
(1990) 05 RAJ CK 0004

In the Rajasthan High Court

Case No : Criminal Miscellaneous Application No. 136 of 1989

Miss. Swati Lodha

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 10-05-1990

Acts Referred:

Constitution of India, 1950 — Article 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 482
Evidence Act, 1872 — Section 73
Family Law Reform Act, 1969 — Section 23
Penal Code, 1860 (IPC) — Section 376

Citation : (1991) CriLJ 939 : (1990) 1 RLW 467 : (1990) 2 WLN 110

Hon'ble Judges : Navin Chandra Sharma, J

Bench : Single Bench

Advocate : N.N. Mathur, for the Appellant; Chandralekha, Public Prosecutor and M.M. Singhvi, for the Respondent

Final Decision : Dismissed

Judgement

Navin Chandra Sharma, J.—(Miss) Swati, a young girl of about 20 in Nov., 1986, and daughter of Charandas Lodha of Purana Fatehpura, Sewa Mandir Road Udaipur, who was a compulsorily retired Government servant sometime in the year 1984-85 and was still yearning for his pensionary benefits and was suffering from some mental disorder, and who had his counterpart Kiran Devi, having completed her Higher Secondary at Udaipur, shifted to Ajmer to join Sophia Women's College there for graduation in or about 1984 and became a Sophian. Apart from being young, she was a sports woman as well and played tennis by shunting balls from this Court to that Court. At Ajmer, there was Dr. Raj Kumar Jaipal (to be referred hereafter as only "Raj Kumar"), born to Jas Raj, a former member of the Rajasthan Legislative Assembly, through his wife, Smt. Bhagwati Devi a former State Minister in the State of Rajasthan, who had himself contested the election in the State Legislature from Ajmer East Assembly (Reserved) Constituency, in the year 1985. Usha and Renu were two real sisters

of Raj Kumar and had acquaintance with (Miss) Swati, Swati says that at their request she canvassed door-to-door for Raj Kumar in that election, and Raj Kumar was declared elected as Member of the Rajasthan Legislative Assembly from that constituency. Raj Kumar thanked her for the canvassing and for persuading the voters to vote for him, and often used to meet her at Ajmer

2. Father of Swati having been compul-sorily retired, how she was pulling on with her Sophian expenses at Ajmer, is explained in this manner that her mother, who was not employed any where, had some income from her investments in the marble-business of one Mr. Gupta, although, she neither knew the firm's name, nor the amount of investment. Swati and Raj Kumar had gone to Agra and visisted that one of the wonders of the world known as "Taj-Mahal", which Emperor Shahjahan had built to perpetuate the memory of his wife, Mumtaz Begum, after her death. It might have been built in token of the profound love which the Emperor for Mumtaz Begum or out of the Emperor's fantasy or monumental taste. But, it is regarded as a monument in the memory of a wife of an Emperor to whom he loved. We find in this case several photographs in colour, which indicate that Rajkumar and Swati were at Agra in the prime of their youth to virtually display the so-called love which they posed to have towards each other. The photographs show that Raj Kumar was in too serious posture, but Swati was all out for him. On completing her appearance at Graduate Examination, she alleged that she came to her home-town, Udaipur, in June, '86. She received a telegram in June '86 (Ex. P3) from Raj Kumar's servant and another telegram in July, 86 (Ex. P. 4) from Raj Kumar himself, requesting her to reach Ajmer. But, she did not go to Ajmer. On the next day of "Deepawali", i.e. on the day what is known popularly as "Bhaiyadoo" day. Raj Kumar is alleged to have himself gone to Udaipur and visisted the house of Swati, located at Purana Fatehpura, Sewa Mandir Road, Udaipur. On that day, Raj Kumar was, for the first time, introduced to the family of Swati. Raj Kumar had come to Udaipur in a bottle green colour Maruti Car, without number plate. It is said that Raj Kumar requested her guardians that he would stay for that day at Swati's house. As his way of putting things was sophisticated, her parents permitted him to stay there. Raj Kumar had his dinner at Swati's house. The parents and younger brother of Swati had gone out to somebody else's house for, dinner, on account of "Bhaiyadoo". Swati herself cooked the food and Raj Kumar took dinner along with two younger sisters of Swati, named Kirti and Sapna. After taking their dinner, her both the sisters went for sleep to their bedroom. After dinner, since Raj Kumar Jaipal had asked for a cup of coffee, Swati prepared coffee for Raj Kumar and herself. She placed both the coffee-mugs on the dinning table. Raj Kumar asked Swati to place the coffee, filled in mugs, in the room which had been provided to him to take rest on that night, as he wanted to talk to Swati over a cup of coffee. Swati accordingly placed the mugs of coffee in the bedroom meant for Raj Kumar's rest on that night., Raj Kumar sent Swati out to fetch a glass of water. She came back with a glass of water, and then, both of them took coffee. On taking coffee, Swati felt dizziness and became unconscious. When she

regained consciousness, she found herself completely nude and there were stains on her clothes lying nearby. Raj Kumar was putting on his clothes. It was only then that she could fathom that Raj Kumar had committed rape on her, without her consent, while she was unconscious. Some hot words were exchanged, and Swati threatened that she would narrate the incident to her parents. Raj Kumar admitted that he had dropped some narcotic drug in her coffee, as a result of which, Swati had become unconscious. Raj Kumar first scolded Swati and also tried to blackmail her, but, when she wept bitterly as if being without any support, Raj Kumar placed his gentle hands on her head and undertook upon himself, her responsibility. The only punishment for his misdeed was that he would marry her.

3. Swati became perplexed, whether she should punish him or adore him. Raj Kumar promised that within 8-10 days, he would marry her and would take her to his home. Raj Kumar told that he had committed rape on her in a stage of her consciousness and nothing would be gained to Swati by disclosing it to her parents or by making a report in police. He told that he was a Member of the Rajasthan Legislative Assembly and had the power and capacity to influence everyone. He also told that he possessed photographs of Swati in her nude condition, and therefore, Swati should not disclose this act of Raj Kumar. Then Raj Kumar left for Ajmer, after giving a pain killer to Swati. This was the first alleged sexual intercourse by Raj Kumar with Swati. On the next day, Swati consulted Dr. Harish Mehta, who gave a prescription (Ex. P. 5) and she took the medicine prescribed. On Nov., 16, 1986, Raj Kumar again came to Udaipur and secretly married Swati, in a temple situated behind the office of Urban Improvement Trust. Raj Kumar placed a garland around her neck and made her to sit in the car and wrote a writing (Ex. P. 6) hurriedly, and handed over the same to Swati. Swati questioned as to what type of marriage it was? Thereupon, the said Raj Kumar told that his father, Jasraj was an Advocate, and he was also literate, and that his mother had been a Minister in the Rajasthan State, and he knew that it was a legal marriage. Thus consoled, they came back home. Raj Kumar had asked her not to disclose it to her parents, and therefore, she did not disclose it to them, and came to Ajmer, after making some excuses to her parents, along with Raj Kumar. On Nov., 17, 1986, Raj Kumar kept her in a house No. 3-Ka/18, in Vaishali Nagar, Ajmer. On that evening, she came to know that Raj Kumar was being married to some other girl. In the evening, she quarrelled with Raj Kumar and complained that she had been cheated. She also revealed to Raj Kumar that she suspected that she had become pregnant on Nov., 3. 1986. Raj Kumar then again committed rape on Swati. Ex. P. 7 is the marriage invitation card of Raj Kumar, with the other girl. Thereupon, Swati telephoned to her mother and called her to Ajmer. Both the mother and daughter tried to stop the marriage of Raj Kumar with the other girl, but, they failed in it. On Nov., 24/25, 1986, they returned to Udaipur. In Dec., 1986, pregnancy of Swati was confirmed. She then contacted Raj Kumar's family members on Jan., 4, 1987; but, they did not pay any heed to her. This led her to file a criminal complaint

against Raj Kumar, for offence u/s 376, I.P.C. She got her pregnancy examined, and in July 1987, she gave birth to a male child.

4. In this case, we are not to adjudicate about the paternity, filiation, legitimacy or custody of the child born to Swati. What is to be adjudicated and tried are the accusations made by Swati of her being raped and ravished by Raj Kumar. She states that she had no trust on Rajasthan police, for the reason that investigation by police could have been hampered by Raj Kumar, by exercising political pressure. There was no medical examination of Swati after the alleged rape, to show forcible sexual intercourse with her, or any other injury on her body, to show resistance on her part, or to show rupture of her hymen. Her dirty linens are stated to have been washed though the alleged dirty linens of Raj Kumar were sought to be produced. Paternity of the child, born to Swati, may not be relevant. Swati applied that the blood flowing in the veins, arteries or in the body of Raj Kumar, may be extracted out as a sample and the same may be got compared with that flowing in her own veins and in that of the child born to her, so that, she may bring on record as evidence, the report of the expert as evidence of sexual intercourse having been committed by Raj Kumar with her, the product of which was the child. As already stated, we are not trying a civil matter relating to guardianship, filiation, legitimacy or illegitimacy or inheritance. We are trying the accusations made by Swati against Raj Kumar by putting the latter in dock with allegations of rape as having been committed by him on her.

5. It is not a mother speaking in Swati to establish the parentage of the child to get it declared as possessing of any civil rights against Raj Kumar. It is the outcome of a revenge that a lady is seeking against this Raj Kumar, who, after violating her virginity, modesty and chastity, parried some other girl. Question, therefore, arises as to whether Raj Kumar, as an accused, can be compelled to subject himself to blood test for being compared through an expert, so that, the expert's report and testimony be adduced as an evidence of sexual intercourse and whether any form of testimonial compulsion arises in these circumstances. Can we compel Raj Kumar to become a witness against himself, so as to impinge upon his fundamental rights? The further question is can he compel Raj Kumar to get a syringe entered into his body to extract blood out of his veins for the above purpose, without his consent. These are the crucial questions to be determined in this case. :

6. For the first question, let me turn to the decision of 1.1 Judge Bench of the Supreme Court in *The State of Bombay Vs. Kathi Kalu Oghad and Others*, There appeals were before the Supreme Court. In one of them, besides other evidence, the prosecution adduced in evidence, a chit (Ex. P. 5), alleging it to be in the handwriting of the accused and was said to have been given by him. In order to prove that Ex. P. 5 was in the handwriting of the accused, the police had obtained from him, during investigation, three specimen handwritings of his, on three separate sheets of paper, which were marked as Exs. P. 27, P. 28 and P. 29. The question was whether by the production of the specimen handwritings (Exs.

P. 27, P. 28 and P. 29), the accused could be said to have been a witness against himself within the meaning of Article 20(3) of the Constitution. And, the second question was, whether, the mere fact that when those specimen handwritings were given, the accused persons were in police custody, by itself amounted to compulsion. In the second appeal, in order to compare the impressions on glass-panes and phials with those of the accused, the investigating officer got the impressions of the palms and fingers of the accused taken in the presence of a Magistrate. The question was whether the impressions of the palms and fingers of the accused taken from him after his arrest, which were compared with the impressions on the glass-panes and phials, were not admissible in evidence in view of the provisions of Article 20(3) of the Constitution. In the last appeal, the accused was directed to give his specimen handwriting and the signature u/s 73 of the Evidence Act and, the question was whether the provisions contained in Article 20(3) of the Constitution applied to the case of writing and signature to be taken as directed by the Magistrate. Article 20(3) of the Constitution; reads as under:--

"20(3) No person accused of any offence shall be compelled to be a witness against himself."

6A. Sinha, C.J., in the case of *The State of Bombay Vs. Kathi Kalu Oghad and Others*, laid down as under (Para 16):--

"(1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances, disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not compulsion."

(3) "To be a witness" is not equivalent to "furnishing evidence" in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression "to be a witness".

(5) To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court, or otherwise.

(6) "To be a witness" in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strick literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, anytime after the statement has been made."

7. It was thus held that giving thumb impressions, or impressions of foot or palm or fingers, or a specimen writing or showing parts of the body, by way of identification, are not included in the expression "to be a witness" as incriminating must mean conveying information based upon the personal knowledge of the person giving the information, and cannot include merely mechanical process of producing documents in Court which may throw a light on any of the points in controversy, but, which do not contain any statement of the accused based on his personal knowledge. Finger impressions or handwritings in spite of efforts of concealing the true nature of it by dissimulation, cannot change their intrinsic character. Giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression "to be a witness".

A specimen handwriting or signature or finger impressions by themselves, are no testimony at all, being wholly innocuous, because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of testimony. Giving of blood sample does not amount to imparting knowledge by the accused in respect of relevant facts by means of Court statements or statements in writing. A blood in a human being, in spite of efforts, cannot be concealed and cannot change its intrinsic character. A blood sample by itself, is no testimony at all being wholly innocuous. It is only material for comparison, in order to lend assurance to the Court that an inference based on other pieces of evidence is relevant. A blood sample is neither oral nor documentary evidence, but belongs to the third category of material evidence which is outside the limit of testimony. Consequently, taking of blood from the veins of an accused, does not amount to compelling an accused person to be a witness against himself. There is thus no violation of Article 20(3) of the Constitution.

8. I shall next come to the second question, which is more important than the first one.

9. In her judgment, Booth, J. in *Turner v. Blunden* (1986) 2 All ER 75, referred to the earlier history of blood test and said;

"It is perhaps somewhat surprising that as yet there is no reported authority whether the report of blood tests may be used for the purpose of corroborating the mother's evidence in accordance with the statute. It is surprising because as long ago as 1948 the results of blood tests were put in evidence in a divorce suit in order to prove that the husband was not the father of a child born to the wife and thereby to establish the wife's adultery (see *Liff v. Liff* (1948) WN 128 and see also *H. v. H. and C* (1962) Times, 23 March). Their use in the determination of a paternity issue was considered in *Re L (An Infant)* (1968) 1 All ER 20 (1968) p. 119. When the Court of appeal directed that a child should be subjected to blood tests, together with all the adults involved, to determine which of the two men could be the father. As between the two men, Ormrod, J. described the use of blood tests as "the scientific determination of paternity" (see (1967) 2 All ER 1110 at p. 1114, (1968) P. 119 at 125). It may well be that it was that case which was the impetus for the enactment of the provisions of the Family Law Reform Act, 1969, by which, the Court is given power to direct the use of blood tests in any civil proceedings in which the paternity of any person falls to be determined."

10. That comment is reinforced when one looks in greater details at some of the judgment in *Re L (An Infant)* (1968) 1 All ER 20, (1968) P. 119, to which the Judge had referred. In that case, the paternity of a child born to a wife during marriage was in dispute in divorce proceedings, and an issue was ordered to be determined whether the child, the defendant to the issue, was a child of the husband or of the party cited, who was also a party to the issue. In proceedings for custody and access the wife, husband and party cited were anxious to know who was the child's natural father. They were willing to have their blood tested and groups determined, and wished the child's blood to be tested in order to provide cogent scientific evidence of paternity. The Official Solicitor, as guardian ad litem of the child, refused consent, and Ormrod, J. made an order directing him to arrange for the child to be blood grouped, subject to the wife, husband and party cited submitting themselves for tests. The passage of Ormrod, J. is found in (1967) 2 All ER 1110 at pp. 1123-1124, where he said :--

"When these social changes are accompanied by scientific developments which provide an invaluable evidential tool to help in the solution of problems such as the present, to decline to use the tool in deference to tradition is to run the risk of imposing a restriction on the ability of the Court to do justice which it is difficult to justify. I respectfully agree with the observation of Cairns, J., in *W. v. W.* (No. 4) (1963) 2 All ER 386 at p. 387 : (1964) P. 67 at 69 that the modern policy of the law is to favour the production of any cogent evidence which will help to establish the true paternity of a child..... I have also considered two other points of general application which were put to me by counsel. These are whether it would be objectionable to compel the child to provide evidence, and the problem of enforcing such an order. On the first point, it would be wrong to speak of making the child give evidence against herself because, ex-hypothesi, the order would not be made if the Court considered it contrary to her interests.

Moreover, there is nothing inherently objectionable in making a party or even a witness give evidence which is to his disadvantage. This is one of the purposes of discovery of documents and particularly of interrogatories. If by chance the guardian ad litem or the child were in possession of a report containing the result of a serological examination on the child undertaken for some other purpose, it would have to be produced on discovery. So far as enforcement is concerned, the Court would undoubtedly reconsider and even rescind its order if it subsequently appeared that the child was refusing to allow the doctor to make a blood sample. If the guardian or other party charged with carrying out the order declined to obey it, the effective sanction would be the hostile inference, which, in the absence of a reasonable explanation, the Court might draw, as it has always done from a refusal to submit to an examination by the medical inspectors in cases of nullity on the ground of incapacity. This is not the place to consider whether the strength of the presumption is in way affected by a refusal by an adult party to submit to a blood test, but the question may have to be decided sooner or later."

In the Court of appeal, Lord Denning MR, with reference to blood tests, said (1968) 1 All ER 20 at 26 (1968) P. 119 at 159 :--

"Both counsel for the husband and counsel for the wife felt bound to concede that, under these sections, the Court could not order an adult to submit to a blood test. A blood test which involves the insertion of a needle is an assault, unless consented to. It would need express statutory authority to require an adult to submit to it. ((1963) 2 All ER 841 (1964) P. 67). If these sections do not authorise the court to order an adult to have his blood tested, I do not see that they authorise the court to make such an order in the case of an infant. A test of the child's blood would be useless unless there were tests of the adults also. But, I would say this. If an adult unreasonably refuses to have a blood test, or to allow a child to have one, I think that it is open to the court in any civil proceedings (no matter whether it be a paternity issue or an affiliation summons, or a custody proceeding) to treat his refusal as evidence against him, and may draw an inference therefrom adverse to him. This is simply common sense. It is in keeping with the rule that in a nullity case, if a party refuses to be medically examined, the court may infer that some impediment exists pointing to incapacity (see *W. v. W. (otherwise L.)* (1912) P. 78). Moreover, being a rule of evidence, it applies not only to the High Court but also in the magistrates' court, and to any court of the land."

11. Interestingly, in *Mc Veigh v. Beattie* (1988) 2 All ER 500, the factual aspects were more or less similar. The facts in that case were that complainant Seattie was born on 21st March '67, and at the relevant times, was employed as nanny by the appellant Mc Veigh and his wife, to look after their five children at the matrimonial home in Buckinghamshire. The complainant was engaged in the spring of 1985 and started work on 18th March of the year. From Monday to Friday, she lived with the family and from Friday afternoon until Sunday

afternoon she returned to live with her parents. Her case was that on a Tuesday or Wednesday night, in the first or second week of April, 1985, she had gone to bed at about 10.30 P.M. and later had awoken to find the appellant in her bed. When she awoke, he was trying to get on top of her and only had his pants on he did not say anything. She was shocked and when she woke up, he left the room. She did not go to sleep and about half an hour later, he came back. She was in bed and it was her case that he got into bed, strated to take off her night shirt and her knickers and had intercourse with her, to which she said she did not consent. She was a virgin. There had been no prior familiarity or or intimacy and no evidence of any affair. This was the only act of sexual intercourse between them and as a result she became pregnant. The appellant's case was a complete denial of sexual intercourse and he sought to set up what in effect an alibi. It was in an appeal by a case stated from a decision of the Justices sitting at St. Albans given on 27th Oct., '86, where on a complaint by the complainant that the appellant was the father of her child, they found that the complaint was true and they ordered that he should pay to the child the sum off 1 per annum. On 7th Feb., '86, the case had first come up before the Court, and an application for blood test was made, which was resisted on behalf of the appellant. The Court nevertheless made a direction for blood test to be taken. On 3rd July, the blood test direction was revoked as the Court had not received the required details from the appellant. On 3rd October, the appellant indicated that he was not willing to submit himself to blood tests, if there was a further application for a blood test direction. As the appellant did not submit to blood test, if a further direction was made, the Justices drew the inference that the appellant failed to comply with the blood test direction, because he had had sexual intercourse with the respondent and he knew that the blood test result would show that he was probably the father of the child. On behalf of the appellant, the main submission before the Family Division, so far as corroboration was concerned, was as follows:--

"Whilst the court can draw any inference it thinks proper and take into account other matters, the fact that the appellant had not complied with an order for blood tests could not be "other evidence" which corroborated the evidence of the complainant in a material particular. The fact that an appellant failed to take blood tests, does not show anything one way or the other."

The Justices expressed their opinion as follows:--

"We were of the opinion that the evidence that the appellant failed to comply with a blood test direction, coupled with inference, we drew from that failure, was sufficient to constitute "other evidence" which corroborated the evidence of the complainant in a material particular and we adjudged the appellant to be the putative father of the child born to the complainant."

The questions which the Justices posed for the decision of the Family Division were :--

"(a) In all the circumstances of the case, were we correct in drawing an adverse inference from the failure by the appellant to comply with the blood test direction
(b) Is the evidence that the appellant failed to comply with the blood test direction capable of being "other evidence" which corroborates the evidence of the complainant in a material particular."

Wood, J. dealt with the second question first. He recast the same question as follows:--

"Was the appellant's failure or refusal to comply with the blood test direction evidence which was "other evidence", i.e. capable of construing corroboration of the complainant's case that it was the appellant who was the father of her child or, to use the words of Sellers LJ in *Simpson v. Collinson* (1964) 1 All ER 262 at p. 267, was it evidence that shows or tends to show the story is true."

It was stated by Wood, J. that whilst it has been held that a report of a blood test relating to the party could constitute corroborative evidence. Then, it was dealt with what is corroborative evidence.

12. The question, what is corroborative evidence, came up for consideration in *Mash v. Darley* (1914) 3 KB 1226. Dealing with the question, Buckley LJ observed at page 1231 of the report as follows :--

"Corroborative evidence, I conceive, may be found either in admissions by the man or inferences properly drawn from the conduct of the man. Admission here, there is none. Conduct there is. Were or were not the justices entitled to take into account as a matter of evidence upon which they might come to some conclusion the fact that the man before the justices told a story, namely, that she was fast and that her condition was due to that state of things, and that the fact that when at the assizes he stood in peril and when, if the defence was true, it was to his interest to set it forward, he did not set it forward at all? It has been argued before us as if he could not have set up that defence without going into the box and exposing himself to cross-examination. It appears to me that that is a mistake. The defence could have been set up on cross-examination of the girl when she was in the box. Nothing of the kind was done. So, upon matters which are admissible in evidence, it is established that the conduct of the man was this that before the justices he took a particular course and at a subsequent date he did not take a particular course and that that was a course which you would have expected him to take under circumstances of his innocence. It is not for us but for the justices to determine whether or not that was evidence which satisfied them. It appears to me that that was corroborative evidence and that the justice were entitled to take into account that the man so conducted himself as that there was reason from his conduct to infer that the girl's story was presumably true. it appears to me that that disposes of this case."

Phillimore LJ said (at 1235) :--

"I also take the finding "nor did the appellant report the evidence on the point"

as a finding of the magistrates that he did go into the witness box. It does not very much matter whether he did so or not. He then, being in increased peril, does not repeat either through his advocate, by cross-examination, or when he comes to give evidence, if he did give evidence, the suggestion which would explain the matter in a way favourable to himself. I do not say that by itself it would be nearly enough; but when corroboration only is required, when, as the books put it, the corroboration is required to prevent men being at the mercy of profligate women, such evidence by conduct might be treated by the tribunal which had to determine not a criminal but a purely civil question as sufficient corroboration. That is all I think it is necessary to say to support the decision."

Wood, J. stated that the criminal test for corroboration is to be considered as very similar to that in affiliation cases which is made clear in *Thomas v. Jones* (1920) All ER Rep 462. In that case, Banks LJ said :

"In *Rex v. Baskerville* (1916) 2 KB 658, ((1916-17) All ER Rep 38) the question as to what constituted corroborative evidence was considered by the Full Court of Criminal Appeal consisting of Lord Reading, C.J., Scrutton, Advory, Rowlatt and Atkin, JJ. The Lord Chief Justice, in delivering the judgment of the Court, stated what in their view amounted to corroboration. It is true that the language was used in reference to the corroboration at common law of the evidence of an accomplice, but I think the language applies equally to a case under the Bastardy Laws Amendment Act, 1972. The Lord Chief Justice said (1916) 2 KB 658 at 667: (1916) All ER Rep 38 at 43 : "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute "implicates the accused", compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the evidence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection with the crime. "I think, with the necessary alterations to fit the language to this particular statute, it is entirely applicable to a case like the present, and I would only add my emphatic agreement with what the Lord Chief Justice said, that it would be in high degree dangerous to attempt to formulate the kind of evidence which should to regarded as corroboration, or to attempt

any general definition of what constitutes corroborative evidence. But I think that assistance in this case can be derived by considering what is not and cannot be properly regarded as corroborative evidence."

13. Thus, within the criminal law, a refusal without reasonable excuse to supply a sample for scientific examination has been held capable of amounting to corroboration.

14. Reference may also be made to the decision in R.v. Smith (1985) 81 Cri App R 286 -- It was a case of robbery. There was evidence that police officers searching the scene of the crime had found hairs there and that the appellant had refused to give hair sample with which they could be compared. The Court of Appeal said :--

"Counsel were unable to cite any authority on the point which we have to decide. In the judgment of this Court, the direction which the trial Judge gave on the appellant's refusal to supply hair samples for scientific examination is not analogous with comment on the accused's failure to answer allegations made against him when he has a right to remain silent. It is true that the samples could not lawfully be taken without the appellant's consent; but the proposition does not perfect the analogy which counsel for the appellant sought to draw. In the absence of direct authority, and deriving such assistance as we can from the cases which we have summarised, we have come to the conclusion that the learned Judge was entitled to leave the appellant's refusal to give the sample, and the circumstances of that refusal, as material which was capable of corroborating the evidence of the accomplice. It was the latter's evidence that the appellant had confessed to him his part in the robbery at the video premises. The cap was found at those premises on the following day. The police had grounds for suspecting that it might be one which had been worn by the appellant during the robbery. When they asked the appellant for samples, he had the advantage of having his solicitor present and therefore, was to that extent on equal terms with the officers. After the request had been made the solicitor enquired where the hairs, with which the comparison was to be made, had been found. He and the appellant were told that they were from the scene of the robbery and that they came from items recovered at the scene. There then followed the question directed to the appellant, "Are you prepared to give a sample, Mr. Smith" and his answer, "In that case, no I am not.". We emphasise the words "in that case." In the judgment of this Court, it would be contrary to good sense to hold that, in the context of the preceding exchange, the evidence of the appellant's refusal was not material which the jury could properly consider as evidence connecting or tending to connect the appellant with the crime and therefore as evidence which was capable of corroborating the accomplice's evidence. It is in a wholly different category from evidence of a failure to answer when a caution has been administered or a failure to answer in a sufficient detail. Each case must be judged on its own particular facts. In the present case, it is the context and the actual terms of the appellant's refusal which given the evidence probative value."

15. It appears that in England, even before Section 23 of the Family Law Reform Act, 1969 came into force, the Courts were clearly envisaging adverse inferences from the failure or refusal to take a blood test. Wood, J. posed the question :--

"What is the argument against such inference being capable of such corroboration. It is said that a refusal points to no conclusion, " because a blood test does not, prove anything; it may exclude, but, if it does not, then it will only place the respondent within a bracket of men, usually expressed as a percentage, who could have been the father. To this it can be said that a forensic test is not necessarily conclusive one way or the other, and the question might be asked, why not take any steps which could in effect exclude. What has the respondent to fear or to hide I am satisfied that the answer to this question is in the affirmative. If it were to be in the negative, then in my judgment the effect of Section 23 would be severely eroded, if not totally negated. No one would comply with a blood test direction and would be so with impunity."

16. A review of the above law, would go to show the following propositions are well-settled :--

(1) Report of a blood-test is capable of amounting to corroboration of the statement of the complainant. It amounts to corroboration even under the common law. The nature of the corroboration would necessarily vary according to the particular circumstances of the offence charged. The test applicable to determine the nature and extent of the corroboration is the same whether the case falls within the rule of common law or within that class of offences for which corroboration is required by statute. A Criminal Court can make a direction for a blood-test to be taken by taking blood-sample of the complainant, accused and of the child. In certain cases, where it is contrary to the interest of a minor, the Court may not make a blood-test direction.

(2) The Court cannot order an adult to submit to blood-test. A blood-test which involves insertion of a needle in the veins of a person, is an assault, unless consented to. It would need express statutory authority to require an adult to submit to it. This is based on the fundamental that human body is inviolable and no one can prick it.

(3) Where a Court makes a direction for a blood-test, and the accused fails or refuses to comply with the blood-test direction, the Court can in the circumstances of the case, use the refusal or failure of the accused to submit to blood test as a corroborative evidence against him. If a party refuses to submit to blood-test, the Court may infer that some impediment existed which pointed out towards the implication of the accused.

17. The net result is that the order passed by the Sessions Judge, Udaipur, dated March 4, 1989, directing respondent No. 2, Dr. Raj Kumar Jaipal, to convey to the Court whether he is ready to submit to blood-test, amounts to a direction to respondent No. 2 to submit to blood-test, and now, it is the choice of the respondent No. 2 to give his consent to submit to blood-test or to refuse to give

consent. It has already been observed that it would ultimately be for the Sessions Judge to use the failure or refusal of respondent No. 2 to submit to blood-test, as a corroborative piece of evidence to corroborate the statement of (Miss) Swati Lodha that sexual-intercourse was committed with her by Dr. Raj Kumar.

18. With these observations, this petition u/s 482, Cr.P.C., is dismissed and disposed of accordingly.