KERALA HIGH COURT

State of Kerala

Vs.

K.K. Sankaran Nair

Criminal Revn. Petns. Nos. 55, 56 and 57 of 1959, in S.C. Nos. 99, 100 and 101 of 1958

(M.A. Ansari, C.J., Anna Chandy and P. Govinda Menon, JJ.)

22.06.1960

JUDGMENT

M.A Ansari, C.J.

1. These revision petitions seek to vacate the order by the Additional Sessions Judge of Kottayam, sustaining the accused's objection to the admissibility of the specimen of his handwriting, which was sought to be proved by a witness. The accused has been committed in Sessions Cases Nos. 99, 100 and 101 of 1958; and the aforesaid order covers all the cases, having been passed on February 3, 1959. The prosecution case is that, with a view to cause wrongful loss to the Transport Department and make unlawful gain, the accused got printed bogus warrant form, affixed false seal on the form purporting to be that of the Superintendent of Police, entered in his own handwriting the false names and numbers of three fictitious constables, made other entries, further forged the signature of one Plathanam a Sub-Inspector of Police who had retired, by false representation induced P. O. Titus a Conductor to hand him three bus tickets, and utilized these for making unlawful gain. Each Sessions case is concerned with a bus warrant so forged by the accused. During the investigation the Sub-Inspector of Police requested the Sub-Divisional Magistrate, Kottayam, to take specimen handwritings of the relevant passages by the accused, and the Magistrate issued notice to the accused, who gave the specimen writing, which was sent to the Covenment Examiner of Questioned Documents, Intelligence Bureau, Ministry of Home Affairs, Government of India, at Simla. The expert has given the opinion that the specimen writing by the accused and the entries in as well as the signatures on the bogus warrants tally, and that the writings on the warrants seem to be of the accused.

2. During the Sessions trial, the prosecution examined the Sub-Divisional Magistrate as P. W. 16 to prove the specimen handwriting, and the accused's advocate then objected to the document being admitted in evidence on the ground that the specimen handwriting was taken by the witness against consent, and the guarantee against testimonial compulsion under Article 20 (3) has been infringed. The prosecution has urged that the handwriting was taken under Section 73 of the Evidence Act, that it was for the purposes of comparison that the accused willingly agreed to give the specimen, and that the complaint of the constitutional guarantee having been infringed, cannot therefore, be sustained. The Additional Sessions Judge has, however, held that

the specimen handwriting cannot be proved, for the admission of the specimen handwriting compelled from the accused, was prohibited by Article 20 (3), and has relied on *M. P. Sharma v. Satish Chandra*[1], All these three revision petitions seek to have the aforesaid order revised.

3. The learned Advocate General has urged that a number of decisions in this country have held the guarantee against self-incrimination not to be infringed where the eaccused's finger impressions are taken, though by compulsion; and that the accused's handwriting being as such part of his person, the decisions taking a different view where handwriting be taken, should not be followed. He has further argued that compulsory exposing of the accused person has been held not to be covered by the guarantee, and it is difficult to see how asking the accused to give specimen of his handwriting should be treated differently, from asking him to expose some scar on or part of his body. He has also argued that the specimen handwriting does not amount to documentary evidence and would not be covered by Article 20 (3). We think the last argument should be dealt with first. If the paper containing the specimen of the accused's handwriting be not document, we do not see why the prosecution should seek to prove it, or complain against its being made inadmissible; and, having sought to prove the paper as a document, it would hardly be consistent with that position to seek revision of the order on the assumption that the payer is something different. That apart, we think the paper containing the writing to be a document.

4. Coming to other arguments, it is clear that pronouncements by the High Courts in this country cannot be reconciled, and in such a state of conflicting decisions, it would be helpful to trace how the rule against testimonial compulsion came to be accepted as one of the cardinal principles of administering criminal justice. It is not dispued that the maxim of no man being compellable to incriminate himself, was evolved in order to prevent courts of law adopting inquisitional procedure of the accused being obliged on oath to answer questions, which procedure began to be followed in Ecclesiastical Courts early in 1200. Before that date, there was no interrogation of the accused by the tribunal, but early in that century the new method of administering oath was followed in order to probe from the accused by questions the details of the matter for which he was brought before the tribunal. The procedure was first allowed in England by the Ecclesiastical Courts that exercised jurisdiction over matrimonial and testamentary causes; and after Coke became the Chief Justice, efforts were made to keep these Courts within the bounds of their jurisdiction. The opposition to the aforesaid procedure became accentuated when the Court of the Star Chamber came to adopt it, and in 1637-45 came Lilburn's agitation, which finally resulted in that Court being abolished. The facts of the case were that Lilburn was committed to prison on a charge of printing or importing certain heretical and seditions books. While under arrest, and having denied these charges, he was asked by the Attorney-General as to other like charges; but he refused. When examined before the Star Chamber itself, the accused again refused, was condemned to be whipped and pilloried for his boldness in refusing to take legal oath, without which many offences might go undiscovered and unpurged. On November 2, 1640, Lilburn preferred a complaint to the Commons, and on May 4, 1641, the Commons voted that the sentence was illegal, against the liberty

[1] AIR 1954 SC 300

of the subject, and ordered reparation. No steps appear to have been taken, and Lilburn applied once more, whereupon, on 13-2-1645, the House of Lords ordered the sentence to be vacated totally as illegal, unjust and against the liberty of the subject and law. Thus the maxim 'nemo teneture selpsum accusare' (No man can be compelled to criminate himself) became an important principle of the English Law, which Coleridge, J., in *R. v. Scott, (1856)* Dears and B. 47 describes

as "a maxim of our law as settled, as important, and as wise as almost any other in it". Having regard to the aforesaid history, it cannot be denied that the insistence on the maxim being observed rests more on grounds of humanity than on excluding perjured evidence from trials. We would, therefore, differ with respect from the decisions where it has been held that the guarantee against testimonial compulsion would not be available where the veracity of evidence sought to be excluded be assured.

5. It is equally well established that much earlier to the inauguration of the Constitution, the aforesaid maxim had received legislative recognition in this country; for Section 3 of Act 15 of 1852 had enacted that an accused in a criminal proceeding was not a competent or compellable witness to give evidence for and against himself. Later Sections 204 and 203 of the Code of Criminal Procedure, 1861, had provided that no oath shall be administered to the accused, and that it shall be in the discretion of the Magistrate to examine him. Though the Evidence Act of 1872 had repealed Section 3 of Act 15 of 1852, Section 250 of the Criminal Procedure Code of the same year had made provision for a general questioning of the accused after the witnesses for the prosecution have been examined compulsorily, and Section 345 provided that no oath or affirmation should be administered by the accused. These have since been incorporated in Section 342 of the present Criminal Procedure Code of 1898. It follows that the accused could not be compelled to make self-incriminatory statements, and this had been a settled principle of the administration of criminal justice in this country as well. Moreover, the English ramification of the principle of the witness not being compelled to answer questions, whose answer would make the witness subject to criminal prosecution, was also accepted, though with modification; for Section 32 of Act 2 of 1855 had made the witness compellable to answer such questions, yet it provided immunity from arrest or prosecution on the basis of such evidence in criminal proceedings, except prosecution for giving false evidence.
This position has been continued under the Evidence Act, 1 of 1872. Therefore, the principle, which is spoken of as being one of the important principles of English Criminal Justice, has been, with insignificant modifications, equally important part of the Indian Law much prior to the inauguration of the Constitution. In this connection we would quote the following observations of Jagannadha Das, J., in AIR 1954 SC 300 :

> "Thus so far as the Indian law is concerned, it may be taken that the protection against self-incrimination continues more or less as in the English Common law, so far as the accused and production of documents are concerned, but that it has been modified as regards oral testimony of witnesses, by introducing compulsion and providing immunity from prosecution on the basis of such compelled evidence."

We have thought it necessary to emphasise the historical background, for the principle having already become part of administering criminal justice, the intention of the guarantee being conferred would not be to uncover what was already governed. On the other hand, the intention would be to extend and to make legislations not otherwise governed subject to the principle. It follows that in adjudicating on the claim of the guarantee contained in Article 20 (3) having been infringed, any consideration of how far the particular evidence be excluded by Section 162 of the Criminal Procedure Code, 6r covered by Section 72 of the Evidence Act, would not be of importance. The objection should rather be decided on consideration of what the guarantee is and how far the complaint is justified, having regard to several elements constituting it. We feel that

some decisions have confused the issue by considering how far the evidence tendered is assured of being true, or whether it be documentary or oral evidence, according to the Evidence Act, or excluded by the Criminal Procedure Code. We would emphasise that any objection lodged by the accused must be adjudicated by settling how far the Constitutional guarantee has been violated, the guarantee which enshrines a recognised principle of administering criminal justice. We, therefore, propose to decide these revision petitions on that ground alone.

6. In this connection we would begin with *Kalavati v. Himachal Pradesh State*[2], where one Kanwar Bikram' Singh was murdered, and the prosecution case was that the two appellants before the Supreme Court, one being his wife, and the other a distant cousin, had illicit intimacy, and got rid of the deceased as he was cruel in his behaviour to the wife. The wife having been charged under Sections 114 and 302, I. P. C., and the cousin under Section 302, the Sessions Judge acquitted the wife and found the cousin guilty. On appeal, the wife's acquittal was set aside and the cousin's appeal dismissed. Both the accused had made confessions under Section 164 of the Criminal Procedure Code, but they retracted before the Committing Magistrate.
These confessions were used against them in their examination under Section 342 Criminal Procedure Code, and before the Supreme Court it was contended that the accused having retracted confessions, they should not be used against them as that would contravene Article 20 (3). Chandrasekhara Iyer, J., rejecting the argument, has observed :-

> "Sub-Section (3) of Article 20 does not apply at all to a case where the confession is made without any inducement, threat or promise. It is true that a retracted confession has only little value as the basis for a conviction, and that the confession of one accused is not evidence against a co-accused tried jointly for the same offence, but can only be taken into consideration against him. This deals with its probative value and has nothing to do with any repugnancy to the Constitution."

7. It follows that the guarantee is against compelling self-incrimination. The next authority is AIR 1954 SC 300, where the Government had ordered investigation into the affairs of a company, and the report of the Inspector appointed showed organized attempt, from the company's inception, to misappropriate and embezzle the funds and to declare substantial loss, thereby concealing from the share-holders the true state of affairs, by submitting false balance sheet. The Special Police, on the basis of the

[2] AIR 1953 SC 131

information applied to the District Magistrate, under Section 96, Criminal Procedure Code, for warrant to search documents at different places. The District Magistrate ordered investigation, and issued warrant for searches at 34 places. On the records being seized, an application was made to the Supreme Court under Article 32 of the Constitution, that the warrants being illegal and unconstitutional, the documents should be returned. It was argued that a search to obtain documents for investigation into an offence, amounted to compulsory procurement of incriminatory evidence from the accused and would be hit by Article 20 (3) of the Constitution. Rejecting the petition, Jagannadha Das, J., observes at p. 303, as follows :-

> "Analyzing the terms in which this right has been declared in our Constitution, it may be said to consist of the following 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". The learned Judge further continues 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, 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".

x x x x

"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 pharse "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. Whether it is available to other persons in other situations, does not call for decision in this case.

Considered in this light, the guarantee under Article 20 (3) would be available in the present case to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for 'production' of evidentiary documents which are reasonably likely to support a prosecution against them. The question then that arises next is whether search warrants for the seizure of such documents from the custody of these persons are unconstitutional and hence illegal on the ground that in effect they are tantamount to compelled production of evidence.

It is urged that both search and seizure of a document and a compelled production thereof on notice or summons serve the same purpose of being available as evidence in a prosecution against the person concerned, and that any other view would defeat or weaken the protection afforded by the guarantee of the fundamental right. This line of argument is not altogether without force". The learned Judge then rejects the argument in these words :-

"A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20 (3) would be defeated by the statutory provisions for searches."

8. The next two pronouncements by the Supreme Court do not reject what has been held above to amount to self-incrimination and would constitute infringement of the guarantee. In *Govinda Reddy v. State of Mysore*[3], the High Court had relied on comparison of finger prints found on the silver vessel with what was taken by the police, but Subba Rao, J., dismissing the appeal, excluded from consideration the evidence furnished by the aforesaid comparison and therefore the constitutionality of admitting evidence furnished by the finger prints taken from the accused, was not decided in the case. The appellant in *Mohamed Dastagir v. State of Madras*[4], was tried for attempting to bribe, and was acquitted by the Special Judge, who came to the conclusion that the charge was not proved, but the State appealed against the acquittal and the High Court held the evidence having established the appellants being guilty. One of the grounds taken before the Supreme Court was that there has been violation of Article 20 (3). The prosecution case against the appellant was that the envelope in which the bribe was offered to the Deputy Superintendent of Police, on being thrown back at the appellant's face, was picked up by him, and on the person summoned by the Deputy Superintendent of Police appearing, the appellant was asked to produce the envelope, whereupon he took out some currency notes on which the office rubber stamp was placed. The objection before the Supreme Court was that the appellant was an accused when the Deputy Superintendent of Police asked him to produce the money, and under the circumstances the production of the incriminatory documents by the appellant under compulsion, amounted to testimonial compulsion. In support Sharma's case, AIR 1954 SC 300 was relied upon. Dealing with the argument, Imam, J., observes as follows :-

> "These observations were unnecessary in Sharma's case, having regard to the fact that this Court held that the seizure of documents on a search warrant was not unconstitutional as that would not amount to a compulsory production of incriminating evidence. In the present case, even on what was stated in Sharma's case, there was no formal accusation against the appellant relating to

[3] AIR 1960 SC 29

[4] Crl. Appeal 137 of 1957, decided on 26-2-1960. : AIR 1960 SC 756

> the commission of the offence. Mr. Kaliyappan had clearly stated that he was not doing any investigation. It does not appear from his evidence that he had even accused the appellant of having committed any offence. Even if it were to be assumed that the appellant was a person accused of an offence, the circumstances do not establish that he was compelled to produce the money which he had on his person. No doubt, he was asked to do so. It was, however, within his power to refuse to comply with Mr. Kaliyappan's request. In our opinion, the facts established in the present case show that the appellant was not compelled to produce the currency notes and therefore do not attract the provisions of Article 20 (3) of the Constitution."

9. What has been stated in Sharma's case would, so far as we are concerned, continue to be binding and to furnish the test for determining what amounts to compelled self-incrimination, and when the guarantee against it would be violated. We think that where a person formally accused is compelled through positive volitional act, to furnish materials which are tendered as evidence against him, the guarantee is infringed.

10. We would now survey some decisions of the High Courts and it is clear that conflicting views have been entertained, at times decisions of the same High Court not being reconcilable. The earliest of such Cases is *Sailendranath v. State*[5], wherein criminal proceedings began against the petitioners on a complaint by the Official Liquidator and an order was made directing specimen writings of the two petitioners to be taken. It was argued that the direction amounted to one for compelling the petitioners to give evidence against themselves; but the learned Judges held that the direction was not for compelling him to give evidence against himself, that Section 73 of the Indian Evidence Act authorised the Court to direct any person to write any words or figures, and that these provisions did not infringe the fundamental right contained in Article 20 (3). The subsequent decisions of the same Court do not support this view; for in *Farid Ahmed v. The State*[6], it has been dissented from and it has been held that taking specimen writing and signature of the accused violates the guarantee contained in Article 20 (3). Again, in *Tarini Kumar v. State*[7], it has been held that there is no provision in the Criminal Procedure Code, which permits the police to take specimen of the handwriting of an accused person in course of investigation when the accused is in custody, and taking of such specimen handwriting from the accused after his arrest so as to furnish evidence against him, amounts to a violation of the guarantee against testimonial compulsion as envisaged by Article 20 (3). Similar view has been taken in *Bhaluka Behera v. The State*[8], where it has been decided that the accused cannot be compelled to give his thumb impression as directed by the Magistrate, and in *State v. Ramkumar*[9], In the latter case the police took the application, alleged to have been written by the accused, from the file of one of the cases pending before the Municipal Magistrate, and taking him to a Second Class Magistrate, made him copy out the application in the presence of the Magistrate. A Handwriting Expert then compared the writing and gave the opinion that the telegram was in the handwriting of the accused. The learned Judges held that the prosecution, by the application being copied and compared, sought to

[5] AIR 1955 Cal 247 [7] AIR 1960 Cal 318 [9] AIR 1957 Mad Pra 73
[6] AIR 1960 Cal 32 [8] AIR 1957 Ori 172

furnish evidence to the Court, which evidence must be overlooked and cannot be received. The same Court in *Brij Bhushan v. State*[10], has decided that a direction by the Court asking the accused to give the thumb impression or specimen of the writing or signature, amounts to asking him to furnish evidence, which is prohibited under Article 20 (3).

11. These are the cases where the accused's objection of being compelled to furnish evidence by the direction to furnish specimen of handwriting, been upheld, and we would now mention the decisions taking a different view, beginning with those of the Madras High Court, where the opinions seem to oscillate between the two views.

12. The petitioner in *Swarnalingam v. Asst. Labour Inspector, Karaikudi*[11], had been charged with the offence of contravening the provisions of the Shops and Establishments Act, and the Sub Magistrate had, under Section 94 of the Criminal Procedure Code, directed him to produce document in his possession. Objection having been taken to the production of the documents, the Magistrate overruled it, and Rajamannar, C. J. allowed the revision petition, holding that the guarantee under Article 20 (3) would extend to any compulsory process for production of evidentiary documents which were reasonably likely to support prosecution against the accused : Similar view was taken in *Swarnalingam Chettiar v. Assistant Inspector of Labour*[12], that the guarantee under Article 20 (3) would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support the prosecution. *In re Sorualingam*

Chettiar[13], the petitioner had prayed that the order directing a search be varied, and Balakrishna Iyer, J., dismissing the revision, had observed that the Constitution was not intended to be a charter for the lawless and there was nothing in Article 20 (3) of the Constitution or in any of its other articles to prohibit the police from searching either the person of the accused or premises in the manner laid down by the Criminal Procedure Code Somasundaram, J., has in *Rajamuthu Pillai v. Periyaswami Nadar*[14], held that the direction by the court to the accused to give his thumb impression amounted to asking him to furnish evidence which was prohibited under Article 20 (3) and the accused could not be compelled to give his thumb impression. The observation in *In re Palani Goundan*[15] is otherwise. There the petitioner had been convicted under the Madras Prohibition Act, and the only evidence on which the Court had come to the conclusion, was of the Medical Practitioner, who had examined him on his production by the Head Constable and had observed smelling of arrack in his breath, redness of the eyes, dialation of pupil, incoherence of speech, and staggering gait. It was contended before the High Court that the symptom observed by the Medical Practitioner must be regarded as having been obtained from the accused by compulsion and was hit by Article 20 (3). While dismissing the revision petition, the learned Judge observes as follows :-

> "There is one aspect of this matter which calls for some mention, namely, the taking of the signature or the thumb impression of an accused for the purpose of its being compared with the signature or thumb impression in questioned documents with a view to establish offences, such as, forgery, criminal breach

[10] AIR 1957 Mad Pra 106 [12] AIR 1955 Mad 716 [14] AIR 1956 Mad 632
[11] AIR 1956 Mad165 [13] AIR 1955 Mad 685 [15] AIR 1957 Mad 546

> of trust, etc. It appears to me that the making of thumb impression or the signature of the accused, does not stand on a different footing from the seizure of the documents or articles or other facts of evidence from the person of the accused."

13. The Allahabad High Court in *Ram Swamp v. State*[16], has held that writing obtained by the Court from the accused under Section 73, would not come within the expression 'evidence' as it would not be a document produced for the inspection of the Court and that an order directing an accused to furnish specimen writing under Section 73, Evidence Act, would not be hit by the provisions of Article 20 (3). Raghubar Dayal, J., while stating the principle on which, according to the learned Judge, the doctrine of protection against testimonial compulsion is based, says :-

> "I may say that the basic principle in favour of the doctrine of protection against testimonial compulsion is that whatever evidence is furnished by the accused under coercion may not be true and therefore any reliance on such evidence would be dangerous. In view of such a principle, the oral statement made by an accused under compulsion or even a document produced by him under compulsion, may be held to be inadmissible. It is just possible that the accused creates a document incrimating himself On account of the compulsion. But there is no possibility of the accused's creating a false document by writing in presence of the Court for the mere purpose of comparing his writing with the disputed writing".

14. With respect, the learned Judge overlooks that the rule against testimonial compulsion was formulated to prevent Courts interrogating the accused and it would hardly be logical to hold that what cannot be got orally, can be had by writing. Nor do we see how such a writing would not be documentary evidence, where something being in accused's handwriting is in issue in the case. Indeed, Mathur, J., had in *Balraj Bhalla v. Ramesh Chandra*[17], treated the aforesaid observations to be obiter dicta, for he says :-

> "With this view I am in full agreement, though I may add with due respect that certain observations made by brother Raghubar Dayal, J., are obiter dicta, and, in my opinion, cannot be considered to be a correct exposition of the law, for example, the observation that the specimen writing cannot be treated as evidence in view of the definition of "evidence" contained in Section 8 of the Indian Evidence Act. It is true that at the initial stage the specimen writing will not be inspected by the Court and will be used only for purposes of comparison with the disputed handwriting.

But if the Expert expresses an opinion that the two handwritings are of the same person, this part of the evidence would be tendered against the accused and at that stage the Court would, without fail, inspect not only the disputed handwriting but also the specimen handwriting. In other words the specimen handwriting taken will be a document which would be produced for inspection of the Court and it will, as laid

[16] AIR 1958 All 119

[17] AIR 1960 All 157

down in Section 8, be "evidence". In case the document amounts to an evidence against the accused, he cannot, of course, be compelled to give evidence against himself, that is, to be responsible for the preparation of that document".

15. Tekchand J., in *Pakhar Singh v. The State*[18], has held that taking thumb impression of the accused in Court by the Magistrate under his direction, was not in contravention of Article 20 (3), and the learned Judge observes :-

> "The true scope of the Constitutional inhibition seems to me to prohibit compulsion in the matter of testifying either by word of mouth or in writing. What is forbidden is the use of force in the process of disclosure by oral statements or by written words of testimonial character. The danger, prevention of which the Constitution visualises, is the interference with the volitional faculties of a person so that he may not be terrified into making depositions as a witness."

16. It is not clear why the position of the accused, who while protesting, affixes his thumb impression, should be different from the position of the accused who furnishes specimen of his writing under similar circumstances, except on the ground of words in Article 20 (3) not being wide enough to cover something which is neither oral nor documentary evidence. But such an interpretation would not be treated as liberal.

17. Of the two decisions of the Mysore High Court, it has been held in *State v. C. V. Gopala Rao*[19], that the Court can direct the accused to give his writing in Court for the purposes of

comparison by the Handwriting Expert and make such use of it as the Court is entitled to, and In re, Govinda Reddy, AIR 1958 Mysore 150, the learned Judges observed :

> "Even if it is assumed that the Sub Inspector of Police and the Daffedar compelled the appellants to give their thumb impressions or forcibly took their impressions on the sheets of paper during the course of the investigation, in our opinion, it is not hit by Article 20 (3) of the Constitution of India since it does not amount to testimonial compulsion".

18. The Supreme Court in dismissing the appeal, has not relied on this evidence as we have already mentioned, and, therefore, we can form our own conclusions regarding the correctness of the basis on which the observation rests.

19. In *State v. Parameswaran Pillai*[20], the Travencore-Cochin High Court had reached the conclusion that the words "any person" in paragraph 2 of Section 73 of the Evidence Act, are wide enough to cover an accused person; but the Court has no power to compel an accused person to write out the contents of a document alleged to have been forged by him; it can only direct him to do so. Koshi C. J., who delivered the judgment, has further held that the practice of taking the thumb impression of the accused under the direction of the Court and using it against him, is in strict compliance with Section 45 of the Evidence Act, Section 73 of the Evidence Act, and

[18] AIR 1958 Pun 294
[19] AIR 1954 Mys117
[20] 1952 Ker LT 310 : AIR 1952 Trav Co. 482 (FB)

also Section 5 of the Identification of Prisoners Act. No objection can be taken to the decisions, where the accused has waived the guarantee and gives the specimen of his handwriting; but we would differ with respect where there be no waiver, for the legislative authorisations would not adversely affect the constitutional privilege of the accused and the learned Judges have not dealt with that guarantee.

20. Coming now to the Bombay High Court, Shah, J., in *State v. Abu Ismail*[21], has agreed that the expression "to be a witness" means to furnish evidence and that the Constitutional guarantee is not restricted in its ambit to proceedings in the Court room; but the learned Judge has also held that every person accused of an offence and complying, in the course of investigation, with the request to give handwriting or thumb impression for comparison, does not give a statement, proof whereof is prohibited by Section 162 of the Cr. P. C With respect, the position, in our opinion, of a person so compelled would be different; for the consequence of the guarantee against testimonial compulsion being operative, would be that exercise of all powers would be subject to the guarantee, and the powers of the investigating authority whether under Section 162 of the Criminal Procedure Code, or otherwise would be subordinated. It follows that the handwriting or the thumb impression would not be admissible if they be evidence, irrespective of the power under which they be taken. In such a position, any reference to Section 162 of the Criminal Procedure Code, would not be of importance, and the question would be whether they be evidence. We would now conclude our survey by referring to *Narayan Lal v. Maneck Phirose*[22], where it has been held that the main and primary function of the investigation under Section 235 of the Companies Act is one of looking into the affairs of the Company from the point of view of the provisions of the Companies Act and for considering whether it was worked in the interest of the share holders, and, therefore, the scope and nature of the inquiry does not amount to investigation into an affair and as there is no accusation, the compulsion in such

proceedings is not struck by Article 20 (3). The learned Judges have rightly held that the protection under Article 20 (3) is available only when there is a formal accusation against the person or where, in the normal course, the proceeding would result in prosecution. We think certain propositions clearly emerge from the aforesaid survey, which are that:

> (1) The guarantee against testimonial compulsion is available only where there be formal accusation or where proceeding would in the normal course result in such accusation;
> (2) The guarantee can be waived and does not cover the accused furnishing evidence willingly;
> (3) The guarantee covers every volitional positive evidentiary act of the accused; and
> (4) There is divergence of pronouncement whether the guarantee covers the specimen of handwriting or thumb impression got from the accused by the investigating authority or Court.

21. Before we finally express our preference to either of the views, it would be of advantage to observe how the common law rule against self-incrimination has been

[21] AIR 1959 Bom 408
[22] AIR 1959 Bom 320

followed and developed in America. It has been adopted by the Fifth Amendment to the Constitution of the United States of America, in the following words :-

> "No person ..... shall be compelled in any criminal case to be a witness against himself". This provision regulates the procedure of Federal Court only, but most of the States' Constitutions contain similar provisions. Willoughby, describing what constitutes self-incrimination writes (Vol. II 2nd Edn. Paragraph 712) :
> "The immunity, which is provided, has for its object the protection of the individual against criminal prosecution based upon evidence, which has been compulsorily obtained from him. Thus the provision is no bar to the use in a subsequent provision of evidence that has been voluntarily given by the accused; nor does it prevent the courts from compelling testimony with reference to acts no longer punishable, or where, by statute, subsequent use of the evidence so obtained in criminal actions has been forbidden. Thus also the immunity does not relate to evidence, the tendency of which is merely to discredit the moral character of the witness". Again the author summarises the legal position (Vol. II 2nd Edn. paragraph 719) concerning compulsory taking of finger prints, in these words :-
> "Though there are no direct cases in the United States Supreme Court upon the point, there are State decisions which support the doctrine that the accused's right to immunity from self-incrimination is not violated when he is compelled to exhibit himself or a part of his body to the jury, or to allow a record of his finger prints to be taken".

Willis in Constitutional Law (page 520) writes :-

> "The protection of the privilege against self-incrimination extends not only to testimony in a prosecution pending, but also to testimony in any proceeding when such testimony can be used in that . jurisdiction in a later criminal prosecution against the accused. The rule has also been extended to protect one against the production of his books and papers. This part of the protection seems to be inconsistent with the limitation of the guaranty to oral testimony, but it was one of the changes of importance made by the United States Supreme Court....."

The author when dealing with the question of how far compulsory medical examination is covered by the guarantee, (page 521), states :

> "An important question is whether or not a compulsory physical examination of an accused by a medical practitioner is a violation of the privilege against seii-inerimination. The correct answer to this question seems to be that such examination is a violation of the privilege against self-incrimination if it is of parts not usually exposed to view, but it is not such a violation if it is an examination of parts usually exposed to view. The test of voluntariness applied to confessions is sometimes used in this connection, but the better explanation is that it is not a violation of the privilege against self-incrimination because a person is not compelled to testify but to As regards finger prints, the author says :

make an exhibition of facts. It is identification".

> "Is the taking of finger prints a violation of the privilege against self-incrimination? This question seems to have been answered in the negative. The accused does not exercise a volition or give oral testimony. He is passive. He is not giving testimony about his body but is giving his body. If there is any question involved, it is a question of the right of privacy....."

22. It would also be useful at this stage to refer to two judicial pronouncements. Justice Brown in *Hale v. Henkel*[23], observes :

> "The object of this amendment, is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to fact which may impair his reputation for probity or even tend to disgrace him, but the line is drawn at testimony that may expose him to prosecution. If the testimony relates to criminal acts long since past, and against the prosecution of which the statute of Limitation has run, or for which the defendant has already received a pardon or is guaranteed immunity, the amendment does not apply."

In *Holt v. United States*[24], it has been held that the protection against self-incrimination afforded

by U.S. Constitution, Fifth Amendment, extends to the use against the accused of communications extorted from him by physical or moral compulsion, but not to evidence obtained from the exhibition of his person, such as testimony as the fitting of a blouse which he was forced to put on. Holmes, J., held in the case as follows :-

> "But the prohibition of compelling a man in a criminal court to be witness against himself, is a prohibition of the one 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."

23. Divergence of views would arise should there be two schools on interpreting the Constitution, and it is well known that such schools exist in America. One school has treatel the Constitution as something rigid, inffexible, and subject to the interpretation according to the meaning existing at the time the Constitution was framed. The other school treats it not as though it were a legislative Code, but as the revelation of a great

[23](1950) 201 U.S. 43 : 50 Law Ed. 652
[24](1909) 218 U.S. 245 : 54 Law Ed. 1021

purpose that was intended to be active, and to be a continuing instrument of Government. It is equally clear that the preference, perhaps unconsciously, of the conservative school of interpretation, would result in placing too narrow an interpretation on Article 20 (3), and that explains some of our own decisions where restricted meaning is placed on the words of the Article. We would prefer the other form of interpretation. It follows that the privilege against self-incrimination contained in Article 20 (3), which rests upon the abhorrence of compelling a man to expose his own guilt, and the avoidance of personal degradation, must not be limited to what is evidence, oral or documentary, according to the Evidence Act, but should cover all positive and compelled acts of the accused, which furnish material for reaching conclusions of facts in criminal cases. The acceptance of the rule against the testimonial compulsion has not resulted in circumscribing the right to search or admitting in evidence what have been got through searches. Nor searches of the house, of the body, and the belongings of the accused, been excluded by the guarantee under Article 20 (3). Therefore, the Courts when adjudicating on complaints of the evidence having been compelled from the accused, should ascertain how far the matter complained against (has?) been got through exercise of that right to search. The working test in America is to ascertain whether the facts (have?) been communicated by the accused, and in this country whether they (have?) been got through compelled volitional positive evidentiary acts. It follows that where the material tendered in evidence be got through such acts, the guarantee under Article 20 (3) would be infringed. We do not agree with the view of the learned Judges of the Allahabad High Court that if the genuineness of the evidence be assured, the guarantee by the Article is not infringed. Nor do we agree with the observations that if something be not statement under Section 162 of the Criminal Procedure Code, it would be admissible. Nor that the specimen of handwriting compelled from the accused is admissible. The words "to be a witness" in Article 20 (3), have been held by our Supreme Court not to be confined to compelled oral

evidence alone, but to cover documentary evidence as well, and we do not see how consistently with such liberal interpretation, compelled writing by the accused can be admitted as not covered by the inhibition. Therefore, we are not impressed with the argument that handwriting, being part of the personality of the accused cannot be treated differently from document containing his or her finger prints. We think that the specimen of the handwriting got by non-voluntary positive act of the accused, cannot but be treated as amounting to self-incrimination by compulsion. The argument that it forms part of the Court's observation, would not be helpful; for it would even then be part of the material, on which findings of fact would be based and, therefore, evidence. Therefore, the Additional Sessions Court was right in upholding the objection in these cases. We do not express any opinion on finger prints, for, that question does not arise for adjudication now, though we are not impressed by the argument that in taking finger prints the guarantee against self-incrimination is never violated. We would judge the question should it arise, by examining how far the particular exhibit tendered in evidence has been got from the accused through compulsion and his positive act. Thus these three revision petitions are dismissed, as we think that the Additional Sessions Judge has rightly excluded the evidence.

Revisions dismissed.