RETHINKING THE INVOLUNTARY CONFESSION RULE OF SELF-INCRIMINATION IN INDIA

Pradipty Bhardwaj

Student
Master of Constitutional and Administrative Law
School of Law, CHRIST (deemed) to be University, Bangalore, India

Abstract: This research paper delves into the scope of Self Incrimination as enshrined under Article 20(3) of the Constitution of India. It further analyses the judicial interpretation of the words under the Self Incrimination clause. It also presents the critical point of view of the author on the well settled law laid down in Selvi's case. It concludes by the remark stating the need to abrogate this privilege available against self incrimination.

Index Terms: **Self Incrimination, Privilege, Accused.**

I. INTRODUCTION

The protection against Self Incrimination is one of the most controversial areas causing hindrance in the criminal justice system. In simple words, a person cannot provide any such information which might be used against him in the criminal cases. In India, this privilege is guaranteed to the accused under Article 20(3) of the Constitution of India, 1950, which is read as-

"No person accused of any offence shall be compelled to be a witness against himself"[1]

This doctrine traces its historical origin from the English Common Law System. In thirteenth century, feeling of disgust and opposition arose against the inquisitorial method used in the criminal justice system, as it overlooked the rights of the accused. This aspect came before the Court in the case of *John Lilburn*[2]; which led to the abolition of the Court of Star Chamber[3]- known for imposing arbitrary and barbarous punishments. Hence, the principle that an accused cannot be put to an oath and evidence cannot be taken away from him was recognized in the particular case. The provision of the Criminal Evidence Act 1898, made it clear that an accused can be considered to be a witness against himself only if he voluntarily approves for it. Additionally, protection was provided against Self Incrimination in regards to oral and documentary evidence.[4]

In India, the history of protection against self incrimination dates back to 1852, when the section 3 of Act 15 of 1852 first time recognized that in criminal proceedings an accused cannot be compelled to be witness against himself. But when the Indian Evidence Act was passed in 1872, this provision was repealed. Meanwhile in 1961, the British Parliament enacted Code of Criminal Procedure and inserted section 203, which provided that an oath cannot be administered to an accused. This provision continued to be there in the later Code of Criminal Procedure. Change was seen when the Prevention of Corruption Act was enacted in 1947, according to which under section 7, an accused can be considered to be a witness against himself with respect to the offences under the said act. Finally in 1950, our Constitution officially adopted the protection against Self Incrimination under Article 20(3). Therefore, the Indian Law continued to be similar to English Common Law with respect to the accused and its right against self incrimination.

Even though a hard and fast rule of Right against Self Incrimination has been enshrined in our Constitution, but it has been subjected to numerous interpretations. There is no clear meaning as to who can be considered 'to be a witness'. The issue of whether 'compulsion' should be physical or mental or both is still unclear from the language of the provision. The words of Article 20(3) states that the protection is available only to the accused, but there have been instances in which suspects and the witnesses claimed protection under the Article 20(3). Hence, analyzing the scope of the Article 20(3) will help us with the better understanding of the Rights of an accused against Self Incrimination, to infer as to what extent they should be given such privilege.

[1] Article 20(3) of the Constitution of India, 1950
[2] 3 State Trials, 1315
[3] Court of Star Chamber was exercising criminal jurisdiction under the inquisitorial System.
[4] H.M. Seervai, Constitutional Law India (Fourth Edition- Vol II), Right to freedom- Pg 1061

II. SCOPE OF ARTICLE 20(3)[5]

'To be a witness'

In 1954, for the first time the issue arose in the case of *M.P. Sharma v. Satish Chandra*[6] as to whether search and seizure of documents from the person against whom FIR has been lodged amounts to be a witness against oneself under Article 20(3). In this case after investigation it was found that Dalmia Jain Airways Ltd. was involved in the malpractices within the company. An FIR was registered and on the basis of the search warrants, search was carried out. As a result of which documents and goods were seized. The court was hesitant to give a very narrow interpretation because of the atrocities suffered by the accused in the past. On the other hand the judges were not prepared to give wider interpretation because they thought that it would defeat the purpose of criminal trial. Hence, the Supreme Court played safe and delivered a balanced judgment.[7] On one hand it held that an expansive interpretation with respect to including search and seizure within the ambit of Article 20(3) cannot be given, because our Constitutional framers deliberately chose not to write anything similar to the IVth Amendment to the US Constitution. On the other hand the Supreme Court also adopted a wider approach by holding that Article 20(3) not only includes oral evidence, but also includes within in its ambit producing documents or intelligible gestures as in case of dumb witness. As a consequence of this ruling by the Supreme Court, other methods of investigation such as collection of fingerprints, specimen handwriting, blood and urine tests and such other scientific and forensic tests started being questioned as being violative of Article 20(3); based on the premise that all the above cases has the tendency of incriminating the accused against himself. Therefore, in the case of *State of Bombay v. Kathi Kalu Oghad*[8], when the issue arose as to whether giving specimen handwriting and the fingerprints amounts 'to be a witness against himself', then the court reconsidered its decision in M.P. Sharma's case and narrowed down its interpretation. The previous judgment was slightly modified and a new qualification was introduced, according to which oral or written evidence can be considered as Self Incriminatory only if it imparts the 'personal knowledge' of the accused. Thus, it made the scope of protected documents under Article 20(3) narrower.

Another aspect can be seen with respect to Section 91 of Code of Criminal Procedure 1973, which is a generic provision summoning the person to produce document or other thing. Going by the literal meaning, it can be inferred that this wide provision encompasses within its meaning- the accused, who can be summoned to produce any document or thing in his possession. This issue came before the Supreme Court in the case of *Shyamlal Mohanlal v. State of Gujarat*[9] in which the money lender was ordered to produce certain account books under section 94(1) of Code of Criminal Procedure 1898[10]. He claimed the protection under Article 20(3). The Court upheld the claim of the accused money lender and gave the view that *Kathi Kalu's* ruling is a settled law and hence an accused cannot be asked to produce the documents incriminating him. Thus, it was concluded that section 94 (section 91 of the new act) do not include within its scope an 'accused person'. The idea behind giving such ruling by the Court was to prevent the unfortunate consequences which may result if the court becomes insensitive towards protection of the rights of the accused. Hence, till date we find the provisions of Indian Evidence Act, 1872 and the old Cr. Pc. which came to the force before our Constitution in conflict with Article 20(3). However, it is well settled that the spirit of our Constitution prevails irrespective of anything.

Compulsion and Right to Silence

The language of Article 20(3) uses the word 'compelled' to be a witness. It is not clear as to what amounts to compulsion. The word compulsion can have various degrees and shades. On one hand it might mean the confession drawn by means of physical or mental torture or both; whereas on the other hand it might include drawing of negative inference if the accused chooses to remain silent. Therefore, the main question is that what kind of pressure would amount to involuntary compulsion and what could be the permissible pressure that can be exercised on the accused so as to not come under the definition of compulsion. One of the issues in *Kathi Kalu'* case was whether the mere fact that the accused was in police custody when the specimen handwriting was given amounts to compulsion or not. On this point the Court ruled that the statement given by the accused cannot be considered as involuntary due to the mere fact that it was given in the police custody. Chief Justice Sinha concluded by saying that-

"compulsion 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."[11]

Here, it must be noted that the judges were not prepared to deviate from the traditional meaning of compulsion or to add anything to this traditional understanding. They kept physical coercion as primary criteria for defining compulsion, and considered psychic coercion an exception.

In 1978, the issue whether refusing to answer question during the course of interrogation can be protected under Article 20(3), came before the court in the case of *Nandini Satpathy v. P.L. Dani*[12]. The appellant was a former Chief Minister of Orissa, against whom a case under the Prevention of Corruption Act was registered. In the course of interrogation she was interrogated with a long list of questions, which she refused to answer on the ground of protection under Article 20(3). For

[5] Constitution of India, 1950
[6] AIR 1954 SC 300
[7] Udai Raj Rai, Fundamental Rights and their Enforcement, Pg. 293
[8] AIR 1961 SC 1808
[9] (1965) 2 SCR 457
[10] Section 94 of the old Code of Criminal Procedure Act 1898 is same as section 91 of the new Code of Criminal Procedure Act 1973.
[11] Chief Justice Sinha in Kathi Kalu Oghad's case AIR 1961 SC 1808
[12] (1978) 3 SCR 608

the first time court came up with very expansive meaning of 'compelled testimony' and clearly stated that compulsion not only includes physical threats or violence but also the testimony procured by way of psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbeating and other such intimidatory methods. Another aspect which Justice Krishna Iyer pointed out was that Article 20(3) includes Right to remain Silent. In addition to which he gave a suggestion that an accused should be allowed to have the assistance of the lawyer during the time of interrogation by relying upon the U.S. Supreme Court's decision.[13]

Right to remain silent pulls out another issue as to whether adverse inferences can be drawn or not if the accuse refuses to answer. Malimath Committee[14] report has recommended that the courts should exercise their power vigorously and pro-actively by drawing adverse inferences so as to discover the truth. But, the only favored thing is that the committee has not said anything relating to compulsorily administration of oath to the accused. In India, despite the recommendations of the Malimath Committee Report, it is well settled law that an accused will be presumed to be innocent by virtue of article 20 (3)[15] and article 14(3)(g) of the International Convention on Civil and Political Rights to which India is a party.

Accused protected

Article 20(3) applies only to criminal proceedings, which is not contested as the provision uses the word 'accused'. But the lacuna here is that it is very difficult to define as to who can be considered as an accused. In *M.P. Sharma's case* it has already been settled that a person against whom charge sheet has been filed and the one who has been tried in the court is an accused person. But the next issue which arises is as to whether during the time of custodial interrogation at police station, the person can be considered as accused within the meaning of Article 20(3) or not. With respect to this the court had clearly laid down the principle in Kalu Oghad's case, that the protection is available not only during the trial stage, but also during the earlier stage of investigation, which includes custodial interrogation at police station. Hence, an inference may be drawn that, if a suspect is subjected to police interrogation, then he can also be considered as an accused under Article 20(3) and therefore can claim the privilege against self incrimination.

In the case of *Mohamed Dastgir v. State of Madras*[16], the accused went to the police officer and offered him bribe, which the police officer threw back on the face of the accused. The officer then asked the accused to produce the money which the accused did. The accused was then tried for the offence of offering bribe. He claimed protection under Article 20(3), stating that he was compelled to produce the currency notes. The Supreme Court rejected his argument on the ground that he was not an accused, as no case was registered against him at that time. This reasoning by the Court may be contended on the ground that everything happened in front of the police officer, who was in a position to take the cognizance of the offence at that point itself; this would have favored the appellant to claim the protection as an accused.

Economic Crimes:

Till now it has been held that Article 20(3) protects the person at two stages- Pre trial stages and the trial stage. But there is an exception with respect to the economic crimes cases in which under administrative inquiry the privilege against self incrimination cannot be claimed. In *Raja Narayanlal Bansilal v. Maneck Phiroz Mistry*[17]an inspector was appointed to inquire into the fraudulent activities of the Company. The inspector then submitted the report after conducting the inquiry. The institution of inquiry was challenged on the ground as being violative of Article 20(3). The Court rejected the plea on the ground that there was no accuse or accuser and the whole thing was merely a fact finding inquiry. [18]

III. ANALYSING SELVI V. STATE OF KARNATAKA[19]

It is believed that the law is now clear and settled after the judgment was delivered by the Court in Selvi's case. But it is argued that the judgment has still left many questions unanswered. Even the judiciary appears confused in many matters. In this case various criminal appeals were taken up together by the Supreme Court via Special Leave Petition, in which the validity of Narcoanalysis, Polygraph tests and Brain Mapping was in question as being violative of Article 20(3). The Court held all the three tests as unconstitutional and void. It gave its decision on the basis that these tests are unreliable, violates the substantive due process rights and protection against self incrimination. It held that accused as well as the suspects and witnesses can avail Right against Self Incrimination.

All the three tests were declared as unconstitutional, by reasoning that the information is provided under the unconscious state of mind which is involuntary, as the person is unaware of the consequence that by providing such information might lead to incriminating against him. On the other hand the court contradicts its own reasoning and confuses the citizens by stating that a person who voluntarily agrees to undergo such tests would not amount to compulsion. It is highly probable that the same techniques will be applied to get suspects or witnesses to agree to Narcoanalysis and other tests, resulting in a mockery of the essence of the Supreme Court's judgment.

The Court has declared the three tests as unconstitutional, but it is argued that there is a difference between "admissibility" and "constitutionality" of these tests. According to the Indian Evidence Law, the results of scientific tests may not be

[13] Miranda v. Arizona 384 U.S. 436 (1966)
[14] Vol I (2003), Ch. 3, especially secs.3.11 and 3.41 to 3.44
[15] The Constitution of India, 1950
[16] (1960) 3 SCR 116
[17] (1961) 1 SCR 417
[18] R.C. Mehta v. State of West Bengal (1969) 3 SCR 461
[19] (2010) 7 SCC 263

admissible in the court of law due the presence of the element of compulsion, but this does not make the tests as unconstitutional. Hence the idea here should be to weigh the actual evidence placed before the court by applying its judicial mind irrespective of the source. Hence, it may be submitted that in order to protect the Rights of the accused the Indian Courts have forgotten that the victims also have the rights. By confirming the unconstitutionality of the rights of an accused the Supreme Court has placed an overarching reliance on the Fundamental Rights of the accused persons as opposed to the line of recommendations made by the Malimath Committee Report.

IV. CONCLUDING REMARKS

Latest development was seen when the constitutionality of Voice Spectrography test was challenged before the Gujarat High Court in the case of *Natwarlal Amarshibhai Devani vs. State of Gujarat*[20]. The court upheld the constitutional validity of the test as it was not considered to be violative of article 20(3). It stated that voice test is constitutional as it does not infringe the mental privacy and does not come within the ambit of psychiatric examination, hence the case was not considered to be hit by the *Selvi*[21] bar.

In a nut shell, after the detailed study of the present case it can be argued that the protection under Art. 20(3) of the Constitution should not be extended in such a way as to hamper the 'social interest'. Sociological School of Jurisprudence establishes that in case of conflict between 'social interest' and 'Individual interest', social interest is going to be protected. Hence, tests like Narco-analysis, Brain Mapping and Polygraph test should not be brought within the purview of Art. 20(3) of the Constitution of India so as to hamper the 'social interest. Also, the right against the self-incrimination establishes the basic fact that the accused person is giving statement against himself and he's not even asked for the consent, then it is definitely going to implant wrong ideals in the current progressive societies.

A decision no matter how well made is always subject to criticism just because there is always scope of improvement. The same applies to the judgment of *Selvi v. State of Karnataka*[22]. Although it is one of the most trendsetting and landmark judgment of its time but still when there is constitutionality and democracy criticism is ought to come up. Moreover when it comes to judicial decision there is always this scope open for critics to pool in their views. But compared to others this is one of those few judgments where the critics might find it difficult to find a lacunae.

[20] Special Criminal Application (Direction) No. 5226 of 2015
[21] Supra
[22] Supra