

CONSTITUTIONAL VALIDITY OF NARCO ANALYSIS TEST*By***—RAVI KUMAR NOWSOLLA, M.C.J., L.L.M.****Osmania University
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Criminal Justice System in India is very broad and lengthy process. The State imposes the punishment to the wrongdoers only after thorough enquiry and fair trial process moreover it is a right of the accused person of fair trial. The Burden of Proof in criminal cases is lies upon the State. The State should prove the guilt of the accused beyond all reasonable doubts.

In any criminal investigation, interrogation of the suspects and accused plays a vital role in extracting the truth from them. From time, immemorial several methods, most of which were based on some form of torture have been used by the investigating agencies to elicit information from the accused and the suspects. With the advancement of science and technology, sophisticated methods of lie detection have been developed which do away with the use of “third degree torture” by the police. The scientific tools of interrogation namely the Lie Detector or the Polygraph Test, the P-300 or the Brain Mapping Test and the Narco Analysis or the Truth Serum Test are the main three tests that have recently been developed for extracting confessions. These psychoanalytical tests are also used to interpret the behaviour of the criminal (or the suspect) and corroborate the investigating officers’ observations.

P-300 Test

When the brain recognises a person or a sound, it generates a particular type of electric wave, which is called a P-300. Sensors are attached to the head of a person undergoing a P-300 Test and the subject is seated before a computer monitor. He is then shown certain

images or made to hear certain sounds. The sensors monitor electrical activity in the brain and register P-300 waves, which are generated only if the subject has some connection with the stimulus, in this case pictures or sounds.

These tests are used by investigators to cross check their findings, determine if a suspect is telling the truth or make him reveal facts pertaining to a case.

However, legal questions are raised about the validity of tests like Narco Analysis, with some upholding its validity in the light of legal principles and others rejecting it as a blatant violation of constitutional provisions. It has been alleged that Narco Analysis is a blatant violation of the Article 20(3) of the Indian Constitution. However, in this age of ever increasing crime rate, such tests often render a lot of help to the investigation agencies and hence, it is high time to blend Article 20(3) with the Narco Analysis.

First, let us understand what Narco Analysis is and how is it conducted. This will help us to decide whether such tests actually violate Article 20(3) or not. In India Narco Analysis is conducted by injecting 3 grams of sodium pentothal dissolved in 300 ml of distilled water and this prepared solution is administered intravenously along with dextrose over a period of 3 hours with the help of anaesthetist. The rate of administration is so controlled to drive the suspect slowly into the state of hypnotic trance. The ECG and blood pressure are monitored continuously throughout the testing procedure. The revelations made during the hypnotic trance are recorded both in video and audio

cassettes. The questions are designed carefully and are repeated persistently in order the ambiguities during drum interrogation. The report prepared by the experts is useful in the process of collecting the evidence. A person is able to lie by using his imagination. In the Narco Analysis Test, the subject enters into a “twilight” stage *i.e.*, a stage between consciousness and unconsciousness. In this state, it becomes difficult for him to lie and his answers would be restricted to facts he is already aware of. Prior to the test, Court’s permission and written consent of subject is secured which are mandatory for conducting the test. The procedure is explained to the subjects. The test is conducted only in the presence of forensic and medical experts.

Article 20(3) of the Constitution of India. Clause (3) of Article 20 declares that no person accused of an offence shall be compelled to be a witness against himself.

- (1) It is a right pertaining to a person accused of an offence;
- (2) It is a protection against compulsion to be a witness; and
- (3) It is a protection against such compulsion resulting in his giving evidence against himself.¹

The privilege under clause (3) is confined only to an accused *i.e.*, a person against whom a formal accusation relating to the commission of an offence has been levelled which is in the normal course may result in the prosecution. A person against whom a first information report has been recorded by the police and investigation has been ordered by the Magistrate can claim the benefit of the protection. Further, the guarantee in Article 20(3) is against the compulsion to be ‘a witness’. In *State of Bombay v. Kathi Kalu Oghad* a Bench of the Supreme Court consisting of eleven Judges held that: “It is well established that clause (3)

of Article 20 is directed against self-incrimination by the accused person. Self-incrimination must mean conveying information based upon personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in Court which may throw a light on any of the points in the controversy, but which do not contain any statement of the accused based on his personal knowledge.” The third component of Article 20(3) is that it is a prohibition only against the compulsion of the accused to give evidence against himself. The Supreme Court held that Article 20(3) does not apply at all to a case where the confession is made by an accused without any inducement, threat or promise².

Narco Analysis in the light of Article 20(3)

The discussion on Article 20(3) spells out three requirements which must be met with in order to claim protection under Article 20(3). If any of these requirements is not met with, Article 20(3) cannot be invoked. If Narco Analysis is carried out on an accused, it definitely fulfils the first requirement of Article 20(3). However, the question is whether subjecting a suspect to such a test also fulfils the requirement of Article 20(3). The Court by ordering a few suspects to undergo a Narco Analysis Test held that the question of putting the test of testimonial compulsion in case of suspects does not arise³.

Hence, if a person is suspected to have some information regarding the commission of an offence, there should be no prohibition on conducting a Narco Analysis Test on him as the protection under Article 20(3) is available only to a person accused of an offence. Another requirement of Article 20(3) is that there should be no compulsion on the accused to give testimony against him.

2. *Kalavathi v. State of H.P.*

3. *State of Andhra Pradesh v. Smt. Inapuri Padma and others*, Case No.459 of 2008.

1. *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300.

However, in Narco Analysis Test, the question of compulsion does not arise because the prior consent of the person who is supposed to undergo such a test is always taken. The Supreme Court held that there is no compulsion when a police officer, in investigating a crime against a certain individual, asks him to do a certain thing. The fact that a person was in police custody when he made the statement is not a foundation for an inference that he was compelled to make the statement. The mere questioning of an accused by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not compulsion. Considering all these we can easily conclude that Narco Analysis Test does not violate Article 20(3) to the extent that the person undergoing such a test is not compelled to do so, rather it is done with the consent of the person who has full knowledge of such a test⁴.

The third requirement of Article 20(3) is that there should be compulsion to give evidence against oneself. Only incriminatory statements are hit by Article 20(3). Whether a statement is incriminatory or not can be ascertained only after the test is conducted and not before it. Hence, I do not see any reason to prohibit such a test because there are enough protections available under the Indian Evidence Act, under Criminal Procedure Code and Article 20(3), to prevent inclusion of any incriminating statement if one comes out after administration of the test. By conducting Narco Analysis Test, the investigating agencies might discover some information which will help them in the investigation of the crime and thus find out the true culprit. In case, during the test, the accused makes a statement that is incriminatory that need not be made admissible in the Court as it is against Article 20(3), but the rest of the information can definitely be used by the investigating agencies to solve the case.

The above discussion very clearly suggests that Narco Analysis Test can be conducted without violating Article 20(3).

The Indian Courts have so far refused to admit the Narco Analysis as evidence, but Narco Analysis is being carried out by the investigators. The reason is that although confession made to the police or in the presence of police is not admissible in Courts, the information is admissible by which an instrument or object used in commission of crime is discovered. Section 27 of the Indian Evidence Act, 1872 is founded on the principle that if the confession of the accused is supported by the discovery of a fact, the confession may be presumed to be true, and not to have been extracted. It comes into operation only: (i) if and when certain facts are deposited to as discovered in consequence of information received from an accused person in police custody; and (ii) if the information relates distinctly to the fact discovered. If the self incriminatory information given by an accused person is without any threat that will be admissible in evidence and will not be hit by Article 20(3).

“Police officer’s power to investigate cognizable cases” states that any officer in charge of a police station without the order of a Magistrate can investigate any cognizable case which a Court has power to inquire into or try under the provisions of Chapter XIII⁵. “Investigation” as defined in Section 2(h) of Cr.P.C includes all the proceedings under the Code of Criminal Procedure for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in that behalf. Thus, collection of evidence by police officer is permitted under law. Conducting Narco Analysis Test on accused is in the process of such evidence by the investigating agency.

The Court posed with the question whether P-300, Lie Detector and Narco

4. *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808.

5. Section 156(1) of the Code of Criminal Procedure, 1873.

Analysis Tests are violative of Article 20(3) observed:

“The question which falls for consideration therefore, is whether such statement can be forcibly taken from the accused by requiring him to undergo the Truth Serum Test against his will. It will be seen that such statement will attract the bar of Article 20(3) only if it is inculcating or incriminating the person making it. Whether it is so or not can be ascertained only after the test is administered and not before. In our opinion therefore, there is no reason to prevent administration of this test also because there are enough protections available under the Indian Evidence Act, under Criminal Procedure Code and under the Constitution (Article 20(3), to prevent inclusion of any incriminating statement if one comes out after administration of the test..... Insofar as the third test (Narco Analysis) is concerned enough protection exists, recourse to which can be taken if and when the investigating agency seeks to introduce such statement as evidence.”⁶

The Court dismissed the petitions filed against these tests and held that these tests do not compel the accused or witness to incriminate himself and there is therefore no question of violation of Article 20(3) of the Constitution.

The Court observed that the field of criminology has expanded rapidly during the last few years, and the demand for supplemental methods of detecting deception and improving the efficiency of interrogation have increased concomitantly. Narco Analysis for criminal interrogation is a valuable technique, which would profoundly affect both the innocent and the guilty and thereby hasten the cause of justice. Further observed that enough protections exist to which recourse can be had by accused if and when

the investigating agency seeks to introduce into evidence the information or statement obtained under Narco-Analysis Test, if the same is found inculpatory or confession. That apart, statement or information by accused in the said test may even show their innocence or may lead to discovery of a fact or object material in the crime. If so, it is not at all hit by Article 20(3)⁷.

The Court while allowing a Narco Analysis Test observed that in present days the techniques used by the criminals for commission of crime are very sophisticated and modern. The conventional method of questioning may not yield any result at all. That is why the scientific tests like polygraph, brain mapping, narco analysis, *etc.*, are now used in the investigation of a case. When such tests are conducted under strict supervision of the expert, it cannot be said that there is any violation of the fundamental rights guaranteed to a citizen of India⁸.

The Court observed that “when after exhausting all the possible alternatives to find out the truth and nab the criminal/accused and when it is found by the prosecuting agency that there is no further headway in the investigation and they are absolutely in dark, there is a necessity of such a test. On the basis of revelations and/or the statement recorded while conducting/performing the Narco Analysis Test, prosecuting agency may have some clues which would further help and/or assist the Investigating Agency to further investigate the crime and at this stage, there will not be any bar of Article 20(3) of the Constitution of India and merely conducting/performing of a Narco Analysis Test on the accused, the protection guaranteed under Article 20(3) of the Constitution of India is not violated. As stated above, only

6. *Ramchandra Ram Reddy v. State of Maharashtra*, Cri. WP No.1924 of 2003.

7. *Smt. Selvi and others v. State of Karnataka*, Criminal Appeal No.1267 of 2004, Supreme Court of India, Available at : <http://www.judis.nic.in/supremecourt/chejudis.asp>.

8. *Kerala (Rojo George v. Deputy Superintendent of Police)*, Cri. WP No.6245 of 2006).

and only at the stage when the prosecuting agency is likely to use such statement as evidence and if it is inculcating and incriminating the person making it, it will attract the bar of Article 20(3).” The Court further observed that various provisions under the Criminal Procedure Code right from Sections 156 to 159 and other related provisions, collection of evidence by the police officer is permitted under the law. Conducting the Narco Analysis Test on accused is to be considered as process of collection of such evidence by the Investigating Agency. The Investigating Agency cannot be prevented to interrogate the accused at the stage of investigation and restraining the Investigating Agency to further investigate the crime through the aforesaid two tests would tantamount to interfere with the right of the Investigating Agency to investigate the crime of which it is statutorily authorized⁹.

The Court observed that where the accused had not allegedly come forward with the truth, the scientific tests are resorted to by the investigating agency. Such a course does not amount to testimonial compulsion. From the above discussion, it is very evident that conducting a Narco Analysis Test does not violate Article 20(3) *per se*. Only after conducting the test, if the accused divulges information which is incriminatory, then it will be hit by Article 20(3). Other information divulged during the test can help the investigation. Thus, there is no reason why we should prohibit such a test on grounds of unconstitutionality¹⁰.

It is high time that we blend this test with Article 20(3) in such a manner that no questions are raised as to its constitutional validity. For this purpose, it is essential that the Union Government should come out with certain guidelines which are to be strictly followed while conducting such a test.

- (1) The permission of the Court and the written consent of the person undergoing such a test should be made compulsory.
- (2) The person who is supposed to undergo such a test must be given all the necessary details about the test before he is asked to sign the consent form.
- (3) Control and supervision of the forensic laboratories should be made under the autonomous bodies like NHRC and the States Human Rights Commissions.
- (4) NHRC has suggested that at the time of polygraph test a forensic psychologist, a psychiatrist and an anaesthetist should remain present. Similar team can be directed to remain present at the time of Narco Analysis with the additional safeguard of entire proceeding audio and videotaped.

“.....Society has the right to be protected against the criminal, and all of society’s rights are manifestly superior to those of the criminal. There can be no gainsaying the fact that a suspect is either innocent or guilty, and no one knows the truth better than does the suspect himself. It, therefore, stands to reason, that where there is a safe and humane measure existing to evoke the truth from the consciousness of the suspect, that society is entitled to have the truth..... If society has the right to take property, liberty, and life for its protection, then society has the right to make, by trained men, the use of truth serum legal. The framers of the Bill of Rights believed the rights of society were paramount to the rights of the criminal. It was an instrument for the protection of the innocent and not intended for the acquittal of the guilty”¹¹.

Conclusion

To conclude, the use of narco-analysis as an investigative tool or as evidence is violative

9. *Santokben Sharmabhai Jadeja v. State of Gujarat*, Special Criminal Application No.1286 of 2007;

10. *Dinesh Dalmiya v. State*, CrI. RC No.259 of 2006 and CrI. MP Nos.1518 and 1519 of 2006, at Para 8.

11. Dr. R.E. House’s address to the First Annual Meeting of the Eastern Society of Anaesthetists in 1925 about the role of his scopolamine tests:

of the right to life, liberty and the right against self-incrimination. Viewed from the point of view of criminal trials, the unreliability of the procedure and the impact of the drugs on the psyche may result in miscarriage of justice and conviction of innocent persons. The logic of 'minimal bodily harm' being permissible for extraction of information

offered for upholding narco-analysis has grave implications as to the use of coercive third-degree methods specially in the context of growing curbs on rights in the name of tackling terrorism. The democratic rights movement must take up a sustained campaign against the use of invasive methods like narco-analysis and brain mapping.

BASIC HUMAN RIGHTS CONVENTION OF INTERNATIONAL LABOUR ORGANIZATION (ILO)

By

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Introduction: Much before the United Nations proclaimed the Universal Declaration of Human Rights in 1948, the International Labour Organisation had enshrined many principles in its Constitution. The Preamble to the Constitution of the International Labour Organisation declares "recognition of the principle of freedom of association" and of "equal remuneration for work of equal value" to be the means of improving conditions of labour and of establishing peace. The Declaration of Philadelphia reaffirms that "freedom of expression and of association are essential to sustained progress, and that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity..."

As far as action by the International Labour Organisation is concerned, virtually all of its activities under its different programmes are aimed at making a reality of the rights and freedoms proclaimed in the Constitution of the ILO, they also are effective means of implementing many of the rights mentioned in the Universal Declaration of

Human Rights and the International Covenants of human rights which concern of ILO. ILO's work in the field of Human Rights aims *inter alia* at safeguarding freedom of association; abolition of forced labour; elimination of discrimination in employment; promotion of equality of opportunity, protection of children from economic exploitation, minimum wages, social security, and adequate conditions of work and life. During the year 1988, which marked a series of significant human rights anniversaries, the Director-General of the ILO presented a report on human rights issues to International Labour Conference. While reviewing the past activities in this field, he observed two distinct trends. On the one hand an impressive body of standards had been brought to existence, which bore a striking impact on attitudes, policies, laws and conduct. On the other hand, there have been innumerable situations in which the same standards were disregarded and where individuals were denied elementary rights. To reconcile these conflicting tendencies he stated that a major task of ensuring knowledge and understanding of these standards lay ahead and it required a global action and international co-operation.