REVISIONAL CRIMINAL

Before Tek Chand, J.

PAKHAR SINGH AND MEHTAB SINGH,—*Petitioners*

versus

THE STATE,—*Respondent*

Criminal Revision No. 946 of 1957

1958

March, 10th

Constitution of India (1950)—Article 20(3)—Rule "nemo teneture seipsum accusare" *or* "nemo teneture prodere seipsum"—*Extent and scope of—Privilege whether to be claimed—Identification of Prisoners Act (XXXIII of*

(1) A.I.R. 1955 S.C. 19, 20.

1920)—Sections 5 and 6—Whether contravene Article 20(3) of the Constitution—Procuring of thumb, finger and palm impressions of the accused—Whether in contravention of Article 20(3) of the Constitution.

Held, that the privilege given to the accused under Article 20(3) of the Constitution embodies a principle of criminal jurisprudence of very ancient lineage, namely, "*nemo teneture seipsum accusare*" or "*nemo teneture prodere seipsum*"—No man can be compelled to criminate himself. The rule against self-incrimination has been extended from criminal courts to civil courts and has been made applicable to the parties as well as to witnesses Under this privilege no witness or party is compellable to answer any question or to produce any document the tendency of which is to expose such a person to a criminal charge or penalty.

Held, that the constitutional immunity guaranteed by Article 20(3) of the Constitution is not without its well-recognised limitations. The privilege is restricted not to any and every compulsion but to *testimonial* compulsion. The prohibition is against compulsion. A man is competent to prove his own crime though not compellable. He cannot be forced to testify his incrimination. But this privilege has to be claimed or otherwise a person will not be considered to be compelled. Unless invoked, the benefit is deemed to have been waived. Evidence which has been voluntarily given, is not under legal ban. A statement made in ignorance of the right to claim privilege will not make the statement inadmissible. As a condition of statutory immunity from prosecution, assertion of privilege against self-incrimination is necessary.

Held, that the true scope of the constitutional inhibition is to prohibit compulsion in the matter of testifying either by word of mouth or in writing. What is forbidden, is the use of force in the process of disclosure by oral statements or by written words of testimonial character. The danger, prevention of which the constitution visualises, is the interference with the volitional faculties of a person, so that he may not be terrified into making depositions as a witness. The principle is confined to protecting disclosure as a witness. Truth runs the risk of being smothered, if

resort is had to compulsion in matter of testimonial utterances. This privilege is based on the policy of encouraging persons to come forward with evidence in Courts of justice by protecting them from injury or needless annoyance in consequence of so doing. But truth is not endangered where compulsion is used for exhibition of the body or of any identifying marks on it, for purposes of comparison with evidence produced at the trial. If finger-impressions are taken from an unwilling accused person, with a view to compare them with marks of finger-prints left by a culprit at the spot where the offence was committed, they cannot undergo any change by reason of the use of compulsion. Force or threat of force may endanger the truth by distorting it, where it is applied for bringing pressure in matters of vocal or written words. As a result of compulsion, the testimony of a witness can be made to deviate from truth, but by such a process the scars or lines on his body or his physiognomy cannot undergo any change. The constitutional immunity is not violated by compelling a witness to stand up and show his face for the purpose of identification. He can be ordered to disclose a tell-tale scar for purposes of his identification. Similarly, the finger-prints, foot-prints, palm-prints, photographs of the accused, for purposes of comparison with those found at the scene of the crime, do not lose their probative character, whether they have been obtained involuntarily or voluntarily. In principle, resort to compulsion requiring the accused to exhibit his body for purposes of establishing identity, is not objectionable, because by doing so he is not being forced to give false testimony. In fact he does not testify at all, and the physical facts, which are noticed, speak for themselves. Neither fear nor hope, neither coersion nor cajoling, can make any difference to the finger-prints or other physical peculiarities. They will reveal the true peculiarities unaffected by the manner in which the impressions have been taken, or scars or other marks have been revealed.

Held, that the provisions of sections 5 and 6 of the Identification of Prisoners Act, 1920, do not contravene Article 20(3) of the Constitution and are not unconstitutional. To strike them down as violative of the Constitutional guarantee against testimonial compulsion will have the effect of affecting and hindering administration of criminal justice in a large number of cases and that would result in effectively preventing Courts from arriving at

truth. Apart from exclusion of finger-prints as proof of identification in cases where consent of persons charged with crimes is not forthcoming, it will not be possible to detect or prevent crime by measuring or photographing the accused persons, by removing or replacing of his garments or shoes for identification or even requiring him to move his body to enable this to be done. Medical examination without consent for ascertaining insanity, existence of contagious disease for purposes of segregation of the person or disease in general, the making of a blood test to ascertain paternity or blood test or urinalysis for ascertaining alcoholic content, or finding of scar or other physical peculiarity for purposes of identity, or other scientific aids requiring co-operation of the accused for ascertaining his guilt or innocence, shall have to be placed under constitutional ban, which could never have been the intention of the framers of the Constitution. The privilege, if extended beyond its reasonable scope, will give a licence to the guilty and result in abuses which cannot be over-estimated.

Held, that the taking of thumb, 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.

Petition under section 439 of Criminal Procedure Code, for revision of the order of Shri K. S. Chadha, Sessions Judge, Hissar, dated the 12th August, 1957, affirming that of Shri R. N. Mahna, Magistrate 1st Class, Hissar, dated 24th June, 1957, convicting the petitioners.

H. C. Sethi ~~H. R. Soshi~~ and H. S. Doabia, for Petitioners.

Chetan Das, Assistant Advocate-General, for Respondent.

JUDGMENT

Tek Chand, J. Tek Chand. J.—Criminal Revision Nos. 946, 947 and 948 of 1957 arise out of the same set of facts and may be decided by one order

Pakhar Singh accused, aged 24 years, is a teacher in District Board High School, Pabra, and Mehtab Singh accused, aged 19 years, is a college

student. Pakhar Singh was convicted by Magistrate, First Class, Hissar, under sections 457/380, Indian Penal Code, and sentenced to two years' rigorous imprisonment on each count. The sentences were to run concurrently, Mehtab Singh was sentenced to nine months' rigorous imprisonment under section 411, Indian Penal Code. The conviction of Pakhar Singh was maintained by the Sessions Judge but his sentence was reduced to one year's rigorous imprisonment under each count. The conviction and sentence of Mehtab Singh under section 411, Indian Penal Code, were maintained by the Sessions Judge and his appeal was dismissed. A revision petition has been filed in this Court against the above conviction and sentence by Pakhar Singh and Mehtab Singh which is entered as Criminal Revision No. 946 of 1957.

Mehtab Singh was convicted by the Magistrate, Hissar, under section 19(f) of the Indian Arms Act and sentenced to two years' rigorous imprisonment. On appeal, the Sessions Judge upheld the conviction but reduced the sentence to nine months' rigorous imprisonment. This sentence was ordered to run concurrently with the sentence awarded in the connected case under section 411, Indian Penal Code. Criminal Revision No. 947 of 1957 has been filed by Mehtab Singh from his conviction and sentence under section 19(f) of the Indian Arms Act.

Pakhar Singh was convicted under section 19(f) of the Indian Arms Act and the Magistrate passed a sentence of two years' rigorous imprisonment and further ordered him to pay a fine of Rs. 1,000 or in default to undergo further rigorous imprisonment for six months. On appeal, the Sessions Judge maintained the conviction but reduced the sentence to nine months' rigorous imprisonment and a fine of Rs. 200 and in default

Pakhar Singh and Mehtab Singh
v.
The State

Tek Chand, J.

Pakhar Singh was to undergo two months' further rigorous imprisonment. The sentence of imprisonment was ordered to run concurrently with the sentence passed on him under sections 457/380, Indian Penal Code, in the connected case. Criminal Revision No. 948 of 1957 has been filed by Pakhar Singh from his conviction and sentence under section 19(f) of the Indian Arms Act.

The prosecution story is that P. W. 2 Anand Bhargava was dealing in arms and ammunition and has his shop on the railway road at Hissar. On the night between 7th and 8th of July, 1955, his shop was burgled and six fire-arms, four double-barrelled guns, one single-barrelled breach-loading gun, and a rifle, were stolen. One of these guns belonged to P.W. 1 Shri Malik Radha Kishan, Advocate, and was left with P. W. 2 for safe custody. The theft of the fire-arms was discovered on the morning of 8th of July, 1955, and first information report, Exhibit P.A./1 was lodged on that very day. The Sub-Inspector investigating the case, took into possession several articles including a piece of glass pane from a show-case, Exhibit P. 13, and three glass phials, Exhibits P. 10 to P. 12, from the shop, per memo. Exhibit P.C. They were taken into possession in the presence of Shri Fateh Chand, Finger Print Expert, as they appeared to have finger impressions on them.

This case remained untraced for nearly a year. On information received by P. W. 18 Shivdat Pal Singh, District Inspector of Police, the two accused were interrogated and as result thereof Pakhar Singh made a statement, Exhibit P.H., to the effect that he had buried one rifle, two double-barelled guns, and one single-barelled gun in his *nauhra* in village Badesra under *toori* and offered to get the fire-arms recovered. This

statement was signed by accused Pakhar Singh and also by P. W. 3 Ajmer Singh, P. W. 4 Raj Mal, P. W. 14 Rup Ram, and P. W. 24 Ram Chander, Sub-Inspector, Station House Officer, Police Station Hissar. Pakhar Singh accused led the police party to his *nauhra* in his village and from there two double-barrelled breach-loading guns, Exhibits P. 3 and P. 4, one single-barrelled gun, Exhibit P. 2, and one rifle, Exhibit P. 1, were recovered. The recovery was witnessed by P. W. 7 Shiv Datt, and P. W. 12 Kanhya Lal of village Badesra, Pakhar Singh accused then led the police party to village Pharmana to the house of Bahal Singh and on the asking of the accused, Bahal Singh produced gun, Exhibit P. 5, with 33 cartridges. These fire-arms were taken into possession by the police. On interrogation by Shri Ram Chander P. W. 24, Station House Officer, Hissar City, accused Mehtab Singh on 24th of April, 1956, made a statement, Exhibit P. K., in the presence of P. W. 5 Megh Singh Lambardar, and P. W. 6 Bawa Harparshad, to the effect that he had buried one gun in three pieces in a dilapidated place called Gujri Mahal in Hissar proper and offered to get it recovered. He then led the police party to the spot and after digging the earth, the gun was produced in three pieces wrapped in cloth,—*vide* memo. Exhibit P.L.

An application, Exhibit P.R./A, was made to the Magistrate on 30th of April, 1956, for obtaining thumb, finger and palm impressions of the two accused for comparison with the impressions on the pieces of glass. On the same day, Magistrate's order was obtained and the impressions were taken in his presence. It does not appear from the record that the accused protested or expressed their unwillingness to the taking of the impressions of their thumbs, fingers and palms.

After completion of the investigation, the accused were sent up to stand their trial under

Pakhar Singh and Mehtab Singh
v.
The State

Tek Chand, J.

sections 457/380 and 411, Indian Penal Code, and by a separate challan under section 19(f) of the Indian Arms Act.

P.W. 21 Sub-Inspector Fateh Chand, Finger Print Expert of Phillaur, compared the thumb, finger and palm impressions of the accused with those found on the glass pane and the phials. As a result of comparison he found that the impressions corresponded with the thumb and finger impressions of Pakhar Singh accused.

Both the accused denied their guilt and also denied having got the respective fire-arms recovered and stated that they had been falsely implicated on account of enmity. Both the Courts below found them guilty of having committed the offences as stated above.

The case against the two accused may now be taken up separately. On behalf of Pakhar Singh, his counsel Shri H. C. Sethi, raised two points. Firstly, he argued that obtaining of the impressions of the thumb, finger and palm of Pakhar Singh contravened the fundamental rights given under Article 20(3) of the Constitution of India and conviction could not be based upon the evidence furnished by comparison of the impressions with those found on the glass pane and the phials. His second argument was based on the contention that the alleged discoveries of fire-arms at the instance of Pakhar Singh were not genuine and in transgression of the provisions of section 27 of the Indian Evidence Act.

Shri H. S. Doabia, learned counsel for accused Mehtab Singh, maintained that the recovery of the arms at the instance of his client was not genuine and the alleged mode of recovery was not sanctioned by section 27 of the Indian Evidence Act.

I may take up the arguments of the learned counsel *ad seriatim*. The privilege given to the accused under Article 20(3) of the Constitution embodies a principle of criminal jurisprudence of very ancient lineage. The rule *"nemo teneture seipsum accusare"* or *"nemo teneture prodere seipsum"* (no man can be compelled to criminate himself) in the words of Coleridge, J., in *R.* v. *Scott*, Dearsl, & B, 47 at p. 61, is—

> "a maxim of our law as settled, as important and as wise as almost any other in it."

Lord Eldon in *Ex parte Symes* 11 ves. 521, at p. 525 said—

> "The proposition is clear, that no man can be compelled to answer what has any tendency to criminate him".

The rule regarding the privilege against self-incrimination has had a long and chequered history and has emerged in consequence of historical conflicts and convulsions dating from mediaeval times, in English history. At common law, accused enjoyed no such immunity and he was required to answer upon oath as to charges made against him till the end of sixteenth century. The inquisitoral principle which then dominated ~~hold away~~ in England has survived up till now on the continent of Europe where even today criminal trial still commences with a rigorous interrogation of the accused.

-and held sway

The long struggle of the civil Courts to resist the usurpation of the ecclesiastical Courts led to the assertion of the maxim *"nemo teneture seipsum accusare"* which was put forward for the first time in 1590 in *Cullier* v. *Cullier* (1). The practice of questioning the prisoner died out after

(1) 78 E.R. (K.B.) 457.

Pakhar Singh and Mehtab Singh v. The State

Tek Chand J.

the Revolution of 1678 and the rule against self-incrimination was extended from criminal Courts to civil Courts and was made applicable to the parties as well as to witnesses. Under this privilege no witness or party is compellable to answer any question or to produce any document the tendency of which is to expose such a person to a criminal charge or penalty. In England, the principle received statutory recognition,—*vide* section 3 of Evidence Act, 1851, and section 1 of Criminal Evidence Act, 1898.

In America, it is embodied in the fifth amendment of the Federal Constitution and also in the several State Constitutions. It reads--

> "No person * * * shall be compelled in any criminal case to be a witness against himself, * * *".

This constitutional immunity is not without its well recognised limitations. The privilege is restricted not to any and every compulsion but to *testimonial* compulsion.

> "The privilege protects a person from any disclosure sought by legal process against him as a witness." (*Vide* Wigmore on Evidence Volume VIII, section 2263, page 363.)

It is to be noted that the prohibition is against compulsion. A man "is competent to prove his own crime, though not compellable" per Alderson, B., in *Udal* v. *Walton* (1). He cannot be forced to testify his incrimination. But this privilege has to be claimed or otherwise a person will not be considered to be compelled,—*vide U. S.* v. *Monia* (2). Unless invoked, the benefit is deemed to have

(1) 153 English Reports. (Ex. D.) 471.
(2) 317 U.S. 424 (427).

been waived *vide U. S.* v. *Murdock* (1); and *State* v. *Duncan* (2). Evidence, which has been voluntarily given, is not under legal ban. A statement made in ignorance of the right to claim privilege will not make the statement inadmissible. *Queen* v. *Coote* (3). As a condition of statutory immunity from prosecution assertion of privilege against self-incrimination is necessary.

In this case, at no stage of the proceedings of the case in the lower Courts, was the privilege against self-incrimination claimed by the accused and it is, therefore, deemed to have been waived,—*vide Ram Sarup* v. ~~The~~ *State* (4), and *Subedar* v. *State* (5).

The next question that requires examination is whether, the order of the taking of finger and palm impressions by the Magistrate could be deemed a violation of the constitutional immunity. In the words of Professor Wigmore—

> "In preserving the privilege, however, we must resolve not to give it more than its due significance. We are to respect it rationally for its merits, not worship it blindly as a fetish. * * * * Courts should unite to keep the privilege strictly within the limits dictated by historic fact, cool reasoning and sound policy." See Wigmore on Evidence, Volume VIII, Section 2251, pages 317—319.

The true scope of the constitutional inhibition seems to me to prohibit compulsion in the matter of testifying either by word of mouth or in writing. What is forbidden is the use of force in the process of disclosure by oral statements or by written words of testimonial character. The

(1) 284 U.S. 141 (148).
(2) (1906) 4 Lawyer's Reports Annotated 1144 (1151).
(3) 1873 L.R. P.C. 599.
(4) A.I.R. 1958 All. 119.
(5) A.I.R. 1957 All. 396.

Pakhar Singh and Mehtab Singh
v.
The State

Tek Chand, J.

danger, prevention of which the constitution visualises, is the interference with the volitional faculties of a person so that he may not be terrified into making depositions as a witness. The principle is confined to protecting disclosure as a witness. Truth runs the risk of being smothered if resort is had to compulsion in matter of testimonial utterances. This privilege is based on the policy of encouraging persons to come forward with evidence in Courts of justice by protecting them from injury or needless annoyance in consequence of so doing. But truth is not endangered where compulsion is used for exhibition of the body or of any identifying marks on it, for purposes of comparison with evidence produced at the trial. If finger impressions are taken from an unwilling accused person, with a view to compare them with marks of finger prints left by a culprit at the spot where the offence was committed, they cannot undergo any change by reason of the use of compulsion. Force or threat of force may endanger the ~~turth~~ truth by distorting it, where it is applied for bringing pressure in matters of vocal or written words. As a result of compulsion, the testimony of a witness can be made to deviate from truth, but by such a process the scars or lines on his body or his physiognomy cannot undergo any change. The constitutional immunity is not violated by compelling a witness to stand up and show his face for the purpose of identification. He can be ordered to disclose a tell-tale scar for purposes of his identification. Similarly, the finger prints, foot prints, palm prints, photographs of the accused, for purposes of comparison with those found at the scene of the crime, do not lose their probative character, whether they have been obtained involuntarily or voluntarily. In principle, resort to compulsion requiring the accused to exhibit his body for purposes of establishing identity is not objectionable, because by doing so he is not being forced to give

false testimony. In fact he does not testify at all and the physical facts which are noticed speak for themselves. Neither fear nor hope, neither coercion nor cajoling can make any difference to the finger prints or other physical peculiarities. They will reveal the true peculiarities unaffected by the manner in which the impressions have been taken, or scars or other marks have been revealed.

In *State* v. *Ah Chuey* (1), at page 532, the question was whether an accused person could object to exhibit certain tattoo marks on his person Judge Hawley said—

> "The object of every criminal trial is to ascertain the truth. The Constitution prohibits the state from compelling a defendant to be a witness against himself, because it was believed that he might, by the flattery of hope or suspicion of fear, be induced to tell a falsehood. None of the many reasons urged against the rack or torture, or against the rules compelling a man 'to be a witness against himself,' can be urged against the act of compelling a defendant, upon a criminal trial, to bare his arm in the presence of the jury, so as to enable them to discover whether or not a certain mark could be seen imprinted thereon. Such an examination could not, in the very nature of things lead to a falsehood. In fact, its only object is to discover the truth ; and it would be a sad commentary upon the wisdom of the framers of our Constitution to say that by the adoption of such

(1) 33 American Reports 530.

Pakhar Singh and Mehtab Singh v. The State

Tek Chand, J.

a clause they have effectually closed the door of investigation tending to establish the truth."

Professor Wigmore says—

"From the general principal (ante, section 2263) it results that an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness; i.e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeve—is immaterial, unless all bodily actions were synoymous with the testimonial utterances; for, as already observed (ante, section 2263), not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself. Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operation of his mind in expressing it, the demand made upon him is not a testimonial one." (*Vide Wigmore* on Evidence, section 2265, page 375, Volume VIII).

Justice Holmes, in *Holt* v. *United States* (1), said—

"Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether

(1) 218 U.S. 245 at p. 252.

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 prohibtion 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."

Willis expressed himself thus—

"Is the taking of finger prints a violation of the privilege against self-incrimination? This question seems to have been answered in the negative. 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." (Constitutional law of the United States by Willis, page 522).

According to Underhill—

"Finger prints may be given voluntarily or they may be taken by force. It is invariably held that the use in evidence of prints voluntarily given does not violate the constitutional provision against self-incrimination. This is true even though the defendant did not know the use which would be made of the prints and

Pakhar Singh and Mehtab Singh
v.
The State

Tek Chand, J.

even where the defendant was induced to sign his name to a sheet of paper which act incidently impressed his prints on the sheet. The same thing is true of prints taken by force or taken involuntarily. Such prints may still be used in evidence." *Vide* Underhill's Criminal Evidence, 1956 Edition. Volume 1, Section 144, pages 270-271. See also *U. S. A.* v. *Mortimer Kelly* (1).

It follows that the accused's right to immunity from self-incrimination is not violated when he is compelled to exhibit himself or a part of his body to the Court or to allow a record of his finger prints to be taken,—*vide People* v. *Sallow* (2).

In *People* v. *Totten* (3), in a larceny trial, it was held lawful to obtain from the wife of the defendant, without the latter's consent, his shoes for comparison of heel markings with those found at the place of theft.

In *Novak* v. *District of Columbia* (4), the defendant was prosecuted for driving an automobile under the influence of intoxicating liquor. It was held that his constitutional right was not infringed by offering in evidence the record of analysis of a specimen of urine taken from him immediately after his arrest. In similar circumstances, taking of blood specimen from a driver of an automobile of finding alcoholic contents was not considered violative of constitutional rights not to be compelled to give testimony against himself,—*vide People* v. *Tucker* (5), *and State* v. *Cram* (2).

(1) 83 A.L.R. page 122.
(2) 165 New York Supplement 915.
(3) 38 North Eeastern Reporter 1.
(4) 49 Atlantic Reporter (2d) 88.
(5) 198 Pacific Reporter (2d) 940 (946-947)
(6) 164 A.L.R. 952.

Am. L. R.

In Swingle v. *United States* (1), the Circuit Court of Appeals observed—

> "Moreover, 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."

In England, under section 16 of the Prison Act of 1952 (15 and 16 Geo. 6 and 1 Eliz. 2), the Secretary of State may make regulations as to the measuring and photographing of prisoners. In addition to the measurements of various parts of the body and the description of every scar and distinctive marks, the finger prints are to be taken. If a prisoner refuses to allow his photographs and finger prints to be taken, a reasonable degree of force may be used,—*vide* Halsbury's Laws of England, Second Edition, Volume 26, page 175.

In India, section 5 of the Identification of Prisoners Act 33 of 1920, Provides—

> "If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or photograph to be taken he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer :
>
> Provided that no order shall be made directing any person to be photographed except

(3) 151 Federal Reporter (2d) 512 (513).

Pakhar Singh and Mehtab Singh
v.
The State

Tek Chand, J.

by a Magistrate of the first class: Provided, further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceedings."

Under section 6 of this Act, it is permissible to use all means necessary to secure the taking of measurements or photograph in case of resistance or refusal. Such resistance or refusal to allow the taking of measurements or photograph is also an offence under section 186 of the Indian Penal Code. The word "measurements" is defined so as to include finger print impressions and foot print impression.

The learned counsel for the defence wants me to hold the above provisions of the Identification of Prisoners' Act as unconstitutional, being in contravention of Article 20(3) of the Constitution of India. I see no justification in striking them down as violative of the constitutional guarantee against testimonial compulsion, as that will have the effect of affecting and hindering administration of criminal justice in a large number of cases and that would result in effectively preventing Courts from arriving at truth. Apart from exclusion of finger prints as proof of identification in cases where consent of persons charged with crimes is not forthcoming, it will not be possible to detect or prevent crime by measuring or photographing the accused persons, by removing or replacing of his garments or shoes for identification or even requiring him to move his body to enable this to be done. Medical examination without consent for ascertaining insanity, existence of contagious disease for purposes of segregation of the person, or disease in general, the making of a blood test to ascertain paternity or blood test or urinalysis for

ascertaining alcoholic content, or finding of scar or other physical peculiarity for purposes of identity, or other scientific aids requiring co-operation of the accused for ascertaining his guilt or innocence, shall have to be placed under constitutional ban, which could never have been the intention of the framers of the Constitution. The argument of the learned counsel for the defence, if sound, will prevent a Court from getting the aid of a physician in order to find out whether the defendant is malingering when he claims to be unable to attend Court. The consequence of the extended interpretation of similar constitutional privilege in America, was expressed by Professor Wigmore in the following words :—

> "* * * 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.*' " (*Vide* Wigmore on Evidence, Volume VIII, section 2263, page 363).

The privilege, if extended beyond its reasonable scope, will give a licence to the guilty and result in abuses which cannot be over-estimated. If I were to concede all that has been demanded

Pakhar Singh and Mehtab Singh v. The State

Tek Chand, J.

on behalf of the accused, that would be clearly beyond the purpose and intendment of the Constitution and to the detriment of justice and social security.

The decision of the High Courts in India are divergent. The leading authority is a decision of the Supreme Court in *M. P. Sharma* v. *Satish Chandra* (1), In that case the Government had ordered an investigation into the affairs of a Company and the report of the inspector appointed under section 138, Companies Act, indicated that an organised attempt was made from the inception of the Company to misappropriate and embazzle its funds and declare it to be substantial loss, and to conceal from the shareholders the true state of affairs by submitting false accounts and balance-sheets. The Special Police on the basis of the information which was recorded as first information report, applied to the District Magistrate under section 96, Criminal Procedure Code, for the issue of warrants for the search of documents at different places. The District Magistrate ordered investigation of the offences and issued warrants for simultaneous searches at 34 places. Records were seized in consequence of the searches. The petitioners in that case presented a petition to the Supreme Court under Article 32 of the Constitution praying that the search warrants be quashed being illegal and unconstitutional, and asked for return of the documents seized. It was urged that a search to obtain documents for investigation into an offence amounted to a compulsory procuring of incriminatory evidence from the accused and was hit by Article 20(3) of the Constitution. Repelling the contention raised on behalf of the petitioners, their Lordships of the Supreme Court held that there was no basis in

(1) A.I.R. 1954 S.C. 300.

the Indian Law for the assumption that a search or seizure of a thing or a document was in itself to be treated as compelled production of the same. Analysing the terms in which this right had been declared in our Constitution, it was said that it consisted of the following components—

(1) It is a right pertaining to a person "accused of an offence" ;

(2) It is a protection against "compulsion to be a witness" ; and

(3) It is a protection against such compulsion resulting in his giving evidence "against himself".

The guarantee in Article 20(3) was against "testimonial compulsion." It was said—

> "* * * the word 'witness' must be understood in its natural sense, i.e., as referring to a person who furnishes evidence. 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."

The dicta of their Lordships, by analogy, lends support to the conclusion, that procurement of the impressions of hand is not hit by Article 20(3) of the Constitution.

In *Ram Sarup* v. *The State* (1), the accused was ordered to furnish a specimen of his writing

(1) A.I.R. 1958 All. 119.

Pakhar Singh and Mehtab Singh v. The State

Tek Chand, J.

under section 73 of the Indian Evidence Act. It was held, that no legitimate exception could be taken to this order of the Sessions Judge on the ground of its being in contravention of Article 20(3) of the Constitution. It was said, that the accused could not refuse to give the specimen writing when ordered by the Court to give it, as that would not amount to compelling the accused to be a witness against himself. It was also held that the identification proceedings of persons suspected of crime, recovery of incriminating articles from their possession, taking of their photographs, trying clothes, etc., upon them, and the like, were proceedings which were valid.

Sailendra Nath Sinha v. *The State* (1), is an authority for the proposition that the direction under section 73, Indian Evidence Act, to take specimen writings of a person who is accused of an offence, does not amount to a direction compelling him to give evidence against himself, and hence such direction does not offend Article 20(3) of the Constitution.

In *Golam Rahman* v. *The King* (2), it was held that section 73, Evidence Act, applied to all persons including the accused and it was permissible to take a specimen of the thumb impression of the accused under the direction of the Court in compliance with section 73 and section 45, illustration (c), Evidence Act, and also under section 5 of the Identification of Prisoners Act, 1920.

In *Kishori Kishore Misra* v. *Emperor* (3), Jack, J., said that he would be inclined to hold that section 73 of the Indian Evidence Act included an accused person.

(1) A.I.R. 1955 Cal. 247.
(2) A.I.R. 1950 Cal. 66.
(3) 39 C.W.N. 986.

The High Court of Bombay in *Emperor* v *Rammrao Mangesh Burda* (1), also expressed the view that specimen signatures and writings made by an accused person during the course of investigation were admissible in evidence at the trial of the accused for the offence of forgery.

In a Full Bench decision of Rangoon High Court in *King-Emperor* v. *Nga Tun Hlaing* (2). May Oung, J., said—

> "* * * there does not appear to me to be anything in common between this power to examine the accused (under section 342, Criminal Procedure Code) and the power to take his finger impression under section 73, Evidence Act, unless indeed it can be held that by directing the accused to make his finger impression the Court is in effect, compelling him to provide evidence against himself. Such a contention is, however, in my view, inadmissible, since what really constitute the evidence, viz., the ridges on his thumb are not provided by him any more than the features of his countenance 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. I would, therefore, hold that the decision under consideration is wrong and that a Court has power under section 73, Indian Evidence Act, to direct an accused person, present in Court, to make his finger impression for the purpose described in that section."

(1) I.L.R. 56 Bom. 304.
(2) A.I.R. 1924 Rang. 115 (118).

Pakhar Singh and Mehtab Singh v. The State

Tek Chand, J.

Division Bench of the Patna High Court in *Zahuri Sahu* v. *King-Emperor* (1), following the view expressed in the above cited Full Bench decision of Rangoon High Court, held that the Court was entitled to ask the accused to allow his thumb impression to be taken for the purpose of comparison and to draw an inference adverse to him on his refusal to give his thumb impression. The observations to the contrary made by Bucknill, J., in an earlier judgment in *Bazari Hajam* v. *King Emperor* (2), were not considered to be a correct exposition of the law.

According to an earlier decision of the Madras High Court in *Public Prosecutor* v. *Kandasami Thevan* (3), taking of thumb-mark of an accused person for comparison by Court was not objectionable and the view expresed in *Bazari Hajam's* case (4), was dissented from.

In re Sheik Muhammad Hussain (5), Somasundaram, J., expressed the view that the thumb impression of the accused taken by the police on a slip of paper which was later on produced in Court could not amount to testimonial compulsion forbidden by Article 20(3) of the Constitution.

In *Rajamuthukoil Pillai* v. *Perivasami Nadar* (6), Somasundram, J., expressed a different view. He said "it seems to me that this direction asking the accused to give his thumb impression would amount to asking him to furnish evidence which is prohibited under Article 20(3). The accused, therefore, cannot be compelled to give his thumb impression as directed by the Magistrate."

(1) I.L.R. 6 Pat. 623.
(2) A.I.R. 1922 Pat. 73.
(3) A.I.R. 1927 Mad. 696.
(4) A.I.R. 1922 Pat. 73.
(5) A.I.R. 1957 Mad. 47.
(6) A.I.R. 1956 Mad. 632.

In *Swarnalingam Chettiar* v. *Assistant Labour Inspector, Karaikudi* (1), objection was taken on behalf of the accused to the production of the documents. This objection was upheld in view of the guarantee under Article 20(3).

In re Palani Goundan (2), a Division Bench of the Madras High Court consisting of Somasundaram, J., and Ramaswami Goundar, J., held that though 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.

In *Brij Bhushan Raghunandan Prasad* v. *The* State (3), a Division Bench held section 5 of the Madhya Bharat Identification of Prisoners Act to be repugnant to Article 20(3) of the Constitution and remarked that the direction given by the Magistrate to take thumb impression and specimen handwriting of the accused was illegal. A view to similar effect was also expressed in *Gunamudavan Packianathan, Christian, Vellam Odi, Nelvely Desom, Nattalam Pakuthy* v. *Sirkar Prosecutor* (4). For the reasons given in detail in the earlier part of my judgment, I do not find myself in agreement with the above view.

My conclusion is that the taking of thumb, 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 our constitution.

The prosecution has also based their case against Pakhar Singh on the recovery of fire-arms,

(1) A.I.R. 1956 Mad. 165.
(2) A.I.R. 1957 Mad. 546.
(3) A.I.R. 1957 Madh. Pra. 106.
(4) A.I.R. 1950 Travancore-Cochin 5.

Pakhar Singh and Mehtab Singh
v.
The State

Tek Chand, J.

Exhibits P. 1 to P. 5, at his instance. He was interrogated by P.W. 18, Shri Shivdat Pal Singh, D.I. Police, in the presence of P.W. 24, Shri Ram Chander, S.H.O., P.W. 3, Ajmer Singh, P. W. 4, Raj Mal, and P.W. 14, Roop Ram on 22nd of April, 1956. Pakhar Singh accused stated,—*vide* his statement Exhibit P.H., that he had buried one rifle, two double-barrelled guns and, one single-barrelled gun in his *nauhra* in village Badesra under *toori* which he could get recovered. He also stated that he had given over one 12-bore double-barrelled gun to Bahal Singh of village Pharmana.

On 24th of April, 1956, accused Mehtab Singh, led the police party to a place of concealment, and got recovered the gun Exhibit P. 6, in three pieces, wrapped in cloth.

P.W. 14, Roop Ram stated in cross-examination that Mehtab Singh was the first among the accused to be interrogated, then Dalip Singh, and last of all Pakhar Singh accused was questioned. It is argued by the learned counsel for accused Pakhar Singh that information had already been given to the police by Mehtab Singh and Dalip Singh and, therefore, section 27, Indian Evidence Act, cannot apply to the statement of Pakhar Singh, which he says is not admissible. He has referred to *Kudaon* v. *Emperor* (1), where it was held that where one accused has agreed to point out a place where a fact would be discovered in pursuance of his statement to point out that place, the section does not cover similar statements of the other accused in police custody. In that case, all the five accused were said to have pointed out the exact spot. But this view of a Single Judge was not followed by a Division Bench of that Court in *State Government, M. P.* v. *Chhotelal-Mohanlal* (2), and it was held that the joint or

(1) A.I.R. 1925 Nag. 407.
(2) A.I.R. 1955 Nag. 71.

simultaneous statements of the accused persons were not inadmissible in evidence.

In this case, however, the guns were recovered not from the same spot but from different places. Discovery of the gun in consequence of the information given by Mehtab Singh was from Gujri Mahal in Hissar City, whereas the discoveries made in consequence of the information given by Pakhar Singh were from village Badesra and village Pharmana.

The learned counsel for the accused also cited *Aher Raja Khima* v. *State of Saurashtra* (1), to the effect that discovery of incriminating articles alleged to have been recovered by the accused is inadmissible in evidence if the police already knew where they were hidden. I do not think this authority can assist either of the two accused as it is not shown that the police were already aware of the hiding places of these articles. It is not a case of matter being already known to the police and the latter going through the formality of a re-discovery. As pointed out by their Lordships of the Privy Council in *Pulkuri Kottaya* v. *Emperor* (2)—

> "The condition necessary to bring the section (section 27) into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some

(1) A.I.R. 1956 S.C. 217.
(2) A.I.R. 1947 P.C. 67.

Pakhar Singh and Mehtab Singh v. The State

Tek Chand, J.

guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence ; * * * *".

In *Ramkishan Mithanlal Sharma* v. *State of Bombay* (1), para 22, the above view of the Privy Council was endorsed.

I am of the view that the discovery of the fire-arms at the instance of Pakhar Singh was genuine and in no respect in contravention of the provisions of section 27, Indian Evidence Act.

The evidence on the record which is based on finger impressions found on the glass pane and the phials, corresponding to those of Pakhar Singh, and on the discovery of guns at his instance, leaves no doubt as to his guilt. I up hold his conviction under sections 457/380, Indian Penal Code, and I do not think that the sentence of one year's rigorous imprisonment imposed upon him is excessive.

I may now take up the prosecution case against Mehtab Singh. He was sentenced under section 411, Indian Penal Code, to undergo rigorous imprisonment for nine months. The case against him rests on the discovery of the gun in three pieces from a concealed place behind Gujri Mahal in Hissar, at his instance on 24th of April, 1956, in the presence of P.W. 5, Megh Singh and P. W. 6, Bawa Harparshad. My attention has been drawn to a decision in *Trimbak* v. *The State of Madhya Pradesh* (2), Mahajan, J., observed—

> "It is the duty of the prosecution in order to bring home the guilt of a person under section 411, Indian Penal Code, to prove, (1) that the stolen property was in the

(1) A.I.R. 1955 S.C. 104.
(2) A.I.R. 1954 S.C. 39.

possession of the accused, (2), that some person other than the accused had possession of the property before the accaused got possession of it, and (3) that the accused had knowledge that the property was stolen property."

These ingredients have not been substantiated beyond reasonable doubt in this case.

Mahajan, J., in the above ruling further said—

"The fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles."

Gujri Mahal, from where the discovery of the gun was made at the instance of Mehtab Singh, is a place accessible to all and sundry. From the fact of the recovery from a place near Gujri Mahal, it is not possible to conclude beyond reasonable doubt that the accused Mehtab Singh had concealed the gun there and, therefore, he was receiver of stolen property in terms of section 411, Indian Penal Code. The facts of this case leave room for reasonable doubt as to the guilt of Mehtab Singh. On this evidence it will not be safe to uphold his conviction. Setting aside his conviction and sentence under section 411, Indian Penal Code, I acquit Mehtab Singh.

Criminal Revision No. 946 of 1957, is accepted to the extent indicated above.

Pakhar Singh and Mehtab Singh
v.
The State

Tek Chand, J.

In Criminal Revision No. 947 of 1957, Mehtab Singh, on the above facts, was found guilty of the offence under section 19(f) of the Indian Arms Act for being in possession of the gun which was recovered at his instance from behind Gujri Mahal. It is not safe to hold that the gun which was concealed there, was in the possession of Mehtab Singh. I set aside his conviction and sentence under section 19(f) of the Indian Arms Act and acquit him.

In Criminal Revision No. 948 of 1957, Pakhar Singh, was found guilty under section 19(f) of the Indian Arms Act and was sentenced to undergo nine months' rigorous imprisonment and a fine of Rs. 200 was also imposed upon him. This sentence was ordered to run concurrently with the sentence imposed upon him under sections 457/380, Indian Penal Code, in Criminal Revision No. 946 of 1957. The recovery of fire-arms hidden under *toori* from his *nauhra* in village Badesra, leaves no room for doubt as to his being in possession of the arms in question. His conviction and sentence under section 19(f) of the Indian Arms act are maintained.

B.R.T.