Published in Institute's Journal March 1996

IMMUNITY FROM SELF INCRIMINATION UNDER ARTICLE 20 (3) OF THE CONSTITUTION OF INDIA

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Some members of the U.P. Judicial Service who recently attended the Refresher Course conducted by the Judicial Training Institute, raised doubts at the conclusion of the course regarding Immunity from self-incrimination guaranteed under Article 20(3) of the Constitution of India In the matter of directions by the court for giving hand-writing, thumb Impressions, specimen signatures, blood or physical examination. According to them, all these tantamount to evidence within the meaning of Indian Evidence Act, and as such during a trial when a person is directed to give handwriting etc. he is compelled to be a witness against himself, if he happens to be the accused. It was said that whatever may be the position in the matters, at least in respect of the thumb impression which can even be forcibly taken in view of the Supreme Court's decision, the same will amount to furnishing of evidence, that is to be a witness within the meaning of Article 20(3). In this connection reference was made to the observations made by the Supreme Court of India in Jaspal v. State of Punjab, A.I.R. 1979 S.C 1708 to the effect that finger print examination is conclusive as it Is an exact science and also in the case of Murari Lal v. State of M.P.. A.I.R.1980.S.C 531, in which it was observed that where there was no expert, court has power to compare the writings itself and decide the matter.

The fundamental right guaranteed under Article 20 (3) is protective umbrella against testimonial compulsion in respect of persons accused of an offence to be witness against themselves. This protection, as the language goes, is not confined to evidence before Court but would even cover stage prior to it like investigation subsequent to becoming accused of an offence. The protection is available not only in respect of evidence given in a trial before Court but also at previous stage If accusation has been made and the same In normal course may result in prosecution. 'Offence' as defined in Section 3 (38) of General Clauses Act is an act punishable under the Indian Penal Code or any special or local law and this is what is meant by the word 'offence' used in Article 20 (3) by virtue of Article 367 of the Constitution of India which makes General Clauses Act applicable for interpreting words and phrases etc. not defined or explained in the Constitution. The guarantee of Article 20 (3) is available only to the person accused of an offence. A person would become accused if an F.I.R. has been lodged against him or a complaint has been made or formal accusation has been made which in normal course would result in prosecution.

A person would thus be accused even if trial has not commenced. The benefit of Article 20 (3) would be available if the person is accused when he made the statement or falls in the position of a witness 'but not if he becomes accused' subsequent to the making of the statement. The use of expression 'accused of an offence' indicates that the same is confined to criminal proceedings or proceedings which are in the nature of criminal proceedings before a court of law or Judicial Tribunal.

The protection against self incrimination envisaged in Article 20 (3) is available only when compulsion is used and not against voluntary statement, disclosure or production of document or other material. A statement given while in police custody necessarily cannot be taken to be under compulsion and no such inference can be drawn regarding a document or other material.

Compulsion means duress and it may be physical or mental. Any non volitional positive act of an accused incriminating himself would be compulsion within the meaning of Article 20 (3) violating the guarantee so granted under Constitution of India by the founding fathers. The expression 'to be a witness' has been subject matter of Judicial decisions and has been interpreted even differently till the year 1961 despite Supreme Court's decision in M.P. Sharma v. Satish Chandra and others, A.I.R.1954 S.C. page 300 a case which was decided by a Bench of 8 Judges of Supreme Court of India which at that stage had a strength of 8 Judges only. In Sharma's case (Supra) the question was as to whether the order as to search and seizure under section 94 Cr.P.C. was violative of guarantee under Article 20 (3) of the Constitution. The court in the said case observed that section 139 of the Indian Evidence Act which says that a person producing a document on summons is not a witness was not a guide to meaning of word 'witness'. The word "witness" In Its natural sense is to be understood to mean a person who furnishes evidence. A person can be a witness not merely by giving oral evidence but also by producing documents or making intelligible gestures in the case of dumb witness (Section 119) or the like. The court held thf1t production of document In compliance with a notice to produce it would be testimonial act by that person but the same would not amount to compelled production of the document. The court was not called upon to answer the similarity between production of document under the direction of court by notice or in other manner and that every document would not become evidence unless admitted or proved and the direction to give handwriting, thumb impression, finger print etc. or to expose the body for measurement or give blood - for testing etc., as such there was no discussion on the point.

After the said case various High Courts Interpreted and applied or distinguished the case of Sharma (Supra) and took even contrary view. Different Benches in three High Courts took opposite views and atleast in two High Courts different Benches took contrary views. Section 73 of the Indian Evidence Act which authoresses court to give direction to give handwriting,

finger print etc. was read and applied differently. Section 73 of the Indian Evidence Act reads as under:

"COMPARISON OF SIGNATURE, WRITING OR SEAL WITH OTHERS ADMITTED OR PROVED. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with one which Is to be proved although that signature, writing or seal has not been produced or proved for any other purpose.

The court may direct any person present in court to write any words or figures for the purpose enabling the court to compare the words or figures, alleged to have been written by such person.

(This Section applies with necessary modifications to finger- impressions also)."

A Division Bench of Calcutta High Court in Shallendra Nath Sinha v. The State A.I.R.1955 Cal 247 with reference to section 73 Evidence Act held that an order to accused to give specimen hand writing did not amount to compelling the accused to give evidence and distinguished Sharma's Case (Supra) on the ground of being a case in respect of search warrant for production of documents. But the above view was dissented to by same High Court in Farid Ahmad v. State A.I.R.1960 Cal32 and Tarini Kumar v. State A.I.R. 1960 Cal318 (DB). In first one it was held that taking of specimen writing and signature of accused would mean furnishing of incriminating evidence against himself positively and volitionally and not mere passively and no such order in justified under section 73 Evidence Act, while in the latter it was held that taking of specimen handwriting was violative of Article 20 (3) as there was no provision in Cr. p .C. which permits police to take specimen handwriting from accused so as to furnish evidence against himself .

The Allahabad High Court in Ram Swarup v. State and others, A.I.R. 1958 All. 119 (DB) held that writing obtained by court from accused under Section 73 of the Evidence Act would not come within the expression 'evidence' as it would not be a document produced for inspection of court (see definition of Evidence) and direction by court under Section 73 would not be hit by the Article 20 (3). But a single Judge of court in **Balraj Bhalla v. Ramesh Chandra,** A.I.R. 1960 All. 157 held that observations in Ram Swarup's case (Supra) were obiter dicta only and could not be said to be a correct exposition of law that specimen signature cannot be considered to be evidence in view of definition of 'evidence' in Section 3 of Indian Evidence Act. There appears to be some inconsistency in the two decisions of Madras High Court in re **Swarnalingam v. Assistant Inspector of Labour, Karaikudi,** A,I.R. 1955 Mad page 716 and in re **Sorulingam Chettiar**, A.I.R. 1955 Mad 685.

Cases decided by various High Courts again reached the portals of Supreme Court of India and the cases were considered by a Bench of 11 Judges. The majority consisting of 8 Judges disagreed in certain respects with the law laid down by Supreme Court in Sharma's case (Supra) while the minority view (3 Judges) agreed with it to some extent. The law laid down by the Supreme Court in the said case of **State of Bombay** v. **Kathu,** A.I R 1961 S.C.1808 still holds good and was followed in subsequent decisions. In **Kathu Kalu's case** (Supra), the majority held that to be a 'witness' may be equivalent to furnishing evidence in the sense of making oral or written statements but in the larger sense of the expression giving of thumb impression or impression of palm or foot or finger or specimen writing or exposing a part of body by an accused person for purpose of identification are not included in the expression 'to be a witness'. The Constitution makers may have intended to protect the accused person from the hazards of self-incrimination in the light of English Law on the subject. They could not have intended to put obstacles in the way of efficient and effective investigation of the crime and bringing the criminals to justice. It is as much necessary to protect the accused person from being compelled to incriminate himself as to arm the agents of law and law courts with legitimate powers to bring offenders to justice. The court held that 9iving of finger impression or specimen signature or handwriting strictly speaking is not to be a witness. To be a witness means imparting knowledge in respect of relevant facts by means of oral statements or in writing by a person who has personal knowledge of the facts to be communicated to a court or to person holding an enquiry or investigation. A person is said to be a witness to certain state of facts which has to be determined by court or authority authorised to come to a decision by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion as expert in respect of matters in controversy. It was further observed that when an accused person is called upon by any court or 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 the efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of the finger impressions or the specimen writing or the 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'. Regarding self incrimination, it was said that the same must mean conveying information based upon personal knowledge of the person giving information and can not include merely the mechanical process of producing documents in court which may throw light on any of the points in controversy but which do not contain any statement of accused based on his personal knowledge.

The minority view was that there was no reason from departing with what the court had said in Sharma's case (Supra). There was no justification for thinking that to be a witness in Article 20 (3) means to impart personal knowledge and to be a witness is nothing more than to 'furnish evidence' and such evidence can be furnished through lips or by production of a thing or of a document or in other modes. It was further observed that an accused person is furnishing evidence when he is giving his specimen handwriting or impression of his fingers or palm or foot. But the evidence of specimen handwriting or the impressions of accused person's fingers, palm or foot will incriminate him only if on comparison of these with certain other handwritings or certain other impressions identity between two sets is established. That is why it must be held that by giving these impressions or specimen handwriting the accused person does not furnish evidence against himself. He may be compelled to be a witness but it can not be said that he has been compelled to be a witness against himself.

There is thus unanimity on the point that direction or order to give handwriting, thumb impression, finger print etc. does not violate Article 20 (3), so far as conclusions are concerned between the majority and minority judgments but the difference is in approach and interpretation of expression 'to be witness'.

The proposition laid down by the Supreme Court in Sharma's case (Supra) included not only oral evidence but also documentary evidence which he may be compelled to produce. The majority in Kathu Kalu's case has narrowed down the proposition in respect of documentary evidence to written statements conveying the personal knowledge of the accused relating to the change against him. The protection would not extend to other documents like statements of other person in his custody or document showing handwriting of accused or containing foot which do not contain the personal knowledge relating to charge against him or may incriminate other person.

The Constitutional guarantee under Article 20(3) as interpreted in Kathu Kalu's case (Supra) in the matter of handwriting, thumb impressions etc. has not been changed in view of Supreme Court on the point of evidentiary value of thumb impression. In Jaspal Singh's case (A.I.R.1979 S.C. 1708) the court has held that science of identifying thumb impression is an exact science and it does not admit of any mistake or doubt. The Court accepted the report of expert who gave his report in the case. But exactness and correctness of report or comparison of any thumb impression by court without aid of expert's opinion would not change the meaning and import of expression "to be a witness" and that too against one's own self for the purposes of self incrimination. In Murali Lal's case (A.I.R. 1980 S.C. page 531) the dispute was regarding handwriting of a person The court observed that where there is no expert opinion to aid the court, it will have to seek guidance from some authenticated text books and court's own experience and knowledge. Even If In the case of thumb

Impression, court comes to definite conclusion after examining thumb Impression, the same would not be in the nature of personal testimony and could not be included in the definition of 'to be a witness'. The reasons given in majority judgment and minority judgment so far as 'to be a witness against himself' Is concerned still hold good.

[J.T.R.I. JOURNAL – Second Year, Issue – 4 & 5 - Year – March, 1996]