C.R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

FRIDAY, THE 19TH DAY OF NOVEMBER 2021 / 28TH KARTHIKA, 1943

CRL.MC NO. 4007 OF 2021

PETITIONER/PETITIONER/ACCUSED

LOUIS
AGED 68 YEARS
CHITTALAPPILLY HOUSE, MANNUTHY P.O., MEENACHERRY GARDEN DESOM, OLLUKKARA VILLAGE, THRISSUR,PIN-680 651

BY ADVS.
M.REVIKRISHNAN
P.M.RAFIQ
SRUTHY N. BHAT
AJEESH K.SASI
POOJA PANKAJ

RESPONDENT/RESPONDENT/COMPLAINANT

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-682 031

2 ADDL.R2.XXX
IS IMPLEADED AS ADDL.R2 AS PER ORDER DATED 10.9.2021 IN CRL.MA 2/2021

BY ADVS.
S.S.ARAVIND
M.V.AMARESAN

PP SANGEETHARAJ N.R

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 5.11.2021, THE COURT ON 19.11.2021 DELIVERED THE FOLLOWING:

ORDER

Dated : 19th November, 2021

C.R.

1. The only question for determination in this Crl.M.C is whether the petitioner/accused has got any right to seek himself to be subjected to Narco Analysis Test. The impugned order has been passed by the Fast Tract Special Judge, Thrissur in S.C.No.160/2015 in a petition filed under Section 45 of the Indian Evidence Act,1872 and Section 293 of the Code of Criminal Procedure,1973 to subject the accused to Narco Analysis Test.
2. Heard both sides. (The victim was subsequently got impleaded as additional second respondent).
3. According to the learned counsel for the petitioner/accused (hereinafter referred as 'the petitioner'), petitioner has been charged under Section 376(2)(i) of the Indian Penal Code, 1860 (in short IPC) and Section 6 r/w 5 (m) of the Protection of Children from Sexual Offences Act, 2012 (PoCSO Act). The impugned order would show that the prosecution evidence is over and accused was also questioned under Section 313 of the Code of Criminal Procedure,1973 (in short Code) and the case stands posted for defence evidence. It is at that juncture the petitioner filed the petition which resulted in the impugned

order.

4. Section 233 of the Code provides for entering upon defence which is relevant in this context to be extracted and it reads as follows :-

> Entering upon defence
> (1) Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.
> (2) If the accused puts in any written statement, the Judge shall file it with the record.
> (3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.

5. The above provision would make it clear that as per sub section (1)of section.233 the accused upon his defence can adduce any evidence in support of his defence. Sub-section (2) enables the accused to file any written statement and if so filed the Court shall file it with the record and sub-section (3) enables the accused to seek for issue of any process for compelling the attendance of any witness or production of any document or thing with a rider that if the Judge considers for specific reasons that application should be refused on the ground that it has

been made for the purpose of vexation or delay or for defeating the ends of justice etc.., the court can refuse to entertain the same.

6. Section 3 of the Evidence Act which deals with Interpretation clause describes evidence as follows :-

> "Interpretation clause – In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context."
> .....
> "Evidence" .— " Evidence" means and includes—
> (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;
> (2) all documents including electronic records produced for the inspection of the Court], such documents are called documentary evidence.

7. Sub clause (1) provides that all statements which the Court permits or requires to be made before it by witness in relation to matters of fact under inquiry and that evidence is called as oral evidence. Sub-clause (2) provides that all documents including electronic records produced for the inspection of the Court and such documents are called documentary evidence. So these are the forms of evidence which the petitioner could adduce as per sub-section (1) of Section 233. The learned Public

Prosecutor brought my attention in this context the 'Interpretation of fact' in the Evidence Act which reads as follows :-

> "Fact" - "Fact" means and includes –
> (1) any thing, state of things, or relation of things, capable of being perceived by the senses;
> (2) any mental condition of which any person is conscious."

8. The learned Public Prosecutor emphasizes that sub-clause (2) provides that only mental condition of which any person is conscious comes under the definition of fact.

9. According to the learned counsel for the petitioner the law laid down in **Smt.Selvi & Ors. v. State of Karnataka (2010 (7) SCC 263)** is that subjecting an accused to scientific test like Narco Analysis, Brain Maping, Polygraph,Lie detection Test etc., without the permission of the accused, by the prosecuting Agency will amount to testimonial compulsion and as such cannot be permitted in view of the constitutional safeguard against the same. But in this case, the petitioner is a hapless old man and has been accused of an offence with reverse burden of proof and is coming to Court voluntarily submitting himself to undergo the Narco Analysis in order to prove his innocence. The learned counsel would further contend that

Sections 29 and 30 of the PoCSO Act provide for reverse burden of proof including culpable mental state of the accused. So it is for the accused to disprove such statutory presumptions. In such circumstances, the request made by the accused for subjecting him to Narco Analysis is to be allowed to buttress his statement under Section 313 of the Code, contends the learned counsel.

10. Section 29 of the PoCSO Act expressly provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

11. Section 30 of the PoCSO Act provides that in any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Sub-section (2) of Section 30 of the PoCSO Act further provides that, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a

preponderance of probability. Explanation to Section 30 further makes it clear that “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

12. In **Justin @ Renjith and Another V.Union Of India ILR 2020 Ker.679** it has been held by a learned single Judge of this court that duty of prosecution to establish foundational facts and duty of accused to rebut presumption arise only after prosecution has established foundational facts of the offence alleged against the accused. It is also found that though in the light of presumptions, the burden of proof oscillate between the prosecution and the accused,depending on the quality of evidence let in ,in practice process of adducing evidence in a PoCSO case does not substantially differ from any other criminal trial.

13. In **David V State of Kerala (2020 (5) KLT 92:2020 CrLJ 3995)** another learned single Judge of this court has held that the presumption under Section 29 of the PoCSO Act does not in any way affect the obligation of the prosecution to produce admissible evidence to prove the foundational facts constituting the offence .

14. **Harendra Sarkar v. State of Assam (2008 9 SCC 204:AIR 2008 SC 2467)** was quoted by the learned Judge in

that decision where in it has been held by the Apex Court that the Parliament certainly has the power to lay down a different standard of proof for certain offences or certain pattern of crimes subject to the establishment of some foundational facts and the same would not therefor affect any of the constitutional and established rights of the accused in such cases.

15. So Section 29 and 30 of the Act does not give any special rights to the prosecution to refrain from adducing evidence in the normal course as in a criminal case to prove the guilt of the accused beyond reasonable doubt. If the basic facts proving guilt is proved by the prosecution, presumption starts to run. It is for the accused to rebut that presumption. If the prosecution proved the acts, as per Section 30 of the Act, presumption of culpable mental state begins to run. It is for the accused to rebut that presumption.

16. For example, suppose an accused is facing trial under Section 7 of the PoCSO Act on allegation that he touched the breast of the child on a public road and thereby committed sexual assault. The burden of prosecution is discharged once evidence to the effect that accused touched the breast of the child is adduced through the victim and witnesses. The court may presume that it was done with sexual intention. But the burden to establish that it was not done with sexual intent is

upon the accused. He can very well establish that while child was about to fall by slip, he tried to rescue her and in that event his hand happened to touch on the breast of the child. That is a factor to be established by the accused. That is all.

17. In **Selvi's** case, the Apex Court categorically held that no individual should be forcibly subjected to any of the techniques where in the context of investigation in criminal cases or otherwise and doing so would amount to an unwarranted intrusion into his personal liberty guaranteed under Articles 20(3) and 21 of the Constitution of India. Paragraph Nos.47, 74, 204, 205 and 213 of **Selvis'** case are relevant to be extracted which read as follows :-

> 47. It is also important to be aware of the limitations of the `narcoanalysis' technique. It does not have an absolute success rate and there is always the possibility that the subject will not reveal any relevant information. Some studies have shown that most of the drug-induced revelations are not related to the relevant facts and they are more likely to be in the nature of inconsequential information about the subjects' personal lives. It takes great skill on part of the interrogators to extract and identify information which could eventually prove to be useful. While some persons are able to retain their ability to deceive even in the hypnotic state, others can become extremely suggestible to questioning. This is especially worrying, since investigators who are under pressure to deliver results could frame questions in a manner that prompts incriminatory responses. Subjects could also concoct fanciful stories in the

course of the `hypnotic stage'. Since the responses of different individuals are bound to vary, there is no uniform criteria for evaluating the efficacy of the `narcoanalysis' technique."

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74. Another significant limitation is that even if the tests demonstrate familiarity with the material probes, there is no conclusive guidance about the actual nature of the subject's involvement in the crime being investigated. For instance a by-stander who witnessed a murder or robbery could potentially be implicated as an accused if the test reveals that the said person was familiar with the information related to the same. Furthermore, in cases of amnesia or `memory-hardening' on part of the subject, the tests could be blatantly misleading. Even if the inferences drawn from the `P300 wave test' are used for corroborating other evidence, they could have a material bearing on a finding of guilt or innocence despite being based on an uncertain premise. [For an overview of the limitations of these neuroscientific techniques, see: John G. New, `If you could read my mind - Implications of neurological evidence for twenty-first century criminal jurisprudence', 29 Journal of Legal Medicine 179-197 (April-June 2008)]

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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."

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205. It is undeniable that during a narcoanalysis interview, the test subject does lose `awareness of place and passing of time'. It is also quite evident that all the three impugned techniques can be described as methods of interrogation which impair the test subject's `capacity of decision or judgment'. Going by the language of these principles, we hold that the compulsory administration of the impugned techniques constitutes `cruel, inhuman or degrading treatment' in the context of Article 21. It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as `torture' and `cruel, inhuman or degrading treatment' are associated with gory images of blood-letting and broken bones. However, we must recognize that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences. [A similar conclusion has been made in the following paper: Marcy Strauss, `Criminal Defence in the Age of Terrorism - Torture', 48 New York Law School Law Review 201-274 (2003/2004)].

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213. Another important consideration is that of ensuring parity between the procedural safeguards that are available to the prosecution and the defence. If we were to permit the compulsory administration of any of the impugned techniques at the behest of investigators, there would be no principled basis to deny the same opportunity to defendants as well as witnesses. If the investigators could justify reliance on these techniques, there would be an equally compelling reason to

> allow the indiscrete administration of these tests at the request of convicts who want re-opening of their cases or even for the purpose of attacking and rehabilitating the credibility of witnesses during a trial. The decision in United States v. Scheffer, 523 US 303 (1998), has highlighted the concerns with encouraging litigation that is collateral to the main facts in issue. We are of the view that an untrammelled right of resorting to the techniques in question will lead to an unnecessary rise in the volume of frivolous litigation before our Courts.

18. So when a Narco Analysis test is conducted with the intervention of some medication, when a person is not conscious and make some revelations from the sub conscious mind the credibility of that revelation stands far short of the fact described under the Evidence Act. The possibility of some persons concocting fanciful stories in the course of hypnotic stage also cannot be ignored. The responses of different individual in such circumstances would vary the result of not having any uniform criteria for evaluating the efficacy of the Narco Analysis technique is a matter of another concern as per the dictum in the **Selvi's** case.

19. The possibility of the testimony being not voluntary even if the person freely consents to undergo the test also is there. The danger of the person not being able to exercise an effective choice of remaining silent and imparting personal knowledge is

also there since the results are derived from the psychological responses. Apex court also had foreseen the danger of such test being permitted at the instance of prosecution since on the principle of parity of procedure if the accused files such application that also has to be allowed. That would result in re opening of cases or even can be used for the purpose of attacking the credibility of witnesses during trial.

20. Hence even if the petitioner voluntarily submits for subjecting himself for Narco Analysis Test, there is no guarantee that the statements would be voluntary. So even if the court permits the petitioner to undergo a Narco Analysis test, it has no acceptability in the eye of law.

21. The learned counsel for the de facto complainant brought to my attention **Vipin Kushwaha v. The State of M.P. in M.Cr.C.No.11699/2021** dated 6.9.2021 of Madhya Pradesh High Court. That was also a petition filed under Section 482 of the Code aggrieved by an order rejecting an application filed by the applicant seeking direction to perform his Narco Test. In that decision the High Court quoted Yogesh @ Charu Ananda Chandane v. State of Maharashtra, an order passed in M.Cr.C.No.11699/2021, petition No.2420/2016 wherein the High Court of Bombay rejected the similar prayer for Narco Analysis. The relevant paragraph No.7 has been quoted in the above

decision which reads thus : -

> "In fact, the order passed by the learned Sessions Judge does not warrant any interference. That the evidence which is recorded in the course of the Narco Analysis Test or Polygraph Test is not admissible in evidence. It would be a hazardous situation to permit any/every accused to undergo narco analysis test for proving his innocence. It is incumbent upon the prosecution to substantiate its case and prove the guilt of the accused beyond reasonable doubt. Criminal Jurisprudence contemplates that an accused has a right to silence and it is the duty of the prosecution to prove its case beyond reasonable doubt. The technique such as polygraph test and narco analysis test would be helpful technology for the investigating agency or to seek a direction in the course of investigation.
>
> "We must also account for the uses of this technique by persons other than investigators and prosecutors. Narco Analysis tests could be requested by defendants who want to prove their innocence."

22. In the present case also, the petitioner wanted to subject himself to Narco Analysis Test which according to the learned counsel, is necessary to buttress his statements under Section 313 Cr.P.C. The above settled principles of law unequivocally lay down the position that the revelations brought out during Narco Analysis under the influence of a particular drug cannot be taken as a conscious act or statement given by a person. The possibility of accused himself making exculpatory statements to

support his defence also cannot be ruled out. There is no mechanism or the present Investigating Agency is also not equipped to assess the credibility of such revelations of the accused. The Investigating Officers also would find themselves difficult to come to a definite conclusion regarding the veracity of the revelations so made and the other evidence already collected by them. So the contention of the learned counsel for the petitioner that in order to buttress his statements under Section 313 Cr.P.C , these materials collected through Narco Analysis Test can be used as corroborative piece of evidence etc, is not at all sustainable in law.

23. In the result, Crl.M.C is found to be devoid of any merit and hence dismissed.

Sd/-

M.R.Anitha
JUDGE

Mrcs/8.11.

ANNEXURES

Annexure A	TRUE COPY OF THE AFFIDAVIT ALONG WITH THE PETITION PREFERRED BY THE PETITIONER AS CRL.M.P.NO.209 OF 2021 IN S.C.NO.160 OF 2015 OF THE COURT OF THE (FAST TRACT) SPECIAL JUDGE, THRISSUR DATED 09.08.2021
Annexure B	TRUE COPY OF THE OBJECTION PREFERRED BY THE SPECIAL PROSECUTOR TO CRL.M.P.NO.209 OF 2021 ON THE FILES OF THE COURT OF THE (FAST TRACT) SPECIAL JUDGE, THRISSUR
Annexure C	TRUE COPY OF THE ORDER DATED 27.08.2021 IN CRL.M.P.NO.209 OF 2021 IN SC NO.160 OF 2015 PASSED BY THE COURT OF THE (FAST TRACT) SPECIAL JUDGE, THRISSUR
Annexure D	TRUE COPY OF ORDER FRAMING CHARGE IN SC NO.160 OF 2015 OF THE COURT OF THE (FACT TRACT) SPECIAL JUDGE, THRISSUR DATED 05.03.2021