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PROTECTION AGAINST SELF-INCRIMINATION : AMBIT AND DIMENSION IN CRIMINAL PROCEEDINGS – AN OVERVIEW

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ABSTRACT:

Protection against self-incrimination in a criminal trail is a fundamental human right, and no accused could be compelled to give any evidence which led himself into any conviction. An accused can deny or refusal to express any statement relating to any criminal activity, if he think that such statement would be contrary to his/her interest or shall be incriminatory. In many legal system accused 'criminals' cannot be compelled to incriminate themselves, they choose to speak to police or other authorities, but they cannot punished for refusing. In this paper the author has tried to find out the ambit and dimension of this principle, through Legal Administration in criminal proceedings.

INTRODUCTION

Throughout the web of English criminal law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prison's or accused guilt. In other words the paramount consideration of Jurisprudence is that 'unless the crime has proved beyond of reasonable doubt any sanction or punishment and penalty should be not imposed. The principles of natural justice provides the 'reasonable or fair hearing'. Therefore evidence is the essential for proving the existence or non-existence of every criminal activity.

The universal rule of law of evidence is that 'nobody can be compelled to give any evidence relating to criminal proceedings, which in-criminated to himself, protection against self-incrimination in respect of conviction for offence is a fundamental Human right and an accused can deny or refusal to express any statement relating to any criminal activity. If he thinks that such statement would be contrary to his interest or shall be incriminated to him. Hence everyone has a right to protect this interest and freedom from to refuse any incriminating evidence in criminal proceedings.

Self-incrimination is the act of exposing oneself (generally by making a statement) "to an accusation or charge of crime to involve oneself or another (person) in a criminal prosecution or the danger thereof. Self-incrimination can occur either directly or indirectly; directly by means of interrogation. Where information of a self-incriminatory nature is disclosed in directly, when information of a self-incriminatory

nature is disclosed voluntarily without pressure from another person. In many legal system accused criminals cannot be compelled to incriminate themselves they choose to speak to police or other authorities, but they cannot be punished for refusing to do so. The precise details of this right of the accused vary between different countries and some countries do not recognize such a right at all.

CANADIAN LAW –

In Canada similar rights exist pursuant 'charter of rights and freedoms'. Section M of the charter provides that one cannot be compelled to be a witness in a proceedings against oneself. Sec. 11 (c) states: Any person charged with an offence has the right …(c) not to be compelled to be a witness in proceedings against that person in respect of the offence. An important distinction (dubious) in Canadian law is that this does not apply to a person who is not charges in the case in question. A person issued subpoena, who is not charged in respect of the offence being considered, must give testimony. However this testimony cannot later be used against the person in case. Sec. 13 of the charter states – A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings except in a prosecution for perjury or for the giving of contradictory evidence.

ENGLISH AND WELSH LAW –

The right against self-incrimination originated in England and Wales. In countries deriving their laws as an extension of the history of English Common Law, a body of law has grown around the concept of providing individuals with means to protect themselves from self-incrimination. As with other features of scots criminal and civil law, both common and statute law originated differently from that in England and Wales. Applying to England and Wales the criminal justice and public order Act 1994 amended the right to silence by allowing inference to be drawn by the jury in cases where a suspect refuses to explain something and then later produces an explanation (in other words, the jury is entitled to infer that the accused fabricated the explanation at a later date, as he or she refused to provide the explanation during the time of the police questioning). The jury is also free not to make such an inference.

UNITED STATES LAW –

The 5th amendment of the United States Constitution protects witness from being forced to incriminate themselves.

Incriminating oneself is defined as exposing oneself to "an accusation or charge of crime" or as involving oneself in a criminal prosecution or the danger thereof"

The privilege against self-incrimination is the privilege derived from the Fifth amendment, U.S. constitution, and similar provisions in the constitution of states … that requires the government to prove a criminal case against the defendant without the aid of the defendant as a witness against himself. "To plead the fifth" is the refuse to answer a question because the response could from self-incriminating evidence. Historically, the legal protection against self-incrimination is directly related to the question of torture for extracting information and confessions.

In **Miranda v. Arizona (1966)** the United States supreme court ruled that the Fifth Amendment Privilege against Self-Incrimination requires law enforcement official to advise a suspect interrogated in custody of his rights to remain silent and to obtain an attorney. Justice Robert H. Jackson further notes that 'any lawyer' worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances. Miranda warnings must be given before there is any questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Suspects must be warned, prior to the interrogation, that they have the right to remain silent, that anything they say may be used against them in a court law, that they have right to

presence of an attorney and that if an attorney and cannot be afforded, one will be appointed. Further, only after such warnings are given and understood, may the individual knowingly waive them and agree to answer questions. or make a statement.

SELF-INCRIMINATION -

Acts or declaration either as testimony at trail or prior to trail by which one implicates himself in a crime. The Fifth Amendment, U. S. Constitution, as well as provisions in many states constitutions and laws, prohibit the government from requiring a person to be a witness against himself involuntarily or to furnish evidence against himself, privilege against self-incrimination is the constitutional right of a person to refuse to answer questions or otherwise give testimony against himself or herself which will subject him or her to an incrimination. This right under the fifth amendment (often called simply Pleading The Fifth) is now applicable to the states through the *'due process'* clause of the fourteenth amendment 378 U.S. 18 and is applicable in any situation, civil or criminal where the state attempts to compel incriminating testimony.

AUSTRALIAN LEGAL PROVISIONS –

According this legal system, a person may refuse to answer any question, or to produce any document or thing if do so may tend to bring him into the peril and possibility of being convicted as a criminal. **Lamb V. Muster (1882) 10 QBD 110-111.** The mere fact that the witness swears that he believes that the answer incriminate him is not sufficient 'to entitle a party called as witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give that the reasonable ground to apprehend danger to the witness from his being compelled to answer". The privilege against self incrimination applies in both civil and criminal proceedings including pre-trail proceedings such as discovery and interrogatories. Under Sec. 128 of Evidence Act provided that when a witness objects to giving evidence on the basis of self-incrimination, at that point, the court must consider whether there are reasonable ground for the objection. As this section requires the witness to object to giving the evidence, the court must satisfy the witness or party is aware of the effect of this provision as per section 132 of the Evidence Act.

MALAYSIA

In Malaysia the privilege against self-incrimination is of relevance in at least two different contexts – during police investigation and during trail.

In the course of police investigation, pursuant to section 112 of criminal procedure code, a police officer may examine any person who is supposed to be acquainted with the facts and circumstances of a case, and such person shall be bound to answer all questions that are put to him by the said officer. The person, however, may refuse to answer any question, the answer to which would have a tendency to expose him to criminal charge or penalty of forfeiture.

In Malaysia the right to remain silent and the legal effect thereof is the same as explain above. The right of silence has also been incorporated in several criminal legislation such as section 113 of criminal procedure cod, section 37A of dangerous drugs act 1952, and section 75 of the Internal Security Act 1960.

INDIAN CONSTITUTIONAL PROVISIONS REGARDING SELF-INCRIMINATION

Clause (3) of Article 20 of Indian constitution provides : No person accused of any offence shall be compelled to be a witness against himself. This clause is based on the maxim *"Nemo tentur prodere accussare seipsum"* which means that no man is bound to accuse himself.

Clause (3) of the Article 20 follows the language of the fifth Amendment of the American constitution which lays down that no person shall be compelled in any criminal case to be a witness against himself. The clause

embodies the general principle of English and American jurisprudence according to which no person would be compelled to give testimony which might expose him to prosecution for a crime.

The main provision regarding crime investigation and trial in the Indian constitution is Art. 20 (3). It deals with the privilege against self-incrimination. The privilege against self-incrimination is a fundamental canon of common law criminal jurisprudence. Hence although an accused person may of his own accord make a voluntary statement as to the charge against himself, a justice, before receiving such statement from him is required to caution him that he is not obliged to say anything and that what he does say may be given in evidence against himself. Hence also arises the rule that evidence of a confession by the accused is not admissible unless it is proved that such confession was free and voluntary.

The privilege against self-incrimination thus enables the maintenance of Human Privacy in the enforcement of criminal justice. It also goes with the maxim 'Nemo Tenetur seipusm accusare' i.e. no man, not even the accused himself can be compelled to answer any question, which may tend to prove him guilty of a crime, he has been accused of'. If the confession from the accused is derived from any physical or moral compulsion (be it under hypnotic state of mind) it should stand to be rejected by the court. The right against forced self-incrimination, widely known as the right to silence is enshrined in the code of criminal procedure (cr.pc.) and the Indian Constitution. In the cr. pc., the legislature has guarded a citizen's right against self-incrimination. Sec. 161 (2) of the code of criminal procedure states that "every person is bound to answer truthfully all questions, put to him by (a police) officer, other than questions the answers to which would have a tendency to expose that person to a criminal charge, penalty to a criminal charge, penalty or forfeiture. But where the accused makes a confession without any inducement, threat or promise art 20 (3) does not apply.

The privilege against self-incrimination is a fundamental canon of common criminal law jurisprudence. The characteristics features of this provisions are –

- that the accused is presumed to be innocent.
- that it is for the prosecution to establish his guilt and
- that the accused need not make any statement against his will

This provision contains following ingredients-

1. It is a right available to a person accused of an offence.
2. It is a protection against compulsion to be a witness.
3. It is protection against such compulsion resulting in his giving evidence against himself.

The protection contained in Article 20 (3) is available to every person. The term 'person' in Article 20 (3) includes not only natural individuals but also companies and unincorporated bodies. The protection is available only if the following ingredients are present.

(I) It is a protection available to a person accused of an offence.
(ii) It is protection against compulsion to be a witness and
(iii) It is a protection against such compulsion resulting in his giving evidence against himself.

(I) Person Accused of an offence – The protection against self-incrimination is available only to a person accused of an offence. Section 26 of the General Clause Act 1897, define the term offence to mean an act or omission punishable by any law for the time being in force. The words 'accused of an offence' make it clear that this right is only available to a person accused of an offence. A person is said to be an accused person against whom a formal accusation relating to the commission of an offence has been leveled which in normal course may result in his prosecution and conviction. Formal accusation is ordinarily brought into existence by lodging of an F.I.R. or a formal complaint to be appropriate authority or court against the specific individual accusing him of the commission of a crime. It is however, not necessary, to avail the privilege contained in Article 20 (3), that actual trail or inquiry should have commenced before a court or a

judicial tribunal. The words 'accused of an offence' indicate an accusation made in a criminal prosecution before the court or a judicial tribunal where a person is charged with having committed on act which is punishable under Indian Penal Code 1860 or any special or local law. It is only on the making of such formal accusation that clause (3) of Article 20 becomes operative covering that person with its protective umbrella against testimonial compulsion.

It follows that a person cannot claim the protection if at the time he made the statement he was not an accused but become an accused thereafter. Thus in **M.P. Sharma V. Satish Chandra**, it was held that a person, whose name was mentioned as an accused in the first information report by the police and investigation was ordered by the magistrate, could claim the protection of this guarantee. The mere fact that at the relevant time the person was arrested on suspicion of having committed an offence under section 124 of the Bombay police Act and a 'panchanama' had been prepared seizing the goods were immaterial when neither the case was registered nor the FIR was recorded by the police. Thus where a custom officer arrests a person and informs him of the grounds of his arrest for the purpose of holding an inquiry into the violation of the provisions of the sea customs act there is no formal accusation of an offence. In **Delhi Judicial Service AssociationV. State of Gujrat.** It has been held that mere issue of notice or pendency of contempt proceedings do not attract Article 20 (3) as the contemners were not 'accused of any offence'. a criminal contempt is different from an ordinary offence. Since the contempt proceedings are not in the nature of criminal proceeding for an offence the pendency of contempt proceedings cannot be regarded as criminal proceedings merely because it may end in imposing punishment on the contemner. A contemner is root in the position of an accused. Even if the contemner is found to be guilty of contempt the court may accept apology and discharge the notice of contempt, whereas tendering of apology is no defence to the trial of criminal offence likewise where a custom officer arrested a person and informed him of the ground of his arrest for the purpose of holding an inquiry into the violation of the provisions of the sea custom act 1898, there being no formal accusation of an offence, it was held that Article 20 (3) would not apply. In **Narayan Lal V. M. P. Mistry** the Registrar of companies acting under section 240 of the companies act 1949 called upon the managing agents of the company to give evidence and produce documents from their possession. It was held that proceedings did not partake the character of a criminal prosecution and the managing agents were not persons accused of any offence, therefore Article 20 (3) would not apply.

A person charged of contempt of court has been held to be not accused of any offence within in the meaning of Article 20 (3). Article 20 (3) does not apply to departmental inquires into allegation against a government servant since, there is no accusation of nay offence within the meaning of Article 29 (3). In **Nandini Satpathy V. P.L. Dani** the appellant, a former chief minister of Orissa was directed to appear at vigilance police station, Cuttack, for being examined in connection with a case registered against her under the prevention of corruption act 1947 and under section 161/165 and 120-B and 109 of Indian Penal Code 1860. On the strength of this first information report, investigation was commenced against her. During the course of the investigation, she was interrogated with reference to a long list of question given to her in writing. She refused to answer those question claiming the protection of Article 20 (3). On this, she was prosecuted under 179 of Indian Penal Code 1860, which punished a person refusing to answer questions demanded by any public servant. It was contended that she was justified in refusing to answer the questions on the ground of Article 20 (3) as well as section 161 (2) of the criminal procedure code 1973.

The supreme court held that sec. 160 (1) of Cr. Pc. which barred the calling of a woman to police station was violated in the case. Further, the question related to the scope of the protection contained in Article 20 (3). The court ruled that Article 20 (3) extended back to the stage of police investigation not commencing in court only, since such inquiry was of an accusatory nature and could end in prosecution. The ban on self accusation and the right to silence while on investigation or trail was underway, the court viewed extended beyond that case and protected the accused in regard to other offences, pending or imminent

which might deter him from voluntary disclosure of criminatory matter.
It follows that the 'protection contained in Article 20 (3) is also available at the stage of police investigation. Further that the right of silence guaranteed by Article 20 (3) is not limited to the case for which the person is examined but extends to other offences pending or imminent which may deter him from voluntrary disclosure of criminal matter. It was also held that protection could be claimed by a suspect also.

(ii) Protection Against Compulsion to be a witness : The protection contained in Article 20 (3) "to be a witness". In **M. P. Sharma V. Satish Chandra** the supreme court interpreted the expression "to be a witness" very widely so as to include oral, documentary an testimonial evidence. The prosecution under Article 20 (3) covers not merely testimonial compulsion in a court room but also compelled testimony previously obtained any compulsory process for production of evidentiary document which are reasonably likely to support the prosecution against him. The court accepted the definition given in the Indian Evidence Act that a person can be witness not merely by giving oral evidence but also by producing documents or making intellible gestures as in the case of a dump witness or the like. If this interpretation on the phrase "to be a witness" adopted by the court in M. P. Sharma's case was to be followed, the compulsory taking of finger impressions or specimen writing of an accused would come within the mischief of Article 20 (3). This broad interpretation, it was thought, would certainly hamper the effective administration of crime and efficient administration of criminal justice.

In **State of Bombay V. KathiKalu** the supreme court held that the interpretation of the phrase 'to be witness' given in Sharma's case was too broad and required a qualification. To be witness is not equivalent to 'furnishing evidence', that is to say as including not merely making of oral or written statement but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused. Self-incrimination can only mean conveying information based upon personal knowledge of the person giving information and cannot include merely the mechanical process of producing documents in court which may throw light on any point in controversy but which do not contain any statement of the accused based on his personal knowledge. Thus when a person gives his finger impression or specimen writing or signature through, it may amount of furnishing evidence in the large sense is not included within the expression 'to be a witness'. In these cases, he is not giving any personal testimony. They are merely materials for comparison. Hence neither seizures made under search warrant, nor the compulsory taking of photographs, finger print or specimen writing of an accused would come within the prohibition of Article 20 (2). What is forbidden under Article 20 (3) is to compel a person to say something from his personal knowledge relating to the charge against him. It has been held that the information given by an accused person after his arrest to a police officer which leads to the discovery of a fact under section 27 of the Evidence Act is admissible in evidence under Article 20 (3) of the constitution.

In **Amrit Singh V. State of Punjab** The accused was charged for rape and murder of an eight year old girl. When the body of child was recovered, some strands of hair were found in the closed fist of the child. The police wanted to analyse the hair found in the fist of the victim with that of hair sample. The Supreme Court observed that the accused had protection against self-incrimination not to give hair. But here in such cases if court started to consider this type of right of self-incrimination than this right might be misuse by many accused through being not reasonable to allow them such rights.

A very interesting situation arose in **X. Vs Y.** in which the Delhi High Court in divorce proceedings for adultery, allowed the paternity test of a preserved foetus, holding that the foetus is no longer a part of body of the wife and she is not subjected to any compulsion.

The provision under section 132 of Indian Evidence Act (Proviso) clearly protect a witness from being prosecuted as the basis of the answers given by him in a criminal proceedings which tend to incriminated him directly or indirectly compulsion resulting in his giving evidence 'against himself.' Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be

proved against him in any criminal proceedings, except a prosecution for giving false evidence by such answer. Section 164 (1) of a Cr. Pc. 1973 empowered to magistrate to recording of confession or any statement which has been taken from an accused during an investigation (2) The magistrate shall, before recoding any such confession, explain to the person making it that he is not bound to make a confession and that if he does so, it may be used evidence against him, and the magistrate shall not recorded any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily. (3) If any time before the confession is recorded the person appearing before the magistrate states that he is not willing to make the confession, the magistrate shall not authorize the detention of such person in police to custody. (4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession and the magistrate shall make a memorandum at the foot of such record to the following effect:- "I have explained to (name) that he is not bound to make a confession and that if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct it contains a full and true account of the statement made by him.

(Signed) AB
Magistrate

In **Bhagwan Singh V. State of M.P.** The supreme court has observed that while recording under sec. 164 following points must be borne in mind of the magistrate-

(1) Magistrate in particular should be ask the accused as to why he wants to make a statement, which surely shall go against his interest in the trail.

(2) Accused should be granted sufficient time for reflection.

(3) Accused should be assured of protection from any sort of apprehended torture or pressure from police in case he declines to make a confessional statement.

(4) Confession should be recorded in questions and answers from which is the manner indicated in the criminal court rules.

(5) Before proceedings to record the confessional statement a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence.

(iii) Compulsion to give evidence "against himself' The protection under Article 20 (3) is available only against compulsion of the accused to give evidence against himself. Thus, if the accused voluntarily make an oral statement or voluntarily produce documentary evidence, incriminatory in nature Article 20 (3) would not be attracted, this Article only applies when any statement oral or documentary has taken through any compulsion or threat from an accused. In this regard sec. 24 of Indian Evidence Act also provides that : A confession made by an accused person is irrelevant in a criminal proceeding , if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceedings from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceeding against him.

In deciding whether the particular confession attracts the frown of section 24 of evidence act, the question has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind. The facts of the case, in which this statement occurs were that a senior police officer, after having failed to get any confessional statement from the accused through other sources took upon himself to question was whether the

confession were voluntary. The supreme court held that they were not. When the two accused were questioned separately after several abortive attempts to secure confession can it be said that there was no inducement, threats or promise of some kind proceedings from the (senior officer) to have made any impact on their minds resulting in the confessions? The officer having stated to the accused that "now that the case has been registered they should state the truth, it is difficult to hold that by this statement he would not generate in the minds of the accused some hope and assurance that if they told the truth they would receive his support. Where the accused was told by magistrate, "Tell me where the things are and I will be favourable to you , or if you do not tell the truth you may get yourself into trouble and it will be worse for you , or "if you make a clear breast of it, I will see you acquitted' and a sailor's confession in response to the captain's words that 'if you do not tell me, I will give you to police'. Confession obtained in response to these statements were held to be irrelevant.

Suggestions like, "I will give you more opportunity to be honest and frank as to your connection with the Michelle Booth case", seemed to have a lurking threat or inducement behind them. The suggestion "why cannot you tell the truth and get it over with? you are only making this worse by telling lies and why cannot you be a man and admit it? These lies are not going to help you" were plain inducement. The accused was arrested for burgalary. He had stored the allegedly stolen goods at the home of a long time friend. The police, knowing this told their suspect that unless the confessed, his friend would be arrested and his children put up to foster placement. A confession thus procured was not allowed to be brought on record.

It is for the prosecution to prove affirmatively that the confession was free and voluntary. It is sufficient for the purpose of excluding a confession that the confession appears to have been the result of an inducement, even if it is not proved that the inducement reached the accused.

In **Kalawati V. State of Himachal Pradesh** the appellant was accused of committing the murder of her husband. The supreme court held that Art. 20 (3) would not apply to a case where the confession was made by an accused without any inducement threat or promise.

The expression 'compelled to be a witness' in Article 20 (3) indicates that the evidence given by the accused must be shown to have been given under compulsion. The term 'compulsion' in the context of Article 20 (3) means 'duress'.

Thus compulsion may take many forms. Person accused of an offence may be subjected to physical or mental torture. He may be starved or beaten and a confession may be extracted from him. By deceitful means he may be induced to believe that his son is being tortured in an adjoining room and by such inducement he may be compelled to make an incriminatory statement.

In **Nandani Satpathi V. State of Orissa** the supreme court observed that the phrase 'compelled testimony' must be read as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure environmental coercion, tiring interrogative prolixity, over beating and intimidatory methods and the like, not legal penalty for violation. Similarly sec. 25 of Indian Evidence Act 1872 provides that 'no confession made to police officer, shall be proved as against a person accused of any offence." The main object of this section is that the variety of confession that are under the Evidence Act regarded as involuntary would not be admissible. This section expressly declare that confession made by an accused before a police authority such confession shall not be proved.

If confessions to police were allowed to be proved in evidence the police would torture the accused and thus force him to confess to a crime which he might not have committed. A confession so obtained would naturally be unreliable. It would not be voluntary such as confession will be irrelevant whatever may be its form direct, express, implied or inferred from conduct. The reasons for which this policy was adopted when the Act was passed in 1872 are probably still valid. Goswami J of the supreme court noted.

The archaic attempt to secure confession by hook or by crook seems to be the be-all and end-all of the police investigation. The police should remember that confession may not always be short-cut to

solution. Instead of trying to 'start' from a confession they should strive to 'arrive' at it. Else, when they are busy on their short-route to success, good evidence may disappear due to inattention to the real dues. Once a confession is obtained there is often flagging of zeal for a full and through investigation with a view to establish the case de hors the confession. It is often a sad experience to find that on the confession, later, being inadmissible for one reason or other the case fundles in the court. However, Article 20 (3) would have no application where the accused is not in any manner compelled to give evidence against himself. In **Mohd. Dastagir V. State of Madras** the appellant went to the residence of the Deputy Superintendent of Police and offered him a closed envelope. The Police Officer on opening the envelope found it containing currency notes and realized that the appellant had come to offer him a bribe. The D.S.P. threw the envelope on the appellant's face and in that process the envelope and some currency notes fell on the floor. Thereafter the DSP asked the appellant to place the envelope and currency notes on the table, which he did. The envelope and the currency notes were seized by the police officer and the appellant was prosecuted for offering bribe to the DSP.

The supreme court held that the accused was not compelled to produce the currency notes as on duress was applied on him moreover, the appellant was not accused at the time. When the currency notes were seized from him and therefore, there was no infringement of Article 20 (3).

In **C. Sampath Kumar V. E. O. Enforcement Directorate, Madras** The supreme court held that administration of caution to person summoned that not making truthful statement was an offence, did not amount to use of pressure within the meaning of Article 20 (3). Administration of such a caution, the court said was in fact in the interest of the person who was making the statement.

SCIENTIFIC TESTS – INVOLUNTARY –

Narcoanalysis, polygraphy and brain finger printing tests of accused violates article 20 (3). In a significant judgement in Selvi V. State of Karnataka the accused have challenge the validity of certain scientific techniques, namely, Narcoanyalysis, polygraphy and brain finger printing (BEAP) tests "without consent" as violative of Article 20(3) as well as Art 21 of the constitution. The state argued that it is desirable that crime should be efficiently investigated particularly sex crimes as ordinary methods are not helpful in these cases. So the issue was between 'efficient investigation' and preservation of individual liberty. A three judge bench of supreme court unanimously held that these tests are testimonial compulsions and are prohibited by Article 20 (3) of the constitution. These tests do not fall within the scope of expression "such other tests" in expression of section 53 of criminal procedure code, the protection of self-incrimination. The drug is known as sodium pentothal --- used or introduced general anesthesia in surgical operations. The polygraphy and brain finger printing (BEAP) test is also known as the wave test. Electric waves are introduced into the mind. It was held that compulsory administration of the narcoanalysis techniques constitutes cruel, inhuman or degrading treatment in the context. Article 21 of the constitution disapproves of involuntary testimony irrespective of the nature and degree of coercion, threats fraud or inducement used to elicit the evidence. The popular means of the terms such as 'torture and cruel' inhuman or degrading treatment are associated with gory images of blood letting and broken bones. A forcible invasion into a person's mental, process is also an affront to human dignity and liberty often with grave and long and lasting consequences. The court also refereed the international conventions though not ratified by parliament, as persuasive value. Since they represent an involving international consensus on the issue convention 'against torture and other cruel inhuman or degrading treatment or punishment (1984). Regarding the contention raised by the respondents that compelling interests demands such techniques for investigation of crimes in future the court said that it was the function of the legislature to consider and make proper law on the issue. But if such matter comes before the court, the court shall interpret the mandate of the constitutional provisions available to the citizens and apply in this favour. The court laid

down the following guidelines for these tests:-

(1) No lie Detector Tests should be administered except the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

(2) If the accused volunteers for a lie Detector Test, he should be given access to lawyer and physical, emotional and legal implications of such a test should be explained to him by the police and his lawyer.

(3) The consent should be recorded by the judicial magistrate.

(4) During the hearing before the magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(5) At the hearing the person in questions should also be told in clear terms that the statement that if made shall not be a confidential statement to the magistrate but will have the statement made to the police.

(6) The magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interogation.

(7) The actual recording of the Lie Detector shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(8) A full medical and factual narration of the manner of the information received must be taken on record.

Protection under Article 20 (3) of the constitution does not extend to any kind of evidence but only of self-incriminating statement relating to the charges brought against an accused. In this case the court had refused to allow narcotic analysis and use of truth-serum against the accused according to the court it violates the right against self-incrimination available to all citizens in terms of Article 20 (3) of the constitution of India. In recent decision, the supreme court however has delineated the limitations of this provision in much as it declared that this right is not available to a person to avoid answering questions in a matter where he has not been charged for an offence.

Called upon to decide the question as to 'whether protection under Article 20 (3) of the constitution is available to the appellant, who though not an accused in the police case in which he has been asked to depose as a witness but figures as an accused in the complaint case filed later on in relation to the same incident", the supreme court in **Balasaheb V. State of Maharashtra:-** declared the law in the following terms protection under Article 20 (3) of the constitution does not extend to any kind of evidence but only to self-incriminating statement relating to the charges brought against an accused within the prohibition of constitutional protection, it must be of such character that by itself it tend to incriminate the accused. Appellant is not an accused in the police case and in fact a witness, whose statement was recorded under Article 161 of the criminal procedure code, and therefore, not entitled to a blanket protection. However, in case of trail in the police case answer to certain question it tends to incriminate the appellant he can seek protection at that stage. Whether answer to a question is in-criminating or otherwise has to be considered at the time it put. Reference in this connection can be made to a decision of this court in the case of **State of Bombay Vs. Kathi Kalud Oghad**. where in it has been held as follows- 'in order that a testimony be an accused person may be said to have been self-incriminatory the compulsion of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other worlds, it should be a statement which makes the case against the accused person atleast probable considered by itself.'

EXCEPTIONS :

The right of silence has various facets, on is that the burden is on the state or rather the prosecution to prove that the accused is guilty. Another is that an accused is presumed to be innocent till he is proved to be guilty. A third is the right of the accused against self incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself. But there are also exceptions of this rule.

DNA TEST :

An accused can be compelled to submit to investigation by allowing his photographs taken, voice recorded, his blood sample tested, his hair or other bodily material used for DNA testing etc.

It follows that giving thumb-impression or impression of foot or plam or fingers or specimen of writings or exposing parts of body by way of identification are not covered by the expression 'to be a witness' under article 20 (3) In these cases, the accused is not giving any personal testimony. They are merely materials for comparison.

EVIDENCE OBTAINED BY UNDESIRABLE MEANS :

The supreme court has made it clear in Pushpa Devi Ram Jatia Vs. M. L. Wadhwan that where 'evidence' offered comes within the meaning of its definition, the court can act on it and need not concern itself with the method by which the evidence in question was obtained. The court cited the observation of 'Sir Lawrence Jenkins' in **Barindra Kumar Ghose V. Emperor'** to the effect that relevant evidence remains relevant even if it was obtained in the course of search or seizure in violation of the provisions of the criminal procedure code. The court found support in the following observation of LORD GODDARD. CJ in judgement of the privy. council in **Kuruma V. Reginam**.

"The test to be applied in considering whether evidence is admissible in whether it is relevant to the matter in issue. If it is, admissible and the court is not concerned with how it was obtained. In their Lordships opinion, when it is a question of the admission of a evidence strictly it is not whether the method by which it was obtained is tortious but whether what has been obtained is relevant to the issue being tried.

Similarly in **R. Vs. Sang** the House of Lords observed that however much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, it is admissible evidence and is probative of the accused's guilt, it is no part of the judicial function to exclude it by this reason. He has no discretion to refuse to admit relevant evidence on the ground that it was obtained by improper or unfair means. The House of Lords would sanction the exclusion of such evidence only where the accused had been lured into incriminating himself by deception on after the commission of an offence.

The fact of entrapment, if proved, would be one of the circumstances which the judge or magistrate should take into account when carrying out his balancing exercise, Breaches of French Law and of the European convention of Human Rights, all these formed part of the circumstances in which the evidence was obtained. The supreme court noted the only exception to the rule, which is that where after the alleged offence, improper methods have been used to obtain evidence for it and the judge is of the view that the prejudicial effect of such evidence would be out of proportion to its evidentiary value, the judge may exclude it. When considering whether the admission of evidence would have such an adverse effect on the fairness of the proceedings as to justify exclusion the court has to have regard to all the circumstances, including the circumstances in which the evidence was obtained. The impact on the fairness of the proceedings is the crucial determining factor. A unique example is to be seen in **R. V. Christou**. The police operated for about three months by establishing a shop of jewelers and putting up the shady image of being interested in buying stolen property. The object was to recover stolen goods and to obtain evidence against those involved in theft and handling. All the transactions in the shop were filmed and conversation recorded and the dealings were observed by other officers through video link. The evidence so collected was not allowed to be excluded from the trail, the court saying: 'The trick was not applied to the appellants (accused person) they voluntarily applied themselves to the trick. It is not every trick producing evidence against an accused which results in unfairness. The fairness of the proceedings as a whole is generally more likely to be compromised in a situation, where the suspect has been deluded after being formally subjected to the control of the police.

DOCUMENT WHICH IS POSSESSION BUT NOT BASED ON PERSONAL KNOWLEDGE

Self-incrimination in the context of Article 20 (3) only means conveying information based upon personal knowledge of the person giving information. Therefore, where an accused is compelled to produce a document in his possession which is not based on the personal knowledge of the accused, there is no violation of Article 20 (3), because he does not become a witness by the mere fact that he has produce it. Directing the accused to give his specimen signature and handwriting does not amount to testimonial compulsion offending Article 20 (3).

SEARCHES AND SEIZURES :

Provisions of Article 20 (3) does not violates of the proceedings on search and seizures. It has been held that the protection of Articles 20 (3) does not extend to searchers made in pursuance of a warrant issued under section 96 of the criminal procedure code 1973.

In Indian law, there is no basis for the assumption that a search or seizure of the thing or document, was in itself to be treated as a compelled production of it. Since the search warrant is addressed to an officer of the government generally, a police officer and not to the person whose premises or property is to be searched, it is not the act of the accused but of a third person the police officer to which the accused is obliged to submit and is therefore, not his testimonial act in any sense and does not involved a violation of Article 20 (3).

Again in **V. S. Kuttan Pillai V. RamaKrishanan** , the supreme court held that search of the premises occupied by the accused without the accused being compelled to be a party to such search would not be violative of the constitutional guarantee enshrined in Article 20 (3).

Sec. 27 of Evidence Act 1872 and Article 20 (3) of the constitution – Sec. 27 of Evidence Act 1872 provides that when at a trail evidence is led to the effect that some fact was discovered in consequence of the information given by the accused in custody, so much of the information as relates to the facts discovered, may be proved irrespective of the fact whether that information amounts to confession or not. It has been held that the provision of this section are not within the prohibition of article 20 (3), unless compulsion had been used in obtaining the information. In **Prasadi Vs. State of UP** . the accused while in police custody stated that he killed the accused with a dagger and had concealed the dagger and blood stained clothes of the deceased in a pit. He led the police to the pit from where, the dagger and the clothes of deceased were recovered. The court held that the statement of the accused leading to the recovery of the dagger and the clothes of the deceased was admissible and could not be held to be compelled testimony within the meaning of Article 20 (3). But, where the statement leading to the discovery of some facts was obtained by employing third degree methods, the statements would be hit by Article 20 (3).

CONFESSION MADE UNDER PROMISE OF SECRECY ETC.

An confession unlike an admission, is relevant even if it is made under promise of secrecy. Sec. 29 of Evidence Act also provides that "if such a confession in otherwise relevant it does not become irrelevant merely because it was made under a promise of secrecy or in consequence of a deception practiced on the accused person for the purpose of obtaining it, or when he was drunk or because it was made in answer to question which he need not have answered, whatever may have been the form of those questions or because he was not warned that he was not bound to make such confession and that evidence of it might be given against him.

In addition to this, section 29 provides for many other things also. The effect of the section is that a confession is relevant even if it is obtained under the following circumstances.

(a) By making a promise to the accused that it will be kept secret or that evidence of it shall not be given against him – It may be recalled that an admission made in civil case under promise that evidence of it shall

not be given is not relevant, the policy being that litigants should be encouraged to compromise their difference. That policy has no relevance to criminal cases because here the public interest lies in criminal prosecuting and not compromise with them. Consequently, therefore, where an accused person is persuaded to confess by assuring him of the secrecy of his statement the confession is nevertheless relevant.

(b) By practicising a deception on the accused for the purpose of obtaining his confession – Where the confession is the outcome of the Fraud being played with the accused it is nevertheless relevant. Thus where the two accused persons were left in a room where they thought they were all alone, but secret tape recorders were recording their conversation the confessions thus recorded were held to be relevant. Similarly, where an accused persuded to submit for a medical examination for an innocent purpose which was infact conducted for criminal purpose, his statements to the doctor and the doctors report were held to be relevant at the discretion of the court. He was charged with drunken driving and he was told that the medical examination was not to ascertain his fitness to drive but to determine other illness or physical disability and in particular whether he was fit to leave the police station. Basing his judgement on the courts' cases, Lord Parker CJ, ruled that the court should have in its discretion refused to allow the evidence to be given on the basis that if the defendant that the doctor was likely to evidence on the matter he might refuse to submit himself to examination.

(c) When the accused was drunk – A confession obtained by intoxicating the accused is equally relevant. The law is concerned to see that the confession is free and voluntary and if this is so it does not matter that the accused confessed under the influence of drink. According to the English practice the judge will have discretion in the matter.

(d) In answer to questions which the need not have answered – A confession obtained in answer to question which the accused need not have answered is valid, whatever even if the accused was not warned that he was not bound to answer such questions or that his answers will be used in evidence against him. this principle applies only to extra judicial confessions, that is to say, confession which are made 'outside the court' to a private person. For recording a confession before the court the provisions of section 164 (3) of the criminal procedure code 1973, would have to he observed. It has been held by the supreme court in **state of U.P. Vs. Singhara Singh** that this section overrides section 29 of the evidence act. The relevant provision is that the magistrate should before recording the confession warn the accused that he is not bound to make it and that if he did make it, it will be use in evidence against him. In English law it is one of the judge's rules that the person being interrogated should be told or you are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.

TAPE-RECORDING OF STATEMENTS BY THE ACCUSED :

Tape recording of statement of an accused does not fall in Article 20 (3). It has been held that the tape-recording of statement made by the accused, though the recording was done without his knowledge, but without force or oppression, is not hit by Article 20 (3). Since there is no element of compulsion with the meaning of this clause.

The protection under 20 (3) is confined to an accused in a criminal proceedings and does not apply to witness or to civil proceedings or proceeding other than criminal. In America the privilege against self-incrimination is not confined to accused only but it extends to witness also. Same is the position under the English law. But in Indian Legal System it is confined an accused only, in-criminal proceedings.

CONCLUSION :

Article 20 (3) invoked protection against self-incrimination and gives an accused the right to remain silent over any issue which tends to incriminate him. This protection by the Indian constitution is also

extended to suspects. Article 20 (3) has been carefully crafted to protect the accused from further self-incriminating himself only if any statement of his might result in prosecution. For the benefit of the courts, the supreme court has distinguished between the terms 'witness' and 'furnish evidence' the former including furnishing statements from one's own knowledge and the latter, referring to simply presenting documents required by the court under which protection under Article 20 (3) cannot be sought. This article also stretches its privileges to a person who is compulsorily being made a witness and also covers search and seizures wherein, an accused or the person being searched is under no obligation to be a part of the search. If any confession or a mere statement is made based on which some material corroboration is found then that statement cannot be protected under Article 20 (3). Under the law, an accused cannot be tortured to make a statement or a confession and no duress can be exercised in order to obtain some information out of him, in such a case the statement would be void and the privileges under Article 20 (3) would be applicable. Narco-analysis tests, polygraph analysis etc. which refer to involuntary administration of mental process, are considered violative of Article 20 (3) and can only be done in a few cases, as it disrupts the right to privacy.

But with advancement in medical sciences, that certainty of such scientific tests has increased and the author thinks that they provide an effective tool of furnish evidence which help in speedy disposal of cases. By balancing the harmony between the protective rights and need for speedy disposal.

Law is living process, which changes according to the changes in society, science, ethics and so on. The legal system should imbibe developments and advances that take place in science as long as they do not violate fundamental legal principles and are for the good of the society. The criminal justice system should be based on just and equitable principles.

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