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Pre-trial Confession: A Right Against Self Incrimination

Karthik Sivadas, Neelvi Rai, Masab Ahmed Maaz

Abstract

This study has been undertaken to investigate the Pre-trial Confession: A Right Against Self Incrimination this subject matter is coming under INDIAN PENAL CODE. This paper truly showcase the status of rights in India with regards to Self-Incrimination.

The Research Framework includes:

Keywords: Distinctly, Codified, Nexus inducement

Introduction

Presently in India the existing criminal laws are very contradictory to each other. On one hand where Article 20(3) of the Indian Constitution, S. 25 and S. 26 of the Evidence Act talk about inadmissibility of Confession made before the trial there only S.27 and 28 of the Indian Evidence Act talk about relevancy of the confessional statements which themselves per se leads to self-incrimination. Although the general rule is that Pre-trial confessions are not admissible in the court of law but several judicial pronouncements state that they can be used for contradiction and corroboration by the prosecution against the accused. Also there are various exemption to this General Rule such as S. 27 of The Indian Evidence Act provides that , when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information , either it amounts to a confession or not, as relates distinctly to the fact thereby discovered , may be proved.

Therefore, confession made to a police officer by an accused person while he is in the custody of such police officer is not admissible. However, there are two exceptions.
Firstly, if the confessional statements are made in the immediate presence of a Magistrate, and secondly if the confessional statement relates to a discovery of any fact, then, so much of such information as relates distinctly to the fact thereby discovered. Additionally, although there is provision in the Criminal Procedure Code that the magistrate shall check the authenticity and voluntariness of the confession given by the accused to the police but the measures taken by the magistrate and methods applied by him do not qualify in testing the voluntariness as the torture provided to the accused may not necessarily be physical rather it can also be mental in nature which is almost impossible to check.

In Emperor v. Kangal Mall[1] it has been held that statements by an accused to police officers pointing out the place where the offence was committed by others or where he concealed himself thereafter, and the house to which he went for assistance were regard as information leading to discovery or as statement made by him as part of his defence, are admissible in evidence as admissions.

[1] 1905 41 Cal 601

But if the confession made to a police officer does not amount directly or indirectly to an admission of any incriminating circumstance, it is admissible. Therefore, in Emperor v Mohamed[2] where the accused was carrying away a box at night and when asked by a police officer about the ownership of the box, he stated that it belonged to him it was held that the statement was admissible against him in a trial of theft regarding the box.

In Kanan Singh v. State of UP[3] The accused told the police that he would show them the knife and then took them to the place where the knife and then took them to the place where the knife was hidden it was held by the Hon'ble Supreme Court that the evidence regarding the recovery of knife was admissible.
In Swarna Singh and others Vs State of Punjab[4] it has been held, the mere recovery of weapon is not a very material circumstance against the accused particularly when every villager is supposed to possess one, as none of the weapons recovered from the appellant's bore any blood stains.

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In most of the criminal cases, the rhetoric that is prominently used is the sufferings of thevictim. By this the Court is able to depart from the traditional paradigm of a trial where theaccuse has certain rights such as right against self-incrimination, right to silence, or hispresumption of innocence to a different paradigm where the accused has wronged the severalinnocent victims. The role of the trial process under is to listen to the two paradigm and tostrike a balance between the rights of the two parties. By portraying the State's citizens asvictims of terror, the Court turns a blind eye to the accused's presumption of innocence or hisfundamental right against self-incrimination.

Moreover, this has changed the role and functioning of the higher judiciary. As pointed out by Prof. Mrinal Satish and Prof. Aparna Chandra, the judiciary does not anymore being "sentinel on the qui vive" i.e. duty-bound to zealously guard fundamental rights, to a pragmatic mediator that balances competing claims of 'national security' and 'fundamental rights'.
The guidelines written down by the SC to the government in *Kartar Singh*[5] lacked clarity on their execution and their rationale. As a result, they have suffered dilution by subsequent Supreme Court judgments which depict non-compliance of them, and the rules framed under Section 15 of the TADA.

In *Gurdeep Singh v. The State (Delhi Admn.)*[6], it can clearly be noticed that coercive and intimidating circumstances that can exist have been wrought by the preceding rulings. The Court held that even though the accused was handcuffed with a policeman holding him in chains and armed guards surrounding the room, the contention of a confession being forcefully taken cannot be admitted as these measures were required and were essential for security purposes.

The above argument can also be illustrated using Article 14 analysis used in *Kartar Singh*[7]. Inevaluating whether it was open for the legislature to make confessions before the policeadmissible, the judges reduce the issue to one where 'different mode of proof' is prescribed by the legislature for a certain class of offences. The rationality behind legislative classification is not questioned at all, instead the analysis is limited to the competence of the legislature to make such a classification without evaluating the rational nexus of such a classification to the object sought to be achieved. In not doing so, the judges leave open the question of whether it would be open for the legislature to make classifications such as 'sexual offenders' and 'other offenders'; 'white-collar crimes' and 'other crimes' and make confessions before the police selectively admissible for one set. Can different classes of crimes have different modes of proof. The judgment reduces it to a question of legislative competence. No analysis is presented with respect to Article 20(3). While the intention may have been to dilute the standards for terror-related cases alone, the judgment by not making that intention explicit jeopardises the right as a whole. Even if the Court had chosen to explicitly hold 'terror cases' as an exception where it is acceptable for confessions made to the police to be admissible, the substantial dilution of Article 20(3) could have been prevented. The result is that the diluted right to self-incrimination has now become the normalised standard under theConstitution.

[2] 1903 5 LR 312
[3] 1973 SCC (Cri) 468
[4] 1976 4SCC 369
[5] 1994 SCC (3) 569, JT 1994 (2) 423
[6] 1999 SC (3) 159
[7] Id at 5

Right against Self-Incrimination in India

Prohibition against self-incrimination is undoubtedly one the fundamental principles of criminal law. Under Article 20(3) of the Indian Constitution the right against self-incrimination is the safeguard, framed which extends to all accused persons to not be forced to be a witness against themselves.
The objects of Article 20(3) are further codified as a guarantee in the Criminal Law under Sections 161, 162, 163 and 164 of the Criminal Procedure Code, 1973 and such guarantees are also present in statutes pre-dating the Constitution in the form of Section 25 and Section 26 of the Indian Evidence Act, 1872.[8] Also India has already ratified the ICCPR which also provides for the right against self-incrimination "in full equality under Article 14".

The context of the right against self-incrimination was recognized by the Supreme Court in *Nandini Satpathy v. P L Dani*[9]. In this case, the court relied on *Miranda v. Arizona*[10], to expand the extent of the compulsion in testimony at the investigation stage as well. Further, the judgment recognises that compulsion may be given in many forms i.e., not just by way of
physical torture, but also in the form of psychic pressure or a coercive environment. Most importantly, the decision holds the right under Article 20(3) and under the Criminal Procedure Code to be equivalent in their protection. Thus, such harsh language used by *Nandini Satpathy*[11] leads to the unconstitutional nature of the confession recorded by the police. However, we notice that subsequent judgements on Article 20(3) dilute the protection altogether.

There are various legislations such as TADA which do not provide this protection to the accused and thus violate Article 14 of the Indian Constitution by not treating all accused equally. But this contention was rejected in the case of *State of W.B. v. Anwar Ali Sarkar*[12], and the Court reasons that classification of offences is constitutional as long as they are legislatively defined and not left to the arbitrary and uncontrolled discretion of the executive. The issue with this reasoning is that the Court refuses to dig deeper into the rationality of the legislative classification itself. Even on assuming that there is an intelligible differentia between the 'terrorists and ordinary criminals' as identified by the police, the Court fails to draw justifications on nexus between such a difference and the reason behind lesser degree of constitutional protection against self-incrimination provided to them.

It is a well to note that it is beyond comprehension why the entire reasoning of the court is based on Article 14 and 21 even though the Court earlier admits that Article 20(3) concerns were implicated by such a provision. There is absolutely no analysis on the extent of protection guaranteed by Article 20(3) and to what degree can it be violated, if at all. Admittedly, the Court does issue guidelines for recording of a complaint of torture by Magistrate if the accused so complains. However, it omits to state the consequence and results of that torture on the probative evidentiary value of the 'confession'. Further, the judges limit their understanding of involuntary confessions to those made under torture. There is no mention of other methods by which a confessional statement may be extracted such as by inducement or threats. As mentioned above in *Nandini Satpathy*, compelled testimony is not limited to those made by "physical threats or violence" alone but also as a response to "psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods" as well. Therefore, there is no way for the Court to determine if the accused did in fact make the confession voluntarily or non-voluntarily.

Thus, despite powerful dissents by Justice Ramaswamy and Justice Sahai, it is unfortunate that the majority chooses to substitute constitutional analysis with rhetoric on barbarity of terrorism. The saving grace of the majority judgment is the guidelines issued by the majority such as appearance of the accused before the Magistrate and forwarding the confessional statement recording. Apparently, the guidelines were aimed at ensuring the voluntariness of the confession and as a protection mechanism against self-incrimination.

The TADA was subsequently repealed but was re-incarnated as the Prevention of Terrorism Act, 2002. Section 32 of the POTA, which is same as Section 15 of the TADA, allowed for admissibility of confessions made to a police officer. Also, although eh confessions made to police officer is not admissible as per S.25 and 26 of the

[8] *Sahoo v. State of U.P*. AIR 1966 S.C. 42.
[9] 1978 AIR 1025, 1978 SCR (3) 608
[10] 384 U.S. 436 (1966)
[11] Supra note 8
[12] 1952 AIR 75, 1952 SCR 284

Evidence, Act but it can very well be used for contradicting the accused in the court of law. Further S.27 of the India Evidence Act provides for the use of the statement of the accused against him if he himself leads the police to the discovery of the murder weapon. In *PUCL v. Union of India*[13] it was argued that the since the accused must be produced before the Magistrate within forty-eight hours, there is no reason why the police are authorised to record confessions Moreover, just as in Kartar Singh[14], the Court makes no reference to the fact that the recording of confession by the police is an exceptional case, departing from the well-established rules under Evidence Act, Criminal Procedure Code and norms under Article 20(3). Thus, it is uncertain from the reasoning whether the Court does view Section 32 of TADA or S.27 of Evidence Act as a justified derogation from Article 20(3) in view of terrorism or if recording of confession by police is normally allowed even for regular offences under Article 20(3).

The case of *Selvi vs State*[15], was decided by a three-judge bench in 2010, and is the Supreme Court's most recent and by far most detailed engagement with Article 20(3). Selvi involved a batch of appeals challenging the constitutionality of three investigative techniques: narcoanalysis, the polygraph test, and the Brain Electrical Activation Profile. The nature of these processes is important. In narco-analysis, a drug is injected into the accused's bloodstream which sends her into a hypnotic state, lowering her inhibitions, and making her more likely to divulge information.

A polygraph test, on the other hand, measures various physiological responses (respiration, blood pressure, blood flow etc.) during questioning, and makes determinations about the truth or falsity of the accused's statements, based on the changes in its responses. Similarly, the Brain Electrical Activation Profile (BEAP) test measures responses within the brain, in order to ascertain whether the accused has recognised the stimuli to which she has been exposed.

Obviously, out of these three tests, only narco-analysis involves "testimony of the accused which is recorded as he communicates information through words, written or spoken. The important issue in the case, therefore, was whether recording physical stimuli amounted tocompelling a person to be a "witness against himself". It is in this backdrop that the Court embarked upon a detailed analysis of whether these investigative procedures fell afoul of Article 20(3). Upfront, it laid out the conceptual foundations of the Article:"Its underlying rationale broadly corresponds with two objectives – firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily… when a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict.

Therefore, the purpose of the `rule against involuntary confessions' is to ensure that the testimony considered during trial is reliable… the concerns about the `voluntariness' of statements allow a more comprehensive account of this right.[16] If involuntary statements were readily given weight age during trial, the investigators would have a strong incentive to compel such statements – often through methods involving coercion, threats, inducement, or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined. In this sense, `the right against self-incrimination' is a vital safeguard against torture and other `third-degree methods' that could be used to elicit information.[17] It serves as a check on police behaviour during investigation. The exclusion of compelled testimony is important, otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such `short-cuts' will compromise the diligence required for conducting meaningful investigations."[18]

The first of the Court's rationales straightforwardly corresponds to the crime-control model.
The second voluntariness seems, at first sight, to correspond to the due process model, but inanswering the question, why is voluntariness important, the Court complicates the issue, it mentions bodily integrity and dignity, but also notes that the "diligence" required for "Meaningful investigations" will be "compromised" if

[13] 2004 (1) CTC 241
[14] Supra note 5
[15] AIR 2010 SC 1974
[16] *Ram Singh v. State*, All. L.J. 660 1958. All. C.R. 462.
[17] *State Of U. P v. Deoman Upadhyaya* 1960 AIR 1125
[18] *K. v. Santya Bandhu*, 1909 11 Bom. L.R. 633.

the investigators can take short-cuts such as torture. It is unclear, therefore, that even within the "voluntariness" framework, whether the focus is on concerns of dignity and integrity, or of diligent investigations.

After examining a plethora of precedents on self-incrimination the world over, the Court then clarified some of the basic tenets of Article 20(3): "accused of an offence" covered a wideambit, that included people formally charged of offences, as well as people whose answers could expose them to criminal charges incriminatory statements included statements that the prosecution could directly rely upon to further its claims, as well as derivative statements. The course of the Court's analysis, however, was in examining whether "testimonial compulsion" was involved in the three impugned techniques. Precedents have drawn a distinction between testimony and physical evidence. In *Kathi Kalu*[19], this distinction had been rationalised on the ground of "volition", in the sense of unchangeability. Under this logic, narco-analysis would be borderline unconstitutional, whereas polygraph tests and brain-mapping would be definitively constitutional.

While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to the forcible extraction of testimonial responses. In conceptualising the `right to privacy' we must highlight the distinction between privacy in a physical sense and the privacy of one's mental processes, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person `to impart personal knowledge about a relevant fact'.

The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of `personal liberty' under Article 21. Hence, our understanding of the `right to privacy' should account for its intersection with Article 20(3). Furthermore, the `rule against involuntary confessions as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting.[20] A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties. Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the right against self-incrimination."[21]

The shift from Kathi Kalu[22] is crucial. In that case, in the sense of changeability played the crucial role, and we saw how it was conceptually connected with the crime-control model information that you had no power to change could not possibly be fabricated. In Selvi, although the Court embarked upon a discussion of the reliability of the investigative techniques, ultimately, the distinction it drew was between "physical privacy" and "mental privacy"; linking the word "witness" to testimony, and then understanding "testimony" as the impartation of information present within a person's mental sphere, the Court placed a certain conception of mental privacy understood as autonomous mental processes at the heart of the guarantee against self-incrimination.

While the result of Selvi was the unconstitutionality of three specific investigative procedures, its implications for criminal/constitutional jurisprudence are more significant. In Selvi, we have a strong recognition of the role of the due process model as the foundation of criminal procedure and associated constitutional guarantees. It therefore provides a template for future cases where the crime-control model and the due process model pull in opposite directions, and the Court is obliged to balance the two.[23]

[19] 1961 AIR 1808, 1962 SCR (3)10
[20] *R v Fulling* [1987] 2 All ER 65
[21] *v Paris* (1993) [1994] Crim LR 361, CA
[22] Ibid
[23] *Gautam Kundu V State of West Bengal* AIR 1947 PC 617

Before examining the judicial history of Article 20(3), it is important to note that the right against self-incrimination is part of a family of procedural safeguards accorded to persons accused of criminal offences. What is the underlying philosophy of these safeguards? In afamous article in 1964, titled Two Models of the Criminal Process, the American jurist Herbert Packer proposed two answers to this question. Under the "crime control model", the ultimate goal of the criminal process is the "repression of criminal conduct." "In order to achieve this high purpose," Packer wrote in a subsequent article, "the Crime Control Model requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime." Simplifying greatly, "the criminal process thus must put special weight on the quality of administrative fact-finding. It becomes important, then, to place as few restrictions as possible on the character of the administrative fact-finding processes and to limit restrictions to such as enhance reliability, excluding those designed for other purposes."

The crime-control model is to be contrasted with the "due process model". This holds that "the combination of stigma and loss of liberty that is embodied in the end result of the criminal process is the heaviest deprivation that government can inflict on the individual." Therefore, "because of its potency in subjecting the individual to the coercive power of the state, the criminal process must… be subjected to controls that prevent it from operating with maximal efficiency." The classic example is, of course, the presumption of innocence.

Conclusion

From the above line of cases, we notice a disturbing trend where the Courts adopt a dangerous and cavalier approach to confessional statements recorded by the police. They are unmindful of the exceptional circumstances under which this exception was sought to be created and constitutionally justified. Instead, there is an increasing trend to issue guidelines to be complied with. These too are not rigorously enforced. This way, the extraordinary standards which are judicially condoned for addressing 'terrorism' slowly seep into the ordinary criminal justice system, and are normalised.

The blame for this undoubtedly falls on the majority opinion in Kartar Singh. Not only does it depart from the progressive interpretation given to the rights of the accused in Nandini Satpathy, it does not adequately frame admissibility of confessions recorded by the police as a strict exception for terror-cases. Indeed, by making it wholly a question of legislative competence, the legal position is such that if Section 25 and 26 of the Evidence Act were replaced completely by a provision akin to Section 32 of POTA, the existing precedent would make it wholly constitutional. Fortunately, the POTA has been repealed and the legislationwhich replaces it the Unlawful Activities (Prevention) Act, 2008 contains no such provision. However, the constitutional guarantee has been undoubtedly diluted.[24]

[24] *Aghnoo Nagesia vs State Of Bihar* 1966 AIR 119