

Sekender Sheikh and anr. Vs. State

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Court : Kolkata

Decided On : Jan-25-1961

Reported in : AIR1962Cal36

Judge : S.K. Sen and ;K.C. Sen, JJ.

Acts : [Constitution of India](#) - Article 20(3); ;[Code of Criminal Procedure \(CrPC\)](#) , [1898](#) - Section 307

Appeal No. : Criminal Ref. No. 10 of 1960

Appellant : Sekender Sheikh and anr.

Respondent : State

Advocate for Def. : Balai Chandra Roy, Adv.

Advocate for Pet/Ap. : Biswanath Bajpayee, Adv.

Disposition : Reference rejected

Judgement :

S.K. Sen, J.

1. This is a reference under Section 307 of the Criminal Procedure Code made by Sri P. Basu, Additional Sessions Judge, Mursbidabad, disagreeing with the majority verdict of guilty returned against the two accused Sekender S. K. who

was charged under Section 467 I. P. C. and Hasibuddin Sk. who was charged under Section 467/109 of the Indian Penal Code.

2. The prosecution case was briefly as follows: One Kaimuddin Sk. who deposed in the case as P. W. 2 and is an old man of 90 or 100, has some landed property at Debkunda P.S. Beldanga. Out of his landed property, he transferred certain property by a registered deed of gift dated 5th November, 1956, to one Katama Bibi, a daughter of his pre-deceased daughter, the land concerned, being case plots Nos. 942, 946 and 947 of Mouza Debkundu. Abdul Hye husband of Katama Bibi, cultivated the plots on behalf of his wife after the execution, of the deed of gift. In 1958 however, Ali Hossain Sk. a son of Kaimuddin Sk. dispossessed Abdul Hye from the plots of land, claiming that his father Kaimuddin Sk. had given the plots to him along with other lands by executing a heba-bil-waz, Abdul Hye reported to his grand-father-in-law i.e. Kaimuddin Sk. who by the deed of gift had given the three plots to his grand daughter Katama Bibi. Under the direction of Kaimuddin Sk., a copy of the registered heba-bil-waz purporting to have been executed and registered on 15th January, 1958, was obtained from the Berhampur Sub-Registry office, and then a petition of complaint was filed in Court on 16th June, 1958, by Kaimuddin Sk. against Ali Hossain. Sekender Sk. and Hasibuddin Sk., with the case that no such heba-bil-waz had been executed by Kaimuddin Sk. and that a forged document had been brought into being by Ali Hossain in collusion with Sekender Sk. and Hasibuddin Sk. It may be mentioned that Sekender Sk. is also an old man of 75 or 80, while Hasibuddin Sk. is a son of Ali Hossain and grand son of Kaimuddin Sk. and he is aged about 19 or 20. The Sub-Divisional Magistrate referred the petition of complaint to the officer-in-charge Berhampur P. S. for taking cognizance and for investigation. The police officer after investigation submitted charge-sheet against Sekender Sk. and Hasibuddin Sk. as it appeared in the course of the investigation that the disputed document had been executed by Sekender Sk. by putting his thumb impressions by pretending to be Kaimuddin Sk. and that Hasibuddin Sk. had identified him before the Sub-Registrar of Berhampur where the document had been executed. A charge-sheet was submitted under Section 467 of the Indian Penal Code against Sekender Sk. and 467/109 of the Indian Penal Code against Hasibuddin Sk. and also under Sections 82c and 82d of the Indian Registration Act against them for

impersonating somebody else and falsely identifying a person before the Sub-Registrar.

3. The case was tried by the Additional Sessions Judge with a jury so far as the charges under Sections 467 and 467/109 of the Indian Penal Code were concerned, and by himself so far as charges under Sections 82c and 82d of Indian Registration Act were concerned. The accused both pleaded not guilty, and the defence was that Kaimuddin Sk. had himself executed the heba-bil-waz, but he was induced by Abdul Hye to bring a false case for challenging the genuineness of the heba-bil-waz. The jury however returned a majority verdict by 4 to 3 of guilty against both Sekender Sk. and Hasibuddin Sk. in respect of charges under Section 467 and 467/109 of the Indian Penal Code against them. The learned Judge thought that the evidence was not satisfactory, and so he has made this reference under Section 307 of the Criminal Procedure Code, recommending that both the accused be acquitted. He at the same time wrote out a separate judgment in respect of charges under Sections 82c and 82d of the Indian Registration Act and acquitted both the accused of the charges.

4. The point for decision therefore is whether in consideration of the opinion of the majority of the jury and of the learned Judge, and the evidence on the record, the charges under Sections 467 and 467/109 of the Indian Penal Code may be deemed to have been established beyond reasonable doubt against the two accused Sekender Sk. and Hasibuddin Sk.

5-6. (After discussion of some oral evidence His Lordship proceeded:) The other category of evidence consists of the identification of specimen of writing and thumb impression of the two accused by the hand-writing expert and the finger print expert. The evidence of the investigating officer P. W. 12 Sri Dhiraj Kumar Mukherjee and the Magistrate P. W. 10 Sri C. D. Chatterjee shows that specimen hand-writings of Hasibuddin Sk. and Kaimuddin Sk. were taken, the specimen handwriting of Hasibuddin being Ext. 10 and Hasibuddin Sk. did not raise any objection when his specimen hand-writing was taken in Court. The specimen finger prints not only of Sekender Sk. but also of Kaimuddin Sk; and Hasibuddin Sk. and Ali Hossain were taken by the investigating officer P. W. 12 in front of the

Magistrate P. W. 13, Sri P. Roy Choudhury. In this case there was no suggestion that Sekendar made any objection to giving his specimen finger impressions. The evidence of the finger print expert P. W. 6, B.K. Bhowmik shows that the finger impression appearing in Ext. 6 which is the entry dated 15th January, 1958, in the thumb impression register at Sub-Registry office of Berhampore in respect of document No. 278, which was marked F by the finger print expert was identical with the left thumb impression of Sekender Sk. of which the specimen was sent to him and was marked by him as B/1. In the counter-foil book of the receipts for original documents filed in the Registry office for registration, which is marked Ext. 5 there is similarly the thumb impression marked E by the finger print expert. This finger print is described, in the document Ext. 5 as in the document Ext. 6, as the finger print of Kaimuddin Sk., and the evidence of P. W. 6 the finger print expert shows that the finger print marked E is also identical with the specimen left thumb impression of Sekendar Sk. marked by the expert as B/1. The finger prints are all clear, and in the circumstances there is no reason at all to reject the evidence of this finger print expert Sri. B.K. Bhowmik as to the identity. Similarly in the document Exts. 6 and 5 respectively, the name of Kaimuddin Sk. against the thumb impression purports to have been written by Hasibuddin Sk. as the writer, and the evidence of the hand writing expert P.W. 1 Pasupati Banerjee is that the writings in Bengali on the documents marked by him respectively as X/1 and Y/1 are identical with the specimen writing of Hasibuddin which was sent to him and which was marked by him as M. The expert gave sufficient reasons for his opinion, and having gone through the reasons we see no reason to reject the evidence of this hand-writing expert.

7. If the evidence as to the identity of the thumb impression and the hand writing is accepted, it is clear that Sekender Sk. representing himself as Kaimuddin Sk. executant of the disputed document, appeared before the Sub-Registry office on 15th January, 1958, and his thumb impression as the executant was taken on the thumb impression book as well as on the counter-foil of the receipt for the original document, and Hasibuddin Sk. identified him as Kaimuddin and wrote that name against the thumb impression. Ext. 4 a certified copy of the registered document, and the endorsement of the Sub-Registrar shows that before the Sub-Registrar, it was Hasibuddin Sk, who identified the executant as Kaimuddin Sk. and from the

identity of thumb impression, it is clear that the man who appeared as the executant of the document before the Sub-Registrar was Sekender Sk. Mr. Baipayee has pointed out that these thumb impressions on Ext. 6 and Ext. 5 respectively and these writings against the thumb impression on the same documents, are not the subject-matter of the charges, but the subject-matter of the charges is the original document itself which is a valuable security said to have been forged by Sekender Sk. as the executant with the Help of Hasibuddin Sk. who acted as the identifier before the Sub-Registrar. The original document is however, not before us, and on the prosecution case the original must be in the possession of the accused party i. e. Ali Hossain or Sekender Sk. or Hasibuddin Sk. and it was not possible therefore for the prosecution to produce the same. But the identity of the thumb impressions and the writings appearing on the two documents Exts. 6 and 5 is important, because the man who appeared before the Sub-Registrar as the executant and admitted execution, was the man whose thumb impression was taken on these two documents. As these thumb impressions indicate that this man is identical with Sekender Sk. it follows that the executant of the document was really Sekender Sk. and he had put the thumb impression on the original of Ext, 4 and he was identified before the Sub-Registrar as Kaimuddin, This is sufficient to establish the charge under Section 467 of the Indian Penal Code against Sekender Sk. and 467/109 of the Indian Penal Code against Hasibuddn Sk. even apart from the evidence of P. Ws. 2 and 3.

8. Mr. Bajpayee has strenuously urged that the taking of the specimen writing and specimen thumb impression of the accused offended against the protection given to an accused by Article 20(3) of the Constitution. In this connection he has referred to the decision of the Supreme Court, *M.P. Sharma v. Satish Chandra* : 1978(2)ELT287(SC) and a decision of a bench pf this Court viz., *Farid Ahmed v. The State* : AIR1960 Cal32 . In the Supreme Court case the question was whether an accused could be directed by the police or by the Court to produce documents some of which might be incriminating. It was held by the Supreme Court that the Protection, afforded by Article 20(3) of the Constitution is not merely in respect of testimonial compulsion in the Court room, but also in respect of compelled testimony previously obtained from the accused, and that testimony cannot be obtained even before the trial from the accused by compulsion. It was therefore

held that the accused could not be compelled to produce documents some of which may prove to be incriminating and be used as evidence against him. In that case the Supreme Court did not have to deal with the question of taking specimen writing or specimen thumb impression of the accused. In the case of : AIR1960 Cal32 a Bench of this Court held that the Court could not allow an investigating officer to take specimen writing and signature of an accused, there being no provision in the Criminal Procedure Code which allowed the Magistrate to make such an order. It should be pointed out that this decision to a certain extent runs counter to an earlier Division Bench decision of this Court viz., Sailendra Nath Sinha v. The State : AIR1955 Cal247 where it was held that a direction under Section 73 of the Indian Evidence Act to take specimen writing of a person who is accused of an offence does not amount to direction compelling him to give evidence against himself and such direction therefore does not offend against Article 20(3) of the Constitution. These two decisions of two Division Benches of this Court can really be reconciled, by holding that while the accused cannot be compelled to give his specimen writing or signature, because such specimen writing and signature may be used as evidence against him there is no legal bar to the accused being merely asked to give his specimen writing and signature, because even under the provisions of the Criminal Procedure Code as amended, the accused may give evidence, if he chooses to do so, but he cannot be compelled to give evidence. This point has been clarified by a decision of the Bombay High Court, State v Abu Ismail Merchant : AIR1959 Bom408 . In that case it was held that the constitutional guarantee of Article 20(3) only protects a person accused of an offence from being compelled to furnish evidence against himself; that every volitional act of a Person accused which is evidence, or facilitates collection of evidence against him, is not to be deemed 'compelled' merely because the act is relied Upon in the judicial proceeding against the person accused; the Constitution does not prohibit a Person accused of an offence from furnishing evidence which may be used against him; it only affords a protection against compulsion in furnishing evidence. At page 412, para 11, of the judgment the legality or otherwise of taking specimen hand writing and signature from the accused was discussed as follows :

'The learned Judge held that the question whether Article 20(3) of the Constitution had any application must depend upon Proof of certain facts; viz., whether any compulsion was used on the accused when he gave his hand-writing, and on that point a suggestion was made by Mr. Neemuchwala for the accused that threats were administered to the accused before specimen handwritings were obtained, which suggestion was denied by the police officer. He observed that as the decision on what was essentially a question of fact depended upon proof or disproof of those facts, it must of necessity be given after all the evidence was recorded and that he would tell the jury to consider the question in the course of summing up. In our view, in so doing the learned Judge was not in error. Evidently, the question whether the writings had been obtained by the Police officer from the accused by compulsion was a question, of fact which had to be decided by the jury, and the jury could not be called upon to give an interlocutory verdict on that question. The learned Judge was, therefore, justified in admitting the evidence of the Panch as well as the police officer and of the hand-writing experts, and then in asking the jury to consider the question whether the writings had been procured by compulsion or threats as alleged by the accused.'

In other words, the learned Judge, being prima facie satisfied that the specimen writing and signature were not obtained by compulsion, should admit the same, and then direct the jury to consider whether they had been given voluntarily or obtained by compulsion, and tell the jury that if they had been obtained by compulsion they had to be left out of consideration, but if they had been given voluntarily they might be taken into consideration. So far as the taking of thumb impression is concerned the position is different, and most of the High Courts in India have come to the conclusion that even if the accused is compelled to give finger print impression, the evidence is admissible, and the protection afforded by Article 20(3) of the Constitution is not contravened. In this connection reference may be made to a decision of the Madras High Court, *Subayya Gounder v. Bhoopala Subramaniam* : AIR1959 Mad396 , where the matter was considered in detail with reference to the various decisions of the Indian High Courts and decisions of American Courts, The learned Judge delivering the judgment in the aforesaid Madras case pointed' out that the wording of Article 20(3) was exactly similar to the wording of the fifth amendment of the American Constitution, and he

referred to the trend of American decisions in para 8, page 399-400 of the judgment. It was pointed that according to the American decisions the law was as follows:

'An accused is permitted to give evidence on his own behalf if he so elects. But if he elects not to give evidence that fact cannot be used to his prejudice. Nor can a man be convicted on testimony obtained by compulsory discovery In the U. S. A., judicial interpretation has enlarged the scope of the privilege. Thus, the privilege has been held to include not only oral evidence but also documentary evidence which is self-incriminating The immunity is merely from giving evidence against the consent of the accused. The prosecution is not debarred from exhibiting the person of the accused to the jury, comparing his finger-prints, photographs etc. : *Holt v. United States*, (1910) 218 US 245.

In short, while 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. This aspect of Article 20(3) has been fully discussed in a Bench decision of this Court (*Somasundaram and Ramaswami Gounder JJ.*) in *In re Palani Goundan* : AIR1957 Mad546 .'

In the case just cited i.e. : AIR1957 Mad546 , it was pointed out by a Bench of Madras High Court that when the evidence sought was to be obtained by a volitional act of the accused, the accused could not be compelled to perform that act, but when the evidence could be taken by the police under provision of law, as taking impression of his fingers or photographs of his face or other measurement of his body, which do not depend on the volitional act of the accused, the protection given by Article 20(3) of the Constitution is not contravened, and the police could take such materials even by the exercise of force under the provision of the Identification of Prisoners Act viz., Central Act XXXIII of 1920. It was also pointed out that if it were to be held that the specimen finger impression could not be taken by the police legally, it might be logically argued that the accused could also Plead that he would not show his face to the witnesses at the trial for identification, which would of course be absurd.

9. Accordingly, we must hold that the taking of the finger impression' of the accused was justified in any case even if it was, done without the consent of the accused, of which there was no suggestion in the case. As regards the taking of the specimen writing, the evidence of the Magistrate P. W. 10, C. D. Chatterjee shows that no objection was raised on behalf of the accused when his specimen writing and signature was asked for, That being so, it must be held that the accused Hasibuddin Sk. voluntarily gave his specimen writing and signature, and therefore the protection afforded by Article 20(3) of the Constitution was not contravened, and that the evidence could be taken into consideration.

10. In view of the evidence discussed, we are clearly of the opinion that the charge under Section 467 of the Indian Penal Code was established against Sekender Sk. and that under Section 467/109 of the Indian Penal Code was established against Hasibuddin Sk, and clearly the majority verdict of the jury was not such a verdict as no reasonable body of men could be expected to arrive at. There is, therefore, no reason to set aside the majority verdict of the jury.

11. Another argument raised by Mr. Bajpayee has to be noticed briefly viz., that in spite of the evidence as to the identity of the writing and finger impression, the learned Judge in respect of charges under Sections 82c and 82d of the Indian Registration Act acquitted the accused; and in view of the acquittal we are no longer entitled to take into consideration the evidence as to the identity of the finger impression and the hand writing, as no appeal was preferred by the State against the order of acquittal in respect of charges under Sections 82c and 82d of the Indian Registration Act. In this connection however, reference may be made to the decision of the Judicial Committee of the Privy Council in *Malik Khan v. Emperor* . In that case there were separate charges of murder and robbery, against the accused, and the learned Sessions Judge convicted the accused of murder but acquitted him of the robbery charge. It was held that the finding of the Sessions Judge on the charge of robbery would not prevent the High Court from weighing evidence on that charge, and using that evidence as corroboration of the murder charge. In the circumstances, even though the learned Judge, in our opinion erroneously, came to a conclusion as to the legality of taking the finger prints and specimen writing of the accused, and the evidence as to the identity of

the fingerprint and the writing, and signature, and no appeal was preferred by the State against that decision, we are entitled to take the entire evidence which was recorded in the course of the same proceeding, and come to our own conclusion. When a reference is made under Section 307 of the Criminal Procedure Code, the whole matter is open before the High Court and the High Court cannot be prevented from considering all the items of evidence, even though on the basis of the same evidence the learned Sessions Judge has come to a different conclusion on a connected charge which was not before the Jury.

12. Accordingly, this reference is rejected. Accepting the majority verdict of the jury we convict Sekender Sk. under Section 467 of the Indian Penal Code and Hasibuddin Sk. under Section 467/109 of the Indian Penal Code; but in consideration of the old age of Sekender Sk. and youth of Hassibuddin Sk. we sentence each of them to suffer rigorous imprisonment for two years only.

13. The accused Petitioners will now surrender and serve out the rest of their sentences.

K.C. Sen, J.

14. I agree.