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Admissibility of DNA Test under Article 20(3) of the Indian Constitution

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The article presents DNA as one of the crucial tools for identifying whether the accused has or has not committed a particular crime. The utilization of DNA as evidence in criminal cases has recently achieved great exposure in Indian law. The accused is subjected to a DNA test in the matter of sexual offence or rape cases but with utmost care and expertise under the guidance of a medical practitioner. However, the statutes and legislation for DNA tests have not been clearly defined under the law thus making the court subjective regarding its admissibility on constitutional grounds of the Right to Privacy and the Right against Self Incrimination under Article 21 and Article 20 (3) as enshrined in the Indian Constitution. This article sheds light on a discussion of various case laws and court judgments thus stating the admissibility of DNA tests in the legal system followed by a conclusion and recommendations.

Keywords: *criminal law, criminal justice, dna profiling.*

INTRODUCTION

According to Black's Law Dictionary, the word 'Self Incrimination' is defined as an act or declaration that occurs during an investigation where a person or witness or accused exposes or implicates oneself to criminal prosecution. It is directly linked to Article 20 (3) of the Indian Constitution which provides resistance to an accused against self-incrimination and is therefore

stated: “No person accused of any offence shall be compelled to be a witness against himself”¹. It is based on the legal maxim “*Nemo tenetur provider seipsum*”² which means “No man is obliged to be a witness against himself”. This privilege is conferred upon the accused based on the “doctrine of presumption of innocence” which is treated as the pivotal component in the administration of criminal justice.

The scope of this immunity has been expanded by the Supreme Court by interpreting the word “witness” to cover oral as well as documenting evidence to confirm the presence of Article 20 (3). It is made clear by the Supreme court that to claim this immunity from making the self-incriminating statement, a formal accusation must be made against the person at the time of interrogation rather than a person who becomes accused after a recording of the statement. The scope of Article 20 (3) as observed by the Supreme court in *MP Sharma vs Satish Chandra*³, presents the following essentials:

- A. Conferred to the right of a person who is accused of an offence.
- B. Acts as a protection against the “compulsion to act as a witness”.
- C. Acts as a protection against the “compulsion to provide evidence against himself”.

The code of Criminal Procedure (CrPc), 1973, and the Indian Constitution provide defendants with the Right to Silence i.e. the right to refuse self-incrimination against themselves. This protection is available when the police examine the accused during an investigation under Section 161 of CrPc⁴ and it is justified that Article 20 (3) is coincident with Section 161 (2) of CrPc⁵. Section 161 (2) states that “Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would tend to expose him to a criminal charge or a penalty or forfeiture”.

¹ Constitution of India, art. 20(3)

² Tripti Bhaskar, ‘Self Incrimination under Article 20(3) of the Constitution of India’ (2021) 2 (2) Indian Journal of Law and Legal Research (IJLLR) 1-7

³ *MP Sharma and Others v Satish Chandra* [1954] AIR 300 SCR 1077

⁴ Criminal Procedure Code 1973, s 161

⁵ *Nandini Satpathy v Dani (PL) & Anr* [1978] AIR 1025 SCR (3) 608

CASES RELATED TO THE VALIDITY OF ARTICLE 20 (3)

A. The person accused of an offence

A formal accusation can be made by filing an FIR against a person being accused of the crime. Art 20 (3) works only on the making of such formal accusations. This privilege to the accused is available at both trial and pre-trial stages i.e. during an investigation and before the initiation of an investigation or even if the defendant's name is not mentioned in the FIR as an accused. This attribute is also evident in the case of *Balasaheb vs The State of Maharashtra* where a witness who is also an accused of the same incident cannot claim the privilege of Art 20 (3) completely from testifying in this case. Moreover, the witness may use his right against self-incrimination while answering for few questions.

B. The compulsion to act as a witness

The second essential that contributes to the validity of Art 20 (3) discusses the case of *The State Of Bombay vs Kathi Kalu Oghad And Others*⁶ which states that there was no violation of Art 20 (3) in compelling an accused to provide his specimen signature or impressions of his fingers, thumb or foot to the said investigating officer under Section 27 of Indian Evidence Act⁷. In support of Art 20 (3), the case *Abdul Razak @ Abu Ahmed vs Union Of India*⁸ states that under Section 315 of CrPc 1973⁹, an accused cannot be called to the witness box even if he is accused of the charges arising from the same set of facts by the same or different courts.

C. The compulsion to provide evidence against himself

In the third essential, the immunity under Art 20 (3) is provided only against the compulsion of the accused to provide evidence against himself. The article comes into play when an accused is tortured, beaten, harassed, etc. to furnish a confession. But, if the accused gives the statement, orally or voluntarily concerning the evidence, then Art 20 (3) would not be applied. In *Mohamed*

⁶ *State of Bombay v Kathi Kalu Oghad & Ors* [1961] AIR 1808 SCR (3) 10

⁷ Indian Evidence Act 1872, s 27

⁸ *Abdul Razak @ Abu Ahmed v Union Of India* [2021] Writ Petition CRL MC NO 2917 of 2021

⁹ Criminal Procedure Code 1973, s 315

*Dastagir v The State Of Madras*¹⁰, the appellant was not an accused at the time the currency notes were seized from him. The judgment by the Supreme Court held that the accused was not forced to produce notes and no duress was applied to him. Therefore, the scope of Art 20 (3) was not valid in this case.

In *Amrit Singh v State Of Punjab*¹¹, the accused was under the rape and murder charges of a student of IInd standard in Ramgarh, Punjab. The body of the deceased was discovered with some strands of hair, dry leaves, and blood, and the accused was subjected to provide his DNA sample. The court found the accused to be protected under the right against self-incrimination. But, in the case of death and brutal crime, the court declared that Art 20 (3) should not be misused by the accused and he was sentenced to death under sections 376 and 302 of the Indian Penal Code (IPC).¹²

ADMISSIBILITY OF DNA IN THE INDIAN LEGAL SYSTEM

The admissibility of DNA evidence before the court has always been a baffling issue due to the existence of discretionary powers within the court. The admissibility depends on the preparation, collection, preservation, and documentation of evidence which later on can prove fruitful against the accused in the court. Sadly, there is no specific statute or legislation in India which can provide guidelines to the investigating officer and the court for undertaking the DNA samples as its evidence. Moreover, there is nothing mentioned explicitly under the Indian Evidence Act, of 1872 and the Code of Criminal Procedure, of 1973 to manage technology ad forensic concerns.

DNA ADMISSIBILITY VIA CASE LAWS CONCERNING INDIAN CONSTITUTION

Under the ambit of the courts, DNA technology contradicts the fundamental rights of an individual like the right to privacy, and the right against self-incrimination as enshrined under Art 20 (3) and Art 21 of the Indian Constitution. The SC ruled that the right to privacy also falls

¹⁰ *Mohamed Dastagir v State of Madras* [1960] AIR 756 SCR (3) 116

¹¹ *Amrit Singh v State Of Punjab* [2006] Writ Petition (crl) 1327 of 2005

¹² Indian Penal Code 1860, s 376

under the ambit of Art 21 and is a part of personal life and liberty. But, it has also been held by SC that these provisions are not absolute and are subjected to reasonable restrictions based on public interest.

As stated in *Govind v State Of Madhya Pradesh & Anr*¹³, the petitioner under Art 32 challenged the validity of regulations of MP police under the Police Act, 1961. The petitioner was under surveillance because of his criminal behaviour and frequent visits to the police station at irregular intervals. The judgment by SC held that as the regulations have the force of law, the petitioner's fundamental right under Art 21 is not violated and the petition is dismissed. In *PBV Ganesh v State of AP*¹⁴, the SC upheld the admissibility of DNA in the identification of samples found at the time of the investigation. But, DNA evidence alone was not sufficient to prove accused the guilty of an offence. The accused was sentenced to life imprisonment under sections 302¹⁵ and 149¹⁶ of the Indian Penal Code along with section 27 (2)¹⁷ of the Arms Act.

DNA ADMISSIBILITY VIA CASE LAWS CONCERNING CrPC, 1973

The only sections that provide implications for DNA tests in the identification of evidence against the accused are Section 53 and Section 54¹⁸ of CrPC 1973. The section provides the examination of the accused by a medical practitioner at the request of the police officer to believe that the DNA sample will act as evidence as to the occurrence of the offence. The flaw in these sections is that they are not accountable for the collection of blood, semen, saliva, etc. at the time of the investigation. Finally, the CrPC amendment act 2005 was amended and inserted Section 53 A which authorizes the collection of DNA samples from the body of the accused in rape cases by the medical practitioner. Under this amendment, a new provision outlines the examination of blood, semen, sputum, swabs, hair samples, and fingernails with the help of modern

¹³ *Govind v State of Madhya Pradesh & Anr* [1975] AIR 1378 SCR (3) 946

¹⁴ *PBV Ganesh v State of AP* [2009] Writ Petition CRML N 174 of 2004

¹⁵ Indian Penal Code 1860, s 302

¹⁶ Indian Penal Code 1860, s 149

¹⁷ Arms Act, s 27(2)

¹⁸ Criminal Procedure Code 1973, s 53

techniques such as DNA Profiling as required in specific cases. Still, the courts doubt the admissibility of samples on the grounds of statutes and constitutional prohibitions.

In *Krishan Kumar Malik v State Of Haryana*¹⁹, eight accused were charged under sections 366 and 376 (2) of IPC for committing abduction and rape offences. The trial court based on section 53 A of CrPC found all eight accused guilty and appreciated the correctness of the blood and semen tests conducted by the said medical practitioner. Thus, the court upheld the validity of the DNA test as evidence and the case is dismissed by the court.

In *Abbas Asmat Ali v The State Of Maharashtra*²⁰, the Bombay high court dismissed the bail plea of the rape accused and held that though the DNA test did not show any evidence against the accused that do not disbelieve the testimony of the victim who stated forced sexual intercourse with her by the accused. The statement is recorded under section 164²¹ of CrPc and therefore the court ruled that “The DNA test cannot be said to be conclusive evidence of rape but it can only be used as corroborative evidence”.

In *Anu Das v State Of Kerala & Anr*²², the Kerela High court ruled that drawing DNA samples from the body of an accused in cases involving rape or sexual offence, does not violate the individual right against self-incrimination enshrined under Art 20 (3) of Indian constitution. The court order further said that “Sections 53A and 164A of CrPc after amendment act 2005, encourages the DNA profiling of the accused and the victim in cases of rape and sexual offences.

DNA ADMISSIBILITY VIA CIVIL CASE LAWS

The role of DNA tests concerning civil cases is generally made to compromise the paternity issues involved in the cases of divorce, inheritance, and succession. It is noted that when Section 112 of the Indian Evidence Act, of 1872 came into enforcement, these modern techniques like DNA Profiling were not present and there was no admissibility of DNA tests in the courts.

¹⁹ *Krishan Kumar Malik v State Of Haryana* [2011] Writ Petition (crl) No 8021 of 2009

²⁰ *Abbas Asmat Ali v State Of Maharashtra* [2022] Writ Petition BA No 1810 of 2021

²¹ Criminal Procedure Code 1973, s 164

²² *Anu Das v State Of Kerala & Anr* [2018] Writ Petition BA No 8507 of 2018

Section 112²³ of the Indian Evidence Act, of 1872 deals with the provision for the legitimacy of a child born during a wedding, and the only ground to deny this presumption is to prove the non-accessibility of the husband. The issue was highlighted and discussed in the case of *Goutam Kundu v State Of West Bengal And Anr*²⁴, where the bench opined the following outcomes:

- (a) That courts in India cannot order any sample test including blood, semen, saliva, etc.
- (b) The case should be prima facie strong enough to prove the non-accessibility of the husband.

In *Rohit Shekhar v Narayan Dutt Tiwari & Anr*²⁵, the Delhi High Court upholds the admissibility of DNA tests stating that a child has the right to know his biological roots which can be undoubtedly proven through scientific tests and modern techniques. Here, the court has given priority to the DNA tests under Section 45²⁶ of the Indian Evidence Act 1872 over the supposition of legitimacy under section 112 of the Indian Evidence Act 1872.

In *Ashok Kumar v Raj Gupta & Ors*²⁷, the plaintiff applied for seeking a declaration of ownership of the property left behind by his parents. The defendants-three daughters of the deceased couple provided the information that Ashok Kumar was disentitled from a share in the property and they demanded a DNA test to prove the biological relationship between the defendants and the plaintiff. As already a piece of concrete evidence was provided by the plaintiff thus the court held that no one can be compelled to undergo a DNA test as it violates the provisions of the right to privacy and personal liberty. In addition to this, the Supreme Court made a statement that DNA tests must be ordered only in deserving cases.

APPLICABILITY OF DNA IN THE LEGAL SYSTEM

Based on the aforementioned case laws and judgments, it is opined that DNA tests come under the ambit of experts' and medical practitioners' opinions. The reason behind this imposition is the lack of expertise and technologies related to medical sciences that overcome the complex

²³ Indian Evidence Act 1872, s 112

²⁴ *Goutam Kundu v State Of West Bengal And Anr* [1993] SCR (3) 917

²⁵ *Rohit Shekhar v Narayan Dutt Tiwari & Anr* [2012] Writ Petition FAO(OS) No 547/2011

²⁶ Indian Evidence Act 1872, s 45

²⁷ *Ashok Kumar v Raj Gupta & Ors* [2021] Writ Petition Civil appeal no 6153 of 2021

and lengthy process of issuing judgments. As a result, the courts are not competent to draw valid inferences based on available evidence.

In the case of the *State of Himachal Pradesh v Jai Lal And Ors*²⁸, the Supreme Court held that the expert evidence is considered based on a study conducted by him on that subject or has acquired an adequate experience in the particular field. The opinions expressed by experts act as a testimony of a witness and can be cross-examined at any point in time. Thus, DNA tests are often subjected to cross-examinations and muzzle arguments.

In *Nandlal Wasudeo Badwaik v Lata Nandlal Badwaik & Anr*²⁹, a special leave petition was filed against the high court order for not allowing a DNA test to prove the paternity of the child. After multiple petitions, the court allowed the petitioner's plea to conduct a DNA test to confirm the paternity of the child. For the first time, the court held its judgment in the favour of the husband by the way of a DNA test that helped in proving the non-accessibility with his wife when the child would have begotten. This is the landmark judgment by the Supreme Court which has changed the presumption under section 112 of the Indian Evidence Act. 1872.

CONCLUSION & RECOMMENDATIONS

The article makes the readers aware of the significance and reliability of DNA tests in a court of law. The court has been subjective regarding the admissibility of DNA based on constitutional grounds of the Right to privacy under Art 21 and the right against self-incrimination under Art 20 (3). In addition to this, the courts are also subjective in their implicit interpretations under the Criminal Procedure Code, 1973, and the Indian Evidence Act. 1872 and witness the conclusive remarks on the DNA tests validity as 'DNA test being conducted under the ambit of expert opinion is only a piece of corroborative evidence to enhance the investigation process that may be subjected to cross-examinations and contradictions'. If the court fully depends on DNA tests, then it cannot conclude that the offence was committed by a specific person.

²⁸ *State Of Himachal Pradesh v Jai Lal & Ors* [1999] Writ Petition (crl) 530 of 1997

²⁹ *Nandlal Wasudeo Badwaik v Lata Nandlal Badwaik & Anr* [2014] Writ petition (crl) No 8852 of 2008

Therefore, DNA evidence recorded in rape cases will be taken into consideration to the extent of its confirmation along with the other pieces of evidence to conclude the final judgment. The methods of investigation should not be discretionary and changed according to modern requirements as 'Modern problems demand modern solutions. Some of the recommendations are as follows:

- A uniform legislation concerning DNA tests and their admissibility must be passed to avoid clouds of dilemma over the investigating agencies and subordinate judiciary.
- Forensic labs must be regularized to increase their reliability and proficiency for generating DNA profiling.
- Proper training is provided to agencies under the guidance of experts and medical practitioners. It may help in investigating issues like the prosecutor's fallacy.
- DNA samples of the accused should not be collected on a routine basis. They should be collected as per the specified guidelines under Sections 53A and 54 of the CrPc Amendment, 2005.