ALLAHABAD HIGH COURT

Subedar

Vs.

State (Allahabad)

Criminal Rev. No. 205 of 1956, against the order of Addl. S.J. Kanpur,
(James, J.)

13.01.1956. 20.12.1956

ORDER

James, J.
This Revision springs from an alleged violation of the fundamental right granted under clause (3) of Article 20 of the Constitution in the words: 'No person accused of any offence shall be compelled to be a witness against himself. The question is of importance and requires careful consideration.

2. The facts are these Dhanna filed a complaint for offences under sections 420, 405, 467 and 384 Indian Penal Code against four persons including one Subedar, and when the Magistrate decided to make a preliminary enquiry under section 202 Criminal Procedure Code, got them summoned as his witnesses in order to satisfy the Magistrate that there was just ground for issuing process against them. Three of the accused duly appeared and were examined as witnesses. But Subedar did not respond, and consequently Dhanna got a warrant issued against him. When he appeared in execution of the warrant he claimed the privilege of Article 20 (3) of the Constitution and contended that he could not be compelled to give evidence against himself. The learned Magistrate held that Subedar could not claim the privilege so long as he was not summoned as an accused person, and further that there were certain rulings which permitted an accused person to be examined as a witness under section 202 Criminal Procedure Code. Accordingly he overruled Subedar's contention and directed him to testify. Subedar filed a Revision before the Sessions Judge, and having failed there has come up in Revision to this Court. The stand he has taken is that the learned Magistrate's order contravenes Article 20 (3) inasmuch as it amounts to compelling him to furnish evidence against himself.

3. The doctrine of immunity from self-crimination is founded on the presumption of innocence which characterizes the English system of criminal justice, and a fundamental principle of that system of justice (which differs from the inquisitorial procedure obtaining in France and some other Continental countries) is that it is for the prosecution to prove the guilt of the accused and that the latter need not make any statement if he does not want to. In the words of Mayne in bis

"Criminal Law" "It is the business of the Crown to prove him guilty, and he need not do anything but stand by and see what case has been made out against him.....He is entitled to rely on the defense that the evidence as it stands is inconclusive and that the Crown is bound to make it conclusive without any help from him." The English Criminal Evidence Act of 1898 provides that although the accused is competent to be a witness on his own behalf, he cannot be compelled to give evidence against himself, and that if he does give evidence in his defence, the prosecution may comment upon such evidence but must not comment upon his omission to do so. In England the protection extends to witnesses also. The Fifth Amendment to the Constitution of the United States of America has adopted the same principle by laying down that no person shall be compelled in any criminal case to be a witness against himself. Indeed, in the United States judicial interpretation has enlarged the scope of the privilege, though it must be stated that to some extent this has been done with the aid of the Fourth Amendment, which guarantees the right of privacy, and the like of which is not provided for in England or India.

4. The doctrine of protection against self-crimination has also to a substantial extent been recognized in the Anglo-Indian administration of criminal justice by incorporation into various statutory provisions, but definite form to it was given for the first time by Article 20 (3) of our Constitution, though the rule laid down by the latter is narrower than the Anglo American rule, since the privilege has been kept confined to persons 'accused of any offence', an 'offence' being defined by section 3 (38) of the General Clauses Act as meaning 'any act or omission made punishable by any law for the time being an force". Witnesses in India have been left untouched by the Constitution and continue to be governed by section 132 and other provisions of the Evidence Act.

5. The exact extent of the privilege against self-crimination has been the subject-matter of some controversy, and it is being increasingly felt that the doctrine on which it is based should undergo curtailment rather than extension. Prof. Wigmore in his 'Evidence' (3rd Ed) in Vol. 8 at pages 304 to 320 has dealt with the matter exhaustively and has come to the conclusion that although the privilege serves to stimulate prosecuting officers to have an independent search for evidence, it is apt to be used as a hiding place for crime and only the guilty stand in need of it, and because the accused person's rights are under current procedure amply protected without the privilege, it should be kept within the strictest possible limits. In the leading case of *M. P. Sharma v. Satish Chandra*[1] our Supreme Court, after considering the background of the privilege, held : 'There is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range'.

6. In the same case, analyzing the terms in which the right under Article 20 (3) has been granted their Lordships have pointed out that it consists of three components : (1) it is a right pertaining to a person "accused of an offence"; (2) it is a protection against "compulsion to be a witness", and (3) it is a protection against such compulsion resulting in his giving evidence against himself.

7. Coming now to the instant case, it is undeniable that Subedar is being 'compelled to be a witness'. In the words of their Lordships in *M. P. Sharma v. Satish Chandra (Supra)* : "..... the word 'witness' must be understood in its natural sense, i.e., as

[1] AIR 1954 SC 300

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." Subedar has neither submitted nor remained silent; on the contrary he has refused to testify. Yet he is being coerced to give evidence. When he did not respond to the original summons a warrant of arrest was issued against him. If he disobeyes the learned Magistrate's order he stands in danger of being proceeded against for contempt or of other jeopardy. Thus the learned Magistrate's order has an element of sanction behind it, and entails penalty or forfeiture. Consequently it amounts to testimonial compulsion of Subedar.

8. It can also not be denied that Subedar ia being compelled to give evidence 'against himself. The object of the complainant Dhanna in insisting upon his examination is to secure evidence from him for supporting the case set up by him (the complainant). The Magistrate's order is avowedly directed at determining whether Subedar's deposition would justify issuing process against him as an accused person. Therefore whatever he states before the learned Magistrate is likely to be used against him to his detriment.

9. Finally - and this is the question round which the controversy mostly centres - is Subedar to be deemed to be a person 'accused of an offence'? The Courts below think that he does not become one until such time as summons is issued to him as an accused. Their view is erroneous. In *M. P. Sharma v. Satish Chandra (supra)* the Supreme Court observed as follows :-

> "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 leveled which in the normal course may result in prosecution." Their Lordships had before them the case of certain persons against whom a first information report had been recorded as accused therein and they declared that the guarantee under Article 20 (3) was available to them. Subedar, since he has been named as an accused in Dhanna's complaint, cannot obviously stand on a different footing. It follows that the protection of Article 20 (3) becomes available to a person as soon as he is named as an accused either in a first information report made under section 154 Criminal Procedure Code or in a complaint instituted against him in Court.

10. All the conditions laid down by Article 20 (3) of the Constitution are thus found satisfied, so that, despite the restricted character of the right, Subedar cannot be compelled by the Magistrate

to testify before him in the preliminary enquiry under Section 202, Cri. P. C., which he is making into the complaint - Dhanna must establish his case independently of the accused.

11. It is Perhaps worth pointing out that in India an accused cannot ever give evidence on behalf of the prosecution. Until a short time ago he could not even appear as a witness in his own defence for section 342 (4) Criminal Procedure Code laid down that no oath should be administered to him, while in view of sections 5 and 6 of the Indian Oaths Act no witness can be examined without oath or affirmation. The position has however undergone a change since the recent enactment of section 342A Criminal Procedure Code which enables an accused person to be a competent witness on his own behalf. But the conditions laid down therein are that he cannot be called as a witness except on his own written request and that he may give evidence only after the charge against him has been made. A person is also entitled by virtue of section 340 (2) Criminal Procedure Code to offer himself as a witness in proceedings under section 107, or under Chapter X, XI XII, or XXXVI or under section 552 of the Code, tut it should be borne in mind that none of these provisions relates to a trial for an offence, so that the person concerned in it is not 'accused of any offence'. The learned Magistrate's order against Subedar cannot therefore be even remotely supported either by this new provision (both because there is no written request by him - on the contrary he refuses to give evidence - and because the case is still in the pre-trial stage) or by section 340 (2).

12. There are no doubt some pre-1950 decisions which permit the Magistrate to examine an accused person in an enquiry under section 202 Criminal Procedure Code. Since the coming into force of the Constitution those decisions must be considered overruled.

13. I might also mention that despite the fact that the three co-accused of Subedar willingly gave their statements the learned Magistrate acted contrary to law in examining them. In their case there was of course no violation of Article 20 (3) because that confers merely a privilege, and it is well-settled that a privilege can always be waived : it may be waived by voluntarily answering questions, or by voluntarily taking stand in the witness-box, or by failure to claim the privilege. As Prof. Wig more has remarked in his 'Evidence' (3rd Ed.) Vol 8, at page 388: The privilege is merely an option of refusal, not a prohibition of enquiry'. Therefore by voluntarily appearing before the Magistrate Subedar's co-accused should be deemed to have waived the privilege. Nevertheless, under the terms of section 342A Criminal Procedure Code they could not be examined as witnesses for the complainant, because there was no written request by them to do so, because no charge had been made against them, and because in any event they can appear only as witnesses for the defense and never for the prosecution. Whatever statements have been obtained from them cannot be used.

14. In view of the discussion attempted above this Revision is allowed and the learned Magistrate's order directing Subedar to give evidence in the section 202 Criminal Procedure Code enquiry set aside. Further, using the High Court's inherent powers, I hereby declare that the

statements obtained from his three co-accused cannot be used by Dhanna for any purpose - he must establish his case unassisted by any of the accused persons.
Revision allowed.