2023/KER/43359

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

MONDAY, THE 31ST DAY OF JULY 2023 / 9TH SRAVANA, 1945

CRL.A NO. 1552 OF 2019

AGAINST THE JUDGMENT DATED 30.04.2018 IN SC 107/2014 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT - IV, PATHANAMTHITTA

APPELLANT/ACCUSED:

BHAGAVAT SING @ BHEEM SING,
S/O. DOOJ BEHADUR SING, KAILASA GRAMAM, CHAIMPUR POLICE BOARDER, NEPAL, BAJAMAGE, NOW IN CUSTODY AS CONVICT NO.4170, CENTRAL PRISON, VIVOOR.

BY ADV R.PADMAKUMARI(K/270/1988) STATE BRIEF

REPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, KOCHI-31.

SRI.ALEX M.THOMBRA SR. PP

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 31.07.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Crl.Appeal No.1552 of 2019

Dated this the 31st day of July, 2023.

JUDGMENT

P.B.Suresh Kumar, J.

The first accused in S.C. No.107 of 2014 on the files of the Additional District and Sessions Court – IV, Pathanamthitta who stands convicted and sentenced for having committed the offences punishable under Sections 457, 342, 397 and 302 of Indian Penal Code (IPC), challenges in this appeal his conviction and sentence in the said case.

2. Body of one Muhammed Kunju who was working as a security guard in a residential house was found in a partly decomposed state in the outhouse of the said residential house on 16.01.2012. A case was registered in connection with the death of Muhammed Kunju on 16.01.2012 by Adoor Police, on the basis of the information furnished by the son in law of the deceased, and a final report has been filed

in the case, after investigation, against the accused alleging commission of the offences punishable under Sections 457, 342, 397, 302 and 120(b) of IPC. The accused, four in number, are natives of Nepal. Among them, the second accused was residing in a rented house near the house where the occurrence took place.

3. The accusation in the case is that in furtherance to a criminal conspiracy hatched between the accused to murder Muhammed Kunju and commit robbery in the house where he is working as security guard, accused Nos.1, 3 and 4 trespassed into that house at about 1 a.m. on 13.01.2012, strangulated Muhammed Kunju to death using clothes, and after keeping the dead body in the outhouse, the accused broke open the kitchen door of the house using screwdriver, iron rods, hacksaw blades etc. and committed theft of a silver lamp, gold ornaments weighing 45.400 grams and silver ornaments weighing 66.500 grams.

4. As accused Nos.3 and 4 could not be apprehended, the final report as against them was split up and accused Nos.1 and 2 were committed for trial. As accused

Nos.1 and 2 pleaded not guilty of the charges framed against them, the prosecution examined 26 witnesses as PW1 to PW26 and proved 44 documents through them as Exts.P1 to P44. MOs 1 to 13 are the material objects in the case. After the prosecution tendered its evidence, when the accused was questioned under Section 313 of the Code of Criminal Procedure (the Code), they denied the incriminating circumstances brought out in evidence against them and maintained that they are innocent. Since the Court of Session did not consider the case to be one fit for acquittal under Section 232 of the Code, the accused were called upon to enter on their defence. The accused, however chose not to adduce any evidence.

5. The Court of Session, in the circumstances, on an appraisal of the materials on record, found the first accused guilty of the offences alleged against him and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- for the offence punishable under Section 457 IPC, to undergo rigorous imprisonment for one year for the offence punishable under Section 342 IPC, to undergo rigorous

imprisonment for seven years and to pay a fine of Rs.10,000/- for the offence punishable under Section 397 IPC and to undergo imprisonment for life and to pay a fine of Rs.1,00,000/- for the offence punishable under Section 302 IPC. Default sentences were also imposed on the accused. The second accused was, however, acquitted as he was found not guilty of the offences. The first accused is aggrieved by his conviction and sentence in the case and hence, this appeal.

6. Heard the learned counsel for the appellant as also the learned Public Prosecutor.

7. The case is one built on circumstantial evidence. The learned counsel for the appellant, after taking us through the oral and documentary evidence adduced by the prosecution, contended that the circumstances established in the case do not prove the guilt of the appellant beyond reasonable doubt. It was pointed out by the learned counsel that it was solely based on the recovery of some of the stolen articles and the implements allegedly used for breaking open the house based on the disclosures made by the appellant, and the evidence tendered by the prosecution that one of the

chance fingerprints developed from the scene of occurrence tallied with the specimen of the right middle finger impression of the appellant, that the Court of Session found the appellant guilty of the offences. It was argued by the learned counsel that the chance fingerprints compared with the specimen fingerprint of the appellant were fingerprints manipulated by the investigating officer after the arrest of the appellant and no relevance can, therefore, be placed on the said evidence. As far as the discoveries are concerned, the submission made by the learned counsel was that it has not been established by the prosecution beyond reasonable doubt that the discoveries are based on the disclosures made by the appellant.

8. Per contra, the learned Public Prosecutor supported the impugned decision pointing out that the circumstances established in the case are conclusive in nature and the same exclude every hypothesis, but the one proposed to be proved by the prosecution. The learned Public Prosecutor has also brought to our notice, the circumstances established in the case, to bring home the point canvassed by him. We are not referring to the circumstances pointed out by the learned

Public Prosecutor as established in the case here, as we propose to deal with the same in detail later.

9. In the light of the submissions made by the learned counsel for the parties, the point that arises for consideration is whether the conviction of the appellant and the sentence imposed on him, are sustainable in law.

10. In order to consider the point, the first and foremost aspect to be examined is whether the case on hand is a case of homicide. PW9 is the Forensic Surgeon attached to the Medical College Hospital, Kottayam who conducted post-mortem examination on the body of the deceased. He deposed that the death of the deceased was due to strangulation. Ext.P4 is the post-mortem certificate issued by PW9. Even though PW9 was cross-examined by the counsel for the appellant on the above aspect, nothing was brought out in the cross-examination to doubt the evidence tendered by PW9 that the cause of death was due to strangulation. We, therefore, affirm the finding of the Court of Session that the case on hand is a case of homicide.

11. The next question to be considered is whether

the prosecution has established beyond reasonable doubt that it is the appellant and others who caused the death of the deceased and committed robbery. It is necessary to refer to the evidence let in by the prosecution to deal with this question. PW1, the son-in-law of the deceased is the person who gave the first information statement. PW2 is the neighbour of the house where the occurrence took place, who runs a tea stall near the said house. He deposed only that he saw the deceased going to the house where the occurrence took place on 13.01.2012 at about 3.30 p.m. PW3 is the staff of the owner of the house where the occurrence took place. It is PW3 who saw the partly decomposed body of the deceased for the first time on 16.01.2012. PW3 deposed the said fact in Court. PW4 is the owner of the establishment where the appellant was found employed after the occurrence. He is an attestor to Ext.P2 mahazar in terms of which some of the stolen ornaments namely, MO1 to MO8 which were concealed under the ground in the establishment of PW4 were seized on discovery, based on the disclosure made by the appellant. PW4 identified the ornaments hidden by the appellant. PW5, the

brother of PW4, deposed that it is he who introduced the appellant to PW4. PW6 is the manager of the auditorium run by the owner of the house where the occurrence took place. It is PW6 who informed the death of the victim to PW1. He deposed the said fact in Court. PW7 is an attestor to Ext.P3 mahazar, in terms of which the various implements used by the appellant to break open the house, which were concealed by the appellant in a property owned by one Peter, had been seized on discovery, based on a disclosure made by the appellant. PW7 has identified MO9 lever, MO10 series screwdrivers, MO11 series hacksaw blades and MO12 plastic cover in which MO9 to MO11 were kept for concealment. PW8 is a person residing near the house where the occurrence took place. He deposed that he saw the appellant in the company of the second accused in the case, prior to the occurrence. PW10 is the owner of the house where the occurrence took place. PW11 is the wife of PW10. Both of them identified MOs 1 to 8 ornaments and deposed that the same are ornaments belonging to them and kept in the house.

12. PW15 is the finger print expert who inspected

the scene of occurrence and developed the chance fingerprints from the various objects kept therein on 16.01.2012 and 17.01.2012. He deposed the said fact in his evidence. Ext.P8 is the final expert opinion of PW15. He deposed that the Station House Officer forwarded the finger prints of the appellant for comparison with the chance finger prints collected from the scene of occurrence and on comparison, it was found that one of the chance finger prints developed by him and covered by Ext.P8(a) photograph from the finger print found in the cover of the liquor bottle tallied with the specimen of the right middle finger impression of the appellant. PW20 is a retired army personnel who deposed that it is he who translated the disclosure made by the appellant to the investigating officer, on the basis of which MO1 to MO8 ornaments and MO9 to MO11 implements were discovered.

13. PW26 is the investigating officer in the case. He deposed that the development of chance finger prints by PW15 from the scene of occurrence has been taken note of in Ext.P17 scene mahazar. He also deposed that since it was revealed during investigation that the second accused was

attempting to abscond from the locality, the investigation of the case continued focussing on persons hailing from Nepal, and having found that the appellant who hails from Nepal is employed in the establishment of PW4, the appellant was interrogated in connection with the occurrence and having found that he is one among the accused, he was arrested on 30.01.2012. It was also deposed by PW26 that during interrogation thereafter, the appellant informed him that he concealed the ornaments stolen from the house in the establishment of PW4 and that he would hand over the same if he is taken to the place where he concealed the same. It was also deposed by PW26 that the appellant was accordingly taken to the establishment of PW4 and upon reaching, the appellant took a cover containing MO1 to MO8 ornaments concealed by him under the ground behind a well and handed over the same to him. PW26 identified the gold ornaments. It was deposed by PW26 that the said ornaments were seized in terms of Ext.P2 mahazar. Ext.P2(a) is the disclosure statement of the appellant which led to the discovery of MO1 to MO8 ornaments. PW26 further deposed that during interrogation,

the appellant also disclosed to him that he had concealed the implements used for breaking open the house, in the property of one Peter and accordingly, the appellant was taken to the place where he had hidden the implements and on reaching the said place, the appellant took a cover containing MO9 to MO11 implements which were concealed by him in the said property. It was deposed by PW26 that the said implements were seized in terms of Ext.P3 mahazar. PW26 identified MO9 to MO11 implements. Ext.P3(a) is the disclosure statement of the appellant which led to the discovery of MO9 to MO11 implements.

14. As noted, the argument advanced by the learned counsel for the appellant as regards the evidence of PW15, the fingerprint expert is that the chance fingerprints compared with the specimen fingerprint of the appellant are those manipulated by the investigating officer after the arrest of the appellant. We do not find any merit in this argument. As deposed by PW26, the investigating officer, the chance finger prints were developed by PW15 on 16.01.2012 and 17.01.2012 simultaneous to the preparation of Ext.P17 scene mahazar and

the said fact has been taken note of in the scene mahazar. The appellant was arrested only on 30.01.2012. Even though it was put to PW15 by the counsel for the appellant that the chance finger prints compared with the specimen finger print of the appellant were manipulated after the arrest of the appellant, no material whatsoever was elicited from PW15 by the counsel for the appellant to suspect or doubt the credibility of the evidence tendered by PW15.

15. Coming to the seizure of Mos.1 to 8 ornaments and Mos.9 to 11 implements, as noted, the contention raised by the learned counsel for the appellant was that the said material objects were not discovered based on the disclosures made by the appellant. We do not find any merit in this argument also. PW20, the retired army personnel deposed in his evidence that he was with the investigating officer while the appellant and second accused in the case were being interrogated and that it is he who translated their statements to the investigating officer. PW20 has also deposed categorically that Ext.P2(a) and P3(a) are statements made by the appellant as translated by him to the investigating officer.

He also deposed that he was with the investigating officer when the appellant took Mos.1 to 8 ornaments concealed by the appellant and handed over the same to the investigating officer and that he was an attestor to Ext.P2 mahazar also. Similarly, PW20 has also deposed categorically that he was with the investigating officer when the appellant took Mos.9 to 11 implements concealed by him and handed over the same to the investigating officer and that he was an attestor to Ext.P3 mahazar as well. He identified Mos.1 to 8 ornaments and Mos.9 to 11 implements. Even though a question was seen put by the learned counsel for the appellant to PW20 that he did not correctly translate the statements made by him to the investigating officer, we do not find anything to discredit the evidence given by PW20. It is all the more so since the fact that the material objects referred to above were handed over to the investigating officer by the appellant from the two places referred to above, where the same were hidden by the appellant, has been deposed by PW4, the attestor to Ext.P2 mahazar as also PW7, the attestor to Ext.P3 mahazar. Needless to say, the argument advanced by the learned counsel for the

appellant as regards the discovery of MO1 to MO8 ornaments and MO9 to MO11 implements is only to be rejected and we do so.

16. It is seen that even though there was a charge of criminal conspiracy against the accused, no evidence whatsoever was let in by the prosecution to establish the said charge. As noted, the Court of Session has rightly found that in the absence of any evidence to prove the criminal conspiracy, the second accused who did not partake in the occurrence is entitled to be acquitted and it is on that basis, he was acquitted in the case. The said part of the judgment has become final. In other words, from the discussion aforesaid, the circumstances brought out by the prosecution in the case are, (1) that one of the chance finger prints developed from the scene of occurrence tallied with the specimen impression of the right middle finger of the appellant, (2) that MOs 1 to 8 ornaments were discovered based on the disclosure made by the appellant and (3) that MOs 9 to 11 implements were discovered based on the disclosure made by the appellant.

17. The next question is whether the

circumstances above mentioned are sufficient to sustain the conviction of the appellant under Sections 457, 342, 397 and 302 of IPC. A presumption of fact is a type of circumstantial evidence which, in the absence of direct evidence becomes a valuable tool in the hands of the Court to reach the truth without unduly diluting the presumption in favour of the innocence of the accused which is the foundation of the criminal law. Section 114 of the Indian Evidence Act which enables the Court to presume existence of certain facts provides that "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." Illustration (a) to Section 114 provides that the court may presume that a man, who is in possession of stolen goods soon after the theft is either the thief or he has received the goods knowing them to be stolen, unless he can account for his possession. The Indian Evidence Act defines the expression "may presume" thus:

> "Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved,

unless and until it is disproved, or may call for proof of it."

Inasmuch as the expression "may presume" is used in Section 114, the Court may either regard the fact as proved, unless and until it is disproved, or call for proof of it. It has come out that MOs 1 to 8 ornaments discovered based on the information furnished by the appellant are personal belongings of PW10 and PW11. The occurrence in the case is one that allegedly took place on 13.01.2012. The appellant was arrested on 30.01.2012. The ornaments mentioned above were discovered on 30.01.2012 itself. No doubt, the presumption under Section 114 (a) can be invoked only if the stolen articles are found to be in the possession of a person concerned soon after the theft. In **Earabhadrappa v. State of Karnataka**, (1983) 2 SCC 330, the Apex Court, while reiterating the principle that no fixed time limit can be laid down to determine whether possession is recent or otherwise, held that even a period of one year was not too long, having regard to the fact that the accused suddenly disappeared after the incident and was absconding for a long time. As in the case of **Earabhadrappa,** the materials indicate that the appellant fled away from the scene

and got himself engaged as a security guard in the establishment of PW4 located at a distant place from the place of occurrence. In other words, the appellant cannot be heard to contend that he was not found to be in possession of MOs 1 to 8 ornaments soon after the arrest. The appellant had no satisfactory explanation to account for his possession of MOs 1 to 8 ornaments. In other words, according to us, the presumption under Illustration (a) to Section 114 could be safely drawn. The question then is, applying the said provision, whether the presumption should be that the appellant stole the goods or later on received them knowing them to be stolen. On an overall consideration of the facts and circumstances established, it is reasonable to presume that the accused committed theft of MOs 1 to 8 ornaments from the house where the deceased was engaged as a security guard.

18. The finding aforesaid takes us to the moot question whether, having regard to the facts of the case on hand, the presumption should be extended to the perpetration of the offence of robbery or murder or both. *Prima facie*, such presumption does not come within the sweep of Illustration (*a*)

of Section 114, but there are conflicting decisions on this aspect and in some cases, Illustration (*a*) has been referred to while upholding the conviction for robbery and murder. Extending the presumption beyond the parameters of Illustration (*a*) could only be under the main part of Section 114, having regard to the expression therein "in their relation to the facts of the particular case." The illustration only provides for an analogy in such a case. With this prelude, let us examine whether, on the facts of this case, there is scope to presume that the appellant committed robbery and murder. The Apex Court has observed in **Limbaji v. State of Maharashtra**, (2001) 10 SCC 340 that on this point, divergent approaches have been made by the Apex Court in various cases. In some cases, the extended presumption was drawn while in some others, the Court considered it unsafe to draw the presumption merely on the basis of recovery of incriminating articles from the possession of the accused soon after the crime. It was also observed that while there are large number of cases against such presumption, the decision of the Apex Court in **Gulab Chand v. State of M.P.**, (1995) 3 SCC

574 falls on the other side of the line. It was observed that there are also decisions wherein the presumption was invoked as an additional reason to support the conclusion based on circumstantial evidence. After an elaborate consideration of the decisions on the point taking the opposite views, the Apex Court has come to the conclusion that the safer course would be to give due weight to the dicta laid down in **Sanwat Khan v. State of Rajasthan**, (1952) 2 SCC 641 and the ultimate conclusion reached by the Apex Court therein. Paragraphs 17, 18 and 25 of the judgment of the Apex Court in **Limbaji** read thus:

> "**17.** The question then is, applying Illustration (*a*) to Section 114, whether the presumption should be that the accused stole the goods *or* later on received them knowing them to be stolen. Though the trial court observed that the accused "might have robbed" the ornaments of the deceased after he was murdered by someone else, it found them guilty of the offence under Section 411 IPC only which is apparently self-contradictory. On an overall consideration of the circumstances established, it is reasonable to presume that the accused committed the theft of the articles from the person of the deceased after causing bodily harm to the deceased. The fact that within a short time after the murder of the deceased, the appellants came into possession of the ornaments removed from the person of the deceased and the first accused offered one of the stolen articles for sale on that very day and the further fact that the

other articles were found secreted to the knowledge of the appellants coupled with non-accountal of the possession of the articles and the failure to give even a plausible explanation vis-à-vis the incriminating circumstances would go to show that they were not merely the receivers of stolen articles from another source but they themselves removed them from the person of the deceased. Thus, the presumption to be drawn under Illustration (*a*) to Section 114 should not be confined to their involvement in the offence of receiving the stolen property under Section 411 but on the facts of the case, it can safely go beyond that. In this context, the three-Judge Bench decision of this Court in *Sanwat Khan* v. *State of Rajasthan* is quite apposite. While holding that from the solitary circumstance of unexplained recovery of the articles belonging to the deceased from the houses of the accused, the presumption of commission of offence of murder cannot be raised, the Court nevertheless held that they can be convicted of theft under Section 380 IPC which was one of the charges against the accused. Another decision of relevance is *Shivappa* v. *State of Mysore*. That was a case in which bundles of cloth being carried in carts were looted by twenty persons and the accused were charged for dacoity. Searches which took place within a few days after the incident led to the recovery of large quantities of stolen clothes from their houses. On these facts the Court drew the presumption that the persons with whom the items of clothes were found were the dacoits themselves and the conviction was sustained. Hidayatullah, C.J. speaking for the three-Judge Bench observed that: (SCC p. 489, para 5) “It is only when the accused cannot be connected with the crime except by reason of possession of the fruits of crime that the presumption may be drawn.” Drawing support from these decisions too, we are of the view that by invoking the presumption under Section 114 read with Illustration (*a*) thereto, the appellants must, as a first step, be

held to have committed theft of ornaments which were removed from the person of the deceased and that they are not mere receivers of stolen property. Theft is a component of the offence of robbery and theft becomes robbery, if, in order to the committing of theft, the offender causes or attempts to cause death, hurt or wrongful restraint or instils fear thereof. Whether, on the facts, they shall be convicted for robbery is yet another aspect which we shall advert to a little later. We are only pointing out presently that if we stop at applying Illustration (*a*) to Section 114, the accused can be safely convicted for the offence of theft rather than for the offence under Section 411. What is the position if we look beyond Illustration (*a*) is another aspect.

18. The above discussion paves the way for consideration of a more important question whether, having regard to the facts of this case, the presumption should be extended to the perpetration of the offence of robbery or murder or both. Presumption envisaged by Illustration (*a*) to Section 114 has been stretched in decided cases to make a similar presumption as the basis for conviction for graver offences of robbery and murder, if they are part of the same transaction. Strictly speaking, such presumption does not come within the sweep of Illustration (*a*), though in some cases Illustration (*a*) has been referred to while upholding the conviction for robbery and murder. Extending the presumption beyond the parameters of Illustration (*a*) could only be under the main part of the section. The illustration only provides an analogy in such a case. With this clarification, let us examine whether there is scope to presume that the appellants committed robbery and murder sharing the common intention. While on this point, we have come across divergent approaches by this Court in various cases. In some cases, the extended presumption was drawn while in some cases the Court considered it unsafe to draw the

presumption merely on the basis of recovery of incriminating articles from the possession of the accused soon after the crime. The decisions of this Court in *Union Territory of Goa* v. *Beaventura D'Souza*, *Surjit Singh* v. *State of Punjab* and *Sanwat Khan* v. *State of Rajasthan* fall in one line, whereas the decision in *Gulab Chand* v. *State of M.P.* falls on the other side of the line. In the midway we find certain decisions wherein the presumption was invoked as an additional reason to support the conclusion based on circumstantial evidence. We shall briefly refer to these decisions.

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

19. **Limbaji** was a case built on circumstantial evidence on the basis of recovery of ornaments pursuant to the information furnished by the accused to the police. The case of the prosecution was that the accused who were inhabitants of the locality where the deceased, who owned a field, was

residing, robbed the ornaments worn by the deceased after causing his death by hitting on his head using a heavy stone, on a night at his field where he used to sleep. Even though the Apex Court, having regard to the facts, came to the conclusion in the said case that an inference can safely be drawn that the accused committed robbery in furtherance to a common intention, did not convict them for the offence under Section 302 IPC, though they were convicted under Section 394 IPC. The reasons for arriving at the said conclusion as stated in paragraph 28 of the judgment read thus:

> **"28.** Whether the presumption could be further stretched to find the appellants guilty of the gravest offence of murder is what remains to be considered. It is in this arena, we find divergent views of this Court, as already noticed. In *Sanwat Khan case*, the three-Judge Bench of this Court did not consider it proper to extend the presumption beyond theft (of which the accused were charged) in the absence of any other incriminating circumstances excepting possession of the articles belonging to the deceased soon after the crime. However, we need not dilate further on this aspect as we are of the view that in the peculiar circumstances of the case, it would be unsafe to hold the accused guilty of murder, assuming that murder and robbery had taken place as a part of the same transaction. The reason is this. Going by the prosecution case, the deceased Baburao was hit by a heavy stone lying on the spot. The medical evidence also confirmed that the fatal injuries would have been inflicted by a heavy

> stone like Article 1. It is not the case of the prosecution that the appellants carried any weapon with them or that the injuries were inflicted with that weapon. There is every possibility that one of the accused picked up the stone at that moment and decided to hit the deceased in order to silence or immobilise the victim. If the idea was to murder him and take away the ornaments from his person, there was really no need of forcibly snatching the earrings before putting an end to the victim. It seems to us that there was no premeditated plan to kill the deceased. True, common intention could spring up any moment and all the three accused might have decided to kill him instantaneously, for whatever reason it be. While that possibility cannot be ruled out, the possibility of one of the accused suddenly getting the idea of killing the deceased and in furtherance thereof picking up the stone lying at the spot and hitting the deceased cannot also be ruled out. Thus two possibilities confront us. When there is reasonable scope for two possibilities and the court is not in a position to know the actual details of the occurrence it is not safe to extend the presumption under Section 114 so as to find the appellants guilty of the offence of murder with the aid of Section 34 IPC. While drawing the presumption under Section 114 on the basis of recent possession of belongings of the victim with the accused, the court must adopt a cautious approach and have an assurance from all angles that the accused not merely committed theft or robbery but also killed the victim."

The view taken by the Apex Court in the said case as revealed from paragraph 28 extracted above is that even if a presumption is drawn stretching the law beyond Illustration (*a*) to Section 114, in a case built up on circumstantial evidence,

where there is reasonable scope for two possibilities, and the court is not in a position to know the actual details of the occurrence, it is not safe to extend the presumption under the said provision so as to find the accused guilty of the offence of murder.

20. Later, in **State of Rajasthan v. Talevar**, (2011) 11 SCC 666, though there is no reference to the decision of the Apex Court in **Limbaji,** after referring to the decision of the Apex Court in **Sanwat Khan,** the law on the point was summarised by the Apex Court in the following words. Paragraph 18 of the judgment reads thus:

> **"18.** Thus, the law on this issue can be summarised to the effect that where the only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. It also depends on the nature of the property so recovered, whether it was likely to pass readily from hand to hand. Suspicion should not take the place of proof."

Later, in **Raj Kumar v. State (NCT of Delhi)**, (2017) 11 SCC 160, the Apex Court, after referring to **Sanwat Khan**, held that with the aid of the presumption under Section 114 of the

Evidence Act, the charge of murder cannot be brought home, unless there is some evidence to show that the robbery and the murder occurred at the same time, i.e., in the course of the same transaction.

21. Let us now revert to the facts of the case. In the case on hand, as noted, apart from the recovery of the material objects, the only other incriminating circumstance against the appellant is that one of the chance finger prints developed by PW15 from the scene of occurrence tallied with the specimen of the right middle finger impression of the appellant. Even though the case of the prosecution, as in the final report filed in the matter was that the appellant caused the death of the victim at the steps leading to the hall room of the main house, the body of the deceased was found in a partly decomposed state only in the outhouse of the house. The chance fingerprint which tallied with the specimen of the right middle finger impression of the appellant is one developed by PW15 from the cover of a liquor bottle kept in the kitchen of the house. In other words, the only circumstance in this case other than the recovery of MOs 1 to 8 ornaments, does not, in any

manner, connect the appellant with the murder. If that be so, the question is whether an inference could be made invoking Illustration (*a*) to Section 114 of the Indian Evidence Act that it is the accused who caused the death of the victim. As noted, the three judge bench of the Apex Court in **Sanwat Khan** did not consider it proper to extend the presumption under Illustration (*a*) to Section 114 beyond theft in the absence of any other incriminating circumstances excepting possession of the incriminating articles. Be that as it may, unlike in **Limbaji,** in the case on hand, there is reasonable scope for several possibilities for the death of the victim. As noted, the deceased was a security guard in a residential house. The owner of the house and his family were not residing in the house at any point of time. The body of the deceased was found in the outhouse of the house only on 16.01.2012. PW2 is the person among the witnesses who last saw the deceased on 13.01.2012. In the absence of any positive evidence, it can certainly be inferred that the death of the victim took place between 13.01.2012 and 16.01.2012. The fact that the main house was broke open was noticed for the first time by PW3

only on 16.01.2012. It is thereafter, it was found that valuables kept in the house were stolen. Inasmuch as no one was residing in the main house and inasmuch as PW2 saw the deceased on 13.01.2012, it is possible to infer that the theft of MOs 1 to 8 also took place between 13.01.2012 and 16.01.2012. Merely for the reason that the death of the victim and theft took place between 13.01.2012 and 16.01.2012, can it be presumed that murder and robbery were integral parts of the same transaction unlike in the case of **Earabhadrappa,** where there is sufficient material for the Court to infer that the murder and robbery were integral parts of the same transaction. As already stated, there are several other possibilities. In the absence of any incriminating circumstances to connect the appellant and other accused with the murder, and having regard to the fact that the body of the deceased was found only in the outhouse of the house, it might be a case where the death of the victim was caused by someone else for some other reason. It might also be a case where the theft must have been committed while the deceased was sleeping, although he is not supposed to sleep during night hours. It might also be a case where the

theft must have taken place after the death of the victim, without noticing his death. As held by the Apex Court in **Limbaji,** when there is reasonable scope for more than one possibility for the death and the court is not in a position to know the actual details of the occurrence, it is not safe to extend the presumption under Section 114 (*a*) of the Evidence Act, so as to find the appellant guilty of offence of murder, for suspicion howsoever strong, cannot take the place of proof.

22. That brings us to the question as to what then is the offence committed by the appellant. As noted, the appellant was found guilty of the offences punishable under Sections 457, 342, 397 and 302 IPC. We have already found that the appellant is one among the persons who has committed the theft in the house where the deceased was working as a security guard. The materials would also indicate that the accused committed house breaking as well, even though there is no evidence to indicate that it is by making use of Mos.9 to 11 that the house breaking was done. There is no evidence to indicate that house breaking was done at night. In other words, the offence punishable under Section 457 IPC is

not attracted. In the absence of any evidence to indicate that it is the appellant and others who have wrongfully confined the deceased, the offence punishable under Section 342 IPC is also not attracted. In the light of Section 390 IPC, theft is robbery if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. In the absence of any evidence to indicate that it is the appellant and others who caused the death of the victim, the offence of robbery is not attracted. If so, Section 397 IPC is also not attracted. In other words, the appellant can be convicted only for the offences punishable under Sections 453 and 380 IPC.

In the circumstances, we set aside the conviction of the appellant under Sections 457, 342, 397 and 302 IPC. We find the appellant guilty of offences punishable under Sections 453 and 380 IPC and sentence him to undergo rigorous imprisonment for a period of two years and to pay a fine of

Rs.500/- and in default to undergo further imprisonment for a period of 3 months. Similarly, the appellant is also convicted under Section 380 IPC and he is sentenced to undergo rigorous imprisonment for a period of seven years and also to pay a fine of Rs.500/- and in default to undergo further imprisonment for a period of 3 months. The appeal is thus allowed in part.

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

C.S.SUDHA, JUDGE.

YKB