

CAN THE BODY TESTIFY? RE-ENACTMENT AND THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 20(3)

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ABSTRACT

The question of using the body of the accused as an investigatory tool under Article 20(3) of the Indian Constitution is indeed a tricky one. The use of fingerprint evidence, handwriting and voice samples has, in general, not been seen as a means of compelling testimony, but the constitutional status of crime-scene re-enactment remains less settled. Recently, in *State of Tamil Nadu v. Ponnusamy*, the Supreme Court held that re-enactment is not per se testimonial compulsion. The Court has made a distinction between a demonstration which involves walking or imitating a visual sequence (a directed physical demonstration) and a demonstration which requires the accused to give incriminating disclosure on the basis of personal knowledge. This article contends that although the distinction is constitutionally defensible, its application is not always clear. The difficulty is that bodily conduct can serve both as evidence of a physical characteristic and as a vehicle for communicating personal knowledge. The article suggests a method for determining the constitutional nature of re-enactment based on an "information-content" approach, in which the nature of re-enactment depends on the type of information sought, its source (and thus, the purpose for which the compelled act is performed), and the evidentiary chain subsequently derived from it. This approach would permit legitimate forensic investigation while reducing the possibility that the constitutional prohibition on testimonial compulsion could be circumvented merely by changing the form of communication.

Keywords: *Article 20(3), self-incrimination, testimonial compulsion, re-enactment, physical evidence, forensic evidence, gait analysis, bodily evidence, Bharatiya Sakshya Adhiniyam.*

I. INTRODUCTION

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Suppose a person is suspected of committing a theft and is asked to walk 10 metres and describe his walk. They then ask him to walk in a similar manner to the one observed in the CCTV footage. Finally, they demand that he show how he allegedly attacked his victim and then got out of the room. All three involve the accused's body, but it would be difficult to maintain that they raise the same constitutional issue. The first merely provides a physical attribute that can be compared. The second can help in identification. The third, however, may require the accused to recreate an event on the basis of personal knowledge of the alleged crime. The distinction is very significant because Article 20(3) does not just seek to prevent the accused from being forced to speak, but also to prevent the accused from being 'compelled to be a witness against himself.'

Indian law has traditionally distinguished testimonial evidence from physical or material evidence. This distinction was elaborated on by the Supreme Court in *Selvi v State of Karnataka*² in the context of 'narcology', polygraph tests, and brain electrical activation profile tests which are not merely physical. This distinction was later used in *State of Bombay v Kathi Kalu Oghad*³ to conclude that fingerprints and palm and foot prints are distinguishable from information communicating personal knowledge.

These principles come face-to-face with crime scene re-enactment in the recent decision of *State of Tamil Nadu v Ponnusamy*⁴. The Supreme Court stated that it is not enough for the accused to be involved in re-enactment for it to be declared unconstitutional. This article suggests that Ponnusamy has taken the right starting point in adopting this decision, but has left an important boundary issue unaddressed i.e. when does a bodily performance become a conveyance of incriminating personal knowledge rather than just physical evidence? The problem is that the physical/testimonial distinction takes for granted that physical evidence and communication are separable, in a more-or-less easy way. Re-enactment is a challenge to this assumption. The body can be the subject of post mortem examination and the means of conveying information.

This article therefore proposes an information-content approach. Rather than simply posing the question of whether an act is physical, a court may ask itself what information the State is trying to obtain, whether that information comes from a physical characteristic or from

²*Selvi v. State of Karnataka* (2010) 7 SCC 263

³*State of Bombay v. Kathi Kalu Oghad* AIR 1961 SC 1808

⁴*State of Tamil Nadu. v. Ponnusamy*, 2026 SCC OnLine SC 893

personal knowledge, the reason the accused is being compelled to do the act and what information is then provided in the act.

II. ARTICLE 20(3) AND THE PHYSICAL/TESTIMONIAL DISTINCTION

The protection against self-incrimination in the Indian Constitution has emerged from the dichotomy between compelled testimony and other types of evidence. The Supreme Court in *M.P. Sharma v. Satish Chandra*⁵ discussed the meaning of the term “to be a witness” and recognized that the physical/testimonial distinction also applied to traditional in-court oral testimony. The Constitution Bench in *Kathi Kalu Oghad* has given the most influential formulation of the physical/testimonial distinction. The majority in that case concluded that the words ‘to be a witness’ in the following words of Article 20(3) did not include the taking of thumb impressions, palm impressions or even foot or finger impressions, specimen writing or showing off the body for identification. The Court understood self-incrimination to involve the communication of information derived from personal knowledge.

This is important because a fingerprint does not contain anything that would show that the accused was aware of the offence, it just provides an identifying characteristic. Likewise, handwriting of the specimen, whose evidentiary value flows from a comparison to another writing that is already in the hands of investigators, does not have to be forcing the writer to talk about the circumstances of the crime. *Kathi Kalu Oghad* also contains a more nuanced line of reasoning. This is significant in the context of re-enactment because the term to be a witness may go beyond verbal evidence to evidence given in other ways, such as “intelligible gestures” and other positive, volitional evidence-giving acts.

The constitutional distinction, therefore, does not simply reduce to speech as testimony and bodily conduct as physical evidence. What the body act communicates is a question which needs to be answered in a more substantive way, in the light of the jurisprudence.

III. THE INVESTIGATIVE STAGE: NANDINI SATPATHY

The next milestone was in the case of *Nandini Satpathy v. P.L. Dani*⁶. The Court stated that the protection against compelled answers during police interrogation fell within the same “constitutional sphere” as Article 20(3). It also noted that the phrase “compelled testimony” should not be interpreted as simply evidence drawn from physical threats or violence. The concept of compulsion arising from psychological pressure, environmental pressure, intimidation, and similar circumstances is also significant in the context of re-enactment.

⁵*M.P. Sharma v. Satish Chandra* AIR 1954 SC 300

⁶*Nandini Satpathy v. P.L. Dani and Another* (1978) 2 SCC 424

A crime-scene re-enactment typically is conducted during an investigation preceding trial. The accused may be in police custody amidst investigating officers and responding to instructions from persons wielding a significant level of power over the accused. Hence, the constitutional debate does not simply stop at the fact that the accused had consented to be moved after being instructed by the police. The relevant question is whether, viewed as a whole, the circumstances of the investigation and the nature of the direction amounted to a proceeding for the purpose of obtaining incriminating information from the accused. This is not to say that all police instructions are necessarily constitutional impositions. It is, however, important to realize, as Nandini Satpathy does, that compulsion is a matter of considering the situation. This principle is more important if an apparently real exercise is meant to elicit information which the police would not have been able to specifically ask for through questioning.

IV. SELVI: WHEN THE BODY BECOMES A MEDIUM OF COMMUNICATION

The most significant conceptual link between the physical-evidence cases and more recent investigative methods is the case of *Selvi v. State of Karnataka*. The Court made a specific reference to the difference between testimonial acts and physical evidence. It further noted that the type of use of some of the samples was not the same as reliance upon compelled testimony; it was a use for identification or corroboration. The following discussion is particularly pertinent to re-enactment. The Court's analysis demonstrates that non-verbal conduct may have constitutional significance even when it does not involve words.

The reasoning is straightforward. If the State cannot lawfully compel the accused to disclose an incriminating fact through verbal communication, it cannot necessarily circumvent that protection by requiring the accused to communicate the same fact through a gesture or bodily movement. At the same time, *Selvi* recognizes a legitimate role for identification evidence. The difference lies instead in what the evidence conveys and how it is used, and not whether the body of the accused is used. It is this challenge that the re-enactment shows.

V. PONNUSAMY: A CONSTITUTIONAL LINE BETWEEN DEMONSTRATION AND TESTIMONY

The Supreme Court first accepted the distinction between testimonial compulsion and physical evidence, and then denied that it would be impossible to find any evidence to fall outside the category of physical evidence, even if it was the result of a re-enactment.

The Court determined that re-enacting a person's conduct did not necessarily amount to disclosure of the accused's personal knowledge if the re-enactment was simply to have the

accused walk, act in a certain manner, or simulate a visual event. The distinction is an important one and a defensible one, however, provided the accused was led to demonstrate incriminating acts committed by him which were the subject of his own knowledge.

This approach avoids two equally problematic extremes. The first would be to treat all bodily performances as testimonial. That would risk constitutionalising ordinary identification processes based on fingerprint, gait, voice or other bodily features. The second would be to hold that every bodily act is necessarily physical evidence. This would enable investigators to get information through bodily performance, instead of having it verbally protected.

Ponnusamy tries to be in the middle. It may thus be summarized as follows:

First, evidence of physical demonstration and no mention of personal knowledge and second when a witness has to testify to incriminating personal information it becomes testimonial compulsion. The difficulty, therefore, lies not merely in identifying the distinction but in determining where the line should be drawn in practice.

VI. THE PROBLEM OF THE “COMMUNICATIVE BODY”

Think about four directions from the police: ‘Walk 10 metres’. ‘Walk like in this CCTV footage’. ‘Demonstrate for us how you walked away after the offense’. ‘Demonstrate to us how you attacked the victim.’ The first direction is easily given an identificatory interpretation. The latter might be used to establish a comparison between gait or bodily movement and the gait that is captured in a different way on CCTV. The third one is more involved, it relates the bodily act to a historical event, and requires the accused to perform the movement that the historical event is connected to. The fourth is even further. The police are not just taking measurements of the criminal’s body, but are putting him on trial for the crime itself. But all four exercises can be characterized as a “re-enactment”. This illustrates a difficulty in applying the doctrine. The term “re-enactment” does not identify the content of the evidence; it describes an investigative technique. The analysis of the constitution should be directed towards the information that the performance seeks to provide. There are two sources of information: First information that comes from the body, such as gait, voice characteristics, handwriting, fingerprints, physical measurements, posture or movement patterns. This information is a physical property of a body and can typically be compared with material which is collected independently. Secondly, information obtained from personal knowledge consists of how the accused entered a place, in which place the accused was standing when the offence was committed, how the accused attacked the victim, where the accused concealed an object and the order in which he committed an act. In this, the

evidentiary content is not only body-based, but it relies strongly on the knowledge of the accused in regards to the event.

The distinction can be stated simply – a gait is a quality the body has. How the accused is believed to have committed a crime could be something that he or she knows. The physical-evidence rationale is strong where the State is looking for the former. Article 20(3) gains in importance in the event it looks for the latter.

VII. DISCUSSION OF “CREATED” EVIDENCE AND EVIDENCE DERIVED FROM RE-ENACTMENT.

Another important distinction made in Ponnusamy is between the re-enactment itself and evidence derived from the re-enactment. The Court characterizes the re-enactment as “created” evidence, which, by itself, is minimally probative. It then distinguishes it from the expert evidence of gait analysis, which is evidence gleaned from the re-enactment. The latter is an independent evidentiary product which is to be assessed separately. This is important doctrinally because it allows for the re-enactment not to be used to supplant proof of the offense committed. The Court also determined that evidence obtained by re-enactment is evidence of corroboration, but not substantive evidence of the actual commission of the crime. The Court also determined that evidence based upon re-enactment is evidence of corroboration but not substantive evidence of the actual commission of the crime. This distinction is particularly important in relation to gait analysis. However, it considered gait analysis to be a scientific technique and allowed the body movements to be compared with CCTV or other types of visual evidence provided that the underlying material was independently admissible and reliable. This is an important observation not just with respect to the facts of the case, but of Ponnusamy in general. It is a good illustration that the evidentiary chain should be severed in the following way: accused’s body to re-enactment, to recording, to forensic comparison, to expert opinion, to the legal inference, each of which raises a different question. It is not justified to automatically conclude that the first stage is constitutional, and therefore is admissible and reliable for subsequent stages.

VIII. TOWARDS AN INFORMATION-CONTENT TEST

The jurisprudence could be made more coherent by adopting an information-content approach of dealing with bodily evidence. The constitutional investigation should be conducted through four questions.

1. What information is the State trying to obtain?

Is it the identification, measurement, comparison or reconstruction of physical circumstances or information of what the accused knew about the crime? The nearer the exercise is to the last category, the more robust will be the Article 20(3) concern.

2. From where does the information come?

Does it stem from a physical attribute possessed by the accused or is the performance based upon knowledge of an event which is known only to the accused? Anyone who is a person of interest doesn't need to recall the crime to give a fingerprint, showing him where and how he claims to have hidden a gun may do.

3. What does the performance convey?

This is the primary question to have. The silence of the accused should not determine the constitutional outcome. Otherwise, all the State would need to do is reformulate the question from "Tell us what you did" to "Show us what you did" and it is the same question with a different linguistic form, which would still be subject to the protection against testimonial compulsion. Just because information is passed on by means of movement, rather than words, does not reduce the constitutional concern.

4. What evidence is subsequently generated?

Courts should independently consider the use of the re-enactment for the purposes of identification, for the purpose of creating an identification sample, for creating expert evidence, for establishing a sequence of events or to support an inference of guilt. This last is particularly significant because Ponnusamy is aware that there is a difference between re-enactment and evidence based on re-enactment.

IX. VOICE SAMPLES AND OTHER FORMS OF BODILY EVIDENCE

It is easier to understand in comparison to voice samples. The Supreme Court in the case of *Ritesh Sinha v. State of Uttar Pradesh*⁷, categorised a voice sample as identification data, not testimonial communication. It would seem there is no doubt that a voice sample, by itself, does not testify to personal knowledge of the crime and might also be compared to a sample of an existing recording. The voice sample is in essence, "This is my voice." A gait sample is a statement that translates to, "This is the way my body moves." Neither of them implies that they are making a statement that "this is what I know about the crime". Re-enactment turns into constitutionally different dealing with the characteristics of the body instead of the accused's knowledge of the event.

⁷*Ritesh Sinha v. State of Uttar Pradesh and Another* (2019) 8 SCC 1

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The distinction thus is principled, on the basis of the physical characteristic (identification) and the personal knowledge (testimony). The problem is there could be a combination of both in a single exercise. For instance, a person could be required to perform the supposed attack to allow investigators to match up his motions with CCTV. The performance can also give clues as to the order of the attack. This constitutional interpretation should not neglect one description of the constitution while focusing on the other one.

X. PROCEDURAL SAFEGUARDS

The potential for re-enactment to involve pressure or confusion also supports the need for procedural safeguards. The whole re-enactment needs to be taped, videoed and documented. The recording would give trial court insight into what the accused was directed to do and if it went from physical demonstration to personal knowledge questions asked by police. Second, the investigators need to be clear about what they are asking the accused to do (direction to a physical movement vs. questions that ask the accused to explain/reproduce an event from his personal knowledge). Third, a physically acceptable demonstration should not be followed by an assumption that the accused will have to tell a story. A direction to walk should not become an indirect order to explain why, when and where the accused allegedly walked. Fourth, expert evidence from the re-enactment should reveal the methodology and limitations of the expert's evidence, as well as the type of comparison made. Finally, the distinction between corroborative evidence and substantive evidence of guilt, as discussed in Ponnusamy, should be observed in courts. These safeguards would not prohibit re-enactment. They would help ensure that a legitimate forensic method does not become an instrument of self-incrimination.

XI. THE NEW CRIMINAL LAW FRAMEWORK.

The statutory context also has evolved since the bulk of the leading Article 20(3) case law was formulated. The Bharatiya Sakshya Adhiniyam, 2023, came into force on 1st July, 2024, in place of the Indian Evidence Act, 1872. This does not change the constitutional text of Article 20(3). The constitutional principle remains the controlling consideration. The constitutional doctrine, however, will have to be adapted to the new statutory context in future courts that are faced with re-enactment. This is significant in understanding Ponnusamy. It was a case in a 'factual' and 'statutory' context of a previous period, but there was nothing in it which required the repealed Evidence Act, and its separation of demonstration from knowledge of the personal facts of others could serve as a constitutional

structure and framework which would be available in the future. The statutory transition then reinforces, not reduces, the need to have a clear conceptual test.

XII. IN THE END, WHEN DOES THE BODY TESTIFY?

The distinction between a fingerprint and a confession has been capable of being made with relative certainty for many years by the law. A fingerprint is a physical trait, a confession, knowledge. Re-enactment is more challenging because it falls in between the two. As a tangible object, the body of the accused can be examined. But it can also serve as a means of communication of information. The difficulty with the constitution starts when the state asks the question, “What does this body look like, or how does it move?” then gets to “What does this person know about the offense, expressed through his body?” *State of Tamil Nadu v. Ponnusamy* rejects the proposition that every re-enactment is testimonial compulsion. Such a blanket ban would be redundant and go beyond what is necessary for proper identification and forensics. Meanwhile, a re-enactment based upon the accused’s personal knowledge may trespass on the constitution. That line ought to be refined in the next step of the jurisprudence. The inquiry should not turn merely on whether the evidence is physical or whether the accused has used words. Instead, it should ask: “What is the State forcing you to say and where is it coming from? Where the information is just a physical characteristic that can be separately identified or compared, such material should be considered to be non-testimonial physical evidence, following *Kathi Kalu Oghad*, *Selvi* and *Ponnusamy*.

However, if the information has to be provided only as a result of the accused having personal knowledge of the alleged offence, then it would not be possible to avoid Article 20(3). The distinction is important because these rights are fundamental and should not be subject to the grammars of investigators’ instructions. Tell us what you did and show us what you did may be two different methods of communicating, but the question of the constitution is whether both want the same incriminating knowledge. A third category in addition to the traditional physical/testimonial binary is, therefore, needed for the future of Article 20(3) in an ever-forensic criminal justice system, namely the communicative body.