

(2010) 08 BOM CK 0133

In the Bombay High Court

Case No : Criminal Writ Petition No. 666 of 2010

Maresh Shribas

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 02-08-2010

Acts Referred:

Constitution of India, 1950 — Article 20(3), 21
Evidence Act, 1872 — Section 24 , 25, 26, 27
Penal Code, 1860 (IPC) — Section 34, 409, 419, 420, 467

Citation : (2010) 112 BOMLR 3140 : (2010) CriLJ 4380 : (2011) 1
RCR(Criminal) 305 : (2011) 1 RCR(Criminal) 305

Hon'ble Judges : S.S. Shinde, J;S.B. Deshmukh, J

Bench : Division Bench

Advocate : Mahesh R. Sonwane, for the Appellant; N.N. Jadhav, Assistant Public
Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S.S. Shinde, J.—This petition takes exception to the judgment and order dated 28.1.2010, passed by the learned Judicial Magistrate, First Class, Shevgaon thereby granting permission of Narco Analysis Test of the petitioner in connection with crime No. I-166 of 2009, dated 30.12.2009 for the offences punishable under Sections 420, 419, 409, 467, 468, 471 r.w. 34 of I.P.C. registered with Shevgaon Police station.

2. We heard learned Counsel for the petitioner and the learned A.P.P. for the respondent-State. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

3. The principal grievance raised in this petition is that the impugned order passed by the learned J.M.F.C. Shevgaon allowing the respondent to conduct the Narco analysis test of the petitioner is passed though petitioner strongly opposed for conducting Narco Analysis Test on health ground. Learned Counsel for the petitioner further submitted that granting permission of Narco analysis test

amounts to infringement of the fundamental rights of the petitioner under Article 20(3) and 21 of the Constitution of India. It is the case of the petitioner that on 25.1.2010 the investigating Officer filed an application before the learned J.M.F.C. Shevgaon thereby seeking permission to allow him to conduct Narco analysis test of the petitioner and another accused. The petitioner strongly opposed the Narco test on the ground that he is suffering from swelling of liver and also have complaints about the low blood pressure and migraine and there is danger to the life of the petitioner if the Narco analysis test is conducted. It is the contention of the petitioner that inspite of strong objection, learned J.M.F.C. has allowed the application of Investigating Officer and directed to conduct Narco analysis test of the petitioner and the accused No. 1, by judgment and order dated 28.1.2010.

4. Learned Counsel for the petitioner invited our attention to the written say filed on his behalf before the learned J.M.F.C. to the application filed by the Investigating Officer seeking permission to conduct Narco Analysis Test. On perusal of the said say, which is at page 31 of the compilation, it is clear that the petitioner had opposed the prayer in the application for Narco Analysis Test.

5. We have given due consideration to the submissions advanced on behalf of the petitioner and also heard learned A.P.P. for respondent-State. The order passed by the learned J.M.F.C. on 28.1.2010 reads thus;

Perused application and say of accused Nos. 1 and 2. Accused No. 1 is ready for Narco test. Accused No. 2 opposed application on the grounds of illness and his health problem only. Therefore if precaution is taken and rules followed at time of Narco test, the purpose of accused No. 2 will be solved. The Narco test will be performed only after assurance of medically fitness of accused. Hence, in above circumstances I.O. hereby authorized person to investigate has process to conduct Narco test of accused to find out truth. Hence, application is allowed. I.O. To follow rules strict in respect of accused No. 2 in respect of his health.

Bare perusal of the order reproduced herein above, it is clear that the petitioner herein who is original accused No. 2 has not consented for Narco Analysis test on the ground of illness and health problems.

6. We have carefully perused the pleading in the petition, annexures thereto and after hearing learned Counsel appearing for the respective parties we are of the opinion that the issue involved in this petition i.e. whether the Narco analysis test, Brain Mapping test and Lie Detector test are violative of the Article 20(3) and 21 of the Constitution of India is no more res-integra and completely answered by the authoritative pronouncement by the Hon"ble Apex Court in the case of Smt. Selvi and Ors. v. State of Karnataka reported in 2010 (3) SC 558. The Hon"ble Apex Court in para 192 of the said judgment, held thus;-

192. So far as the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law

mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person "to impart personal knowledge about a relevant fact". The theory of interrelationship of rights mandates that the right against self incrimination should also be read as a component of "personal liberty" under Article 21. Hence, our understanding of the "right to privacy" should account for its intersection with Article 20(3). Furthermore, the "rule against involuntary confessions" as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognize the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be a no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties.

7. In para 193 of the said judgment, the Apex Court opined that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the "right against self-incrimination". However, this determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction. In such case he/she could still face adverse consequences such as custodial abuse, surveillance, undue harassment and social stigma among others.

8. In para 223 of the said judgment, it is further held 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. In the said paragraph, the Hon"ble Supreme Court has further laid down the guidelines. These guidelines are laid to safeguard the interest of the accused while conducting "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 to 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.

9. In the instant case, it is an admitted position that the petitioner have not consented for Narcoanalysis test or any other test before the learned Judicial Magistrate. Therefore, since there is no consent by the petitioner for the said tests, the question of applying the guidelines laid down by the Hon"ble Supreme Court does not arise in this case.

10. In the facts of this case and upon perusal of the order dated 28.1.2010, passed by the learned J.M.F.C., we have seen that the original accused No. 1 has consented for Narco analysis test and the present petitioner, who is original accused No. 2, has not given consent for Narco Analysis test, we therefore, inclined to maintain the order dated 28.1.2010 in so far as accused No. 1 is concerned. However, we are inclined to allow the petition filed by the petitioner.

11. In the light of what is stated herein above and in view of authoritative pronouncement by the Hon"ble Apex Court in the case of Smt. Selvi and Ors. (supra), we set aside the impugned order dated 28.1.2010 qua the petitioner herein i.e. original accused No. 2 in crime No. I-166 of 2010 registered with Shevgaon police station.

12. Writ petition is allowed accordingly and disposed of. Rule made absolute in the above terms.