A LIMBAJI AND OTHERS

v.

STATE OF MAHARASHTRA

DECEMBER 14, 2001

B [R.C. LAHOTI AND P. VENKATARAMA REDDI, JJ.]

Evidence Act, 1872 :

Section 114 with illustration(a)—Presumption—Accused prosecuted for murder and robbery—No direct evidence for commission of offence—Recovery
C *of incriminating articles of deceased at the instance of accused—Trial Court convicting under Section 411 IPC—However, High Court convicting accused for murder and robbery drawing presumption under Section 114—On appeal held : Evidence proved that accused committed theft of articles from person of the deceased after causing bodily injury and accused not merely receivers of*
D *stolen articles—Booty distributed between the accused persons—Shared common intention to commit robbery—Hence presumption can be drawn with regard to robbery though not for murder—Penal Code, 1860, Sections 302 and 394 read with 34 and 411.*

Appellants were prosecuted for offences under Sections 302 and 392
E **read with Section 34 IPC for committing murder of one 'B' at his field and robbing him of his ornaments. According to prosecution, there was no direct evidence regarding the involvement of accused in the murder and robbery of deceased. However, the incriminating articles stolen by accused were recovered consequent to the information received from accused in**
F **custody. Trial Court acquitted the accused persons of the charges under Sections 302 and 392 but convicted them under Section 411 IPC. State as well as accused persons filed appeal. High Court drawing presumption under Section 114(a) of Evidence Act, found the appellants guilty of robbery and murder and accordingly set aside the order of the trial court.**
G **Hence the present appeal by accused.**

The question that arises for consideration is whether there was discovery of incriminating articles in consequence of information received from the accused in custody and whether such discovery warrants a presumption to be drawn under Section 114 and if so, to what extent it has to
H **be drawn.**

Partly allowing the appeals, the Court A

HELD : 1. In the instant case, the circumstances unerringly point to the involvement of the accused in the commission of theft of the articles from the persons of the deceased after causing bodily injury. However, in the peculiar circumstances of the case it would be unsafe to hold the accused guilty of murder assuming that murder and robbery had taken B place as part of the same transaction. Therefore, the conviction of the accused persons under Section 302 read with Section 34 IPC is set aside. However, they are held guilty of the offence punishable under Section 394 read with Section 34 IPC to rigorous imprisonment for a period of five years and fine. [693-D; 694-C] C

2. The case rests on circumstantial evidence of recovery of ornaments worn by the deceased pursuant to the information furnished by the accused to the police. The High Court pressed into service the presumption under Section 114(a) of the Evidence Act in support of its conclusion. It is the correctness of that view that falls for consideration in this appeal. The D discovery of the ornament of the deceased on the basis of the confessional statement under Section 27 of the Evidence Act has been established. The next two questions, viz. whether the accused shall be deemed to be in possession of the articles concealed at various spots and whether such possession could be said to be recent possession have been answered in the E affirmation. In the light of the confessional statement under S.27 and the case-law referred, the accused must be deemed to be in exclusive possession of the articles concealed under the earth though the spots at which they were concealed may be accessible to public. The factual circumstances contemplated by illustraction(a) to Section 114 are fulfilled. [675-F; 682-A; 684-E] F

Trimbak v. *State of M.P.*, AIR (1954) SC 39, referred to.

K. Chinnaswamy Reddy v. *State of Andhra Pradesh*, AIR (1962) SC 1788 and *Pulukuri Kotayya* v. *King Emperor*, AIR (1947) PC 67, relied on.

3.1. In the instant case, the presumption under Section 114 illustration (a) could be safely drawn and the circumstance of recovery of the incriminating articles within a reasonable time after the incident at the places shown by the accused unerringly points to the involvement of the accused. Further, it is reasonable to presume that the accused committed the theft of the articles from the person of the deceased after causing H

A **bodily harm to the deceased and that they are not mere receivers of stolen property. [685-G-686-F]**

3.2. The fact that the ornaments on the person of the deceased came into the hands of the accused soon after the crime and they failed to give any explanation for the circumstances appearing against them justifies the B **presumption that they themselves removed these articles from the person of the deceased after causing bodily injuries. Causing injuries to the deceased in the process of removal of ear-rings is, inextricably inter-linked with the commission of theft which is an ingredient of robbery. Further, the fact that the booty was distributed between the three accused and that** C **they had secreted the robbed articles would clearly reveal that the three accused shared the common intention to commit robbery. Thus by having resort to the presumption under Section 114, an inference can be safely drawn that the appellants committed robbery in furtherance of common intention. However, in the peculiar circumstances of the case, the presumption under Section 114 could not be further stretched to find the appellants** D **guilty of gravest offence of murder assuming that murder and robbery had taken place as a part of the same transaction with the aid of Section 34 IPC. [692-G-H; 693-A-B; D]**

Sanwath Khan **v.** *State of Rajasthan,* **AIR (1956) SC 54 and** *Shivappa* **v.** E *State of Mysore,* **[1970] 1 SCC 487, relied on.**

Union Territory of Goa **v.** *Beaventure D'Souza,* **[1993] Supp. 3 SCC 304;** *Surjit Singh* **v.** *State of Punjab,* **AIR (1994) SC 110;** *Ronny* **v.** *State of Maharashtra,* **[1998] 3 SCC 625;** *Tulsiram Kanu* **v.** *State,* **AIR (1954) SC 1;** *Mukund* **v.** *State of M.P.,* **[1997] 10 SCC 130;** *Sanjay* **v.** *State (NCT of Delhi),* F **[2001] 3 SCC 193;** *Earabhadrappa* **v.** *State of Karnataka,* **AIR (1983) SC 446 and** *State of Maharashtra* **v.** *Suresh,* **[2000] 1 SCC 471, referred to.**

Greer **v.** *US,* **245 USR 559, referred to.**

G *Gulab Chand* **v.** *State of M.P.,* **[1995] 3 SCC 574, held inapplicable.**

The Law of Evidence by Taylor **(on the subject of 'Presumptions'), referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1120- H 1121 of 2000.

From the Judgment and Order dated 24.3.2000 of the Bombay High Court in Crl. A. Nos. 140 and 182 of 1985.

C.G. Solshe and Ms. S.V. Sonawane for the Appellants.

Sushil Karanjkar, S.S. Shinde for S.V. Deshpande for the Respondent.

The Judgment of the Court was delivered by

P. VENKATARAMA REDDI, J. I. The three appellants herein faced trial in the Court of Sessions Judge, Osmanabad, for the offences punishable under Section 302 read with Section 34 and Section 392 read with Section 34 IPC. They were charged of committing murder of one Baburao Nana Lagdive (hereinafter referred to as 'Baburao') at his field and robbing him of golden ear rings and silver 'lingakar' worn by him in the early hours of 30th May, 1984. Both the accused and the deceased were the residents of village Shekapur.

The learned Sessions Judge acquitted the accused of the charges under Sections 302 and 392 but found them guilty under Section 411 IPC and sentenced each of them to rigorous imprisonment for two years. On appeal by the State as well as by the accused, the High Court of Bombay (Aurangabad Bench) having found the accused guilty of offences punishable under Section 302 read with Section 34 and Section 392 read with Section 34, set aside the judgment of the Sessions Judge. The High Court sentenced them to life imprisonment for the offence of murder and five years rigorous imprisonment for the offence of robbery with the direction that both the sentences should run concurrently. The appeal of the State was allowed and the appeal filed by the accused was dismissed. Questioning the said judgment, the present appeals are filed. Leave to appeal was granted by this Court on 11.12.2000.

The case rests on circumstantial evidence of recovery of ornaments worn by the deceased, pursuant to the information furnished by the accused to the police. The High Court pressed into service the presumption under Section 114 (a) of the Evidence Act in support of its conclusion. It is the correctness of that view that falls for our consideration in this appeal.

The prosecution case as revealed by the charge sheet and the record is that the murdered person Baburao aged about 65 years was having his field close to the village and he used to tether his cattle in that field and keep fodder heaps therein. That is why he used to sleep in the field. Deceased Baburao, a lingayat by caste used to wear golden ear rings and silver lingakar on his

A person. On the night of the crucial day, he went to the field to sleep there. Early in the morning of 30th May, 1984, his unmarried daughter named Sharadbai went to the field to collect cow dung. She found her father lying dead near the heap of fodder. She rushed back to the house and informed her brother Ramakrishna (PW2) and others. PW2 and his family members went to the field and found Baburao lying dead with injuries on his ear, chest etc. and the golden ear rings and silver lingakar missing from his person. One Guruling (PW3) who was residing in a house close to the field of Baburao came to the spot at that time. On seeing the dead body, he mentioned to PW2 and others that he saw accused Nos. 1 to 3 going towards the field of Baburao at about 3 A.M. when he woke up for drawing water. Keshav, PW1 who was the police patel of the village then came to this spot and after knowing the facts went to the police station at Osmanabad and lodged the FIR (Exh. 12) which was recorded by PW10 (PSI). On the basis of it, a case was registered under Sections 302 and 392 IPC. Thereafter, PSI Swami (PW11) held inquest on the dead body of the deceased Baburao in the presence of two Panchas. Having found a big stone lying at the spot of occurrence, he seized the same and it is marked as article No.1. He sent the dead body of Baburao to Civil Hospital at Osmanabad on the same day. PW8 conducted post-mortem examination between 4.30 and 5.30 P.M. The post-mortem report is Exh. 21. He opined that the injuries sustained by the deceased were ante-mortem and the deceased Babu Rao died of bilateral haeomothorax with heart injury, liver injury and hemoperitoneum with multiple injuries. We shall advert to the details of injuries a little later. In the meanwhile, the I.O. (PW11) recorded the statements of P.Ws 2, 3 and others. On 1.6.1984, he arrested accused No.1 Limbaji and accused No.2 Bapu. The investigation was then taken over by Shri Ramesh, Dy. S.P. (PW12), Osmanabad. On 2.6.1984, PW 12 secured police custody remand of both the accused.

On 7.6.1984 the first accused Limbaji gave information in the presence of Panchas, namely, Sidling (PW9) and Shivaji (not examined) that he would point out a shop in which he had sold the golden ear ring. This statement made by A-1 which is admissible under Section 27 of the Evidence Act is Exh. 24. Thereafter, A-1 took them and PW 12 to the shop of PW5 who, at the instance of A-1, handed over the golden ear ring marked as Article No.7 and the same was seized under a panchanama Exh.25. Again on 15.6.1984, A-1 furnished information regarding the place at which silver lingakar was kept. PW12 along with the same panchas went to the spot which was by the side of Osmanabad-Shekapur road. The lingakar covered in a piece of cloth concealed beneath the stones under a Babul tree was shown. The memorandum of the statement of

accused is marked as Exh. 26 and the seizure panchanama relating to 'lingakar' (article No.8) is Exh. 27. On the same day, accused No.2 gave information that he would point out two golden ear rings kept buried under a mango tree situated in the fields of a nearby village. The statement was recorded under Exh. 28 and PW12 along with the panchas went to the field and found the two golden ear rings shown by A-2 and seized the same under a panchanama Exh.29. They are Article No.9. Accused No.3, who was arrested on 11.6.1984, gave information on 20.6.1984 in the presence of same panchas that he would point out one golden ear ring kept buried under a mango tree situated in a field at Shekapur. After recording the statement Exh. 30, he went to the spot shown by the accused Arun and recovered one golden ear ring kept in a cloth and the same was attached under a panchanama marked as Exh. 31. It is Article No.10. The seized articles, 7 to 10 were identified by PW2 as those belonging to his deceased father. On 24.6.1984, PW12 seized the shirt of accused No.2 under the panchanama Exh. 16 and sent the same to the Chemical Examiner as it was found to contain blood. But the report Exh.36 revealed that no blood was detected on the shirt.

II. There is no direct evidence as regards the involvement of accused in the murder and robbery of the deceased. As analysed by the Sessions court and the High Court, the following circumstances were relied upon by the prosecution :-

(i) Accused Nos. 1 to 3 were seen going together towards the field of Baburao in the night of occurrence;

(ii) The deceased Baburao was wearing golden ear-rings and silver ring on his person and the same were found missing. His ear-lobes were found injured which indicated that in the process of removal of ear-rings such injuries were caused.

(iii) The accused No.1 Limbaji pointed out the shop of Vijaykumar PW5 to whom he had sold one golden ear ring belonging to Baburao and recovery of the same in consequence of the said information;

(iv) recovery of silver lingakar in consequence of the information given by the said accused;

(v) recovery of two golden rings on 15.6.1984 in consequence of the

A information by accused No2;

(vi) recovery of one more ear-ring in consequence of the information given by accused No.3 on 20.6.1984;

(vii) human blood noticed on the shirt of accused No.2.

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In so far as the last circumstance is concerned, the High Court disbelieved the seizure and that apart, the Chemical Examiner's report does not reveal that any blood was found thereon. With regard to the first circumstance, learned Sessions Judge held that it will not lead the prosecution anywhere, especially in view of the fact that, as stated by PW3, there was a public lane C behind his house which was used by the villagers. This is a reasonably possible view that could be taken. The High Court had given undue weight to this circumstance and we do not think that the High Court was justified in its approach

D We are now left with the evidence of recovery of the ornaments of the deceased on the basis of the confessional statement of accused under Section 27 of Evidence Act, leaving apart for the time being the aspect concerning injuries inflicted on the deceased. The question then is whether there was discovery of incriminating articles in consequence of information received from the accused in custody and whether such discovery warrants a presumption to be drawn under Section 114 and if so, to what extent that presumption E has to be drawn.

III. As the presumption under Section 114 of Evidence Act looms large in this case, a brief discussion on the basic postulates and evidentiary implications of presumption of fact may not be out of place. A presumption of fact F is a type of circumstantial evidence which in the absence of direct evidence becomes a valuable tool in the hands of the Court to reach the truth without unduly diluting the presumption in favour of the innocence of the accused which is the foundation of our Criminal Law. It is an inference of fact drawn from another proved fact taking due note of common experience and common G course of events. Holmes J. in *Greer* v. *US,* 245 USR 559 remarked "a presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth". Section 114 of the Evidence Act shows the way to the Court in its endeavour to discern the truth and to arrive H at a finding with reasonable certainty. Under the Indian Evidence Act, the

guiding rules for drawing the presumption are set out broadly in the Section. Section 114 enjoins: "the Court may presume the existance of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case." Having due regard to the germane considerations set out in the Section, certain presumptions which the Court can draw are illustratively set out. It is obvious that they are not exhaustive or comprehensive. The presumption under Section 114 is, of course, rebuttable. When once the presumption is drawn, the duty of producing evidence to the contra so as to rebut the presumption is cast on the party who is subjected to the rigour of that presumption. Before drawing the presumption as to the existence of a fact on which there is no direct evidence, the facts of the particular case should remain uppermost in the mind of the Judge. These facts should be looked into from the angle of common sense, common experience of men and matters and then a conscious decision has to be arrived at whether to draw the presumption or not.

Among the illustrations appended to Section 114 of the Evidence Act, the very first one is what concerns us in the present case: "The Court may presume - that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

Taylor in his treatise on The Law of Evidence has this to say on the nature and scope of the presumption similar to the one contained in Section 114 (a) :

> "The possession of stolen property recently after the commission of a theft, is *prima facie* evidence that the possessor was either the thief, or the receiver, according to the other circumstances of the case, and this presumption, when unexplained, either by direct evidence, or by the character and habits of the possessor, or otherwise, is usually regarded by the jury as conclusive. The question of what amounts to recent possession varies according to whether the stolen article is or is not calculated to pass readily from hand to hand.
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> This presumption which in all cases is one of fact rather than of law, is occasionally so strong as to render unnecessary any direct proof of what is called the corpus delicti. Thus, to borrow an apt illustration from Maule J., if a man were to go into the London Docks quite sober,

A and shortly afterwards were found very drunk, staggering out of one of the cellars, in which above a million gallons of wine are stored, "I think," says the learned Judge — and most persons will probably agree with him — "that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached, and that any wine had actually been missed."

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IV. We shall now examine as a first step whether the conditions, or to put it in other words, factual circumstances contemplated by Illustration (a) to Section 114 are fulfilled.

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IV (a). There can be no doubt that the ornaments which were located at the instance of the accused were the personal belongings of the deceased and they were being worn by the deceased. The evidence of PW2, who is the son of the deceased-victim bears testimony to this fact and even a gruelling cross examination could not raise a cloud on the veracity of his deposition on this aspect. The next step which has to be proved by the prosecution is the possession of the said ornaments of the deceased soon after the incident. One of the ear rings weighing 1.200 gms.was sold by accused No.1 to PW 5 who was running a jewellery shop at Osmanabad for Rs. 170. The evidence of PW 6 — a cycle shop owner, whose assistance was sought by accused No.1 to dispose of the ear ring also corroborates the evidence of PW 5 and the Investigating Officer (PW 10). According to PW 5, the sale transaction took place on May 30, 1984 at 1.30 P.M. i.e. on the very next day after the murder of Baburao. PW5 also deposed that accused No.1 accompanied by two panchas and police came to his shop five or six days later and the accused asked him to return the gold ear ring sold to him and on production of ear ring by PW 5, the police seized the same in the presence of panchas on 7.6.1984. The fact that he had not given any receipt and taken the signatures of the accused or that he was not having licence to sell or purchase the gold ornaments are not factors which go to discredit the evidence of P.W.5 in whose shop the ear ring was found. The possession of golden ear ring belonging to the deceased by accused No.1 soon after the occurrence and the sale thereof immediately to PW 5 is thus established beyond doubt.

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Drawing our attention to the evidence of PW 6, it is contended by the learned counsel for the appellant that there was no discovery of the ear ring on the basis of the information furnished by accused No.1, but the police party

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had information through PW 6 about the sale of ear ring to PW5 and, therefore, the alleged discovery under Section 27 has no value. The portion of the deposition of PW 6 relied upon by the appellant's counsel is as follows:

> "It is correct that after about seven days the police had called me in the police station. The police had enquired from me as to the person to whom the gold was sold. I had told the police the shop in which the golden ear ring was sold. I had pointed out the shop to the police. Police had taken Vijay Kumar (PW 5) and myself to the police station. The police had got confirmed the sale of the golden ear rings."

From this statement, it does not follow that there was no discovery within the meaning of Section 27 of the Evidence Act. As rightly pointed out by the learned Sessions Judge, the statements were immediately recorded after the seizure of ear ring from the shop of PW5. The Investigating Officer evidently cross-checked the information furnished by the accused and PW 5 as regards the role played by PW 6 and that is why he was summoned to the police station. From the statement of PW 6, it cannot be deduced that the information furnished by accused No. 1 to the police was only subsequent to the information furnished by PW 6. Hence the argument that there was no information leading to discovery of the material object and the statement of the accused is inadmissible under Section 27 was rightly repelled by the trial Court. There is no good reason to take a different view in this regard.

Then we have the evidence of discovery of the other stolen articles concealed beneath the earth in the fields of others and at a spot on the road side. These discoveries were made on the basis of the statements made by accused Nos. 1 and 2 on 15.6.1984 and accused No.3 on 20.6.1984. The evidence of panch witness (PW9) and the Investigating Officer (PW12) lends proof to these discoveries. Argument has been addressed by the learned counsel for the appellant that the panch witness Sidling was always being called by the police. He figured as panch not only on the first occasion but also on subsequent two occasions when he was allegedly called by the I.O. while going past the police station. The said witness is related to the deceased. It is highly doubtful whether he witnessed the accused pointing out to the places where the stolen articles lay and the police seizing the same. His evidence does not therefore merit acceptance, according to the learned counsel. We are not inclined to disturb the finding of fact recorded by the trial Court as well as the High Court on the truth of the discoveries by disbelieving the panch witness merely on account of some suspicious features.

IV (b). We are left with the evidence of recovery of the ornaments of the deceased on the basis of the confessional statement of accused under Section 27 of Evidence Act. If the discoveries are to be believed — which ought to be, the next two questions are, whether the accused shall be deemed to be in possession of the articles concealed at various spots and whether such possession could be said to be recent possession. But for the decision of this Court in *Trimbak* v. *State of M.P.*, AIR (1954) SC 39, the first question need not have engaged our attention at all. That was a case in which at the instance of the accused the stolen property was recovered at a field belonging to a third party and the accused gave no explanation about his knowledge of the place from which the ornaments were taken out. The High Court while absolving the appellant of the charge of dacoity, convicted him under Section 411 IPC for receiving the stolen property by applying the presumption that he himself must have kept the ornaments at that place. On appeal by the accused, this Court took the view that there was no valid reason for convicting the appellant under Section 411 IPC. The Court pointed out that one of the ingredients of Section 411, namely, that the stolen property was in the possession of the accused, was not satisfied. The Court observed thus:-

> "When the field from which the ornaments were recovered was an open one, and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of these articles. The fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles."

If this view is accepted, there is the danger of seasoned criminals who choose to keep the stolen property away from their places of residence or premises escaping from the clutches of presumption whereas the less resourceful accused who choose to keep the stolen property within their house or premises would be subjected to the rigour of presumption. The purpose and efficacy of the presumption under Section 114 (a) will be practically lost in such an event. We are, however, relieved of the need to invite the decision of a larger Bench on this issue in view of the confessional statement of the accused that they had hidden the articles at particular places and the accused acting further and leading the Investigation Officer and the Panchas to the spots where they were

concealed. The Memoranda of panchnama evidencing such statements are Exhibits 26, 28 and 30. If such statement of the accused in so far as the part played by him in concealing the articles at the specified spots is admissible under Section 27 of the Evidence Act, there can be no doubt that the factum of possession of the articles by the accused stands established. We have the authority of the three-Judge Bench decision of this Court in *K. Chinnaswamy Reddy* v. *State of Andhra Pradesh,* AIR (1962) SC 1788 to hold that the statement relating to concealment is also admissible in evidence by virtue of Section 27. In that case, the question was formulated by Wanchoo, J. speaking for the Court, as follows:-

> "Let us then turn to the question whether the statement of the appellant to the effect that 'he had hidden them (the ornaments)' and 'would point out the place' where they were, is wholly admissible in evidence under S. 27 or only that part of it is admissible where he stated that he would point out the place but not the part where he stated that he had hidden the ornaments."

After referring to the well known case of *Pulukuri Kotayya* v. *King-Emperor,* AIR (1947) PC 67, the question was answered as follows :-

"If we may respectfully say so, this case clearly brings out what part of the statement is admissible under S.27. It is only that part which distinctly relates to the discovery which is admissible; but if any part of the statement distinctly relates to the discovery it will be admissible wholly and the court cannot say that it will excise one part of the statement because it is of a confessional nature. Section 27 makes that part of the statement which is distinctly related to the discovery admissible as a whole, whether it be in the nature of confession or not. Now the statement in this case is said to be that the appellant stated that he would show the place where he had hidden the ornaments. The Sessions Judge has held that part of this statement which is to the effect 'where he had hidden them' is not admissible. It is clear that if that part of the statement is excised the remaining statement (namely, that he would show the place) would be completely meaningless. The whole of this statement in our opinion relates distinctly to the discovery of ornaments and is admissible under S.27 of the Indian Evidence Act. The words 'where he had hidden them' are not on a par with the words 'with which I stabbed the deceased' in the example given in the judgment of the Judicial Committee. These words (namely, where he had hidden them) have nothing to do with the past history of the crime

A and are distinctly related to the actual discovery that took place by virtue of that statement. It is however urged that in a case where the offence consists of possession even the words 'where he had hidden them' would be inadmissible as they would amount to an admission by the accused that he was in possession. There are in our opinion two answers to this argument. In the first place S.27 B itself says that where the statement distinctly relates to the discovery it will be admissible whether it amounts to a confession or not. In the second place, these words by themselves **though they may show possession of the appellant* would not prove the offence, for after the articles have been recovered, the prosecution has still to show that the articles recovered are connected with crime, i.e. in this case the prosecution will have to show that they are stolen property. We C are therefore of opinion that the entire statement of the appellant (as well as of the other accused who stated that he had given the ornament to Bada Sab and would have it recovered from him) would be admissible in evidence and the Sessions judge was wrong in ruling out part of it."

D * (emphasis supplied)

In the light of this decision, we must hold that the accused must be deemed to be in exclusive possession of the articles concealed under the earth though the spots at which they were concealed may be accessible to public. It may be mentioned that in *Trimbak's* case (supra) this Court did not refer to the E confessional statement, if any, made by the accused falling within the purview of Section 27 and the effect thereof on the aspect of possession.

IV (c). Coming to the next question whether the test of time factor or 'recent possession' has been satisfied, there can be no doubt that the accused F came to possess incriminating articles (ornaments) soon after the crime. Accused No.1 Limbaji sold one of the articles, namely, the golden ear rings on the very next day to PW 5. The other articles were found concealed at the places shown by the accused within a short time after their arrest. All the discoveries were made within three weeks. The arrest took place on the very next day after the occurrence in the case of the accused Nos.1 and 2. The G ornaments which came into their possession were concealed by them for obvious reasons before their arrest. As regards the third accused, he was arrested 10 days after the occurrence and by that time the stolen articles were found concealed under a tree. Even in the case of the third accused, the time lag is not so much as to preclude the presumption being raised under illustration H (a) to Section 114. In *Earabhadrappa's* case AIR (1983) SC 446, this Court

while reiterating the principle that no fixed time limit can be laid down to determine whether possession is recent or otherwise, held that even a period of one year was not too long having regard to the fact that the accused suddenly disappeared after the incident and he was absconding for a long time. In the present case, the 3rd accused Arun gave the information about the stolen article, namely, golden ear-ring soon after his arrest and this led to the discovery of stolen property. Having regard to the nature of the articles, it is difficult to visualise that it would have changed hands within this short time and ultimately landed itself in the possession of the said accused. The accused, on his part, did not come forward with any such explanation.

V.(a) In the light of the above discussion, in the instant case the presumption under Section 114 illustration (a) could be safely drawn and the circumstance of recovery of the incriminating articles within a reasonable time after the incident at the places shown by the accused unerringly points to the involvement of the accused. Be it noted that the appellants who were in a position to explain as to how they could lay their hands on the stolen articles or how they had the knowledge of concealment of the stolen property, did nothing to explain; on the other hand, they denied knowledge of recoveries which in the light of the evidence adduced by the prosecution must be considered to be false. By omitting to explain, it must be inferred that either they intended to suppress the truth or invited the risk of presumption being drawn. Thus, the presumption as to the commission of offence envisaged by illustration (a) of Section 114 is the minimum that could be drawn and that is what the trial court did.

V (b). The question then is, applying illustration (a) to Section 114, whether the presumption should be that the accused stole the goods or later on received them knowing them to be stolen. Though the trial court observed that the accused "might have robbed" the ornaments of the deceased after he was murdered by someone else, it found them guilty of the offence under Section 411 IPC only which is apparently self-contradictory. On an overall consideration of the circumstances established, it is reasonable to presume that the accused committed the theft of the articles from the person of the deceased after causing bodily harm to the deceased. The fact that within a short time after the murder of the deceased, the appellants came into possession of the ornaments removed from the person of the deceased and the 1st accused offered one of the stolen articles for sale on that very day and the further fact that the other

A articles were found secreted to the knowledge of appellants coupled with non-accountal of the possession of the articles and the failure to give even a plausible explanation *vis-a-vis* the incriminating circumstances would go to show that they were not merely the receivers of stolen articles from another source but they themselves removed them from the person of the deceased. B Thus, the presumption to be drawn under illustration (a) to Section 114 should not be confined to their involvement in the offence of receiving the stolen property under Section 411 but on the facts of the case, it can safely go beyond that. In this context, the three-Judge Bench decision of this Court in *Sanwath Khan* v. *State of Rajasthan,* is quite apposite. While holding that from the C solitary circumstance of unexplained recovery of the articles belonging to the deceased from the houses of the accused, the presumption of commission of offence of murder cannot be raised, the Court nevertheless held that they can be convicted of theft under Section 380 I.P.C. which was one of the charges against the accused. Another decision of relevance is *Shivappa* v. *State of Mysore,* [1970] 1 SCC 487. That was a case in which bundles of cloth being D carried in carts were looted by twenty persons and the accused were charged for dacoity. Searches which took place within a few days after the incident led to the recovery of large quantities of stolen clothes from their houses. On these facts the Court drew the presumption that the persons with whom the items of clothes were found were the dacoits themselves and the conviction was E sustained. Hidayatullah, C.J. speaking for the three Judge Bench observed that "It is only when accused cannot be connected with the crime except by reason of possession of the fruits of crime that the presumption may be drawn." Drawing support from these decisions too, we are of the view that by invoking the presumption under Section 114 read with Illustration (a) thereto, the appel-F lants must, as a first step, be held to have committed theft of ornaments which were removed from the person of the deceased and that they are not mere receivers of stolen property. Theft is a component of the offence of robbery and theft becomes robbery, if, in order to the committing of theft, the offender causes or attempts to cause death, hurt or wrongful restraint or instils fear thereof. Whether, on the facts, they shall be convicted for robbery is yet another G aspect which we shall advert to a little later. We are only pointing out presently that if we stop at applying illustration (a) to Section 114, the accused can be safely convicted for the offence of theft rather than for the offence under S.411.. What is the position if we look beyond illustration (a) is another aspect.

H VI. (a)The above discussion paves the way for consideration of a more

important question whether, having regard to the facts of this case, the presumption should be extended to the perpetration of the offence of robbery or murder or both? Presumption envisaged by illustration (a) to Section 114 has been stretched in decided cases to make a similar presumption as the basis for conviction for graver offences of robbery and murder, if they are part of the same transaction. Strictly speaking, such presumption does not come within the sweep of illustration (a), though in some cases illustration (a) has been referred to while upholding the conviction for robbery and murder. Extending the presumption beyond the parameters of illustration (a) could only be under the main part of the Section. The illustration only provides an analogy in such a case. With this clarification, let us examine whether there is scope to presume that the appellants committed robbery and murder sharing the common intention. While on this point, we have come across divergent approaches by this Court in various cases. In some cases, the extended presumption was drawn while in some cases the Court considered it unsafe to draw the presumption merely on the basis of recovery of incriminating articles from the possession of the accused soon after the crime. The decisions of this Court in *Union Territory of Goa* v. *Beaventura D'Souza,* [1993] Supp. 3 SCC 304, *Surjit Singh* v. *State of Punjab,* AIR (1994) SC 110 and *Sanwath Khan* v. *State of Rajasthan,* AIR (1956) SC 54 fall in one line, whereas the decision in *Gulab Chand* v. *State of M.P.,* [1995] 3 SCC 574 falls on the other side of the line. In the mid way we find certain decisions wherein the presumption was invoked as an additional reason to support the conclusion based on circumstantial evidence. We shall briefly refer to these decisions.

In *Union Territory of Goa* v. *B. D'Souza* (supra) a two-Judge Bench of this Court held that discovery of incriminating articles including gold ornaments of the deceased and the absence of explanation for the possession of stolen articles does not by itself justify a presumption that the accused committed murder. Suspicion however strong cannot take the place of proof. The finding of the Sessions Judge based on the presumption "does not stand scrutiny in the eye of law". Unless there is something else to show that the accused alone were in the company of the deceased, the presumption cannot be drawn. It was held that there were no circumstances connecting the accused with the murder. The Court however, convicted the accused under Section 411 IPC. In a more recent case, namely, *Ronny* v. *State of Maharashtra,* [1998] 3 SCC 625, the above decision was referred to and distinguished and the raison d'etre for not drawing the presumption was said to be that the injured witness did not

A implicate the accused and the recovery was after one month. However, on a perusal of the judgment in *D'Souza* case, it is not apparent that the injured witness was in a position to see and identify the accused at all. As regards the time factor, there was no categorical observation in *D'Souza's* case that the lapse of one month's time would weaken the presumption. Another judgment
B rendered by the same Bench was in the case of *Surjit Singh* v. *State of Punjab* (supra). It was held therein that recovery of watch belonging to the deceased from a pawn broker after 15 days of the date of occurrence on the basis of the information furnished by the accused was held to be insufficient to connect him with murder by invoking Section 114 of the Evidence Act. At the most, it was held that he can be convicted under Section 411 and accordingly he was
C convicted and sentenced. Another case which broadly falls within first category is that of *Sanwath Khan* (supra). As it is a three-Judge Bench decision, we may refer to it in some detail.

Two persons who were living in a temple were found lying dead in the
D temple premises. They succumbed to axe injuries. The house was found ransacked and almirahs etc. opened. One of the accused who was arrested 12 days later produced a gold kanthi which it was lying buried in his premises. Another accused who was arrested 17 days later produced a silver plate from his house where it lay buried in the ground. Both these articles belonged to the
E deceased. The High Court upheld the conviction by relying on the solitary circumstance of the recovery of two articles at the instance of the accused and the absence of explanation about their possession. On further appeal, the three-Judge Bench of the Supreme Court set aside the conviction under Section 302 and found the appellants guilty under Section 380 IPC. Mahajan, J. speaking for the Bench observed as under :-

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> "In the absence of any evidence whatsoever of the circumstances in which the murders or the robbery took place, it could easily be envisaged that the accused at some time or other seeing the Mahant and Ganpatia murdered, removed the articles produced by them from the
G temple or received them from the person or persons who had committed the murder."

The Court, after having referred to the possibility of someone else murdering the deceased observed thus :

H "Be that as it may, in the absence of any direct or circumstantial

evidence whatsoever, from the solitary circumstance of the unexplained recovery of the two articles from the houses of the two appellants the only inference that can be raised in view of illustration (a) to S.114 of the Evidence Act is that they are either receivers of stolen property or were the persons who committed the theft, but it does not necessarily indicate that the theft and the murders took place at one and the same time.

The accused produced these articles about a fortnight after the theft and the maximum that can be said against them is that they received these goods knowing them to be stolen or that they themselves stole them; but in the absence of any other evidence, it is not possible to hold that they are guilty of murder as well."

Having referred to the decisions of various High Courts, the Court concluded as follows :-

"In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof."

Now, it is time we refer to *Gulab Chand* v. *State of M.P.*, [1995] 3 SCC 574 case, where presumption under Section 114 of the Evidence Act was carried to the utmost extent. In that case the accused were charged under Sections 120-B, 302, 394 and 397 for having committed the murder and robbery. The appellants were convicted under Section 380. On appeal by the State, the High Court reversed the order of acquittal and convicted the appellant Gulab Chand under Sections 302, 394 and 397. The conviction of the other accused was modified to one under Section 411. In that case, within a few days after the incident, on the search of the appellant's house, various articles were found including ornaments belonging to the deceased. Some of the ornaments were also recovered from a shop on the basis of the information given by the accused. The Court started the discussion with the preface: "it is true that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and

A robbery. But, culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced." After referring to the test of time factor for drawing the presumption under S. 114 (a) as laid down in *Tulsiram Kanu* v. *State,* AIR (1954) SC 1, the Court observed, if the ornaments of the deceased were found in possession of a person soon B after the murder, a presumption of guilt can follow. But if several months have expired, the presumption may not be permitted to be drawn. Having regard to the close proximity of the time of recovery and lack of credible explanation for the possession thereof and on account of dealing with the ornaments immediately after the crime, it was held that a reasonable inference of commission of offence could be drawn against the accused. In conclusion, the learned C Judges observed:

> In the facts of this case, it appears to us that murder and robbery have been proved to have been integral parts of the same transaction and, therefore, the presumption arising under Illustration (a) of Section 114 Evidence Act is D that not only the appellant committed the murder of the deceased but also committed robbery of her ornaments."

The above decision was cited with approval in the case of *Mukund* v. *State of M.P.,* [1997] 10 SCC 130. The Court, having negatived the contention of the appellant's counsel that mere recovery of stolen articles from the house pointed E out by the accused could only lead to the presumption that the offence was committed under Section 411 but not the offences under Sections 302 and 394, observed thus :-

> "If in a given case — as the present one — the prosecution can F successfully prove that the offences of robbery and murder were committed in one and the same transaction and soon thereafter the stolen properties were recovered, a court may legitimately draw a presumption not only of the fact that the person in whose possession the stolen articles were found committed the robbery but also that he committed the murder. In drawing the above conclusion we have G drawn sustenance from the judgment of this Court in *Gulab Chand* v. *State of M.P.".*

At the same time, the Court was cautious enough to say that the other incriminating circumstances detailed earlier reinforced the ultimate conclusion. H Various others incriminating circumstances were referred to in the judgment.

Gulab Chand's case was also referred to in *Ronney* v. *State of Maharahstra,* [1998] 3 SCC 625 and *Sanjay* v. *State (NCT of Delhi),* [2001] (3) SCC 193. But it is to be noted that in all the three cases decided subsequent to *Gulab Chand's* case, there were additional circumstances which shed light on the involvement of the accused. So also in the case of *Earabhadrappa* v. *State of Karnataka,* AIR (1983) SC 446, presumption was raised that the accused who pointed out the places at which the ornaments and sarees of the victim were kept committed robbery and murder. Here again, quite a number of additional circumstances were noticed, apart from the recovery of stolen articles. Thus, as far as the factual matrix goes, only *Gulab Chand's* case stands apart. The recovery of the articles of victim soon after the crime at the instance of the accused and incredible explanation given by the accused for possession of the articles were held to be sufficient to raise the presumption of having committed robbery and murder, if they were otherwise part of the same transaction.

Before parting with the discussion on judicial precedents, we may advert to a recent decision in *State of Maharashtra* v. *Suresh,* [2000] 1 SCC 471. The Bench consisting of G.T. Nanavati and K.T. Thomas JJ., observed that a false answer offered by the accused to explain away the incriminating circumstances which are supposed to be within his knowledge 'provides a missing link for completing the chain'.

Whether the approach of the Court and ratio of the decision in *Gulab Chand's* case is in consonance with the three-Judge bench decision in *Sanwath Khan's* case (supra) is, at least a debatable issue. When this decision was brought to the notice of their Lordships who decided *Gulab Chand's* case, it was merely observed that "the said decision is not applicable in the facts and circumstances of the present case". There was no further elaboration. In this state of law, the safer course would be to give due weight to the dicta laid down and the ultimate conclusion reached by the larger Bench in *Sanwath Khan's* case. We cannot go against that decision in so far as it applies to the present case.

VI (b). Now, let us revert back to the question formulated by us at the outset and examine whether in the light of the facts and circumstances of the present case, the presumption under Section 114 should be so extended as to hold the appellant liable for graver offences of robbery and murder.

Before proceeding further, it is relevant to refer to the medical evidence.

A PW 8, who was the medical officer in the Civil Hospital, Osmanabad, conducted post-mortem over the dead body. He found four external injuries : (1) Contused lacerated wound on posterior aspect of the left ear measuring 3 cm.; (2) Contused lacerated wound on the right ear lobule and measuring 2 x 1 x 2 cm.; (3) Abrasion on the chest wall, anterior side in the third intercostal space B on right side of the size of 3 x 3 cm.; and (4) Contusion on the right pectoral region measuring 3 x 2 cm. He stated that all the injuries were antemortem. On internal examination, he found bilateral haemothorax and laceration of the right lung base of the size of 6 x 7 cm. He also found that there was a vertical tear on both right and left ventricles of the heart and a contused lacerated wound C on right lobe of the liver of the size of 5 x 3 x 2 cm. PW 8 deposed that the cause of the death was bilateral haemothorax with heart injury, liver injury and haemoperitonium. According to him, external injuries 1 and 2 could have been caused if the earrings were forcibly snatched. External injuries 3 and 4 could have been caused by hard and blunt object like a stone. He clarified that internal injuries could be caused by article No.1 (stone weighing 10 k.g.). if it is D forcibly hit on the chest. Further he deposed that the external injuries and internal injuries were sufficient in the ordinary course of nature to cause death. He denied the suggestion that the deceased could not have been hit with a stone. In the light of the medical evidence, there are three points which are to be prominently kept in view. Firstly, there was a lacerated wound on the posterior E aspect of the left ear and another such wound on the right ear lobule which according to the doctor could have been caused in the process of forcibly snatching the ear-rings worn by the victim. Secondly, the internal injuries which were the immediate cause of death would have been caused by a hard and blunt object. According to the prosecution the deceased was hit by a heavy F stone found at the spot and seized under a panchanama. Thirdly, the injuries in question were antemortem. In this state of evidence, it is clear beyond reasonable doubt that the person or persons who removed the ornaments worn by the deceased themselves inflicted the wounds in the process of removing them. There was evidently a hush-hush operation to run away with the booty without allowing much time to pass. The fact that the ornaments on the person G of the deceased came into the hands of the accused soon after the crime and they failed to give any explanation for the circumstances appearing against them justifies the presumption, as already discussed, that they themselves removed these articles from the person of the deceased. Causing injuries to the deceased in the process of removal of ear-rings is, in our view, inextricably H inter-linked with the commission of theft which is an ingredient of robbery. It

would be far-fetched to think, as the trial Judge has expressed that someone else might have caused injuries and the appellant would have stolen the articles thereafter. The fact that the booty was distributed between the three accused and that they had secreted the robbed articles would clearly reveal that the three accused shared the common intention to commit robbery. Hence we are of the view that by having resort to the presumption under Section 114, an inference can be safely drawn that the appellants committed robbery in furtherance of common intention. No other reasonable hypothesis consistent with the innocence of the accused is possible.

VI. (c) Whether the presumption could be further stretched to find the appellants guilty of gravest offence of murder is what remains to be considered. It is in this arena, we find divergent views of this Court, as already noticed. In *Sanwath Khan's* case, the three-Judge Bench of this Court did not consider it proper to extend the presumption beyond theft (of which the accused were charged) in the absence of any other incriminating circumstances excepting possession of the articles belonging to the deceased soon after the crime. However, we need not dilate further on this aspect as we are of the view that in the peculiar circumstances of the case, it would be unsafe to hold the accused guilty of murder, assuming that murder and robbery had taken place as a part of the same transaction. The reason is this. Going by the prosecution case, the deceased Baburao was hit by a heavy stone lying on the spot. The medical evidence also confirmed that the fatal injuries would have been inflicted by a heavy stone like article No.1. It is not the case of the prosecution that the appellants carried any weapon with them or that the injuries were inflicted with that weapon. There is every possibility that one of the accused picked up the stone at that moment and decided to hit the deceased in order to silence or immobilise the victim. If the idea was to murder him and take away the ornaments from his person, there was really no need to forcibly snatching the ear-rings before putting an end to the victim. It seems to us that there was no pre-mediated plan to kill the deceased. True, common intention could spring up any moment and all the three accused might have decided to kill him instantaneously, for whatever reason it be. While that possibility cannot be ruled out, the possibility of one of the accused suddenly getting the idea of killing the deceased and in furtherance thereof picking up the stone lying at the spot and hitting the deceased cannot also be ruled out. Thus two possibilities confront us. When there is reasonable scope for two possibilities and the Court is not in a position to know the actual details of the occurrence it is not safe

A to extend the presumption under Section 114 so as to find the appellants guilty of the offence of murder with the aid of S.34 IPC. While drawing the presumption under Section 114 on the basis of recent possession of belongings of the victim with the accused, the Court must adopt a cautious approach and have an assurance from all angles that the accused not merely committed theft or B robbery but also killed the victim.

VII. In the result, we set aside the conviction of the accused under Section 302 IPC. We find the accused guilty of the offence punishable under Section 394 read with Section 34 IPC and accordingly convict the accused under Section 394 and sentence them to undergo rigorous imprisonment for a C period of five years and to pay a fine of Rs. 500 each and in default to undergo further imprisonment for a period of three months. The appeals are thus partly allowed.

S.V.K. Appeals partly allowed.