

ADMISSIBILITY OF DECEPTION DETECTION TESTS IN INDIA

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INTRODUCTION

Deception Detection Test (herein referred to as DDTs) is an evaluation of a statement to detect the possible intentional deceit and has moral, scientific and legal significance in the society and is generally known as 'guilty knowledge test'. DDTs includes polygraphs, narco analysis, brain mapping and lie detectors. These tests are simply known as 'drug induced revelation' of intentional deceits. This has been in practice even before the Greeks and the Romans. Before science emerged, the self-revelation tests were conducted through the ingestion of drugs such as peyote, opium, cannabis and henbane.¹ Medical psychologists say that it is an effort to utilize scientific techniques to observe and comprehend the human conduct affected by the drugs. The masked information, which is known only to self, is sometimes central for criminal investigations.

DDTs are conducted only on the accused, suspect or witness to a particular case and it increases the potency of the investigation. DDTs are argued to be safer and a better alternate to the 'third degree methods'. However, DDTs are allowed to be conducted only with the 'voluntary consent' of the concerned individual. Without the said voluntary consent, the results from DDTs are not admissible in all cases in the Court in India. It is up to the discretion of the Courts whether to include or not, the information obtained from the drug- induced tests as evidences for a particular case.

The question is, 'whether the information received from the DDTs with the voluntary consent amounts to testimonial compulsion thereby violating Article 20(3) of the Constitution of India'.

¹George H. Dession, Lawrence Z. Freedman, Richard C. Donnelly and Frederick C. Redlich, *Drug-Induced Revelation and Criminal Investigation*, THE YALE LAW JOURNAL, Vol. 62, No. 3 (Feb., 1953), <http://www.jstor.org/stable/793442> (Last visited on June 22, 2018)

The Court only mandates obtaining voluntary consent for administering these tests, but does not provide for what amounts to voluntary consent under any law. Hence, the claim is that, there is a need for the judiciary to define the term 'voluntary consent' and provide for what amounts to voluntarily consent. Also, there is a need for framing proper guidelines for conducting DDTs.

SCIENCE BEHIND DECEPTION DETECTION TESTS

In various studies conducted by psychiatrists, jurists and scholars, it was observed that those individuals, who performed adequately in their functions, are less likely to confess and those with strong feelings of depression, guilt and anxiety often confess under the influence of the drug induced. The process of repression, dissociation and synthesis is operated while the subject (accused/ suspect/ witness) is under the influence of the revelation drugs. The deceptions are usually caused by various emotions, but it can also be caused by manipulating the questions posed to the subject during the procedure of DDTs.

POLYGRAPH

Polygraph tests are basically the recordings of the psychological responses of the subject while undergoing the test and then comparing the same with responses given by the subject under normal circumstances. These tests also include the measures of heart rate, blood pressure, respiratory rate, skin conductance, electromyography, etc.

Those deceptions caused due to anxiety, fear, nervousness, depression or any other emotions can be easily detected by the help of Polygraph method. However, the drawback of this particular test arises when the subject deliberately manipulates or attempts to manipulate the question posed by the examiner.

NARCO ANALYSIS

The Narcoanalysis test is performed by injecting what is called the 'truth serum' in the subject. Truth serums are nothing but drugs that incapacitates the subject to conceal any sort of information. Drugs like Sodium Pentothal, Sodium Amytal and Scopolamine are used in these tests to sedate the subject. These drugs are administered during the procedure, which makes the person enter into an anaesthetic stage known as 'hypnotic trance stage', in which the person is more likely to give out the concealed information, which might be helpful for the criminal investigation.

In Narco Analysis Test, the subject's imagination is neutralized by making him semi-conscious. This makes it difficult for the subject to lie or manipulate the question posed and is thus, confined to the facts that he/she is already aware of. This test is also conducted to refresh the memory of the subject and to confirm the mental state of the subject to stand trial.

The effect of the drug that is injected into the subject only lasts for a minimal time. Thus, the information to be extracted from the subject needs to be done faster. The drug cannot be administered again on the same subject because over dosage may lead to other biological problems. Thus, the test must be performed in a fast pace and if the subject does not cooperate with the procedure, then it might result in a failed attempt.

BRAIN MAPPING

Brain Mapping Test is also known as 'P300 wave test'. When the brain recognizes a particular thing, maybe a person or a sound, it generates a specific type of electric wave, which is called P300.

The test is conducted to examine the Event- Related Potentials (EPR). EPR is the electrophysiological response to stimuli, which may be a person or sound. The P300 waves are observed and recorded on a computer monitor and it is only generated if the subject has some connection to the picture or sound that is shown to him. No questions are asked to the subject during this procedure.

The basic principle of this test is that, when a stimulus is shown to the subject, which is usually related directly or indirectly to the crime scene or is in any relation to the investigating case, the brain sends certain electric wave, which may be due to his fear or anxiety.

This test can only be conducted on those persons who are directly related to the case in some way or another.

LEGAL POSITION OF DECEPTION DETECTION TESTS

In India, the results from DDTs, conducted with the voluntary consent of the subject, is not always admitted as evidence by the Court. The main reasoning of the Court is that, these tests violate certain fundamental rights of the accused or witness. The rights infringed are:

- i. Right against self-incrimination provided under Article 20(3) of the Constitution. According to Article 20(3), no person accused of an offence shall be compelled to be a witness against himself/herself.
- ii. Right to life and personal liberty provided under Article 21 of the Constitution. This Article has been judicially expanded to include the right against cruel, inhuman or degrading treatment.

DDTs are conducted only after the accused or witness gives voluntary consent to undergo the procedure and thus, the question of violating Article 20(3) does not arise. Article 20(3) only states that no accused shall be compelled or coerced to give statements against himself. The results from DDTs should be admissible as evidence to a case because it suffices as a primary source in proving the accused either as guilty or as innocent, which essentially means delivering proper justice. The Courts is of the opinion that, DDTs should only be conducted with the voluntary consent of the accused and in such cases the same shall be admissible as evidences.

In a judgment by the Madras High Court, it was held that, if the accused fails to cooperate with the investigation during custodial interrogation, scientific methods may be carried out to unveil the truth.² In a similar case³, the Court held that Narco Analysis Test was said to be a test that aids the investigation and ordered for the test to be conducted. The result from the same was

² Dinesh Dalmia v. State, 2006 (3) Cr LJ 2401 (Mad)

³ Sh. Shailender Sharma v. State and Another, WP (CrI.) 532 of 2008

admitted as evidence in the trial. In these two judgments, the Courts were in favour of the DDTs.

However, in some cases, the Court rejected the filing of the results from the DDTs as evidences. The first argument given by the Court is that, the accused being compelled to undergo the test. The Supreme Court has passed a judgment in relation to the involuntary administration of DDTs for improving the judgment.⁴ The Court said that involuntary administration of DDTs violates the accused' right against self- incrimination and right against cruel, inhuman or degrading treatment. Involuntary administration essentially amounts to compulsion, and thus, violating the concerned person's right against self-incrimination which is enshrined under Article 20(3) of the Constitution.

The second argument is that the responses given during the tests are not given consciously and voluntarily. The Constitution gives every citizen the right to silence, which is inevitably infringed while conducting DDTs. The accused undergoing the deception test does not have the right to decide whether to answer or remain silent to a particular question posed to him.

The 'right to silence' guarantees every individual the right to refuse to answer questions from law enforcement officers or by the Court. This right mainly aims to avoid self-incrimination. The Court in its judgment said that, no one can forcibly extract statements from the accused, who has the right to keep silence.⁵ The Court was of the opinion that, DDTs nullifies the legitimacy of the Right to Silence, which is provided for under Article 20(3).

When the accused or witness gives his/her voluntary consent to undergo DDTs, it implies that the person is willing to go through the procedure for whatever reason it may be. Arguing that it violates the accused' Right to Silence becomes invalid, because there is no compulsion involved in making that accused undergo the test. It is only conducted with the voluntary consent, which even the Court favours. Still there is ambiguity about this because the term 'voluntary consent' in relation to DDTs has not been defined under any Indian Law. There has always been questions' regarding what amounts to voluntary consent and what doesn't. Thus, there is a need for the Judiciary to define the term 'voluntary consent' for conducting DDTs and should clearly explain as to, what amounts to voluntary consent and what doesn't.

⁴ Selvi v. State of Karnataka, AIR 2010 SC 1974

⁵ Nandini Satpathy v. P.L. Dani, AIR 1978 SC 1025.

DECEPTION DETECTION TESTS AND ARTICLE 20(3)

Article 20(3) states that no person accused of any offence shall be compelled to be a witness against himself. This Article stresses on the term 'compulsion'. Compulsion is nothing but, duress. Compulsion in this context has to be a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted.⁶ In the case of DDTs, voluntary consent to undergo the test is made mandatory. So, if the Court orders DDT in a particular case and, if the accused gives his consent for the same voluntarily, then the results obtained from the test cannot be deemed violative of Article 20(3), rather, the information obtained from the test shall be admitted as evidence if it relates to case either directly or indirectly.

The statements that are obtained through the deception tests with voluntary consent are of the nature of confession or admission. Confession is the statement made by the accused or the witness that is unpropitious to that person. Black's Law Dictionary defines confession as a statement admitting or acknowledging all the facts necessary for conviction of a crime. By obtaining the consent from the accused to undergo the deception test, it is implied that the accused has consented to reveal any sort of information that is related to the case. However, this shouldn't be misused by the examiner, as well as, by the investigator. Only questions restricted to the case should be asked to the accused, who is taking the test.

Article 20(3) is not violated when the accused volunteers evidence against himself. Since the Article gives only a privilege, the accused may waive it if he so likes.⁷ These tests are a chance of reducing the situations where the police exert duress or compulsion against the accused.

Section 342 A of the Criminal Procedure Code permits the accused to turn witness when he wants to. Thus, not allowing the conduction of DDTs with the voluntary consent means that, the right of the accused to offer himself as a witness to the case is affected. However, no adverse inference can be drawn from the failure of the accused to testify.⁸

⁶ M.P. JAIN, INDIAN CONSTITUTIONAL LAW, (LexisNexis 8th ed., 2018).

⁷ Laxmipat Choraria v. State of Maharashtra, AIR 1968 SC 938.

⁸ T.G. Gaokar v. R.N. Shukla, AIR 1968 SC 1050.

The immunity against self-incrimination extends to only those incriminating evidences which were compelled out of the accused; it does not include those incriminating evidences which were collected without any manner of compulsion or forcing him to be a witness.

The confession made should appear to have been made voluntarily and the investigator recording the confession should satisfy himself that the same was being made voluntarily by the accused.⁹

DECEPTION DETECTION TESTS AND RIGHT TO PRIVACY

One might question about the violation of the Right to Privacy of the accused when he is taking the test. There are no set guidelines for conducting the deception tests in India. Thus, the investigators and examiners are free to post any question to the accused who is in a hypnotic stage. This is where the concern relating to the professional ethics of the medical personnel arises. The National Human Rights Commission published Guidelines in 2000 for the Administration of Polygraph tests¹⁰ after various concerns regarding violation of human rights in conducting DDTs were raised. The guidelines that were framed, however, is not followed properly and also, it is restricted only to Polygraph tests and not DDTs as a whole.

In order to protect those accused who take up the deception tests from oppression, from both the examiner and from the investigator, the Court should either frame Guidelines to be followed while conducting DDTs in general and should also specify the steps to be followed while conducting the tests, while recording the responses of the accused and after the entire procedure is over. The Laws should also provide for the doctor-patient privileges and should make provisions for protecting the accused from oppression, from those persons present while conducting the DDT.

The recorded confession should indicate that the guidelines had been followed correctly. In case of any violation, the investigating authority and the medical examiner administering the deception test shall be held liable and penalised. Also, while filing the evidences in the Court, the recordings of the confession by the accused along with the written statement shall be

⁹ Ayub v. State of Uttar Pradesh, (2002) 3 SCC 510.

¹⁰ National Human Rights Commission. NHRC Guidelines. (Accessed on Sept. 05, 2018).

submitted. This way, the Court can compare the discrepancies and render proper judgment accordingly.

INVESTIGATION PROCEDURE AND DECEPTION DTECTION TEST

The privilege under Article 20(3) is available at the trial stage of the case in the Court.¹¹ It is also available at the pre-trial stage, during the investigation procedure. The Court may allow the investigating officer to conduct DDT on the accused for the smooth and faster proceedings of the case.

The use of third degree methods by the investigating officers during the custodial interrogation is common in India. These measures are taken to obtain information from the accused or the suspect. The Supreme Court has pointed that there is a lot of custodial violence and abuse of police power in India.¹²

The investigating officer should inform the accused that they have the Right against self-crimination and also has the Right to call a lawyer before consenting and answering to any of their questions. However, this has hardly been in practice in India. The accused or the suspects in most of the cases aren't aware of their Rights. Hence, it is right to say that these third degree measures practiced by the Indian law enforcement violates more Fundamental Rights of the accused or suspect who is in custody, than those Rights that are said to be violated while administering DDTs.

The DDTs should be conducted only after the initial stage of investigation is completed. A complete background check should be done by the investigating officers, before requesting the Court to grant permission for conducting DDT. This would help the investigators to get an idea of what information is to be extracted by undertaking this deception test. It also allows the Court to judge whether a deception test is a necessity in the case presented for trial.

The DDTs should only be administered after seeking the permission of the Court. If the Court rejects the request for conducting DDTs in any case, then it shall not be administered even if the accused gives voluntary consent for it. If the Court permits the conduction of DDTs, then

¹¹ State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.

¹² See *supra* note 5.

the investigating officers shall make sure that the tests are conducted within a stipulated period. Also, the investigating officers shall make the accused undergo the deception test only if he deems it necessary and the test shall be administered only once to an accused. Any violation of this shall be penalised.

CONCLUSION

For the better understanding of the working of the DDTs, the Supreme Court should constitute a Committee, which shall look into the pros and cons of these procedures. The Committee shall also be assigned with the task of framing the Guidelines that are to be followed while conducting DDTs. Once voluntary consent is obtained, the deception test results should not be dismissed due to violation of Article 20(3) or any other provisions. The expression voluntary consent needs to be defined and its scope must be expanded to include the administration of DDTs.

Though there has been a lot of a criticism against DDTs, it is a better alternative for the third degree methods that the investigating officers practice. DDTs need to undergo research in order to be permitted as evidence in the Court. It is important to understand the sensitivity and specificity of these tests. There ought to be standard guidelines for administering DDTs. While reasoning DDTs, scientific, human rights, ethical, legal and constitution perspectives shall be taken into consideration. Therefore, the future of the DDTs will evolve based on the advancement the Court makes in this matter. The Court needs to take a more liberal decision rather than a narrow one. DDTs is a way of rendering speedy justice, thus, enhancing social trust and reliability of the Indian Legal System.