

(2006) 01 RAJ CK 0016

In the Rajasthan High Court

Case No : Criminal Death Reference No. 1 of 2005 and Cri. Appeal No's. 261, 347 and 431 of 2005

State of Rajasthan and Others

APPELLANT

Vs

Ram Niwas and Another

RESPONDENT

Date of Decision : 09-01-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 306, 306(1), 306(4)
Evidence Act, 1872 — Section 113, 114, 118, 133, 27
Penal Code, 1860 (IPC) — Section 149, 302, 303, 323, 34

Citation : (2006) CriLJ 2477 : (2006) 4 RCR(Criminal) 2 : (2006) 1 WLC 563

Hon'ble Judges : V.K. Bali, J; R.S. Chauhan, J

Bench : Division Bench

Advocate : S.R. Bajwa and Vivek Bajwa, V.P. Bishnoi and Ranveer Singh, for the Appellant; Mohammad Rafiq, A.A.G. and Sunil Yadav and Arun Sharma, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

R.S. Chauhan, J.—For the rape and murder of a helpless woman Rekha, appellants have been sentenced to death. Learned trial Judge has referred papers of this case for confirmation of death sentence whereas the appellants have challenged order of conviction and sentence recorded against them by filing appeals. Substantial questions of general importance and somewhat ticklish, involved in the case are whether Rajesh, presented as an approver by the prosecution around whose testimony almost entire case of prosecution rests, qualify as an approver in view of his statements made under Sections 164, 306, Cr. P.C. and his testimony before the Court where he completely exculpates himself and inculpates only appellants and whether from narration of facts given by him, he rather appears to be a protestor, preventor and to some extent, even a victim of the crime himself. The other question of equal significance that confronts the Court is that if testimony of Rajesh is discarded as approver whether he is a competent witness u/s 113 of the Evidence Act and his testimony

should be appreciated and accepted in the same way and manner like any other witness. Appended to the two important questions of law, as mentioned above, are also usual questions like the testimony of Rajesh if accepted as an approver, to be fulfilling usual tests and that sans statement of the approver, whether conviction of the appellants could possibly rest on circumstantial evidence led by the prosecution.

2. The facts that necessarily precede adjudication of the questions framed above, as per prosecution version, are that on the intervening night of 1-2/11-2003, Rekha was allegedly raped and murdered by the two appellants-Ram Niwas and Balveer and by the alleged approver Rajesh. For the commission of the crimes of rape and murder, vide judgment dated 5-3-2005, the Additional District and Sessions Judge (Fast Track) No. 4, Bharatpur, convicted the appellants for the offence under Sections 302/34, I.P.C. and sentenced them to death penalty, fine of Rs. 1000/- each, and, in default thereof, to undergo a six month simple imprisonment. He convicted them further for the offence u/s 376(g), I.P.C. and sentenced them to imprisonment of ten years and imposed a fine of Rs. 1000/- each and to serve tax months in default thereof. Since the death reference and the attendant three appeals arise out of the same impugned judgment, they are being decided by this common judgment.

3. According to the prosecution story, one Prem Bahadur, SHO, Police Station Nadbai, got a formal FIR (Ex. P. 12), recorded on 1-11-2003, after bringing Rajesh back from the crime scene to the police station, wherein he (SHO Bahadur) claimed as under:

On 1-11-2003 at 10.45 p.m., they (the police) received a telephonic information that a woman had been murdered near the rail way tracks in the vicinity of the jungles of village Kishanpura. The informer also told them that they (the people) had nabbed a person, who was in their custody. Upon this information, a police party left for the said spot. They reached the place at 10.55 p.m. Upon arrival, they found about fifteen persons standing around, including Malkhan Luhar, Nemi Brahman, and Bharat Singh Jat. They told them (SHO Bahadur) that around 10.30 p.m. when they heard a hue and cry, they rushed to the spot. They saw two persons fleeing on a motorcycle along the railway track towards the village of Khedali. They also saw a person running through the fields, whom they managed to catch. They found a half-nude body of a woman who was dead. When the SHO asked the captured person his name, he told them that he was Rajesh, s/o Rekh Ram Meena, r/o village Peelwa, Police Station Mandawar, District Dausa. He further told them that that afternoon, between 4.00-5.00 p.m. Ram Niwas Meena s/o Devi Ram Meena, who was a resident of his (Rajesh's) village, along with Ram Niwas's paternal-aunt's (Bua's) son, Balveer, r/o village Badyowas, came along with a girl, Rekha, who was known to Ram Niwas, and that he (Rajesh) arrived on Ram Niwas's motorcycle, Registered No. RJ 29/2M/2370, along the railway track near the village Khedali. He further claimed that under the Khedali Bridge all three of them raped Rekha. After that, Ram

Niwas and Balveer wanted to stuff her mouth with a piece of cloth and to strangle her. He protested and told them that someone was coming as noises could be heard. Thereupon, they forced her to accompany them on the motorcycle and brought her along the railway track to this place. Here both Ram Niwas and Balveer kicked her in the neck and strangled her with her scarf ("chunni"). According to Rajesh, they assaulted him, when he protested. When he freed himself from their clutches, he raised a hue and cry. Consequently, Ram Niwas and Balveer fled on the motorcycle, along the railway tracks, towards Khedali. The SHO examined the dead body of the girl and discovered that her mouth was stuffed with cloth and her "chunni" was tightly wound around her neck, and that she had injuries on her chest and neck, and her "salwar" and "chunni" were pulled down to her knees. In the pocket of her jacket, they discovered an identification card. The card had her photograph and showed her name to be Rekha Marothiya d/o Bherulal Morathiya, Nursing Student, at the BRBM Hospital, Bharatpur, resident of village Gaddi Maliyan, Dist. Ajmer. Subsequently, the site inspection and an examination of the dead body were carried out. While the body of the deceased was sent to the mortuary at the CHC, Nadbai, Rajesh was brought to the Police Station.

4. Upon this report, a formal FIR No. 492/2003 was registered for offences under Sections 302/34, 376(b), I.P.C. against Ram Niwas, Balveer, and Rajesh.

5. Since there were no eye-witnesses to the commission of the alleged crime except Rajesh, on 22-12-2003, the police submitted an application (Ex. P.69) before the Chief Judicial Magistrate, Bharatpur. According to the said application, the Superintendent of Police had clearly directed the police that, u/s 164, Cr. P.C. Rajesh's statement, be recorded by a Magistrate, especially since the police had decided to seek his pardon and to produce him as an approver during the course of the trial. Hence, a prayer was made to the learned Magistrate to direct another Magistrate to record Rajesh's statement u/s 164, Cr. P.C. Consequently, on 29-12-2003, a Judicial Magistrate recorded Rajesh's statement u/s 164, Cr. P.C. Thereafter, on 16-1-2004, the police moved an application (Ex. P.70) for pardoning Rajesh and for declaring him an approver. Vide his order, dated 19-1-2004 (Ex. P.71), the Chief Judicial Magistrate pardoned Rajesh and permitted him to appear as an approver in the case.

6. Thus supported by an approver, the prosecution examined 32 witnesses to prove its case. It also produced 71 documents to substantiate its case. The defence, on the other hand, did not produce any witness; it did, however, submit five documents to support its defence. In light of the oral and documentary evidence, as aforementioned, the learned trial Court convicted and sentenced the appellants. Hence, the death reference and the three appeals before us.

7. As unfolded during the trial, in brief, the prosecution case is that Ram Niwas used to be a tenant of Rekha's parents in Ajmer. While Ram Niwas used to live in Ajmer, both Balveer and Rajesh used to visit him. Thus, all three of them knew Rekha. In fact, once the three of them had misbehaved with Rekha.

Consequently, Rekha's father, P.W. 6, Shri Bhairav Lal, had asked Ram Niwas to vacate the house. Subsequently, Rekha came for training as a Nurse in Bharatpur. She was staying in a house at Gopalgarh, Bharatpur. She was occupying the house along with Smt. Anjana, P.W. 12 and Smt. Khem Kanwar, P.W. 13. Smt. Shivdevi, P.W. 14 was the landlady of the house. To these three and to others, Rekha had introduced Ram Niwas as her maternal uncle (Mama). According to them, Ram Niwas used to visit Rekha at night and, at times, used to stay with her overnight. In the afternoon of 1-11-2003, Rekha had told P.W. 12 and P.W. 13 that she would be going with her Mama today, i.e. with Ram Niwas. However, she told the landlady, Smt. Shivdevi that she would be going to Ajmer on that date. According to Rajesh's testimony, on 1-11-2003, Ram Niwas first picked him up and took him to the Jaipur Bus Stand at Mahuwa. He was looking for someone in the buses. Later on, as they were about to leave Mahuwa, Ram Niwas stopped the motorcycle near a girl and picked her up too. Subsequently, they also picked up Balveer. All four of them, namely, Ram Niwas, Balveer, Rekha and Rajesh went towards Nadbai on the motorcycle. They went to the jungle near Nadbai, stopped the motorcycle, where Ram Niwas and Balveer allegedly raped and murdered Rekha. When Rajesh tried to raise a hue and cry, he was verbally abused and physically dragged by Ram Niwas. However, he still managed to free himself from Ram Niwas. He ran and shouted for help. Some villagers who heard his shouts came there. He told them about Rekha's rape and murder. They all went to the site of the crime. They saw two men fleeing on a motorcycle from the place. Lastly, the police was informed. The police came, Rajesh told the police about the incident and the police took the villagers and Rajesh to the police station. Thus, began the investigation into the offences. During the course of investigation the police did recover a large number of love letters written by one Nisha to Ram Niwas from Rekha's room. However, Nisha was never produced as a witness during the trial. Further, during the investigation, the police applied for Rajesh to be declared as an approver u/s 306, Cr. P.C. As stated above, the Chief Judicial Magistrate granted pardon to Rajesh and declared him to be an approver.

8. Mr. S. R. Bajwa, senior Advocate, and the learned Counsel for the appellants, has argued, firstly, that Rajesh does not qualify as an approver, for, in his statement u/s 164, Cr. P.C., and in his statement u/s 306, Cr. P.C. and in his testimony before the Court, he exculpates himself and inculpates only the appellants. In fact, he has presented himself as a victim, as a protestor, but not as a "particeps criminis" (as participant in the crime), and the prosecution has not submitted any incriminating evidence against Rajesh, except his statement made to the SHO. On such a basis, Rajesh does not fall within the definition of an approver, especially as he is neither directly, nor indirectly, related to the offences, nor is he, on the basis of admissible evidence, a privy to the offences. According to the learned Counsel, since Rajesh does not qualify as an approver, the pardon granted to him u/s 306, Cr. P.C. has been given illegally.

9. Secondly, according to the learned Counsel, the testimony of an approver is

trustworthy provided he fulfills three tests : i) that he was an accomplice, ii) sufficient corroboration is available from other evidence, iii) he is otherwise reliable witness. However, Rajesh fails all the three tests. His evidence is, therefore, to be ruled as untrustworthy.

10. Thirdly, Rajesh was initially arraigned as an accused. He was arrested, pardoned, and produced as an alleged approver. Thus, his evidence is not of a "free person." He was bound by the condition of pardon. He had to tailor his testimony to the prosecution's case. Hence, he is not free to speak as an independent witness. Hence, his testimony should be discarded lock, stock and barrel.

11. Fourthly, his testimony is not merely bland, broad, and cryptic, it is also full of contradictions. There is, for example, no mention in Rajesh's account of the struggle or co-operation on the part of the woman; no curses, protests, or plea for help, and certainly no description of the last moments of the dying woman. Therefore, even coming from a solitary witness, Rajesh's testimony is not of any sterling worth. Hence, the appellants cannot be convicted on the basis of his testimony alone.

12. Fifthly, in case Rajesh's testimony is discarded, the circumstantial evidence is too weak to warrant a conviction. No motives are adduced, no proofs furnished, not even normal procedures such as DNA testing followed.

13. Sixthly, the prosecution's case is full of infirmities. The circumstantial evidence marshalled by the prosecution is insufficient to warrant the conviction of the appellants. Obviously, the prosecution has failed to prove its case beyond a shadow of doubt.

14. As against this, Mr. Mohammad Rafiq, the Additional Advocate General, has argued, firstly, that Rajesh was directly involved with the commission of the crime. He had accompanied the appellants and had witnessed the occurrence. Hence, he was an accomplice. And, as an accomplice, he fulfills the criterion laid down by Section 306, Cr. P.C. He was, therefore, rightly granted pardon, it has been argued, under the said section. His testimony is that of an approver. His testimony is trustworthy.

15. Secondly that, if for the sake of argument it is conceded that Rajesh is not an approver, then he is a competent witness u/s 113, Evidence Act. Therefore, his evidence is admissible. And as he has described the incident in detail, his testimony is trustworthy. The appellants can be convicted on the testimony of this sole witness.

16. Thirdly, that even if the Court discards Rajesh's testimony there is still sufficient direct and circumstantial evidence on record to warrant the appellants' conviction. The testimony of the villagers tells us that two persons escaped on a motorcycle from the scene of the crime. The motorcycle was recovered at the instance of Ram Niwas. Moreover, semen was discovered on Ram Niwas'

underwear. The black bag, allegedly belonging to Rekha, was discovered at Balveer's instance. Hence, the circumstantial evidence completes a chain unerringly pointing to the guilt of the appellants.

17. Fourthly, that considering it is a case of rape and murder of a young lady, the death penalty, according to the learned Counsel, was rightly awarded.

18. We have heard the learned Counsel for the parties and have also considered the record and examined the impugned judgment.

19. In order to appreciate the first contention raised by Mr. Bajwa, it is imperative to understand the scope and ambit of Section 306, Cr. P.C. The section reads as under:

Tender of pardon to accomplice-- (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to--

(a) any offence triable exclusively by the Court of Session or by the Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952)

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under Sub-section (1) shall record--

a) his reasons for so doing:

b) whether the tender was or was not accepted by the person to whom it was made, and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under Sub-section (1)--

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any:

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under Sub-section (1) and has been examined under Sub-section (4), the Magistrate taking cognizance

of the offence shall, without making any further inquiry in the case--

(a) commit it for trial--

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate:

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court:

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

20. It follows, then, that a pardon can be granted only to an accomplice; an accomplice being a person who participates in the commission of the crime charged against a co-accused. He needs to be a "participes criminis." And crime consists of two elements, the actus reus (the actual act of the commission of the offence) and the mens rea (the guilty mind preparatory to the act done). So, the participation has to be in the actus reus and/or in the mens rea. Such participation could be "directly" or "indirectly" linked, or be "a privy" to an offence. Direct participation would consist of mere physical presence, or of actual physical participation. This would include vicarious liability u/s 34, I.P.C., or an offence u/s 149, I.P.C. Indirect participation could well be mental or physical. Mental, when one has an interest in the outcome of an offence, or when one is involved in the planning. The latter would reflect either a criminal conspiracy or an abetment. Physical, when in a crime consisting of a series of acts, one, or more acts are committed by the person. One is said to be "privy to the offence" when one has secret knowledge of or "is a person who is in privity with another. One who is a partaker or has any part of interest in any action, matter or thing." (per Black's Law Dictionary). In conclusion, there has to be some connectivity between the crime and the accomplice.

21. A person totally unrelated to the offence is deemed to be innocent, and an innocent person cannot be called, or treated as, an approver. Lack of complicity is, indeed, a disqualification for approvership. To be eligible as an approver, there should be some interest, on the part of the person, in the commission of the crime.

22. In the case of Suresh Chandra Bahri Vs. State of Bihar with Gurbachan Singh, the Hon''ble Supreme Court had emphasised the object behind Section 306, Cr. P.C. However, on this specific aspect of the issue the Hon''ble Supreme Court has not weighed in. The most critical analysis of Section 306, Cr. P.C. has been done by the Hon''ble Gujarat High Court in the case of State of Gujarat Vs. Ramasi Devasi Bhil alias Chakala, But, the Hon''ble Gujarat High Court has held a contrary point of view. It has held that, "Thus, the very basis of the section is that a person who applies for pardon under the provisions of Sections 306 and 307 of the Code of Criminal Procedure can be assumed to be directly or indirectly concerned in the offence. Similarly, he may be assumed to be privy to an

offence. The assumption does not mean that he is party to the offence. Thus the person applying may not be actual culprit. If he is not an actual culprit there does not arise any question of exculpating one's own self.

(Emphasis added).

23. However, we respectfully disagree with this interpretation of the provision. The very word "accomplice" means that the person who seeks pardon, or for whom pardon is sought, has been "complicity an "associate," connected with the offence. For, in case he is unconnected, then he is innocent. And an innocent person does not need any pardon. Moreover, the supposition of his connection cannot be imagined or assumed as suggested by the Hon"ble Gujarat High Court. "Suppose," means "likely to be" or "some probability of." However, the "likelihood" of a connection is a question of fact. The existence of a fact has to be found in some evidence. A judicious mind has to examine the relevant evidence to arrive at a supposition that the person was "directly," or "indirectly," connected to, or was "privy" to, the offence. In order to see the existence of the connection, there has to be some inculcation by the accomplice about his role in the commission of the offence. Unless there is some inculcation, the difference between an accomplice and an eye-witness gets blurred. The inculcation might be ever so slight, but the accomplice cannot paint himself totally as a protestor, as a victim, as an innocent person, and place the entire blame on the other co-accused persons for the commission of the crime. In case he were to do so, then he removes himself from the category of an accomplice and places himself as an eye-witness.

24. Mr. Bajwa has drawn our attention to Rajesh's statement recorded u/s 164, Cr. P.C. His statement reads as under:

The incident is of the eleventh month, I was irrigating my fields. Ram Niwas came to me. He told me to accompany him as he could get me hired for a job. He said, "my Bua's (paternal aunt's) son has a machine, you could be hired for that." Ram Niwas took me to Mahua and asked me to sit at the Bus Stop for Jaipur. As I sat, he searched the buses, I asked him "what are you looking for if we must go, then let us go immediately." By the time we left Mahua it was already 5.00-5.30 p.m. When we were about to leave, Ram Niwas stopped his motorcycle in front of a girl, and told her, "I had asked you to come at 4.00 p.m. now it is 5.30 p.m." He asked the girl to get on the motorcycle. I was standing by then, I asked him "Who was she?" "You come with me, I will get you hired. You don't know her," he told me. All three of us left on the motorcycle. Beyond Mudawar, on the by pass road, we met Ram Niwas' Bua's (paternal aunt's) son, Balveer. Ram Niwas asked me to get off and took Balveer on his motorcycle. I asked him, "What is going on?" Ram Niwas said, "She is from Bharatpur. Let us drop her off there." He threatened me and forced me to come with them on the motorcycle. Then he drove the motorcycle along the railway tracks towards Nadbai. He stopped the motorcycle in the jungle. Then both raped the girl. They didn't allow me to raise a hue and cry. They said to me, "Madar**d, shut up."

When after raping her, they were killing her, I ran off shouting : "They are killing a girl!" Ram Niwas caught hold of me and dragged me back and forced me to sit down. He told me "Madar***d, we would give you the same treatment." I pretended that I had to go to answer the call of nature, and ran away. In the jungle I saw a bulb burning brightly, I walked with the help of its light. I lost my slipper in the mud. Ram Niwas was running after me. I ran away, leaving Ram Niwas behind. I met 8-10 people whom I told that "they are killing the girl; let us go." We all went there and saw that both were going and the girl's neck was wound up in her "chunni" (scarf). People said, "let us inform the police. Don't touch anything." I told the police. Police took the people and me and asked us to sit in the police station.

25. On 4-3-2004 Rajesh's statement u/s 306, Cr. P.C. was recorded as under:

The incident is of the eleventh month. It was about four months ago. I was irrigating my field in the village. Ram Niwas, who is the accused and who is present in the Court, came to me. He told me to come with him as he could get me a job. He further said, "My Bua's (paternal aunt's) son has a machine, you could work on that." Ram Niwas took me on his motorcycle to the Jaipur Bus Stand at Mahuwa. Ram Niwas started searching the buses. I asked him, "What are you looking for?" "If we have to go, then let's go," I told him. We left Mahuwa at 5.30 p.m. When we were about to leave Mahuwa, Ram Niwas stopped his motorcycle near a girl. He told the girl, "I asked you to come at four O'clock and you are coming at five thirty." I asked him as to who was the girl. He said, "What do you have to do with the girl?" "You come with me and I will get you a job," he told me. He asked the girl to come with us on the motorcycle. When we were beyond Mundawar on the by-pass, we ran into Ram Niwas' Bua's son, Balveer. There Ram Niwas asked me to get off and asked Balveer to get on the motorcycle. I asked them "What is the matter," Ram Niwas said, "She is from Bharatpur, let us go and drop her off there." They forced me to come with them on the motorcycle. We went along the railway tracks towards Nadbai. Balveer was driving the motorcycle. When we came near Nadbai, near its jungle, they stopped the motorcycle. There Ram Niwas and Balveer raped the girl. They didn't let me raise a hue and cry. They told me, "Madar***d, shut up otherwise we would kill u" When after raping her, Ram Niwas and Balveer tried to kill her, I ran and raised an alarm. Ram Niwas ran after me and caught hold of me and took me where the girl was. They told me to shut up or else I would be given the same treatment. "First let us finish this girl off," they said. "Then we will deal with you," they remarked. They strangled the girl with her chunni (scarf). Seeing this, I again ran off. I noticed an electric bulb through the forest. I ran towards it. I found eight to ten persons sitting by the light. I told them that two persons were killing a girl and I brought them to the place. We saw Ram Niwas and Balveer fleeing from the place. The girl was dead and her "chunni" (scarf) was tied to her neck. People said, "Don't touch the girl. Let us go to the police station." Then along with the people, I too went to the police station. The police asked me to wait at the police station. The police went to the scene of the crime.

When Rajesh is examined as P.W. 1, he testifies as under:

The incident is of the first of the eleventh month of year 2003. That day I was irrigating my fields in my village. My village is Peelwa. That day. Ram Niwas s/o Devi Ram, resident of Peelwa, came to me. He told me to go with him, as he could put me on a job. He told me that his Bua's (paternal aunt's) son, Balveer, had a machine and I could be engaged there. He took me with him to Mahuwa on his motorcycle. Motorcycle was "Splendor" by Hero Honda. I don't remember its registration number. Ram Niwas took me to the Jaipur Bus Stand at Mahuwa and asked me to wait there. Then he started looking into the buses here and there. I kept on sitting there, I asked him, "What you are searching for in the buses? In case we have to go, let us go immediately." It was 5.30 p.m. in the evening. As soon as we started. Ram Niwas stopped his motorcycle near a girl. Ram Niwas told the girl, "I had told you for four O'clock. You have come at 5.30 p.m." I was standing near by. Then I asked Ram Niwas, "who is this girl?" Ram Niwas said to me, "You don't know her." Ram Niwas told me to come with him as he could get me a job. Ram Niwas asked the girl to get on the motorcycle. I don't know the girl's name. We three left on the motorcycle towards Mundawar. Beyond Mundawar near the bypass, we met Ram Niwas' Bua's (paternal aunt's) son, Balveer. He asked Balveer to get on the motorcycle and dropped me off. I asked Ram Niwas, "What is going on?" Ram Niwas said, "This girl is from Bharatpur. Let us drop her off there." They threatened me and forced me to sit on the motorcycle and we went towards Nadbai along the railway tracks. They stopped the motorcycle in a jungle. Ram Niwas and Balveer raped the girl. I saw the rape with my own eyes. When I tried to shout, they cursed me, saying, "Motherf***er shut up." They didn't let me shout. After the rape, Ram Niwas and Balveer tied the girl's "chunni" (scarf) around her neck and killed her. They didn't let me. shout. After killing her, they came towards me; I ran away and shouted, "They have killed the girl." Ram Niwas ran after me and caught hold of my shirt from the back. The buttons of my shirt fell off. They said, "Mather***d, now we will give you the same treatment." Ram Niwas caught hold of my neck while Balveer stood by the girl. Ram Niwas and Balveer have been brought here from J.C. These two raped the girl and strangled her with her "chunni" (scarf). I saw an electric light through the jungle. By its light, I could run off. My slipper was left behind in the mud of a farm. Ram Niwas kept running after me. But I kept on running and left him behind. I met eight to ten men from the village. I told the villagers that Ram Niwas and Balveer had killed the girl. The villagers went with me to the spot where the incident had taken place. Ram Niwas and Balveer fled the place. The woman's body was half naked and her neck was tied with her "chunni" (scarf). The villagers said, "Let us inform the police." The police took the villagers and me to the police station. The motorcycle on which I was taken belonged to Ram Niwas. The place where the girl was raped and murdered, the police had" made the site plan as Ex. P.1. A to B are my signature on this document. The woman whom Ram Niwas and Balveer raped and murdered, I had seen her. Ex. P.2, the identification card has the picture of the

deceased-girl, I can recognise her photo, I saw the girl in the nude. Photographs, Ex. P.3 to Ex. P.5, are of the deceased. They were taken in the position she was at that time. On 29-12-2003, my statements were recorded in Bharatpur before the Magistrate, which is Ex. P.6. Without any pressure, I had narrated all the facts there. It has my signature at three places. On 4-3-2004 my statement was recorded before the Magistrate at Nadbai, which is Ex. P.7 and my signature are at two places, at A and B. Mohan Singh, the SHO, had submitted an application for my pardon before the Judicial Magistrate, Bharatpur. It is true that the Chief Judicial Magistrate had explained to me the conditions for pardoning, I had accepted them and had signed the papers after understanding them, which is Ex. P.8, wherein my signature is at A and B.

26. Even a simple perusal of the statement u/s 164, Cr. P.C., of the statement u/s 306, Cr. P.C. and of the Court testimony, reveals, firstly, that Rajesh does not inculcate himself in the commission of the offences. In fact, according to him, he was tricked by Ram Niwas into accompanying him, threatened by Ram Niwas, forcefully taken by Ram Niwas, cursed and caught hold of by Ram Niwas, from whose clutches he finally escaped. Thus, he is more of a victim than an accomplice. Secondly, according to him, he protested about the commission of rape, about the commission of murder. He tried to stop the appellants. He runs to inform the people about the occurrence of the crime. He brings them to the scene of the crime. On the basis of the evidence, he has no interest in the commission of the crime. In fact, his sole interest is in the prevention of the crime. According to him, he participates neither in the mens rea nor the actus reus of the crime. He is innocent. He is, therefore, neither "directly" nor "indirectly" linked to, or "privy" to the offence. Therefore, he is not an accomplice. Hence, he cannot well qualify to be an approver.

27. Nevertheless, vide his order, dated 19-1-2004, (Ex. P.71), the Chief Judicial Magistrate has, in treating him as an approver, granted him a pardon. The learned Magistrate has ignored that Rajesh does not inculcate himself either in his statement u/s 164, Cr. P.C, or in the statement u/s 306, Cr. P.C. He inculcates only the appellants. He denies participating in the commission of the crime. In fact, he affirms, he tries to prevent the commission of the crime. On the basis of the admissions made by him, it cannot be supposed that he is directly, or indirectly concerned with, or privy to, the offence. Since he is not concerned with the commission of the crime, the learned Magistrate has wrongly extended the benefit of Section 306, Cr. P.C. to him.

28. Now, if a person does not qualify as an approver, then what sort of witness is he? What is the validity and veracity of his testimony? These issues now call for our attention. These issues were raised before the Hon'ble Supreme Court in the case of Balbir Singh Vs. State of Punjab, . However, the issue was left open. Hence, we do not derive any benefit from the said citation. In the instant case, since Rajesh is not an accomplice, Sections 30 and 133 of the Evidence Act, which deal, respectively, with the confession of a co-accused and the testimony

of an accomplice, do not come into play here. Similarly, neither can the presumption under the second illustration to Section 114 of the Evidence Act stigmatize his testimony. Therefore, these provisions do not concern us. However, u/s 118 of the Evidence Act, Rajesh is a competent witness. For, according to the section, "All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind." Since Rajesh is not visited by any of the disqualifications, he is certainly competent to testify as a witness.

29. But considering the fact that while testifying in the Court, he was bound by the condition of pardon, he is not free to depose before the Court as an independent person. He is, rather, legally obligated to conform his testimony to the prosecution case. He, therefore, becomes duty-bound to inculcate the appellants. In case he violates the condition of pardon, then the Damocles' sword of Section 308 looms large on his head. Hence, his testimony is cribbed, cabined, and confined to the prosecution case. His testimony, naturally, suffers from lack of credibility.

30. Unfortunately, the prosecution case is anchored in the testimony of a sole witness. He has to be a witness of sterling worth, for conviction cannot be staked on the testimony of a doubtful witness. In the instant case, Rajesh's testimony, at best, can be said to consist of only half-truths. Other witnesses have contradicted him as well. Most importantly, his testimony doesn't find any corroboration from other quarters. From the very initial stage of his testimony, he distances himself from the offence. He claims that he asked Ram Niwas as to who the girl was. He claims in his testimony that he did not know the girl. However, P.W. 6 and P.W. 7, the father and the mother of deceased-Rekha, clearly state that when Ram Niwas was their tenant in Ajmer, both Rajesh and Balveer used to visit him. Once these boys had misbehaved with their daughter, Rekha. Consequently, they had asked Ram Niwas to vacate the room. Therefore, Rajesh knew Rekha from the time Ram Niwas used to live as a tenant in Rekha's parents' house.

31. Initially, in his statement before the police Rajesh claimed that the rape and murder were committed in two different places. Believing his statement, the police had prepared two different site plans for the occurrence, which exist as Ex. P. 1 and Ex. P.13. Yet, in his statements u/s 164, Cr. P.C. Section 306, Cr. P.C., and in his Court testimony, he claims that the rape and murder took place at the same place. Thus, he changes the place of the occurrence of the twin crimes.

32. Further, Rajesh claims to be an eyewitness to both the rape and the murder of Rekha, yet the facts he states are totally bland and devoid of realistic details. He tells us neither about the sequence of rape, nor as to who actually strangled the deceased. He does not even tell us about the possible resistance made by and about the last words of the deceased-Rekha. His statement is devoid of all

details. It is a vague statement to say "both Ram Niwas and Balveer raped her." Such half-baked accounts are unpalatable to judicial taste. They do not, and cannot, inspire the Court's confidence in his testimony.

33. His testimony of rape is not supported by other circumstantial evidence. According to the post-mortem report, Ex. P. 55, the medical jurist does not give any definite finding about the rape. There are no injuries on the private parts of the deceased. Although Rekha was allegedly raped on the rough ground near the railway tracks, yet there are no injuries on her back. Similarly, although human semen is found to be present in the vaginal swab taken from her, the prosecution has not proven as to whose semen it is from among the three culprits. The prosecution did not bother to get the DNA testing for the human semen. Further, although Rajesh claims that the appellants fled on Ram Niwas's motorcycle, he neither describes nor remembers its number. Interestingly, no tyre marks were picked up, either, from the scene of the crime. Therefore, on material particulars there is either vagueness or lack of corroboration. Hence, it is difficult to uphold a conviction on the testimony of such an unreliable witness. His testimony should be discarded in toto.

34. In the case of Chandan and Another Vs. State of Rajasthan, their Lordships of the Hon^{ble} Supreme Court held, "In the present case the only evidence against the accused was that of the approver. He claimed to be a spectator at every moment but did not participate at any stage. Apart from it the initial story appears also to be absolutely unnatural as according to him, he did not know anyone of the accused persons but a month before the incident they took him into confidence and told him to join them. The evidence of the witnesses as a whole does not appear to be natural and does not inspire confidence. Apart from it as there was no corroboration at all from any other independent circumstance or source of evidence, the conviction of the appellants could not be maintained." Therefore, the Hon^{ble} Supreme Court had acquitted the appellant in that case.

35. With the rejection of the direct evidence, only shreds of circumstantial evidence exist in the prosecution's armoury. The learned trial Court has relied on the circumstantial evidence to bolster its conclusion about the appellants' guilt. According to the prosecution, vide Ex. P. 24, Ram Niwas' underwear was recovered. According to the FSL report, Ex. P. 56, human semen was discovered on the said underwear. But, the said underwear was discovered five days after the date of incident and two days from the date of Ram Niwas' arrest. The prosecution has not proven the fact that Ram Niwas was wearing the said underwear at the time of commission of rape. And the finding of human semen on the underwear of a potent young man is not so unnatural. Such a discovery cannot be relied upon to connect Ram Niwas to the crime.

36. According to Ex. P. 66 Ram Niwas gave a statement u/s 27 of the Evidence Act. In pursuance of the said statement, the motorcycle, which was allegedly used by Ram Niwas and Balveer, to commit the alleged offences and to flee the crime scene was discovered. However, as the investigative agency did not pick up

the tyre marks from the scene of the crime, and since neither the villagers nor Rajesh identified the said motorcycle as the vehicle used to escape from the scene of the crime, the mere recovery does not connect the accused to the crime. That apart, prosecution endeavored to prove recovery of motor cycle from Ram Niwas through recovery witnesses P.W. 8 Siyaram who was a Police Constable and Kailash, who was driver of the official jeep. In so far as Kailash, is concerned, he was not examined. Non-joining of independent witness in the matter of recovery of motor cycle, casts a doubt upon recovery of the same.

37. Much has been made about the recovery of Rekha's black bag upon information given by Balveer, the co-accused. However, there is no evidence to prove that on the fateful day the deceased had carried the said bag with her. Even Rajesh does not tell us that the deceased was carrying a black bag with her when Ram Niwas met her and when she rode with them. There is a conspicuous silence on his part with regard to the black bag. Moreover, the independent witnesses like P.W. 12. Anjana, P.W. 13, Smt. Khem Kwar, P.W. 14, Smt. Shivdevi, the two nursing students who lived in the same building as Rekha, and the landlady, do not tell us that, on the fateful day, Rekha had carried the black bag with her. Therefore, the sheer recovery of the black bag is insufficient to hold Balveer as a culprit.

38. There is not even the evidence of the last seen available to the prosecution. Both P.W. 12, Anjana and P.W. 13 Smt. Khem Kanwar merely state that Rekha had introduced Ram Niwas as her Mama (maternal uncle). They further depose that on the fateful day, Rekha had informed them that she was going with her Mama. Hence, her going with Ram Niwas is based on hearsay evidence. On the other hand, P.W. 14, Smt. Shivdevi, the landlady claims that Rekha used to inform her about her movements. According to her, on the fateful day Rekha had told her that she would be going to Ajmer. Again this is hearsay evidence. It is no evidence in the eye of the law. Such testimony would not prove that Rekha went with Ram Niwas. Such testimony would not prove the factum of the "last seen."

39. While examining the circumstantial evidence, we would also have to consider the lack of motive for the rape and murder. According to P.W. 6, Shri Bhairav Lal and P.W. 7, Smt. Santosh, the father and mother respectively of the deceased-Ram Niwas and Rekha were known to each other when the former lived as a tenant in their house. According to P.Ws. 12 to 14, Rekha had introduced Ram Niwas as her maternal uncle (Mama). According to them, Ram Niwas not only used to visit her, but also used to stay back at night with her. Hence, there was a certain amount of intimacy and permissiveness between the two. In view of such intimacy, there is no cogent reason for him to rape her with his cousin brother, Balveer and to kill her in front of a friend, Rajesh.

40. What further weakens the prosecution case are the glaring infirmities in the prosecution story. Initially, the prosecution claims the rape and murder occurred in two different spots. It even drew up the site plans of these two different locations Ex. P. 1 and Ex. P.13. Yet, during the trial, it changed the place of

occurrence and claimed that the two offences occurred at the same place Ex. P. 13. Thus, the very genesis of the prosecution story is shrouded in mystery.

41. During the course of investigation, the police do not lift any tyre marks from the scene of the crime. They do not have the DNA testing done on the human semen found in the vaginal swab nor the one found on Ram Niwas" underwear. The half-hearted investigation does not buttress the prosecution case.

42. The prosecution presents Rajesh as an accomplice and requests for his pardon. But, according to his own testimony, both within and without the trial Court, he is a victim of Ram Niwas" and Balveer"s alleged deeds. He is forced to accompany them, they assault him, he is dragged back and confined by them; yet, the prosecution does not arraign them as accused for offences under Sections 323, 352, 367 and 342, I.P.C. Eager to parade Rajesh as an approver, they overlook the gaping holes in his statement made before the learned Magistrate.

43. During the course of investigation, certain love letters were discovered from Rekha"s room. One, Nisha, allegedly wrote the letters to Ram Niwas. However, Nisha was never presented as a witness during the trial. Even her statement, permitted u/s 161, Cr. P.C., was not recorded. Hence, a material witness, one that could shed light on Rekha-Ramniwas relationship, was withheld from the learned trial Court. An adverse presumption should be drawn against the prosecution for her non-production.

44. Of course, the rape and murder of an innocent young lady is a blow to the society. But in the glaring absence of convincing, cogent, and substantial evidence, judicial verdict cannot be swayed merely by the gravity of the offence. To uphold the sentence would tantamount to morally convicting the appellants. But capital punishment cannot be confirmed only on moral grounds. It has to be based and grounded on solid legal evidence and derived from judicial logic. The direct evidence does not prove the case of the prosecution; the circumstantial evidence does not unerringly point to the guilt of the accused-appellants.

45. As a result of our discussion, we decline to accept the death reference. Consequently, we allow the three appeals, mentioned above, and set aside the judgment dated 5-3-2005. We acquit the appellants of the offence under Sections 303/34 and 376(g), I.P.C. Further, we direct that the appellants be released forthwith, if they are not wanted for any other offence.