IMPORTANCE OF EXPERT OPINION IN CRIMINAL JUSTICE SYSTEM IN INDIA WITH SPECIAL REFERENCE TO DETERMINATION OF PATERNITY: A LEGAL ANALYSIS

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Introduction

At the outset, it is pertinent to mention here the importance of opinion of a person in a court of law who is skilled and specialised in a particular branch of science or art. In common parlance, opinion means an inference from the observed facts.[2] It is to be noted that inferences, opinions[3], beliefs and mere speculations of witnesses are inadmissible before the court of law. As far as the adversarial system[4] of criminal justice

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[2] For an instance, a statement that a car was driven on the left side of the road is a fact. While the assertion that a particular piece of driving was negligent is an inference from the observed facts.

[3] The exclusionary rule includes opinion because of various reasons, as it is impedes the evaluation of judge and jury. Also, opinion formed out of reasoning of witness from observed facts is product of their own reasoning and cannot be said to be reliable and are often fraught with uncertainties.

[4] S.V.Joga Rao, "Evidence: Cases and Materials", Lexis Nexis Butterworth's Publication, p.11.The Core features of adversarial system can be summarized as:

(1) Contest
   (a) Prosecuting party (state or private party) initiates trial;
   (b) Usually two parties are involved;
   (c) Parties select their own witnesses to testify;
   (d) Emphasis is upon oral evidence and witnesses are trained or coached;
   (e) Surprise element permissible;
   (f) Accused is entitled to give evidence; and
   (g) Confession and guilty plea is conclusive.

(ii) Judge as umpire
   (a) Judge is a passive participant;
   (b) Evidence is predominantly adduce by respective parties;
   (c) No prior knowledge about the case or character of the accused;
   (d) Clear division of fact finding and prosecution responsibilities ; and
   (e) Fact finding responsibility is devolved to the jury.

(iii) Procedure are controlled by rules
   (a) Evidence is adduced on the basis of relevancy and admissibility;
   (b) Documentary evidence is restricted.

in India is concerned, there is a cardinal principle of law of evidence which is known as "Best Evidence Rule". In accordance of this rule, best evidence should be adduced before the court. The best evidence means the evidence collected from the direct source.[5] But, practically it is a cumbersome task to distinguish between the two because in cases evidence of fact is mingled with the evidence of law. In such situations, court allows witness to state their opinion (expert) so that fact finding can be conclusive and to avid the practical difficulties and to draw reasoned conclusion. The perception of some facts differs ordinarily depending on the skill and training of the witness. The ordinary lay witness may not be able to detect certain facts[6] as they may be obscure or invisible to him with ordinary prudence but a witness equipped with special knowledge or training might. So, it is indispensable to seek the opinion of an expert for the sake of convenience and administration of justice.

Expert Opinion: Its Importance and Relevance

There are many matters which require professional or specialised knowledge which the court may not possess and may, therefore, rely on that person who possess it called experts. Matters commonly made the subject of evidence include causes of death, insanity, effects of poison, genuineness of works of art, value of articles, genuineness of handwriting, proper navigation of vessels, meaning of trade terms and foreign law. A witness who is qualified to speak on these matters is called an expert. Section 45 of the Evidence Act recognises the relevancy and utility of expert evidence.

Who is an expert?

Section 45 permits only the opinion of expert to be cited in evidence. It does not define the word expert. As such, it requires determination of question as to who is an expert. The only guidance in this section is that he should be a person specially skilled on the matter.

(iv) The ultimate aim is to decide whether the accusation stands proved in the light of rational and cogent evidence or not. In other words, the aim is to decide whether the accused ought to be convicted or acquitted.

5 *See generally*, *Phipson 'Evidence'* (10th Edition 1983), Page (Hereinafter referred as ¶) 475; *See also*, Object and Reasons of the Indian Evidence Act, 1872.

6 For an example, from a murder scene a lay witness can furnish evidence regarding verbal quarrel between the deceased and the accused, stabbing and death of the deceased. But he cannot give evidence regarding identity of the bloodstain found on the scene. Such sort of evidence can be given by a forensic scientist trained in DNA technology or by a serologist.

Generally, a witness is considered as an expert witness if he is skilled in any particular art, trade or profession and possessed of peculiar knowledge concerning the same. He must have made a special study of the subject or acquired special experience therein. The question of competency of fitness of a witness as an expert is to be decided by the court.

Opinion of experts namely doctors on medical evidence, cause of death, blood group test, age, etc., report of chemical examiner, forensic science laboratory, nautical assessors, hand writing experts, etc. are relevant. Tape-recorded voice, opinion on finger prints, thumb impression, palm impressions, foot-prints, identification of hair, ballistic expert, typescript, photographs, technical work, trade made and copy right, foreign law, opinion regarding value of land, report of public analyst, etc are held to be relevant.

Law governing Expert Witness

As far as the Indian legal system and its position is concerned, when Indian Evidence Act 1872 or the Code of Criminal Procedure, 1973 were enacted, legislature could not anticipate the tremendous development of modern science and technology and its deep impact on the forensic science as well as administration of justice. However, it was later on that the reports of the expert in relation to the results of forensic toxicology, became admissible as the Indian Evidence Act permits evidence of the opinion of persons specially skilled upon a point of foreign law, science, art or as to identity of handwriting or finger impressions, the opinions upon that point.[7] Expert evidence is appreciated based on several factors such as the skill of the expert[8] and the exactness of the science.[9]

Since expert witnesses may deliver expert evidence about facts from the domain of their expertise, therefore, they are usually instructed to produce a joint statement detailing points of agreement and disagreement to assist the court or tribunal.

However, the Supreme Court has opined in a case,[10] concerning specifically with the medical examination of a victim of rape, that medical jurisprudence is not an exact science. If the science itself is imprecise, expert opinion is only of corroborative value and insufficient to secure a conviction by itself. Therefore, such evidences have to be seen along with the physical and circumstantial evidence in every case.

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7 Section 45, Indian Evidence Act, 1872.
8 State v. S.J.Choudhary, AIR 1990 SC 1050.
9 Pratap Mishra v. State of Orissa, AIR 1977 SC 1307.
10 Ibid.

The main legal provisions which govern the expert evidences are as follows:

1. Indian Constitution. (Article 20 (3)
2. Indian Evidence Act, 1872 (Sections 45 & 112)
3. Code of Criminal Procedure, 1973 (Sections 53, 194 & 293)

An analysis

It is pertinent to mention here that for collection of blood samples, Section 53 of the Cr. P.C needs to be mentioned here. It says "Examination of the accused by Medical Practitioner at the request of the Police". This Section deals with examination of the accused by a medical practitioner at the request of the police officer, if there are reasonable grounds for believing that an examination of a person will afford evidence as to the commission of offence. So, it shall be lawful for a registered medical practitioner at the request of the police officer not below the rank of Sub-inspector and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence and to use such force as is reasonably necessary. This Section does not specifically say whether it would be applicable for DNA tests also. This section does not state that the police officer shall be entitled to personally collect semen, blood, hair root, urine, vaginal swab, etc for the purpose of investigation himself. By the Amendment Act of 2005, the Cr. P.C has been amended and added Section 53A which states that examination of a person accused of rape by medical practitioner. The new Explanation now stands which include within its ambit examination of blood, blood stains, semen, sputum, swabs, sweat, hair samples and finger nails by the use of modern techniques in the case of sexual offences including DNA profiling and such other tests which is necessary in a particular case. Though, Section 53 refers only to examination of the accused by medical practitioner at the request of the police officer but the Court has wider power for the purpose of doing justice in criminal cases. By issuing direction to the police officer to further investigation samples from the accused and conduct DNA test for the purpose of further investigation under Section 173(8) of the Cr. P.C.[11]

Section 293 (4) of the Cr. P.C provides for report of certain Government scientific experts. This section is only an ancillary provision which provides for giving of report by scientific experts.

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[11] Dr. Mazoor Ahmad Mansoori, "Forensic Toxicology and its Relevance with Criminal Justice Delivery System" Published in Lex Revolution, Journal of Social & Legal Studies, Vol. III, Issue. 3, July-Sept 2017, p.37.

Section 112 of the Evidence Act raises a conclusive presumption about the paternity of a child born during the subsistence of a valid marriage. The said conclusiveness can be rebutted and it can be shown that the parties had no access to each other at the time when the child could have been begotten. The result of genuine DNA test is said to be scientifically accurate. If a husband and wife were living together during the time of conception, and the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. There was an admitted access between husband and wife during which she could have conceived and delivered normal child. The presumption under Section 112 was not rebuttable. No adverse inference can be drawn against refusing to submit himself to blood test. Section 112 requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the actual co-habitation. It is a rebuttable presumption of law under Section 112 that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities.

Evidentiary Value of Expert Opinion

An expert is not a witness of fact. His evidence is of an advisory character. However, he is not an accomplice. Regarding evidentiary value of opinion evidence of handwriting expert it has been observed by the Apex Court in *Murari Lal v. State of M.P.*,[12] that sometimes it is said that it is hazardous to base a conviction solely on the opinion of an expert. It is not because experts in general, are unreliable but because human judgment is fallible and one expert may go wrong because of some defect of observation, some error of premises or honest mistake or conclusion. However, it is unfair to view his opinion with an initial suspicion and to treat him as an inferior type of witness. Reiterating this view, the Apex Court in *Alamgir v. State (NCT Delhi),*[13] observed that the science of identification of handwriting has attained more or less a state of perfection and the risk of an incorrect opinion is practically non-existent. The Court went on further to record that there is no rule of law, nor any rule of prudence which has crystallised into a rule of law that opinion evidence of a handwriting expert must never be acted upon, unless substantially corroborated.

In the instant case, the Supreme Court held that there is no justification for condemning his opinion to the same class of evidence as

[12] AIR 1980 SC 531.
[13] (2003) 1 SCC 21.

that of an accomplice and insist upon corroboration. But, on the particular facts of each case, if so requires, the court may require corroboration.

There may be cases where both sides call experts and conflicting voices are heard on the same point. Again, there may be cases where neither side calls an expert being unable to afford one. In all such cases, it becomes a plain duty of the court to compare the writings and give its own conclusions. The duty cannot be avoided by taking recourse to the reasoning that the Court is not an expert. Where there is opinion of expert, that will aid the Court, where there is none, the Court will have to seek guidance from the authorities, texts books and the Court's own experience and knowledge. But the Court should discharge its duty.

The weight that ought to be attached to the opinion of the expert is a different matter from its relevancy. The act only provides the relevancy of exert opinion, but gives no guidance as to its value. The value of expert opinion has to be viewed in the light of many adverse factors.

Firstly, there is the danger of error deliberate falsehood, "these privileged persons might be half-blind, incompetent or even corrupt".

Secondly, his evidence is after all opinion and "human judgment is fallible human knowledge is limited and imperfect". No man ever mastered all the knowledge in any of the sciences.

Thirdly, it must be borne in mind that an expert witness, however, impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him.

The above factors seriously reduce the probative value of expert evidence. The reliability of such evidence, has, therefore to be tested the same way in which any other piece of evidence is tested. The court should, therefore, call upon the expert to explain the reasons for his opinion and then form its own opinion whether or not the expert opinion is satisfactory.

Evidence of an expert is rather a weak type of evidence and the courts do not generally consider it as offering conclusive proof.[14] The opinion of expert is admissible if it is accompanied with reasons.[15] Expert opinion is good even if it is not decisive, the court is not bound by such evidence, but must consider it along with other evidence and circumstances on record. The court may not place any reliance on expert opinion if it is unsupported by reasons.[16]

The expression 'science' or 'art' as used in Section 45 is of wide import and should not be attributed narrow meaning. Expressions 'science'

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[14] AIR 1956 SC 2184.
[15] (1999) (1) ALD, 422 (A.P)
[16] (1987) MPLJ 214.

and 'art' therefore, have to be construed widely to include within their ambit the opinion of an expert in each of such branch.[17]

Importance of DNA Test in determining Paternity

DNA tests in the arena of Criminal jurisprudence are considered as a boon for the criminal investigation. Alternatively, in civil cases DNA tests can be used to determine the paternity of a person and to disprove allegations of paternity Fraud. In comparison of other methods of determining parenthood, DNA tests provide positive and conclusive determination [18] . Unlike blood typing which provides for statistical likelihood and exclusion, the DNA test can provide certainty of practical level in paternity cases[19]. DNA can be extracted from a wide range of sources, including samples of hair, cigarette butts, blood, razor clippings or saliva. Thus, it is relatively easy to obtain samples, which can then be tested in a laboratory to determine any genetic relationships that may be present.

Relevancy of Section 112, Indian Evidence Act

Maternity admits of positive proof, but paternity is a matter of inference. The connection of a child with his father is secret, but it may be ascertained by the subsisting facts. It is a legally constituted relationship between him and the mother of the child. To be clear it is known to everybody that maternity is a fact and paternity is a surmise. As such, Section 112 of Indian Evidence Act, 1872[20] lays down the rule for the proof of paternity of an individual.

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[17] State through C.B.I, New Delhi v. S.J.Choudhary, AIR 1996 SC 149.

[18] DNA science establishes that the pattern of chemical signals i.e. the genetic structure which may be discovered with the DNA molecule in the cells of each individual is unique and different in every individual. As such, the chemical structure of the DNA in the cells of each individual is the sole determining factor to identify one separately from another, except in the case of "genetically identical twins."

[19] *See generally*, RATAN LAL & DHIRAJ LAL: The Law of Evidence: 20th Ed: (Wadhwa and Company) ¶ 960.

[20] Section 112, Indian Evidence Act, 1872: Birth during marriage, conclusive proof of legitimacy: The fact tht any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time which he could have been begotten.

The most relevant legal provision which governs the test of paternity is Section 112 of the Indian Evidence Act 1872.[21] This Section enshrines the following criteria:

(i) Presumption of paternity

As far as Section 112, I.E.A is concerned, there is a legal presumption with regard to paternity. The language of this Section clearly reveals presumption of paternity. It is desirable that Indian Legislature should realize that it is the high time to alter the rigour rule of Conclusiveness in the advent of the new scientific DNA technology. The Conclusive[22] Presumption should be made a mere legal presumption which is rebuttable.

(ii) 280 days criteria

The birth of the child to qualify for legitimacy as per strict legal understanding of the section shall be within 280 days of dissolution of marriage. However, medical science itself cannot substantiate the period stipulated in the section i.e. the maximum period of pregnancy can exceed 280 days. Section 112 does not apply to all those critical situations where even after 280 days of dissolution of marriage a mother remaining unmarried can claim legitimacy of the child born to her. In such a situations DNA test is the only method to establish the legitimacy of the child and solve the dispute with respect the paternity of the child.[23] However, no matter how soon the birth of the child occurs after marriage the legitimacy presumption in Section 112 has been interpreted very strongly conclusive in nature[24]

(iii) No Access Criteria

The term 'access' in the present Section means "opportunity of sexual intercourse" [25] . The traditional viewpoint is that the legal presumption of paternity which is Conclusive in nature can be displaced only by proof of 'non access' between the parties to the marriage at a time when according to the ordinary course of nature the husband could have

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[21] "Birth during Marriage, Conclusive Proof of Legitimacy": The fact that any person was born during the continuance of a valid marriage between his / her mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless it can be shown that the parties had no access to each other at any time when that child could have been begotten.

[22] Section 4 of Indian Evidence Act 1876 describes 'Conclusive Proof' as ' When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

[23] See MODI's Medical Jurisprudence, 22nd Edn. at ¶ 540 to 542.

[24] Umra v. Muhammad Hayat, (1907) PR No. 79 of 1907 (Civil).

[25] Krishnappa v. Vennkatappa, AIR 1943 Mad 632.

been the father of the child[26]. To comprehend the modern viewpoint we will have to take a look at the judicial pronouncements pertaining to the DNA evidence's admissibility in determination of paternity cases.

Concluding remarks

As far as the abovementioned discussions, deliberations are concerned, the Courts are expected to hear and determine all the cases that come before it. As a consequence of advancement of science and technology expert testimony has become an indispensable part of the Court process. Additionally, it is a well known fact that data obtained from forensic science has no use if it is not explained before court of law. Thus, expert testimony acts as a vehicle of transmission of the knowledge to the non expert judges.[27] It is noteworthy to mention here that ordering DNA test is the proof of paternity of the child but without hearing mother and child (through his or her natural guardian) would be volatile of natural justice. Furthermore, while ordering for the DNA test the issue of privacy should also be taken into consideration and the test should be conducted in such a manner that the right to privacy is not violated. DNA test to determine paternity should be ordered in exceptional and deserving cases when such tests are in the interests of the child. The ordering of such tests cannot be directed as a matter of routine. The reasons should be recorded while ordering DNA tests. The burden of proof should lie on the party who challenges the presumption of paternity.

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[26] Ajaya Kumar Nayak v. State of Orissa, 1995 CrLJ 82 at ¶ 6. See also, Banarasi Dass v. Teeku Datta, 2005(4) SCC 449.

[27] E.S. GARDNER, '*Need for New Concepts in the Administration of Criminal Justice*. (50 J Crim L Crimino & Po Sci. 25.)