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INDIA'S CALL ON SCIENTIFIC CRIMINAL INVESTIGATIONS

B. Yamuna Saraswathy* and R.B. Rishabh**

Abstract

"Most Indian investigators work towards getting a confession rather than investigating the case. It is the easiest way to get a conviction in court – and the laziest."

Avirook Sen, Aarushi

Law is adaptive in nature so as to keep in nexus with the transforming social order. Law is being interpreted by the judiciary and so the judiciary must be kept updated with the various advancements occurring in the society. Gone were those days where criminals had no access to the technology and criminals today are the ones who take up sophisticated and contemporary means to commit crimes. This shows that there is a need to crack them down using equivalent scientific/ psychological tests. The constitutionality of the scientific tests like polygraph, P-300, narco analysis are in question because during the recent times these tests have been gaining judicial acceptances, which it did not previously receive. So now there is an exigency for serious consideration regarding its constitutional validity from the perspective of human rights.

Keywords*:* Article 20(3), Criminal investigation, P-300, Polygraph, Narcoanalysis.

INTRODUCTION

The basis of law is justice. The criminal law has got a major role to play in every civilized society in the world. The presence of criminal law provision can be seen among the citizens of the state in his day-to-day living. Still, the Indian criminal law is not found to be up to the mark. The investigation by the police forms the foundation of the Indian criminal justice system. The duties of the police are to investigate the matter, ascertain the facts, compile

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their conclusions and then present the whole to the court to figure out whether the person accused is guilty or not. Nowadays getting bail for a criminal case is not regarded as a big deal. So there are a number of cases wherein the person accused has been acquitted due to lack of evidence and the person who had suffered the trauma is left helpless. The trial judges do not hold an upper hand in the criminal justice system because they have to only rely on the conclusions or materials presented before them by the police. Therefore if the investigation methods applied are not up to the standards, if the witnesses become pugnacious, if there are no enough evidence or zero evidence, the judge presiding the trial is left with no other option other than to give the person accused the 'benefit of doubt' because law generally requires proof and confirmation beyond reasonable doubt. In India, the main problem is that there are many to defend the rights of the accused but no one to think about the victim. Criminals nowadays have been incorporating or applying hi-fi and sophisticated techniques to commit the crimes. The police often resort to third degree methods during police investigations to extort the truth from the criminals. India of all countries being a civilized society and governed by the principles of rule of law cannot permit such methods. The principle which India has been following is that 'evil cannot be destroyed by another evil' in any case. Therefore, all the methods adopted by the police in interrogations must be well within the permissible limit provided in the legal frameworks. Thus, the investigators nowadays seek the help of scientific evidence as it combines both science and law. They incorporate a number of scientific techniques like polygraph, brain mapping and narco analysis etc. in order to extract the truth from criminals in extraordinary cases. The fundamental principle in applying all these scientific methods is to promote the rule of fair play, unbiased approach and use these scientific evidences both by investigators and forensic experts.

Crime detection has turned to be easier due to the application of forensic science. Forensic science is regarded as a powerful soldier in the army of justice administration. When an investigation seems to be weak, forensic science acts as a strengthening agent of such investigation. The needs of forensic science have arrived because criminals are clever enough these days that they hardly leave any evidence to catch them. In *Som Prakash v State of Delhi*[1], polygraph, P-300 and narco analysis were stated to be the rebellious tools of forensic science but prove to be very beneficial in criminal investigation.

1 *Som Prakash v. State of Delhi*, AIR 1974 SC 983 (India).

Scientific Tests and their Validity:

P-300

P-300, which is also known as brain mapping is used as an interrogative method on criminals in the recent era. Here the subject is made to wear a headband with sensors and electrodes with the help of a physician mostly a neurosurgeon. These electrodes help in detecting the Multifaceted Electroencephalographic Response (MERMER) emitted from the subject's brain. MERMER is a mere brain wave emitted by the subject when he recognizes something said or shown to him in his memory. Hence it is clear that the electrodes will not detect any MERMER from subjects who does not have any related memory i.e., innocent persons. These brain waves are recorded with the help of EEG-ERP Neuro Scan Recording system which will later be studied and analysed by a neurosurgeon. The results thus arrived will help the investigation process and in collection of any evidence. It is crucial to note that this test does not involve any oral response from the subject.

Polygraph

Polygraph or a lie detector uses the psychological variations in the subject's body to analyse him. In this method, the psychiatrist attaches various probes on the subject's body which detects the variations in his heartbeat, blood pressure, pulse rate, skin conductance etc. It is believed that when a person lies he becomes nervous and his heartbeat, pulse rate increases as a result. For this purpose, a base line of the subject's psychological character is determined and then the interrogative questions are asked. So, any variation from such baseline will lead to the fact that the subject has lied in the specific interrogation. It is notable that this test does not involve any direct invasion in the subject's body.

Narco Analysis

Narco analysis also known as truth serum is one of the controversial scientific investigation methods. In this method, 3 grams of sodium pentothal is mixed with 3000 milliliters of distilled water and then administered in the subject's body along with 10% of dextnose for a period of three hours with the help of anesthetist. In medical terms, the drug injected exposes the neural membranes in brain to chloride ions which results in inhibition of the subject. This mixture kind of hypnotises the subject and makes him attain a stage where he cannot repress any of his emotions or facts while the interrogation is made. In layman language it can be said that the subject attains a drunken stage because of this sedative drug. Hence it is easy for the officers to extract truth from the subject which will help their investigation process. As said earlier, it is one of the controversial methods because

it involves direct invasion of drug in the subject's body. Any misstep in the mixture or dose level will lead the subject to comatose stage or even death. This can be said as a sophisticated barbaric method used by the investigation officers.

Constitutional Validity

During the past few years, the investigation methods have seen a shift from third degree interrogations to scientific methods. The officers nowadays are keen in extracting the truth using their wits rather than their fists. But the question here is, won't it amount to self-incrimination if the statement is made by the subject himself with the help of scientific investigations? This attracts the question of legal validity under Article 20(3) of The Constitution of India[2]. The article runs as follows: "No person accused of any offence shall be compelled to be a witness against himself". Thus, any statement made under these scientific tests will be considered as testimonials and not taken as an evidence as it attracts bar under Art. 20 (3). It is also significant to note that mostly every country around the world entitles its citizens the right to remain silent. Similarly, in India the witnesses and accused are protected by the law from self-incrimination. This part analyses the extent of legal validity of such scientific tests.

Polygraph and P-300 uses only probes and electrodes and does not involve any direct invasion. The investigation is made only with the help of analysis given by the doctors after getting the psychological reports of the patient. In these tests, the subject doesn't even give any oral responses while the investigation is made. Thus, there are no statements made by the accused and what is not said cannot be considered as a statement. The bar on self-incrimination is attracted only when there is a statement. Therefore, there is no reason to stop using this kind of scientific methods. The courts in India have acknowledged polygraph and P-300 as constitutionally valid scientific tests and the reports or analysis made from such tests can be used as evidence before the court of law.

As of narco analysis, it is still controversial as it involves administration of drugs into the subject's body. In this test the mental state of the subject is compromised with the help of sedatives as discussed above. The important question that should be considered in narco analysis is the consent of the suspect. Under Indian Laws, every human has the right to presumption of innocence and therefore forcing to undergo the narco analysis test would result in intrusion of privacy. Furthermore, while considering the legal validity of narco analysis, it is pertinent to take into account that an oral statement is made by

2 INDIAN CONST. art. 20(3).

the subject during the test which in the end might result in self-incrimination. Some high courts in India have upheld the validity scientific tests including narco analysis in cases like *Ramchandra Reddy v. State of Maharshtra*[3], *State of Bombay v. Kathi Kalu Oghad*[4] and *Nandhini Satpathy v. P.L. Dani & Anr*[5]. The constitutional validity was given in these cases because of the view that the legal permission got before the test is conducted does not amount to self-incrimination. However, the recent judgment of three judge bench consisting of the then Chief Justice K.J. Balakrishnan, Justice R.V Ravindranan and J.M. Panchal of the supreme court of India held narco analysis as unconstitutional and violative of Article 20(3) in the case *Smt. Selvi and Others v State of Karnataka*.[6] To that end, narco analysis is unconstitutional in India as of now. Nevertheless, it can be used for helping the investigation process and in collecting evidences.

Evidentiary Value

The Indian Evidence Act, 1872[7] regulates the confessions and admissibility of evidence before the court of law. A material or confession to become evidence must fulfill various factors and the court may either accept or reject such evidence. Section 24 to 30 of this act provides for admissibility of confession by the courts. These provisions clearly provide that any confession made in an unstable mental state or by way of inducement or threats cannot be accepted as evidence by the courts. Therefore, it is clear that any statement made by the accused during narco analysis test cannot be accepted as evidence because it is made under the inducement of narcotic drugs and the accused will not have a stable mind in such cases. This stand was taken in the *Smt. Selvi case*[8] where the Supreme Court decided narco analysis to be unconstitutional and not legally valid even if the consent of the person is attained by the authorities before such test is conducted. The narco analysis test also attracts bar under other criminal laws such as Indian Penal Code[9] and Criminal Procedural Code.[10] As per Sections 352, 323, 324, and 328 of Indian Penal Code, inflicting hurt to extort information or inducing any dangerous drugs in a person's body is a serious offence which is punishable under the court of law. This makes narco analysis a legally invalid scientific investigation method under all the criminal laws of the country. However, Section 45 of the

3 *Ramchandra Reddy v. State of Maharshtra*, Cr. L.J. July 2006 P.2401 (India).
4 *State of Bombay v. Kathi Kalu Oghad,* AIR 1961 SC 1808 (India).
5 *Nandhini Satpathy v. P.L. Dani & Anr,* AIR 1978 SC 1025 at 1032 (India).
6 *Smt. Selvi and Others v. State of Karnataka,* AIR 2010 SC 1974 (India).
7 The Indian Evidence Act, 1872 (India).
8 *Supra* note 7.
9 The Indian Penal Code, ACT NO. 45 OF 1860 (India).
10 The Criminal Procedural Code, ACT NO. 2 OF 1974 (India).

Evidence Act allows expert opinion in certain cases which makes the reports of scientific investigation methods such as polygraph and brain mapping a valid one.

Highlights and Challenges of Scientific Investigations

The polygraph and brain mapping tests are similar in some ways. Both tests need a well-trained doctor and equipments or machines to analyse the activities of the subjects. The polygraph uses probes on the subject's body whereas the brain mapping uses electrodes on the subject's brain. But in the end both the tests analyse the psychological behavior of the subject only. The highlights of these tests are that they do not involve any threat to the subject's health as there is no direct invasion in the body. Furthermore, the reports can be used as evidence before the court of law as it is constitutionally valid. Nevertheless, these tests are not free from shortcomings. The reliability of these tests still remains to be a questionable one. A person can easily deceive the polygraph test by knowing the tactics of the interrogations made. The person undergoing the test shall remain calm by having a stable mind which will not affect his polygraph report. On the other hand, an innocent may become a victim of the polygraph test due to his apprehension towards such test which in turn will give a false report. As in the case of brain mapping, it involves a huge amount of money to conduct these tests and the reading of such reports is not always easy which might end in misreading by the doctors.

In this ever growing scientific age, the investigators opt to use narco analysis rather than polygraph or brain mapping as it highly helps in the interrogation process even though it cannot be produced as evidence before the court of law. The drawbacks of narco analysis are lot more than that of the other tests. Firstly, this test has a high probability of affecting the subject's health. Any wrong mixture of the sedative can lead the person to comatose stage or even death. It is to be noted that the level of dosage depends on the subject's health conditions and varies from person to person. Thus, there is a high degree of going wrong in the mixture. Furthermore, it is not worthy to put a person's life at stake for a scientific test which cannot even be used as evidence in courts. Secondly, it is not proven that the statements made by the subject under the test are factual and truth. This is because; when a person is at inhibition stage it is not certain that he only speaks the truth, he can also talk about any fantasy of his own regarding the questions asked. Hence the reliability of narco analysis test is considerably low. Finally, even though narco analysis is a sophisticated scientific test, it is still being considered a form of third degree torture in psychological aspect.

Conclusion

The state governments and central authorities in India work in a correlated manner. Working in such a correlated manner has enhanced the investigative capabilities of police department. It is evident that in India there is a very low criminal conviction rate[11] and the situation needs to be checked on. These scientific techniques would be very helpful in bringing out the truths from the criminal thereby increasing the conviction rate. In *Aarushi murder case*[12], *Nithari killings case*[13], *Telgi scam*[14] and *Mumbai Bomb blast case*[15], the scientific criminal investigation methods were used which hastened the justice. Various courts in India have given judgments favoring these tests. Nowadays, as we already mentioned that the criminals have been using science and technology in performing their criminal offences has now compelled the drafters to rethink on the part of criminal justice to seek the help of scientific community in helping the investigators and the courts. To add on, the provisions in the evidence act which are more than a hundred years old are now found to be inadequate in today's rapidly growing science and technological world. Mostly these tests have been carried out only in high profile cases. Slow and steadily these scientific tools of investigation can become a legal alternative to the third degree physical torture while in police custody. In *D.K. Basu v. State of West Bengal*[16] the Supreme Court has rightly held that there is an urgent need to develop scientific tools of investigations and interrogations because torturing the accused by using third degree methods is nothing other than a huge hit at the principles of rule of law.

Suggestions

1. A clear policy must be enacted by the parliament regarding the scientific investigation methods inculcating the standards to be followed while conducting the tests by making them non violative of the fundamental rights guaranteed by law.

11 Arun Bothra, *Why is our conviction rate so low?,* THE NEW INDIAN EXPRESS (Feb.21, 2019, 10:04 AM), https://www.newindianexpress.com/opinions/2019/feb/21/why-is-our-conviction-rate-so-low-1941680.html.

12 *Aarushi Talwar & Anr. v. CBI*, (2013) 82 ACC 303 (India).

13 *Surendra Koli v. State of U.P,* (2011) 4 SCC 80 (India).

14 Anupama Katakam, *The Truth Serum Trial,* FRONTLINE (Mar.12, 2004, 10:10AM), https://www.google.co.in/amp/s/frontline.thehindu.com/the-nation/article30221420.ece/amp/.

15 *Ruling on the 1993 Mumbai bomb blasts, Supreme Court sends a strong anti-terror message*, TOI (Mar. 22, 2013, 11:00AM), http://articles.timesofindia.indiatimes.com/2013-03-22/edit-page/37935918_1_blasts-case-bomb-blasts-tada-court.

16 *D.K. Basu v. State of West Bengal,* AIR 1997 SC 610 (India).

2. In this changing world, development and advances in science and technology must be adopted by the law so as to ensure fair play with the criminals who have started using developed crime techniques and thereby serve justice.

3. With lower criminal conviction rate in developing countries like India, the scientific investigation methods should be adopted for the greater good because the public interest prevails over the individual rights and interests.

4. The legislations such as Indian Evidence Act and Criminal Procedural Code (CrPC) must be amended for providing evidentiary value for these scientific criminal investigations.

5. Article 20(3) of the Constitution of India must be amended to provide legal validity for these scientific criminal investigations at least in high profile cases.