
(1998) 03 DEL CK 0088

Delhi High Court

Case No: Criminal Appeal No.116 of 1994

Dinesh Kumar

APPELLANT

Vs

State

RESPONDENT

Date of Decision: March 20, 1998

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 100(4)
- Evidence Act, 1872 - Section 27
- Penal Code, 1860 (IPC) - Section 302

Citation: (1998) CriLJ 4546 : (1998) 45 DRJ 73 : (1998) 1 ILR Delhi 309

Hon'ble Judges: N.G. Nandi, J; Devinder Gupta, J

Bench: Division Bench

Advocate: Mr. Sandeep Sethi, for the Appellant; Mr. Pawan Behl, for the Respondent

Judgement

N.G. Nandi, J.

This appeal u/s 374 of the Code of Criminal Procedure (hereinafter referred to as the Code) is directed against the conviction recorded and sentence imposed for the offence u/s 302 IPC by the learned Additional Sessions Judge, New Delhi in FIR No.253/89 Police Station Okhla Industrial Area-II whereby the appellant convict Dinesh Kumar has been sentenced to suffer imprisonment for life for committing the murder of his minor son Sanket in the incident which took place between 6 PM of 1.12.1989 and 10 AM of 2.12.1989.

2. The prosecution case, as revealed from the record, is that the appellant/convict Dinesh Kumar lived with his wife Saroj Bala and two sons Sanket (since deceased) and Ankit at House No.581, Gali No.6, Gobind Puri, New Delhi; that Saroj Bala on 10.5.1986 married with Dinesh mar; that two sons Sanket @ Ginny on 16.3.1987; and Ankit on 12.10.1988 were born from the said wedlock; that since some time prior to 1.12.1989, Saroj Bala and Dinesh Kumar came to reside in the premises in Gobind Puri area belonging to Ramdas, the father of Saroj Bala; that thereafter Dinesh

Kumar started saying that Sanket, the elder son is an illegitimate child born to Saroj Bala and that he is not the father of Sanket alleging illicit relations by Saroj Bala with her brother-in-law Rameshwar Dayal qua the birth of Sanket which led to the disturbance in the domestic life leading to maltreatment of Saroj Bala by Dinesh Kumar; that Saroj Bala had employed herself some where and was a working woman; that Dinesh Kumar did not have any service or avocation; that on 1.12.1989, Dinesh Kumar told Saroj Bala to take leave from the office whereupon Saroj Bala remained at home; that at about 6 P.M., Dinesh Kumar told her to go in the kitchen and prepare the meals and also told that he would go for a stroll taking Sanket with him; that when Dinesh Kumar and Sanket did not return for some time, Saroj Bala came out in the street and saw Dinesh Kumar coming all alone; that on being asked as to where is Sanket, Dinesh Kumar turned about and went away saying that he would come back after searching him; that for the whole night between 1.12.1989 and 2.12.1989, Dinesh Kumar and Sanket did not return; that the child was searched for the whole night; that at about 10.20 A.M. on 2.12.1989, an information was received at P.S. Okhla Industrial Area-II from the PCR that the dead body of a five years old boy was lying near Gobind Puri Check Post tank whose neck was cut off: that the police reached the place of occurrence and recovered the dead body of the child; that around 1.30/2.00 P.M, the dead body with injury on the neck was identified to be that of child Sanket; that formal FIR was registered for the offence u/s 302 IPC and thereafter the usual investigation started; that Dinesh Kumar was arrested on 4.12.1989; that on completion of the investigation, charge-sheet was filed against Dinesh Kumar and charge for the offence u/s 302 IPC came to be framed; that the prosecution, in order to bring home the guilt to the accused Dinesh Kumar, adduced oral as well as documentary evidence; that the further statement of the accused Dinesh Kumar was recorded u/s 313 Cr.P.C. with regard to the circumstance emerging from the prosecution evidence incriminating against him; that the say of the accused is that on the date of the incident he did not live with his wife and children; that the defense is that of total denial; that on 4.12.1989 when he came to see his children, he was taken to the Police Station by his father-in-law and other persons and was falsely implicated in the murder of Sanket. The Additional Sessions Judge, appreciating the evidence on record, found Dinesh Kumar guilty for the murder of his son Sanket and sentenced him to suffer imprisonment for life which is assailed in the present appeal by the appellant/convict.

3. It is not in dispute that Saroj Bala is the wife of appellant/convict Dinesh Kumar. It is also not in dispute that two sons were born to Saroj Bala. According to the prosecution, appellant suspected the fidelity of his wife Saroj Bala alleging that he is not the father of the first child Sanket and that he is an illegitimate offspring born to Saroj Bala through her extra marital relations with her brother-in-law (sister's husband) Rameshwar Dayal.

4. The evidence of PW.2 Dr. B.N. Bhardwaj, Assistant Professor, AIIMS, New Delhi suggests that on 3.12.1989, he conducted the post-mortem on the dead body of

Sanket @ Ginny, son of Dinesh Kumar aged about 3 years, r/o House No.581, Gali No.6, Gobind Puri, New Delhi; that on examination of the dead body, external injuries were noticed and the same were noted in the post mortem report Ex.PW.2/A; that there was incised wound on front of neck placed transversely 2 cm. above super astranal notch and 5 cm. below chin; that the cause of death was hemorrhagic shock and asphyxia due to the above mentioned injury; that the injury could be caused by sharp edged weapon and it is sufficient to cause death; that on 23.2.1990, the opinion of the witness was sought on the alleged weapon of offence; that the sealed parcel was brought before the witness for the purpose, which was opened and a knife was found; that the witness prepared the sketch of the knife; that after examining the knife, the witness was of the opinion that the injury No.1 mentioned in the post-mortem report Ex.PW.2/A could be caused by the weapon Ex.P-1; that this knife was again sealed and handed over to the police along with the sample seal; that the witness was shown Ex.P.1, the weapon of offence during his evidence. It has been deposed by the witness that it is the same knife which was shown to him on which he gave his opinion, as above. The inquest panchnama Ex.PW.20/B suggests the injuries on the dead body of victim Sanket. Appreciating the evidence of PW.2, 8 and 9 and post-mortem notes, Ex.PW.2/A and the inquest panchnama Ex.PW.20/B, it is amply suggested that in the occurrence of 1.12.1989_2.12.1989 between 6 P.M. to 10.00 A.M, child Sanket died a homicidal death.

5. It is not much disputed that victim Sanket was found lying dead at Gobind Puri Check Post near a water tank close to a tent with slit neck. On 2.12.1989 at about 1.30/2 P.M, P.Ws.8 and 9 identified the dead body of the child Sanket at the aforesaid place.

6. There is no direct evidence implicating the accused with the commission of offence. The evidence relied on by the prosecution is in the nature of circumstances inasmuch as according to the prosecution, on 1.12.1989 at about 6 P.M, the appellant took Sanket with him on the pretext of stroll and after some time he returned home alone unaccompanied by Sanket. The prosecution also relies on the discovery u/s 27 of the Indian Evidence Act inasmuch as the accused is said to have volunteered to produce the weapon of offence which he got recovered from behind boxes in an open almirah in his house which was allegedly concealed/put by the accused. The prosecution also relies on, if at all it can be called to be a circumstance incriminating against the appellant, the disappearance abscontion by the appellant till the early hours of 4.12.1989.

7. This brings us to the complicity, if any, of the appellant/convict in the murder of child Sanket.

8. PW.3 Saroj Bala, wife of appellant Dinesh Kumar stated in her evidence that after marriage she started living with accused Dinesh Kumar at Faridabad and lived there with him till 1989; that she gave birth to son Sanket @ Ginny on 16.3.1987; that

second son Ankit was born to her on 12.10.1989; that on the eve of Rakshabandhan in 1989, her husband left her at her parents' house at Sarojini Nagar; that after two days she went to her inlaws; that quarrels used to take place between the two and physical beatings given to her by her husband saying that he had determined to finish her; that the beatings continued and on asking as to why he was beating her, the accused used to say that he has suspicion about her fidelity as she was having illicit relations with her brother-in-law Rameshwar Dayal and he always insisted that she should tell him the truth as to who was the real father of her first child Sanket; that at times he even used to strangle the child by saying that this child was the root cause of their strained relations as he had not fathered him; that the accused started saying so from June/July 1989; that the witness was fed up of the behavior of the accused and came to her parents and started living there; that however, in the month of October 1989, the accused himself shifted to Gobind Puri and took the witness from Sarojini Nagar and she started living with her children along with her husband at Gobind Puri; that the accused was unemployed and not doing any work; that the witness joined some private job at Naraina for livelihood on 24.11.1989; that on 1.12.1989, the accused asked her to take leave from the office which she accordingly took and remained at home; that at about 6 P.M, the witness brought some vegetable from the market and the accused told her to go in the kitchen and prepare the meals and also told that he would take Sanket with him for stroll; that when he did not return for about 45 minutes or so, the witness came out in the street with her younger child and saw the accused coming all alone in the street and she asked him as to where was Sanket, on that accused turned about and went away by saying that he would come back after searching him; that the witness thought that Sanket might have been lost or disappeared; that the witness and other neighbours searched for him and the child was not traceable; that her uncle and maternal uncle went to lodge the report with the police post; that throughout the night, search was made for Sanket; that the accused also did not return home during the whole night; that on the next day at about 10 A.M, the police came to their house and said that they had recovered the dead body of one boy and asked to identify the same; that her brother, uncle and brother-in-law went with the police and identified the dead body to be that of her son Sanket; that the accused did not return home on 2nd December and 3rd December 1989 and on 4th December 1989, he came at about 3.30 O' clock in the morning; that at that time all the inmates of the house were sleeping; that the accused came inside the room, the neighbours collected there after a short time, the police came and arrested the accused; that on 1.12.1989, the accused took the child sanket when he was alive and thereafter it was the dead body of Sanket which was recovered.

In the cross-examination, it has been stated that the police recorded her statement at about 11.30 A.M, that the first report was lodged regarding the missing of her child which was lodged by the uncle and maternal uncle of the witness; that in Gobind Puri she used to reside in her father's quarter since this room was lying

vacant; that her father used to reside at Sarojini Nagar; that she had left accused at Faridabad because the accused was not earning and doing anything; that she started residing with her parents and brothers; that accused brought the household goods from Faridabad on 15.10.1989 and also took the witness to Gobind Puri house on the same day; that there were three tenants also in the house at Gobind Puri; that one tenant was living adjacent to her and the other was living on the first floor; that at about 6.30 P.M. on 1.12.1989, when the accused took Sanket with him, one of the lady tenant was present in her house on the first floor; that she had sent one of her neighbours Sukhbir Singh to her father at Sarojini Nagar to inform that her child was missing; that she did not tell police that her uncle and maternal uncle had lodged a report with the police about the missing of the child; that when police came to her house, her uncle and maternal uncle were already present; that many neighbours had collected when the police arrived; that it is denied that the accused was not living in Gobind Puri on the date of the incident; that it is also denied that the accused was in search of his employment or that he used to stay out; that it is denied that the accused has been wrongly implicated as she had been fed up because of the unemployment of the accused and wanted to get rid of him.

9. Thus, it would be seen from the evidence of PW.3 that after the marriage she was residing with accused at Faridabad; that two sons Sanket and Ankit were born to her; that on the eve of Rakshabandhan of 1989, she was left at her parents' house at Sarojini Nagar by the accused; that after some days, she went to her in-laws at Faridabad. It is further suggested from the evidence that on account of the ill-health of her husband, she returned to her matrimonial home and joined her husband at Faridabad shortly after she came to her parents' place on the eve of Rakshabandhan. The reason assigned for leaving accused at Faridabad and residing with her parents and brothers at Sarojini Nagar by the witness is because the accused was not earning and doing anything.

It is sought to be suggested from the evidence of PW.3 that after she returned to Faridabad, the accused used to maltreat her and give even physical beatings and he also used to tell the witness that he was determined to finish her; that the maltreatment and beatings continued as the accused suspected the fidelity of the witness and alleged that she was having illicit relations with her brother-in-law and insisted her to disclose the name of the real father of Sanket and that the child Sanket was stated to be the real cause of the strained relations as the accused used to say that he has not fathered the child Sanket. It may be appreciated that according to PW.3, the allegations about the unchastity on her part and the suspicion about the paternity of the child Sanket started from June/July 1989. It may be appreciated that the ill-treatment and the physical beatings by the accused to the witness were because of the suspected extra-marital relations which the witness was stated to be having with her brother-in-law. The witness also states that the witness was fed up because of the behavior of the accused, so she came to her parents and started living there. It is also suggested that in the month of October

1989, the accused himself shifted to Gobind Puri and he took her from Sarojini Nagar and the witness started living with her children along with her husband at Gobind Puri and as the accused was unemployed and was not doing any work, she joined some private job at Naraina for livelihood on 24.11.1989.

10. The above evidence suggests that after few days of Rakshabandhan in the year 1989, the witness returned to the matrimonial home and joined the accused at Faridabad. According to the witness the accused started alleging infidelity on her part and child Sanket having not been fathered by him and insisting to disclose the name of the real father of Sanket and the consequent ill-treatment and cruelty to the witness started somewhere in June/July 1989. Being fed up with the behavior of the accused, the witness comes to her parents and starts living there. The accused came in the month of October 1989 to Gobind Puri and she started living with her children along with her husband at Gobind Puri and as the accused was unemployed and not doing any work, she took some private job at Naraina for livelihood on 24.11.1989. If the allegations of unchastity were leveled against the witness and of Sanket being an illegitimate child, paternity having been doubted/disowned by the accused in June/July 1989, would the witness join the accused at Faridabad after few days of akshabandhan in 1989 which could be somewhere in August 1989. The accused shifts to Gobind Puri in October 1989 and the witness starts living with the accused and the children at Gobind Puri and as the accused was unemployed and not doing any work, the witness took up some private service at Naraina for livelihood on 24.11.199. If the witness was so fed up with the accused because of the allegations of unchastity on her part and Sanket suspected to be an legitimate child not born to the witness through the accused, then whether witness would permit the accused to join her at Gobind Puri in October 1989 and start living with her children and the accused at Gobind Puri. It is pertinent to note that as the accused was unemployed and not doing any work, the witness takes up private service at Naraina for livelihood on 24.11.1989, about a week before the incident. When the relations between husband and wife are strained on account of the suspicion about the fidelity of the wife, whether such a wife would ever take up the private job for the livelihood of the family particularly of such a husband and if the husband suspected the fidelity of the wife, would such a husband permit the wife to take up private job. On the other hand, whether the wife would ever take up a private job when her fidelity suspected by her husband, to add to her trouble and misery especially when the husband is unemployed, if we accept the say of PW.3, she was staying with her parents having been fed up with the behavior of the husband, as aforesaid. Now taking the reason of alleged infidelity deposed by the witness for coming to her parents' place and start living with them, why should she permit resumption of cohabitation by the accused in October 1989 and stay under the same roof with the husband in Gobind Puri and also support the accused financially by taking up a private job. She could have very well continued staying with her parents and she could have taken up some private job for herself and her

children rather than oblige the husband who has leveled unchastity against her disclaiming the paternity of child Sanket. It may be appreciated that the evidence of PW.3 with regard to the accused being unemployed and not doing anything being the reason for leaving the accused at Faridabad and residing with her parents and brothers supports the version of the accused.

11. It has been the say of the accused in his statement u/s 313 Cr.P.C. that he was not residing with PW.3 and the children at Gobind Puri on the date of the incident. It has come in evidence of PW.3 that she was staying on the ground floor whereas there were other tenants in the same property and that neighbours also searched for Sanket in the evening of 1.12.1989 and that the information about the missing of the child was sent to her father Ramdas PW.4 through one Sukhbir Singh residing in her neighbourhood. None from the neighborhood including the tenant residing in the same property wherein PW.3 was residing and also Sukhbir Singh examined by the prosecution to suggest that on the date of the incident, the accused was living with PW.3 and the children in Gobind Puri house belonging to PW.4. If a person with his family is staying at a particular place, atleast his/her neighbours would know that he or she has been staying, especially the occupants of the other portion of the same property. Sukhbir Singh has also not been examined to suggest what was the exact message sent through him by PW.3 to her father/ brother about the missing of the child.

12. According to PW.3, in the evening of 1.12.1989 when the child did not return with the accused after evening stroll, search was made by her and the neighbours for the child and when the child was not traceable, her uncle and maternal uncle went to lodge the report with the police post. It is pertinent to note that no missing report stated to have been lodged with the police post by the uncle and maternal uncle of the witness comes forth on the record. The cross-examination of PW.3 suggests that the defense counsel asked for the supply of the copy of the missing report. It is also suggested from the record that the Additional Public prosecutor in charge of the conduct of the trial stated that there is no such report on the file. If the missing report was filed, then that would certainly contain the fact about child Sanket having left in the company of the accused at about 6 P.M. The evidence clearly suggests that the search by PW.3 as well as neighbours were only for child Sanket. It may be appreciated that if the accused, on being asked by PW.3 as to where was Sanket, is said to have turned about and left saying that he would come back after searching the child and thereafter the accused was not seen throughout the night and till the early hours of 4.12.1989, and if the father and the son both were missing, then the conduct of a person interested in finding out the missing persons would be to make search for both. There is no iota of evidence to suggest that search was also made for the accused. Now if we accept the statement made by the Additional Public Prosecutor, in charge of the trial that no such missing report is on file, then it would mean that no missing report was filed at all and that PW.3 has been falsely deposing on that score. Taking the non-filing of the missing report to

be true, then it would speak volumes against PW.3 inasmuch as though her son was taken by accused under the pretext of stroll at about 6 P.M. in the evening and after some time accused returned alone unaccompanied by her son Sanket who was barely three years old on the date of the incident and despite the search by her and her neighbours, neither the child nor the accused could be traced, then why the missing report was not filed or got filed by PW.3 who is none else but the mother of the child missing accepting for the present that she was not interested in her husband accused Dinesh Kumar, taking her say about imputation of unchastity and the consequent ill-treatment/cruelty meted out to her to be the gospel truth.

13. PW.9 Suresh S/o Ramdas, who is the real brother of PW.3, states in his evidence that accused doubted the fidelity of her sister (PW.3) and used to allege that child Sanket was not born through him. Due to this allegation, there used to be quarrels between his sister and the accused; that on 2.12.1989, a message was received that child Sanket was not traceable. The witness reached Gobind Puri along with his brother-in-law Rameshwar Dayal at about 10.30 AM. In the cross-examination, he has stated that the person who had informed about the disappearance of the child was named Sukhbir Singh who lived in Gobind Puri; that the witness along with others searched for child near about the house and in the lanes.

14. PW.8 Rameshwar Dayal, S/o Hira Singh stated in his evidence that Saroj Bala (PW.3) is his sister-in-law who was married with the accused; that on 2.12.1989 at about 9.30 AM, his brother-in-law Suresh Kumar came to his residence and informed that the elder son Sanket of Saroj Bala was missing from the previous day. The witness along with Suresh Kumar reached at the residence of Saroj Bala and the made the search of Sanket.

15. Thus, the evidence of PW.9 suggests that the information about the DISAPPEARANCE of child Sanket was given by one Sukhbir Singh who lived in Gobind Puri. The identify of the informer of the message is thus fixed. As pointed out earlier, Sukhbir Singh is not examined as a witness which would have thrown light as to what was the information, available with him, sent by PW.3 to be conveyed to PW.9. It is pertinent to note that on receipt of the information of disappearance of child Sanket through Sukhbir Singh, PW.9 goes to the house of his brother-in-law Rameshwar Dayal, takes Rameshwar Dayal with him to the house of PW.3 at about 10.30 AM. PW.8, Rameshwar Dayal also corroborates PW.9 inasmuch as it is stated by him that on 2.12.1989 at about 9.30 AM, his brother-in-law Suresh Kumar (PW.9) came to his residence and informed that the elder son Sanket of Saroj Bala was missing since previous evening and along with Suresh Kumar the witness reached at the residence of Saroj Bala and the search for Sanket was made. It is suggested from the evidence of PW.8 that PW.9 told him that Sanket was missing since previous evening which fact is not deposed by PW.9 in his evidence. It may be appreciated that the information given to PW.9 by Sukhbir Singh must be relating only to the disappearance/missing of child Sanket and nothing more than that,

otherwise PW.9 would state Sukhbir Singh having named the accused if Sanket was taken by him and then missing, because the first question that would occur to anybody in such a case would be how three years old child happened to disappear. We are at a loss to know, in the absence of Sukhbir Singh examined as a witness, as to what was told to him by Saroj Bala or some other person from Gobind Puri to be conveyed to PW.9. It may further be appreciated that according to PW.3, the accused doubted her fidelity and suspected her extra-marital relations with her brother-in-law Rameshwar Dayal (PW.8). PW.9, in his evidence, only says that accused doubted fidelity of his sister and used to allege that child Sanket was not born from him and due to this allegation, there used to be quarrel between his sister and the accused. PW.9 does not name the person with whom PW.3 was alleged to have had illicit relations which led to the birth of child Sanket by PW.3, as stated to have been alleged by the accused.

Can it be gulped even for a moment that PW.9, on receipt of the information about the missing of the child, would first go to his brother-in-law PW.8, inform him about the missing of the child Sanket since previous evening and take him to Gobind Puri at the house of PW.3 if the brother-in law PW.8 was suspected to be a person in illicit relations with PW.3, as deposed by her.

16. As pointed out above, according to PW.3, accused took child Sanket with him under the pretext of stroll at about 6 PM on 1.12.1989 and after about 45 minutes was seen by PW.3 returning alone unaccompanied by child Sanket. This is the circumstance relied on by the prosecution for the purpose of establishing the complicity of the appellant convict in the crime which culminated into the homicidal death of child Sanket, whose dead body was found on the next day morning around 10.00-10.20 AM with slit neck.

It may be appreciated that according to PW.3, accused took child Sanket with him and returned alone after about 45 minutes. The question that would, Therefore, arise is even accepting the say of PW.3 that accused took child Sanket with him at about 6 PM on 1.12.1989 and returned alone unaccompanied by child Sanket, could by itself be regarded sufficient to prove the complicity of the accused in the crime ?

17. In the case of [Eradu and Others Vs. State of Hyderabad](#), in a case u/s 300 of IPC, appreciating the evidence of seen together, the Supreme Court held that it is a fundamental principle of criminal jurisprudence that circumstantial evidence should point inevitably to the conclusion that it was the accused and the accused only who were the perpetrators of the offence and such evidence should be incompatible with the innocence of the accused. Whether the accused enticed away the deceased on the evening of the day of the murder and the deceased was found hanging in the back courtyard of his house, these circumstances by themselves are not enough without anything more, to connect the accused with the crime. In the instant case, the accused is said to have taken Sanket with him on the evening of 1.12.1989 and thereafter only the dead body of Sanket was found in the morning of the next day.

18. In the case of Indradeo Mishra, etc. Vs. State of Madhya Pradesh, JT 1996 (11) S C 661, while dealing with the case wherein Laxamin Bai had expressed her desire to stay with Indradeo Mishra (A-2) regardless of whether he would keep or kill her, accordingly, she then went to Indradeo Mishra and thereafter both of them proceeded towards the jungle side enroute to the Labour Colony; that Anang Mishra (A-1) and Chandrika (A-3) were also then present at bus stand. Anang Mishra (A-1) then asked Malang Singh (PW-5) as to what happened in the court, after coming to know that she was released on furnishing a personal bond, he and Chandrika proceeded in the same direction in which Indradeo Mishra (A-1) and Laxamin Bai (victim) had gone; that it was alleged by the prosecution that Laxamin Bai was not seen alive thereafter. The Supreme Court, in light of the above facts, held that "it would not be safe to accept the evidence standard and to hold that deceased was last seen with A-2. The evidence of blood stains also does not prove connection of A-1 with the crime. No alternative but to give benefit of doubt to the appellants and to acquit them as prosecution did not care to carry out proper investigation of murder, cases of circumstantial evidence handled without care."

19. Relying on the decision in the case of [Sharad Birdhichand Sarda Vs. State of Maharashtra](#), it has been submitted by Mr. Sandeep Sethi, learned Advocate amicus curiae for the appellant that the conditions laid down for the proof of the chain of circumstances in the said decision have not been established by the prosecution and, Therefore, the appellant cannot be held to be guilty of the offence alleged.

20. According to PW.3, the accused returned alone unaccompanied by child Sanket whereupon she asked him as to where the child Sanket was, the accused turned about and went away by saying that he would come back after searching him; that thereafter the witness and other neighbours searched for him but the child was not traceable; that throughout the night, search was made for Sanket; that the accused also did not return home during the whole night and till the early hours of 4.12.1989; that in the meantime, at about 10.00 AM on 2.12.1989, the dead body of child Sanket was found by the side of tank near Gobind Puri check-post with slit neck. It is sought to be suggested thereby that the accused absconded/disappeared soon after the incident and returned only in the early hours of 4.12.1989 i.e. after three nights and two days. As pointed out above, the say of the appellant in his further statement is that he was not staying with his family at Gobind Puri during the period when his son was murdered; that a false report was lodged through his wife at the police station and when he turned up on 4.12.1989, he inquired about the whereabouts of his child and he was told by his father-in-law that report has been lodged with the police and we went to P.S. to find out the exact position whether anybody has been arrested in the case or not; that he accompanied them to the police station where he was detained and the case was planted on him. Thus, it would be seen that it is not disputed even by the accused that he came to Gobind Puri house in the morning of 4.12.1989 but according to him, he was not staying

there but he came to inquire about the children on 4.12.1989. As pointed out earlier, none from amongst the other occupants of the said house or immediate neighborhood has been examined with regard to the stay of the accused with PW.3 and children in Gobind Puri house. There is also no evidence at the same time that anybody else from the neighborhood saw the accused taking child Sanket with him in the evening of 1.12.1989. There is no evidence to suggest that anybody saw accused alone coming towards his house in the evening of 1.12.1989. Even assuming what PW.3 says to be true with regard to the absconsion of the accused from the evening of 1.12.1989, that by itself cannot be the circumstance which can militate against the accused.

21. It need hardly be said that absconding by itself does not necessarily lead to a definite conclusion of guilty mind. In the case of *Matru @ Girish Chandra Vs. State of U.P.* reported in AIR 1971 S C 1059, the Supreme Court has held that the act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend upon the circumstances of each case. Generally, the courts consider it as a very small item in the evidence for sustaining conviction. It cannot certainly be held as a determining link in incomplete chain of circumstantial evidence consistent only with the hypothesis of the guilt of the accused.

22. PW.3 stated in her evidence that the accused did not come back home on 2nd and 3rd December 1989 and on 4th December 1989, he came at about 3.30 O" clock in the morning; that they all were sleeping in the room; that the accused came inside the room, the neighbours collected there after some time, the police came and arrested the accused. Thus, according to PW.3, the accused returned home at about 3.30 AM on 4.12.1989 when all the inmates in the house were sleeping in the room, came inside the room, the neighbours collected there after a short while and the police came and arrested the accused, meaning thereby that the accused was arrested from the dwelling house of PW.3 where other inmates of the house were also sleeping in the room when the accused came and the neighbours also collected within a short time. It is pertinent to note that no neighbour has been examined to show that the accused came to the house of PW.3 in the early hours of 4.12.1989 and that police came and arrested him from the house.

23. PW.6 S.I.Jai Narain stated in his evidence that accused Dinesh was arrested in his presence and his personal search was conducted vide Ex.PW.6/A; that the accused was interrogated who disclosed vide disclosure statement Ex.PW.6/B that he could get the churi recovered which was concealed in the Almirah of his house. In the cross-examination, it has been deposed that he cannot say at what time accused was brought to P.S; that the accused was arrested at 9 AM near Kaya Maya Mandir, again said that he does not know from where the accused was arrested; that the witnesses only saw the accused at the police station at about 8.45 AM. The evidence of this witness suggests that the accused was arrested at 9 AM near Kaya Maya

Mandir. He also says that he does not know wherefrom the accused was arrested. The evidence of this witness cannot be said to be reliable for the purpose of saying as to where and when the accused was arrested.

24. According to the accused, on 4.12.1989, he had gone to Gobind Puri house and inquired about the child and was told by his father-in-law that report had been lodged with the police and thereafter all went to the police station to find out the exact position and the accused was then arrested at the police station. PW.20 I.O. has stated in his evidence that in the early hours of 4.12.1989, accused Dinesh Kumar was apprehended from his house by ASI Waryam Singh. It is pertinent to note that it does not appear that in course of the investigation, the statement of ASI Waryam Singh was recorded suggesting the arrest of accused Dinesh Kumar by him in the early hours of 4.12.1989 nor ASI Waryam Singh has been examined as a witness for the purpose. If ASI Waryam Singh had arrested the accused in the early hours of 4.12.1989 from his house, we fail to understand why the statement of ASI Waryam Singh should not have been recorded and also examine him as a witness to substantiate the arrest of the accused, as sought to be contended by the prosecution.

25. According to the prosecution, the accused made a disclosure statement Ex.PW.6/B and expressed his willingness to produce the knife which was stated to have been concealed in the almirah of the house and that the accused vide recovery memo Ex.PW.4/B got recovered the weapon of offence knife Ex.P-1. PW.6, in his cross-examination, has stated that the disclosure statement of the accused was recorded near Kaya Maya Mandir, M.B. Road which was a public place and many persons were coming and going there; that no public witness was with the I.O. when his statement was recorded. The I.O. did not request in the presence of the witnesses any passerby to become a witness at the time of recording of disclosure statement. It is pertinent to note that PW.6 on 4.12.1989 was part and parcel of and posted at P.S. Okhla Industrial Area-II and he joined the investigation which was being conducted by the SHO. The evidence of this witness suggests that no public witness was procured or any attempt made for getting any public witness for the disclosure statement Ex.PW.6/B which is stated to have been recorded near Kaya Maya Mandir. Looking to the facts, as above, no weight can be attached to this witness as regards the making of personal search vide Ex.PW.6/A and the disclosure statement vide Ex.PW.6/B.

26. The evidence of PW.10 S.I.Rajbir Singh of Crime Branch, Dev Nagar, Delhi suggests that disclosure statement Ex.PW.6/B was made near Kaya Maya Mandir which bears his signature and he joined the investigation with Inspector Bhag Singh on 4.12.1989; that pointing out memo Ex.PW.6/C also bears the signature of this witness. PW.19 Om Pal Singh has stated in his examination-in-chief that on 4.12.1989, he saw number of persons outside House No.581-A/6, Gobind Puri, New Delhi; that the accused was also there with the police; that the police got recovered

knife churi from the room of House No.581-A/6, Gobind Puri, New Delhi. The witness has identified Ex.P-1 which was stated to have been recovered from the aforesaid house. In the cross-examination, it has been deposed by the witness that House No.581 -A/6, Gobind Puri is a single storeyed house. It may be recalled here that according to PW.3, he is staying on the ground floor, with one tenant adjacent to her and other tenants occupying the first floor. The witness was taken by the police to a room in the said house from where the churi was recovered. It is admitted that the churi was all along in possession of the police. It is stated that the witness cannot say as to from which spot of the room the churi was taken. According to this witness, House No.581-A/6 is a single storeyed house, which is falsified by PW.3 as pointed out above.

27. It may be appreciated that according to the prosecution, the accused returned to Gobind Puri house in the early hours of 4.12.1989 and that he was absconding since the evening of 1.12.1989. It means that he returned after three nights and two days. According to the prosecution, the accused had washed the knife Ex.P-1 in the Naali and thereafter he concealed it behind the boxes in the open almirah in the house. The evidence of PW.10 suggests that the churi was taken out from behind the boxes lying in the almirah and that the almirah had no door. The question would then arise as to if the accused could do away his son, whose dead body was found with slit neck from a ditch, would he wash the knife in the Naali and would come to his house to conceal the weapon of offence when so many persons were in the house. Would the accused take the risk of returning to his house only for the purpose of concealing the weapon of offence, that too in open almirah ? Could he not have anticipated the presence of PW.3 and her relations in the house which is a one room premises, as disclosed from the evidence on record. As far the evidence of PW.19 is concerned, in view of his cross-examination, as aforesaid, no reliance can be placed on his evidence for the purpose of suggesting the recovery of Ex.P-1 at the instance of the accused as in the cross-examination, it has been stated that the knife Ex.P-1 all throughout remained with the police. Considering the facts as above, in our opinion, evidence of PW.6 and 19 and the disclosure statement Ex.PW.6/B and the pointing out and seizure memo Ex.PW.4/B do not inspire confidence in conclusively holding that the recovery of knife Ex.P-1 is at the instance of the accused and also for the reasons that the disclosure statement Ex.PW.6/B and the pointing out memo Ex.PW.4/B have not been witnessed by any independent public witness, who can be relied upon for the purpose.

28. It need hardly be said that in order to lend assurance that the investigation has been proceeding in fair and honest manner, it would be necessary for the investigating agency to take independent witnesses to the discovery u/s 27 of the Indian Evidence Act and not taking independent witnesses and taking subordinate police person as the witnesses to the disclosure/recovery/discovery would in a given case, render the discovery at least not free from doubt. The object of sub-Section (4) of Section 100 of the Code is to ensure an honest and genuine search and to

prevent trickery by "planting" the things to be "found" in searches.

29. The above state of evidence, especially the evidence of PW.3 does not sound trustworthy in holding that the accused took Sanket with him at about 6.00 P.M. on 1.12.1989 and that he returned alone after about 45 minutes and that he absconded till early hours of 4.12.1989. The evidence on record also does not satisfactorily and conclusively suggest disclosure statement Ex.PW.6/B having been made by the accused and the consequent recovery of knife Ex.P-1 vide Ex.PW.4/B at the instance of the accused. In our opinion, the evidence does not establish the completion of the chain of circumstances so as to point to the guilt of the accused and the accused alone inconsistent with the hypothesis of the innocence of the accused, and the appellant/convict entitled to the benefit of doubt. Appreciating the evidence on record, the learned trial judge cannot be regarded justified in recording the finding of guilt on the basis of the evidence, as discussed above. Under the circumstances, the appellant is required to be given the benefit of doubt and the consequent acquittal.

30. In the result, the appeal is allowed. The conviction recorded in FIR No.253/89 P.S. Okhla Industrial Area-II u/s 302 IPC is set aside. The appellant/convict is given benefit of doubt and acquitted. The appellant be set at liberty forthwith, if not required in any other case.