

FRANCISCO BELTRAN, PETITIONER, VS. FELIX SAMSON, JUDGE OF THE SECOND JUDICIAL DISTRICT, AND FRANCISCO JOSE, PROVINCIAL FISCAL OF ISABELA, RESPONDENTS.

G.R. No. 32025. September 23, 1929

Ponente: ROMUALDEZ, J.

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ROMUALDEZ, J.:

This is a petition for a writ of prohibition, wherein the petitioner complains that the respondent judge ordered him to appear before the provincial fiscal to take dictation in his own handwriting from the latter.

The order was given upon petition of said fiscal for the purpose of comparing the petitioner's handwriting and determining whether or not it is he who wrote certain documents supposed to be falsified.

There is no question as to the facts alleged in the complaint filed in these proceedings; but the respondents contend that the petitioner is not entitled to the remedy applied for, inasmuch as the order prayed for by the provincial fiscal and later granted by the court below, and against which the instant action was brought, is based on the provisions of section 1687 of the Administrative Code and on the doctrine laid down in the cases of *People vs. Badilla* (48 Phil., 718) ; *United States vs. Tan Teng* (23 Phil, 145); *United States vs. Ong Siu Hong* (36 Phil., 735), cited by counsel for the respondents, and in the case of *Villaflor vs. Summers* (41 Phil., 62) cited by the judge in the order in question.

Of course, the fiscal under section 1687 of the Administrative Code, and the proper judge, upon motion of the fiscal, may compel witnesses to be present at the investigation of any crime or misdemeanor. But this power must be exercised without prejudice to the constitutional rights of persons cited to appear.

And the petitioner, in refusing to perform what the fiscal demanded, seeks refuge in the constitutional provision contained in the Jones Law and incorporated in General Orders, No. 58.

Therefore, the question raised is to be decided by examining whether the constitutional provision invoked by the petitioner prohibits compulsion to execute what is enjoined upon him by the order against which these proceedings were taken.

Said provision is found in paragraph 3, section 3 of the Jones Law which (in Spanish) reads: "Ni se le obligará a declarar en contra suya en ningún proceso criminal" and has been incorporated in our Criminal Procedure (General Orders, No. 58) in section 15 (No. 4) and section 56.

As to the extent of this privilege, it should be noted first of all, that the English text of the Jones Law, which is the original one, reads as follows: "Nor shall he be compelled in any criminal case to be a witness against himself."

This text is not limited to declaration but says "to be a witness," Moreover, as we are concerned with a principle contained both in the Federal constitution and in the constitutions of several states of the United States, but expressed differently, we should take it that these various phrasings have a common conception.

"In the interpretation of the principle, nothing turns upon the variations of wording in the constitutional clauses; this much is conceded (*ante*, par. 2252). It is therefore immaterial that the witness is protected by one Constitution from 'testifying' or by another from 'furnishing evidence' or by another from 'giving evidence' or by still another from 'being a witness.' These various phrasings have a common conception, in respect to the form of the protected disclosure. What is that conception?" (4 Wigmore on Evidence, p. 863, 1923 ed.)

As to its scope, this privilege is not limited precisely to testimony, but extends to all giving or furnishing of evidence.

"The rights intended to be protected by the constitutional provision that no man accused of crime shall be compelled to be a witness against himself is so sacred, and the pressure toward their relaxation so great when the suspicion of guilt is strong and the evidence obscure, that it is the duty of courts liberally to construe the prohibition in favor of personal rights, and to refuse to permit any steps tending toward their invasion. Hence, there is the well-established doctrine that the constitutional inhibition is directed not merely to giving of oral testimony, but embraces as well the furnishing of evidence by other means than by word of mouth, the divulging, in short, of any fact which the accused has a right to hold secret." (28 R. C. L., paragraph 20, page 434 and notes.) (Italics ours.)

The question, then, is reduced to a determination of whether the writing from the fiscal's dictation by the petitioner for the purpose of comparing the latter's handwriting and determining whether he wrote certain documents supposed to be falsified, constitutes evidence against himself within the scope and meaning of the constitutional provision under examination.

Whenever a defendant, at the trial of his case, testifying in his own behalf, denies that a certain writing or signature is in his own hand, he may on cross-examination be compelled to write in open court in order that the jury may be able to compare his handwriting with the one in question. It was so held in the case of *Bradford vs. People* (43 Pacific Reporter, 1013) inasmuch as the defendant, in offering himself as witness in his own behalf, waived his personal privileges.

Of like character is the case of *Sprouse vs. Com.* (81 Va., 374, 378), where the judge asked the defendant to write his name during the hearing, and the latter did so voluntarily.

But the cases so resolved cannot be compared to the one now before us. We are not concerned here with a defendant, for it does not appear that any information was filed against the petitioner for the supposed falsification, and still less is it a question of a defendant on trial testifying and under cross-examination. This is only an investigation prior to the information and with a view to filing it. And let it further be noted that in the case of *Sprouse vs. Com.*, the defendant performed the act voluntarily.

We have also come upon a case wherein the handwriting or the form of writing of the defendant was obtained before the criminal action was instituted against him. We refer to the case of *People vs. Molineux* (61 Northeastern Reporter, 286).

Neither may it be applied to the instant case, because there, as in the aforesaid case of *Sprouse vs. Com.*, the defendant voluntarily offered to write, to furnish a specimen of his handwriting.

We cite this case particularly because the court there gives prominence to the defendant's right to decline to write, and to the fact that he voluntarily wrote. The following appears in the body of said decision referred to (page 307 of the volume cited):

"The defendant had the legal right to refuse to write for Kinsley. He preferred to accede to the latter's request, and we can discover no ground upon which the writings thus produced can be excluded from the case." (Italics ours.)

For this reason it was held in the case of *First National Bank vs. Robert* (41 Mich., 709; 3. N. W., 199), that the defendant could not be compelled to write his name, the doctrine being stated as follows:

"The defendant being sworn in his own behalf denied the indorsement.

"He was then cross-examined and questioned in regard to his having signed papers not in the case, and was asked in particular whether he would not produce signatures made prior to the note in suit, and whether he would not write his name there in court. The judge excluded all these inquiries, on objection, and it is of these rulings that complaint is made. The object of the questions was to bring into the case extrinsic signatures, for the purpose of comparison by the jury, and we think the judge was correct in ruling against it."

It is true that the eminent Professor Wigmore, in his work cited (volume 4, page 878), says:

"Measuring or photographing the party is not within the privilege. Nor is the removal or replacement of his garments or shoes. Nor is the requirement that the party move his body to enable the foregoing things to be done. Requiring him to make specimens of handwriting is no more than requiring him to move his body * * *" but he cites no case in support of his last assertion on specimens of handwriting. We note that in the same paragraph 2265, where said author treats of "Bodily Exhibition," and under proposition "1. A great variety of concrete illustrations have been ruled upon," he cites many cases, among them that of *People vs. Molineux* (61 N. E., 286) which, as we have seen, has no application to the case at bar because there the defendant voluntarily gave specimens of his handwriting, while here the petitioner refuses to do so and has even instituted these prohibition proceedings that he may not be compelled to do so-

Furthermore, in the case before us, 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. Except that it is more serious, we believe the present case is similar to that of producing documents or chattels in one's possession. And as to such production of documents or chattels, which to our mind is not so serious as the case now before us, the same eminent Professor Wigmore, in his work cited, says (volume 4, page 864) :

"* * * 2264. Production or Inspection of Documents and Chattels.—1. It follows that the production of documents or chattels by a person (whether ordinary witness or party-witness) in response to a subpoena, or to a motion to order production, or to other form of process treating him as a witness (i. e. as a person appearing before the tribunal to furnish testimony on his moral responsibility for truth-telling) , may be refused under the protection of the privilege; and this is universally conceded." (And he cites the case of *People vs. Gardner*, 144 N. Y., 119; 38 N. E., 1003.)

We say that, for the purposes of the constitutional privilege, there is a similarity between one who is compelled to produce a document, and one who is compelled to furnish a specimen of his handwriting, for in both cases, the witness is required to furnish evidence against himself.

And we say that the present case is more serious than that of compelling the production of documents or chattels, because here the witness is compelled to write and create, by means of the act of writing, evidence which does not exist, and which may identify him as the falsifier. And for this reason the same eminent author, Professor Wigmore, explaining the matter of the production of documents and chattels, in the passage cited, adds:

"For though the disclosure thus sought be not oral in form, and though the documents or chattels be already in existence and not desired to be first written and created by a testimonial act or utterance of the person in response to the process, still no line can be drawn short of any process which treats him as a witness; because in virtue of it he would be at any time liable to make oath to the identity or authenticity or origin of the articles produced." (Ibid., pp. 864-865.) (Italics ours.)

It cannot be contended in the present case that if permission to obtain a specimen of the petitioner's handwriting is not granted, the crime would go unpunished. Considering the circumstance that the petitioner is a municipal treasurer, according to Exhibit A, it should not be a difficult matter for the fiscal to obtain genuine specimens of his handwriting. But even supposing it is impossible to obtain a specimen or specimens without resorting to the means complained of herein, that is no reason for trampling upon a personal right guaranteed by the constitution. It might be true that in some cases criminals may succeed in evading the hand of justice, but such cases are accidental and do not constitute the *raison d'être* of the privilege. This constitutional privilege exists for the protection of innocent persons.

With respect to the judgments rendered by this court and cited on behalf of the respondents, it should be remembered that in the case of *People vs. Badilla* (48 Phil., 718), it does not appear that the defendants and other witnesses were questioned by the fiscal against their will, and if they did not refuse to answer, they must be understood to have waived their constitutional privilege, as they could certainly do.

"The privilege not to give self-incriminating evidence, while absolute when claimed, may be waived by any one entitled to invoke it." (28 R. C. L., paragraph 29, page 442, and cases noted.)

The same holds good in the case of *United States vs. Tan Teng* (23 Phil., 145), where the defendant did not oppose the extraction from his body of the substance later used as evidence against him.

In the case of *Villaflor vs. Summers* (41 Phil., 62), it was plainly stated that the court preferred to rest its decision on the reason of the case rather than on blind adherence to tradition. The said reason of the case there consisted in that it was a case of the examination of the body by physicians, which could be and doubtless was interpreted by this court, as being no compulsion of the petitioner therein to furnish evidence by means of a testimonial act. In reality she was not compelled to execute any positive act, much less a testimonial act; she was only enjoined from something, preventing the examination; all of which is very different from what is required of the petitioner in the present case, where it is sought to compel him to perform a positive, testimonial act, to write and give a specimen of his handwriting for the purpose of comparison. Besides, in the case of *Villaflor vs. Summers*, it was sought to exhibit something already in existence, while in the case at bar, the question deals with something not yet in existence, and it is precisely sought to compel the petitioner to make, prepare, or produce by this means, evidence not yet in existence; in short, to create this evidence which may seriously incriminate him.

Similar considerations suggest themselves to us with regard to the case of *United States vs. Ong Siu Hong* (36 Phil., 735), wherein the defendant was not compelled to perform any testimonial act, but to take out of his mouth the morphine he had there. It was not compelling him to testify or to be a witness or to furnish, much less make, prepare, or create through a testimonial act, evidence for his own condemnation.

Wherefore, we find the present action well taken, and it is ordered that the respondents and those under their orders desist and abstain absolutely and forever from compelling the petitioner to take down dictation in his handwriting for the purpose of submitting the latter for comparison.

Without express pronouncement as to costs. So ordered.

Avanceña, C. J., Johnson, Street, Villamor, Johns, and Villa-Real, JJ., concur.

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