

Narco-Analysis in Criminal Investigation and Trial: A Conspectus

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Abstract

In the present decade commission of crime has qualitatively changed. Offenders have started using new techniques and methods of commission of crimes. They are also getting technology based logistic support in carrying out their nefarious acts. Perpetrators of crime either leave little evidence or no evidence in the course of the commission of crime. Even if the witnesses are available they do not turn up to help the investigators, prosecutors or depose in courts. Traditional methods of criminal investigation which have been in practice in India for a long time have failed to yield concrete results. All this has resulted in low conviction rate.

For the proper administration of Criminal Justice and to ensure the confidence of the people in the criminal justice system it is necessary that new techniques of crime detection are employed and the offenders are brought to justice. So, it has become very necessary for the investigators and the criminal courts to resort to the advancement of forensic medicine in administration of Criminal Justice. Narco-Analysis test commonly known as "truth Serum test" is one of such techniques employed by investigators. But the use of Narco- Analysis has been hotly debated at the national as well as International level. Both the sides boast of having support of law enforcement agencies, Social thinkers, Human Right activists and Jurists. Though the issue has been hotly debated, there is a dearth of studies on the jurisprudence of Narco- Analysis. The present study is an attempt to examine the various issues involved in the use of Narco-Analysis in criminal Investigation.

Keywords: *Narco-Analysis, Perpetrators, Criminal Justice, forensic medicine, Human right.*

I. Introduction

The term Narco-analysis is derived from the Greek word meaning 'anesthesia' or 'torpor.'²It is believed that a person lies by employing his power of

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imagination. In Narco- analysis test, barbiturates like “Sodium Pentothal or Sodium Amytal” are administered to the subject³. The dose of barbiturates is dependent on, age, sex, will power, mental capacity and health conditions⁴. Under these conditions it becomes difficult for the accused to lie.⁵ In such sleep-like state the forensic psychologists try to get facts about the crime. The accused under the influence of barbiturates⁶ is not capable of answering the questions thrown out by the experts but can answer simple questions on the basis of suggestions offered in that context.⁷The revelations made by the subject administered the hypnotic substances are video recorded. It is used to connect the missing links in the crime or evidence collection. The success of the Narco analysis is dependent upon the professional skills in putting relevant questions.⁸ In India, Narco-analysis has been used in Godhra carnage case, Arun Bhatt kidnaping case in Gujarat, Telgi stamp paper scam, Nithari serial killings and Arushe’s murder case.⁹

²Narco-. (n.d.) *American Heritage Dictionary of the English Language*, Fifth Edition. (2011). Retrieved November 7 2019 from <https://www.thefreedictionary.com/narco->

³"Truth" Drugs in Interrogation Available at https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol5no2/html/v05i2a09p_0001.htm.(visited on Oct.29,2019).

⁴Barbiturate Abuse, <https://www.webmd.com/mental-health/addiction/barbiturate-abuse#1>(visited on Nov. 2,2019).

⁵Sandhya Verma, (thesis) <https://shodhganga.inflibnet.ac.in/bitstream/10603/70232/9/chapter5.pdf>(visited on **Nov. 2,2019**)

⁶European monitoring centre for drugs and drugs addiction, <http://www.emcdda.europa.eu/publications/drug-profiles/barbiturates>(visited on **Nov. 2,2019**)

⁷https://shodhganga.inflibnet.ac.in/bitstream/10603/102549/9/09_chapter%202.pdf.(visited on Oct.31.10.2019)

⁸ Barcelona Panda, Narco-Analysis and its Evidentiary Value in India, (2011) PL July.

⁹ .N.D.Gowda, “Role Of Forensic Medicine In the Administration of Criminal Justice With Special Reference to Human Rights” Volume 3, International Journal Of Research And Analysis.

II. Criminal Investigation

The word 'investigation' has been defined in Section 2(h) of the Code of Criminal Procedure (Cr.P.C).¹⁰ The Supreme Court in *H.N. Rishbud vs State of Delhi Delhi*¹¹ said the investigation generally consists of the following:

steps: (i) Proceeding to the spot

(ii) Ascertainment of the facts and circumstances of the case

(iii) Discovery and arrest of the suspected offender

(iv) Collection of evidence relating to the commission of the offence which may consist of: (a) Examination of various persons (including accused) and the reduction of their statements into writing, if the officer thinks fit b) Search of places and seizure of things considered necessary for the investigation and to be produced at the trial; and (v) Formation of the opinion as to whether on the materials collected, there is a case to place the accused before a Magistrate for trial and, if so, taking the necessary steps for the same for the filing of a charge sheet u/s 173 Cr.P.C.

Every investigation is a search of truth for justice and to bring the accused to book. In this search every citizen who has knowledge of the commission of cognizable offence or in any way can assist the investigator and has a duty to inform police and co-operate with the investigating officer who is entrusted with a responsibility of collecting evidence. The investigator is expected to adopt scientific methods of crime detection which are permitted in law to unearth the crime.¹² Narco Analysis test fulfils the essential ingredients of section 2(h) of Cr.P.C so it can be inferred that Narco- analysis is a scientific investigation where some sort of information related to the crime is acquired from the accused which may become evidence against him. It is a settled principle of law that police authorities have the statutory right and duty to investigate into a cognizable offence under the scheme of Cr.P.C and the Supreme Court on various occasions, denounced undesired interference by the

¹⁰ All the proceedings under the Code for the collection of evidence by a police officer or by any other person (other than a Magistrate) who is authorized by the Magistrate in this behalf will come under the purview of investigation.

¹¹ AIR 1955 SC 196.

Courts into investigation of crimes by police authorities in due discharge of their statutory functions under the law of the land.¹³ A segment of people comprising of social thinkers, lawyers and human right activists have opposed the application of Narco analysis against a subject without the consent of the subject on the grounds of freedom of speech and expression, privacy rights, individual liberty and human dignity. They contend that the drugs used in narco analysis are harmful to human body. Wrong dose can prove to be fatal. The Supreme Court in the case of Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi)¹⁴ held “in the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime” It further observed “the investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.”

Under the provisions of section 161 Cr. P.C¹⁵ police officer may examine orally any person whom he considers to be acquainted by the facts of the case. Some of the person examined under section 161 may later be accused. So “any

¹³D.Venkatasubramaniam&Ors vs M.K.MohanKrishnamachari&Ors. In The Supreme Court Of India Criminal Appellate Jurisdiction Criminal Appeal No.1766 Of 2009.

¹⁴ 2010 6 SCC 1.

¹⁵ Section 161 of Code of Criminal procedure provides:

Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

2. 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 to a penalty or forfeiture.

3. The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

person” under section 161 includes accused also.¹⁶ Under Section 162 the person so examined is bound to answer all questions except those questions which have the tendency to incriminate him.¹⁷ But if during the examination by a police officer the person so examined answers any question which tends to incriminate him, the answer cannot be proved against him in the enquiry or trial. The information acquired from the accused through performing Narco analysis on him is akin to the statement recorded under section 161 Cr.P.C. which if reduced in writing is not required by the maker to be signed and cannot be proved against him. A person is arrested on a charge of committing an offence can be subjected to medical examination against his consent.¹⁸ In *Ram Lal Narang vs. State (Delhi Administration)*¹⁹ it was held that there is no reason to believe that court in the administration of criminal justice is not empowered to request a medical practitioners under section 53 which empowers a police officer, to request a medical practitioners to examine a person for facts which can be an evidence in the cases investigated by the police for example collecting blood sample, semen from the accused or conducting DNA test for the purpose of further investigation under Section 173(8) of the Code.

¹⁶*Nandini Satpathy vs Dani (P.L.) and anr.* 1978 SCR (3) 608.

¹⁷ Section 162 provides that “statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.”

¹⁸Section 53 Cr.P.C provides that “when a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a 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 reasonable for that purpose.”

¹⁹(1979) 2 SCC 322.

III. Constitutional Paradigm

The use of Narco analysis can be very useful, as the conscious mind does not speak out the truth, unconscious mind may reveal vital information about a criminal case.²⁰ But a segment of lawyers and human rights activists view Narco analysis test as a cruel form of investigation and similar to a third-degree treatment, with Constitutional prohibitions against interrogation of an accused in hypnotic or semi conscious state. Narco analysis has been challenged on the ground of violation of Article 21 of Constitution.²¹ Privacy is an essential attribute of right to life and liberty guaranteed to the citizens of India.²² This Article has been judicially expanded to right to live with human dignity. Thus, the state may take away or abridge even right to life in the name of law and public order following the procedure established by Law. However, it is necessary that the procedure must be “due process” as held in *Maneka Gandhi v. Union of India*.²³ Thus the state cannot take away or abridge the right to life by truncating processual justice. Allahabad High Court in *Re Provision of Section 14A of Sc/St(Prevention Of Atrocities) Amendment Act,2015 vs. Nil*²⁴ observed “Procedure established by law” are words of deep meaning for all lovers of liberty and judicial sentinels. Amplified, activist fashion “procedure” means “fair and reasonable procedure” which comports with civilised norms like natural justice rooted firm in community consciousness -- not primitive processual barbarity or legislated normative mockery.” Narco Analysis has also been challenged on the ground that it violates Article 20(3) of the Constitution.²⁵ The accused is entitled to a fair trial. This right has various dimensions. Firstly, prosecution has to stand on its own leg to prove the guilt of accused. Secondly presumption of innocent till the guilt is proved. Lastly right

²⁰ Barcelona Panda “Narco-Analysis and its Evidentiary Value in India” (2011) PL July.

²¹ No person shall be deprived of his life or personal liberty except according to procedure established by law.

²² *Puttaswamy v. Union of India* known as Rights to Privacy Case. It has been reproduced from (2017) 10 SCC 1

²³ 1978 SCR (2) 621.

²⁴ Criminal Writ-Public Interest Litigation No. 8 of 2018.

against self-incrimination.²⁶ In *M. P. Sharma vs. Satish Chandra*,²⁷ the Supreme Court observed as follows: "Article 20(3) embodies the principle of protection against compulsion of self-incrimination which is one of the fundamental canons of the British system of criminal jurisprudence and which has been adopted by the American system and incorporated as an article of its Constitution. It has also, to a substantial extent, been recognized in the Anglo-Indian Administration of criminal justice in this country by incorporation into various statutory provisions." It further observed "So far as the Indian law is concerned, it may be taken that the protection against self-incrimination continues more or less as in the English common law, so far as the accused and production of documents are concerned, but that it has been modified as regards oral testimony of witnesses, by introducing compulsion and providing immunity from prosecution on the basis of such compelled evidence." It further observed "So far as the Indian law is concerned, it may be taken that the protection against self-incrimination continues more or less as in the English common law, so far as the accused and production of documents are concerned, but that it has been modified as regards oral testimony of witnesses, by introducing compulsion and providing immunity from prosecution on the basis of such compelled evidence." In *State of Bombay vs Kathi Kalu Oghad and Others*²⁸ it was held that if a police officer questions an accused and the accused voluntarily offers statements which at any stage become incriminatory cannot be considered to be a statement under compulsion. In the case of *Ramchandra Ram Reddy vs The State of Maharashtra*²⁹ the issue before the court was whether narco analysis test is violative of article 20(3) and the fundamental rights of the person against whom tests are conducted. The court held that Article 20(3) prohibits compelling a person to be a witness against him. The court differentiated brain mapping and P300 with Narco analysis online detector or polygraph test, whatever information comes from the accused cannot be considered to be a statement coming out of the involuntary test. It can be said that in the case of narco analysis the information which is extracted from the accused is a statement. As

²⁶ Article 20(3) provides "No person accused of any offence shall be compelled to be a witness against himself." Every person accused of an offence has a right to remain silent.

²⁸ AIR 1961 SC 1808.

²⁹ 2004 All MR (Cri) 1704.

regards the issue of statements taken from the accused by undergoing involuntary test will attract the provision of article 20 (3) or not will depend upon the fact whether the statement made by the accused by undergoing the test against his will is incriminatory or not. Statements are incriminatory or not can be decided only after the performing of the test. If it turnout to be incriminatory then there are sufficient protections available under Cr.P.C. and Indian Evidence Act come to the rescue of the accused. It was held that the statement acquired in process of narco analysis test is also admissible. In Narco analysis accused is subjected to the tests against his will, but the disclosures or statements made by the subject during such tests are not voluntary.

In *Selvi&Ors vs State of Karnataka*³⁰ in the context of narco- analysis technique, it was observed³¹. Wrong dose of hypnotic medicine administered to the subject can also result in coma or death. It can be safely concluded that narco- analysis conducted against the consent of accused invades his privacy and is violative of fundamental rights and should be sparingly allowed as a last resort. However, a witness is not the same thing as evidence in wider sense of terms. To be a witness is not equivalent to production of documents or providing certain materials which can be used to determine the guilt or innocence of the accused. Giving thumb impression or fingerprint or specimen of handwriting or exposing any part of the body for examination is not same as that of becoming a witness. To be a witness means giving oral evidence in a Court of law. Taking of thumb, finger and palm impressions of an accused person by a Court does not fall within the prohibition of Article 20(3) of the Constitution.³¹

When all the possibilities are exhausted and the investigating officers do not get any clue or clinching evidence then these tests become essential in order that the criminals are brought to book. The nature of the test which is required under the circumstances depends upon the nature of investigation. These scientific tests have now become part of investigation process and simply because of the fact that the accused does not consent for a test the investigating officer should not be restricted from carrying out the tests. It was also argued that these scientific tests exclude the possibility of third degree to which the investigating officers resort to when they do not find any clue regarding the crime.³² If such tests are

³⁰(2010 (7) SCC 263.

³¹ *Prakhar Singh v. The State* AIR 1958 Punjab 294.

³²*SantokbenSharmanbhai Jadeja vs State Of Gujarat* 2008 Cri.L.J 68Gujrat.

not conducted, the investigating agency will be deprived of clinching evidence as against the accused. The contention that under the influence of barbiturates answers are influenced by suggestions offered by the interviewer and thus there is a likelihood of false results is difficult to be agreed. The scientific value of such tests and its reliability is evaluated during the course of trial. Conducting such scientific tests will not amount to violating his right to silence.

IV. Evidentiary Value of Statement of Accused in Narco- Analysis

In *R. v. Leatham*³³ it was held "it matters not how you get it if you steal it even, it would be admissible in evidence." It seems that the Indian courts have endorsed the view taken in *R. v. Leatham*. In *R. M. Malkani vs State of Maharashtra*³⁴ the evidence of tape recording of a conversation by police was challenged. The challenge was based on the ground that it offended Articles 20(3) and 21 of the Constitution. But the Supreme Court observed that evidence is admissible even if it is illegally obtained unless it is tainted by an inadmissible confession of guilt. The Court took a pragmatic approach and said that the telephonic conversation of an innocent citizen is protected against unreasonable interference by tapping the conversation. The protection cannot be extended to the guilty citizen against the efforts of the police to prevent corruption of public servants. But the Courts will not permit the police to proceed by unlawful or irregular methods and encroach with the safeguards provided to the people.

Confession made to a police officer is not admissible as evidence against accused.³⁵ If confession is made by a person while he is in custody of police it is not admissible.³⁶ But section 27 is an exception to the rule under section 25 and 26 which prohibits the proof of confession made to a police officer or where he

³³(1861). 8 Cox CC 498 at 501.

³⁴1973 SCR (2) 417.

³⁵ Section 25 Indian Evidence Act :No confession made to a police officer, shall be proved as against a person accused of any offence.—No confession made to a police officer, shall be proved as against a person accused of any offence."

³⁶ Section 26: Indian Evidence Act. Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

makes a confession while he is in custody of police.³⁷ The Supreme Court in case of *Madhu vs State Of Kerala*³⁸ stated “the rationale behind Section 27 of the Indian Evidence Act is, the facts in question would have remained unknown but for the disclosure of the same by the accused. Discovery of facts itself, therefore, substantiates the truth of the confessional statement. Since it is truth that a court must endeavour to search. Section 27 has been incorporated as an exception to the mandate contained in Sections 25 and 26 of the Indian Evidence Act.”

V. Extra Judicial Confession of Co-accused

Extra Judicial Confession of a co accused is not evidence under section 3 of Indian Evidence Act in technical sense but still the court can consider it in a trial.³⁹ Section 30 provides a confession can be taken into account against a co-accused also.⁴⁰ In *HaricharanKurmi v. State of Bihar*⁴¹ the Court concluded that an extra-judicial confession cannot be treated as a substantive piece of evidence against the co-accused, the proper judicial approach is to use it only to

³⁷ Section 27 of Indian Evidence Act: How much of information received from accused may be proved.—Provided that, when any fact is proved to have been discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

³⁸ (2012) 2 SCC 399.

³⁹ *Kusal Toppa vs The State Of Jharkhand In The Supreme Court Of India Criminal Appellate Jurisdiction Criminal Appeal Nos.1691-1692 OF 2010*

⁴⁰ In *Sahadevan v. State of T.N.*, the Supreme Court culled out certain principles regarding the reliability of an extra judicial confession (i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

⁴¹ AIR. 1964 SC 1184.

strengthen the opinion formed by the Court having regard to other evidence placed on record. In *Ram Lal vs the State of Himachal Pradesh*⁴² the Supreme Court observed “it is well settled that conviction can be based on a voluntarily confession but the rule of prudence requires that wherever possible it should be corroborated by independent evidence. Extra-judicial confession of accused need not in all cases be corroborated..... the rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated.” If extra judicial confession is admissible in evidence against the co- accused which does not fulfill all the essential elements of evidence under section 3, on the similar lines statement acquired through involuntary narco analysis should also be accepted against the accused.

VI. Conclusion and Suggestions

The present criminal justice system is heavily aligned towards the accused. Freedom of speech and expression, individual liberty and freedom are being used as shield by criminals due to weakness in the administration of criminal justice system in general and investigation and trial of criminal cases in particular. Incriminating statement of the accused extracted through involuntary Narco Analysis is akin to the statement of “any person” under section 161 Cr.P.C which can be taken by investigating officer of a criminal case which does not require any permission of court. So, there is no difficulty in using such statements as an aid to investigation. However, if it has to be used as evidence against the accused then it should be done with the prior permission of the court and the court should allow it to be proved if the court is convinced of the genuineness of the statement and it inspires confidence. The criminal justice system of India by making admissible statement of accused under section 27 of Indian Evidence Act has shown the possibility of accepting incriminatory statement of accused the veracity of which is supported by recovery of incriminatory substances. If taking of thumb, finger and palm impressions of an accused person by a Court do not fall within the prohibition of Article 20(3) of the Constitution; there is no reason to treat narco- analysis on a different footing

⁴²In the Supreme Court of India Criminal Appellate Jurisdiction Criminal Appeal No.576 OF 2010.

due to certain amount of risk involved in Narco- analysis. But the test is conducted in forensic laboratories by experts of forensic medicine. So the amount of risk is insignificant. When barbiturates are administered following the procedure prescribed and observing the due safety precautions the risk is minimised. We must be ready to undertake a calculated risk for the larger interest of society. The validity of Narco- analysis has been upheld on various occasions having regard to the circumstances of the cases. If it is carried out with a permission of court in presence of a lawyer of the choice of the accused, possibility of miscarriage of justice is excluded. Narcoanalysis test in crimes of severe nature will improve the quality of administration of criminal justice through strengthening of evidence system.