The State of Bombay

Vs

Kathi Kalu Oghad and Others

Criminal Appeal No. 146 of 1958

(CJI B. P. Sinha, Syed Jafar Imam, P. B. Gajendragadkar, A. K. Sarkar, K. N. Wanchoo, K. C. Das Gupta, N. Rajgopala Ayyangar, S. K. Das, K. Subha Rao, Raghuvar Dayal, J. R. Mudholkar JJ)

04.08.1961

JUDGMENT

SINHA C. J. -

These appeals have been heard together only insofar as they involve substantial questions of law as to the interpretation of the Constitution, with particular reference to clause (3) of Article 20. This larger Bench was constituted in order to re-examine some of the propositions of law laid down by this Court in the case of M. P. Sharma v. Satish Chandra ([1954] S. C. R. 1077), because when one of these cases was heard by five of us, we felt that some of the propositions therein laid down may have been too widely stated, and, therefore, required to be re-stated with more particularity. We have not heard counsel for the parties on the merits of the orders passed by the Courts below, but have confined the discussions at the Bar, insofar as they had any bearing on the questions of law relating to the interpretation of clause (3) of Article 20 of the Constitution.

It is not necessary to state in any detail the facts of each of the cases now before us. We shall, therefore, state only so much of the facts as have occasioned calling in aid of the provisions of clause (3) of Article 20 of the Constitution. In the first case, namely, Criminal Appeal 146 of 1958, the State of Bombay is the appellant. The respondent was charged, alongwith another person, under section 302, read with section 34 of the I. P. C., as also under section 19(e) of the Indian Arms Act (XI of 1878). The Trial Court found him guilty of those charges and sentenced him to imprisonment for life under section 302, read with section 34 of the I. P. C. and to a term of two years rigorous imprisonment for the offence under the Arms Act. At the trial the identification of the respondent, as one of the two alleged culprits, was the most important question to be decided by the Court. Besides other evidence, the prosecution adduced in evidence a chit-Ex. 5 alleged to be in his handwriting and said to have been given by him. In order to prove that Ex. 5 was in the handwriting of the respondent, the police had obtained from him, during the investigation, three specimen handwritings of his on three separate sheets of paper which were marked as Exs. 27, 28 and 29. The disputed document, namely, Ex. 5 was compared with the admitted handwritings on Exs. 27, 28 and 29 by the Handwriting Expert whose evidence was to the effect that they are all writings by the same person. At the trial and in the High Court, the question was raised as to the admissibility of the specimen writings contained in Exs. 27, 28 and 29, in view of the provisions of Article 20(3) of the Constitution. It is an admitted fact that those specimen writings of the accused had been taken by the police while he was in police custody, but it was disputed whether the accused had been compelled to give those writings within the meaning of clause (3) of Article 20. The plea of the accused that he was forced by the Deputy Superintendent of Police to give those writings has not been accepted by the learned Trial Judge. But those documents have been excluded from consideration, as

inadmissible evidence, on the ground that though there was no threat or force used by the police in obtaining those writings from the accused person, yet in the view of the Court "the element of compulsion was implicit in his being at that time in police custody. " In this conclusion both the Trial Judge and the High Court have agreed. The identification of the accused person was also sought to be proved by the evidence of witnesses, who identified him at an identification parade. But the holding of the identification parade has not been sought to be brought within the prohibition of clause (3) of Article 20. After eliminating the Exs. 27, 28 and 29 from their consideration, the High Court, on a consideration of the other evidence in the case, came to the conclusion that the identity of the respondent had not been established beyond a reasonable doubt. Hence, giving him the benefit of doubt, they acquitted him. The State of Bombay moved this Court and obtained special leave to appeal from the Judgment and Order of acquittal, passed by the High Court. On these facts, the only questions of constitutional importance that this Bench has to determine are; (1) whether by the production of the specimen handwritings - Exs. 27, 28, and 29 - the accused could be said to have been 'a witness against himself' within the meaning of Article 20(3) of the Constitution; and (2) whether the mere fact that when those specimen handwritings had been given, the accused person was in police custody could, by itself, amount to compulsion, apart from any other circumstances which could be urged as vitiating the consent of the accused in giving those specimen handwritings. This Bench is not concerned with the further question whether in all the circumstances disclosed by the evidence in this case, the accused could be said to have been compelled, as a matter of fact, to give those specimens.

In Criminal Appeals 110 and 111 of 1958, which arose out of the same set of facts, the accused person has been convicted by the Courts below under sections 380 and 457 of the I. P. C., as also under section 19(f) of the Indian Arms Act. The facts of the case necessary for bringing out the points in controversy are that a shop in Hissar in Punjab was burgled. In the course of the burglary four double- barrelled guns, one single-barrelled gun and a rifle were stolen. During his interrogation by the police at the investigation stage, the appellant is alleged to have given the information that out of the arms stolen from the shop at Hissar he had buried one. 22 bore rifle, two. 12 bore double-barrelled guns and one. 18 single-barrelled gun at a certain place. It is alleged that as a consequence of the information thus given by the accused and on his pointing out the exact location where these buried articles could be found, the rifles and guns were actually recovered. During the investigation the police had taken possession of certain glass panes and phials from the burgled shop which bore some palm and finger impressions (Exs. P10 to P12). In order to compare the impressions on those glass panes and phials with those of the accused, the investigating police officer got the impressions of the palms and fingers of the accused taken in the presence of a Magistrate. On the evidence adduced by the prosecution, including the fact of the recovery of the firearms and the evidence of the identity of the impressions of the accused taken as aforesaid, he was convicted and sentenced by the Courts below to certain terms of imprisonment and was also ordered to pay a fine of one thousand rupees. On appeal, the sentence of fine and imprisonment was modified by the Court of Appeal. In revision in the High Court, both the revisional applications were dismissed. The convicted person prayed for and obtained the necessary certificate of fitness under Article 134(1) (c) of the Constitution from the High Court of Punjab. The points raised in this Court were; (1) that section 27 of the Indian Evidence Act is violative of Article 14 of the Constitution; and (2) the impressions of the appellant's palms and fingers taken from him after his arrest, which were compared with the impressions on the glass panes and phials, were not admissible evidence in view of the provisions of Article 20(3) of the Constitution. Though the provisions of sections 5 and 6 of the Identification of Prisoners Act, 1920, (XXXIII of 1920) have not in terms been attacked as ultra vires Article 20(3) of the Constitution, the effect of the argument

based on that article is to bring into controversy the constitutionality of sections 5 and 6 of the Act. As a matter of fact, one of the propositions of law to be urged in support of the appeals is stated in these terms; "that sections 5 and 6 of the Identification of Prisoners Act, 1920, read with Article 20(3) of the Constitution render the evidence of measurements to be inadmissible".

In the last case, Criminal Appeal 174 of 1959, the State of West Bengal has preferred this appeal by special leave granted by this Court under Article 136(1) of the Constitution against the judgment and order of the High Court at Calcutta dated June 4, 1959, passed in its revisional jurisdiction, against an order of the Magistrate, First Class, Howrah, directing the respondent to give his specimen writing and signature, under section 73 of the Indian Evidence Act. It is only necessary to state the following facts in order to bring out the questions of law bearing on the interpretation of the Constitution. During the investigation of a criminal case relating to trafficking in contraband opium, the respondent's residence was searched and certain quantity of contraband opium was alleged to have been found in his possession. The respondent, along with another person, was produced before a Magistrate of the Ist Class at Howrah and was later released on bail. From the materials and statements obtained during the investigation of the case by the police, it was considered that there were reasonable grounds to believe that the endorsement on the back of certain railway receipts for consignment of goods seized at Howrah Railway Station was in the handwriting of the respondent, and it was, therefore, necessary to take his specimen writing and signature for the purpose of comparison and verification, When the accused were produced before the Magistrate, the Investigating Officer made a prayer to the Magistrate for taking specimen writing and signature of the respondent. On an adjourned date when the accused persons, including the respondent were present in the Court of the Magistrate, the respondent declined to give his specimen writing and signature, contending that Article 20(3) of the Constitution prohibited any such specimens being taken against the will of the accused. After hearing the parties, the learned Magistrate overruled the objection on behalf of the accused and allowed the prayer by the prosecution for taking the specimen writing and signature of the respondent. The respondent moved the High Court at Calcutta under section 439 of the Cr. P. C. and Article 227 of the Constitution. The case was heard by a Division Bench consisting of J. P. Mitter and Bhattacharyya, JJ, on July 2 and 3, 1958, but the judgment was not delivered until the 4th of June, 1959. The Court held that the prohibition contained in Article 20(3) of the Constitution applied to the case of writing and signature to be taken, as directed by the learned Magistrate. The Court relied upon the decision of this Court in M. P. Sharma's case. ([1954] S. C. R. 1077) In coming to this conclusion, the Division Bench disagreed with the previous decision of another Division Bench of that Court in the case of Sailendra Nath Sinha v. The State ([1955] A. I. R. Cal. 247), which has laid down that a mere direction under section 73 of the Evidence Act to a person accused of an offence to give his specimen writing did not come within the prohibition of Article 20(3) of the Constitution. The earlier Bench further held that the decision of this Court in Sharma's case ([1954] S. C. R. 1077) referred to above, did not govern the case of direction given by the Court under section 73 of the Evidence act for giving specimen writing. Instead of referring the question to a larger Bench, the later Division Bench took upon itself to pronounce against the considered view of that Court in the earlier decision. The State of West Bengal naturally had to come up to this Court to get the constitutional issues determined because the issues raised were of far-reaching importance in the investigation and trial of criminal cases. The main question which arises for determination in this appeal is whether a direction given by a Court to an accused person present in Court to give his specimen writing and signature for the purpose of comparison under the provisions of section 73 of the Indian Evidence Act infringes the fundamental right enshrined in Article 20(3) of the Constitution.

The arguments at the Bar may be classified as taking three distinct lines. The first line, on the one

extreme, may be said to have been taken by Mr. Sikri, the Advocate General of Punjab, and which may be characterised as a narrow view, runs as follows : Clause (3) aforesaid, in view of its setting, its history and the policy underlying, the privilege accorded by the Constitution to an accused person, should not be applied at the stage of investigation of an offence. It should be confined to cases of compulsory extraction of incriminating statements or communications by an accused person in Court, the expression 'compelled to be a witness' being understood as meaning 'being compelled to give oral testimony'. It does not include the compulsory production of documents. Similarly, it does not prohibit the compulsory exhibition or examination of the body of the accused, or any part of it, or the taking of specimen writing, thumb impression, impression of the palm or the feet or the fingers of an accused. Whether or not there has been compulsion should be judged by the nature of the action taken by the authority, or the Court that determines the controversy, and not the state of mind of the accused.

On the other extreme is the argument by Mr. S. P. Varma, for the accused in the first case, who contended that the clause aforesaid of the Constitution gives complete protection of the widest amplitude to an accused person, irrespective of the time and place and of the nature of the evidence, whether it is oral or documentary or material. The extreme form, which his argument took can best be stated in his own words as follows : "Anything caused, by any kind of threat or inducement, to be said or done, by a person, accused or likely to be accused of any offence, by non-voluntary positive act or speech of that person which furthers the cause of any prosecution against him or which results or is likely to result in the incrimination of that person qua any offence, is violative of the fundamental right guaranteed under clause (3) of Article 20 of the Constitution of India". According to his argument, if an accused person makes any statement or any discovery, there is not only a rebuttable presumption that he had been compelled to do so, but that it should be taken as a conclusive proof of that inferential fact. Any kind of inducement, according to him, is also included in the expression 'compulsion' by the police or elsewhere. The test, according to him, is not the volition of the accused but the incriminatory nature of the statement or communication. Hence, any statement made to a police officer, while in police custody, brings the same within the prohibitory ambit of the clause of the Constitution. On the face of them, the propositions propounded by Mr. Varma are much too broadly and widely stated to be accepted.

The third view, which may be characterised as an intermediate view, was advocated by the learned Attorney General, appearing for the Union. According to him, a person seeking protection under the clause must satisfy all the four constituent elements contained in clause (3) of Article 20, namely, (1) he must be an accused person; (2) he must have been compelled; (3) the compulsion must be to be a witness; and (4) against himself. Compulsion, according to him, means coercion or constraint and does not include mere asking by the police to do a certain thing or the direction by a court to give a thumb impression or specimen writing. In other words, compulsion has to be equated to what has been sometimes characterised as "third degree" methods to extort confessional statements."To be witness" is an expression which must be understood in consonance with the existing law of evidence and criminal procedure, e. g. sections 27 and 73 of the Evidence Act and sections 94 and 96 of the Code of Criminal Procedure. Though, according to English Law, the expression is confined to oral testimony, he was prepared to go to the length of conceding that any statement, whether oral or in writing by am accused person, transmitting his knowledge disclosing relevant facts of which he was aware, would amount to 'bring a witness' against himself. But mere production of some material evidence, by itself, would not come within the ambit of the expression 'to be a witness'.

The several questions for decision arising out of this batch of cases have to be answered with reference to the provisions of clause (3) of Article 20 of the Constitution which is in these terms :-

> "No person accused of any offence shall be compelled to be a witness against himself. "

These provisions came up for consideration by the Full Court in the case of M. P. Sharma v. Satish Chandra. ([1954] S. C. R. 1077) Though the question directly arising for decision in that case was whether a search and seizure of documents under the provisions of sections 94 and 96 of the Code of Criminal Procedure came within the ambit of the prohibition of clause (3) of Article 20 of the Constitution, this Court covered a much wider field. Besides laying down that the search and seizure complained of in that case were not within the prohibition, this Court examined the origin and scope of the doctrine of protection against self-incrimination with reference to English Law and the Constitution of the United States of America, with particular reference to the Fourth and Fifth Amendments. On an examination of the case law in England and America and the standard text books on Evidence, like Phipson and Wigmore, and other authorities, this Court observed as follows :-

> "Broadly stated the guarantee in Article 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in article 20(3) is "to be a witness". A person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see section 119 of the Evidence Act) or the like."To be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished through lips or by production of a thing or of a document or in other modes. So far as production of documents is concerned, no doubt section 139 of the Evidence Act says that a person producing a document on summons is not a witness. But that section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word "witness", which must be understood in its natural sense, i. e., as referring to a person who furnishes evidence. Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in article 20(3) is "to be a witness" and not to "appear as a witness" : It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case. "

This Court did not accept the contention that the guarantee against testimonial compulsion is to be confined to oral testimony at the witness stand when standing trial for an offence. The guarantee was, thus, held to include not only oral testimony given in court or out of court, but also to statements in writing which incriminated the maker when figuring as an accused person. After having heard elaborate arguments for and against the views thus expressed by this Court after full

deliberation, we do not find any good reasons for departing from those views. But the Court went on to observe that "to be a witness" means "to furnish evidence" and includes not only oral testimony or statements in writing of the accused but also production of a thing or of evidence by other modes. It may be that this Court did not intend to lay down - certainly it was not under discussion of the Court as a point directly arising for decision - that calling upon a person accused of an offence to give his thumb impression, his impression of palm or fingers or of sample handwriting or signature comes within the ambit of "to be a witness" which has been equated to "to furnish evidence". Whether or not this Court intended to lay down the rule of law in those wide terms has been the subject matter of decisions in the different High Courts in this country. Those decisions are, by no means, uniform; and conflicting views have been expressed even in the same High Court on different occasions. It will serve no useful purpose to examine those decisions in detail. It is enough to point out that the most recent decision, to which our attention was called, is of a Full Bench of the Kerala High Court in the case of State of Kerala v. K. K. Sankaran Nair (A. I. R. 1960 Kerala 392). In that case, Ansari C. J., who delivered the opinion of the Court, has made reference to and examined in detail the pronouncements of the different High Courts. Ultimately he came to the conclusion that the decision of this Court in Sharma's case ([1954] S. C. R. 1077) also covered the case of a specimen handwriting given by an accused person, under compulsion.

"To be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. "Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that - though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject - they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. Further more it must be assumed that the Constitution-makers were aware of the existing law, for example, section 73 of the Evidence Act or sections 5 and 6 of the Identification of Prisoners Act (XXXIII of 1920). Section 5 authorises a Magistrate to direct any person to allow his measurements or photographs to be taken if he is satisfied that it is expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure to do so : 'Measurements' include finger impressions and foot-print impressions. If any such person who is directed by a Magistrate, under section 5 of the Act, to allow his measurements or photographs to be taken resists or refuses to allow the taking of the measurements or photographs, it has been declared lawful by section 6 to use all necessary means to secure the taking of the required measurements or photographs. Similarly, section 73 of the Evidence Act authorises the Court to permit the taking of finger impression or a specimen handwriting or signature of a person present in Court, if necessary for the purpose of comparison.

The matter may be looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not "to be a witness"."To be a witness" means imparting knowledge in respect of relevant fact, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said 'to be a witness' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not

hit by the rule excluding hearsay or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in Sharma's case ([1954] S. C. R. 1077) that the prohibition in clause (3) of Article 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charges against him. The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document in accordance with the provisions of section 139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession or power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-examined. Of course, he can be cross- examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in Court otherwise than by reference to the contents of the documents. In our opinion, therefore, the observations of this Court in Sharma's case ([1954] S. C. R. 1077) that section 139 of the Evidence Act has no bearing on the connotation of the word 'witness' is not entirely well-founded in law. It is well- established that clause (3) of Article 20 is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot changed their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'.

In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person atleast probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony'.

Similarly, during the investigation of a crime by the police, if an accused person were to point out

the place where the corpus delicti was lying concealed and in pursuance of such an information being given by an accused person, discovery is made within the meaning of section 27 of the Evidence Act, such information and the discovery made as a result of the information may be proved in evidence even though it may tend to incriminate the person giving the information, while in police custody. Unless it is held that the provisions of section 27 of the Evidence Act, in so far as they make it admissible evidence which has the tendency to incriminate the giver of the information, are unconstitutional as coming within the prohibition of clause (3) of Article 20, such information would amount to furnishing evidence. This Court in Sharma's case ([1954] S. C. R. 1077) was not concerned with pronouncing upon the constitutionality of the provisions of section 27 of the Evidence Act. It could not, therefore, be said to have laid it down that such evidence could not be adduced by the prosecution at the trial of the giver of the information for an alleged crime. The question whether section 27 of the Evidence Act was unconstitutional because it offended Article 14 of the Constitution was considered by this court in the case of State of U. P. v. Deomen Upadhyaya ([1961] 1 S. C. R. 14). It was held by this Court that section 27 of the Evidence Act did not offend Article 14 of the Constitution and was, therefore, intra vires. But the question whether it was unconstitutional because it contravened the provisions of clause (3) of Article 20 was not considered in that case. That question may, therefore, be treated as an open one. The question has been raised in one of the cases before us and has, therefore, to be decided. 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. 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, If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of clause (3) Article 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion has been used in obtaining the information.

In this connection the question was raised before us that in order to bring the case within the prohibition of clause (3) of Article 20, it is not necessary that the statement should have been made by the accused person at a time when he fulfilled that character; it is enough that he should have been an accused person at the time when the statement was sought to be proved in Court, even though he may not have been an accused person at the time he had made that statement. The correctness of the decision of the Constitution Bench of this Court in the case of Mohamed Dastagir v. The State of Madras ([1960] 3 S. C. R. 116) was questioned because it was said that it ran counter to the observations of the Full Court in Sharma's case. ([1954] S. C. R. 1077) In the Full Court decision of this Court this question did not directly arise; nor was it decided. On the other hand, this Court in Sharma's case ([1954] S. C. R. 1077), held that the protection under Article 20(3) of the Constitution is available to a person against whom a formal accusation had been levelled, inasmuch as a First Information Report had been lodged against him. Sharma's case ([1954] S. C. R. 1077), therefore, did not decide anything to the contrary of what this Court said in Mohamed Dastagir v. The State of Madras ([1960] 3 S. C. R. 116). The latter decision in our opinion lays down the law correctly.

In order to bring the evidence within the inhibitions of clause (3) of Article 20 it must be shown not only that the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to make that statement.'Compulsion' in the context, must mean what in law is called 'duress'. In the Dictionary of English Law by Earl Jowitt, 'duress' is explained as follows :

> "Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress per minas). Duress also includes threatening, beating or imprisonment of the wife, parent or child of a person. "

The compulsion in this sense is 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. Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. In other words, it will be a question of fact in each case to be determined by the Court on weighing the facts and circumstances disclosed in the evidence before it.

In view of these considerations, we have come to the following conclusions :-

> (1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.
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> (2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.
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> (3) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt innocence of the accused.
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> (4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.
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> (5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.
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> (6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression

which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made.

The appeals will now be listed for hearing on merits in accordance with the above principles.

The Judgment of S. K. Das, Sarkar and Das Gupta, JJ. was delivered by

DAS GUPTA, J. 

Is a person compelled "to be a witness" against himself within the meaning of Article 20(3) of the Constitution when he is compelled to give his specimen handwriting or signature, or impressions of his fingers, palm or foot to the investigating officer ? Is he compelled "to be a witness" against himself within the meaning of the same constitutional provisions when he is compelled to give his specimen handwriting and signature for the purpose of comparison under the provisions of section 73 of the Indian Evidence Act ? These are the main questions canvassed before us and they have both been answered in the negative in the judgment just pronounced by my Lord the Chief Justice. We agree with these answers; but as we have reached the same conclusion, by a somewhat different approach, and for different reasons, these have to be briefly indicated.

The question as regards the meaning to be attached to the words "to be a witness" as used in Article 20(3) of the Constitution came up for consideration in M. P. Sharma's Case ([1954] S. C. R. 1077). It was heard by all the eight Judges who constituted the Court at the time, and they came to a unanimous decision. The Court in that case had to decide whether search and seizure of documents under sections 94 and 96 of the Code of Criminal Procedure is a compelled production of the same so as to infringe the provisions of Article 20(3) of the Constitution. After pointing out that the guarantee in Article 20(3) was against "testimonial compulsion", Jagannadhadas J. speaking for the Court said :-

"The phrase used in Article 20(3) is "to be a witness". A person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see section 119 of the Evidence Act) or the like."To be a witness" is nothing more than "to furnish evidence" and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. "

He next observed that section 139 of the Evidence Act which says that a person producing a document on summons is not a witness, is really meant to regulate the right of cross-examination and can not be "a guide to the connotation of the word "witness" in Article 20(3), which must be understood in its natural sense, i. e., as referring to a person who furnishes evidence", and then proceeded :-

"Indeed, every positive volitional act which furnishes evidence is testimony and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or

submission on his part".

It was further stated that there was no reason to think that the protection in respect of the evidence so procured was confined to what transpired at the trial in the court room.

If the learned Judges had hoped that by their exhaustive judgment they would end all disputes about the limits of the protection granted by Article 20(3), these hopes were soon shattered. Questions were before long raised before the different High Courts, as to whether on the interpretation of the words "to be a witness" given by this Court in Sharma's Case, compelling an accused person to give his finger prints or impressions of palm or foot or a specimen handwriting in the course of investigation, amounted to an infringement of Article 20(3). The conclusions reached by the different High Courts, and in one case at least, by two Benches of the same High Court were different. That is why it has become necessary to examine the question again, and see how far, if at all, the interpretation given in Sharma's Case ([1954] S. C. R. 1077) requires modification.

The complaint against the interpretation given in Sharma's Case ([1954] S. C. R. 1077) is that it does not solve the problem as to what the words "to be a witness" mean; but merely postpones the difficulty, of solving it by substituting the words "to furnish evidence" for the words "to be a witness". It throws no light, it is said, on what is "furnishing evidence", and unless that is clear, little is gained by saying that "to be a witness" is to "furnish evidence". Rival interpretations were suggested before us which it was claimed on behalf of the protagonists will solve the problem once for all. One of the propositions put forward was that "to be a witness" as used in Article 20(3) cannot refer to anything said or done at the stage of investigation of an offence. We agree with our learned brethren that this is an unduly narrow construction. As was pointed out in Sharma's Case ([1954] S. C. R. 1077) the phrase used in Article 20(3) is "to be a witness" and not "to appear as a witness". That by itself justifies the conclusion "that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him". If the protection was intended to be confined to being a witness in Court then really it would have been an idle protection. It would be completely defeated by compelling a person to give all the evidence outside court and then, having what he was so compelled to do, proved in court through other witnesses. An interpretation which so completely defeats the constitutional guarantee cannot, of course, be correct. The contention that the protection afforded by Article 20(3) is limited to the stage of trial must therefore be rejected.

That brings us to the suggestion that the expression "to be a witness" must be limited to a statement whether oral or in writing by an accused person imparting knowledge of relevant facts; but that mere production of some material evidence, whether documentary or otherwise would not come within the ambit of this expression. This suggestion has found favour with the majority of the Bench; we think however that this is an unduly narrow interpretation. We have to remind ourselves that while on the one hand we should bear in mind that the Constitution-makers could not have intended to stifle legitimate modes of investigation we have to remember further that quite clearly they thought that certain things should not be allowed to be done, during the investigation, or trial, however helpful they might seem to be to the unfolding of truth and an unnecessary apprehension of disaster to the police system and the administration of justice, should not deter us from giving the words their proper meaning. It appears to us that to limit the meaning of the words "to be a witness" in Article 20(3) in the manner suggested would result in allowing compulsion to be used in procuring the production from the accused of a large number of documents, which are of evidentiary value, sometimes even more so than any oral statement of a witness might be. Suppose,

for example, an accused person has in his possession, a letter written to him by an alleged co-conspirator in reference to their common intention in connection with the conspiracy for committing a particular offence. Under section 10 of the Evidence Act this document is the relevant fact as against the accused himself for the purpose of proving the existence of the conspiracy and also for the purpose of showing that any such person was a party to it. By producing this, the accused will not be imparting any personal knowledge of facts; yet it would certainly be giving evidence of a relevant fact. Again, the possession by an accused of the plan of a house where burglary has taken place would be a relevant fact under section 8 of the Evidence Act as showing preparation for committing theft. By producing this plan is he not giving evidence against himself ?

To a person not overburdened with technical learning, the giving of evidence, would appear to be the real function of a witness. Indeed English literature is replete with instances of the use of the word "witness" as meaning "evidence". To give one example; Shakespeare's Horation speaking to Hamlet says :-

> "Season your admiration for a while with an attent ear, till I may deliver, Upon the witness of these gentlemen, This marvel to you" (Hamlet, Act I, Scene, II).

There can be no doubt that to the ordinary user of English words, the word "witness" is always associated with evidence, so that to say that to be a witness is to furnish evidence is really to keep to the natural meaning of the words.

But, what is the purpose of evidence ? Section 3 of the Indian Evidence Act defines evidence thus:-

> "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 produced for the inspection of the Court; such documents are called documentary evidence. "

Section 5 states that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are "hereinafter declared to be relevant and of no others. " Then follow several sections laying down what are relevant facts.

It is clear from the scheme of the various provisions, dealing with the matter that the governing idea is that to be evidence, the oral statement or a statement contained in a document, shall have a tendency to prove a fact - whether it be a fact in issue or a relevant fact - which is sought to be proved. Though this definition of evidence is in respect of proceedings in Court it will be proper, once we have come to the conclusion, that the protection of Article 20(3) is available even at the stage of investigation, to hold that at that stage also the purpose of having a witness is to obtain evidence and the purpose of evidence is to prove a fact.

The illustrations we have given above show clearly that it is not only by imparting of his knowledge that an accused person assists the proving of a fact; he can do so even by others means, such as the production of documents which though not containing his own knowledge would have a tendency to make probable to existence of a fact in issue or a relevant fact.

Much has been written and discussed in England and America as regards the historical origin and development of the rules against "testimonial compulsion". These matters of history, however, interesting they be, need not detain us and we must also resist the temptation of referring to the numerious cases especially in America where the concept of "testimonial compulsion" has been

analysed. It is sufficient to remember that long before out Constitution came to be framed the wisdom of the policy underlying these rules had been well recognised. Not that there was no view to the contrary; but for long it has been generally agreed among those who have devoted serious though to these problems that few things could be more harmful to the detection of crime or conviction of the real culprit, few things more likely to hamper the disclosure of truth than to allow investigators or prosecutors to slide down the easy path of producing by compulsion, evidence, whether oral or documentary, from an accused person. It has been felt that the existence of such an easy way would tend to dissuade persons in charge of investigation or prosecution from conducting diligent search for reliable independent evidence and from sifting of available materials with the care necessary for ascertainment of truth. If it is permissible in law to obtain evidence from the accused person by compulsion, why treat the hard path of laborious investigation and prolonged examination of other men, materials and documents ? It has been well said that an abolition of this privilege would be an incentive for those in charge of enforcement of law "to sit comfortably in the shade ribbing red pepper into a poor devil's eyes rather than to go about in the sun hunting up evidence". (Stephen, History of Criminal Law, p. 442). No less serious is the danger that some accused persons at least, may be induced to furnish evidence against themselves which is totally false - out of sheer despair and an anxiety to avoid an unpleasant present. Of all these dangers the Constitution-makers were clearly well aware and it was to avoid them that Article 20(3) was put in the Constitution. It is obvious however that these dangers remain the same whether the evidence which the accused is compelled to furnish is in the form of statements, oral or written about his own knowledge or in the shape of documents or things, which though not transmitting knowledge of the accused person directly helps the Court to come to a conclusion against him. If production of such documents, or things is giving evidence, then the person producing it is being a witness, on what principle or reason can it be said that this does not amount to "being a witness" within the meaning of Article 20(3) ? We find none.

We can therefore find no justification for thinking that "to be a witness" in Article 20(3) means to impart personal knowledge and find no reason for departing from what this Court said in Sharma's Case ([1954] S. C. R. 1077) that "to be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished through lips or by production of a thing or of a document or in other modes.

The question then is : Is an accused person furnishing evidence when he is giving his specimen handwriting or impressions of his fingers, or palm or foot ? It appears to us that he is : For, these are relevant facts, within the meaning of section 9 and section 11 of the Evidence Act. Just as an accused person is furnishing evidence and by doing so, is being a witness, when he makes a statement that he did something, or saw something, so also he is giving evidence and so is being a "witness", when he produces a letter the contents of which are relevant under section 10, or is producing the plan of a house where a burglary has been committed or is giving his specimen handwriting or impressions of his finger, palm or foot. It has to be noticed however that Article 20(3) does not say that an accused person shall not be compelled to be a witness. It says that such a person shall not be compelled to be a witness against himself. The question that arises therefore is : Is an accused person furnishing evidence against himself, when he gives his specimen handwriting, or impressions of his fingers, palm or foot ? The answer to this must, in our opinion, be in the negative.

The matter becomes clear, when we contrast the giving of such handwriting or impressions, with say, the production of a letter admissible in evidence under section 10, or the production of the plan of a burgled house. In either of these two latter cases, the evidence given tends by itself to

incriminate the accused person. But the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions, identity between the two set is established. By themselves, these impressions or the handwritings do not incriminate the accused person, or even tend to do so. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself. So when an accused person is compelled to give a specimen handwriting or impressions of his finger, palm or foot, it may be said that he has been compelled to be a witness; it cannot however be said that he has been compelled to be a witness against himself.

This view, it may be pointed out, does not in any way militate against the policy underlying the rule against "testimonial compulsion" we have already discussed above. There is little risk, if at all, in the investigator or the prosecutor being induced to lethargy or inaction because he can get such handwriting or impressions from an accused person. For, by themselves they are of little or of no assistance to bring home the guilt of an accused. Nor is there any chance of the accused to mislead the investigator into wrong channels by furnishing false evidence. For, it is beyond his power to alter the ridges or other characteristics of his hand, palm or finger or to alter the characteristics of his handwriting.

We agree therefore with the conclusion reached by the majority of the Bench that there is no infringement of Article 20(3) of the Constitution by compelling an accused person to give his specimen handwriting or signature; or impressions of his fingers, palm or foot to the investigating officer or under orders of a court for the purpose of comparison under the provisions of section 73 of the Indian Evidence Act; though we have not been able to agree with the view of our learned brethren that "to be a witness" in Article 20(3) should be equated with the imparting of personal knowledge or that an accused does not become a witness when he produces some document not in his own handwriting even though it may tend to prove facts in issue or relevant facts against him.

In Criminal Appeals Nos. 110 & 111 of 1958 a further question as regards the validity of section 27 of the Evidence Act was raised. It was said that the receipt of information from an accused person in the custody of a police officer which can be proved under section 27 is an infringement of Article 20(3). Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. It cannot be disputed that by giving such information the accused furnishes evidence and therefore is a "witness" during the investigation. Unless however he is "compelled" to give the information he cannot be said to be "compelled' to be a witness; and so Article 20(3) is not infringed. Compulsion is not however inherent in the receipt of information from an accused person in the custody of a police officer. There may be cases where an accused in custody is compelled to give the information later on sought to be proved under section 27. These will be other cases where the accused gives the information without any compulsion. Where the accused is compelled to give information it will be an infringement of Article 20(3); but there is no such infringement where he gives the information without any compulsion. Therefore, compulsion not being inherent or implicit in the fact of the information having been received from a person in custody, the contention that section 27 necessarily infringes Article 20(3) cannot be accepted.

A question was raised in the course of the discussion as to when a person can be said to have been "compelled" within the meaning of Article 20(3). One view is that there must be an element of constraint or coercion in the physical sense before it can be said that an accused person has been

"compelled". The other view is that in addition to cases where there has been such constraint or coercion an accused should be said to have been "compelled" to be a witness whenever there has been inducement or promise which persuaded the accused to be a witness, even though there has been no such coercion or constraint. In Criminal Appeals Nos. 110 and 111 the information proved under section 27 of the Evidence Act was that Pokhar Singh had buried certain fire-arms in village Badesra under Toori and these were recovered when he pointed these out to the investigating police officer. This information was proved under section 27. But it does not appear to have been suggested that the accused was made to give this information by inducement or threat or promise. On the facts therefore there is no question of the information having been received by compulsion. The question whether any inducement or promise which leads an accused person to give information amounts to compulsion or not, does not therefore fall to be decided.

It may be pointed out that in the other appeals, viz., Criminal Appeal No. 146 of 1958 and Criminal Appeal No. 174 of 1959, also, this question does not arise for consideration in view of our conclusion that in any case the accused does not become a "witness" against himself by giving his specimen signature or impressions of his fingers or palms.

It appears to us to be equally unnecessary to decide another which was mooted in the course of the hearing, viz., whether the prohibition of Article 20(3) operates only after a person has been accused of an offence or even before that stage. Admittedly, in all these cases the person on whose behalf the protection under Article 20(3) is claimed gave the specimen signature or impressions of fingers or palms after he had been actually accused of an offence.

We think it right therefore not to express any opinion on any of these questions.

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