

Roshan Lal Vs State of U.P.

Habeas Corpus Petition No. 260 of 1972 and Cr. Rev. No"s. 109 and 401 of 1972

Court: Allahabad High Court

Date of Decision: Nov. 8, 1974

Acts Referred:

Constitution of India, 1950 " Article 20, 20(3)#Criminal Procedure Code, 1973 (CrPC) " Section 342, 342(2), 342(3), 96#Evidence Act, 1872 " Section 119, 139

Citation: (1975) AWC 77

Hon'ble Judges: Satish Chandra, J; K.N. Seth, J; K.B. Asthana, J

Bench: Full Bench

Final Decision: Disposed Off

Judgement

K.N. Seth, J.

The constitutional validity of Section 342 of the Code of Criminal Procedure 1898, was unsuccessfully challenged in

Banwarilal and Another Vs. The State, . The Bench negated the contention that the provisions of Section 342 of the Code are violative of Article

20(3) of the Constitution of India. Before the Bench hearing the above noted case it was urged that in view of the decision of the Supreme Court in

State of Bombay v. Kathi Kalu Oghad 1961 AWR 736 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" 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. This 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 the 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 that 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, 1893,

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-incrimination 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.

An 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 incrimination is clubbed with the guarantee 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 affirmation, and particularly describing the place to be searched, and

the persons or things to be seized.

4a. 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. The 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.

5. 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 proceeding as is the case in England and U.S.A. The protection conferred by Article 20(3) does not touch the law relating

to a witness

6. The doctrine against self-incrimination and how far it is embodied in Article 20(3) was considered by the Supreme Court in *M.P. Sharma and*

Others Vs. Satish Chandra, District Magistrate, Delhi and Others, , where the question which directly arose was whether a search and seizure of a

document from a person against whom a FIR 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 Amendments 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 a 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 119, 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 procured 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 u/s 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.

7. As it was felt that some of the proposition of law laid down in M.P. Sharma's case (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 (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 statement, but not in the large 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 matters in controversy.

8. The Court held that the observation in Sharma's case (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.

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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 hand writing, 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 of his handwriting,

inspite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions 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.

9. 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 statements, except where through extraneous process the

statement is rendered involuntary and, therefore, extorted. The mere questioning of an 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 (Supra) “testimonial compulsion connoted 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.

10 We may now test the validity of Sub-sections (2) and (3) of Section 342 of the Code of Criminal Procedure, 1898, which runs 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 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 (sic) nature with a

view to entrap the accused and to extract from him damaging admissions to form the basis of the prosecution case.

11. 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 answers 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

put in evidence for or against him in any other inquiry into, of 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 much 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.

12. The argument, apparently plausible, cannot survive that test of a critical examination. The answers given by an accused u/s 342(2), Code of

Criminal Procedure 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 impression 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".

13. The statement of the accused cannot be termed "a compelled statement". As laid down by the Supreme Court in Kathi Kalu's case (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

question 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 "a compelled

statement".

14. 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.