

In Re: Palani Goundan

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Court : Chennai

Decided On : Apr-05-1956

Reported in : AIR1957Mad546; 1957CriLJ976

Judge : Somasundaram and ;Ramaswami Goundar, JJ.

Acts : Madras Prohibition Act, 1937 - Sections 4A; [Constitution of India](#) - Article 20 and 20(3)

Appeal No. : Criminal Revn. Case No. 772 and Criminal Revn. Petn. No. 731 of 1955

Appellant : In Re: Palani Goundan

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : K.S. Jayarama Aiyar, Adv.

Disposition : Revision dismissed

Judgement :

1. I agree and I have nothing to add.

Ramaswami Goundar, J.

2. The accused has preferred this revision to this Court against his conviction under Section 4-A of the Madras ' Prohibition Act, 1'937, both by the Sub-

Magistrate, Trichengode and the Sub-Divisional Magistrate, Sankari, in appeal, and sentence of a fine of Rs. 100. That section lays down that whoever is found in a state of intoxication in any public place.....shall be punished with imprisonment which may extend to six months* or with fine which may extend to Rs. 1000 or with both. While the legislature has made intoxication in a public place a punishable offence, it is somewhat surprising that it has not taken care to define what intoxication means.

In the absence of any statutory definition, we will have to adopt its ordinary etymological meaning, namely, a condition produced by excessive use of alcoholic stimulants, as defined in Dorland's American Medical Dictionary. It will be seen that Section 4 (1) (j) also provides that whoever consumes liquor or any intoxicating drug shall be punished with imprisonment and fine and so, the offence under Section 4-A appears to be an aggrieved form of the offence under Section 4 (1) (j). In this case, both the Courts below came to the conclusion that the accused was guilty of the offence with which he was charged.

3. The only material evidence on which the lower Courts came to that conclusion was that of the rural medical practitioner P. W. 2, who examined the accused on his production by the Head Constable at about 2-15 a.m. on 16-3-1955; and on such examination, the doctor observed the following symptoms : (1) smelling of arrack in the breath; (2) redness of the eyes and dilation of pupil; (3) tongue clean and dry; (4) speech incoherent; and (5) staggering gait. On those symptoms, the doctor formed the opinion that the accused had consumed liquor and was under its influence.

The learned counsel for the accused contended that those symptoms did not necessarily lead to the only conclusion, namely, that the accused was under intoxication; and he further contended that about that time, the accused was taking some medicinal preparations containing slight alcohol under the prescription of the Civil Assistant Surgeon, Government Hospital, Bhavani, examined as D. W. 1, and that the symptoms observed might be due to the accused taking those medicine. The doctor D. W. 1, gave evidence that in October 1954, he examined the accused and found that he was suffering from Asthma and chronic bronchitis.

He prescribed the mixture and some tonic as mentioned, in his prescriptions, Exs. D-1 and D-2. The medicine prescribed by him and also the tonic contained slight alcohol, and tonic containing 12 per cent, of alcohol. The doctor gave evidence that if the mixture and tonic were taken together, the smell of alcohol would continue for an hour. Thus, the smelling of arrack in the breath observed by P. W. 2 was sought to be explained. But then, as the accused was examined by P- W. 2 at 2-15 a.m. the accused must have taken the medicine and the tonic at about 1 a.m. when he was arrested; and I am not sure whether at that hour of the night the accused took his medicine.

As regards the redness of the eyes, D. W. 1 stated that even at the time of the trial, the eyes of the accused were red; and, of course, the redness in the eyes might be due to various other causes. The doctor also deposed that asthmatic mixture makes the tongue dry. Even assuming that on the evidence of D. W. 1, the symptoms such as smelling of arrack in the breath, redness of eyes, tongue clean and dry, might be explained as being due to the accused taking the asthmatic mixture and tonic, the other two important symptoms, namely, incoherent speech and staggering gait, will have to be explained,

In regard to that, the doctor, D. W, 1, stated that his asthmatic mixture consisted of bromide, iodide, ammonium carbonate, spirit etc., and that he had also prescribed phenobarbitone and morphia. His evidence, further, was that morphia produced giddiness but the degree he could not say. The evidence of the District Medical Officer, Salem, who was examined as Court witness, was that phenobarbitone is administered to persons suffering from bronchitis or asthma and that it causes giddiness.

The two symptoms referred to above, namely, incoherent speech and staggering gait, were accordingly attributed to the giddiness which might have been caused by morphia and phenobarbitone. But the two doctors, D. Ws. 1 and 2 have not been asked whether the small percentage of those drugs present in the prescriptions Exs. D-1 and D-2, would have been sufficient to cause giddiness, and, in consequence, those/two symptoms. Nor has it been elicited from those two doctors that the taking by the accused of the medicine and the tonic prescribed

under Exs. D-1 and D-2 would have been sufficient to produce the symptoms observed by P. W. 2.

On the other hand the evidence of D. W. 1 was that the therapeutic does not cause intoxication, though he was cautious enough to add that it would depend upon the patient. There is therefore no explanation offered by the accused how those symptoms could have been possible' if what he consumed was confined only to the medicine and the tonic prescribed by his doctor. On the symptoms observed by P. W. 2, I am prepared to agree with the opinion expressed by that doctor, namely, that the accused, when he was examined, was under the influence of liquor, that is to say, was in a state of intoxication.

4. But the learned counsel for the accused further contended, that, in a case like this, it was for the prosecution to prove that the accused must have consumed the prohibited variety of liquor and not alcohol which is exempted, such as medicinal preparations. In support of his contention, he cited the decision of the Supreme Court in *Behram Khurshid Pesikaka v. State of Bombay*, (A). In that case, the doctor found the accused's breath smelling of alcohol conjunctive congested, pupils semidilated, but the speech coherent.

Their Lordships, therefore, pointed out that the bare circumstance that a person accused of an offence was smelling of alcohol was compatible both with his innocence as well as his guilt, as the smell of alcohol might be due to the fact that the accused had taken alcohol which fell under the exempted category; and so, it was the duty of the prosecution to prove that the alcohol of which he was smelling was such that it came within the category of prohibited alcohols.

In this case, as I said, I am not in the least convinced that the symptoms observed by P. W. 2 could have been caused by taking the medicines prescribed by his doctor. In the opinion of P. W.2, which I accept, they must have caused only by the excessive consumption of liquor. In other words, the prosecution has established that those symptoms were not the result of the accused consuming any medicinal preparation exempted under the Act, but of some liquor which threw him into a state of intoxication. I therefore hold that the conviction of the accused was proper.

5. The learned counsel for the accused put forward another broad contention that the symptoms observed by P. W. 2 must be regarded as evidence obtained from the accused by compulsion and that It was therefore hit by Article 20(3) of the Constitution, which provides that no person accused of any offence shall be compelled to be a witness against himself. The learned counsel contended that in this case, the accused was arrested, and, to use his expression bundled away in a police van to the presence of the doctor and made to undergo the medical tests at the hands of P. W. 2.

But , the learned counsel did not dispute the powers of the police officer in a case like this to arrest the accused by virtue of Section 15 of the Prohibition Act. There is no evidence to prove that the accused was subjected to any compulsion during his examination by the doctor, P. W. 2. What all the doctor did was to record his observations of the physical features and other symptoms exhibited by the accused at that time; that is to say, the police, with the help of the doctor, gathered evidence which was available on the person of the accused and not that the accused himself was compelled to make such evidence available for the prosecution.

6. The leading case on this subject is a decision of the Supreme Court reported in M P. Sharma v. Sri Satishchandra, (B). In that Case, during the investigation of the affairs of a company, Dalmia Jain Airways Ltd., by the Inspector appointed under Section 138 of the Indian Companies Act, it transpired that there was an organised attempt made from the inception of the company to misappropriate and embezzle the funds of the company and to conceal from the share-holders the true state of affairs by submitting false accounts and balance-sheets.

It was also stated that the director and the chairman of the company had been controlling four Other companies. To determine the extent of the fraud, it was necessary to get hold of the books not only of the company under liquidation, but also of the allied concerns controlled by the Dalmia group. Lists of the offices and places in which and of the persons in whose custody the records might be available were furnished. On the basis thereof, an application was made to the District Magistrate under Section 96, Cr. P. C. for the issue of warrants for the

search of documents and in the places mentioned.

The District Magistrate issued warrants for simultaneous searches of all the places, and a voluminous mass of records was seized from various places. Thereupon, applications were made to the Supreme Court on behalf of the four allied concerns, praying that the search warrants might be quashed as being absolutely illegal and asking for the return of the documents seized. One of the contentions advanced for the petitioners was that a search to obtain documents for investigation into an offence is a compulsory procuring of incriminatory evidence from the accused himself and was therefore hit by Article 20(3) as unconstitutional and illegal.

Their Lordships pointed out that Article 20(3) embodied the principle of protection against compulsion of self-incrimination which is one of the fundamental canons of the British system of criminal jurisprudence. They also pointed out that "to be a witness" is nothing more than to furnish evidence, and such evidence can be furnished through the lips or by the production of a thing or of a document or in other modes, and that the connotation of the word "witness" must be understood in its natural sense as referring to a person who furnishes evidence. At page 159 (of Mad WN Cr): (at p. 304 of AIR), they expressed themselves thus :

"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."

It is therefore clear that the principle of protection against self-incrimination is not confined, to the oral evidence of a person standing his trial for an offence when called to the witness-stand, and it refers to all kinds of evidence which the accused might be compelled to produce as a positive volitional evidentiary act. Their Lordships observed :

"It would extend to any compulsory process of production of evidentiary documents which are reasonably likely to support a prosecution against them." It follows that any attempt to compel the accused to produce, evidence of any kind

which is likely to support a prosecution against him would be struck down by Article 20(3) of the Constitution. Having said that, their Lordships, then addressed themselves to the question whether search warrants for the seizure of such documents from the custody of the, accused, would be unconstitutional, and, hence, illegal on the ground that in effect they are tantamount to compelled production of evidence. On that question, their Lordships were clearly of the opinion that the searches with which they were concerned in that case could not be challenged as illegal on the ground of violation of any fundamental rights. The following observation at page 162 (of Mad WN Cr): (at p. 306 of AIR), is noteworthy:

"It is therefore, clear that there is no basis-in the Indian Law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. Indeed, a little consideration will show that the two are essentially different matters for the purpose relevant to the present discussion. A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Article 20(3) as above explained. But a search warrant is addressed to an officer of the Government, generally, a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense."

7. From this decision, it seems to me that the following rule can be safely enunciated. An incriminating or relevant object or document or other form of evidence can be seized under process of law from the custody or person of the accused but he cannot be compelled to produce it. It would follow from that rule that a stolen article can be seized from the person of the accused, though he may be unwilling to part with it; or, if he happens to swallow a stolen property, he can be taken to a doctor, and made to undergo the necessary medical process or treatment with a view to have the article extracted from his body.

Similarly, if a police officer finds an accused charged with murder wearing blood-stained clothes, such clothes may be seized from him, though he may not be

willing to surrender them. But it is important to bear in mind that while it may be open to a police officer to seize such incriminating articles or evidence from the person of the accused, he cannot himself be compelled to produce them.

In *In re, Palani Mooppan*, (C), it was contended that no weight should be attached to the recovery of bloodstained clothes, M.Os. 3 and 4 in that case, on the ground that under the said Article of the Constitution, a person accused of an offence could not be compelled to be a witness against himself. The learned Judges held that the securing of the blood-stained clothes on an accused person would be very material and relevant, and the Magistrate was bound to take possession of them, and such being the case, it cannot be said that there has been any compulsion exercised upon the accused to produce the bloodstained clothes. Similarly in *Sunder Singh v. State* (S) (D), it was observed at p. 369 :

"No doubt, if there had been any evidence to prove that the appellant had been compelled to produce the incriminating articles, the argument advanced on his behalf could have had some force. In the present case, not only there is no evidence that the appellant was compelled to produce the incriminating articles, but there is not even a suggestion to that effect anywhere in the evidence or in the cross-examination of witnesses."

In this connection, reference may be usefully made to three decisions, of our High Court, reported in *Swarnalingam Chettiar v. Asst. Labour Inspector, Karaikudi*, 1955-2 Mad LJ 267: ((S) AIR 1956 Mad 165) (E), *Swarnalingam Chettiar v. Asst. Inspector of Labour*, (F), and *In re, Swarnalingam Chettiar*, (G). In all those cases, one Swarnalingam Chettiar was a petitioner before this Court as against Assistant Labour Inspector, Karaikudi, the respondent. The petitioner was charged with the offence of contravening the provisions, of the Madras Shops and Establishments Act, and it was alleged by the prosecution that the documents necessary for the purpose of the trial of the accused were with the accused as they were accounts being maintained by him; & so, the Sub-Magistrate directed summons under Section 94, Cr. P. C., to issue to the accused for the production of those documents in his possession.

In the first of those cases, My Lord the Chief Justice and Rajagopala Aiyangar, J., following the decision of the Supreme Court, referred to above, observed that Article 20(3) would "extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against the accused. In the second case, the same Sub-Magistrate issued notice to the same petitioner to show cause why a general search warrant as asked for by the Assistant Inspector of Labour, Karaikudi, should not be issued, so that the premises of the accused might be searched and the documents mentioned in the lists might be produced before Court. In that case, my learned brother, Somasundaram, J., held that the notice to the petitioner to show cause why his premises should not be searched practically amounted to stating that either he produced the document's or else the premises would be searched. He observed:

"Instead, of directly compelling him to produce by means of a summons, this notice to show cause will practically have the same effect in an indirect manner. This notice, therefore, will amount to a testimonial compulsion and will stand on the same footing as the summons to produce the same documents."

He accordingly quashed the notice to show cause why the premises should not be searched. This case can be distinguished on the ground that no search warrant was issued; but there was a threat to issue a search warrant in default of production of documents, which, for all practical purposes, amounted to the accused being compelled to produce the documents. In the third case, the Assistant Inspector of Labour applied to the Sub-Magistrate for the issue of a search warrant under Section 96, Crl. P. C., and the same was granted. Against that order, the petitioner came to this Court for a third time to have that order quashed. But, this time, he necessarily failed, because, what was issued was a search warrant, and not a summons to the accused to produce documents. Balakrishna Aiyar, J., put the matter thus:

"A person may commit a murder and bury the body in the backyard of his house and he may commit burglary and keep the loot in an almirah inside his house. Or he may commit cheating and keep the proceeds thereof in a drawer of his writing desk, & they would all be as safe as if they had been lodged in the Bank of

England. The Constitution is not intended to be a charter for the lawless and there is nothing in Article 20 of the Constitution or in any of its other Articles to prohibit the police from searching either the person of the accused or premises in the manner laid down by the Criminal Procedure Code."

8. It is therefore clear from the decisions cited above that under a search warrant or other kindred process of law, documents or articles or any other incriminating evidence can be seized from the custody or the person of the accused by force and against his will, such as stolen articles, blood-stained clothes, etc., but he cannot be compelled to produce them himself. For the same reason, there can be no objection to an accused person being taken to a doctor for the examination of injuries on his body so as to ascertain whether he could not have participated in an occurrence. He can also be taken to an identification parade to enable the prosecution witnesses to observe his physical features with a view to identify him.

9. There is one aspect of this matter which calls for some mention, namely, the taking of the signature or the thumb impression of an accused for the purpose of its being compared with the signature or thumb impression in questioned documents' with a view to establish offences, such as, forgery, criminal breach of trust, etc. It appears to me that the making of thumb impression or the signature of the accused does not stand on a different footing from the seizure of documents or articles or other facts of evidence from the person of the accused.

Though he cannot be compelled to produce such evidence, it can be taken or seized from him. That is 'an act of another to which he is obliged to Submit', and not 'the positive volitional evidentiary act of the accused, to use the language of the Supreme' Court. Section 73 of the Evidence Act enables a Court to take such thumb impressions; and the Criminal Act XXXIII of 1920 enables a police officer to take what is called the measurements of the accused, which include finger and footprint impressions.

That being so, it seems to me that the finger print or the footprint of that accused is a fact of evidence which he "carries with him, and the police officer who is authorised under the said Act may seize that evidence by taking his thumb impression to a piece of paper. In a Rangoon decision reported in *Emperor v. Nga*

Tun Hlaing, AIR 1924 Rang 115 (FB) (H), in answering a contention that by directing the accused to make his finger impression, the Court is, in effect, compelling him to provide evidence against himself, one of the learned Judges who constituted the Full Bench, observed thus at p. 119:

"Such a contention is, however, in my view, inadmissible, since what really constitutes the evidence, viz., the ridges on his thumb, are not provided by him any more than the features of his contentions 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."

In a Bench decision of the Calcutta High Court, reported in *Sailendranath v. State*, (I), it was argued that the order directing specimen writing of the accused to be taken amounted to a direction of the Court compelling the petitioners to give evidence against themselves, and therefore, offended Article 20(3) of the Constitution; and in support of that contention, the decision of the Supreme Court referred to above was relied on. But the learned Judges held that that decision was not any authority for the proposition that the direction to take specimen writings of a person who is accused of an offence amounted to a direction compelling him to give evidence against himself. It was observed that "a mere direction to a person accused of an offence to give his specimen writings does not amount to compelling him to give evidence against himself." If there is a direction to the accused to give his thumb impression, then, with great respect, this decision may not sound and may require reconsideration. On the question of taking the thumb impression or the handwriting of the accused, there are two decisions of our High Court, both rendered by my learned brother, Somasundaram, J. in *Rajamutliukoil Pillai v. Periyasami Nadar* 1955-2 Mad LJ 468: (AIR 1956 Mad 832) (J), there was a direction by the Magistrate to the accused to give his thumb impression in Court, so that it might be compared with certain other documents, on which the complainant relied.

The learned Judge held that the direction asking the accused to give his thumb impression would amount to asking him to furnish evidence which is prohibited under Article 20(3) of the Constitution, and therefore the accused cannot be

compelled to give the thumb impression as directed by the Magistrate. I respectfully agree with that decision, because that was a case where the accused was directed to give his thumb impression, and not a case where it was taken from him. He cannot be compelled to produce evidence against himself.

But there can be no objection to a police officer taking the thumb impression of an accused for the purpose of his investigation. That was, in fact, the decision in the other case, *In re, Muhammad Hussain*, Cri App. No. 552 of 1955: (Unreported) (Since) (K), where the thumb impression of the accused was taken by the Sub-Inspector of Police. Relying on the decision of the Supreme Court, it was contended that that evidence was hit by Article 20(3) as it amounted to testimonial compulsion. But my learned brother repelled that contention with this observation:

"But so far as I am aware, their Lordships of the Supreme Court have not held that any statement taken by the police or anything done by the police in the course of investigation which is subsequently produced before the Court as evidence is hit by Sub-Clause (3) of Article 20 of the Constitution. In my opinion, the thumb impression taken by the police on a slip of paper which was later on produced in Court cannot amount to testimonial compulsion."

These two decisions of my learned brother, Somasundaram J. forcibly illustrate the general principle which I have endeavored to evolve, namely, while the accused cannot be compelled to produce any evidence against himself, such evidence can be taken or seized, provided, of course, such taking or seizure is legally permissible.

10. It follows from the above discussion that the contention put forward by the learned counsel for the accused in this case that the symptoms observed by the doctor, P. W. 2, must be excluded from evidence cannot be accepted. The conviction was right, and the sentence was not excessive. The revision petition must therefore be dismissed.

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