

Peare Lal Show Vs. the State

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Court : Kolkata

Decided On : May-11-1960

Reported in : AIR1961Cal531,1961CriLJ462

Judge : J.P. Mitter and ;Bhattacharya, JJ.

Acts : [Constitution of India](#) - Article 20(3)

Appeal No. : Criminal Revn. Nos. 538 and 596 of 1960

Appellant : Peare Lal Show

Respondent : The State

Advocate for Def. : A.C. Roy, Adv. (in Rev. 596) and ;K.M. Charkraborty, Adv. (in Rev. 538)

Advocate for Pet/Ap. : Archana Sen Gupta, Adv. (in Rev. 596) and ;Somraj Dutta, Adv. (in Rev. 538);S.C. Mookerjee and ;N.C. Banerjee, Adv.

Judgement :

Mitter, J.

1. These two Rules involve a point of some importance in the administration of criminal justice. The petitioners contend that the learned Magistrate's order requiring them to attend test identification parades violates their fundamental right

under Article 20(3) of the Constitution which is in these terms:

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

2. I have had the advantage of reading the judgment which my learned brother is about to deliver. I should nevertheless like to express my own views on the subject.

3. In my view, the true scope of Clause (3) of Article 20 of the Constitution was laid down by the Supreme Court in the case of *M.P. Sharma v. Satish Chandra*, : 1978(2)ELT287(SC) . Jaganadhadas, J., delivering the judgment of the Court, observed:

'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, in my view, the procuring by compulsion of the positive volitional evidentiary acts of an accused 'that is prohibited by Article 20(3) of the Constitution. It is true that an accused may be said to be compelled to attend a test identification parade, but this compulsion does not involve any positive volitional evidentiary act. His mere attendance or the exhibition of his body at a test identification parade even though compelled, does not result in any evidentiary act until he is identified by some other agency. The identification of him by a witness is not his act, even though his body is exhibited for the purpose. His compelled attendance at a test identification parade is comparatively remote to the final evidence and cannot be said by itself to furnish any positive volitional evidentiary act. I must, therefore, hold that the order of the learned Magistrate requiring the petitioners, or any of them, to attend a test identification parade does not violate the provisions of Article 20(3) of the Constitution.

4. A similar point was decided by a single learned Judge of the Madras High Court in the case of *Subayya Goundar v. B. Subramaniam*, : AIR1959 Mad396 . There,

the learned Judge referred, amongst others, to the case of *Holt v. United States*, (1910) 218 US 245. At page 522 of Willis' *Constitutional Law*, 1936 Edition, appears the following passage which is germane to the question before us:

'It is not a violation of the privilege against self-incrimination to require an accused to put on a hat or another garment, or to stand up, or to move his foot so that it can be seen, or to make a foot-print, because in all such cases he is not giving testimony but is exhibiting facts'.

True, we are to construe Article 20(3), but the language of Article 20(3) is as to the material part *tolidem verbis* the 5th Amendment of the American Constitution. Dealing with the point, Holmes, J., in (1910) 218 US 245 (*Supra*) observed:

'A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use 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'.

In the same strain are to be found comments in Wigmore on Evidence, Volume VIII (3rd Edition), Section 2263 at page 363. The emphasis is upon the testimonial status of the accused and not upon any compulsion which might be a step in obtaining the final evidence against the man. Dealing with, this topic, Wigmore observed:

'Such, finally, is the practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence: for if the privilege extended beyond these limits, and protected an accused otherwise than in his strictly testimonial status, -- if, in other words, it created inviolability not only for his

physical control of his own vocal utterances, but also for his physical control in whatever form exercised then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidential articles, a clear 'reductio ad absurdum'.

5. The foregoing principles were embodied in the judgment of the Supreme Court in : 1978(2)ELT287(SC) and the statement of the law set out earlier in this judgment furnishes, to my mind, the real test for determining whether any particular accused is compelled to be a witness against himself. As I have pointed out, the identification of an accused at a test identification parade by someone is not the accused's own act. His mere attendance or the exhibition of his body cannot be regarded as furnishing any positive volitional even-dentiary act. That being the position, the impugned order cannot be regarded as violative of Article 20(3) of the Constitution.

6. In the result, both the applications fail and the relative Rules are discharged.

7. We greatly appreciate the assistance of learned counsel who have appeared as amicus curiae.

Bhattacharya, J.

8. So far as we are aware, there is no decision either of the Supreme Court or of any High Court on this precise point but questions somewhat akin to the present point, for example, taking of thumb impression, were decided in some High Courts one way or the other. The question of thumb impression was left undecided by the Supreme Court in Govinda Reddy v. State of Mysore, : AIR 1960 SC29 .

9. In : 1978(2)ELT287(SC) it is pointed out that the guarantee under Article 20(3) of the Constitution is available to the person against whom a first information report has been recorded. As was observed in Collector of Customs v. Calcutta Motor and Cycle Co., : AIR1958 Cal682 no format complaint is necessary and even if a person has been named as one who committed an offence, particularly

by officers who are competent to launch a prosecution against him, he has been accused of an offence within the meaning of Article 20(3) and he can claim protection under that provision of law and, therefore, the extortion of any evidentiary material even at the stage of investigation, as in the present case, which may aid in the making out of a case against him may be within the meaning of condemnation of the Article. After the decision of the Supreme Court in Sharma's case, : 1978(2)ELT287(SC) referred to above, it cannot be said that the guarantee in Article 20(3) is confined to the oral evidence of the accused. Their Lordships pointedly observed:

'We can see no reason to confine the contents of the constitutional guarantee to this barely literal import. So to limit it would be to rob guarantee of its substantial purpose and to miss the substance for the sum as stated in certain decisions. 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 any other means'.

The Magistrate has directed the production of the petitioner in a test identification parade. The petitioner has objected to this procedure. Consequently, there is an element of coercion and therefore no question of acquiescence arises. This kind of objection may be raised, in my opinion, by an accused person not only at the time of passing of such an order by a Magistrate orally or in writing, personally or through his lawyer, but also at the time of actual collection of his evidence which, according to the accused, may be self-incriminatory in character. The objection of the petitioner is in time. There is, therefore, no technical bar.

10. The point raised by the petitioner should be examined on merit. In deciding the issue, extraneous considerations such as 'effective detection of crime', or 'license to the guilty' or 'social security' by themselves will not be allowed to override the fundamental rights enshrined in the Constitution. Equally futile will be the argument that refusal to appear in a test identification parade will amount to an admission of guilt by the accused, for the presumption of innocence will continue

till the end, that is, till the Court holds the accused guilty. Nor can it be directly argued that Article 20(3) should not be invoked because it is not known beforehand whether the evidence, so sought to be obtained, will go to exonerate the accused or establish the guilt of the accused,

11. The real test has been laid down clearly in Sharma's case : 1978(2)ELT287(SC) ;

'Indeed, every positive volitional act which furnishes evidence is testimony, find 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 the point'.

Apart from the question of coercion as opposed to acquiescence the fundamental idea stressed is 'positive volitional evidentiary act'. This is distinct from 'negative attitude of silence or submission'. It is clear that the Supreme Court did not lay down only the negative principle of silence or acquiescence. What stands out prominently in the judgment is 'a positive volitional evidentiary act'. If coercion is sought to be imposed in getting from an accused evidence which cannot be procured save through positive volitional act on his part, the Constitutional guarantee will step in to protect him. This was the view of this Court in the case of Farid Ahmed v. The State, : AIR1960 Cal32 in connection with a case in which the Magistrate allowed an investigating officer to take specimen writing and signatures of the accused. But if that evidence can be procured without any positive volitional evidentiary act on the part of the accused, Article 20(3) of the Constitution will have no application. In so far as the above ratio decidendi laid down by the Supreme Court was not kept in view fully in Bhaluka Behara v. The State : AIR1957 Ori172 ; Brij Bhusan v. The State, : AIR 1957 MP106 ; Nazir Singh v. The State, : AIR 1959 MP411 or Sailendra Nath v. The State, : AIR1955 Cal247 or Ram Swarup v. The State, : AIR1958 All119 we would with due deference dissent from the views in these decisions. In : AIR1957 Ori172 the Orissa High Court seems to have been of the opinion that any direction asking the accused to give his thumb impression would amount to asking him to furnish evidence which is prohibited under Article 20(3). In this case, however, there was no element of

coercion or compulsion and no objection had been raised by the accused persons at the time of taking the thumb impression. In : AIR 1957 MP106 the Madhya Pradesh High Court held that Section 5 of the Madhya Bharat Identification of Prisoners Act, in so far as it conferred powers on the Magistrate to direct an accused person to give his thumb impression, specimen writing and signature for comparison to be used against him in a trial, was repugnant to Article 20(3) of the Constitution and was, therefore, void. In : AIR1955 Cal247 and : AIR1958 All119 it was pointed out that taking specimen writing did not offend Article 20(3) of the Constitution, -- a view that was dissented from in : AIR1960 Cal32 . Mrs. Sen Gupta has referred to two decisions reported in In re, Palani Goundan, : AIR1957 Mad546 and : AIR1959 Mad396 . Those cases, in my opinion, do not really support her point of view. On the other hand, the later decision goes against the point taken by her.

13. So far as thumb impressions are concerned, they stand on a different footing from specimen writings and signatures. When the accused is directed to give specimen writings and signatures, he is being compelled to do some positive volitional act. as was pointed out by us in Farid Ahmed's case, : AIR1960 Cal32 mentioned above. But as will be indicated in the latter part of the judgment, taking of thumb impressions does not involve, in our opinion, any positive volitional act, for the accused does nothing positively and out of his volition.

14. Tek Chand, J., it may be noted here, in an elaborate judgment came to the conclusion that the taking of thumb impression, finger and palm impressions of the accused in the Court of the Magistrate under his directions was not in contravention of Article 20(3) of the Constitution: Pakhar Singn v. The State, . Reliance was placed inter alia on three American decisions. In Swingle v. The United States, 151, Fed Rep (2d) (S and T) it was observed:

'The prohibition against compelling an accused person to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him and not an exclusion of his body as evidence when it may be material'.

It will appear from *People v. Swallow*, 165 New York Supp. 915, that the rule against self-incrimination is not violated when the accused is compelled to exhibit himself or part of his body to the court or to allow a record of his finger prints to be taken. In *State v. Ah Chuey*, (1879) 33 Am Re 530, the Court held that an order directing the accused to exhibit certain tattoo marks on his person would not amount to an infringement of the rule against self-incrimination.

15. Negating the contention that taking of finger prints is a violation of the privilege against self-incrimination, Willis in *Constitutional Law of the United States* (1936 Edition, page 522) observed inter alia:

'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'. Speaking of inspection of bodily features by the Tribunal or by witnesses, Wigmore in *Evidence*, Vol. VIII, page 375, Section 2265 comments that what is obtained from the accused by such action is not testimony about his body but his body itself. This aspect, I cannot help repeating, was also stressed by Holmes, J. in the case of (1910) 218 US 245 by observing:

'But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material'.

16. If, as we find, taking of thumb impression is not violative of Article 20(3), with greater force the reasons set out above *mutatis mutandis* will be applicable to a case directing the production of the accused in a test identification parade, apart from such consideration as interposition of a magisterial order. It is not the accused who is called upon to testify against himself but somebody else on seeing him and others now in the parade may have something to say later on. The accused does not produce any evidence or perform any evidentiary act. It may be a positive act and even a volitional act, but only to a limited extent, when he walks to the place where the test identification parade is to be held, as has been urged by Mr. Dutt, but certainly it is not his evidentiary act. The view that we take in the instant case is in full accord with the test of positive volitional evidentiary act laid

down by the Supreme Court in the case of : 1978(2)ELT287(SC) .

17. There are certain allied questions such as search for missing articles in an accused person's pouch in the mouth or in other parts of his anatomy, administration of emetic or purgative for ejection of an article suspected to have been stolen or an X'ray examination for the purpose or placing an instrument against the body by, say, a Customs Official to detect the presence of precious metals and the like on the person of a suspected smuggler, and examination of the accused medically after, say, an alleged rape or a motoring accident while the accused was suspected to be under the influence of drink. In this connection we are not unmindful of such decisions as *Bhondar v. Emperor* : AIR1931 Cal601 and *Deoman Shamji v. State*, : AIR1959 Bom284 as also the contrary view taken in American decisions in *Novak v. District of Columbia*, 49 Atlantic Rep (2d) 88; *People v. Tucker*, 198 Pacific Rep. (2d) 940 and *State v. Cram*, 164 Am Law Rep 952 but we do not feel called upon to consider these aspects for the purpose of deciding the case before us.

18. In Revision Case No. 596 Mrs. Sen Gupta, learned Advocate for the petitioner, has put forward a second line of argument that the very object of the test identification parade will be frustrated because the petitioner is on bail and on several occasions he was pointed out to the witnesses. This is however a matter of evidence and may affect the probative value of the test identification parade. At this stage the points appear to be Premature. This objection does not stand in the way of holding the test identification parade.

19. On an anxious consideration of Article 20(3) of the Constitution I am of opinion that a Magistrate's order directing the petitioner to appear in a test identification parade is not ultra vires the Constitution, and I agree that the Rules should be discharged.