

**In Reference Vs. Dileep @ Dipu and Others**

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**Court :** Madhya Pradesh

**Decided On :** Aug-28-2012

**Appellant :** In Reference

**Respondent :** Dileep @ Dipu and Others

**Judgement :**

(1) Cr.Ref.No.1/2012 & Cr.A. 161/12 HIGH COURT OF MADHYA PRADESH AT JABALPUR DIVISION BENCH:HON'BLE SHRI JUSTICE RAKESH SAKSENA HON'BLE SHRI JUSTICE T.K.KAUSHAL CRIMINAL REFERENCE No.1/2012 IN REFERENCE Received from First Additional Sessions Judge, Mandla (M.P.) Versus 1. Dilip @ Dipu S/o Suresh Raghuvanshi (Bhaina), aged 29 years 2. Shailesh S/o Birju Raghuvanshi (Bhaina), aged 25 years 3. Manish S/o Churaman Raghuvanshi (Bhaina), aged 20 years 4. Kuldeep S/o Vijay Raghuvanshi (Bhaina), aged 25 years All residents of Kurvan Tiraha Chowki Hirdenagar, Police Station Maharajpur District Mandla (M.P.) For the State : Shri Umesh Pandey, Govt. Advocate. For the Respondents/ Shri Surendra Singh, Senior Adv. with Accused : Shri Mukesh Pandey & Shri Jagat Sher Singh, Advocates. CRIMINAL APPEAL No.161/2012 APPELLANTS:

1. Dilip @ Dipu S/o Suresh Raghuvanshi (Bhaina), aged 29 years 2. Shailesh S/o Birju Raghuvanshi (Bhaina), aged 25 years 3. Manish S/o Churaman Raghuvanshi, (Bhaina), aged 20 years 4. Kuldeep S/o Vijay Raghuvanshi (Bhaina), aged 25 years (2) Cr.Ref.No.1/2012 & Cr.A. 161/12 All residents of Kurvan Tiraha Chowki Hirdenagar, Police Station Maharajpur District Mandla

(M.P.) Versus RESPONDENT: State of Madhya Pradesh through Police Chowki Hirdenagar Police Station Maharajpur District Mandla For the Appellants: Shri Surendra Singh, Senior Advocate with Shri Mukesh Pandey & Shri Jagat Sher Singh, Advocates. For the State : Shri Umesh Pandey, Govt. Advocate. Date of hearing :

21. 08/2012 Date of order/judgment :

28. 08/2012 (

ORDER

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JUDGMENT

) Per: Rakesh Saxena; J.Aforesaid Criminal Reference and appeal arise out of the common impugned judgment, therefore, this order/ judgment shall govern the disposal of both the cases.

2. Appellants have filed this appeal against the judgment dated 29.12.2011 passed by First Additional Sessions Judge, Mandla in Sessions Trial No.74/2011, convicting the appellants under Sections 302 read with Section 34, 376 (2) (g) read with Section 34 and 201 read with Section 34 of the Indian Penal Code and sentencing them to death with fine of Rs. 3000/-, imprisonment for life with fine of Rs. 2500/- and rigorous imprisonment for seven years with fine of Rs. 2000/-, on each count respectively. In default of (3) Cr.Ref.No.1/2012 & Cr.A. 161/12 payment of fines, appellants have further been sentenced to rigorous imprisonment for one year, on each count respectively.

3. Learned trial Judge has since awarded death sentence to all the accused/appellants, he has made reference to this Court under Section 366 (2) of the Code of Criminal Procedure for confirmation of the same.

4. Briefly stated the prosecution case is that on 12.3.2011, at about 11.10 A.M., Bhole Prasad (PW1) gave an information at Police Chowki, Hirdenagar District Mandla that at about 9 A.M., kotwar of the village informed him that his sister Dujabai, who lived separate from him, hanged herself on a tree in the field of

Ramkumar Mishra and died. A merger report was recorded. Sub Inspector Ashok Singh (PW27), In-charge of Police out post, Hirdenagar proceeded for enquiry. He inspected the spot and noted the injuries on the body of deceased. The body was hanging with the help of the 'Saree' of deceased. Dried grass and leaves stuck on the back and head of deceased. The body was almost nude. A petticoat of deceased was tied over her breasts. He conducted inquest proceedings in presence of witnesses and recorded memorandum Ex. P/4. The dead (4) Cr.Ref.No.1/2012 & Cr.A. 161/12 body of deceased was sent to District Hospital, Mandla for postmortem examination. Dr. S.P.Dubey (PW18) and Dr. Gaurav Jetli (PW21) conducted postmortem examination of the body and submitted report Ex. P/29.

5. Near-by the place of occurrence, underwear and blouse of the deceased were also found lying. According to Bhole Prasad, Dujabai had illicit relations with accused Dilip, who used to visit her. In the course of investigation, Mangal Singh (PW5) disclosed that he witnessed the incident in the night of 11.3.2011. According to him, all the four accused persons forcibly committed rape on Dujabai and when she became senseless, they carried her towards the field. Statement of Mangal Singh was recorded by Magistrate under Section 164 of the Code of Criminal Procedure. On 13.3.2011, accused persons were arrested and were sent for medical examination. Dr. R.K.Baghel (PW19) examined and found injuries on their person. After completion of the investigation, charge sheet was filed in the Court of Magistrate, who committed the case for trial.

6. On charges being framed, accused persons abjured their guilt and pleaded false implication. According to them, police inflicted injuries on their bodies and (5) Cr.Ref.No.1/2012 & Cr.A. 161/12 got them examined by the doctor.

7. Relying mainly on the evidence of solitary eye witness Mangal Singh (PW5), Sulochna (PW10) and other circumstantial evidence, learned trial Judge held the accused persons guilty, convicted and sentenced them as aforesaid. Aggrieved by their conviction and sentence, appellants have preferred this appeal.

8. For confirmation of the death sentence awarded to accused persons, learned trial Judge has made reference to this Court.

9. Shri Surendra Singh, learned senior counsel for the appellants submitted that the evidence of alleged solitary eye witness Mangal Singh (PW5) was not reliable. His presence at the spot was doubtful. His conduct after the occurrence was suspicious and unnatural. It was not established by the prosecution evidence that the death of deceased by hanging was homicidal and that before her death she was subjected to rape by accused persons. He submitted that though the evidence of alleged eye witness and the medical evidence was inconsistent, yet learned trial Judge mis- appreciated the evidence and held the accused persons guilty. The conviction and sentence of accused persons were liable to be set aside. On the other hand, Shri (6) Cr.Ref.No.1/2012 & Cr.A. 161/12 Umesh Pandey, learned Govt. Advocate for the State submitted that the evidence of Mangal Singh as well as other circumstantial evidence was reliable. It was proved beyond doubt that the accused persons committed gang rape on deceased and caused her death by hanging her on a tree for making out a purported case of suicide. He justified the finding of conviction recorded by the trial Court and sentence of death awarded to accused persons.

10. We have heard the learned counsel for the parties at length and perused the impugned judgment and the evidence on record carefully.

11. Learned counsel for the accused/appellants submitted that from the medical evidence, it was not established that deceased died a homicidal death.

12. From the evidence of Bhole Prasad (PW1), Kuntobai (PW4) and Investigating Officer Sub Inspector Ashok Singh (PW27), it is revealed that the dead body of Dujabai was found hanging on a tree with the help of her 'Saree'. There were abrasion marks on her hands, breasts, thighs and back. Except a petticoat, which was tied over the breasts of deceased, no other clothes were on her body. Blouse and underwear of deceased was seized from nearby place. Sub Inspector (7) Cr.Ref.No.1/2012 & Cr.A. 161/12 Ashok Singh (PW27) prepared the spot map Ex. P/2 of the place, where the dead body was found hanging with the tree. The branch of the tree from which the deceased was hanging was about 15 ft. high from the ground. He conducted inquest and recorded memorandum Ex. P/4. As per inquest memorandum, the distance between the feet of deceased and the

ground was about 3 ft. He sent the dead body of deceased for postmortem examination.

13. Dr. S.P.Dubey (PW18) along with Dr. Gaurav Jetli (PW21) conducted postmortem examination and recorded marks of injuries found on the body of deceased and the following observations:- The rope is present around the neck. The rope is of Saree. The knot on the Saree is on the left side. The dried streak of saliva is present from the right angle of mouth to downwards. The fingers are flexed. The nail beds are blue in colour.

#### . INJURIES:

1. Abrasions on lateral aspect of right thigh three in number. (a) 5 x 0.1 cm (b) 6 x 0.1 cm (c) 3 x 0.1 cm 2. Abrasions on lateral aspect of left thigh two in number. (a) 3 x 0.1 cm (b) 4 x 0.1 cm 3. Abrasions on right side waist three in number on back side. (a) 3 x 0.1 cm (b) 5 x 0.1 cm (c) 4 x 0.1 cm (8) Cr.Ref.No.1/2012 & Cr.A. 161/12 4. Abrasion on right arm lateral aspect 4 x 0.1 cm 5. Abrasion on chin right side 2 x 1 cm 6. Abrasion below right breast 1 x 0.1 cm On removal of rope, ligature mark is present around the neck. Ligature mark is one inch below the right ear lobule. To front of the neck where it is above the adams apple, to left side of the neck where it is just below the left ear lobule, to nape of the neck where it is faint. Ligature mark is 3/4. to 1. in width. Ligature mark forms a groove. On dissection underlying thyroid, hyoid and trachea cartilages are found intact. Mucosa of the trachea is normal. Vagina admits two fingers easily. Pubic hair present but not matted. There is no injury over vulva, vagina, inner thighs, perineum and pubic area. Vaginal fluid present. .... Two vaginal smears prepared sealed and handed over to A/C.

. In his opinion, the cause of death was asphyxia as a result of ante mortem hanging. The injuries present were caused by hard and blunt object and were simple in nature. As the deceased was habitual, recent signs of rape were not present.

14. Vide report Ex. P/42, it was opined by Dr. Gaurav Jetli (PW21) that the injuries of abrasion found on the body of deceased were possible in case of rape on (9)

Cr.Ref.No.1/2012 & Cr.A. 161/12 deceased by four persons. The injury No.1 found on the body of deceased was not possible if deceased voluntarily committed suicide. Immediate cause of death was asphyxia as a result of ante mortem hanging. However, the nature of ante mortem hanging whether was suicidal or homicidal could not be given. On the basis of this opinion, learned counsel for the appellants contended that it was not established that the death of deceased was homicidal. We are unable to accept the submission made by learned counsel for the appellants for the reason that the injuries found on the body of deceased could not have been self inflicted. It was not possible for deceased to have climbed up on the tree and tied her 'Saree' on a branch, which was about 15 ft. high from the ground. It is also important to note that the feet of deceased while hanging were about 3 ft. high from the ground and nothing was found at the spot on which deceased could have stood before hanging. Apart from it, it cannot be presumed that a woman even if committing suicide would almost be in a nude position. Admittedly, the underwear and blouse of deceased were found lying at some distance and there was only a petticoat tied over her breasts. These circumstances definitely indicated that the death of (10) Cr.Ref.No.1/2012 & Cr.A. 161/12 deceased was not a case of voluntarily suicide. In our opinion, the finding recorded by the trial Court that the death of deceased was homicidal was just, correct and proper.

15. not the question before us is whether the accused persons subjected deceased to sexual intercourse and caused her death. In this regard, the prosecution case mainly rested on the evidence of eye witness Mangal Singh (PW5). According to him, he knew all the accused persons and also to deceased, who was her neighbour. In the night at about 11 P.M. on 11.3.2011, when he went out of his house to answer the call of nature, near hilly passage he heard shrieks of a woman. He identified the voice to be of Dujabai. He proceeded ahead and saw all the accused persons with Dujabai. Accused Dilip had mounted over Dujabai and other three accused persons were scuffling with her. He saw that all the accused persons committed sexual intercourse with Dujabai one after another. He identified accused persons in the moonlight. It took half an hour, thereafter accused persons picked up Dujabai and carried her towards the field, but he could not see more because his vision was obstructed by bushes and trees. Since he

had got frightened, after relieving (11) Cr.Ref.No.1/2012 & Cr.A. 161/12 himself he went back home. He saw the incident from the distance of 15-16 meters. His house was situated at the distance of about 50 meters from the place of incident. He stated that on the next day, he saw a big mob going towards the field. Standing at his door, when he asked to Bholeprasad, the brother of Dujabai, as to what had happened, he replied that Dujabai hanged herself. According to him, at about 9-9.30 A.M., on the same day while going to his school, he informed the incident to police at out post. On the basis of his information, on 15.3.2011, a spot map Ex. P/17 was drawn by Investigating Officer and Nazri Naksha Ex. P/19 was also prepared by Patwari.

16. Learned counsel for the appellants submitted that the evidence of Mangal Singh (PW5) was unnatural, improbable and inconsistent with the medical evidence, therefore was untrustworthy. Learned trial Judge mis- appreciated the evidence of this witness and committed error in placing reliance on his testimony. According to him, the fact of sexual intercourse with the deceased was not established by the medical evidence. Deceased had developed strong illicit relations with appellant Dilip, therefore, it was quite improbable that he would commit rape on her along with accused (12) Cr.Ref.No.1/2012 & Cr.A. 161/12 persons. Mangal Singh (PW5) happened to be a teacher in the school. He knew deceased and her brother Bhole. He was neighbour of deceased. In the vicinity of his house the aunt of deceased also resided. There were number of houses near his house, but he did not disclose the incident to anybody immediately after the occurrence. He did not shout or call any body for help while he allegedly saw the occurrence for about half an hour. According to him, his house was situated about 50 meters away from the place where deceased was subjected to rape. Hearing her cries, he was attracted towards the spot, but it's quite strange that the cries of deceased were not heard by anybody else. He remained a passive spectator for about 25 minutes and did not approach to any body including the brother or aunt of deceased seeking help for her. He stated that accused Dilip saw him while accused persons were indulging in the commission of the offence. Still they did not spare the deceased. The explanation given by Mangal Singh (PW5) that he did not shout or inform to any body about the occurrence out of fear does not appear sound, natural or reasonable. It is quite unnatural that in the next morning while he

saw mob going towards the field and he met Bhole, the brother (13) Cr.Ref.No.1/2012 & Cr.A. 161/12 of deceased, he did not inform him about the incident, rather he inquired from Bhole as to what had happened. It is also important to note that this witness made a false statement that while going to school he gave information about the occurrence to police at about 9-9.30 A.M.. Merg intimation Ex. P/1 was given by Bhole (PW1) at out post Hirdenagar at 11.10 A.M. Had this witness informed police about the occurrence, it would have certainly recorded the report. According to Investigating Officer Ashok Singh (PW27), when the intimation was given by Bhole at police station, he was not present, he had received this information on mobile from constable Ayub. He contradicted Mangal Singh (PW5) by saying that on 12.3.2011 Mangal Singh gave no oral or written report to police.

17. Police statement of Mangal Singh (PW5) was recorded only on 13.3.2011. Placing reliance on Apex Court decisions in the case of State of Orissa Vs. Mr. Brahmananda Nanda-AIR 197.SC 248.and Peddireddy Subbareddi and others Vs. State of Andhra Pradesh-AIR 199.SC 1356.learned counsel for the appellants submitted that since Mangal Singh (PW5), who happened to be solitary eye witness of the incident did not disclose about the occurrence till 13.3.2011, no (14) Cr.Ref.No.1/2012 & Cr.A. 161/12 reliance can be placed on his testimony.

18. In case of Brahmananda Nanda (supra), the Apex Court observed that where in a murder case the entire prosecution case depended on the evidence of a person claiming to be eye witness and this witness did not disclose the name of assailant for a day and a half after the incident and the explanation offered for non-disclosure was unbelievable, such non-disclosure was a serious infirmity which destroyed the credibility of the evidence of the witness and that the High Court was correct in rejecting it as untrustworthy and acquitting the accused.

19. In case of Peddireddy Subbareddi (supra), the Apex Court observed that no doubt, plurality of witnesses is not necessary to establish a fact in issue and a conviction can be based on the testimony of a sole witness provided that evidence is wholly believable (Vide Vadivelu Thevar Vs. State of Madras-AIR 195.SC 614). In the present case as we have come to the conclusion that the evidence of P.W.1

is clouded with strong suspicion and as the first information report was lodged by a delay of 15 hours, the false implication of appellants in the present case cannot be completely ruled out.

. (15) Cr.Ref.No.1/2012 & Cr.A. 161/12 20. Apart from the fact that Mangal Singh (PW5) did not disclose the incident to the brother and family members of the deceased or to anybody else for a long period, it is also important to note that he is a solitary eye witness of the incident. It was just by chance that he went to the place of occurrence. It is quite unnatural that he kept on watching the incident for about 25-30 minutes and kept mum. It is also unnatural that accused Dilip saw him, but he did not react at him. According to Mangal Singh, he saw all the four accused persons forcibly committing rape on deceased, but his testimony on this part was belied by the medical evidence of Dr. S.P. Dubey (PW18), who stated that he did not find any injury over vulva, vagina, inner thighs, perineum and pubic region of the deceased. Recent signs of rape were also not present. It is true that since deceased was habituated to sexual intercourse, there might have been no marks of injury on private parts if some body might have committed sexual intercourse in normal circumstances, but according to eye witness four persons committed rape on deceased. In such circumstances, it appeared quite improbable that no injury would have been caused on the private parts of the deceased. Another striking feature (16) Cr.Ref.No.1/2012 & Cr.A. 161/12 of the prosecution evidence is that in DNA report Ex. P/45 of the vaginal smears of deceased no male DNA profile was obtained. Only female DNA profile was detected from the vaginal smears slide. Though, Dr. Pankaj Shrivastava (PW24) the Scientific Officer, who conducted DNA examination stated that if during intercourse condom was used or no ejaculation was done in vagina, no male profile would be found in vaginal smear, but by no stretch of imagination it could be inferred that accused persons acted in that manner in the absence of evidence in that regard. Even otherwise if two inferences were possible from one set of evidence, the inference in favour of accused has to be adopted. In these circumstances, we are of the definite view that it was not established by the prosecution evidence that sexual intercourse was done with the prosecutrix and further that the evidence of sole eye witness Mangal Singh (PW5) in this regard was not believable. The explanation furnished by Mangal Singh that out of fear he did not shout or inform to anybody

and kept mum for a long period does not appear reasonable. He even made false attempt in saying that he informed the occurrence at police out post on 12.3.2011. (17) Cr.Ref.No.1/2012 & Cr.A. 161/12 21. In a murder case, a solitary eye witness, who happens to be a chance witness, whose conduct in not informing the incident to anybody for a long time is suspicious, and particularly when his evidence is inconsistent with the medical evidence, cannot be held to be trust worthy witness and no reliance can be placed on the evidence of such a witness (Shankarlal Vs. State of Rajasthan-AIR 200.SC 3559).

22. In the aforesaid circumstances, we are of the opinion that learned trial Judge did not appreciate the evidence of the alleged eye witness Mangal Singh (PW5) and committed error in placing reliance on his testimony.

23. Learned counsel for the State argued that injuries were found on the body of accused persons which indicated that accused persons committed rape on deceased. On 14.3.2011 when accused persons were subjected to medical examination by Dr. R.K.Baghel (PW19) some abrasions were found on their body. The abrasions were also found on the knees of accused persons.

24. Learned counsel for the appellants referring to the statements of accused persons under Section 313 of the Code of Criminal Procedure submitted that the aforesaid (18) Cr.Ref.No.1/2012 & Cr.A. 161/12 injuries were caused to appellants by the police after they were arrested. The explanation furnished by the accused persons may or may not be true, but merely on the basis of the evidence about the injuries on the body of accused persons in the absence of any other reliable evidence, it cannot be held established that the said injuries were caused in commission of rape by them on deceased, especially, in view of the fact that the medical examination report of the deceased and the report of DNA test of vaginal smear belied the possibility of commission of rape on her.

25. Learned counsel for the State submitted that Sulochna (PW10), the niece of deceased stated that in the night before her death, Dujabai was watching T.V in her house. At about 11 O' clock, accused Manish called Dujabai from her house and Dujabai went with him. In the next morning, she came to knot that Dujabai died by hanging. This evidence of Sulochna indicated that deceased was last seen

in the company with Manish. Evidence of Sulochna (PW10) does not find corroboration from any other evidence on record. Rather Murli (PW11), though declared hostile, stated that in the night when he saw Dujabai going towards her house, she was all alone. On his asking, she told that she had (19) Cr.Ref.No.1/2012 & Cr.A. 161/12 gone to watch T.V.. Except the aforesaid evidence of last seen with appellant Manish for a while, there is no other evidence to presume that Dujabai went together with Manish towards the place of occurrence. From the evidence of Sulochna (PW10), it appears that accused Manish merely stated that he wanted to talk to Dujabai; as soon as Dujabai went out of her house, she closed her doors. She did not say whether Dujabai went with Manish. In number of cases, it has been held that the only circumstance that the deceased was last seen in the company of accused by itself is not sufficient to establish the guilt of the accused. No doubt that the deceased's death was homicidal, but since there was no direct trustworthy witness connecting the appellant with the crime, it was hardly sufficient to establish the guilt of the accused (Inderjit Singh Vs. State of Punjab-AIR 199.SC 1674). Further, it is settled rule of circumstantial evidence that each one of the circumstances have to be established beyond doubt and all the circumstances put together must lead to the only one inference, i.e. the guilt of the accused. The only circumstance of appellant being with the deceased for a while alone in the absence of other evidence would not be sufficient to hold him guilty. (20) Cr.Ref.No.1/2012 & Cr.A. 161/12 In the instant case since we have found no other trustworthy evidence against the appellants, in our opinion, the evidence of last seen of Manish with deceased cannot be held sufficient to convict him.

26. Yet another important feature of the case is that deceased had developed illicit relations with appellant Dilip. It has been stated by Bhole Prasad (PW1), Kuntobai (PW4), Sulochna (PW10), Revtibai (PW12) and Bhupat (PW13), who are the close relatives of deceased that Dilip used to visit the house of Dujabai. About 4-5 years back, Dujabai was married to one Rakesh of village Pادمي, but because of her affairs with Dilip, she did not live in her husband's house and abandoned marriage. Thereafter, she started living with another man viz. Sukhdas, but again because of her relations with Dilip, she did not live there. She started living all alone. She even conceived from Dilip, but got her pregnancy terminated. In these circumstances, it

appears highly improbable that Dilip would commit rape on her along with other accused persons and then commit her murder. There is even no whisper in evidence that Dilip for any reason wanted to get rid of Dujabai.

27. In the aforesaid circumstances, we find that prosecution failed to establish beyond a reasonable (21) Cr.Ref.No.1/2012 & Cr.A. 161/12 doubt that accused/appellants committed rape on Dujabai and/or caused her death. Learned trial Court mis- appreciated the evidence on record for recording the finding of conviction. No doubt, it was an unfortunate incident in which deceased was killed brutally, but in the absence of cogent, convincing and trustworthy evidence, we feel handicapped to hold the appellants guilty.

28. In the result: (i) The Criminal Reference No.1/2012 made by the trial Court for confirmation of death sentence awarded to accused persons viz. Dilip @ Dipu, Shailesh, Manish and Kuldeep is rejected. (ii) The Criminal Appeal No.161/2012 filed by appellants is allowed. Conviction and sentence including sentence of death awarded to appellants under Sections 302 read with Section 34, 376 (2)(g) read with Section 34 and 201 read with Section 34 of the Indian Penal Code is set aside. They are acquitted of all the charges. A copy of this order/judgment be kept in the record of Criminal Appeal No.161/2012. (RAKESH SAKSENA) (T.K.KAUSHAL) JUDGE JUDGE AD/

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