

## CHAPTER IV

### EXHIBITION OF BODY AND TAKING OF PHOTOGRAPHS

At times it may be necessary to require the accused to exhibit his body. For this purpose he may be asked to disrobe so that certain marks, scars, or wounds can be seen. It may also be necessary to require him to appear at an identification parade, to wear a particular apparel, to grow beard, to remove various disguising effects from his body like glasses, veil, or visor.

Under Section 51 of the Criminal Procedure Code the police can search an arrested person and, doubtless remove disguises; but it is not clear whether the police can under this power physically examine the accused to discover certain marks, etc.

With regard to identification parade at the *investigation stage* there is no provision in law in India which provides for identification parade to be held.<sup>1</sup> Thus it has been held that it is not necessary for the prosecution to hold identification parade at the instance of the accused.<sup>2</sup> Of course, if the prosecution turns down the request of the accused to hold an identification parade, there is danger of credibility of eye-witnesses being adversely affected at the trial

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1. "The identification proceedings being in the nature of *tests*, no provision is to be found in the Code or even in the Evidence Act. Proceedings are record of facts 'which establish the identity of anything or person' and which may be relevant under S. 9, Evidence Act. The facts are to be proved according to law, and in the absence of such proof the identification proceedings are valueless. The facts if proved can be used both for purposes of corroboration as well as for contradiction." *State v. Gulam Mohiuddin*, A. I. R. 1951 All. 475, 477.
  2. *In re Sangiah*, A. I. R. 1948 Mad. 113; *State v. Gulam Mohiuddin*, A. I. R. 1951 All. 475; *Awadh Singh v. State*, A. I. R. 1954 Pat. 483; *Lajja Ram v. State*, A. I. R. 1955 All. 671. But see, *Asharfi v. State*, A. I. R. 1961 All. 153, in which the court stated that under S. 540 of the Criminal Procedure Code a court had ample power to direct the holding of a regular test identification in order that the witnesses' veracity might be tested. However, under S. 540 the court may summon any person as a witness or examine any person in attendance before itself, but certainly it cannot direct the holding of a regular identification parade to test the veracity of a witness.

stage. Therefore, as a rule of prudence the prosecution should hold the parade if the accused so requests.<sup>3</sup>

There is apparently no case in which it was held that an identification parade could be held in the face of objection by the accused.<sup>4</sup> If the identification parade involves only mixing of the accused with other persons or standing or sitting without more (like requiring him to wear a particular apparel, to shave, to grow a beard or to do some positive act, etc.) it may valid as a concomitant of his arrest, and no statutory authorisation can be stated to be necessary. But at times it may be necessary for proper identification to require the accused to do acts mentioned in the parenthesis of the preceding sentence<sup>5</sup> for which there is no provision in the Criminal Procedure Code, and hence in the absence of law the accused may not be compelled to do those acts.

With particular reference to the *trial stage*, it may be mentioned that some of the cases which hold that a court cannot make an order for regular identification parade at the request of the accused also hold that when the accused challenges the credibility of prosecution witnesses the court may "in its discretion, satisfy itself by asking the accused to stand among other persons, present in Court, and then call upon the witnesses, who appear before the Court, to identify the accused and make a note of the result on the record."<sup>6</sup> Therefore the court in its discretion in the interest of justice may examine the prosecution witnesses and call upon them to identify the accused and for this purpose mix the accused with other persons. This may be

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3. See for instance, *Awadh v. State*, A. I. R. 1954 Pat. 483; and *Lajja Ram v. State*, A. I. R. 1955 All. 671.
  4. In *Peare Lal v. State*, A. I. R. 1961 Cal. 531, the accused had objected to the order of the magistrate requiring him to attend test identification on the contention that the order violated Art. 20(3) of the Constitution. However, no objection was raised on the ground of lack of statutory authority.
  5. Thus it was stated in *Asharfi v. State*, A. I. R. 1961 All. 153 at p. 162: "Of course the ideal test identification would be one held under conditions identical with those of the crime under enquiry, but such a notion bears no relation to the actualities of life for crime can never be adequately re-enacted. Nevertheless steps be taken to encourage conditions approaching those of the crime . . . It is possible for an honest witness to be unable to identify a suspect standing still but to be able to do so when he is walking or running. Consequently, if such a request is made it would perfectly be admissible for the magistrate to direct the person in the parade to walk or run. Similarly, if the witness wants the people in the parade to stand in a particular way, or wear their caps at a certain manner, this should be directed."
  6. *State v. Mohiuddin*, A. I. R. 1951 All. 475, 477. Also see *In re Sangiah*, A. I. R. 1948 Mad. 113.

done under Section 165<sup>7</sup> of the Indian Evidence Act or Section 540<sup>8</sup> of the Criminal Procedure Code. There is however no statutory provision which empowers the court to require an accused to wear particular clothes, to grow beard or to shave, or to do some other positive act.

The weight of the authority in America supports the view that requiring the accused to undergo the processes mentioned above does not infringe the privilege against self-incrimination. Thus it was observed by the American Supreme Court in *Holt v. U. S.*<sup>9</sup> that "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of his body as evidence when it may be material."<sup>10</sup> In this case the question arose whether a certain blouse found at the scene of the crime fitted the accused. It was held that it was proper to admit the testimony of witnesses that the defendant had put on the blouse after having been required to do so, and that it fitted him.<sup>11</sup> So also the Supreme Court of Indiana held that

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7. It reads: "The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer in reply to any such question: . . ."
  8. It reads: "Any Court may, at any stage of an inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."
  9. 218 U. S. 245 (1910).
  10. *Ibid.*, pp. 252-253. Note also the following American cases in which the same statement appears. *Blackford v. U. S.*, 247 F. 2d 745 (1958); *McFarland v. U. S.*, 150 F. 2d 593 (1945); *Swingle v. U. S.*, 151 F. 2d 512 (1946).
  11. In some American cases distinction has been made between requiring the accused to wear particular clothing before the trial and the same requirement at the trial stage, the former as not, and the latter as, violating the privilege. Such a distinction was made by the Oklahoma Court in *Ward v. State*, (1924) 27 Okla. Cr. R. 362, 228 P. 498 cited in *Annotation, Pre-Trial Requirement that Suspect or Accused Wear or Try on Particular Apparel as Violating Constitutional Rights*, 18 A. L. R. 2nd 796, 799 (1951). "The difference is this", the court stated, "that when such comparisons and experiments are made outside of court, the evidence thereto falls from the lips of witnesses other than

the privilege was not violated when the police officer had placed a handkerchief on the face of the accused so to be dressed the same way as the guilty person.<sup>12</sup>

Without violation of the privilege against self-incrimination, the accused in America, generally speaking, may be required to stand up,<sup>13</sup> walk or assume various positions;<sup>14</sup> to remove glasses, veil, visor or the like;<sup>15</sup> to roll up a sleeve to disclose tattoo marks,<sup>16</sup> etc.

In accord with the above view, it was stated by the Punjab High Court in *Pakhar Singh v. State*<sup>17</sup> that "the constitutional immunity is not violated by compelling a witness to stand up and show his face for the purpose of identification. He can be ordered to disclose a tell-tale scar for the purpose of identification."

One matter which may be particularly considered here is the legality of requiring the accused to be shaved or have his hair trimmed. For the reasons mentioned above, it may be stated that this practice does not violate the privilege. In *People v. Strauss*<sup>18</sup> the accused, while awaiting trial, changed his appearance by letting his hair go untrimmed and letting his beard grow so as to give him the wild appearance of manic psychosis and to make his identification difficult. The court held that the accused could be required to shave his beard<sup>9</sup> and

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the defendant...; while, on the other hand, if the defendant is required against his objection in open court, in the presence of the jury, to make such experiments and comparisons, no extraneous evidence is required, and the constitutional prohibition is thereby violated." See, however, the contrary decision in *State v. Oschoa*, (1926) 49 Nev. 194, 242 P. 582, cited in *Annotation*, 18 A. L. R. 2nd at 808.

12. *Ross v. State*, 204 Ind. 281, 182 N.E. 865 (1932).
13. Note, for instance, the following two American federal cases; *Panzich v. U.S.* 65 F. 2d 550 (1933) and *Swingle v. U. S.*, 151 F. 2d 512 (1946) which held that defendant had no maintainable privilege against being required to stand for identification purposes.
14. See cases cited in *Annotation, Requiring Defendant in Criminal Cases to Exhibit Self, or Perform Physical Acts, during Trial and in Presence of Jury*, 171 A. L. R. 1144, 1160, 1162 (1947). Also see Inbau, *Self-Incrimination*, pp. 27-31 (1950).
15. See cases cited in *Annotation, ibid.*, p. 1171.
16. *State v. Ah Chuey*, (1879) 14 Nev. 79, 33 Am. Rep. 530, cited in *Annotation, supra* note 14 at 1173.
17. A.I.R. 1958 Punj. 294, 298. See also *In re Palani Goundan*, A.I.R. 1957 Mad. 546 where the Madras High Court held that Art. 20(3) of the Constitution was not violated when the doctor to whom accused was taken by the police recorded his observations of the physical features and other symptoms exhibited by the accused to determine the question of his intoxication.
18. 22 NYS 2nd 155 (1940). quoted in *Annotation, supra* note 14 at 1161.

to have his hair trimmed. The court said:

“The trial court may direct where the defendant shall sit, in what direction he shall face and to stand up for the purpose of identification. Also, it may strip him of any artificial covering or disguise, and may compel him to submit to compulsory disrobing for the purpose of revealing bodily marks or characteristics which may aid in identification. It may hardly be gainsaid that a defendant may be compelled to appear cleanly washed, suitably dressed and with hair properly combed and brushed. The defendant’s argument that this being a natural, rather than an artificially applied, disguise, provides a controlling basis for distinction, is not well taken.”

In this context there is a point of some significance in India. It may be socially disgraceful for a person who is in the habit of keeping a beard to shave it off, and this matter acquires importance in India in view of the requirement of a particular religious sect that its followers keep beard. Whether the purpose is concealment or not, removing the beard or allowing one to grow will not amount to testimonial compulsion. Nevertheless, since the shaving of the beard may be socially disgraceful, it may be necessary, apart from applying the privilege, for the court to determine whether the accused is trying to disguise himself before he is asked to remove the beard. It has been stated by the Allahabad High Court in *Asharfi v. State*<sup>19</sup> that if the magistrate came to entertain good cause for the belief that the suspect had indulged in such trick, it was open to him to defer the identification of the clean-shaven suspect until he had grown a beard of the appropriate size, or to get the bearded suspect shaved. The court was of the view that no violation of Art. 20(3) of the Constitution occurred if the magistrate did so.<sup>20</sup>

### Photographs

Section 5 of the Identification of Prisoners Act, 1920, gives power to magistrates of the first class to ask any arrested person to allow his photo to be taken by the police. No case has occurred in India in which the section has been challenged as violating the privilege against self-incrimination. However, taking photographs of the accused by the police is not, it seems, an infringement of Art. 20(3), since testimonial compulsion is not involved in view of the fact that the photograph can be taken by the accused’s passive submission and that

19. A. I. R. 1961 All. 153.

20. *Ibid.*, p. 162<sup>c</sup>.

he is not required to exercise his volition. In an American case, *Shaffer v. U.S.*<sup>21</sup> the taking of photographs of the accused by the police while in custody was held not to violate the privilege against self-incrimination. The case also furnishes an excellent illustration of the importance of photography in criminal investigations. The accused was photographed at the time of arrest on a charge of murder. Upon his trial a witness used these photographs, rather than personal observation, to identify the accused, because during the period between his arrest and trial he had grown a beard. Holding the procedure valid the court observed as follows:

“It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen, while in prison, by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mask, in court, to enable witnesses to identify him as the party accused, as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for purposes of proof and identification. It is one of the usual means employed in the police service of the country and it would be a matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege?”

In India, due to religious inhibition for certain community not to shave the beard, it may frequently be necessary to take the photographs of the accused immediately on arrest.

It may be noted that in order to prevent misuse of photographs by the police, it is necessary to have the photographs destroyed after the acquittal of the accused. Section 7 of the Identification of the Prisoners Act provides for this. Further, a photograph must be properly verified or authenticated, and shown to be accurate and correct, before it may be admitted in evidence.

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21. (1904) 24 App. Dist. Colum.417, quoted in Inbau, *Self-Incrimination*, pp. 38-39 (1950).