MADHYA PRADESH HIGH COURT

Brij Bhushan Raghunandan Prasad

Vs.

State

Criminal Revn. No. 127 of 1955
(Dixit and Samvatsar, JJ.)

20.3.1957

JUDGMENT

Dixit, J.

1. The only question that arises in this case and which has been referred to us for decision is whether a direction made by the First Class Magistrate of Mhow asking the petitioner to give his thumb impression and specimen writing and signature for comparison is prohibited by Article 20 (3) of the Constitution of India.

2. The facts are that the Special Police Establishment of the Government of India has registered a case against the applicant before us for offences under Sections 409 and 471, Indian Penal Code. The charge against the applicant is that on certain dates some money-orders were entrusted to him for payment to payees; and that instead of paying the amounts of the money-orders to the payees, he misappropriated the amounts and returned the money-order forms with forged thumb impressions and signatures of the payees. The accused is a postman. Soon after the arrest of the accused and during the course of investigation, an application was made by the Police before the First Class Magistrate of Mhow for a direction to the accused to give his thumb impression, specimen handwriting and signature in Court for comparison. This application was purported to be one under section 73 of the Evidence Act and section 5 of the Madhya Bharat Identification of Prisoners Act, Samvat 2008 (Act No. 15 of 1951). The accused objected to this saying that under Article 20 (3) of the Constitution and under the decision of the Supreme Court in *M. P. Sharma v. Satish Chandra,* [1] he could not be compelled to give his thumb impression, specimen writing and signature. The First Class Magistrate of Mhow overruled the objection. He held that Article 20 (3) had no applicability as by a direction to give his thumb impression, specimen writing and

signature the accused was not being compelled to give any evidence against himself and that the decision of the Supreme Court was distinguishable on facts. Accordingly, on 28th May 1955, he directed the accused to give his thumb impression, his specimen signature and writing. The applicant then preferred a revision petition before the Additional Sessions Judge of Indore which was rejected. The learned Additional Sessions Judge, agreeing with the view taken by the learned Magistrate, added that there was no question of the accused furnishing any evidence by giving his thumb impression or signature or specimen writing for comparison as it would be the expert's opinion with regard to the alleged forged signatures and thumb impressions on the money-order forms and not the thumb impression and specimen signature or writing given by the accused that would constitute evidence. Thereafter, the applicant made a revision petition to the Madhya Bharat High Court impugning the order of the First Class Magistrate. When the matter came up for hearing before Chaturvedi, J., he thought that in view of the decisions in AIR 1954 Supreme Court 300, *Rajamuthukoil Pillai v. Preiyasami Nadar,* [2] and *Silendra Nath Sinha v. The State,* [3] the question "whether any direction under section 73 of the Evidence Act to take specimen writing of a person who is accused of an offence does or does not amount to a direction compelling him to give evidence against himself and whether such a direction offends or not the provisions embodied in Article 20 (3) of the Constitution" is not free from difficulty. Accordingly he thought that the question should be decided by a Division Bench rather than by him sitting singly.

3. At the outset, it must be stated that the impugned direction was made by the learned Magistrate before any challan was presented against the accused in the Court. The direction cannot, therefore, be regarded as having been made under section 73 of the Evidence Act in judicial proceedings before the First Class Magistrate. It was purported to be under section 5 of the Madhya Bharat Identification, of Prisoners Act, which is as follows:-

> "If a Magistrate is satisfied that for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or photographs to be taken, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photographs to be taken, as the case may be, by a Police Officer;

> Provided that no order shall be made directing any person to be photographed except by a Magistrate of the First Class;
> Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

Under Section 2 (a) of the Act 'measurements' include finger impressions and foot-print impressions. The question, therefore, for determination, is whether section 5 of the Madhya Bharat Identification of Prisoners Act, Samvat 2008, in so far as it empowers a Magistrate to direct an accused person to give his thumb impressions, specimen writing or signatures, being repugnant to Article 20 (3), is void and inoperative.

4. The applicant contends that the order directing him to give his thumb impression, specimen writing and signature really amounts to a direction compelling him to give evidence against him and so offends the provisions of Article 20 (3) of the Constitution. In support of this contention, reliance has been placed on AIR 1954 Supreme Court 300, *Swarnalingam Chettiar v. Assistant Labour Inspector, Karaikudi,* [4]In our judgment, regard being had to the observations of the Supreme Court in para 10 of the judgment in the case of AIR 1954 Supreme Court 300, it must be held that section 5 of the Madhya Bharat Identification of Prisoners Act, to the extent it empowers a Magistrate to direct an accused person to give his thumb impression, specimen writing and signature for comparison with other documents to be used against the accused at the trial, is repugnant to Article 20 (3) of the Constitution and void, and the direction made by the First Class Magistrate of Mhow is illegal. In the case of AIR 1954 Supreme Court 300, the Supreme Court considered the scope and meaning of Article 20 (3) of the Constitution in connection with the question whether a search warrant for the seizure of documents from the custody of an accused person for investigation into an offence is a compulsory production of incriminating evidence against the accused person and is, therefore, hit by Article 20 (3) of the Constitution as unconstitutional and illegal. The Supreme 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, 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.

"So far as production of documents is concerned, no doubt Section 139, 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 produced 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. 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 cases to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process of 'production' of evidentiary documents which are reasonably likely to support a prosecution against them."

The Supreme Court then proceeded to consider the question whether a search warrant for the seizure of documents in the custody of an accused person is illegal on the ground that in effect it is tantamount to compelled production of evidence. On a consideration of Sections 94 and 96, Criminal Procedure Code, and certain American

decisions, the Supreme Court came to the conclusion that a search and seizure made in pursuance of a warrant issued under section 96, Criminal Procedure Code, is not the testimonial act in any sense of the occupier of the searched premises; it does not constitute the testimonial act of the accused; it is an act of the person to whom the warrant is addressed, and that, therefore, a warrant issued under section 96, Criminal Procedure Code, could not be challenged as illegal on the ground of the violation of fundamental right under Article 20 (3) of the Constitution. The decision here depends upon the true application to the facts of the case of the construction put by the Supreme Court on Article 20 (3). The Supreme Court construed the words 'to be a witness' as used in Article 20 (3) to mean that 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 or the like; and '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. It was further observed that 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.' The Supreme Court also pointed out that the guarantee under Article 20 (3) of the Constitution is available to the person against whom a first information report has been recorded as distinguished therein and would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against him. On this construction, it seems to us that there can be no doubt that a direction by the Court asking the accused to give his thumb impression or specimen writing or signature amounts to asking him to furnish evidence which is prohibited under Article 20 (3) of the Constitution. It cannot be denied that the applicant is an accused person and that the giving of the thumb impression, specimen writing and signature are the positive acts of the accused and that when he is directed to give his thumb impression, specimen writing and signature he is being compelled to do something which is likely to be used as evidence to support the prosecution case against him. The learned Additional Sessions Judge's view that at the trial it would be the expert's opinion that would be evidence against the accused and not the thumb impression, specimen writing and signature given by him is altogether untenable. The fact that at the trial the evidence against the accused would be as to the identity of the thumb impressions and signatures on the money-order forms and would be given by an expert none-the-less constitutes the giving by the accused of his own thumb impression, specimen writing and signature for comparison with the thumb

impressions and signatures on the money-order forms furnishing evidence against him. As pointed out by the Supreme Court, Article 20 (3) is not confined to the oral evidence of an accused person at his trial in the Court-room. It extends to any compulsory process by which the accused is asked to furnish evidence against him, 'through the lips or by production of a thing or of a document or in other modes'. It is obvious that the foundation of the expert's opinion that the thumb impressions and signatures on the money-order forms were made by the accused himself would be the fact that on comparison they were found to resemble the thumb impression, specimen writing and signature given by the accused himself. Learned Government Advocate said that by the direction given, the applicant was not being asked to produce any document. The argument cannot be acceded to when according to the Supreme Court's decision in AIR 1954 Supreme Court 300, evidence can be furnished not merely by production of a thing or of a document but also by any other mode.

5. The view taken by us is supported by AIR 1956 Madras 632, where it was held that a direction by the Court asking the accused to give his thumb impression amounted to asking him to furnish evidence and fell within the scope of the decision of the Supreme Court in AIR 1954 Supreme Court 300, and that it was prohibited under Article 20 (3) of the Constitution. In AIR 1955 Calcutta 247, a contrary view was no doubt taken. In that case Guha Ray, J., was of the opinion that a mere direction to a person, accused of an offence, to give his specimen writing did not amount to compelling him to give evidence against him. In regard to the decision of the Supreme Court in AIR 1954 Supreme Court 300, the learned Judge said :-

> "This was a case in which their Lordships interpreted the Article as meaning (1) that it is a right pertaining to a person accused of an offence, (2) that it is a protection against compulsion to be a witness and (3) that it is a protection against such compulsion resulting in his giving evidence against himself and while they also said that broadly stated the guarantee in Article 20 (3) is against testimonial compulsion, they could not go to the length of holding that the issue of a search warrant for production of documents amounted to such testimonial compulsion. The decision therefore is not, in our opinion, any authority for the proposition that the direction to take specimen writings of a person who is accused of an offence amounts to a direction compelling him to give evidence against himself."

The learned Judge did not stop to consider the significance and effect of the observations of the Supreme Court made in para 10 of the judgment in that case, and with all due deference to the learned Judge we are unable to agree with the view expressed by him. It is true that in AIR 1954 Supreme Court 300, the question decided was about the legality of a search warrant for the production of documents and it cannot be disputed that a case is an authority for what it decides and not for what might be deduced from it. But here there is no question of deducing any principle from what was said by the Supreme Court in AIR 1954 Supreme Court 300. The question is about the applicability of the direct and specific observations of the Supreme Court as to the construction of Article 20 (3), that is to say, on a point which arose directly on arguments made before the Supreme Court and which was necessary for the decision of that case. Those observations cannot be ignored; and on their basis, to our mind, the conclusion is inescapable that a direction by the Court to an accused person to give his thumb impression or specimen writing and signature violates Article 20 (3) of the Constitution. The cases in AIR 1956 Madras 165 and In re, Sheik Muhammad Hussain, AIR 1957 Madras 47 are not akin to the present case.

In the former case, the question that was considered was about the legality of a summons issued under section 94, Criminal Procedure Code, to the accused for the production of certain documents in his possession. The Madras High Court held that the guarantee under Article 20 (3) would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against the accused and that, therefore, the order made to the accused could not be said to be legal. In AIR 1957 Madras 47, the point that was decided was that the thumb impression of the accused taken by the Police on a slip of paper which was later on produced in Court did not amount to testimonial compulsion and therefore was not hit by Article 20 (3) of the Constitution. Learned Government Advocate thought that the decision of Somasundaram, J., in AIR 1957 Madras 47, ran counter to what the learned Judge himself had stated in the earlier case, AIR 1956 Madras 632. We do not see any contradiction between the two decisions. In AIR 1956 Madras 632, it was held that a direction by the Court to the accused to give his thumb impression amounted to asking him to furnish evidence and that this was prohibited under Article 20 (3), and in AIR 1957 Madras 47, what was considered was the question about the admissibility of the thumb impression given by the accused apparently without any objection.

6. For all these reasons, we are of the opinion that section 5 of the Madhya Bharat

Identification of Prisoners Act, in so far as it confers powers on a Magistrate to direct an accused person to give his thumb impression, specimen writing and signature for comparison to be used against him in a trial, is repugnant to Article 20 (3) of the Constitution of India and is, therefore, void, and that the direction made by the First Class Magistrate of Mhow in this case to the applicant to give his thumb impression, specimen writing and signature is illegal. The result is that this application is accepted and the decisions of the learned Additional Sessions Judge of Indore and of the First Class Magistrate of Mhow are set aside.

Samvatsar, J.

I agree.

Application allowed.

1. AIR 1954 SC 300
2. AIR 1956 Mad 632
3. AIR 1955 Cal 247
4. AIR 1956 Mad 165 and AIR 1956 Mad 632