

The Concept of Narco Analysis in the View of Constitutional and Human Rights

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Abstract—Narco analysis is one of such scientific development that has become an increasingly one of the most common forms of evidence in the nation and a huge debate going on the admissibility of such evidence. The idea behind using narco analysis test as a tool of interrogation is being constantly debated in India.

Index Terms—Narco analysis

I. INTRODUCTION

Science has definitely outpaced the development of law or least a layman's understanding of the law and it cannot be avoided that the admissibility of an evidence in the court is of complex nature. Narco analysis is therefore one such scientific development that has become an increasingly one of the most common forms of evidence in the nation and a huge debate going on the admissibility of such evidence. The term Narco analysis is derived from the Greek word *narkō* (which means "anesthesia" or "torpor") and is used to conduct a diagnostic and psychotherapeutic technique that uses psychotropic drugs, under the influence of which they can be exploited by the therapist. Horsley coined the term narco-analysis. Narco analysis poses several complexities in the field of law, medicine and ethics. The procedure of narco analysis is violative of the rights against self-incrimination, guaranteed under Article 20(3) of constitution. It figured prominently in the media as well when it recently became the eye of the storm and became a debate when media played tapes of Telgi, an accused who was subjected to Narco analysis procedure.

II. NARCO ANALYSIS FROM CONSTITUTIONAL AND LEGAL STAND POINTS

Tests like narco analysis don't have legal validity as confessions are made by semiconscious person are not admissible in court. However after considering the circumstances under which the test was conducted the court may, grant limited admissibility. The petitioners in one of the case stated 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 most significant provision regarding crime investigation and trial in the Indian constitution is Art. 20(3). The article talks about privilege against self-incrimination.

The privilege against self-incrimination is a fundamental principle of common law criminal jurisprudence. Art 20(3) which lay's down this privilege read "No person accused of any offence to act as a witness against himself" subjecting the accused to undergo the test, as has been performed by the investigative agencies in India, is considered by many as a violation of Art. 20(3) it was held that to attract of constitution. The application of Narco analysis test involves the fundamental question related to to judicial matters and also to Human Rights. The legal position of applying this technique as an investigative aid raises genuine issues like encroaching individual's rights, freedom and liberty. In the case of *State of Bombay v. Kathikalu*, it must be shown that the accused was compelled to make a statement which was likely to be incriminative of himself. Compulsion means duress, which includes threatening, beating or imprisonment of wife, parent or child of person. Thus where the accused produces a statement without any inducement, threat or promise Art 20(3) does not apply. The privilege against self-incrimination thus enables the maintenance of human privacy and observance of civilized standards in the enforcement of criminal justice. It also contradicts the maxim *Nemo Tenetur se Ipsum Accusare* that is, '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 confession from the accused is derived from any physical or moral compulsion (be it under hypnotic state of mind) it should not stand admissible in the court. The right against forced self-incrimination, widely known as the Right to Silence is set down in the Code of Criminal Procedure (CrPC) and the Indian Constitution. In the CrPC, the legislature has protected a citizen's right against self-incrimination. S.161 (2) of the Code of Criminal Procedure states that every person "is bound to answer truthfully all questions, put to him by [a police] officer, other than questions the answers to which would have a tendency to expose that person to a criminal charge, penalty or forfeiture". Arguments have been made that narco analysis constitutes mental torture and thus is violative of Article 21 Right to life as it deals with right to privacy. Again, law against intruding the privacy of individual would not allow brain fingerprinting evidence to be given in court. It is well established that the Right to Silence has been granted to the accused by virtue of the pronouncement in the case of *Nandini Sathpathy v. P.L.Dani*, no one can force to extract statements

from the accused, who has the right to keep silent during the course of interrogation (investigation). By the administration of these tests, forced intrusion into one's mind is being restored to, thereby eliminating the validity and legitimacy of the right to Silence. She claimed that she had a right of silence by virtue of Article 20(3) of the Constitution and Section 161 (2) of Cr. P.C. The Apex Court upheld her plea.

Moreover, the tests like Narco analysis are not considered very reliable. Studies done by various medical associations in the US 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. In USA, in the case of *Townsend v. Sain*, it was held that the petitioner's confession was constitutionally inadmissible if it was adduced by the police questioning, during a period when the petitioner's will was overborne by a drug having the property of a truth serum. Collecting evidence and helps in investigation does not amount to testimonial compulsion. Thus it does not violate the constitutional provision regarding protection against self-incrimination. In *M.P.Sharma v. Satish Chandra*, the Apex Court observed that since the words used in Article 20(3) were "to be a witness" and not "to appear as a witness" the protection is extended to compelled evidence obtained outside the Courtroom. The same point was reiterated in *Kathi Kalu Oghad's* case. The term "Right to Privacy" is generic term encompassing various rights recognized to be inherent concept or ordered liberty. The right to be left alone on right of a person to be free from unwarranted publicity is Right to privacy. This Right to Privacy is implicit in the right to life and liberty guaranteed to the citizens of India by article 21 of the constitution of India. None can publish anything covering the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If done so, it will be violating right to privacy of person concerned and would be liable in an action for damages. In Indian constitution protection of life, liberty and freedom has throughout interpreted and article 14, 19, 21 are best example for any constitution against right to privacy. In the Code Criminal Procedure "injury" is defined in Sections 44, 323, 324, 328 and the punishment for which may extend to 10 years, imprisonment. Hence, administration of narcotic drug amounts to causing injury. Furthermore, the reliability of scientific tests is not free from doubt. It is necessary to recall background of article 20(3) of the constitution. One of the fundamental canon of British and American system of criminal jurisprudence has been the accused should not be compelled to incriminate himself. One of extension of doctrine was with regard to the production of documents by an accused in respect to subpoena or other form of legal process. In *R v. Purnell*, "We know of the instance herein this court has granted a rule to inspect books in a criminal prosecution nakedly considered".

III. NARCO ANALYSIS IN INDIA

A few democratic countries, India most notably, still

continue to use narco analysis. Narco analysis is not openly permitted for investigative purposes in most developed and democratic countries. My interest in narco analysis test was revived when it caught the attention of media and critics thereby raising several issues regarding its validity as a scientific tool of investigation and its admissibility in court of law infringement of individual fundamental rights and questions its value as evidence. In India, the narco analysis test is done by a team comprising of an anesthesiologist, a psychiatrist, a clinical/forensic psychologist, an audio-videographer, and supporting nursing staff. The forensic psychologist will prepare the report about the revelations, which will be accompanied by a compact disc of audio-video recordings. The strength of the revelations, if necessary, is further verified by subjecting the person to polygraph and brain mapping tests. Narco analysis is steadily being mainstreamed into investigations, court hearings, and laboratories in India. The judgment of an eleven-judge bench in the case of *State of Bombay v Kathi Kalu Oghad* where it was observed that self-incrimination means conveying information based upon personal knowledge of the person and cannot include merely the mechanical process of producing documents in court. It has been held in *Ram Jawayya Kupar's* case that executive power cannot intrude on either constitutional rights and liberty, or for that matter any other rights of a person and it has also been observed that in absence of any law ant intrusion in fundamental rights must be struck down as unconstitutional.

Lie detection test comes under the general power of investigation (Sections 160-167, Cr.P.C.). But it must be realized that it is prerogative of the person to allow Himself / herself to be put to polygraph test or not and it should not be left to the discretion of police. Unless it is allowed by law it must be seen as illegal and unconstitutional. But if it is conducted with free consent' of the person it may be permitted. 'Free consent' means it is voluntary and is not given under coercive circumstances. Voluntariness can be understood by the example- If a person says, "I wish to take a lie detectors test because I wish to clear my name". It shows his/her voluntariness but it is still to be shown that whether this voluntariness was under coercive circumstances or not. If a person is told by police "If you want to clear your name take a lie detector test" or "take a lie detector test and we will let you go" then it shows that police has linked up the freedom to go with the lie detector test and as such it cannot be held voluntary. These kinds of statements are held to be self-incriminatory.

IV. ADMISSIBILITY

While narco analysis gave out an immense amount of information, it also triggered off many question as several critics shared profound sense of skepticism over the administration of serum on the witness to extract truth. Narco analysis is considered as a tool or aid in collecting and supporting evidence. However, doubts are raised whether it

amounted to testimonial compulsion in judiciary and violation of human right, individual liberty and freedom. Lawyers are divided on whether the results of Narco analysis and P300 tests are admissible as evidence in courts, as they claim that confessions made by a semiconscious person is not admissible in court. A Narco analysis test report has some validity but is not totally admissible in court, which considers the circumstances under which it was obtained and assessed its admissibility. Results of such tests can be used to get admissible evidence, can be collaborated with other evidence or to support other evidence. But if the result of this test is not admitted in a court, it cannot be used to support any other evidence obtained the course of routine investigation. The Bombay High Court, in a significant verdict in the case of Ramchandra Reddy and Others v State of Maharashtra, upheld the legality of the use of P300 or Brain Mapping and narco analysis test. The court also said that evidence procured under the effect of narco analysis test is also admissible. However, defence lawyers and human rights activists viewed that narco analysis test was a very primitive form of investigation and third degree treatment, and there were legal lapses interrogation with the aid of drugs. Narco analysis is in the limelight in the context of infamous Nithari village (Noida) serial killings. The two main accused in the Nithari serial killings Mohinder Singh Pandher and Surendra Kohli have undergone narco analysis tests in Gandhinagar in Gujarat.

V. LOOPHOLE

The method of narco analysis has been criticized for the fact that it is not 100% accurate. It has been found out that certain subjects which were made were completely false in nature. It is often proved out of being unsuccessful in eliciting truth as such it should not be compared to the statement already given to the police before use of drug. It has been found that a person even after administration of drug has given false information. It is not of been of much help in case of malingers or untruthful or evasive person. It is very difficult to prove that a correct amount or dose of the drug for a particular person. The dose of drug differs according to various things such as will power, the mental attitude of a person, physique etc., No successful narco analysis test is dependent on the injection. For its success it requires a competent and skilled interviewer who is trained well in putting appropriate and successful questions to the interviewee. The narco analysis test is a restoration of memory which the suspect. The test results may be doubtful if the test has been used for the purposes such as of confession of crimes. Suspects of crimes may, under the influence of drugs, deliberately give old information or may give untrue account of incident that had persisted. Narco analysis is not recommended as an aid to criminal investigation. For medical purposes like that of treatment of psychiatric disorder the narco analysis may be useful.

VI. PUBLIC INTEREST

Another angle while looking into the legal validity of narco analysis test is that it is used as an aid for gathering evidence and it also helps in investigation and thus not amounting to testimonial compulsion. Thus there is no violation against the constitutional provision that is regarding protection against self-incrimination. Supporters of narco analysis test represent the view that narco analysis is specifically used when there is a need to procure some required information for prevention of future offences or criminal acts by persons who are considered to cause damage. However, its implementation must be assessed objectively so that it can be replaced by existing conventional methods of interrogation which brought shame, ignominy and disrepute to police leading to loss of credibility in the minds of common people who believe in the criminal justice system. Narco analysis can become as viable an effective alternate to barbaric third degree methods. However, care must be taken to look out that this procedure is not being misused or abused by the investigating officers and it should be correlated with corroborative. In case of Dinesh Dalmia v State of Madras, it was held by Madras Court that scientific test of accused by conducting polygraphy.

VII. CONCLUSION

Law is a living process, which evolves according to the changes in society, science, ethics many more other dependent variables. The legal system should encourage developments and advances that take place in science as and up till it does not violate any of the fundamental legal principles and is in overall for the good of the society. In few democratic countries, especially India, they still continue to use narco analysis. The idea behind using narco analysis test as a tool of interrogation is being constantly debated in India. The extent of its acceptance in our legal system and in society is something, which will become clearer in the near future. There have been various orders by many different High Courts of the country in upholding the validity of narco analysis. These judgments seem to be in stark contrast with the prior judgments given out by the Supreme Court while interpreting Art. 20(3). The truth lies in the fact that narco analysis still continuous to be a nascent interrogation method used in the Indian criminal justice system without much of any specific rules or guidelines. Various High Courts have passed orders upholding the validity of narco analysis. These judgments are stark contrast to the previous judgments of the Supreme Court that were read out while interpreting Art. 20(3). The Central government of India must take a clear policy stand on narco analysis because the fact is that India's commitment to individual freedom and transparent criminal justice system is at stake.

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