

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (Cr.) No.148 of 2014

Rishiraj Mukherjee, S/o Ashok Mukherjee, aged about 36 years, R/o Link Road, Rajendra Nagar, Opposite Bajpayee Chambers, P.S. Civil Lines, Bilaspur, District Bilaspur, Civil and Revenue District Bilaspur (CG)

----- Petitioner

Versus

1. Central Bureau of Investigation, through the Director, Central Bureau of Investigation, CBI/SC-II, New Delhi.
2. Superintendent of Police, CBI/SC-II, New Delhi.
3. Sub Inspector of Police, CBI/SCII/New Delhi.

----- Respondents

For Petitioner: Mr. Awadh Tripathi and Mr. Avinash Singh,
Advocates.

For Respondents/CBI: -

Mr. Kishore Bhaduri and Mr. Pawan
Kesharwani, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

08/03/2016

1. The scientific question that emanates for consideration in this writ petition is legal permissibility of Narcoanalysis, polygraph test (lie-detector test) and BEAP (Brain Electrical Activation Profile) test to be

conducted against the will and without consent of a person suspected of an offence, subjected to either of the test(s).

2. The above stated question has to be answered in the following factual backdrop: -

2.1) Mr. Sushil Pathak was working as Sub-Editor in the Office of Dainik Bhaskar daily newspaper at Bilaspur. In the intervening night of 19th & 20th of December, 2010, while he was returning back to his home in the night after 12 O' clock in his Tata Indica car from Dainik Bhaskar press, he was shot dead at around 1.20 a.m. near his house by some unknown assailant(s). Pursuant to the report made on 20-12-2010, Police Station Sarkanda, Bilaspur registered an offence under Sections 302 and 201 of the IPC read with Sections 25 and 27 of the Arms Act, 1959 and thereafter, wheels of investigation started running to find out the culprit of the above-stated offences and to bring the culprit to book.

2.2) In the meanwhile, the Government of India, Ministry of Personnel, Public Grievances and Pension,

Department of Personnel and Training vide its notification dated 4-8-2011 issued with the consent of the Government of Chhattisgarh, Department of Home vide notification dated 24-3-2011, directed transfer of investigation relating to the above stated offences to the Central Bureau of Investigation (for short 'the CBI') and consequently, Case No.RC.3(S)/2011/SCU-V /CBI/SC-II/ New Delhi was registered on 5-9-2011 in the CBI, New Delhi.

2.3) The Central Bureau of Investigation, while investigating the matter suspecting that the present petitioner to have been played an important and decisive role in the assassination / murder of Mr. Sushil Pathak, made an application to the Court of Special Judicial Magistrate (CBI), Raipur, that though the present petitioner has been examined, since he has denied his involvement in the offence in question, therefore, his polygraph test (lie-detector test), brain mapping and narcoanalysis test are required to be conducted in the interest of justice as these tests are absolutely necessary

for furtherance of investigation in the case. It was also brought to the notice of the learned Special Judicial Magistrate that two suspects namely Ram Bahadur Nagar and Rajesh Thakkar have already been permitted to undergo the above tests, but on account of absence of the petitioner, no such permission was granted with regard to the petitioner. The petitioner appeared before the learned Special Judicial Magistrate on 8-8-2014 and stated that he has no knowledge of the facts of the case, he declined to accord his consent for the aforesaid tests and opposed the application filed by the CBI for such tests. The learned Special Judicial Magistrate by its impugned order allowed the application filed by the CBI and held that the above-stated tests are necessary for the purpose of furtherance of investigation and directed the petitioner to undergo the above-stated tests.

2.4) Invoking the extraordinary jurisdiction of this Court under Article 226/227 of the Constitution of India, the instant writ petition has been filed by the petitioner inter alia on the ground that such tests viz., narcoanalysis

test etc., directed to be conducted by the learned Special Judicial Magistrate without the consent of the petitioner, is violative of the petitioner's right guaranteed under Article 20 (3) of the Constitution of India, Section 161 (2) of the CrPC and also it violates the right to personal liberty guaranteed under Article 21 of the Constitution of India and therefore the order of the learned Special Judicial Magistrate directing to undergo the above-stated tests deserves to be quashed.

2.5) Return has been filed by the respondents/CBI opposing the writ petition stating inter alia that the above-stated scientific tests are necessary to unearth the truth behind the murder of Mr. Sushil Pathak and there is no intention to implicate the petitioner in this murder case and if he is not involved, the tests in question will be helpful for him in proving his innocence. It has further been averred that these scientific tests are conducted to ascertain the truth behind the case to get lead in the investigation and eventually, if the person suspected is not involved in the offence then it will

prove his innocence and therefore, the order of the learned Special Judicial Magistrate directing the above-stated scientific tests are in the interest of justice and the writ petition deserves to be dismissed.

3. Mr. Awadh Tripathi, learned counsel appearing for the petitioner, would submit that such tests like narcoanalysis and others are violative of Articles 20 (3) and 21 of the Constitution of India as well as the provisions contained in sub-section (2) of Section 161 of the CrPC, as the accused / suspect cannot be compelled to make self-incriminating statement, such a testimonial compulsion is strictly prohibited by law and the order passed by the learned Special Judicial Magistrate (CBI) directing the petitioner to undergo aforesaid tests against the will of the petitioner runs contrary to the authoritative pronouncement laid down by the Supreme Court in **Selvi and others v. State of Karnataka**¹ and therefore, the writ petition deserves to be allowed quashing the direction / order of the learned Special Judicial Magistrate to undergo such tests.

¹ (2010) 7 SCC 263

4. On the other hand, Mr. Kishore Bhaduri, learned counsel appearing for the CBI, while seriously opposing the writ petition would submit that the petitioner is being asked to undergo the scientific tests like narcoanalysis etc., to find out the truth and in order to solve the blind murder case of Mr. Pathak and as such, there is no intention on the part of the CBI to implicate the present petitioner in such an offence, rather it would give a clean chit to the petitioner if he undergoes the tests, as his innocence will be proved thoroughly in such tests and there is no such violation of any fundamental or human right of the petitioner and therefore, the writ petition deserves to be dismissed.
5. I have heard learned counsel for the parties and bestowed my thoughtful consideration to the submissions made by the parties herein and also gone through the record with utmost circumspection.
6. In order to resolve the controversy and to judge the correctness of the order passed by the learned Special Judicial Magistrate (CBI) directing such scientific tests,

it would be appropriate to notice Article 20 (3) of the Constitution of India as well as Section 161 (2) of the CrPC which state as under: -

“The Constitution of India

Article 20. Protection in respect of conviction for offences.-

(1) *** **

(2) *** **

(3) No person accused of any offence shall be compelled to be a witness against himself.”

Thus, Article 20 (3) of the Constitution of India gives protection against “testimonial compulsion” and also it is right against self-incrimination.

“The Code of Criminal Procedure, 1973

Section 161. Examination of witnesses by police.-

(1) *** **

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge

or to a penalty or forfeiture.

(3) *** **

Thus, the above provision protects any person supposed to be acquainted with the facts and circumstances of the case in course of examination by the police.

7. The question as to whether the scientific tests like narcoanalysis, polygraph and BEAP tests can be directed to be conducted at the request of investigating authority during the course of investigation of a crime against the will of the person to the accused or suspect and whether it is legally permissible or not, came to be considered before the Supreme Court in Selvi (supra) in which Their Lordships have authoritatively held that such scientific techniques would violate the right against self-incrimination and violative of Articles 20 (3) and 21 of the Constitution of India as well as Section 161 (2) of the CrPC, and pertinently held as under in paragraph 262: -

“262. In our considered opinion, the compulsory administration of the impugned techniques violates the “right against self-

incrimination”. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of [Article 20\(3\)](#) extends to the investigative stage in criminal cases and when read with [Section 161\(2\)](#) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. [Article 20\(3\)](#) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. [Article 20\(3\)](#) aims to prevent the forcible “conveyance of personal knowledge that is relevant to the facts in issue”. The results obtained from each of the impugned tests bear a “testimonial” character and they cannot be categorised as material evidence.”

8. Their Lordships of the Supreme Court further held in the

aforesaid case that the impugned scientific techniques cannot be read into the statutory provisions contained in the Explanation to Sections 53, 53-A and 54 of the CrPC and even the compelling public interest cannot justify such tests as it would dilute the constitutional right such as right against self-incrimination, and observed in paragraph 263 as under: -

“263. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of “substantive due process” which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases i.e. the Explanation to [Sections 53](#), [53-A](#) and [54](#) of the Code of Criminal Procedure, 1973.

Such an expansive interpretation is not feasible in light of the rule of “*ejusdem generis*” and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to “cruel, inhuman or degrading treatment” with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the “right to fair trial”. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the “right against self-incrimination”.”

9. Their Lordships of the Supreme Court finally concluded in **Selvi** (supra) that a person should not be forcibly subjected to any of the techniques in question in the context of investigation in any criminal case as it would amount to an unwarranted intrusion into the personal liberty of an individual and observed as under in

paragraph 264: -

“264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with [Section 27](#) of the Evidence Act, 1872.”

10.It has also been held by the Supreme Court in **Selvi** (supra) that Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused

published by the National Human Rights Commission should be strictly adhered to and similar safeguards should be adopted for conducting the “narcoanalysis technique” and the “Brain Electrical Activation Profile” test. The above-stated Guidelines clearly provide that no lie detector tests should be administered except on the basis of consent of the accused. Paragraph 265 of the report states as under: -

“265. 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.

(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.

(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.”

11. On the basis of above-stated legal analysis, it is held that narcoanalysis, polygraph and BEAP tests cannot be conducted without the consent of person suspected of an offence and against his will, as it is violative of “right against self-incrimination” guaranteed under Articles 20(3) and 21 of the Constitution of India and also violative of Section 161 (2) of the CrPC.

12. Determination of the above-stated question brings me to the factual matrix of the present case. A careful perusal of the record and the impugned order would show that the petitioner has expressly declined to undergo the afore-stated scientific tests stating inter alia that he has no knowledge of the facts of the case, he is not involved in the offence in question and is not ready and willing to undergo such tests. In such an event, direction by the learned Special Judicial Magistrate to the petitioner to undergo such scientific tests for the purpose of furtherance of investigation is plenary, arbitrary, illegal and in teeth of the authoritative pronouncement laid

down by Their Lordships of the Supreme Court in **Selvi** (supra) in which it has been concluded that no individual should be forcibly subjected to any of such scientific tests against his will in the context of investigation in criminal cases, as it violates the right against self-incrimination, violation of Articles 20 (3) and 21 of the Constitution of India, and Section 161 (2) of the CrPC and also runs contrary to the Guidelines issued for the Administration of Polygraph Test on an Accused person published by the National Human Rights Commission which have been directed to be followed strictly by the Supreme Court in **Selvi** (supra), as such, the learned Special Judicial Magistrate is absolutely unjustified in directing the petitioner to undergo such scientific techniques against the will and without the consent of the petitioner.

13. Conclusion reached herein-above takes me to the next submission urged by learned counsel for the respondents that the afore-stated impugned test(s) will help the petitioner in proving his innocence, if he is not actually

involved in the offence. It is well settled principle of Indian Criminal Jurisprudence that an accused is presumed to be innocent till he is proved to be guilty and the presumption of innocence is a human right. In the matter of Narendra Singh and another v. State of M.P.² the Supreme Court has held that the presumption of innocence is a human right. In the matter of S. Ganesan v. Rama Raghuraman³, the Supreme Court has reiterated the same legal proposition and observed as under: -

“39. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India”

14. The aforesaid decision has been followed by the Supreme Court with approval in the matter of State of U.P. v. Naresh⁴ and very recently, in a decision in the matter of Kailash Gour and others v. State of Assam⁵,

2 (2004) 10 SCC 699

3 (2011) 2 SCC 83 : (2011) 1 SCC (Cri) 607

4 (2011) 4 SCC 324 : (2011) 2 SCC (Cri) 216

5 (2012) 2 SCC 34

the above-stated decision has been followed with approval holding that the accused is presumed to be innocent till he is proved to be guilty.

15. Thus, the presumption of innocence is one of the most important and ancient rights embodied in our criminal judicial system and it is also a fundamental element of the right to fair trial that every person should be presumed to be innocent unless and until proved guilty following a fair trial. It is for the State to produce evidence of guilt. Therefore, the petitioner cannot be compelled to undergo the impugned tests in order to prove his innocence, as every person is presumed to be innocent till he is proved to be guilty and presumption of innocence is a basic human right duly recognized subject to statutory exceptions. Thus, the submission of the respondents/ CBI in this regard deserves to be rejected. No other plea was raised.

16. As a consequence and fallout of afore-stated discussion, the order passed by the learned Special Judicial Magistrate dated 8-8-2014 directing the petitioner to

undergo narcoanalysis, polygraph and BEAP tests by the impugned order, is hereby quashed being impermissible in law.

17.The writ petition is allowed to the extent indicated herein-above but without imposition of cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (Cr.) No.148 of 2014

Rishiraj Mukherjee

Versus

Central Bureau of Investigation and others

HEAD NOTE

A person suspected of an offence cannot be forced to undergo Narco-analysis, BEAP and polygraph tests without his consent. Presumption of innocence is human right.

किसी अपराध के संबंध में शंकास्पद व्यक्ति को उसकी सहमति के बिना नार्को-विश्लेषण, बी.ई.ए.पी. और पालीग्राफ परीक्षण के लिए विवश नहीं किया जा सकता। निर्दोषता की उपधारणा मानव अधिकार है।