

18

FORENSIC LAW*Gajendra K. Goswami**

I INTRODUCTION

FAIR TRIAL¹ is the quintessence of rule of law in a just society, necessary to instil faith of the people in the criminal justice system (CJS). Fair investigation is a precursor to fair trial in the process of administration of justice.² Investigation is the procedure of evidence collection, necessarily needed to help the judiciary to establish truth and fairness in justice. Procedural fairness in evidence collection improves the veracity and transparency of investigation. One of the weak links in the chain of investigation has been that even the primary evidence of oral testimony may suffer from various defects including hostility, aborting the ultimate purpose of justice. The Supreme Court of India has observed, “It is a general handicap attached to all eyewitnesses, if they fail to speak with precision, their evidence would be assailed as vague and evasive, on the contrary if they speak to all the events very well and correctly their evidence becomes vulnerable to be attacked as tutored.”³ Therefore, as an alternative, forensic evidence has emerged globally as a reliable corroborative tool, appreciated from every quarter of CJS. Medico-legal examination, fingerprinting, serology, toxicology, ballistics, DNA profiling and various deception detection tests (DDTs) like narco-analysis, polygraph (lie detector) and brain mapping (P-300) are some of the forensic tools which have strengthened faith in justice delivery by augmenting transparency in evidence collection and their appreciation.⁴

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1 The Universal Declaration of Human Rights (UDHR), 1948 art. 10 International Covenant of Civil and Political Rights (ICCPR), 1966 art. 14 European Convention on Human Rights, 1950 art. 6; of the African Charter on Human and People’s Rights, 1981 art. 7 and American Convention of Human Rights, 1969 art. 8 deal with “Right to a Fair Trial”.

2 G.K. Goswami, “Fair and Participatory Investigation: The New Paradigm towards Internal Police Reforms” in Shankar Sen (ed.), *Police Reforms* 131-160 (2016).

3 *Bhag Singh v. State of Punjab* (1997) 7 SCC 712.

4 G.K. Goswami, “Forensic Law-2014”, *L ASIL* 649-672 (2015).

Recently the apex court in *Dharam Deo Yadav v. State of U.P.*⁵ has observed the tendency of witnesses turning hostile and has upheld scientific evidence as under:⁶

The criminal justice system in this country is at crossroads. Many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons.

The investigating agency has, therefore, to look for other ways and means to improve the quality of investigation which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts like power of observation, humiliation, external influence, forgetfulness, etc. whereas forensic evidence is free from those infirmities. Judiciary should also be equipped to understand and deal with such scientific material. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasising the necessity of promoting scientific evidence to detect and prove crimes over and above the other evidence.

Indian judiciary has awarded conviction based solely on forensic evidence provided the chain of circumstances is complete, proving guilt beyond a reasonable doubt.⁷ Mixed approach of ocular and scientific evidence appears to be the curative measure for ensuring justice, which is conditioned upon professional approach towards collection, analysis and appreciation of evidence.

This survey entails an analytical account of various judicial pronouncements during 2015 by the constitutional courts emphasising their evolving legal propensity towards forensic aid for evidence collection and appreciation while administering justice in civil and criminal matters. It also reflects on legal provisions through discussing nearly seventy cases covering almost all issues in forensic science such as DNA as corroborative evidence, DNA Profiling in rape cases, equitable justice in civil disputes of paternity determination, DNA in resolving maintenance petitions *etc.*

5 (2014) 5 SCC 509.

6 *Id.*, para 30.

7 *Abdulwahab Abdulmajid Baloch v. State of Gujarat* (2009) 11 SCC 625; *Ajayvir Singh v. State of Haryana*, 2015 Law Suit (P&H) 585.

II CRIMINAL ADJUDICATION

In 2015, Indian courts have extensively used forensic evidence to ensure fairness in justice. The legal issues raised thereupon have been briefly touched upon in the subsequent discussion.

DNA Evidence: Corroborating tool for advancing justice

In the last three decades, DNA has gained global acceptance as a sterling corroborative evidence in the court of law for settling both civil and criminal disputes. Perfection in human identification is the hallmark of DNA profiling which may be used for identification of victim (if dead body is disfigured or putrefied) and for linking crime with criminals with greater exactitude. DNA has reinforced oral testimony in criminal justice system which on its own is susceptible to weaknesses capable of jeopardising the very purpose of trial. Scientific literature suggests that subject to genuineness of the sample and accredited laboratory procedural protocols, DNA results would be unquestionable and may conclusively lead either to establishing guilt or exoneration of the accused in criminal cases. Some of the major observations by the Indian higher judiciary on DNA for advancing justice during 2015 have been discussed in the following paragraphs.

Ram Kishan v. State of NCT Delhi,⁸ was a case of kidnapping for ransom followed by murder of the kidnapped person by hitting on head with a stone, where one of the accused was apprehended while he was dropping the third ransom letter at the gate of the house of the deceased victim. The forensic report of handwriting expert established the writing on ransom letter connecting it to one of the accused. The decomposed dead body was recovered under section 27 of the Indian Evidence Act 1872, and was identified by DNA match as that of the missing person. The defense contended that absence of blood stains of the deceased on the seized pant and slippers of the accused prove his innocence because if he had been hit with a stone by the accused in the manner claimed by the prosecution, blood stains would have been inevitable on his person. The High Court of Delhi, after appreciation of entire chain of evidence, upheld the conviction order of the learned trial court and dismissed the appeal.

In *State of Uttarakhand v. Deepak Arya*,⁹ a blind rape cum murder case of an eight years old girl child, the prosecution theory was based entirely upon DNA evidence. Blood samples of several suspects were collected and DNA profile of accused was found matching with the DNA obtained from the vaginal wash and swab of the deceased victim. The judge was pleased to hold the appellant accused guilty and considered the case within the category of “rarest of rare”, for awarding a death penalty. The High Court of Uttarakhand relied upon the observation of the apex court on infallible veracity of DNA profiling, as stated in the case of *Pantangi Balarama Venkata*

8 III (2015) CCR 72 (Del.) : 2015 (3) Cri CC 456.

9 2016(95) ALLCC 73 : 2016 Cri LJ 98 : 2015(3) N.C.C. 314 : 2016(1) UC 763.

Ganesh v. State of Andhra Pradesh.¹⁰ Since the accused had lifted the naked dead body of the victim from the field and covered her with his shirt hence he came in contact with the dead body. The moot question before the court was whether accused was in touch with the victim when she was alive or he had posthumously come in her contact? On this point forensic expert opined:¹¹

The dead skin cells can be a source of DNA. The body has its regular process to create the new cells and discarding dead cells and in the circumstance there is a probability if the body is touched with the other individual's body, transfer of dead cells would occur to the body of other person. The hairs without root are not useful for DNA test. The saliva contains DNA if sufficient numbers of cells are present in saliva and again in the sweat, sufficient numbers of dead cells are present, there remains a probability of DNA for test.

However, the court observed that the alleged confessional statement of the accused was recorded by the police to corroborate DNA profile. The apex court on the issue of suspicion and proof has adduced several guidelines.¹² As per the dictum of apex court, the suspicion, howsoever grave it may be cannot be a substitute for proof and the prosecution has to prove the case beyond a reasonable doubt. In the case in hand, the court observed that the probability that dead cells of the accused might have been mixed with the vaginal swab cannot be ruled out completely and hence the appeal was allowed and conviction order of the trial court was set aside.

In *Budha v. State of NCT Delhi*,¹³ an appeal was preferred against the order of conviction for life in a murder case based on reliable evidence including DNA matched with blood stains found on the clothes of the deceased and weapon used for offence which was recovered under section 27 of the Indian Evidence Act, 1872. The High Court of Delhi dismissed the appeal by placing reliance on DNA report proving guilt of accused beyond reasonable doubt.

Similarly, in a case of kidnapping of a mentally and physically challenged 8 years old girl child from the custody of her mother followed by rape and brutal murder by smashing her head, the trial court convicted and awarded death sentence to the accused. DNA of the victim matched with the blood samples collected from the clothes

10 (2009) 14 SCC 607, para 46. What is DNA? It means: "Deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine."

11 *Id.*, para 11.

12 *Vikramjit Singh alias Vicky v. State of Punjab* (2006) 12 SCC 306; *Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116; *Shivaji Sahabrao Bobade v. State of Maharashtra*, 1973 SCC (Cri) 1033.

13 IV (2015) CCR 468 (Del.): 224 (2015) DLT 345.

of the accused and blood stains found on motorcycle used for carrying the child. Together with other circumstantial evidence, it convinced the high court to confirm the award of death sentence.¹⁴

Many a times it is suspected that allegations of rape are fictitious and motivated. The traditional mode of investigation based merely on oral evidence may not always solve such riddles accurately but advent of DNA test has the potential to ensure justice in such cases. Indian judiciary has adjudicated on various cases of false accusations of rape in 2015. The prosecutrix of *Rohit Bansal v. State of NCT Delhi*,¹⁵ alleged her paramour and his friend of raping her on several occasions and blackmailing with the photographs clicked at the time of committing rape. Later when the investigation machinery was set in motion, one photograph of alleged rape was recovered from the house of the accused. On the veracity of 'sterling witness', the defence cited observations made by the apex court in *Rai Sandeep @ Deepu v. State*:¹⁶

In our considered opinion, the 'sterling witness' should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness.

In this case, reliance has also been placed on *Krishan Kumar Malik v. State*,¹⁷ where the Supreme Court has observed that no doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

In *Vijay @ Chinee v. State of Madhya Pradesh*,¹⁸ the apex court has observed that the law that emerges on the issue is to the effect that the statement of the prosecutrix if found to be worthy of credence and reliable, requires no corroboration. However, the court might convict the accused on the sole testimony of the prosecutrix. The High Court of Madhya Pradesh has allowed the appeal and set aside the conviction order on the basis of inconsistency in the statements of the prosecutrix and medico-legal report as it did not support the allegations of beating and forcefully subjecting her to sexual intercourse by several persons on multiple occasions. The court also commented adversely on the *malafide* investigation and false implication of accused.

14 *Manoj Pratap Singh (J. P. Bhardwaj) v. State of Rajasthan*, 2015 Law Suit (Raj) 1021.

15 2015 VI AD (Delhi) 566.

16 (2012) 8 SCC 21, para 15.

17 (2011) 7 SCC 130.

18 (2010) 8 SCC 191.

Similarly in another case, the DNA report and medico-legal examination of prosecutrix of aged 16 years could not support the allegation of rape.¹⁹ The High Court of Haryana and Punjab acquitted the two accused of the offences under section 372 (2) (g) of Indian Penal Code 1860 (IPC). but held them guilty under sections 342 and 354 IPC, for kidnapping, wrongful confinement, disrobing her by use of criminal force and assaulting her with an intent to outrage her modesty. In yet another case, *Ved Prakash v. State of Haryana*,²⁰ the prosecutrix alleged rape by the accused who was blackmailing her with her nude photographs taken from the ventilator of the bathroom while she was bathing. DNA report did not match with the biological content of vaginal swab and other artefacts but based on the sole testimony of the prosecutrix, learned trial court held the accused guilty. The high court set aside the order of conviction after considering the entire chain of circumstantial evidence like long delay in reporting the incident, height of the ventilator of the bath room, poor investigation in not even confirming whether nude photographs are present in the mobile phone of the accused and financial dispute between the family of the prosecutrix and accused.

In *Emarajan v. The State represented by Inspector of Police, Tirunelveli*,²¹ victim alleged sexual exploitation by the accused on deceitful promise to marry her and consequently she gave birth to a child. DNA test proved the accused as biological father of the child. However, the child was given in adoption to a Muslim family by the victim mother. Referring to *Uday v. State of Karnataka*,²² the High Court of Madras set aside the conviction order for rape since the victim was adult and underwent consensual sexual relations.

Sexual offences have social overtone and rape victims sometime turn hostile due to various reasons despite there being strong evidence in favour of prosecution. Such situation appeared in the case of *State of Gujarat v. Mahadevbhai Maghabhai Suthar*,²³ where the prosecutrix of rape turned hostile resulting into acquittal despite proven DNA report of the child borne out of allegedly repeated rape by her father-in-law. The high court upheld the acquittal based on the volte-face of the prosecutrix and observed that the alleged act at best may be a consensual sexual relationship between the two adults.

Impact of shoddy investigation

Justice through fair trial in criminal matters is conditioned upon procedural fairness ensured during investigation. If evidences are not properly collected, miscarriage of justice will be inevitable. In *Rajiv Singh v. State of Bihar*,²⁴ the apex court has squarely reflected on shoddy investigation and its repercussion on the fate

19 *Mahender Singh v. State of Haryana*, (2015-3) 179 P.L.R. 724.

20 2015(1) RCR (Cri) 807.

21 2015 LawSuit (Mad) 387.

22 (2003) 4 SCC 46.

23 2015 LawSuit(Guj) 2789.

24 2015(13) SCALE 901 : 2015 (12) JT 305 : 2015 SCC OnLine SC 1336.

of justice. The husband, in this case was accused of murder of his wife who reportedly went missing from a running train while travelling with him. Later, police recovered a decomposed dead body near railway track which was identified as that of the wife of the accused with the help of DNA profiling. However, the parents of the deceased refused to accept the identification of the dead body as that of their daughter and challenged the authenticity and probative worth of DNA test on the ground that it neither adopted correct procedure for collection of blood samples nor was conducted in an accredited laboratory as per the prevalent rules. They also alleged that the scientist who conducted the DNA test was deficient of desirable academic credential required for a DNA expert. Moreover, the DNA samples collected from the viscera of the deceased and blood sample collected from the parents of the deceased were not accompanied with authentication cards violating the procedural norms. It surfaced on probing that DNA report was prepared by computer staff, signed by a technician and countersigned by the Director of Forensic Science Laboratory (FSL), Patna. Due to lack of infrastructure in the FSL, Patna, the DNA test was outsourced and was conducted by a private laboratory which is violation of section 293 Code of Criminal Procedure 1973, (Cr. PC.) Consequently the court held that the DNA test report being deficient of the required procedures, *ipso facto* failed to establish identification of the dead body and prove the factum of death of the daughter of the Petitioner. The Supreme Court observed that the shoddy, casual, laconical and insensitive investigation conducted by the police and during adjudication audit, several shortcomings and pitfalls in the process have been noticed.

In an appeal, the convicted step-father accused of committing rape on his 12 years old daughter who got impregnated, argued that when he moved the high court for DNA test of the foetus to prove that it was not from his loin, the prosecutrix and her mother preferred abortion to frustrate his plea after coming to know of this fact.²⁵ The DNA test was conducted and failed to connect the foetus with accused-appellant. Medico-legal report also confirmed no injury on the person of the prosecutrix. However the high court dismissed the appeal in the light of credible oral evidence that DNA test failed due to technical reasons and that negligence committed by the officials involved should not become the ground for denying justice to the rape victim.

Lack of fair and proficient methods for collection of credible evidence also frustrate the purpose of investigation. In the *State of Punjab v. Ram Sewak*,²⁶ shoddy investigation resulted into acquittal of the accused where seven persons including two women were brutally killed with sharp weapons and theft was also committed in the house. The post mortem report revealed that a copious amount of semen fluid coming out of the introitus of the two female victims. Fingerprints and footprints were lifted from the scene of the crime and several other evidence/exhibits were collected. The DNA on the artefacts,²⁷ could not be isolated due to putrefaction of

25 *Ram Kishan v. State of Punjab*, 2015 SCC OnLine Raj 837 : 2015 LawSuit (P&H) 4800.

26 *State of Punjab v. Ram Sewak*, MANU/PH/1519/2015 : 2015 LawSuit(P&H) 2519.

27 Artefacts such as vaginal swab, pubic hair, clothes etc.

samples. The accused was arrested and on his behest, blood stained axe (*Kulhari*) and spade (*Kahi*) as lethal weapons used for committing crime along with other stolen articles were recovered under section 27 of Indian Evidence Act. A charge sheet was filed under sections 302, 379 and 411 of the without reflecting on the allegation of rape, however, the commitment order made the offences punishable under sections 302, 376, 379 and 411 of the. The trial court convicted the accused but no conviction was recorded for the commission of rape because no charge in that regard had been framed. At the direction of the high court, charges were reframed for rape also by the trial court. But, as regards scientific proof in the form of finger print or DNA matching, there was no conclusive proof whatsoever resulting in acquittal by the high court. Such cases indeed emphasise the need for fair investigation and remedial measures need to be designed.

Criminal justice should not be allowed to become a casualty at the hands of wrongs committed by the investigating officer.²⁸ The need of the hour is to have compulsory legal provisions for using scientific methods of evidence collection. The High Court of Punjab and Haryana in *Naresh Dass v. State of U. T. Chandigarh*,²⁹ has emphasised on introducing mandatory provisions in law for ensuring use of forensic evidence like DNA by the investigating agencies. The court observed:³⁰

As a matter of fact, to ensure that heinous crimes are taken to a logical conclusion by ensuring that a person does not get acquitted on benefit of doubt, or erroneously convicted, simply because of the investigating agency not having adopted even basic 'scientific' methods of investigation, such as DNA testing and properly preserving blood/ semen/fingerprint samples taken, or because of the police not taking such samples, mandatory provisions need to be introduced to ensure that such basic investigative methods are followed by the investigating agency and samples taken are preserved by technology as is easily now available.

Sometimes investigating agencies arbitrarily avoid collection of scientific evidence for reason best known to them as was evident in the case of *Pinki @ Rimpi v. Bheema*.³¹ In the appeal by prosecutrix of rape to conduct DNA test, instead of complying with the order of the trial court for DNA profiling, the forensic expert conducted a low resolution DNA-based HLA test,³² and having reliance on its result,

28 *State of Karnataka v. Yarappa Redy*, AIR 2000 SC 185.

29 2015 SCC OnLine P&H 6679.

30 *Id.*, para 8.

31 MANU/PH/1468/2015.

32 Human Leukocyte Antigen (HLA) eliminates 80% of the male population from being the possible father, and in some cases, it is possible to produce a probability of paternity up to 90%. However, HLA testing cannot differentiate between related alleged fathers. The method of choice for paternity testing in DNA testing via RFLP which has a 99.99% (and higher) power of exclusion.

the trial court exonerated the accused persons giving them the benefit of the doubt. The high court observed that once the trial court has directed conducting of DNA testing, there was no reason for the trial court to rely upon HLA testing till the order passed by the trial court had been modified in accordance with law. Accordingly, the acquittal order of trial court was set aside and matter was remitted to the trial court for consideration afresh in the light of observations made by the high court and the trial court had the liberty again to conduct the DNA test of the accused, the prosecutrix and the child.

Impact of non-conducting DNA profiling

Investing officer has sweeping powers in investigation and interference of any kind in this process is strictly proscribed by the law.³³ Recently the apex court, reflecting on wrongful confinement of the innocent accused, has emphasized on the quality of evidence collection and its appreciation through proper capacity building and training of the investigation and prosecuting officials.³⁴ In criminal matters, under section 53A of Cr.PC. a police officer not below the rank of sub-inspector is empowered to request a registered medical practitioner to examine the accused of rape and to take biological sample from the person of the accused for DNA profiling and can use such force as is reasonably necessary for that purpose.³⁵ An emerging issue before the courts recently has been that despite there being legal provisions in place, investigating agencies do not conduct DNA profiling and accused have been raising this failure as a defense. The survey reveals the rising trend of requests having been made by the accused to conduct DNA test to prove their innocence which is a promising step widening the scope of genetic evidence in advancing equitable justice. However, the investigating agencies need to be sensitised for making use of scientific advancements in evidencing.

In *State of Karnataka v. Shivanand Veerabhadra*, a mentally challenged victim, about 37 years of age, was raped and later delivered a male child.³⁶ The request of investigating agency to conduct DNA test of the child, accused and the prosecutrix was rejected by the court which only allowed for ascertaining the blood groups despite the fact that accused had no objection to giving blood for DNA test. The High Court of Karnataka, in the interest of justice, permitted DNA test. This case highlights the fact that judicial officials also need proper sensitisation and understanding of forensic science in the administration of justice.

In *Ratan Das v. The State of West Bengal*,³⁷ the appellant accused argued in his defense that DNA Profiling may have proved his innocence but investigating agency

33 *Abhinandan Jha v. Dinesh Mishra*, AIR 1968 SC 117; *R. Sarala v. T. S. Velu*, AIR 2000 SC 1732.

34 *State of Gujrat v. Kishanbhai* (2014) 5 SCC 108.

35 The Criminal (Amendment) Act, 2005.

36 2015 SCC OnLine Kar 5236.

37 2005 Cr LJ 1876 : 2005(1) Cal LT 437 HC.

had failed to conduct the DNA test. Scientific evidence may cure the latches on the part of the investigating agency as opined by the Supreme Court in *State of Gujarat v. Kishan Bhai*.³⁸ On defective investigation the court has observed:

In our perception it is almost impossible to come across a single case wherein the investigation was conducted completely flawless or absolutely foolproof. The function of the criminal courts should not be wasted in picking out the lapses in investigation and by expressing unsavoury criticism against investigating officers. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the victim. Effort should be made by courts to see that criminal justice is salvaged despite such defects in investigation...The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which is judicially conscientious mind entertains with some objectivity, no benefit can be claimed by the accused.

Thus an analysis of judicial interpretations clearly reveal that shoddy investigation or certain lapses in evidence collection must not frustrate the judicial process unless there are reasonable dimensions for extending benefit of doubt in favour of the accused. Similarly, an appeal in *State of Punjab v. Mohinder Singh*³⁹ was dismissed and the court observed that not conducting DNA test is a lapse on the part of the investigating agency and benefit thereof cannot be given to the appellant as the case of the prosecution is based on cogent, convincing and reliable testimony of the prosecutrix, which is further corroborated from the testimony of other witnesses, medical and scientific evidences. The lapses or defect in the investigation cannot lead to the conclusion that the accused is innocent.⁴⁰

In some cases, courts have considered lapses in evidence collection to extend some advantage to the accused. The High Court of Madhya Pradesh granted bail to the accused on the pretext of failure in conducting DNA test. The court relied upon the apex court which observed that after the incorporation of section 53 (A) in the Cr. PC,⁴¹ it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. It further states that prior to 2006, even without the aforesaid specific provision in the Cr. PC, prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen on the clothes of the appellant.⁴²

38 (2014) 5 SCC 108.

39 2008(3) R.C.R (Criminal) 226.

40 *Acharapaarambath Pradeepan v. State of Kerala*, 2007 (1) R.C. R. (Criminal) 928.

41 Enforced w.e.f. 23.06.2006.

42 *Krishan Kumar Malik v. State of Haryana*, (2011) 7 SCC 130, para 45.

Thus the provisions under section 53A Cr PC, empowers investigating agencies to conduct DNA test and also cast a duty upon them to resort to this provision as a mandatory measure. Furthermore, courts have sympathetic view towards accused if they submit before court and face forensic tests like DNA. The High Court of Madhya Pradesh granted bail when an accused submitted to undergo DNA test.⁴³ Anticipatory bail of the petitioner-husband for six months was granted by the High Court of Patna when both parties consented to submit to DNA test to ascertain paternity of the child born to the couple in the proceeding under section 498-A of IPC. The high court also directed learned trial court to confirm the bail if the DNA of the child did not match with the petitioner, but if DNA proved otherwise, then the petitioner was to surrender and pray for regular bail.⁴⁴ On a similar approach, in case of accusation of establishing forceful physical relationship with deceitful promise to marry culminating into child birth, the DNA test was ordered by the high court and provisional bail was granted directing the trial court to confirm the bail if DNA report excluded the petitioner as the father of the child otherwise the petitioner was asked to surrender and apply for regular bail.⁴⁵

In *Mathiyazhagan v. State through the Inspector of Police, All Women Police Stations, Ulundurpet*⁴⁶ the appellant-accused, a man already married and having children, was facing charge under section 376 and 417 for allegedly enticing a juvenile into having sex with him on the promise of marriage due to which, she conceived and delivered a child. The trial court permitted conducting a DNA test on the child for determining paternity linking the accused. In appeal, the accused pleaded that his blood was not taken during arrest under the provision of section 53A of Cr PC and any subsequent order for taking his blood sample for DNA was contrary to law. Based on the ratio propounded by the Supreme Court in *Selvi v. State of Karnataka*⁴⁷ (hereafter called the *Selvi*), the Madras High Court found no illegality in the order of the trial court to conduct DNA Profiling on the accused since at the time of his arrest the child was not born and DNA sample of the child was not possible to be collected and accordingly the petition was dismissed.

In yet another case, the accused filed an appeal against conviction order for committing rape of a six year old girl child.⁴⁸ Here neither DNA test was conducted, nor any vital injury on the private parts of the prosecutrix and accused was reported even though accused was caught and medically examined within 24 hours of the incident. The High Court of Punjab and Haryana observed that absence of injuries on the private parts of the prosecutrix and the accused may not be fatal and necessarily

43 *Rajesh v. The State of Madhya Pradesh*, 2015 Cri LJ 1673.

44 *Md. Imtiyaz v. The State of Bihar*, 2015 SCC OnLine Pat 2248.

45 *Mukesh Kumar v. State of Bihar*, 2015 LawSuit (Pat) 1584.

46 2015 LawSuit(Mad) 3848.

47 (2010) 7 SCC 263.

48 *Narinder Kumar Sharma v. State of Punjab*, 2015(4) RCR (Cri) 669.

believe the prosecution story provided the testimony of prosecutrix and other corroborative evidences were trustworthy.⁴⁹ The presence of spermatozoa in the chemical examination report of the vaginal swab further supported the fact that prosecutrix was subjected to sexual act.

Thus courts have settled the issue that non-conducting of DNA test may not necessarily impede the process of justice without any cogent reason casting reasonable doubt on the prosecution story. But in the light of the Supreme Court observation cited above,⁵⁰ the provisions under section 53A to collect DNA sample of the accused at the time of arrest are mandatory in nature, hence the investigating agencies must bear the responsibility of conducting investigation in accordance with law otherwise plea of failure in conducting DNA test by the prosecution may continue to be a defense before the courts. It is a proven fact that DNA evidence is corroborative in nature, but it instils transparency and fairness in delivery of justice therefore equitable justice demands that accused must be given legal right to demand for conducting such a test to prove his/her innocence.

Negative DNA findings on child paternity in rape cases

DNA profiling potentially helps in linking the accused with the child born out of forced sexual act to prove an allegation of rape. Sometimes the accused gets advantage of negative DNA report proving absence of biological knot with the child. Such cases of contradiction in oral testimony and DNA led genetic truth pose a challenge before the court to deliver justice to both the mother-child and the accused, which may be resolved by evaluating the entire chain of evidence. In *State of Gujarat v. Jayantibhai Somabhai Khant*,⁵¹ a minor prosecutrix was forcibly raped by the father of her classmate and she was threatened to keep quiet. When her pregnancy was noticed at an advanced stage, a criminal case was registered and subsequently a child was born to the victim. DNA Profiling was conducted on the blood samples collected from the victim mother, her child and the accused. Autosomal and Y-STR Analysis based DNA report unequivocally opined that the prosecutrix was the mother of the child but the accused was not his biological father. However, the learned trial court discarded the DNA findings by observing that the DNA test, if not found positive, it would not mean that the testimony of the victim should not be believed.⁵²

In this case, High Court of Gujarat referred to the observations of the apex court that the court should not usurp the functions of an expert by arriving at its own conclusion contrary to the one given by the expert witness.⁵³ The findings of an expert cannot be set aside by a court by making a reference to some literature without

49 *State of Himachal Pradesh v. Gian Chand* (2001) 6 SCC 71.

50 *Supra* note 37.

51 2015 CrL J 3209.

52 *Id.*, para 14.

53 *Gambhir v. State of Maharashtra*, AIR 1982 SC 1157.

confronting the expert.⁵⁴ It has been observed that if the DNA report is the sole piece of evidence, even if it is positive, cannot conclusively fix the identity of the miscreant, but if the report is negative, it would conclusively exonerate the accused from the involvement or charge.⁵⁵ Relying upon the DNA test, the accused was exonerated and the order of conviction by trial court was set aside. In this case, the allegation of rape and pregnancy of the victim may or may not have been necessarily linked and the DNA analysis or medico-legal examination, after a lapse of several months, could not prove the incident of rape. In yet another case, the trial court convicted the accused on allegation of rape despite having negative DNA report excluding the accused from the burden of genetic fatherhood of the child. The High Court of Karnataka, having reliance on the other evidence, convicted the accused under section 354 IPC but conviction under section 376 Indian Penal Code was set aside.⁵⁶

In *Gautam Chowdhury v. The State of West Bengal*,⁵⁷ the accused and the complainant - a minor girl, fell in love and luring her with a promise of marriage, he allegedly committed rape on her. As a result of this, she got pregnant and gave birth to a child. Since he reneged on his promise to marry, the complainant was forced to take recourse to law by lodging a complaint. The investigation ratified the allegations and after observing due process, the trial concluded in conviction. In absence of DNA confirmation of paternity exclusively implicating him, the appellant claimed entitlement for the benefit of doubt. The High Court of Calcutta observed that the failure of conducting DNA test during investigation standalone may not demolish the case of prosecution in view of the clear stream of cogent evidence deposited by the minor victim. Further, DNA test may be more relevant for maintenance disputes through establishing paternity. In absence of any iota of doubt, appeal was dismissed in accordance with law.

Procedural lapse on collection of samples

In common law, oft-quoted statement of Crompton J., “It matters not how you get it, if you steal even, it would be admissible”⁵⁸ may potentially contravene certain rights. In United States, judicial proposition as propounded in *Kyllo v. United States*,⁵⁹ ensures the obedience of legal procedures for evidence collection. Apex Court in India has also adjudicated on admissibility of evidence collected during investigation without observing due procedures enshrined under criminal code.⁶⁰ In *State (NCT of*

54 *Sundar Lal v. State of Madhya Pradesh*, AIR 1954 SC 28; *Bhagwan Das v. State of Rajasthan*, AIR 1957 SC 580.

55 *Premjibhai Bachubhai Khasiya v. State of Gujarat*, 2009 Cri LJ 2888.

56 *Rama @ Ramaiah v. The State of Karnataka*, 2015(3) AKR 364 : 2015(4) KCCR 3923 : AIR 2015 Kar 364.

57 2015 Cri L J (NOC) 218 (Cal) : 2015 Cri L J 690 (Cal).

58 *R v. Leatham* (1861) 8 Cox CC 498.

59 533 US 27 (2001).

60 *RM Malkani v. State of Maharashtra* (1973) 1 SCC 473 : 1973 AIR SC 157; *State of Maharashtra v. Natwarlal Damodardas Soni*, AIR 1980 SC 593; *Radhakishan v. State of UP*, AIR 1963 SC 822.

Delhi) v. *Navjot Sandhu*,⁶¹ the court had opined that even if the evidence is illegally obtained, it is admissible. The appellant in *Deepak Nanda v. State (NCT of Delhi)*,⁶² challenged the integrity of chance fingerprints lifted from the scene of crime of triple murder with house robbery. Signature and writing are excluded from the range of section 5 of the Identification of Prisoners Act, 1920 but finger impressions are included in both section 73 of the Indian Evidence Act, 1972 and section 5 of the Act, 1920. A bench of three judges in High Court of Delhi in *Sapan Haldar v. State (NCT Delhi)*⁶³ has observed firstly handwriting and signature are not measurements as defined under clause (a) of section 2 of The Identification of Prisoners Act, 1920. Therefore, section 4 and 5 of the Identification of Prisoners Act, 1920 will not apply to a handwriting sample or a sample signature. Thus, an investigating officer, during investigation, cannot obtain a handwriting sample or a signature sample from a person accused of having committed an offence; secondly prior to June 23, 2006, when Act No.25 of 2005 was notified, inter-*alia*, inserting section 311-A in the Code of Criminal Procedure, 1973, even a magistrate could not direct a person accused to give specimen signatures or handwriting samples. In cases where magistrates have directed so, the evidence was held to be inadmissible as per the decision of the Supreme Court in *State of U.P. v. Ram Babu Mishra*.⁶⁴ According to section 73 of the Indian Evidence Act, 1872, only the court concerned can direct a person appearing before it to submit samples of his handwriting and/or signature for purposes of comparison.

Regarding genuineness of the fingerprints, the apex court in *Prakash v. State of Karnataka*, has observed:⁶⁵

To avoid any suspicion regarding the genuineness of the fingerprint so taken or resort to any subterfuge, the appropriate course of action for the Investigating Officer was to approach the Magistrate for necessary orders in accordance with section 5 of the Identification of Prisoners Act, 1920. In *Mohd. Aman v. State of Rajasthan* (1997) 10 SCC 44 this Court referred to the possibility of the police fabricating evidence and to avoid an allegation of such a nature, it would be eminently desirable that fingerprints were taken under the orders of a Magistrate. We may add that this would equally apply to the creating evidence against a suspect. This is what this Court had to say: Even though the specimen fingerprints of Mohd. Aman had to be taken on a number of occasions at the behest of the Bureau, they were never taken before or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. It is true that under Section 4 thereof police is competent to take fingerprints of the accused but to dispel

61 (2005) 11 SCC 600.

62 2015 LawSuit(Del) 5512.

63 (191) 2012 DLT 225.

64 (1980) 2 SCC 343.

65 2014 (5) SCALE 83, para 46.

any suspicion as to its bona fides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate.

Thus the *Prakash* case has affirmed and upheld that specimen fingerprints taken by the police are admissible and therefore, judicial evidence which can be used to prove facts in issue or facts from which inference as to the facts in issue can be drawn. Admissibility of evidence and manipulation or creation of false evidence should be distinguished and differentiated. However, hegemonic powers of investigating agencies, especially in evidence collection need to be watched and responsibility of intentionally erring investigating officers must be fixed for ensuring transparency in investigation.⁶⁶

Effect of negative forensic report

Due to various reasons, many a times the biological samples collected from the scene of crime, recovered from artefacts and from the victim, fail to connect the accused. The High Court of Delhi has dealt with several issues related to forensic evidence in *Mithlesh Kumar Kushwaha v. State (NCT Delhi)*.⁶⁷ It referred to *Jagroop Singh v. State of Punjab*,⁶⁸ whereby the Supreme Court held that once the recovery is made in pursuance of the disclosure statement of the accused under section 27 of the Indian Evidence Act, 1872, the matching or non-matching of blood group(s) loses significance. The issue with regard to the effect of failure to match the blood on the article with the blood group of an injured/deceased person has been authoritatively considered by the Supreme Court in *Sunil Clifford Daniel v. State of Punjab*.⁶⁹ It has been observed that a failure by the serologist to detect the origin of the blood due to disintegration of the serum does not mean that the blood stuck on the axe would not have been human blood at all. Primary evidence along with corroborative evidence, in fact, in totality help the court in upholding guilt or innocence during criminal adjudication.

Plea of termination of pregnancy and DNA evidence

Protection of mentally challenged women from sexual exploitation is a challenge warranting urgent attention and sensitisation of all stakeholders of judicial system. Sometimes as a consequence of rape, such victims become pregnant and in various petitions, the sensitive issue of termination of foetus is raised, posing a dilemma of choosing between long standing 'pro life' and 'pro choice' debate before the court.⁷⁰ In India, section 3 of the Medical Termination of Pregnancy Act, 1971 deals with

66 *Supra* note 30.

67 2015 (4) CurCriR 261.

68 (2012) 11 SCC 768.

69 (2012) 11 SCC 205 : 2012 (8) SCALE 670.

70 Randy Alcorn, *Pro-Life Answers to Pro Choice Arguments*, (Multnomah Books, Colorado Spring, 2009)

termination of pregnancy including rape induced pregnancy by a registered medical practitioner.⁷¹

The preservation of biological samples of the foetus before termination of rape induced pregnancy is a vital step for forensic analysis to nail the accused. However, it is of utmost importance that forensic inviolability of such samples must be ensured so that at later stage, any procedural lapse should not frustrate the result of forensic report. In *Anand Manharlal Brahmhatt v. State of Gujarat*,⁷² the trial court ordered to preserve the DNA sample of the foetus and the victim after termination of the pregnancy of an orphaned, mentally challenged woman. The matter came up before the High Court of Gujarat to issue guidelines on medically assisted termination of pregnancy in cases of such women. Since the pregnancy was already terminated, and no cause of action survived for adjudication, the petition was disposed off. Earlier the apex court in *Suchita Srivastava v. Chandigarh Administration*,⁷³ had granted permission to a mentally challenged woman to give birth to a child. Medical practitioners must mandatorily preserve the biological samples of the foetus and that of the expectant mother, observing due process of protecting the chain of custody in the interest of justice. The attention of the apex court is humbly drawn to formulate specific guidelines on the fate of rape induced pregnancy.

Rape victims and children born to them face socio-legal stigma and their rehabilitation remains a challenge before law, society and State. A petition for ordering termination of pregnancy was filed in the Lucknow Bench of High Court of Allahabad by the father of a rape victim, aged about 13 years, citing the recent judgement of the apex court⁷⁴ and to conduct DNA test of the foetus for the purpose of evidence and trial.⁷⁵ Factum of the case include the allegation on a minor boy of forcibly raping the girl resulting in pregnancy which was noticed by the girl's parents at an advanced stage. The medical board found teenage pregnancy of 7 and ½ months (30-32 weeks) and refused termination due to very high risk involving physical health of the girl. The hapless victim suffered from "Rape Trauma Syndrome" (RTS).⁷⁶ The child was

71 S. 3 (2)(i) MTP Act, 1971 the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health. Explanation-1: Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

72 2015 LawSuit(Guj) 2786.

73 (2009) 9 SCC 1.

74 *Chandra Kant Jayanti Lal Suther v. State of Gujarat*, 2015 SCC OnLine SC 668.

75 "A" through her father "T" v. *State of U.P.*, 2015 (10) ADJ 602 : 2016(1) ALLJ625 : 2016 (1) CRIMES (HC) 1.

76 Rape Trauma Syndrome (RTS) is psychological trauma experienced by a rape victim that includes disruptions to normal physical, emotional, cognitive, and interpersonal behaviour. The theory was first described by Psychiatrist Ann Wolbert Burgess and Sociologist Lynda Lytle Holmstrom in 1974. Waddle, Jeffrey T. and Parts, Mark, "Rape Trauma Syndrome: Interest of the Victim and Neutral Experts" 18(1) *University of Chicago Legal Forum* 399-420 (1989).

born but the victim mother and her family refused to rear the child, consequently with the help of NGO and other public spirited persons, child was handed over to a family under valid adoption. Under Indian law, the minor mother is competent to act as guardian of her child and has the capacity to give the child in adoption.⁷⁷ The court granted exemplary compensation of ensuring education and employment to the victim by the State apart from financial assistance to her under section 357-A of Cr.PC. read with the Uttar Pradesh Victim Compensation Scheme, 2014⁷⁸ and Uttar Pradesh Rani Lakshmi Bai Mahila Samman Kosh Rules, 2015.⁷⁹ Robust schemes of rehabilitation may not only enable the victims to regain self confidence but will also ensure *paren patrie* role of a democratic welfare State.

DNA Test in parallel intercourse:

The Criminal (Amendment) Act, 2013 has widened the definition of rape under section 375 of the Indian Penal Code. In investigation of parallel intercourse, DNA plays significant role in ascertaining the truth. In *State (NCT of Delhi) v. Badruddin*,⁸⁰ the accused indulged in penetrative carnal intercourse with nine years old boy who was living in neighbourhood of the accused. In addition to medico-legal certificate (MLC); DNA test was conducted on the anal swab and the blood/semen stain found on the clothes of the victim and it matched with that of the accused. Such clinching evidence corroborated the culpability beyond doubt resulting in conviction of the accused.

Forensic assessment of hair for identification

The hair identification is another vital forensic tool for corroborating crime with criminal. In an appeal against conviction in a case of rape and murder of a girl working as domestic help, medico-legal report established the cause of death as a result of asphyxia due to manual strangulation (throttling). Some hair was recovered from the right hand of the deceased which matched with that of the accused-appellant in forensic morphological hair comparison. In medico-legal report, the accused was found having scratch injuries on his face, neck and chest at the time of arrest a day after the incident. On hair comparison, the High Court of Delhi observed that there is some debate in judicial and forensic field concerning reliability of forensic comparison of hair samples. Some studies in United States do suggest that post conviction DNA testing had resulted in doubts on the results of morphological hair comparisons. These studies observe

77 Guardian and Wards Act, 1890 s.21 reads: Capacity of minors to act as guardian: "A minor is incompetent to act as guardian of any minor except his own wife or child or where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family."

78 Government of Uttar Pradesh, Home (Police) Section-9, Notification No. – 653/VI-P-9-2014-31(90)/2010 dated 09 April, 2014.

79 Government of Uttar Pradesh, Women and Child Development Section-3, Notification No. – 255/60-3-2015-13 (11)/14, dated 06 February, 2015.

80 2015 LawSuit (Del) 2585.

that morphological hair comparisons should be treated as presumptive in nature and should be confirmed by nuclear DNA profiling or mitochondrial DNA sequencing.⁸¹

However, the seizure of hair from the right hand of the deceased in addition broken hair lying on cot was questioned by the defense. Discrepancy found in the seizure memo of hair and report of police team inspecting the crime scene created doubt on the recovery of the hair in the right hand of the deceased and also in casting doubt on the FSL report. The court acquitted the accused giving the benefit of doubt since the chain of circumstantial evidence, the edifice of the prosecution case, was not capable of any explanation other than the guilt of the accused. This proves that procedure in collection of biological samples is extremely crucial and any negligence in maintaining the chain of custody may frustrate the purpose of analysing the forensic evidence.

Consent in voice sample

In the age of Information Technology, forensic analysis of voice has proven significance as corroborative evidence in court proceedings. The issue before the High Court of Delhi in *Sudhir Chaudhary v. CBI*⁸² was whether an accused while reading a text containing certain exculpatory statements was 'compelled to be a witness against himself', barred under article 20(3) of the Constitution of India, 1950 especially so when he himself consented to give his voice sample. Article 20(3) serves as a check on testimonial compulsion during course of investigation; section 161(2) of Cr P C prevent investigators from compelling a person to give self-incriminating statements. However, what is prohibited under article 20(3) is furnishing of information based on personal knowledge likely to lead to incrimination by oneself or furnishing a link in the chain of evidence. The rule against self-incrimination does not prohibit firstly, collection of material evidence such as bodily substances and other physical objects and secondly, statement used for comparison with the facts already known to the investigator. The apex court in *Bombay v. Kathi Kalu Oghad*,⁸³ has settled various issues related to self-incrimination and testimonial compulsion, maintaining a balance between the fundamental rights of the accused and public interest.

In *State (NCT of Delhi) v. Navjot Sandhu*,⁸⁴ it was held that asking an accused to give his voice sample is not violation of article 20(3). In *Rakesh Bisht v. Central Bureau of Investigation*,⁸⁵ the High Court of Delhi has said that voice sample may be permitted only for the purpose of identification. The Supreme Court in *Amit Singh v. State of Punjab*,⁸⁶ held that during course of investigation an accused cannot be

81 *Mani Kumat v. State (Govt. of NCT, Delhi)*, MANU/DE/2410/2015.

82 2016 Lawsuit (Del) 2499.

83 AIR 1961 SC 1808.

84 AIR 2005 SC 3820 : (2005) 11 SCC 600.

85 (2007) 1 SCC 482.

86 2006 (3) SCC 2138.

compelled to provide hair sample. Section 311-A of Cr PC applies only to handwriting specimen and not to voice samples. The High Court of Delhi has held:⁸⁷

A voice sample is like a finger print impression, signature or specimen handwriting. Like giving of fingerprint impression or specimen handwriting by an accused for the purpose of investigation, giving of voice sample for the purpose of investigation cannot be included in the expression “to be a witness.” By giving a voice sample, the accused does not convey any information based upon his personal knowledge which can incriminate him. A voice sample by itself is fully innocuous. It is only used for the purpose of comparing it with the recorded conversation but it by itself is not a testimony at all. By giving a voice sample an accused merely gives an identification data. When an accused is asked to furnish a voice sample he is neither asked nor expected to furnish any statement based on his personal knowledge as would be barred under Article 20(3) of the Constitution of India. The only thing that is required of him while giving a sample is to read from a given text which gets recorded for comparative purpose.

It further held that the voice sample is not, in itself, a substantive piece of evidence. The use of such a sample is limited to the purpose for which it was collected. It cannot be considered in isolation and what is stated therein cannot be admitted as evidence before any court on its own footing. The only use of such a sample is for comparison and no other.⁸⁸

The accused had tendered his consent for recording his voice sample which itself was not evidence to be used in isolation but to be used only for comparison. The court dismissed the petition after observing that once the accused persons have given their consent for furnishing their voice samples, they cannot be allowed to shift their stand again and again. It further states that neither the investigation can be endlessly left at the mercy of the accused nor can the accused be left to lead the investigation. If they want to give voice samples they have to read the statements given to them as per the requirement of the scientific experts. The bar contained under article 20(3) of the Constitution of India would not come to their rescue at this stage.⁸⁹

III CIVIL DISPUTES RESOLUTION

Civil disputes generally involve issue of paternity determination especially for construing rights and duties. Before the advent of surrogacy, motherhood was considered a reality but surrogacy has brought even maternity disputes to courts.⁹⁰ In

87 *Ibid* at 82, para 16.

88 *Id.*, para 17.

89 *Id.*, para 22.

90 G. K. Goswami, *Assisted Reproduction and Conflicts in Rights* (Satyam Law International, New Delhi, 1st edn., 2016)

traditional legal framework, maternity determination had no specific law. Legally, paternity has been a conclusive presumption if child is born within lawful wedlock between validly married heterosexual couples. Further, legitimacy of a child recognises only socio-legal father and biological father has no legal existence especially if the child is born during continuation of lawful marriage or within 280 days of divorce.⁹¹ Since 1991, Indian judiciary has increasingly been placing greater reliance on DNA for administration of justice.⁹² Interestingly, DNA determines biological father but law recognises only socio-legal parentage; this legal paradox which has been witnessed in various judicial verdicts during 2015 and warrants legal discourse.

Paternity disputes vis-a vis equitable justice

The legitimacy of paternity of a child under Indian law is conditioned upon the birth of a child within the period of lawful marriage between the parents.⁹³ Section 112 of the Indian Evidence Act, 1872 determines only the legitimacy of a child but DNA test determines biological (genetic) origin of the child having no statutory bearing on socio-legal status. This conundrum between law and science needs balancing as is reflected in various judgments of constitutional courts in India. In *Goutam Kundu v. State of West Bengal*,⁹⁴ (hereafter called the *Goutam Kundu*) the Supreme Court issued five guidelines emphasizing reliance on section 112, especially in civil disputes of child's paternity and discussed ordering of DNA test only to protect the best interest of the child, for preventing his branding as a bastard and that of the mother as an unchaste women. But such judicial approach caused dissatisfaction amongst many petitioner husbands. Later, the higher judiciary preferred a balancing approach in paternity determination especially when conflict arose between the right of privacy and duty of the court to reach to the truth.⁹⁵

In *Rohit Shekhar v. Narayan Dutt Tiwari*,⁹⁶ (hereinafter called the *Rohit Shekhar*), the court preferred to ascertain the putative father of the petitioner and the respondent was forced to submit blood sample for conducting the DNA test despite his unwillingness. It was a deviation from the *Goutam Kundu* guidelines. The court referred to the judgement of the Court of Appeal (Civil Division) in *Re G (Parentage: Blood sample)*.⁹⁷

Justice is best served by truth. Justice is not served by impeding the establishment of truth. No injustice is done to him by conclusively

91 G. K. Goswami, "The genetic truth of surrogate parentage" 83(4) *MLJ* 188-193 (2015).

92 *Kunhiraman v. Manoj*, 1991 (II) DMC.

93 Indian Evidence Act, 1872, S.112.

94 AIR 1993 SC 2295; (1993) 3 SCC 488.

95 *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women* (2010) 8 SCC 633.

96 AIR 2012 Del 151.

97 *Re H (Paternity Blood Test)*, [1996] 2 FLR 65; *Re G (Parentage: Blood Sample)*, [1997] 1 FLR 360.

establishing paternity. If he is the father, his position is put beyond doubt by the testing, and the justice of his position is entrenched by the destruction of the mother's doubts and aspersions. If he is not the father, no injustice is done by acknowledging him to be a devoted stepfather to a child of the family. Justice to the child, a factor not to be ignored, demands that the truth be known when truth can be established, as it undoubtedly can.

The High Court of Delhi in the *Rohit Shekhar* observed that there was of course the vital interest of child not to be branded illegitimate; yet the conclusiveness of the presumption created by the law in this regard must not act as a detriment to the interests of the child. The protective cocoon of legitimacy should not entomb the child's aspiration to learn the truth of her or his paternity.⁹⁸ The judicial approach in the *Rohit Shekhar* has been advanced in *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik*,⁹⁹ (hereinafter called the *Nandlal Badwaik*) where the Supreme Court, giving precedence to DNA report over presumptive fiction under section 112, has stated:¹⁰⁰

The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. Truth must triumph is the hallmark of justice.

The *Nandlal Badwaik* became pathfinder for the Supreme Court in *Dipanwita Roy v. Ronobroto Roy*,¹⁰¹ (hereinafter called the *Dipanwita Roy*) which upheld the decision of the family court and the high court, allowing DNA test for determining not only the paternity of new born child but also to conclusively test the veracity of accusations of infidelity labelled by the husband in the divorce petition filed in the family court under section 13 of the Hindu Marriage Act, 1955. The apex court was, therefore, firm in holding that proof based on DNA test would be sufficient to dislodge a presumption under section 112. The Supreme Court in the *Dipanwita Roy* upheld DNA test as the most legitimate and scientifically perfect means to prove infidelity of a wife and at the same time to protect the interest of the wife, as it would authentically establish the sexual loyalty of a wife towards her husband and would uphold genetic

98 2011 (121) DRJ 563 2010 : LawSuit(Del) 3529.

99 (2014) 2 SCC 576.

100 *Id.*, para 19.

101 AIR 2015 SC 418 : (2015) 1 SCC 365.

integrity of the child. Thus the *Goutam Kundu* guidelines are now history and judiciary is increasingly using DNA for a variety of disputes resolution.

The trend of “finding the truth of paternity by DNA rather than presumptive legitimacy of child birth under section 112” set by the Supreme Court in the *Nandlal Badwaik*¹⁰² and the *Dipanwita Roy*¹⁰³ has fervently been observed in 2015 by various high courts in deciding paternity disputes. In *Jahir v. Rajan @ Rujjan*,¹⁰⁴ the High Court of Rajasthan has discussed at length the growth of DNA led paternity determination in Indian courts as under:¹⁰⁵

It has become too fashionable and easy in these days to apply to the Court for DNA examination by making a wrong inference that this test which is most scientific for determining paternity issue could be resorted to at the drop of a hat. The issue of a testimonial compulsion and the scope for applying for DNA was considered at length by the Supreme Court in *Goutam Kundu v. State of W.B.* (1993) 3 SCC 418. The Court was considering the effect of Section 112 of the Evidence Act, which is a rule of evidence giving a conclusive proof of legitimacy of a child born through a valid marriage between the mother and any man within a period of 280 days. The Court was cautioning that the conclusive presumption available under Section 112 of the Evidence Act cannot be easily thwarted by resort to application for DNA and exposing a child to the social stigma of bastardization. This judgment came to be considered again at reasonable length in *Sharda v. Dharmpal* (2003) 4 SCC 493, where the Court while even allowing for a DNA test to be made, was setting out the boundaries within which the Court will operate and ensure that the test is made only to assure a legitimacy for a child and when there is a strong proof that there was no sexual access to the mother of the child whose DNA was sought to be appraised.

It has further opined that:¹⁰⁶

There is no change in law to the exposition of the law made by the Supreme Court in the above said two judgments and all the subsequent rulings have come to affirm and re-interpret the very same law. Reliance on the judgment of the Supreme Court in *Dipanwita Roy v. Ronobroto Roy* (2015) 1 Supreme Court Cases 365 ought not to be understood merely from the fact that the Supreme Court was allowing for a DNA test to be given in that case; nor could this be taken to be laying down

102 *Supra* note 99.

103 *Supra* note 101.

104 2015 LawSuit(P&H) 4133.

105 *Id.*, para 3.

106 *Id.*, para 4.

a law that the DNA test which is a scientific one ought to be resorted to in all cases. That it is a scientific test and the result is bound to be close to 100% accurate admits of no doubt at all but when the Courts intervene, it ought to be convinced that there is a very strong *prima facie* case for an application before it orders DNA test.

In *Chinta Madhu Sudhana Rao v. Chinta Naga Lakshmi*,¹⁰⁷ the trial court ordered for DNA test to ascertain the alleged paternity of the child born to a woman claiming herself to be the legally wedded wife of the petitioner who denied the claim and declared himself to be already married, having children as well. Relying upon the ratio propounded by the Supreme Court in the *Bhabani Prasad Jena*,¹⁰⁸ the High Court of Andhra Pradesh allowed for conducting the DNA test to know the truth of paternity of the child.

On the similar grounds, a divorce was granted by the family court since the defendant wife was found causing physical harassment to the petitioner-husband and his family and also causing mental agony to him by her adultery. The father of the wife registered a frivolous criminal case of cheating and demand for dowry against the husband and his family members in order to harass them. The husband's plea of having no sexual access to the wife when the alleged child was conceived stood corroborated by DNA test. The wife contended that she was living with her husband as required under section 112 for conclusive presumption of legitimacy of the child. The High Court of Punjab and Haryana referred to the observation by the apex court in *K. Srinivas Rao v. D. A. Deepa*,¹⁰⁹ where it was opined that if a false criminal complaint is preferred by either spouse it would invariably and indubitably constitute matrimonial cruelty and it would entitle the other spouse to claim a divorce. The high court dismissed the appeal of the wife against decree of divorce and observing that when the scientific reports proved to the contrary, the respondent could not be compelled to bear the fatherhood of the child. Accordingly, the court held that the act and conduct of the appellant even when she was living with the respondent was such that she caused him grave mental cruelty.¹¹⁰

However, the High Court of Karnataka in *Hanumappa v. Yallakka*,¹¹¹ followed the ratio propounded by the apex court in the *Goutam Kundu*¹¹² for not ordering DNA test mechanically until strong *prima facie* genetic proof was required to rebut the presumption under section 112 of the Evidence Act, 1872. The ratio in the *Hanumappa* case was followed by High Court of Karnataka in *K. M. Suma v. Manjula*¹¹³ while

107 2015 SCC OnLine Hyd 219 : AIR 2015 AP 131 : 2015 (5) ALT 580.

108 *Supra* note 95.

109 2013(5) SCC 226.

110 *Pooja Sharma v. Vikrant Sharma*, 2015 LawSuit (P&H) 2757 : 2015 (3) RCR (Civ) 174.

111 (2015) (1) Kar LR (Civ) 246 : 2015 (2) SCC 292.

112 *Supra* note 94.

113 2015 LawSuit(Kar) 3455.

ordering DNA test under order 26 rule 10 of CPC for resolving dispute related to partition and separate possession of the property.

In *Dheeraj Gada v. State of Madhya Pradesh*,¹¹⁴ the husband recorded a mobile phone conversation between his wife and her paramour proving their illicit relationship and subsequent DNA testing proved that the husband was not the biological father of the son. Interestingly a criminal case was lodged by the father of the husband under section 406, 120-B and 497 of IPC and during investigation, prosecution filed an application before the judicial magistrate seeking DNA test of mother, paramour and child. The application was dismissed stating that section 497 of IPC does not deal with the issue of biological fatherhood of a child. This was at variance with the facts of the judgement in the *Rohit Shekhar*.¹¹⁵ The petitioner prayed before the High Court of Madhya Pradesh to conduct DNA test based on the principle laid down in the *Nandlal Badwaik*. The respondent raised the issue of *locus standi* since a case under section 497 of the IPC may be instituted by none other than the husband and the child in question not being an accused, could be compelled to submit blood sample for DNA test.

In this case, the legal issue before the court was whether a child, who is not an accused in a criminal case under section 53A of Cr. PC, can be compelled to give blood sample for DNA testing and whether orders under section 53A Cr. PC can be passed after the investigation is concluded. In the *Nandlal Badwaick*¹¹⁶ and the *Dipanwita Roy*,¹¹⁷ the apex court had validated the order of the family court for conducting DNA test however, both these cases were civil in nature and DNA Profiling had been used to ascertain paternity of the child and to examine allegations labelled against the wife for adulterous relationship. The High Court of Madhya Pradesh held that after filing charge-sheet in the court, findings of the DNA report may be submitted before the court by way of supplementary charge-sheet under section 173(8) of Cr PC. The court further observed:¹¹⁸

So far as the criminal case is concerned as observed above section 53 of CrPC permit taking samples from the body of the accused persons for the purpose of conducting DNA test and so the ratio of Nandlal Wasudeo Badwaik case (supra) applies on criminal cases as well. Similarly, in Dipanwita Roy case (supra) the same principle was reiterated and, therefore, now it is an established principle that for ordering DNA test to ascertain paternity of a child, the presumption under section 112 Evidence Act is not a bar in appropriate cases. However, it appears from the observations of the Apex Court that such order should not be passed mechanically.

114 2015 LawSuit(MP) 785.

115 *Supra* note 96.

116 *Supra* note 99.

117 *Supra* note 101.

118 *Supra* note 114 para 13.

In a *habeas corpus* petition,¹¹⁹ the petitioner - father had alleged the respondent - mother of selling their newborn child and prayed to hand over the custody of the child to him. The respondent - mother denied any marriage with the petitioner and disclosed that after the birth, the child was given in adoption. The DNA report proved that the petitioner and the respondent were the biological parents of the girl child. The petitioner's claim of marriage with the respondent was found invalid since the petitioner professed Christianity, which does not permit dissolution of marriage and a mere deed of divorce bilaterally executed between the first wife and the petitioner could not dissolve the marriage. In such a situation, any subsequent marriage of the petitioner with the respondent stood invalidated, since neither was it solemnised as per the provisions of the Special Marriage Act, 1954, nor were the two in a live-in relationship. A third party custody under adoption which was not valid in accordance with the existing laws, was also found illegal considering the best interests of the child. Thus, the custody of the child was given to the respondent-mother by the high court.

The High Court of Punjab and Haryana in *Bijender v. Manjeet*,¹²⁰ upheld the order of the trial court on the prayer of the husband for conducting DNA test to determine paternity of the child. The high court observed that ordering DNA test does not violated the basic principles laid down in the *Goutam Kundu* as contended by the wife. In *Kailash Devi v. Pyare Lal*,¹²¹ the petitioner-wife filed an appeal to conduct the DNA test of the accused husband and his illegally wedded wife and the children begotten to them from such a marriage, the High Court of Punjab and Haryana observed that the DNA test can prove the physical relation between the two individuals, as a result of which the children have born but the legality or illegality of marriage cannot be proved by DNA test.¹²²

Thus in paternity determination, DNA has widely been used transgressing the boundaries of section 112 in search of the 'truth' of genetic lineage. It is interesting to note that legislative intent appears to promote and acknowledge the social face of parentage rather than biological reality of the conception of a child. Indian judiciary has overemphasized on genetic ancestry even for children born within lawful wedlock which may cause irreparable damage to the 'doctrine of the best interest of the child', as propounded by the apex court in the *Gautam Kundu*.¹²³ The judiciary is yet to reflect upon the issue of who shall be the father of such a child because till date, law entertains no distinction between socio-legal and biological fathers but DNA demands such a classification in the legal framework. The diffused paternity may lead to bewilderment in existing laws on inheritance. Further, the judicial approach in the *Dipanwita Roy* may jeopardise the liberal movement for women emancipation and

119 *Solomon Thangaraj v. The Commissioner of Police, Madurai*, MANU/TN/3491/2015.

120 2015 SCC OnLine P&H 13586.

121 2015 LawSuit(P&H) 7419.

122 *Id.*, para 5.

123 *Supra* note 94.

enabling their sexual rights. In the era of assisted reproduction, where womb, sperm and ovum are readily available in the reproduction market, time is ripe for raising the issue of maternity determination for which law has no answer at present. Thus law of parentage determination as a whole demands a legal overhaul to cope with the advancement in science and emerging social changes. DNA must be used for assisting court in advancing justice and not for causing confusion in the society.

Based on the cardinal principle of protecting the best interest of the child as propounded by the apex court in various pronouncements,¹²⁴ the High Court of Punjab and Haryana in *Yakshi v. Sanjay Jangra*¹²⁵ has refused to order DNA test. In this case the petitioner-son submitted that the husband of his mother was impotent and on the insistence of her mother-in-law, she started living with the defendant (brother of her husband) and had begotten the petitioner by the loins of the defendant and the petitioner (son) placing reliance on the judgment of the apex court in the *Dipanwita Roy*¹²⁶ and the *Nandlal Badwaik*¹²⁷ demanded to conduct a DNA test. Interestingly, this case has facts similar to the *Rohit Shekhar*¹²⁸ demanding for determining DNA led third party biological fatherhood despite having admission of being born within lawful wedlock. Unlike *Rohit Shekhar*, the high court upheld the order of the trial court of refusing DNA test after carefully examining the consequence of DNA test which may potentially brand the plaintiff as a bastard and his mother as an unchaste woman.

The demand for conducting DNA test of the plaintiff to determine his paternity since his mother had admitted that he was not the son of her husband was rejected by the trial court and hence the matter was brought before the High Court of Madhya Pradesh in *Noor Mohammad v. Ramser @ Samsar Ansari*.¹²⁹ Here the DNA test was opposed by defendants on plea that the plaintiff was born after due solemnization of marriage and cohabitation of the husband and the wife. The high court upheld the order of trial court for refusing DNA test since the child was born after marriage and after cohabitation between the parties.

It is respectfully submitted that judicial approach even now has two different folds while dealing with paternity disputes within the ambit of legitimate wedlock. Firstly, the *Gautam Kundu*¹³⁰ whereby reliance is placed on section 112 and secondly, the two cases namely *Nandlal Badwaik*¹³¹ and the *Dipanwita Roy*¹³² emphasizing on

124 *Goutam Kundu v. State of West Bengal* (1993) 3 SCC 488; *Kanti Devi v. Poshi Ram* (2001) 5 SCC 311; *Kanchan Bedi v. Gurpreet Singh Bedi*, AIR 2003 Delhi 446; *Ramkanya Bai v. Bharatram* (2010) 1 SCC 85; and *Master Manoj v. Bhuvnesh Gupta @ Bhanu* (2014) 210 DLT 161.

125 2015 SCC OnLine P&H 14927.

126 *Supra* note 101.

127 *Supra* note 99.

128 *Supra* note 96.

129 2015 LawSuit(MP) 1589.

130 *Supra* note 94.

131 *Supra* note 99.

132 *Supra* note 101.

DNA test for establishing 'genetic truth'. The existing state of legal interpretation needs unified legislative prescription to avoid jurimetric embargo.

Consent for biological sample vis-as vis Paternity Determination

In civil jurisprudence, consent of the subject plays a dominant role and in the *Gautam Kundu*¹³³ for DNA test and the *Selvi*¹³⁴ for any forensic evidence, emphasis was given to collect biological sample of the subject only after receiving free and informed consent. But the *Rohit Shekhar*¹³⁵ has witnessed a digressed approach from this vital principle and here the defendant Narayan Dutt Tiwari was compelled to give blood sample for conducting DNA test. In 2015, the Indian judiciary faced several cases involving consent component for submitting DNA sample for paternity determination. In a revision petition *Karupayee v. P. Kannan*,¹³⁶ the status of petitioners as wife and daughter of the respondent was disputed and the order of the family court was challenged, demanding DNA test of the respondents for the purpose of proving the paternity of the minor child. The respondent initially consented to a DNA test, but later it was contended by him that he gave the consent without knowing its consequences and therefore, was not willing to undergo the test anymore. On the refusal of consent to face DNA test, the High Court of Madras observed:¹³⁷

The grounds stated for dismissing the petition are unwarranted. It is made clear that if the respondent is not willing to subject himself to DNA test, it is always open to the Family Court to draw only the adverse inference and not to compel the respondent, but if he is willing to undergo DNA test, the Family Court has no option to refuse. The Family Court has accepted the reason offered by the respondent and has chosen to dismiss the petition.

Therefore the high court remanded the matter back to the family court leaving it open to the Family Court to draw adverse inference having regard to the totality of the facts and circumstances, in case the respondent continued to refuse the conduct of DNA test.

Judicial response to repeat DNA Test

The accused or defendant, in cases where DNA report is adverse, often demand repetition of DNA test on various grounds of procedural lapse namely, extracting of blood samples, breakage of chain of custody *etc.* Several petitions to resolve this issue have been decided by the higher courts in 2015. In *Pandya Hashmukhbhai Ambalal v. Pandya Sharmistha Hashmukhbhai*,¹³⁸ the petitioner husband filed divorce

133 *Supra* note 94.

134 *Supra* note 47.

135 *Supra* note 96.

136 2015 SCC OnLine Mad 8189.

137 *Id.*, para 6.

138 2015(2) MLJ (Cri) 39.

petition accusing the wife of leading a promiscuous life and denying himself as being the biological father of the three children born to her. The DNA test falsified the allegation but the petitioner challenged the DNA results, alleging some procedural lapses leading to incorrect conclusion. Considering the act of petitioner-husband as not only an abuse of law but also an insult of his wife, the high court dismissed the writ with cost. For ordering a second DNA Test, the High Court of Madras has laid down certain guidelines listed below:

- i) The Courts cannot compel the parties to undergo DNA test for the second time;
- ii) The first DNA test cannot be treated as doubtful or set aside merely on the basis of bald and vague allegations made by the party against whom the result of the said test was declared;
- iii) When already a DNA test report is available, there is no need to order second DNA test unless it is proved by the party who raised objections, that it has been exposed to reasonable degree of suspicion and the said report has been obtained by influencing the Expert who gave the report;
- iv) Direction to conduct DNA test more than once cannot be granted since it would lead to unhealthy practice where the parties repeatedly seek to send the sample till they get a favourable report and different reports may also lead to confusion;
- v) DNA test report is only a piece of evidence (though of course a strong piece of evidence) in determining the paternity of a child, but it is to be noted that the said report is to be analysed along with the facts and other evidence to be adduced by the parties in support of their case. It is always open to them to raise objections regarding the DNA test during the course of trial;
- vi) In order to avoid unnecessary doubts in the minds of the parties, it is necessary that the blood samples of the parties concerned are to be taken in the presence of each other and sent to the lab and the entire process is to be recorded by video at the expenses of the party who is interested in such video recording.

A revision petition for fresh DNA test casting a doubt on the previous sampling of blood was dismissed since no discrepancy was observed by the high court in sample collection.¹³⁹ In *Abdul Rahuman v. State represented by the Inspector of Police, Valliyur, Thoothukudi*,¹⁴⁰ the accused faced DNA test to ascertain whether the child born to prosecutrix was a result of alleged forced sexual relationship arising out of

139 *Ramesh @ Ramesh Kumar v. State by the Inspector of Police, Coimbatore*, MANU/TN/2301/2015.

140 2015(5) MLJ 218.

deceitful promise of marriage. DNA Profiling excluded the accused as biological father of the child in question. The complainant requested for DNA retest which was accepted by the learned trial court while giving opportunity of hearing to the accused also. Revision was filed by the petitioner-accused by placing reliance on *S. Veeralakshmi v. The Superintendent of Police, Madurai*,¹⁴¹ and *Sakhivel v. Karpagam*,¹⁴² where the court had held that the second DNA test cannot be ordered in absence of any reasonable defect in the earlier report. Since the order passed by trial court to conduct DNA test again had no mention of any infirmity in the earlier DNA report, the order was set aside by the high court.

DNA evidence in maintenance claims

In divorce and maintenance petitions, husbands generally allege their wives of leading an adulterous life and deny the biological fatherhood of the children. The apex court, in the *Dipanwita Roy*, on the behest of the petitioner-husband seeking divorce, had preferred DNA test going beyond the legal boundaries under section 112 for ascertaining the alleged paternity of the child to prove infidelity of the wife. DNA test on same pretext is used by husbands for avoiding maintenance especially for a child begotten by alleged adulterous conduct of the wife. However, in *Shamima Farooqui v. Shahid Khan*,¹⁴³ the Supreme Court has opined:¹⁴⁴

There can be no shadow of doubt that an order under Section 125 Cr.P.C. can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometime, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. There are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 Cr.PC, unless disqualified, is an absolute right.

In 2015, several cases appeared before constitutional courts of India demanding DNA approval to ascertain the paternity of the child to avoid payment of maintenance by the husband. In *Bilendra Sahu @ Birendra Sahu v. The State of Jharkhand*,¹⁴⁵ the High Court of Jharkhand has observed that the settled principles is that when the petitioner had the means to pay for the cost of DNA test, the presumption is that he has sufficient income which he did not disclosed. However, he cannot get rid of his

141 2015 (2) Mad LJ (Cri) 39 : 2015 (1) LW(Cri) 202.

142 (2005) 3 MLJ 483.

143 (2015) 5 SCC 705.

144 *Id* para 15.

145 2015 LawSuit(Jhar) 1789.

moral responsibility to maintain his wife and minor daughter. Accordingly the high court directed the petitioner husband to pay the maintenance allowances as ordered by the trial court. To counter the maintenance petition, the husband demanded for DNA test of the child for determination of paternity. The high court permitted the test since wife had consented for submitting blood samples of herself and the child but the court ordered for the cost of DNA test to be borne by the husband.¹⁴⁶

In *Senthil Andavar v. Muthumari*,¹⁴⁷ a maintenance suit filed on behalf of the wife and her two children, it surfaced that the alleged respondent husband was already married but both petitioner and the respondent had intimacy and one child was born out of their illicit sexual liaison. As they subsequently had apart, the second child in question needed paternity determination. The petitioner (alleged biological father) requested for DNA test by referring the *Nandlal Badwaik*.¹⁴⁸ The High Court of Madras allowed the DNA test and observed as under:¹⁴⁹

Section 112 of the Evidence Act speaks of presumption of legitimacy of the child born during the subsistence of a marriage so long as the marital relationship continues. But in the instant case, such presumption under Section 112 cannot be raised, because there is no valid marriage between the first respondent and the petitioner. Though the said marriage is not valid, in the event, if the petitioner happens to be the biological father of the third respondent, still he is liable to pay maintenance, because as per Section 125 of Cr.P.C., the illegitimate child is also entitled for maintenance. Therefore, the fundamental question is whether the petitioner is the biological father of the third respondent or not. Though the procedure to be followed under Section 125 of Cr.P.C., is summary in nature and though the decision on the question of paternity arrived at by the Magistrate is not conclusive, such a question is to be conclusively decided only by the competent civil Court, as held by the Supreme Court in *Nandlal Wasudeo's* case, even for the purpose of ordering for payment of maintenance, the paternity is to be proved. When there is denial, as held by the Supreme Court, the child may be subjected to DNA Test.

In a maintenance case, the petitioner under article 227 of the Indian Constitution, prayed for conducting DNA test stating that the defendant is neither wife nor concubine of the petitioner.¹⁵⁰ The High Court of Orissa ordered for conducting DNA test of both petitioner and the defendant by referring *Parayankandiyal Eravath Kanapraavan Kallianamma v. K. Devi*.¹⁵¹

146 *John Bosco v. Ezhilrani*, 2015 SCC OnLine Mad 8225.

147 MANU/TN/1617/2015.

148 *Supra* note 99.

149 *Supra* note 146 para 17.

150 *Sulochana Sahoo v. Baman Charan Sahoo*, MANU/OR/0440/2015

151 (1996) 4 SCC 76.

DNA test in resolving property dispute

In the recent past, a rising trend of use of DNA for ascertaining genetic linkages for inheriting property has been observed in Indian courts. In *Jasbir Singh @ Gogga v. Parmod Kumar*,¹⁵² the High Court of Punjab and Haryana observed that a balance must be observed by the court in the interest of the parties clearly lies in its duty to reach the truth and to “follow truth wherever it may lead”.¹⁵³ The apex court in *ABC v. The State (NCT of Delhi)* has granted natural guardianship of a child to an unwedded mother since she maintained privacy of her sexual liaison with a married man. However, in such a situation, if the child wants to know his father at subsequent stage, then the privacy right of the mother may potentially clash with the child’s right to know her parentage.¹⁵⁴

IV COMMON ISSUES IN CRIMINAL AND CIVIL MATTERS

In forensics, several issues are common to both civil and criminal proceedings which have been addressed by higher judiciary in India during the year 2015.

DNA test not a matter of right

Forensic evidences including DNA assist the court in reaching to the truth but order of conducting such test needs application of judicial mind. No party to the *lis* has an inherent right to conduct forensic test as has been decided in the case of the *Selvi* and the *Dipanwita*. In *Joydeb Dey v. Smt. Mousumi Bose (Dey)*, a petition for substitution of legal heirs, the defendant under section 151 of Cr PC demanded DNA test.¹⁵⁵ During the life time of the deceased, the controversy of heir was never raised despite the fact that rights claimed by parties were joint. The High Court of Calcutta referred to the *Dipanwita* case wherein the apex court was of the opinion that the DNA test cannot be claimed as a matter of right in as much as a party cannot be compelled to undergo it.¹⁵⁶ The high court, in the light of plethora of evidence in favour of the defendant, upheld the judgement of the trial court and dismissed the revision application praying for DNA test.

Failure of depositing cost for DNA test

In criminal matters, the responsibility of evidence collection including forensic tests lies on the prosecution and cost is borne by the state. But, in civil suits, the cost for conducting forensic test, in general, is borne by the party which demand for the test. In paternity disputes filed by the husbands, the courts order DNA test to find the truth of genetic affiliation between the alleged father and the child, and cost of the

152 2015 SCC OnLine P&H 5629.

153 *Id.*, para 16 whereby the parenthesis “follow truth wherever it may lead” was used by Chief Justice Bronson, New York Supreme Court in *Pierce v. Delamater* 1 NY 3 (1847): A.M.Y. at 18.

154 2015 (5) CTC 547.

155 2016 LawSuit(Cal) 1319.

156 *Supra* note 101, para 22.

test is ordered to be paid by the husband. Sometimes, the husband fails to pay the cost which delays the court proceedings and frustrate the process of justice. In maintenance petition *Geethavani @ Geetha Reddy v. J. N. Gurappa Reddy @ G. Reddy*,¹⁵⁷ the family court directed to conduct DNA test for ascertaining the disputed paternity of child but the husband failed to deposit the cost for the test. Based on the provisions as envisaged under section 114(g) of the Indian Evidence Act 1872, adverse inference could have been drawn by the family court. The High Court of Karnataka remitted the case for fresh consideration based on the DNA Report.

In *State of Karnataka v. Pradeep @ Pradeep Koraga*,¹⁵⁸ the defendant was accused of rape and prosecutrix got pregnant but the defense argued of false implication due to enmity between the two families and blamed the brother-in-law of the prosecutrix for being responsible for her alleged pregnancy. The accused applied for conducting DNA test in order to establish the truth of his genetic affinity with the child born to the victim. The Trial court recalled the order for DNA test since prosecution was not ready to bear the cost involved in conducting DNA test. Finally, the trial court acquitted the accused. The high court remanded the matter to the trial court observing that it is for the prosecution to prove its case and the DNA test must have been conducted at the expense of the state particularly when the material on records may require corroboration.¹⁵⁹

In *Binod Tirkey v. The State of Jharkhand*,¹⁶⁰ during investigation of allegation of rape, the cost of DNA test was not deposited by the accused to determine the paternity of the child, so the test was never conducted. The court held that in criminal case, it is the duty of prosecution to get the DNA test conducted for proving the accusation of rape beyond a reasonable doubt. The bail application by the court was rejected since the petitioner - accused had not demanded before investigating agency to conduct DNA test and prosecutrix had reasonably adduced the allegations.

DNA sample in criminal and civil matters

Section 53A of Cr PC enables the prosecution to draw biological samples of the accused of rape even by using required force for the DNA test but in other criminal and civil matters the consent of the subject is necessary as propounded by the apex court in the *Selvi*.¹⁶¹ However, the court may draw adverse opinion in case of unreasonable refusal to undergo DNA test by the accused. The High Court of Delhi dismissed the petition for further investigation for want of proper identification of the recovered dead body on the ground that the petitioner and his wife refused to submit their blood samples to identify the dead body of their deceased-daughter.¹⁶²

157 MANU/KA/0012/2015 : 2015 LawSuit(Kar) 1283.

158 MANU/KA/2387/2015.

159 *Id.*, para 9.

160 2015 LawSuit(Jhar) 1787.

161 *Supra* note 47.

162 *Mangtu Ram v. Govt. of NCT of Delhi*, 2015 SCC OnLine Del 11616.

Prosecutrix of Sujata Pradhan v. The State of Jharkhand,¹⁶³ alleged the accused of indulging in forced sex with her several times resulting into the birth of her child. The accused prayed before the court to conduct DNA test to prove the fact. Two witnesses testified citing ulterior motive as reason behind the false implication of the accused and the accused was acquitted. The appeal was dismissed for want of merit since the prosecutrix had denied conducting DNA test of the child born to her, which created strong doubt over the testimony of the prosecutrix as sterling witness.

Referring to the *Dipanwita Roy*, the High Court of Madhya Pradesh in *Subhendu Maity v. Sushma Nayak*,¹⁶⁴ observed that it has to be understood that the issue sought to be covered by the proposed DNA test would pertain only to the question of determination of the biological paternity of the female child and in no way the same would have any bearing on the question whether or not the child is actually legitimate since the alleged marriage between the parties is an entirely different question for consideration.

On the other hand, in *Saji Mathew v. Bindu*,¹⁶⁵ in a petition related to divorce and maintenance, the husband alleged his wife of leading an adulterous life and demanded DNA test for determining paternity of the second son born to his wife. The petitioner submitted that merely because they are living under the same roof does not mean that he had cohabited with the first respondent. The presumption under section 112 of the Evidence Act can be rebutted only by adducing scientific evidence contemplated by the DNA test. The trial court denied the DNA test; hence the husband preferred appeal. The High Court of Kerala relying upon the *Nandlal Badwaik* allowed the DNA test.

V CONCLUSION

Forensic evidence has emerged as a steadfast investigating tool for corroborating ocular witness and has helped judiciary in ensuring fairness in delivery of justice. In court of law, ocular evidence receives primacy over forensic evidence.¹⁶⁶ In case eyewitness for the prosecution is totally inconsistent with the opinion of the forensic expert, it may amount to a fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case.¹⁶⁷ Hence there must be functional synergy between ocular and forensic evidence to prove the accusation beyond reasonable doubt.

Indian courts have increasingly placed greater reliance on forensic evidence in addition to other conventional testimonies. In criminal matters, DNA evidence as 'gold standard' have manifold applications like identification of victim and linking

163 2015 LawSuit(Jhar) 1788.

164 2015 LawSuit(Cal) 1577.

165 2016(2) KHC 907 : 2016(2) KLJ 777.

166 *Abdul Sayeed v. State of Madhya Pradesh* (2010) 10 SCC 259.

167 *Ram Narayan Singh v. State of Punjab*, AIR 1975 SC 1727; *State of Haryana v. Bhagirath* (1999) 5 SCC 96; and *State of Rajasthan v. Daud Khan*, 2015 LawSuit (SC) 1095.

crime with criminal with greater precision. DNA has scrupulously been used as a 'truth machine' in establishing paternity disputes even for a child born within the lawful wedlock, thus crossing the borders of section 112. During 2015, a mixed judicial approach has emerged for deciding the paternity dispute on the basis of the *Goutam Kundu*¹⁶⁸ and the *Nandlal Badwaik - Dipanwita Roy* cases but having preference for DNA led biological truth of pregnancy has overshadowed the legislative intent enshrined under section 112, which so far was the standalone existing law on the subject under Indian legal panorama.

Peeping through DNA lens into the bedrooms of legitimate connubial couples may potentially abridge sacred right to privacy and sexual right. It may also cause the child to become 'fatherless' and may excuse the legally wedded husband of the mother from the liability of fatherhood. It is not clear so far as to who, then, shall be 'the father' of such a child and how the rights and duties including inheritance shall be decided. In cases of diffused parentage, the sexual and reproductive autonomy of the female and the right of child to know parentage may potentially clash and this needs judicial and legislative review. Moreover, assisted reproduction has introduced multiplicity of parentage,¹⁶⁹ which needs legal answers for parentage determination and succession in a progressive society like India.

The issue of consent of the subject for facing various forensic tests as discussed in the *Selvi*¹⁷⁰ needs scrupulous legal discourse to ensure equitable justice between individual's right of privacy and the public interest. Judicial elucidation of the survey year reflects of ordering DNA test in civil disputes parallel to section 53A of Cr.PC. but this provision is exclusively meant for collecting DNA sample from the arrested accused of rape during criminal proceedings. Thus judicial attention is necessitated to reflect on the vital jurisprudential issue related to collection of biological sample both for civil and criminal matters.

At present, several forensic tools are used in judicial process but many of these have no legal standing in the list of experts enshrined under Indian legal lexicon. It is humbly suggested that section 45 of the Indian Evidence Act, 1872 and section 293 of Cr PC should incorporate DNA and other forensic experts in order to validate the expert opinion. Further the paternity of child born to a rape victim may be decided by DNA for establishing culpability, but on the civil side, can the child claim the rights as son of the rapist is still an unresolved issue, wanting legal interpretation and legislative response. Thus in the interest of justice, time appears to be ripe to issue guidelines for conducting DNA test in heinous crime like rape and the matter not to be left for cherry picking by the investigating agency.¹⁷¹

168 *Supra* note 94.

169 *Supra* note 90.

170 *Supra* note 47.

171 G. K. Goswami, "Fair and Participatory Investigation in Sexual Offences: Gate for access to Justice" Syed Umarhathab (ed.) *Conference Proceedings - 38 Annual Conference of the Indian Society of Criminology* Oct. 15 and 16, 2015, Tirunelveli, Tamil Nadu, India 130-135 (Bonfring, ISBN 978-93-85477-26-3, 2015).