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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRIMINAL APPEAL NO. 370/2015

Date of decision: 20th August, 2015

MINTU MANDAL Appellant
Through Mr. Azhar Qayum, Advocate.

versus

STATE Respondent
Through Mr. Varun Goswami, APP with SI
Surender, PS-Bawana.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.K. GAUBA

SANJIV KHANNA, J. (ORAL):

Mintu Mandal, by the impugned judgment dated 26th November, 2014, stands convicted for murder of Rani on 1st November, 2011 in a room on the second floor of a factory located at N-39, Sector-2, DSIDC Bawana. By order on sentence dated 29th November, 2014, Mintu Mandal has been sentenced to imprisonment for life, fine of Rs.25,000/- and in default of payment of fine, to undergo simple imprisonment for three months. Section 428 of the Code of the Criminal Procedure, 1973 (Cr.P.C., for short), it was directed, would apply. The aforesaid conviction arises out of the charge sheet filed in FIR No.376/2011, police station Bawana.

2. Deceased Rani was the wife of Desh Raj (PW2). The appellant Mintu Mandal was known to Desh Raj (PW2) and the deceased Rani. Desh Raj (PW2), who used to work as a “*Raj Mistri*”, in his testimony

has stated that on 1st November, 2011 at about 9 A.M., he had left his room on the second floor of the factory located at N-39, Sector-2, DSIDC, Bawana and at that time, his wife Rani and two children, Kajal and Ajay, were present there. At about 3.45 P.M., the owner of the said factory, Amit, had made a call on his mobile phone and had asked him to return immediately. When he reached the factory, he met his children on the ground floor who were weeping and on going to the second floor, he noticed that his wife had died. She had strangulation marks on her neck. He had then made a call to his brother Gyasi (PW1). The police was called which came to the spot and recorded PW2's statement marked Ex.PW2/A. PW2 had professed and claimed that the appellant Mintu Mandal had murdered his wife. He had known Mintu Mandal, who used to come to the factory at N-39, Sector-2, DSIDC, Bawana and had developed a good friendship with him. However, his wife had expressed apprehension and doubt about the appellant Mintu Mandal, for he had an evil eye on her and used to visit their room during day time in his absence. A day earlier i.e. on 31st October, 2011, the appellant had come to his room at about 7 P.M. and in spite of PW2's reluctance, they had cooked and eaten meat and had drank liquor. At about 9 P.M. on 31st October, 2011, Desh Raj (PW2) had left the appellant at the gate of the factory, asking him to leave the place. At about 7 A.M. on 1st November, 2011, when PW2 had gone to switch on the water motor, he had seen the appellant sitting in the basement near the water motor. He had then warned the appellant not to visit the factory again.

3. Head Constable Satbir (PW6) was one of the first police officers to reach the spot i.e. the room on the second floor of the factory located at N-39, Sector-2, DSIDC Bawana. PW6 had seen the dead body of a female lying in the room. He had also seen a few broken bangles and

one hair clip lying outside the room, a fact deposed and affirmed by Desh Raj (PW2) also. Later on, SI Anil Tushir and the SHO had inspected the dead body and had noticed signs of pressing on the neck of the deceased. Head Constable Satbir (PW6) has testified that Desh Raj (PW2) husband of the deceased was found to be present there. The hair clip and the broken bangles were put in a plastic *dibbi* and converted into a *pullanda* and seized vide memo Ex.PW2/C, which was signed by PW6 at point B. A bed sheet and a shawl were also seized from the spot.

4. SI Anil Tushir (PW17) has similarly deposed about the presence of broken pieces of bangles and one hair clip, which were found outside the room. Inside the room, clothes were scattered and the room had been ransacked. He had observed strangulation marks on the neck of the deceased. The hair clip and broken pieces of bangles were seized vide memo Ex.PW2/C, which was signed by him at point X. In his cross-examination, PW17 has affirmed that no chance prints could be lifted from the spot and he had not noticed any fresh blood marks on the broken pieces of bangles.

5. Inspector Kapil Dev (PW27) testified that on reaching the spot, he had noticed that SI Anil Tushir (PW17) and Constable Harpal (PW13) were present there. SHO Satish Kumar and other police officers had also reached the spot. Crime team had been informed and had inspected the spot.

6. Crime team report marked as Ex.PW4/A proved by retired SI Prem Singh, records that the crime team remained at the spot from 5.45 P.M. to 6.40 P.M. and had advised the Investigating Officer/police to examine the labour working in the factory and apprehend the accused by going to his residence. Incredibly and without explanation, the neighbours or the workers of the factory were not examined by the

police and have not testified in the Court. As per the unscaled site plan Ex.PW27/A, the room in question is located in a corner of the second floor of the property in question. The scaled site plan marked Ex.PW11/A is more detailed and mentions presence of four rooms on the second floor including the room where the occurrence had taken place. There was open space and terrace with steps leading to the lower floors. Presence of broken bangles and hair clip outside the room indicates that there was a scuffle and resistance by the deceased. As per the prosecution version, two minor children of the deceased and Desh Raj (PW2), who were aged about 2 and 5 years, were present in the room at the time of the occurrence. The aforesaid factual narration would indicate that the occurrence of this nature would not have gone unnoticed. The noise and commotion would have raised an alarm and possible intervention by the persons present near the spot. At least, the perpetrator would have been noticed and seen.

7. As per the statement of Desh Raj (PW2), Amit, the owner of the factory had informed the said witness by making a call at about 3.30 P.M. Amit Kapoor (PW7) has testified that at about 3-30 P.M. on 1st November, 2011, he had received this information on telephone from one person called Chauhan. PW7, however, claims that he had reached the factory at about 7.30-8.00 P.M. and had then learnt that one person Mintu Mandal had murdered the *Chawkidarni* i.e. Rani. We assume that the occurrence would have taken place around the same time or shortly before i.e. around 3-3.30 P.M.

8. Bir Singh Chauhan (PW9) in his testimony had stated that he is the owner of adjacent factory at N-33, Sector-2, DSIDC, Bawana and on 1st November, 2011 at about 2.45 P.M. he had seen one boy aged about five years weeping in front of the factory No. N-39 and some workers were also present near the said boy. On inquiry from the said

boy, he had learnt that one Mintu had pulled down his mother. Desh Raj (PW2) claims that his children including his elder son Ajay who was aged about 5 years, had seen the occurrence. Desh Raj (PW2) professes that Ajay had told him that the appellant had come there and dragged his mother inside the room.

9. It is noticeable and significant that Ajay, stated to be five years of age at the time of occurrence, has not deposed as a witness. His statement under Section 161 Cr.P.C. was not recorded by the Investigating Officer. Mr. Deepak Wason (PW24) has stated that on 4th January, 2012, when he was posted as a Metropolitan Magistrate at the Rohini Courts, an application was moved by Inspector Kapil Dev (PW27) for recording the statement of Ajay under Section 164 Cr.P.C. The said application was marked Ex.PW24/A and his findings on the application were marked Ex.PW24/B. The notings on the application show that the said Ajay had come to the Court room along with Inspector Kapil Dev (PW27) and his father Desh Raj (PW2). PW24 had asked questions from Ajay but he was unable to give rational answers at that stage. PW24 had, therefore, recorded that Ajay's statement cannot be recorded on the said date and the application was disposed of. Ajay has not deposed in the Court and we cannot rely upon the statement of Desh Raj (PW2), Gyasi (PW1) and Bir Singh Chauhan (PW9) as what was stated and told to them by Ajay as it would be hit by the rule of hearsay and is inadmissible in evidence. The said rule compels us to ignore and turn a blind eye to the said part of the deposition by Desh Raj (PW2), Gyasi (PW1) and Bir Singh Chauhan (PW9). Section 60 of the Evidence Act incorporates the principle that oral evidence must be direct and not derivative. In another words, oral evidence should be given by the person who must have seen the fact or the event through the medium of his own senses

i.e. the person must be the one who has seen it, heard it or perceived it. The reason being that this is the best evidence and its' veracity can be tested when the said witness appears in the witness box and is subjected to cross-examination. The rule prevents depreciation of truth in the process of repetition, protracted legal inquiry and enforces production of stronger proofs, etc. Rule against hearsay, it is correct, is not applicable when what is proposed to be established by evidence, is not the truth of the statement but the fact that it was made. Albeit, in the present case, the assertion that Ajay had named the culprit would be inadmissible as the object of the evidence is to establish the truth of what is contained in the statement. This part of the deposition relating to the statement purportedly made by Ajay being inadmissible, has to be completely excluded from consideration.

10. Prosecution has placed on record the call detail record of the appellant relating to telephone number 9289818963 which have been marked Ex.PW22/A. The said call detail record for the date 1st November, 2011 show that the appellant had conversation on several numbers beginning 1.03 P.M. onwards. The said call detail records also show that Desh Raj (PW2) beginning from 4.49 P.M. had made several calls and had spoken to the appellant Mintu Mandal. This indicates and reflects that the appellant Mintu Mandal was available and had conversed with Desh Raj (PW2) even after the police had reached the spot. As per the prosecution version, the appellant was arrested on 2nd November, 2011, at about 10.05 A.M. in the morning. The police witnesses including Head Constable Satbir (PW6) and Inspector Kapil Dev (PW27) have deposed that the appellant was not traceable on 1st November, 2011 and could be only located in the morning on 2nd November, 2011. The police witnesses, however, have not deposed about the telephone calls between Desh Raj (PW2) and the

appellant after 4.49 P.M. on 1st November, 2011. Some of the calls were for long durations. Most of the calls were in fact had been made by Desh Raj (PW2) to the appellant Mintu Mandal but there was also one call by the appellant to PW-2 at 7.06 P.M. It would be reasonable to assume that the conversation would be centred around the death of Rani.

11. Learned counsel for the prosecution has drawn our attention to the recovery of muffler marked Ex.P5 and the injury marks noticed and recorded in the MLC Ex.PW14/A of the appellant. The muffler in question was allegedly recovered on 2nd November, 2011 from the bushes near the Iron Bridge at Sector-2, DSIDC Bawana. A muffler is an article which is easily available. It is highlighted that the appellant Mintu Mandal had bruises and injuries. The medico legal report dated 2nd November, 2011 (Ex.PW26/A) which was recorded at about 1.46 P.M. in Maharishi Valmiki Hospital, mentions the presence of brownish abrasion on the left arm about 1-2 days old, one superficial cut mark on the left hand palm region, one superficial cut mark between the thumb and the index finger, one on the tip of the index finger and an abrasion on the left cheek. There are two more MLCs of the appellant. The second MLC marked Ex.PW14/A relates to examination on 2nd November, 2011 at 5.30 P.M. It refers to very small abrasions and bruises over the left hand and on the left side of the face and scabbed abrasions on the left arm. The third MLC marked Ex.PW23/A, dated 3rd November, 2011 at 2.19 P.M., refers to a superficial incised wound on the left side palm at the base of the thumb and a superficial incised wound on the left side of the index finger tip. There are slight variations in the injuries mentioned in the three MLCs. When these injuries were put to the appellant Mintu Mandal while recording his statement under Section 313 Cr.P.C., the appellant had explained that

he had sustained the said injuries during his work of physically loading and unloading iron sheets. Such injuries were normal and were generally sustained at that time. Dr. Kavindra Kumar (PW23) and Dr. N.S. Khurana (PW26), in their cross-examination, have accepted as correct that the injuries mentioned in the MLC Ex.PW23/A and Ex.PW26/A could have been caused during loading or unloading of rough surface material or some sharp object like iron sheets. In fact, the appellant has stated that on 1st November, 2011, he had gone to the house of Desh Raj (PW2) in the morning as he wanted to celebrate “*Chatt Pooja*”, but he has denied his presence thereafter. He has also stated that he had not gone for work on 1st November, 2011. He has claimed that he was apprehended on 1st November, 2011 at 8 P.M. and not on 2nd November, 2011.

12. The last witness and circumstance relied upon by the prosecution is the testimony of Rozudeen (PW8). PW8 has stated that he had worked for about 5-6 years in the factory located at C-32, DSIDC, Bawana and he knew the appellant, who used to work in the same factory. On 31st October, 2011, the appellant had slept at night with him at about 9-10 P.M. At that time, the appellant appeared to be drunk and was under stress/tension. On the next day i.e. on 1st November, 2011, the appellant had left the factory in early morning hours. In his cross-examination, PW8 has accepted that the appellant had left at about 4 A.M. on 1st November, 2011. On the same day, at lunch time at about 1 or 1.30 P.M., he had seen the appellant outside the factory at N-39, Sector-2, DSIDC. The appellant was there but PW8 had not seen him coming out of the factory. Before PW8 could speak or call him, the appellant went away.

13. The prosecution version, as noticed above, in the absence of eye witness account, relies on circumstantial evidence. The evidence lead

by the prosecution at best indicates that the appellant knew the deceased Rani and was a good friend of her husband Desh Raj (PW2). The appellant and Desh Raj (PW2) used to interact and have food and drinks together. They were together in the evening on 1st November, 2011. The appellant used to work in the same industrial area at Bawana. After the occurrence, PW2 did converse and exchange a number of phone calls with the appellant. Rozudeen (PW8) had also seen the appellant outside the factory in question at about 1 or 1.30 P.M. on 1st November, 2011. Desh Raj (PW2) has professed that the appellant Mintu Mandal had taken fancy for and liked Rani. When we read and cumulatively consider the entire evidence on record, we do not think that the prosecution has been able prove its case against the appellant beyond reasonable doubt. The chain is not complete and we cannot rule out the possibility of involvement of a third person. Prosecution version, at best, raises some suspicion and doubt as to the involvement of the appellant. However, the evidence is grossly inadequate and short of the standard of proof required in a criminal case i.e. proof beyond reasonable doubt.

14. Accordingly, we accept the present appeal and set aside the conviction of the appellant for having committed murder of Rani on 1st November, 2011. The appellant will be released forthwith unless he is required to be detained in any other case in accordance with law.

SANJIV KHANNA, J.

R.K. GAUBA, J.

AUGUST 20, 2015
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