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Court : Allahabad

Decided On : Apr-03-1961

Reported in : AIR1961All456; 1961CriLJ306

Judge : M.C. Desai, C.J., ;D.S. Mathur and ;D.P. Uniyal, JJ.

Acts : Constitution of India - Article 20(3); Evidence Act, 1872 - Sections 73

Appeal No. : Criminal Appeal No. 1112 of 1960

Appellant : Ranjit Ram

Respondent : State

Advocate for Def. : B.N. Katju, Asstt. Govt. Adv.

Advocate for Pet/Ap. : T. Rathore, Adv.

Judgement :

Desai, C.J.

1. I agree with my brother Uniyal, whose judgment I had the advantage to read, that the second question must be answered in the negative. Since the question is an important one, I would briefly state my reasons. The rule of exemption from compulsory self-incrimination in the English law is not regarded as a part of the law of the land of Magna Charta or the due process of law but is regarded as separate from, and independent of, due process and came into existence not as

an essential part of due process but as 'a wise and beneficent rule of evidence developed in the course of judicial decision'.

The wisdom of the exemption has never been universally assented to; many doubt it today, and it is best defended not as an unchangeable principle of universal justice, but as a law proved byexperience to be expedient. It has no place in the jurisprudence of civilised and free countries outside of the domain of the common law and is nowhere observed in the search for truth outside the administration of the law. See Twining v. New Jersey, (1908) 211 U.S. 78 : 53 Law Ed 97.

The Fifth Amendment of the American Constitution providing that "Nor shall any person be compelled, in any criminal case, to be a witness against himself which is based on the English common law, has been criticised, if not ridiculed.

'It is declared to have no logical relation to the abuses that are said to sustain it, and that the pretence for it, so far as based on hardship, is called an 'old woman's reason' (also a 'lawyer's reason') and a double distilled and trebled refined sentimentality.' So far as based on unfairness, it is called 'the fox hunter's reason, its basis being that a criminal and a fox must have a chance to escape, the subsequent pursuit being made thereby more interesting', per McKenna J. in Wilson v. U.S. (1910) 221 U.S. 361 (392) : 55 Law Ed 771 (784).

In M.P. Sharma v. Satish Chandra : 1978(2)ELT287(SC) referred to by my learned brother, Jagannath Das, J. stated that there was considerable debate as to the utility of the principle of protection against self incrimination and that it was seriously doubted in some quarters whether it did not have a tendency to defeat justice. At page 1086 (of SCR) : (at p 303 of AIR) he laid down that in view of this background there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range, though he did not consider it legitimate to confine it to the barely literal meaning of the words.

The Supreme Court of America decided in Ullmann v. U.S. (1956) 350 U.S. 422 (427) : 100 Law Ed 511 (519) that the privilege against self-incrimination which servos as a protection to the innocent as well as to the guilty should be given a liberal application and that

'if it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion'.

2. The fundamental right of a person accused of any offence that he shall not 'be compelled to be a witness against himself', conferred by Article 20(3) of our Constitution, is based on the English common law and the Fifth Amendment. It is not disputed that the immunity conferred by our Constitution is from compulsion to make an oral statement against oneself as well as from compulsion to produce documentary evidence against oneself. Neither oral nor documentary testimony can be compelled from an accused person; see State of Kerala v. Sankaran Nair : AIR1960 Ker392 and the case of M.P. Sharma : 1978(2)ELT287(SC) .

The immunity is (1) from compulsion (2) of being a witness and (3) against oneself. Article 20(3) is not infringed if an accused person is compelled to be a witness against someone else and nothimself, or if he is compelled to do an act which does not amount to his being a witness, or if he becomes a witness against himself voluntarily and not on account of compulsion. In the present case I find that all the three elements which are required for infringement of the guarantee of Article 20(3) are lacking.

3. Coming first to the element of compulsion, I agree with my brother Uniyal that the appellant was not compelled to give a sample of his writing. All that happened is that learned Sessions Judge asked him to write out something and he readily wrote it out without any objection or protest. So long as he did not object or protest, there could not arise any question of his being compelled. Mere asking or directing a person to do an act does not amount to compelling him to do it; see Mohammad Dastagir v. State of Madras, AIR 1960 S.C. 756 and State v. Parameswaran Pillai, AIR 1952 Trav.-Co. 482 (FB).

The learned Sessions Judge directed the appellant to write certain words in exercise of the power conferred upon him under Section 73 of the Evidence Act. In the case of Parameswaian Pillai, AIR 1952 Trav-Co 482 it was held by the Full Bench that a person who is directed to write something has an option, to refuse to write it and cannot be forced to write it. In the case of Mohd. Dastagir, AIR 1960

SC 756 he was asked to hand over a certain incriminating article which was in his pocket and he handed it over and Imam J. held that since it was within his power to refuse to hand it over, he could not be said to have been compelled to do so.

There is this distinction between the two cases that in the former there was a sanction of a statutory provision behind the act whereas in the latter case there was no such sanction. In Ram Swarup v. State : AIR1958 All119 it was held by Raghubar Dayal and James JJ. that a person who is directed by a court to write any words cannot refuse to write them and that if he does refuse, the court will be entitled to draw an adverse presumption against him.

Earlier Raghubar Dayal J., however, had observed that a person directed by a court under Section 73 to give a wilting may refuse to give it and that the refusal does not amount to an offence though it might amount to contempt of the court. I am of the view that the direction contemplated by Section 73 is not complusion, that Section 73 is only an enabling provision which confers power upon court to give a certain direction and does not impose an obligation upon the person to comply with it and that there is no other provisions obliging a person to write any words at the dictation of the court.

If a person were to be under an obligation to carry out the direction, the obligation would have, been imposed upon him in express or implied terms; it cannot be implied merely from the conferment of a power upon a court to give the direction. What is meant by Section 73 is that a court may direct a person to write any words but it is open to the person to refuse to write them. There is nothing in the section in the nature of a threat and even if a direction coupled with athreat amounts to compulsion, there is no compulsion in this case. There must be something besides mere direction to convert direction into compulsion and there is no such thing in Section 73.

Had the appellant protested against the direction and the court insisted upon his complying with it, it could be said that he was compelled, but nothing like this happened. I do not agree with the contention advanced on his behalf that compulsion is tantamount to absence of voluntary offer and that if he was not cognizant of his right to refuse to comply with the direction and thought that he had

no option, the mere direction amounted to compelling him. The mere absence of a warning that he was free to refuse will not bring about compulsion.

If an act does not involve coercion, violence or brutality to the person it is not compulsion; see Irvine v. California, (1954) 34V U.S. 128 at p. 133 : 98 Law Ed. 561 at p. 569. Black and Douglas JJ. said at page 141 that the Fifth Amendment forbids the use of physical torture, psychological pressure, threats of fines, imprisonment or prosecution or other governmental pressure to force a person to testify against himself. If physical force is used there would be compulsion as held in Rochin v. California, (1952) 342 U.S. 165: 96 Law Ed 183.

Rochin was charged with possession of morphine on the basis of evidence that when confronted by a police officer with morphine lying near him he swallowed it, that the force used by the police to extract it from his mouth proved unsuccessful, that he was taken to a hospital where a doctor forced an emetic into his stomach against his will and that the stomach pumping produced vomiting containing morphine. On account of the force used against him he was held to be compelled.

In Breithaupt v. Abram, 352 U.S. 432: 1 Law Ed. 2d, 448 the accused was charged with manslaughter arising from an automobile collision involving a truck driven by him while intoxicated. The evidence of intoxication was that on examination of a sample of blood extracted from his body while he was lying unconscious, it was found to contain alcohol. The Supreme Court distinguished the case of Rochin because there was nothing brutal or offensive in the taking of the sample of blood when the accused was unconscious and held that the absence of conscious consent without more did not constitute compulsion. It is not easy to reconcile the finding that Rochin was compelled with the finding that Breithaupt was not compelled, though the ultimate decisions in the two cases can be reconciled on the ground that in Rochin's case, (1952) 342 U.S. 165: 96 Law Ed 183 the compulsion was to produce an incriminating evidence whereas in Breithaupt's case, 352 U.S. 432: 1 Law Ed 2d 448 the compulsion was to produce an article (vis blood) which itself was not an incriminating evidence.

4. Legislative authorization for an act is no defence if it amounts to compulsion. The legislature must yield to Article 20(3) and any enactment which permits an

accused to he compelled to be a witness against himself is void. See the casesof Sankaran Nair : AIR1960 Ker392 and Farid Ahmad v. State : AIR1960 Cal32 .

5. The compulsion that is prohibited is that exercised against an accused to be a witness. Evidence can compulsorily be obtained but not from the accused himself. If he is not compelled to do an act, he cannot be said to have been compelled to be a witness. To be a witness is an act; an accused cannot be compelled to do the act. 'To be a witness' means to furnish evidence, whether through lips or by production of an incriminating article or of a document or by any other mode; see the case of Sankaran Nair : AIR1960 Ker392 , State v. Abu Ismail : AIR1959 Bom408 and M.P. Sharma's case : 1978(2)ELT287(SC) . In M.P. Sharma's case : 1978(2)ELT287(SC) Jagannathdas J. observed:

'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.'

In this case the appellant was directed to do a positive volitional act of writing something.

6. It has been held that when evidence is discovered by a search or seizure of property of the accused, there is no infringement of the guarantee of Article 20(3); See for instance the case of M.P. Sharma. : 1978(2)ELT287(SC) . When a police officer searches the house of an accused and recovers incriminating materials, it is he who does an act and not the accused and it cannot be said that the accused becomes a witness merely because evidence is recovered by the police officer.

The submission or silence of the accused to the search does not amount to an act on his part and the submission or silence to a search which results in the discovery of evidence does not amount to his being a witness. Therefore, even it the search is conducted illegally Or forcibly, one element of the immunity is missing. In Adams v. New York, (1903) 192 U.S., 585 : 48 Law Ed 575 Day J. said at page 596 that evidence obtained unfairly or by means of a search warrant, even if it is issued illegally, is not evidence which the accused can be said to have been

compelled to furnish.

Similarly when an accused is shown to witnesses, who later give evidence about his identity it does not mean, that he becomes a witness; see Holt v. U.S. (1910) 218 U.S. 245: 54 Law Ed. 1021, Mahal Chand v. State : AIR1961 Cal123 and Willoughby's Constitution of the United States Volume II, 2nd Edn., para 719. In re Palani Goundan : AIR1957 Mad546 it was held that subjecting an accused to medical examination does not amount to making him a witness.

In Subayya Gounder v. Bhoopala : AIR1959 Mad396 Ramaswami J held that subjecting an accused to identification or to blood or urine test does not amount to asking him to be a witness. Kerwin C. T. said in Attorney-General for Quebec v. Begin, (1955) SCR (Canada) 593 at page 596 that 'in taking a blood test the accused does not say anything because he is not asked any question.' In all these cases it may be said that the accused does some positive act, such as that of standing in an identification parade or of going for medical examination or of allowing himself to be medically examined, but none of these acts by itself amounts to his being a witness.

7. Asking an accused to give his thumb impressions does not amount to making him a witness; see : AIR1957 Mad546 Pakhar Singh v. State , In re, Govinda Reddy, AIR 3958 Mys 150 confirmed on appeal by the Supreme Court (vide Govinda Reddy v. State of Mysore : AIR 1960 SC29), AIR 1952 Trav-Co. 482, : AIR1959 Bom408 and Willoughby, volume II, para 719. The contrary view was taken in : AIR1960 Ker392 , Rajamuthukoil Pillai v. Periyasami Nadar, AIR 1956 Mad 632 and : AIR1960 Cal32 . With respects, I do not agree with it. It is said in the Annotation on the case of Rochin (1952) 342 U.S. 165 at page 195 of the Lawyers' Edition that 'the permissibility of identification by finger-prints ....is beyond doubt'.

8. There is said to be a distinction between taking thumb impressions of an accused and obtaining a sample of his writing from him; see : AIR1960 Cal32 and Badri Lal v. State 0044/1960 . The distinction is not without sense. When a thumb impression of an accused is taken, he has not to do any act; it is the other person, who takes his impression, who does an act. But when a sample of his writing is

taken from him, he has to do a positive act, viz. that of writing something.

It may be said that the difference is only superficial; when an accused allows his thumb impressions to be taken, he does remain steady and allow his thumb to be inked and to be pressed against paper. It is always open to him to lock up his thumb inside his fist so that it cannot be inked or brought in contact with paper, or to keep it constantly moving so that nothing but a smudge is produced on paper.

But the fact is that when his thumb impressions are taken, he himself has not to do any positive act in order that they may be taken. In the case of hand writing, he has to do the positive act of moving a pen across a paper; however much force may be used against him, if he does not intend to write anything, no writing can be obtained from him. His thumb may be seized by two or more men and its impressions may be obtained howsoever unwilling he may be, but no writing can be obtained if he does not want to give it.

A change in his will may be brought about by force and then a writing can be obtained from him, but so long as his will is not changed no writing can be obtained however much force is used against him. When an accused, therefore, gives a writing, he undoubtedly does an act and the case stands on a different footing from that of taking his thumb impressions or subjecting him to a blood or urine test or to an observation of his face.

9. Though an accused does an act when he writes something, he does not become a witness because the writing does not amount to evidence; see : AIR1958 All119 , State of Mysore v. Gopala Rao, AIR 1954 Mys 117, AIR 1958 Mys 150 and 0044/1960 . Evidence is either oral or documentary; oral evidence consists of statements made by witnesses in relation to matters of fact under inquiry, while documentary evidence consists of documents produced for inspection of the court. A record of writing of an accused is nothing but a document and can at the most be documentary evidence. Under Section 5 of the Evidence Act, evidence may be given of the existence or non-existence of every fact in issue and of every relevant fact and of no others. A document containing a writing of an accused may, if produced for inspection of the court, become evidence but can be produced for inspection of the court only if it is evidence of

the existence or non-existence of a fact in issue or of a relevant fact.

Since the contents of the writing may have no connection whatsoever with a fact in issue or a relevant fact, it cannot be tendered in evidence and, therefore, does not become evidence. A taut is said to be proved when 'after considering the matters before it', the court believes it to exist or considers its existence reasonable and probable. It is to be noted that what the court is authorized to consider is not 'evidence' but 'the matters before it.' The matters before it include 'evidence' and other things.

A writing taken from an accused under Section 73 is among the other things that the court is authorized to consider before deciding whether a fact is proved or not. Thus the record of an accused's writing taken under Section 73 is considered by the court not because it is 'evidence' but because it is one of the matters before it. After considering it along with the disputed writing and the opinion of an expert, if any, the court will decide whether the disputed writing is proved to have been written by the accused or not.

The object behind Section 73 is not to bring in documentary evidence for comparison with the disputed writing but a matter to be compared with it. The writing taken from him under Section 73 has absolutely no connection with any fact declared to be a relevant fact in the Evidence Act. It is to be used only for comparison and is no more 'evidence' than a weight or measuring tape. It is nothing but a standard though supplied by the accused's volitional act.

10. My brother Uniyal has referred to the authorities in which it has been held that directing an accused to write something for comparison with the disputed writing does not infringe the guarantee of Article 20(3). In U.S. v. Mullaney, (1887) 32 F., 370, referred to in the Annotation on the case of Rochin (1952) 342 U.S. 165 at page 199 of the Lawyers' Edition the court pointed out that the accused's privilege against self-incrimination is not violated by his being compelled to write in the presence of the court and the writing being compared with the disputed writing.

11. Even if directing an accused to write something for the purpose of comparison with the disputed writing be said to be compelling him to be a witness, it cannot be

said that he is compelled to be a witness against himself. The simple reason is that at the time when the writing is token from him it is not known whether it would prove his guilt or innocence. It is only when it is compared with the disputed writing and is foundto tally with it that it can be said that by giving the writing he gave evidence against himself.

If it is not compared at all, or is found on comparison not to tally with the disputed writing, it cannot be used against him at all and he cannot possibly be said to have given evidence 'against himself' by creating it. At the time of his giving the writing it would be evidence either for or against him. What is prohibited is his being a witness 'against himself;' at the time of his being a witness it must be known that he is being a witness against himself.

If at the time of his being a witness it is not known whether he is being a witness for or against himself, compelling him to do so does not come within the prohibition. I am supported by the observations of Raghubar Dayal J. in the case of Ram Swarup : AIR1958 All119 , and by 0044/1960 . In Swarnalingam Chettiar v. Asstt. Inspector of Labour, Karaikudi, (S) AIR 1955 Mad 710 it was said that compelled testimony is prohibited if it is reasonably likely to support the prosecution.

Subjecting an, accused to medical examination was held in the case of Palani Goundan : AIR1957 Mad546 not to be within the prohibition because the result of the examination could be in favour of the accused or against him. Examining an accused under Section 342, Cr. P.C. has been held to be not within the prohibition because the result of the examination may be in the interest of the accused as much as against him; see Banwari Lal v. State : AIR1956 All341 .

12. In 22 C.J.S 'Criminal Law', para 649, it is stated that the privilege against self-incrimination 'extends only to communications, written or oral, on which reliance is to be placed as involving accused's consciousness of the facts and the operation of his mind in expressing it'.

13. In the result I agree that the appellant was not compelled to be a witness against himself when he was directed to write something.

14. I agree with my learned brother that the first question is too general. No question of waiver of the constitutional guarantee of Article 20(3) is involved in this case. It would be a contradiction of terms to say that an accused waives i.e. agrees to his being compelled to incriminate himself. It he voluntarily incriminates himself, there arises absolutely no question of compulsion; 'to agree to be compelled' is nonsense. 'Agreement' or 'consent' and ''compulsion' are mutually exclusive and cannot go together.

If there is agreement or consent, it means that there is an absence o compulsion. If there is no compulsion, the constitutional guarantee is not infringed at all, and there arises no question of waiver at all. The question of waiver may arise if the constitutional guarantee has been infringed and subsequently the accused waives the guarantee by agreeing to the compelled testimony being produced against him. Another circumstance in which the question may arise is when an accused places himself in the witness-box where he can be compelled to answer questions put in cross-examination.

By putting himself in the witness-box as a witness for himself he is deemed to have waivedthe constitutional guarantee of silence and to have become compellable to answer questions in cross-examination, as held in Sawyer v. U.S., (1905) 202 U.S., 150 : 50 Law Ed. 972 and Brown v. U.S. 356 U.S., 148: 2 Law Ed 2d., 589. I respectfully do not agree with the observation in the case of Sankaran Nair. : AIR1960 Ker392 that an accused can waive the guarantee and write something.

By writing something without objection he may be refraining from exercising his right to refuse to write something but is certainly not waiving the immunity from compulsion. In Behram Khurshid v. State of Bombay 0065/1954 : 1955 CriLJ215 and Basheshwar Nath v. Commissioner of Income-tax : [1959]35ITR190(SC) it was held that there can be no waiver of a constitutional right, but there is no occasion for applying that doctrine in the present case. I would therefore say that the first question does not arise.

Mathur, J.

15. I agree with the Chief Justice and my brother Oniyal that the second question referred to the Full Bench must be answered in the negative; but as the question is of great importance I would indicate my reasons, all the more, when with respect I am still of the view expressed in Balraj Bhalla v. Ramesh Chandra Nigam : AIR1960 All157 . In that Writ petition only one question was raised, whether an accused person could be compelled to be a witness against himself by giving impressions of his thumb and toes for obtaining a report of an Expert after comparison with the disputed impressions.

The respondents of that case had not filed any written statement and there was no assertion that Bakaj Bhalla had not been accused of any offence and consequently was not entitled to the protection of Article 20(3) of the Constitution of India. The respondents did not also raise the question whether the Courts could direct the police officials to take the impressions of thumb and toes of Balraj Bhalla against his will without any direction to him, to himself give the impressions. The view expressed by me was that the impressions amount to evidence as defined in the Evidence Act, and as an accused could not be compelled to furnish evidence, Balraj Bhalla could not be compelled to comply with the direction to give the impressions of thumb and toes.

16. Article 20(3) of the Constitution of India runs as follows:--

'No person accused of any offience shall be compelled to be a witness against himself.'

The protection under Article 20(3) can be availed of only by a person accused of an offence and it extends to the extent that he cannot be compelled to be a witness against himself. The important ingredients of this Article, therefore, are :

(1) That the person claiming the benefit is accused of an offence;

(2) that he cannot be compelled;

(3) that he cannot be so compelled to be a witness against himself

If any of these ingredients are not in existence, the person concerned has no right to claim privilege under this Article. In other words, if the person called upon to furnish evidence has not beenformally accused of any offence, he has to comply with the directions of the Court, or of the investigating agency even though thereby he may be forced to furnish evidence against himself. But it the person has been formally accused of an offence, he can be compelled to furnish evidence which would not go against him but may go against the co-accused or other persons.

17. On the first point there is no longer any controversy specially in view of two decisions of the Supreme Court. The protection under Article 20(3) is not confined merely to what transpires at the trial in the Court room but also extends to compelled testimony previously obtained from him. It is available 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, that is, to persons against whom a first information report has been recorded as accused therein (see : 1978(2)ELT287(SC)).

These observations were not distinguished and as one may say, were quoted with approval in AIR 1960 SC 756. We shall have to make a differentiation between a mere suspicion and formal accusation. Where a dacoity has been committed by unknown persons and in the first information report no one has been accused though suspicions may have been indicated against certain persons, in the eye of law no accusation has been made against any one.

It invariably happens that during the investigation police officials are given information implicating certain persons for the commission of the dacoity, but there is no judicial evidence against them and such persons can be formally accused only after they have been put up for identification and identified by witnesses in a test parade as persons who had committed the dacoity. Prior to the holding of the test parade there is no judicial evidence against the persons suspected of committing the crime; there exists mere suspicion and there is no formal accusation.

Consequently, at the stage a test identification parade is held suspected persons called upon to appear in the parade have not been accused of an offence and

such persons cannot seek protection under Article 20. It can happen that the dacoits were recognised by some persons and not by all, and the investigating officer may consider it desirable to make a request for holding the test parade to enable witnesses who were not acquainted with the named accused, to point out the persons who had committed the crime.

In such circumstances the complainant would invariably make allegations against those accused by naming them in the first information report. When a person is named in the report as an accused, he will become entitled to seek protection under Article 20(3), that is, not to be compelled to furnish evidence. Identification in a test parade is not substantive evidence: it can merely be utilized to corroborate the direct testimony of a witness made during the trial.

If the accused named in the report objects to holding the test parade, and it is not possible to hold the parade, the identification of the accused in Court during the trial can be used against him without any previous corroboration on the ground that the accused himself was responsible for no test parade being conducted. It will be by implication that the Courts shall utilize the conduct of the accused against him, that is, they would accept the direct testimony of a witness made during the trial.

If considered necessary, the Magistrate may not issue any direction to the accused to compel to appear in the test parade, but may direct the police officials to take steps for the forcible appearance of the accused in a test parade to be held for verification or for determination of the identity of persons who had committed the crime. In such circumstances, he will not be the accused who would be called upon to do a voluntary act by participating in the test parade.

The directions will be given to the police officer and not to the accused and without the co-operation of the accused it would be open for the police officials to, by themselves, take steps as may be necessary. It may at occasions prove fruitless to hold the test parade, all the more, if the accused sticks to his initial objection and does not expose his face or behaves in such a manner that it may be difficult to call upon witnesses to point out in the parade the offenders who had committed the crime.

18. I shall further dialate on this point while considering the other questions involved in the case. At this place, however, another instance of no formal accusation being made can be cited. Supposing that surety bonds purporting to have been executed by a person 'A' have been filed in Court, but later on he puts in appearance and denies the execution of the surety bonds. If the surety bonds were fabricated, it would be necessary to ascertain who had affixed his signature or thumb impression on the surety bonds.

The identity of that person would be unknown at the time the forgery is detected. In order to determine the identity of the forgerer the investigating authorities can call upon any suspected person to furnish his specimen signature or thumb-impression to find out if the bond had been forged by him. As the identity of the offender is not known, there is no accusation against anyone.

Whatever steps are taken are taken with the intention to determine the offender so as to bring him to the book. To put it in brief, the protection under Article 20(3) does not extend to a person who has been merely suspected, and has not been accused of an offence. He will become entitled to the protection as soon as he has been formally accused during the investigation.

19. An act done under compulsion generally involves intimidation, coercion, violence or brutality to the person. With regard to acts done under the directions of and at the instance of authorities other than the Courts of law, there can be no controversy, as whenever physical force is used or any dubious method is adopted the Courts would record the finding that the person had been coerced to furnish evidence and he had been compelled to be a witness against himself.

Whenever a person furnishes evidence against himself, that is, acts as a witness against himself,under the directions of the Court, it has to be seen whether the direction does Or does not amount to compulsion as contemplated by Article 20(3). It was urged on behalf of the accused that where a direction is given to him for furnishing his finger impression, or specimen handwriting or signature, without clarifying that he was not being compelled and could refuse to comply with the direction, it should amount to compulsion as the accused was not aware of his constitutional right and may comply with the direction under the impression that it

was an order which must be complied with.

The suggestion made is that the absence of a warning that he was free to refuse will amount to compulsion. Reliance was also placed upon certain provisions of the Cr. P.C. and of other enactments where it is laid down that an accused is competent to be a witness in case he gives his consent in writing before appearing as a witness. It is contended that when the Legislature considered it proper to place restriction before an accused could appear as a witness in defence, the same rule of caution should be adopted while interpreting the provisions of Article 20(3) of the Constitution of India.

The constitutional provisions have to be liberally construed but not by departing from the ordinary rules of interpretation of statutes. One of the rules of interpretation of statutes is that the Courts of law must give the ordinary meaning to the words used in the enactment without adding a few words on the supposition that the intention of the Legislature was not as has been expressed in the enactment, nor can the Courts of law remove a few words while giving a meaning to provisions which are unambiguous and capable of one interpretation.

It is a different thing that while passing some law the Legislature may consider it desirable to modify the words used in some other enactment or in the Constitution of the country so that the interest of the accused may be further safe-guarded. The subsequent enactment cannot therefore be considered while interpreting the earlier enactment. In such circumstances, the Court shall give one meaning to the earlier enactment and a restricted one to the later.

20. It will be found that Article 20(3) of the Constitution has been worded simply without any additional restriction, nor is Article 20(3) subject to any further conditions. Consequently, Article 20(3) must be given a meaning without reference to the other enactments whether passed earlier or later, In other words, the absence of a warning that the accused was free to refuse to comply with the direction will not amount to compulsion. Thus where the accused complies with the direction and submits to the order of the Court by being passive or by not raising an objection, it shall have to be held that there was no compulsion.

21. In this connection a reference may be made to the provisions of the Evidence Act itself. Under Section 73 the Court can direct any person to write any words or figures and to give his thumb impression for the purpose of enabling it to compare the words or figures so written or the impressions so taken with any words or figures orimpressions alleged to have been written or affixed by such person. Under the first clause of Section 73, disputed signature, writing or impression of the person can be compared with the one which is proved to be the undisputed signature, writing or impression of that person.

When Section 73 is read as a whole, it becomes apparent that the Court can direct any accused person present in Court to give his specimen writing or signature and also finger impression for inspection by the Court or for comparison and report by an Expert. The material word used in Section 73 is 'direct' and not 'compel'. In other provisions regarding the examination of witnesses, the word used is 'compel'. The Legislature was thus aware of the difference between 'direction' and 'Compulsion'. It used the word 'direct' in Section 73 and 'compel' in other sections.

The two words must, therefore, be given their ordinary meaning. In other words, when a direction is given under Section 73, the accused has a right to refuse to comply with the direction. Thereafter he cannot be compelled to comply with the order. The Courts will, of course, be at liberty to draw such presumptions as may be permissible under the law. It may be difficult to take contempt of Court proceeding against the accused, but if the law permits such a recourse, such a step can also be taken.

The fact, however, remains that an order passed under Section 73 is a mere direction and does not amount to compulsion. When an accused submits to the direction without raising any objection, he shall be deemed to have done the act voluntarily and not under compulsion. This view has been taken by most of the High Courts. Before referring to their decisions it would be proper to cite two Supreme Court cases: the principle laid down therein can usefully be applied to the instant case.

It may be mentioned that High Courts, who have taken a contrary view, did so on interpretation of the Supreme Court cases. We, with respect, do not agree with

their reasoning. The observations of the Supreme Court, though made in different circumstances, could not be given two meanings and we are of opinion that not only the provisions of law but also the decisions of the highest Court of the Country lead to the only conclusion that a direction under Section 73 or any similar provision of the law does not amount to compulsion. At this place, it may also be observed that some of the High Courts changed their view in subsequent decisions, and at present there is the Full Bench decision of Kerala High Court only which is against the view that we are taking.

22. In : 1978(2)ELT287(SC) Jagannadhadass, J., oserved that -

'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'.

Silence or submission on the part of the accused when given a direction does not amount to coercion and consequently the testimony so obtained cannot he deemed to have been obtained by compulsion. In AIR 1960 SC 756, the Deputy Superintendent of Police to whom the bribe was offered had asked the person, later prosecuted in a criminal case, to produce the money.

It was observed that it was within the power of the person to refuse to comply with the request of the Deputy Superintendent of police, and the request did not amount to compulsion to produce the currency notes. It is virtually a settled law that mere direction by anyone to a person later accused of a criminal offence to handover the property or to comply with any direction does not amount to compulsion, when that person adopts the negative attitude of silence or submission on his part. We may take a contrary view where the person called upon to comply with the order raises an objection by refusing to comply with the order and even then he is made to comply with that order.

23. In Sailendra Nath Sinha v. State : AIR1955 Cal247 , the accused had raised an objection to his specimen writing being taken for comparison and report by an Expert, but the Magistrate overruled the objection. The accused persons then went

in revision to the Calcutta High Court, but the revision was dismissed on the ground that a mere direction to a person to give his specimen writings did not amount to compelling him to give evidence against himself.

This decision was dissented from in : AIR1960 Cal32 where it was observed that to call upon the accused to give specimen writing against his wishes after he had raised an objection, was in violation of the fundamental right contained in Article 20(3). In Hira Lal Agarwala v. The State : AIR1958 Cal123 , the Hon'ble Judges adopted a via media by laying down that the specimen writing obtained from the accused after he had raised an objection to the direction under Section 73 could be utilized by the Magistrate for his own study and, it necessary, by examining an Expert as a Court witness; but he could not hand over the specimen writing to the prosecution to make use of them as a piece of their own evidence, nor could such documents be sent to an Expert to be examined in the case as a prosecution witness.

When the 1955 case was dissented from in : AIR1960 Cal32 , no final opinion was expressed with regard to the correctness of the decision in : AIR1958 Cal123 . With due respect I find it difficult to reconcile with the rule laid down in : AIR1958 Cal123 . If the document was not, in the eye of law, obtained by compulsion, in other words, was not hit by the rule of testimonial compulsion, there could be no objection to the prosecution also utilising the specimen writing.

But if the specimen writing was obtained by compulsion and amounted to compelled testimony and was hit by Article 20(3), neither the prosecution nor the Court could utilise it in any manner. In Tarini Kumar v. The State : AIR1960 Cal318 , the earlier decision in : AIR1960 Cal32 was followed, but it was held that specimen writing taken by the Investigating Officer while the accused was in custody was in violation of the guarantee against testimonial compulsion.

No finding was recorded that the Investigating Officer was guilty of compulsion when he obtainedthe specimen writing. Article 20(3) is a guarantee against self incrimination by compulsion and not when the accused voluntarily incriminates himself. The protection under Article 20(3) applies irrespective of whether the person accused is or is not in custody and at what occasion the self-incriminating

evidence was furnished.

If a person in custody is deemed to have been compelled, such an inference shall have to he drawn if a person in custody is called upon by the Magistrate to furnish specimen writing under Section 73 of the Evidence Act. I find no justification in distinguishing the case where the Investigating Officer himself took the specimen writing and made no request to the Magistrate to take the writing of the accused. In any case, the latest decision of the Calcutta High Court does not lay down that a mere direction under Section 73 of the Evidence Act amounts to compelling the accused to furnish evidence against himself.

24. In State v. Ram Kumar Ramgopal : AIR 1957 MP73 , the presence of the Magistrate at the time when the specimen writing of the accused was obtained was considered to introduce an element of compulsion. There is no reason why an accused should be terrified of the Magistrate. He is there to see that everything is done fairly, Consequently, to draw such an inference will not be fair. In Brij Bhushan Raghunandan Prasad v. The State : AIR 1957 MP106 , the accused had objected to the taking of finger impressions, specimen signature and writing and they were taken after the Magistrate over-ruled the objection. When the accused had raised objection and thereafter under orders of the Magistrate finger impressions, specimen signature and writing were obtained, that would be a case of compulsion.

25. In the Full Bench case of : AIR1960 Ker392 , it was observed that the compliance of the order issued under Section 73 will be in violation of the constitutional privileges of the accused guaranteed under Article 20(3) of the Constitution of India unless he waived the guarantee and gave the specimen of his writing. It was further observed that where there was no waiver the protection shall continue and specimen writing, if taken, shall have to be excluded from consideration.

In other words, it was held that the constitutional right should be brought to the notice of the accused and he should be told that it was not necessary for him to comply with the orders of the Court, and if the record does not suggest that the warning had been given to the accused, the compliance of the order shall be

deemed to amount to his being compelled to act as directed. As mentioned above, Article 20(3) has been simply worded without laying down that an accused can furnish evidence against himself only after he is administered a warning or if he gives his consent in writing.

If the circumstances of the case suggest that there was no compulsion, there would be no infringement of the provisions of Article 20(3). But if there is evidence on record that the accused gave the specimen writing or finger impression against his will, that would be a case of compulsion which would be hit by Article 20(3). When theaccused furnishes evidence against himself, he does not waive any fundamental right. What he does is that he acts voluntarily to give evidence in the case.

26. The other High Courts have taken a contrary view, namely, that a mere direction under Section 73 of the Evidence Act does not amount to compulsion unless an objection was raised and the compliance of the order was obtained after overruling the objection. See : AIR1958 All119 , Bhaluka Behera v. State, : AIR1957 Ori172 , , 0044/1960 .

27. The other cases which were brought to our notice are those in which the accused hadraised an objection to his giving finger impression or specimen writing or signature.

28. It will thus appear that most of the High Courts have taken the view which we are taking in this case and this view is in conformity with the decisions of the Supreme Court. This view can be summarised by laying down that an order of the Court under Section 73 of the Evidence Act directing the accused to give the impressions of his fingers etc. and his specimen writing and signature for inspection by the Court or for comparison by an Expert, does not by itself amount to compulsion and if the accused adopts a passive attitude or does not raise an objection to the giving of finger impression etc. and thus furnishes evidence which may go against him, he shall be deemed to have been acting voluntarily and not to have been subjected to testimonial compulsion.

But where the accused raises an objection and such an objection is overruled, the taking of the finger impression and specimen writing and signature as a result of directions issued to the accused shall be deemed to have been obtained by compulsion and such evidence shall be hit by Article 20(3) of the Constitution of India. However if the Magistrate or police seizes such information with or without the co-operation of the accused, and without issuing any direction to him for compliance of the order, that would not be evidence furnished by the accused but would be the evidence procured by the police, as is said for documents, by seizure.

29. If the accused is called upon to furnish evidence which could without doubt, not go against him, but shall go against the co-accused or against some other person, there would be no immunity under Article 20(3) of the Constitution as, the evidence which the accused is compelled to furnish is not against him.

30. Now we come to the other ingredient ofArticle 20(3), namely, what is meant by 'to be awitness against himself. The word 'witness' hasnot been defined 'in any enactment and it mustbe given its ordinary meaning. Witness is onewho gives evidence' in a cause. Evidence can beoral or documentary or of any other kind. Consequently, 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 any other mode (See : 1978(2)ELT287(SC) .)

This naturally leads us to the question what meaning should be assigned to the word 'evidence' while giving interpretation to the term 'to be a witness'. Should the word 'evidence'' be given a wider meaning as has been assigned to it by many English jurists, or 'evidence' must be restricted to the definition as contained in the Evidence Act? If a restricted view is adopted, it would mean that the guarantee laid down in Article 20(3) shall be confined to only oral and documentary evidence and not to a third kind of evidence which has been called by some authors as 'real' evidence.

This category of evidence is often referred to and exhibited in our Courts as material exhibits. Weapons of assault or stolen properties come in this category. If the protection guaranteed in Article 20(3) is confined to only oral and documentary

evidence furnished by an accused, the effect would be that an accused, without infringing the law, can be compelled to give discovery of weapons of assault, stolen properties etc. It cannot be denied that the recovery of such properties from the possession of or at the instance of the accused is an important piece of evidence against him.

If the pistol with which the deceased was shot at is recovered and it contains impressions of the fingers of the assailant the recovery of the weapon can be utilized as a strong piece of evidence against offender if it is possible to determine the identity of the impressions. If stolen properties are recovered soon after the commission, of a crime, presumption under Sec. 114 of the Evidence Act can be drawn against the person found in possession thereof unless, of course, he can furnish a reasonable explanation.

The accused may not like to deliver such properties knowing that thereby he would be furnishing evidence which may go against him, but when compelled by the use of physical force or torture he may deliver such properties or furnish information knowing that he was thereby assisting the police in establishing his guilt. Should it be inferred that the makers of the Constitution contemplated affording protection to the accused only with regard to oral and documentary evidence and not other kinds of evidence?

Further, if the term 'Evidence' is deemed to include only such evidence as is covered by Section 3 of the Evidence Act, statement of the accused will not fall within the category of evidence'. 'Evidence' has been defined in Section 3 to mean and include oral evidence, that is, statements of witnesses which the Court permits or requires to be made before it, and documentary evidence, that is, documents produced for the inspection of the Court.

In : AIR1958 All119 the term 'evidence' was given a meaning by excluding the words 'and includes' from the definition, a view which, in my opinion, is not in consonance with the principles governing interpretation of statutes. To this I shall make a detailed reference later. It may, however, be noted that the term 'evidence' defined in Section 3 can in no case, include an oral statement of an accused person.

If an oral statement of an accused is not treated as evidence, and by making statement her cannot be deemed to furnish evidence againsthimself, it shall be permissible for the investigating agency to compel him to make an oral statement. This is contrary to the principle laid down in Article 20(3) of the Constitution. In other words, by giving a restricted, meaning to the word 'evidence' we shall be whittling down the constitutional protection given to an accused person. I am, therefore, of opinion that we must assign a wider meaning to the word 'evidence', to include all the matters which the Court can take into consideration before recording the finding whether any fact has been proved, disproved or not proved.

31. Bentham has defined evidence as

'any matter of fact, the effect, tendency or design of which when presented to the mind, is to produce in the mind a persuasion concerning the existence of some other matter of fact -- a persuasion either affirmative or disaffirmative of its existence'.

This definition was adopted by Best. Taylor, however, used the word 'evidence' to mean

'all the legal means exclusive of mere argument which tend to prove or disprove any fact the truth of which is submitted to judicial investigation'.

Thayar, Wigmore and Phipson have defined 'evidence' in almost the same manner as Taylor. Phipson says:

' 'Evidence means the testimony whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute.'

Consequently, 'evidence' shall include all the material which can legally be brought before the Court for decision of the case.

It can be, oral or documentary, or what is often said real evidence. But the framers of the Evidence Act intentionally restricted evidence to the first two categories for the reason that 'real' evidence cannot be used against an accused unless some one makes an oral statement thereto. If we adopt the wider meaning and

'evidence' is deemed to include all matters which are brought before the Court for decision of the case, specimen writing or signature, finger impression, material exhibits, the taking of the sample of blood etc. will come within the category of 'evidence'. In the present case we are concerned with the evidence of specimen writing or signature and finger impression and not of the medical examination, taking of the sample of blood etc. Consequently, it will be desirable to consider the above question in the alternative, that is, not only by giving a wider meaning to the word 'evidence' but also by restricting its scope to the definition as contained in the Evidence Act.

32. A perusal of Section 3 of the Evidence Act will make it clear that certain terms have been defined specifically by laying down what is meant by those terms. The definition of others has been given generally by indicating what they include. The definition of a few others has been given by laying down what it means and includes. For example 'document' is defined to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or whichmay be used, for the purpose of recording that matter.

But when the definition of the terms 'fact', 'facts in issue' and 'evidence' was given the Legislature used the words 'means and includes'. The definition of 'Court' was given by including all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence. The Legislature thus adopted three modes for laying down the definition: the first two by using the word 'means' or 'includes' and the third by using both the words 'means and includes'. Should the words 'means and includes' be given the same meaning as 'means' or a wider meaning? If these words are given a wider meaning and the definition is not necessarily confined to the language expressed therein, it will be possible to give a wider meaning to the word 'evidence'', but not as wide as already suggested above.

33. One of the rules of interpretation of statutes is that nothing is to be added to or to betaken from a statute unless there are adequate reasons to justify the inference that the Legislature intended something which it omitted to express. Consequently, we will not be justified in excluding the words 'and includes' on the

ground of superfluity or on the supposed intention of the Legislature. We must assign proper meaning to both the words, namely, 'means and includes' as used in the definition.

If the Legislature had used one word 'means', there would have been no controversy in laying-down the scope of the term 'evidence'' as contained in the Evidence Act, as its scope would have had to be restricted to the words used therein. But the word 'includes' by itself indicates that the definition contained is not exhaustive. It is, as one may illustrate (sic) to include other evidence of a similar kind. There is no reason why the maxim of construction 'Ejusdem Generis' be not applied to the definition as contained in the Act.

The use of the word 'means' suggests that the instances detailed are specific and the word 'includes' would show that the definition can be extended to 'evidence' of the same kind or species. We will not be justified in giving a very wide meaning to the word 'evidence' as contemplated by the Evidence Act, but shall not in any manner override the rules of interpretation of statutes, by including within 'evidence' all oral or documentary evidence of the same kind as detailed in the definition.

34. 'Evidence' has been defined in Section 3 or the Evidence Act 'to mean and include all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry and all documents produced for the inspection of the Court'. The Court shall not permit a statement to be made which is not in relation to matters of fact under inquiry, that is, matters relating to facts in issue or relevant facts or otherwise admissible in evidence.

Consequently, when we extend the scope or oral statement on the principle of Ejusdem Generis, oral evidence of persons other than witnesses can also be included in evidence if such persons stand in the same class as witnesses. With regard to documents, however, an opinion can be expressedmore clearly as no restriction of the kind laid down for oral evidence has been prescribed. All documents produced for the inspection of the Court are evidence.

Documents not actually produced but which are on the record of the case and are inspected by the Court will fall in similar species. Consequently, finger impressions or specimen writing or signature, if they are in the eye of law documents, shall fall in this category and will amount to evidence even if a restricted meaning is assigned thereto, that is, the word 'evidence' is given the meaning as contained in Section 3 of the Evidence Act.

35. Finger impressions of an accused when brought on paper and also the specimen writing or signature stand in the same category: both shall be documents as defined in Section 3 of the Evidence Act and also Section 3 of the General Clauses Act. The word 'document' has been defined in the two enactments to mean any matter expressed or described by means of letters, figure or marks, or by more than one of those means, intended to he used or which may be used for the purpose of recording that matter.

It will be found that document has reference to the matter expressed or described and not the substance on which it is expressed or described. In case, of finger impression or specimen writing or signature the matter shall be specimen finger impression, writing or signature. The finger impression, writing or signature is obtained on the paper under orders of the Court for the purpose of recording such impression, writing or signature.

Consequently, the impression, writing or signature obtained under orders of the Court shall fallin the category of 'document'', irrespective ofwhether the Court itself peruses the specimen soobtained or sends it to the Expert for examinationand report. Consequently, the specimen obtainedunder Section 73 of the Evidence Act shall amountto 'evidence' as contemplated by Section 3 of theAct.

36. When the documentary evidence is examined by the Court and such evidence is admissible in evidence, it shall be evidence brought on record in accordance with the law. It is not necessary that the evidence must pertain to a relevant fact. In my opinion what is necessary is that the evidence must be admissible under the provisions of the Evidence Act or under any other enactment.

Courts have to reject inadmissible evidence, but admissible evidence has to be brought on the record and perused while recording a finding on the facts in issue. Further a (specimen) document of the above nature, cannot be placed in the category of standards like weight and measuring tape. Standard weight or a standard length signifies invariability. The distance which amounts to one inch shall not vary with individuals.

37. The only use of the specimen impression, writing or signature is to compare the disputed document with the specimen taken under orders of the Court or otherwise, to record a finding with regard to the identity of person responsible for the preparation of the disputed document. As finger impression and also writing or signatureshall vary from individual to individual, comparison shall not be possible unless specimen impression, writing or signature is available. In otherwords, the specimen impression, writing or signature has great evidentiary value and consequentlyit is evidence as contemplated by the EvidenceAct also.

38. Section 5 of the Evidence Act lays down 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. It will be found that the specimen impression, writing or signature is also a relevant fact and consequently evidence thereto shall be admissible under Section 5.

39. Section 9 of the Evidence Act provides that facts which establish the identity of anything or person whose identity is relevant, are relevant in so far as they are necessary for that purpose. 'Fact' has been defined in Section 3 to mean and include anything, state of things, or relation of things capable of being perceived by the senses. Both disputed and undisputed finger impression, writing or signature are facts as they are things which can be perceived by the senses.

The identity of the person who affixed his finger impression or signed or wrote the disputed document can be established only on comparison of the specimen impression, writing or signature and consequently the specimen is a fact which establishes the identity of the accused. The taking of the finger impression, specimen writing or signature is thus relevant under Section 9 of the Evidence Act.

Such evidence will also be admissible under Section 11(2) of the Act as the specimen in connection with the disputed documents will make the existence or non-existence of the forgery or preparation of the disputed document highly probable or improbable. In other words, the parties can lead evidence under Section 5 of the Evidence Act with regard to the undisputed impressions, writing or signature and the evidence when brought on the record would be relevant and shall be evidence as defined in the Act (see Queen Empress v. Fakir Mohammad, 1 Cal WN 33).

40. Relying upon the case of : AIR1958 All119 it was contended on behalf of the State that at the time specimen writing or signature or finger impressions of an accused are taken, it is not known whether the disputed writing, signature or impressions are of the accused : there is always a possibility that the comparison of the specimen writing, signature or finger impressions may go in favour of the accused in establishing that he had not forged or prepared the document.

It is thus suggested that when it is not known that the opinion of the Expert shall go against the accused, it should not be held that he is being compelled to be a witness against himself. It may be found that he was a witness in his own favour. It is also contended that specimen writing, signature or finger impressions are ordinarily taken by the police for the proper investigation of the crime and if the investigating authorities are not in a position to obtain the finger impressions and also the specimen writing or signature of the accused,they may find it difficult to make the investigation and in certain cases it may not be possible for them to proceed against the accused even though he had committed the forgery or an offence against the law.

41. It is true that if the Finger Print or Handwriting 'Expert gives a report in favour of the accused, he would not be sent up for trial and if the criminal case is pending, he may be acquitted of the charge. But at the same time it cannot be lost sight of that if the report of the Expert is against the accused, the Expert would he examined in the criminal case irrespective of whether the report of the Expert was obtained during the investigation or during the inquiry or trial.

Where a person has merely been suspected of committing the crime, there may not be a reasonable possibility of the specimen writing, signature or finger impressions being used against him, for the simple reason that it is not known who had committed the crime and the person who is directed to give, or whose specimen writing, signature or finger impressions are taken, may be an innocent person. In the case of a suspected person against whom no formal accusation has been made, the guarantee provided in Article 20(3) of the Constitution is inapplicable.

While expressing an opinion on the scope of the latter part of Article 20(3), we should not be unduly influenced by instances which cannot come within the purview of Article 20(3) in view of the fact that the person has not been accused of an offence, we must confine ourselves to those cases where he has been formally accused of a criminal offence. Where he has been so formally accused, the report of the Expert shall generally be by way of corroboration of the other evidence already existing against the person accused of a criminal offence in other words, there is a strong possibility, in any case, there would be a reasonable possibility, that the specimen writing, signature or finger impressions are being taken to obtain further evidence against him.

The protection, under Article 20(3) is available to a person accused of a criminal offence not only during the trial, but at all the previous stages including the investigation by the police. Consequently, where it appears that the evidence which a person accused of an offence is called upon to furnish is likely to go against him, he cannot be compelled to furnish such evidence. This is a protection which has been guaranteed under Article 20(3).

42. In : 1978(2)ELT287(SC) the constitutionality of the issue of a general search warrant for the seizure of documents was under consideration and in that connection the scope of Article 20(3) was held to extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them. The words 'reasonably likely' are of great importance. It is not necessary that the documents sought to be seized during the house search are such which would, in all probability support a prosecution

against persons whose houses are being searched.

The police would never like to make a search for no useful purpose, if the reasonable likelihoodis that the documents seized would not go against one person or the other. It will be a different matter if the prosecution make a statement and the courts of law make it clear from the very beginning that the specimen writing, signature or finger impressions being obtained would in no case be used against the person, but that would be a case where the evidence which he is being sought to furnish is not against him. No final opinion need be expressed on this point as it does not arise in the present case, nor is it likely to arise in majority of the cases.

43. At this place, it may be observed that in majority of the cases it shall not be known whether the evidence, oral, documentary or otherwise, which an accused person is compelled to furnish, shall go against him. The examination of an accused person under Section 342, Cr. P.C. is not hit by the provisions of Article 20(3) in view of the fact that he is merely called upon to furnish an explanation, if he so desires, on the evidence direct or circumstantial existing against him.

An accused person is free not to furnish any explanation, that is, not to make a statement under Section 342, Cr. P.C. He is not compelled to make an oral statement; but when the accused is called upon to make a statement, it is not known what statement he may make. He may make a statement which is in his favour, or in his statement may refer to some evidence which may conclusively establish his innocence.

I am alive to the factor that the accused willnot like to undergo a trial for nothing and inmajority of the cases he would give his defenceplea in support of his innocence at the earlieststage; but it can sometimes happen that he mayat a later stage come to know of some evidencewhich would establish that the prosecution caseis false. In his statement under Section 342, Cr. P.C.the accused can easily make a reference to suchevidence, or may file the necessary documentaryevidence. In such circumstances the statementwhich the accused may make shall go in his favour.

Further, the statement of an accused made at any stage is for purposes of the trial 'evidence' which the Courts of law must take into consideration while recording a finding. When it is not known that such evidence is likely to go against the accused, he can be compelled to make a statement even if we hold that the nature of the evidence sought to be obtained from the accused must be known before hand whether it will go against him or prove to his benefit. In other words, we are not to be unduly influenced by the factor that at the time specimen writing, signature or impressions are taken, it is not known whether such evidence shall go against that person or will eventually prove his innocence.

44. The second point raised does not require any further consideration as it has already been held above, that where a person is merely suspected of having committed a criminal offence and has not been formally accused, he is not entitled to the protection under Article 20(3). Consequently, it the view being expressed by me is adopted, the investigating authorities should not feel any difficulty in making the investigation and in bungingthe culprit to the book, all the more, when the conduct of the accused can by implication be used against him.

For example, if the prosecution adduces oral evidence to prove that the accused had affixed his thumb impression on a document or had scribed it, that statement can be accepted if in spite of an opportunity given, the accused declines to give his finger impression and specimen writing or signature for comparison by an Expert. In case the accused is innocent and knows that he did not forge the document he shall thereby be compelled to examine an Expert in his defence.

To prove his innocence he will be put to considerable expenses, for which he alone shall be responsible. But where it is not known who had executed the document or affixed his signature or thumb impression, no one would be formally accused and it shall be open for the investigating agency to take the specimen writing or finger impressions of anyone suspected to be responsible for the forgery.

45. It is also contended that the guarantee incorporated in Article 20(3) of the Constitution is to prevent the prosecution agency from obtaining false evidence. In my opinion, it will not be proper for us to go beyond the words of Article 20(3) in

laying down its scope. Any supposed intention of the framers of the Constitution cannot help us where the safe-guard has been worded in unambiguous words.

Further, if the guarantee is against procuring false evidence, there may be no objection to an accused being compelled to produce documentary evidence which may go against him. The documentary evidence can be one which had been prepared in due course of business and could not be prepared at a later stage for production before the investigating agency. Account books duly scrutinized by the Income-Tax Officer or the Sales Tax Officer at some previous occasion will fall in such category.

46. Some High Courts have placed finger impression in a category of its own, different to specimen writing or signature, sometimes on the ground that what the accused is called upon to do is to exhibit the identifying marks of his body and such identifying marks can be perused or obtained without any active co-operation on his part. It is said that when the accused is compelled to submit to his giving finger impressions, he 3oes mot do any act and whatever act is done is done fey the person who obtains the impressions.

On the other hand, specimen writing or signature cannot be obtained without the co-operation of the accused. If the accused non-cooperates, he way not put his signature on a paper and may also refuse to write down the words or sentences dictated by the Court. The prosecution agency cannot hold the hand of the accused and without any volitional act on his part, obtain his specimen writing or signature. It is true that on this ground it may be possible to make a differentiation between finger impressions and writing or signature; but it cannot be lost sight of that the prosecution will find some difficulty in obtaining finger impressions of the accused if he does not co-operate.

He may try to move his thumb or fingers such that the impressions if taken be blurred. In view of the interpretation which can be properly given to Article 20(3) and also the inferences to be drawn from the conduct of the accused, already commented upon above, it will not in my opinion, be proper to make any differentiation between finger impressions and writing or signature, or evidence of a similar kind seized from the person of the accused.

47. It may here be noted that the conflict in the decisions of the Courts in India appears to have arisen on account of the adoption of decisions of the United States of America without noticing that the constitutional safe-guards in America are materially different to the safe-guards provided in our Constitution. We did incorporate Fifth Amendment of the American Constitution by enacting Article 20(3), but the framers of the Constitution did not make any provision similar to the Fourth Amendment of the American Constitution. The Fourth and Fifth Amendments of the American Constitution are:

AMENDMENT IV

'The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated: and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

AMENDMENT V

'No person ..... shall be compelledin any criminal case to be a witness against himself, ...'

It will be found that the privacy of the person and properties of the citizens of America is secured by the Fourth Amendment and no one can violate such right except on reasonable grounds. In America a general search of the house without knowing what incriminating articles shall be found there, may be held to be unreasonable; but as held in : 1978(2)ELT287(SC) , a general search warrant can be issued in our country.

Their Lordships of the Supreme Court did not accept the American decision on account of there being no constitutional safe-guard similar to the Fourth Amendment of the American Constitution. In other words, the American decisions cannot be a safe guide in laying down the scope of Article 20(3) of the Constitution of India. It may further be observed that it is on account of the Fourth Amendment of the American Constitution that the Courts in America have taken views which

can be considered to be self-contradictory.

The Chief Justice has referred to (1952) 342 US 165 : 96 Law Ed 183; the evidence existing against Rochin was that when confronted by a police officer he swallowed the morphine lying near him, that the force used by the police to extract it from the mouth proved unsuccessful and when Rochin was taken to a hospital, a doctor forced an emetic, into his stomach against his will and that the stomach pumping produced vomiting containing morphine.

It was held that on account of force having been used against Rochin, he was compelled to give evidence against himself. In 352 U.S. 432: 1 Law Ed. 2d. 448 sample of blood was extracted from his body while he was lying unconscious and on examination the sample was found to contain alcohol. This was the evidence which was used against the accused charged with manslaughter arising from an automobile collision involving a truck driven by him while intoxicated.

The Supreme Court of America distinguished the case of Rochin, (1952) 342 U.S. 165 on the ground that there was nothing brutal or offensive in the taking of the sample of blood when the accused was unconscious and mere absence of conscious consent did not constitute compulsion. The two decisions may be reconcilable on the basis of the Fourth Amendment of the American Constitution if we suppose that the first is an instance of unreasonability and the other of a reasonable mode of invading the privacy of a person. But in our Constitution there is no provision like the Fourth Amendment and we would not be justified in making any differentiation between the two cases.

Whether the evidence compelled from the person of the accused is an incriminating article, as in the case of Rochin, (1952) 342 US 165 morphine which he was in possession of, or is an article which if analysed would incriminate the accused, the net result is the same, namely, that it is an evidence which would go against the accused. An accused cannot be compelled to furnish such evidence. Similarly, the Courts in America felt the difficulty in answering the question whether an accused could be compelled to expose his body and a via media has been adopted, namely, that it is not violation of the privilege against self-incrimination if it is an examination of parts usually exposed to view. It will be a violation of the

privilege if it is an examination of party not usually exposed to view (see Willis on Constitution Law at page 521). On the basis of Article 20(3) such a differentiation cannot be made, for the simple reason that in both either the accused would be compelled to furnish evidence or not so compelled.

48. The questions that very often arise before the Courts of law for consideration are, whether the specimen writing or signature, finger impressions, sample of blood etc. of an accused person can be taken and, if so, in what circumstances whether the accused can be compelled to give such specimen or sample, or the Court can direct the police Officer to forcibly take the finger impressions etc. of the accused to be eventually used against him.

In this connection we can also consider instances of compulsory medical examination of an accused and his being compelled to appear in a test identification parade. The question of general search of the house of an accused for seizure of documents is beyond controversy in view of the decision of the Supreme Court in : 1978(2)ELT287(SC) . I see no reason why the differentiation made in this case cannot be made applicable to other instances indicated above.

Though the accused cannot be compelled to give his finger impressions, or specimen writing or signature, or sample of blood etc., there is no legal bar to the police extracting such evidence from the person or body of the accused by the use of force, if necessary. When the house of an accused is searched for seizure of documents, he can cause obstruction and it may become necessary for the police to restrain his movements or to use force against him.

Though there exists an element of compulsion or use of force and the search is made against the will of the accused, the search is valid as the act done, namely, the seizure of documents, is an act of the police official. In other words, the accused cannot be compelled to produce documents in his possession, but the police can by the use of force, if necessary, seize such documents from his house or building. Similarly, our Constitution does not forbid the personal search of an accused, nor has any restriction been imposed or, the taking of the search on the lines of the Fourth Amendment of the American Constitution.

If an accused is carrying incriminating documents or articles with him, he cannot be compelled to hand over such documents or articles; but a competent authority can search his person and seize the incriminating documents and articles. Though the accused is restrained and force is used in seizing the articles, yet in the eye of law he was not compelled to himself furnish evidence: the act of seizure was done by the public servant or authority. This principle can easily be extended to other instances detailed above.

In other words, no legal difficulty should arise if the taking of finger impressions, specimen writing or signature, sample of blood etc. are placed on the same footing without an attempt to make any differentiation between them on the ground of the impressions being a reproduction of the ridges existing on the body, The accused cannot be compelled to give his specimen writing or signature, and as no mode is at present available to obtain his writing or signature against his will, it will not be possible for any agency to take or seize the specimen writing or signature of the accused from his person.

Similarly, Courts cannot compel the accused to give his finger impressions, but a police officer or any competent authority can forcibly obtain the thumb mark or finger impressions without any direction or order being given to the accused. The finger impressions can be taken on a paper with an inkpad or by taking a photograph. Impressions so taken shall, in the eye of law, be deemed to have been taken or seized from the body of the accused.

It is true that if the accused does not cooperate the impressions may not be clear; but there is always a limit to the resistance which a person can show and if the authority concerned takes many sets of impressions, there is a likelihood that some of the impressions would not be blurred and can be easily compared with the disputed ones. In any case, photographs of ridges and depressions can be easily taken with a powerful camera.

49. Taking of sample of blood stands on the same footing. The accused cannot be compelledto give the sample, but the investigating agencycan make arrangement for the extraction of blood for the purposes of analysis and report. The samecan be said of the medical examination or takingof Photographs. These are all

instances where the body of the accused is exhibited against hiswill, but the authority does not commit any illegality by adopting compulsory methods to seize or take such evidence.

They are all instances of compulsion on the part of public authorities, but in none is the accused compelled to himself do an act to furnish evidence against himself. In reality, the evidence is extracted from him, may be, by exposure of body or by taking photograph or sample of blood (see : AIR1957 Mad546). The existence of an element of compulsion in carrying Out thesearch was not considered as a ground for invalidating a general search warrant for the seizure of document, in : 1978(2)ELT287(SC) .

At page 306 column 2, it was also observed that there was no basis in the Indian Law for the assumption that a search or seizure of a thing ordocument is in itself to be treated as compelled production of the same. Such search or seizurewas the result of an act of an officer of the Government to which the accused was obliged to submit, and consequently was not his testimonial act in any sense.

50. It is said at occasions that mere exposureof body does not amount to furnishing evidence and what the accused does is to make his body available for inspection of the Court. At many occasions the inspection of the body may greatly influence the mind of the Court, e.g. the prosecutrix refers to the existence of a scar mark or a mark which cannot be seen by anyone unless inclose contact. The existence of the scar will be a strong corroborative evidence to accept the testimony of the Prosecutrix.

In other cases also the existence of specialmarks of identification or other evidence of a similar nature may be a strong piece of corroborative evidence. The same can be said with regard to finger impressions. Consequently, compelled exposure of the body can amount to testimonial compulsion in the sense that by exposing the bodythe accused says by implication that what the complainant or the witnesses say is correct. The accused furnishes corroborative evidence and that is also evidence as far as the provisions of Article 20(3) are concerned.

51. To sum up, the taking of finger impressions and specimen writing or signature stand on the same footing and the same rule must apply to both namely, that a person accused of a criminal offence cannot be compelled to give his finger impressions or specimen writing or signature, though the investigating agency can, by itself or under orders of a Magistrate or of the Court, use force, if necessary, and obtain the finger impressions, which can be obtained on paper with ink or by taking photograph.

To obtain specimen writing or signature against the will of the accused, that is, without his co-operation, will be difficult, and consequently for all practical purposes it will not be possiblefor the police or the Courts to obtain specimen writing or signature by compulsion. In the present case, the Sessions Judge had merely directed the appellant to furnish specimen writing. Mere direction cannot amount to compulsion. To put it differently, the appellant had not been compelled to give evidence against himself by giving his specimen writing.

52. The first question referred to us is too general. In fact no question of waiver of the constitutional guarantee under Article 20(3) arises in a case where the accused voluntarily gives his specimen writing or signature, or finger impressions. The constitutional guarantee is not that specimen writing or signature, or finger impressions, of an accused cannot be obtained. The protection afforded to the accused is that he cannot be compelled to be a witness against himself.

When he was not compelled and instead he complied with the direction of the Court, what he did, was to exercise his discretion under Article 20(3) of the Constitution. I agree with the Chief Justice that it will be better if we do not express any opinion on the first point on the ground that such a question does not arise in the present case.

Uniyal, J.

53. This case comes before us under the following circumstances: The appellant was prosecuted under Sections 218 and 466, Indian Penal Code before the Additional Sessions Judge of Faizabad. One of the charges against him was in respect of forgery of certain Khataunis. He denied the disputed entries in the said

documents to be in his handwriting. Thereupon sample writing of the appellant was taken by order of the Sessions Judge with a view of its being compared with the writings in the questioned documents by the Government Handwriting Expert, and to this he made no objection.

The Sessions Judge finally recorded a conviction of the appellant who then preferred an appeal to this Court. It was urged before the learned Single Judge hearing the appeal that the order of the trial court directing his sample writing to be taken had the effect of compelling the accused 'to be witness against himself' and was, therefore in contravention of Article 20(3) of the Constitution of India.

54. The learned Single Judge was apparently impressed with this argument and was of opinion that the Division Bench case of : AIR1958 All119 , was wrongly decided and required reconsideration by a Full Bench. He, therefore, referred the following two questions for decision.

(1) Is it open to a citizen to waive his fundamental rights conferred by Part III of the Constitution of India?

(2). Does an order requiring an accused person to furnish his fingerprints or specimen of his handwriting amount to 'testimonial compulsion' and does such an order contravene the provisions of Article 20(3) of the Constitution of India?

55. The arguments made before the learned Single Judge were reiterated before us and it was contended, firstly, that the order of the SessionsJudge, directing the specimen writing of the accused to be taken amounted to 'testimonial compulsion' and, secondly, that the specimen writing thus taken without administering a warning to the accused could not constitute a waiver of his fundamental right.

56. I propose to consider the second question referred to us, first.

57. The protection guaranteed to the accused against self-incrimination embodies a principle of criminal jurisprudence and is founded on the 'presumption of innocence' which is a fundamental doctrine of the English system of criminal justice, and which has been adopted and incorporated in our laws as a basic rule of criminal jurisprudence.

58. The principle of immunity from self-incrimination has had a long and chequered history. Even in England the inquisitorial rule that required an accused to answer upon oath as to charges made against him held the field up to the sixteenth century. Later, however, the common law rule against self-incrimination came to be recognised as a fundamental doctrine of criminal jurisprudence. In course of time it was extended from criminal courts to civil courts and was made applicable to parties as well as to witnesses, vide Section 1 of the Criminal Evidence Act, 1898.

59. This doctrine has been incorporated in the fifth amendment of the Federal Constitution of the United States of America and is in these words :

'No person ..... shall be compelled in any criminal case to be a witness against himself.'

59a. The Constitution of India has also provided similar immunity to the accused from self-incriminating evidence by guaranteeing such protection under Article 20(3) of the Constitution of India in these terms:

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

59b. The scope of the privilege guaranteeing protection to the accused against self-incriminating evidence was considered by the Supreme Court in : 1978(2)ELT287(SC) . In that case the Registrar of Joint Stock Companies lodged information with the Special Police Establishment, Delhi, regarding misappropriation of the funds of the Company. On the basis of that information an application was made to the District Magistrate Delhi, under Section 96, Cr. P.C., for the issue of warrants for the search of documents of the Company. The District Magistrate issued warrants for simultaneous searches at various places.

As a result of the searches made a number of records were seized from various places. An application was then made to the Supreme Court under Article 32 of the Constitution praying that the search warrants be quashed as being violative of Article 20(3) of the Constitution of India. It was urged before their Lordships that a

direction permitting search by the police to obtain documents was compulsory procuring of incriminating evidence from the accused, and that the fundamental guarantee included not merely oral testimony givenby an accused in a criminal case pending against him, but also included documentary evidence compelled out of a person who is, or is likely to become incriminated thereby as an accused. After examining the arguments made in the case their Lordships observed as follows :

'Analysing 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 ..... Broadlystated the guarantee under 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 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 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 normal 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.'

60. Their Lordships repelled the argument that search to obtain documents is a compulsory procuring of incriminating evidence from the accused and observed that,

"there is no basis in the Indian Law for the argument that a search or 'seizure of a thing' or document is by itself to be treated as compelled production of the same ..... Neitherthe search nor the seizure are the acts of the occupier of the searched premises. They are acts of another to which he is compelled to submit and are therefore not his testimonial acts in any sense ..... Therefore issue of a searchwarrant is normally the judicial function of the Magistrate. When such judicial Function is interposed between the individual and the officer's authority to search, no circumvention thereby of the fundamental right is to be assumed.'

61. It would thus appear that what is prohibited by Article 20(3) of the Constitution is that the accused shall not be compelled to furnish incriminating evidence against himself. The accused is free to enter the witness-stand and to depose against himself if he chooses to do so. The prohibition is against his being compelled to furnish evidence, oral or documentary, which is against him. Every volitional act of an accused person which is evidence cannot be deemed to be compelled testimony merely because the act is relief upon in a judicial proceeding against the person accused.

The Constitution does not prohibit a person accused of an offence from appearing as a witness. The accused may make a voluntary contession of his guilt before a Magistrate under section 164, Cr. P.C. or may make a statement at the trial under Section 342, Cr. P.C., which incriminates him in the crime. He is also tree to apply to the court to examine himself as a witness under Section 342-A, Cr. P.C. He may, therefore, make a statement in examination-in-chief or in cross-examination which would incriminate him in the crime.

In none of these cases can it be said that the evidence furnished by the accused is hit by Article 20(3) of the Constitution merely because it tends to implicate him in the crime. It follows, therefore, that every positive volitional act of the accused

does not amount to testimony. Secondly, the prohibition under Article 20(3) of the Constitution is against compelled testimony, i.e., evidence which is procured from the accused by physical or moral compulsion.

62. This brings me to the consideration of the question whether the obtaining of signatures of the accused can be held to be a positive volitional evidentiary act on his part. The argument is that the accused exercises a volition when he gives his signatures and that it cannot be done without his co-operation. But the same is true when the accused is asked to expose his body toexhibit a scar on his arm or when he is asked to face a camera for the purpose of his photograph being taken. In both these instances the accused is performing a positive volitional act.

If he were so minded he could so distort the features of his face that the photograph would not be a true replica of his face. Likewise when the accused is asked to affix his thumb impression or finger prints on a piece of paper he could so blur the impressions of his thumb or finger-prints that the ridges of the thumb would not leave a clear impression on the paper. It has, however, been held that the accused can be compelled to give his finger-prints or thumb impressions because while doing so he is not exercising a positive volitional evidentiary act. He is not giving testimony but is giving his body.

63. Willis in Constitutional Law at page 521observes as follows:

'An important question is whether or not compulsory physical examination of an accused by a medical practitioner is a violation of the privilege against self-incrimination. The correct answer to this question seems to be that suchexamination 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 make an exhibition of facts.'

Dealing with the question of finger-prints the author proceeds :

'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 .....'

64. The opinion expressed by Willis has been accepted by the Supreme Court of America in (1910) 218 US 245. The following observations were made in that case :

'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.'

65. It follows, therefore, that the protection guaranteed to the accused from self-incrimination, is not infringed when he is compelled to make an exhibition of 'facts' relating to his body.

66. The Indian Law permits the identification of the accused before a Magistrate. Section a of the Identification of Prisoners Act (33 of 1920 empowers a Magistrate to direct any person to allow his measurements or photographs to be taken. Under Section 6 of this Act it is permissible to use all means necessary to secure the taking of measurements or photographs of the accused and any obstruction or resistance offered by the accused against the taking of measurements or photographs is made punishable under Section 186, I.P.C.

The Act defines the word 'measurements' to include finger-print impressions and foot-print impressions. Similarly, under Section 73 of the Evidence Act the court has been empowered to direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so

written with any words or figures alleged to have been written by such, person. It has been held that there is no violation of Article 20(3) when identification proceeding is held in respect of an accused and he is compelled to expose his body.

This is founded on the principle that the accused is not furnishing evidence but is only uncovering or displaying a part of his body. Similarly, an accused person can be made to undergo a medical test for the purpose of ascertaining the alcoholic content in his blood, just in the same way as he can be made to bare his arm to expose a scar on it, without violating the provisions of Article 20 of the Constitution.

67. I find no valid reason or principle to distinguish between obtaining the thumb impression of the accused by the court and the obtaining of his handwriting for purposes of uncovering or exposing a physical trait of his body. The handwriting of the accused is as much a physical part of his body as his thumb impressions are. Just as a police officer or a Magistrate can seize the existence of a scar on the body of the accused by exposing that part of the body, so can he seizethe peculiar physical characteristics of his writing by asking him to give his sample writing on a piece of paper.

The contention is that if the writing were procured from the accused under compulsion andwas not his voluntary act, he would feign or simulate his writing and it would, therefore, be of no value for purposes of comparison with the disputed writings. From this it is argued that unless the accused exercises a positive volitional act when he gives his writing it would be of no help to the court in adjudging the identity of his hand-writing.

Supposing the identity of a person accused of an offence was sought to be established by the peculiarity of his gait, say a limp in his walk. If in such a case the court directed the accused to demonstrate his walking, the latter, if he is unwilling, may refuse to walk or may walk in such a manner as to conceal the limp in his gait. If the accused did demonstrate his walking, could it be said that he was furnishing incriminating evidence against himself? It cannot be doubted that the accused is exercising a volitional act, butis that volitional act 'testimony'? In my

opinion the act of walking performed by the accused is only a demonstration of a physical act and is not oral or documentary evidence, nor evidence of conduct.

68. The taking of thumb impressions orsignatures of the accused is 'an act of another to which he is obliged to submit' and not 'the positive, volitional evidentiary act' of the accused in the words of the Supreme Court. Though he cannot be compelled to produce such evidence it canbe taken or seized from him. The handwriting of the accused is a 'fact' of evidence which he carrieswith himself. In the Full Bench case of Rangoon High Court, Emperor v. Nga Tun Hlaing, AIR 1924 Rang 115, it was held by Ma Oung, J., that:

'there does not appear to me to be anything in common between this power to examine the accused under Section 342, Cr. P.C. and the power to take his finger impression under section 73, Evidence Act, unless indeed it can be held, thatby directing the accused to take his finger impression, the court is, in effect, compelling him to provide evidence against himself. Such a contention is, however, in my view inadmissible, since what really constitutes evidence, namely, the ridges of his thumb, are not provided by him anymore than the features of his countenance are provided by him. All that he is asked to do is to display those ridges; for better scrutiny the ridges are inked over and an impression is made on a piece of paper.

I would, therefore, hold that the decision under consideration is wrong and that a court has power under Section 73, Evidence Act to direct an accused person in court to make his finger impression for the purpose described in that section.'

69. I am in respectful agreement with the above view as regards the interpretation of Section 73 of the Evidence Act, It appears to me that the making of a thumb impression or signature by the accused does not stand on a different footing from the seizure of documents or articles or other 'facts' of evidence from the person of the accused. I am further of opinion that the characteristics of the writing of a person are also in a sense a physical aspect of his personality and are as permanent as the features of his body. It is the distinctive character that a person lends to his handwriting that makes it a part of his being and it is on this footing that the test of genuineness of a person's handwriting can be determined by the

courts. As was observed by Coleridge J., in Doe v. Suckermore, (1836) 5 A and E 703 :

'the test of genuineness ought to be the resemblance not to the formation of letters in some other specimen or specimens but to the general character of the writing which is impressed on it as an involuntary and unconscious result of constitution, habit or other permanent acts, and is therefore itself permanent.'

Therefore, when a person accused of an offence is directed to give his handwriting, all that he does is that he uses his fingers and his wrist for the purpose of formation of letters and thereby merely displays a movement of a part of his body. It is as a result of that movement that his writing comes into existence. The writing thus produced by the accused is not by itself testimony. It is only an exhibition of facts. I am, therefore, of the view that the order directing an accused to furnish specimen of his handwriting does not amount to furnishing evidence by the accused.

70. Assuming, that the specimen writing given by the accused under the direction of the court has the effect of testimony, and I am far from saying that it has, even so it cannot be held to have been obtained from him by coercion unless there is evidence to show that the accused was compelled to give his writing. The compulsion exercised may be physical or moral. In the instant case admittedly there was no physical compulsion. There was no question of moral compulsion either; in fact the accused did not raise any objection and willingly gave his writing to the court.

The question as to whether the writing was procured by coercion is a question of fact in each case. It was conceded by the learned counsel that no coercion or pressure had been exercised by the court on the accused. It was, however, contended that there was moral pressure inasmuch, as the accused was not warned that he was under no obligation to give the writing to the court. The argument in my opinion is wholly unacceptable. The law has not imposed a penalty on the accused for his refusal to give a specimen writing to the court.

71. It was further argued that the accused would be guilty of contempt if he refused to comply with the order of the court, This contention is equally without force, because the expression used in Section 73 of the Evidence Act is 'direct' and not 'compel'. It will be seen that the same Act uses the word 'compel' in Sections 129, 130, 131 and 132, which goes to show that the two expressions are not interchangeable. Hence the direction under Section 73 to take specimen writings of a person accused of an offence would not amount to compelling him to give evidence against himself, nor would the disobedience of such direction amount to the contempt of court.

72. The learned counsel cited a number of cases in support of his contention. The decisions of the High Courts in India are by no means unanimous on this point. I, therefore, propose to briefly refer to some of the cases cited before us.

73. In : AIR1958 All119 , the court was considering as to whether the writing obtained from the accused under the direction of the court amounted to compelled testimony. Dayal, J. held that, the order directing an accused to furnish his specimen writing under Section 73, Evidence Act is not hit by the provisions of Article 20(3) of the Constitution and that the accused could not, therefore, refuse to give his handwriting when ordered by the court to give it.

Whether the writing obtained under Section 73 from the accused does or does not come within the expression 'evidence' does not really affect the matter. The real test in such a case is whether the writing obtained from the accused amounts to furnishing evidence by the accused against himself. I am in respectful agreement with the view of Dayal, J., that the writing obtained from the accused under Section 73, Evidence Act does not amount to compelled testimony.

74. In : AIR1955 Cal247 , it was observed that the direction under Section 73, Indian 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. It may be mentioned that the accused had raised objection in that case to the giving of his specimen, writing to the court.

75. In : AIR1958 Cal123 , a Magistratedirected the accused to furnish his writing to the court. The accused gave his writing under protest. It was contended in that case that the effectof the order of the court was that the accused was compelled to furnish evidence against himself. The learned Judges held that the court was empowered to assist itself to a proper conclusion in the interest of justice and for that purpose to obtain the writing of the accused, but that it was not open to the Magistrate to hand the document over to the prosecution in order that they might make use of it as a piece of their own evidence. The court declined to adjudicate upon the question of the constitutionality of the order andallowed the objection of the accused on the footing that the act of the Magistrate in handing over the document to the prosecution was tantamount to permitting the prosecution to use it as a piece of evidence against the accused.

76. In : AIR1960 Cal32 , it has been held that taking of specimen writing and signature of the accused violates the guarantee contained in Article 20(3) of the Constitution. In that case the accused had raised objection to the giving of specimen writing.

77. In 0044/1960 , the public prosecutor requested the court to direct the accused to give his specimen handwriting. An objection was raised on behalf of the accused but the same was overruled. When the matter came before the High Court it was held by the Bench that a mere direction to the accused to give specimen handwriting or signature does not by itself contravene the provisions of Article 20(3) of the Constitution. It may well be that the accused agrees to give such specimen handwriting and signature. Thus even where the accused has objected the direction will not contravene the provisions of Article 20(3) of the Constitution; but no action will be taken to compel him to furnish evidence against himself.

78. In : AIR1957 Mad546 , the accused was prosecuted and convicted under Section 4-A of the Madras Prohibition Act, 1937. It was contended that die symptoms of intoxication observed by the doctor at the time of the medical examination of the applicant must be regarded as evidence obtained from the accused by compulsion and it was, therefore, hit by Article 20(3) of the

Constitution. Their Lordships rejected the contention of the learned counsel and observed that though an accused cannot be compelled to produce evidence of intoxication it can be taken or seized from him. They further observed that it did not constitute a positive volitional evidentiary act of the accused and was not, therefore, testimony furnished by the accused against himself.

79. In : AIR1959 Bom408 , the handwriting of a person accused of an offence was obtained during investigation by the police. It was contended that the accused was by threats compelled to give his handwriting to the police officer and that writing had been utilised by the Handwriting Expert. It, therefore, offended Article 20(3) of the Constitution. The learned Judges repelled the arguments and observed that evidently the question; whether the writings had been obtained by the police officer from the accused by compulsion was a question of fact that had to be decided by the jury, and that the guarantee against self-in-crimination protects a Person accused from being compelled to furnish evidence against himself. The protection is only against compelled testimony and the accused cannot complain if the evidence is furnished by the accused voluntarily and without compulsion.

80. In AIR 1966 Kerala 392, the specimen writing of the accused was taken under the orders of a Magistrate at the instance of the investigating officer. The accused objected but his objection was overruled. The contention on behalf or the accused was that the guarantee against testimonial compulsion envisaged by Article 20(3) of the Constitution had been infringed as the accused had been compelled to furnish testimony against himself.

The Full Bench held that the specimen of the handwriting got by a non-voluntary positive act of the accused cannot but be treated as amounting to self-incrimination by compulsion, and they accordingly upheld the objection of the accused that his specimen writings had been obtained under compulsion. It was, however, observed that there could be no valid objection where the accused had waived the guarantee and given the specimen of his handwriting without protest.

81. In re, Palani Moopan : AIR1955 Mad495 , the accused had surrendered before the court. The Magistrate on finding his dhoti and upper cloth blood-stained directed his clerk and peon to seize them and they were duly taken into

possession. It was urged that the order of the Magistrate directing the clothes of the accused to be removed from the body of the accused amounted to compelling the accused to furnish evidence against himself. Their Lordships held that the securing of blood-stained clothes from the person of the accused who had himself surrendered was justified and that it could not be said that there had been any compulsion exercised upon the accused to produce the article and be a witness against himself in the murder case against him.

82. In , on an application made to the Magistrate the thumb and finger impressions of the accused persons were obtained for the purpose of comparison with the impressions on certain pieces of glass. It was contended before the High Court that the order of the Magistrate asking the accused to give their thumb impressions amounted to testimonial compulsion and was in contravention of Article 20(3) of the Constitution.

His Lordship held that the finger-prints, foot-prints, etc. of the accused for purposes of comparison with those found at the scene of the crime did not lose their probative character whether they had been obtained voluntarily or involuntarily. Any particular resort to compulsion requiring the accused to exhibit his body for the purpose of establishing his identity was not objectionable because by doing so he is not forced to give false evidence, In fact, he does not testify at all and the physical facts which he furnishes speak for themselves. The High Court upheld the order of the Magistrate as being legally justified.

83. In AIR 1960 SC 756, the appellant was tried for attempting to bribe a police officer. He was acquitted by the Special Judge. A State appeal was filed against his conviction and the High Court convicted the accused. He then filed an appeal before the Supreme Court and it was contended before their Lordships that the conviction of the appellant was vitiated as there had been a violation of Article 20(3) of the Constitution. It appeared that the appellant had offered the bribe in an envelope to the Deputy Superintendent of Police. The latter threw the envelope at the appellant's face who 'picked it up'.

The Deputy Superintendent of Police then asked the appellant to produce the envelope and the currency notes which were kept inside it. The contention before

the Supreme Court was that the appellant was an accused person and the order of the Superintendent of Police to the accused to produce the envelope and the money inside it amounted to compelling him to produce incriminating evidence against himself. The case of : 1978(2)ELT287(SC) was relied upon by the accused. Justice Imam, who delivered the judgment of the court, observed as follows :

'As to the second submission, Article 20(3) of the Constitution states : 'No person accused of any offence shall be compelled to be a witness against himself. Before this provision of the Constitution comes into play two facts have to be established: (1) that the individual concerned was a person accused of an offence and (2) that he was compelled to be a witness against himself. If only one of these facts and not the other is established, the requirements of Article 20(5) will not be fulfilled. It was, however, urged that on the facts the appellant must be regarded as a person who was accused of an offence at the time that Mr. Kaliyappan asked him to produce the money. The circumstances also showed that the appellant did so on compulsion. He was at the time within the power of the Deputy Superintendent of Police and was compelled to comply with his direction ..... Reliance was placedupon the decision of this Court in : 1978(2)ELT287(SC) , in support of the proposition that a compelled production of incriminating document by a person during police investigation is testimonial compulsion within the meaning of Article 20(3) of the Constitution ..... In thepresent case even on what was stated in Sharma's case, : 1978(2)ELT287(SC) , there was no formal accusation against the appellant relating to the commission of an 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.'

84. The facts of the instant case clearly go to show that when the Sessions Judge passed the order that the accused's handwriting be taken, the latter did not raise

any objection and voluntarily gave his writing. In these circumstances, there could be no question of any compulsion being exercised on the accused to furnish his writing to the court. In my view, the giving of his writing by the accused was 3 voluntary act, and could; not by any stretch of imagination, be held to be compelled testimony.

In the first place, the giving of his handwriting by the accused person does not amount to furnishing evidence because the accused is not compelled to testify but 'to make an exhibition of facts'. It is, strictly speaking, identification.In the second place, the handwriting of the accused is not an incriminating fact; and lastly, as in this case, it was a voluntary act of the accused and had not been obtained under compulsion.

85. After giving my careful thought to the arguments of the learned counsel I am of the view that the answer to the second question referred to us must be in the negative.

86. The first question referred to us does not strictly speaking, arise. The question as framed is too broadly stated. On the facts of this case the accused had voluntarily given his writing to the court. The main argument urged was that the accused had given his handwriting in ignorance of his fundamental right and, as such, he was not barred from invoking that right in his favour. The question of waiver does not really arise at all, because if the handwriting given by the accused was not obtained under compulsion, then it is wholly immaterial whether the accused had a fundamental right to refuse to furnish evidence against himself or not.

On the question as to whether an accused can waive his fundamental right or not the case of 0065/1954 : 1955 CriLJ215 was cited before us, in that case Justice Mahajan observed that

'the theory of waiver hag no relevancy in construing the fundamental rights conferred by Part III of our Constitution. They (fundamental rights) have been put there as a matter of public policy and the doctrine of waiver can have no application to the provisions of law which have been enacted as a matter of

constitutional policy'.

In : [1959]35ITR190(SC) , Mr. Justice S.K. Das observed that the true position as he conceived it was that where a right or privilege or guarantee by Constitution rests on an individual and is primarily intended for his benefit, it can be waived provided such waiver is not prevented by law and is not a matter of public policy or public morals, The last-mentioned Supreme Court case, to my mind, sets out the legal position more explicitly.

87. In U.S. v. Monia, (1943) 317 US 424, it was held that the constitutional privilege has to be claimed or otherwise a person will not be considered to be compelled. Similarly, in U.S. v. Murdock, (1931) 284 US 141, it was observed that unless a privilege is invoked the benefit is deemed to have been waived. Thus the evidence which has been voluntarily given is not under a legal ban. Similarly, in Queen v. Coote, (1873) 4 PC 599, it was held that a statement made in ignorance of the right to claim privilege will not make the statement inadmissible.

88. It would thus appear that the accused cannot claim absolute privilege even in respect of self-incriminating evidence. The argument of the learned counsel that the accused must be deemed to have been ignorant of his right because no objection was raised by him before the court, appears to me to be without substance. The accused was represented by counsel in the court of the Sessions Judge and, therefore, the argument is not available to him that he hadgiven his handwriting to the Court without understanding the implications of his act.

89. I have come to the conclusion that the answer to the first question as framed must be in the affirmative, the right or privilege claimed by the accused is in respect of an individual right and does not involve a question of public policy or public morals.

BY THE COURT :

90. Reference answered.

The first question referred to us does not arise.So far as the second question is concerned, it isanswered in the negative.

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