

Narco Analysis: A new investigative Strategy and its Admissibility

Mr. Manojkumar E. Naik¹ & Ms. Daneshwari G. Hasabi²

Abstract:

An advancement of technology accompanied with growing individual freedom, decreasing influence of society, religion, family encourage intensity rate of crime which has led to complexity in investigation of crimes. Law should always run with the pulses of the society. Hence, the criminal justice system should also be devised in order to deal with changing nature of the crimes and criminals strategies. Accordingly, investigatory agencies, by introducing technological advancement, are using various modern technologies to elicit truth from the criminal and eye witness involved in any crime. The Narco-analysis test, Lie Detector, BEAP tests are the commonly used tests across the globe including India. Narco-analysis test is one of the most debatable issue in the present scenario for its use in criminal investigation. The main issues relating to this test are firstly, whether the Narco-analysis is hit by Article 20 of the Constitution i.e. self-incrimination? and secondly, whether the statement made under the above mentioned test, come under the purview of Section 25 and 26 of the Evidence Act?

In this context, the main aim of paper is to focus on evidentiary value and its admissibility in the light of the Constitution of India and Cr.P.C. provisions and Law of evidence. Under this research paper the authors will explore, these crucial issues in the backdrop of judicial approach and NHRC guidelines. The paper would suggest some possible remedies to remove the hurdles in the implementation of this test as a tool of investigation of a crime.

Keywords: Admissibility, Constitution, Evidentiary, Narco-analysis, Self-incrimination.

¹ Law Student 4th Year B.A., LL. B (Hons), Karnataka State Law University's Law School, Hubballi.

² Law Student 4th Year B.A., LL. B (Hons), Karnataka State Law University's Law School, Hubballi.

Introduction:

“Memory is a man’s real possession in nothing else is he rich, in nothing else is he poor. Crime wave deceives, criminal mind perceives and criminal soul Conceives”

-Alexander Smith

The advent of using science as a means to investigate criminal cases is of recent origin. Earlier, the courts used to rely upon the non-scientific evidences such as statements by eye witnesses and documents, such evidence cannot be relayed upon since its validity cannot be tested. Few years ago a new technology has been introduced in the field of investigation through forensic science i.e., Narco-analysis, this advanced method in technology have significantly increased the capabilities of forensic science laboratories, “cold cases”, those which have been classified as dead or unsolved, have had life breathed into them because of these advances in criminal investigation.³

The term Narco-analysis is derived from Greek word ‘NARKE’ (Meaning ‘Anaesthesia’ 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 capacity for imagination is blocked or neutralised by leading the person into a semiconscious state by which it becomes difficult for the person to lie and his answers would be restricted to facts he is aware of.⁴

The term Narco-analysis was first coined by ‘Horseley’. It is also known as lie detector Testing or truth serum under this test the person goes into the unconscious state by passing the serum and speaks whatever is present in their mind. This technological advancement forces two professions, which are law and science, to work together in the array of cases.⁵ The main aim of any legal system is to create a criminal free society and to uphold the law and maintain in the society which it govern, thus successful and fair investigation is the main ingredients for a criminal free society and successful trial and conviction in criminal cases depends upon the proper investigation and the collection of evidences by investigating officers. It is difficult task for the investigating officer to inquest the information from the

³ Yawer Qazalbash, *Law of Lie Detectors: Narco-analysis, Polygraphy, Brainmapping, Brain Fingerprinting*, 05-06(1st ed. 2016).

⁴ Dr. Shakeel Ahemad, *Narco-analysis and Rights of an Accused: An Appraisal*, Civil & Military Law Journal., January-March., 2014 at 50.

⁵ Ajay Kr. Barnwal & S.N Ambedkar, *Narco-analysis Test: An analysis of various Judgements of Indian Judiciary*, Journal of Humanities & Social Science., 2014 at 19.

suspect relying upon conventional tools and there might be a chance of misleading or altering the evidences by the culprit.⁶

Hence in complicated criminal cases the investigating officer will make use of such scientific methods to trace involvement of criminals and cross verify their findings whether suspect made the true statement or not this technique is a new arena in criminal investigation which can aid to prevent the innocent from the conviction by proving the guilt of real culprit. However, such concealed information is extracted from the suspected person by way of conducting Deception Detection Test (here in after DDT)⁷ and the Narco-analysis test is one among DDT.

In the past Narco-analysis was unheard in India, but now it is extensively used by the investigating officers. The reason for the immense use of said test is increasing the gap between the rate of accusation and conviction. Dr. M. S. Rao states that forensic activism is the solution for better crime management as it plays a vital role in detecting terrorism related cases by Narco-analysis method which can reveal further plans of terrorists and can be deciphered to prevent terror activities and countering terror acts.

Narco-analysis will have no side effects on body because the dose of drug is given according to the age sex as suggested by the medical experts based on many cases, where the accurate veracity of the confession has been proved such as in the Nithari killing case. Thus the issues which will be discussed here are firstly the importance of Narco-analysis test, secondly whether the statement revealed from the test is hit by Article 20(3) and 21 of the constitution and lastly its admissibility and combined effect of section 24 to 27 of Indian evidence act, 1872 would bar the statement made thereunder.

Hypothesis:

All through the paper, the following questions is being addressed to which answers found on the basis of research analysis.

1] What repercussions does it have on Fundamental Rights of an Individual, i.e. Right against Self- Incrimination Article 20(3) and Article 21?

⁶ As RTI Act provides right to know the information and it can be demanded from any office if it is of public importance and which is in document form, but the information only know to self (Suspected) is very difficult to extract and becomes crucial for criminal investigation.

⁷ The symposium “The physiological Detection of Deception: Where Are We & What Lies Ahead” focused on exactly these questions. Each Year, people in police stations and even in their own offices are questioned about their involvement in criminal activity and workplace misconduct. To this end, a number of tests have been crested to determine if an individual is telling the truth or lying, these test are called as Deception Detection Test.

2] Whether it is admissible as an evidence under Indian Evidence Act 1872 or not?

Research Methodology:

The research methodology adopted is of a descriptive- Analytical Method. Narco-analysis and its Admissibility paper was prepared based on extensive review of literature, articles. The data has been collected from secondary sources, which include Books of eminent authors, Law journals, Websites, research publications, several Statutes which gives a better idea about the concept and scope of research.

Object of the test:

The objective behind the Narco-analysis test is that to restore the uses by a person through his imagination, but under this test but it will neutralize his imagination as the person will go to subconscious mind and hence it is believed that whatever he answers is spontaneous and true. The statements made by the accused are recorded on audio and video cassettes, and such report of the experts will be helpful in collecting evidence.

Need for Narco-analysis Test: -

With recent advent of technologies in every sphere of life, criminal investigation is no more left out of its effects, which necessitated the need of scientific tools to improve the efficacy in investigation methods to detect the crime. Thus we have witnessed a spate in the use of modern scientific techniques such as Narco-analysis test in criminal investigation as the manner in which modern day criminals make use of science and technology perpetrating their criminal activities.⁸In *Som Prakash v. State of Delhi* Supreme court recognized the requirement, the necessity of scientific investigation, Law commission also emphasized on the need of training of police officers in using scientific methods of investigation. Relative impurity which has compelled to rethink on the part of criminal justice establishment to seek the help of the scientific community to aid in investigation process, to tackle criminal issues based on material facts and evidence to meet the demands of today's scientific age. Narco-analysis test is a pace worthy technique especially at the time when the investigating agency is in the dark and after all possible efforts and even though exhausting all alternative methods still there is no progress in the investigation or when reality is doubtful in such situations it

⁸ The Scientific examination by forensic scientists adjoins a missing link and strengthens the weak chain of investigation. In today's scenario criminals are shrewd enough that they hardly leave any evidence, we need to bring into picture forensic science.

aids to find out the truth and to apprehend the real culprit by getting some reliable clue after conducting this test as a tool of investigation.⁹

This Scientific test helps the investigating agency in the collection of hidden evidence and to prove either guilt or innocence of the accused. The result obtained by such test can be relayed as a clue in the investigation process as it is a useful and non-invasive asset for the investigation as well as for the prevention of crimes.

Narco-analysis from point of view of Constitution: Right against Self-incrimination:

Prevention of crime is a prerogative of the state and the punishment of the crime if proved is also the duty of the state. But then what needs to be weighed is the extent to which the state can do away with the individual's rights in the garb of fulfilment of its duty. Nowadays, Narco-analysis is a frequently used test for investigation and for prevention of crimes which aid and subsequently complete the investigation has been well established theoretically the question whether such tests are valid and not against principle of natural justice still remained unanswered. Indian Constitution ensures certain Fundamental Rights which in its core have the doctrines of Natural Justice and Human Rights enshrined. Narco-analysis acts as a boon for investigation procedure but on the other hand it acts as a curse against the Right of a person, hence it can be called double edged sword.¹⁰

The question regarding Constitutional validity of this said test stems from the fact that it appears to infringe a person's Right to Life & Personal Liberty (Art 21), Right against Self-Incrimination. However, over a period of years in various cases by courts of the country including even the Hon'ble Supreme court the stance regarding Narco-analysis has become clear. Right against Self-Incrimination: Article 20(3) of the Constitution of India which guarantees protection against Self-Incrimination states that "No person accused of any offence shall be compelled to be a witness against himself".¹¹ The Maxima 'nemo tenetur prodere accusare seipsum' which basically means no man is bound to accuse himself, is the basis of this article. The Fifth Amendment to the US Constitution provides for the same

⁹ Saryendra Kaul & Mohd.H. Zaidi, *Narcoanalysis and lie detector tests in Interrogation of suspects*, 482-483(1st ed., Alia law agency, 2009).

¹⁰ Kaur Gagandeep, *Narcoanalysis: A volcano in criminal investigation system*, *Legal service India* (Nov.12, 2018, 10:15 AM), <http://www.legalserviceindia.com/article/1410-Narco-Analysis.htm>.

¹¹ M.P JAIN, *INDIAN CONSTITUTIONAL LAW*, 1163 (6th ed., Lexis Nexis Butterworths Wadhwa, 2010).

privilege. This right is also guaranteed by Article 14(3)(g) of the International Covenant on Civil and Political Rights, 1966.¹²

In *M.P Sharma v Satish¹³ Chandra* case SC said, making any statement that has the possibility of exposing the accused to criminal prosecution either in present or in future is not allowed under Indian Constitution and this immunity is available to every person against whom formal accusation has been framed. However, any person who while making statement is not accused can claim this protection, additionally it becomes immaterial if he becomes accused thereafter. A person against whom a first information report has been recorded by the police and investigation has been ordered by the magistrate can claim the benefit of the protection.¹⁴ Self-Incrimination must mean conveying information based upon personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may through a light on any of the points in the controversy, but which do not contain any statement of the accused based on his personal knowledge. Investigating agencies often argue that Narco-analysis test doesn't amount to testimonial compulsion as given under Art 20(3) as it aid's in investigation process.

In *Kalwathi v H.P.State¹⁵* the Supreme Court held that Art. 20(3) does not apply at all to a case where the confession is made by an accused without an inducement, threat or promise. The Madras High Court in a case held that the scientific tests such as Narco-analysis conducted on an accused to extract the truth would not amount to breaking his silence by force if there occurs no compulsion then it doesn't fall under the preview of Art. 20(3).

In case of *Rojo George v Deputy superintendent of police,¹⁶* where the court allowing Narco-analysis test opinioned that conventional method of investigation and interrogation of criminals will not be successful for solution and there is need to utilize some new techniques such as Narco-analysis, Brain finger printing. Court also said that when such techniques used in presence of medical experts then it cannot be contended that investigating agencies violated Fundamental Right of any Citizen of India. In *Santokben Sharmabhai Jadega v State of Gujrat¹⁷* while upholding order for Narco-analysis, that when after exhausting all the possible alternatives if investigating agencies are absolutely in dark in such situations on the

¹² *Ibid*, 1163-1164.

¹³ *M.P. Sharma v. Satish Chandra* (1954) 1 S.C.C.300. (India)

¹⁴ Narendra Kumar, *Constitutional Law of India*, 6-7 (6th ed., Allahabad law agency, 2007).

¹⁵ *Kalwathi v. H.P. State* (1953) S.C.C.546. (India)

¹⁶ *Rojo George v. Deputy Superintendent of police*, (2006) 2 K.L.T. 197. (India)

¹⁷ *Santokben Sharmabhai Jadeja v. State of Gujarat*, (2008) 1 G.L.R 497. (India)

basis of this revelation if they find some clue or statement which helps or assists for further investigation of crime will not amount to violation of Art 20(3). In landmark case of *Nandini Sathpathy v P.L.Dani*¹⁸ where court held that Right to remain silent is encompassed under Art. 20(3), however Art.20(3) can be waived by the person himself. Again Supreme Court in one of the case held that it is the statutory duty of every witness who has knowledge or a party in the commission of crime to assist the state including evidence and it seems justified that if a person not willing to provide information which is very important for investigation process then adverse impression must be taken against them and Art. 20(3) will stop to do this.

It is true that the information collected from the test include both inculpatory and exculpatory statements. The inculpatory statement is hit by article 20(3), but what statement is useful or not for the interrogation, it will be decided after the test only. Later, in one of the celebrated case where Supreme Court heralded to a conclusion where constitutionality of Narco-analysis was questioned, SC rejected the High Court's reliance on the supposed utility, reliability and validity of Narco-analysis tests and other tests as method of criminal investigation. First the court found that forcing a subject to undergo Narco-analysis test itself amounted to the requisite compulsion, regardless of lack of physical harm tend to administer the test or the nature of 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 an individual does not have ability to decide whether or not to answer a given question, the results from all such test amount to the requisite compelled testimony to violate article 20(3).¹⁹ The Supreme Court found that Narco-analysis violated individual right to privacy and amounted to cruel, inhuman or degrading treatment. But it should also be noted here that, court also said that it will not hit by Art 20(3) if it has been conducted by taking consent from the subject and complying with all the prior requirements which was prescribed in this judgement and hence the constitutional validity of the test lies in the hands of the judiciary, but there is a tie between the societal interest and the individual interest. As discussed above that the sodium pantheon uses in medical also this is given according to the medical condition of a person in the presence of the doctors.¹⁸

Narco-analysis from the prospective of Evidence:

¹⁸ *Nandini Satpathy v. Dani P.L.*, (1978) 3 S.C.R. 608. (India)

¹⁹ Barcelona Panda, *Narco-Analysis and its Evidentiary Value in India*, 64. (The Practical lawyer, 2011)

There is no clear cut provision which talks about the admissibility of scientific evidences like that of Narco-analysis. It is recognized that twenty percent of the total number of the individual subjected for Narco-analysis are found to be innocent, therefore these techniques not only helps to find the real criminal, motive and conspiracies etc., but also to identify the innocent in a short period of time.²⁰

The question arises whether any answer received as a result of Narco- analysis test would be evidence or not? Here the fact must be clear that whether court has permitted for the test or not, if the court has not given permission for the test it does not become evidence. In some cases, court allowed the above said test when there are no evidences except the circumstantial evidence. Thus in several cases court allows the test to fill the vacuum in the evidence and admissibility would depend upon several factors.

The statements made under this however be classified into two parts i.e., admission and confession. Further the confession made to the police officer or in their presence or in custody is not admissible as per the Evidence Act provided if it is made in presence of magistrate then it can be admissible. The core issue is that the collected evidence from the above said test will hit by section 25 and 26 of the Indian evidence act, 1872, for this exception was provided under section 26 of Indian Evidence Act which says that if the test is conducted in the presence of magistrate then it would be valid confession and will not hit section 25 and 26 of the Indian evidence act, 1872.

Arguments for giving evidentiary value to narco-analysis in *United States v. Solomon*, there was a detailed discussion on the topic of narco-analysis and court established that truth serum is generally accepted as an investigative technique.²¹ In *Selvi case*²² the supreme court held that the results of the test cannot be admitted as an evidence if it has not consented by an accused because there is exercise of conscious control by subject during the course of test but court left open the possibility for the admissibility of the test with an exception i.e. “Voluntary administered test” which means discovered with the help of the information obtained from such test can be admitted as evidence under section 27 of the Indian evidence act, 1872. In the *Shashi murder case*, the court allowed narco-analysis test, the CJM permitted

²⁰DR. B. V SUBRAHMANYAM, *MEDICAL JURISPRUDENCE & TOXICOLOGY*, 1360 (Vol 2, Law Publishers India Pvt. Ltd 2015).

²¹ Sriram Lakshmana, *Is Narcoanalysis a pseudo-science?* *The Hindu*, May, 2, 2007, at 8.

²² *Selvi v. State of Kanataka*, (2010) 7 S.C.C. 263. (India)

a police officer to conduct the test. In *Satakben Sharm and Hailodeji v. state of Gujarat*,²³ the high court granted permission to conduct the test in spite of opposition made by an accused. The Bombay High Court in a significant verdict in *Ramchandra Ram Reddy v. State of Maharashtra*, upheld the legality of the use of Brain Mapping and Narco-analysis test and said that evidence produced under the effect of Narco-analysis test is also admissible. Under Section 75(e) of the Code of Civil Procedure and Order 26, Rule 10-A the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation.²⁴ Even Supreme Court of US implicitly approved using such test where the public safety is at risk. The head of drafting committee of the National Criminal Justice System Policy, Prof. N.R. Madhavan also recommended for utilization of scientific method in investigation process. Hence such evidence is admissible if it is conducted in the presence of experts or in presence of magistrate.²⁵

Advantages and Disadvantages of the Narco-analysis test:

From the above analysis it can be said that the judiciary has took a harmonious construction regarding the Narco-analysis test. By looking at the several judicial pronouncements the following advantages and disadvantages are formed:

- By looking at the present pathetic condition of the society regarding the criminals and crime rate and affected innocent people, it seems to be right time to check the way by which it can be reduced. It can be possible by encouraging the scientific method of investigation Narco-analysis is one of them.
- When there is an absolute darkness to discover an evidence the investigating agencies should be provided with the scientific tools like Narco-analysis.
- Narco-analysis helps in replacing the traditional method of extracting truth by torture which is very heinous, which bolt in society.
- And scientific tools help in speedy disposal of the case.
- The evidence extracted can be used to get an admissible evidence, to corroborate with other evidence or in support of other evidence.²⁶

²³ *Satakben Sharm and Hailodeji v. State of Gujarat*, (2002) 1 S.C.R. 635. (India)

²⁴ SIR JOHN WOODROFFE & AMEER ALI'S, *THE CODE OF CIVIL PROCEDURE*, 1908, 1331 (5th ed., Delhi law house 2008).

²⁵ AJAY K. MEHRA & LEVY, *THE POLICE, STATE & SOCIETY: PERSPECTIVES FROM INDIA AND FRANCE*, 284 (1st ed., Pearson Publishers 2010).

²⁶ *Supra* note 7, 490.

Disadvantages:

- While administering the chemical a wrong dose of a chemical may lead to a state of coma or death of a person.
- The process is not highly successful if the person is drug addicted.
- The well-known principle of the criminal justice is that the person giving information should be well and fit but in Narco-analysis he will be in semiconscious state hence question of reliability of such information is being raised.²⁷

NHRC Guidelines for conducting Narco-analysis:

The National Human Rights Commission had published ‘Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused’ in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the ‘Narcoanalysis technique’ and the ‘Brain Electrical Activation Profile’ test. The text of these guidelines has been reproduced below:

- (i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.
- (ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
- (iii) The consent should be recorded before a Judicial Magistrate.
- (iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.²⁸
- (v) At the hearing, the person in question 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.

²⁷ *Ibid* 491.

²⁸ NHRC Guideline of Nacro-analysis, at <http://www.wbja.nic.in/wbja>.

(vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(viii) A full medical and factual narration of the manner of the information received must be taken on record.

Conclusions and Suggestions:

In this fast changing world of technology there has also occurred a change in the pattern of crime. In this scenario the criminals have replaced the traditional methods with more advanced form of technology to commit the crimes. Thus in order to ensure justice in such situations advancement in investigation patterns is imperative. Narco-analysis is one of such tool that can play an immense role in the investigation but there is a huge cry relating to its admissibility and even doesn't have proper provisions which can deal with scientific tools. The discretion lies in the hands of the judiciary which have the power to allow or not to allow the test. On the basis of above discussion, we can come to a conclusion that it violates the rights conferred under Article 20(3) of the accused even including the suspect. But in the case of Rohit Shekar v. N.D Tiwari²⁹ the Delhi High Court held that where there is a conflict between the individual right and societal right then in those case the societal interest will prevail over the individual interest. Thus the Supreme Court kept open door for the question of its admissibility of the voluntary test.

Suggestions:

- Author suggest that the legislature should allow narco-analysis test before the magistrate and take it as an evidence then it is beneficial in the cases like threat to national security, rape and other such heinous crimes.
- The said test is not so harmful when compared to that of other tortures given by investigating agencies while interrogation which are violative of constitutional rights.
- The results obtained from such tests should be kept confidential and the drug should be administered keeping in view the health conditions of the subject with due care by the experts who will be present there.

²⁹ Rohit Shekar v. N. D Tiwari, (2012) 12 S.C.C. 554. (India)

Hence, even though narco-analysis may come with certain amount of criticism but it has become a need in today's time in interest of society at large and to meet the ends of justice.