CHAPTER VI

MEDICAL TESTS TO SECURE INCRIMINATING EVIDENC E FROM (WITHIN) THE BODY OF THE ACCUSED

Medical tests to secure evidence from within the body of the accused may take various forms, for example, examination to determine pregnancy, recent child birth, or presence of venereal disease, blood or urine test to determine intoxication, or fluoroscopic or x'ray examination to determine the presence of a suspected article inside the body, which, if found, may possibly be removed by enema. Some of the tests require co-operation of the accused. It may also be necessary to puncture the skin or perform such other acts which may be painful or harmful (if not done under competent medical supervision) to the body.

Examination of the sexual organs

It may be necessary to examine a mother accused of infanticide to determine whether she delivered a baby at a relevant time. Though such an examination may create personal embarrassment, the argument applies that the examination of the accused is not testimonial in nature.[1] The physical facts speak for themselves.

In the course of investigation in a rape case it may be necessary to examine the accused to determine whether he is suffering from the same venereal disease as the victim who may have contracted the disease as a result of the action.[2]

The American courts have generally held that examinations of this nature are violative of the privilege, unless consent of the

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1. "Personal embarrassment is not an element of self-incrimination. There is nothing remotely approaching the quality of 'testimonial' compulsion in either pregnancy-childbirth determinations or examinations for venereal diseases; and policy considerations are also totally lacking here. Neither type of examination, therefore, should be considered within the protective scope of the privilege." Inbau, *Self-Incrimination*, p. 20 (1950).
2. See the following Indian case, *Hanuman* v. *Emperor*, 34 Cr. L. J. 177, where medical examination of the accused was done, with his consent, to find out whether he was suffering from the same venereal disease as the girl whom he was alleged to have raped.

accused was obtained.[3] However, such examinations are not testimonial. They could not, in the very nature of things lead to a falsehood. In fact their object is to discover the truth. Therefore, the correct view is that evidence obtained from those examinations does not violate the privilege.[4] In support of the admissibility of such evidence, Prof. Inbau states that even assuming the unreliability and possible prejudicial effect of evidence of similar venereal infection in both victim and suspect — a factor which seems to make itself felt in some of the decisions—the courts are unjustified in denying admissibility on the ground of self-incrimination.[5]

Blood and urine test

Blood examination may be necessary to determine the question of paternity, e.g., in a suit for maintenance against his or her alleged putative father by a child[6] or in a rape case where the allegation is made that the accused is the putative father of a child born to the prosecutrix. It has also been established that intoxication of a person can be determined by chemical tests of body fluids like blood or urine.[7]

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3. See cases cited in *Annotation, Compulsory Examination for Venereal Disease,* 2 A.L.R. 1332 (1919); *Annotation, Requiring Submission to Physical Examination or Test as Violation of Constitutional Rights,* 164 A.L.R. 967, 970 (1946); Inbau, *Self-Incrimination,* p. 28. But see the case in the next note.
4. It may be noted that in *Richardson* v. *State,* 159 Tex. Crim. 595 : 266 S. W. 2nd 129, admission of doctor's testimony as to examination of defendant's tongue, in a rape case in which prosecutrix testified that she had bitten assailant's tongue was held not to violate self-incrimination. The case is cited in A. L. R. 2d Supp. Serv. (1960) at 2149.
5. Inbau, *Self-Incrimination,* p. 19.
6. See for instance, *Gounder* v. *Bhoopala,* A. I. R. 1959 Mad. 396; *Polavarapu* v. *Polavarapu,* A. I. R. 1951 Mad. 910. It may be noted, as pointed out in chapter V, blood test is of exclusionary value; it may in some cases be possible to exclude a person as the father of a particular child but it is not possible to conclusively establish the paternity of a child.
7. It is scientifically established that a person whose blood shows a concentration of less than 0.05% alcohol is not under the influence of alcohol. Likewise, where blood shows a concentration of 0.05% alcohol, or more it is deemed unsafe for that person to operate a motor vehicle. Between 0.05% and 0.15%, the capability varies with the individual person. Using the Uniform Vehicle Code prepared by the National Committee on Uniform Traffic Laws and Ordinance as a model, various states in the United States have enacted statutory provisions for the use of blood tests in cases of alleged driving while intoxicated. One typical example is provided by the following Arizona statute: "....in any criminal prosecution for a violation of this statute relating to driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the defendant's

Compulsory taking of urine or blood from the accused does not amount to testimonial compulsion. In *State of Bombay* v. *Balwant Ganpati*,[8] the Bombay High Court held that Art. 20 (3) was not violated, where Section 129A of the Bombay Prohibition Act allowed compulsion to be exercised for the medical examination of a person believed to have consumed an intoxicant and for extraction of his blood for chemical analysis.[9]

Coming to the American cases, in *United States* v. *Nesmith*,[10] a federal case, the defendant had been indicted on a charge of manslaughter arising out of a fatal automobile accident. He complied with a request or direction to furnish a urine specimen for purposes of analysis to determine whether he was intoxicated. The motion to reject the evidence of the chemical test of the urine at the trial on the ground of self-incrimination was disallowed by the court. The court observed:

> "The law is clear.....that the privilege against self-incrimination is limited to the giving of oral testimony. It does not extend to the use of the defendant's body as physical or real evidence. The conclusion is inevitable that it does not bar the use of secretions of the defendant's body and the introduction of their chemical analysis in evidence."[11]

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blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:

"One, if there was at that time 0.05% or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor.

"Two, if there was at that time in excess of 0.05% but less than 0.15% by weight of alcohol in the defendent's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

"Three, if there was at that time 0.15% or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor." Quoted in *State* v. *Childress*, 46 A. L. R. 2nd 1169, 1172.

8. 1961 Bom. L. Rep. 87.
9. One of the sections in the Act provided that where the concentration of alcohol in the blood of an accused person is shown to be not less than 0.05%, the burden of proving that the liquor consumed was a medical or toilet preparation, or was otherwise not prohibited by the Act, shall be upon the accused person, and the court shall, in the absence of such proof, presume the contrary.
10. 121 F. Supp. 758 (1954). For comment on this case see 4 J. of Pub. L. 202 (1955).
11. 121 F. Supp. at 762, *ibid.*

In this case, there was no evidence that the defendant was compelled (he was merely directed or requested) to give evidence, yet, it seems, the same conclusion would have followed under the self-incrimination clause even though the defendant had been compelled.[12]

The problem of the admissibility of involuntary blood test to determine intoxication of the accused arose before the United States Supreme Court in *Breithaupt* v. *Abram*.[13] Petitioner, while driving a pickup truck on the highways of New Mexico, was involved in a collision with a passenger car. Three occupants of the car were killed and petitioner was seriously injured. Petitioner was taken to a hospital and while he was lying unconscious in the emergency room the smell of liquor was detected on his breath. An attending physician, while petitioner was unconscious, withdrew a sample of about 20 cubic centimeters of blood by use of a hypodermic needle. Subsequent laboratory analysis showed this blood to contain about 0.17% alcohol. Since the self-incrimination clause of the Federal Constitution does not apply to the states but the due process clause of the Fourteenth Amendment does apply, the Supreme Court considered the admissibility of chemical analysis only under the due process clause. The majority of the court held that the evidence could be admitted consistently with due process. The court pointed out that the test here administered would not be considered offensive by even the most delicate. It stated:

> "The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licences. Many colleges require such tests before premitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorising tests of this nature or permit findings so obtained to be admitted in evidence. We therefore conclude .....that a blood test taken by a skilled technician is not such 'conduct that shocks the conscience',..... This is not to say that the indiscriminate taking of blood under different conditions or by those not competent to do so

12. For other cases on the subject, see *Annotation, Requiring Submission to Physical Examination or Test as Violation of Constitutional Rights*, 25 A. L. R. 2d 1407, 1409 (1952).
13. 352 U. S. 432 (1957).

may not amount to such 'brutality' as would come under the Rochin rule."[14]

Even though the self-incrimination rule was not considered by the Supreme Court, yet on the basis of the reasoning mentioned earlier[15] compulsory taking of blood does not amount to testimonial compulsion. There does not appear to be any direct federal case on the subject and the state courts decisions in America reveal a diversity of opinions. In some jurisdictions compulsory taking of blood for the purposes of chemical analysis is held to be not violative of the privilege against self-incrimination.[16] In some jurisdictions it is held to be violative of that privilege.[17] In some cases the courts have evaded the issue by interpreting the word "consent" or "voluntary" very broadly.[18] Thus taking of a specimen of blood from an unconscious person was held to be non-compulsory.[19] So also in another case the court found a valid consent even though the defendant maintained that he was so seriously injured at the time of the alleged consent that he did not understand his rights.[20]

Fluoroscopic examination of the body of the accused and extraction of foreign objects from within the body

Fluoroscopic examination of the body of the accused may be necessary to determine whether he is concealing something which is

14. *Ibid.*, pp. 436-438. For the *Rochin* case see *supra* chap. II, text accompanying notes 21 and 22, and *infra* p. 38.
15. See *supra*, p. 33. In support of the non-testimonial character of taking of blood for purposes of determining intoxication, Prof. Inbau observes: "It is quite clear that the privilege against self-incrimination has no pertinency whatsoever to situations involving voluntary submissions to scientific alcoholic intoxication tests or to the taking of specimens of body fluids or breath. It is equally clear that there should be no need for a court to inquire into the voluntariness of the submission if a proper distinction is recognised by that court between compulsory testimonial evidence and compulsory physical disclosures. All that need be done is to announce that the privilege is inapplicable even though the evidence may have been obtained under compulsion" Inbau, *Self-Incrimination*, p. 73.
16. For cases, see *Annotation, Requiring Submission to Physical Examination or Test as Violation of Constitutional Rights*, 164 A. L. R. 967, 975 (1946); 25 A. L. R. 2d 1407, 1409 (1952); A. L. R. 2nd Supplement Service (1960), pp. 2148-2153; *Annotation, Scientific Test for Intoxication or Presence of Alcohol in System*, 159 A. L. R. 209 (1945); Thornton, *Use of Chemical Tests of Body Fluids in Evidence*, 4 J. of Pub. Law, pp. 202-206 (1955).
17. For cases, see *ibid.*
18. For cases, see *ibid.*
19. *State* v. *Cram*, 164 A. L. R. 952 (1945).
20. *Abrego* v. *State*, 157 Tex. Cr. A. 264; 248 S. W. 2d 490 (1952).

suspected to be stolen or the keeping of which is banned by law. In an American case, *Ash* v. *State*,[21] the accused, who had been charged with receiving certain stolen rings swallowed some of the rings. He was taken to the hospital and the rings were located by fluoroscopic examination. Against his vigorous objections he was compelled to submit to an enema, and the stolen property was recovered. The court held that the extracting of evidence did not constitute a violation of the privilege against self-incrimination.

Blackford v. *United States*[22] decided in 1957 by a United States Court of Appeals, presents an interesting factual situation. Appellant Blackford, an American citizen, was entering the country from Mexico. While so entering he was taken to the customs building for a personal examination. On seeing numerous puncture marks in the veins of his arms, he was directed to disrobe entirely. The customs officer suspected him of carrying narcotics and they noticed a substantial quantity of foreign substance of a greasy nature outside appellant's rectum. With the help of a physician, an attempt was made to remove the narcotics, which were in a rubber condom, by means of instruments. Subsequently, after a number of enemas they were recovered. On these facts the question arose whether the extraction of the evidence violated the privilege against self-incrimination. The court held that it did not. In support of its holding the court pointed out:

> "The privilege protects one only against extracting from the person's own lips an admission or confession of guilt. The distinction between testimonial compulsion and real evidence taken from the person of the accused is one drawn by both the courts and the writers. The privilege has never had, nor was it intended to have, application to the removal of real evidence from the person of the accused. Therefore, the taking of evidence forcibly from appellant's body does not come within the purview of testimonial compulsion."[23]

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21. 139 Tex. Crim. 420, 141 S. W. 2d 341. Also see *Haynes* v. *State*, (1940) 140 Tex. Crim. 52, 143 S. W. 2d 617 which is to the same effect. The cases are cited in 25 A. L. R. 2nd, *supra* note 12 at 1410.
22. 247 F. 2d. 745 (1958).
23. *Ibid.*, p. 754. It may be noted that the admissibility of the evidence was also challenged under the unreasonable search and seizure and the due process clauses. These contentions of the appellant were also rejected, the court saying, "As to the actual physical examinations, they were conducted by qualified physicians, under sanitary conditions, with the use of medically approved procedures. This kind of examination is a routine one which countless persons have undergone. It is an uncomplicated and non-hazardous procedure. It normally is not painful to a healthy person." *Ibid.* at 752.

In *Rochin* v. *California*,[24] the police had some information that the petitioner was selling narcotics and they raided his house. They saw petitioner putting few capsules in his mouth. At the direction of the police a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" produced vomiting and the capsules were thus recovered. The petitioner objected to the admissibility of the capsules so obtained. The Supreme Court of the United States upheld the contention of the petitioner on the ground of violation of due process. The majority of the court did not consider the question under the privilege against self-incrimination, since that clause of the Federal Constitution was not applicable to the states. On the question of violation of due process the court pointed out that "the proceeding by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about cambatting crime too energetically. This is conduct that shocks the conscience."[25]

It may be noted that two of the justices, Black and Douglas, JJ., in separate concurring opinions relied upon the privilege against self-incrimination which in their opinion imposed restraints upon the states also. Black, J. stated: "I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science."[26] Douglas, J. stated: "Of course an accused can be compelled to be present at the trial, to stand, to sit, to turn this way or that, and to try on a cap or a coat... But I think that words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from his without his consent. They are inadmissible because of the command of the Fifth Amendment."[27]

In view of the considerations mentioned earlier in this chapter and the policy behind the privilege, it is felt that the view of the concurring judges, in so far as it rests on the rule of privilege against self-incrimination, is not sound.[28]

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24. 342 U. S. 165 (1952).
25. *Ibid.*, p. 172.
26. *Ibid.*, p. 175.
27. *Ibid.*, p. 179.
28. It has been observed in an Indian case, *In re Palani Goundan*, A. I. R. 1957 Mad. 547, 549, that if the accused swallows stolen property, he can be validly taken to a doctor to undergo the necessary medical process or treatment with a view to having the article extracted from his body.

Conclusion

The methods discussed in this chapter differ from those used for securing physical evidence from outside of the body of the accused or derived from the exhibition of the body, in that they may be painful, may even endanger life if carried out incompetently, are relatively more disgraceful, and in general constitute a more serious invasion of the person. Therefore, some of the evidence discussed here may have to be held inadmissible on these grounds. This aspect has been considered in chapter II.[29]

There are no statutory provisions in India which give power to the police or the court to require the accused to undergo the processes discussed here. Under section 117 of the Motor Vehicles Act driving a motor vehicle while under the influence of drinks or drugs is an offence. But the Act does not provide for medical examination of the accused to determine that question. To secure scientific evidence of the existence on the person of "the influence of drink or a drug to such an extent as to be incapable of exercising proper control over the vehicle"[30], it is necessary to have statutory provisions in India on the lines of provisions stated earlier in this chapter.[31]

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29. See *supra* pp. 17-19.
30. Section 117 of the Motor Vehicles Act, 1939.
31 See *supra* note 7.