

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP (Crl.) 532 OF 2008**

% Date of Decision: November 14th, 2008

Sh. Shailender Sharma

..... Petitioner

Through: Mr. R.S. Sodhi with Mr. R.S.
 Nirman and Mr. Ajay Kumar,
 Advocates.

Versus

State & Another

.... Respondents

Through: Mr. Saleem Ahmed, ASC (Crl.)
 with Mr. Habibur Rehman,
 Advocate for the State.

Mr. Jayant K. Sud with
Mr. Anupam Mishra and
Mr. Atul Sahi, Advocates for
R-2.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

- | | |
|--|------|
| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in the digest? | Yes. |

J U D G M E N T

MANMOHAN, J

1. The issue that arises for consideration in the present proceedings is the constitutionality and legality of subjecting an accused to Narco Analysis Test without his consent.

2. The facts of this case are that on 6th July, 2007 at 1.25 AM the police received information regarding an accident at Mathura Road, near Haldiram, Delhi. When the police reached the spot they found a damaged Wagon R car bearing No. DL-9C-M-9711, which had already been placed on the left side on the road. At about the same time, the police also received information from Apollo Hospital regarding admission of Mr. Chetan Sharma, S/o. Shri Chand aged 22 years in an injured condition. In fact, the doctors declared Chetan Sharma as 'brought dead' vide MLC No. 314 of 2007. On the basis of this information police registered a case vide FIR No. 516/2007 under Section 279/304A IPC.

3. The Investigating Officer seized the vehicle and subsequently got the car mechanically inspected. The postmortem report of the deceased was also collected by the Investigating Officer. However, no public witness of the incident is available.

4. During initial investigation on 5th July, 2007 the Petitioner/Accused, who is an uncle of the deceased, stated that deceased Chetan who was present with him at Apollo Hospital, took his Wagon R car to fetch food and on the way Chetan met with an accident. He further stated that on being telephonically informed about the accident, the Petitioner/Accused reached the spot and found that the car had toppled to the left side and deceased Chetan's head had been crushed between the vehicle and the road. According to the police, Petitioner/Accused initially stated that he managed to get the car to stand up and pulled out Chetan from the car and took him to

Apollo Hospital. During investigation, mobile call details of deceased Chetan and Petitioner/Accused were obtained and Petitioner/Accused was further interrogated.

5. Finally on 29th July, 2007 the Petitioner/ Accused disclosed to the police that while he was driving the vehicle, it met with an accident in which the car toppled to the left side and as a consequence of this accident, Chetan who was sitting on the left side of the car got crushed between the road and the car. On the basis of this interrogation, the police added Sections 201 IPC and arrested the Petitioner/Accused. But he was subsequently released on bail.

6. It is pertinent to mention here that the father of the deceased has been leveling allegations that his son Chetan has been murdered by the Petitioner/Accused and the behaviour of the Petitioner/Accused has not been normal towards him from the date of the accident.

7. To find out the truth, a lie detector test was conducted on the Petitioner/Accused and according to the police, the analysis of the same revealed deceptive responses on behalf of the Petitioner/Accused. It was only thereafter that the police filed an application seeking a direction from the Court to direct the Petitioner/Accused to undergo Narco Analysis Test.

8. The Metropolitan Magistrate vide his order dated 28th March, 2008 allowed the application of the prosecution and directed the Petitioner/Accused to undergo the Narco Analysis Test.

9. Mr. R.S. Sodhi, learned Counsel for Petitioner/Accused has argued at length as to how the Narco Analysis Test was evolved and as to what are its ingredients. Mr. Sodhi termed the test a ‘psychological third degree test’ which has several side effects. According to him, one cannot vouch for reliability of such a test.

10. Mr. Sodhi further submitted that Narco Analysis Test is nothing but compelling an accused to give a statement against him and consequently constitutional protection of right of silence as contained in Article 20 (3) of the Constitution comes to the aid of the accused persons. In this context Mr. Sodhi relied upon the judgment of the Apex Court in **Nandini Satpathy Vs. P.L. Dani & Another** reported in (1978) 2 SCC 424, wherein it has been held as under:-

“57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation — not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read “compelled testimony” as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like — not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman

for obtaining information from an accused strongly suggestive of guilt, it becomes “compelled testimony”, violative of Article 20(3).

59. We have explained elaborately and summed up, in substance, what is self-incrimination or tendency to expose oneself to a criminal charge. It is less than 'relevant' and more than 'confessional'. Irrelevance is impermissible but relevance is licit but when relevant questions are loaded with guilty inference in the event of an answer being supplied, the tendency to incriminate springs into existence. We" hold further that the accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation actual or imminent, even though the investigation underway is not with reference to that. We have already explained that in determining the incriminatory character of an answer the accused is entitled to consider-and the Court while adjudging will take note of the setting, the totality of circumstances, the equation, personal and social, which have a bearing on making an answer substantially innocent but in effect guilty in import. However, fanciful claims, unreasonable apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to criminate.”

11. On the other hand, Mr. Jayant K. Sud learned counsel for the deceased's father submitted that the constitutionality of Narco Analysis Test was no longer res integra as it had been upheld by the Madras and the Bombay High Court. In this context he relied upon the judgment of the Madras High Court in the case of **Dinesh Dalmia Vs. State** reported in **2006 Criminal Law Journal 2401**, wherein it has been held as under:-

14. That the accused will face health hazard and his physical frame will be endangered if he undergoes such scientific tests are totally without any scientific basis. As rightly pointed out by the learned counsel for the respondent, the scientific tests are like taking MRI or CT Scan. The scientific value of such tests and the credibility thereof will have to be evaluated only during the course of trial. Unless such tests are conducted, the investigating agency may not be in a position to come out with clinching testimony as against

the petitioner. Subjecting an accused to undergo such scientific tests will not amount to breaking his silence by force.....

12. He further referred to the judgment of the Division Bench of the Bombay High Court in the case of **Ramachandra Ram Reddy Vs. State of Maharashtra reported in MANU/MH/0067/2004** wherein it has been held as under :-

*“21. 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 to 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.*

22. 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 dignities. 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 cannot 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 weigh more than the fundamental duty casts 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). The petitions are premature in relation to the third test.....

*23. 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 judgments cited at the bar which relate to scope and extent of Article 20(3). The judgment **in Sharma's case** the Supreme Court laid down what is the extent of guarantee under Article 20(3). It was then explained by 11 Judges Bench in **Kathi Kalu's case** what exactly is the protection. The law has been ultimately crystalised by the Supreme Court in the case of **Nandini Satpathy**. In all these cases, 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.*

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

13. In rejoinder, Mr. Sodhi submitted that the said High Court judgments were neither binding nor conclusive. He pointed out that when the legality of Narco Analysis Test was raised before the Apex Court, the Supreme Court only allowed it when the accused agreed to give its consent to undergo

the test. In this context, Mr. Sodhi referred to the order dated 13th April, 2005 of the Supreme Court in *Jitubhai Babubhai Patel Vs. State of Gujarat*. The said order is reproduced hereinbelow :-

“By order dated 16th December, 2003, passed in Special Criminal Application No.1200 of 2003, the High Court directed that narco test of the accused-petitioner Jitubhai Babubhai Patel be conducted at the earliest and not later than fifteen days from the date of the receipt of the application submitted by the Investigating Officer. It seems that pursuant to the said order, the Investigating Officer addressed a letter to the petitioner for remaining present on 22nd December, 2003 for narco test. On receipt of that letter, some telegrams were sent by the accused to the learned Judges. In the impugned order dated 26th December, 2003, the High Court has rightly deprecated the practice of sending telegrams to the Judges but left the matter at that without taking any further action. The order, however, reiterates the earlier directions dated 16th December, 2003 about conduct of narco test. The main question for consideration in these petitions is whether narco test can be conducted without the consent of the petitioner. Insofar as the present case is concerned, the respondent-State, on affidavit, has taken the stand that it does not want to conduct the said test without the consent of the petitioner. Mr.Lalit, learned senior counsel appearing for the respondent, reiterates that stand and submits that the narco test in the present case would be conducted only if the petitioner consents. Learned counsel for the petitioner objects to the said test and states that the petitioner is not willing to give his consent.

In view of the stand of the respondent, insofar as the present case is concerned, the point in issue has become only academic and, therefore, we leave it to be decided in an appropriate case. The direction of the High Court in conduct of narco test of the petitioner is clarified to mean that the test would be conducted only in the event of the petitioner consenting thereto.

The special leave petitions are disposed of accordingly.”

14. Right to silence has been a topic of much debate. Professor N.R. Madhava Menon in a recent article "*Human Rights vis-à-vis Security and Safety*" has submitted that the issues and the approach to criminal justice system varies from time to time with changes in socio-economic situation and quality of governance. According to him, after independence of India the focus shifted from crime to liberty, but now with rise of terrorism and organized crime, the focus is on preservation of integrity of the nation, control of abuse of police power and ability of the criminal justice system to inspire public confidence. He further states that in every society according to the times that we live in there is a '*trade off*' between liberty and security. According to Professor Menon, the right to silence during a criminal trial is not really a right but a privilege and recently in Singapore and United Kingdom, the right to silence has been curtailed and the Courts have been allowed to draw inferences as may appear proper from the fact of silence of the accused under given circumstances. It is pertinent to mention that the Malimath Committee on Criminal Justice Reforms (2003) and the Administrative Reforms Committee on Public Order and Terrorism (2007-2008) have recommended that the Courts should be empowered by suitable amendment to question the accused and if the accused continues to remain silent and refuses to answer any question put to him by the Court, then to draw adverse inferences as it considers appropriate in the circumstances.

15. But in my view Professor Menon's approach requires an amendment to the statute and it is for the Government and Legislature to consider this aspect.

16. Therefore, in the present case, what arises for consideration are actually three issues. Firstly, whether the conduct of Narco Analysis Test is authorized by law? Secondly under whose authority this test can be carried out? Thirdly, whether such a test on an accused violates Article 20 (3) of the Constitution of India?

17. Section 53 of the Code of Criminal Procedure Act, 1973 (hereinafter to be referred as the "Cr.P.C.") as it stands today is reproduced hereinbelow:-

"53. Examination of accused by medical practitioner at the request of police officer.

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting, at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and -under his direction, to make such all examination of the person arrested as is reasonable necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation: In this section and in section 54, "registered medical practitioner means a medical practitioner who

possesses any recognized medical qualification as defined in clause (l) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956), and whose name has been entered in a State Medical Register.

*'Explanation.-In this section and in sections 53A and 54,-
(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by including the use of modern and scientific techniques DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;*

(b) "registered medical practitioner" means a medical practitioner who possesses any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register."

(emphasis supplied)

18. I am of the opinion that the expression "such other tests" in the Explanation to Section 53 of Cr. P.C. would include within its ambit the Narco Analysis Test.

19. It is pertinent to mention that the Cr.P.C.1898 did not contain a provision similar to Section 53 in the Cr.P.C. 1973. The Law Commission of India in its 37th Report on the Cr.P.C. 1898 considered the question of legality of physical and medical examination of the accused at the stage of investigation. The Commission after noting the law as prevailing in India, United States and United Kingdom, recommended the need for a provision permitting physical and medical examination of the accused. The Commission opined that such a provision would provide valuable evidence. The relevant portion of the report states, "*as to (c) above, it would appear*

that such a provision is needed as examination of the body would reveal valuable evidence.” In fact, the Commission quoted with approval the language in Section 259 of the Criminal Code Queensland, Australia as far as the frame of any such law in Indian law was concerned.

20. In its 41st Report on the Cr.P.C. 1898, the Law Commission recommended that a provision authorizing the examination of the person of an accused by a qualified medical practitioner be inserted. The Commission was of the opinion that such a provision was necessary for effective investigation and the same would not offend Article 20 (3) of the Constitution of India. The relevant portion of the report reads as under:-

“5.1 Chapter V is divided into two parts, Part A dealing with arrest generally and Part B without arrest warrant. In regard to Part A consisting of Sections 46 to 53, no amendments have been suggested in the previous report; but the Commission considered at length the question as to how far the physical examination of the arrested person is legally and constitutionally permissible and what provision, if any, should be made in the code for this purpose. It came to the conclusion that a provision on the subject was needed and recommended a new section authorizing in certain circumstances and subject to certain safeguards, the examination of the person of the accused by a qualified medical practitioner. We agree that such a provision is necessary for effective investigation and will not offend Article 20(3) of the Constitution.”

21. Accordingly, it recommended that a new Section 53A be inserted in the Code which was along the lines of Section 259 of the Queensland Criminal Code.

22. The Criminal Procedure Code, 1970 (Bill XLI of 1970) introduced clause 55 relating to examination of person by a medical practitioner. The Notes on Clauses to the Bill emphasized the fact that Clause 55 is a tool to facilitate effective investigation. In this regard the relevant Notes to Clauses read as follows:-

*“Clauses 44 to 61 – These clauses correspond to Section 46 to 67 and deal with matters relating to arrest of persons. **To facilitate effective investigation**, provision has been made authorizing the examination of the arrested person by a medical practitioner, if, from the nature of the alleged offence or the circumstance under which it was alleged to have been committed, there is a reasonable ground for believing that an examination of the person will afford evidence.....”.*

23. In these circumstances, Section 53 Cr.P.C., which related to ‘Examination of accused by a medical practitioner at the request of police officer was inserted.

24. By the Code of Criminal Procedure (Amendment) Act, 2005 a new explanation (a) was added to Section 53 Cr.P.C. After such amendment, Section 53 Cr.P.C. reads as reproduced hereinabove.

25. In my view, the examination of the person has been defined by an inclusive definition and the use of the words “include” and “including” in the Explanation to Section 53 Cr.P.C. suggests that the same is not exhaustive. However, the techniques that are to be used should be modern and scientific. The wordings of Section 53 Cr.P.C. are couched in the widest possible terms and are meant to assist the police officers in discharging his

statutory duty of collecting all possible information with regard to commission of offence.

26. Thus, the term “examination of a person” in terms of Section 53 Cr.P.C. takes within its ambit the examination of a person by way of a Narco Analysis Test as it is a modern and scientific technique. Consequently, Section 53 Cr.P.C. provides statutory sanction for the Narco Analysis Test and, in my view, the said test is an important aid in the process of investigation.

27. As far as the issue as to which authority can conduct the test is concerned, I am of the view that it can be done at the instance of a police officer investigating the case not below the rank of a Sub Inspector subject to satisfaction of a registered Practitioner. However, I am of the view that prior permission of the concerned Criminal Court has to be obtained which, needless to say, will grant permission only if the request is reasonable in the facts and circumstances of the case. It is pertinent to mention that even some High Courts have held this permission to be an additional safeguard. In the present case as in the initial lie detector test (according to the Prosecution) the Petitioner has given deceptive responses, I am of the opinion that the trial court has rightly exercised its discretion in allowing the Prosecution’s application seeking the Petitioner to undergo Narco Analysis Test.

28. This takes me to the third issue as to whether administration of Narco Analysis Test would amount to violation of Article 20 (3) of the

Constitution. In my view, the order dated 13th April, 2005 of the Supreme Court in **Jitubhai Babubhai Patel (Supra)** does not conclude the matter in controversy as it is a consent order. Therefore, this issue has to be determined in the present proceedings with reference to Article 20 (3) of the Constitution which is reproduced hereinbelow for ready reference:-

“20. Protection in respect of conviction for offences (3):- No person accused of any offence shall be compelled to be a witness against himself.”

29. In my opinion, to attract Article 20 (3) of the Constitution, the following ingredients have to be fulfilled, namely:-

- (a) There must be an accused person.
- (b) He must have been compelled.
- (c) The compulsion must be to be a witness.
- (d) Against himself.

30. Equally, Section 161(2) of Cr.P.C. provides :-

“Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than question the answers to which would have the tendency to expose him to criminal charge or to penalty or to forfeiture.”

31. It has been held by the Supreme Court in **Nandini Satpathy’s case (Supra)** that :-

“The area covered by Article 20(3) and Section 161(2) is substantially the same.....that section 161(2) of the Cr.P.C. is parliamentary gloss on the constitutional clause”

32. In the narco-analysis test, a drug called “Sodium Pentothal” is administered in controlled quantity in the body of the person by a qualified anesthetist. The subject of the test thereafter goes into a state which may be called a “hypnotic trance” and makes utterances which are then recorded.

33. In my view, mere compulsion to undergo the test is not enough. It must further be shown that the accused/person is being compelled to be a witness against himself. Needless to say that at the stage, prior to undergoing the Narco Analysis Test, it cannot be even alleged that the accused/person is being compelled to be a witness against himself.

34. During the test, the statement made by the accused may provide some clues and leads to the Investigating Agency. However, if during the said test, accused makes a statement which incriminates him, then the said statement cannot be used against him. It is clarified that statements made during narco-analysis test cannot be used as sole evidence to convict the accused as the test is only meant to assist and aid the Investigating Agency to find out the truth especially in grave offences like terrorism, organized crimes, murder, kidnapping etc. and moreso, when these are “blind crimes” and there is no direct evidence available.

35. Even in **Nandini Satpathy’s case (Supra)** it was recognised by the Apex Court that law is a response to life and approach to criminal justice system varies from time to time. The relevant portion of the said judgment, is reproduced hereinbelow :-

“24. Whether we consider the Talmudic law or the Magna Carta, the Fifth Amendment, the provisions of other constitutions or Article 20(3), the driving force behind the refusal to permit forced self-crimination is the system of torture by investigators and courts from medieval times to modern days. Law is a response to life and the English rule of the accused’s privilege of silence may easily be traced as a sharp reaction to the Court of Star Chamber when self-incrimination was not regarded as wrongful. Indeed, then the central feature of the criminal proceedings, as Holdsworth has noted, was the examination of the accused.

25. The horror and terror that then prevailed did, as a reaction, give rise to the reverential principle of immunity from interrogation for the accused. Sir James Stephen has observed:-

“For at least a century and a half the (English) Courts have acted upon the supposition that to question a prisoner is illegal. This opinion arose from a peculiar and accidental state of things which has long since passed away and our modern law is in fact derived from somewhat questionable source though it may no doubt be defended.” [Sir James Stephen (1857)].”

36. Moreover, as the test is a mere step in aid of investigation and the statement recorded pursuant to the said test by itself is not to be used against the person, it cannot be alleged that he is being compelled to be witness against himself.

37. In the **State of Bombay Vs. Kathi Kalu, AIR 1961 SCC 1808** an eleven Judges Bench of the Hon’ble Supreme Court held that restrictions against any compulsion to be a witness against oneself under Article 20 (3) of the Constitution do not include giving of thumb impression, or impressions of palm or foot or fingers or specimen writing or exposing a part of the body by the accused persons for the purposes of identification. The relevant portion of the said judgment is reproduced hereinbelow:-

“10. “To be a witness” may be equivalent to “furnishing evidence” in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving

of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. "Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution makers for the simple reason that — though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English law on the subject — they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution-makers were aware of the existing law, for example, Section 73 of the Evidence Act or Sections 5 and 6 of the Identification of Prisoners Act (33 of 1920). Section 5 authorises a Magistrate to direct any person to allow his measurements or photographs to be taken, if he is satisfied that it is expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure to do so: "Measurements" include finger impressions and foot-print impressions. If any such person who is directed by a Magistrate, under Section 5 of the Act, to allow his measurements or photographs to be taken resists or refuses to allow the taking of the measurements or photographs, it has been declared lawful by Section 6 to use all necessary means to secure the taking of the required measurements or photographs. Similarly, Section 73 of the Evidence Act authorises the court to permit the taking of finger impression or a specimen handwriting or signature of a person present in court, if necessary for the purpose of comparison.

11. *The matter may be looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not "to be a witness". "To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said "to be a witness" to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in Sharma case¹ that the prohibition in clause (3) of Article 20 covers not only oral testimony given by a person accused of an*

offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the court to produce that document in accordance with the provisions of Section 139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession or power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-examined. Of course, he can be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in court otherwise than by reference to the contents of the documents. In our opinion, therefore, the observations of this court in Sharma case¹ that Section 139 of the Evidence Act has no bearing on the connotation of the word "witness" is not entirely well-founded in law. It is well established that clause (3) of Article 20 is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a "personal testimony". The giving of a "personal testimony" must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression "to be a witness".

12. In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case

against the accused person at least probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of "testimony".

13. Similarly, during the investigation of a crime by the police, if an accused person were to point out the place where the corpus delicti was lying concealed and in pursuance of such an information being given by an accused person, discovery is made within the meaning of Section 27 of the Evidence Act, such information and the discovery made as a result of the information may be proved in evidence even though it may tend to incriminate the person giving the information, while in police custody. Unless it is held that the provisions of Section 27 of the Evidence Act, insofar as they make it admissible evidence which has the tendency to incriminate the giver of the information, are unconstitutional as coming within the prohibition of clause (3) of Article 20, such information would amount to furnishing evidence. This Court in Sharma case was not concerned with pronouncing upon the constitutionality of the provisions of Section 27 of the Evidence Act. It could not, therefore, be said to have laid it down that such evidence could not be adduced by the prosecution at the trial of the giver of the information for an alleged crime. The question whether Section 27 of the Evidence Act was unconstitutional because it offended Article 14 of the Constitution was considered by this Court in the case of State of Uttar Pradesh v. Deomen Upadhyaya. It was held by this Court that Section 27 of the Evidence Act did not offend Article 14 of the Constitution and was, therefore, 'intra vires'. But the question whether it was unconstitutional because it contravened the provisions of clause (3) of Article 20 was not considered in that case. That question may, therefore, be treated as an open one. The question has been raised in one of the cases before us and has, therefore, to be decided. The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion had been used in obtaining the information."

38. In my opinion, the Narco Analysis Test is a step in aid of investigation. It forms an important base for further investigation as it may lead to collection of further evidence on the basis of what transpired during such examination. The use of Narco Analysis is of particular relevance in the context of terrorism related cases, conspiracy to commit murder and other serious offences where the Investigating Agencies do not have vital leads.

39. Therefore, having regard to the proliferation of crimes against society, it is necessary to keep in mind the necessity of the society at large and the need of a thorough and proper investigation as against individual rights while ensuring that constitutional rights are not infringed. Consequently, in my opinion, the Narco Analysis Test does not suffer from any constitutional infirmity as it is a step in aid of investigation and any self-incriminatory statement, if made by the accused, cannot be used or relied upon by the prosecution. The present petition is disposed of in the above terms and the Petitioner is directed to undergo the Narco-Analysis Test within a period of eight weeks from today. The Investigating Officer will intimate the date and time of the Test to the Petitioner/Accused.

November 14th, 2008
rn/sb

[MANMOHAN]
JUDGE