

138

मध्य भारती



MADHYA BHARTI
(UGC CARE Group- I, Multi disciplinary)

CERTIFICATE OF PUBLICATION

This is to certify that the article entitled

POLYGRAPH TEST: ANALYSIS OF INDIAN LEGAL POSITION

Authored By

Ms Suma Suresh Kogilgeri,

Assistant Professor, Shri Dharmasthala Manjunatheshwara Law College, Centre for Post Graduate Studies and Research in Law, Mangaluru, (affiliated to KSLU, Hubballi)

Published in

Madhya Bharti (मध्य भारती) : ISSN 0974-0066 with IF=6.28
Vol. 82, No. 10, July - December : 2022

UGC Care Approved, Group I, Peer Reviewed, Bilingual, Biannual,
Multi-disciplinary Referred Journal



UGC
Udharanam Saranam, Gyanam Alankaram

Chief Editor
प्रो. अश्विनीकुमार शर्मा

173

POLYGRAPH TEST: ANALYSIS OF INDIAN LEGAL POSITION

Ms Suma Suresh Kogilgeri, Assistant Professor, Shri Dharmasthala Manjunatheshwara Law College, Centre for Post Graduate Studies and Research in Law, Mangaluru, (affiliated to KSLU, Hubballi)

Abstract

In the quest for finding the truth, the investigating agency always strives to find effective methods of investigation. Normally, police officers are always blamed for custodial torture and the use of third-degree methods during the investigation. This in turn builds pressure on the police to investigate the case in an acceptable manner. In such a situation, the scientific methods of the investigation come as a ray of hope to investigate criminal cases. One such scientific tool is the polygraph test. Though the polygraph test was in use around the world for a very long time, it gained attention in India in the year 2002 during the Godhra riots. From then till 2010 the various issues relating to the use of polygraph tests have been challenged before the court of law. Finally, in the year 2010 Supreme Court in *Selvi v. State of Karnataka* held that without the consent of the accused, a polygraph test cannot be conducted. Today, in the changing crime scenario there is a need to revisit the rationale behind the principle laid down in *Selvi's case*.

Keywords: Investigation, scientific method, polygraph, crime, and police.

Introduction

India follows the adversary system of law, according to this system burden is on the prosecution to prove the guilt of the accused beyond a reasonable doubt.¹ If they fail to do so the accused will be acquitted by giving him the benefit of doubt. This shoulders greater responsibility on the investigating officer to unravel the mystery. In such circumstances, the polygraph² test comes as a rescue to the investigation officer to investigate the case on a scientific basis. Polygraph which is also known as a lie detector is said to be an effective scientific tool in the interrogation of suspects. It is believed that some physiological reactions occur when a person is lying. A polygraph is one such instrument which records a person's physiological reactions. This instrument is nicknamed a lie detector³. As its nickname suggests it never detects lies, rather it only manifests deceptive behaviour in a person by recording blood pressure, respiratory rate, heartbeat etc. The idea behind the polygraph test is that when a subject lies in response to a question, he will tend to produce some physiological responses that are quite different from those that arise in a normal course.⁴ However, in the present Indian scenario, the ever-increasing crime rate, faulty investigation, huge pendency of cases and low conviction rate, compel our criminal justice system to be in tune with changing needs of our society. While resorting to the third-degree method is condemned, the scientific methods of investigation would be the only option available. Therefore, in this paper, an attempt has been made to revisit the rationale behind the principle laid down in *Selvi's case* considering the changing crime scenario.

Statement of problem

Crimes are increasing today. The accused adopts sophisticated techniques to commit the crime. It is the duty of the police to maintain law and order in society. To discharge this duty, they are empowered to investigate the case. The investigation is the backbone of the criminal case. The success of a criminal trial depends upon effective investigation. Such being the case if the police still adopt traditional techniques of investigation would not yield fruitful results as desired. In order to avoid the adoption of the third-degree method during investigation polygraph test is the best alternative. In the *selvi case*, the court held that consent of the accused is required to conduct the test which curtailed the use of

¹ Ratanlal & Dhirajlal, *The Law of Evidence*, 508 (LexisNexis, Haryana, 25th edn.,

² The term 'Polygraph' refers to the recording device that is used for registering different physiological parameters.

³ Lie detector is a word used synonymously for the Polygraph test.

⁴ Dr. Subodh K. Singh, "Admissibility of Polygraph test in Indian administration of criminal justice system", Cr L J 77 (2012).

polygraph tests during an investigation without the accused consent. Therefore, there is a need to reconsider the rationale behind the decision in the selvi case.

Objectives of the study

- To understand the Meaning and procedure of the Polygraph test
- To know the advantages and disadvantages of the polygraph test.
- To critically analyse Selvi and others v State of Karnataka.
- To find out the challenges faced during the investigation and the need for the polygraph test for criminal investigation.

Review of Literature

Dr Subodh K. Singh in his article titled “*Admissibility of Polygraph test in Indian administration of criminal justice system*” explained the admissibility of a polygraph test and how it’s effective in the justice delivery system. In Synopsis of Investigation of Criminal Cases in Karnataka, Synopsis Series, published by Karnataka Police Academy authored by Amar Kumar Pandey and B. Umadethan’s article titled “*Principles and Practice of Forensic Medicine* explained the procedure of polygraph test. Rajesh Punia in his article titled “*NarcoAnalysis – Investigation tool or a torture?*” critically analysed the selvi case and discussed various case laws on this matter. R. Sri Kumar in his article titled “*Trusting the Police: Challenges of Criminal Investigation and trials in India*” and Bostjan Penko in his article titled “*Issues of concern related to investigating and prosecuting serious economic crime and grand corruption*” explained the challenges faced during the investigation.

Research Methodology

The methodology adopted for the study is doctrinal involving primary sources such as Statutes, Precedents, and secondary sources of information such as journals, textbooks, articles, commentaries, and websites.

Meaning and procedure of Polygraph test

The word polygraph is derived from the Greek language which means “many writings”. Since it can read several physiological responses simultaneously and record them on a rolling drum of smoked paper, it is named a polygraph. Today, a polygraph test is conducted with the aid of digital equipment. The scrolling paper has been replaced with sophisticated algorithms and computer monitors.⁵ This procedure is conducted by a criminologist trained in the polygraph technique. The subject is connected to the polygraph machine and certain pre-framed questions which are relevant and irrelevant are asked. A cuff tied around the upper arm records the blood pressure, and pulse rate and the Pneumograph tied across the chest and abdomen measures the respiratory movements of the chest and abdomen. Two electrodes attached to the forefinger and the third finger measure the variations in electrical conductance. Transducers fixed in the chair will pick up the muscular movements. The polygraph test is based on the principle that if a person lies his blood pressure will rise, pulse rate will become rapid, respiration becomes shallow, galvanic resistance of skin lowers and there will be involuntary muscular movements.⁶

Advantages of the test

Since it aids in finding the truthfulness of the subject’s statement. It helps to exonerate an innocent person accused of a crime. It does not cause any bodily harm to the subject.

The drawback of the test

Polygraph results are not 100% accurate. Nervousness, emotional stress, and mental abnormalities can cause a false-positive response. Moreover, a habitual liar may not show any deceptive behaviour. The

⁵ Amar Kumar Pandey, Synopsis of Investigation of Criminal Cases in Karnataka, Synopsis Series, 2011, Karnataka Police Academy, Mysore at p 526.

⁶ B. Umadethan, *Principles and Practice of Forensic Medicine* 711 CBS publishers and distributors private limited, New Delhi, 2nd edn., 2016).

polygraph doesn't reveal whether the accused is lying or not. It only records the psychological changes and it's the examiner who must analyse the response. Framing of questions purely depends upon the ability of the examiner. It has no strict rules. A person who has strong control over their mind can still lie during the polygraph test. There is a chance that an innocent man could be nervous and show psychological changes when questioned relating to crime.

Selvi and others v. State of Karnataka⁷

In a landmark judgement of the Supreme Court in *Selvi v. State of Karnataka* delivered by a three-judge bench of the Hon'ble Supreme Court headed by Justice K.G. Balakrishnan in the year 2010 the following questions issues were raised:⁸

1. Whether the involuntary administration of the impugned techniques violates the "right against self-incrimination" enumerated in Article 20(3) of the Constitution?⁹

1-A. whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject.

1-B. Whether the results derived from the impugned techniques amount to "testimonial compulsion" thereby attracting the bar of Article 20(3) of the Indian Constitution?

2. Whether the involuntary administration of the impugned techniques a reasonable restriction on the "personal liberty" as understood in the context of Article 21¹⁰ of the Constitution?

After discussing all these aspects, the Supreme Court finally held as follows:

1. Subjecting the accused to Narco analysis, Brain mapping and Polygraph tests against the will of the person violate the right against self-incrimination under Article 20(3) of the Constitution of India, right to personal liberty under article 21 of the Constitution of India and right to remain silent under section 161(2)¹¹ of the Criminal Procedure Code.

Reasons:

a. Article 20(3) of the Constitution of India and Section 161(2) of the Criminal Procedure Code protects the accused, suspects, and witnesses from being compelled to make self-incriminating statements. On other hand "testimonial compulsion"¹² is prohibited by law.

b. The person concerned has the right to remain silent on questions which may incriminate him. This right is said to be violated in these impugned tests on the ground that there is no conscious control over these responses.

2. In all these tests, 'mental privacy' which is a vital aspect of personal liberty under Article 21¹³ is intruded upon.

Reason: The common feature of all these tests is that subject has no conscious control over their verbal or physiological responses. The Court considered it a cruel, inhuman and degrading treatment of an individual.

⁷ AIR 2010 SC 1974.

⁸ *Ibid.* at p 282-283.

⁹ Article 20(3)- No person accused of an offence shall be compelled to be a witness against himself.

¹⁰ Article 21- No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹¹ Section 161: Examination of witnesses by police. (1) 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 have a tendency 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.

¹² The term testimony refers to a spoken or written statement that something is true, esp. one given in a court of law, or the act of giving such a statement and the term testimonial compulsion refers to compelling a person to be witness against himself.

¹³ *Supra* note 10.



3. These tests also violate the right to a fair trial.
Reason: Access to legal advice, which is composed of Article 21¹⁴, becomes meaningless when the test subject is made to reveal information without having conscious control over it.
4. The Court further held that conducting certain medical tests on the accused is permissible under explanation (a) to Section 53¹⁵, Section 53-A¹⁶ and Section 54¹⁷ of Cr. P.C, yet Narco analysis, Brain mapping and Polygraph test are not included in those tests.
Reasons:

¹⁴ *Supra* note 10.

¹⁵ Section 53: Examination of accused by medical practitioner at the request of police officer. (1) 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. (2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner. Explanation: - In this section and in section 53A and 54, - (a) "Examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case; "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.

¹⁶ Section 53-A: Examination of person accused of rape by medical practitioner:- (1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometres from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely: -

- (i) the name and address of the accused and of the person by whom he was brought,
- (ii) the age of the accused,
- (iii) marks of injury, if any, on the person of the accused,
- (iv) the description of material taken from the person of the accused for DNA profiling, and"
- (v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.]

¹⁷ Section 54: Examination of arrested person by medical officer: (1) When any person is arrested, he shall be examined by a medical officer in the service of Central or State Government, and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made:

Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner. (2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person.]



- a. The expression "such other tests" in explanation (a) cannot be construed as covering these three tests because they are not the same category to which tests specified in explanation (a) belong. The interpretational rule of ejusdem generis¹⁸ does not permit their inclusion.
 - b. Narco analysis, Brain mapping and Polygraph tests cannot be accorded the same treatment as is given to collecting specimen signatures and handwriting samples because specimen signatures and handwriting samples are not used as testimony against the test subject but are used for identification or corroboration of facts already known to investigators.
5. Finally, the Hon'ble Supreme Court permits for voluntary submission of the subject to these tests provided certain safeguards which are recommended by the National Human Right Commission in case of a polygraph test are observed.¹⁹ Further, it said to device similar safeguards for Narco analysis and Brain mapping.
6. Answering the admissibility of results of these tests the Supreme Court held that they can be used for a limited purpose as indicated in section 27²⁰ of the Indian Evidence Act, 1872.

Critical analysis of Selvi and others v. State of Karnataka concerning Polygraph test.

Article 20(3) of the Constitution of India embodies the principle of protection against self-incrimination which is one of the fundamental canons of the British system of criminal jurisprudence and which has also been adopted by the American system and incorporated in its Constitution.²¹ Analysing the terms in which this right has been declared in our Constitution, it may be said to consist of the following components. (1) It is available to a person who is "accused of an offence"; (2) It is a protection against "compulsion to be a witness"; and (3) It is a protection against such compulsion resulting in his giving evidence "against himself".²² The reason behind this principle seems to protect the accused from torture and inhuman degrading treatment during police custody. It also acts as a check on police powers during the investigation.

The term "testimony" generally covers oral testimony by the accused. Giving broader meaning to the term testimony in *M.P Sharma v. Satish Chandra*²³ the Supreme Court held that it not only includes oral testimony or statement in writing of the accused but also the production of things and evidence by other modes. A bench of eleven judges in *State of Bombay v. Kathi Kalu oghad*²⁴ had interpreted the words "to be a witness". The court held that "self-incrimination" must mean conveying information based upon the personal knowledge of the person giving information and

¹⁸ Rule of ejusdem generis: when particular words pertaining to a class, category or genus are followed by general words, the general words are constructed as limited to things of the same kind as those specified.

¹⁹ The National Human Rights Commission, after bestowing its careful consideration of this matter of great importance laid down, the following guidelines relating to the administration of Lie Detector Test :

- a. No Lie Detector Test should be administered without the consent of the accused. Option should be given to the accused as to whether he wishes to avail the test.
- b. If the accused volunteers for the tests, he should be given access to a lawyer. The police and the lawyer should explain the physical, emotional and legal implication of such a test to him.
- c. The consent should be recorded before a Judicial Magistrate.
- d. During the hearing before the Magistrate, the accused should be duly represented by a lawyer.
- e. At the hearing, the person should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.
- f. The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of interrogation.
- g. The actual recording of the Lie Detector Test shall be done in an independent agency (such as a hospital) and conducted in the presence of a lawyer.
- h. A full medical and factual narration of the manner of information received must be taken on record.

²⁰ Section 27: How much of information received from accused may be proved: - Provided that when any fact is proved to as discovered in consequence of information received from a person accused of an offence, to 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.

²¹ *M.P. Sharma and others v. Satish Chandra* AIR 1954 SC 300 available at <http://www.indiankanoon.org/doc/70398131> (last visited on May11, 2022).

²² *Ibid.*

²³ *Supra* note 21.

²⁴ AIR 1961 SC 1808.



convey only "personal knowledge which depends upon his volition". The Court distinguished 'to be a witness' from 'furnishing evidence'²⁵ and interpreted the former to mean imparting knowledge in respect of relevant facts by an oral statement or statement in writing made or given in court or otherwise. The latter included the production of documents or giving materials which might be relevant at a trial to determine the guilt or innocence of the accused.²⁶ In *Rama Chandra Reddy and others v. State of Maharashtra*²⁷, the Judge distinguished between a "Statement" made before the police officer and "testimony" (made under oath in court). The court held Brain Mapping and Polygraph test did not involve any "statement being made". *Dinesh Dalmla v. State*²⁸, the High Court of Madras held that merely subjecting the accused to the Narco analysis test will not amount to testimonial compulsion. The court further observed that taking the accused to the laboratory may be against his will, but the statement made by him during the test is voluntary.²⁹ This same principle applies to the Polygraph test. Taking the accused to test may be forceful but whatever psychological reactions occur are voluntary.

In the Polygraph test, psychological changes in the body are recorded. The rationale behind this is that when a person is giving a false reply to an incriminating question, he would produce psychological responses which are different from the responses given in a normal course. A guilty person is more inclined to lie about the relevant facts as opposed to lying about the facts in general. An innocent person will have no trouble giving false answers to control questions. The scoring of the test is based on assigning a numerical value to each response given by the accused, which can be either positive or negative. After collecting all details, the result is compared to a standard numerical value to indicate the overall level of deception. The final result may indicate truth, deception or uncertainty. In *Selvi's case*,³⁰ the court held that the subject has no conscious control over the responses. Nevertheless, the psychological responses automatically emit while giving answers to the questions.

The polygraph test is admissible as evidence in most developed countries like Japan, the United States and New Mexico. In India, it is still not admissible as evidence nor during the investigation. However, in *Ram Singh v. Sonia and others*,³¹ Supreme Court held that test results could be used as an aid to investigation. The power to investigate the case is vested with the investigating officer. In *Selvi's case*,³² the Supreme Court has curtailed the investigating power of the police. The SC which blames the police officials for custodial torture should have paved the way for the scientific method of investigation. The polygraph test does not amount to inhuman and degrading treatment. It does not involve any bodily harm to the subject. The protection under Article 20(3) is provided only to avoid shortcut methods which would be adopted by the investigating officer and to ensure that investigating officer conducts a diligent and meaningful investigation.

The Investigating Officer (IO) has got a statutory right to investigate the case under Sections 156³³ to section 159³⁴ of the Criminal Procedure Code. The power of the IO to interrogate the accused

²⁵ *PUCL v. Union of India*, AIR 2004 SC 456.

²⁶ Kudrat Dutta Choudary, "Immunity against self incrimination", available at <https://www.lawctopus.com/academike/immunity-self-incrimination/> (last visited on May 1, 2022).

²⁷ 2004 ALL MR(Cri)1704.

²⁸ 2006(3) Cr L J 2401 (Mad).

²⁹ Rajesh Punia, "NarcoAnalysis – Investigation tool or a torture?" Cr L J 25 (2009).

³⁰ *Supra* note 7.

³¹ AIR 2007 SC 1218

³² *Supra* note 7.

³³ Section 156: Police officer's power to investigate cognizable case: (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate. (3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

³⁴ Section 159: Power to hold investigation or Such Magistrate, on receiving such report, may direct an investigation, or, if he thinks fit, at once proceed, or depute any Magistrate



under section 161³⁵ of Cr. P. C cannot be curtailed at the stage of the investigation. If restrained it would amount to interference with the rights of the IO to investigate the crime. Moreover, the evidentiary value of the statement recorded under section 161 is explained in section 162 of Cr.P.C³⁶. A statement recorded under section 161 of Cr. P.C can be used only to prove the contradictions or omissions. Under subsection 2 of Section 161 of Cr. P.C accused can remain silent during interrogation. Ironically there are two provisions one empowering the IO to conduct an investigation and the other is the right of the accused to remain silent during the investigation. No doubt Article 20(3) and Section 161(2) of Cr.P.C. provide greater protection to the accused. It is equally crucial, at the same time to counterbalance such rights with that of the victims' rights. This calls for balancing between the larger interest of society and the corresponding interest of the individual. And there are also no provisions in our legal system to draw an adverse inference against the accused who choose to remain silent. In *Selvi's case*, the court failed to balance these rights. They forgot about the victims, who always remained neglected in our criminal justice system.

In *State v. Dorsey*³⁷, the New Mexico Supreme Court found that polygraph tests are admissible if three requirements are fulfilled. Firstly, the polygraph operator must be competent. Secondly, the procedure must be reliable and thirdly, the test on the subject must be valid. In India too, to get a fair look as to how the expert comes to a particular conclusion the test is conducted in the presence of an expert. Additionally, the test is audio and video graphed. Therefore, the result of the test should be used for corroboration with other evidence. It can be used for a limited purpose under section 27³⁸ of the Indian Evidence Act and it can be used for the purpose mentioned under section 162 of Cr.P.C.³⁹ For admissibility of confession as evidence, Section 164⁴⁰ of Cr.P.C requires that

Subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in the manner provided in this Code.

³⁵ Section 161. Examination of witnesses by police: (1) 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 have a tendency 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.

³⁶ Section 162: Statements to police not to be signed: Use of statements in evidence: (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to 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: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872) or to any statement falling within the provisions of section 27 of that Act. Explanation. - An omission to state a fact or circumstance in the statement referred to in subsection (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

³⁷ 532 P.2d 912 (1975) available at <https://law.justia.com/cases/new-mexico/court-of-appeals/1975/1469-1471.html> (last visited on May 3, 2022).

³⁸ *Supra* note 20.

³⁹ *Supra* note 36.

⁴⁰ Section 164: Recording of confessions and statements: (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial: Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force. (2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he



confession must be recorded in the presence of a magistrate. These only go to show that measures have been taken to ensure that the confession is not extorted from the accused. When the confessional statement recorded under section 164⁴¹ is admissible as evidence. There is no strong reason for not admitting the result of the polygraph test, therefore a blanket ban imposed in *Selvi's case* on conducting polygraph tests would amount to a miscarriage of justice.

Need for Polygraph test.

I. Today the crime scene is changing drastically. Technological development has transformed the very perspective of crime. A technically sound person can commit the offence without leaving behind any traces of evidence. The growing crime rate and the sophisticated methods of committing a crime are big challenges faced by the investigating officer. This demands the use of scientific methods of investigation like the Polygraph test.

The investigating officer plays a vital role to render justice in criminal cases. Their role in course of the investigation is very crucial in proving the guilt or innocence of the accused. During this stage, they face many challenges. The challenges are as follows:

1. Lack of proper investigative tools. Even today police adopt traditional methods of investigation despite development in scientific methods of investigation like Narco analysis, Brain mapping and Polygraph test. However, there is a lack of well-trained police officials to scientifically analyse the crime scene to collect scientific evidence.
2. Witness turning hostile during the trial.
3. Long and delayed trials.
4. Increase in the number of criminal cases.
5. Political and public pressure on the Investigating officer to conduct the investigation.
6. Corruption in the police department.
7. The Investigating officers are frequently transferred often due to political reasons. It adversely affects the investigation process. During the trial, IO is summoned as a witness.
8. Generally, the credibility of the Police is always questioned. They are undermined as most untrustworthy.

All of these contribute to the defective investigation which in turn causes the failure of the criminal justice system.⁴²

II. Certain offence requires sophisticated methods of investigation such as economic offence, organized crime, offence on high seas, terrorism, and cybercrime etc., Most corruption cases are consensual and are motivated by mutual interest. As a result, police officials have serious difficulties to collect reliable evidence. Due to a lack of supporting evidence, it is often difficult to prove the guilt of the accused.⁴³ Not only the crime on land the offences

does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily. (3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody. (4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:- "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B. Magistrate". (5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best suited to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded. (6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

⁴¹ Ibid

⁴² R. Sri Kumar, "Trusting the Police: Challenges of Criminal Investigation and trials in India" available at dakshindia.org/Daksh_Justice_India/30_Chapter_03.xhtml (last visited on May 10, 2022).

⁴³ Bostjan Penko, "Issues of concern related to investigating and prosecuting serious economic crime and grand corruption" available at



on high seas, terrorism, human trafficking and migrant smuggling, wildlife and fisheries crime, but firearm trafficking etc. are also very tough to investigate.

Conclusion

The world has been changing very fast and in unforeseeable ways. Amid these transformations, the role of the judiciary is bound to be pivotal. Dynamic interpretation of the laws in the changing world is the need of the hour. No doubt, the judiciary in India has been alive to these changes and has approached them in the light of the vision contemplated under the Indian Constitution. However, in *Selvi's case*, the Hon'ble Supreme Court failed to properly appreciate and contextualize the concept of scientific methods of Investigation in the light of the changing crime scenario and curtailed the power of the police to conduct tests without the accused consent. If the logic of the decision is to protect the rights of the accused; justice equally requires the protection of interest of victims who may be an individual and for that matter, a larger entity called the state itself. To put the accused behind the bar and ensure justice for the victim and society at large the use of polygraph test even without the consent of the accused is the need of the hour. It's a boon to the criminal justice system, we must work on the loopholes.

