Pershadi vs The State on 10 February, 1955

Equivalent citations: AIR1955ALL443, 1955CRILJ1125, AIR 1955 ALLAHABAD 443

JUDGMENT

Mehrotra, J.

1. Appellant Pershadi has been convicted under Section. 302, Penal Code by the Sessions Judge of Ali-garh for having committed the murder of Chimman Lal aged about six years and sentenced to transportation for life.

2. Chimrnan Lal was the son of Shanker Lal Halwai of village Ramanpur, which is at a distance of eight furlongs from the town of Hathras. The accused is the appellant Pershadi, who was employed as a servant at the house of Shankar Lal. The prosecution case is that about a month before the murder of Chimman Lal a small iron safe containing cash kept in the Halwai shop of' Shanker Lal was stolen in the night. A report was lodged by Shanker Lal of this theft in the police station on 1-11-1950 under Section 457, I. P. C. against the appellant and one Charna. Charna was sent to jail but the appellant Pershadi was arrested, put up in the lock-up and released subsequently on furnishing security. After his release the appellant pointed out the place where the safe had been kept and Shanker Lal got back the stolen property. Finally, however, both Pershadi and Charna were convicted under Section 381, I. P. C. but they were ordered to be released on executing bonds and producing sureties to appear before a Magistrate whenever called within a period of three years.

It is alleged by the prosecution that while Pershadi was in the lock-up he told Ram Nath (P. W. 6) and Jwala Pershad (P. W. 10) that when he would come out of the jail he would take revenge on Shanker Lal. After his release from the lock-up he is alleged to have made a similar statement to Zahar Mal (P. W. 4). On 2-12-1950, after about a month of this incident, Chimman Lal, as usual, left the shop of his father at about 5 p.m. for the house which is at a distance of about one furlong from the shop. Shanker Lal on reaching his house at 6 p.m. did not find Chimman Lal there. He made a search of the boy whole night. He also went to the house of the accused but no satisfactory - answer was given by the appellant to Shanker Lal on that date. Shanker Lal, therefore, lodged a report at the police station Hathras at 9 a.m. the next day, i.e. 3-12-1950. In this report he stated that his child had disappeared and mentioned the clothes which he had been wearing at the time of leaving the shop.

Nobody is suspected in this report. On 9-12-1950, when -Gian Chand, who is a resident of village Jogia adjacent to the village of the accused, went to his well where he had fixed his Persian wheel and felt some foul smell coming out of the well. He saw a corpse floating in the water. He sent for Lohrey chowkidar and showed him the corpse. Then both of them went to the police station where a

report was lodged by the chowkidar. Kishan Singh, Second Officer, Police Station, Hathras, went to the well and the dead body was recovered from the well. At that time there was only one black pyjama on the person of the dead body. Pooran Mal, father of Shanker Lal, was then called at the well and he identified the body to be of Chimman Lal. Inquest report was prepared by Kishan Singh and the dead body was removed to the police station, Hathras. At the police station Shanker Lal also identified the dead body to be that of his son Chimman Lal. The post mortem examination of the dead body was conducted " by Sri J. L. Jagota, Medical Officer in-charge Hathras Hospital. The post mortem report shows that the fingers of the hands and toes of the feet were shrunk and there was mud present.

The sutures of the skull bones were separated, the body was highly decomposed and swollen and foul odour was coming and skin peeling off. No injuries were found on the person of Chimman Lal. In the report the doctor stated that no opinion could be given for the cause of death as the body had been highly decomposed. From the evidence of Shanker Lal, who identified the dead body, and that of the doctor it is clear that Chimman Lal died because either he was thrown into the well by somebody or he accidentally fell into the well.

3. The appellant was arrested by Kishan Singh, Second Officer, on 11-12-1950 at his house on suspicion. While he was being taken to the police station it is stated by Kishan Singh, Second Officer that the appellant said that he would point out the clothes of Chimman Lal which he, had placed in a pit of a brick-kiln. The appellant was then taken by the Second Officer, Kishan Singh to a temple of Chamars in village Ramanpur close to the brickkiln and in the presence of Santoshgir, the pujari of that temple, Bhoorey Lal (P. W. 3) of Ramanpur who was present when Pershadi was arrested and who accompanied the Sub-Inspector, and Kishori Lal (P. W. 8) the Head Master of the Ramanpur School, the appellant removed the earth from a hole and took out the clothes Exts. 1 to 5.

The fact that the clothes were recovered by the accused from the pit is fully established by the testimony of three witnesses, Bhoorey Lal, Kishori Lal and Santoshgir. The identification proceedings regarding the clothes were held on 4-1-1951 by Sri Jagat Behari Lal Mathur, Magistrate (P. W. 9) and the clothes Exts. 1 to 5 were identified by Shanker Lal. Shanker Lal has also proved that some of the clothes were the clothes which the deceased was wearing when Chimman Lal left the shop in the evening of 2-12-1950. Lalloo Mal, brother of Shanker Lal, has also proved that these clothes were of Chimman Lal. One Lala Babu Versheny (P. W. 7), Assistant Sales Tax Officer. Hathras, who knew Chimman Lal, had also identified clothes Exts. 1 to 5 to be of Chimman Lal deceased. He also identified these clothes before the Magistrate.

4. According to the prosecution the motive for the crime is that Shanker Lal got the appellant implicated in the theft case and that the appellant had taken his revenge. The appellant somehow or other managed to take the deceased with him on 2-12-1950 while returning to his house and after taking off his clothes threw Chimman Lal into the well. The appellant in his statement denies to have removed Chimman Lal on 2-12-1950 and having thrown him into the well. He also denies that he was ever in the service of Shanker Lal and that he stated to Zahar Mal, Ram Nath and Jwala Per-shad that he would take revenge on Shanker Lal. He also denies that he told the Sub-Inspector that he would point out the clothes and that he never took 'the Sub-Inspector to the brick-kiln and

produced the clothes. There is no direct evidence on the record to prove that the appellant took away the deceased with him on 2-12-19.50 and threw him into the well. There is no evidence that he was seen in the company of the child any time in the evening of the 2nd December and that he was seen near the well after the disappearance of the child.

The contention of the prosecution is that the fact that the clothes were produced by him from the pit is direct evidence of the knowledge on the part of the appellant that the clothes belonged to the deceased and that they were kept in the pit from where they were recovered. It has been further contended that in the absence of any reasonable explanation on the part of the accused as to how he acquired the knowledge that the clothes were at the spot from where they were recovered and the fact that a month before the occurrence he had stated to some of the prosecution witnesses that he would take revenge, the only presumption which can be raised in the circumstances is that he committed the murder of the child by throwing him into the well after removing the clothes from his body. In my opinion this evidence does not conclusively establish the fact that the appellant threw the child into the well and obtained the clothes after removing them from his body before he had been thrown into the well.

The Sessions Judge has held that "When things which were on the murdered person's body at the time when he was murdered are traced to person accused of murder and he admits, having concealed those things and points out those things to reliable witnesses but fails to give any explanation for their possession, these Site important factors in coming to an inference that the accused took part in the murder." He has further held that:

> "If a person is found soon after the murder of another person in possession of property which was on the person of the deceased when seen alive, an inference might be drawn that the accused obtained possession of the property after having murdered the deceased provided the, other circumstances do not go to prove the innocence of the accused and provided further that the accused is unable to give any satisfactory explanation of how he came into possession of that property."

5. He has relied upon the case of -- 'Narayana v. King Emperor', AIR 1933 Mad 233 (A) for the propositions stated above. In the Madras case relied upon by the Sessions Judge the evidence against the appellant was that after the arrest the appellant stated in the presence of the Sub-Inspector and another independent witness, that he had hidden ornaments worn by the deceased at a particular place. His statement was recorded by the Sub-Inspector and the articles were produced by the appellant. Apart from the evidence referred to above there was the evidence that on the evening previous to the night of the occurrence the deceased was called from her mother's house on the pretext that the appellant was calling her. In these circumstances the Madras High Court held that the production of the ornaments by the appellant and the failure on his part to give a satisfactory explanation as to how he acquired knowledge of the articles being buried gave rise to a reasonable presumption that the appellant had obtained possession of the ornaments after having murdered the deceased.

In an earlier case of the same Court -- "In re Sogiamuthu Padayachi', AIR 1926 Mad 638 (B), it was observed by Spencer (Officiating C. J.) that : "When the charge is that the accused committed murder or theft in a building or both, it is not legitimate to presume that the accused are guilty of the more serious offence of murder because they are unable or unwilling to explain their possession of stolen property, and when the unexplained possession of stolen property is the only circumstance appearing in the evidence against an accused they cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered."

6. Both these cases were considered in a later case by the same Court -- 'In re Singaram', AIR 1954 Mad 152 (C). In that case a Bench of the Madras Court disagreeing with-the proposition laid down in the case in AIR 1933 Mad 233 (A), held that:

> "The mere possession by an accused person of articles which were on the person or in custody of a murdered man at the time of his murder without any explanation for such possession cannot lead to an inference that he took part in the murder or that he was privy to it. The presumptions mentioned in the illustration to Section 114, Evidence Act cannot be stretched to that extent. One can very well imagine a case where a jewel on the person of a murdered individual came to be in the possession of another without any kind of reasonable explanation being offered by that individual. The fact that no rational explanation is possible, or that the explanation offered is unacceptable, should not militate against the innocence of the individual with regard to the offence of murder. Something more is necessary than mere possession of articles ..... Unless some kind of connecting link, however remote it may be, is made out between the movements of the deceased and the accused, at or about the time of murder even if no reasonable explanation can be suggested or invented by the Court for the possession by the accused of the stolen articles, it would be unsafe to convict the accused person of the offence of murder."

7. The two earlier Madras cases were also considered by a Bench of the Bombay High Court in the case -- 'Basangouda v. Emperor', AIR 1941 Bom 139 (D), where it was laid down that:

> "The rule as to circumstantial evidence" is that it must be consistent, and consistent only with the guilt of the accused, and if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. No doubt one of the circumstances, which has to be taken into account is the fact that the accused had offered no explanation, or has offered a particular explanation; but it must be borne in mind that in this country the accused cannot go into the witness-box, and is not bound to give any explanation at all. The fact that he does not open his mouth cannot be used against him.
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> It is clearly the duty of counsel in defending an accused to point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence, and the Judge is bound to ask himself whether there is any rational explanation of the

> evidence which is consistent with the innocence of the accused, and if there is, he is not justified in convicting. A reasonable explanation of the evidence should not be rejected because it was not offered by the accused. The Court is competent to invent possible explanation and to speculate when the accused's statement does not explain the evidence against him, as to the possible hypothesis that may be made out in favour of the accused."

8. In a recent case -- Trimbak v. State of Madhya Pradesh', AIR 1954 SC 39 (E), their Lordships of the Supreme Court observed as follows: "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 possesion of those 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 probf that the accused was in possession of these articles."

9. In this case the accused had been charged under Section 411, Penal Code. The case of the prose-

cution was that the appellant along with other persons committed dacoity in the house of one Namdeo Motiram on the night o 11-12-1950, and thereby committed an offence punishable under Section 395, I. P. C. The defence was a complete denial of the charge. The property in this case had been recovered on being pointed out by the accused. The Magistrate acquitted the appellant and in appeal the High Court agreed with the finding of the trial court and held that the appellant was not guilty of an offence under Section 395, I. P. C. but convicted him under Section 411, I. P. C. for receiving the stolen property. The matter came up before the Supreme Court on special appeal.

The Supreme Court referred to the finding of the High Court in these terms:

> "The learned Judges in the High Court, however, took the view that the ornaments belonging to the complainant were taken out by the respondent from the field of Namde Anand and that the respondent having given no explanation regarding his knowledge of the place from which the ornaments were taken out, it must be presumed that he must have kept the ornaments there. It was further held that the fact that the field did not. belong to the respondent and that the place was accessible to others would not show that the ornaments were not in his possession but were kept, by someone else, in the absence of a statement from the respondent explaining the circumstances under which he came to know about the ornaments."

This line of approach by the High Court was not approved by their Lordships of the Supreme Court.

10. It was contended by the counsel for the State that the existence of a motive and the threats given by the appellant may lead to a reasonable inference that the knowledge of the fact that the clothes which the deceased was wearing at the time of his disappearance, were concealed in a brick-kiln, was due to the murder having been committed by the appellant. The motive alleged in this case is that sometimes prior to the occurrence the appellant had been prosecuted at the instance of the

father of the deceased and convicted. I do not think that this can be a good ground for the murder of the child. If the appellant had any grievance he had one against his father and there was no reason why he should have murdered the innocent child. As regards the evidence of threat the witnesses have deposed that after the release from the lock-tip the appellant gave out that he would take revenge on Shanker Lal and would in-. jure him. The appellant never said that he was going to murder the child.

It is no doubt true that by the murder of the child Shanker Lal has been injured but the appellant when giving threat could not have contemplated to murder the child who had no hand in prosecuting the appellant. It will not be reasonable to infer from the threat given by the appellant that the murder was result of the appellant's decision to take revenge upon his father. It is also admitted that at the time of the occurrence the appellant was not in the employment of Shanker Lal. The mere fact that sometimes back the appellant was in the service of Shanker Lal and he knew the child does not conclusively prove that he on the evening of the occurrence was able to persuade the child to go with him and took him away. There is no evidence on the record to prove that at any time in the evening the appellant was seen in the company of the child or that any time after he had been removed from the service, he was seen near the house of Shanker Lal talking to the child. It cannot be assumed that the appellant alone was in a position to take away the child and had motive to commit the murder of the child.

11. In my opinion in the absence of any evidence to the effect that the appellant was seen in the company of the deceased prior to the occurrence or other circumstances to connect him with the crime no reasonable presumption can be drawn against the appellant from the mere fact that the clothes that the deceased was wearing when he disappeared were produced by the appellant and that he offered no satisfactory explanation as to how he acquired the knpwledge of those - articles being kept there. From the fact that he had konwledge of the clothes it would not be a reasonable presumption in the absence of any other circumstance to draw that the appellant got these clothes after having committed the murder of the deceased.

12. In my opinion, therefore, there is no evidence against the appellant and he has been wrongly convicted by the Sessions Judge and is entitled to an acquittal. I would, therefore, allow the appeal, set aside the conviction and order the appellant to be released forthwith unless required in connection with any other case.

Desai, J.

13. I regret, I am unable to agree with my learned brother. The circumstantial evidence that has been produced in the case convinces me beyond any reasonable doubt of the guilt of the appellant. I attach considerable importance to the fact that two of the assessors and the learned Sessions Judge were" also convinced. The case might have been different if the appellant had been acquitted by the trial court and we had to decide on an appeal by the Government whether to convict him. The approach in as Government appeal is different from that in an appeal by a prisoner; the difference was stressed by the Supreme Court very recently in 'AIR 1954 S. C. 39 (E)', referred to by my learned brother. One cannot be certain of what the result of Trimbak's appeal to the Supreme Court would

have been if he had been convicted by the trial court and his appeal dismissed by the High Court. But if one reads between the lines of the judgment of the Supreme Court, one may say that the Supreme Court would have found nothing wrong in the judgment of the High Court. The present appeal is from conviction and not from acquittal. Therefore, it is not governed by the decision of the Supreme Court in Trimbak's case (E).

Moreover, in Trimbak's case (E) the crucial question was whether the accused was in possession or not. Unless he was in possesssion, there could be no conviction under Section 411, I. P. C. Possession is not an essential ingredient of the offence under Section 302, I. P. C. The appellant can be convicted of murder even though he was not in possession of any property of the deceased. Therefore, the prosecution had not to prove that he was in possession of some property of the deceased. Of course, if he was in possession of any property of the deceased, it would be evidence against him, but that evidence is by no means essential in a case of murder.

14. There are five circumstantial facts against the appellant, (1) motive, (2) threats, (3) opportunity, (4) knowledge of the fact that the clothes that the deceased was wearing at the time of his disappearance were found concealed in a brick-kiln and (5) subsequent conduct.

15. There is documentary evidence in support of the motive. Shankar Lal, the father of the deceased boy, made a report against the appellant on 1-11-50. The appellant was prosecuted at the instance of Shankar Lal and convicted by a Magistrate in March 1951. The appellant had the hardihood of saying before the learned Sessions Judge that he was never in the service of Shankar Lal and that he did not know whether he was prosecuted by him and convicted by a Magistrate. The prosecution and conviction could have given rise to such an emotion in the mind of the appellant as would drive him to commit the murder of Shankar Lal's son. That it did is proved by bis own-admission to Ram Nath, Jwala Prasad and Zahar Mal P. Ws. Ram Nath and Jwala Prasad deposed that, when the appellant was put in the lock-up,' he told them that he would take vengeance upon Shankar Lal for falsely implicating him in the case. They are the persons in whose presence the police recovered the property said to have been stolen from Shankar Lal's possession by the appellant; so they had accompanied the police and the appellant to the police station and there the appellant had talked with them.

When the appellant was released on bail, he told Zahar Mal that he had been falsely implicated by Shankar Lal and that, when he was acquitted, he would take revenge upon him. None of these witnesses was on bad terms with the appellant, and there is nothing improbable in the evidence. There is thus no reason for disbelieving their evidence which proves that the appellant had a design for taking revenge upon Shankar Lal. The evidence tending to show the existence of a motive is admissible because "if clearly shown, it may help to confirm the conclusion reached from all the other evidence that accused has committed the offence charged." This rule is especially applicable where the evidence against the accused is largly or entirely circumstantial. See '40 Corpus Juris Secundum, Paragraph 227 and the foot-note at page 1152.' It' is stated in Phipson on Evidence, '9th Edition, page, 153, that when A is charged with the murder of B, the fact that he had a motive for killing B along with the fact that he made preparations for it and had made an earlier attempt on his life, is relevant to show that he murdered B. Wigmore on Evidence, 'Vol. 1, Paragraph 118, page 558,

quotes Woodruff J.' stating in -- "Kennedy v. People,' 39 N. Y. 245 (F), that "proof of motive tends in some degree to render the act so far probable as to weaken presumptions of innocence and corroborates evidence of guilt."

He also quotes Harlan J. stating in -- 'Pointer v.

United States', (1893) 151 US 396 (G), that motive is pertinent, however, only in so far as it tends to furnish evidence indicative of guilt to be considered and weighed in connection with the other evidence, which "may be so weak that, without a disclosed motive, the guilt of the accused would be clouded by a reasonable doubt." Thus the existence of motive lends support to the other evidence and helps in removing the doubt, if any is left by the other evidence.

16. That the boy was murdered is proved and admits of no controversy. There is no evidence that he wore any ornaments at the time when he disappeared and that the ornaments were missing from his corpse. Shankar Lal made a simple report of his disappearance without suspecting anybody. Had the boy been wearing ornaments at the time when ho disappeared, he would have mentioned the fact in the report & would have suspected that some foul deed had been committed for the sake of the ornaments. It is obvious that the boy was not murdered on account of his property. He, being only six years old, could not have given any provocation to any one on account of which he could be murdered. The record is completely silent about any reason for his being murdered other than the desire on the part of the appellant to take revenge upon Shankar Lal. One way of taking revenge upon him was to kill his son.

The facts that the appellant had expressed his intentions of causing an injury to Shanker Lal and that an injury was caused to him lead to the presumption that it was the appellant who did the injury.

> "When one threatens to do an injury to another, and that or a similar injury afterwards happens, this furnishes ground to presume that he who threatened the fact was the perpetrator or instigator"; Chief Justice Swift, Evidence, 136: quoted by Wigmore in paragraph 105 at page 538.
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> In -- 'R. v. Ball', 1911 AC 47 (H), Lord Atkinson observed at p. 68 that "previous acts or words of the accused showing motive and enmity towards the deceased, are evidence not only of malice, but also that the accused killed the deceased."

This case makes it clear that in a trial of A for the murder of B the fact that A was heard to declare that he would be revenged on B is relevant to show that he murdered B. "Previous threats by accused to kill deceased maybe shown for the purpose of identifying accused as the person who did the killing." see 40 Corpus Juris Secundum, "Homicide", Paragraph 236.

17. The appellant had been employed by Shanker Lal and the deceased must have been well, acquainted with him. The deceased could willingly go with him on being offered some inducement or excuse. It is true that the appellant had been removed from service after his release on bail in the

previous case. But the fact that he was no longer in Shanker Lal's employment was not bound to prevent the boy, who was so small, from being swayed by his inducement. The boy disappeared when he was going from his shop to his house. The time was about 5-30 p.m. It is not the case of any one that any force or compulsion was used in order to' make him deviate from the route to his house; he must, have been kidnapped by a person known to him and not by a stranger with whom he would not have gone readily or voluntarily. Moreover, nobody would have suspected anything in the boy, going in the appellant's custody even if he had been discharged from service a few days previously. It is true that another person might have kidnapped him; but, as remarked by Wigmore (Vol. 1, paragraph 131, page 563), he is "at least within the limited number of persons who could have done it, and thus is fit to become a subject for further 'investigation,"

18. Now, I come to the most important evidence, namely, that of the recovery of the boy's clothes with the help of the appellant. There is ample evidence to prove that the appellant told the investigating officer that he would point out where the boy's clothes were, that he took him, Ghurey Lal and Kishori Lal to a brick-kiln in village Ramanpur, where the appellant resides and which is two fields away from Hathras where Shanker Lal resides, that he took out five clothes from a pit above the kiln and handed them over to the investigating officer and that they belonged to the boy and were worn by him when he was last seen alive. The station officer, Ghurey Lal, Santosh -Gir, Kishori Lal, Shanker Lal and Lallu Mal have given evidence about these matters. The first four deposed about the recovery; Kishori Lal was the Head Master of the school in that village. There is nothing, to shake the credit of these witnesses. Shanker Lal and Lallu Mal (who is his brother) deposed that the clothes belonged to the boy; their evidence is supported by their having identified them without any mistake in the presence of a magistrate.

Shanker Lal further deposed that the boy was wearing these clothes when he left his shop on the day of his disappearance. He was also wearing pyjamas but they were found on his corpse. Some of the recovered clothes are mentioned in the report of the disappearance made by Shanker Lal on 3-12-50 at 7-30 a.m. It is not disputed that the clothes did not belong to the boy or that he was not wearing them when he was last seen alive. It appears that the appellant told the investigating officer that he had removed the clothes from the corpse of the boy before throwing it into a well, but actually no question was put to anyone of the recovery witnesses about this statement of the appellant. The whole of it was admissible in evidence under Section 27 of the Evidence Act and the prosecution ought to have led evidence about it. It is unfortunate that the provisions of Section 27 of the Evidence Act are not properly understood by the police, the prosecution counsel and even magistrates and judges with the result that important evidence is not brought on record and miscarriage of justice results. Had the prosecution proved that the appellant told the station officer that he had hidden the clothes of the boy in a pit in a certain brick-kiln, the case against him would have been much stronger.

It was stated in -- "Chavadappa Pujari v. Emperor', AIR 1945 Bom 292 (I), that the statement of an accused to a police officer that he has concealed the property in a particular place and would produce it, is admissible and that if the property is discovered in consequence of it, it would be evidence of his possession even though it was kept or concealed in another man's property because unless he had possession he would not have concealed it there. It was pointed out that if he, without

stating that he had concealed it merely produced it, from a place to which other people could have access, it would not be sufficient to establish his possession over it, but at the most would show his knowledge that it was concealed there. A statement "I have concealed the knife in such and such a place" is admissible but not the words "with which I stabbed the deceased." In -- 'R. v. Gould', (1840) 9 Car & P 364 (J), the statement of the accused to the police that he had thrown a lantern into a pond in a certain field (from which it was subsequently recovered by the police), was admitted in evidence by the House of Lords.

In -- 'The State v. Lehna Singh', AIR 1953 Punj 101 (K), the statement of Lehna Singh to the police that he had concealed a rifle in a manure heap lying outside his house (from where it was taken out by himself subsequently), was held admissible in evidence. It is high time that the State agents, who conduct prosecution in magistrates' courts and Sessions Courts, understood the provisions of Section 27 of the Evidence Act thoroughly and prevented the escape of guilty persons through their own ignorance of the law.

19. Coming now to the statement actually proved to have been made by the appellant, it must be conceded that after the decision in 'Trimbak's case (E)', the appellant cannot be held to be in possession of the clothes. But it undoubtedly proves that the appellant knew that the clothes that the boy was wearing at the time of his disappearance were concealed in a pit in a brick-kiln in his own village. That is itself an incriminating fact, though, standing alone, it may not suffice to prove that he himself murdered the boy and concealed his clothes. It certainly takes us to him as the subject of investigation and throws upon him the burden of explaining how he acquired the knowledge. He might have acquired it in any of the following ways. He might have acquired it because he himself killed the boy and concealed the clothes, or somebody else killed the boy either in or without his presence and he removed the clothes from the corpse and concealed them, or he saw somebody concealing them, or he accidentally dug the ground and found them buried there. Or he might have acquired it from another person. His guilt, if any, depends upon the manner in which he acquired the knowledge. If he acquired it in the manner first described, he would be guilty of murder and, if he acquired it in the manner last described, he would be guilty of no offence.

The law prevents us from taking into consideration what the appellant told the investigating officer about the means of his acquisition of knowledge. Wigmore criticises this law as illogical and unsound (vide paragraphs 858 to 858); but that is the law and we are bound to obey it. In the Magistrate's court the appellant denied having pointed out the place where the clothes were buried. In the Sessions Court also he denied the fact. He was specifically asked whether they were recovered in his presence and he gave the absurd answer that he did not know. The memo of recovery prepared by the investigating officer bears his thumb-mark, but he denied having put his thumb-mark on it.

Thus instead of explaining how he acquired the knowledge, he simply denied his acquisition of it. It leads to the inference that he could offer no explanation consistent with his innocence. If he had accidentally dug the ground in the pit and found the clothes buried there, or had seen somebody burying the clothes there, or had heard from somebody, I can think of no reason for his refusal or failure to say so. He had absolutely nothing to lose . by saying so.

I consider it quite irrational to say that even if he had acquired the knowledge innocently, be would have remained quiet and not disclosed the means of the knowledge. Because he could offer no plausible explanation consistent with his innocence, he felt obliged to deny the possession of the knowledge altogether. When he was prepared to show the place of concealment and also to take the clothes out of it, he would not have failed to explain how he discovered the place of concealment, if he could explain it without any danger to himself. It is no use arguing that he was not bound to explain and that no onus lay upon him except of rebuttal. He did not refuse to explain; he did not impliedly or expressly say that he was not bound to explain and that it was for the prosecution to prove his guilt. He did not take his stand on any right, existing or supposed. What he did was to. deny the very occasion for his being called upon to explain by denying the possession of the knowledge. Moreover, one does not always do what one is bound to do, nor does one always refrain from doing what one is not bound to do. The conduct of a man is governed not only by his legal rights and duties but also by human nature.

The appellant might not have been bound to open his lips; but, when his life was in danger, he would not have remained silent on the basis of his right to keep silent, if he could utter some words in order to save his life. Having regard to the human nature which is one of the factors to be considered by a court under Section 114 of the Evidence Act, I have no hesitation in saying that the failure of the appellant to explain how he knew that the clothes were buried inside the pit points to his guilty knowledge. I do not say at this moment that it proves him to be the murderer, but it does point to his being the murderer or an accessory after the murder. Even apart from the silence of the appellant, there are good reasons to think that he acquired the knowledge criminally. He would not have been exploring the pit in a brick-kiln and would not have come upon the place of concealment accidentally. It is also not likely that he would have accidentally seen somebody hiding the clothes there. The pit is above a brick-kiln and I do not think people would be walking through it. It would be too much of a coincidence if he, who had resolved to take revenge upon the boy's father, soon after saw someone burying the boy's clothes, or dug the ground and found them buried there.

20. As between the remaining two inferences, one that the appellant himself murdered the boy and removed the clothes and the other that somc- body else murdered him and he removed the clothes or helped the former in removing and concealing them, the former is the inference that is consistent with- the proved facts. The appellant himself would have chosen the lesser evil by stating that somebody else murdered the boy and he concealed the clothes if that were the fact and he would not, by remaining silent, have incurred the risk of his being held to be the murderer when, by merely saying that he was only an accessory after the murder, he could avoid that finding. When one takes into consideration the circumstances mentioned above, viz. the motive, the design and the opportunity, along with the fact of the appellant's own silence, one should not have the slightest doubt in coming to the conclusion that he murdered the boy. I would consider any other conclusion to be against commonsense.

21. Pointing out property of the deceased may be said to have the same evidentiary value as pointing out of the corpse. There are authorities laying down that the mere pointing out of a corpse is not enough to prove the offence of murder against the accused; see, for example, -- 'Gulab v. Emperor', AIR 1923 Lah 315 (L); -- 'Sulakhan Singh v. Emperor', AIR 1926 Lah 138 (M); -- 'Abdul Jalil v.

Emperor', AIR 1939 Cal 539 (N); -- 'Farzand AH v. Emperor', 29 Cri LJ 252 (Lah) (O); -- 'Bhai Khan v. Emperor', AIR 1922 Lah 189 (P) and --'State Govt, M. P. v. Ramkrishna', AIR 1954 SG 20 (Q). All these cases are distinguishable from the instant case. In 'Gulab's (L)' and 'Sulakhan Singh's (M)' cases, the evidence of motive was very slender; there was no evidence of design or threat nor of opportunity. In 'Farzand Ali's case (O)', there was motive and the accused was convicted under Section 201, I. P. C. though not for murder. In the case of 'Ramkrishna (Q)', the corpse was found buried in the house of Limsey himself; but the cause of death was not ascertained, there was quite a distinct probability of the death being the result of drinking and smoking ganja, the matter went before the Supreme Court in an appeal by the State from acquittal by the High Court and the Supreme Court observed that the utmost that could be said was that if they had tried the case, they might have come to a different conclusion.

22. On the other hand, in -- 'Mangal Singh v. Emperor', AIR 1937 Lah 127 (R), Mangal Singh was convicted of murder by a Bench of the Lahore High Court on the evidence that he knew the place of burial of the deceased, that he told lies regarding the movements of the deceased, that he went out ostensibly in search of the deceased but did not return and failed to explain his conduct, and that he had a motive. The decision was upheld by the Privy Council in -- 'Mangal Singh v. King Emperor', AIR 1937 PC 179 (S). In 'Trimbak v. State of M. P. (E), and 'Chavadappa Pujari v. Emperor (T)', the main evidence against the accused was that he knew where the property stolen from the deceased was buried and that evidence was held to be insufficient to find him guilty of being in possession of stolen property. The former case was under Section 411, I. P. C., and the other under Section 395, I. P. C., or Section 412, I. P. C., in the alternative.

In the other it was observed:

> "The presumption would, therefore, be that a person in recent possession of articles seized in a dacoity is either a dacoit or receiver of stolen property. It is important to note that this presumption is not of one definite offence but of an alternative offence, because possession of stolen property by itself is not sufficient to prove participation in the offence of theft. It can only go to corroborate other independent evidence of theft. If there is no such evidence, the conviction may be of the alternative offence and the punishment only for the lower offence of posses-sion under Section 72, Penal Code."

This suggests that when the only evidence is of possession, the Court must record conviction in the alternative and cannot record conviction for theft. The law regarding the presumption to be drawn from recent possession of the fruits of crime has been settled long ago and there are numerous decisions in this country, in England and in America laying it down and I have ever understood it to be as interpreted in the above case. With great respect to the learned Judges, I differ from that interpretation which is not supported by any authority. The meaning of illustration (a) to Section 114, Evidence Act, is not that the presumption is in the alternative; its plain meaning is that both the presumptions are possible and that which should be adopted in a case depends upon circumstances. If the interval between the theft and the accused being found in possession is very small, the presumption can be that he is the thief. If, on the other' hand, the interval is relatively large, the

presumption, can be that he is the receiver. If the interval is very, large, the Court may not draw any presumption, Wigmore writes in para 152-

> "On a charge of taking goods, the fact that A was found, subsequently to the taking, in possession of the goods taken is relevant to show that he was the taker. It is true that several other hypotheses are conceivable as explaining the fact of his possession; nevertheless the hypothesis that he was the taker is a sufficiently natural one to allow the fact of his possession to be considered as evidentiary. There has never been any question of this."

In -- 'R v. Langmead', (1864) 9 Cox CC 464 (T), Blackburn J. says:--

> "he is called upon to account for having it, and on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver, 'according to the circumstances'." .

> The phrase - is similar to the phrase used in illustration (a). The underlined words (here in ' ') make it clear that it is for the Court, after considering the circumstances of the case, to decide which of the two presumptions to draw and that the Court is not required to record conviction in the alternative for theft or for receiving in every case. Possession is not an essential ingredient of the offence of murder and if a person cannot be convicted under Section 411, I. P. C. (because he is not found to be in possession), it does not follow that he cannot be convicted under Section 302, I. P. C. also. (23) In -- 'Mirza v. Emperor', 27 Cri LJ 993 (Lah) (U); -- 'Moyila Kurmiah v. Emperor', 14 Cri LJ 49 (Mad) (V) -- 'Bhikha Gober v. Emperor', AIR 1943 Bom 458 (W), AIR 1954 Mad 152 (C), and -- 'State v. Shankar Prasad', AIR 1952 All 776 (X), it was stated that the mere possession of property stolen from the deceased is not enough for convicting the possessor for the murder. In the case of 'Moyila Kurmiah (V)', there was absence of motive for the heinous crime of murder and of evidence to prove that the deceased was wearing, at the time of her murder the ornaments subsequently recovered from the possession of the accused who was her own husband and it was not improbable that the deceased committed suicide and there was nothing suspicious in her ornaments being found in the accused's possession. In the case of 'Bhikha Gober (W)', he pointed out the ornaments belonging to the deceased which were concealed in a hedge near his field, but at the trial denied having pointed them out. A bench of the Bombay High Court convicted him under Section 411, I. P. C., instead of Section 302, I. P. C. There was absolutely nothing to connect him with the murder and it was thought that he might have acquired the ornaments from the murderer or might have robbed the deceased before she was murdered by someone.

> In the absence of evidence to prove that he had a design, and had also threatened, to murder the deceased, the Court held that the only inference that could be drawn was that he knew that the property had been stolen, whether or not he knew that the

owner had been murdered. In the present case, it cannot be said that the appellant did not know that the owner of the clothes had been murdered. If a person receives other articles, he may not suspect that the owner has been murdered, but if he receives clothes, and clothes of no particular value, he cannot pretend not to know that the owner has been murdered. Other articles may be stolen on account of the value but used clothes of no particular value would not be stolen by anyone The decision, therefore, has no application to the facts of the instant case. The facts in the case against 'Shankar Prasad (X)' were that one B was murdered in a dharamshala and his goods were stolen, that there was evidence to the effect that Shankar Prasad and others were seen with the deceased on the previous evening, that Shankar Prasad and others were seen going out of the dharmashala late in the night, and that the appellant pointed out some of the goods of the deceased. The evidence about Shankar Prasad having been seen in the dharamshala was not believed.

Far from there being any evidence of malice, the evidence was that relations between him and the deceased were very intimate. In these circumstances, it was held by a bench of ,this Court that the mere fact that he was in possession of the deceased's property does not prove his complicity in the murder. This Court set aside 'Shankar Prasad's (X)' conviction under Section 302, I. P. C., and ordered him to be retried for the offence of Section 411, I. P. C. The premise that "the only evidence against the accused is recovery of stolen property" stated at p. 782 does not exist when there is evidence of design, threat and opportunity. The observation of Govinda Menon J. in 'In re Singararn (C)', quoted by my brother Mehrotra, was obiter dictum. The facts there were that a Swami was seen alive on a day at 9 p.m. wearing a gold chain and gold rings' that next morning he was found murdered in his hut and his ornaments missing and that Singaram was found in possession of the ornaments. It was also proved that he and the other accused were, seen in the vicinity of the hut where the Swami was sleeping about the time when he was murdered.

The learned Judges upheld the conviction of both the accused under Section 302, I. P. C. They found the evidence sufficient to connect them with the murder of the Swami. They were not concerned with the question what they would have done if the evidence against the accused in the case were less than what it was. There was evidence to connect the accused with the deceased immediately before his death; and the learned Judges' observation at p. 155 that "the presumption from the possession of articles belonging to the deceased by accused persons immediately after the murder, or robbery should be drawn only where some more evidence is present to show that the accused persons were seen with the deceased immediately before his death or that the deceased was last seen alive, in the company of the accused persons", was nothing but obiter dictum. Because such evidence is found in many cases, or is of some value, it cannot be laid down as a law that without it there can be no conviction.

> Equally obiter was the observation at p. 156 that "unless some kind of connecting link, however remote it may be, is made out between the move ments of the deceased and the accused, at or about the time of murder, ***** it would be unsafe to convict the accused person of the offence of murder."

Moreover, as I would show subsequently, this law is against authorities and views of experts and is not supported by reason. The accused were seen near the hut of the Swami at about midnight. It is not known at what time the Swami was murdered; he was seen alive at 9 p.m. on the previous evening and found murdered at 6 a. m. He was, therefore murdered some time between 9 p.m. and 6 a.m. and it cannot be assumed that he was murdered at about midnight and that the accused were seen near his hut at or about the time of his murder. When a case rests upon circumstantial evidence, it means that nobody has seen the crime being committed and that one cannot say definitely at what time it was committed. There are thus practical difficulties in proving that the accused was seen near the place of the crime at or about the time when it was committed unless his being seen within some hours of the commission of it is deemed to be equal to his being seen at or about the time.

I do not think it reasonable to infer from a person's being seen near the place of murder three hours before or after the commission of murder that he was concerned in the murder; the interval is too long for any connection between him and the murder to be inferred from it. There is nothing in this piece of evidence that would make the rest of the circumstantial evidence conclusive, if otherwise it was not.

24. There are cases in which persons have been "convicted of murder on the strength of their being found in possession of property stolen from the murdered and the decisions are supported by experts in the law of evidence. In AIR 1933 Mad 233 (A), decided by Sir Owen Beasley C. J. and Keilly J., the only evidence against Narayana was that he stated that he had hidden the ornaments of the murdered girl in a fort and the recovery of them from the fort on his pointing out the place of concealment. Though there was no evidence of any malice against the murdered girl or of any design to murder her or of his being seen near the place of murder at the time when it was committed, he was convicted of murder. He offered no explanation for his knowing that the ornaments were concealed in the fort. In 29 Cri LJ 252 (Lah) (O), Nabi Bux was convicted of murder on the evidence that he took the police to a field and dug out from it the ornaments worn by the murdered girl. Basangouda, whose case (D) has already been referred to was convicted of murder on similar evidence coupled with his failure to explain his possession. Beaumont, C. J., could not conceive of any rational explanation of the evidence consistent with Basangouda's innocence.

It was theoretically conceivable that somebody else committed the murder and robbery and that he was in turn robbed by Basangouda or he handed over the ornaments to him; but the learned Chief Justice did not consider it a rational explanation because, to quote his own words at p. 143:

> "If that were the explanation, it is almost inconceivable that the accused would not have given it and mentioned who it was who gave him the property."

In -- 'Ramprashad Makundram v. The Crown', AIR 1949 Nag 277 (Y), the learned Judges followed -- 'Narayana v. King Emperor (A)', and convicted Ramprashad under Section 302, I. P. C., on the basis of his being found in possession of the ornaments belonging to the murdered woman and blood stains on his dhoti; the explanation that he offered for his possession of the ornaments was not accepted by the learned Judges. They observed, at p. 280, that:

> "the possession of the ornaments by the accused soon after her death is undoubtedly a very strong piece of evidence against the accused."

Then there is the case of -- 'Emperor v. Chinta-mani Shahu', AIR 1930 Gal 379 (2) (Z), in which Chintamoni was convicted of murder and robbery on account pf his .being found in possession of the murdered woman's ornaments. In -- 'In re Van-kataswami', AIR 1950 Mad 309 (Zl), unexplained possession of an ornament worn by a murdered woman was held to be evidence not only of theft or robbery but also of the murder itself, if the possession could not reasonably be got without committing the murder. In -- 'Sunderlal v. State of M. P.', AIR 1954 SC 28 (Z2), Sunderlal was found in possession of ornaments of the deceased on the very day on which the dead body of the deceased was discovered. His explanation for the possession was found to be untrue and he was seen going in the company of the deceased on the previous day; on this evidence he was convicted under Section 302, I. P. C., and his conviction was confirmed by the Supreme Court.

25. The law regarding the inference that can legitimately be drawn from the recent possession of the fruits of crime is same in India as in England and in America. Wat is stated in illustration (a) of Section 114 Evidence Act is nothing but a re-production of the law stated by English and American Jurists. Naturally the inference to be drawn depends entirely upon reason, experience, human conduct and human nature and would not differ from Nation to Nation or Country to Country. It is stated by Taylor in his Treatise on Evidence, paragraph 127A, that the possession o stolen property soon after the commission of theft raises a prima facie presumption that the possessor was either the thief, or the receiver, according to the other circumstances of the case and that the presumption, when unexplained either by direct evidence, or by the character and habits of the possessors, or otherwise, is usually regarded by the jury as conclusive. In paragraph 127C it is stated that the presumption is not confined to charges of theft, but extends to all charges, however penal, including the charge of murder. The same law is stated by Greenleaf on Evidence, Vol. 1, paragraph 34.

According to Kenny, the possessor of goods recently stolen may fairly be regarded as either the actual thief or else a guilty receiver and that "his possession raises also--but less strongly--a presumption of his guilty connection with any further crime that accompanied the theft, e.g., a burglary, an arson, or a murder"; See Outlines of Criminal Law, Fifteenth Edition, p. 391. Phipson says in his Law of Evidence, 9th Edition, p. 40, that if the recent possession of stolen property by the accused is not explained, or, if though reasonably explained, the explanation is disbelieved, it raises a presumption of fact that he is the thief or receiver and that he may be found guilty by the jury. He says on page 138 that, "the possession of property connected with the transaction is often a highly incriminating fact", and on page 139 that, "the inference of complicity from possession of articles connected with a crime applies also to other criminal charges." Wigmore writes: "Wherever goods have been taken as a part of the criminal act, the fact of the subsequent possession is some

indication that the possessor was the taker, and therefore the doer of the whole crime." Vol. I, paragraph 153. He adds that such possession is receivable to show the commission of a murder.

In -- 'Wilson v. United States', (1895) 162 US 613 (Z3), C. J. Fuller approved of the above-mentioned statement of the law by Greenleaf and of the probable presumption of complicity in the murder arising out of the possession soon after the murder of the property apparently taken from the deceased at the time of his death. It will be noticed that these jurists do not attach any condition to the drawing of the presumption of complicity in the murder; they stop at laying down that the presumption is of fact, or a prima facie presumption or refutable; they did not go further and lay down that the presumption cannot be drawn unless a certain fact is proved in addition.

Even under Section 114, Evidence Act, it is left to the wise discretion of the Court whether to draw the presumption of complicity in the crime from the recent possession of the fruits of the crime. The question is essentially one of fact and no hard and fast rule can be laid down. To say that unless there is evidence that the accused was seen near the place of the murder at or about the time of it, he cannot be convicted of the murder merely on account of his possession of the property removed from the deceased at the time of the murder, is fettering the discretion of the Court. Circumstances of no two cases can be exactly alike and the drawing, or the refraining from drawing, the presumption of guilt in one case is ho precedent for drawing, or refraining from drawing, the presumption in another case. Greenleaf writes in Vol. III, paragraph 31:

> "On this subject no certain rule can be laid down of universal application; the presumption being not conclusive but disputable, and therefore, to be dealt with by the jury alone, as a mere inference of fact. Its force and value will depend on several considerations."

26. Though possession of the knowledge that an article is kept at a certain place is not the same as possession of it, and though a person cannot bo convicted under Section 411, I. P. C., merely on its being proved that he knew where the stolen property was concealed, the inference to be drawn from his possession of the knowledge can be the same as that to be drawn from his possession of the article itself. A person who steals another's property may retain it in his own possession or may conceal it in a place not in his occupation. Similarly a person who murders and robs another of his property may retain it in his own possession or hide it in a place not in his occupation. In other words, whether the person has the property in his own possession or knows where it is concealed, he might have been the actual thief or the actual murderer. There is no reason for saying that if the person is in possession, he may be presumed to be the thief but if he is not in possession and only knows the place where it is concealed, he cannot ba presumed to be the thief.

The inference of being the thief is drawn from the fact of possession on account of certain connection between the possession and the stealing; the same connection may exist between the knowledge of the place of concealment and the stealing, or if it is accompanied by murder, of the murder. When the person himself does not say, and there is also nothing to indicate, that he learnt that the property was concealed in a certain place either because he heard about it from another person or' saw another person hiding it there or he accidentally came upon the place of hiding, there

is no justification for refusing to draw, from the possession of the knowledge of the place of hiding, the presumption that one would draw from the fact of possession.

27. There is a considerable amount of confusion in the law about calling upon the accused to explain his possession and the effect of his refusal to explain or offering a false explanation. It has been argued that even if no explanation is furnished by the accused, he cannot be found guilty if the Court itself can conceive of an explanation. It has also been argued that unless a prima facie case is made out against an accused, he cannot be asked to explain. As a corollary it has been argued that no adverse inference can be drawn against him from; his failure or refusal to offer an explanation, or, acceptable explanation, and that his failure or re-

fusal does not make the incriminating fact of 'possession more incriminating. There is no substance at all in the last two arguments. The. first argument found favour with the learned Judges who decided the case against Basangouda (D), but I am doubtful of its soundness.

In the case of Narayana (Aj, Reilly J. stated:

> "There may be a hundred possible explanations other than that he himself was the original thief.
>
> But it is not for the Judge or Jury to invent or imagine such explanation. It is for the accused person to give his explanation, if he has one.
>
> (page 240). ***** It is not the law that the Judge or Jury must be certain that no other explanation of the facts is possible before they find the accused guilty. * * *** All the facts proved must be clearly in their minds, including the very important fact that the accus ed person has offered no explanation of his possession of the stolen things. **** * It is not required that they should be satisfied that no other conceivable explanation is consistent with the facts.*** * * One of the facts before them, which it is their duty to take into account, is the fact that he has offered no explanation."

(page 241).

Beaumont C. J. disagreed with those observations in Basangouda's case (D). He conceded that one "of the circumstances to be taken into account is the fact that the accused offered no explanation or offered a particular explanation. He stated that an accused is not bound to give any explanation at all, that relying upon the law (that circumstantial evidence, must be consistent only with the guilt of the accused and must not be consistent with any rational explanation indicating innocence of the accused) he may not open his mouth because of the evidence being consistent with the guilt of somebody else, that the fact that he does not open is mouth cannot be used against him and that it is the duty of the Court to invent possible explanation. Really there was no necessity for the learned Chief Justice's making these observations; he held the circumstantial evidence to be consistent only with the guilt of Basangouda. He found that there was no rational explanation for the possession of the stolen property and therefore there arose no question of the Court's duty to take into

consideration, rational explanations even if not offered by the accused. The observations were obiter dicta. Moreover, the observation that an accused is not bound to offer any explanation and that the fact that he does not open his mouth cannot be used against him is hardly consistent with the observation that one of the circumstances to be taken into account is that he has offered no explanation.

In -- 'In re Singaram (C)', the learned Judges disagreed with the observations of Reilly J. and Beaumont C. J. and observed at p. 155:

> "One can very well imagine a case where a jewel on the person of a murdered individual came to be in the possession of another without any kind of reasonable explanation being offered by that individual. The fact that no rational explanation is possible or that the explanation offered is unacceptable, . should not militate against the innocence of the individual with regard to the offence of murder. Something more is necessary than mere possession of articles."

As I stated earlier, this observation was not necessary for the decision of the case and therefore loses much of its force. The law is that circumstantial evidence must be inconsistent with every rational hypothesis of innocence of the accused. It is not required to be inconsistent with every imaginable or conceivable hypothesis of innocence. Were it so, no conviction would at all be possible on circumstantial evidence. It is always possible to imagine facts consistent with the innocence of the accused. Even in a case where there is direct evidence against an accused, it is possible to imagine that the evidence is false; in the case of circumstantial evidence, the scope for this imagination is even greater because not only can the witnesses who depose about the circumstantial facts be imagined to be false but also it can be imagined that somebody else committed the offence and fabricated the circumstantial evidence against the accused.

So long as a Court has to depend upon testimony, it can always imagine that the testimony is false and that the crime was committed by another person. But certainly the law does not require or even permit a Court to indulge in such imagination. The observation of Govinda Menon J. that "the fact that no rational explanation is possible, or that the explanation offered is unacceptable, should not militate against the innocence of the individual with regard to the offence of murder" at page 155 is against the established law and, I say with respect, is not sound. It is pointed out by Stephen that the caution against the admission of circumstantial evidence must not be excessive, as when some maintain that there should be no conviction unless guilt be the only possible inference from the circumstances, see Kenny's Outlines of Criminal Law, Fifteenth Edition, page 401. The only important restrictions on basing conviction for homicide on circumstantial evidence are, as pointed out by Kenny, that the fact that there has been a death must be proved fully and that the possession must be recent.

Illustration (a) in Section 114 itself speaks of want of explanation as a circumstance to be taken into account. So do all the writers on the law of evidence. As regards the effect of the failure or refusal to offer an explanation, the law makes no distinction between the inference of theft and that of murder. In every case in which an inference of, theft can be made, an inference can also be made of murder,

if it was committed in the same transaction as the theft, and this is a sound law; if the theft and the murder are both committed in one transaction and a person found in possession of the stolen goods soon after the theft can be presumed to have committed it, there is no reason why he should not be presumed to have committed the murder as well. If the offers an acceptable explanation which suggests that he did not commit the theft and the murder both or that he committed the theft but not the murder, the position may be different but when he offers no explanation, if one presumption can be drawn, the other also must be drawn. It is an arbitrary rule that there can be no presumption of murder in the absence of evidence that the accused was seen near the place of the murder and theft at or about the time when they were committed. Why he can be presumed to have committed the theft, but not the murder, in spite of there being no evidence to prove his presence in the vicinity is beyond my comprehension.

> "The kinds of evidence to prove an act vary in probative strength, and the absence of one kind may be more significant than the absence of another; but the mere absence of any one kind cannot be fatal"; seee Wigmore, paragraph 118. When it is stated by some Judges that mere possession of stolen property is not sufficient for an inference of murder, they only reiterate what Greenleaf says in paragraph 31, Vol. III. According to him the force and value of the evidence o recent possession depend on several considerations. "If the fact of possession stands alone, wholly 'unconnected with any other circumstances', its value or persuasive power is Very slight';" (because there are several hypotheses which can explain his possession such as planting, picking up the article on its being thrown away by the real culprit, taking it from the real culprit in order to restore it to the owner, etc.) and "it will be necessary, therefore, for the prosecutor to add to the proof of other circumstances, indicative of guilt; * * ** * such as " the previous denial of the possession, by the party charged, or his refusal to give any explanation of the fact, or giving false or incredible accounts of the manner of the acquisition; ***** or that he was seen, * **** near the place, and at or near the time when the crime was committed; or other circumstances, naturally calculated to awaken suspicion against him and to corroborate the inference of guilty possession."

This exposition of the law by Greenleaf ought to remove many false notions. It shows that the failure or refusal to offer an acceptable explanation is itself a circumstance, that when one speaks of "mere possession", it means the absence of that circumstance or any other, that the presence of the accused near the place of occurrence at or near the time when it took place is only one of the circumstances which can be availed of and that motive, design and opportunity naturally calculated to awaken suspicion against him and to corroborate the inference of guilty possession may suffice.

28. The logical process involved in the admission and consideration of circumstantial evidence is explained by Wigmore in paragraph 32 et seq. The test for the admissibility of evidence to prove a circumstantial fact is that "the evidentiary fact will be considered when, and only when, the desired conclusion based upon it is a more probable or natural, or at least a probable or natural hypothesis, and when the other hypotheses or explanations of the fact, if any, are either less probable or natural, or at least not exceedingly more probable or natural" (paragraph 32, page 421). "Where even the

possibility of a single other hypothesis remains open, Proof fails, though it suffices for Admissibility if the desired conclusion is merely the more probable, or a probable one, even though other hypotheses, less probable or equally probable remain open. It is thus apparent that, by the very nature of this test or process, a specific course is suggested for the opponent. He may now properly show that one or another of these hypotheses, thus left open, is not merely possible and speculative, but is more, probable and. natural as the true explanation of the originally offered evidentiary fact" (Paragraph 34, page 423). When a person is found in recent possession of stolen goods, several hypotheses can explain the fact of his possession;

> "nevertheless the hypothesis that he was the taker is a sufficiently natural one to allow the fact of his possession to be considered as evidentiary. There has never been any question of this."

29. Kenny states that "an amount of testimony which is not sufficient to rebut the presumption of innocence entirely (i.e., to shift the burden of proof so completely as to compel the prisoner to call legal evidence of circumstances pointing to his innocence), may yet suffice to throw upon him the necessity of offering, by at least an unsworn statement, some explanation. If he remain silent and leave this hostile testimony unexplained, his silence will corroborate it, and so justify his being convicted" (page 388).

On page 395 he includes the accused's false statements and his silence among the principal forms of circumstantial evidencer In -- 'Mangal Singh's case (R)', Young C. J. stated that the want of explanation of a very suspicious circumstance is itself circumstantial evidence. The Courts "regard false statements in explanation or defence made, or procured to be made, as in themselves tending to show guilt" as stated by Fuller C. J. in (1895) 40 Law Ed 1090 at p. 1095 (Z3).

In 'Basangouda's case (D)', the learned Chief Justice remarked that if the accused had an innocent explanation, "it is almost inconceivable that the accused would not have given it and mentioned who it was who gave them the property." "The silence of one of the discovery of property recently stolen in his possession & under his exclusive control, raises the presumption that, it came into his hands unlawfully."; 22 Corpus Juris Secondum, paragraph 597. 'In AIR 1954 SC 28 (22)', Sunder Lal was convicted because he could not offer a satisfactory explanation for his possession of the ornament worn by the murdered man. There is, therefore, not the slightest doubt that the failure or refusal of the accused to give a reasonable explanation for his possession of stolen property is an important circumstance indicative of the possession being criminal.

30. The argument that the accused refuses to offer an explanation on the grounds that he is not bound to explain and that the onus lies upon the prosecution to prove his guilt has in most cases no factual basis. In most cases he does not refuse to offer an explanation; instead he denies the very existence of the circumstantial evidence. In the present ease, the appellant did not say that he was not bound to open his lips or to help the prosecution in proving his guilt: he did not refuse to offer an explanation. On the other hand, he denied the circumstantial evidence altogether, suggesting that there was nothing which he had to explain. In such a case, it seems to me, it is not open to Court to assume that he had refused to offer an explanation on the ground that he has a right to keep silent. I

would go further and call it illegal. It is the Court's duty to see that justice is done in every case; justice consists in punishing the guilty and acquitting the innocent. A Court is not justified in assuming a fact, even in favour of an accused, when there is nothing to support the assumption. The saying that it is better to acquit ten guilty men than to convict one innocent man might have had its use in old days when the punishments were severe, the accused suffered from many disadvantages and it was not so difficult to bring the guilty to book.

The principle that criminal Courts should bear in mind is; in the words of C. B. Pollock:

> "To make a comparison between convicting the innocent man and acquitting the guilty is perfectly unwarranted. There is no comparison between them. Each of them is a great misfortune to the country and discreditable to the administration of justice. The only rule that can be laid down is that in a criminal trial you should exert your utmost vigilance and take care that if the man be innocent he should be acquitted, and if guilty that he should be convicted." (quoted in Donough's Principles of Circumstantial Evidence, 1918, 158).

31. From the above discussion of the law the following propositions emerge as laying down the correct law:

> (1) Circumstantial evidence to justify conviction must be inconsistent with any reasonable or rational hypothesis of guilt of the accused.
>
> (2) When the inference of guilt from the proved incriminating (i.e. circumstantial) facts is a more natural and probable hypothesis than the other, the onus of offering an explanation for the incriminating facts lies upon the accused. If he does not offer any explanation, or falsely denies the very existence of the incriminating facts it is itself a circumstantial fact against him, even if the court is in a position to imagine an explanation. The guilt is the legitimate inference from the incriminating facts and the added circumstantial fact of failure or refusal to offer an explanation for the incriminating facts because it is not reasonable or rational to say that the accused would fail or refuse to offer an explanation consistent with his innocence if he could. It is immaterial in such a case whether the Court can imagine an explanation or not.
>
> (3) If the inference of guilt from the proved incriminating facts is a less natural or probable hypothesis than the other, the Court cannot draw it and the accused must be acquitted whether he offers any explanation or not.
>
> (4) If the inference of guilt from the proved incriminating facts is as much a natural or probable hypothesis as any other, the accused may be called upon to explain and if he fails or refuses, the Court may treat it as an additional circumstantial fact and infer his guilt. Or it may take judicial notice of the other hypothesis even without any explanation by the accused and acquit him. The instant case falls under proposition (2).

32. When an accused is examined under Section 342, Criminal P. C., it is done "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him", and not because a prima facie case has been made out against him. It would, therefore, be fallacious to contend that unless the circumstantial evidence itself makes out a prima facie case against him, he cannot be asked to explain the incriminating circumstances. He can be questioned at any stage of the trial and whether a prima facie case is made out against him or not is seen after his examination. The answers that he gives to the questions are to be taken into consideration along with the prosecution evidence and then it is to be decided whether a prima facie case is made out against him and a charge is to be framed. His failure or refusal to explain the adverse circumstances thus comes in logical sequence before the decision whether a prima facie case is made out against him or not.

33. The law is that the accused is only asked to explain the adverse circumstances he is not required to prove his innocence until a prima facie ease is made out against him. There is a distinc-tion between his being called upon to explain and his proving innocence on rebuttal of the prima facie case made out against him; see -- 'JaSannath v. Emperor', AIR 1945 All 19 (Z4). Kenny writes on page 392 with reference to the presumption arising out of the recent possession of the fruits of crime that, "this presumption does not displace the presumption of innocence so far as to throw upon the accused the burden of producing legal proof of the innocent origin of his possession. He merely has to state how it did originate. If his account is given at, or before, the preliminary examination, and is minute and reasonably probable, then he must not be convicted unless the prosecution can prove the story to be untrue. If it is no explanation or gives an explanation which is disbelieved by the Court, the Court would convict him, though it is not bound to do so. The presumption, not being one of law, does not need sworn evidence to rebut it and the accused's unsworn explanation suffices;" see foot-note 6 on page 391.

Calling upon the accused to explain his recent possession of the fruits of the crime was erroneously confused with calling upon him to prove his innocence in -- "In re Singaram (C)'.

34. The evidence of conduct against the appellant consists of his failure to offer any explanation for his knowing that the boy's clothes were concealed in the brick-kiln and of the answer given to Shanker Lal in the course of the search of the boy. I have already dealt with his failure to explain. When Shanker Lal, searching for the boy, asked the appellant about him, he told him that he had thrown him in a fire-place. I do not think any inference of guilt can be drawn from that reply which could have been given by him out of anger even if he had been innocent.

35. The evidence discussed above is inconsistent with any reasonable hypothesis of the appellant's innocence and proves beyond reasonable doubt his guilt. It cannot be said that the learned Sessions Judge went wrong in presuming the guilt from it. It is often remarked by Judges that suspicion is not proof or that the evidence does not go beyond creating a suspicion against the accused. With great respect to them I think that the remark is generally unnecessary. When a subordinate Court convicts an accused, it does it on the ground that the evidence proves the case against him and not on the ground that it creates a suspicion against him. The superior Court may think that the evidence does not prove the case and only creates a suspicion against him. But unless it is explained how and where to draw the line between proof and suspicion no useful purpose is served, and no

guidance whatsoever is given to lower Courts, by the remark that suspicion is not proof. No Court has ever attempted to explain how and where to draw the line between suspicion and proof. One can be cent, per cent, sure of the innocence of an accused (as where the person alleged to have been murdered by him is proved to be alive), but one can never be cent, per cent, sure of the guilt of an accused. Absolute certainty of guilt is unknown.

One may be 99.99 per cent, certain but not 100 per cent. Therefore, in every conviction there is some uncertainty. In suspicion there is more uncertainty than in conviction. Nobody can lay down the minimum percentage of uncertainty for conviction. So nobody can say that it is wrong to convict if the certainty of the guilt is less than 95 per cent.; nor can anyone say that if the certainty is of less than 95 per cent., it only amounts to suspicion. One test for judging whether the circumstantial evidence creates suspicion only or proves the guilt is whether it is reasonably consistent with his innocence or not. If it is, it only creates a suspicion against him. In the present case the circumstantial evidence is not reasonably consistent with the appellants' innocence. Not only is it consistent with his guilt, but also it is not consistent with his innocence. Had he been innocent, instead of the circumstances that he falsely denied Ms pointing out the place of the concealment of the boy's clothes and that he could not explain at all how he discovered the place of concealment, there would have been some other circumstance. The appellant is, therefore, proved to be guilty of murder and was rightly convicted.'

36. Even if it be said that' the utmost that is proved is that the appellant himself buried the boy's clothes or helped someone else to bury them, be is guilty under Section 201, I. P. C. The boy's clothes were concealed in order to conceal the evidence of the boy's murder. He is in no case innocent of very offence.

37. I would dismiss the appeal.

Agarwala, J.

38. This case comes before me on a difference of opinion between my learned brothers Desai and Mehrotra. The facts of the case are as follows:

39. Appellant Parshadi has been convicted under Section 302, Penal Code, for having committed the murder of Chimman Lal, a lad of six years of age on or about 2-12-1950 and has been sentenced to transportation for life. The appellant Parshadi is a resident of village Ramanpur, which is at a distance of eight furlongs from the town of Hathras. He was in the service of Shankar Lal, father of the deceased, who carried on a Halwai shop at Hathras. An iron safe containing cash was stolen away from the shop of Shankar Lal and so he lodged a report of theft in the police station on 1-11-1950, under Section 457, I. P. C., implicating the appellant Parshadi as also one Charna. Charna was arrested and sent to jail, while the accused Parshadi was put up in the lock up and released later on -furnishing security. The next day he pointed out the place where the safe had been kept and Shankar Lal got back the stolen property. Ultimately in 1951 both Parshadi and Charna were convicted under Section 381, I. P. C., but they were ordered to be released on executing bonds and producing sureties to appear before the Magistrate whenever called upon to do so within a period of,

three years.

While the appellant was in the lock up he told Ramnath (P. W. 6) and Jwala Prasad (P. W. 10) that when he would go out o the jail he would take revenge on Shankar Lal. After his release from the lock up he again . repeated the threat in the presence of Zahar Mal (P. W. 4). A month later i.e., on 2-12-1950, Chimman Lal, deceased left his father's shop at about 5 p. m. for home which was at a distance of about a furlong. But the poor lad never reached his house. When Shankar Lal came back to the house at about 6 p. m. he did not find Chimman Lal there. He made a, search for the boy. He went to the appellant also but got no satisfactory reply from him. Then he lodged a report at the police station Hathras about the disappearance of the child at 9 a. m. the next day i.e., on 3-12-1950. In the report he did not mention that he suspected any particular person.

On 9-12-1950, Gyanchand, a resident of village Jogia which is just adjacent to the village of the accused, went to his well where he had fixed his Persian wheel and found that some bad smell was coming out of the well. He saw a corpse floating in the water. He then informed Lohrey, Choukidar and showed him the corpse. The chaukidar at once went to the police station and lodged a report. Kishan Singh, Second Officer, police station, Hathras, went to the well and took out the dead body. There was only one black pyjama on the person of the dead body. Popran Mal, father of Shankar Lal was called at the well and he identified the body to be of Cbimman Lal. The dead body was then sent to the police station Hathras and was identified there again by Shankar Lal, to be that of his son. The post mortem report showed that the fingers of the hands and toes of the feet were shrunk and there was mud present, the sutures of the skull bones were separated, the body was highly decomposed and swollen and foul odour was coming out and the skin was peeling off. No injuries were found on the person of the deceased.

The doctor could not give any opinion as to the cause of death due to the decomposition of the body. On 11-12-1950, Parshadi appellant was arrested at his house. On his way to the police station Parshadi informed the police officer that he would produce the clothes of the deceased. The police officer stated that Parshadi had also confes-

sed his guilt and that he had also said that he had placed the clothes in a pit above a brick-kiln. The statement that Parshadi had confessed his guilt, was not admissible but the other statement that he had placed the clothes in a pit, was admissible. Unfortunately the statement of the police officer on this point was not supported by any other witness, probably because no questions were put to the witnesses about it.

The statement that the accused stated to the police officer that he had placed the clothes in a pit above the brick-kiln cannot, therefore, be said to have been proved in the case and must be ignored. The appellant took the police party to the top of the brick-kiln, removed earth from the pit and took out the clothes in the presence of the police - officer and three witnesses who have been believed by the Court below and by my learned brothers.

40. The prosecution case was that it was Parshadi who on account of the fact that Shanker Lal had implicated him in a theft case, took with him the deceased when the latter was returning to his

house and after' murdering him, took off his clothes and threw the dead body into the well from which it was recovered.

41. In defence Parshadi denied that he was in the service of Shanker Lal at all or was prosecuted for theft or concealed the clothes or knew the deceased boy or pointed out the clothes and recovered them from the pit. These denials were obviously false. He also denied that he murdered the boy and concealed his clothes in the pit.

42. There is no direct evidence of the murder and the case has to be decided on circumstantial evidence. It was the month of December when the incident happened and the weather was very cold. Therefore it would be unreasonable to suppose that the clothes had been taken off by the boy himself of his own volition and that he accidentally fell into the well. I think the only reasonable inference is that he was deliberately thrown into the well by the person who had taken off his clothes with a view to murder him and then the murderer concealed the clothes at a place from where no one was likely to find them out. Thus it may be safely presumed that the boy had been murdered.

43. The next question is whether the appellant murdered him. The facts which have been proved . without any shadow of doubt are these:

44. Firstly that the appellant had a motive for . the crime. He had been implicated in a theft case by Shankar Lal, father of the deceased. He, therefore, bore enmity against Shankar Lal.

45. Secondly that the appellant held out a threat against Shankar Lal saying that he would take revenge against him. Revenge is very often taken against an enemy, not necessarily by causing any physical injury to him but by causing physical injury to a near or dear one of his. Experience shows that very often this is done by murdering the son of one's enemy.

46. Thirdly, that the appellant had access to the deceased and could have induced him to go along with him and had an opportunity of killing him. The appellant was the servant of the deceased's father for sometime past and though he had been dismissed and at the time of the incident a case was going on against him at the instance of the deceased's father, yet the appellant because of his past action with the family of the deceased, could have very well persuaded the deceased td accompany him on some pretext or allurement and having regard to the fact that the deceased was only six years of age, could have very easily killed him.

47. Fourthly, that the clothes of the deceased were handed over by the appellant to the police. He, therefore, knew that the clothes belonged to the deceased and also knew the place where the. clothes were hidden.

48. Fifthly, the appellant falsely denied several facts which have been conclusively established, namely that he was ever in the service of Shankar Lal, that Shankar Lal had implicated him in a theft case, that he knew the deceased, that he pointed out the clothes of the deceased to the police at the top of the brick-kiln. Because of these denials he could not give any satisfactory explanation as to how he came to know of the clothes being hidden at the piece from where they were recovered.

49. None of these five facts taken singly is sufficient to hold the accused guilty of the murder of the deceased. But in my judgment the cumulative effect of all the facts leads to the irresistible inference that it was the appellant who had removed the clothes from the person of the deceased, was privy to the murder of the deceased and hid the clothes at the top of the brick-kiln.

50. Holding out of a threat of doing injury to another furnishes ground to presume that he who threatened the fact was the perpetrator or instigator. This was so held by Chief Justice Swift, see. Wigmore on the Law of Evidence, para. 105 at p. 538. In 40 Corpus Juris Secondum, title "Homicide", paragraph 236, it has been stated:

> "Previous threats by accused to kill deceased may be shown for the purpose, of identifying accused as the person who did the killing," though standing by itself mere threat cannot be substantive evidence of murder."

51. The mere fact that the accused pointed out the clothes and did not give satisfactory explanation as to how he acquired the knowledge of the place from where the clothes were taken out would not have been sufficient to show that the accused had hidden the clothes at that place, as was held in AIR 1954 SC 39 (E). But here there are additional facts which were not present in Trimbak's case (E). It should be noted that not only did the accused not offer an explanation as to his knowledge of the place where the clothes were hidden but that he made utterly false statements denying all knowledge about the recovery of the clothes, his implication in the theft case, his service with Shankar Lal and his acquaintance with the deceased. These facts tend to show that the accused had a guilty mind.

It is quite true as Sir Beaumont C. J. observed in AIR 1941 Bom 139 (D) that "in this country the accused cannot go into the witness-box and is not bound to give any explanation at all. The fact that he does not open his mouth cannot, be used against him. It is clearly the duty of counsel in defending an accused to point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence and the Judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused, and if there is, he is not justified in convicting him. A reasonable explanation of the evidence should not be rejected because not offered by the accused." But at the same time his Lordship further observed: "No doubt one of the circumstances, which has to be taken into account, is the fact that the accused has offered no explanation, or has offered a particular explanation."

This view is fortified by the decision of the Supreme Court in AIR 1954 SC 28 (Z2). Therefore it is clear that the fact that the accused has offered no explanation as to how he came to the knowledge of the place where the clothes were hidden and of the owner of the, clothes has to be taken into consideration, although no conviction can be based merely upon it.

52. The rule as to circumstantial evidence, as has been repeatedly pointed out, is that it must be consistent, ancl consistent only with the guilt of the accused, and if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the Benefit. Any hypothesis or explanation tending to show his innocence must be 'rational' because

an irrational or unnatural or a highly improbable explanation will not be taken into consideration. The law does not demand the impossible to be proved by the prosecution. The Indian Evidence Act applies to civil and criminal trials. The words 'proved' or 'disproved' are defined in Section 3 of the said Act. "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." "A fact is said to be disproved when, after considering the matter before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist." "A fact is said not to be proved when it is neither proved nor disproved."

53. These definitions clearly show that the test is of probabilities upon which a prudent man may base his opinion. It is often said that one of the well-known maxims of criminal trials is that it is letter that ten guilty persons be acquitted rather than one innocent person be convicted. This maxim is often misunderstood. It means nothing. more than this that the greatest possible care should be taken by the Court in convicting an accused. The presumption is that he is innocent till the contrary is clearly established. The burden of proof of proving that the accused is guilty is always on the prosecution. If there is an element of reasonable doubt as to the guilt of the accused, the benefit of that doubt must go to him. The maxim merely emphasises these principles in a striking fashion. It does not mean that even an imaginary or unreal and improbable doubt is enough for holding the accused not guilty if the evidence, on the whole, points to- the only conclusion, on which a prudent man can act, that the accused is guilty.

54. Various alternative hypotheses have been discussed by my learned brother Desai and I do not wish to repeat what he has said as I agree with him on this point. Before me learned coupsel for the appellant has suggested another hypothesis that Charna, the co-accused and the appellant in a theft case, might have murdered the deceased and hidden the clothes. But this hypothesis is not at all reasonable having regard to the facts that Charna had not threatened revenge against Shankar Lal, that he was a resident of village Sikurpur, police station Sasni while the clothes were recovered near the village Nagla Ramanpur where the appellant resides. Further it does not appear that Charna was out of jail at the time of murder. The evidence on the record shows that both of them were arrested when a report against them for theft was made by Shankar Lal. Parshadi was released that very day in the night while Charna was sent to jail. The murder and the hiding of the clothes could not have been done by Charna as suggested by the learned counsel tor the appellant.

55. The cases cited at the Bar have been discussed by my learned brothers. No case has been cited in which all the facts which have been proved in the present case were established and yet an inference of guilt was not drawn. In 29 Cri LJ 252 (Lab) (O), Farzand AH was not convicted of murder because the only evidence against him was considered to be of motive and of pointing out of the corpse of the deceased. It may, however, be pointed out with respect that the case was wrongly decided because in addition to the evidence of motive and of pointing out of the corpse, there was evidence of Farzand Ali having said that he had thrown the dead body at the place. This was overlooked by the Court. Nabi Baksh the other accused in the case was not convicted of the murder because the only evidence against him was that the ornaments were recovered from his field.

In -- 'Shahdad Knan v. Emperor', AIR 1926 Lah 139 (Z5), there was no threat or motive established as in the present case. In -- 'Basant Singh v. Emperor', AIR 1927 Lah 541 (Z6), the only evidence was that the deceased was last seen with the accused and that the accused had motive of murder. In AIR 1926 Mad 638 (B), the only evidence was the unexplained possession of the stolen property and it was held that on this finding the accused could not be convicted of murder unless the Court was satisfied that the possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. In AIR 1954 Mad 152 (C), the same view was expressed. This case seems to have dissented from the view taken in an earlier Madras case, AIR 1933 Mad 233 (A), But the other facts proved in the present case were not established in . the Madras cases. It is not necessary to pronounce an opinion as to the correctness or otherwise of the view taken in the Madras cases of Sogiamuthu (B) and of Siiigaram (C) referred to above.

56. For all these reasons I am of opinion that the accused was guilty of the offence with which he was charged and I agree with the conclusion reached by my brother Desai. I would, in agreement with him, dismiss the appeal.

BY THE COURT

57. In view of the opinion of the third Judge we maintain the appellant's conviction and sentence and dismiss his appeal. He must surrender himself to undergo the sentence.

58. We certify this as a fit case for appeal to the Supreme Court.