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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

SELF INCRIMINATION IN CONTEXT OF NARCO **ANALYSIS IN INDIA**

AUTHORED BY - KIRTI MORE

A3221518208 SECTION:-C BBA/LLB (H) 2nd year



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ABSTRACT

In this article I had attempted to examine about constitutional validity of Narco Analysis Test under Article 20(3) with reference to Judicial Pronouncements. Narco analysis test is used for purpose of extracting truth from accused or suspect. The main aim of Narco Analysis test is to detect the truth from criminal. Narco analysis is scientific form of investigating tools. The principle object of Narco analysis test is to go in the root of truth just as to decrease the criminal conduct in the public arena. But, one of the biggest legal controversy around Narco Analysis Test are its alleged violation of the fundamental rights against self incrimination guaranteed under Article 20(3) of the Indian Constitution.

Therefore, I had tried to discuss the constitutional validity of Narco Analysis Test in India under Article 20(3) and also tried to discuss the admissibility and reliability of Narco Analysis test. Narcoanalysis has been introduced as a tool in the investigation, under this test the person goes into the subconscious state by passing the serum and answer the questions on the basis of knowledge, whatever present in their mind. In India the principle issues in context of this test are whether the Narcoanalysis is hit by article 20 of the Constitution i.e self-incrimination? Advancement in science and technology in today's world has led to the change in the patterns of crime in the modern society. Needless to say it is faced with a lot of criticism as it prima facie appears to be violating various provisions of law and specifically the fundamental rights, expressed in the Indian Constitution.

INTRODUCTION

A sound criminal justice system is necessary to regulate and make any society free from criminals and criminal activity. Unlike the Right to Information Act, 2005 which enables general people to obtain information of public importance, extraction of information from the human mind becomes very difficult. However, with the development of technology, certain scientific methods have been developed which make such extraction of information possible. Such methods are popularly known as Deception Detection Tests (DDTs)

The term Narcoanalysis is gotten from the Greek word 'NARKE'¹ which means Anaesthesia or Torpor and was used to describe a diagnostic psychotherapeutic technique that uses psychotropic drugs to introduce a stupor suspension or great diminution of sensibility, a state in which mental element with a strong associated affects come to the surface where they can

¹ <https://en.wikipedia.org/>

be exploited by the therapist or investigating agency. Under this test the person goes into the unconscious state by passing the serum and speaks whatever is present in their mind. The Narco analysis is one of the DDT test, Polygraph, brain mapping are the other two test of the DDT. Needless to say the police officers in many countries thus restrict to the use of drugs for extraction of confession from the accused person. Narcoanalysis has been a rather new concept in India, however since its inception in India Narcoanalysis has been used extensively for purpose of investigation by the police. The reason for the immense use of said test is increasing the gap between the rate of accusation and the rate of the conviction.

The primary provision with respect to crime investigation and trial in the Indian Constitution is Article 20(3). It manages the benefit against self incrimination. The privilege against self incrimination is a fundamental right under Article 20(3) which exemplify this privilege read, “No person accused of any offence shall be compelled to be a witness against himself”². Subjecting the charged to experience the test, as has been done by the investigative agencies in India, is considered by numerous individuals as an obtrusive violation of Art. 20(3). The application of Narco analysis test involves the principal question relating to judicial matters and furthermore to fundamental and Human Rights. The legal position of applying this technique as an investigative guide raises real issues like this technique violates fundamental right of an accused person such as right against self incrimination under Article 20(3) of the Constitution and furthermore infringement of an individual’s rights, liberties and freedom.

However, Narcoanalysis comes with a lot of criticism on its part. It has often been in controversy owing to its usefulness in solving crimes on one hand and going against the principles of natural justice on the other hand. The core issue in the context of the Narcoanalysis test are the effect of the test in the body but according to the experts the test left no side effects on the body because the dose of the drugs is given according to the age, sex and hence there is the controversy in the admissibility of the test. On the other hand, in many cases the accurate veracity of the confession has been proved such as in the Nithari killing case.

In the Narcoanalysis test, the subject enters into a twilight stage i.e. a stage between consciousness and unconsciousness. In this stage, it becomes difficult for him to lie and his answers would be restricted to facts he is already aware of. Before the test, Courts authorisation

² Constitution of India

and written consent of subject is made sure about which are required for conducting the test. The strategy is explained to the subjects. The test is conducted only in the presence of forensic and medical experts.

Next, it gets basic to analyse Article 20 (3) of the Indian Constitution. Clause (3) of Article 20 pronounces that no person accused of an offence shall be compelled to be an observer against himself. However, lawful inquiries are raised about the legitimacy of tests like Narco Analysis, with some maintaining its legitimacy in the light of legal principles and others rejecting it as an outright infringement of constitutional provisions. It has been asserted that Narco Analysis is a obvious violation of the Article 20(3) of the Indian Constitution. However, in this age of ever increasing crime percentage, such tests often render a great deal of help to the investigation agencies and thus, the opportunity has already come and gone to blend Article 20 (3) with the Narco Analysis.

This provision may be stated to consist of the following three parts:-

1. it is a right pertaining to a person accused of an offence
2. it is a protection against impulse to be a witness; and
3. it is a protection against such impulse resulting in his giving evidence against himself.³

The privilege under clause (3) is limited only to an accused i.e. an individual against whom a formal accusation relating to the commission of an offence has been levelled which is in the typical course may result in the prosecution. An individual against whom a first information report has been recorded by the police and investigation has been ordered by the Magistrate can claim the advantage of the protection.

METHODOLOGY

The test of narco analysis involves the administration of small amounts of Sodium Penthatol and Sodium Amytal dissolved in distilled water and mixed with dextrose, intravenously over a period of three hours. The psychological effect is that the subject loses all inhibition and does not have the ability to manipulate answers easily. This is why it is believed that the information revealed during such a test is mostly the truth.

The subject is then interrogated by investigating officers in the presence of doctors and the

³ lawoctopus.com

same is recorded in audio and videocassettes. Also, experts prepare a report, which is used for the purpose of collecting evidence.

OBJECTIVES OF STUDY

The Objective behind the Narcoanalysis test is that to resort the lying uses by a person through his creative mind yet in the Narcoanalysis test this creative mind is neutralised as the person goes into the sub conscious stage. Hence, it is believed that the person can't lie and whatever he answers is spontaneous and true.

While doing this research the following objectives are :-

1. To discover the constitutional validity of Narco Analysis test in India.
2. To feature the issues on Narco Analysis Test in India.
3. To analyze the evidentiary value of Narco Analysis test in India.
4. To explore the role of Judiciary while dealing cases relating to Narco Analysis test in India.

SELF INCRIMINATION IN CONTEXT OF NARCO ANALYSIS IN INDIA

Narco-analysis refers to the practice of administering barbiturates or certain other chemical substances, regularly Pentothal Sodium, to lower a subject's inhibitions, with the expectation that the subject will more freely share information and feelings. The subject is administered with Pentothal Sodium, Sodium Thiopental and Suxamethonium Chloride, barbiturates or even a cocktail of these drugs. The Narco- analysis test is conducted by mixing 3 grams of above chemicals dissolved in 3000 ml of distilled water and expert inject a subject the solution under controlled circumstances in a laboratory or in an operation theatre⁴. The dose depends on the person's sex, age, health and physical condition. The subject, in a state of hypnosis, cannot speak on his/her own but can answer specific. These drugs are also called 'truth serums' and help in extracting the truth in the form of repressed feelings, thought or memory of a person.

A person is able to lie by using his creative mind, but in Narco-analysis Test, the subject's inhibitions are lowered by interfering with his nervous system at the molecular level. In this state, it gets troublesome however, not feasible for him to lie. The subject is put in a state of

⁴ www.thehindu.com

Hypnotism isn't in a situation to speak up on his own but can answer specific. The answers are believed to be spontaneous as a semi-conscious person is unable to manipulate the answers. This drug works on the principle of inhibiting the thought filtration process of the brain. The theory behind this is that when we lie, our brain filters our thoughts and decides what is to be revealed and what has to be concealed. If this process is inhibited, a person can no longer filter his thoughts and has to speak the truth, or so is assumed. In such sleep-like state efforts are made to acquire "probative truth" about the crime.⁵

How to conduct Narco-Analysis Test in India?

In India, Narco-analysis test is done by a team comprising of one anaesthetist, one physician and one clinical/ forensic psychologist, an audio-videographer, and supporting nursing staff. The physician certifies the fitness of the person before and after Narco-analysis, the anaesthetist modulates the depth of anaesthesia required depending upon the quantum of information to be obtained and monitors the various stages of anaesthesia. Only the clinical or forensic psychologist interacts with the individual who is a "trance" and gives reports along with videotapes to the courts on behalf of the team. No medical professional in the team is involved in interrogating the individual. The revelations made during this stage are recorded both in video and audio cassettes. The strength of the revelations, if fundamental, is further verified by exposing the person to polygraph and brain mapping tests. The report prepared by the experts is what is used in the process of collecting evidence. This procedure is directed in government hospitals after a court order is passed instructing the doctors or hospital authorities to conduct the test. Individual consent of the subject is also required.

Wrong dose can send the subject into coma or even outcome in death. The rate of administration is controlled to drive the accused gradually into a hypnotic trance.

Narco analysis has become an increasingly, perhaps common term in India. It refers to the process of psychotherapy conducted on a subject by inducing a sleep-like state with the help of other drugs. The defining moment for narco-analysis in India came in 2002. In June 2002, three months after the burning of a train bogie by a crowd at Godhra in Gujarat, and the subsequent massacre of Muslims, seven persons accused of burning the train were brought to

⁵ www.lawjournals.org

the Sree Sayaji General (SSG) Hospital in Vadodara.⁶

Since then, this test has been conducted in many high profile cases, such as the Nithari killers and the Mumbai train blasts, the multi crore fake stamp paper case, etc. The narco-analysis test has found ready acceptance as a gadget to extract the truth during police investigations. It was likewise revealed that there are about 300 people in the narco-analysis line at the Forensic Science Laboratory (FSL) in Bangalore alone.

Constitutional Validity of Narco Analysis Test in India

Article 20 (3) provide protection against self incrimination clause (3) of Article 20 of Constitution of India provides that no person accused of any offence shall be compelled to be a witness against himself⁷. It is duty of prosecution to prove the offence. In any criminal investigation, cross examination of the suspects and accused plays a crucial role in extracting the truth from them. From time, immemorial several methods, a large portion of which were based on some form of torture have been used by the investigating agencies to inspire information from the accused and the suspects. With the advancement of science and technology, advanced techniques for lie identification have been created which get rid of the utilisation of "third degree torment" by the police. The scientific tools of interrogation are- the Lie detector or the Polygraph test, the P300 or the Brain Mapping test and the Narcoanalysis or the Truth Serum test are the primary 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 authenticate the investigating officers' observations. However, such tests generally don't have legal validity as confessions made by a semi-conscious person are not admissible in court. The court may, however, grant limited acceptability after considering the circumstances under which the test was obtained. This guarantee reaches out to any person accused of an offence and prohibits all kind of compulsions to make him a witness against himself.

The provision consists of the following three essentials:-

- 1) It is right pertaining to a person who is accused of an offence.
- 2) It is a protection against compulsion to be witness; and

⁶ Economicstimes.indiatimes.com

⁷ Constitution of India

- 3) It is a protection against such impulse resulting in his giving evidence against himself.⁸ For invocation of Article 20(3) of the constitution of India all the three ingredients must exist together. The privilege under clause (3) is limited 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 guarantee the advantage of the protection. Further, the guarantee in Article 20 (3) is against the compulsion to be ‘a witness’.

In State of Bombay vs. Kathi Kalu Oghad, a Bench of the Supreme Court comprising 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 him. In Kalawati vs. H.P. State, 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 promise.

JUDICIAL APPROACH TOWARDS NARCO ANALYSIS TEST IN INDIA

The extent of protection of right against self incrimination revered under Article 20(3) has been clearly laid down by Supreme Court in the case of Nandini Satpathy Vs. P L Dani. The court in other cases laid down that protection under Article 20(3) begins to operate at pre-trial stage.

Any giving of evidence, any outfitting of information, if likely to have an incriminating impact, the description of being witness against oneself not being restricted to the forensic stage by express words in Article 20(3) we need to translate the expression to apply to every stage where outfitting of information and collection of material takes place. That is to say even the investigation at the police level is grasped by Article 20(3).

⁸ lawoctopus.com

Hence, Article 20(3) may be attracted even at the cross examination stage. In this context, Supreme Court held that the protection under Article 20(3) reaches out to any compulsory process for gathering evidence against the accused. Further constrained declaration resulting in violation of the Article 20(3). It is defined by Apex Court as any mode of pressure, subtle or crude, mental or physical, direct or indirect but sufficiently substantial, applied by the police for obtaining information from accused strongly suggestive of guilt⁹. Hence, through this landmark case the Supreme Court extend the scope of constrained declaration under Article 20(3) to not just evidence admitted in the court as well as state compulsion in this setting could mean both physical and mental. The critics of the procedure contend that Narco Analysis test amount to mental compulsion. Mental compulsion result when the mind has been so conditioned by some extraneous process as to render the making of the statement automatic and in this way blackmailed.

Simultaneously the court also recognize the fact that a voluntary statement by accused can be important in solving a crime and underlines the requirement for safeguard to erase involuntariness and ensure freedom of the accused to make statement during investigation. It has also been held in the case of Kalawati Vs. H.P. State, the Supreme Court held that Article 20(3) does not have any significant bearing at all to a case where the confession is made by accused without any inducement threat or promise.

A few important cases are:-

1. State of A.P. vs. Inapuri Padma 2008 CriLJ. 3992 (AP), it was held by Andhra Pradesh High Court that where the petitioners are not the accused but arrested by the order of the court, there is no need to acquire any permission from the court to undergo Narco-Analysis test if they express no objection to undergo this test. Where the witnesses are not willing to undergo the test, the police has to convince the court as to what are circumstances that made the police to gain the impression that there is likelihood that the person proposed to be put to test knows something about the commission of the offence.
2. Abhay Singh vs. State of U.P 2009 CriLJ 2189(All)(LKO Bench), it was held by Justice Barkat Ali Zaidi that "it is now well settled that hairs and nails of the accused cannot be taken for the utilisation during the investigation even if the accused does not agree

⁹ supra

for the same. In this case the application was moved by the investigating authority for conducting the Narco-Analysis test and brain mapping test of the accused person. It was the question before the court that whether the accused may be compelled for the Narco-Analysis and Brain Mapping test against his will. It was held by the court that the investigation and all efforts have to be made to find out the real offender, because, one guilty person, who escapes, is the hope of one million . The NarcoAnalysis test and Brain mapping test may be supportive in finding out the facts relating to the offence then it should be used and the court should not impede the conduct of the exercise.

3. Mohinder Singh Pandher and Surender Singh Koli vs. State of U.P(AIR 2011 SC 970), which is also known as Nithari Murder case: Narco-Analysis test was conducted on Surender Koli and Mohinder Singh Pandher in Jan 2007, who were the primary accused in the well known Nithari Murder case. This test was essentially conducted in the Forensic Science Laboratory in Gandhinagar. This test was basically conducted to ascertaining the veracity of their statement during their custodial cross examination. During this test, the accused person disclosed the name of various females and children who had been murdered by them and also revealed his argue to rape them after murdering them. By conducting this test many relevant information were disclosed to the investigating authorities.
4. Rojo George vs. Deputy Superintendent of Police (AIR2006), the Court while permitting a Narco Analysis test saw 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 outcome at all. That is the reason 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 India.
5. Santokben Sharmanbhai Jadeja vs. State of Gujarat (AIR 2007 CriLJ 4566), the Court while maintaining the request for conducting a Narco Analysis on the accused Santokben Sharmanbhai Jadeja, 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 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 cross examine the accused at the stage of investigation and restraining the Investigating Agency to additionally investigate the crime through the aforesaid two tests would equivalent to interfere with the right of the Investigating Agency to investigate the crime of which it is legally authorised.¹⁰

CONCLUSION AND SUGGESTIONS

In a world with fast changing technology there has also occurred a change in the pattern of crime. In this scenario the criminals have replaced the traditional methods with more advanced form of technology to commit the crimes. Thus, in order to ensure justice in such situations advancement in investigation patterns is necessary. Use of advancement in science and technology would only help in solving the crime and delivering of justice specifically in cases like rape, terrorism and other heinous crime which is shaking the conscience of the society. Narcoanalysis is one such tool of modern scientific advancement. Narcoanalysis can play an immense role in the investigation. Narcoanalysis test is being practiced in India because of the mutual understanding between the judiciary, police, investigative agencies, human rights activist etc. There are mainly two issues in these contexts firstly the self incrimination and secondly the statement is hit by section 25 and 26 of the Indian Evidence Act, 1872. It must be said that according to article 20(3) the Narcoanalysis test violate the right to self incrimination of the accused which include the suspect also. In the case of Rohit shekhar vs. N.D Tiwari, the Delhi high court held that where there is a conflict between the individual right and societal

¹⁰ www.indiatoday.in

right then in those case the societal interest will prevail over the individual interest. Thus, the Supreme Court allows for the admissibility of the voluntary test. But, in India the legislature and the judiciary does not completely allow or disallow the scientific methods as a investigation tool. The test is not so much harmful as compare to the third degree torture given by the police officer and hence if the test is allowed then the accused would be save from the third degree torture which are violation of fundamental rights. Hence, narco analysis may come with certain amount of criticism but, it has become a need in today's time in interest of Justice.

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