

MAINSTREAMING NARCO-ANALYSIS IN
STREAMLINING CRIMINAL INVESTIGATIONS:
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Introduction:

The key difference between a guilty party and an innocent person is that the perpetrator of the crime has a record of the crime stored in their brain, and the innocent suspect does not. Until the invention of Polygraph, Narco analysis and Neuroscientist Lawrence Farwell's "brain fingerprinting" technology, which measures an electrical signal called the P300 wave (because it occurs about 300 to 600 milliseconds after a stimuli), as the neuro scientific testimony to collect the credible evidence, there was no scientifically valid way to detect these lies, or vice-versa establish the truth, however, the scientific validity of the impugned techniques has been questioned and it is argued that their results are not entirely trustworthy, veritable and reliable. On the other hand, in the fake stamp paper scam the prosecution got to the bottom of the matter successfully during the Narco Analysis in which King Pin Mr. Karim Lala Telgi blurted out the truth-gave out the names of his VVIP accomplices and illegal business details.

Discussion and Analysis:

Narco-analysis can be examined in the National dimension as well as the in the International dimension. The International dimension will relate to the International norms located in the United Nations documents, declarations, Covenants and Conventions and other proclamations. For example, it is expressly proclaimed in Article 10 of the Universal Declaration of Human Rights, Article 6 of the European Convention on Human Rights, Article 14.3 (g) of the United Nations Covenant on Civil and Political Rights, 1966 that, in the determination of any Criminal Charge against a person, everyone shall be entitled to the minimum guarantees in full equality, e.g., "not to be compelled to testify against himself or confess guilt."

The national dimension will relate to the Constitutional guarantees and responsibilities flowing from other statutes such as, the Indian Evidence Act, 1872, provisions of Criminal Procedure Code, 1973, the Protection of the Human Rights Act, 1993 and Protection of the Human Rights Act, 1997 (in case of Jammu & Kashmir), rules and regulations and guidelines like National Human Rights Commission Guidelines, 2000 for the administration of Polygraph tests, and health laws and regulations. The main provisions regarding investigation of crime and procedure for trial in the Indian Constitution are featured by Art. 20(3). Art.20 (3) deals with the privilege against self-incrimination. The characteristic features of this doctrine are that the accused is presumed to be innocent until proved guilty. It means that it is for the prosecution to establish his guilt beyond reasonable doubt, and the accused need not make any statement against his will or volition. These propositions arise from an apprehension that if compulsory examination of an accused were to be allowed then undue and improper amount of force & coercion may be used against the accused to confess

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for a crime which he may or may not have committed. It affords a protection against such compulsion or self-incrimination to be a witness against himself or resulting in his giving evidence against himself. The privilege against self-incrimination thus enables the safeguarding of fundamental right of privacy which flows from Art. 21.

The application of neurological testimony involves the fundamental question pertaining to fundamental human rights. The privilege against self incrimination is a fundamental canon of Common law Criminal Jurisprudence. Art. 20(3) which embodies this privilege reads as, "No person accused of any offence shall be compelled to be a witness against himself". Subjecting the accused to undergo the test, as has been done by the investigative agencies in India, is considered by many as a blatant violation of Art. 20(3). The legal implications of applying these techniques as an investigative aid raises genuine apprehensions regarding infringement of individual's rights, liberties and freedoms, including the right to live with human dignity.

In *State of Punjab V. Mahinder Singh Chawla*, Air 1997 Sc 1225, the Apex Court has held that the right to life includes right to health. Subjecting a person to an unsafe scientific test as part of investigatory procedure will amount to denial of right to health. Narco analysis is not a safe method of interrogation since the use of such drugs could lead the subject to various health hazards.

Outlines of the Relevant Provisions in Code of Criminal Procedure, 1973:

Albeit, the Code of Criminal Procedure, 1973 has provided the adequate methods to be followed in collecting the information from the witnesses and the accused. A provision related to scientific evidence is mentioned in Section 293 of the CrPC, 1973 by which the report of a Chemical Examiner may be used as evidence in any inquiry or trial. The Code of Criminal Procedure (Amendment) Act, 2005, has inserted an explanation to Section 53 which says that the term 'examination' now includes the examination of blood, blood stains, semen and swabs in the case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in the case. The right against self-incrimination is enshrined in the Code of Criminal Procedure (CrPC), 1973 also besides the Indian Constitution. Section 161(2) of the CrPC provides a protection against self-incrimination to the accused. It provides that a person is bound to answer all questions while being examined by the police except those questions that "would have a tendency to expose him to a criminal charge or to a penalty or forfeiture." The protection against self-incrimination is available to both the accused persons and suspects who have not been charged with the commission of an offence.

Outlines of the Relevant Provisions in Code of Criminal Procedure, Svt.1989:

The right against self-incrimination is enshrined in the various local and special laws like the Code of Criminal Procedure, Svt.1989 (in case of Jammu and Kashmir) also, besides the Jammu and Kashmir Constitution exemplifies it too. Section 161(2) of the Code of Criminal Procedure, Svt.1989 provides a protection against self-incrimination to the accused. Again, it provides that a person is bound to answer all questions while being examined by the police except those questions that "would have a tendency to expose him to a criminal charge or to a penalty or forfeiture." The Jammu and Kashmir Enemy Agents Ordinance provides a

special procedure for the trial of an 'enemy' and 'enemy agent' materially different from the ordinary Criminal Procedure.

Outlines of the Relevant Provisions in Indian Evidence Act, 1872:

The provisions of the Evidence Act, 1872 allow a person, who is a witness in any case, to state the facts related to either a fact in issue or to a relevant fact. Unlike, Oral testimony which depends on the deposition of a witness, scientific evidence is obtained by using the scientific methods. Such type of evidence, which is admitted in the trial, must not only be relevant but also credible and reliable. Section 45 of the Indian Evidence Act, 1872 does allow expert opinions in certain cases. Section 45 is silent on other aspects of forensic evidence that can be admissible in a Court of law in criminal proceedings. It is pertinent here to make a passing reference to the report of the Madhava Menon Committee also which in turn refers to the recommendations of the Malimath Committee (2003) and Second Administrative Reforms Commission (2005) which stated that statements made to police including audio-visual recordings of confessions be made admissible with the condition that accused is informed of his right to consult a lawyer.

Outlines of the Relevant Provisions in Evidence Act, Svt.1977 (1920 A.D.):

Law of evidence in Jammu and Kashmir known as, Evidence Act, Svt.1977 (1920 A.D.) allows a person, who is a witness in any case, to state the facts related to either a fact in issue or to a relevant fact. The expert is permitted to give opinion evidence under section 45 of the Evidence Act, Svt.1977 (1920 A.D.). The evidence which serves to either support or counter a scientific theorem or hypothesis is thus admissible as veritable evidence. However, Section 45 of the Jammu and Kashmir, Evidence Act, Svt.1977 (1920 A.D.) is also silent on other aspects of forensic evidence that can be admissible in a Court of law in criminal proceedings.

Such tests generally don't have a legal validity as confessions made by a semi-conscious person are not admissible in court. The court may, however, grant limited admissibility after considering the pro's and con's and circumstances under which the test was obtained. The petitioners in many cases have said that the Courts could not direct the prosecution to hold Narco analysis, brain mapping and lie detector tests against the will of the accused as it would be violative of Article 20 (3) of the Constitution. The main provision regarding crime investigation and trial in the Indian Constitution is Art. 20 (3). It deals with the privilege against self-incrimination.

In the case of *State Bombay V. Kathikalu* **Air 1961 Sc 1808**, it was held by the Apex Court that it must be shown that the accused was compelled to make statement likely to be incriminative of himself. Compulsion means duress, which includes threatening, beating or imprisonment of wife, parent or child of a person. Thus where the accused makes a confession without any inducement, threat or promise Art. 20(3) does not apply.

The right against self-incrimination has been granted to the accused also by virtue of the pronouncement in the case of *Nandini Sathpathy Vs P.L. Dani* **AIR 1978 SC 1025**, in which the Apex Court held that no one can forcibly extract statements from the accused, when he has the right to keep silent during the course of investigation.

Narco-analysis was for the first time utilized in India in 2002 in the Godhra carnage case. In *Ramchandra Reddy and Ors. Vs. State Of Maharashtra*, **Criminal Writ Petition NO. 1924 OF 2003**, their Lordships, upheld the legality of the use of P300, Brain Mapping and Narco analysis test on the accused. On the other hand, in the *Abdul Karim Telgi Fake Stamp Paper (2006) Case*, the prosecution got to the bottom of the matter successfully during the Narco Analysis in which King Pin, namely, Karim Lala Telgi blurted out the truth-gave out the names of his VVIP accomplices and illegal business details and immense amount of information was yielded, but doubts were raised about its credibility as evidence. The Apex Court of India stayed the order of a Metropolitan Judge in 2006, to conduct Narco-analysis on the accused in the *Krushni Cooperative Urban Bank (Kuchb) Case*. The *raison d'être* was that the accused refused to sign the consent form and the concerned Forensic Science Laboratory declined to conduct the Narco-analysis test without a duly filled and signed consent form. In the same year in *Dinesh Dalmia V State*, **Crl. R.C. No. 259 Of 2006 And Crl. M.P. Nos. 1518 And 1519 Of 2006**, the High Court of Madras, held that subjecting an accused to Narco Analysis is not tantamount to testimony by compulsion. During the arguments, in Telgi's case Vahanvati justified the use of these three tests, saying they have the legal mandate under Section 53 of the Criminal Procedure Code (CrPC), which lists a host of various modern techniques like DNA fingerprinting and collection of blood samples as perfectly legal tools to probe a crime. He said the term 'such other tests' occurring in the explanatory note of the Section 53 includes these three tests too. 'If these tests are properly considered to be steps in the aid of investigation and not for obtaining incrimination statements, there is no constitutional infirmity whatsoever, said Vahanvati. These tests are scientific methods in furtherance of investigation. All these tests are considered to be the part of the process of collection of some subsequent evidence.

It means such subsequent evidence is admissible in terms of Section 27 of the Evidence Act, 1872 and Section 27 of the Evidence Act, Svt. 1977 (in case of Jammu & Kashmir).

In the recent past the issue was brought before the Apex Court in *Selvi V. State Of Karnataka*, **AIR 2010 SC 1974**. The question required their Lordships to spell out the scope and extent of the protective umbrella enshrined in Article 20(3) which is commonly known as the "right against self incrimination". The Court addressed the rationale behind the non-derogable norms guaranteed under Article 20(1) to Article 20(3). In the case at hand, the accused had challenged the validity of each of the impugned scientific tests like Narcoanalysis, Polygraphy and Brain Finger Printing as being violative of Article 20(3) of the Constitution because the tests were carried out without their consent. They pleaded before the Court that these scientific techniques violated their right against self incrimination guaranteed by Article 20(3) of the Constitution. On the other hand, the State argued that it is in the interests of the investigation that the crime should be efficiently investigated as ordinary methods are not workable in many such cases. The bench came to the conclusion that the results obtained from each of the impugned tests bear a testimonial character and they cannot be categorized as material evidence and the following tests were laid down in this case:

(i) That, the right against self incrimination and personal liberty are non-derogable rights,

(ii) That, the investigation of offence and examination of any accused cannot override Constitutional protection guaranteed by Article 20(3) and that the protection springs right from the stage of investigation,

(iii) That, under the law of the land a person who is examined during the investigation, has been given a choice, either to speak or to remain silent.

(iv) That, the statements having non-penal consequences are outside the purview of Article 20(3), but the accused in those cases, can invoke other articles of the Constitution like Article 21;

(v) That, the compulsory administration of the Narco-Analysis technique amounts to “testimonial compulsion”, and thereby hits the protection guaranteed by Article 20(3).

In *Shashi Murder Case*, the Court of law allowed Narco-analysis. In this case, the main accused in the disappearance and murder case of Faizabad law student Shashi, was subjected to polygraph and narcoanalysis test from January 12 to 26. Honourable, Chief Judicial Magistrate permitted the police to conduct the tests at the Central Forensic Laboratory in Bangalore. In his order, the CJM said the tests on the accused will be conducted in judicial custody and prohibited I.O to accompany the accused to Bangalore during the process of tests.

In *Moninder Singh Pandher Case*, the Court of law again allowed Narco-analysis test of the prime accused in the Noida serial murder case of women and children. Narco-analysis test of Moninder Singh Pandher was conducted at the Directorate of Forensic Laboratory. Pandher and his associates were accused of serial killing of women and children in Nithari village, in Noida, Uttar Pradesh.

The decision to conduct Narco-analysis is usually made by the Superintendent of Police handling the case. The test is conducted by a team comprising of an anaesthesiologist, a psychiatrist, a clinical or forensic psychologist, an audio-videographer, and the supporting nursing staff. The forensic psychologist prepares the report about the revelations made during the course of the investigations. Meanwhile, the Mumbai police have utilized a new test in certain cases. It is BEOS; Brain Electrical Oscillation Signature test.

Conclusion:

At the moment these tests are violative of various fundamental rights of the individual. Moreover, the studies done by various medical associations in the United States adhere to the view that truth serums do not induce truthful statements and subjects in such a condition of trance under the truth serum may give false or misleading answers. So far as India is concerned, if these tests are to be mainstreamed veritably in streamlining the Criminal Investigations, Court Hearings and Laboratories in India, then a separate legislation needs to be enacted. Therefore, the Evidence Act, 1872 may need to be amended to make the forensic evidence of these impugned tests admissible in a court of law, particularly those which have assumed a certain degree of acceptability because of a certain level of accuracy and reliability.