
(2011) 07 DEL CK 0400
In the Delhi High Court
Case No : Criminal A. 346 of 2011

Chander Shekhar @ Shekhar

APPELLANT

Vs

State of Nct of Delhi

RESPONDENT

Date of Decision : 20-07-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 313
Evidence Act, 1872 — Section 106, 25, 26, 27
Penal Code, 1860 (IPC) — Section 302

Citation : (2011) 3 JCC 2053

Hon'ble Judges : S. Ravindra Bhat, J;G.P. Mittal, J

Bench : Division Bench

Advocate : Sumeet Verma, for the Appellant; Lovkesh Sawhney, APP, for the Respondent

Final Decision : Allowed

Judgement

G.P. Mittal, J.—The Appellants impugn the judgment dated 22.12.2010 and order of sentence dated 24.12.2010 whereby they were convicted of the offence punishable u/s 302 read with Section 34 Indian Penal Code (IPC) and were sentenced to undergo imprisonment for life and to pay a fine of 5,000/- each. In default of payment of fine, they were directed to further undergo rigorous imprisonment for six months.

2. According to the prosecution version the Appellant Chander Shekhar and PW-1 Girja Devi were tenants in respect of one room each in the house No. C-195, Gali No. 14, Kacchi Colony, Madanpur Khadar Extension, New Delhi owned by Riyazuddin (the deceased). The deceased used to visit Chander Shekhar and also sometimes conversed with Girja Devi. A few days before the incident PW-1 noticed that the Appellant Chander Shekhar used to be in a pensive mood and had taken to chain smoking. It is alleged that a few days before the incident the Appellant Vijay Kumar also started residing with the Appellant Chander Shekhar. Both the Appellants were working as waiters with Rahul Thekedar. PW-1 used to

work as a member of a welcome team in marriage parties.

3. PW-1 Girja Devi was married to one Pradeep Kumar, who used to stay at Nabi Kareem with his parents. It is alleged that she used to stay at Madanpur Khadar as her place of work was far away from Nabi Kareem. Therefore, Pradeep Kumar, her husband used to visit her at Madanpur Khadar and sometimes would also stay with her.

4. On 01.09.2005 at about 7:00 P.M. Girja Devi prepared some Halwa Puri for herself; after having her food she also gave the dish to the Appellants. Girja Devi started cleaning the utensils as she was to go to Paras Cinema to watch a movie with her husband at 9:00 P.M.

5. Girja Devi noticed that at about 8:00 P.M. Riyazuddin, landlord went to Chander Shekhar's room; she left the house at 9:00 P.M. for Paras Cinema.

6. On 04.09.2005 at 8:20 A.M. intimation, DD No. 5 (Ex. PW-4/A) was lodged in the Police Post (PP) Madanpur Khadar that a foul smell was emanating from the house of Riyazuddin and that it was bolted from inside. SI Bishwajit, In charge PP along with ASI Chaman Singh, Constable Ajay and other Police Officials reached house No. C-195, Madanpur Khadar Extension, New Delhi. The front room at the main entry was locked from outside and the SI broke open the lock. On opening the door a dead body of a male in a de-composed state was discovered. It was revealed that one boy named Shekhar resident of Bihar used to stay in the said room; Girja Devi used to stay in the adjoining room with her son Arjun. It was further noted that Shekhar and Girja were not coming to their rooms for the last 2/3 days. The SI sent a rukka Ex. PW-4/C to the Police Station for registration of a case u/s 302 IPC.

7. The dead body was identified by Nijamuddin (PW-2) the deceased's cousin and information regarding death of Riyazuddin was given to his family in the village.

8. On 05.09.2005 Girja Devi went to her room at Madanpur Khadar and learnt that Riyazuddin had been killed. On 06.09.2005 she received a phone call from the Appellant Chander Shekhar, who confessed to having killed the deceased by strangulation along with the Appellant Vijay Kumar. The Appellant Chander Shekhar also informed her that he did not like Riyazuddin talking to her. It is alleged that the Appellant Chander Shekhar also forbade her from disclosing the information to anyone else.

9. Girja Devi did not adhere to the threat given by the Appellant Chander Shekhar and passed on this information to the Police.

10. The postmortem examination on the dead body was conducted by Dr. M. G. Jain on 05.09.2005 at 2:45 P.M. PW-16 Dr. Sudepta Ranjan Singh proved the postmortem report Ex. PW-16/A. As per the postmortem report the cause of death was "asphyxia due to ligature strangulation". The time since death was about three days.

11. According to prosecution version on 03.09.1995 Banwari Lal (PW-8) received a telephone call from the Appellant Chander Shekhar. They met at Hare Rama Hare Krishna Mandir, when the Appellant Chander Shekhar wanted to make a call from PW-8's mobile phone. It is alleged that after PW-8 handed his mobile phone to him (the Appellant Chander Shekhar), he overheard the Appellants talking to each other that they were to take out a dead body as it would decompose and start emitting foul smell because of summer. PW-8, it is alleged, enquired as to why they (the Appellants) had done such an act for which they replied that "Stithi Gambhir Ho Gayi Thi Isliye Hamein Hadd Se Gujarna Pada".

12. On 12.09.2005 Girja Devi again received a telephone call from the Appellant Chander Shekhar asking her to reach Sector-37, Noida Bus Stop at 2:00 P.M. Girja Devi gave this information to the Police. A Police party headed by Inspector Jagdish Yadav (PW-17) proceeded to the said Bus Stop. Girja Devi was asked to get down a few steps before the Bus Stop. On a signal given by Girja Devi the Appellants were apprehended at about 3:30 P.M. and brought to the Police Station Sarita Vihar.

13. The Appellants were formally arrested by memos Ex. PW-1/A and PW-1/B prepared in the Police Station. On interrogation they made confessional statements and offered to get the pillow and the towel recovered from a forest near the Agra Canal as well as a key to the room from Appellant Vijay Kumar's house at Sector-31, Noida. In pursuance of the confessional statement, the Appellants got recovered the pillow and the towel and also the key of Chander Shekhar's room, which were sealed by the IO separately.

14. After completion of the investigation a report u/s 173 Code of Criminal Procedure was filed against the Appellants.

15. On Appellants pleading not guilty to the charge the prosecution examined 17 witnesses. PW-1 Girja Devi, PW-2 Nijamuddin, PW-4 Bishwajit Kumar, PW-14 Constable Ajay Kumar and PW-17 Inspector Jagdish Yadav are material witnesses.

16. PW-1 Smt. Girja Devi is the prosecution's star witness. She is a witness to the last seen evidence, extra judicial confession made by Appellant Chander Shekhar on 05.09.2005 and Appellants' arrest on 13.09.2005.

17. PW-2 Nijamuddin identified the deceased's body after the latch of the room was broken open by PW-4 SI Bishwajit Kumar.

18. PW-4 SI Bishwajit Kumar is a witness to the recovery of the dead body from the rented room allegedly occupied by the Appellant Chander Shekhar and also for the Appellants' arrest and the recoveries made thereafter. Banwari Lal (PW-8) is the Appellants' colleague and deposed about him handing over his mobile to the Appellant Chander Shekhar and over hearing a confession made by the Appellants. PW-3 Constable Dharmender had accompanied the IO (PW-17) to Noida and deposed about Appellants' apprehension.

19. Constable Ajay Kumar PW-14 corroborated the testimony of PW-4 SI

Bishwajit Kumar regarding breaking open the lock of Chander Shekhar's room and recovery of the dead body.

20. PW-17 Inspector Jagdish Yadav was the Investigating Officer (IO) of the case. He deposed about seizure of the lock, disclosure statements and recoveries in pursuance thereof.

21. The Appellants were examined u/s 313 Code of Criminal Procedure They generally denied prosecution evidence and pleaded their false implication.

22. The Trial Court by the impugned order believed the circumstantial evidence of last seen, recovery of dead body from Chander Shekhar's room, recovery of the key to the lock on the said room at Appellant Chander Shekhar's instance in pursuance of his disclosure statement Ex.PW-4/D, recovery of the pillow and towel and the extra judicial confessions made to P Ws-1 and 8 and held that prosecution's case was proved against the Appellants beyond shadow of all reasonable doubt. Therefore, the Appellants were convicted and sentenced as stated earlier.

23. We have heard Mr. Siddharth Aggarwal, Advocate learned Amicus on behalf of Appellant Vijay Kumar and Mr. Sumeet Verma, Advocate learned Amicus on behalf of Appellant Chander Shekhar and the learned APP for the State and have perused the record.

24. On the basis of the evidence produced by the prosecution the incriminating circumstances relied upon by the prosecution can be outlined, briefly as under: -

A. The recovery of dead body from the rented room in Appellant Chander Shekhar soccupation.

B. Last seen evidence.

C. The recovery of the key of the lock on the room in which the dead body was found and recovery of the pillow and the towel in pursuance of Appellants? disclosure statements.

D. The extra judicial confession made to PW-1 on 06.09.2005 and to PW-8 on 03.09.2005.

E. The Appellants? abscondence from the rented room since 02.09.2005 till their arrest on 13.09.2005.

25. On receipt of DD No. 5 SI Bishwajit, In charge PP Madanpur Khadar reached the spot. He recorded rukka Ex.PW-4/C for registration of a case u/s 302 IPC. It is mentioned in rukka that the dead body of Riyazuddin was recovered from Appellant (Shekhar's room).

26. On this aspect, the prosecution examined PW-1 Girja Devi, PW-2 Nijamuddin, PW-4 SI Bishwajit, PW-5 Al Nabi Saleem and PW-14 Constable Ajay Kumar, who had accompanied PW-4 SI Bishwajit to the spot.

27. In her examination-in-chief, PW-1 Girja Devi deposed that on 01.09.2005 she used to reside in the house of Riyazuddin in Kacchi Colony, Madanpur Khadar Extension, she was tenant in respect of two rooms. Appellant Chander Shekhar was a tenant in another room in her neighbourhood.

28. In her cross-examination, she clarified that she was a tenant in respect of one room for a monthly rent of ` 500/- and the Appellant Chander Shekhar was a tenant in respect of the other room. A look at the Site Plan Ex.PW-17/B and the scaled Site Plan Ex.PW-6/A would also show that there are just two rooms in house No. C-195, Gali No. 14, Madanpur Khadar Extension. Thus, it is clear that there were only two rooms and if there was an independent tenancy Girja Devi was a tenant in respect of one room and the Appellant Chander Shekhar was a tenant in respect of another room. It is, however, what is noteworthy is that Girja Devi is completely silent as to which of the two rooms, she was a tenant or in occupation.

29. PW-4 SI Bishwajit is the author of the rukka Ex.PW-4/C. He deposed that on receipt of DD No. 5, he reached the spot i.e. house No. C-195, Kacchi Colony, Madanpur Khadar Extension; the said room was found locked from outside and a stinking smell was emanating from the said room. He deposed about breaking open of the lock etc. and recovery of the dead body. He is also silent as to who was in occupation of the room from which the dead body was recovered. His testimony assumes importance since Girja Devi as well as the Appellant Chander Shekhar were not present in their respective rooms, when the witness along with other police personnel reached there. It also came to his (PW-4's) notice that they (PW-1 and Appellant Chander Shekhar) were absconding (from the rented room) for the last 2/3 days. Thus, it is apparent that as per initial investigation, PW-1 as well as the Appellant Chander Shekhar were the suspects. It was, therefore, important to find out as to from whose room the dead body was recovered if they (PW-1 and Chander Shekhar) were residing in separate rooms as is the case of the prosecution.

30. PW-2 Nijamuddin was present at the spot by PW-4. He is a witness to the identification of the dead body immediately at the spot. He deposed that deceased Riyazuddin was his cousin. He (deceased) owned a house consisting of two rooms which were let out to Girja Devi and Chander Shekhar. He deposed that he became aware about Riyazuddin's death through the police. He reached Riyazuddin's house at Madanpur Khadar Extension where his (Riyazuddin's) dead body was lying (in a room). He informed Riyazuddin's family in his village about the death. Thus, PW-2 also did not identify as to which of the rooms was in whose occupation and from whose room Riyazuddin's dead body was recovered.

31. PW-5 Al Nabi Saleem is the immediate neighbor as he was a resident of house No. C-194, Gali No. 14, Madanpur Khadar Extension. He deposed that house No. C-195 was owned by Riyazuddin. The said house consisted of two rooms. Both the rooms were in occupation of Chander Shekhar and Girja Devi for about one year prior to the incident. He also did not identify the specific room in

occupation of Chander Shekar and Girja Devi.

32. Similarly, PW-14 Constable Ajay Kumar did not throw any light as to who was the occupant of the room from where the dead body was recovered. PW-1 Girja Devi, PW-2 Nijamuddin and PW-5 Al Nabi Saleem could have revealed to PW-4 as to who was the occupant of the room in question. However, no efforts were made either by PW-4 or by the subsequent IO during the investigation to pin point as to who was the occupant of which room.

33. The Rukka Ex.PW-4/C mentions that the dead body was recovered from the room in Chander Shekhar's occupation. The averments made in the rukka, however, are not substantive evidence. Thus, in the absence of any evidence, we are of the opinion that the prosecution has failed to prove that the dead body was recovered from the Appellant Chander Shekhar's room.

34. The prosecution relies on PW-1's testimony to prove this circumstance .PW-1 testified that as on 01.09.2005 she used to reside as a tenant in one of the rooms in the house owned by Riyazuddin (the deceased). The other room was occupied by the Appellant Chander Shekhar. Riyazuddin used to visit Chander Shekhar's room and sometimes used to stay with him in the room. Sometime prior to the incident Riyazuddin started visiting Chander Shekhar very frequently and Riyazuddin would sometimes also talk to her (PW-1). During this period, Chander Shekhar used to be in pensive mood and started consuming bhang in addition to chain smoking. Sometime prior to the incident Appellant Vijay Kumar also started residing with Chander Shekhar. Both the Appellants were working as Waiters with Rahul Thekedar.

35. On 01.09.2005 at 7:00 P.M. she (PW-1) prepared halwa puri in her room and ate it; she also served some halwa puri to the Appellants. Thereafter, she started cleaning utensils as she was to go to Paras Cinema at 9:00 P.M. to watch the movie "No Entry" with her husband. Before she could leave, Riyazuddin went to the Appellants' room at about 8:00P.M after which she left the room at about 9:00 P.M. to join her husband at Paras Cinema (as per pre-decided programme).

36. The learned Counsels for the Appellants criticized PW-1's testimony on the ground that she herself was a suspect as she was staying with Appellant Chander Shekhar in the room belonging to the deceased, away from her husband and in-laws. Further, she did not give any explanation about her whereabouts after watching the movie on the night of 01.09.2005. She did not produce the movie tickets nor did the prosecution examine her husband or anyone from her family to prove that she really watched the movie or that she went to her in-laws house at Nabi Kareem, Paharganj and stayed there till 5th September, 2005 (when she visited the rented room). It is argued that PW-1 had stated in her examination-in-chief that she was a tenant in respect of two rooms and thus it cannot be said that Riyazuddin's dead body was recovered from the room rented by the Appellant Chander Shekhar.

37. On the other hand, it is submitted by Mr. Lovkesh Sawhney, learned APP that

nobody retains the tickets of a movie and thus non production of the movie tickets was of no consequence. It is urged that the husband and the in-laws were not witnesses to any material aspect and thus their non-examination is of no avail.

38. We would agree with the learned APP that normally nobody retains the tickets after watching a movie: no adverse inference can be drawn against the prosecution for non seizure of the movie tickets. At the same time, it has to be borne in mind that a decomposed dead body of Riyazuddin was recovered from a room which was in occupation of either Girja Devi or Appellant Chander Shekhar or both and thus, she too was a suspect. It was, therefore, expected of the Investigating Officer to have secured some corroboration to PW-1's testimony that she had left the two Appellants and the deceased together in a room. PW-1 stated that she along with her husband visited her room on 05.09.2005. The IO, therefore, ought to have examined Girja Devi's husband to verify whether she had really gone to watch a movie with him, as was claimed by her. The IO could have also examined Girja Devi's in-laws to confirm that she and her husband Pradeep went to their house at Nabi Kareem on the night of 01.09.2005. In the absence of any corroboration to Girja Devi's testimony, especially when we are not sure from whose room Riyazuddin's dead body was recovered, it would be highly unsafe to rely on her statements.

39. The dead body was discovered from the room on the morning of 04.09.2005. The postmortem examination was conducted by the autopsy surgeon on 05.09.2005 at 2:45 P.M. The postmortem report Ex. PW-16/A gives the time of death about three days from the time of postmortem examination, which would mean that the deceased had died sometime around 2:45 P.M. on 02.09.2005. It is urged by the learned Counsel for the Appellants that last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. In support of the contention reliance is placed on State of Goa Vs. Sanjay Thakran and Another,

40. We have already held above that the prosecution has not proved if Riyazuddin's dead body was recovered from Appellant Chander Shekhar's room or from PW-1's room. According to PW-1 she left the two Appellants and the deceased in the room in house No. C-195, Gali No. 14, Madanpur Khadar Extension on 01.09.2005 at about 9:00 P.M. The postmortem on the dead body of Riyazuddin was conducted on 05.09.2005 at 2:45 P.M. The time since death was given as "three days". Though, time since death is given only by approximation, yet PW-1's testimony has not been found to be credible we are not inclined to believe this circumstance tried to be established against the Appellants to seek their explanation u/s 106 of the Evidence Act. It is difficult to hold that the deceased was left by Girja Devi in the Appellants' company, especially when it was suggested to Girja Devi in cross-examination that she had

illicit relations with the deceased and that her husband had committed Riyazuddin's murder.

41. According to the prosecution on 12.09.2005 the Appellant Chander Shekhar contacted PW-1 Girja Devi on telephone and asked her to come to Sector 37, Noida Bus Stop on 13.09.2005 at 2:00 P.M. PW-1 deposed that she passed on this information to the police. A trap was laid and on 13.09.2005 at 3:30 P.M. the Appellants were apprehended from the Bus Stop and were formally arrested in Police Station Sarita Vihar. It is the prosecution case that the Appellants made disclosure statements leading to the recovery of a key, which was later on found to match the lock of the room from which Riyazuddin's dead body was recovered.

42. The IO has collected neither PW-1's nor the Appellant Chander Shekhar's call details to verify whether there was any conversation, between them, on 12.09.2005. Apart from the call details what is intriguing is that as per rukka Ex.PW-4/C SI Bishwajit (PW-4) broke open the lock of the room by hitting it with a stone. In his examination-in-chief SI Bishwajit deposed that the lock of the room was opened and a dead body was found inside the room, covered by a sheet of cloth. PW-14 Constable Ajay Kumar also corroborated SI Bishwajit on this aspect and deposed that the lock of the gate was broken by SI Bishwajit. There was, however, a shift in the prosecution case when Inspector Jagdish Yadav, who is the main IO, entered the witness box as PW-17. He deposed that after registration of the case, the investigation was taken up by him. He reached the spot and sent the dead body to the AIIMS mortuary. He deposed that "locking bolt along with locked lock which was lying at the spot were lifted." Though, the key recovered at the instance of Appellant Chander Shekhar was tried in the lock before the Court as is recorded in his statement dated 27.02.2009, it is quite strange that the prosecution did not even try to verify whether the key alleged to be recovered at the Appellants' instance matched to the lock of the room from where the dead body was recovered. It seems that the IO was very sure even without verifying that the key recovered must open the lock, though, as per initial prosecution version (as also according to P Ws 4 and 14) the lock was broken for opening the door of the room. Even if the lock was broken, scientific investigation could have been carried out whether the key pertains to the lock in question. There is every possibility that the lock and the key which fitted in the lock were subsequently planted to strengthen the prosecution case. We are not inclined to believe the recovery of the key at the Appellant Chander Shekhar's instance.

43. According to the prosecution version, the Appellants made disclosure statements that they could get recovered the towel and a pillow concealed by them from the bushes near Agra Canal. The towel could not be connected with the offence as nothing incriminating was detected on it; whereas some human blood was found on the pillow, but, there was no reaction to any specific blood group. Admittedly, the dead body was lying in the room where the offence was committed. It is not believable that the Appellants would have, under the

circumstances, removed the pillow and the towel allegedly used by them for commission of the offence and would conceal them leaving the dead body in the room. If at all the towel and the pillow had been carried by the Appellants, they would simply throw it away in the Canal instead of concealing it in the bushes to get it recovered later on.

44. Even otherwise, recovery of pillow with some blood of human origin that too from an open place is too innocuous to fasten any culpability on the part of the Appellants. In the circumstances, we are not inclined to believe the recovery of the pillow and the towel.

THE EXTRA JUDICIAL CONFESSIONS MADE TO PW-1 ON 06.09.2005 AND TO PW-8 ON 03.09.2005

45. PW-1 Girja Devi testified that on 05.09.2005 she went to the Madanpur Khadar house along with her husband after which she came to know that Riyazuddin had been murdered. On hearing this, she returned to her in-laws house at Nabi Kareem. She deposed that on 06.09.2005 she received a telephone call from Appellant Chander Shekhar. He (Chander Shekhar) informed her that he together with Vijay had murdered Riyazuddin by strangulation and that they were not able to dispose of the dead body. She testified that Chander Shekhar also informed her that he did not like Riyazuddin talking to her. She further testified that Chander Shekhar threatened her not to disclose this fact to anybody or to the police.

46. It can be perhaps surmised that the Appellant Chander Shekhar was fond of Girja Devi; he (Appellant Chander Shekhar) did not like Riyazuddin talking to her. This tenuous and vague assumption, cannot lead the court to assume a motive for Riyazuddin's murder. Now, another question arises as to why the Appellant would not confide in Girja Devi about his feelings. Moreover, if Chander Shekhar had such a liking for Girja Devi, that prompted him to commit Riyazuddin's murder for talking to her it defies logic, as to why would he then extend a threat to Girja Devi.

47. The Investigating Agency was in possession of Girja Devi's mobile number and, therefore, as stated earlier could have collected the call details to verify if any call was made by Chander Shekhar to her on 06.09.2005 as alleged by it. The failure to

obtain the call details is a very serious lacuna as PW-1 herself was a suspect as has been noticed by us earlier.

48. Now, turning to the extra judicial confession allegedly made to PW-8 Banwari Lal, we may say that the same is also totally unreliable and unbelievable. PW-8 deposed that Appellant Chander Shekhar called him up as he was in need of his (PW-8's) mobile phone. PW-8 claims to have given his mobile phone to the Appellants on humanitarian grounds. At the same time, the witness has not deposed as to why his (PW-8) mobile phone was needed by the Appellants.

49. As per PW-8 after he (PW-8) handed over his mobile phone to the Appellants, they were talking to each other about some quarrel at Madanpur Khadar and that they were to take out the dead body.

50. According to the prosecution version, the Appellants committed Riyazuddin's murder on the night of 01.09.2005. If that was the case, they would have planned to take out the dead body immediately. It is also not understandable as to why the two Appellants would be talking to each other within PW-8's hearing about taking out the dead body of a person whose murder was committed by them. PW-8 deposed that on his enquiry it was revealed by the Appellants that "Stithi Gambhir Ho Gayi Thi Isliye Hamein Hadd Se Gujarna Pada". The witness was allowed to be cross examined by the learned APP and admitted that apart from the other conversation the Appellants had uttered the words to dispose of the dead body "Thikane Lagana" and "Unhone Ek Kantga Sada Ke Liya Raste Se Hata Diya." In cross-examination on behalf of the Appellants, PW-8 admitted to having stated to the police the words "Stithi Gambhir Ho Gayi Thi Isliye Hamein Hadd Se Gujarna Pada". However, this was found to be improvement and the witness was confronted with his statement Ex.PW-8/A-1. We are not inclined to rely on the confession alleged to have been made to PW-8 by the Appellants as there was neither any reason to seek PW-8's mobile phone nor there was any reason to talk about any dead body to him. Moreover, as stated earlier, the call details of the mobile phone on which PW-8 received Appellants' call on 03.09.2005 and the mobile phone which was handed over by him to the Appellants have not been collected by the prosecution which raises doubt about the credibility of the PW-8's testimony. Also, after the alleged confession, PW-8 merrily went for work and does not bother to inform the police; then where was the necessity for him to later on disclose the same to the police.

51. For basing a conviction on extra judicial confession, it must be established that the confession was true and made voluntarily in a fit statement of mind. The words of the witness must be clear, unambiguous and clearly convey that the accused was the perpetrator of the crime. The extra judicial confession can be accepted in case it passes the test of credibility, which is not the case here. (State of Rajasthan Vs. Raja Ram, and Kulvinder Singh and Another Vs. State of Haryana,

52. This circumstance was not specifically put to the Appellants in their examination u/s 313 Code of Criminal Procedure Otherwise also it is settled legal preposition that a person can also abscond on account of fear of arrest and harassment by the police. This circumstance can be taken only as an additional circumstance where the other circumstances established are sufficient to bring home the guilt of the accused.

53. In the case of Kundula Bala Subrahmanyam and Another Vs. State of Andhra Pradesh, it was held that "absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused because it is not unknown that even innocent persons may run away for fear of being

falsely involved in a criminal case and arrested by the police, but coupled with the other circumstances the absconding of the accused assumes importance and significance".

54. Thus, the circumstance of the Appellant Chander Shekhar not returning to the rented room by itself is insufficient to draw an inference that the Appellants or for that matter Appellant Chander Shekhar had committed the murder of deceased Riyazuddin.

55. In view of the foregoing discussion, we are of the view that the Trial Court fell into error in concluding that the incriminating circumstances were proved against the Appellants. In our opinion, there is only a strong suspicion against the Appellants. But, suspicion, however, strong cannot take the place of proof. The judgment and order of the Trial Court, therefore, cannot be sustained. The same are accordingly set aside. The Appellants are in custody, they are hereby ordered to be set at liberty.

56. Before parting with the judgment, we would like to comment about the way the trial was conducted by the learned Additional Sessions Judge in this case. Question No. 4 put to the Appellant Chander Shekhar is extracted hereunder:

Q.4 It is in evidence against you that you used to love PW-1 Girja Devi and, therefore, you did not like Riazuddin talking to her who was also after her. What do you have to say?

57. The fact that the Appellant Chander Shekhar used to love Girja Devi was neither the prosecution case nor was any evidence led in this regard. Not a word was stated either by PW-1 Girja Devi or any other witness that Appellant Chander Shekhar used to love her. This question was thus put to the accused without any evidence on record. It is expected of the Senior Courts of the level of Additional Sessions Judges who normally try capital offences, to carefully scrutinize the prosecution evidence so that only the incriminating evidence which is produced by the prosecution is put to the accused to seek their explanation.

58. Similarly, Section 25 of the Evidence Act places a bar to the admissibility of any confessional statement made by an accused to a police officer. Section 26 goes further and bars a confessional statement made to any person other than a Magistrate if the accused is in police custody. Section 27 is in the form of a proviso to Section 25 and 26 and provides for admission of so much part of the information given by an accused, whether it amounts to a confession or not, as it relates distinctly to the facts thereby discovered. Thus, there is partial lifting of ban against confessions and statements made to the police, if a fact is actually discovered in consequence of an information given by an accused limited to the discovery. In Para 34 (Page 33) of the impugned judgment the disclosure statement made by the Appellant Chander Shekhar is dealt with as under:

.... Accused Chander Shekhar has not replied the above question in negative. By answering this question as "I do not know", it seems that accused Chander

Shekhar used to love PW1 Girja and he did not like Riyazuddin talking to her. In his disclosure statement Ex.PW-4/D accused Chander Shekhar has stated that Riyazuddin started coming closer to Girja and he did not like this because he was in love with her. The disclosure statement is admissible in evidence since recoveries were effected on the basis of it. So, in view of the above evidence and discussions, I am of the view that the prosecution has established the motive to kill Riyazuddin in this case.

59. Thus, the learned ASJ seems to be under the impression that if any recovery is effected on the basis of any disclosure statement /confessional statement the whole of the disclosure statement/confessional statement becomes admissible in evidence. This is against the elementary principles of reception of evidence.

60. A copy of paragraphs 57 to 60 of this judgment may be circulated amongst the officers of Delhi Higher Judicial Services and Delhi Judicial Services to apprise them judicial officers of the fundamental principles of putting incriminating evidence to an accused u/s 313 of the Code of Criminal Procedure and the extent of the admissibility of the disclosure statement/confessional statement as provided u/s 27 of the Evidence Act.

61. In view of the above, this application has become in fructuous and the same is accordingly dismissed.

62. The appeal is allowed in the above terms.