

Roshanlal and ors. Vs. State

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Court : Allahabad

Decided On : Nov-08-1974

Reported in : 1975CriLJ1877

Judge : K.B. Asthana,; Satish Chandra and ;K.N. Seth, JJ.

Appellant : Roshanlal and ors.

Respondent : State

Judgement :

K.N. Seth, J.

1. The constitutional validity of Section 342 of the Code of Criminal Procedure 1898 was unsuccessfully challenged in Banwari Lal v. The State : AIR1956 All341 . The Bench negated the Contention that the provisions of Section 342 of the Code are violative of Article 22(2) (sic) (2)(3) of the Constitution of India. Before the Bench hearing the above noted cases it was urged that in view of the decision of the Supreme Court in State of Bombay v. Kathi Kalu Oghad : 1961 CriLJ856 the authority of the judgment of this Court in the case referred to above has been shaken. Reference was also made to the views expressed by Seervai in his treatise Constitutional Law of India's and Durga Das Basu's views in his Commentary on the Constitution of India. It was felt that the question of validity of Sub-sections (2) and (3) of Section 342 of the Code requires reconsideration and consequently the following question has been referred to a Full Bench : -. 'Whether

Sub-sections (2) and (3) of Section 342 of the Code of Criminal Procedure are inconsistent with Article 20(3) of the Constitution.'

2. Article 20(3) Provides that 'No person accused of any offence shall be compelled to be a witness against himself' and enshrines in our Constitution the doctrine against self-incrimination. The doctrine is well established in countries which have based their criminal law on principles of English jurisprudence. It is designed to protect the accused from being compelled by hope or fear to admit facts or deny them. No compulsion, physical or moral could be used to extort a communication from an accused. The doctrine had its origin in 16th century England in protest against the inquisitional methods of the Ecclesiastical Courts. The principle of immunity from self-incriminating evidence is based on the 'presumption of innocence' and so long as the presumption remains as one of the fundamental canons of criminal jurisprudence, evidence against the accused should come from sources other than the accused. In England the principle has been incorporated in the Criminal Evidence Act, 1898, which provides that though the accused is a competent witness on his own behalf, he cannot be compelled to give evidence against himself and his failure to give evidence in defence cannot be commented upon. The protection is extended to a witness other than the accused.

3. The principle of protection against compulsion of self-incrimination was adopted in the Fifth Amendment to the Constitution of the U. S. A. of which the relevant part is:

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

The protection is provided not only to an accused on trial but to all persons giving testimony. The privilege against self-in-crimination has been judicially enlarged to include oral as well as documentary evidence in criminal as well as civil proceedings and is not confined to evidence in Court but extends to evidence even before legislative committees and other tribunals. The Fifth Amendment guarantees freedom only from compulsion. As accused may voluntarily elect to give evidence but if he elects not to give evidence in defence this fact cannot be

considered to his prejudice.

4. This protection against self-in-crimination is clubbed with the guarantees in the Fourth Amendment which provides:

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 affirmations and particularly describing the place to be searched, and the persons or things to be seized.

5. The law of crime in India, based on English jurisprudence, has adopted the principle of 'presumption of innocence of the accused' as one of its cardinal principles. The burden is on the prosecution to prove a person guilty of the offence with which he is charged. The accused need not make an admission or statement against his will. He may stand by and see what case has been made out against him. He is entitled to rely on the failure of the prosecution to establish the charge conclusively and beyond all reasonable doubts. This 'presumption of innocence' gave birth to the rule of immunity from self-incriminating evidence which has been embodied in Article 20(3) of our Constitution.

6. The rule laid down in our Constitution gives protection (i) to a person 'accused of an offence' (ii) against compulsion to be a witness; and (iii) 'against himself'. It is thus narrower than the American rule contained in the Fifth Amendment as extended by judicial interpretation. It is confined to 'an accused of an offence' thereby limiting it to proceedings before a Court of law or judicial tribunal where a person is charged with commission of an act punishable under the Penal Code or any special or local law. The immunity can be invoked by an accused and is not available to a witness in a proceeding as is the case in England and U. S. A. The protection conferred by Article 20(2) does not touch the law relating to a witness.

7. The doctrine against self-in-crimination and how far it is embodied in Article 20(3) was considered by the Supreme Court in *M. P. Sharma v. Satish Chandra* : 1978(2)ELT287(SC) where the Question which directly arose was whether a search and seizure of a document from a person against whom a First Information

Report had been lodged with the police amounted to compelling him to be a witness against himself within the meaning of Article 20(3) of the Constitution. The Court considered the historical background of the doctrine as also the Fourth and the relevant part of the Fifth Amendment to the U. S. A. Constitution as well as the American authorities which enlarged the scope of the doctrine and rejected the narrow interpretation that the doctrine against testimonial compulsion was confined to the oral evidence of a person standing his trial for an offence when called to the witness stand. It observed:

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 witness'. A person can 'be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see Section 113, Evidence Act) or the like. 'To be a witness' is nothing more than 'to furnish evidence', and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes.

After observing that Section 139, Evidence Act, was not a guide to the meaning of the word 'witness', which must be understood in its natural sense as referring to a person who furnishes evidence, the Court proceeded to observe:

Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so produced is confined to what transpires at the trial in the Court room.

The phrase used in Article 20(3) is 'to be a witness' and not to 'appear as a witness'. It follows that the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a

formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution, ...

After analysing the American authorities which were based on the express term of the Fourth Amendment and after considering the relevant provisions of the Code of Criminal Procedure the Court held that the searches made in Pursuance of the warrants issued under Section 96 of the Code of Criminal Procedure could not be challenged as illegal on the ground of violation of any fundamental rights under Article 20(3) of the Constitution.

8. As it was felt that some of the propositions of law laid down in M. P. Sharma's case (1954 Cri LJ 865) (SC) (supra) have been too widely stated, a Bench of eleven Judges of the Supreme Court considered the scope of Clause (3) of Article 20 of the Constitution in Kathi Kalu's case 1961-2 Cri LJ 856 (SO (supra)). Dealing with the interpretation of the Words 'to be a witness' the Court observed:

'To be a witness' may be equivalent to 'furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or Impression of Palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification 'To be a witness' means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a Court or to a person holding an enquiry Or investigation. A person is said 'to be a witness' to a certain state of facts which has to be determined by a Court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matter in controversy...

9. The Court held that the observation in Sharma's case 1954 Cri LJ 865 (SC) (supra) that Section 139 of the Evidence Act had no bearing on the connotation of the word 'witness' was not entirely well founded in law and observed:

It is well established that Clause (3) of Article 20 is directed against self-incrimination by an accused person. Self-incrimination must mean conveying

information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in Court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge...

When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impression or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'.

Dealing with the question of compelled testimony the Supreme Court observed: 'compulsion' in the context, must mean what in law is called 'duress''. The compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and therefore, extorted.

10. In view of these observations it may be treated as finally settled that 'to be a witness' is not equivalent to furnish evidence in its widest significance. It means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in Court or otherwise by a person accused of an offence but does not, embrace within its ambit the production of documents or furnishing materials which may be relevant at the trial to determine the guilt or innocence of the accused. The compulsion, which comes within the prohibition of constitutional provisions, is a physical objective act and not the state of mind of the person making the statement, except where through extraneous process the statement is rendered involuntary and, therefore, extorted. The mere questioning

of accused resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not compulsion. As ruled in M.P. Sharma's case 1954 Cri LJ 865 (SO (supra)) '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.' It naturally follows that a person cannot be said to have been compelled where he is not bound to answer the Question or to produce the document asked for.

11. We may now test the validity of Sub-sections (2) and (3) of Section 342 of the Code of Criminal Procedure, 1898, which run as follows:

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them : but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for any other offence which such answers may tend to show he has committed.

It may be noticed that questioning of an accused comes at the stage when the prosecution evidence against him has come on the record. At that stage he is afforded an opportunity to explain any circumstances which may tend to incriminate him or of stating in his own way anything which he may be desirous of stating. The purpose of questioning the accused is not to cross-examine him nor it is an examination of an inquisitorial nature with a view to entrap the accused and to extract from him damaging admissions to form the basis of the prosecution case.

12. The earlier part of Sub-section (2) lays down that the accused shall not render himself liable to punishment either by refusing to answer the questions put by the Court or by giving false answer to them. So far there is nothing to which exception can possibly be taken. It is, however, contended that the latter part of Sub-section (2) and Sub-section (3) which provide that the Court and the jury, if any, may draw such inference from such refusal or answers as it thinks just or that the answers

given by the accused may be taken into consideration in such inquiry or trial, and out in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed are violative of the principles laid down in Article 20(3) of the Constitution. It is urged that since the Court or the jury are entitled to draw adverse inferences from the answers given by the accused and also from his refusal to answer the questions put to him he is compelled to be a witness against himself. If his silence is taken as a circumstance against him, it is as such evidence against him as any other circumstance which may appear from the prosecution evidence. Similarly if any use of the answers of the accused is made to convict him, it is patent that the statement of the accused given in answer to Court question is being used 'against' the accused.

13. The argument, apparently plausible, cannot survive the test of a critical examination. The answers given by an accused under Section 342(2), Criminal Procedure Code are not on oath and they are optional. It is open to the accused to refuse to answer the questions put to him. He is free to make a statement in favour of himself and consequently it cannot be said that he is compelled to make a statement against himself. Of course, it is open to the Court to take into consideration the answers given by the accused as also his refusal to answer the question put to him while determining his guilt but they cannot be a substitute for the prosecution evidence on which alone an accused can be held guilty. These matters stand on the same footing as the giving of finger impressions or of specimen writing or of signatures by an accused person and though they may amount to furnishing evidence in the, larger sense, they are not included within the expression 'to be a witness'.

14. The statement of the accused cannot be termed 'a compelled statement'. As laid down by the Supreme Court in Kathi Kalu's case (1961-2 Cri LJ 856) (supra) the compulsion in the context in which it is used in Article 20(3) is a physical objective act and not the state of mind of the person making the statement, except of course where the mind had been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted. As pointed out earlier an accused is free to make any statement and he may even

refuse to answer the questions put to him. The indirect compulsion resulting from the risk that his refusal to answer may be taken as a circumstance against him is not the type of compulsion which comes within the prohibition of constitutional provisions. The negative attitude of silence or submission on the part of an accused is outside the scope of testimony compulsion envisaged in Article 20(3) of the Constitution. Where a person is not bound to answer questions or to answer them in a particular manner it is not possible to hold that he acts under a compulsion. The provision that his answer or refusal to answer may be taken into consideration in determining his guilt does not render the statement involuntary so as to be termed as compelled statement.

15. In our view Sub-sections (2) and (3) of Section 342 of the Code of Criminal Procedure, 1898 are not inconsistent with Article 20(3) of the Constitution.

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