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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 102.

ADMIRAL DEWEY ADAMSON,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPELLEE'S BRIEF.

Opinion Below.

The opinion of the Supreme Court of California [R. 381] is reported in 27 Cal. (2d) 478, 165 Pac. (2d) 3.

Jurisdiction.

The opinion of the California Supreme Court was filed and its judgment entered [R. 409] January 4, 1946, Petition for Rehearing was filed January 18, 1946 [R. 394], and denied January 31, 1946 [R. 408], Petition for an Appeal to the United States Supreme Court was filed in the California Supreme Court, April 3, 1946, and denied April 8, 1946. [R. 410.] An order allowing such appeal was made by Associate Justice Wm. O. Douglas, April 15, 1946 [R. 413], and probable jurisdiction was noted June 10, 1946. [R. 418.] Jurisdiction was sought under 28 U. S. C. A. 344a, Judicial Code, Section 237.

Statement.

The body of Stella Blauvelt, a widow 64 years of age, was found on the floor of her Los Angeles apartment on July 25, 1944. The evidence indicated that she died on the afternoon of the preceding day. The body was found with the face upward covered with two bloodstained pillows. A lamp cord was wrapped tightly around the neck three times and tied in a knot. The medical testimony was that death was caused by strangulation. Bruises on the face and hands indicated that the deceased had been severely beaten before her death. [R. 381.]

Six fingerprints, each identified by expert testimony as that of the appellant, were found spread over the surface of the inner door to the garbage compartment of the kitchen of the deceased's apartment. After the murder this door was found unhinged leaning against the kitchen sink. It was established that appellant could have entered through the garbage compartment by having a man about his size do so.

The tops of three women's stockings were found on and in appellant's dresser in his room among other articles of apparel. The stocking parts were not all of the same color. At the end of each part away from what was formerly the top of the stocking a knot or knots were tied. When the body of the deceased was found it did not have on any shoes or stockings. It appeared that on the day of the murder deceased had been wearing stockings. The lower part of a silk stocking with the top torn off was found lying on the floor under the body. No part of the other stocking was found. None of the stocking tops from appellant's room matched with the bottom part of the stocking found under the body. [R. 382.]

The deceased was in the habit of wearing large diamond rings and was wearing same on the day of the murder. These rings were not on the body and search has failed to uncover them. A witness positively identified the defendant and stated that at some time between the 10th and 14th of August, 1944, she overheard defendant ask an unidentified person whether he was interested in buying a diamond ring. [R. 383.] The appellant did not take the witness stand and rested his case without putting in any evidence. [R. 329.]

In oral argument to the jury the prosecutor commented approximately seven times on the appellant's silence. [R. 393.] With but a couple of exceptions these are simple comments upon the fact of defendant's failure to deny or explain evidence which would have been within his power to do. In discussing the testimony of a witness who had identified appellant as having offered a diamond ring for sale, the prosecutor said [R. 343-4]:

> "The defendant has not taken the stand; he has not denied that; it is uncontradicted in the testimony. There he sits, not getting on the stand, not giving you what his version of the situation is. You have got the right, members of this jury, to consider the fact and consider that four hundred and some odd pages of testimony are uncontradicted from the lips of this defendant. Why, For example, during the time that Frances Turner was on the stand—it happened here in the courtroom—the defendant and his counsel went into a huddle, and then came up with some questions about a juke box. You remember that. He was there. That conversation happened. He has not denied it; it is uncontradicted."

In discussing the portions of women's stockings found in appellant's room the prosecutor said [R. 347]:

> "At least, we have those in the possession of this defendant. No explanation; nothing said or testified by him as to what they are doing in his room. The record is silent."

Again, in discussing the testimony relative to the absence of one stocking and the portion of another stocking found under the deceased's body, the prosecutor said [R. 350-1]:

> "Now, the defendant has not explained that. He has not told you why. I would have liked to find out, if he had gotten on the stand, and I think you would have liked to have known why."

Regarding the testimony that the appellant told police officers when arrested that he would have alibi witnesses when the time comes, the prosecutor told the jury [R. 367-8]:

> "Have you heard from the lips of the defendant or a single witness called by the defendant where he was other than in that apartment? If he had alibi witnesses that would testify, they would be up here testifying.
>
> Counsel asked this question: 'The defendant may or may not take the stand'—you remember that—'In the event he does not take the stand, will you view that in the light of the presumption of innocence?' You were asked this question by myself: If the court instructs you that you can consider the fact of the failure of the defendant to take the stand, his failure to explain or deny anything, if you would do that, and you said you would. Now, the defendant does not have to take the stand in any case. He didn't

take it here. He did not call, however, any witnesses. He tells the officers, 'I will have my alibi witnesses.' Where are they? Where are they? You know what stopped him. Those fingerprints; those fingerprints. Not one single witness did they call to the stand. You heard yesterday, 'The People rest,' and the defendant said, 'The defense rests.' I say, why didn't they have them? The reason is, fingerprints; powerful evidence. So far as this defendant is concerned, as I said before, he does not have to take the stand. But it would take about twenty or fifty horses to keep someone off the stand if he was not afraid. He does not tell you. No."

In discussing the presumption of innocence and the doctrine of reasonable doubt the prosecutor after reviewing the same said [R. 369-70]:

"And here we started out in this case with the defendant, as counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the People's case, when he did not take the stand or did not put any witnesses on the stand, he stood here with that presumption removed, based on the evidence in this case."

Further discussing the evidence of fingerprints and the possibility of crawling through the garbage compartment, the prosecutor stated [R. 372]:

"Then counsel says, if the defendant wasn't there, what has he got to tell you? He says, 'if he wasn't there, what has he got to tell you?' Well, there are a lot of things he could tell us. If he wasn't there,

> where was he? Where was he? Was he by himself or was he with somebody? Where are these alibi witnesses he talked about? He could explain how his prints got on there, and he could explain what he was trying to do when he was selling or attempting to sell a diamond ring. He could have done that. Neither he nor witnesses did it."

Then at the close of his argument the prosecutor stated [R. 379]:

> "In conclusion, I am going to just make this one statement to you: Counsel asks you to find this defendant not guilty. But does the defendant get on the stand and say, under oath, 'I am not guilty'? Not one word from him, and not one word from a single witness."

The jury was instructed on the right of court and counsel to comment as follows [R. 9]:

> "You are the sole and exclusive judges of the weight of evidence and the credibility of witnesses, and it is your function to determine all questions of fact arising from the evidence in the case. It is the right of court and counsel to comment on the failure of defendant to explain or deny any evidence against him, and to comment on the evidence, the testimony and credibility of any witness; yet the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of witnesses."

The jury returned verdicts finding appellant guilty of murder of the first degree and without any recommendation, thus inflicting the death penalty, and of burglary of the first degree. [R. 30.] A motion for new trial was made and denied. [R. 31-2.]

Summary of Argument.

I.

Article I, Section 13 of the California Constitution, and the similar provision in California Penal Code, Section 1323, permitting comment by the court or counsel on a defendant's failure to explain or deny any evidence or facts in a criminal case against him, do not violate due process of law and are not in conflict with the Fourteenth Amendment to the Constitution of the United States.

II.

Statements by the prosecutor in his argument to the jury, assuming for the sake of argument only that the same are unwarranted, constitute at most procedural errors which were waived by failure to object and do not violate due process of law nor conflict with the Fourteenth Amendment to the United States Constitution and do not constitute a federal question.

III.

The admission of evidence relative to the portions of stockings, assuming for the sake of argument only that the same were inadmissible, constitute at most procedural errors and do not violate due process or conflict with the Fourteenth Amendment to the Constitution of the United States, and do not present a federal question.

ARGUMENT.

Introduction.

This appeal involves primarily two questions: (1) does Article I, Section 13 of the California Constitution and the similar provision of California Penal Code, Section 1323, allowing comment by the court and counsel on a defendant's failure to explain or deny evidence or facts in a criminal case violate the Fourteenth Amendment to the Constitution of the United States, and (2) does the introduction in evidence of portions of women's stockings not belonging to the deceased deny due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

Appellant's attack upon the California constitutional and statutory provisions is that they inherently violate the due process and the privileges and immunities clauses of the Fourteenth Amendment (Appellant's Specifications I and III), that as applied in this case they violate such clauses by shifting the burden of proof from the state to the defendant and infringe upon the presumption of innocense (Appellant's Specifications II and IV), and that there is no reasonable or logical connection between the failure to testify and the presumption or inference therefrom that the defendant is thereby guilty. (Appellant's Specifications V and VI.)

Inasmuch as the basic ground upon which each of these contentions rest is fundamentally the same, we believe it will make for better understanding and eliminate repetition to treat this subject as a whole without any attempt at segregation.

I.

The Right Given by a State to Court and Counsel to Comment Upon Defendant's Failure to Explain or Deny Any Evidence or Facts Against Him Does Not Violate the Fourteenth Amendment to the Constitution of the United States.

Article I, Section 13, of the California Constitution provides, among other things, that:

> ". . . but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

The foregoing was added to this section of the Constitution by an amendment in 1934. Following this the State Legislature in 1935 added to Section 1323 of the Penal Code the following:

> "The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

These amendments were enacted following studies made by the American Law Institute and the American Bar Association (9 Proceedings American Law Institute 202-218; 56 Reports A. B. A. 137-152) and considerable discussion and study by the local bar of California. These and similar enactments in other states were brought about in response to a widespread demand on the part of the bench and bar for definite recognition of the right to comment upon the failure of the defendant to testify in a criminal case. The premise upon which this demand rests is well

stated in a remark attributed to former Chief Justice Hughes (9 Proceedings American Law Institute 215): "It is clear that reversals because a prosecuting attorney had directed the attention of the jury to a circumstance which no intelligent person can help taking into consideration of his own accord, should have no place in any well ordered system of criminal procedure."[1]

It is true that by the Federal Constitution and by most, if not all, of the State Constitutions it is guaranteed that no person in a criminal trial shall be compelled to testify against himself. Section 13, of Article I, of the California Constitution, which includes the provision for comment on failure to testify here in question, also contains the provision that:

> "No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; . . ."

The opinion of the California Supreme Court in the instant case leaves little to be added to the discussion of the question here involved. Prior to this decision the ap-

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[1]The commentator in 22 Cornell Law Quarterly 392, 396, stated the reason as follows: "But perhaps the strongest argument in favor of permitting comment is that it is merely giving judicial sanction to realities. In the absence of comment, and even in the face of instructions to the jury, it is generally recognized that the jury considers the defendant's failure to testify. To say that comment will not affect the jury's verdict, however, is not to admit that the change is unnecessary. To recognize the right will prevent reversals in the appellate court, on what is now regarded as a mere technicality. The right to comment will mean the removal of one of the badges of our sporting theory of justice, and thus, perhaps, help to bring about a greater respect for an approval of our criminal procedure."

pellate courts of California had frequently upheld the validity of both the constitutional provision and the corresponding section of the Penal Code.[2]

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[2]*People v. Owens,* 11 Cal. App. (2d) 724, 54 Pac. (2d) 728;
People v. Dukes, 16 Cal. App. (2d) 105, 109-10, 60 Pac. (2d) 197;
People v. Turner, 22 Cal. App. (2d) 186, 70 Pac. (2d) 642;
People v. Dozier, 35 Cal. App. (2d) 49, 59-60, 94 Pac. (2d) 598;
People v. Schneider, 36 Cal. App. (2d) 292, 297, 98 Pac. (2d) 215;
People v. Wiezel, 39 Cal. App. (2d) 657, 104 Pac. (2d) 70;
People v. Murray, 42 Cal. App. (2d) 209, 108 Pac. (2d) 748;
People v. Cowan, 44 Cal. App. (2d) 155, 112 Pac. (2d) 62;
People v. Harsch, 44 Cal. App. (2d) 572, 576, 112 Pac. (2d) 654;
People v. Amaya, 44 Cal. App. (2d) 656, 659, 112 Pac. (2d) 942;
People v. Byers, 5 Cal. (2d) 676, 55 Pac. (2d) 1177;
People v. Zirbes, 6 Cal. (2d) 425, 428-9, 57 Pac. (2d) 1319;
People v. McKenna, 11 Cal. (2d) 327, 336, 79 Pac. (2d) 1065;
People v. Boggs, 12 Cal. (2d) 27, 35, 82 Pac. (2d) 368;
People v. Beckhard, 14 Cal. (2d) 690, 96 Pac. (2d) 794.

In *People v. King,* 40 Cal. App. (2d) 137, 142, 104 Pac. (2d) 521, the following comment by prosecuting counsel was held proper under these provisions:

> ". . . 'I make no recommendation, frankly, as to Mr. Jarvis, but I submit to you that King is guilty beyond a reasonable doubt in his whole conduct here and in the exercise of his constitutional right not to testify. Take that for what it is worth.' . . ."

In *People v. Perry,* 14 Cal. (2d) 387, 395, 94 Pac. (2d) 559, 124 A. L. R. 1123, the court stated that the prosecuting attorney "made some remarks which at first consideration might seem objectionable" but added that "with reference to the comments made by the Deputy District Attorney regarding the failure of defendant to take the witness stand in his own behalf or to deny any of the incriminating evidence against him, it may be noted that by constitutional amendment adopted in 1934," such comment is proper.

Augmenting the amendment to Section 13, of Article I of the California Constitution, the voters of that state at the same time amended Section 19 of Article VI, changing that provision from its original context which read:

> "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

to read:

> "The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

The validity of this amendment was upheld in *People v. Ottey,* 5 Cal. (2d) 714, 56 Pac. (2d) 193.[3]

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[3]In an interesting comment in *People v. Ottey,* 5 Cal. (2d) 714, 722, it is said:

> "This court has had occasion heretofore to consider generally the scope of the power reposed in the courts of this state by the change in the Constitution. (People v. De Moss, 4 Cal. (2d) 469 (50 Pac. (2d) 1031).) In view of the extensive research by counsel on the question, as evidenced by their briefs, some further elaboration seems desirable. In the first place it is certain that a very distinct and important innovation in the long-standing rule in this state was brought about by the constitutional amendment. Its purpose was to abolish the prior limitations on the trial judge's participation in the trial of a case with respect to comment on the evidence and on the credibility of the witnesses. In other words, it was the intention to place in the trial judge's hands more power in the trial of jury cases and make him a real factor in the administration of justice in such cases, instead of being in the position of a mere referee or automaton as to the ascertainment of the

A rather extended discussion of this question is found in the opinion of the Supreme Court of Iowa in *State v. Ferguson,* 226 Iowa 361, 283 N. W. 917, 918-23, where the defendant failed to take the witness stand and the prosecuting counsel commented upon that fact to the jury. This was attacked as being a violation of the due process clause of the Iowa Constitution. Originally the Iowa law

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facts. To the seasoned practitioner in our state courts this so-called radical change has no doubt come with considerable of a shock. None the less the change has been made and it must be recognized as an endeavor to remedy an evil in the trial, especially of criminal cases, by jury. It is the duty of this court to accord to the amendment its full beneficial effect, uninfluenced by decisions in this state under the old law.

"It is apparent from the history of the constitutional amendment that its purpose was to establish the rule in this state in substantial harmony with the practice in other jurisdictions where like powers have been exercised by the trial courts. In the argument submitted to the electors at the general election in 1934, in support of the proposed amendment, it was stated: 'This measure also enables the trial judge to comment to the jury on the facts of the case; to give the jurors his analysis of the evidence and to express his opinion on the merits of the case, but informing them at the same time, that his views are advisory only, and that the jury is the final and sole judge of the facts and of the guilt or innocence of the accused. This is the practice in the courts of Great Britain and Canada, and also in our United States courts.' While the argument sent to the voters is not controlling (Fay v. District Court of Appeal, 200 Cal. 522, 537, (254 Pac. 896)), it may be resorted to as an aid in determining the intention of the framers and the electorate when such aid is necessary. Here we need not invoke such argument as an aid to interpretation, for the language of the amendment, though brief, is plain and unambiguous; but it may with propriety be noticed to indicate that it was the general understanding that the proposed innovation in the practice in this state was intended to conform to the practice in other jurisdictions where similar powers were vested in the trial courts, viz., Great Britain, Canada, and the United States courts. By a reference to the courts in those jurisdictions we are not foreclosed from resorting to decisions in sister states which have adopted the same or similar rules."

provided that should a defendant not elect to testify, that fact should not be used against him and prohibited any comment upon the absence of his testimony. Later the section of the law was separated and it was provided in one section that defendants in criminal cases shall be competent witnesses in their own behalf but cannot be called as witnesses by the state, and in another section it was provided that should the defendant not elect to become a witness that fact should not be used against him nor be the subject of comment. This latter section was subsequently repealed. The question then arose in that case as to whether such comment violated the due process clause where the law had specifically prohibited such comment and then such prohibition had been repealed without any legislative provision expressly authorizing comment. The Iowa court held that such comment was not violative of due process.[4]

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[4]*State v. Ferguson,* 283 N. W. 917, 922:

> "Due process of law requires that the accused be properly charged by an indictment or information and be given adequate information in regard to the nature of the charge against him, that he be accorded representation by counsel, a jury trial in open court, and that the state introduce such competent evidence which, if believed, would be sufficient to establish a defendant's guilt beyond a reasonable doubt, without compelling the defendant, against his will, to testify against himself. When this has been accomplished, the defendant must be accorded full opportunity to introduce his evidence to meet that introduced by the state. Defendant may choose to introduce no evidence. He may choose to offer only witnesses other than himself. He may choose to testify in his own behalf. The choice, in each event, is that of the defendant. Having made his choice, if he chooses not to testify in his own behalf, the effect of such choice, as an inference or presumption of guilt, does not come within the contemplation of what constitutes due process of law."

To the same effect, see *State v. Benson,* 230 Iowa 1168, 300 N. W. 275.

The case of *Twining v. New Jersey,* 211 U. S. 78, 90-91, 29 S. Ct. 14, 16, 53 L. Ed. 97, would seem to be, and generally is considered by courts and text writers, as determinative of this question.[5]

In the *Twining* case the jury were instructed that they might draw an unfavorable inference against the defendants from their failure to testify where it was within their power in denial of the evidence which tended to incriminate them. The law of New Jersey, where the case arose, was deemed to permit such an inference to be drawn.

The Supreme Court said (211 U. S. 90, 29 S. Ct. 14):

> ". . . The general question, therefore, is whether such a law violates the Fourteenth Amendment, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their life, liberty or property without due process of law. In order to bring themselves within the protection of the Constitution it is incumbent on the defendants to prove two propositions: First, that the exemption from compulsory self-incrimination is guaranteed by the Federal Constitution

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[5]31 Mich. L. Rev. 40, 226, 228;
22 Cornell L. Quarterly 392, 396;
25 Va. L. Rev. 90;
2 Selected Essays on Constitutional Law 1427-29;
16 C. J. S. 1182;
12 Am. Jur. 122;
4 Wigmore on Evidence 836;
8 Wigmore on Evidence, 3rd Ed., 414.
Constitution of U. S. (Anno.), U. S. Gov. Printing Office, 1938 Ed., p. 939.

For a discussion on the experience under a similar constitutional provision in Ohio, see 13 J. Crim. L. 292; 26 Yale L. J. 464.

against impairment by the States; and, second, if it be so guaranteed, that the exemption was in fact impaired in the case at bar. The first proposition naturally presents itself for earlier consideration. If the right here asserted is not a Federal right, that is the end of the case. We have no authority to go further and determine whether the state court has erred in the interpretation and enforcement of its own laws."

After an extended discussion on this point this court concluded (211 U. S. 99, 29 S. Ct. 19):

". . . We conclude, therefore, that the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgment by the States."

Continuing, the court said:

"The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they allege the instruction to the jury compelled, was a denial of due process of law."

In a further extended consideration of this proposition, the court in the course of its opinion said (211 U. S. 107, 29 S. Ct. 23):

". . . The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expresesd in that provision, not the rights fundamental in citizenship, state or National, for they are secured otherwise, but the rights fundamen-

> tal in due process, and therefore an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. . . . (211 U. S. 112, 29 S. Ct. 25.) 'It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend;' . . . (211 U. S. 113-114, 29 S. Ct. 26.) There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The States had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened, by forced construction of the Federal Constitution."

So far as the Fifth Amendment is concerned the ruling in the *Twining* case has been more recently approved in *Feldman v. United States,* 322 U. S. 487, 490, 64 S. Ct. 1082, 1083, 88 L. Ed. 1046.

In discussing the restrictions placed upon the State by the Fourteenth Amendment, this court in *Palko v. State of Connecticuit,* 302 U. S. 218, 325, 58 S. Ct. 149, 152,

82 L. Ed. 288, gave further approval to the doctrines expressed in the *Twining* case, *supra,* and said:

> "The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discreet instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' (Citing cases.) Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. Twining v. New Jersey, *supra.* This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefiit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. (Citing case.) Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the States has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself."

We respectfully submit that most of the authorities cited by appellant have little, if any, application to the question here involved. *Boyd v. United States,* 116 U. S. 616; *Counselman v. Hitchcock,* 142 U. S. 547; *Brown v. Walker,* 161 U. S. 591, and *Hale v. Henkel,* 201 U. S. 43, contain strong and vigorous language in support of the guarantee against compulsion to testify against one's self. However, none of these cases have any bearing upon the Fourteenth Amendment but were concerned only with the Fourth and Fifth Amendments. *Johnson v. United States,* 318 U. S. 189, 63 S. Ct. 549, 87 L. Ed. 704, likewise had to do with the Fifth Amendment and an exercise of the claim of privilege against self-incrimination.

The case of *Tot v. United States,* 319 U. S. 463, 466, 467, 63 S. Ct. 1241, 1244, 1245, 87 L. Ed. 1519, involved a Federal prosecution for violation of the Federal Firearms Act. The point for decision was the "question of the power of Congress to create the presumption which section 2(f) declares, namely, that, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute."

The court said that, "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

Appellant argues that the California law requires an inference of guilt to be drawn from failure of the defendant to testify and then, from that premise, urges that there is no rational or logical connection between the two.

The Supreme Court of California, however, in the instant case has specifically held that [R. 388]:

> "It was never intended, of course, that the 1934 constitutional amendment should relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt by admissible evidence supporting each element of the crime. . . . Nor can the defendant's silence be regarded as a confession."

On the contrary, that court specifically held that the effect of the California law is that [R. 387-8]:

> "Whenever therefore a fact is shown which tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists. Therefore the failure of the defendant to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable. . . .
>
> "The failure of the accused to testify becomes significant because of the presence of evidence that

> he might 'explain or deny by his testimony' (Art. I, sec. 13, Cal. Const.), for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it. No such inference may be drawn, however, if it appears from the evidence that defendant has no knowledge of the facts with respect to which evidence has been admitted against him, for it is not within his 'power' to explain or deny such evidence."

We submit that there is no "lack of connection between the two in common experience" as stated in the *Tot* case, *supra,* but on the contrary, it is, as stated in the remark attributed to former Chief Justice Hughes, *supra,* "a circumstance which no intelligent person can help taking into consideration of his own accord," and as said by the commentator in 22 Cornell Law Quarterly 392, 396, permitting such comment "is merely giving judicial sanction to realities. In the absence of comment, and even in the face of instructions to the jury, it is generally recognized that the jury considers the defendant's failure to testify."

In his Specification of Error II appellant bases his attack upon the claim that the violation consists in shifting the burden of proof from the state to the defendant. Of course, the California law makes no such shift. As we have just seen, the California Supreme Court in its opinion in this case stated that this amendment was never intended to "relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt by admissible evidence supporting each element of the crime."

Moreover, the case of *McFarland v. American Sugar Co.,* 241 U. S. 79, 86, 36 S. Ct. 498, 501, 60 L. Ed. 904, while holding it to be a violation of the Fourteenth Amendment to create a rebuttable presumption that any person systematically paying in Louisiana a less price for sugar than he pays in any other state is a party to a monoply or conspiracy in restraint of trade, said:

> "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' "

Likewise, in the case of *Morrison v. People of the State of California,* 291 U. S. 82, 88, 54 S. Ct. 281, 284, 78 L. Ed. 672, while it held that statutes placing the burden of proving citizenship or eligibility thereto upon defendants when charged with conspiracy to violate the Alien Land Law of California was invalid as denying due process of law, nevertheless, the court placed no such prohibition upon all shifting of burden of proof from the state to defendant, and said that:

> "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in crimnial prosecutions and cast on a defendant. The limits are in substance

> these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

While the burden is not shifted under the California law, we submit that if it were it would come within the limits delineated and that with the proof the state had offered as to fingerprints and other circumstances pointing to appellant as the perpetrator of the crime, it was just that he be required to repel such proof and circumstances, or in the absence of any denial or explanation to suffer the inference of the probable truth thereof.

In none of the authorities mentioned by appellant has it been intimated that a state may not permit comment upon failure of the accused to testify or to explain or deny some fact in evidence presumably within his knowledge. It has been stated as a general rule in 23 C. J. S. 558, Sec. 1098, that:

> "Where a statute permits an indicted person to become a witness in his own behalf, and does not provide that his failure to offer himself shall not raise any presumption, against him, or does not forbid an allusion to such failure by counsel, accused's failure to offer himself as a witness in regard to matters which may be disproved by him may be commented on by the prosecuting attorney, . . ."

II.

The Admission in Evidence of Portions of Women's Stockings Found in Appellant's Room and Not Belonging to Deceased Did Not Deny Appellant Due Process of Law.

Appellant urges that the admission of such evidence served no other purpose than to influence or inflame the passions and prejudices of the jury and to imply to appellant, a negro, a sex fetish and a low moral character. It will be noted that the only place in which any such implication is made is to be found in appellant's own language.

The prosecuting attorney made only one reference to this evidence. [R. 346-7.] In that comment the prosecuting attorney made a very fair statement in which there was nothing derogatory to appellant in any way other than the unexplained implication of the identity between the stocking tops found in appellant's room and the fact that one stocking of the deceased victim was wholly missing and the other stocking had the top torn off and removed.

The California Supreme Court in its opinion [R. 384-5] held that this evidence was relevant as showing in appellant an interest in women's stocking tops which was a circumstance tending to identify him as the person who removed the stockings from the victim and took away the top of one and the whole of the other. The court was careful to say that while this was not by itself sufficient to identify appellant as the criminal it did constitute a logical link in the chain of evidence, the weight of which was a matter for determination by the jury.

> "Evidence which is relevant is not rendered incompetent because it is prejudicial to the defendant

> or reflects discreditably upon him, or because it may awaken feelings of horror or indignation in the minds of the jury." (8 Cal. Jur. 77; *People v. Soeder,* 150 Cal. 12, 15, 87 Pac. 1016; *People v. Lucich,* 111 Cal. App. 293, 296, 295 Pac. 593.)

In *Lisenba v. People of the State of California,* 314 U. S. 219, 228, 62 S. Ct. 280, 286, 86 L. Ed. 166, cited by appellant, the same contention was raised relative to the production in court and offer in evidence of two rattlesnakes for the purpose of identifying the same as having been purchased by the defendant for the purpose of poisoning his wife. This court said:

> "We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of law. The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process."

There is, of course, as asserted by appellant, no question but that "this court has repeatedly held that incompetent evidence used to inflame the passions and prejudices of the jury offends due process of law." Here, however, the highest court of the state has held that such evidence was competent, not "incompetent," and there is not the slightest basis to show that it was introduced for the purpose of, or did in fact, inflame the passions and prejudices of the jury.

Such cases as *Chambers v. Florida,* 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, and following ones cited by appellant, have, we submit, no application to the point here in question. In the *Chambers* case this court concluded that negro defendants in the southern states had been bulldozed and mistreated until in sheer desperation a confession was obtained from them, and as the court said, ". . . To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol."

The Constitution does not guarantee that the decisions of State courts shall be free of error. Also, the guarantee of due process is not a guarantee that every ruling of the court during the trial shall be correct, at least where there is an appropriate remedy for the correction of errors; and where the trial is conducted in accordance with the general principles of the prescribed procedure, mere errors of the trial court in the application of these principles may not constitute a denial of due process.[6]

As was said by this court in speaking of an action in the Massachusetts courts in *Snyder v. Commonwealth of Massachusetts,* 291 U. S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674:

> "The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so

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[6] *Worcester County Trust Co. v. Riley,* 302 U. S. 292, 299, 58 S. Ct. 185, 188, 82 L. Ed. 268;
16 C. J. S. 1186;
Constitution of the United States, Annotated Edition by U. S. Government Printing Office 1938, pp. 946, 947; 949.

rooted in the traditions and conscience of our people as to be ranked as fundamental. (Citing cases.) Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. (Citing cases.) Indictments by a grand jury may give way to informations by a public officer. (Citing cases.) The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. Twining v. New Jersey, *supra*. What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it."

Conclusion.

We have attempted to set forth such additional matters as we thought might be helpful to the already fairly thorough discussion of this subject contained in the opinion of the California Supreme Court. That the provisions of the California Constitution and of the Penal Code, permitting comment by court and counsel on the failure of a defendant to explain or deny any evidence or facts in the case against him, whether he testified or not, are valid and do no violence to the Fourteenth Amendment, finds, we believe, abundant support, both in reason and in the authorities cited.

A careful examination of the record in this case will, we submit, afford conviction that appellant had a full and fair trial, and that if there were procedural errors they were not prejudicial and not of a character nor importance to warrant this court in taking cognizance of

them. Certainly there is nothing in the record that can be said to "shock the conscience," or that is "abhorrent to the sense of justice," or that offends any principle of justice so rooted in the conscience as to be ranked as fundamental. The comments of the prosecuting attorney now complained of were not even so harsh or uncalled for as to bring forth at the time a single protest or objection on the part of appellant or his counsel.

Respectfully submitted,

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