

MARIA BERMUDEZ, COMPLAINANT, VS. LEODEGARIO D. CASTILLO, RESPONDENT.*Per. Rec. No. 714-A. July 26, 1937*Read online (full-text search, related cases, audio case brief): <https://batas.org/library/e844a61b1cc2/>**DIAZ, J.:**

In the course of the investigation which was being conducted by the office of the Solicitor-General against the respondent, in connection with this administrative case, said respondent filed, in addition to other evidence in support of his defense, the six letters which, for purposes of identification, were marked as Exhibits 32, 33, 34, 35, 36 and 37. He then contended, as he now continues to contend, that said six letters are the complainant's, but the latter denied it while she was testifying as a witness in rebuttal. She admitted, however, that the letters marked as Exhibits 38, 39 and 40 were in her own handwriting.

As the respondent believed that the three letters admitted by the complainant to be hers were insufficient for purposes of comparison with those questioned in this case and as he was determined to show that said Exhibits 32, 33, 34, 35, 36 and 37, as well as Exhibits 38, 39 and 40 were the complainant's, he required her to copy them in her own handwriting in the presence of the investigator. The complainant, upon advice of her attorney, refused to submit to the trial to which it was desired to subject her, invoking her right not to incriminate herself and alleging that Exhibits 38, 39 and 40 and the other letters already in the respondent's possession, were more than sufficient for what he proposed to do. The investigator, upholding the complainant, did not compel her to submit to the trial required, thereby denying the respondent's petition. As the respondent did not agree to this decision of the investigator, he instituted these proceedings praying that the investigator and the Solicitor-General in whose representation he acted, be ordered to require and compel the complainant to furnish new specimens of her handwriting by copying said Exhibits 32 to 37 for that purpose.

The question raised before this court is not new. In the case of Beltran vs. Samson and Jose ([1929], 53 Phil., 570), a similar question was raised before this court. The respondents therein desired to compel the petitioner to write by hand what was then dictated to him. The petitioner, invoking the constitutional provision contained in section 3, paragraph 3, of the Jones Law which reads: " * * * nor shall be compelled in any criminal case to be a witness against himself, refused to write and instituted prohibition proceedings against the therein respondents. This court granted the petition and ordered the respondents to desist and abstain absolutely from compelling the petitioner to take down dictation by hand for the purpose of comparing his handwriting. The reasons then adduced therein can and must be adduced in this case to decide the same question ; and all the more so because Article III, section 1, No. 18, of the Constitution of the Philippines is worded in such a way that the protection referred to therein extends to all cases, be they criminal, civil or administrative. The Constitution provides: "No person shall be compelled to be a witness against himself." It should be noted that before it was attempted to require the complainant to copy the six documents above-stated, she had sworn to tell the truth before the investigator authorized to receive statements under oath, and under said oath she asserted that the documents in question had not been written by her. Were she compelled to write and were it proven by means of what she might write later that said documents had really been written by her, it would be impossible for her to evade prosecution for perjury, inasmuch as it would be warranted by article 183 of the Revised Penal Code, which reads:

"The penalty of *arresto mayor* in its maximum period to *prision correccional* in its minimum period shall be imposed upon any person who, knowingly making untruthful statements and not being included in the provisions of the next preceding articles, shall testify under oath, or make an affidavit, upon any material matter before a competent person authorized to administer an oath in cases in which the law so requires.

"Any person who, in case of a solemn affirmation made in lieu of an oath, shall commit any of the falsehoods mentioned in this and the three preceding articles of this section, shall suffer the respective penalties provided therein."

The respondent invokes in his support the doctrine laid down in *Ex Parte Crow* (14 Pac. [2d series], 918), to the effect that " * * * a witness may not arbitrarily refuse to answer a question on the ground that his answer might incriminate him when the court can determine as a matter of law that 'no direct answer which the witness may make can tend to criminate him.' " It must be taken into account that the question asked the petitioner in said case, as stated by the prosecuting attorney, was only a preliminary question, as it was simply attempted to learn from her who was with her on a certain occasion, and on what date, to the best of her recollection, had she visited Dr. Grosse. She refused to answer said questions alleging that her answers might incriminate her. The court upheld her saying:

"We are therefore of the opinion that the trial court erred when it determined as a matter of law that petitioner's answers to the questions propounded could have no tendency to incriminate her. They clearly might have such tendency, and it was petitioner's right and privilege to decline to answer any of the above-mentioned questions upon the ground stated. We fully realize the difficulty encountered in the prosecution of cases under section 274 of the Penal Code when those present and capable of establishing the facts are unwilling to testify because of fear of subjecting themselves to prosecution. But the constitutional and statutory guaranties accorded to petitioner cannot be swept aside merely because they may result in making difficult, or even impossible, the conviction of the accused."

The respondent likewise invokes in his support the doctrine laid down in *in re Mackenzie* (100 Vt. Rep., 325). This court is of the opinion that what had been said in the above-cited case is not applicable to the case under consideration. The petitioner Mackenzie, upon being required after he had pleaded guilty of intoxication to disclose the person or persons who had furnished him the liquor, said that they were strangers to him, whom he met late in the evening in Barre. The court, considering his alleged disclosure unsatisfactory, ordered him committed to jail until he should tell the truth or until further orders. He instituted habeas corpus proceedings in his favor alleging in his pleading that as he had already made a truthful disclosure, the result of his commitment would be to compel him to deny his former statements and make others which would make him guilty of perjury. The court, deciding the question, said:

"The privilege against self-crimination is a personal one. * * * But the privilege is an option of refusal, not a prohibition of inquiry. Hence, when an ordinary witness is on the stand, and a self-criminating act relevant to the issue is desired to be shown by him, the question may be asked, and then it is for the witness to say whether he will answer it or claim its privilege, for it cannot be known beforehand what he will do."

It further states that "the proper place in which to claim the privilege is in the trial court, when the question is propounded, not here." This is exactly the case of the herein complainant. She opportunely invoked the privilege when it was desired to subject her to trial by copying the six letters in question, which Mackenzie failed to do.

It is true that in said case of Mackenzie, it was likewise stated that "No reason appears why the examination on disclosure should not be subject to the ordinary rules of cross-examination. The person making the disclosure is in the position of a witness called by the State, and is subject to the rule permitting the impeachment of such a witness. It is no invasion of the constitutional guaranty against self-crimination to compel the witness to answer

questions relating to the truthfulness of his previous testimony." This court, however, is of the opinion that the foregoing is not applicable to the case of the herein complainant, firstly, because she has made no disclosure; she confined herself to denying that the letters in question were hers when the respondent, appearing in court with them, said, rather than insinuated, that they were hers, presenting, in support of his statement, other letters which, by reason of the handwriting, were to all appearances similar thereto; and, secondly, because her testimony, denying that she was the author of the letters in question, may be attacked by means of other evidence in the possession of the respondent, which is not precisely that coming from the complainant herself.

The reason for the privilege appears evident. The purpose thereof is positively to avoid and prohibit thereby the repetition and recurrence of the certainly inhuman procedure of compelling a person, in a criminal or any other case, to furnish the missing evidence necessary for his conviction. If such is its purpose, then the evidence must be sought elsewhere; and if it is desired to discover evidence in the person himself, then he must be promised and assured at least absolute immunity by one authorized to do so legally, or he should be asked, once for all, to furnish such evidence voluntarily without any condition. This court is of the opinion that in order that the constitutional provision under consideration may prove to be a real protection and not a dead letter, it must be given a liberal and broad interpretation favorable to the person invoking it.

In view of the foregoing considerations and holding, as it is hereby held, that the complainant is perfectly entitled to the privilege invoked by her, the respondent's petition is denied. So ordered.

Avancena, C. J., Villa-Real, Imperial, and Concepcion, JJ., concur.

CONCURRING

LAUREL, J.,

I concur in the majority opinion in this case.

The principle expressed in the legal maxim *Nemo tenetur seipsum accusare* has a historical background too long to narrate. Suffice it to say that the principle which later found expression in constitutional charters was aimed at the unjust inquisitorial practices which prevailed in Continental Europe, and even in England and in the American colonies in the early days. (See *U. S. vs. Navarro*, 3 Phil, 143, 152; *Villaflor vs. Summers*, 41 Phil., 62; *Brown vs. Walker*, 161 U. S., 591; 16 S. Ct., 644; 40 Law. ed., 821.)

The privilege against self-incrimination is guaranteed in the Fifth Amendment to the federal constitution and in the great majority of the state constitutions of the United States. In the Philippines, the same principle obtains as a direct result of American influence. At first, the provision in our organic laws was similar to that found in the Fifth Amendment to the Constitution of the United States and was as follows: "That no person shall * * * be compelled in any criminal case to be a witness against himself." (President's Instructions to the Philippine Commission; Philippine Bill of July 1, 1902, sec. 5, par. 3; Jones Law, Act of Congress of August 29, 1916, sec. 3, par. 3.) Although the provision makes reference only to criminal cases, the privilege has consistently been held to extend to all proceedings sanctioned by law and to all cases in which punishment is sought to be visited upon a witness, whether a party or not (70 C. J., sec. 875, p. 722). Prof. Wigmore states these principles clearly in his valuable work on Evidence (vol. IV, sec. 2252, pp. 834, 835), in the following language:

"This variety of phrasing, then, neither enlarges nor narrows the scope of the privilege as already accepted, understood, and judicially developed in the common law. The detailed rules are to be determined by the logical requirements of the principle, regardless of the particular words of a particular constitution. This doctrine,

which has universal judicial acceptance, leads to several important consequences :

"(a) A clause exempting a person from being 'a witness against himself protects as well a witness as a party accused in the cause; that is, it is immaterial whether the prosecution is then and there 'against himself or not. So also a clause exempting 'the accused' protects equally a mere witness.

"(b) A clause exempting from self-criminating testimony 'in criminal cases' protects equally in civil cases, when the fact asked for is a criminal one.

"(c) The protection, under all clauses, extends to all manner of proceedings in which testimony is to be taken, whether litigious or. not, and whether 'ex parte' or otherwise. It therefore applies in all kinds of courts * * * in all methods of interrogation before a court, * * * and in investigations by a legislature or a body having legislative functions."

When the Constitution of the Philippines was drafted, the phraseology in the previous organic, acts was altered by omitting the phrase "in any criminal case" to make the letter conform with the evident spirit of the provision. The Constitution provides that "No person shall be compelled to be a witness against himself." (Article III, sec. 1, subsec. 18.) Similar provisions are to be found in our statutes (G. O. No. 58, sec. 15, subsec. 4; Act No. 194 as amended, sec. 2; Act No. 2711, sees. 1687 and 2465; Act No. 3108, sec. 26).

This court has had occasion to rule that the constitutional provision relates solely to testimonial compulsion (U. S. vs. Tan Teng, 23 Phil., 145; U. S. vs. Salas, 25 Phil., 337.; U. S. vs. Ong Siu Hong, 36 Phil., 735; Villaflor vs. Summers, 41 Phil., 62). In the case of Beltran vs. Samson and Jose (53 Phil., 570, cited in 70 C. J., sec. 887, p. 727), however, this court enlarged the application of the provisions by holding that a person may not be compelled to produce specimens of his handwriting for purposes of confrontation with certain documents supposed to have been falsified by him. It was there said that "writing is something more than moving the body, or the hand, or the fingers; writing is not a purely mechanical act, because it requires the application of intelligence and attention; and in the case at bar writing means that the petitioner herein is to furnish a means to determine whether or not he is the falsifier, as the petition of the respondent fiscal clearly states." (Pages 576, 577.)

It must be admitted that the case before us is one in which differences of opinion may reasonably be expected; and in other jurisdictions conflict of opinion is clearly noticeable. In some jurisdictions it is ruled that a person who denies during his examination in chief the authenticity of handwriting purporting to be his may be asked to write specimens of his handwriting for the purposes of comparison, while in other jurisdictions and under practically the same circumstances, a directly opposite view is reached. The reason for this is not far to seek. One vainly looks at the naked text of the constitutional provision for unalterable rules applicable in particular cases. Courts have to deal with cases as they arise and while agreeing on the principle they do not and can not unite on the application. But I vote to sustain the objection of the witness for the following reasons:

(1) As between two possible and equally rational constructions, that should prevail which is more in consonance with the purpose intended to be carried out by the Constitution. The provision, as doubtless it was designed, should be construed with the utmost liberality in favor of the right of the individual intended to be secured. (Boyd vs. United States, 116 U. S., 616; 6 S. Ct., 524; 29 Law. ed., 746; Counselman vs. Hitchcock, 142 U. S., 562; 12 S. Ct, 195; 35 Law. ed., 1110; Brown vs. Walker, 161 U. S., 596; 16 S. Ct., 644; 40 Law. ed., 819; Interstate Commerce Commission vs. Baird, 194 U. S., 45; 5 S. Ct., 563; 48 Law. ed., 860; Gould vs. United States, 255 U. S., 298; 41 S. Ct, 261; 65 Law. ed., 647; In re Machman, 114 Fed., 995; U. S. vs. Wetmore, 218 Fed., 227; People vs. Hackley, 24 N. Y., 74; 24 How. Pr., 369, 372 [Off. 12 Abb. Pr., 150; 21 How. Pr., 54]; People vs. Cassidy, 213 N. Y., 388, 107 N. E., 713; Ann. Cas. [1916C], 1009; People vs. Forbes, 38 N.E., 303; 143 N. Y., 219; People vs. Spain, 138 N. E., 614; 307 111., 283; People vs. Newmark, 144 N. E., 338; 312 111., 625; Gillespie vs. State,

5 Okla. Crim., 546; 115 Pac, 620; Ann. Cas. [1912D], 259; 35 L. R. A. [N. S.], 1171; Ward vs. State, 228 Pac, 498; 27 Okla. Crim., 362; Thornton vs. State, 117 Wis., 338; 93 N. W., 1107; 98 A. S. R., 924; People vs. Danziger, 213 N. W., 448; 238 Mich., 39; 52 A. L. R., 136; Underwood vs. State, 78 S. E., 1103; 13 Ga. App., 206.) Justice Bradley of the Supreme Court of the United States once said that "illegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis." (Boyd vs. United States, supra.) An equally liberal interpretation should be given to similar provisions found in our statutes. (People vs. Forbes, supra.)

(2) I am averse to the enlargement of the rule allegedly calculated to gauge more fully the credibility of a witness if the witness would thereby be forced to furnish the means for his own destruction. Unless the evidence is voluntarily given, the policy of the constitution is one of protection on humanitarian considerations and grounds of public policy (see U. S. vs. Navarro, 3 Phil., 143). This is not saying that the constitutional privilege was intended to shield the witness from the personal disgrace or opprobrium resulting from the exposure of crime. It was only intended to prevent the disclosure of evidence that may tend to render the witness liable to prosecution in a criminal case. (70 C. J., sec. 880, p. 729.)

(3) The privilege should not be disregarded merely because it often affords a shelter to the guilty and may prevent the disclosure of wrongdoing. Courts can not, under the guise of protecting the public interest and furthering the ends of justice, treat a sacred privilege as if it were more excrescence in the Constitution.

(4) It is true that the privilege afforded by the constitution is purely personal to the witness and may be waived by him; (U. S. vs. Cofrada, 4 Phil., 154; U. S. vs. Rota, 9 Phil., 426; U. S.-m--Grant and Kennedy, 18 Phil., 122; U.S. vs. Binayoh, 35 Phil., 23) either by a failure to claim the privilege on time or by testifying without objection; and a witness who has waived the privilege is not permitted to stop but must go on and make a full disclosure of all matters material to the case (Fitzpatrick vs. United States, 178 U. S., 304; 20 S. Ct., 944; 44 Law. ed., 1078; Reagan vs. United States, 157 U. S., 301; 15 S. Ct, 610; 39 Law. ed., 709; Sawyer vs. United States, 202 U. S., 150; 26 S. Ct., 575; 50 Law. ed., 972; Powers vs. United States, 223 U. S., 303; 32 S. Ct, 281; 56 Law. ed., 448). But in the case before us there has not been a waiver. The privilege was invoked on time. The objection to the question of respondent's counsel was raised upon the asking of the question which would subject the witness to the danger of committing perjury. This the witness had a right to do. (State vs. Blake, 25 Me., 350; Friess vs. New York Cent, etc, R. Co., 22 N. Y. S., 104; 67 Hun., 205, aff. 55 N. E., 892; HON. Y., 639.)

(5) It was riot the complainant but the respondent who offered the letters (Exhibits 32 to 37) in evidence. The complainant was presented in rebuttal and she simply denied having written the letters. She should not be made to furnish the other party evidence by which to destroy her own testimony under circumstances which tend to incriminate her. She was not even presented by the respondent as his own witness.

(6) There are already in evidence letters written by the complainant and admitted by her to be genuine. The purpose then of respondent's counsel can be attained without extracting from the witness herself evidence which would subject her to punishment for a felony.

DISSENTING

ABAD SANTOS, J.;

I am unable to concur in the opinion of the court in this case, because the doctrine it lays down is, in my judgment, not only unsound but in conflict with the great weight of competent authority on the subject. We are called upon to determine, for the first time the scope and application of an important provision of the Constitution and it goes without saying that the matter requires careful consideration, since our decision is bound to have a far-reaching effect.

The Constitution provides that "no person shall be compelled to be a witness against himself." (Article III, section 1, cl. 18.) This provision has been derived from that clause of the Fifth Amendment to the Constitution of the United States which declares that; no person "shall be compelled in any criminal case to be a witness against himself." While the omission of the words "in any criminal case" from the Philippine version may seem important, the truth is that such a change in phraseology carries no legal significance whatever, inasmuch as the Supreme Court of the United States had construed the provision in the Federal Constitution to mean that the privilege against self-incrimination is not confined to the accused; that it is also available to witnesses both in criminal and civil cases; and that it may be invoked in court, before legislative committees, grand juries, and other tribunals. (*McCarthy vs. Arndstein*, 266 U. S., 34; 69 Law. ed., 158.)

The origin of this constitutional inhibition is related by the Supreme Court of the United States as follows: "The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions of confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in, English, as well as in American, jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactments (*Brown vs. Walker*, 161 U. S., 591, 597; 40 Law. ed., 819, 821.)

While the courts have guarded the privilege with great care and liberally extended the mantle of its protection in appropriate cases, they have at the same time insisted that the constitutional provision embodying it "should be construed, as it was doubtless designed, to effect a practical and beneficent purpose—not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder, or obstruct the administration of criminal justice." (*Brown vs. Walker*, *supra*.) It has been held that the privilege against self-incrimination, like any other privilege is one which may be waived. It may be waived by voluntarily answering questions, or by voluntarily taking the stand, or by failure to claim the privilege. (*People vs. Nachowicz*, 340 111., 480; 172 N. E., 812; *Salibo vs. United States*, 46 Fed. [2d], 790; *United States*

vs. *Murdock*, 284 U. S., 141; 76 Law. ed., 210.) A party who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to a cross-examination covering his statement.

In *Fitzpatrick vs. United States* (178 U. S., 304; 44 Law, ed., 1078, 1083), the Supreme Court of the United States said: "Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defense, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room."

It is well-settled that the right to cross-examine witnesses of the adverse party, being absolute, should not be unduly restricted, especially when the witness is the opposite party and is testifying to make out his own case. (70 C. J., 615.) And while there is some conflict of authorities, the better view appears to be that when a witness has denied what purports to be his handwriting, he may on cross-examination be called upon to write in order that such writing may be compared with the disputed writing for the purpose of contradicting him. (22 C. J., 785.)

The petitioner in this case having waived her privilege against self-incrimination by voluntarily taking the stand and testifying, it was legitimate cross-examination to call on her to write in order that such writing may be compared with the disputed writing for the purpose of contradicting her, and the investigating officer erred in sustaining her objection on the ground that she might incriminate herself.

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