

Narco - Analysis - A Tool of Investigation

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Abstract

As advancement of technology accompanied with growing individual freedom, decreasing influence of family, religion, and society encourage intensity, rate and complexity of crimes. In our times there is growing need to evolve new advanced methods and techniques of eliciting truth from the criminal and eye witness involved in any crime. To this category of hypnosys and lie detectors, narco analysis is latest innovation and advanced technique presently employed by investing agencies all over the world, including our own country. This researcher proposes to study the scope and limitations of the latest psycho-analytical test such as narco-analysis, a new innovation in investigating techniques.

Keywords: Narco-analysis, Truth-serum, Investigation, Technique, Trance.

Introduction

The Narco-analysis test is of recent origin and its implementation has caused furore among lawyers, psychologists etc. This researcher has therefore selected this subject to examine intensively and extensively the veracity of objections to above- mentioned test by certain legal faculty, and make an attempt to render legal admissibility to such tests.

Review of the literature

Literature on the psycho analytical test is scanty. Though the narco analysis is almost a hundred years old, the literature comparatively is less. The researcher here has attempted to take a review on all the available literature in the form of books, research articles and the available literature on the e source.

Sivananda Reddy, "*Narco Analysis and Truth Serum*", the author discusses the history of narco analysis and other scientific methods and how the former was in prevalence and has been replaced by the latter.

Subhojyoti Acharya in "*Is Narco Analysis a Reliable Science? The Present Legal Scenario In India*" has analysed the three tests and the law affecting their validity as scientific test to be used for investigation.

In '*Constitutionality of Narcoanalysis*', Shrishti Saxena has discussed what is narco analysis. She has considered the constitutional aspect of the test. She has analysed through legal point of view if the test infringes Art. 20(3) and Art.21 of the Constitution and relating case laws.

In '*Question of law and ethics*' by Amar Jesani, the author has criticized narco analysis test. He opines that the tests are unethical as they amount to torture and interfere with the privacy of the accused.

'*Medical professional and interrogation: Lies about finding the truth*' Jesani Indian J Med Ethics, the author criticises on the doctors who participate in these tests as they go against the medical ethics. He also criticises these tests to be unreliable.

In '*Misconceptions about Narco Analysis*' by Banner Muthai Mohan, he has cleared the issues raised in 'Medical professionals and interrogation: lies about finding the truth' by Amar Jesani.;

In *Narco-analysis leads to more questions than answers*, Jagadeesh N has criticised the Narco-analysis test and raised issues on the claims made by made Dr. Mohan in the above mentioned article;

In *Truth serum trial* by Anupama Katakam, she has analysed the Narcoanalysis tests on the backdrop of constitutional and legal provisions. She opines that these three tests suffer from legal implications.

Theoretical Background

The term Narco analysis is epistemologically derived from the Greek word 'narke' meaning "anesthesia" or "torpor".

This test is also known as 'truth serum test'. This is recently used as an investigating tool by the police either to corroborate their findings or to know things which the suspect knows and they do not know. This test is truth serum test because the person under influence of such a drug will be deprived of power of reasoning and self-control. Hence he would talk freely and will not be able to manipulate any answer. A person can lie only by using his power of imagination. Thus when devoid of such power, he is bound to speak the truth.

The truth serums used are clinically used drugs. Today the most commonly used drug is Sodium Pentathol. It is generally used to give anaesthesia. With proper dosage the person goes in a trance like stage in which his reasoning is neutralized. He may not be able to speak on his own but he is in state to make specific answers to simple questions.

The term Narco analysis was first introduced in India in 1935 in the process of investigation. It was used to put a person in trance like state and subject him to queries. In the later period it was unheard of as an investigating tool in many years. It again surfaced in the Godhra carnage probe(Inter-communal violence in Gujarat following the burning of a train in Godhra on 27 February 2002, which caused the deaths of 58 Hindu pilgrims and religious workers returning from Ayodhya in 2002). Thereafter it is consistently being used as an investigating tool in many cases. Narco-analysis has been conducted in some major cases like, Godhra Carnage Probe in Gujarat, Multi Crore Rupee fake stamp murder, Shashi murder case, Noida serial murder i.e the infamous Nithari case, Abu Salem, The Arushi Murder Case in May

2008, Malegaon Bomb Blast Case, Mumbai train blast, Mohammed Ajmal Amir Kasab, a Lashkar-e-Taiba militant case etc.

1.4 Procedure

Following procedure is to be followed to conduct the narco-analysis test.

- Two grams of Sodium Pentathol is dissolved in 2000ml of dextrose.
- One boule (10 ml) of the above solution is injected intravenously, one ml per minute, at each time till the stage-II i.e. Trans is achieved.
- The above procedure is done in a hospital under medical supervision by a team consisting of an Anesthetic, a Physician and a Clinical/ Forensic Psychologist.
- Heart rate and blood pressure of the accused is continuously monitored.
- The dose of sodium pentothal is usually 5-10 times less than the dose of anaesthesia.
- Initially to establish rapport with the subject certain irrelevant questions are asked. These questions are also known as Controlled questions, for eg. Name, birth place etc.
- The administration of drugs continues until the subject enters the state of trance.
- Relevant or specific questions are asked once the subject enters the state of trance.
- The procedure is recorded in audio and video format.
- A CD is to be provided along with the report. Duration of the test is based on the number of questions. All through the test the required amount of sodium pentathol is administered to keep the subject in trance.

No adverse effects are attributable to the chemical Sodium Pentathol have been noticed during the cardiac surgeries running for several hours, which will have patients, anaesthetized either by using large concentrations of sodium pentathol (anesthetic dosages) or in conjunction with other anesthetics.

Legality

The Narco analysis test has no evidentiary value in courts. Till recently it was used as an investigation tool. But the Supreme Court decision in *Selvi & others vs. State of Karnataka & Anr* (Criminal Appeal No. 1267 of 2004 SC) has held that no Narco analysis tests should be administered except on the basis of consent of the accused as it contradicts Art. 20(3), Art. 21 and some sections of Cr.P.C.

This researcher has identified the following constitutional issues that surround the test.

1. Whether the involuntary administration of the impugned techniques violates the 'right against self-incrimination' enumerated in Article 20(3) of the Constitution? Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?
2. Whether the results derived from the impugned techniques amount to 'testimonial compulsion' thereby attracting the bar of Article 20(3)?
3. Whether the involuntary administration of the impugned techniques is a reasonable restriction on 'personal liberty' as understood in the context of Article 21 of the Constitution?

Analysis

These tests suffer from some Constitutional and Legal implications. Any law, any rule, any decision, any test and anything that violates the Fundamental rights of an individual guaranteed by the Constitution of India is unconstitutional. These tests are said to violate the Art. 20(3) and Art. 21 of the Indian Constitution.

Art. 20(3) reads, 'No person accused of any offence shall be compelled to be a witness against himself.'

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

On the basis of decisions of the cases mentioned here, *Balkishan A. Devidayal v. State of Maharashtra; Nandini Satpathy v. P.L. Dani; Bombay v. Kathi Kalu Oghad*, following conclusions follow:

1. An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.
2. 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.
3. Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.
4. 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.
5. 'To be a witness' in its ordinary grammatical sense means giving oral testimony in court. Case-law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing.
6. To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."
7. The right guaranteed under Article 20(3) does not extend to a total exemption from appearing before any authority who summons for recording evidence but is restricted to compelled testimony.

Art.21 gives an individual the Right to live with human dignity. Some criticise these tests as interfering with the privacy of the accused person, while some call it 'rape of mind', some call it torture claiming that it satisfies all the four points given in the definition of torture by the UN.

Sec. 161(2) of Cr.P.C. protects against compelled testimony and gives two rights to person being interrogated: (1) Right to refuse – person may expressly refuse to answer incriminatory questions. (2) Right to silence – person may not answer but prefer to remain silent. Sec. 163 Cr.P.C. gives express

direction to the police that no statement can be obtained by using threat, promise or inducement. Both provisions prohibit compelled testimony. It is contended that the three tests amount to giving compelled testimony.

SC decision in Smt. Selvi vs State of Karnataka

Various High Courts had taken a stand in favour of these three tests. But the Supreme Court in its decision in Smt. Selvi vs State of Karnataka has overruled all these decisions stating that these tests violate Art. 20(3) and Art (21) of the Indian Constitution. The SC has taken the stand that no test will be conducted on the accused without his consent. The Honourable Court has also held that no court can interfere in the personal rights of any accused person.

This decision has proved to be set back for the test. The SC in its decision has not totally discarded the test. SC has said that the tests can be conducted but only with the consent of the accused. Prior to the decision in the said case on test was conducted on the accused without the permission of the accused as per the information given by Dr. Malini Former Director, Forensic Science Laboratory, Bangalore and Dr. A.D. Shukla Assistant Director of Gujarat Forensic Science Laboratory. They also said that there have been cases where the accused has refused to undergo the test on the test bed and the test was not conducted. The thing is prior to the decision of SC in Ms. Selvi & ors vs State of Karnataka, the police could take the permission from the Magistrate to get the test conducted on the accused which they cannot do so now.

It is relevant to mention the observation made by Justice Krishna Iyer, a great champion of Human Rights especially of accused and under trial prisoners; in Nandini Sathpathi's case that **"More than human dignity of accused is involved; the Human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest is of equal weight."**

The accused as such have opposed these tests. But as told by both Dr. Malini and Dr. A.D. Shukla, many accused person undergo these tests to prove their innocence. The number is as much as 25% of their total tests conducted.

Hence these tests should be used as an investigative technique.

Findings and Suggestions

".....throughout the web of English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt" (per Viscount Sankey).

Findings

1. The test suffer from the above-mentioned legal implications relating to Article 20(3) and Article 21.
2. The test has successfully helped in investigating many hi-profile cases and at times have also assisted in averting major disaster like Mumbai, Malegaon and Hyderabad blasts. Though these tests suffer from legal implications, yet these cases have proved to be an effective tool of investigation.
3. It is a trite saying that justice delayed is justice denied. Out of the many reasons for this pendency, one of the major reasons can be said to be unavailability of adequate evidence. Collection of evidence is the duty of Police Officer. But the administration of Criminal Justice System

all over the world seems to be guided by cherished principle, viz, the protection of rights of the accused, and it is to be secured by all costs by a Criminal Court determining liabilities on him.

4. In the world of high tech crime, use of advanced methods in collection of evidence has been the need of the hour. Narco Analysis as scientific test can prove to be of great assistance in collection of such evidence which is hard to get by the traditional means of collection of evidence.

The test has been used regularly since 2002 Godhra Carnage Probe in a number of high profile cases. The revelations made during the Narco-analysis have been found to be very useful in solving sensational cases of Mumbai serial train blasts, blasts at Delhi, Malegaon and more recently in Hyderabad and in various other sensational cases of National and International ramifications.

According to the available data of FSL Bangalore, Dr. Mohan has opined that about 25 per cent of the total number of individuals subjected to narco analysis turned out to be "innocents". Therefore, the "rights of innocent individuals" stand established. Dr. A.D. Shukla⁵ also had a similar opinion. She said that many accused persons who are innocent on their free will get this test conducted on them to prove their innocence. So these tests play a major role in proving the innocence of 'innocent accused'. Thus these tests are also of much significance to prove the innocence of an accused.

5. Lack of follow up by FSLs

During her research, the researcher has been unable to get to-the- point data from the FSLs. One reason was confidentiality. The other was lack of follow up on part of FSLs of has the test result really assisted in investigation or has the accused been punished by the court or acquitted. What role has the test result played in the entire process. The reason as opined by Dr. A. D. Shukla, Assistant Director, Gandhi agar FSL is that the entire process from police conducting investigation till the decision on the case given by court is a very lengthy process. At times it takes years and years together. The FSL doing almost 10-15 case every month, it is not feasible for them to keep a track of a single record for all these many years. But if this follow up is done, it will help in finding exactly the use of these tests as investigation process and also in the decision making of the court.

Suggestions

The researcher is putting forth some suggestions based on her research and consultations with Police Officers, Advocates, Medical Practitioners and the People in general during the personal interview taken by the researcher.

1. It is observed that before arriving at the decision in Smt. Selvi vs. State of Karnataka, the SC did not formulate any independent body of experts to conduct research on the three tests, Polygraph, Brain Mapping and Narco analysis. So it is suggested that an independent body be formed by the SC to analyse the reliability and accuracy of the said tests.
2. Data made available to this researcher by FSLs is indicative of success rate, though moderate in utilization of test results in investigation of various crimes in right direction.

3. The SC decision has made these tests inapplicable unless with the consent of the accused. These tests also can be used to prove the innocence of the accused person.
4. The basis of Art. 20(3) of Constitution of India and Sec. 161,162,163 and 164 of Cr.P.C. is to protect the accused person from the abuse of power by the Police Officer. The limitations put on the investigating power of the police are to protect the accused from the threat or force used by the police to elicit confession from the accused. Hence the Police must take measures to improve their image and credibility in the society.
5. Proper follow up should be taken by the FSLs about how the test conducted on the accused has helped in the investigation process and what was the decision of the court in the said case. This will give us a clear cut idea about how authentic the tests are.
6. The Mallimath Committee on Criminal Justice Reforms on examination of the inquisitorial system followed in France, Germany and other continental countries recommends that some of the good features of this system be adopted in the adversarial system to make it more effective. With regard to the right to silence, the committee recognizes the accused as the best source of information and feels that without subjecting him to any duress, a way to tap this critical source of information must be found; it prescribes the freedom of the court to question the accused and elicit relevant information and drawing adverse inferences upon refusal to answer.
7. With due respect to the decision taken by the SC, the legislature should make these tests a part of the investigation process in crimes which affect the State and society at large like bomb blasts, terrorist attacks, scams etc.
8. Proper procedure, rules and regulations should be drafted for the proper implementation of the tests.
9. The Police be given proper training on the procedure to conduct such tests.
10. Awareness should be created amongst people regarding the three tests.

The observation of eminent Jurist, Sri. Fali Nariman, on right to silence is reproduced below

“It is time that we recognize the right to silence during a trial is not really a right, but a privilege and although every accused has a right to be presumed innocent till he is proved guilty, in terrorist related and other grave crimes, the accused has an obligation to assist the discovery of truth.”

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