

EVIDENTIARY VALUE OF FORENSIC SCIENCE WITH SPECIAL REFERENCE TO NARCO ANALYSIS TEST

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I. Introduction

The vigilant search for truth is the hallmark of our criminal justice system. Our methods of investigation, rules of criminal procedure and appellate process are designed to ensure that the guilty are punished while the innocent are protected. Science and law, though are two distinct professions, but have increasingly become commingled for ensuring a fair process. The legal system today, has to seal with novel scientific evidence on several occasions, which has posed profound challenges for the law. In the present times forensic science forms an important branch of jurisprudence. It is potent and powerful weapon in the armory of administration of justice. Moreover, the operation of forensic sciences is nothing but application of techniques and methods of basic science techniques for various analysis of the evidence associated with crimes. Such forensic science in criminal investigation and trial is mainly concerned with materials and therefore, indirectly through materials, with men, places and times. Subsequently the growth development and use of forensic science in detection of crime in developed countries is tremendous and increasing with new techniques.²

Therefore, in our country also, the necessity and importance of forensic science hardly need any emphasis.³ The recent development in this scientific community that has a substantial on the legal profession is the development of Narco Analysis Test in criminal cases. This corresponding necessitates the employment of modern scientific techniques in investigative and judicial processes such as DNA, fingerprinting, lie-detector tests, brain mapping and narco analysis tests. The revolution in scientific technology is waving like fast flowing air and water in modern world of advancement. Scientific inventions and discoveries are growing at much faster speed in every sphere of life.⁴ Narco Analysis is one of such scientific development

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² Justice Jatinder N.Bhatt, 'A profile of forensic science in juristic journey', Supreme Court Cases Journal, Vol. 8, 2003, P.25.

³ National Research Council, Strengthening forensic science in the United States; A path forward, first edition (The National Academic Press 2009).

⁴ "*Science and Technology Studies*", Retrieved from <http://en.wikipedia.org/wiki/science-and-technology-studies>, visited on 5 April, 2014.

that has become an increasingly common term in India. Development of new tools of investigation has led to the emergence of scientific tools of interrogation like the narco analysis test. Such tests are a result of advances in sciences but they often raise doubts regarding basic human rights and also about their reliability. In India, Narco analysis test once again is in the limelight in the contest of Aarushi Murder case and Geetika Sharma suicide case in Delhi. Earlier it was used in the Nithari Village (Noida) serial killings, Telgi Stamp paper scam, Arun Bhat Kidnapping case in Gujrat, Godhra carriage probe and others.

Narco Analysis test can be effective as an alternative to barbaric third degree methods case however must be taken to ensure that this procedure is not misused or abused by investigating officer and should be co-related with corroborative evidence.

II. Meaning and Historical Prospectives of Narco-Analysis Test

The term Narco-Analysis is derived from Greek word 'narke' (meaning anesthesia or torpor) and is used to describe a diagnostic and psychothepetic technique that uses psychotropic drugs, particularly barbiturates, to induce a stupor in which mental elements with strong associated affects come to the surface, where they can be exploited by the therapist. According to Webster Dictionary the word Narco analysis had its origin in the 20th century and is coined from "Narco + analysis" which means analysis of the knowledge of the individual in drug induced sleep like state. The term narco-analysis was coined by Harselley.

Narco-analysis first reached the mainstream in 1992, when Robert House, a Texas obstetrician used the drug scopolamine on two prisoners. Under the influence of drug, both prisoners denied the crimes for which they had been detained the crimes for which they had been detained and upon trial were found not guilty. After the successful experimentation, house concluded that an accused under the influence of Scopolamine cannot lie. The phrase "Truth serum" is believed to have appeared first in the news report of Robert House is experiment, sometimes in 1922 and thereafter he came to be known as the 'Father of Truth Serum'.

III. Narco Analysis used in India

Narco analysis was rather unheard in India till recent past. It was first used in 2001 in Godhra Carnage probe. This test was done in the Forensic Science Laboratory, Bangalore on an individual associated with

offences committed by Veerappan⁵. For conducting the test, the National Human Rights Commission has laid down certain guidelines to the effect that the last should only be administered if the consent of the subject is obtained before a magistrate and therefore, the police cannot by themselves conduct the test whenever they deem appropriate.⁶ However, the guidelines are only recommendatory in nature and therefore, cannot bind an investigating agency. In 2006, however, the Supreme Court stayed the order of a Metropolitan Judge to conduct narco-analysis. This is the first and only case in respect of scientific techniques which has reached the Supreme Court.

IV. Utility in Investigative and Judicial Processes

The scientific tests may be employed in two ways, that is, they may directly be used as evidence in court in a trial or they may be used merely as clues for investigation. Where the test involve the making of a statement, they may be directly adduced in evidence, provided they do not amount to a confession because proof of a confession before a police officer or in custody of a police officer is prohibited.⁷ However, if the statements are merely admissions, they may be adduced in evidence⁸. Alternately, where no statement has been made or the statement cannot be adduced without an interpretation of the report prepared at the end of the test, the results of the test as interpreted by an expert may be furnished to the court. A third alternative is whereby the statements may be used as proof of the specific knowledge of the accused with regard to those facts, information about which has resulted in subsequent discoveries during the course of the investigation.⁹ However, the evidence gathered from the investigation is independently used in evidence, without the statements.

V. Arguments regarding Narco Analysis

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

⁵ Bannur Muthai Mohan, *Misconceptions about Narco Analysis*, available <http://www.issuesinmedicalethics.org/151co07.html> (last visited 7 May, 2014).

⁶ Selvi V/s State 2004(7) Kar.L.J.501 (Kant) stating that experts or doctors are more willing to co-operate with the police in investigation if there is an order of a magistrate to that effect. However, the case does not stipulate the consent of the subject as a mandatory prerequisite for administration of the test.

⁷ Sec 25-26, Indian Evidence Act, 1872.

⁸ Sec 17, Indian Evidence Act, 1872 defines admission as a statement oral or documentary or contained in electronic form which suggests any inference as to any fact in issue or relevant fact.

⁹ Sec 17 of the Indian Evidence Act.

of Art 20(3) of our constitution which says “no person accused of any offence shall be compelled to be witness against himself”. It deals with the privilege against self incrimination.

The proposition emanate from an apprehension that if compulsory examination of an accused were to be permitted then force and torture may be used against him to entrap him into fatal contradictions.

The conditions for the applicability of Article 20(3) are:-

- (i) There must be a person accused of an offence;
- (ii) There must be compulsion against such person;
- (iii) Such compulsion must be to be witness and;
- (iv) Such person must be compelled to become a witness against himself, in other words to incriminate himself by his evidence.

All the four ingredients must necessarily coexist before the protection of Art 20(3) can be claim. If any of these ingredients is missing Art 20(3) cannot be invoked.

The application of narco-analysis test involves the fundamental question pertaining to judicial matters and also to human rights. The legal position of applying this technique as an investigative aid raises issues like encroachment of an individual’s rights, liberties and freedom.

Since the modus operandi of this test depends upon administration of drugs, which suppress reasoning power without affecting memory and speech.

Another thing is that, this test also goes against the maxim "Norno Tenetur se Ipsurn Accusare"- which means, no man not even the accused himself can be compelled to answer any question, which may tend to prove him guilty of a crime, he has been accused of. If the confusion from the accused is derived from any physical or moral compulsion (be it under a hypnotic state of mind) it should stand to be rejected by the Court. In State of Bombay V. Kathi Kalu Oghad¹⁰, the Supreme Court held that information provided by the accused not based upon his personal knowledge cannot be held to be self-incriminatory. Similarly, Narco analysis test also cannot be said to be self-incriminatory. It is well established that Right to Silence has been granted to the accused by virtue of the pronouncement In the case of Nandini Sathpathy v. P. L. Dani.¹¹ No one can forcibly extract statements from the accused, who has the right to keep silent during the course of investigation. By the administration of these tests forcible intrusion into

¹⁰ AIR 1961 SC 1808.

¹¹ AIR 1978 SC 1025: 1978 CrL LJ 968 (SC).

one's mind is being resorted to, thereby nullifying the validity and legitimacy of the right to silence. In another case our Apex Court held that an accused has the right to refuse to answer only those questions that tend to incriminate him.¹²

However now in the English Legal System dramatic changes have been made after passing of Criminal Justice Public Order Act of 1994 which has diluted the rule of right of silence or does not explain the incriminating circumstances in the course of investigation. The Malimath Committee Report on reforms of criminal justice system has recommended active participation of the accused in the investigation of offences.

The Court should have the freedom to question the accused to know the relevant Information and if he refuses to answer, then adverse inference may be drawn against the accused.

The Madras High Court in *Dinesh Dalmia v. State of Madras*¹³ held that subjecting an accused to undergo such scientific tests will not amount to breaking his silence by force. He may be taken to the laboratory for such test against is quite voluntary. Therefore, such process does not amount to compelling a witness to give evidence as against him. When there is a hue and cry from the public and the human rights activists that the investigating sleuths adopt third degree methods to extract information from the accused it is high time the Investigating agency took recourse to scientific methods of investigation.

VI. Other Legal Imperatives

Section 3 of the Indian Evidence Act, 1872 defines 'evidence'. Questions arise whether any answer received as a result of Narco analysis test would be 'evidence' or not. Perhaps such answers or statement would not form part of 'evidence' unless it satisfies some other test. It must be made clear that if any statement has been permitted, or required by the Court it does not become admissible in evidence, Court admit or may not admit It. Admissibility would depend upon number of factors.

In 2004, the Bombay High Court ruled in the multi-crore-rupee fake stamp paper case that subjecting an accused to certain tests like narco analysis does not violate the fundamental right against self-incrimination. Article 20(3) of the Constitution guarantees this: "No person accused of any offence shall be compelled to be a witness against himself." Statements made under narco analysis are not admissible in evidence. However, recoveries resulting from such drugged interviews are admissible as

¹² R.B. Shah v. D.K. Guha, AIR 1973 SC 1196.

¹³ 2006 CrL LJ 2401(Mad).

corroborative evidence. This is arguably, a roundabout way to subverting the right to silence- acquiring the information on where to find the weapon from the subject when, in his right senses, he would not turn witness against himself. Arguments have been made that narco analysis constitutes mental torture. It works by inhibiting the nervous system and thus lowering the subjects inhibitions. It is not difficult to interpret this as a physical violation of an individual's mind-space. The State police departments are responsible for generating demand for the process. The decision to conduct narco analysis is usually made by the Superintendent of Police or the Deputy Inspector General handling a case.

A high-ranking official in the Karnataka Police told The Hindu that police departments in India have, poor skills when it comes to collection, collation, and presentation of evidence before the courts. Consequently, when there is enormous pressure on a police department to solve a case, sending suspects to narco analysis not only buys time but also gives the impression that something concrete has been done about the case.

In January 24th, 2008, a bench of Chief justice K.G. Balakrishnan reserved its ruling after hearing arguments for three days from various parties, including Solicitor General Goolam E. Vahanvati and senior advocate Dushyant Dave, appointed by the bench as amicus curiae to assist the court in the case. The bench, which also included Justice R.V. Raveendran and Justice J.M. Panchal, heard the arguments by counsel of various people, including Santokhben Jadeja from Gujarat, popularly known as 'Godmother', and some accomplices of fake stamp paper case accused Abdul Karim Telgi. Telgi and his accomplices are facing probe by various slates police and other investigative agencies for their alleged criminal acts.

These accused people have challenged the legality of the use polygraph, brain mapping and narco-analysis by the investigative agencies to probe the crime.

During the arguments, Vahanvati justified the use of these three tests, saying they have the legal mandate under 'Section 53 of the Criminal Procedure Code (Cr.P.C.), 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 lobe the part of the process of collection of some subsequent evidence.

These tests may provide some clues to the investigative agency to collect some evidence but the statements given by the accused against themselves during these tests are not of any evidentiary value,' clarified the law officer.

But Dave during his arguments, contended that parliament never intended to include these tests as tools for probe as Section 53 was last, amended in 2005, when a list of various modern scientific techniques was included in it as legal tools for investigation. Dave also contended that the use of these three tests as tools of investigation is not validated by Article 20(3) of the constitution, which says: 'No person accused of any offence shall be compelled to be a witness against himself.

In Shashi murder case, Court allows narco-analysis. Vijaysen Yadav, the main accused in the disappearance and murder case of Faizabad law student Shashi, has gone through polygraph and narco-analysis test from January 12 to 26. Faizabad Chief Judicial Magistrate Shailesh Tiwari permitted the police on Friday to conduct the tests at the Central Forensic Laboratory in Bangalore.

In his order, the CJM said the tests on Vijaysen will be conducted in judicial custody and prohibited investigating Officer Sharat Chandra Pandey from intervening in any matter during the process of tests. The court also asked him not to accompany Vijaysen to Bangalore.

The Bombay High Court recently in a significant verdict in the case of, Ramchandra Reddy and Ors. v. State of Maharashtra, upheld the legality of the use of P300 or Brain finger-printing, lie-detector test and the use of truth serum or narco analysis. The court upheld a special court order given by the special court in Pune as mentioned above, allowing the SIT to conduct scientific tests on the accused in the fake stamp paper scam including the main accused, Abdul Karim Telgi. The verdict also said that the evidence procured under the effect of truth serum is also admissible. In the course of the judgment, a distinction was drawn between "statement" (made before a police officer) and "testimony" (made under oath in court). The Judges, Justice Palshikar and Justice Kakade, said that the lie-detector and the brain mapping tests did not involve any "statement" being made and the statement made under narco analysis was not admissible in evidence during trial. The judgment also held that these tests involve "minimal bodily harm".

The Supreme Court found that narco-analysis violated individuals; right to privacy and amounted to cruel, inhuman or degrading treatment. Article 21 protects the right to life and personal liberty, which has been broadly interpreted to include various substantive due process protections, including the right to privacy and the right to be free from torture and cruel, inhuman, or degrading treatment.

However, any information or material that is subsequently discovered with the help of voluntarily administered test results can be admitted, in accordance with Section 27 of the Evidence Act. The Supreme Court left open the possibility for abuse of such tests when it provided a narrow exception, almost as an afterthought, namely, that information indirectly garnered from a voluntarily administered test i.e. discovered with the help of information obtained from such a test; can be admitted as evidence. The power of the police to coerce suspects and witnesses into voluntarily doing or not doing certain things is well known. It is highly probable that the same techniques will be applied to get suspects or witnesses to agree to narco-analysis and other tests, resulting in a mockery of the essence of the Supreme Court judgment.

VII. Criticism of Narco-analysis test as an evidence

Narco-analysis has been criticised on the ground that it is not hundred percent accurate. It has been found that certain subjects made totally false statements. It is often unsuccessful in eliciting truth as such it should not be used to compare the statement already given to the police before use of drug. It has been found that a person has given false information even after administration of drug. It is not much help in case of malingerers or evasive, untruthful person. It is very difficult to suggest a correct dose of drug for a particular person. The dose of drug will differ according to will power, mental attitude and physique of the subject. Successful narco-analysis test is not dependent on injection.

For its success a competent and skilled interviewer is required who is trained in putting recent and successful questions. Narco-analysis test is a restoration of memory which the suspect had forgotten. This test result may be doubtful if the test is used -for the purposes of confession of crimes. Suspects of crimes may, under the influence of drugs, deliberately withhold information or may give untrue account of incident persistently. Narco-analysis is not recommended as an aid to criminal investigation. In medical uses like in treatment of psychiatric disorder narco-analysis may be useful: Unless the test is conducted with the consent of the suspect it should not be used in criminal investigation.

VIII. Conclusion

Even if the result of the scientific tests, or discoveries resulting from the tests in tandem with the statements made during interrogation are not directly used. Investigation does receive a tremendous fillip on many occasion. For example, one source states that investigations into the July 11 train blasts in Mumbai and the subsequent blasts in Malegaon were

successful only because of the revelations made by individuals during narco-analysis.¹⁴ It goes further to state that narco-analysis has also taken the place of preventive forensics, because it has helped the administration take steps to prevent further planned blasts in Malegaon and Karnataka. The murkiness around the Aarushi murder case finally got cleaner after conducting the narco analysis test on certain suspects.¹⁵

The Criminal Procedure Code allows conducting such an examination of the accused as is reasonably necessary in order to ascertain facts which may afford evidence about the commission of an offence, and to use reasonable force for the same. We have submitted that the Criminal Procedure Code does not envisage the use of such scientific tests, in particular the narco-analysis test, which was in fact used first in India in the new millennium.

Thus, after an overall assessment, the only reason that an unrestricted use of a narco-analysis test may be justified seems to be because of practical necessity. In this context one is reminded of the observation of the Supreme Court that, "It is as much necessary to protect a accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice."

The legal system should imbibe developments and advances that take place in science as long as they do not violate fundamental legal principles and are for the good of the society. The issue of issuing narco analysis test as a tool of interrogation in India has been widely debated. Courts in India have taken into account an incomplete consideration of the law, which is the reason for their conclusion in favour of the test. While the test may be practical necessity, the sanction of the law for same of them is difficult to find, and extensive safeguard need to be laid out to prevent their abuse.

¹⁴ Bannur Muthai Mohan, *Misconceptions about Narco Analysis*, available <http://www.issuesinmedicalethics.org/151co07.html> (last visited 7 May, 2014).

¹⁵ Vicky Nanjappa, *Aarushi Murder: The Narco-Test That Cracked The Case* available at <http://www.rediff.com/news/2008/jul/11aarushi1.html> (last visited 7 May, 2014).