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

+ **CRL.A. 1571/2011**

Date of decision: 13.01.2015

BABU MANDAL

..... Appellant

Through Mr.Ajay Verma, Adv. With
Mr.Narsingh Narain Rai & Ms. Neha
Singh, Advs.

versus

STATE OF THE NCT OF DELHI

..... Respondent

Through Ms. Aashaa Tiwari, APP for the state.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J. (ORAL)

The appellant Babu Mandal stands convicted by the impugned judgment dated 21.07.2011 for having committed murder of Rinku Mandal aged about 8 years in the night intervening 13 and 14th of September, 2009.

2. The prosecution relies upon circumstantial evidence and there is no eyewitness to the commission of the said offence.

3. The undisputed and accepted factual position is that the dead body of Rinku Mandal with injuries was found at about 6.30-7.00 a.m. on 14.09.2009 at a distance of 25-30 yards from her residence in the jungle.

This factum is deposed by Ruma Mandal (PW-7) mother and Bablu Mandal (PW-10) father of the deceased. Rinku Mandal had died an unnatural and homicidal death is also proved from the testimony of Insp. Vijay Singh (PW-17), the Investigating Officer who had reached the spot and noticed the dead body. The said witness deposed as to an underwear lying beside the dead body and one blood stained stone (cemented stone) lying nearby. Photographs Ex.PW5/1 to Ex.PW5/7 proved by Ct. Girdhar Singh (PW5) also establish the said facts. Rinku Mandal was wearing a white baniyan on the upper portion, but the lower portion was bare and exposed. The Post-mortem report (Ex.PW2/A) was proved by Dr. Hari Prasad (PW-2) who had identified signatures of Dr. Sunay Mahesh on the said report. The post-mortem report records presence of mud stain on the lower limbs and over buttocks and dried blood stains on the scalp, hair, face, neck and chest. Ante mortem injuries were noticed on the right side of the face, forehead, temple and cheek. Green leaves were stuck on the back side. The following three ante mortem wounds/injuries caused by blunt external force, it stands opined were sufficient individually and collectively to cause death in ordinary course of nature : -

- “1. Contusion, red in colour, of size 14x10 cm present on right side of face over right side of forehead, right temple, right orbit, right cheek.
- (a) A laceration of size 8x5 cm bone deep in its medial half, it is situated on right forehead extending upto the middle of frontal bone. Comminuted fracture of the frontal bone is present and visible through this laceration. Brain is exposed through thus laceration wound.
- (b) Laceration of size 6x3 cm, present on right zygomatic region involving outer aspect of right orbit. It is bone deep. Fractured zygomatic bone is visible through it.
2. Laceration of size 11x4 cm, bone deep situated on right parieto-occipital region of scalp. Comminuted fracture of underlying parietal and occipital bone of skull is visible through it.
3. Contusion of size 8x12 cm present on left side of head over left ear, back of ear and left side of neck, red in colour.”

4. Thus homicidal death suffered by Rinku Mandal is established and proved beyond doubt.

5. The primary and core issue in the present appeal pertains to the involvement of the appellant Babu Mandal, who is said to be the perpetrator. The incriminating materials relied upon by the prosecution are three fold. The appellant was present at the residence of the deceased Rinku Mandal in the intervening night between 13th and 14th September, 2009. Secondly, the appellant had an extramarital affair with Ruma Mandal (PW-7). At night, the deceased Rinku Mandal had seen her mother Ruma Mandal (PW7) with

the appellant. Thirdly, scratch marks were found on the face, chest and wrist of the appellant as deposed to by SI Vijay Pal (PW-17). These scratch marks, as per MLC report of the appellant (Ex.PW8/A), could have been caused by nails. Implication being, that the deceased Rinku Mandal, while struggling, had caused the said scratch marks.

6. PW-10 Bablu Mandal has testified on the presence of the accused along with Sunil Mandal, Namita Mandal, his wife Ruma Mandal, deceased Rinku Mandal and his other child Abhijeet aged 5 years. They went to sleep at 12:00 midnight after taking meals and drinking alcohol. Thereafter, the deceased Rinku Mandal had gone to sleep in the side room with Namita Mandal, their relative (Massi i.e. sister of mother Ruma Mandal). In the morning at about 06:00 a.m., he noticed that Rinku Mandal was missing. Normally, Rinku Mandal would wake up at about 5.30/6.00 a.m. to go to school at 07:00 am. On pursuit, he found her dead body in the bushes at a distance of 25-30 yards from his house. She had injury marks. Police was informed. It is noticeable that Bablu Mandal (PW10) in the court deposition did not blame anyone or implicate the appellant. FIR (Ex.PW14/A) which was recorded on the basis of the statement of Bablu Mandal does not implicate or doubt the appellant Babu Mandal. Ex.PW10/A (also numbered

as Ex.PW9/A),the statement of Bablu Mandal (PW-10) which became the subject matter of the FIR (Ex.PW10/E) is silent and abstains from accusing and inculping the appellant.

7. Bablu Mandal (PW-10) in his cross examination had asserted that the appellant Babu Mandal was not with them or was present when they searched for the deceased Rinku Mandal. Bablu Mandal (PW10) denied the suggestion that the appellant Babu Mandal was with them in the search. However, Insp. Vijay Singh (PW-17), the Investigating Officer has deposed that he had interrogated several persons including Namita Mandal, Sunil Mandal, another Sunil Mandal, friend of Bablu Mandal and the appellant Babu Mandal. The deceased was sleeping with the said persons in the same house. PW-17 did not depose about abscondance or absence of the appellant Babu Mandal or that his behaviour was abnormal or suspicious. The conduct of the appellant Babu Mandal did not raise any doubt or concern. Dubiety was not apparent. The appellant Babu Mandal, it is apparent, was behaving normally. PW-17 has stated that after examining and collecting evidence from the scene of crime, they had proceeded towards All India Institute of Medical Sciences for post mortem examination. In the inquest papers and the brief facts prepared by PW-17, it was not indicated or stated

that appellant Babu Mandal was a suspect. The perpetrator till then was unknown. The crime team report (Ex.PW18/A) does not record that the appellant Babu Mandal or any other person was a suspect. The crime team as per the aforesaid report (Ex.PW18/A) had remained on the spot from 09:05 a.m. to 10:15 a.m.

8. On the question of motive implicating the appellant, the prosecution primarily relies upon the testimony of Ruma Mandal (PW7), mother of the deceased Rinku Mandal. She has accepted that the appellant Babu Mandal was related and had come to the house on 13th September, 2009. He had taken his meals with them and several others. Thereafter, Rinku Mandal went to sleep in a room. Appellant Babu Mandal went to sleep with others. She had gone to sleep in the room with her husband and their son. Ruma Mandal (PW-7) has testified that the appellant Babu Mandal had fixed a prior meeting with her behind the house. Accordingly, she reached the appointed place. When they were talking to each other, the deceased Rinku Mandal came there and upon seeing her, PW7 had pushed the appellant away from her. Thereafter, Ruma Mandal (PW7) told Babu Mandal and Rinku Mandal to go inside and sleep. She also went back to her room and slept. In the morning, she was woken up by her husband, Bablu Mandal,

and informed that deceased Rinku Mandal was missing. In the cross examination, PW7 accepted that she did not know who killed deceased Rinku Mandal. Further, several persons including the appellant had taken dinner in the room of Namita Mandal. There were 11 persons who were present at that time including children. She had remained in the room of Namita Mandal from 7 p.m. to 12 mid night and had prepared and served the food. She did not accept that the appellant Babu Mandal used to visit their house daily and stated that she did not know where the appellant used to work. She deposed that she used to speak to the appellant Babu Mandal in the presence of her husband and her children and also sometimes in the absence of her husband. She testified that police had taken her to the police station on the day when the dead body of deceased Rinku Mandal was recovered and her statement was recorded in the police station. She was scared when her daughter (deceased Rinku Mandal) had seen her with the appellant Babu Mandal. Being disturbed, she could not go to sleep immediately. At night, she did not hear any noise or anyone crying. She has accepted as correct that Insp. Vijay (PW-17) had slapped her in the police station. She asserted that she did not have any physical relationship with anyone, except her husband.

9. We have also examined the unscaled site plan (Ex.PW16/B).The place/location where the dead body of the deceased Rinku Mandal is indicated. The location of the nearby houses or residences is not indicated in the unscaled site plan (Ex.PW16/B). However, it is apparent from the testimony of Ruma Mandal (Ex.PW7) and Bablu Mandal (PW-10) that there were several persons residing in the property and also in the neighbourhood. Bablu Mandal (PW-10) had deposed as to the call made by his landlord to the police after the dead body of Rinku Mandal was found.

10. We have also carefully scrutinized the testimony of PW-7 Ruma Mandal wherein she has accepted that she had met the appellant on the said night at a pre-determined place and the deceased Rinku Mandal had seen them. However, Ruma Mandal (PW7) has stated that thereafter all of them went to sleep. It is apparent that the deceased Rinku Mandal had not cried or shouted. At best, the testimony of Ruma Mandal would show and establish motive. But on the question of motive, we also have evidence to show that she was physically abused.

11. Dead body of Rinku Mandal was found in the morning at 6:30/7 am on 14th September, 2009. She was not wearing her underwear, which had been removed and was lying near her.

12. Ct. Yogender Singh (PW-13) in his court deposition has mentioned that the doctor who had conducted the post-mortem had handed over to him two plastic containers which included vaginal swab and anal swab of the deceased. These were taken into possession vide seizure memo (Ex.PW13/A), and thereafter, sent for forensic tests. The forensic report, dated 29th June, 2010, which the counsel for the appellant has requested to be taken on record, is marked as Ex.HC1. The report records that human semen was detected on Exhibit 6 (anal swab). Thus, it appears that the deceased Rinku Mandal had been subjected to sexual assault. It is correct that in the post-mortem report of Rinku Mandal (Ex.PW2/A), it is mentioned that the anal opening was dilated and there were no fresh injuries present but presence of semen in the anal swab gives a different colour and contrasting hue to the motive and cause of death. The reason apparently and ostensibly was different from the one alleged by the prosecution and deposed by Ruma Mandal (PW7). Noticeably, after receiving the forensic report (Ex.HC-1), the blood samples of the appellant was sent for DNA fingerprinting unit.

13. The DNA fingerprinting unit report is available on the trial court record. Learned counsel for the appellant has requested that the same may be

taken on record and exhibited. The same is marked as Ex.HC-2. The DNA examination report (Ex. HC-2) opines that the exhibits received were subjected to DNA isolation but DNA isolations was not possible on the wool/cotton swabs on sticks described as 'Anal swab'. Thus, no opinion could be given.

14. The other evidence against the appellant Babu Mandal are the alleged scratch marks on the face, chest and wrist. Insp. Vijay Singh (PW-17) asserted that he became suspicious after seeing the said marks on the appellant's face. Babu Mandal was medically examined as per the MLC report (Ex.PW8/A). The report records that scratch marks were found present over the cheek, mouth, chin, neck, upper chest and wrist. The abovementioned injuries could have been caused by nails and were fresh in nature (about 3/4th of a day or 18 hours old). The said MLC was prepared by Dr. Manish Goyal, who appeared as PW-8. In his court deposition PW-8 had deposed that there could be variation of 6-7 hours in estimating the time. He also accepted that the said scratches could be caused by a bush or any pointed object.

15. The MLC (Ex.PW8/A) records that the physical examination of Babu Mandal was conducted on 14.09.2009 at about 08:58 p.m. This was almost

14 hours post recovery of the dead body. The appellant Babu Mandal had slept in the same property with Ruma Mandal (PW-7) and Bablu Mandal (PW-10). If the said scratch marks were prominent and visible on the face etc. this could have been noticed by Insp. Vijay Singh (PW 17) and several others. Queries would have been then raised and asked from the appellant Babu Mandal as to how these scratch marks had occurred. As per the MLC report (Ex.PW8/A)) the appellant Babu Mandal had red abrasions. If this is correct, the scratch marks, would not have gone unnoticed and attracted attention. The time gap raises doubt regarding scratch marks, which are possible for several reasons, not necessarily attributable to nails and in particular nails of the deceased.

16. It is noticeable that the nail clippings of deceased Rinku Mandal were not taken. Counsel for the state submits that the deceased Rinku Mandal was cremated earlier and thereafter the scratch marks of the face, chest etc. of the appellant Babu Mandal were noticed. We have commented on the scratch marks and presence of the appellant Babu Mandal in the morning. Further, it was for the prosecution to establish and prove a live connection between the scratch marks, which could be easily caused and created, and the assertion that these were caused by Rinku Mandal. Thus, the failure to

take the nail cutting of deceased Rinku Mandal and subject them to forensic tests is material. Importantly, the post mortem report (Ex. PW 2/A) does not indicate or refer to the presence of blood/skin in the nails of the deceased Rinku Mandal.

17. Thus, the prosecution in the present case relies upon motive as deposed to by Ruma Mandal (PW-7), but there is evidence that the motive of the crime might be different. The second circumstance is the scratch marks on the face, chest and wrist of the appellant, but on the said aspect again we have reservations. The aforesaid evidence, when read together, is rather slender and, therefore, we do not think that the prosecution has been able to prove and establish their case beyond reasonable doubt. Conclusion of guilt in a case of circumstantial evidence is established when the facts proved by the prosecution taken cumulatively unerringly point towards the accused as the perpetrator, i.e. there is no escape from the conclusion that within all human probabilities the crime was committed by the person prosecuted and none else. It is then conviction in a case of circumstantial evidence can be sustained and accepted. Thus, the conclusion so reached on cumulative effect of evidence should be incapable of explanation on any other hypothesis other than the guilt of the accused. Such evidence should

not only be consistent with said finding but also should be inconsistent with his innocence. [Refer *Shanmughan versus State of Kerala* (2012) 2 SCC 788, *Madhu versus State of Kerala* (2012) 2 SCC 399 and *Sangili versus State of T.N.* (2014) 10 SCC 264]

18. In view of the aforesaid discussion, we find merit in the present appeal. Conviction of the appellant Babu Mandal u/s 302 of the IPC for having committed the murder of deceased Rinku Mandal is set aside. The appeal is allowed.

19. The appellant Babu Mandal will be released unless required to be detained in any other case, in accordance with law.

20. Trial court record will be sent back.

(SANJIV KHANNA)
Judge

(ASHUTOSH KUMAR)
Judge

JANUARY 13, 2015/ab