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Self-incrimination - by Trying on Hat - Allen v. State

Casenotes

SELF-INCRIMINATION — BY TRYING ON HAT

Allen v. State[1]

In this case, defendant-appellant was convicted of assault with intent to rape and was sentenced to death. At the trial a state's witness has testified that a hat found near the scene of the crime belonged to Allen. Accused took the stand in his own behalf and denied ownership, whereupon the prosecutor gave the hat to accused and asked him to try it on. This was allowed by the trial court over counsel's objection, which was the basis for the appeal.[2] The Court of Appeals reversed, with a new trial.

In any discussion of the privilege of the rule it is necessary to refer briefly to its common law history.[3] Though the federal and all but two of the constitutions have embodied this privilege,[4] they do not change the common law tenor or scope of it. This is evidenced by the minor variations and the brevity of the clauses.[5] The authors of the constitution were merely recognizing a rule that already existed, and not creating it anew.[6]

The ecclesiastical courts, when examining causes over which they had jurisdiction, and especially when interrogating heretics, administered to the accused the "oath ex officio". The judges could then put the accused to answer any questions whether relevant to the inquiry or not, and a refusal to answer was tantamount to an admission of guilt. The first popular antagonism toward these courts was spurred because of the manner of calling any accused without a formal presentment. This feeling came to embrace the oath ex officio as an odious procedure also. Later when the Court of Star Chamber and the Court of High Commis-

[1] 183 Md. 603, 39 A. 2d 820, 171 A. L. R. 1138 (1944).

[2] For a criticism of this case from the waiver aspect see Sherbow, T., *Self-Incrimination and the Waiver Thereof*, 10 Md. L. Rev. 158 (1949).

[3] For a thorough discussion of the history of the privilege see VIII WIGMORE ON EVIDENCE (3rd Ed., 1940), Sec. 2250, p. 276.

[4] New Jersey and Iowa are the two exceptions and their courts have held the rule is a part of the common law of those states. State v. Zdanowicz, 69 N. J. Law 619, 55 A. 743 (1903); State v. Height, 117 Ia. 650, 91 N. W. 935 (1902).

[5] U. S. Const. Amend. V, cl. 3: "No person . . . shall be compelled in any criminal case to be a witness against himself." Md. Decl. of Rights, Art. 22: "No man ought to be compelled to give evidence against himself in a criminal case."

[6] WIGMORE, *op. cit., supra*, n. 3, Sec. 2252, p. 320.

sion for Ecclesiastical Causes had assumed most of the functions of the ecclesiastical courts, the feeling against the oath reached a pitch. The common law courts were vying with these courts for authority and helped bring about their downfall. In 1641 when the Court of Star Chamber and The Court of High Commission were abolished the oath ex officio went with them. The antagonism against the oath then spread to its use in the common law courts. The reaction enlarged the rule so that it came to be doubted that any person should be bound to incriminate himself on any charge before any court. Many cases at this time quote the maxim *"nemo tenetur prodere seipsum"*.[7]

It is seen then that the purpose of the rule was to prohibit the court from extracting an admission of guilt from the lips of the accused.

In the Allen case the court lays down a test to be used in these borderline cases: ". . . Who furnished or produced the evidence? If the accused, especially if in open court and on the witness stand, is made to do so by performing an act or experimentation which might aid in connecting him with the crime and establishing his guilt, it is inadmissible".[8]

It is submitted that the rule is too broad to be practicable as a working test. The rule as propounded would seriously hamper the workings of the prosecutors if any fact which *might* aid in connecting accused with the crime were excluded.

In this respect it is valuable to consider what other jurisdictions have held in similar cases. It is not a violation of the privilege to compel the accused to walk around so that he may be identified by a witness[9] or to stand up[10] or to be pointed out from the witness stand.[11] And it has been held that accused can be compelled to exhibit a tattooed arm[12] or to put on a shirt found near the scene of the crime.[13] So accused can be compelled within the limits required by decency to exhibit his body to the jury,[14] and

[7] For an interesting theory as to the origin of this maxim see Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1 (1930).

[8] *Supra*, n. 1, 611.

[9] State v. Clark, 156 Wash. 543, 287 Pac. 18 (1930).

[10] People v. Gardner, 144 N. Y. 119, 38 N. E. 1003 (1894); People v. Curran, 286 Ill. 302, 121 N. E. 637 (1919); Benson v. State, 69 S. W. 165 (1902).

[11] State v. Johnson, 67 N. C. 55 (1872).

[12] State v. Au Chuey, 14 Nev. 79 (1879).

[13] State v. Oschoa, 49 Nev. 194, 242 Pac. 582 (1926), commented on in 24 Mich. L. Rev. 617 (1926).

[14] State v. Nordstrom, 7 Wash. 506, 35 P. 382 (1893), aff'd. 164 U. S. 705 (1896).

to speak in court so he might be identified by a witness who had encountered him in the dark.[15] "Out of court as well as in court, his body may be examined with or without his consent".[16]

An accused may be compelled to take his feet from under a chair and put them into full view so a witness can judge their size,[17] or to allow a witness to examine his face to see if he has pock marks as did the culprit.[18] The court may direct accused to remove his glasses[19] or a visor[20] or a veil,[21] so he might be better identified by a witness. There is much dicta to the effect that if accused wore a mask or veil the court could certainly require him to remove it.[22] And the court may require accused to be shaved or have hair trimmed. "It may hardly be gainsaid that a defendant may be compelled to appear cleanly washed, suitably dressed and with hair properly combed and brushed".[23]

In a very recent Supreme Court case[24] defendants' home was entered and he was assaulted by officers who attempted to remove some pellets of morphine from his mouth. The officers took defendant to a hospital and directed a doctor to "pump" his stomach. Among the vomited matter was found the two pellets of morphine. Over defendant's objection, the morphine was allowed as evidence and the defendant was convicted of possession of morphine in violation of the California Health and Safety Code. This judgment was affirmed by the District Court of Appeal, and the Supreme Court of California denied without opinion defendant's petition for a hearing. On certiorari to the Supreme Court, it reversed, all justices concurring. Mr. Justice Frankfurter, speaking for the majority said the fifth Amendment did not apply to trials in a state court,

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[15] Johnson v. Commonwealth, 115 Pa. St. 369, 9 A. 78 (1887) (dictum).

[16] MacFarland v. U. S., 150 F. 2d 593, 594 (C. A., D. C., 1945), *cert. den.* 326 U. S. 788 (1946).

[17] State v. Prudhomme, 25 La. Ann. 522 (1873).

[18] State v. Butler, 157 La. 1087, 103 So. 332 (1925) — though accused's counsel did not claim privilege against self-incrimination the court sustained the district attorney in asking questions "evidently for purpose of forcing an identification of the accused".

[19] Rutherford v. State, 135 Tex. Crim. 530, 121 S. W. 2d 342 (1938).

[20] People v. Clark, 18 Cal. 2d 449, 116 P. 2d 56 (1941).

[21] People v. Robinson, 2 Park Crim. (N. Y.) 235 (1855) — accused did not object to lifting her veil and no error was contended for. The appellate court did not comment on the matter.

[22] People v. Gardner, *supra*, n. 10; State v. Tucker, 190 N. C. 708, 130 S. E. 720 (1925); State v. Graham, 74 N. C. 646 (1876); and see People v. Straus, 174 Misc. 881, 22 N. Y. S. 2d 155 (1940) — that accused may be compelled to remove any artificial covering or disguise.

[23] People v. Straus, *supra*, n. 22, 156.

[24] Rochin v. People of California, 72 S. Ct. 205 (1952), ... U. S. ....

but the proceedings had violated the Due Process Clause. "They are methods too close to the rack and the screw to permit of constitutional differentiation."[25] Mr. Justice Douglas in a concurring opinion said the standard established for due process included the Fifth Amendment and should be applied to state as well as federal trials. The Supreme Court should prohibit a state court from compelling a witness to testify against himself. "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 him without his consent."[26]

The cases which involve repeating words heard at the scene of crime and standing up for purposes of identification doubtless are based on the theory that since the state has a right to the presence of accused in court and since the accused must stand and answer the indictment in proper person, no rights of accused are violated by compelling him to perform the same acts at some subsequent phase of the trial. However, this view should be followed even if accused is required to perform some physical act such as rolling up a sleeve,[27] (or putting on a hat.) "No fears or hopes of the prisoner could produce the resemblance of his track to that found in the cornfield. This resemblance was a fact calculated to aid the jury and fit for their consideration."[28]

Though there are a substantial number of cases contra,[29] they represent the minority view. "The tendency of the more modern cases is to restrict the . . . privilege . . . to confessions and admissions proceeding from the accused."[30]

The Proposed Model Code of Evidence takes the view that "An accused in a criminal action has no privilege to refuse to submit his body to examination by the judge or

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[25] *Ibid*, 210.

[26] *Ibid*, 213, conc. op. (Emphasis supplied.)

[27] WIGMORE, *op. cit., supra*, n. 3, Sec. 2265, p. 375.

[28] State v. Graham, *supra*, n. 22, 647.

[29] Violative of privilege to (a) put on hat, Allen v. State, *supra*, n. 1; (b) stand in court to enable jury to ascertain accused's status as a free Negro, State v. Jacobs, 5 Jones (N. C.) 259 (1858) (since "distinguished" by several cases); (c) show an amputated leg, Blackwell v. State, 67 Ga. 76 (1881); (d) put foot in a pan of mud placed before the jury and compare the track with measurements of one found at scene of crime, Stokes v. State, 5 Baxt. (Tenn.) 619 (1875), Elder v. State, 143 Ga. 363, 85 S. E. 97 (1915); (e) put on coat found near scene of crime, Ward v. State, 27 Okl. Cr. 362, 228 Pac. 498 (1924).

[30] Cases collected 64 A. L. R. 1097, also 171 A. L. R. 1144.

trier of fact or to refuse to do any act in their presence other than to testify."[31] Bearing in mind the scope and purpose of the privilege at common law, the stand taken by the Model Code is in line. The purpose of the rule was to forbid the extraction of incriminatory evidence from the *lips* of the accused by testimonial compulsion. The broadening of the scope of the rule so as to include all the other facets of nontestimonial compulsion is, says Dean Wigmore, an example of "Justice tampered with mercy."

There have been forceful arguments for the abolition of the rule on the ground that it has outlived its usefulness.[32] Wigmore says its retention is justified because *"any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.* The inclination develops . . . to be satisfied with an incomplete investigation of the other sources."[33]

The report of an Indian police officer illustrates the truth of that statement. "It is far pleasanter to sit comfortably in the shade, rubbing red pepper into a poor devil's eyes, than to go about in the sun hunting up evidence."[34]

However the privilege should not be given more than its due significance. It should be accepted rationally, not worshipped blindly as a fetish. We should not merely emphasize its benefits, but concede its shortcomings and guard against its abuses. The common judicial practice of ". . . treating with warm and fostering respect every appeal to this privilege, and of amiably feigning each guilty invocator to be an unsullied victim hounded by the persecutions of a tyrant, is a mark of traditional sentimentality."[35] The evil inherent in the rule should be regretted, not enlarged by judicial approval.

The majority of the foregoing cases are those in which the privilege was claimed because accused was compelled to perform some act in the courtroom. Often there is an appeal to the privilege by an accused who has been compelled by the arresting officers to perform some act which would aid in his identification as the culprit.[36]

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[31] MODEL CODE OF EVIDENCE OF A. L. I., Rule 201(2).

[32] BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, 7 Bentham's Works (Bowring's Ed.), p. 452.

[33] WIGMORE, *op. cit., supra*, n. 3, Sec. 2251, p. 309.

[34] I STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883), 442, n. 1.

[35] WIGMORE, *op. cit., supra*, n. 3, Sec. 2251, p. 317.

[36] For a justification of this view see 5 Temple L. Q. 368 (1931).

The marked weight of authority is that compelling accused to try on a garment and appear before a witness (in jail) wearing the apparel so he could ascertain whether accused is the same person he had seen wearing such garments, is not a violation of the privilege.[37]

In one of the leading cases[38] a witness had testified that defendant had tried on a blouse found near the scene of the crime (and it fitted him). Defendant claimed his privilege against self incrimination had been violated. Holmes, J., speaking for the court said, "Another objection is based on an extravagant extension of the Fifth Amendment . . . But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."[39] Holmes' and Wigmore's views are in substantial agreement and they have met with wide approval. The theory of the Holt case is that the privilege does not extend to physical facts such as size of accused but only to testimonial utterances.

The Oklahoma court[40] distinguishes the two situations thus, ". . . when such comparisons and experiments are made outside of court, the evidence thereto falls from the lips of a witness other than the defendant. The production of such evidence, therefore, and the testimony thereto, is not that of defendant but of other witnesses; . . ."[41]

In two cases since the Allen case the Court of Appeals has also drawn the distinction. Both cases involved blood grouping tests. In the first of these[42] blood was taken from the coat of the accused and examined by a toxicologist who later testified in court as to what type it was. Held: this does not violate privilege because accused did not testify.

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[37] 18 A. L. R. 2d 796 — cases collected.

[38] Holt v. U. S., 218 U. S. 245 (1910).

[39] *Ibid*, 252-3. Case *contra:* Boyers v. State, 198 Ga. 838, 33 S. E. 2d 251 (1945).

[40] Ward v. State, *supra*, n. 29, 500.

[41] Accord: Arresting officers may require defendant to put on a cap for identification purposes, Crenshaw v. State, 225 Ala. 346, 142 So. 669 (1932); officers put hat on head of accused in jail, Barrett v. State, 190 Tenn. 366, 229 S. W. 2d 516, 18 A. L. R. 2d 789 (1950); compelling accused to make footprints and comparing them with prints found near the scene of the crime, State v. Barela, 23 N. M. 395, 168 P. 545 (1922); Pitts v. State, 60 Tex. Cr. Rep. 524, 132 S. W. 801 (1910); Hahn v. State, 73 Tex. Cr. Rep. 409, 165 S. W. 218 (1914); sheriff took shoes of accused by force, Younger v. State, 80 Neb. 201, 114 N. W. 170 (1907). See 28 *Journal of Criminal Law and Criminology*, 261 (1937-8), where Prof. Inbau says courts could rest their opinion on the theory that everything of evidential value to person of accused may be seized.

[42] Shanks v. State, 185 Md. 437, 45 A. 2d 85 (1945).

"The blood was taken from his coat, and the evidence as to it was produced by another witness."[43]

The later case[44] involved the same facts. The court held the evidence about the blood was admissible. Commenting on the Allen case, they said it draws a line of "demarcation between cases where accused was compelled to allow a physical exhibition while on the witness stand, and those where the physical evidence, obtained from him, was testified to by other witnesses."[45]

[43] *Ibid*, 444.
[44] Davis v. State, 189 Md. 640, 57 A. 2d 289 (1948).
[45] *Ibid*, 645.