

Jamshed Vs. State of U.P.

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SooperKanoon Citation : sooperkanoon.com/469241

Court : Allahabad

Decided On : Jan-09-1976

Reported in : 1976CriLJ1680

Judge : H.N. Seth and ;G.D. Srivastava, JJ.

Appellant : Jamshed

Respondent : State of U.P.

Judgement :

G.D. Srivastava, J.

1. Jamshed alias Dabli has come up in appeal against the judgment of the IVth Additional Sessions Judge, Aligarh finding him guilty under Sections 394 and 302 of the Indian Penal Code and sentencing him to undergo imprisonment for life under the former count and to death under the latter count. The appellant is said to have committed the murder of Smt. Anwar Begum alias Anwar Fatima, wife of Chhuttan (P.W. 8) and daughter of Shamsuddin (P.W. 1) on 10-3-74 at about noon in her house in mohallah Chaucharian, Police Station Atrauli, district Aligarh. The deceased and her husband Chhuttan used to reside in a house in the aforesaid mohallah and in those days these were the only two inmates of the house because other members of the family were out. The house of Shamsuddin is in the same locality at a distance of 1 or 1-1/2 furlongs, On 10-3-74 Chhuttan left his house in the morning for 'shikar'. Because the wife was to live all alone in the house in his

absence, he thought it fit to take her to her father. While leaving for 'shikar', Chhuttan therefore left the deceased at her father's house telling his father-in-law that he would be back at about noon and that Anwar Begum should be escorted back to his house by her father some time after noon. At about 12-30 p.m. therefore, Shamsuddin left his house with the deceased to leave her at her house. When he reached the house, Anwar Begum entered the house after opening the lock of the main door, while Shamsuddin began talking to two other persons, namely, Kabir Ahmed and Wahab Khan, These three persons were talking to each other regarding some land, at a distance of a few paces from the main door outside the house. Immediately after, Anwar Begum had entered the house, shrieks were heard by Shamsuddin and his two companions inside the house. Immediately Shamsuddin rushed inside followed by Kabir Ahmed and Wahab Khan. This appellant was seen coming out from the Kotha with a bloodstained knife in his hands. Shamsuddin had a 'danda' with him and he succeeded in apprehending the appellant after giving him some beating. He was helped by Kabir Ahmed and Wahab Khan. On a search being taken, the appellant was found in possession of a bundle containing currency notes worth Rs. 1,210 and two wrist watches. These watches were identified by Shamsuddin to be the property of his daughter and son-in-law. He also identified the handkerchief to be that of the deceased in which the currency notes were wrapped. When these persons entered the kotha and the room, they found that bolt and locks of the doors and boxes had been broken and articles were lying scattered. Shamsuddin dictated a report on the spot to Mahendra Swarup and took it to the thana, where it was received by H. C. Balbir Singh at 1 p.m. The investigation was taken up by K. P. Sharma S. O., who at once left for the spot. The currency notes and the watches were taken in custody and sealed, the blood-stained knife was also taken from the hands of the appellant and was sealed. An inquest was held on the body of the deceased and the necessary papers were prepared. Plain and blood-stained earth was collected from the scene of occurrence and a site-plan was also prepared, Blood-stained garments of the appellant were taken off from his body and sealed, and these garments are marked Exts. 1 and 2. Broken locks and bolts were also examined by the investigating officer. Statements of material witnesses were recorded and on 1-4-74, a charge-sheet was submitted against the appellant.

2. Dr. G. D. Tripathi, Superintendent Aligarh Hospital conducted the post-mortem examination of the body on 11-3-74 at 3-30 p.m. and noted the following ante-mortem injuries.

1. Incised wound 1-1/4' X 1/2'X bone deep tapering outside on the left side of face started from 3/4' in front of left ear lobule, reaching near the angle of mouth.

2. Incised wound 3-1/3' X 3/4'X muscle deep running on the undersurface of the left mandible from its angle. The direction of the wound was downwards.

3. Incised wound deeper and tapering outside the mid-line of neck at its middle. Wound was 1-1/4'X1/4'X neck cavity deep.

4. Incised wound 3/4'x1/2'X muscle deep tapering at the outer side of the wound lying 1/2' to the back of injury No. 3.

5. Incised wound 3/4' X1/4' tapering to outside of middle line, deeper at its middle. Muscle deep.

6. Incised wound 1/2' X 3/4' X chest cavity deep deeper at its outer side 3' above the left nipple at 11 O'clock position.

7. Incised wound 4'X1-1/4'X chest cavity deep tapering on outside, lying slanting on the left side of chest, 3-1/4' below left nipple at 1 to 5 O'clock position. Through the wound cut omentum and part of cut large intestine with faecal matter coming out.

8 Incised wound 1'X 1/4'X abdomen cavity deep deeper at the inner and lying just outside the nipple on right side running slanting.

9. incised wound 1'X 1/2' X muscle deep tapering at both ends running horizontal on the posterior side of forearm 3-1/2' above wrist joint left side.

10. Incised wound 1/2'X1/4' X muscle deep 3' above wrist joint running slanting on the front side.

11. Incised wound on the mid phalangeal joint of left little and ring fingers on the palmer side.
12. Contusion 2'X1/2' on the right of flank, 2' above right iliac crest.
13. Incised wound 1/2' X1/4' X muscle deep running slanting deeper at outer end on the right side of neck 2' below the right ear lobule.
14. Incised wound 1/4' X 1/4' X skin deep running vertically down on the back of the neck.
15. Incised wound 1-1/4'X1/6'X skin deep on the upper surface of left shoulder blade.
16. Abrasion 1' x 1/10' lying 2' above the knee joint running across the upper end knee joint right side.
17. Abrasion 1' x 1/10' running horizontal on the right knee joint.

On internal examination it was found that the eighth rib was fractured, pleura had an incised wound, trachea was cut below injury No. 3 and the larynx was also cut. The left lung had an incised wound in its upper lobe and the chest cavity contained 1 pint of partially clotted blood. The peritoneum had an incised wound under injury No. 7 and the abdominal cavity was partially full with clotted blood. The stomach contained some watery fluid, small intestines had faecal matter while the large intestine was incised at one place. Cause of death was found to be shock and haemorrhage resulting from injuries and the probable time since death was estimated to be about one day.

3. The appellant admitted only this much that he was a cousin of Chhuttan and that the deceased was married to Chhuttan. Regarding the allegation that on that date Chhuttan had gone for 'Shikar' and had left the deceased at her father's house, the appellant pleaded ignorance. The appellant denied the whole prosecution case and he also denied his arrest inside the house, as alleged by the prosecution. On the other hand, he suggested that he was arrested from his house. The appellant also denied taking of his blood-stained clothes by the police.

About witnesses, the appellant said that they were inimical to him. He alleged that his uncle was a candidate in the election for M.L.A. and in that connection enmity grew up between him and Shamsuddin. He further said that Sham-suddin used to throw sand on the land of his (appellant's) father-in-law and that the appellant gave an application against Shamsuddin to the S. O. Police Station Atrauli and that Shamsuddin had therefore threatened to falsely implicate him in some ease, The learned Sessions Judge relied on the statements of the three eyewitnesses and also on the statement of Chhuttan. Believing the entire prosecution case to be true he convicted the appellant under Sections 394 and 302 of the Indian Penal Code and sentenced him as mentioned above.

4. It seems to be undisputed that on 10-3-74 some time in the afternoon, fatal injuries were caused to the deceased by some sharp-edged pointed weapon like knife. The doctor estimated the duration of death to be about one day and he deposed that there was a margin of only three hours in the estimated duration, which means that the murder must have been committed sometime between 12 noon and 6 p.m. It also appears certain that when this murder was committed, the deceased was the only inmate inside the house. The question now is whether the trial court was justified in placing reliance on the testimony of the three eye-witnesses. From the side of the appellant, this oral evidence was attacked mainly on two grounds. Firstly, it was argued that these three witnesses were related to each other and secondly it was urged that because of enmity between Shamsuddin and the appellant, the entire oral evidence should be discarded. The time of occurrence has also been disputed and regarding the story about the arrest of the appellant on the spot, it was contended that it was fabricated on account of enmity and, as already noted, the case of the appellant is that he was arrested from his house some time after the murder. The genuineness of the F.I.R. has also been questioned and the suggestion of the defence is that it was prepared on the next day in collusion with the police and the whole story was concocted to falsely implicate this appellant. It is needless to say that the prosecution relied on the statements of the three eyewitnesses, whose names have already been indicated above and then we have the statement of Chhuttan, who has come forward to corroborate these eye-witnesses in material particulars. The prosecution also relied on the statement of one Gauri Shanker (P.W. 6), who

came forward to state that about a month earlier, the appellant had pawned his cycle with him for a sum of Rs. 100. Obviously this evidence was led to show that the appellant was in need of money and was, therefore, likely to commit this theft. It may be pointed out in the very beginning that no enmity whatsoever has been alleged between the appellant and the deceased or her husband. This would naturally mean that the primary object of the appellant was to commit theft and because the deceased had recognised the appellant he, therefore, feared that he might be apprehended if the woman raised an alarm and this must be the motive for causing fatal injuries to her. It may again be noted at this stage that admittedly the appellant is a cousin of Chhuttan, their grandfathers being real brothers. Regarding connection between three eye-witnesses inter se, it has no doubt been brought out in evidence that they are related to each other. The sister of P.W. Kabir Ahmed Khan is married to Habbu Khan, who was the uncle of Shamsuddin. Nafisa Begum was the real mother of the deceased, Raisa Begam, wife of the P.W. Wahab Khan is the real sister of Nafisa Begum. So far as the allegation of enmity is concerned, the only contention of the appellant is that his uncle was a candidate in the election of M.L.A. and some enmity grew up between the appellant and Shamsuddin in connection with that election. He however did not disclose in what connection this enmity grew up between him and Shamsuddin. From the statement of Shamsuddin, however, it is borne out that he too was a candidate in the Municipal elections. But he did not do any harm against Anwar Khan. This election of the Municipal Board took place about 10 or 15 years ago. From these circumstances, therefore, no enmity between the appellant and Shamsuddin is borne out. Ext. Kha 4 was filed by the defence and it is an application given by the appellant on 2-3-74 to Sub-Divisional Magistrate, Atrauli. In this application he complained that Shamsuddin was wrongfully storing sand and parking trucks on the land of his (appellant's) father-in-law, as noted by the learned Sessions Judge. This application bears a remark that it had been filed only for peshbandi. Various other documents were also filed on behalf of the defence and they have been discussed by the trial court. We have examined those documents and in our opinion, there is no material on record to indicate that Shamsuddin could have any grudge against the appellant. This being the position, the mere fact that the other two witnesses are relations of Shamsuddin appears to

be of no consequence.

5. The next question now is whether these three eye-witnesses have given a convincing and consistent story. To Shamsuddin it was suggested that the story of his escorting the deceased to Chhuttan's house is a mere fabrication and has been invented only to make Shamsuddin an eye-witness. Similarly the story that Shamsuddin stayed outside the house talking to Wahab Khan and Kabir Ahmed is also imaginary. As has been noted above, when the appellant was questioned on this point, he simply pleaded ignorance. Our attention was drawn to a contradiction in the statements of Shamsuddin and Chhuttan in this regard. The version of Shamsuddin is that he had been requested by his son-in-law to escort the deceased to the house near about noon, while Chhuttan stated that he intended to take back his wife himself on returning from 'Shikar'. In our opinion, this sort of a minor contradiction should not go to discredit the whole story. It is in evidence that in those days other members of the family were out and therefore it was most natural that while going out on 'phikar' Chhuttan did not think it proper to leave his young wife all alone in the house. The girl's father has his house at a distance of about 1 or 1-1/2 furlongs and therefore there is nothing unnatural in the story that when Chhuttan left for 'shikar'. he thought it fit to leave his wife at her father's house. Chhuttan intended to come back some time after 12 . noon and it is, therefore, quite possible that when he did not return till 12 noon, the girl herself expressed her desire to go back to cook food and do other household duties. The statement of Chhuttan is to the effect that when he came back from 'shikar' at .about 1-45 pm., he first went to the house of his father-in-law and there he was informed about the murder of his wife. He naturally, rushed to his house and found that there was a large crowd assembled. He found his wife lying in a pool of blood in the courtyard and he also found this appellant under arrest, Thus the prosecution has attempted to corroborate the statements of these eye-witnesses by the statement of Chhuttan, The relationship between Chhuttan and the appellant is admitted. Prima facie it does not appear probable that Chhuttan would come forward to falsely implicate his own cousin only to please his father-in-law. There is absolutely nothing in the statement of Chhuttan to show as to why he had come to support the prosecution case, if it was a false one.

6. Coming now to the question as to whether the statements of these three eye-witnesses are natural and probable, the testimony of these three eye-witnesses shows that when Shamsuddin reached Chhuttan's house with the deceased, the latter entered the house and at that very time Shamsuddin noticed that Kabir Ahmed Khan and Wahab Khan were going away; he called them and enquired about the topic of their talk. Kabir Ahmed wanted to sell some of his land in Garaua Bagh and Wahab Khan was intending to purchase that land. Wahab Khan was, therefore, going to have a look at that land and Kabir Ahmed was going to point out that land. A talk had been going on between them regarding this transaction for the last 10 or 15 days. Shamsuddin also felt interested and therefore participated in this talk. We were not referred to any improbability in this story. Our attention was, however, drawn to certain contradictions in the statements of the eye-witnesses regarding the manner in which the appellant was apprehended and the number of injuries that were caused to him. We think that the statements of the eye-witnesses should not be discarded if they have contradicted themselves on such minute details. The whole occurrence was so unexpected that it could not be possible for all the eyewitnesses to focus their attention on such minute details, Briefly speaking, we are not going to discredit the oral evidence on account of such contradictions.

7. Coming now to the other point, namely, the genuineness of the F.I.R., the learned Counsel for the appellant argued that the F.I.R. was prepared on the next day and that the whole story was concocted only to falsely implicate the appellant in collusion with the police. In this connection our attention was drawn to the statement of K. P. Sharma investigating officer, when he was examined by us regarding certain documents which he prepared during the investigation. In the inquest report (Ext. Ka 11), diagram (Ext. Ka 12) and other documents marked Exts. Ka 13 and Ka 15 the crime number was first noted as '49' and later on it was corrected as '47'. It was then pointed out that in the inquest report, the date, as originally written, was 11-3-74 at some places but afterwards figure '11' was changed into '10'. Although the investigating officer denied this interpolation, but even to the naked eye it is clear that at some places in the inquest report the original date was noted as 11-3-74. But afterwards figure '11' was changed to '10'. He however admitted that the crime number was wrongly noted by him as '48' and

later on it was corrected. But at the same time he could not give any reason as to how this mistake crept in. The argument on behalf of the defence was that if the investigating officer had taken with him a copy of the F.I.R. and the G. D. entry, there was no possibility of any mistake in crime number. From these circumstances, therefore, it, was sought to be inferred that no report was in existence when the inquest report etc. were prepared. Apparently this is a plausible argument but still the question remains whether on the basis of these circumstances the genuineness of the F.I.R. should be doubted. As has been seen above, the suggestion of the appellant is that he was arrested at his house some time in the night after this murder. If this was so, it would necessarily follow that before the arrest of this appellant, Shamsuddin etc., in collusion with the police, had decided to implicate him. It therefore does not stand to reason that after having taken this decision and after arresting the appellant, neither the police nor Shamsuddin was able to fabricate a story for the whole night so that the story could be invented only next morning. We should not rule out the possibility that the mistakes in dates and in the crime number were simply honest mistakes, although the investigating officer has refused to admit the mistake in date. A copy of the General Diary may be with the investigating officer when he was on the spot, but he might have carelessly omitted to look into it before preparing the various papers. If no report was in existence, the investigating officer will not put down an imaginary crime number on the inquest report etc., so as to make correction afterwards, if necessary. In fact it was never suggested to Shamsuddin that he had fabricated this story on account of any enmity. On the other hand, the suggestion was that the appellant was arrested on account of suspicion and that Shamsuddin was deposing against the appellant because he was made to believe that this appellant was really the murderer. We fail to understand why there should be a suspicion against the appellant if it is nowhere in the evidence that this appellant had any enmity either with the deceased or with her husband, Similarly to the other two eye-witnesses it was not suggested that they were deposing falsely in the case only on account of relationship with Shamsuddin. No enmity with the police has also been suggested by the defence, Another circumstance referred to in this connection was that in the F.I.R. the precise value of the currency notes had been noted, while in cross-examination, Shamsuddin admitted that he did not

count the notes. From this it was sought to be inferred that the F.I.R. was prepared afterwards. We have examined this argument and it appears that in his examination-in-chief Shamsuddin clearly said that when he searched the person of the appellant he found a handkerchief in which currency notes worth Rs. 1,210 were wrapped. But in cross-examination he stated that he did not open the knot of the bundle, although the currency notes were visible, and that he did not count them. In order to be fair with the witness, he should have, in fact, been questioned as to how he had given the exact value of the currency notes if he did not count them. In the absence of such a question, it would not be proper to draw an adverse inference. Had the witness been questioned, he might have been able to give some explanation. From the statement of Chhuttan it would appear that this amount had been kept wrapped in a handkerchief by the deceased and it is, therefore, quite likely that the deceased might have told about the same to her father some time before this murder. This circumstance, therefore, also does not help the defence.

8. Regarding the time of occurrence, the only point referred to us was that according to Shamsuddin, the deceased had taken bread and meat at the former's house, while her stomach was found empty. On the basis of this medical evidence it was contended that the murder must have been committed some time in the evening and that the time of murder, as set up by the prosecution, is not correct. It has been seen above that the murder must have been committed some time before 6 p.m. Shamsuddin deposed that on that day he took his food at 11-30 a.m. and he went on to state that his daughter also took food and that she ate bread and meat mixed with some vegetables. Shamsuddin did not say at what time the girl took her food and there seems to be no reason for supposing that the girl took food with her father at 11-30 a.m. It is also possible that the girl might have taken bread and meat some time earlier and not with her father at 11-30 a.m.

9. With reference to the injuries found on the person of the appellant, it was argued that these injuries had been caused some time on 11th and that third-degree methods were used by the police, and it was also pointed out that no such injuries, as are alleged to have been caused on 10-3-75, were found on the body of the appellant. Dr. H. K. Tandon who was then posted as Assistant Medical

Officer, District Jail, Aligarh, examined the appellant on 11-3-74 at 1 p.m. and noticed that the appellant had one contusion on the left scapular part, one lacerated wound on the right hand second finger and traumatic swelling on both ankles, legs and upper part of right foot. The doctor gave the age of these injuries as 6 to 8 hours. Thus, according to this estimate, these injuries had been caused on 11-3-74 some time in the morning. He denied the suggestion of the State counsel that these injuries could have been caused on 10-3-74 at about noon. The doctor was questioned as to the basis of his opinion regarding the age of injuries. This much however appears to be certain that the duration of 6 to 8 hours, as noted by the doctor, is not correct, simply because if the appellant had been arrested one day earlier, it does not stand to reason that third-degree methods will be used by the police next day in the morning when he was to be taken to the District Jail. The story as contained in the F.I.R. was that the culprit had been arrested on the spot and third-degree methods could be used only to extract a confession. There seems to be no other reason why such a beating should be given by the police. The doctor deposed that he had given the age of the injuries only on the basis of the colour of the contusions. His attention was drawn to the observations of Dr. Modi in his book of Medical jurisprudence. Dr. Modi is of the opinion that the changes in the colour of a bruise commence from 10 to 24 hours after its infliction. At another place in the Book, Dr. Modi has observed that the bruise is red at first but during the next three days it appears blue and then bluish-black. Similarly regarding the lacerated wound, the doctor said that because the margins of the injury were red, he mentioned in the injury report that such injury could have been caused by some blunt knife and that the duration of injuries was 6 to 8 hours. But the doctor also said that it was possible that the blood might have clotted and then the wound stopped bleeding, but when subsequently for some reason the clot was removed, the blood might have started flowing again, and then the clotting would start within 10 or 15 minutes. Such a clot having been reformed might retain its colour for about 8 to 10 hours. We are, therefore, of the opinion that the age of injuries as estimated by the doctor is not correct. He has not been able to give any satisfactory reason as to why these injuries could not be about 18 hours old. The swellings on the lower parts of the body and the contusion on the scapular region are typical injuries which might have been inflicted when the

appellant was apprehended. The story of the appellant that he was arrested afterwards and was falsely implicated in the case does not appeal to us. On the one hand the appellant said that he was arrested from his house, while the suggestion to the investigating officer was that he sent for the appellant some time in the night. There being no enmity between the appellant and the deceased or her husband, there was no possibility of any suspicion having arisen against the appellant, It is needless to say that Chhuttan, who is a near relation of the appellant, has fully supported the prosecution case and he has come forward to state that when he reached his house at about 1-45 p.m. he found the appellant under arrest. There is also nothing in the statements of other eye-witnesses to raise any reasonable suspicion that they would invent such a story to implicate the appellant. We have, therefore, come to the conclusion that the trial court was right in acting on this oral evidence.

10. We now come to another piece of evidence which, if accepted, should go a long way to connect the appellant with them. After the appellant had been arrested, the investigating officer took off two garments, namely, a shirt and a tehmad marked Exts. 2 and 3 from his person and the garments were duly sealed in presence of the witnesses and the recovery memo is marked Ext. Ka 2. The memo bears the thumb impression of P.W. Wahab Khan and signature of P.W. Kabir Ahmed. Both these witnesses deposed about the recovery in their presence. Shamsuddin also stated about the recovery and there is, of course, the statement of the investigating officer on the point. The appellant has no doubt denied this recovery and has disowned the garments, but in view of such oral evidence, we find no reason to disbelieve this part of the prosecution case. Exhibits Nos. 4 and 5 are the garments which were taken off from the body of the deceased by the doctor, who conducted the postmortem examination, and were sent in a sealed bundle to the Superintendent of Police, Aligarh for doing the needful. Now the reports of the Chemical Examiner and the Serologist, which are marked Exts. Ka 19 and Ka 20, go to prove that the two aforesaid garments of the deceased and the tehmad of the appellant were stained with human blood and this blood was found to be of Group 'A'. During the hearing of arguments, we thought it proper to make further enquiry as to whether the blood of the appellant was of Group 'A' or of any other Group, simply because if it was found that the appellant's blood was

not of Group 'A', it would be a circumstance to connect the appellant with the crime. With the consent of the learned Counsel for the appellant, we directed the Chief Medical Officer, Aligarh to arrange for the taking of the appellant's blood in Jail and get it analysed and send a report about its Group. Subsequently, the learned Counsel informed us that he had instructions to withdraw that consent and therefore an order was passed that the taking of blood may, for the present, be postponed. But before this order could reach the Officer concerned, blood of the appellant had already been taken and analysed. Dr. Chhotey Singh, Medical Officer-in-charge Blood Bank, District Hospital, Agra was examined as C.W. 1 and he stated that on 29-9-75, on the direction of the Deputy Chief Medical Officer, Agra, he collected the blood of the appellant who was confined in District Jail, Agra. He immediately took the blood to the Laboratory and, after analysing it, found that it was of 'B' Group, and he accordingly proved his report marked Ext. C-2, The witness was cross-examined by the learned Counsel for the appellant and it was suggested to him that the blood was forcibly taken, but the doctor denied that suggestion, On the other hand he said that the appellant did not offer any resistance nor did he raise any objection, Now, therefore, so far as the aspect of the matter is concerned, the evidence on record establishes that the appellant's blood is that of Group 'B', while the blood, which was found on the appellant's tehmada was of group 'A'. Obviously, therefore, it cannot be said that the blood which was found on the appellant's tehmada could be the blood of the appellant which might have dropped from his injuries. This being so it must follow as a necessary consequence that the blood, which was found on the tehmada of the appellant being of the same Group which was the group of blood found on the garments of the deceased was that of the deceased. Now the learned Counsel for the appellant objected to the admissibility of this evidence on two grounds. Firstly, he contended that collection of this evidence amounted to testimonial compulsion and was, therefore, hit by Article 20 of the Constitution. The second contention was that such a procedure was unwarranted by law and it amounted to causing hurt to the appellant within the meaning of the Indian Penal Code and therefore such an evidence should be ruled out of consideration.

11. So far as the first contention is concerned, it seems to us that the matter is finally settled by the judgment of the Supreme Court in *State of Bombay v. Kathi*

Kalu : 1961 CriLJ856 . The question, which arose for consideration in that case, was whether taking of specimen handwriting or impressions of fingers or palms or foot was hit by Article 20 of the Constitution. Article 20 of the Constitution says that 'No person accused of any offence shall be compelled to be a witness against himself.' The phrase 'to be a witness' was interpreted to mean 'imparting knowledge in respect of relevant facts by means of oral statement or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation'. It was pointed out that the handwriting or finger impression could not change their intrinsic character and, therefore, even though the taking of finger impressions or .specimen handwriting may amount to furnishing evidence in the larger sense, but they could not be included within the expression 'to be a witness'. It was further observed that the Constitution makers may have intended to protect an accused from the hazards of self-incrimination but they could not have intended to put obstacles in the way of efficient and effective investigation into a crime and of bringing criminals to justice. In view of this interpretation, the majority judgment came to the finding that taking of specimen writing or thumb impressions etc. did not amount to 'testimonial compulsion'. The minority judgment came to the same conclusion but on a different reasoning. The minority judgment did not agree with the aforesaid interpretation of the phrase 'to be a witness'. On the other hand, the reasoning was that mere taking of specimen writing or impressions of fingers etc., did not incriminate the accused person unless it was established on comparison of these impressions etc., that they fixed the identity of the culprit. Whatever reasoning is adopted, the taking of the blood of the appellant, as in the instant case, will not amount to the accused becoming a witness against himself. If the interpretation given by the majority judgment is adopted taking of blood does not amount to making any oral statement or statement in writing by a person, who has knowledge of the facts to be communicated to a court. Even according to the minority judgment, mere taking of blood is not an incriminating circumstance, unless on comparison it is found to be sufficient for establishing the identity of the culprit, We were not referred to any subsequent decision of the Supreme Court in which a different opinion might have been expressed. In view of this pronouncement, we find no substance in the first contention raised on behalf of the

appellant.

12. Now as regards the second contention, the learned Counsel for the appellant relied on a number of cases, namely, Subayya Gounder v. Bhoopala Subramanian : AIR1959 Mad396 ; Polavarapu Venkataswarlu v. Polavarapu Subbayya : AIR1951 Mad910 ; State v. Sheshappa Dudhappa Tambade : AIR1964 Bom253 ; Bipinbandra Shantilal Bhatt v. Madhuriben Bhatt : AIR1963 Guj250 and Krishnamurthi Aiyar v. Govindaswami Filial : AIR1966 Mad443 . On the basis of these cited cases, the learned Counsel for the appellant argued that unless there be some specific provision permitting the taking of blood for the aforesaid purpose, such a procedure should be held to be illegal. We have examined the observations made in the aforesaid cases and what we find is that all these cases relate to civil matters. In the case of Krishnamurthi Aiyar (supra), it was held that there could be no order for compulsory examination of a person alleged to be suffering from leprosy. That was a case under the Madras Panchayats Act and it was pointed out that the Civil Procedure Code did not warrant such a procedure. Similarly the Gujarat case cited above, was under the Hindu Marriage Act, 1955 and it was held therein that a party could not be compelled to undergo medical examination to establish un-soundness of mind, because that was not provided anywhere by the Civil Procedure Code or by the Evidence Act. The Bombay case (supra) was under Bombay Prohibition Act. In that case, the objection was that taking of blood was hit by Articles 19, 20 and 21 of the Constitution, but the said objection was overruled and it was held that taking of blood, as provided in the Bombay Prohibition Act, was not ultra vires the Constitution. In the said case it could not be argued that the procedure was unwarranted by law, simply because there was a specific provision for taking of blood in the Bombay Prohibition Act. But because there is no specific provision for taking of blood for any other purpose, it will not mean that taking of blood for any other purpose is unwarranted by law. There is, however, one relevant point in the Bombay case. It was contended that taking of blood offended 'sense of decency' and that it was 'brutal' and 'offensive' and was therefore 'shocking' to the 'conscience'. This contention did not find favour with the Hon'ble Judges, who held that in the modern society taking of blood could not be said to be something 'offensive' or 'against the sense of decency'. In : AIR1951 Mad910 (supra) the dispute was regarding paternity of a child, and it was pointed

out that Section 151, C.P.C. did not authorise the Civil Court to compel any party to give his blood in exercise of inherent powers. The last case viz. : AIR1959 Mad396 (supra) was a case under Section 488, Cr. P.C. and it was pointed out that because it was a quasi civil matter, blood test for ascertaining paternity could not be permitted without the consent of the party concerned. It would thus appear that in all the above cases, either it was a civil proceeding or quasi civil proceeding. But in a criminal case, in our opinion, the position is different. A relevant observation to that effect is to be found in : AIR1959 Mad396 (supra) which may be reproduced here:..... On the other hand, the object of criminal procedure is always punishment, the convicted offender is made to undergo evil which is inflicted upon him not for the sake of redress but for the sake of example. The other distinctive attribute of criminal procedure is that the sanctions, punishments of criminal procedure are remissible by the Crown or State.

It was remarked that the maintenance proceedings under Section 488, Cr. P.C. are not criminal proceedings, because the object of maintenance proceeding is not to punish the husband or the appellant. A similar observation is to be found in the aforesaid case (1959 Madras), which may also be reproduced below with some advantage:

The permissibility of identification by finger, palm and foot-prints and the taking of accused's pictures after arrest, blood and urine tests, use of emetic stomach pump or similar device for extracting ornaments swallowed etc. requiring suspect or accused to wear or trying on particular apparel or requiring defendant in criminal case to exhibit himself or perform physical acts during trial and in presence of Jury are not hit by the immunity conferred by Article 20(3) and do not offend the due process clause.

We are therefore of the view that there is nothing repulsive or shocking to conscience in taking the blood of the appellant in the instant case in order to establish his guilt. So far as the question of causing hurt is concerned, even causing of some pain may technically amount to hurt as defined by Section 319 of the Indian Penal Code. But pain might be caused even if the accused is subjected to a forcible medical examination. For example, in cases of rape it may be

necessary to examine the private parts of the culprit. If a culprit is suspected to have swallowed some stolen article, an emetic may be used and X-ray examination may also be necessary. For such purposes the law permits the use of necessary force. It cannot, therefore, be said that merely because some pain is caused, such a procedure should not be permitted.

13. We now come to the question whether such a procedure is really warranted by law or not. It is true that there is no specific provision permitting taking of blood for this purpose. But at the same time there is no provision of law prohibiting this procedure. Reference may, however, be made to certain relevant provisions in this connection. In the new Criminal Procedure Code, a provision has been specifically added, and it is Section 53(1), which provides as follows:

When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of Sub-Inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

This new provision of law is akin to the provision which was incorporated in the Bombay Prohibition Act referred to above. This new provision of law authorises a police officer to arrange for the medical examination of an accused for the purpose of collecting evidence as to the commission of the offence and also permits the use of such force as is reasonably necessary for that purpose. It may be said that examination of person should not include taking of blood. We do not think that such a restricted meaning should be given to the phrase 'examination of a person'. There seems to be no reason for holding that examination of a person should mean only the examination of the skin and what is visible on the body. If it is necessary to make an examination of any organ inside the body for the aforesaid purpose, we think that this is also permitted by Section 53(1) of the Code of

Criminal Procedure, 1973. As has been noted above, if an accused has swallowed some stolen article, an X-ray examination may be necessary. Similarly in cases of gun shot wounds it may be necessary to find out whether there are any pellets or other marks inside the body. It should not, therefore, be confined to examination of the skin alone. It is true that Section 53 refers only to examination on the request of a police officer, but if such a power is given to a police officer, the Court should have a wider power for the purposes of doing justice in criminal cases. The other relevant provision in the Criminal Procedure Code is Section 367, Sub-section (1), which runs as under:

If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

This special provision has been made in cases where death sentences have been awarded. In other cases, an appellate court has the power to take additional evidence, but it seems that, so far as cases of death sentences are concerned, the Legislature intended to confer a wider power on the High Court, namely that it may not only take additional evidence but can also make a further enquiry into any point bearing upon the guilt or innocence of the convicted person. If the law gives an authority to make further enquiry, it can also be deemed to have given ancillary powers to the High Court to make such directions and take such steps as may be necessary for the purposes of such further inquiry. Section 482 of the Criminal Procedure Code provides for inherent powers of the High Court to make such orders as may be necessary to secure the ends of justice, We, therefore, feel that these provisions of law as embodied in the Criminal Procedure Code, fully cover such a procedure and although there is no specific provision, yet we think that the taking of blood for the aforesaid purpose is warranted by these provisions of law. The second contention of the learned Counsel for the appellant, therefore, also fails.

14. After appraisalment of the entire evidence, we are satisfied that the charges framed against the appellant were proved beyond any shadow of doubt. On the

question of sentence, it has been noted above that the primary intention of the appellant was to commit theft. It was just a chance that the unfortunate girl entered the house when the appellant was busy in his operations and he committed this murder to disable the girl from raising any alarm which could otherwise result in the arrest of the appellant. The other object of committing the murder might be that the appellant wanted to wipe out the only direct evidence which would be available against him if he was later on tried for this offence. Because the appellant was related to the husband of the deceased, it is reasonable to suppose that the deceased had recognised the appellant. In view of these circumstances, we think that this is not a case for imposing the death sentence under Section 302 of the Indian Penal Code.

15. In the result, the appeal is dismissed with the modification that the sentence of death passed under Section 302 of the Indian Penal Code is converted into sentence of life imprisonment. The sentence imposed under Section 394 of the Indian Penal Code is upheld. Both the sentences shall run concurrently. The reference made for confirmation of death sentence is hereby rejected. The appellant is in Jail. He shall serve out the sentence awarded by this Court.