

# SUPREME COURT OF INDIA

State of Rajasthan

Vs.

Balveer @ Balli

Crl.A.No.942 of 2006

(A.K.Patnaik and Gyan Sudha Misra, JJ.)

31.10.2013

## JUDGMENT

### **A.K.Patnaik, J.**

1. This is an appeal against the judgment dated 09.01.2006 of the High Court of Rajasthan in D.B. Criminal Death Reference No. 1 of 2005 and D.B. Criminal Appeal Nos. 261 of 2005, 347 of 2005 and 431 of 2005.

### **Facts:**

2. The facts very briefly are that on 01.11.2003 at 10.45 P.M., Prem Bahadur Singh, Station House Officer, Nadbai Police Station, received an information on telephone that a woman has been murdered in the forest of Kishanpura close to the railway track and that a person has been nabbed. The Station House Officer reached the place of occurrence at 10.55 P.M. and found 10 to 15 villagers standing there who told him that at about 10.30 P.M. they heard someone crying and they came running and saw two persons running away towards Khedali along the railway track on a motorcycle and the third person running towards the fields and they managed to catch this third person named Rajesh and they also found a girl in a semi-naked condition lying dead. When the Station House Officer questioned Rajesh, he told that on 01.11.2003 at about 4 to 5 O'clock in the evening, respondent- Ram Niwas and the respondent-Balveer brought the girl named Rekha on the motorcycle of Ram Niwas, bearing Registration No. RJ-29-2M-2370, along

the Mandawar railway track towards Khedali and Ram Niwas, Balveer and Rajesh had sexual intercourse with Rekha and thereafter Ram Niwas and Balveer wanted to kill Rekha by gagging and pressing her neck, but Rajesh asked them not to do so and thereafter Rekha was made to sit on the motorcycle and brought along the railway track to the place of occurrence and Ram Niwas and Balveer killed Rekha by strangulating her with her Chunni (scarf) and by causing injury on her neck and feet. Rajesh also told Station House Officer that both Ram Niwas and Balveer gave Rajesh some beating, but he managed to escape and started running and shouting. Rajesh also told the Station House Officer that both Ram Niwas and Balveer escaped on the motorcycle along the railway track towards Khedali. The Station House Officer then examined the dead body of Rekha (hereinafter referred to as 'the deceased') and came back to the Police Station and registered the First Information Report (for short 'FIR') under Sections 376 and 302 read with Section 34 of the Indian Penal Code (for short 'IPC') against Rajesh, Ram Niwas and Balveer and handed over investigation to Mohan Singh, the Sub-Inspector (for short 'the I.O.').

3. On 29.12.2003, the statement of Rajesh was recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') and on 16.01.2004, the I. O. submitted an application before the Chief Judicial Magistrate, Bharatpur, for making Rajesh an approver under Section 306, Cr.P.C. and on 19.01.2004, the Chief Judicial Magistrate passed an order tendering pardon to Rajesh on the grounds that he was the sole eye-witness of the incident and without the evidence of Rajesh, there was possibility of acquittal of the two respondents. The Chief Judicial Magistrate in his order dated 19.01.2004 stated that the pardon was being tendered for the purpose of obtaining the evidence of Rajesh on the condition that he shall disclose the truth about each and every information, circumstance and person (directly or indirectly connected with the incident) relating to the offence, within his knowledge. Thereafter, charges were framed against the two respondents under Section 376(2)(g), IPC, and alternatively under Sections 376, 302 and 34, IPC. Since the two respondents denied the charges, the trial was held and at the trial, as many as 32 witnesses including Rajesh (PW-1) were examined and a large number of documents and material objects were exhibited. The trial court, after examining and discussing the evidence on record and in particular the evidence of Rajesh (PW-1), convicted both the respondents under Sections 376(2)(g) and 302/34, IPC. Thereafter, the trial court heard learned counsel for the respondents on the point of sentence and sentenced both the respondents to rigorous imprisonment for ten years with fine of Rs.1,000/- each and in default of payment of fine, to undergo simple imprisonment for six months for the offence under Section 376(2)(g), IPC, and sentenced them to death with fine of Rs.1,000/- each and in default of payment of fine, to undergo simple imprisonment for six months for the offence under Section 302/34, IPC, by order dated 05.03.2005.

4. Aggrieved, the respondents filed criminal appeals before the High Court and the sentence of death was also referred to the High Court. In the impugned judgment, the High Court found that the prosecution case was anchored in the sole testimony of the sole witness Rajesh (PW-1), but his testimony as an approver could not be accepted as he had not inculpated himself in the crime in his statement recorded under Section 164, Cr.P.C.,

or in his statement before the Chief Judicial Magistrate for grant of pardon under Section 306, Cr.P.C. and as he was not privy to the crime, he cannot be held to be an approver. The High Court further held that the evidence of PW-1 was not supported by other circumstantial evidence and in the absence of any corroboration of the evidence of PW-1 in material particulars; it was difficult to uphold the conviction of the respondents on the basis of such an unreliable witness. By the impugned judgment, the High Court, therefore, declined to accept the death reference and allowed the three appeals of the respondents and set aside the judgment of the trial court and acquitted the respondents of the offences under Sections 376(2) (g) and 302/34, IPC, and directed that the respondents be released forthwith. Aggrieved by the impugned judgment, the State of Rajasthan is in appeal before us.

### **Contentions on behalf of learned counsel for the parties**

5. Dr. Manish Singhvi, learned counsel appearing on behalf of the State of Rajasthan, submitted that PW-1 is the only eye-witness to the incident and he has stated that on 01.11.2003 he was in village Pilwa and he was irrigating his field and Ram Niwas came to him and took him on a Hero Honda Splendor motorcycle to Mahua at the Jaipur bus stand and started looking for someone in the buses and around 5.30 p.m. they started proceeding on the motorcycle. He submitted that PW-1 has further stated that Ram Niwas stopped the motorcycle near a girl and made the girl to sit on the motorcycle and thereafter all the three proceeded towards Mandawar and next to Mandawar at the by-pass road, Balveer met them and Balveer was given lift on the motorcycle and PW-1 was dropped. He further submitted that PW-1 has stated that Ram Niwas threatened him and made him sit on the motorcycle and went along the railway line till they arrived at Nadbai and stopped the motorcycle in the jungle and Ram Niwas and Balveer raped the girl and after the rape, Ram Niwas and Balveer killed the girl by tying chunni (scarf) around her neck and after killing the girl both of them came towards him and seeing them he ran away from there and raised alarm that the girl has been killed. He submitted that PW-1 has also stated that 8-10 villagers met him and he told the villagers that Ram Niwas and Balveer killed the girl. Dr. Singhvi submitted that this eye-witness account of PW-1 was not believed by the High Court only on the ground that as PW-1 has not inculpated himself in the crime, his evidence as an approver cannot be accepted.

6. Dr. Singhvi next submitted that the finding of the High Court that the testimony of PW-1 as an approver cannot be accepted as he has not been inculpated in the crime during evidence in the trial court is not correct in law. He referred to the provisions of Section 306 Cr. P.C. and argued that the section does not provide that an approver must be privy to the offence if his evidence is to be accepted. He submitted that an approver is in fact an accomplice and Section 133 of the Indian Evidence Act provides that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. He submitted that Illustration (b) under Section 114 of the Indian Evidence Act, however, states that an accomplice is unworthy of credit, unless he is corroborated in material particulars and

therefore the Court looks for corroboration of the testimony of the accomplice in material particulars either by some other direct or circumstantial evidence.

7. Dr. Singhvi next submitted that in this case, there is sufficient corroboration of the testimony of PW-1 that the respondents committed rape on the deceased and thereafter killed her. He submitted that under Section 157 of the Indian Evidence Act the testimony of a witness can be corroborated by any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact. He submitted that in the present case the statement of PW-1 before the police recorded in the FIR (Ex.P-12) soon after the rape and murder of the deceased on 01.11.2003 corroborates his testimony before the Court. Hari Singh (PW-11) has also stated in his evidence that PW-1 was running towards the colony raising the alarm when a girl was killed and on his call for help, 10-15 persons gathered there and PW-1 told that two boys Ram Niwas and Balveer were killing a girl, save her and thereafter he went to the place of incident and found a dead body of a girl lying at the place of incident. He submitted that although PW-11 was declared hostile this part of evidence of PW-11 can be relied on by the prosecution to corroborate the testimony of PW-1. He submitted that Bharat Singh (PW-16) has also stated in his evidence that on 01.11.2003 in the night, he heard the boy's cry for help who was shouting "save the girl" and that boy told his name as Rajesh and he had told that two boys had killed a girl. He submitted that PW-16 has also deposed that he remembered the name of one of the boys as Ram Niwas, but he did not remember the name of other boy. He submitted that though PW-16 was also declared hostile, this part of his evidence can be relied on by the prosecution as corroborating the testimony of PW-1. Dr. Singhvi also referred to the evidence of the father of the deceased (PW-6) who has stated that the deceased was undergoing nursing training at Bharatpur and that she had told him that 2-3 boys used to trouble her and she had named Ram Niwas, Balveer and Rajesh (PW-1). He submitted that the evidence of PW-6 strengthens the prosecution story that Ram Niwas and Balveer were involved in the offences against the deceased. He submitted that the testimony of PW-1 was also corroborated by the FSL report (Ex.P-56), which establishes that human semen has been detected on the underwear and private parts of the deceased confirming rape on the deceased. He submitted that the testimony of PW-1 that the deceased was strangulated is confirmed by post-mortem report (Ex.P-55). He submitted that the testimony of PW-1 is also corroborated by the recovery of the bag vide memo of seizure (Ex.P-46) from the possession of Balveer, which has been identified to be that of the deceased by the father of the deceased (PW-6) and the mother of the deceased (PW- 7).

8. Dr. Singhvi cited the judgment of this Court in *Rameshwar s/o Kalyan Singh vs. The State of Rajasthan*<sup>1</sup>, in which this Court has held that the rule, which according to cases has hardened into one of law, is not that corroboration of evidence of an accomplice is essential, but that there is necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it. He submitted that in the aforesaid case this Court while holding that it would be impossible to formulate the kind of evidence which should, or would, be regarded as corroboration has laid down some of the rules regarding the nature and extent of the corroboration required of the testimony of

an accomplice. He also relied on *Haroom Haji Abdulla v. State of Maharashtra* [AIR 1968 SC 832] in which this Court has held that the effect of provision of Section 133 of the Indian Evidence Act is that the Court trying an accused may legally convict him on the single evidence of an accomplice, but Illustration (b) of Section 114 of the Indian Evidence Act incorporates a rule of prudence that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. He also cited *State of Kerala vs. P. Sugathan & Anr*<sup>2</sup>, for the proposition that once an accomplice becomes an approved by a valid grant of pardon under Section 306, Cr.P.C., and withstands cross-examination, his testimony can be relied on for convicting the accused if it is corroborated in material particulars by others.

9. In reply, Mr. K.B. Upadhyay, learned counsel appearing for the respondent no.2-Ram Niwas, submitted that the evidence of Rajesh (PW-1) cannot be believed by the Court as it is inconsistent with the evidence of other witnesses in prosecution. He submitted that while PW-1 has stated that he informed the Police by going to the Police Station, the Station House Officer of the Police Station (PW-5) has said in his evidence that someone informed him over the telephone about the incident. He submitted that while PW-1 has stated that he does not know the girl Rekha (deceased), the father of the deceased (PW-6) has clearly stated that PW-1 used to visit their house and knew the deceased and similarly the mother of the deceased (PW-7) has stated that the deceased had told her that at Bharatpur, Rajesh (PW-1) used to tease her and for this reason she did not want to return to Bharatpur. He submitted that again PW-1 has stated that the place of rape and murder of the deceased was at Nadbai, but the I.O. (PW-32) has stated that the rape and the murder took place at different places as will be evident from the site maps (Ext.P-42 and Ext.P-43). He submitted that again PW-1 has stated in his evidence that the motorcycle was driven by Ram Niwas, but in the statement recorded by the Magistrate in Ext.P-7 before the pardon was granted to PW-1, he has stated that the motorcycle was driven by Balveer. He submitted that because of these inconsistencies and contradictions, PW-1 is not reliable and the High Court has rightly discarded his evidence.

10. Mr. Upadhyay next submitted that sixteen love letters written by Nisha to Ram Niwas were seized from the room where Rekha was living in Bharatpur and these love letters show that there was love between Ram Niwas and Nisha and this is also made clear from the evidence of Anjana (PW-12) who was living adjacent to the house in which the deceased lived. He submitted that there was also evidence of PW-14, the landlady of the house in which the deceased, Anjana and Khem Kanwar (PW-13) lived, that Ram Niwas used to visit the deceased and sometimes used to stay during the night time and used to come to meet her on the motorcycle. He submitted that there was therefore an intimate relationship between Ram Niwas and the deceased and there was no necessity for Ram Niwas to commit rape on the deceased.

11. Mr. Upadhyay next submitted that two of the villagers, PW-10 and PW-11, who have been examined in the Court, have stated in their evidence that they had only seen the back light of the motorcycle in which the persons, who had committed rape and murder, had

left the place of occurrence and, therefore, none of the villagers have really identified Ram Niwas and Balveer who had committed the offences. He further submitted that the incident took place on 01.11.2003 and the arrest of the respondents took place on 05.11.2003 and the respondents were in police custody on 05.11.2003, 06.11.2003, 07.11.2003 and 08.11.2003 and the recovery of the motorcycle alleged to have been used for taking the deceased was made on 09.11.2003. He argued that these recoveries made belatedly when Ram Niwas was in police custody for several days cannot be relied upon.

12. Mr. Upadhyay cited the decision of this Court in *Chandan & Anr. vs. State of Rajasthan*<sup>3</sup>, in which it has been held that the approver's testimony against the accused, absolving himself and appearing unnatural, did not inspire confidence and in the absence of independent corroboration of such testimony, conviction of the accused cannot be sustained. He also cited *State of Andhra Pradesh through CBI vs. M. Durga Prasad & Ors*<sup>4</sup>, for the proposition that this Court will interfere with the order of acquittal only when it comes to the conclusion that the view taken by the High Court while acquitting the accused was not a possible view. Mr. Upadhyay submitted that in the present case the view taken by the High Court that the evidence of PW-1 was not reliable and that conviction on the testimony of PW-1 is unsafe, is a possible view in the facts and circumstances of this case and should not be interfered with by this Court in exercise of its power under Article 136 of the Constitution.

13. Mr. Ranvir Singh Yadav, learned counsel appearing for respondent No.1-Balveer, adopted the submissions of Mr. Upadhyay and further submitted that though the bag of the deceased was recovered by the seizure memo Ex.P-46 on the information and at the instance of Balveer, there was no evidence that the deceased Rekha had that particular bag which was seized with her when she left the room at Bharatpur on 01.11.2003 for Ajmer. He submitted that the bag that was actually seized at the instance of Balveer was a rexine black bag and neither the father of the deceased (PW-6) and nor the mother of the deceased (PW-7) have described the bag of their daughter as a rexine bag.

14. Mr. Yadav cited the decision of this Court in *Bhiva Doulu Patil vs. State of Maharashtra*<sup>5</sup>, for the proposition that there should be corroboration of the evidence of the approver in material particulars qua each accused person. He submitted that the corroboration of the testimony of PW-1, therefore, has to be of material particulars which would connect Balveer to the offence. He also relied on the decision of this Court in *Piara Singh vs. State of Punjab*<sup>6</sup>, and submitted that the evidence of the accomplice must be corroborated in material particulars by other independent evidence. He further submitted that in *Ramprasad vs. State of Maharashtra*<sup>7</sup>, this Court has further held that the approver's evidence must pass the test of reliability and secure adequate corroboration before the same can be acted upon. He vehemently argued that the tests laid down by this Court with regard to the reliability of the approver's evidence and the necessity of corroboration by independent evidence are not satisfied in this case.

## Findings of the Court:

15. The first question that we have to decide is whether the High Court is right in coming to the conclusion that for being an approver within the meaning of Section 306, Cr.P.C., a person has to inculcate himself in the offence and has to be privy to the crime, otherwise he removes himself from the category of an accomplice and places himself as an eyewitness. Section 306, Cr.P.C. provides that with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence, the Magistrate may tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. This Court in the case of *Suresh Chandra Bahri vs. State of Bihar*<sup>8</sup>, explained the object of Section 306 Cr.P.C. in the following words:

"The object of Section 306 therefore is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon the offence may be brought home to the rest. The basis of the tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but the principle is to prevent the escape of the offenders from punishment in heinous offences for lack of evidence. There can therefore be no objection against tender of pardon to an accomplice simply because in his confession, he does not implicate himself to the same extent as the other accused because all that Section 306 requires is that pardon may be tendered to any person believed to be involved directly or indirectly in or privy to an offence."

Thus, the High Court failed to appreciate that the extent of culpability of the accomplice in an offence is not material so long as the magistrate tendering pardon believes that the accomplice was involved directly or indirectly in or was privy to the offence. The High Court also failed to appreciate that Section 133 of the Indian Evidence Act provides that an accomplice shall be a competent witness against an accused person and when the pardon is tendered to an accomplice under Section 306, Cr.P.C., the accomplice is removed from the category of co-accused and put into the category of witness and the evidence of such a witness as an accomplice can be the basis of conviction as provided in Section 133 of the Indian Evidence Act.

16. As a rule of prudence, however, as provided in Illustration (b) to Section 114 of the Indian Evidence Act, the Court will presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. In *Rameshwar s/o Kalyan Singh vs. The State of Rajasthan* (supra), this Court laid down the kind of evidence which should, or would, be regarded as corroboration of the testimony of an accomplice and held that it is not necessary that there should be independent confirmation of every material circumstance but independent evidence must not only make it safe to believe that the

crime was committed and must in some way reasonably connect the accused with the crime. In the language of this Court in the aforesaid case:

"All that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness' story that the accused was the one, or among those, who committed the offence."

In this case, the Court also clarified that corroboration need not be by direct evidence that the accused committed the crime and it is sufficient if it is merely circumstantial evidence of the connection of the accused with the crime. In the aforesaid case, this Court also explained that unless the testimony of an accomplice is treated as evidence, many crimes which are usually committed between accomplices in secret, particularly offences with females could otherwise never be brought to justice. With these principles with regard to the testimony of an accomplice in mind, we may now examine the testimony of PW-1 and the corroboration of such testimony by material particulars, if any, so as to connect Ram Niwas and Balveer in the offences.

17. In his testimony, PW-1 has stated that on 01.11.2003 when he was irrigating his field in village Pilwa, Ram Niwas came to him and took him on a Hero Honda Splendor motorcycle to Mahua at the Jaipur bus stand and at 5.30 p.m. they again started proceeding on the motorcycle and Ram Niwas stopped the motorcycle near the deceased and made her sit on the motorcycle and thereafter all the three proceeded towards Mandawar. He has further stated that at the by-pass road, Balveer met them and Balveer was given lift on the motorcycle and thereafter they went to Nadbai. PW-1 has further deposed that they stopped the motorcycle in the jungle and Ram Niwas and Balveer raped the deceased and after the rape, Ram Niwas and Balveer killed the deceased by tying chunni (scarf) and after killing the deceased both of them came towards him and seeing them he ran away from there and raised alarm that a girl has been killed. He has also stated that 8-10 villagers met him and he told the villagers that Ram Niwas and Balveer killed a girl.

18. Section 157 of the Indian Evidence Act states that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. PW-5, the SHO of the Police Station Nadbai, has stated in his evidence that at 10.45 p.m. on 01.11.2003 someone informed him over the telephone that a woman had been murdered and her body was lying along with the railway track in the jungle of Kishanpura and one person in this connection had been nabbed and he reached the place of incident and took that person Rajesh (PW-1) into custody and on the basis of the statement made by PW-1, the First Information Report (Ext.P-12) was prepared. We have read Ext.P-12, the First Information Report in Hindi, and we find that the aforesaid testimony of PW-1 is corroborated by the statement of PW-1 made before PW-5 and recorded in the FIR (Ext. P-12) soon after the incident on 01.11.2003. In *Rameshwar s/o Kalyan Singh vs. The State of Rajasthan* (supra), this Court

after extracting Section 157 of the Indian Evidence Act has held:

"The section makes no exceptions, therefore, provided the condition prescribed, that is to say "at or about the time etc." are fulfilled there can be no doubt that such a statement is legally admissible in India as corroboration. The weight to be attached to it is, of course, another matter and it may be that in some cases the evidentiary value of two statements emanating from the same tainted source may not be high, but in view of Section 118 its legal admissibility as corroboration cannot be questioned."

Thus, even though the evidence given at the trial and the former statement relating to the incident is from the same tainted source of an accomplice (PW-1), the former statement of PW-1 as recorded in Ext.P-12 is legally admissible as corroborative of the evidence of PW-1 in the trial court.

19. However, to make sure that what PW-1 has stated before the Police soon after the incident and what he has stated before the Court in the trial is true and reliable, the Court must look for corroboration from sources independent from the tainted source, i.e., PW-1 who is an accomplice and we do find such corroboration of the testimony of PW-1 from independent sources. PW-11, who was one of the villagers of Nadbai, has stated that a boy named Rajesh was running towards the colony raising alarm that a girl is killed and he told that two boys Ram Niwas and Balveer are killing a girl, save her. PW-16, who is also a villager of Nadbai, has also stated in his evidence that they heard a boy's cry for help who was shouting "save the girl" and he had seen that boy who was making the noise and that boy told his name as Rajesh and also told him that two boys have killed the girl and PW-16 remembered the name of one boy as Ram Niwas, but he did not remember the name of other boy. The post mortem report (Ext.P-55) shows ligature mark of 2 cm width, dark brown in colour, encircling the upper part of the neck prominent on the right side of the deceased, which goes to show that the deceased had been strangulated. As per the opinion expressed in the post mortem report also the death was because of asphyxia due to strangulation. This corroborates the story given out by PW-1 that Ram Niwas and Balveer strangulated the deceased by a chunni. The report of the State Forensic Science Laboratory (Ext.P-56) states that human semen was detected in the vaginal smear, swab, chaddi and salwar of the deceased. In the FIR (Ext.P- 12) prepared on the basis of the information given out by PW-1 soon after the incident, the motorcycle of Ram Niwas was described as Hero Honda Splendor motorcycle and the number of the motorcycle is given as RJ 29/2M 2370 and the Investigating Officer (PW-32) has deposed that on 09.11.2003 in pursuance of the disclosure statement made by Ram Niwas, a Hero Honda motorcycle having the registration number RJ 29/2M 2370 was recovered vide memo of seizure (Ext.P-45). PW-32 has also deposed that on 09.11.2003 on the information at the instance of Balveer, the bag of the deceased was recovered vide memo of seizure (Ext.P-46). There is, therefore, direct and circumstantial evidence independent from the evidence of PW-1 in support of the prosecution story given out by PW-1 and to connect Ram Niwas and Balveer in the offences of rape and murder.

20. Mr. Upadhyay, learned counsel appearing for the respondent no.2-Ram Niwas, was right that there were some inconsistencies between the evidence of PW-1 and PW5, between the evidence of PW-1 and PW-6 and between the evidence of PW-1 and PW-32 as well as contradictions in the statement of PW-1 recorded before the trial by the Magistrate and the evidence of PW-1 before the Court but these inconsistencies and contradictions were not material enough to doubt the story given out by PW-1 that Ram Niwas and Balveer committed rape on the deceased and then killed her. Mr. Upadhyay is also right in his submission that there was intimate relationship between Ram Niwas and the deceased but if evidence of PW-1 corroborated in material particulars established that Ram Niwas did commit rape and murder of the deceased, we cannot discard the evidence only on the ground that there was no necessity for Ram Niwas to commit rape and murder of the deceased.

21. Mr. Upadhyay and Mr. Yadav rightly submitted that the recovery of the motorcycle at the instance of Ram Niwas and the seizure of bag of the deceased at the instance of Balveer were made belatedly on 09.11.2003, eight days after the incident on 01.11.2003 and after they had remained in custody in the police lock up on 05.11.2003, 06.11.2003, 07.11.2003 and 08.11.2003. Section 27 of the Indian Evidence Act, however, states that when any fact is discovered to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Hence, even though Ram Niwas and Balveer were in police custody during 05.11.2003, 06.11.2003, 07.11.2003, 08.11.2003 and 09.11.2003, the given by Ram Niwas and Balveer pursuant to which the motorcycle of Ram Niwas and the bag of the deceased were recovered can be utilized against Ram Niwas and Balveer respectively for the purpose of corroboration of the testimony of PW-1 that Ram Niwas and Balveer committed rape and murder of the deceased.

22. Coming now to the submission of Mr. Yadav that the bag recovered at the instance of Balveer was a rexine black bag and neither the father of the deceased (PW-6) nor mother of the deceased (PW-7) have described the bag of the daughter as rexine bag, we find from the evidence of Investigation Officer (PW-32) that he had seized the black colour rexine bag from Balveer and this very bag was identified by the parents of the deceased (PW-6 and PW 7). To quote from the evidence of the mother of the deceased (PW-7):

"SHO had told us at the police station that 4-5 bags are lying in the office of Tehsildar, go and identify. I do not know if SHO would have accompanied to the office of Tehsildar. Tehsildar had opened before us a sealed bag and took out 4-5 bags and placed the same before us on the table. Thereafter, I pointed towards one bag and said that this belong to my daughter. It was a black colour bag. I did not say to the Tehsildar that I have come to identify a black colour bag.

There were other black bags also. Our black colour bag was stitched with red colour thread and other bags do not have red colour stitches."

The Tehsildar, who was examined as PW-30, has confirmed that besides the bag of the deceased four other bags which looked alike were placed at the time of identification and Santosh Devi (PW-7) identified the right bag. It is, thus, clear that the bag of the deceased that was seized from Balveer was identified as the bag of the deceased and Balveer has not explained in his statement under Section 313 Cr.P.C. as to how the bag of the deceased came to his possession.

23. Thus, the testimony of PW-1 was corroborated by material particulars qua Ram Niwas and Balveer and the only possible view on the evidence on record in this case is that both the respondents committed the rape and murder of the deceased on 01.11.2003 and the trial court had rightly convicted them under Section 376(2)(g) and Section 302 read with Section 34, IPC. The decision of this Court in *Andhra Pradesh through CBI vs. M. Durga Prasad & Ors.* (supra) cited by Mr. Upadhyay applies only to a case where the view taken by the High Court on the evidence that the accused should be acquitted is a possible one and in such a case this Court will not interfere with the order of acquittal passed by the High Court. In the facts of the present case, however, the view taken by the High Court that the respondents were entitled to acquittal was not at all a possible view. The evidence on record, considered in the light of the provisions of the Indian Evidence Act and in particular Sections 27, 114 Illustration (b), 133 and 157 thereof establish beyond reasonable doubt that respondents were guilty of the offences under Section 376(2)(g) and Section 302 read with Section 34, IPC.

24. For the offence under Section 302, IPC, the accused is liable to be punished with death or imprisonment for life and also liable to fine and for the offence under Section 376(2) (g), IPC, the accused are liable to be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and also liable to fine. The trial court has recorded special reasons for imposing the punishment of death on the respondents and these are that the respondents deceived and took away the deceased, turn wise committed rape on her in the darkness of night and thereafter committed her murder by throttling her by her

chunni (scarf) and hence they were not entitled for any leniency and should be punished with death. In our view, the reasons given by the trial court do not make out the case to be a rarest of rare cases in which death sentence could be awarded to the respondents. As has been held by the Constitution Bench of this Court in *Bachan Singh vs. State of Punjab*<sup>9</sup> :

"... As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. ..."

Thus, for awarding death sentence, special reasons have to be recorded as provided in

Section 354(3), Cr.P.C., and while recording such special reasons, the Court must pay due regard both to the crime and the criminal. In this case, there are materials to show that the crime committed by the respondents, both rape and murder of the deceased, were cruel, but there were no materials to establish that the character of the respondents was of extreme depravity so as to make them liable for the punishment of death. We are, thus, of the view that the respondents should be punished for life for the offence of murder under Section 302, IPC. For offence under Section 376(2)(g), IPC, the trial court has awarded the punishment of 10 years rigorous imprisonment which we would like to maintain.

25. We, accordingly, allow this appeal, set aside the impugned judgment of the High Court and hold the respondents guilty of the offences under Section 376(2)(g) and Section 302 read with Section 34, IPC, and impose the punishment of rigorous imprisonment for life for the offence under Section 302 read with Section 34, IPC and maintain the sentence of 10 years rigorous imprisonment imposed by the trial court for the offence under Section 376(2)(g), IPC.

*Judgment referred*

<sup>1</sup>*AIR 1952 SC 0054*

<sup>2</sup>*2000 (8) SCC 0203*

<sup>3</sup>*1988 (1) SCC 0696*

<sup>4</sup>*AIR 2012 SC 2225*

<sup>5</sup>*AIR 1963 SC 0599*

<sup>6</sup>*AIR 1969 SC 0961*

<sup>7</sup>*1999(5) SCC 0030*

<sup>8</sup>*1995 Supp.(1) SCC 0080*

<sup>9</sup>*AIR 1980 SC 0898*