CALCUTTA HIGH COURT

Farid Ahmed

Vs.

State (Calcutta)

Criminal Revn. No. 623 of 1958

(J.P. Mitter and Bhattacharya, JJ.)

04.06.1959

JUDGMENT

Mitter, J.

1. This Rule was issued upon the District Magistrate of Howrah to show cause why an order of a learned Magistrate dated May, 1, 1958, allowing the investigating officer to take the specimen writings and signatures of the petitioner should not be set aside. The petitioner is an accused in a case under the Bengal Excise Act. The point involved is whether the impugned order infringes the petitioner's fundamental right guaranteed under Article 20(3) of the Constitution.

2. Before we deal with the point, we must say that the order concerned could not have been made under section 73 of the Indian Evidence Act, as the order was made in the course of an investigation. It is not disputed that there is no provision in the Code which allows a Magistrate to make such an order.

3. Article 20(3) is in these terms :

> "No person accused of any offence shall be compelled to be a witness against himself." That the petitioner is a person accused of an offence admits of no doubt. There is also no doubt that the guarantee under Article 20(3) is against "testimonial compulsion." Nevertheless, it is necessary to construe the meaning of the phrase "to be a Witness against himself". For a little while, it was erroneously thought that the expression was confined to the oral evidence of an accused when he gave evidence. "To be a witness against himself" would, in our view, mean 'to furnish evidence against himself.' Such evidence can be furnished as much by word of mouth as by hand. We see nothing in the language of the Article to confine the guarantee to parol evidence. As their Lordships of the Supreme Court observed in *M. P. Sharma v. Satish Chandra*[1],
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> "Broadly staged 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

[1] AIR 1954 SC 300

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." 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, 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."

4. The guarantee is against compelled testimony, both in and out of court. In our view, both the points are concluded by the decision of the Supreme Court. Accordingly, we would respectfully dissent from the Bench decision of this Court reported in *Sailendra Nath Sinha v. The State*[2].

5. In the result, we must allow this application, set aside the order of the learned Magistrate, dated May, 1, 1958 and make the Rule absolute.

6. Let the records be sent down at an early date.

Bhattacharya J.

7. The meaning and scope of the Article 20(3) was elaborately reviewed by Jagannadhadas J. in AIR 1954 Supreme Court 300: 1954 S. C. A. 449. It may be summed up 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. There is 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, 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. " The word "witness" 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 leveled which in the normal course may result in prosecution.

8. The Supreme Court pointed out, for reasons stated therein, that searches made in

[2] AIR 1955 Cal 247

pursuance of warrants issued under section 96 of the Criminal Procedure Code could not be challenged as illegal on the ground of violation of fundamental rights under Article 20(3) of the Constitution. In consonance with the principles discussed therein it was observed by a Division Bench of the Madras High Court *In re Palani Goundan*[3]*,*

> "Any incriminating or relevant object or document or other form of evidence can be seized under process of law from the custody or person of the accused, but he cannot be compelled to produce it. It would follow from that rule that a stolen article can be seized from the person of the accused though he may be unwilling to part with is or, if he happens to swallow a stolen property, he can be taken to a doctor and made to undergo the necessary medical process or treatment with a view to have the article extracted from his body. Similarly, if a police officer finds an accused charged with murder wearing bloodstained clothes, such clothes may be seized from him, though he may not be willing to surrender them. But it is important to bear in mind that while it may be open to a police officer to seize such incriminating articles of evidence from the person of the accused, he cannot himself be compelled to produce them. Under a search warrant or other kindred process of law, documents or articles or any other incriminating evidence can be seized from the custody or the person of the accused by force and against his will, such as stolen articles, blood-stained clothes, etc., but he cannot be compelled to produce them himself. For the same reason, there can be no objection to an accused person being taken to a doctor for the examination of injuries on his body so as to ascertain whether he could not have participated in an occurrence. He can also be taken to an identification parade to enable the prosecution witnesses to observe his physical features with a view to identify him." It may perhaps be permissible to take the thumb-impression of the accused without violating any fundamental right. This was the view taken in *State v. Parameswaran Pillai*[4]*,* It finds support in the judgment of Justice Wendell Holmes in *Holt v. United States*[5]*,* The following observations may be usefully quoted :
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> "But the prohibition of compelling a man in a criminal Court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited whether voluntarily or by order and even if the order goes too far, the evidence, if material is competent."

9. The criterion of "positive volitional act" as mentioned in AIR 1954 Supreme Court 300, furnishes a good working rule. It is realised, however, that the problem may not be an easy one in all cases. The unseemliness of the extent and nature of the force that may have to be applied, for example, in a hypothetical case of extraction of blood to test its alcoholic contents in connection with a motoring offences or one against Prohibition law may perhaps affect this broad

generalization not simply because of the question of infraction of human dignity involved therein but mainly because it will be difficult to draw the line between positive volitional act and compelled testimony as between

[3] AIR 1957 Mad 546

[4] AIR 1952 Tranvancore Cochin 482 (FB)

[5](1910) 218 U.S. 245

passivity and compulsion.

10. The question before us is, can the accused be compelled to give specimen writings and signatures? Applying the test of "positive volitional evidentiary act" as laid down by the Supreme Court, we are bound to say that any such order would be violative of the fundamental right contained in Article 20(3) of the Constitution, for it will be asking the accused to furnish incriminating evidence against himself positively and volitionally and not merely negatively or passively. The accused already objected before the Magistrate about the taking of sample writings, including signatures and the only step that remains to be taken is compelling the accused to furnish this. We are not in a position to say what shape this "testimonial compulsion" will take. A thumb-impression, for example, may be taken by catching hold of the thumb of the accused forcibly, if necessary, but no amount of force barring torture will succeed in compelling a man to write according to dictation or otherwise.

11. Leaving aside the question whether section 73 of the Evidence Act may or may not apply to accused persons, prior to trial, it will not afford any justification for compelling the accused to furnish this evidence. The relevant word in section 73 of the Evidence Act is "direct" and not "compel". It cannot be said that the two words are interchange able, for in the same Act the word "compel" appears in several sections, e.g. 129, 130, 131 and 132. Moreover, as was pointed out in *Hiralal Agarwalla v. The State*[6], the scope of section 73 may be limited as enabling only the court to form its own conclusion as distinct from entitling the court to assist a party to the proceedings. It is true in AIR 1955 Calcutta 247 a Division Bench of this court held that the direction under section 73 of the Evidence Act to take specimen writings of a person who is accused of an offence does not amount to a direction compelling him to give evidence against himself and hence such direction does not offend Article 20(3) of the Constitution. But that decision was based on interpretation of section 73 of the Evidence Act which, in our opinion, does in no way authorise a court to compel an accused person to furnish specimen writings. In our view Article 20(3) will be a guarantee of the fundamental rights of the accused.

12. In this view I agree that the relevant Rule should be made absolute and the impugned order of the learned Magistrate set aside.

Rule made absolute.

[6]61 Cal W. N. 691: (AIR 1958 Cal123)