

(2001) 10 GAU CK 0005

In the Gauhati High Court

Case No : Criminal Appeal No's. 7 and 18 of 1998

Naba Kumar Das

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 19-10-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 299, 306, 306(4), 465

Evidence Act, 1872 — Section 113, 114

Penal Code, 1860 (IPC) — Section 201, 302, 34, 376

Citation : (2002) CriLJ 1950 : (2001) 3 GLT 322

Hon'ble Judges : R.S. Mongia, C.J.; A.K. Patnaik, J

Bench : Division Bench

Advocate : A.K. Bhattacharjee, J.M. Choudhury, P. Katakya, M. Choudhury and M.U. Mamud, for the Appellant; K. Deka, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Patnaik, J.—These two appeals are against the judgment dated 12.12.1997 of the learned Sessions Judge, Bongaigaon, in Sessions Case No. 20(BGN)/97 convicting the appellants under Sections 376/34, 302/ 34 and 201/34, IPC. By the said judgment, the learned Sessions Judge imposed on each of the appellants the sentences of imprisonment for life and fine of Rs. 25,000 in default to suffer further rigorous imprisonment for three years by each of them for the offence u/s 376/34, IPC, sentences of life imprisonment and fine of Rs. 25,000 in default to suffer further rigorous imprisonment for three years by each of them for the offence u/s 302/34, IPC, Considering the aforesaid sentences imposed for the offences u/s 376/34 and 302/34, IPC, the learned Sessions Judge did not impose any further sentence on the appellants for the offence u/s 201/34, IPC. The learned Sessions Judge further ordered that the sentences will run concurrently and half the fine, if realized, will be paid to the father of the victim girl as compensation.

2. The facts briefly are that on 3.1.1995 and FIR was lodged before the Office

Incharge of Bongaigaon GR Police Station by one Shri Chiran Chandra Dutta stating that at about 10 AM of 2.1.1995 his daughter Ranjita Dutta aged about 14 years had left home for Birjhora Girls High School to collect from there her mark sheet of the last annual examination but she did not return home till evening and they enquired about her all around and later at 8.30 PM an FIR was lodged with the Bongaigaon Police put out and the search for the girl was continued all night but she was not found anywhere and at about 9 AM in the morning of 3.1.1995 the girl was found lying dead with injuries by a railway track near 144/7 KM milestone between Bongaigaon and New Bongaigaon railway station- in the FIR it was further stated that sight of the body of the girl indicated that someone had raped her and later murdered her and left the body on the railway track to pass it as a train accident with the intention of causing disappearance of evidence. Bongaigaon GR Police Station Case No, 1/95 was registered under Sections 376/34, 302/34 and 201/34, IPC and the case was transferred to the Bongaigaon Police Station on 5.1.1995 and registered afresh as Bongaigaon Police Station Case No. 1/95 and investigation started. On 9.1.1995, the appellant Ambarish was arrested and produced before the learned Chief Judicial Magistrate, Bongaigaon, who remanded him to police custody. On 16.1.1995, the other appellants were arrested and produced before the learned Chief Judicial Magistrate and were remanded to police custody and were subsequently enlarged on bail. On 3.11.1996, Hitech Chandra Roy was arrested. On 15.11.1996, Hitech was produced from police custody and his statement was recorded u/s 164, CrPC, by the Executive Magistrate and thereafter he was remanded again to the police custody. On 21.11.2001, Hitesh was again produced from police custody before the learned Chief Judicial Magistrate who recorded his second confessional statement u/s 164, CrPC. On 5.2.1997, charge sheet was filed against the accused persons. On 13.5.1997, Hitesh filed an application for granting him pardon stating therein that he will make full disclosure of the incident as an approver and the said application was heard and orders were passed by the learned Chief Judicial Magistrate granting pardon to Hitesh on the condition that he will have to make full disclosure of the commission of the offence and the statement of Hitesh was recorded by the learned Chief Judicial Magistrate. On 20.6.1997, learned Chief Judicial Magistrate passed orders committing the case to the learned Sessions Judge, Bongaigaon, for trial. By the said order dated 20.6.1997, the learned Chief Judicial Magistrate declared two accused persons, namely Binoy Roy @ Chatu and Prafulla Choudhury @ Fu as absconders and observed that the case against them was to proceed under the provisions of Section 299, CrPC. By the said order dated 20.6.1997, the learned Chief Judicial Magistrate also rejected the prayer for bail moved on behalf of the appellants Narottom Barman, Dalim Sinha and Naba Kumar Das who were on bail. On 2.7.1997, the learned Sessions Judge framed charges against the appellants under Sections 376/34, 302/34 and 201/34, IPC. The appellants pleaded not guilty. At the trial as many as 20 witnesses were examined. The approver Hitesh was examined as PW 1. His statement recorded u/s 164, CrPC, before the Executive Magistrate on

15.11.1996 was marked as Ext-1, his statement recorded u/s 164, CrPC, on 21.11.1996 by the learned Chief Judicial Magistrate was marked as Ext-2. In his statement recorded u/s 306, CrPC, was marked as Ext-4. In his evidence before the Court as well as in Exts-1, 2 and 4, the approver Hitesh narrated the incident which took place on 2.1.1995. He has stated that in the night of 2.1.1995 he and the appellants committed rape on Ranjita Dutta at the veranda of the Hindi High School, thereafter the accused Prafulla strangled her and the accused Ambarish scratched her face and the accused Prafulla gave her a blow on her buttock with a Kukri and thereafter they carried the dead body to the railway line and left it there. The learned Sessions Judge considered the evidence and held, inter alia, that the approver has not only unfolded the prosecution story but also proved it by his reliable and trust worthy evidence being materially corroborated by other true and reliable evidence and that he has no reason to disbelieve it. The learned Sessions Judge further held that the appellant and the approver in furtherance of their common intention committed rape on Ranjita Dutta, committed murder of the girl and caused disappearance of the dead body of the girl to shield themselves from legal punishment. The learned Sessions Judge held that the appellants are guilty of the offences punishable under Sections 376/34, 302/34 and 201/34, IPC and convicted them accordingly.

3. Mr. A.K. Bhattacharjee, learned counsel for the appellant in Criminal Appeal No. 18/98, submitted that although Section 113 of the Indian Evidence Act, 1872, (for short "Evidence Act") states that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice, illustration (b) of Section 114 of the Evidence Act states that an accomplice is unworthy of credit, unless he is corroborated in material particulars. He cited the decisions of the Privy Council and the Supreme Court with which we shall deal later to show that the rule of prudence incorporated in illustration (b) to Section 114 of the Evidence Act that the evidence of an accomplice is not trust worthy unless it is corroborated in material particulars has crystallised into rule of law. He explained referring to the decisions of the Supreme Court that Courts do not feel safe to convict an accused on the evidence of an approver unless such evidence satisfies the double test of reliability and corroboration in material particulars. Mr. Bhattacharjee submitted that the learned Sessions Judge has convicted the appellant in this case on the testimony of the approver Hitesh (PW1) but the evidence of the approver Hitesh was neither reliable nor corroborated in material particulars. He argued that there were discrepancies in the statements of the approver Hitesh recorded on 15.11.1996 (Ext-13, 21.11.1996 (Ext-2), 13.5.1997 (Ext-4) and his evidence before the Court. He took great pains to demonstrate before the Court as to how there were variations in the story given out by the approver Hitesh in Exts-1, 2 and 4 and his evidence before the Court. According to him since there were contradictions in the version of the approver about the incident on the night of 2.1.1995 in his different statements given at different times in Exts-1, 2 and 4 and in his evidence before the Court, his evidence is not

reliable. He further argued that the approver Hitesh was arrested on 3.11.1996 and produced before learned Chief Judicial Magistrate on 4.11.1996 and thereafter remanded to the police custody from time to time after long 18 days and only thereafter his confessional statement (Ext-2) was recorded by the learned Chief Judicial Magistrate on 21.11.1996. thus the evidence of the approver Hitesh has to be viewed by the Court with suspicion. Mr. Bhattacharjee submitted that since serious offences u/s 376/34, 302/34 and 201/34, IPC, are alleged to have been committed by the accused persons the Court should not rely on the testimony of the approver for convicting the appellant without corroboration in material particulars. He submitted that the approver Hitesh has sated in his evidence that on the night of 2.1.1995 after the girl was raped by the accused persons, Prafull strangled the girl to death and taking out a razor from his pocket, Ambirish disfigured her face so that she could not be recognized and Prafula stabbed her at the buttock with small Khukri, but the evidence of the Doctor (PW 18) instead of corroborating in material particulars the story given out by the approver Hitesh contradicted the story. He vehemently argued that Courts have held that corroboration of the evidence of the accomplice in material particulars would include some evidence other than that of the accomplice to show that each of the accused persons were involved in crime. But there is no corroboration whatsoever by any evidence, direct or circumstantial, showing the involvement of the appellant. He further submitted that the Chowkidar of the school where the occurrence is alleged to have taken place on the night of 2.1.1995 was a very material witness and was in fact cited as a witness in the charge sheet and yet he was not examined, Mr. Bhattacharjee finally argued that the Investigating Officer instead of making full fledged investigation to pin the real culprits who had committed the serious offences of rape and murder has relied on only the approver whose evidence was not sufficient to establish the case against the appellant.

4. Mr. M.U. Mamud, learned counsel for the appellant in Criminal Appeal No. 7/98, adopted the aforesaid arguments of Mr. Bhattacharjee. In addition, he submitted that Sub-section (4) of Section 306, CrPC, provided that a person accepting a tender of pardon shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in subsequent trial, if any. Thus the approver Hitesh was to be examined as witness in the Court of the learned Chief Judicial Magistrate who took cognizance of the offences. The learned Chief Judicial Magistrate examined the approver Hitesh on 13.5.1997 under Sub-section (4) of Section 306, CrPC. But such examination took place in the absence of the accused persons and the accused persons were not afforded any opportunity to cross examine the approver Hitesh. This irregularity, according to Mr. Mamud, learned counsel for the appellant in Criminal Appeal No. 7/98, vitiated the entire trial. He cited some decisions to which we will advert while dealing with this contention.

5. Ms. K. Deka, learned Public Prosecutor, Assam, on the other hand, submitted relying on some authorities that it was not at all necessary for learned Chief

Judicial Magistrate to afford the opportunity to the accused persons to cross-examine the approver Hitesh when he was examined by learned Chief Judicial Magistrate under Sub-section (4) of Section 306, CrPC, She further submitted that after the Chief Judicial Magistrate committed the case of the Court of learned Sessions Judge for trial and the approver Hitesh was examined as PW 1 at the trial, the appellants were given all due opportunities to cross-examine the approver Hitesh. According to Ms. Deka, there was no irregularity in the trial which would vitiate the trial. In reply to the said submission of Mr. Bhattacharjee, Ms. Deka submitted that there was no contradiction in material particulars in the earlier statements of the approver Hitesh on 15.11.1996, 21.11.1996 and 13.5.1997 and the evidence given by the approver Hitesh in the Court. She argued that the evidence of the approver Hitesh was sufficiently corroborated in all material particulars by other witnesses, namely PWs2, 12, 14 18 and 20. She pointed out that the evidence of PW1, the approver Hitesh that there were injuries on the face and on the buttock of the deceased girl was corroborated by the inquest report, Ext-9. She submitted that the evidence of PW 1, that Prafulla strangulated the victim girl to death was also corroborated by the evidence of PW 18, the Doctor who examined the body of the deceased girl. Regarding the involvement of the appellants in the crimes, she vehemently argued that the offences under Sections 376/34, 302/ 34 and 201/34, IPC, have been committed in a lonely place in the dead of the night and it was difficult to get any witness to the crime. She, however, pointed out that the evidence of Investigating Officer PW 20, would show that the appellant Narottom was the registered owner of the Ambassador Car which was used for bringing the girl to the school for rape. Therefore, there was sufficient evidence to connect the appellants with the crimes. She pointed out the Chowkidar though cited as witness in the charge sheet was not examined because he was not a material witness in this case. She referred to the evidence of the approver Hitesh that the house of the Chowkidar was 300 meters away from the place of occurrence and that the Chowkidar did not come there at the time of occurrence. According to her, as the Chowkidar had not seen the offences of rape and murder with which the accused persons were charged, he was not a material witness and no adverse inference can be drawn against the prosecution if he has not been examined at the trial. She submitted that considering the heinous crimes committed by the appellants, the learned Sessions Judge was fully justified in convicting the appellants on the basis of the evidence of the approver Hitesh and other corroborative evidence, both direct and circumstantial, adduced by the prosecution and the judgment of learned Sessions Judge should not be set aside by this Court only on the ground of defects, if any, in the investigation.

6. In reply Mr. Bhattacharjee submitted that law is now well settled that where there is conflict between inquest report prepared by the police officer and the medical evidence of the Doctor, the Court should not believe the inquest report but the medical evidence of the Doctor. In support of this proposition, he cited the decisions of the Supreme Court in Surjan and Others Vs. State of Rajasthan,

Lakshmi Singh and Others Vs. State of Bihar, and Maula Bux and others v. State of Rajasthan He reiterated that the medical evidence of the Doctor PW 18 does not corroborate the evidence of the approver Hitesh that Prafulla strangled the girl to death and taking out a razor from his pocket. Ambarish disfigured her face badly so that she could not be recognized and Prafulla stabbed her at the buttock with small Khukri.

7. We will first deal with the contention of Mr. M.U. Mamud, learned counsel for the appellants in Criminal Appeal No. 7/98, that the entire trial stood vitiated as the appellants were not afforded the opportunity to cross-examine the approver Hitesh when his statement was recorded on 13.5.1997 by the learned Chief Judicial Magistrate under Sub-section (4) of section 306, CrPC. It is not disputed by Mr. Mamud that the appellants were afforded opportunity to cross-examine the approver Hitesh at the subsequent trial before the learned Sessions Judge, it is the evidence of the approver Hitesh (PW1) at the trial tested by cross-examination by the appellants which the Court has to consider for finding out whether the charges leveled against the appellants stand proved or not. Hence the appellants have not suffered any prejudice if they were not given any opportunity to cross-examine the approver Hitesh when he was earlier examined by the learned Chief Judicial Magistrate on 13.5.1997 under Subsection (4) of Section 306, CrPC. Further in case the appellants were aggrieved for not being afforded with the opportunity to cross-examine the approver when he was examined by the leaned Chief Judicial Magistrate on 13.5.1997, they should have raised objection before or soon after the learned Chief Judicial Magistrate committed the case to the learned Sessions Judge for trial. But instead of raising any such objection, the appellants participated at the trial in which as many as 20 witnesses were examined. In State of Himachal Pradesh Vs. Surinder Mohan And Others, cited by Ms. K. Deka, learned Public Prosecutor, Assam, the Supreme Court after analyzing the ingredients of Section 306, CrPC, held that at the stage of investigation, enquiry or trial of the offence, the person to whom pardon is granted, is to be examined for collecting evidence and at this stage the accused cannot claim any right under law to cross-examine and the right to cross-examine would arise only at the trial. On the facts of that case, the Supreme Court further found that before or after the case was committed to the Sessions Court, the accused had not raised any objection that they were not permitted to cross-examine the approver, nor did they contend so when the approver was examined and cross-examined during the trial and the Supreme Court held that at the stage of final argument the accused cannot raise this contention. The Supreme Court further held that as a matter of fact after the accused had cross-examined the approver in detail at the trial there is no question of failure of justice nor any prejudice had been caused to the accused. The Supreme Court also held that acceptance of the objection of the accused in these facts would only promote technical plea which would adversely affect dispensation of justice and in such circumstances provisions of Section 465, CrPC, would come into operation.

8. In *State (Delhi Administration) v. Jagjit Singh* 1989 1 SCJ 221 and *A. Deivendran Vs. State of T.N.*, cited by Mr. Mamud, the Supreme Court has nowhere laid down that the accused has to be afforded an opportunity to cross-examine the person who is examined under Sub-section (4) of section 306, CrPC, by the Magistrate before commitment of the case for trial. In *Uravakonda Vijayaraj Paul Vs. The State and Others*, cited by Mr. Mamud, the Andhra Pradesh High Court held that examination of the approver under Sub-section (4) of Section 306, CrPC, has to be done in the manner provided u/s 138, of the Evidence Act and hence the accused had to be given an opportunity to cross-examine the approver who is examined as witness. In the aforesaid case of *Uravakonda Vijayaraj Paul v. State and others*, (supra) the order of committal had been challenged on the ground that the accused had not been given an opportunity to cross-examine the approver when he was examined by the Magistrate under Sub-section (4) of Section 306, CrPC, and the Andhra Pradesh High Court quashed the order of committal and directed the Magistrate to give opportunity to the accused to cross-examine the approver. But in this case, as discussed above, the appellant did not raise any objection either before or soon after the committal of the case by the learned Chief Judicial Magistrate to the learned Sessions Judge. In our considered opinion the contention of Mr. Mamud that the trial stood vitiated as appellants were not given an opportunity to cross-examine the approver when his statement was recorded by the learned Chief Judicial Magistrate on 13.5.1997 under Sub-section (4) of Section 306, CrPC, has no merit.

9. Coming now to the submissions of AIR 1949 257 (Privy Council) the Privy Council held referring to the provisions of Section 133 and illustration (b) to Section 114 of the Evidence Act that the evidence of an accomplice must be corroborated not only with regard to the occurrence but also against each of the accused sought to be implicated in the crime. This position of law has been reiterated by the Supreme Court in *Sarwan Singh Vs. The State of Punjab*, *Jnanendra Nath Ghose Vs. The State of West Bengal*, *Bhiva Doulu Patil Vs. State of Maharashtra*, *The State of Andhra Pradesh Vs. Cheemalapati Ganeswara Rao and Another*, *Haroon Haji Abdulla Vs. State of Maharashtra*, *Ravinder Singh Vs. State of Haryana*, *Dagdu and Others Vs. State of Maharashtra*, *Balwant Kaur Vs. Union Territory of Chandigarh*, *Suresh Chandra Bahri Vs. State of Bihar with Gurbachan Singh, Narayan Chetanram Chaudhary and Another Vs. State of Maharashtra*, cited by Mr. Bhattacharjee.

10. Regarding the kind of corroborative evidence required, in *Rameshwar Vs. The State of Rajasthan*, the Supreme Court held that it would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration and its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offences charged. Similarly, in *Narayan Chetanram Chaudhary and Another Vs. State of Maharashtra*, the Supreme Court had reiterated that the nature and extent of such corroboration may depend upon the

facts of different cases. Thus, not only peculiar facts and circumstances of the case are to be seen but also the nature of the offence charged has to be looked into by the Court to determine the nature and extent of corroboration of the evidence of the accomplice that is required. One of the offences in this case is the offence of rape which is committed normally with accomplices in secret and there may not be any direct evidence for corroboration. In *Rameswar s/o Kalyan Singh v. State of Rajasthan* (supra), the Supreme Court quoted the following observations of Lord Rading in *Kiing v. Baskerville* 1960 KB 658

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. A good instance of this indirect evidence is to be found in *Reg. v. Birkett*. (2) Were the law otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, would never be brought to justice."

11. The offences charged in this case are those u/s 376/ 34, 302/34 and 201/34, 1PC, which are serious in nature. In, *Balwant Kaur Vs. Union Territory of Chandigarh*, the Supreme Court has observed :

"In indictment particularly of serious crimes, the counsel of caution and the rule of prudence enjoin that it is unsafe to rest a conviction on the evidence of a guilty partner in a crime without independent corroboration on "the material particulars."

Further as has been held in *Rameswar s/o Kalyan Singh v. State of Rajasthan* (supra), it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the accomplice, should in itself be sufficient to sustain conviction and all that is required is that there must be some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. Similarly in *A Devendran v. State of TN*, (supra) the Supreme Court held that the evidence of the approver implicating several accused persons in connection with the commission of the offence is not only to be corroborated generally but also qua each accused but that does not mean that there should be independent corroboration of every particular circumstance from an independent source and all that is required is that there must be some additional evidence rendering it probable that the story of the accomplice is true and corroboration could be by direct evidence or circumstantial evidence.

12. Besides satisfying the test of corroboration in material particulars, the evidence of the accomplice has to satisfy the test of the liability. In *Swaran Singh v. State of Punjab* (supra) the Supreme Court held that appreciation of the approver's evidence has to satisfy a double test of reliability and corroboration. In *Major E.G. Barsay Vs. The State of Bombay*, the Supreme Court further explained that this does not mean that the evidence of the approver with the corroborating pieces of the evidence should be treated in two separate

compartments, that is to say, the Court shall have first to consider the evidence of the approver de hors the corroborating piece of evidence and reject it if it comes to the conclusion that his evidence is unreliable. In other words, the reliability of the evidence of the accomplice cannot be considered independent of the corroboration of the evidence of the accomplice in material particulars and if the evidence of the accomplice is corroborated in material particulars his evidence can be safely relied upon. But the Supreme Court has held in *Swaran Singh v. State of Punjab* (supra) that where two sets of statements are made by the approver and the two sets of statement of the approver are wholly inconsistent and irreconcilable the obviously leads to a very serious infirmity in the character of the witness and such a witness is not reliable. In the said case, the Supreme Court found that in his first statement the approver had not implicated Harban Singh in the offence but in his subsequent statement before the Court he implicated Harban Singh in the commission of the offence and the Supreme Court held that the evidence of the approver was so thoroughly discrepant that it is difficult to resist the conclusion that the approver is wholly unreliable witness. In *Narayan Chetanram Choudhury v. State of Maharashtra* (supra), the Supreme Court, however, held :

"Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person."

Bearing in mind these principles laid down by the Courts, we may now proceed to appreciate the evidence in this case.

13. We will first discuss the evidence of PW 1, the approver, Hitesh, at the trial. He has stated that he is a member of surrendered ULFA and knew the accused Ambarish, Narottam, Dalim and Naba. Ambarish and Narottam are also members of surrendered ULFA. Narottam has bought a new Ambassador Car the number of which is AS-19/1909 and he rented the car out and he himself knows how to drive and he keeps the car overnight in his driver's house at Borpara, Bongaigaon, Dalim is also a member of surrendered ULFA. Naba's brother has a tent house at Mahabirasthan and he stays there sometimes and sometimes they get together at Mahabirasthan and talk. The accused Setar and Prafulla are also their colleagues and they used to give them company. On 2.1.1995 at about 5 PM he was going from his house to Mahabirasthan by cycle when at Choudhury par of Bhakaribhita he found that accused Setar was going along with a girl who was wearing a frock and sweater and was 14/15 years old and they were going in the direction of a truck depot and a brick wall. He found Ambarish and Prafulla following them. After seeing them he straightaway went to the tent house

"Chayanika" at Mahabirasthan and stayed there. A little later he saw Narottam bringing his Ambassador Car and Ambarish was in the car and the car came to Chayanika tent house and two of them told him that "Let us take the girl for a drive" and he told that "He would not go". Narottam and Ambarish then picked up the girl in the Ambassador car and went to the direction of Dangfol of Choudhurypar Road. Sometimes later, Setar and Prafulla came to the tent house where he was and started gossiping with him. At about 8 PM, the Ambassador car came back and the accused Narottam was driving the car while the accused Ambarish and the girl were inside the car. They stopped the car near Hindi High School. Seeing this Setar, Prafulla and he went to the Car, Naba and Dalim also followed. Getting out of the Car Ambarish took the girl to the Hindi High School. The girl was taken to the Southern side of the veranda of the school. This place was not visible from other side. In the meanwhile, Narottam had come back from his house after leaving the car and had joined them in Hindi High School. It was then 8.30 PM. Prafulla and Setar went to the veranda and stripped the girl. She offered resistance with all her might. Setar then gagged her with a piece of cloth so that she could not scream. First of all Ambarish laid the girl on her back and performed sexual act. Setar was pinning her while Prafulla was holding her hands back. Ambarish finished his sexual act. After that Prafulla performed sexual act with the girl. One by one Setar, Dalim, Naba, Narottam and he raped the girl and after that some of them again raped the girl once or twice. It was mid-night then they drank liquor in the day time in the village. After the rape, the condition of the girl became very serious. She kept lying on her back. Prafulla asked "What should we do?" Ambarish told "Girl knows me. If she lives, all of us will be in trouble.". They discussed the problem. Ambarish said "We should better finish her off". Prafulla then strangled her to death. Taking out a razor from his pocket, which he used to take each and every time, Ambarish disfigured her face so that she could not be recognized. Prafulla stabbed the girl's buttock with a small Khukri. Ambarish said "The girl had died" and asked "What should we do now". Prafulla then told "It would be better to leave her at the railway track" which was 250 yards away from that place. He, Dalim, Naba and Narottam wiped the blood from the veranda with sand and gunny bag. He had brought the gunny bag from nearby shop which was lying there. Prafulla put back the clothes on her and took the body for laying on the railway track. Ambarish and Setar followed him. Naba, Narottam and Dalim left for their home through the back side of the school. He followed Prafulla who was carrying the body for a short distance. Laying the body by the side of the railway track, Prafulla and Setar left for home. Ambarish left for railway colony and he left for home. As the girl had known Ambarish, she had not raised any alarm while being taken to the school.

14. The evidence of the approver, PW 1, according to Ms. K. Deka, Public Prosecutor, Assam, is corroborated in material particulars by the evidence of PWs 2, 9, 12, 14, 18 and 20. PW2 has stated that he used to sell liquor at Bhakaribhita where his house is located and he knew the accused Setar, Prafulla, Ambarish, Narottam, Dalim and Naba. At about 4 PM on a day in winter 2"/2

years ago he was sitting before fire in front of his house with his two nephews. At the time a frock clad girl was going from east to west by the road in front of house. Setar who was drunk came to his house and stood before the fire and the girl came and passed them. Srtar asked him if he knew the girl and he said he did not. Setar there said "I will go home, dress up and meet the girl". Saying this he went to his house by the side of the wall in the north. Thereafter, he went in search of his cow along the path of the western side and he was brining the cow along the side of the wall of the railway line, when he saw Setar and Prafulla going from east to west along the path of the wall and the girl was following them. He went home with his cow. At about 1.30 AM or 2.00 AM at night Prafulla and Setar came to his house and called him and he got up and they asked him for liquor and he gave them one and half bottle of liquor. They drank the liquor sitting inside his house and they were discussing something. Setar asked "Was it a mistake to have left it on the rails?" and Prafulla said "Do not worry, it will be all over when train comes". After finishing drink they went away. He got up early in the morning, washed and went out and he over heard people saying that a girl had been run over by train. He went to have a look and found the girl lying by the side of a track but she was not run over. He found her dead and this girl was the one he had seen in the previous evening and the people told the her name was Ranjita Dutta.

15. PW 12 is a railway employee at New Bongaigaon and his evidence is that on 3.1.1995 he had gone to his place of work at New Bongaigaon and from the employees of the workshop he learnt that a body of 13 year old girl was lying on the railway track near Mahabirsthan and some persons sitting in the tea stall outside were saying that the day before Chiran Duta's daughter had gone to school and had not come back. He was a relation of Chiran Dutta. He immediately left the place of work and reached the place where the girl was found at Mahabirsthan and he found that the body of the girl was Chiran Dutta's daughter Ranjita Dutta and she bad a Blue frock (Ext-3) and mixed pink sweater (Ext-2) and the sweater was slightly raised on the back side and he noticed one inch wide and three inch long cut on the right side of her face. He also saw red blood mark on the back side of her panties. The police examined the body at 5 PM. He saw stabbed mark on the left buttock. The police prepared inquest report (Ext-9) and took his signature.

16. PW 14 is the ASI of Police, GRPS, Bongaigaon and he has stated that on 3.1.1995 at about 8.30 AM, the memo, Ext-13, was sent by the ASM of the railway Station, Shri Surya Kumar Sarkar, informing him that a body of a girl was lying-at Bongaigaon railway track between Bangaigaon LC gate and Mahabirsthan and after getting the said memo the officer incharge registered UD case No. 1 /95 and went to the place of occurrence. He prepared inquest report, Ext-9, in presence of the witness. Ext-9(3J) is the signature. Witnesses put signatures. Indraswar Barman identified the body. There was a "tape" under the frock and there was cut mark, stretching from near the right ear to the eye which had blood. After undressing the deceased, he found a stab mark caused by a pointed

object on her left buttock. It too had bled. The vagina was ruptured. There were three black marks on the back. The vagina had blood marks also. The body was fresh.

17. PW 18 is the Doctor who was posted at Civil Hospital, Kokrajhar, on 4.1.1995 and he had performed Post Mortem on the body of the deceased girl on 4.1.1995 at about 12.30 PM. He has stated, inter alia, that he had noticed on the body of the deceased girl laceration at the forehead region above the right orbit. He also found multiple scratch marks over the left breast, few scratch marks over the right breast and bruises over the left breast, and the whole breast skin was reddened. He also found that the hymen of the deceased girl was torn and blood stain was present. Seminal stain was present over perineal region and inner aspects of thighs. In his opinion, the cause of death was due to asphyxia caused by strangulation and there was evidence of forcible sexual Intercourse with post mortem wounds in the fore head. He has also stated that the external injuries on the forehead might be caused by sharp or blunt weapon, but he did not find any sharp cutting wound on the face. He has also stated that he has not mentioned any injury on the buttock. He has stated that strangulation might be caused manually and also by ligature and ligature might be caused by rope, wire etc. and in throttling finger marks are usually found but he did not find any such mark of thumb or other fingers.

18. PW 20 is the Investigating Officer. He has stated that he was the Officer in Charge of Bongaigaon Police Station and on 30.10.1996, he took charge of investigation of the case which was pending at the thana. After taking over charge of investigation he found the forensic science laboratory report, Ext-21, and forwarding letter, Ext-22, on records. According to records, he found that the tests for hymen, semen and blood on the torn underwear were positive. On 30.10.1996, he gathered information from secret sources that Hitesh was involved in the crime. On 4.11.1996, Hitesh was formally arrested in connection with the case and after forwarding him to the Court he prayed for further custody and the Court granted 5 days instead of 10 days as prayed for. The material part of his evidence as to what he learned from Hitesh after he interrogated him is as follows :

"While Hitesh was under my interrogation, I learnt on 9.11.1996 that a white / mbassador Car had been used in this crime, and that one Setar Ray and another Phu alias Prafulla of Bhakaribhita were involved in it, and that Narottam Barman, loo was involved. On the basis of the information gathered, accused Narottam was brought to thana on 10.11.1996.

On 11.11.1996, I arrested Natottam Barman and sent him up to Court, and obtained his custody for further interrogation.

It was gathered that the number of the said car was AS-19/ 1909, and that its owner was Narottam Barman, Satish Das, SI was asked to seize the Car. Accordingly, he seized the Car. Mat. Ext-1, by seizure list dated 12.11.1996,

Ext-16."

On 15.11.1996, Hitesh told him that he would show him the place of occurrence and accordingly Hitesh was produced before the Extra Assistant Commissioner who recorded his statement (Ext-1). Hitesh then led the Extra Assistant Commissioner and the Police party to the place of occurrence at Bhakaribhita and showed how the incident took place in minutest details, how Prafulla met the deceased girl Ranjita, which way he had taken her, how Setar had met them on the way, where Ambarish had met them, which way Narottam had come by Car, how they had gone to the veranda of Hindi High School at Bhakaribhita, in which place gang rape had taken place and by which way they had taken the body of the deceased girl to the railway track. The entire exercise was recorded in a video Cassette, Mat. Ext-4.

19. The aforesaid discussion would show that the evidence of the approver, PW 1, that the deceased girl was raped and thereafter murdered and her body was thereafter left in the railway track stands corroborated by the evidence of PWs 12 and 14 who had seen the body of the deceased girl on the morning of 3.1.1995 near the railway track and the evidence of the Doctor, PW 18 who had conducted post mortem examination on 4.1.1995 also confirms that the deceased girl was forced to sexual intercourse and thereafter strangled to death and the variations in the description of the injuries inflicted on the body of the girl given by PW 1, those given in the inquest report and those given by PW 18 are minor and not material. Hence, the evidence of the approver that the offences u/s 376/34, 302/34, and 201/34, IPC, were committed was corroborated in material particulars by the independent or additional evidence other than that of the approver. This is why the Court cannot discard the evidence of the approver, PW 1, on the ground that his evidence was not reliable. As discussed above, reliability of the evidence of the accomplice cannot be considered independent of the corroborative pieces of evidence and if the evidence of the accomplice is corroborated in material particulars, his evidence can safely be relied on. In our opinion, since the evidence of the approver, PW 1, with regard to the commission of the offences under Sections 376/ 34, 302/34, and 201/34, IPC, stands corroborated by independent or additional evidence other than that of the approver, PW 1, the Court can safely rely on the evidence of the approver, PW 1, that the offences u/s 376/34 302/34, and 201/34, IPC, were in fact committed on the night of 2.1.1995, and the discrepancies in the different statements of PW 1, Exts-1, 2 and 4 and his evidence in Court are not material.

20. But as had been held by Courts, corroboration in material particulars would mean not only corroboration of the evidence of the accomplice with regard to the commission of the offences but also with regard to the connection of the accused persons in the offences. In the present case, since the offences committed are serious in nature, it will be unsafe to rest the conviction of any of the accused persons on the evidence of the approver unless there is some additional or independent evidence to confirm that such accused persons were connected with

the commission of the serious offence. The evidence of PW 1 the approver, discussed above is clear that Narottam owns an Ambassador Car No AS-19/1909 and he knows how to drive the Car and Narottam and Ambarish picked up the girl in the Ambassador Car and at about 8 PM the Car came back when the accused Narottam was driving the Car and the girl was inside the Car and the Car stopped near the Hindi High School. Thereafter the girl was taken to the Hindi High School and as the girl had known Ambarish, she had not raised any alarm while being taken to the school. Thereafter, the girl was raped by all the accused persons one by one and then they discussed the problem as to what to do with the girl and thereafter the girl was strangled to death and her body was laid in the railway track. Thus, as per the evidence of the approver, PW 1, Narottam and Ambarish amongst other accused persons committed the offences u/s 376/34, 302/34 and 201/34, IPC. PW20 in his evidence quoted above, has stated that when Hitesh, PW 1, was under interrogation he learnt on 9.11.1996 that a white Ambassador Car had been used for the commission of the crime and that Narottam too was involved in the crime and that the number of the Car was AS-19/1909 which was owned by Narottam. He asked SI, Satish Das, to seize the Car. Accordingly, the SI, Satish Das, seized the Car, Mat, Ext-1, by seizure list dated 12.11.1996, Ext-16, Seizure list, Ext-16, indicates that in the registration certificate of the Ambassador Car No. AS-19/1909, the name of Narottam Barman was recorded as the owner. In his examination of the accused Narottam u/s 313, CrPC, the Court put a question as to whether Narottam had bought a new Ambassador Car bearing registration No. AS-19/1909 by taking loan from the Government and whether he used to drive the Car and keep it at the driver's residence at Bongaigaon, the accused Narottam answered in the positive and had stated that he bought a Car by taking loan and hired out to a company and the driver used to keep the Car in his house, itself.

21. DW 1 is a typist in the site officer of M/s Bridge & Roof India Limited. In his evidence he had stated that the company had used an Ambassador Car bearing No. AS-19/1909 and it was taken on hire and that there was a log book for operating the vehicle and that the same was lying under the custody of the company office. DW2 is the driver of the Car who in his evidence has stated that he had been the driver of the Ambassador Car No. AS-19/1909 from 1993 to 1996. He has stated that the Car had been rented out to M/s Bridge & Roof India limited on monthly basis. He used to take out the Car at 8 PM from his house to the company's office and after doing the company's work, he used to take out the Car to his house at about 8 PM or 8.30 PM and one of the additional keys of the Car used to be kept with him and the other with the bank because the Car was hypothecated to the Bank. He has further stated that on 2.1.1995, the Car was in his house and no one had come to take the Car away and it was in his house for the whole of that night and that at 8 AM he took the Car to the company's office at Dhaligaon. In cross-examination, however, he has stated that without consulting the log book he was unable to tell at what time on 2.1.1995, the company had released the Car. He had also stated that his

employer (Narottam) knew driving. DW 3 is a Junior Construction Engineer of M/s Bridge & Roof India Limited in BRPL Branch, Dhaligaon. He has stated that Ext-Kha, is the letter which he submitted stating that their company did not maintain log bok of any hired vehicle. He was allowed to be cross-examined by the defence. The aforesaid defence evidence has been disbelieved by the learned Sessions Judge on the ground that the log book of the vehicle had not been called for from the company which had taken the Car on hire and Narottam, the owner of the Car, did not mention about the log book. That apart, the driver of the Ambassador Car No. AS-19/1909 has clearly stated in the cross-examination that he was unable to tell at what time on 2.1.1995, the company had released the Car and has further admitted that his employer Narottam knew driving.

22. The aforesaid discussion would show that there was additional evidence, besides the testimony of the approver PW 1, to render probable the story of the approver that the deceased girl knew Ambarish and that Narottam and Ambarish picked up the girl after 5 PM on 2.1.1995 in the Ambassador Car No. AS-19/1909 and went for a drive and refturned at 8 PM to the Hindi High School and Narottam also after leaving the Ambassador Car came back to the Hindi High School and despite resistance by the girl the accused persons committed the rape, one by one, and since the girl knew Ambarish she was strangulated to death and her forehead region was cut by Ambarish and finally, her body with clothes on, put on the railway track. The defence has made an attempt through DW 1, DW 2 and DW 3 to show that the Ambassador Car No. AS-19/1909 was given on hire to a company on 2.1.1995, but DW2, the driver, has admitted in his evidence that without consulting the log book he cannot say at what time on 2.1.1995 the company released the Car and the log book could not be adduced as evidence on behalf of the defence. PW 1, the approver, himself has stated in his evidence that the Ambassador Car was being rented out by Narottam and yet has given out a believable story that on 2.1.1995 Narottam brought the Ambassador Car sometime after 5 PM in which Narottam and Ambarish took the girl for a drive and thereafter came to the Hindi High School at about 8 PM where the rape on the girl was committed. The defence has not been able to adduce evidence which makes the story improbable and not believable.

23. The counsel for the appellants has laid great stress on the fact that the Chowkidar of the Hindi High School though cited as a witness in the charge sheet has not been examined by the prosecution at the trial and they have referred to the suggestion made in the cross-examination of PW 1, the approver, that he told the Investigating Officer that Ambarish had driven away the Chowkidar of the Hindi High School, who was on duty, saying that he was not required. But PW 1 has denied the said suggestion and has instead said that the Chowkidar's house is 300 meters away from the varanda of the school where the occurrence took place and the Chowkidar did not come there at the time of occurrence and that he did not see the Chowkidar that night. This statement of PW 1 to the Investigating Officer that Ambarish had driven away the Chowkidar of the Hindi High School, who was on duty, saying that he was not required has not been

proved by the defence. In fact, no question had been put by the defence to the Investigating Officer, PW 20, as to whether or not such a statement was given by PW 1, before him. Both Sections 162, CrPC and 145 of the Evidence Act provide that a previous statement in writing of a witness could be used to contradict him only if such previous statement in writing is proved and not otherwise. Thus the evidence of PW 1, that the Chowkidar did not come to the place of occurrence and he did not see him that night has not been disproved in any manner and in view of this evidence of PW 1, in our considered opinion, the Chowkidar was not at all a material witness.

24. Regarding the argument of the counsel for the appellants that the Investigating Officer, PW 20, only relied on the approver's evidence and did not investigate further, we find that PW 20 has stated in cross-examination that he thought that the case of the prosecution would be established only by an approver because circumstances showed that he knew everything and would tell the same. Ms. Deka, the learned Public Prosecutor, Assam, rightly contended that the offences in this case having been committed at the dead of the night in a veranda of a school, it was Impossible to get other direct evidence to implicate the other accused persons. As has been observed by Lord Reading in Baskerville's case (*supra*), corroboration in cases of offences with females committed by accomplices in secret need not be by direct evidence and if the law were otherwise the offenders would never be brought to justice and in such cases, it is sufficient if there is circumstantial evidence of the connection of the accused with the crime. There is in our considered opinion, corroborative circumstantial evidence in this case discussed above to connect the appellants Narottam Barman and Ambarish Nath to the heinous crimes committed against the deceased girl.

But there is no such corroborative evidence, direct or indirect, to connect the appellant Naba Kumar Das and Dalim Sinha to the crimes. Mrs. Deka, the learned Public Prosecutor, Assam, placed great reliance on the evidence of PW 2 but as discussed above, PW 2 has implicated Setar and Prafulla who are yet to be tried and are not appellants before us and has not implicated any of the appellants. Even though the offences committed against the deceased girl are the worst crimes against society and the persons found guilty of the offences have to be dealt with by severe punishment, we have to bear in mind the caution of the Supreme Court in Balwant Kaur's case (*supra*) that in serious crimes such as these it will not be prudent and safe to rest the conviction of accused persons on the evidence of a guilty partner in the crimes without independent corroboration showing their connection with the crimes.

25. In the result, we dismiss the appeals of Narottam Barman and Ambarish Nath and maintain their conviction under Sections 376/ 34, 302/34 and 201/34, IPC, and the sentences imposed on them by the impugned judgment, but allow the appeals of Naba Kumar Das and Dalim Sinha and set aside their conviction under the said judgment of learned Sessions Judge and in case they are still in

custody they will be set at liberty forthwith.