State vs Shankar Prasad And Anr. on 29 February, 1952

Equivalent citations: AIR1952ALL776, AIR 1952 ALLAHABAD 776

JUDGMENT

Bind Basni Prasad, J.

1. Between 11 P.M. and the daybreak on the night between the 16th and 17th August 1950, one Bhagwan Das Kalwar aged about 50 years, was murdered by strangulation in a room in the upper storey of Onkar Nath Dharamshala situated in Mohalla Naka Muzaffra in the city of Faizabad. The murder remained unnoticed upto about 10 A.M. in the morning when Smt. Mulha, the wife of Debi Prasad, informed Bhagwan Din, Pujari of the Dharamshala that one of the backdoors of one of the rooms in the occupation of Bhagwan Das was open. Mahadeo, a relative of Bhagwan Das was sent for, and then a party went into the room on the upper storey where Bhagwan Das was found lying dead on the floor. Constable Barkhurdar happened to reach there. He communicated this news to Mahamudul Hasan, Head Constable, who visited the scene and at 1 P.M. he lodged a report at the Kotwali, Faizabad. The report runs as follows:

> "I, Mahumudul Hasan, Head Constable No. 59/C.P., was informed by Barkhurdar Khan, Constable No. 304, at about 12 noon that while he was on his beat, he had come to know that Bhagwan Das Kalwar had been murdered at Onkar Nath Dharamshala in Naka Muzaffra and his goods had also been stolen. Acting on the information, I reached Naka Muzaffra and learnt from Bhagwan Din Pujari, Musammat Inderpati, daughter of Debi Prasad Kalwar, Bhagwati Prasad and other persons that Shankar Prasad Shukla, a newspaper man, Sheo Bahadur Singh Thakur, a scholar of the Forbes College, Raghunath barber a railway employee, and one fourth man, whose name could not be ascertained, had been seen at the house of Bhagwan Das Kalwar, deceased, last night till about 12 P.M. or 1 A.M. The household goods are lying scattered and he (Bhagwan Das) is lying murdered in the house. Leaving Barkhudrar Khan, Constable at the spot, I have come to make a report."

2. Four persons viz., Shambu Nath, Shankar, Sheo Bahadur and Raghunath were sent up by the police for the charge under Section 302 read with Section 34, I. P. C. Learned Sessions Judge acquitted Shambu Nath and Sheo Bahadur and convicted Shankar and Raghunath under Section 302 and sentenced them to death. They prefer this appeal and there is also a reference by the learned Sessions Judge for the confirmation of the death sentence.

3. The case rests upon circumstantial evidence and bristles with difficulties. The learned Sessions Judge has based his judgment upon the following facts determined by him:

1. Shankar Prasad, appellant, was with the deceased Bhagwan Das at his shop on the evening of the 16-11-1950, upto 11 P.M.

2. At about midnight there was a knock at the door of Bhagwan Das, the door was opened by someone and two persons one of whom was Raghunath, appellant, entered the house of the deceased.

3. Subsequently late at night a girl by the name of Kumari Inderpati (P. W. 2) who is an inmate of the Dharamshala came out of it to make water and she then saw three persons (Shanker, Raghunath and Shambhu Nath) coming out of the room of Bhagwan Das.

4. Certain ornaments belonging to Bhagwan Das's wife and his daughter, Smt. Kewalpati, were also stolen from Bhagwan Das's room on the night of the occurrence and most of these were subsequently recovered either from the house of his sister on being pointed out by Shankar, appellant, or from the house of Raghunath.

5. A confession made by Shankar, appellant.

4. The recovery of a blood-stained shirt from the house of Raghunath, has also been strongly relied upon by the learned Deputy Government Advocate in this Court,

5. Before discussing the evidence it is necessary first to enunciate the guiding principles of approach to a case of this nature based upon circumstantial evidence. These principles were laid down in 'QUEEN EMPRESS v. HOSH NAK', 1941 All L J 416 in the following words:

"To proof by circumstantial evidence four things are essential.

(1) That the circumstances from which the conclusion is drawn be fully established.
(2) That all the facts should be consistent with the hypothesis.

(3) That the circumstances should be of a conclusive nature and tendency. (4) That the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved."

This case has been followed by this Court in later cases e.g., 'RATAN LAL v. REX', AIR 1949 All 222. In the recent case of 'BRIJ BHUSHAN SINGH v. EMPEROR', AIR 1946 P C 38, their Lordships had to deal with circumstantial evidence. That was a case in which the accused had admittedly given a beating to a woman. According to the prosecution it was a severe beating. In the midnight, the accused with his wife took the woman in a car at a distance of 60 miles. According to the prosecution, it was the dead body of the woman. which was taken in the car but according to the defence the woman was taken alive. Be that as it may, soon after her removal to that distance she was never seen. The prosecution alleged that she had died on account of the beating received by her. Certain bones alleged to be that of the deceased woman were produced but the evidence did not

establish satisfactorily that they were the bones of the woman. Their Lordships, in these circumstances, held that the prosecution case was not proved. They observed:

> "There is no evidence that Bilasia was beaten very severely; no one saw her in a state of collapse, and no one saw her dead body, and there is no evidence sufficient to justify a finding that Bilasia is dead. It is true that both the Courts in India disbelieved the reason given by the appellant to explain the midnight motor-car journey, holding that it was untrue and indeed absurd, to suggest that such a journey was undertaken because the appellant could not face passing another night under the same roof as Bilasia; and their Lordships entirely concur in this view. The fact, that a long motor-car journey was undertaken in the middle of the night, and that a false reason was given in explanation, raises a suspicion that the object of the journey may have been to dispose of the dead body of Bilasia, and that suspicion is much strengthened by finding that from the time when the motor-car left the 'applicant's house, Bilasia was never seen alive by any independent witness, and that admittedly she had disappeared the next day. The appellant has only himself to blame for much of the course which the case has taken. 'But suspicion is not proof."

We approach the case in the light of the principles enunciated above.

6. The first question is whether Shankar Prasad appellant was with the deceased Bhagwan Das at his shop on the evening of the 16-8-1950, at 11 P. M. and also passed his night with him. (His Lordship examined the evidence of Bhagwandin, Pujari and proceeded:) It may be taken as established that Shankar was with Bhagwan Das up to 10 or 11 p. m. That fact by itself cannot suggest anything adverse to Shankar. They were friends and intimate with each other. They were on visiting terms and if Shankar stayed with Bhagwan Das upto 10 or 11 p. m. no incriminating inference can reasonably be drawn from it. But Smt. Inderpati adds that when she woke up at about midnight to make water and came out of the Dharamshala she saw Shankar and Raghunath and a fat man with them coming out of the shop of Bhagwan Das by opening the middle tin flap of the shop and then they took their way on the road. Raghunath is alleged to have been carrying a gathri.

If this evidence is true then certainly it is a circumstance very much against Shankar and Raghunath appellants. The question is whether this piece of evidence is true or not. Smt. Inderpati is the sole witness of this fact. She is a girl of 12 years. It is a well established rule of law that juvenile evidence must be examined with great caution. We may only refer to the observations of their Lordships of the Privy Council in 'MOHAMMED SUGAL ESA RER AALALAH v. THE KING,' AIR 1946 P. C. 3 and 'ABBAS ALI SHAH v. EMPEROR,' AIR 1933 Lah 667 at p. 668. There are certain inherent improbabilities in this evidence. (His Lordship pointed out the improbabilities and discarding the evidence of the witness proceeded :) Our finding, therefore, on the first of the facts is that Shankar appellant was with Bhagwan Das upto 11 p. m. only.

7. Coming to the second circumstance relied upon by the learned Sessions Judge, viz., a knock at the door of Bhagwan Das at about midnight, the door being opened by someone and the entry of two persons one of whom was Raghunath, in the house of the deceased, we Have, firstly, the evidence of

Bhagwan Din, Pujari. (His Lordship discussed the evidence and proceeded:) We hold that the second circumstance also relied upon by the learned Sessions Judge has not been established beyond any reasonable doubt.

8. In considering the first circumstance we have already considered whether or not Inderpati saw three men coming out of the shop of Bhagwan Das and we have given reasons to hold that it is not established. The third circumstance also is thus not proved.

9. The fourth circumstance, viz., the recovery of ornaments is a very important one. As already stated the first information report was lodged at 1 p. m. S. O. Chandra Saran Swami reached the spot at about 1.50 p. m. Before he commenced the investigation Smt. Kewalpati, daughter of the deceased, gave him a list of the stolen ornaments, Ex. P4. He deputed the Second Officer and Head Constable, Mahmudul Hasan, to arrest the accused. Shreo Bahadur and Shankar were produced before him under arrest between 8 & 9 p. m. He interrogated them. Shankar accused is alleged to have state-ed:

> "I have kept the property, which was allotted to me as my share, in an earthen pot in a 'kothri' in the house of my sister, Musammat Subraji, wife of Rani Piarey Brahman, resident of Baburiha, police station Bikapur. I can point out that property and deliver it."

He was then taken to Baburiha. The party reached there at about 6 A. M. on the 18-8-1950, and Shankar, accused, brought an earthen pot containing ornaments Exs. I to XII. A recovery list was prepared. The recovery witnesses are Sulaiman, Subraji and Ram Lakhan. The Station Officer then went to Kurmi-ka-Purwa in search of Raghunath accused. He did not find Raghunath but his father, Gur Prasad, was present there. The Station Officer searched the house of Raghunath in the presence of the witnesses, Ram Lakhan Singh, Thakur Sitla Bakash Singh and Gur Prasad and recovered the ornaments, Exs. XIII to XXXIII from a tin box in a kothri inside the house. From the same 'kothri' he recovered the blood-stained shirt. This was sent to the Chemical examiner and the Imperial Serolosist and was found to contain human blood. Raghunath was arrested on the 20-8-1950. The Station Officer interrogated him and he is alleged to have stated:

> "I have kept the property which was given to me as my share, at the house of my brother's father-in-law, Ram Lal, barber, at villaga Kasturipur, police station Mahrajganj. I can point out that property and get the same recovered."

The party then went to Kasturipur and in the presence of the witnesses Rameshar, Jagdish Singh and Hargovind Singh, Raghunath is alleged to have pointed out and to have taken out a packet containing the ornaments, Exs. XXXV to XLII and XLIV and the 'dhoti' Ex. XXXIV and the towel Ex. XLIII. Identification proceedings were held by a learned Magistrate and the articles recovered were identified to be those which were in the house of Bhagwan Das. The ornaments belonged partly to Smt. Kewalpati and partly to the wife of Bhagwan Das. Before the Committing Magistrate Kewalpati and Jag Taran Devi, daughters of Bhagwan Das deceased, Ram Achal, husband of Smt. Kewalpati, and Jokhu, father-in-law of Kewalpati, identified these articles to be those which were in

the house of Bhagwan Das and to have been stolen away on the night of the murder. All these witnesses save Kewalpati appeared also in the court of Session. The evidence of Kewalpati was admitted under Section 33 of the Evidence Act as she died before the commencement of the trial in the court of Session. There is no room for any doubt that the articles which were recovered were in the house of Bhagwan Das on the night of the murder and were stolen away. "The appellants deny the recovery of these articles in the manner alleged by the prosecution. They themselves lay no claim to them.' We shall discuss later as to what is the legal effect of the recovery of these articles from the possession of the appellants.

10. Fifthly, there is the confession of Shankar made before a learned Magistrate on 23-8-1950. In this confession he does not incriminate himself as to the charge of murder. The story given by him is as follows:.

> "On 16-8-1950, I went from the Commissioner's quarters to Naka to get back Maya magazine from a boy named Parmeshwar. He (Parmeshwar) lived at Onkar Dharamshala. He (Bhagwan Das) used to sell earthen pots and cow-dung cakes etc. He carried on shop in the same Dharamshala on the ground floor and lived in the room on the upper storey. I reached there at 6-30 P.M. or 6-45 P.M. and found both Parmeshwar (the boy) and Bhagwan Das sitting at the shop of Bhagwan Das. I demanded back 'Maya' and 'Navjug' magazines from Parmeshwar. He said that they were kent at the place of Bhagwan Das. Lala Bhagwan Das brought and gave both the books to me and said to me. 'Why are you in a hurry? Take your seat". He then brought four fired ears of maize from the upper storey. I ate two out of them and one was eaten by Parmeshwar and one was eaten by Lala Bhagwan Das himself.
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> After some time Bhagwan Das asked me to take 'roti' (food). I said that, being a Brahman, I did not take food cooked by anyone. He then brought and gave me 'lai' and parched gram. After that, it began to rain. He then got a bed spread for me in the room adjacent to his shop. There was a door connecting the room and the shop. I lay down there. Lala Bhagwan Das had gone upstairs. A staircase in his shop led to his room (on the upper storey). At about 10 P.M. Bhagwan Das came downstairs and said, 'the 'roti' (food) of Raghunath was prepared at my place but he has not come.' After saying so, he again went upstairs. Raghunath came after half an hour and called out Bhagwan Das addressing him as 'Nana, Nana, (maternal grandfather)'. I then opened my room. He then passed through my room outside and went up by the staircase in the shop. He remained on the upper storey.
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> Another man, whom he was addressing as 'Pandit, Pandit,' had also come with him. He too had gone to the upper storey. I then fell asleep. At about 1 A.M. or 2 A.M., I heard the sound of some one falling down on the staircase. I then woke up. I thought that the Lala had fallen down. I then also went up by the staircase. I saw the dead body of Bhagwan Das lying on the staircase and Raghunath and the Pandit, who had a light with them, opening the lock of the other room of 'Bhagwan Das. Just on reaching up, I came back at once. At the same time, the Pandit came downstairs with

> a knife and said that I would be killed if, I uttered a word. I sat down on the bed and the Pandit remained standing with the knife.
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> After half an hour, Raghunath came down with a bundle containing ornaments and other things not known to me. They then also brought me outside. On the way, they gave me 'Kantha', (a kind of necklace) 'bazu' (an armlet) and two or four other ornaments and asked me to go to my quarters saying that if I divulged the secret to anyone, I would be dealt in the same manner as Bhagwan Das. Then they ran away and I came to my quarters with a sad heart. As I stood in fear (of them), I did not present these ornaments to the Police nor did I lodge any report. I then kept the ornaments at the house of a relative in village Babruya. The police then arrested me in front of the compound of the Commissioner. Parmeshwar did not remain with me. He went to his room after eating an ear of maize. Sheo Bahadur has absolutely no knowledge of this case."

As regards this confession the explanation which he gave before the Committing Magistrate was that he was promised by the Station Officer that he would be made an approver and that is why he made that statement on 23-8-1950 before the Magistrate. He adhered to that statement in the court of Session. There are certain inherent improbabilities in this confession. (His Lordship pointed out those improbabilities and proceeded:) In these circumstances, we can place no reliance upon this confession.

11. Now there remain the two statements made by the two appellants to the Station Officer as a result of which the ornaments were recovered. Learned Deputy Government Advocate has argued that these statements are admissible in evidence under Section 27, Evidence Act. The section provides:

> "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not as relates distinctly to the fact thereby discovered, may be proved."

The word "distinctly" in the section is important. It means that only that part of the statement which leads directly to the recovery is admissible in evidence.

12. The first point to be noted is that the statements alleged to have been made by Shankar on 18-8-1950, and by Raghunath on 20-8-1950 are almost in identical terms, so far as their incrimination is concerned. Assuming that the whole of these two statements are admissible in evidence, the question arises how far they establish the guilt of murder against the appellants. There is nothing in these statements to show that the appellants were a party to the murder. They could have come in possession of the stolen articles in BO many ways without being connected with the actual murder, for instance, on coming to know of the murder of their friend Bhagwan Das they went inside the room in which the offence was committed and the culprits silenced them by giving them a share of the ornaments stolen by them or the culprits might have sold the ornaments to them

or they might have been the custodians of the ornaments from the culprits. They may be guilty of the offence under Section 411, but the mere recovery of these ornaments from the possession of the appellants while creating a suspicion against them is not sufficient to fasten the guilt of murder upon them.

13. The sixth circumstance relied upon by the learned Deputy Govt. Advocate was the recovery of the blood-stained shirt from the house of Raghunath. The first point to be noted in this connection is that there is no evidence to prove that the shirt belonged to Raghunath. It is true that it was recovered from his house, but there were several inmates in it. There must be some evidence to connect the shirt with Raghunath and without such evidence we cannot hold it as a fact that it belonged to him, however strong our suspicion may be that the shirt was his. In 'BRIJ BHUSHAN SINGH v. EMPEROR', AIR 1946 P C 38, their Lordships of the Judicial Committee observed that for coming to a decision on a question of fact the Court cannot act upon evidence which was not given, however much it may feel that it ought to have been given.

14. The established facts thus are that Shankar, appellant, was seen with Bhagwan Das on the night of the murder upto 11 P.M. There is no proof that after that he was with Bhagwan Das that night. As regards Raghunath there is no satisfactory proof that he entered the house of Bhagwan Das that night or that he was there that night. There is the recovery of the articles at the instance of the appellants and there are the statements of the appellants made to the police which led to the recovery of these ornaments. The question is what inference is to be drawn from these proved facts. Before dealing with the case law referred to by the learned counsel for the parties we may state certain other circumstances which have a bearing upon the determination of the point under consideration.

The incident takes place in the heart of the city of Faizabad in a Dharamshala in which according to the evidence of Bhagwan Din, Pujari, about 30 visitors were staying that night. He cannot give their names and addresses as no register of visitors was maintained in the Dharamshala. He cannot say whether among those who were in the Dharamshala there were thieves or dacoits. The main door of the Dharamshala remained open throughout the night and any person could freely come inside the Dharamshala. Between the appellants and Bhagwan Das admittedly the relations were very intimate so much so that in the day immediately preceding the night of the murder Shankar and Bhagwan Das went together to see the Mela. They were frequently visiting each other and Shankar often used to dine with Bhagwan Das.

It is improbable that with such cordial relations the appellants should all of a sudden have been overtaken with greed so much that they thought of murdering such a close friend. It is true that the appellants are giving no satisfactory explanation as to how they came in possession of the stolen ornaments. That is a factor which is certainly against them, but the points for and against must be weighed together and the balance struck. As already stated, the appellants might have come in possession of the ornaments without being themselves a party to the murder. We find embellishments in the court of Session in the evidence of the prosecution. That raises a suspicion in our mind.

15. It has been strenuously argued by the learned Deputy Govt. Advocate that the recovery of the stolen articles from the custody of the appellants raises a presumption of their complicity in the offence of murder and in this connection he has relied upon certain cases to which we now proceed to refer.

16. The first case relied upon is 'BAIJU v. KING EMPEROR', 11 All L J 94. That was not a case of murder. A burglary was committed at night and the stolen property was found in possession of the accused the next morning. It was held that there was a presumption that he was one of the men who had committed the theft. The facts of this case are distinguishable. Learned counsel contends that a presumption of a graver offence under Section 457/75, I. P. C. was made and not under Section 411. A perusal of the judgment would show that the point was not argued before the Court that a presumption under Section 411 ought to be made. This case is of no help to the present case.

17. The second case relied upon is 'EMPEROR v. MT. HAR PIARF, AIR 1926 All 737. In that case a man died in his own house surrounded by his own family and poisoned shortly after eating food which must have been prepared by his wife. No explanation was forthcoming from the occupants of the household as to what had happened to him to cause his death. The accused were proved to have been guilty of persistent lying in an attempt to account for the absence of the deceased and were also shown to have hidden the corpse to save themselves from the offence. In these circumstances a presumption against the accused was made. The facts are distinguishable. Here the only evidence against the appellant is the recovery of the stolen articles, the other factors are all in their favour. The circumstances of the present case are Quite distinguishable from those of 'HAR PIARI'S CASE'.

18. The third case referred to us is that of 'EMPEROR v. KANHAIYA', AIR 1930 All 481. That was also a case in which the circumstances were quite different. A man was found taking along in a cart persons one of whom had blood stained clothes arid a broken head, and those persons were subsequently found to have taken part in a dacoity recently before being taken away in the cart. It was held that the burden lay upon the cartman so found in the circumstances to disclose what he knew about the circumstances in which he was found. It was further held that the failure to discharge the burden would lead the Court to the irresistible conclusion that the cartman must have known that those persons had taken part in the dacoity and that one of them was injured in that dacoity. This case is also of no assistance to the one before us.

19. The fourth case is that of 'EMPEROR v. CHHEDDA', 1944 All L J 411. That was also not a case of murder. A burglary took place in a certain house and the accused persons were seen the next day with the stolen property in circumstances which suggested that they were dividing up the booty. It was held that in these circumstances it was a reasonable inference that the accused had committed the theft or burglary. The facts are quite distinguishable.

20. The fifth case is that of 'BHAGWAN v. EMPEROR', AIR 1929 Oudh 190. The case is also distinguishable from the present one. There a person admittedly knew that his wife was murdered shortly after midnight and yet he made no report to the police station, nor made any attempt to find out who killed his wife. It was held in these circumstances that his conduct was unnatural and might lead to the conclusion that he himself was the murderer.

21. The sixth case is that of 'IMMAMUD-DIN v. EMPEROR', AIR 1934 Oudh 388. The facts of that case are also distinguishable from those of the present one. It was held that if an article stained with human blood is recovered from the possession of an accused or from a place pointed out by an accused, then the case against him becomes very serious. It is for him to explain that point. But if the prosecution failed to establish that there were stains of human blood on any of the articles so recovered, then a Court would be wholly unjustified in drawing an inference that the blood stains were of human blood. As already stated, there is no proof that the blood stained shirt belonged to Raghunath.

22. The seventh case relied upon is that of 'EMPEROR v. NEAMATUALLAH', 14 Cri L J 556 (Cal). That was a case of murder in which the accused was found to have been in recent possession of articles belonging to the deceased and traces of human blood were found on those articles as also on articles of clothing one of which was actually being worn by the accused when he was arrested by the police. It was held that the possession was a fact from which the Court might presume not merely theft or receipt of stolen property but the more aggravated offence connected with theft. In the present case there is no proof of any clothes worn by the appellants being blood-stained. In that case there were circumstances in addition to the recovery of the property.

23. The eighth case is that of 'EMPEROR v. CHINTAMANI SHAHU', (AIR 1930 Cal. 379 (2)). That was a case in which the accused was the servant of the family. The murdered woman was wearing certain ornaments and those ornaments were missing after the murder. The servant disappeared after the murder. He was subsequently arrested and one of the missing ornaments was found from his possession. In these circumstances a presumption was made that the murder was committed by him. Such are not the facts of the present case.

24. The ninth case is that of the 'PUBLIC PROSECUTOR v. CHIAREDDI MUNAYYA', 12 Cr. L. J. 564 Mad. It was a case in which murder and robbery were parts of one transaction. The facts in that case were that the deceased was last seen alive in her house upto 1 O'clock in the afternoon. At about 3 O'clock the same afternoon the accused and another man were seen to enter the house and to leave it again some time later. In the evening, it was discovered that the lady was lying murdered. The entry of the accused in the house was publicly mentioned by the witnesses who had seen it.

A search was made by the village Magistrate and Police but the accused was not to be found in his house or in the village. Subsequently he was arrested and then he made a statement and took the Police, the village Magistrate and several others to a place about half a mile from the village and dug up a pot which contained a number of jewels which agreed with the jewels that were stolen. The Chemical. Examiner reported that some of the jewels so given up by the accused had on them traces of mammalian blood. In these circumstances a presumption of murder was made against the accused. These circumstances do not exist in the present case.

25. The tenth case is that of 'RAMJI v. EMPEROR', 20 Cri. L. J. 753 (Nag). The facts of that case were also different. In that case a girl of 7 was in her parents' house upto about 10 a. m. At about 4 p. m. the same day her corpse was found covered with sand in a pit a mile from the abadi. It was clear that she had been strangled and all her ornaments had been removed. On the day following the

accused was arrested and the ornaments were then recovered at his instance. There was evidence to prove that the girl was taken by the accused to the jungle on the pretext of giving her 'sitaphal' and that he turned the deceased's sister back on her going there in search of the child. It was in these circumstances that from the recovery of the stolen articles at the instance of the accused a presumption of murder was made against him.

26. The eleventh case is that of 'MT. JAMUNIA PARTAP v. EMPEROR', AIR 1936 Nag. 200., The circumstances of that case are also distinguishable from those of the present one. The deceased was seen going with the accused together to the scene of the occurrence. There was evidence of the conduct of the accused tending to show her guilty mind, for instance; soon after the occurrence she was seen in a trembling condition. The articles recovered at the instance of the accused bore human blood. In these circumstances the recovery was taken as an important evidence in proof of the guilt of the accused for murder.

27. The twelfth case referred to is 'QUEEN-EMPRESS v. SAMI AND ANOTHER', 13 Mad. 426. In that case one of the appellants confessed and other evidence against him was sufficient. As against the second appellant the evidence was that he was a friend of the first one and was in company with him. He was found selling one of the ornaments removed from the person of the deceased. The confessional statement of the first appellant incriminated the second one also. In these circumstances the recovery of the stolen ornaments from the possession of the second appellant was taken as a presumptive evidence against him not only on the charge of robbery but also on the charge of murder. The facts of the present case are quite different.

28. The thirteenth case is that of 'NAINAMALAI KONAN IN RE', AIR 1921 Mad. 679. It was held in that case that the possession of the jewels of a murdered woman if unexplained, is presumptive evidence that the accused was the murderer as well as that he committed the theft. The circumstances connecting the accused with the murder were that the accused came to the field hut where the deceased was with her husband and called her promising to give her paddy. Her dead body was found about midnight in a lane near the house of the accused. The following morning the accused said that he had kept the jewels, which were missing from the deceased's corpse, in his house and that he would produce them and then he actually produced them. In the present case the only circumstance which has been proved is the recovery of the stolen articles at the instance of the appellants. No other incriminating circumstances have been established. It may be noted that the case was sent back for retrial.

29. The same learned Judge, viz., Spencer J., decided also the case 'IN RE, SOGIAMUTHU PADAYACHI, AIR 1926 Mad. 638.' In that case he observed:

> "When the charge is that the accused committed murder or theft in a building or both, is it 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? I think the answer must be that if there is other evidence to connect the accused with the death of the murdered man, a jury, or in this country a Judge, may find upon circumstantial evidence that he is the murderer. But when the

> unexplained possession of stolen property is the only circumstance appearing in the evidence against an accused charged with murder and theft, the accused 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."

This is a proposition with which we entirely agree.

30. This case was subsequently considered in 'K. NARAYANA v. EMPEROR', AIR 1933 Mad. 233. Disagreement was expressed with certain observations made by Spencer, J. The learned Judge observed:

> "There is one general rule which must never be forgotten, namely, that in making presumptions of fact or in drawing inferences of fact from evidence a Judge or a jury must always have regard to all the known facts of the case. And that they must do because they are required to decide on all questions of fact as reasonable men. To attempt to isolate a particular fact or group of facts from surrounding circumstances and to discuss the logical inference may be useful mental exercise; but it appears to me wholly out of place in a judicial decision."

31. What inference may be drawn from a certain set of circumstances always depends upon the circumstances which have been established by evidence. In the present case, on the solitary fact of recovery of stolen articles from the possession of the appellants we do not feel that it is proper to draw an inference of murder also against them. An inference of their having been in possession of stolen property may be drawn, but on that we do not wish to express any categorical opinion as we are going to direct a retrial of the accused under Section 411, I. P. C.

32. We may also refer to the case of 'YAMIN v. EMPEROR', AIR' 1924 All. 701. That was a case in which the accused was charged under Section 395, I. P. C. and the evidence against him was that of recovery of the stolen articles, nevertheless Sulaiman, J. drew only the inference of lighter offence of Section 411, I. P. C. and not of the graver offence under Section 395 I. P. C.

33. In 'NAGA THEIN PE v. THE KING', AIR 1939 Rangoon 361 it was held that the highest presumption which could be drawn from possession of stolen property by itself, and in the absence of any other evidence, is presence at the scene of theft. Where a long interval has elapsed before the stolen property has been recovered it is often unsafe to assume that the possessor is the actual thief.

34. The conclusion which is deducible on a consideration of the cases mentioned above is that no hard and fast rule can be laid down as to what inference can be drawn from a certain circumstance. The cumulative effect of all the circumstances established by evidence and the nature of these circumstances have to be taken into consideration and then it has to be judged whether, having regard to the ordinary course of human conduct, it is safe to presume that the offence was committed by the accused. Where the only evidence against an accused is the recovery of the stolen property, although circumstances show that the theft and the murder were committed at the same

time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof. There may be suspicion against the appellants, but we cannot say that it amounts to a proof beyond all reasonable doubt. As already stated, they may be guilty of the offence of having been in possession of the stolen property knowing it to be stolen.

In view of these considerations, we cannot uphold the conviction of the appellants under Section 302, I. P. C. At the same time the fact that the appellants were found in possession of the stolen articles makes a good 'prima facie' case for their trial under Section 411, I.P.C. It is unfortunate that they were not charged with this offence. It would, however, be a travesty of justice if with the evidence before us the appellants are not tried for the offence under Section 411, I. P. C. We think it proper that the appellants should be tried for this offence.

35. The appeal is allowed. The conviction and sentence of the appellants under Section 302.

are set aside. The reference is rejected. The appellants shall be charged and tried under Section 411, I. P. C. for having been in possession of the stolen articles recovered respectively from the possession of each knowing them to be stolen. The record will be returned at once through the learned Sessions Judge to the Magistrate concerned so that he may commit the appellants under Section 411, I. P. C. to the learned Sessions Judge and if they are found guilty then they may be adequately punished, for it. The Sessions Judge will hold the trial.

The appellants shall continue to remain in custody unless granted bail by any competent court.