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USE OF NARCO ANALYSIS AND BRAIN MAPPING IN
CRIMINAL INVESTIGATION: A RAY OF HOPE IN
ADMINISTRATION OF CRIMINAL JUSTICE

-Ms. Suma Suresh Kogilgeri*

INTRODUCTION

As quoted by John F. Kennedy that "For the time and the world do not stand still. Change is the law of life. And those who look only to the past or the present are certain to miss the future"¹. Likewise, the law should be dynamic to meet the changing needs of the society. Using age old technique of criminal investigation buries the justice. Crime control is the immediate goal of the state. Today there is alarming rise of crimes like offence against the state, white collar crimes, cybercrimes and terrorism etc. However, our criminal justice system is based on the principle that "let hundred go unpunished rather than one innocent is punished". Whether this principle holds good in today's changing crime scenario is prime question for consideration. Perhaps, the first obligation of the state is to secure justice to the victims and society at large. Science and technology play a major role in the criminal investigation process. With the development of science and technology, the criminal justice system should pay the way for new trends of using scientific methods like Brain Mapping and Narco-Analysis in criminal investigation. This test should be adopted where public interest is involved and when the interest of justice demands for it. After all the law is for the society and dispensation of justice is the paramount duty of the state. But these tests often raise doubts about their legal validity. However, in 2010 Supreme Court in *Selvi v. State of Karnataka*² held that subjecting the accused without their consent to these tests is blatant violation of Article 20(3), Article 21 of the Constitution of India and Section 161(2) of the Criminal Procedure Code. In this back ground, author has made an attempt to understand and analyse the need to use scientific method in criminal investigation and the legal position of use of Brain Mapping and Narco Analysis in crime investigation.

OBJECT OF CRIMINAL TRIAL

The object of a Criminal trial is to render Public Justice, to punish the Criminals and to see that the trial is concluded expeditiously. Indeed, administration of justice is main goal of any Law. This goal is reached

* Assistant Professor, Shri Dharmasthala Manjunatheshwara Law College, Centre for Post Graduate Studies and Research in Law, Mangaluru.

¹ <https://goo.gl/images/sXdP4H>, Last Visited on 1st December, 2020

² AIR 2010 SC 1974



through trial process. In this process Judge play a prominent role. He should protect the right of the accused as well as ensure justice to the victims.

In *Ambika Prasad v. State* the Hon'ble Supreme Court observed that, the object of criminal trial is to deliver justice not only to the accused but to the victim and society at large. It should also aim at ensuring maintenance of law and order in the society.³ In another case, *State of U.P v. Anil Singh* Hon'ble Supreme Court observed, it is the public duty of the judge to see that no innocent is punished and at the same time also ensure guilty does not escape.⁴ Yet in another case, *Zahia Habibulla H Sheikh v. State of Gujarat* Hon'ble Supreme Court explaining the role of a judge held that, Judge should not preside over the trial merely as spectator. Rather he should actively participate in the trial proceedings and collect all the material facts which is necessary for him to arrive at conclusion. So that justice is administered to the parties fairly and impartially.⁵

NEED FOR FORENSIC SCIENCE IN CRIMINAL INVESTIGATION

Today crime rate is accelerating. Increase in the crime rate is the major concern which India is already facing. In 2016 shocking revelation was made in NCRB data according to which, the total crimes reached 2.97 million. Whereas the crime rate was found to be 379 crimes per population.⁶ In order to make crime free society offenders should be punished. In order to punish, accused should undergo fair trial. During trial evidence is placed before the court. If the evidence placed proves the guilt of the accused beyond reasonable doubt accused will be convicted otherwise, he will be given benefit of doubt and will be released. Thus, evidence is very important to administer justice. The evidence is collected during investigation. Thus, investigation stage is crucial to find the truth. Indeed, development of science and technology gave new dimension to the crime. The criminals are using more sophisticated methods to commit crimes. But ironically investigation officer still remains handicapped with age old methods of investigation. While understanding the need of scientific method of investigation report submitted by Malimath committee is worth mentioning. It recommended to amendment police manuals and standing orders to facilitate use of forensic science in

³ AIR 2000 SC 718 at p.721

⁴ AIR 1988 SC 1998

⁵ AIR 2004 SC 3114 at p.3125

⁶ <http://www.financialexpress.com/india-news/crimes-in-india-rise-in-2018-as-compared-to-last-year-murder-rapes-see-a-spike-saya-this-report/1080222/> dated 26 February 2018, Last visited on 1st December, 2020



investigation of heinous cases like sexual offences, dacoity, robbery, terrorists' acts, fraud, forgery, cybercrimes etc.⁷ It also expressed concern about less use of scientific methods in investigation. Whereas only 5% to 6% of the registered criminal cases were referred to various Forensic Science Laboratory across the country. The committee finds a hope in scientific method of investigation as it would provide clinching evidence against accused which aids in proving the guilt of the accused.⁸ Further explaining the importance and need of forensic science Supreme Court in *Prakash v. State of Karnataka*⁹ stated that scientific methods of investigation were available even at that time in 1990 but not made use of. At least from now onwards prosecution must lay stress on scientific collection and analysis of evidence, particularly since there are enough methods of arriving at clear conclusions based on evidence gathered. In *Dharam Deo Yadav v. State of U.P.*¹⁰ Supreme Court observed that though scientific method of investigation is in infancy stage, its accuracy when compared to other evidence should not be under estimated. Therefore, to uphold justice and reassure faith of common man in court and criminal justice system scientific methods of investigation is to be encouraged.

NARCO ANALYSIS

The term Narco analysis is derived from the Greek word narke meaning "anesthesia" or "torpor". Sir Horseley coined the term Narco analysis. The much-known fact to everyone is that, by using imagination a person can lie. In Narco analysis test, administration of drug to the suspect will take him to semi-conscious state of mind which results in lowering his imagination power. To take the subject to semi-conscious state, Narco analysis is conducted by administering to the subject 3 grams of Sodium Pentothal or Sodium Amytal dissolved in 3000 ml of distilled water. The dose to be administered depends upon the subject's age sex, health and physical condition. With the help of anesthetist, this solution is administered to the subject intravenously along with 10% of dextrose over a period of 3 hours. Wrong dose sometimes led to the death of the subject. The most commonly used barbiturates in this test are Sodium Amytal, Pentothal Sodium and

⁷ Committee on reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, Report Volume I, India March 2003 at p 103 at para 7.16.4 available at <https://mha.gov.in> Last visited on 1st December, 2020

⁸ Ibid at p 102 para 7.16.2

⁹ (2014) 12 SCC 133 Para 53 referred at <http://www.scconline.com> last visited on 8th December, 2020

¹⁰ (2014) 5 SCC 509 Para 30 and 31 referred at <http://www.scconline.com> last visited on 10th December, 2020



Secobarbital. During the since subject's imagination level is lowered, he will not be in a position to manipulate the facts. There are more chances that his answer to the questions is spontaneous. This will in fact aid the investigation officer to collect material information from the suspect.¹¹

BRAIN MAPPING

Brain mapping test is also called as "Brain Activation Profile Test". Which is also known as "P300 Waves test". It is said that brain is the store house of everything. Brain mapping is conducted to ascertain, if an individual is familiar with certain facts. This can be known by measuring brain activity which triggers when exposed to certain stimuli. It consists of examining and measuring 'event-related potentials' (ERP) i.e electrical wave forms which is emitted by the brain after it has observed an external event. During this test subject is made to sit in front of screen and images related to crime is shown to him. If his brain recognises the image, it emits P300 waves.¹² Once the brain responds to the stimuli, suspect has to justify his presence in the crime scene.

ARTICLE 20(3) OF THE CONSTITUTION OF INDIA

Article 20(3) of the constitution of India provides that "No person accused of any offence shall be compelled to be a witness against himself"¹³. Science and Technology was not so well advanced, during drafting of Indian Constitution. Perhaps, the only rationale behind this provision is to avoid inhuman and degrading treatment to the accused during interrogation¹⁴. The state has witnessed the use of third-degree methods during the investigation. In order to avoid such a situation, the privilege against self- incrimination is given to the accused. Moreover, subjecting the accused to this test does not amount to compulsion. This is evident in judgement passed by High court. Article 20(3) prevents information to be obtained under compulsion. What is compulsion? In *Bombay v. Kathri Kalag Oghad*¹⁵ the word compulsion has been defined as Duress. To elucidate it further, duress is said to be caused

- ¹¹ Sajeev T. Prabhakaran, Advocate, High Court of Kerala, Modern Forensics for Crime Investigation Practice and Procedure, Edition 2008, EM TEE EN PUBLICATION, Perandoor Road, Kaloor, Kochi at p.316-317
- ¹² Sarita Jand, Forensic Science and Law, First edition 2017, New Era Law Publications, Faridabad (Harayana), p 96
- ¹³ P. M. Bakshi, The Constitution of India, Eleventh edition, reprint 2012, Universal Law Publishing Co., New Delhi – India, p. 52
- ¹⁴ Professor M P Jain, Indian Constitutional law, Sixth edition Reprint 2011, LexisNexis, Butterworths Wadhwa, Nagpur at p. 1164
- ¹⁵ AIR 1961 SC 1808 at 1819 para 30

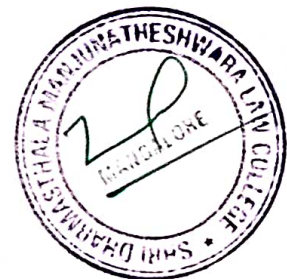


when a man compelled to do an act by injury, beating or wrongful imprisonment or threatening such or harming persons related to the accused- Earl Jonlet Dictionary of English law.¹⁶ But such types of compulsion is completely absent in narco analysis and brain mapping. *Ramachandra Ram Reddy v. State of Maharashtra*¹⁷, the High Court of Bombay examined the issue of “whether requiring the accused to undergo these tests against his will would amount to compelling him to be a witness against himself”. The court held that bar under Article 20(3) would be attracted when the statement made by that person tends to incriminate him. Perhaps, it is only after the test one can come to conclusion with regard to incriminating nature of the statement. *Dinesh Dalmia v. State*¹⁸, the High Court of Madras held that merely by subjecting the accused to Narco analysis test will not amount to testimonial compulsion. The court further observed that taking the accused to laboratory may be against his will but the statement made by him during test is voluntary.¹⁹ There is a misconception about Narco analysis and brain mapping tests. By subjecting the accused to Narco analysis test he is not compelled to tell the truth. He is not forced to incriminate against himself. The only idea behind this test is to extract information whatever stored in his memory with regard to the crime. On the other hand, the science of brain fingerprinting accurately determines whether or not specific information is stored in a specific person’s brain. It only helps in finding presence or absence of specific information in the brain²⁰. If the accused is really an innocent person then this test is at his advantage. Therefore, what is protected under Article 20(3) is inculpatory material and not exculpatory materials. Whether the information obtained from accused is inculpatory or exculpatory can be decided only after the test is being conducted. So, there should not be any hurdle in subjecting the accused to this test. As this certainly amount to use of reasonable force as compared to third degree methods.

SECTION 161(2) OF CRIMINAL PROCEDURE CODE

The protection given under Section 161(2) of the criminal procedure code and Article 20(3) of the Constitution of India are one and the same. The

¹⁶ Tathagata Choudhury, Narco Analysis and Art. 20(3): *Blending the realm of individual and societal rights*, *Criminal Law Journal*, 2010, p. 30
¹⁷ 2004 ALL MR(Cri)1704
¹⁸ 2006(3) CrLJ 2401 (Mad)
¹⁹ Rajesh Punia, NarcoAnalysis – *Investigation tool or a torture?*, *Criminal Law Journal*, 2009, p. 25
²⁰ Sajeev T. Prabhakaran, Advocate, High Court of Kerala, *Modern Forensics for Crime Investigation Practice and Procedure*, Edition 2008, ‘EM TEE EN PUBLICATION, Perandoor Road, Kaloor, Kochi at p.164



right of the accused to remain Silent during interrogation is upheld Under Section 161(2) of Criminal Procedure Code. Section 161(2) enumerates that "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"²¹. In *Nandini Sathpathy v. P.L.Dhani*²² Supreme Court upheld the right of the accused to remain silent during investigation. The right of the accused to remain silence during interrogation is mischief right given to the accused. How far is this right? On one hand the entire burden is on the prosecution to prove the guilt of the accused beyond reasonable doubt and on the other hand, the hands of the investigating officers are tied by showering number of rights on the accused. In our opinion, it is a grave setback in the administration of criminal justice, by allowing the accused to remain silent during interrogation and burdening the prosecution to prove the guilt of accused beyond reasonable doubt. Nevertheless, there are decisions pronounced by the Supreme Court which favours the use of scientific methods in criminal investigation. One of such case is *Bhagwan Singh v. State of Punjab*²³ where Supreme Court reiterated that during interrogation "use of some scientific principles must be made rather than resorting to physical torture". Again in *D.K. Basu v. State of West Bengal*²⁴ Hon'ble Supreme Court emphasized the need to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge. These scientific methods are boons of modern medical science which are considered as alternative to third degree methods.

ARTICLE 21 OF THE CONSTITUTION OF INDIA

Article 21 of the constitution of India provides that "No person shall be deprived of his life or personal liberty except according to the procedure established by law". The right to privacy is not an independent right in itself but it flows from Art.21. When a crime is committed it is the obligation of the police officer to investigate the case. Under Section 155 and 156(3) of Criminal Procedure Code ample power is vested with investigating officer to investigate the case. If criminals seek this right to privacy no crime would be probed anywhere in the world. Public interest should be given prime

²¹ Ratanlal and Dhirajlal, *The Code of Criminal Procedure*, 21st edition Reprint 2016, LexisNexis, Gurgaon at p. 287

²² AIR 1978 SC 1025

²³ AIR 1992 SC 1689, ref at Tathagata Choudhury, *Narco Analysis and Art. 20(3): Blending the realm of individual and societal rights*, *Criminal Law Journal*, 2010, p. 28

²⁴ AIR 1997 SC 610



importance than the individual right to privacy. Moreover, right to privacy is a not absolute right reasonable restriction can be imposed. In *Govind v. State of Madhya Pradesh*²⁵ Mathew, j., observed that "Assuming that the Fundamental Rights explicitly guaranteed to a citizen have penumbral zones and that right of privacy is itself a Fundamental Right, on the basis of compelling public interest, that right to privacy must be subjected to restriction". Yet in another Landmark decision in *MR. 'X' v. Hospital 'Z'*²⁶ the Supreme Court observed that, the public interest would override the duty of confidentiality in case of investigation and prosecution of serious crime or where it involves health risk to others. In another decision given by the Hon'ble Andhra Pradesh High Court in *Shaik Fakruddin v. Shaik Mohammad Hasan*²⁷, it was held that the court has power to order a person to undergo medical test and such an order would not be in violation of the right to personal liberty under Article 21 of the Constitution of India. However, the court should exercise such a power only when it is expedient in the interest of justice and when the fact situation in a given case warrants such an exercise. But it is argued that right to privacy is violated by subjecting the accused to Narco analysis and Brain mapping without his consent. Truly speaking no guilty man will give consent to subject himself to these tests. The harder truth is that no adverse inference can be drawn against accused in case he fails to give consent. No doubt right to privacy is a fundamental right but one should not forget that no right is absolute reasonable restriction can be imposed. Therefore, in the light of changing crime scenario use of Narco analysis and Brain mapping in criminal investigation should be protected under reasonable restriction.

CONCLUSION

It is observed that there is a drastic social change in the society. The police are no more feared. The criminals are using more sophisticated methods to commit the crime: A person sitting in one corner can commit crime anywhere in the world without leaving any traces of evidence. These scientific methods of investigation help in connecting the crime with criminal. There is also increase in White Collar Crimes which affects the very economic condition of the country, Terrorism which is threat to the national security and peace of the country and cybercrime which shatters the entire world. In all these cases there is hardly any witness or physical evidence left

²⁵ AIR 1975 SC 1378, referred at Professor M P Jain, Indian Constitutional law, Sixth edition Reprint 2011, LexisNexis, Butterworths Wadhwa, Nagpur at p. 1237
²⁶ AIR 1999 SC 495 at p 500 , referred at Law relating to protection of Human Rights under the Indian Constitution and allied laws by Justice Palok Basu, Second Edition Reprint 2010, Modern Law publications, New Delhi, Allahabad.
²⁷ AIR 2006 AP 48



behind. But the irony is that our Criminal Jurisprudence still believes that “accused is innocent until proved guilty”. Perhaps, in order to prove the guilt or innocence of the accused use of scientific methods should be encouraged. Criminals are misusing the loopholes in the legal system and committing more heinous crimes. In order to put an end to all these there is urgent need to bring reformation in the criminal justice system. The criminal justice system should not be obsessed only with the right of the accused. It has to strike a balance between the right of the accused, the victim and the public interest at large. In its zeal to protect the rights of the accused state should not forget the innocent victim whose right has already been violated. Therefore, use of scientific methods should be made compulsory where the public interest is involved and in the interest of justice. As rightly said by Louis .D. Brandeis *“If we desire respect for the law, we must first make the Law respectable”*²⁸. Hence it is high time to do away with consent of accused to subject him to Narco analysis and Brain mapping tests, as inflicting some sort of force is inevitable in the present changing crime scenario.

²⁸ https://www.brainyquote.com/quotes/louis_d_brandeis_106240, Last Visited on 15th December, 2020

