HIGH COURT OF TRIPURA
AGARTALA

CRL.A. (J) NO. 01 OF 2019

Sri Raju Malakar
S/O Sri Jogendra Malakar,
Resident of South Nayapara,
P.O & P.S. : Dharmanagar,
District: North Tripura ---- Appellant

Versus

The State of Tripura

---- Respondent

For the appellant	:	Mr. S. Bhatacharjee, Advocate.
For the Respondent	:	Mr. S. Debnath, Addl. P.P.
Date of hearing	:	**19.06.2020**.
Date of delivery of Judgment & order	:	**23.07.2020.**
Whether fit for reporting:		**YES.**

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI
THE HON'BLE MR. JUSTICE ARINDAM LODH

JUDGMENT & ORDER

(*Arindam Lodh, J)*

In impugnment, is the judgment and order of conviction and sentence dated 17.10.2015, passed by the learned Sessions Judge, North Tripura, Dharmanagar, in case No. ST(T-1) 18 of 2014, whereby and whereunder the appellant has been convicted and

sentenced to undergo imprisonment for life and to pay a fine of Rs.2000/-, in default to suffer further R.I. for 6 months for the offence punishable under Section 302 of IPC and also sentenced to suffer R.I. for 3 years and to pay a fine of Rs.500/-, in default to suffer further R.I. for 3 months for the offence under Section 201 of IPC and it was directed that both the sentences imposed upon the appellant shall run concurrently.

2. The prosecution case, as unearthed, in brief, is that on 24.12.2013 at 3.05 pm an information was received by Panisagar police station from one Priti Ranjan Chakma, the officer-in-charge of Panisagar Fire Service station, that a dead body was lying in the cabin of a truck at Bilthai Parking zone under Panisagar police station. The information was immediately recorded in the General Dairy of the police station as GD Entry No. 755 dated 24-12-2013 and Pradyut Ch. Dutta, Officer-in-Charge of the police station, directed S.I., Debshish Saha to rush to the place of occurrence, and while S.I. Debasish Saha rushed to the place of occurrence found a dead body lying inside the cabin of a truck bearing registration No. TR01E1639. Sri Manna Dey, son of Manik Ch. Dey, a hotel owner of Panisagar, volunteered to lodge a complaint to police at the spot. Accordingly, he lodged an oral

complaint with Debasish Saha, Sub-Inspector of police of Panisagar P.S. at Bilthai parking point on 24.12.2013 at 3.45 pm.

The complainant alleged, *inter alia,* that at about 3.00 pm on that day he found the dead body of the driver of a truck bearing registration No.TR01E1639 inside the cabin of the truck. The head of the deceased was crushed and his tongue was found between his teeth and the complainant suspected that the driver was killed. The police officer also found the driving licence of the deceased inside the tool box. The driving licence revealed that the dead body was of Narayan Ch. Roy of Roy Coloney, Amtali of West Tripura District.

3. Being endorsed, the investigating officer took up the case for investigation. During investigation, the I.O. visited the place of occurrence, prepared inquest of the dead body and made seizure of the articles found at the P.O. He had also sent the body of the deceased for post-mortem examination and examined the material witnesses of the case. On 27.12.2013, the I.O. arrested the accused from his hideout and also recovered the weapon of offence at the instance of the accused and collected other incriminating materials against the accused.

After completion of the investigation, the investigating officer submitted a charge-sheet against the accused, Raju Malakar for

committing offence punishable under Sections 302 and 201 of Indian Penal Code.

4. Being committed, the learned Additional Sessions Judge took cognizance of offence and framed the following charges against accused Raju Malakar, which are as follows:-

> *"That, on or about the 24th day of December, 2013 at any time before 15.30 hours at Bilthai parking area on Assam Agartala road you committed murder of Narayan ch. Roy by intentionally causing his death and you thereby committed an offence punishable under Section 302 of IPC and with my cognizance.*
>
> *Secondly, that you on or about the same date and at the same time and place committed murder by intentionally causing the death of Narayan ch. Roy punishable with imprisonment for life or with death, and did cause certain evidence of the said offence to disappear, to wit hammer, mobile set of the deceased, blood stained ganjee, money of the deceased etc. with the intention of screening yourself from punishment and you thereby committed an offence punishable under section 201 of IPC and within my cognizance.*
>
> *And I hereby direct that you be tried by this court on the said charges."*

5. As many as 25 witnesses were examined by the prosecution to substantiate the charges against the accused person. On the closure of the prosecution evidence, the accused person was examined under Section 313 of Cr.P.C, and he denied all the

prosecution evidences and other incriminating materials against him, but, he declined to adduce any evidence on his behalf and claimed to be tried.

6. The Trial Judge had formulated the following points for decision:

> *"1. Whether accused Raju Malakar killed the driver of his vehicle Narayan Ch. Roy on 24.12.2013 by intentionally causing his death and thereby committed an offence punishable under Section 302 of the Indian Penal Code?*
>
> *2. Whether accused Raju Malakar caused disappearance of the evidence of his crime after committing the murder of Narayan Ch. Roy and thereby committed an offence punishable under section 201 of the Indian Penal Code?"*

7. The learned Additional Sessions Judge after considering the submissions of the learned counsels for the parties and also after discussions of the oral testimonies of the witnesses as well as the incriminating materials against the accused person had convicted and sentenced the appellant as afore-stated.

8. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence, as stated above, the appellant has preferred this appeal.

9. Mr. S. Bhattacharya, learned counsel appearing for the convict-appellant has strongly argued that the accused and deceased have allegedly seen together on 21.12.2013, but, the evidence of the doctor, *i.e.,* PW14 clearly shows that autopsy over the body of the deceased was done at 2.20 pm on 25.12.2013, and according to the doctor, the death occurred 48 hours before autopsy, *i.e.,* approximately on 23.12.2013, and thus, the time gap between last seen together and the death occurred is such a vast time gap, that the last seen theory cannot form the basis of conviction. Learned counsel for the appellant further argued that there was no disclosure statement of the accused leading to any fact discovered and, so, the recovery of weapon at the instance of the appellant cannot be said to be proved beyond reasonable doubt. Learned counsel further argued that there was no clear evidence that the injuries as well as the murder were caused by the "*hammer*" the alleged weapon of offence in the case. Mr. Bhattacharya, learned counsel contended that the investigating officer only produced the call details report(CDR) of the mobile of the deceased, but, no audio/voice recording from the mobile operator was produced to show that it was the accused who had made such call to his father. It is further submitted by Mr. Bhattacharya that the bloodstained wearing apparels of the accused allegedly recovered from the house of the accused and bloodstains of wearing apparels of

deceased were of 'O' group, but, surprisingly, no blood test or grouping of the accused person was done, so that, it cannot be conclusively determined that the alleged bloodstained clothes of the accused is not of his own.

10. On the other hand, to substantiate the guilt of the appellant, learned Addl. P.P., Mr. S. Debnath, has submitted that the case has totally been established and the chain of circumstances has been proved by the fact that accused was the assistant of the vehicle and he was accompanying the deceased in the vehicle on its way from Agartala to Mizoram and he left the vehicle after killing the driver at Bilthai Parking point. Learned Addl. P.P. has further argued that the circumstantial evidence available against the accused has conclusively proved his guilt, and the prosecution has proved the case beyond any shadow of doubt, and learned Sessions Judge has not committed any error in convicting the accused-appellant as stated above.

11. In view of the aforesaid submissions of the learned counsels appearing for the parties, we have perused the evidence and materials on record to judge the sustainability of the conviction and sentence as recorded by the learned Sessions Judge.

12. PW1, Sri Debashis Das, is the owner of the truck, which was being driven by the deceased. PW1 in his deposition stated that Narayan Ch. Roy was the driver of his truck no. TR.01E-1639 who was directed to go to Mizoram to bring log along with his other trucks. He also gave Rs.14,000/- to each of the drivers. PW1, further deposed that Raju Malakar was the Assistant of the vehicle driven by Narayan Ch. Roy. PW1 further deposed that on 22-12-2013 he talked with Narayan Ch. Roy at about 10 pm and the deceased Narayan Ch. Roy told him that he was at Panisagar and he would stay there. On the next morning, at about 8 am, PW1 rang the deceased, but, he found that the phone of the deceased was switched off.

In cross-examination PW1 stated that previously there was no assistant, but, on that occasion, the deceased took Raju Malakar as his assistant with his prior consent.

13. PW2, Sri Krishna Biswas, deposed that on the material date his father Sunil Biswas was driving the truck bearing registration No. TR 01C 1519 from Agartala to Mizoram. He was also proceeding along with his father on the material date. PW2 further deposed that vehicle No.TR 01E 1639 was driven by the deceased and accused Raju Malakar was the assistant of the vehicle. PW2 further deposed that he had seen the accused proceeding along with Narayan Ch. Roy on that date.

During cross-examination, PW2 deposed that one day before the date of incident he had seen Raju Malakar along with the deceased driver. Both the vehicles were started almost at the same time from Agartala. PW2 further deposed that at Kumarghat there was a breakdown of their vehicle, as a result, they could not proceed from Kumarghat. PW2 also stated that he saw the accused was wearing one suit and full shirt.

14. PW3, Sri Subodh Das, in his deposition stated that he had a hotel at Panisagar, which was situated across the Chamtila bridge. PW3 further deposed that about a year back, driver of a truck vehicle was found dead on his seat inside the cabin of his truck. PW3 further deposed that during investigation police came with the accused Raju Malakar and the accused identified a spot in a bush from where a hammer was recovered by police and after recovery of the hammer police prepared a seizure list. PW3 also deposed that after identification the accused told that after killing the driver with the hammer he had thrown away the same into the bush from where it was recovered.

In his cross-examination PW3 stated that he did not see the dead body of the driver, when his attention was drawn to his 161 statement, where he stated that "*when the police came I saw the dead*

body of the driver along with police", PW3 denied that he had made such statement to the police. PW3 further deposed in cross-examination that the police took about one hour to find out the hammer, and during that time accused was with police.

15. PW4, Sri Suman Das, is a seizure witness, and he also supported the evidence of PW3 regarding discovery of weapon of offence. PW3 in his deposition stated that in his presence the hammer was seized from a bush near Chamtila bridge at the instance of the accused and he signed the seizure memo as witness and he proved his signature as Exhibit-2.

16. PW 5, Sri Manna Dey, in his deposition stated that he had a hotel near the parking point on the national highway at Panisagar, and on 24.12.2013, at about 3 pm he saw a crowd on the road, and when he went there he saw that police brought down the dead body of a person from truck in his presence. PW5 further deposed that police recorded his complaint in writing and procured his signature on the complaint and he proved his signature as *exhibit*-3. PW5 also stated that he came to know that the deceased was accompanied by the assistant of the vehicle before his death, but, the assistant was found absconding after the occurrence.

In his cross-examination, PW5 deposed that police visited the place of occurrence in the evening and the place of occurrence was surrounded by dwelling houses and shops. PW5 further stated that his hotel was situated at a distance of about 50 meters from the place of occurrence, but, he did not hear any cry from the P.O. He cannot say who brought the vehicle there and what time it was brought there. PW5 further stated that he did not see the assistant of the vehicle.

17. PW6, Smt. Suchitra Roy, in her deposition stated that deceased Narayan Ch. Roy was her husband, and on 21-12-2013 at about 7/7.30 pm, she received a telephone from her husband that he would be returning home within a while along with a new assistant of his vehicle, and her husband asked her to cook food for him and his assistant. PW6 further deposed that her husband and the assistant returned home at about 8/8.30 pm. Thereafter, her husband and the assistant had taken their meals. PW6 deposed that she came to know from her husband the name of the assistant as Raju Malakar and he was from Dharmanagar. After taking the meal Raju Malakar went to the vehicle for sleep. PW6 also deposed that on the following day morning she left for work, and accordingly, her husband left with the assistant for Mizoram with that vehicle, and on 24.12.13 Debashish Das, owner of the truck met her in her house at Amtali, and informed

her that her husband was killed inside the vehicle on his way to Mizoram.

In her cross-examination the PW 6 stated that she was not at her home when her husband left for Mizoram, as a result she could not see whether there was any other person with them. PW6 further stated that she stated to the police that on 21-12-2013 her husband asked her over telephone to cook food for him and new assistant Raju Malakar. But, when attention of the witness is drawn to her statement under Section 161 of Cr.P.C no such statement was found.

18. PW 7, Smt. Jyotika Roy @ Manthi deposed that deceased Narayan Ch. Roy is her father. On 21.12.13, in the evening her father called her from Agartala town over telephone that he was returning home within a while, and asked her to tell her mother to cook food for him and his new assistant. PW7 stated that her father returned home along with the assistant at about 8 O'clock in the night. During night Raju Malakar slept inside the vehicle and her father slept in their home. The following morning, she gave them tea and breakfast and thereafter her father along with the assistant left for Mizoram. PW7 further deposed that on 22.12.13 at 9 O'clock on Sunday, she received a call from her father over telephone that he reached at Panisagar at

night. On 24.12.2013, Debashish Das, owner of the truck informed her that her father was killed at Panisagar.

In her cross-examination PW7 denied all the suggestive questions made by the learned counsel for the accused.

19. PW 9, Sri Bappa Das, in his deposition stated that he was the driver of police vehicle bearing registration no. TR 02A2300 in which the PW 25, IO and other police officers traveled to Maheshpur on 27.12.2013 and apprehended the accused in presence of PW9 from Mahespur Tea Estate and, then, they arrived in the house of the accused at Smashan Kalibari, Dharmanagar and on arriving in the house of Raju Malakar, at the instance of the accused and his younger brother, police recovered a bag near a stream behind the house of the accused. The bag contained a bloodstained vest (ganjee), a gamcha (towel), a long pant and a striped shirt and, thereafter, the police seized the wearing apparels of Raju Malakar in his presence.

In his cross-examination PW9 stated that the place of seizure was about 15/20 cubits away from the house of Raju Malakar. The bag was seized from the bank of a stream near the road and it was not covered by anything to keep it away from the notice of others.

20. PW 10, PW 11 and PW12 are not of much importance for the fact that all are of seizure witnesses and PW 13 is a constable of police at Panisagar police station and he accompanied the investigating officer to Bilthai Parking point where the dead body of the deceased was found, but, they did not depose anything important.

21. PW 14, Sri Rajat Goswami, Medical Officer stated that on 25.12.2013 he along with Dr. Pulak Chakma and Dr. Pranabesh Chakraborty started conducting autopsy over the dead body of Narayan Ch. Roy, and on examination they found 4 depressed fractures present over the forehead and frontal skull area and forehead fracture was stuck up to brain matter. PW14 further deposed that after autopsy they prepared the post mortem examination, and in their opinion, the cause of death was hemorrhagic shock due to head injury as a result of blunt trauma head and it was homicidal in nature. PW 14 also stated that the time of death was about 48 hours before autopsy.

In his cross-examination PW 14 stated that the date and hour of dispatch is not mentioned in the post-mortem report. PW 14, further stated that *the fracture area was measuring 10cmx 3.5cmx 3cm over forehead. 10 cm was the length of the wound, 3.5 cm was its breath and 3cm was the depth of the wound. Such injury particularly*

the injury of such depth could not be caused by falling on hard substance.

22. PW 16, Sri Dayananda Choudhury, in his deposition stated that Officer-In-Charge of Panisagar Police Station called him to the police station for photography. PW 16 further deposed that the accused in his presence confessed that he had killed a person with a hammer and after killing the person he had thrown away the hammer at the western side of the bridge over Juri river at Chamtila .

In his cross-examination PW16 stated that the accused led the police to the recovery of the hammer and at the place of discovery he was freed and he himself took out the hammer.

23. PW 17, Suman Das was a constable of police who collected the call details in four pages and PW18 is the SDPO who forwarded the samples of bloodstained wearing apparels of the deceased to the Director, SFSL along with a forwarding memo. PW 19, 20, 21 and 22 are the seizure witnesses, they are not of much importance, for the fact that they did not depose anything important in their depositions.

24. PW 23, Dr.Sabyasachi Nath deposed that on 13.01.2014 he received a parcel containing *Exhibits* in connection with Panisagar PS case No. 86 of 13/U/S-302 of IPC. PW23 stated that through forensic

test it was determined that the blood groups of *Exhibits* A1, A2, A3 and A4 were of 'O' group and the same *exhibits* contained the wearing apparels and blanket of the deceased. *Exhibit* B1 contained the white colour full sleeves T-shirt of the accused. It was also bloodstained and the blood group of *Exbt*.B1 was determined as of 'O' group. PW23 also stated that the bloodstain found on all the exhibits was of human origin.

In cross-examination, PW23 stated that it cannot be said with certainty that the blood belonged to the same person.

25. PW25, Sri Debasish Saha stated that on the direction of the Officer-In-Charge he visited the place of occurrence and recorded the complaint of Manna Dey in writing and forwarded the complaint to Officer-In-Charge of Panisagar police station for registration of the case. After receiving the FIR he took up the investigation of the case and during investigation IO inspected the PO, held inquest over the dead body and made seizure of the articles found at the PO. He also sent the body of the deceased for post-mortem examination and examined material witnesses of the case. After arresting the accused on 27.12.2013 from his hideout, he also recovered the weapon of offence at the instance of the accused and collected other incriminating materials against him. PW25 further stated that during investigation it

was proved that the accused was the assistant of vehicle and he was accompanying the deceased driver from Agartala. When they reached Panisagar the accused killed him for money and left with his money and mobile set and while leaving after the commission of the crime he had thrown out the weapon of offence in a nearby bush under Chamtila bridge over Juri river. PW25 also stated that the mobile set of the deceased was also recovered from the possession of the accused and the blood group determined from the bloodstains of his shirt matched with the blood group of the deceased.

In cross-examination, PW 25 stated that he searched the places around the place of occurrence immediately after the recovery of the dead body, but, he did not find any incriminating materials except bloodstained materials at that time. PW25 further deposed that he had mentioned in the seizure list that the iron portion of the hammer was 500 gram in weight approximately, but, he did not weigh the hammer. PW25 also deposed that the hammer was not sent for forensic examination, and there was no rust or bloodstain on the hammer. PW26 further deposed that he had not collected the model number, IMEI number, serial number, etc. of the mobile of the deceased.

26. This Court perused the testimonies of the PW 1, PW2, PW6, and PW7. From the evidence of those PWs, it is found that the deceased was the assistant in the vehicle of the deceased which was proceeding towards Mizoram from Agartala and on 22-12-2013 they left together. PW7 stated that on 21.12.2013 she last met the deceased and on the following day after taking breakfast he left for Mizoram and on 22.12.2013 at about 9 O'clock the deceased called her and informed that he reached at Panisagar and he will be staying at Panisagar during night.

PW1 stated that on 22.1.2013 Narayan Ch. Roy was the driver of vehicle bearing No.TR01E 1639, and Raju Malakar was the assistant of the driver and on the same date at about 10 pm he talked with the deceased and the deceased told him that the deceased was at Panisagar and he will stay at Panisagar, and on the next date, at about 8 am, when PW1 rang Narayan Roy, his mobile was found switched off.

PW2, also in his deposition stated that he had seen the deceased leaving Kumarghat for Panisagar along with accused Raju Malakar. The accused also in his cross-examination under Section 313 Cr.P.C. admitted that he was the assistant of the deceased.

27. In ***Satpal vs. State of Haryana,*** reported in ***MANU/SC/O492/ 2018***, in (Para-6), the Apex Court had observed thus:

> *"We have considered the respective submissions and the evidence on record. There is no eye witness to the occurrence but only circumstances with the fact of the deceased having been last seen with the Appellant. Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the Accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the Accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilty of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."*

28. In ***Shambu Nath Mehra vs. The State of Ajmer***, reported in ***AIR 1956 SC 404***, in (Para 14), the Apex Court observed that:-

> *"This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that it means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that cannot be the intention and the privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle vs. Emperor A.I.R. 1936 P.C. 169 and Seneviratne v. R. (1936) 3 All E.R. 36, 49."*

29. After considering the judgments of the Apex Court, it can be opined that the accused in his examination under Section 313 of Cr.P.C. admitted that he was the assistant of the driver, and when the deceased-driver started quarrelling with another truck driver on way to Panisagar, he left the truck. The accused has not led any evidence

regarding the quarre or the time when he subsequently left the truck. Through a series of witnesses last seen theory is established.

30. PW1 and PW2 consistently have stated that they had seen the deceased with the accused-appellant on the truck while proceeding from Agartala to Mizoram on 22.12.2013 and the accused-appellant also admitted that he was the assistant of the deceased driver while proceeding from Agartala to Mizoram. PW1 also deposed that on 22.12.2013 at about 10 O'clock, he last talked with the deceased and on 23.12.2013 in the morning at about 8 O'clock when he rang the deceased, the mobile phone of the deceased was found switched off. PW7, Smt. Jyothika Roy, daughter of the deceased stated that on 22.12.2013, at about 9 O'clock on Sunday, she received a call from her father that he reached Panisagar. After considering the statements of those PWs, it can be opined that '*The last seen theory'* can be applied in this case.

31. In ***State of U.P. vs. Satish***, reported in, ***(2005) 3 SCC 114,*** the Apex Court had observed thus:

> *"22. The last seen theory comes into play where the time gap between the point of time-gap between the point of time when the accused and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to*

positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witness PW's 3 and 5, in addition to the evidence of PW 2".

32. The post-mortem was done on 25.12.2013 by PW 14, Dr. Rajat Goswami, who opined that the cause of death was hemorrhagic shock due to head injury as a result of blunt trauma head and it was homicidal in nature. Time elapsed since death has been estimated as 48 hours before autopsy. It can be safely presumed that the death of the deceased was caused between 22.12.2013 and 23.12.2013, when the accused was with the deceased and the body has been recovered from the truck where the deceased was last seen with accused-appellant.

33. The investigating officer namely, Debashish Saha deposed that during police remand he interrogated the accused and the accused confessed that after killing of Narayan Ch. Roy, the deceased, he had thrown away the weapon of offence in a bush on the western side of the Chamtila bridge of Juri river. On 30.12.2013, the investigating officer visited the place with the accused and recovered the hammer

from the place identified by the accused in presence of the witnesses. The IO also deposed that the entire seizure was videographed to prove the authenticity of such seizure. PW 16, Sri Dayananda Choudhury, PW 3, Sri Subodh Das and PW 4, Sri Suman Das, also supported the statements of the IO. Though there was some lapse in the investigation by the IO, he showed his inefficiency and insincerity in not sending the weapon "*hammer*" to the SFSL for examination, and no disclosure statement of the accused-appellant was recorded by him regarding the discovery of weapon, but, the same cannot in any manner shake the prosecution case, when other incriminating circumstances against the accused are featured so pre-dominantly that points towards his guilt alone and none else.

34. In ***State of Rajasthan vs. Kishore***, reported in, ***(1996) 8 SCC 217***, the Apex Court observed that "*it is equally true that the investigating officer PW 8 committed grave irregularity in omitting to send the burnt clothes and other incriminating material for chemical examination to lend corroboration to the evidence. Mere fact that the investigating officer committed irregularity or illegality during the course of investigation would not and does not cast doubt on the prosecution case nor trustworthy and reliable evidence can be cast aside to record acquittal on that account*".

35. In the instant case, on close scrutiny of the evidences on record, following circumstances have been established beyond reasonable doubt:-

(i) The accused-appellant was engaged as an assistant of the deceased-driver for the first time;

(ii) Narayan Ch. Roy, the deceased-driver at about 7/7.30 P.M. on 21.12.2013 had informed his wife over telephone that he along with his assistant would be returning home and asked his wife to cook food for him and his assistant. Both the deceased and the accused-appellant reached home at about 8/8.30 P.M. and had taken meal. The accused-appellant told P.W.-6, Smt. Suchitra Roy, the wife of the deceased regarding his family members. Thereafter, the accused went to the vehicle for sleep having received a quilt and bed sheet from P.W.-6 for the purpose of sleeping. Narayan Ch. Roy had slept at home. On the next morning, P.W.-6 had left for work.

(iii) On the next day, in the morning i.e., on 22.12.2013 at 9 O'clock P.W.-7 had served tea and breakfast to both her father and the accused-Raju Malakar and thereafter both of them together had boarded the truck to go to Mizoram.

(iv) On the way to Mizoram, both Narayan Ch.Roy, the deceased-driver and the accused-Raju Malakar were seen by

P.W.-2 as he was in another vehicle of the same owner and was also going to Mizoram along with his father, Lt. Sunil Biswas who was driving the vehicle.

(v) We have noticed the examination of the accused-Raju Malakar under Section 313 Cr.P.C. wherein it is revealed that he admitted that he was travelling in the said vehicle along with the deceased as his assistant.

(vi) Debashis Das (P.W.-1), the owner of the truck and employer of the deceased had a last talk with the deceased at 10 O'clock on 22.12.2013. The daughter (P.W.-7) had talked last with her deceased-father at 9'O clock on 22.12.2013 when she was told by the deceased driver that he arrived at Panisagar and he would be staying at Panisagar during the night.

(vii) The sample of the blood stains of the deceased has been matched with the wearing apparels of the accused. The wearing apparels of the accused were recovered from a place near to his house at the instance of the accused-Raju Malakar.

36. In view of this proven facts and circumstances that both the deceased and accused-appellant were last seen alive together, we have given our thoughtful consideration to the explanation given by the accused-appellant in his examination under Section 313 of Cr.P.C., on the point as to how and when he left the vehicle. The accused told

that there was quarrel between the deceased and the driver of another vehicle and he left the vehicle out of fear, but, we find no material available on record in regard to any quarrel that was entered into between the deceased and the driver of another vehicle. The accused did not lay any evidence in support of his statement that he left the vehicle out of fear due to the quarrel between the deceased and the driver of another vehicle. According to us, the prosecution has discharged its liability to prove the circumstance that they were last seen alive together on their way to Mizoram. P.W-2 has categorically stated that their truck had suffered breakdown at Kumarghat and for that reason their vehicle could not proceed further towards Panisagar, but, the truck which was being driven by the deceased accompanied by his assistant, the accused-Raju Malakar had proceeded further. According to us, at this juncture, when the prosecution has established the burden of the fact of last seen together, thereafter, the onus was shifted upon the accused to come up with a plausible satisfactory explanation as to how the deceased had suffered severe fatal injury on his head, which fact was especially within the knowledge of the accused himself and none else. The explanation which was given by the accused does not inspire confidence in this Court. According to us, P.W.-23, Dr. Sabyasachi Nath, the forensic expert has categorically deposed that he received a parcel containing five exhibits from police

in connection with the case and among those exhibits, exhibits-A1, A2, A3 and A4 were blood-stained wearing apparels of the deceased and exhibit-B/1 was a blood-stained T shirt of the accused. In all the blood stained wearing apparels of the deceased as well as the T shirt of the accused, 'O' blood group was found, the blood group of the accused.

37. We repel the introduction of the theory of quarrel which has surfaced from the statement made by the accused in his examination under Section 313 of Cr.P.C., for the reason that had there been any quarrel and if the deceased had died out of that quarrel, then, the injuries would not have been confined to only head. According to us, there would have been mark of injuries on the other parts of the body also. But, on scrutiny of the post mortem report, we do not find any such injuries on any parts of the body of the deceased.

38. Further, we are of the opinion that, even if there is some discrepancy here and there in respect of recovery of the weapon of offence i.e., the hammer used in the crime, but, on consideration of the total cumulative effect of all the proven facts, such discrepancies would not undermine the other established circumstantial evidence. We have noticed that the body of the deceased was found in the cabin of the truck itself and not in any other place or places.

39. Furthermore, in the event of quarrel, the accused would have raised alarm, but, he would not have left the place. The conduct of the appellant appears to be unnatural to normal human conduct. His immediate absconsion from the place as well as from his residence has lent additional strong circumstantial support to the guilt of the accused. It is also proved that the mobile of the deceased was recovered from the rented house of the accused at his instance, and the accused had failed to give any explanation under what circumstances he had left the vehicle. The accused has also failed to give any satisfactory explanation as to how and under what circumstance he took away the mobile phone from the possession of the deceased.

40. If all the facts and circumstances, as analyzed above, are juxtaposed in sequence, then, we find that each one of which reinforces the conclusion of the guilt of the accused, even though, there may be some discrepancy/discrepancies in regard to recovery of the weapon of offence i.e., the hammer.

41. In our view, the proven circumstances have excluded the every hypothesis except the hypothesis of guilt of the accused.

42. For the reasons stated above, the instant appeal deserves no merit and is liable to be dismissed. Accordingly, the instant appeal filed by the appellant-Raju Malakar stands dismissed. Consequently,

the judgment and order of conviction and sentence dated 17.10.2015 delivered in ST (T-1) 18 of 2014 stands affirmed. The accused-appellant, Raju Malakar has to suffer the remaining period of sentence as recorded by the learned Sessions Judge as afore-stated.

43. With the above observations and directions, the instant appeal stands disposed of.

(ARINDAM LODH,J) **(AKIL KURESHI,CJ)**

Suhanjit