



2024/KER/54309

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 11TH DAY OF JULY 2024 / 20TH ASHADHA, 1946

CRL.MC NO. 5865 OF 2024

CRIME NO.441/2022 OF WADAKKANCHERY POLICE STATION, THRISSUR
IN S.C. NO.991 OF 2022 OF FAST TRACK SPECIAL COURT, WADAKKANCHERY

PETITIONER/1ST ACCUSED:

ABOUBAKKAR @ ABU
AGED 56 YEARS
S/O SOMMU, PATTACHALIL HOUSE, CHITTANDA VILLAGE,
CHITTANDA DESAM, THRISSUR, PIN - 680585
BY ADVS.
BONNY BENNY
SANIL JOSE
AMALJITH
MANAS P HAMEED

RESPONDENTS/COMPLAINANT/STATE:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
PIN - 682031
- 2 XXXXXXXXXXXX
XXXXXXXXXX

PP - M P PRASANTH

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
11.07.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**“C.R.”****ORDER****Dated this the 11th day of July, 2024**

This Criminal Miscellaneous Case has been filed challenging Annexure.A3 order dated 27.04.2024 in CrI.M.P.No.63/2024 in S.C.No.991/2022 on the files of the Special Court for the trial of offences under the Protection of Children from Sexual Offences Act [hereinafter referred as 'POCSO Act'], Wadakkanchery, whereby the Special Judge dismissed an application filed by the 1st accused under Section 45 of the Evidence Act, to subject PW1 to PW3 to Narco Analysis Test or Polygraph Test, to prove the defense case. The petitioner herein is the 1st accused in the above case.

2. Heard the learned counsel for the petitioner and the learned Public Prosecutor. Perused the impugned order and relevant materials available.

3. In this matter, the prosecution allegation is that, the accused who used to go to the area of the house of the victim in Puduruthi Village for selling fish on a motor cycle, with sexual intent, developed intimacy with the victim, a girl child



aged 10 years, by giving fish to feed her pet cats. Then, on two different days during the period from 01.04.2022 to 10.05.2022, the accused called the victim to a place near the steps in front of the house of the victim and the road in front of the steps by offering fish to her pet cats and committed sexual assault on the victim by touching on her private part. Thereafter, on a day in May 2022 in between 10.30 a.m. and 11.30 a.m., the accused took the victim to a secluded place on the road near her house and repeated the sexual assault against her by touching on her private part and making her to hold the penis of the accused. On this premise, the prosecution alleges commission of offences punishable under sections 354, 354A(1)(i) and (ii) of IPC, Section 8 r/w 7, 10 r/w 9(1), 10 r/w 9(m), 12 r/w 11(i) and 12 r/w 11(iv) of the POCSO Act. It is also alleged that the accused who does not belong to either Scheduled Caste or Scheduled Tribe, committed the sexual assault against the victim knowing that the victim is a member of scheduled caste and thereby committed offence punishable under sections 3(1)(w)(i) and 3(2)(va) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act (hereinafter referred as 'SC/ST (POA) Act' for short).



4. On the above facts, the Special Judge framed charge and proceeded with trial. Then, prosecution evidence completed and after questioning the accused under Section 313 of Cr.P.C., the case was posted to adduce defense evidence. At this stage, the accused/petitioner herein filed petition under Section 45 of the Evidence Act with prayer to direct PW1 to PW3 (the defacto complainant and her parents) to undergo Narco Analysis Test or Polygraph Test to prove his innocence, contending that the allegations against him are false and family of the defacto complainant had borrowed an amount of Rs.1,50,000/- from the accused and this case was foisted against the accused to avoid repayment of the said amount.

5. The learned Special Judge as per Annexure.A3 order dismissed the application for the reasons stated in paragraph No.7 of the order and the same is as under:

“The grounds canvassed by the petitioner for subjecting PW1 to PW3 for Narco analysis or Polygraph test can only be considered as matters for his defence. The accused has no right to demand that the victim and her family should undergo a lie detection test. Moreover, it is a settled law that the information extracted through deception detection tests such as Polygraph test,



Narco analysis or brain mapping cannot be used as conclusive evidence during the trial stage. There is no request for the accused to undergo narco analysis by himself. In support of his defence the accused has already produced some documents and cited witnesses. In the above circumstances this court is of the view that the present petition is only to protect the proceedings. Hence it is liable to be dismissed”

6. It is submitted by the learned counsel for the petitioner that the Special Judge even not made any attempt to ascertain the willingness of PW1 to PW3 to subject themselves for Narco Analysis Test or Polygraph Test to prove the defense. He has placed decision of this Court in ***Louis v. State of Kerala [2021 (6) KLT 683]***, with reference to paragraph No.22, to contend that an accused cannot ask for subjecting himself for Narco Analysis Test.

7. In so far as the question as to whether a person shall be directed to subject himself for Narco Analysis Test or Polygraph Test, the Three Bench decision of the Apex Court reported in ***Smt.Selvi and Others v. State of Karnataka [2010 (7) SCC 263]*** is relevant and in the said decision it has been held paragraph 204 as under:

“204. We can also contemplate a possibility that even when an individual freely



consents to undergo the tests in question, the resulting testimony cannot be readily characterised as voluntary in nature. This is attributable to the differences between the manner in which the impugned tests are conducted and an ordinary interrogation. In an ordinary interrogation, the investigator asks questions one by one and the subject has the choice of remaining silent or answering each of these questions. This choice is repeatedly exercised after each question is asked and the subject decides the nature and content of each testimonial response. On account of the continuous exercise of such a choice, the subject's verbal responses can be described as voluntary in nature. However, in the context of the impugned techniques the test subject does not exercise such a choice in a continuous manner. After the initial consent is given, the subject has no conscious control over the subsequent responses given during the test. In case of the narcoanalysis technique, the subject speaks in a drug- induced state and is clearly not aware of his/her own responses at the time. In the context of polygraph examination and the BEAP tests, the subject cannot anticipate the contents of the 'relevant questions' that will be asked or the



'probes' that will be shown. Furthermore, the results are derived from the measurement of physiological responses and hence the subject cannot exercise an effective choice between remaining silent and imparting personal knowledge. In light of these facts, it was contended that a presumption cannot be made about the voluntariness of the test results even if the subject had given prior consent. In this respect, we can re-emphasize Principle 6 and 21 of the Body of Principles for the Protection of all persons under any form of Detention or Imprisonment (1988). The explanation to Principle 6 provides that:

"The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time."

*Furthermore, Principle 21(2) lays down that:
"No detained person while being interrogated shall be subjected to violence, threats or*



methods of interrogation which impair his capacity of decision or judgment."

8. Again in paragraph Nos. 221 to 223 the Apex Court concluded as under:

221. 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 Art.20(3) extends to the investigative stage in criminal cases and when read with S.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. Art.20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Art.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.

222. 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 S. 53, S. 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'.

223. 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 S.27 of the Evidence Act, 1872. 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.

9. It is true that, conduct of Narco Analysis Test or Polygraph test is a device during investigation, but the said procedure can be adopted only when the person, who will be subjected to such test is willing to do the same. But, an accused, who is defending a case cannot unilaterally ask the witnesses or victims to subject themselves for Narco Analysis Test or Polygraphic Test to prove his defense case.

In such view of the matter, this petition lacks merits and the impugned order do not require interference. Accordingly, this petition stands dismissed.

**Sd/-
A. BADHARUDEEN
JUDGE**



APPENDIX OF CRL.MC 5865/2024

PETITIONER ANNEXURES :

- Annexure A1** **THE TRUE COPY OF THE APPLICATION FILED BY THE PETITIONER DATED 23.02.2024**
- Annexure A2** **THE TRUE COPY OF THE COUNTER FILED BY THE PUBLIC PROSECUTOR DATED 23/3/2024**
- Annexure A3** **THE TRUE COPY OF THE ORDER OF IN CRL M P NO.63/2024 IN SC NO.991/2022 BEFORE THE FASTRACK SPECIAL COURT (POCSO CASES), WADAKKANCHERY DATED 27.04.2024**