CHAPTER VII

HANDWRITING AND VOICE IDENTIFICATION

Handwriting differs from fingerprints in the sense that handwriting can only be obtained by the active co-operation of the accused whereas a fingerprint can be taken even though the person is passive. Because of this distinction, some High Courts in India which upheld compulsory fingerprinting of the accused had rejected forcing the accused to write for the purpose of identification.[1] In some of the cases the issue was evaded by the courts by holding that mere direction by the court to the accused to give his handwriting under Section 73[2] of the Indian Evidence Act at the trial stage did not amount to compulsion.[3] There is no provision in the Criminal Procedure Code which permits the police to take specimens of the handwriting of an accused person in the course of investigation and when he is in custody.[4]

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1. See *Farid Ahmed* v. *State*, A. I. R. 1960 Cal. 32 (handwriting violating the privilege); *Mahal Chand* v. *State*, A. I. R. 1961 Cal. 123 (thumb impression not violating the privilege); *Badrilal* v. *State*, A. I. R. 1960 Raj. 184. See also *State* v. *Ram Kumar*, A. I. R. 1957 M. P. 73 and *State* v. *Sankaran*, A. I. R. 1960 Ker. 392, where obtaining of handwriting from the accused was held to violate Art. 20 (3) of the Constitution and the courts did not maintain any distinction between fingerprints (the Kerala case on fingerprints to be noted is *Damodaran* v. *State*, A. I. R. 1960 Ker. 29) and handwriting.
2. See *infra* p. 56, appendix, for the section.
3. See *supra* cases cited in chapter III, note 7.
4. *Tarini Kumar* v. *State*, A. I. R. 1960 Cal. 318. Could the magistrate under S. 73 of the Indian Evidence Act ask the accused to allow his handwriting to be taken for the purpose of comparison by the police officer during investigation of the crime ? The answer of the Patna High Court was "yes" in *Gulzar Khan* v. *State*, A. I. R. 1962 Pat. 255. But note the following contrary opinions. Mitter, J. in *Farid Ahmed* v. *State*, A. I. R. 1960 Cal. 32 stated that under Section 73 of the Evidence Act, a magistrate could not make an order allowing the investigating officer to take specimen handwriting of the accused. Williams, J. also observed in *Kishori Kishore Misra* v. *Emperor*, 39 C. W. N. 986, 989: "I think that where the section says that the Court may direct any person present in Court to write, it must mean that where the accused is in Court, the Judge presiding in that Court

The Supreme Court in its recent judgment in *State of Bombay* v. *Kathi Kalu Oghad*[5] held that compulsory obtaining of handwriting from the accused for comparison, as distinguished from obtaining his statement with regard to personal knowledge of the facts in issue, did not violate Art. 20 (3) of the Constitution and so the High Court decisions deciding contrary are no longer good law.

It is true that handwriting requires active co-operation of the writer. It may be argued against compelling the accused to give his handwriting that writing is not a purely mechanical act, because it requires the application of intelligence and attention and in a sense the accused is thus compelled to create evidence against himself. The answer to this reasoning is that the purpose of obtaining handwriting is not to determine the sense of the matter written but to secure a physical comparison between the written specimen and other handwriting. This is the same purpose as in fingerprinting. In support of the admissibility of handwriting obtained by compelling the accused to write, Prof. Inbau states:

> "A specimen of handwriting, obtained for purpose of comparison with a questioned document, can logically be considered as nothing more than mere physical evidence. It differs very little in principle, from a fingerprint impression secured by compulsion for purposes of comparison with a fingerprint found at the scene of a crime. The purpose for which it is desired is not to make a study of the handwriting to determine the mental attitude or character of the accused as bearing upon his guilt or innocence—as would be the case, let us say, if a pseudo-scientific graphological (character reading) examination were made—but merely to observe whatever physical, habit-formed peculiarities may be present in a specimen which will serve as *identification* data..... For these reasons a specimen of handwriting should not be confused

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may there and then ask him to write something for the purpose of enabling the Court to compare his writing with some other writing and that the procedure of delegating to another Magistrate, not sitting as a Court, to take such a writing from the accused when the accused is not in Court nor standing his trial in Court, does not come within the provisions of the section."

The decision of the Patna High Court mentioned earlier seems to be wrong in view of the clear language of Section 73 that the "Court may direct any person *present* in Court to write any words or figures for the purpose of enabling *the Court to* compare the words or figures so written with any words or figures alleged to have been written by such person." Emphasis supplied.

5. A. I. R. 1961 S. C. 1808.

with *incriminating documents as such*—that is, any inculpatory writings in possession of the accused, the production of which are sought by process against him as a witness. In the latter case the accused 'would be at any time liable to make oath to the authenticity or origin of the articles produced', and consequently compelled to 'testify'. In the other situation, however, only the physical characteristics of the handwriting are of any significance, and it would be immaterial that the production of a specimen of handwriting requires any 'creation' or 'positive act' on the part of the accused.....

"Moreover, policy consideration certainly support the view that compulsory handwriting specimens are outside the coverage of the privilege. Consider, for instance, the investigation or prosecution of a kidnapping case involving ransom notes. In such cases the most dependable evidence obtainable is often presented by an expert comparison of the handwriting in the ransom note with a specimen of the suspect's writing which consists of the dictated contents of the ransom note itself. The intelligent and conscientious criminal investigator realises the value of such evidence, not only in his search for the guilty individual but also in his efforts to quickly absolve innocent suspects. Affording him this opportunity is not going to encourage a 'lazy and pernicious attitude.' It will have precisely the opposite effect."[6]

There is no danger of an innocent person being convicted by requiring him to give his handwriting, since it will be different from all others even though he may be forced to write in different ways. In fact at times it may be of advantage to the accused to give his handwriting to prove his innocence. In the undernoted article[7] by Hilton is mentioned a case where an individual was identified by four eye witnesses as the person who committed the armed robbery, but ultimately he was exculpated through the identification of his handwriting. The article concludes: "In any crime in which handwriting is an element, scientific identifica-

6. Inbau, *Self-Incrimination*, pp. 46-48 (1950). Footnotes omitted. Emphasis as in original.
7. Hilton *Handwriting Identifications vs. Eye Witness Identification*, 45 J. of Cr. L., Criminology & Police Sc. 207 (1954-55). Also see Conway, *The Identification of Handwriting*, *ibid.*, p. 605; Purtell, *The Identification of Checkwriters*, *ibid.*, p. 229; Hilton, *Can the Forger Be Identified From His Handwriting?* 43 J. of Cr. L., Criminology & Police Sc. 547 (1952-53).

tion of the writing is the most accurate means of identification. Eye witnesses to a crime are from time to time mistaken."[8] In view of the earlier mentioned observations of Prof. Inbau and of the fact that there is no danger of an innocent person being punished, it is suggested that enforced yielding of the handwriting by the accused does not infringe the privilege against self-incrimination.

It may be noted that identification of handwriting is a specialised job in which expert opinion greatly counts. Lay witnesses are usually not qualified to testify to it. In an experiment involving identification of their own handwriting by the subjects, it was found that "59.8% of 165 subjects made errors in identifying their own writing." Hence it was asked, "how well can the lay witness succeed in identifying writing which is *not* his own? .....The results of the present experiment well complement Inbau's conclusion that 'lay witness identifications based upon mental comparisons should not be considered as acceptable legal evidence."[9]

Voice identification

At times it may be necessary to require the accused to speak for purposes of comparing his voice with the voice of the offender. Such a necessity may arise in two situations. Firstly, the crime may have been committed in the dark or the offender may have, been so disguised that there may not be a possibility of recognising him except by comparison with the voice heard at the time of the commission of the crime. Secondly, in some instances the voice of the accused may be compared with the recorded voice of the criminal obtained by tapping a telephone or recording his voice in some other way.

So far as the applicability of the privilege to voice comparison is concerned, a distinction has been made in the United States between asking the accused to say the same words as were heard by witnesses at the time of the commission of the crime and asking him to utter some other words for the purpose of identifying his voice. According to the courts that maintain this distinction, the former is precluded by the constitutional protection against self-incrimination. For instance this distinction was maintained by the South Carolina Supreme Court in *State* v. *Taylor*,[10] where the accused was compelled

8. Hilton, *ibid.*, 45 J. of Cr. L., Criminology & Police Sc. 207, 212.
9. Britt and Mensh, *The Identification Of One's Own Handwriting*, 34 J. of Cr. L., Criminology and Police Sc. 50, 60 (1943-44).
10. 16 A. L. R. 2nd 1317 (1951). Also see *Annotation, Requiring Suspect or Defendant in Criminal Case to Demonstrate Voice for Purposes of Identification*, 16 A. L. R. 2nd 1322 (1951).

to repeat the same words as were heard by the prosecutrix in a rape case. The court held the evidence to be inadmissible on the ground of violation of the privilege against self-incrimination. It pointed out:

> "Appellant was required to repeat certain words which the prosecutrix says were used by the person who assaulted her. The effect of this was to require him to partially re-enact the scene. The conclusion of the prosecutrix as to appellant's identity was based in part at least on the enforced conduct of the defendant. We conclude that the testimony as to identity based on the enforced repetition by appellant of words alleged to have been used at the scene of the crime was inadmissible and highly prejudicial."[11]

The court seems to approve mere voice comparison as not violating the privilege.

This distinction has not found favour with some other courts and it has been said that both types of voice evidence should be admissible.[12] The argument in favour of this conclusion is that in either event the evidence is of a physical nature and not testimonial compulsion of the type which the constitutional privilege is designed to protect, and that so long as the accused is not required to discuss the crime or his own possible incrimination the privilege against self-incrimination is not attracted.[13]

It is suggested here that if compulsory voice exhibition is to be disallowed, it should be done upon some grounds other than the privilege against self-incrimination such as (a) undue prejudice; (b) unreliability of voice identification.[14]

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11. *Ibid.*, p. 1322.

12. Note, for instance, *Aaron* v. *State*, (Ala) 11 So. 2d 360, where it was held that the testimony in a rape case as to the identity of the defendant based on his compelled repetition of words used at the scene of crime did not violate defendant's self-incrimination privilege. The case is cited in A. L. R. 2d Supp. Serv. (1962) at 396. Also *Cf. Johnson* v. *Commonwealth*, 115 Pa. 369 (1887), cited in Annotation, *supra* note 10 at 1324.

13. See Inbau, *Self-Incrimination*, p. 51.

14. See comment on *Taylor's* case in 24 Indiana L. J. 587. Also see *Nga Aung* v. *Emperor*, A. I. R. 1937 Rang. 407.

There is no statutory provision in India which expressly gives power to a police officer or a court to require an accused person to speak. It is not clear whether the general power of investigation given to the police under Sections 155-157 of the Criminal Procedure Code implies the power to require the accused to speak words. In none of the cases, in which the voice of the accused was obtained for comparison with the voice of the criminal offender, was the question raised.[15]

15. See for example, *Arshed* v. *Emperor*, 30 C. W. N. 166; *Mahni* v. *R.*, A. I. R 1925 Lahore 137; *Laijam* v. *Emperor*, A. I. R. 1925 All. 405.