousness or state of deep sleep. The victims falling within these circumstances have no other alternative but await judicial activism giving recognition to the above factors for the interest of these victims.

However it will not be out of place to mention here that this section has the potential to secure vulnerable women by inserting a new provision of rape committed in **police custody**. Here the police may be accused not so much for committing rape but may be accused for the offence by omission, that is for the failure to secure the safety of the woman or child in police custody. The custody is not limited to those women who are remanded to judicial custody or are taken into custody by arrest but also women kept under protection, charge, care, guardianship or procured under search warrant etc., are included as persons in 'police custody'. There was no provision in the Penal Code for punishing person in authority for the offence of omission to provide security and safety to women who were taken to police custody.

This provision is incorporated in the Act of 2000, after the incidence of Yasmin,²⁵ who was killed after being gang raped by the person in authority on 24-8-95. Yasmin was picked-up by the police forces of Tero

25. *The State V Md Moinul Haque and others*, 21 BLD (HC) 2001 at pp 465-494 .

Mile patrol camp, who were in patrol on the high way. According to the accused persons, when they reached Dosh Mile Point, they noticed a gathering of few people questioning a girl, Yasmin and on the request of the people, Yasmin was picked up by the police. The defence case is that the girl jumped out of the pickup van. They stopped the van and saw her lying with bleeding injury. They took the girl in the van and started for Dinajpur Sadar Hospital but after a while they found the girl motionless. The inquest report was made by an A.S.I. and the dead body was sent to the hospital for post mortem. On examination the doctor opined that the cause of death was head injury. Thereafter the dead body of Yasmin Akhter was buried as an unidentified dead body. Such burial caused a mass uproar and agitation throughout Dinajpur and throughout the country. The dead body was taken out of the graveyard and another inquest was made by the Magistrate of Dinajpur and a second post-mortem examination reported stated that the girl was killed by throttling after being raped, followed by head injury which was ante mortem and homicidal in nature and that the deceased was raped before her death.

The High Court Division confirmed the sentence of death passed by the trial court under section 6(4) of the *Nari-O-Shishu Nirjaton (Bishesh Bidhan) Ain*, 1995 and held:

Where the girl in question was in a helpless and vulnerable condition in the police custody and she was gang raped and murdered by persons in authority and by uniformed people whose duty was to protect her, this Court did not find any mitigating circumstances in the instant case to consider any alternative sentence and even if there was a discretion left to us this is not a case where such a discretion should be exercised.²⁶

The Criminal Petition for leave to appeal to the Appellate Division in the above case upheld the decision of the trial court and held that it is not necessary to prove individual overt act to connect them with the offence under sub-section 4 of section 6 of the Act which provides for punishment both for individual as well as for constructive liability of a gang. It is pertinent to note the word 'gang' and the word 'cause of death' as has been used to make not only the acts but also omission as defined in section 32 of the Penal Code punishable under section 6(4) of the *Nari-O-Shishu Nirjaton (Bishesh Bidhan) Ain*, 1995.²⁷

The court strongly condemned the custodial rape and expressed its disgust by stating that an innocent girl was subjected to such barbaric

26. Ibid at.492.

27. *Moinul Haque (Md) and another v State* 56 DLR (2004) pp 81-86 at 86.

treatment by a group of person who were in a position of trust. Their culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. The girl was in the van in helpless condition in the police custody and she was entrusted to the police personnel who are paid from the public exchequer for the protection of the citizen and therefore they having committed rape upon the victim and murdered, deserve extreme punishment in the facts and circumstances of the case.²⁸ The sensitized court weighed the gravity of the offence and responded to the loud cry of justice of the society by imposing a proper sentence.

Unlike Indian Penal Code,²⁹ this provision of *Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain, 2000* does not include sexual abuses of woman in custody, care and control by other categories of persons like public servant, Superintendent of Jail, Remand House, or by any member

28. Supra note 25 at 492

29. Section 379(2) of the Indian Penal Code provides :

Whoever,-

- (a) being a police officer commits rape-
 - (i) within the limits of the police station to which he is appointed; or
 - (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
 - (iii) on a woman in his custody or in the custody of a police officer subordinate to him; or
- (b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or
- (c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or
- (d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or
- (e) commits rape on a woman knowing her to be pregnant; or
- (f) commits rape on a woman when she is under twelve years of age; or
- (g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

of the management or staff of a hospital etc. The women are likely in such cases to be seduced, induced or even persuaded by these people to surrender to their overtures who can not to be considered to have given free consent.

Women are prey to social custom and are easily victimized by the indigenous court i.e *shalish*. *Shalish* has traditionally been an adjudicating body maintaining peace and render so-called justice at the village level. It is basically comprised of village elites and members of the *Union Parishad* and quite often the Chairman of the *Union Parishad*. Women have no voice or position in the traditional *shalish*. They are particularly vulnerable to the system of gender bias verdict and often subjected to harsh penalties and humiliation. This sometimes lead them to commit suicide. Prior to the passing of this law the co-called *shalishdars* (arbitrators) could not be brought to justice because of lack of appropriate provisions of law by virtue of which such criminal could be penalized. Section 9A provides:

Punishment for abetting woman to commit suicide etc: If any person voluntarily does any act to insult a woman without her consent or against her will and due to such insult the woman commits suicide, then he will be liable for abetment of suicide and shall be punished with rigorous imprisonment for a term not exceeding ten years but not less than five years and in addition shall be liable to fine.

Nari-o-Shishu Nirjaton Domon (Bishesh Bidhan) (Amendment) Ain, 2003 amended the provision of section 13 of the 2000 Act in order to protect the interest of the child born as a result of rape. Now the provision reads as follows:

Notwithstanding anything contained in any other law, if a child born as a result of rape:-

Explanation 1.- Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.- "Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or widow's home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.- "Hospital" means the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation

- (a) such child can be kept in custody of the mother or the maternal relatives;
- (b) such child shall have the right to be known by her mother or father or both;
- (c) such child shall be maintained by the State;
- (d) such child shall get maintenance till the age of twenty-one years and in case of female till she is married and in case of disabled child until he can maintain himself;

The amount payable as maintenance of the child under subsection 1 will be determined by the provision of the Government.

The Government can recover the amount payable to the child as maintenance from the rapist and if the amount cannot be recovered from the existing property of the rapist then it can be recovered from his property owned or acquired in future.

This new provision enables a child to be known by the father or mother or both. The law has given a choice for the child to be known by either of the parents or both but who has the power to exercise this choice is not mentioned in this provision. If the child is known by the father this will not entitle the child to inherit the property of the father nor the father will get the legal guardianship of the child as per provision of Muslim law. Although this section secures the social position of the child born as a result of rape, it may be repression for the woman who does not want to have any connection with the rapist. Rape in fact makes a woman a living death. A victim of rape needs sympathy and reassurance yet she is ostracized by the society and even by the family. The case of raped women is worse because rape is not just a physical violence or injury, its significance lies in the physical repugnance, mental and emotional trauma and the severe social repercussions. In the process she ceases to be a person or a social being, she merely becomes a rape victim.³⁰ It appears that the provision under discussion will compel her to bear with the stigma permanently. Law should protect woman who chooses not to have child born as a result of rape and therefore, abortion in circumstances should be legalized.

Proof of rape: corroborative evidence

The cardinal principle of Criminal law is that every man is presumed to be innocent until the contrary is proved. The prosecution shall have to prove the guilt of the accused and until then the accused has no onus to discharge. The other relevant evidential principle is that there must be

30. *Supra* note 24 at p. 325.

corroboration or supporting evidence on material point by independent, neutral and neighboring witnesses.³¹ It is already mentioned before that in rape cases the burden of proof lies on the victim on the question of the 'consent.' In this patriarchal society a rape victim, irrespective of age and status, is treated as an object of shame and despair and by way of inference she is presumed to be an accomplice to the rape. The prosecution faces difficulties in obtaining corroboration. In assessing the testimonial potency of the victim's version, the human psychology and behavioural probability must be looked into. The inherent bashfulness and the feminine tendency to conceal the outrage the masculine sexual aggression are the factors relevant to improbabilise the hypothesis of false implication.³² The general rule is that the court can act on the testimony of a single witness i.e. provided her credibility is not shaken by adverse circumstances. In a case the court held:

Corroborative evidence is not an imperative component of judicial credence in the every case of rape. Corroboration as a condition for judicial reliance in the testimony of a victim of sex crime is not a requirement of law but merely a guidance of prudence under given circumstances. The rule is not that corroboration is essential before there can be a conviction. The testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessities looking for corroboration of her statement, the court should find no difficulty in acting on the testimony of a victim of sex crime alone to convict an accused where her testimony inspires confidence and is found to be reliable.³³

In the present society there gender bias, exists and where money, power, influence and corruption are rampant In addition, work of the investigation officer sometimes are not satisfactory due to various reason or where witnesses are reluctant to depose before the court. In view of this situation it would not be unfair on the part of the court to shift the burden of proof upon the accused. In section 9 of the *Nari-o-Shishu Nirjaton Domon (Bishesh Bidhan) Ain*, 2000, the burden of proof has been shifted on the accused if the victim in a rape case is recovered either from the custody of the accused or from a place which is within the control of

31. Haque, Justice Md. Hamidul, 2005, "Law relating to offences Against Women and Trial of such Offences," *JATI* (Judicial Administration Training Institute) Journal, Volume IV, May 2005, Old High Court Building, Dhaka, pp. 1-16 at p 10.

32. *Krishan Lal v State of Haryana* (1980) 3 SCC 159.

33. *Al-Amin v State* BLD (1999) 307, 51 DLR 154.

the accused, then the onus is upon the accused to explain how the victim came to his custody or came to that place.

In a case the court³⁴ held that evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit. The evidence of a victim of a sexual offence is entitled to a great weight, notwithstanding absence of corroboration. Section 134³⁵ of the Evidence Act is based upon the well known maxim "evidence has to be weighed and not counted" Therefore, conviction can be recorded on the sole testimony of the victim if her evidence inspires confidence and there are no such circumstances which militate against the veracity.³⁶ The courts appear to be right when the very injuries were considered sufficient to lend corroboration to the testimony of the victim, particularly when no motive was attributed to the victim for falsely implicating the accused.

The principle of benefit of doubt in favour of the accused is accepted as a matter of public policy in the Criminal Jurisprudence. Under this protective principle the accused is often graced with a verdict of acquittal. Proof beyond reasonable doubt does not mean proof beyond all shadow of doubt. This doubt is not an imaginary doubt and fanciful doubt.³⁷ Benefit of doubt to the accused would be available provided there is supportive evidence on record. The 'benefit of doubt' had been explained by Mr. Justice A.K. Badrul Huq and he emphasised that reasonable benefit of doubt must be real, substantial, and serious, well founded actual doubt arising out of the evidence and existing after consideration of all the evidence. The negative definition are more frequent and perhaps more helpful. Hence a mere whim or a surmise or suspicion furnishes an insufficient foundation for raising a reasonable doubt and so a vague, conjecture, whimsical or vague doubt, a capricious and speculative doubt an imaginary, uncertain, trivial indefinite of a more possible doubt is not a reasonable doubt. He further stated that the desire for more evidence of guilt, a capricious doubt or misgiving suggested by

34. *Misti and others v The State*, 6 MLR (HC) 2001 p.395. A case under *Nari-O-Shishu Nirjaton, (Bishes Bidhan) Ain*, 1995.

35. "No particular number of witnesses shall in any case be required for the proof of any act."

36. *State of HP v Raghubir Singh* (1923) 2 SCC 622.

37. *Awal Fakir (Md) v The State* (2004) 9 MLR (HC) 305

an ingenious counsel or arising from a merciful disposition or kindly feeling towards a prisoner, or from sympathy for him or his family cannot be a consideration for recording an order of acquittal upon the offender of sexual assault upon an unfortunate victim of sex crime. The dedication to the doctrine of "benefit of doubt" should not be allowed to reign sodden and supreme. Justice is as much due to the accuser as to the accused and the balance must be maintained.³⁸ Therefore it is to be understood that the court relying on a vague or unsubstantial evidence will not only lead to an absurdity but also would be opposed to the basic tenets of law.

Conclusion

The analysis of the law and the decisions of the courts reflect that there is a shift from the traditional attitudes of the society. That attitude of the society is formulated in such a way that excludes perspectives, interest and experiences of woman. The composition of the legal regime of rape presuppose that women are weak, soft and their sexuality must be protected according to the moral code of the society, religion and culture. Under the present legal regime the term "without consent" is meant consent procured through force, threat, fraud or misrepresentation. The provisions of the law does not take into account victim's inability to resist due to other factors beyond the control of the victim, such as youth, being overpowered by force, unconsciousness or in the state of deep sleep.

The provisions of law contained in *Nari-O-Shishu Nirjatan Domon (Bishesh Bidhan) Ain, 2000* protect women's sexuality by protecting married women when a man commits rape by impersonating as her husband. The definition of rape in the Penal Code upholds the precepts of the traditional society and reinforces the notion that rape cannot be committed by the husband unless the wife is minor by ignoring the fact that the wife beyond that age has a right to protect the dignity of her body against the unsolicited approach by the husband. Gender injustice is the resultant perpetuation of patriarchal bias in the law and conceptualization that woman is nothing more than a property of the husband.

The newly enacted law, *Nari-O-Shishu Nirjatan Domon (Bishesh Bidhan) Ain, 2000* could not go beyond traditional norms and values of the patriarchal society. This gender specific law may be repressive for some

38. Huq, Justice A.K. Badrul Huq, 2000, *Violence Against Women: Judge's Attitude*, 52 DLR, Journal, p.44

women, when the law imposes certain consequences such as leaving her to encounter the rapist because of the child born out of rape. Abortion following rape, if legalized, may release her from such unacceptable position and enhance woman's dignity as human being.

The analysis of the judicial decision showed that the court are presently manifesting some sign of change in their mind-set by do not adhering to the strict application of law. The Supreme Court has rightly observed: "Judicial response to Human Right cannot be blunted by legal bigotry".³⁹ The court often takes into consideration the prevailing vulnerable condition of the women in the society while arriving at a correct or proper decision of the court. The court would respond better to the cry for reducing gender discrimination if it applies the same principle for shaking the credibility of the accused as that of the victim.

It would not be out of place to plead that Criminal Law needs an exhaustive review in the backdrop of woman's vulnerable position in the society. Enactment of new laws piecemeal alone will not protect woman against crime, the protection is likely to enhance only if certain social practices and values affecting the position of women are treated as evil, inhuman and oppressive. In this regard there is need to arouse social consciousness and public opinion against injustice against women and to generate resistance to arbitrariness of social norms and practices affecting women. Rape has not only a legal facet but has a social and economic dimension which is required to be felt and dealt with by all concerned including the judiciary, executive, the politician, and reformers, intelligentia and the law enforcing agency.

39. Ibid at p.46