



EVIDENTIARY VALUE OF NARCO-ANALYSIS

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ABSTRACT

As science has outpaced the development of law there is unavoidable complexity regarding what can be admitted as evidence in court. Narco-Analysis is one such scientific development that has become an increasingly common term in India. Recent times have witnessed a spate in the use of modern scientific techniques such as the lie detector, brain-mapping and Narco-Analysis, for use in criminal investigation. Although the legal and ethical propriety of their use has been in doubt, they may in fact be a solution to many a complicated investigation. Narco-Analysis has been the most debated topic amongst the legal fraternity, media and common masses. With recent advent of technologies in every sphere of life, criminal investigation is no more left out of its effects. Narco-Analysis is one of such scientific forms of investigation in which some sort of statement from the accused is acquired which might form an evidence. The Evidence Act is completely silent on such employment of scientific process.

INTRODUCTION

The term Narco-Analysis was introduced in 1936 for the use of Narcotics to induce a trance-like state wherein the person is subjected to various queries. The term

Narco-Analysis is derived from Greek word 'narkc' (meaning anesthesia or torpor) and is used to describe a diagnostic and psychotherapeutic 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. The term Narco-Analysis was coined by Horselley.¹ The Narco-Analysis test is based on the principle that a person is able to lie using his imagination and, under the influence of certain barbiturates, this capacity for imagination is blocked or neutralized by leading the person into a semi-conscious state. It becomes difficult for the person to lie and his answers would be restricted to facts he is aware of. The statements made by the accused are recorded on audio and video cassettes, and the report of the expert is helpful in collecting evidence. The use of such drug in police work or interrogation is similar to the accepted psychiatric practice of Narco-Analysis and the only difference in the two procedures is the difference in the objectives.² Narco-analysis is also known as the truth serum test. An injection known as Thiopentone is used for one such test. Its chemical name is sodium pentathol and it is mixed in distilled water before being administered to the accused. Narco-analysis is also known as the truth serum test. An injection known as Thiopentone is used for one such test. Its chemical name is sodium

¹GagandeepKaur, Narco-Analysis: A Volcano in Criminal Investigation System.

www.legalserviceindia.com/article/1410- Narco-Analysis.html

²Rojo George v. DSP, (2006) 2 KLT 197.



pentathol and it is mixed in distilled water before being administered to the accused.

UTILITY IN INVESTIGATIVE 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 tests 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 the custody of a police officer is prohibited.³ However, if the statements are merely admissions, they may be adduced in evidence.⁴ 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.⁵ Lastly, they may be used merely as clues for the investigation, where the statements are not adduced at all in evidence. However, the evidence gathered

from the investigation is independently used in evidence, without the statements.

NARCO-ANALYSIS VIS-À -VIS THE EVIDENCE ACT

Expert evidence and criteria for appreciation

The Evidence Act permits evidence of the opinion of persons (called 'experts' under the Act itself) especially skilled upon a point of foreign law, science, art, or as to identity of handwriting or finger impressions, the opinions upon that point.⁶ Expert evidence is appreciated based on several factors such as the skill of the expert⁷ and the exactness of the science as stated in *Pratap Misra v. State of Orissa*.⁸ If the science itself is imprecise, expert opinion is only of corroborative value and insufficient to secure a conviction by itself. In *Shashi Kumar Banerjee v. Subodh Kumar Banerjee*,⁹ wherein the Supreme Court held that an expert's evidence as to handwriting being opinion evidence can never take the place of substantive evidence. The question which then arises is regarding the credibility of the evidence gathered from the Narco-Analysis tests, which is studied from a twofold perspective, firstly, as perceived by the scientific community, and secondly, as perceived by the courts.

ACCEPTABILITY OF NARCO-ANALYSIS

Admissions and confessions

³ Sections 25-26 of the Evidence Act, 1872

⁴ Section 17 of the 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.

⁵ Section 27 of the Evidence Act, 1872 states that when any fact is discovered as 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.

⁶ Section 45 of the Evidence Act, 1872

⁷ *State v. S.J. Choudhary*, (1990) 2 SCC 481, para 8: 1990 SCC (Cri) 364.

⁸ (1977) 3 SCC 41, para 5: 1977 SCC (Cri) 447.

⁹ AIR 1964 SC 529.



In the lie detector test, the accused is not obliged to make a statement, as he may choose not to answer the question at all. However, the statements in fact made under the scientific tests may be classified into admissions or confessions,¹⁰ as they suggest an inference as to a fact, including a blanket denial of any knowledge of the crime, or the statement may substantively admit to the commission of the crime itself. Confessions made to the police by way of such statements are inadmissible in evidence as no confession made to a police officer or in the presence of a police officer is admissible¹¹, unless made in the immediate presence of a Magistrate. The only event in which they may be admissible is when they are made before a Magistrate. Before a confession is made before a Magistrate, the Magistrate is to explain to the subject that he is not bound to make such a confession and the Magistrate may only record it if he believes that it is being made voluntarily.¹² The Narco-Analysis test on the other hand proactively involves the making of statements by the accused. However, a Magistrate would not record the statements as they are involuntary and induced and also not reliable as held in the case of *Balbir Singh v. State of Punjab*¹³. They may be useful for investigative purposes as the latter inherently entail a significant bit of trial and error work, but they may not be perfectly accurate all the time to be recorded as evidence and relied for conviction.

Admissions made to police officers are admissible in evidence. This causes problems with the lie detector and brain-mapping tests as the police may prefer a longer investigation. Admissions nevertheless, are caught by the general rule stating that no statement made in course of an investigation, even if reduced to writing, is to be signed by the maker. Further, even if the statement is oral, and the factum of its being made to a police officer is proved, it cannot be used as evidence.¹⁴

The last way of offering any statement in evidence, whether confession or not, is by adducing it alongside a discovery made pursuant to the statement. This makes it a cakewalk for the investigation as it can conduct Narco-Analysis and discover all the incriminating material that is required, and offer the statement in conjunction with the recovery. However, a recovery under Section 27 will not be admissible if compulsion has been used in obtaining the information leading to it. The possibility of the element of compulsion under the Narco-Analysis test has been recognized if the statements made under its influence are sought to be adduced in evidence and if they are incriminatory, in which case they are to be excluded. This conclusion shall restrict the application of Section 27 of the Evidence Act which allows adducing statements made to police officers if they are supported by subsequent discoveries such that statements made under the influence of Narco-Analysis shall be excluded as coerced. However, whether the discoveries made pursuant to those statements shall also

¹⁰ Section 25 of the Evidence Act, 1872.

¹¹ Section 24 of Evidence Act.

¹² Section 164(2) of the Code of Criminal Procedure, 1973.

¹³ AIR 1957 SC 216: 1957 Cri LJ 481.

¹⁴ Section 162(1) of the Code of Criminal Procedure, 1973.



be excluded has not been assessed by the judiciary.

Till today, due to the lack of a final and clear-cut judgment on the same, illegally or falsely obtained evidences are still admissible in the court, and regrettably the court still accepts them as proper evidence. The same can be said for Narco-Analysis and brain mapping as they are techniques of obtaining evidence in an illegal manner, without the consent of the accused. The condition continues from Malkani case¹⁵ to State (NCT of Delhi) v. Navjot Sandhu¹⁶ where the illegality of the evidence is not taken into consideration at all. The clear violation of Article 20(3) by such Narco-Analysis which strikes even the commoner in the face is completely ignored and neglected by what the country calls the Seat of Justice.

ARGUMENTS AGAINST GIVING EVIDENTIARY VALUE TO NARCO ANALYSIS

The Constitution of India has clearly stated that a person cannot be compelled to be a witness against himself,¹⁷ and therefore, any statement given during the Narco-Analysis test cannot be considered evidence in the constitutional framework of the country. In fact, studies have shown that sometimes the subject (person undergoing the test) gives false statements during the test. If the test was given evidentiary value, the police would harass innocent persons under the

garb of tackling terrorism.¹⁸ The principle of the Indian legal system is based on the fact that until proved guilty, a person is innocent and we cannot convict an innocent even if we need to surrender hundred criminals. With such objectives in mind subjecting a person to Narco-Analysis without his consent will be surely undermining his individual rights which are absolutely negating the principle of a right based society.

Narco-Analysis is carried out only after a detailed medical examination of the accused. If the accused is found medically fit to undergo the procedure, then only will it be done, otherwise not. However, it has been argued in various cases that sodium pentathol or sodium amytal is a barbiturate and thus has ill effects on the body.

The use of evidence obtained under duress has been prohibited by the Human Rights Committee by stating - the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment. The Committee has further stated that, the law should require that evidence provided by any form of compulsion is wholly unacceptable.

In India Article 20(3) and Section 161(2) of the Code of Criminal Procedure protect the accused from self-incrimination. Article 20(3) and Section 161(2) of the Code of Criminal Procedure states, No person accused of any offence shall be compelled to be a witness against himself and such person

¹⁵ R.M. Malkani v. State of Maharashtra, (1973) 1 SCC 471 : 1973 SCC (Cri) 399.

¹⁶ (2005) 11 SCC 600 : 2005 SCC (Cri) 1715.

¹⁷ Article 20(1) of the Constitution of India.

¹⁸ Narco-Analysis Test has No Evidentiary Value, Indian Express, 27-9-2009.



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 have a tendency to expose him to a criminal charge or to a penalty or forfeiture respectively. In *Nandini Sathpathy v. P.L. Dani*¹⁹, it was held that no one could forcibly extract statements from the accused that have the right to keep silent during the course of interrogation or investigation. However Article 20(3) can be waived of by a person himself.

Section 45 of the Evidence Act, 1872 does allow expert's opinions in certain cases. However, this section is silent on other aspects of forensic evidence that can be admissible in court in criminal proceedings. Section 161(2) of the Criminal Procedure Code also provides 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. Hence, Article 20(3) of the Constitution and also Section 161(2) of the Code of Criminal Procedure enshrine the right to silence.²⁰ To judge whether statement given is confession or not, is by adducing it alongside a discovery made pursuant to the statement. Some writers are in opinion that in cases where an incriminatory set of statements is additionally backed by discoveries which are sufficient to incriminate the accused independently of the statements, then the discoveries too should be excluded from evidence. This is because the discoveries,

which comprise all the evidence that is required for conviction, directly follow from incriminatory statements of the accused. However, where the discoveries are not sufficient to result in incrimination, but only amount to evidence of some facts against the accused, they may be admissible in evidence, as they are merely the equivalent of admissions as they require collection of additional evidence.

ARGUMENTS FOR GIVING EVIDENTIARY VALUE TO NARCO-ANALYSIS

In *United States v. Solomon*²¹ there was a detailed discussion on the topic of Narco-Analysis. In this case the expert opinion given to the Court established that truth serum is generally accepted as an investigative technique. It need not be said that prevention of crime and punishment for the crime are the duties of the State. Fetters on these duties can be put only in extreme cases where the protection of fundamental rights weigh more than the fundamental duty cast on the State moreover every person is required to furnish information regarding offences.²²

Protection against self-incrimination was instrument for the protection of the innocent and not intended for the acquittal of the guilty. The framers of the Bill of Rights believed the rights of society were paramount to the rights of the criminal. Believing in the same principle in a spate of high-profile cases, such as those of the Nithari killers, the Mumbai train blasts, Aarushi murder case, Malegaon blasts and

¹⁹ (1978) 2 SCC 424 : 1978 SCC (Cri) 236.

²⁰ Ankita Patnaik, Article 20(3) of the Constitution of India and Narco-Analysis, *The Hindu*, 2-5-2007.

²¹ 753 F 2d 1522 (9th Cir 1985).

²² Section 39 of the Code of Criminal Procedure.



the most recent Mumbai blasts case suspects have been made to undergo Narco-Analysis, drugged with the sodium pentathol.

Judiciary and the State Government seem to have supported this practice. Furthering its support the Supreme Court has held that the right to life includes right to health but subjecting a person to a scientific test as part of investigation will not amount to denial of health. Therefore it will not amount to denial of reasonable and just procedure as held in the case of State of Punjab v. Mohinder Singh Chawla.²³

In today's complex social milieu with proliferating crimes against the society and the integrity of the country, it is necessary to keep in mind the interest of the society at large and the need for a thorough and proper investigation, as against individual rights, while ensuring that the individual constitutional rights are not infringed. 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. Section 53 of the Criminal Procedure Code accords the requisite statutory sanction for conducting these tests.

The Bombay High Court, in a significant verdict in Ramchandra Ram Reddy v. State of Maharashtra²⁴, 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. As crimes going hi-tech and criminals becoming professionals, the use of Narco-Analysis can

be very useful, as the conscious mind does not speak out the truth, unconscious may reveal vital information about a case.²⁵ The judgment also held that these tests involve minimal bodily harm.

SurenderKoli, main accused in the Nithari case, was brought to Forensic Science Laboratory in Gandhinagar in January 2007 for Narco-Analysis. Polygraph test was conducted on Moninder Singh Pandher and his servant SurenderKoli, accused of serial killing of women and children in Nithari, to ascertain the veracity of their statements made during their custodial interrogation. Various confessional statements were made by the accused under the effect of the drug, he could remember the names of the females he had murdered and revealed his urge to rape them after murdering them.

Post Selvi case: highlighting the present position In Selvi v. State of Karnataka²⁶, the Supreme Court rejected the High Court's reliance on the supposed utility, reliability and validity of Narco-Analysis and other tests as methods of criminal investigation. First, the Court found that forcing a subject to undergo Narco-Analysis, brain-mapping, or polygraph tests itself amounted to the requisite compulsion, regardless of the lack of physical harm done to administer the test or the nature of the answers given during the tests. Secondly, the Court found that since the answers given during the administration of the test are not consciously and voluntarily given, and since an individual does not have the ability to decide whether

²³ (1997) 2 SCC 83 : 1997 SCC (L&S) 294.

²⁴ 2004 All MR (Cri) 1704.

²⁵ Syed TazkirInam, Scope of Narco-Analysis in Criminal Investigation.

²⁶ (2010) 7 SCC 263.



or not to answer a given question, the results from all three tests amount to the requisite compelled testimony to violate Article 20(3).

The Supreme Court found that Narco-Analysis violated individual's 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 privacy²⁷ 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 voluntary 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 voluntary 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's judgment.

CRITICISM OF NARCO-ANALYSIS TEST AS AN EVIDENCE

²⁷Kharak Singh v. State of U.P., AIR 1963 SC 1295: (1963) 2 Cri LJ 329.

Narco-Analysis has been criticized on the ground that it is not hundred per cent 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 malingers 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.

NARCO ANALYSIS IN INDIA

A few democratic countries, India most notably, still continue to use narco analysis. This has come under increasing criticism from the public and the media in that country. Narco analysis is not openly



permitted for investigative purposes in most developed and/or democratic countries. 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. However, it raises serious scientific, legal, and ethical questions. These need to be addressed urgently before the practice spreads further. Narco analysis has become an increasingly, perhaps alarmingly, common term in India. It refers to the process of psychotherapy conducted on a subject by inducing a sleep-like state with the aid of barbiturates or other drugs. In a spate of high profile cases, such as those of the Nithari killers and the Mumbai train blasts, suspects have been whisked away to undergo an interview drugged with the barbiturate sodium pentothal.

SUGGESTION

It has become absolutely necessary for the State Governments to work with the Central authorities to enhance the investigative capabilities of their police departments. The Indian criminal justice system has an alarmingly low conviction rate and the situation needs to be rectified with emphasis on real science and state-of-the-art

technology. The Central Government must make a clear policy stand on Narco-Analysis. 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. Narco-Analysis for criminal interrogation has proved to be a valuable technique, which profoundly affects both the innocent and the guilty and thereby hasten the cause of justice which has seen in various cases like the Aarushi murder case, Nithari killings case, Telgi scam and Mumbai blasts case. Courts in India have taken into account an incomplete consideration of the law, which is the reason for their conclusion in favour of the tests. While the tests may be a practical necessity, the sanction of the law for some of them is difficult to find, and extensive safeguards need to be laid out to prevent their abuse. It is time for our legislature and judiciary to act immediately for the sake of justice and fair procedure to bring Narco-Analysis within the scope of Article 20(3) of the Constitution.

CONCLUSION

The manner in which modern-day criminals make use of science and technology in perpetrating their criminal activities with relative impunity has compelled rethinking on the part of the criminal justice establishment to seek the help of the scientific community to come to the help of the police, prosecutors and the courts. The criminal procedure, rules of evidence, and the institutional infrastructure designed more than a century ago, are now found inadequate to meet the demands of the scientific age. The absence of a national policy in criminal justice administration in



this regard, is felt to be a serious drawback. The Evidence Act may need to be amended to make scientific evidence admissible as substantive evidence rather than opinion evidence and establish its probative value, depending on the sophistication of the scientific discipline concerned.

