

Constitutional Validity of Scientific Tests for “Lie- Detection”

Editor: There is a raging debate on the constitutional validity of tests carried out to determine whether a person is telling the truth or not. In light of the opinions expressed by the Supreme Court while hearing the “Best Bakery” case, the mandate of the investigator to use scientific tests to uncover the truth has become even stricter. One can do no better than go through the judgement pronounced by Justice Palshikar of the Mumbai High Court on 5th February, this year in the case of Ramachandra Ram Reddy & others vs. the state of Maharashtra for a clearer exposition on this issue. Excerpts from the judgement:

These petitions have been filed by the petitioners who have been charge sheeted by the investigating authority for various offences including those contained in Maharashtra control of Organised Crimes Act (hereinafter called as MCOCA for the sake of brevity). Some petitioners have impugned the orders made by the designated court permitting administering of certain physical tests involving minimal bodily harm to these persons. Some other petitioners knowing that such action is going to be taken against them have come in anticipation of certain orders as according to all of them, administration of such tests whether it effects physical violation of the person or not, may be violation of their fundamental right guaranteed by Article 20 Clause (3) of the Constitution of India.

The three tests involved in these petitions are:

- 1) **P-300 test.**
- 2) **Lie Detector test.**
- 3) **Narco Analysis test.**

We will consider the exact nature of tests, before we proceed to consider the challenges made to administering those tests and the submissions in reply on behalf of the State and the investigating authority. To a large extent there is no factual dispute. Some of the admitted facts noted briefly are that:

- 1) All the petitioners are charge sheeted.
- 2) All the petitioners are charged with offences under the IPC.
- 3) All the Petitioners are charged with Offences under MCOCA.
- 4) All the petitioners apprehend administering of these three tests described above.

All the petitioners contend that compulsive administering of these tests amount to violation of Article 20 clause (3) of the Constitution of India, which contention is opposed by the State.

Except the last contention, the State also has no dispute regarding those facts.

It appears to us that the main contention or we may put it to be the only contention on which these petitioners urges is the protection from compulsive testimony or testimonial compulsion, whether it operates immediately on the direction of the designated court to administer these tests and would therefore be operative, whether test are administered or not. OR whether the protection granted under Article 20(3) of the Constitution of India begins to operate only when the investigating agency of the state or the prosecuting authority seeks to tender these tests or the results thereof as evidence in the prosecution.

We will first note what are the tests, which according to the petitioners cannot be administered to them by reason of the protection granted by Article 20(3) of the constitution of India. The three tests are (1) Lie Detector test or polygraph test, (2) P-300 Test or Brain Mapping test and (3) Narco Analysis test or Truth Serum Test. The Lie Detector test is an examination, which is conducted by various probes attached to the body of the person who is interrogated by the Expert. The heart rate, the skin conductance is measured. The underlying theory of this test is that when people lie they also get measurably nervous about lying. The heart beat increases, blood pressure goes up, breathing rhythm change, perspiration increases, etc. A baseline for this physiological characteristic is established by asking the subject questions whose answers investigator knows. Deviation from the base line for truthfulness is taken as a sign of lie. Here therefore there is no direct invasion of the body. In this test the polygraph is taken which gives this reaction and an expert would then explain these reactions in the court which would be his reading of the polygraph from which would flow his conclusion which are to be admitted or not admitted by a judge on appreciation of the statement and the objections raised thereto. In this case the witness may answer or may not answer the questions. The response of his answers to the questions as recorded on the polygraph analysis of which is sought to be tendered as evidence if and when the occasion arises.

The second test is Brain Mapping or P-300 test. In this test of Brain Mapping the suspect is first interviewed and interrogated to find out whether he is concealing any information. The activation of brain for the associated memory is carried out by presenting list of words to the subjects. There are three types of words in the list used for Brain Mapping test; part I consisted of neutral words, which have no direct relationship with the case. Part II consists of probe words directly related to the case and suspects to elicit concealed information, which all suspects have had opportunity to come to know during the course of events related to the case. Then comes part III, which consists of target, which are not part of the first two parts. The words in this part are based on confidential findings, which the suspect does not know. The recording of this test is done by acquiring the response through 32 channel EEG-ERPL Neuro Scan recording system. It is carried out by asking the suspect to sit down and close his eyes. The 32 channel electrodes are placed according to international system, and 32 discrete electrodes are placed over the scalp directly. While conducting this test twice by presenting each word in three parts randomly. The suspect is instructed to relax and listen to the words presented in the auditory mode. This test does not expect any oral response from the witness. The conclusion drawn by the experts after the conduct of the test to indicate the possession of the knowledge about the relevant subject which is helpful in the investigation and collection of evidence. In this case it is also not direct violation of the body, in ordinary sense of the word, is conducted. It will be seen that what is received at the conclusion of such test is indication of the fact that the accused or the suspect does have or is in possession of knowledge about the subject on which he was questioned. Here there is no verbal response from the witness. Except touching the physique of the person both these tests do not involve invasion of the body in the ordinary sense of the term.

The third test is Narco Analysis test. It is conducted by injecting 3 grams of sodium pentathol is dissolved in 3000ml of distilled water and above solution is administered intravenously along with 10% of dextrose over a period of three hours with the help of anaesthetist. Obviously this test has some invasion on the body. The rate of administration is so controlled to drive the suspect slowly into the state of hypnotic trance. The ECG and blood pressure are monitored continuously throughout the testing procedure. The revelations made during the hypnotic trance are recorded both

in the video and audiocassettes. The entire conduct of the procedure is video graphed. The questioned are designed carefully and are repeated persistently in order to reduce the ambiguities during drug interrogation. After the Narco examination is over the suspect is made to relax for 2 - 3 hours. The report prepared by the experts is useful in the process of collecting the evidence.

It is the contention of the petitioner that all these tests involve either contact with the body or invasion of the body. The electronic equipment is attached to the body and in each test, therefore there is element of user of the body if it is compulsory, it would violate according to the petitioner, the guarantee or protection given by Article 20(3) of the Constitution of India. The contention seems to be that the protection given to Article 20(3) is against testimonial compulsion and these tests if compelled would amount to compulsion of making a statement.

We will therefore note what the guarantee is given by Article 20. What exactly is protected by Article 20? In our opinion it is necessary to reproduce Article 20 which is as under:

PROTECTION IN RESPECT OF CONVICTION FOR OFFENCES;

- (i) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
- (ii) No person shall be prosecuted and punished for the same offence more than once.
- (iii) No person accused of any offence shall be compelled to be a witness against himself.

It gives protection in respect of conviction for offences. Presently we are not concerned with it. It protects a person from being prosecuted and punish for the same offence more than once. We also not concerned with this in the present case. Clause (3) protects a person or accused from being compelled to be a witness against him. We are concerned with this clause only.

The contention is that the petitioners are the persons charged with offences covered by IPC or MCOCA. They are being administered these tests against their will and it is therefore in a way compulsion against these persons to be witnesses against themselves. It is the contention of the petitioner that this protection is threatened by the impugned orders passed by the designated court when it permits holding of test or by the application for such permission. It is undisputed before us that the State and the Investigating Agency does wish to administer these tests to the suspects whether they are consenting for it or not and that is why the orders are obtained or orders are sought. The question which arises for consideration in these circumstances is whether requiring the accused to undergo these tests against his will would amount to compelling him to be a witness against himself and whether the protection granted by this clause commences the moment the witness or the accused is told that he has to undergo the test which are according to them violative of clause (3). The contention on the contrary by the respondent State and the investigating agency is that this protection guaranteed by clause (3) of Article 20 begins when the compulsion is used or the accused is compelled to be a witness against himself. As long as he is not compelled to be a witness, as long as the statement sought from the witness or the accused is not being used against the witness the protection given by clause (3) of article 20 cannot be and does not commence. So considered the petitions according to the respondent are premature.

We have stated above what the tests are. We have quoted above what protection Article 20 gives. We have to now analyse as to whether the result of these tests after they are administered whether willingly or unwillingly, are the statements made by the accused or the witness, whether they are testimonies of these persons because it is now a well settled proposition of law and there is guarantee by Article 20 (3) of the Constitution, his protection against the testimonial compulsion. We will have to examine as to whether the results of these tests are statements or testimony. Then we will have to consider whether these statements or testimonies are compelled from the witnesses and if so compelled, at what stage use thereof has to be stopped.

What was contemplated by the makers of the Constitution was protection against compelling a person to be a witness and it is in this light that we will have to examine the rival contentions raised in the present petitions. We will have to find out whether the conclusions drawn after administering the above tests are statement or testimony and for obtaining the same compulsion is used. That brings other fact of the basic question as to what is the protection. Is it the protection against compulsion to administer a test or make a statement or it is a protection against user of that statement as evidence? As will be noticed on the debate of the parliament on Article 20, provisions very similar to those made by Article 20 already existed in the Indian Evidence Act of 1872 and the Criminal Procedure Code of 1898 is also subsequent amendment of the code include the Cr.P.C. 1973. It was also a question and therefore inclusion of the similar question in the constitution is also questioned in the Constituent Assembly. It was pointed out by Chairman of the Constituent Assembly that though similar provision existed in the Cr.P.C. or in the Evidence act, it was desirable to place this important provision beyond the reach of the Legislation by including them in the Constitution as he apprehended that it was perfectly possible that some Legislatures in future might abrogate these provisions in the Cr.P.C. Indian Evidence Act etc., and therefore it was desirable to place them beyond the reach of the Legislatures by including them in the Constitution. So in our opinion what was intended by the framers of the Constitution was to give constitutional protection from testimonial compulsion, even though such protection was already available under the Evidence Act or under the Cr.P.C. In our opinion, therefore the Constituent Assembly debated the grant of protection to an accused from being compelled to be a witness against himself. The entire debate discloses that what the framers of the Constitution had in mind was protection from testimonial compulsion or the protection to an accused or witness, from being compelled to be a witness against himself. Whether a person is compelled to be a witness against himself by compulsorily administering the tests to him is therefore the question. In our opinion what is being granted as protection is from testimonial compulsion. That is the use of the statement made by the accused against him self.

In our opinion it is obvious that the first two tests are concerned, there is no statement made by the accused. There also cannot be a doubt that result of the third test by administration of serum is necessarily a statement. We will therefore consider the first two tests in one part and the third in another.

We will consider as to whether the results of these two tests are statements or testimony as commonly understood in criminal jurisprudence. We will then consider as to whether forcible extraction of such statement at the stage of extraction itself is prohibited by Article 20(3). Therefore it is the user of that statement that the evidence against the accused is protected. In our opinion in order to invoke Article 20(3) the following things must happen.

1. There should be formal accusation of commission of any offence.

2. The accused of such formal accusation should be compelled to make a statement.
3. The statement so compulsorily made or evoked or provoked is incriminating to the accused or maker thereof.
4. Result of such statement must be a testimony with these ingredients as even though Article 20(3) are established, the protection under testimonial compulsion will come into operation;

In effect a statement must be compulsorily made by the accused in order to invoke the protection against testimonial compulsion as guaranteed by Article 20 (3) of the Constitution. We will therefore consider what is exactly meant by a statement or a testimony. Black's Law Dictionary defines what statement is as under:

Meaning of Statement.

“In general sense, an allegation, declaration matters of fact. The term has come to be used of a variety of formal narratives of facts, required by law in various jurisdictions as the foundations of judicial or official proceedings and in a limited sense is a formal exact, detailed presentation.

An oral or written assertion, or nonverbal conduct of a person, if it is intended by him as assertion, Oral or written verbal expression, or non verbal conduct of person intended by him as a substitute for oral or written verbal expression.

Report sent monthly or periodically by a bank to its customer or by a creditor to a debtor, setting forth amounts credited and balanced due".

Meaning of Testimony.

"Evidence given by a competent witness under oath or affirmation, as distinguished from evidence derived from writings, and other sources. Testimony is particular kind of evidence that comes to tribunal through live witnesses speaking under oath or affirmation in presence of tribunal, judicial or quasi-judicial.

In common parlance, "testimony" and "evidence" are synonymous. Testimony properly means only such evidence as is delivered by a witness on the trial of a cause, either orally or in the form of affidavits or depositions.

Negative testimony. Testimony not having bearing directly upon the immediate fact or occurrence under consideration but evidencing facts from which it may be inferred that the act or fact in question could not possibly have happened.

Positive testimony. Direct testimony that a thing did or did not happen."

K.J.Aiyer's Judicial Dictionary defines statement as a writing presented in court by any party making any particular claim or plea respectively.

According to Shorter Oxford English Dictionary and Webster's New World Dictionary a statement means something that is stated. It may be written or oral communication, though it need not in every element of word be communication to someone. It will thus be seen that what is required to be made under compulsion by an accused is a statement as defined in the above quotations. In our opinion, the tests of Brain Mapping and Lie Detector in which the map of the brain is the result, or polygraph, then either cannot be said to be a statement. As we have seen from the description of the tests noted above and end result of brain mapping tests, is a map showing re-actions of the brain to certain target questions and the conclusion that can be drawn by an expert after such treatment is that the person undergoing the tests does possess certain knowledge of the crime in relation to which target questions were put to the accused. It does not give or provide any means to know what that knowledge is. Therefore even after administration of these tests, what comes out is (I) that the person undergoing the tests had the knowledge of the crime above, which he was questioned (brain mapping) and (ii) the polygraph indicates that the person undergoing the tests is speaking lie. In both these tests there is no way to find out

what the lie is or what is the information stored in the brain of the person concerned. That being the end result of the tests, it cannot be said by any stretch of imagination that the end result is the statement made by the witness. At the most it can be called the information received or taken out from the witness. Whatever is the information it has to be established that it is incriminating the person who makes it for invoking the protection under Article 20(3). In our opinion therefore there is no reason why these two tests be not administered.

We will consider this aspect of not being a statement in certain cases reported in AIR 1959 S.C page 1012 Tahasildar Singh vs. State of U.P. It is laid down that the statement does not include what is not said. In Saboo's case reported in (1965) 2 SCWR 464 it is laid down that the statement may be oral or written, the dictionary meaning of the word "statement" is the act of stating, reciting or presenting verbally or on paper. The term "statement" therefore, includes both oral and written statements. In both the tests referred to above, what comes out is a map of brain taken out by the scientific method and a polygraph stating whether or not the accused lied in relation to certain questions put to him. Both cannot be the accepted statement as laid down by the Supreme Court of India in these cases.

We have therefore no hesitation in holding that Brain Mapping /P-300 or Lie Detector/Polygraph tests can be administered to any accused or a witness. There is no statement coming out of the involuntary tests, and the conclusions which come out of such tests are not statements, the conclusions are not proved in any manner to be even likely to be incriminating to the maker of it, the expert can very well depose as an expert in relation to the tests in court that the Brain Mapping of the accused or the witness discloses existence of knowledge about a crime in the brain of those persons undergoing the tests. What that information is nobody is going to say or any body can say and therefore there is no question that even the statement coming via expert is incriminatory. The protection given by Article 20(3) gives protection from compulsory testimony, it therefore cannot apply to these two tests. We therefore reject all the contentions in relation to these two tests.

That takes us to the third test, which is called as Narco Analysis (Truth Serum Test). We stated above that in this test the person to whom it is administered does make a statement as stated above. It undoubtedly is a statement. The question which falls for consideration therefore, is whether such statement can be forcibly taken from the accused by requiring him to undergo the truth serum test against his will. It will be seen that such statement will attract the bar of Article 20 (3) only if it is inculcating or incriminating the person making it. Whether it is so or not can be ascertained only after the test is administered and not before. In our opinion therefore, there is no reason to prevent administration of this test also because there are enough protections available under the Indian Evidence Act, under Criminal Procedure Code and under the Constitution Article 20(3), to prevent inclusion of any incriminating statement if one comes out after administration of the test.

We have to look at this aspect of holding test in a very broad prospective. The protection or the cover granted by the fundamental right appearing in clause (3) of the constitution is complete and invariable. The question is what is sought to be provided by guaranteeing such right and it is undisputed that what is sought to be protected is the protection of human rights and dignity. It is also to be considered in the light of other equally important provisions of the constitution. Article 51 (A), which has been added to the constitution by subsequent amendment, provides via clause (1) which says that it shall be the duty and the duty can not be properly done by the state, if unnecessarily large protection is spelt out from other provisions like Article 20 (3). Prevention of crime is a sole prerogative of the State and the punishment of the crime

if proved is also the duty of the state. Fetters on these duties can be put only in extreme cases where the protection of fundamental rights weighs more than the fundamental duty castes on the state. However we need not further dilate on this aspect for the reason that in our opinion administration of these tests against the will of the person to whom it is sought to be administered does not violate the guarantee of Article 20(3) as in the first two cases it is not a statement and that it is not incriminatory in any manner. It is the last case where it is a statement and unless it is shown to be incriminating to a person making it, it does not give rise to the protection under Article 20(3). In so far as the first two tests are concerned as aforesaid these tests do not violate any protection.

It will be seen that in our opinion the first two tests do not result in any incriminating material, they do not result in any statement containing such material and, therefore, does not in any way violate Article 20(3). In so far as the third test is concerned enough protection exists, recourse to which can be taken if and when the investigating agency seeks to introduce such statement as evidence. We need not therefore consider the contention in relation to the time when the right or protection given by Article 20(3) starts. In our opinion, we also need not consider several judgements cited at the bar, which relate to scope and extent of Article 20(3). The judgment in AIR 1954 S.C. page 300 (Sharma's case) the Supreme Court laid down what is the extent of guarantee under Article 20(3). It was then explained by Judges Bench in Kathi Kalu's case what exactly is the protection. The law has been ultimately crystallised by the Supreme Court in the case of Nandini Satpathy. In all these case, what came up for consideration was obviously a statement made by the witness which obviously was incriminating and therefore the scope was accordingly considered by the Supreme Court of India. In the present case we have come to the conclusion that it is not a statement in relation to the first two tests and in relation to the third test it is a statement entry of which in evidence is adequately protected by various provisions of law and therefore we need not consider this and other cases cited at the bar.

In the result, all these petitions fail and are dismissed.