NARCO ANALYSIS AND BLOOD TEST: A MANDATE OF FAIR INVESTIGATION

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INTRODUCTION

Where there is a crime there is a victim and there is a culprit. A fair investigation unveils the unruly face of the culprit of the crime in question. But crime investigation is not a simple process. It is a process which mandates fairness in all sense. In order to achieve this fairness, investigation has to fetch evidences and it also outlines a list of suspects. These suspects later metamorphose to accused of a case on further collection of evidence. Narco analysis and blood test are certain scientific mechanisms by which the guilt or innocence of an accused can be confirmed as the case may be. However, there is widespread criticism against such tests cemented by rights of privacy and rights against self-incrimination. The arguments against such tests are brought in by the accused and the prosecution vouches for the conduction of such tests.

Let us start from the prosecution point of view. The fundamental rights bestowed under the Constitution is intended to protect an accused person from the hazards of self-incrimination, but not intends to put obstacles in the way of efficient and effective investigation into the crime and bringing criminals to justice.\(^1\) Invariably, accused is/are questioned in every crime as, at times, it helps the investigation of the crime.\(^2\) The victim has a right to be protected against the criminal\(^3\), and all of victim's rights are manifestly superior to those of the criminal.\(^4\) There can be no gain saying the fact that a suspect is either innocent or guilty, and no one knows the truth better than does the suspect himself.\(^5\) It, therefore, stands to reason, that where there is a safe and humane measure existing to evoke the truth from the consciousness of the suspect, then the truth must be extracted.\(^6\)

The argument of the accused trails. The maxim, *nemo tenetur seipsum prodere* has become clothed in this country with the impregnability of a constitutional enactment.\(^7\) If the

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\(^1\) *Kerala High Court Sasikumar, v. Sub Inspector Of Police, (2007) 2 SCC 165*


\(^3\) *Gajendra v. State of U.P AIR 1975 SC 1703*

\(^4\) *Lalita Kumari v. Govt. of U.P. (2014) 2 SCC 1*

\(^5\) *State(NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600*


\(^7\) *Smt.Selvi v. State of Karnataka, AIR 2010 SC 1974*
accused is being administered these tests against his will and it is therefore in a way compulsion against these persons to be witnesses against themselves.  

**FUNDAMENTAL RIGHTS PERSPECTIVE**

Narco Analysis test is thoroughly scientific, perfectly harmless and humane, since by no flight of the imagination can it be considered in any way cruel. It need not be said that prevention of crime and punishment for the crime are the duties of the State. Fetters on these duties can be put only in extreme cases where the protection of fundamental rights weighs more than the fundamental duties casted on the State. The involuntary administration of narco analysis is a reasonable restriction on `personal liberty'. It is a well settled principle that personal liberty guaranteed in our constitution is not absolute and fetters can be placed on them according to a procedure established by law. It is a priori that if a person’s liberty is taken away by any substantive due process, then it does not violate Article 21. The involuntary administration of any of these tests is compatible with the constitutional guarantee of `substantive due process.' The procedural law of our country is endowed with numerous provisions for narco analysis and blood test.

The contrary argument is that narco analysis is in clear infringement of Article 21. This contention gains strength from the adherence to submission that Article 21 has been judicially expanded to include a `right against cruel, inhuman or degrading treatment'. Narco analysis is a form of violence or intrusion of a moral or mental nature, more subtle than visible violence administered by force. The law should not incentivize the use of interrogation tactics that

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9 *Rojo George v. Deputy Superintendent of Police* 2006 (2) KLT 197  
11 *Smt. Selvi.v. State* 2004 (7) Kant LJ 501  
12 *Murugesan v. State* (2007) 2 MLJ (Crl) 894  
14 *Maneka Gandhi v. Union Of India* 1978 AIR 597; *Indira Sawhney v. Union of India* AIR 1993 SC 477  
16 *Arun Gulab Gavali v. State Of Maharashtra* 2006 CriLJ 2615
violate the dignity and bodily integrity of the person being examined. Subjecting the accused to narco analysis violates the multiple dimensions of personal liberty recognized by the court.

Another opposition to narco analysis is that it violates the accused’s right to fair trial. Free and fair trial is a sine qua non of Article 21 of the Constitution. Fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial has been accorded to every accused in the spirit of right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. The trial should be a search for the truth and not about over technicalities and must be conducted under such rules as will protect the innocent. Moreover, everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law. The guarantee of ‘presumption of innocence’ bears a direct link to the ‘right against self-incrimination’ since compelling the accused person to testify would place the burden of proving innocence on the accused instead of requiring the prosecution to prove guilt.

The privacy rights rooted in Article 21 also plays its role against narco analysis. Article 21 has been judicially expanded to include the right to privacy. Narco analysis infringes the accused’s right to privacy, both in a physical and mental sense. During the induction period and particularly during the recovery interval, patients were prone to make extremely naive remarks about personal matters, which, in their normal state, would never have revealed. 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. The ambit of personal liberty guaranteed under Article 21 is very wide and it concludes the right for their privacy,

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18 Prabhu Dayal Deorah v. District Magistrate, Kamrup, AIR 1974 SC183
22 Mohd. Hussain @ Jafikar Ali v. State (Govt. of NCT of Delhi), AIR 2012 SC 750
24 Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 14(3)(g) the International Covenant on Civil and Political Rights (ICCPR).
25 Ibid
26 People’s Union for Civil Liberties (PUCL) v. Union of India, (1997) 1 SCC 301; R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264
29 Sister Sister Sherly, v. Central Bureau Of Investigation (2009) 1 SCC 342
which cannot be intruded by administering drugs to conduct narco analysis test. The right of privacy is an essential component of the right to life envisaged by Art.21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. Therefore conducting narco analysis or blood test is not an intrusion into the privacy of accused.

Another point of criticism is that the involuntary administration of any of these tests is incompatible with the constitutional guarantee of ‘substantive due process.’ There is no law in force which permits the use of these tests on the accused. As explicated by the court, if there is no other provision providing for a power, it ought not to be read in any other provision. Referring to the relevant provisions which permit the compulsion to perform certain acts by an accused, it is clear that there is no such compulsion adumbrated under Cr.P.C. In the absence of any specific provision in the enactment subjecting the accused to compulsion to participate in the Test, any direction issued to the accused to present himself in the Test would be directly hit by the provision under Article 20(3) of the Constitution of India. Section 53 does not include injecting drug to accused.

Further, the definition of the investigation under section 2(h) of the takes in only collection of evidence by a Police Officer or by any person who is authorised by a Magistrate in this behalf and hence will not take in, narco analysis test being conducted by the expert in that field and therefore the test is not authorised by the Code of Criminal Procedure. It is evident that Section 161(2), Cr.P.C. enables a person to choose silence in response to questioning by a police officer during the stage of investigation. The narco analysis also violates Section 161, Cr.P.C. which protects the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. If the accused is indeed compelled to make statements while in custody, relying on such testimony as well as its

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32 Murugesan v. State (2007) 2 MLJ (Crl) 894
33 Ibid
38 Vinayagam v. State (2006) 1 MWN (Cri) 409
derivative use will offend Article 20(3). The scheme of the CrPC itself acknowledges this hierarchy between constitutional and statutory provisions in this regard.

It is an often unraveled argument by the accused in most of the cases that administering the narco analysis and blood test, interferes with the protection guaranteed under Article 20(3). Article 20, it is one of the fundamental protections that controls interactions between individuals and the criminal justice system. The involuntary administration of the narco violates the `right against self- incrimination'. In order to invoke Article 20(3) there must be formal accusation of commission of any offence, the accused of such formal accusation should be compelled to make a statement and the statement so compulsorily made or evoked or provoked is incriminating to the accused or maker thereof.

An accused cannot claim protection under Article 20 (3). In order to invoke Article 20(3) the accused should be compelled to make a statement and the statement so compulsorily made or evoked or provoked should be incriminating to the accused. Here there is no testimonial compulsion and Narco analysis does not amount to testimonial compulsion. The compulsion in the above sense is physical objective act and not state of mind of person making the statement. Hence, the mere asking by a police officer investigating the crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3) of the Constitution of India.

The accused also tends to put forth that the techniques of narco analysis and blood test amount to testimonial compulsion thereby attracting the bar of Article 20(3). The administering of the impugned tests could prompt a person to make incriminatory statements.

41 State of Bombay v. Kathi Kalu Oghad AIR 1961 SC 131
42 Sri Maruthi Processors v. R. Subramanian (2013) 2 MWN (Cri) DCC 49
45 Sr. Sephy, St. Pious Xth Convent v. Union Of India 2009 (4) KLT 287; Shobhit Samayya v. The State Of Madhya Pradesh W.A. No. 1185/2012
46 Chandran v. State of Kerala 1987(1) KLT 391
Hence, the act of threatening to administer the impugned tests could also elicit testimony. It was held that law confers on 'any person' who is examined during an investigation, an effective choice between speaking and remaining silent. It is, therefore, submitted that Narco Analysis Techniques involves a testimonial act. A person who is subjected to such a Test is encouraged by official means by injecting drugs and pushing such a person to a drug-induced state. Such a technique of eliciting answers and information is totally different from verbal answers which may give during an ordinary interrogation. The verbal responses articulated by an accused during the process of such tests would amount to oral statements emanated from his personal knowledge of the facts. Therefore, subjecting an accused to such tests for the purpose of drawing information from the personal knowledge of an accused against his will and pleasure would amount to testimonial compulsions and violative of Article 20(3) of the Constitution of India.

Further, blood test results obtained from blood test are treated as personal testimony since they are a means for imparting personal knowledge about relevant facts. Hence, it must be concluded that the results obtained through the involuntary administration of either of the impugned tests come within the scope of testimonial compulsion thereby attracting the protective shield of Article 20(3).

Self-incrimination occupies the paramount position in the argument of an accused who is subjected to narco analysis and blood test. In order to bring the evidence within the inhibition of Clause 3 of Article 20, it must be shown that it had a material bearing on the criminality of the maker of the statement. When the accused undergoes narco analysis test or blood test, he comes out with certain incriminating facts as against himself from his personal knowledge. The protection is against compulsion to administer a test or make a statement and not a protection

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50 Sukhvinder v. State Of Haryana on CRM No. M-18014 of 2010 (O&M)
51 Sh.Shailender Sharma v. State (2009) 1 KLD 212
52 Avtar Singh v. State of Haryana (2006) 2 RCR (Cri) 152
53 Ibid
56 Ibid
57 Ibid
58 Panner Selvam v. State, (2012) 1 MWN (Cri) 310
59 Sukhvinder v. State Of Haryana on CRM No. M-18014 of 2010 (O&M)
60 Ibid
against user of that statement as evidence.\textsuperscript{61} Therefore the protection granted by this clause commences the moment the witness or the accused is told that he has to undergo the test.\textsuperscript{62} The investigative use of the impugned techniques creates a likelihood of incrimination for the subject.\textsuperscript{63} It could expose the accused to criminal charges.\textsuperscript{64} The statements made could be directly relied upon by the prosecution to strengthen their case.\textsuperscript{65} Moreover, when information revealed during such leads to the discovery of independent materials, thereby furnishing a link in the chain of evidence gathered it must be held wide enough to cover a case which offends Art.20(3).\textsuperscript{66}

However, in my view point, extracting blood sample is not a testimonial compulsion within the meaning of Article 20(3). Compelling a person physically or morally to give evidence against himself for the purpose of extorting communications from him is prohibited, but not exclusion of his body as evidence when it is material to do so.\textsuperscript{67} It has been categorically pronounced by the Hon’ble Supreme Court that exposing part of the body by an accused person for the purpose of identification would not amount to furnishing evidence in the capacity as a witness.\textsuperscript{68} Conducting DNA test is held to be not violative of Article 20(3) of the Constitution of India as subjecting an accused to give material sample of DNA would not amount to testimonial compulsion of an accused.\textsuperscript{69} No oral response is articulated by the accused exposing him to self-incrimination during the course of blood test.\textsuperscript{70} Therefore, the blood test conducted with the compulsory association of an accused would not violate the spirit of Article 20(3) of the Constitution of India.\textsuperscript{71}

Another point for consideration is that the statement so compulsorily made or evoked or provoked should be incriminatory to the accused. As explicated in \textit{Dushyant Somal v. Sushma Mohinder Singh v. Surendra Koli}, (2009) 84 (Sum 2) 2
\textit{Abhai Singh v. State of U.P.} (2009) 75 ALR 269
\textit{Chandra Mohan Shukla v. Anil Dhirubhai Ambani}, (2011) 1 All LJ (NOC 105) 28
\textit{Kalawati v. State of H.P.}, AIR 1953 SC 131
\textit{Holt vs. United States}, 218 U.S. 245(1910)
\textit{Dastagir v. State of Madras} AIR 1960 SC 756
Somali if the statements extracted from accused do not incriminate him then Article 20(3) is not called for.

Results of Narco analysis is not incriminating to the accused. To attract the protection under 20(3) it must be of such a character that a statement by itself should have the tendency of incriminating the accused. It should be a statement which makes the case against the accused at least probable, considered by itself. The Court has then and again indicated that Article 20(3) could be invoked only against statements which had a material bearing on the criminality of the maker of the statement. In light of these observations, it could be seen that a statement extracted through narco analysis does not by itself incriminate the accused. Such statements may furnish a link in the chain of evidence and hence create a risk of exposure to criminal charges. The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that Section 27 and it was is not held ultra vires the constitution. However, it is conceivable that in some circumstances the testimony extracted through compulsion may not actually lead to exposure to criminal charges or penalties. At the time of administering the impugned tests, it cannot be ascertained whether the resulting revelations or inferences will prove to be inculpatory or exculpatory in due course. Taking this reasoning forward, it was held that the narco analysis test does not attract protection of Article 20 (3) since the same does not necessarily lead to the extraction of inculpatory evidence. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by

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72 AIR 1981 SC 1026
74 Narayanlal v. Maneck AIR 1961 SC 29
75 Cf. Dana v. State of Punjab, AIR 1959 SC 375
78 Ramachandra Ram Ready v. State of Maharashtra (1973) 1 SCC 417
itself, be the foundation for an inference of law that the accused was compelled to make the statement.  

Conducting blood test for the purpose of a fair investigation does not incriminate the accused. By giving blood sample the accused does not convey information based upon his personal knowledge which can incriminate him. A blood sample by itself is fully innocuous. By comparing it with other evidences, the investigator may draw his conclusion but, blood sample by itself is not incriminating at all. When an accused is asked to give blood sample, he is not giving any testimony of the nature of a personal testimony. When compared with the other samples on hand with the help of mechanical process, it may throw light on the points in controversy. It cannot be said, by any stretch of imagination that by giving blood sample, the accused conveyed any information based upon his personal knowledge and became a witness against himself. The accused by giving the blood sample merely gives ‘identification data’ to the investigating agency. Thus, taking blood sample of an accused by the police during investigation is not hit by Article 20(3) of the Constitution. 

THE SHIELD OF CRIMINAL PROCEDURE CODE 1973 AND INDIAN EVIDENCE ACT 1872

For facilitating effective investigation, Section 53 authorizes investigating machinery to get an arrested person examined by a medical practitioner. A registered medical practitioner at the request of a police officer can lawfully examine the accused to ascertain the facts which may offer some evidence. If there is any resistance from the person arrested to such medical examination, some force reasonably necessary for that purpose can also be used. The doctrine

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82 Neeraj Sharma v. State of U.P. 1993 Cr LJ 2266  
83 Thogorani v. State of Orissa 2004 Cr LJ 4003 (Ori)  
85 Magraj Patodia v. R.K. Birla AIR 1971 SC 1295  
87 Sarwan Singh v. State of Punjab AIR 1957 SC 637  
88 Pyarelal v. State of Rajasthan AIR 1963 SC 1094  
89 Anil Anantrao Lokhande v. State of Maharashtra 1980 Mah LJ 849  
90 Ananth Kumar v. State of A.P. 1977 Crl.LJ 1797  
91 Sh.Shailender Sharma v. State (2009) 1 KLD 212
of ‘ejusdem generis’ entails that the meaning of general words which follow specific words in a statutory provision should be construed in light of commonality between those specific words. It must be acknowledged that substances mentioned in Explanation (a) to Section 53 are examples of such extracted and, hence, the words “and such other tests” mentioned therein should be construed to include narco analysis test as well. In modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, it must be presumed to be aware of an enlarged meaning. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them.

Section 156 authorizes the investigative agency to conduct narco analysis. Section 156(1) empowers any officer-in-charge having jurisdiction to investigate any cognizable case. Admittedly, the offence punishable under Section 302 of the Indian Penal Code is a cognizable offence. So, said provision comes to the aid of investigating agency for investigation. "Investigation" as defined in Section 2(h) of the Criminal Procedure Code includes all the proceedings under the Code of Criminal Procedure for the collection of evidence conducted by a Police Officer. Thus, collection of evidence by Police Officer is permitted under law. Conducting Narco-analysis Test on accused is in the process of collection of such evidence by the investigating agency. So and when the word investigation includes collection of evidence by the I.O., it cannot be termed as unwarranted or bad in law. So long as it is not barred under any statute or does not violate fundamental rights or barred under any other provisions of law, Investigating Agency is definitely entitled to employ the said scientific test.

95 Senior Electric Inspector v. Laxminarayan Chopra (1962) 3 SCR 146
96 Senior Electric Inspector v. Laxminarayan Chopra (1962) 3 SCR 146
97 Section 2(h) of the Criminal Procedure Code, 1973
99 State of West Bengal v. Swapan Guha (1982) 1 SCC 561
100 Sister Sherly, v. Central Bureau Of Investigation (2009) 1 SCC 342
Section 39 of the Criminal Procedure Code casts a duty upon every person to furnish information regarding offences. Criminal justice system cannot function without the cooperation of the people.\textsuperscript{101} Rather, it is the duty of every person to assist the State in the detection of the crime and bringing criminal to justice. Withholding such information cannot be traced to the right to privacy,\textsuperscript{102} which itself is not an absolute right.\textsuperscript{103} it is the statutory duty of every witness, who has the knowledge of commission of crime, to assist the State in giving evidence.\textsuperscript{104}

Apart from the aforementioned provisions, Section 161(1) of Cr.P.C. empowers the police officer investigating a case to orally examine any person who is supposed to be acquainted with the facts and circumstances of the case. Section 161 enables such Police Officer to examine him orally. Sub section (2) of Section 161 mandates that such person shall be bound to answer truly all questions relating to such case put to him by such officer.\textsuperscript{105} The overall intent of these provisions is to ensure the citizens cooperation during the course of investigation.\textsuperscript{106}

The violation of the substantive law of confession contained in Sections 24 to 30 of Indian evidence Act is an argument by the accused built against narco analysis test and blood test. It is a settled principle that statements made in custody are considered to be unreliable\textsuperscript{107} unless they have been established by other cogent evidence.\textsuperscript{108} The scheme created by the Code of Criminal Procedure and the Indian Evidence Act also mandates that confessions made before police officers are ordinarily not admissible as evidence.\textsuperscript{109} The doctrine of excluding the 129 'fruits of a poisonous tree' has been incorporated in Sections 24, 25 and 26 of the Indian Evidence Act, 1872.\textsuperscript{110}

If an individual's `will was overborne' or if his confession was not `the product of a rational intellect and a free will', his confession is inadmissible because coerced.\textsuperscript{111} These standards are applicable whether a confession is the product of physical intimidation or

\begin{itemize}
  \item \textsuperscript{101} Raj Deo Sharma v. State of Bihar (1999) 7 SCC 604
  \item \textsuperscript{102} State v. Dharmapal, AIR 2003 SC 3450
  \item \textsuperscript{103} Mr 'X' v. Hospital 'Z' (1998) 8 SCC 296
  \item \textsuperscript{104} State of Gujarat v. Anirudha Singh (2011) 10 SCC 420
  \item \textsuperscript{105} Arun Gulab Gavali v. State of Maharashtra 2006 Cr LJ 2615
  \item \textsuperscript{107} State of Assam v. Manik Chandra Dey, 1989 Cr LJ 1495 Gau;
  \item \textsuperscript{108} Santosh v. State of Kerala, 1991 Cr LJ 570 Ker
  \item \textsuperscript{109} Balbir Singh v. State of Orissa, 1995 Cr LJ 1762(Orissa); Maghar Singh v. Punjab, AIR 1975 SC 1320
  \item \textsuperscript{110} Smt.Selvi v. State of Karnataka, AIR 2010 SC 1974
  \item \textsuperscript{111} State of Haryana v. Paramanand, 1995 Cr LJ 396(P&H)
\end{itemize}
psychological pressure\textsuperscript{112} and, of course, are equally applicable to a drug-induced statement.\textsuperscript{113} A confession obtained from the impugned tests would be less the product of a free intellect, less voluntary. Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible. It is then and again been held that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary.\textsuperscript{114}

Section 27 of the Evidence Act authorises the court to ignore those means and act on the information if the end justifies it\textsuperscript{115} only "so much of information\textsuperscript{116} "as relates distinctly to the fact thereby discovered" is made admissible but that is equally bad as the other parts if the means employed are bad. The discovery of the incriminating article is not sufficient to justify the admission of the information which otherwise would have stood inadmissible. Using these tests the accused can be broken down and he would blurt out incriminating statements.

Section 27 of the evidence act makes the evidence collected from narco and blood test as an admissible piece of evidence. The Apex court has held that statement or information by accused in the said test may even show their innocence or may lead to discovery of a fact or object material in the crime. If so, it is not at all hit by Article 20(3).\textsuperscript{117} no question could possibly arise as to be admissibility of such information on the ground that it was obtained by coercion and it was supposed that the guarantee of the truth of the information, even induced\textsuperscript{118} was afforded by the actual discovery of the fact discovered in consequence of that information.\textsuperscript{119}

\textsuperscript{112}Vinod Solanki v. Union of India (2008) 16 SCC 537
\textsuperscript{113}National Investigation Agency v. Devendra Gupta Crl.A. No. 1197 of 2012
\textsuperscript{114}Ibid
\textsuperscript{116}Bahadul v. Orissa, 1979 Cr LJ 1075
\textsuperscript{117}State of Gujarat v. Shyamal Mohanlal Choksi AIR 1965 SC 151
\textsuperscript{118}Cf. State of Orissa v. Basania AIR 1959 Ori 33
\textsuperscript{119}State of Bombay v. Kathi Kalu Oghad AIR 1961 SC 131
CONCLUSION

A meticulous analysis of the Constitutionality of the tests of narco analysis and collection of blood samples of the accused along with the criminal procedure laws implicates that such tests are inevitable in fair investigation. Investigations are often criticized for not being fair, proper and speedy. These tests if conducted actually accelerate the speed and accuracy of an investigation. Of course it is true that the rights of an accused are to be protected. But it should not be at the cost of the rights of the victim. Presumption of innocence is only till the accused is proved guilty. The guilt can be proved or disproved in certain cases only with the help of such tests. When a person refuses to undergo such tests, an adverse presumption should be mandatorily drawn. Above all, narco analysis and blood test is necessary to effectively and efficiently pursue and conclude an investigation and to reveal the mystery behind a crime.