

**HIGH COURT OF MADHYA PRADESH**  
**BENCH AT INDORE**  
**(DIVISION BENCH: HON. MR. JUSTICE VIVEK RUSIA & HON. MR.**  
**JUSTICE SHAILENDRA SHUKLA)**

**Criminal Appeal No.807/2007**

- (1) Ishwar Singh S/o Bapu Singh  
 Aged – 25 years,  
 (2) Balu Singh S/o Mangu Singh,  
 Aged – 50 years  
 (3) Kalu Singh S/o Balu Singh,  
 Aged – 25 years

All R/o – Village Kataria, Tehsil Mahidpur,  
 District - Ujjain (M.P.)

.... Appellants

**Versus**

State of Madhya Pradesh  
 through P.S. Jharda,  
 District – Ujjain (M.P.)

.... Respondent

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 Shri Umesh Sharma, learned counsel for the appellants.

Shri Amit Singh Sisodiya, learned Govt. Advocate for the  
 respondent/State.

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**Whether approved for reporting :**

**JUDGMENT**

**(Delivered on 31/7/2021)**

**Per, Shailendra Shukla, J :-**

1/ This appeal under Section 374 Cr.P.C. has been preferred against the judgment dated 7.7.2007 passed by the Addl. Sessions Judge, Link Court Mahidpur, Camp – Ujjain (M.P.) in S.T. No.294/2005, whereby the appellants have been convicted and sentenced as under:-

Conviction	Sentence	Fine	Imprisonment in lieu of payment of fine amount.
u/S. 366 IPC	5 years R.I.		
u/S. 376(2)(g) IPC	Life Imprisonment	Rs.5,000/- each	1 year's R.I.

u/S. 302/34 IPC	Life Imprisonment	Rs.1,000/- each	1 year's R.I.
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2/ Prosecution story, in short, is that on 23.7.2005 Ratan Singh, brother of the deceased Kamal, arrived at Police Station Mahidpur and informed that his brother was missing since 21.7.2005 and that he had come to know about a body hanging from a tree, which has been identified by him as his brother's body. On the basis of this information, Merg i.e. information related to unnatural death was recorded and the matter was further handed over to ASI R.D. Vaishnav (PW-6) for investigation, who arrived at the spot and recorded the statements of prosecutrix 'X'. He also drew the Panchayatnama of dead body and drew the spot map and collected various articles from the spot.

3/ The statements of prosecutrix which have been taken down are Ex.P/2. The prosecutrix, in her statements, has made allegations that she knew the deceased Kamal and considered him to be her brother, that on 21.7.2005 the accused persons had barged inside her house and they had tied down Kamal (deceased) and the prosecutrix with rope and after assaulting the prosecutrix, accused had dragged both of them at about 1 A.M. in the night to a nearby forest besides Kshipra river and had assaulted Kamal and had later hanged him with the rope on the branch of a tree and thereafter each of the three accused persons had taken turns to rape the prosecutrix. She became unconscious and regained consciousness next day and while coming back, she met her husband Rai Singh and daughter Sona. They tried to establish contact on phone with their other known persons, however the contact could not be established and they came down to Police Station Jharda.

4/ Shri R.D. Vaishnav (PW-6) after registering the case, made over the same to Police Station Jharda, in the jurisdiction of which the incident had taken place, where investigating officer Shri J.S. Bhaskar (PW-16) conducted rest of the investigation, in which he recorded the statements of witnesses, sent the prosecutrix for her medical examination, proceeded to the spot and collected some incriminating

articles. He thereafter recorded the memorandum statements of accused persons, in which they admitted to have murdered Kamal Singh because of his illicit relations with the prosecutrix, whose husband was the brother of accused/appellant Balu Singh. The accused persons were found to be hiding in their respective huts situated in the agricultural fields and bamboo sticks were recovered from them which were used for assaulting the deceased and the prosecutrix. He also recovered broken pieces of bangles from the house of the prosecutrix. After residual investigation including medical examination of accused persons, he filed the charge sheet.

5/ The 3<sup>rd</sup> ASJ, Link Court, Mahidpur on receiving the case after committal, had framed charges under Section 363, 366, 376(2)(g) and 302/34 of IPC against all the three accused persons. The accused abjured the guilt and pleaded for trial.

6/ The prosecution has examined 16 witnesses. The appellants claimed to have been falsely implicated by the prosecutrix. They have examined three witnesses in defence, who are the witnesses of a document executed on stamp paper in which prosecutrix has purportedly claimed the innocence of appellants.

7/ The appellants were, however, convicted as mentioned in Para-1 by the trial Court.

8/ In the appeal which has been preferred, it has been stated that there are no such injuries on prosecutrix which would establish the offence of committal of rape upon her, no FSL report has been received, that prosecutrix herself has executed the document exonerating the appellants, that there are no independent eyewitnesses, that it would not have been possible for appellants to assault and drag the prosecutrix and Kamal Singh without being noticed by neighbours, that report has been lodged very belatedly, that the important witness Ratan Singh who had found the body of his brother, has also not been examined, that Bhomsingh to whom the prosecutrix had narrated the incident, has also not been examined, that prosecution has miserably failed to prove the case beyond reasonable

doubt. Hence, it is prayed that the appeal be allowed and the appellants be acquitted.

9/ The question before this Court is that in view of these submissions, whether the trial Court's conclusion regarding the charges having been found proved against the appellant is erroneous and whether the appellants deserve to be acquitted?

10/ The case is based on eyewitness account of prosecutrix (PW-2) and other circumstantial evidence. The prosecutrix in her statements has stated that the deceased was her Rakhi brother and on the date of the incident at about 12.00 A.M. she had seen the deceased Kamal Singh and all the three accused consuming liquor behind her house. Thereafter Kamal Singh was assaulted by the accused. Subsequently the appellants forcibly entered her house, dragged her and assaulted her with stick resulting in injuries on her legs, back and other places. The accused thereafter tied Kamal Singh with one end of a rope and the prosecutrix from the other end. When Kamal Singh started shrieking, his face was tied down with a Safa, then both of them were taken to the slope of the river. As per the witness, Kamal Singh asked for water to drink which was denied by accused and they assaulted him with sticks on his stomach and elsewhere. Kamal Singh then pleaded that if he cannot be given water, he be done to death. Thereafter the accused tied his hands and hanged him from a Babool tree and after killing him the accused took turns in committing rape upon the prosecutrix.

11/ Prosecutrix states that she became unconscious and gained consciousness at 3 P.M.. As per the prosecutrix, she came to Kankad concealing herself from being watched and met Bhom Singh, brother of Kamal Singh. She told Bhom Singh that Kamal Singh's body was hanging from Babool tree. Thereafter she came to her village and found her husband Rai Singh and daughter Sona looking for her and narrated the incident to them. She then went to Mangu Singh for making a call but phone was found to be disfunctional, then they went to Dhabla at 12 PM but again the phone line was found to be dead. The witness states that thereafter they went to Jharda police station

and lodged the report. Report is Ex.P/2. Her signatures are on A to A part. In the spot map Ex.P/3 also she has appended her signatures.

12/ In her cross-examination, prosecutrix has admitted that there are houses of other villagers near her house and there should be as many as 50 to 60 persons, in all, living nearby. The witness states that the villagers were not called out because it was not expected that accused would indulge into such assault. Regarding presence of her husband, she has stated that her husband had gone to attend a Kirtan. She further states that when accused violently kicked upon the door of her house, she cried aloud but did not call anybody.

13/ Even assuming that she did not call the neighbours, the prosecutrix herself has stated that she had cried aloud but no one came. Regarding the submission that her husband had gone to attend Kirtan at the time of incident, the prosecution has not examined any person who had seen her husband attending the Kirtan. Even her husband Rai Singh has not been examined. In para-8 prosecutrix has admitted that her husband had lost his mental balance since the time her daughter was one year old. However, the prosecution has not substantiated the aforesaid fact. The prosecution story appears to be that the accused Balu Singh being elder brother of the husband of prosecutrix, along with other co-accused persons, resorted to honour killing of Kamal Singh with whom prosecutrix was having illicit relations.

14/ As already seen, despite prosecutrix having stated to have cried aloud no one from the neighbourhood came or heard her cries. She even states that after coming back she told no one in the village about the incident as it had turned dark. However, it has not been mentioned in the examination-in-chief that she came back to her house when it had turned dark. She has been confronted with her police statement (Ex.D/2) but there are not many substantial contradictions therein. The prosecutrix has been confronted with the document Ex.D/1 which has been proved by defence witnesses Shri Purushottak Kumar Tiwari (DW-1) who is the stamp vendor, Shri Leela Choudhary (DW-2) who is the notary and Govardhanlal (DW-3), in which the prosecutrix has denied the incident. This document is dated 27.9.2006. The

prosecutrix on being confronted has denied execution of such document.

15/ As far as Ex.D/1 is concerned, the same carries no evidentiary value. The Court is only obliged to consider the documents which form part of the investigation process. Hence, the prosecutrix cannot be countered and her evidence cannot be sought to be breached by confronting her with any subsequent submission made by her. It can be understood that prosecutrix being daughter-in-law of accused Balu Singh, may have been compelled to execute such document. The probative value of the evidence available can alone form the basis of conclusions.

16/ The daughter of prosecutrix Sona (PW-3) is 13 years old. She has been asked some initial questions in order to determine her capability of understanding and has been asked question without administering oath. She has stated that on the night of the incident she was in her house with her mother (prosecutrix) and they had been preparing to go to sleep, when accused loudly knocked the door and rushed in and started assaulting her mother. They thereafter tied her mother with one end of the rope and Kamal Singh with other end and when Kamal Singh tried to cry aloud, his mouth was tied up. Witness states that she started shrieking thereafter. She states that her father was not present and had gone to Kirtan. She states that she called out to villagers pleading to help and free her mother and Kamal Singh but the villagers denied to help her and told her that if they intervene, the accused would kill them as well. Witness states that she ran to call her father and on coming back she did not find her mother and Kamal Singh. She thereafter states that her mother told her and her father at about 3 PM in the afternoon as to what had happened to her. As per the witness, her mother told her that she had been raped and beaten up. This witness also states that her father is not sound mentally. She admits that Kamal Singh belongs to another village Kantharia and does not know as to why deceased Kamal Singh was present in her village on the night of the incident. This witness has been confronted with her statements, in which she has made no mention of her calling out to the

villagers and pleading with them. Thus, the evidence of this witness as far as cry for help and villagers denying to intervene, is not substantiated. This witness admits that there is previous enmity between her family and Kalu Singh, however she denies that she is lying because of such enmity.

17/ A perusal of the evidence of Sona (PW-3) shows that there is no reason to disbelieve her statements that she was present in her house when the incident had taken place.

18/ Dr. Nidhi Jain (PW-11) has stated that she had examined the prosecutrix on 24.7.2005 and found four injuries on her body which are as follows:-

(i) Abrasion 2x1 inch in healing stage with swelling near ankle joint, for which x-ray was advised.

(ii) Contusion 6x2 inch on the right thigh, duration within 48 to 72 hours.

(iii) Contusion of the right hip covering whole buttock 8x6 inch with slight tenderness, for which x-ray was advised.

(iv) Pain in the hand 4 inches below elbow, for which x-ray was advised.

There were no injuries on breast or private organs. The report is Ex.P/21. The opinion which was given, was that no conclusion could be given regarding recent intercourse.

19/ In the cross-examination it has been stated that injuries were caused within 24 hours because of blue tinge on injuries. In cross-examination she has reiterated that there was no sign of rape committed recently upon the prosecutrix. Thus, from the evidence of Dr. Nidhi Jain (PW-11) forcible sexual intercourse with prosecutrix has not been affirmed.

20/ Learned counsel for the State has submitted that the injury on the buttock which was extensive in nature itself shows that prosecutrix was thrown to the ground and rape was committed upon her.

21/ This submission was considered.

22/ If such injury would have occurred due to throwing on the ground, then similar injury would have been found on left buttock also, which is not the case here.

23/ Shri J.S. Bhaskar (PW-16) has stated that on receiving information regarding accused hiding in their huts situated in their agricultural fields, they were arrested and their memorandum statements were recorded. Ex.P/14 is the memorandum statement of Kalu Singh, on the basis of which a bamboo stick was recovered from his hut vide Ex.P/16. Similarly on the basis of memorandum (Ex.P/15) of Balu Singh, a bamboo stick was seized as per Ex.P/17. These sticks and other items were sent to FSL vide (Ex.P/43). However, the FSL report has not been found to be placed on record. The investigating officer Shri J.S. Bhaskar (PW-16) has stated that he had found broken pieces of bangles and prepared a seizure memo of the same vide Ex.P/38. He has been further asked question whether in the spot map (Ex.P/3) did he show the presence of broken pieces of bangles. The witness replies in affirmative, however he admits that the same has not been mentioned in the spot map. However, it cannot be stated that the broken pieces of bangles have been implanted by the investigating officer.

24/ The statement of prosecutrix that she was assaulted with sticks by the accused, have been supported by her daughter Sona (PW-3) and injuries by hard and blunt object have been found by medical specialist PW-11 on various parts of prosecutrix (PW-1) and broken pieces of bangles have also been found near the house. The only thorn in the prosecution story is that despite there being neighbours in the vicinity, none of them had come to the spot. It appears that the incident had occurred in the dead of night and, therefore, the cries could not have been heard. As far as the offence of rape upon the prosecutrix is concerned, it has already been found that there are no signs of forcible intercourse committed upon her as per the doctor (PW-11). The accused are father and son and cousin between themselves and it is not natural that father and son both would commit rape upon the prosecutrix. The witness J.S. Bhaskar



(PW-16) has seized the underwear, pubic hair of accused Ishwar Singh vide Ex.P/44, of Kalu Singh vide Ex.P/45 and Dhoti and public hair of Balu Singh vide Ex.P/46 and sent the same for FSL examination. However, the FSL report is not found to be placed on record. Similarly Dr. Jain (PW-11) has prepared vaginal slides and handed over the Petticoat of prosecutrix carrying many white spots and these items have also been sent to FSL but as already stated the report is not available. As far as the evidence of prosecutrix regarding the sequence of events which took place after the incident is concerned, there is some discrepancy. She states that after the incident she met Bhomsingh, the brother of Kamal Singh, however the aforesaid witness has not been examined. In fact it was Ratan Singh who had approached the police station having seen the body of his brother. This witness has also not been examined. Prosecutrix states that she narrated the incident to her husband Rai Singh, who has also not been examined and she states that she did not inform the villagers after coming back since it had turned dark, whereas her daughter Sona (PW-3) states that her mother had come in the afternoon at 3 PM and informed about the incident.

25/ In view of such inconsistencies and further in absence of doctor's affirmation regarding rape and non availability of FSL report and also looking to the improbability of father and son committing rape upon prosecutrix one after the other, who was their relative, leads to the conclusion that the offence of gang rape could not be proved by prosecution beyond reasonable doubt. These aspects were not considered by the trial court. Although the prosecutrix has been found to have suffered injuries but no charge under Section 323, 325 IPC etc. have been framed against the appellants. However, it is found proved that Kamalsingh and prosecutrix were tied with rope and taken across the river. The offence under Section 363 IPC is established against the appellants.

26/ Now the question is whether the appellants committed the murder of Kamal Singh?

27/ The question now is, whether the deceased Kamal Singh was murdered by the appellants?

28/ Rakesh Narayan (PW-13) has stated that on 23.07.2005, while he was posted as Head Constable at Police-Station, Mahidpur, District-Ujjain (MP), Ratan Singh had arrived and had informed that his brother Kamal Singh, who had gone missing from 21.07.2005, was being searched and his body had been found hanging on a tree, based on which a Merg was registered which is Ex.P/24.

29/ R.D. Vaishnav (PW-6) has stated that on receiving information on 23.07.2005, he had arrived at the spot and prepared a body panchnama which is Ex.P/7.

30/ Nasirullah Qureshi (PW-15) has stated that on 23.07.2005 while he was posted as Head Constable in photo Section of Police Station, Mahidpur and on receiving information from the Police Control Room, he had arrived at the spot of incident and had clicked the photographs of deceased Kamal Singh. These photographs are found to be from Ex.P/26 to Ex.P/36.

31/ A perusal of these photographs placed on record shows that the deceased Kamal Singh had been hanging with a rope around his neck from a tree which are visible.

32/ Dr. Mukesh Jain (PW-1) has stated that he had conducted the postmortem of deceased Kamal Singh S/o Suresh Singh on 23.07.2005. His hands were tied with a nylon rope. The nylon rope was also tied around his neck. The knot of the rope was adjustable, there were marks of rope on the throat starting from behind left side of the ear and posterior side of the neck. The sign of rope on the neck was measured as 10 inch x ½ inch. The colouration on the aforesaid part had become deep brown. The corners of the neck were having blood marks. The signs of rope were also found on left wrist and also on the right forearm and there was swelling on the neck region, his face had turned blue. This apart, there were number of injuries on his body which are as follows:

(i) one lacerated injury ½ x ½ x ½ inch on the fourth finger of left leg.

- (ii) bluish contusion 3x1 inch on the left side of face and the left eye was found to be swollen.
- (iii) the nose was found to be swollen.
- (iv) bluish linear injury on the right side of back side 15 x 2 cm and 12 x 2 cm.
- (v) bluish contusion 8 x 1.5 cm on the right side of the back.
- (vi) bluish contusion 12 x 8 cm on left scapula region.
- (vii) bluish contusion 5 x 2 cm on the left side of shoulder.

33/ All the aforesaid injuries were ante-mortem in nature and were caused by hard and blunt object. On internal examination, it was found that the breathing tube was found to be congested, right and left lungs were congested, left chamber of heart was empty and right chamber contained blood. Liver, spleen and kidney were found to be congested. The cause of death was found to be asphyxia due to ante-mortem hanging and the death was homicidal in nature. The report is Ex.P/1. The witness has stated that the nylon rope which was tied on hands and on neck were separately sealed and were handed over to the Police Constable.

34/ Dr. D.K. Satpaty (PW-14) who is the Director of Medico Legal Institute at Bhopal, had stated that he received the two sealed packets containing rope in relation to Crime No.117/2005 of Police Station Jharda. On examination, it was found that the rope contained four strands and that there was a movable knot on it and in the knot there was a flock of hair embedded in the same. The one end of the aforesaid rope had been cut with a sharp object. Another rope also contained movable knot which was also found to be cut at two ends with a sharp object. Although the witness had been cross-examined at length, however there is no substantial point which had been brought out by the appellants. Hence, it is appropriate that the death of Kamal Singh was homicidal in nature and he had been hanged while he was alive and he was also assaulted with sharp and blunt objects. It has already been found proven that the deceased Kamal Singh had been tied along with prosecutrix Sarekunwar (PW-2) and had been dragged

to forest towards river. This conclusion is based on reliable evidence of prosecutrix (PW-2) as also her daughter Sona (PW-3).

35/ The spot-map (Ex.P/3) shows the spot 'B1' which is the spot where the body was found to be hanging. It is at a distance of 5.5 kilometres from the house of prosecutrix and number of Babool trees have been found to be growing over there.

36/ Previously, it has been found proved that the prosecutrix and the deceased Kamal Singh were tied with rope and dragged towards the spot. Number of injuries on the prosecutrix have been found but rape committed upon her has not been established. The place where the prosecutrix got injured, was her house which is spot 'A1' as per Ex.P/3.

37/ As already discussed earlier, from the memorandum of accused Kalu Singh and Balu Singh respectively which is Ex.P/14 and Ex.P/15, bamboo sticks were recovered from each of them as per seizure memo Ex.P/16 and Ex.P/17. These weapons have been sent to FSL but the FSL report has not been received regarding the same. However, even in absence of FSL report, the factum of last seen theory had been proved against the appellants. It has already been found that the deceased and the prosecutrix were tied with rope by the appellants and dragged towards the jungle. The statements of prosecutrix were recorded immediately on discovery of body of the deceased. Seizure of weapons on the basis of memorandum had also been proved from the appellants. The burden was upon the appellants to show as to how the deceased was found to be hanging from the tree with a rope in the direction of which the deceased had been dragged by the appellants after tying him with a rope. This onus has not been discharged by the appellants. The motive also appears to be proved that the appellants nurse a grudge against Kamal Singh (deceased) for having illicit relations with the prosecutrix and it appears that it is a case of honour killing. No exceptions under Section 300 IPC have been brought forth during arguments and it appears to be a well thought and pre-planned act of causing death by assaulting and thereafter hanging the deceased Kamal Singh on a tree. Hence, offence under Section 302

IPC stands proved. The trial Court's conclusion in this regard is affirmed.

38/ In view of the foregoing discussion, as mentioned above, we are of the considered opinion that the appellants are liable to be convicted under Sections 363 and 302/34 of IPC, but they stand acquitted under Sections 366 and 376(2)(g) of IPC. The appeal, thereby, succeeds in part in respect of the two provisions in which the appellants have been acquitted. The sentences imposed on appellants regarding other two provisions proved i.e. Sections 363 and 302/34 IPC are found to be appropriate and are affirmed. All the jail sentences shall run concurrently.

39/ Let a copy of this judgment along with original record be sent to the trial Court for compliance.

40/ The disposal of the property shall be as per the order of trial Court.

**(Vivek Rusia)**  
**Judge**

**(Shailendra Shukla)**  
**Judge**

Trilok/-