Criminal Appeal
Present:
The Hon'ble Justice Ashim Kumar Banerjee
AND
The Hon'ble Justice Kishore Kumar Prasad

CRIMINAL APPEAL No. 260 of 2005
Judgment on : March 22, 2010

HIRA ROUTH AND ANOTHER
VS
THE STATE OF WEST BENGAL
WITH
CRIMINAL APPEAL NO. 326 OF 2005
DILIP MALLICK
VS
THE STATE OF WEST BENGAL

POINTS:
Murder---Death of the victim-----Two accused persons were charge sheeted and tried ----- Sentenced to suffer Life Imprisonment by the Trial Court-------Appeal by the accused ----- Contradiction in the statements by the witnesses----Indian Penal Code, Sections 201&302, Evidence Act 1872,Sections 27 & 106.

FACTS:
Victim's body without head found in tea garden. Head found at separate place in the tea garden covered with soil and with the clothes of the deceased. Accused number 1 and 2 charge sheeted and convicted under Sections 201,302 and 34 of the Indian Penal Code based on circumstantial evidence. No eyewitness was found. The Trial Court convicted the accused and sentenced them to Rigorous Imprisonment for life. The accused persons preferred appeal against the said Judgment.

HELD:
There is nothing in the testimony of P.W. 18 (the Investigating Officer) that the alleged recovered knife bore any marks of blood and he took steps in accordance with law for sending the same to the clinical examination in order to ascertain that the same bore marks of human blood. The evidence of P.W. 18 touching the recovery of the cut head of the deceased and the weapon in question in the manner stated by him has not been corroborated at all by the independent seizure list witnesses namely, P.Ws. 7 and 14.

PARA---31

According to Section 27 of the Evidence Act that part only of the information given by an accused is admissible as distinctly relates to the facts recovered. Unless, therefore, the exact words used by an accused in giving the information are known, the Court is not in a position to decide to what extent the particular statement is admissible in evidence.

PARA---33

The appellants while in custody is alleged to have made a joint disclosure statement. Though they have been examined as P.Ws. 7 and 14, they are silent with regard to the making of the disclosure statement by the appellants.

PARA----35

The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 of the Evidence Act does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain.

PARA----47

The Court feels that it cannot be inferred that there was plan or meeting of mind of the appellants to commit the offence for which they were charged with the aid of Section 34 of the Indian Penal Code. From the circumstances appearing on record, no common intention can be inferred.

In the Court's view , the cumulative effect of circumstantial evidence in this case falls far short of the test required for sustaining conviction of the appellants. The Court has a serious doubt as to the prosecution version in respect of the appellants and once the case is in the region of suspicion, the benefit will go to the appellants .

PARA---52

CASES CITED:

1991 Criminal Law Journal 2191, 2006 (1) Acquittal 458, 1991 SCC (Cri) 407 and ***(2007) 2 SCC (Cri) 162***
2007 (1) SCC (Cri) 688 and **2005 (1) C.Cr.L.R. (SC) 366**

Sharad Birdhichand Sarda –vs- State of Maharashtra AIR 1984 SC 1622

State of Rajasthan –vs- Rajaram 2003 (8) SCC 180
State of Haryana –vs- Jagbir Singh and Another 2003 (11) SCC 261. KanuruYanadi Changaiah v. State of A.P. 1985 Cri LJ 1822 while dealing with a similar question has held that where several

Nathu –vs- State A.I.R. 1958 Allahabad 467

Panchu Gopal Das –vs- The State A.I.R. 1968 Calcutta 38

Bahadul –vs- State of Orissa A.I.R. 1979 S.C. 1262

Rex v. Gokul Chand Dwarkadas Morarka, Criminal Appeals No. 454 and 464 of 1949
KanuruYanadi Changaiah v. State of A.P. 1985 Cri LJ 1822

Raghava Nadar Reghu v. The State, 1988 Cri LJ 1364

Mohd. Abdul Hafeez v. State of Andhra Pradesh AIR 1983 SC 367: (1983 Cri LJ 689).

Sahadevan –v- State in **(2003) 1 SCC 534**

State of Rajasthan –v- Kashi Ram (2007) 1 SCC (Cri) 688.

Lok Pal Singh –vs- State of M.P., 1985 (Supp) SCC 76

Mr. Subir Banerjee,
Mr. Jayanta Banerjee,
Ms. Paumita Basu Mallick
For the appellants in CRA 260/2005.
Mr. Jayanta Narayan Chatterjee
For the appellant in CRA 326/2005.

Ms. Jharna Biswas For State.

THE COURT:

1.These two appeals arise out of a common judgment and order dated. 11.2.2005 passed by the learned Additional Sessions Judge, Fast Track 2nd Court, Siliguri in Sessions Trial No. 03 /04 arising out of Session Case No. F.T.C./05/ 04 convicting the appellants namely, Hira Routh, Khogesh Bansfore and Dilip Mallick for the offences punishable under Sections 302/201/34 of Indian Penal Code.

2.The appellants were heard on the question of sentence on 11.2.2005 and thereafter by an order passed on the same day, they were sentenced to suffer imprisonment for life for the offences punishable under Sections 302/201/34 of Indian Penal Code.

3.Being aggrieved by the judgment and orders of conviction and sentence passed by the learned Trial Court, the appellants herein have preferred the present appeals separately.

4.Prosecution version as unfolded during trial in a nutshell is as follows: -

On 03.02.2004 at about 13.15 hours one beheaded body was found lying in the Chandmuni Tea Garden area near Himachal Behar Abasan Project; that one Bhupendra Nath Sinha (P.W. 12) lodged a written complaint at Matigara P.S.; that the appellants were arrested on 3.2.2004 and leading to their statement showing a place on 4.2.2004 the cut head of the beheaded body was recovered from the land of Chandmuni Tea Garden which was wrapped with the wearing apparel of the deceased Sambhu Mallick; that the cut head was kept concealed with soil and dry leaves in the garden drain near the place of occurrence where the beheaded dead body was recovered on 3.2.2004 and the cut head was identified by the relatives of the deceased and others at the place of occurrence.

5.The investigating agency after registering the case on the basis of written complaint of P.W. 12 took up investigation. During investigation, the Investigating Officer visited the place of occurrence, prepared sketch map of the place of occurrence, conducted inquest on the beheaded body and cut head of the deceased, examined the available witnesses, recorded their statements and collected the post mortem examination report of the beheaded and cut head of the deceased.

6.In the usual course after completion of investigation, the Investigating Officer P.W. 18 submitted charge sheet against the appellants under Sections 302/201/34 of Indian Penal Code. The case was committed to the court of Sessions.

7.The learned Trial Judge framed charges against the appellants under Sections 302/201/34 of Indian Penal Code. The appellants pleaded not guilty to the charges framed against them and claimed to be tried.

8.In the Trial Court, as many as eighteen (18) witnesses were examined on behalf of the prosecution.

9.Apart from leading oral evidence, the prosecution also tendered and proved a large number of exhibits, which were marked as exhibits 1 to 24.

10.Though the appellants were examined under Section 313 of the Code of Criminal Procedure, yet there was no adduction of evidence by them.

11.The defence version was denial of the prosecution case as brought out in evidence.

12.The learned Trial Judge after considering the oral and documentary evidence and hearing the learned counsel for the parties, passed orders of conviction and sentence against the appellants as indicated above.

13.Learned counsel appearing for the appellants urged that there is no eyewitness of the occurrence and the prosecution case is totally based on circumstantial evidence. Learned counsel vehemently contended that no incriminating circumstances, which have been relied upon by the prosecution, have been proved beyond shadow of doubt and as such the learned Trial Judge

was not justified in recording the finding of guilt against the appellants.

14.Placing reliance on the four decisions of the Hon'ble Apex Court reported in ***1991 Criminal Law Journal 2191, 2006 (1) Acquittal 458, 1991 SCC (Cri) 407*** and ***(2007) 2 SCC (Cri) 162,*** Learned counsel appearing on behalf of the appellants Hira Routh and Khogesh Bansfore submitted further that circumstance of the last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime.

15.Learned counsel appearing on behalf of the State-respondent supported the judgment and conviction and sentence passed by the learned Trial Court in respect of the appellant Dilip Mallick. Learned counsel for the State in her usual fairness submitted that since the nkcircumstances as brought on record against the appellants Hira Routh and Khogesh Bansfore have not been proved beyond shadow of doubt, she was unable to support the judgment and order of conviction in respect of the appellant Hira Routh and Khogesh Bansfore.

16.Placing reliance on the two decisions of the Hon'ble Supreme Court reported in **2007 (1) SCC (Cri) 688** and **2005 (1) C.Cr.L.R. (SC) 366**, the learned counsel for the State contended that in a case resting on circumstantial evidence, if the accused fails to offer a reasonable explanation on the basis of facts within his special knowledge, that itself provides an additional link in the chain of circumstance proved against him.

17.We have given our anxious and thoughtful consideration to the respective contentions of the learned counsel for the parties. We have perused the evidence both oral and documentary tendered and proved by the prosecution to substantiate its case and the impugned judgment of the learned Trial Court.

18.At the outset, it needs to be mentioned here that it is not disputed that the deceased Sambhu Mallick was murdered at anytime during night on 2.2.2004; that his beheaded body was found lying in the Chandmuni Tea Garden near Himachal Behar Abasan Project and his cut head was recovered from the drain of the same garden, wrapped with wearing apparel of the deceased. There is evidence on record both oral and documentary to establish that the deceased met a homicidal death on account of the ante mortem injuries sustained by him.

19.The only point for our consideration is whether the appellants herein were responsible for causing the homicidal death of the deceased.

20.On going through the evidence on record, it is found that the conviction of the appellants is based on circumstantial evidence as there is no direct evidence to establish the involvement of the appellants in the murder of the deceased.

21.The five golden principles with reference to which the case of the prosecution must be assessed have been enunciated in the judgment of the Hon'ble Supreme Court in **Sharad Birdhichand Sarda –vs- State of Maharashtra** reported in **AIR 1984 SC 1622**, thus :

"1. the circumstances from which the conclusion of guilt is to be drawn should be fully established,

2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

3. the circumstances should be of a conclusive nature and tendency,

4. they should exclude every possible hypothesis except the one to be proved, and

5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.**"**

22.These aspects were highlighted in the **State of Rajasthan –vs- Rajaram** reported in **2003 (8) SCC 180** and **State of Haryana –vs- Jagbir Singh and Another** reported in **2003 (11) SCC 261**.

23.In the light of the above golden principles, we shall now deal with the circumstances which have been relied upon for bringing home the offences to the appellants in order to determine whether all these circumstances have been proved or not beyond shadow of reasonable doubt.

24.CIRCUMSTANCE NO. 1.
The prosecution in order to prove the crucial circumstance of appellants and deceased "last seen" together has examined Smt. Malati Mallick (P.W. 3), who is the wife of the deceased. It is in her evidence that on 2.2.2004 at about 2 p.m. the appellants came to their house and asked her husband to come with them for cleaning a tank. Appellant Dilip Mallick took the by-cycle of her husband and he carried her husband on the said cycle. It is also in her evidence that when her husband did not return after evening of 2.2.2004, she went to the house of the appellant Dilip Mallick to take information about the whereabouts of her husband but she did not find Dilip Mallick in his house. It is further in her evidence that on the next day she met Dilip Mallick and asked him about the whereabouts of her husband and then appellant Dilip Mallick instead of providing information about the whereabouts of her husband told her to go to Matigara in search of her husband.
25. The testimonies of P.W. 3 to the effect that the appellant Dilip Mallick came to their house on 2.2.2004; that he took her husband from her for the purpose of cleaning a tank and thereafter he did not return get support from the testimony of P.W. 5, Smt. Maya Mallick, who is the mother of the deceased.

26.The testimonies of P.W. 4, the sister of the deceased to this part of the prosecution case is hearsay version and it cannot be accepted since P.W. 3 did not whisper in her evidence that she told this fact to P.W. 4.
27.The testimony of the P.W. 5 in respect of two appellants namely, Hira Routh and Khogesh Bansfore is not consistent. Her evidence to the effect that the appellants, Hira Routh and Khogesh Bansfore also came to their residence along with Dilip Mallick and took her son with

them has been clearly falsified by the testimony of P.W. 18, the Investigation Officer of this case, who recorded her statement under Section 161 of the Code of Criminal Procedure.

27.The evidence of P.W. 18 in this regard is as follows:-
" The witness Maya Mallick, the mother of the deceased, did not state that Khogesh and Hira came to their house, called the deceased, and took him to engage in any work.**"**

28.Thus, we find material contradiction in the testimony of P.W. 3 and P.W. 5 in respect of the appellants namely, Hira Routh and Khogesh Bansfore. The testimony of these two witnesses in respect of appellants, Hira Routh and Khogesh Bansfore is far from impressive and it is difficult to accept their testimony on its face value.
29.As such this circumstance could not be said to have been proved beyond shadow of reasonable doubt against the appellants, Hira Routh and Khogesh Bansfore. But the evidence of P.Ws. 3 and 5 undoubtedly reveal that the appellant Dilip Mallick came to the house of the deceased on 2.2.2004 at about 2 p.m.; that he asked the deceased to come with him for cleaning a tank; that the appellant Dilip Mallick took the deceased along with him and thereafter they had not seen the deceased alive. P.Ws. 3 and 5 consistently speak about the circumstance of the appellant Dilip Mallick and deceased last seen together. As such this circumstances could be said to have been proved beyond shadow of reasonable doubt against the appellant Dilip Mallick.

30.CIRCUMSTANCE NO. 2.
It is clear from the evidence of P.W. 3 that the appellant Dilip Mallick was providing misleading information as regards the whereabouts of the deceased. P.W. 3 stated that on 3.2.2004 on enquiry the appellant Dilip Mallick stated that her husband had gone to his home after performing his work. P.W. 3 confronted the appellant Dilip Mallick as to why he was providing misleading information. He told her to go to Matigara in search of her husband. Thus, the evidence of P.W.3 clearly reveals that the appellant Dilip Mallick was providing misleading information about the whereabouts of the deceased. Thus, it is the second incriminating circumstance against the appellant Dilip Mallick.
31.CIRCUMSTANCE NO. 3.
During the course of investigation the appellants were arrested. While in police custody they are alleged to have been made disclosure statement leading to the recovery of cut head of the deceased including the weapon allegedly used for the purpose of committing the crime. There is nothing in the testimony of P.W. 18 (the Investigating Officer) that the alleged recovered knife bore any marks of blood and he took steps in accordance with law for sending the same to the clinical examination in order to ascertain that the same bore marks of human blood. The evidence of P.W. 18 touching the recovery of the cut head of the deceased and the weapon in question in the manner stated by him has not been corroborated at all by the independent seizure list witnesses namely, P.Ws. 7 and 14.

32.That apart, the prosecution in this case has not produced the recorded version of the statement made by the appellants in consequence whereof the cut head of the deceased and the weapon in question were recovered.

33.The decision of Allahabad High Court in the case of **Nathu –vs- State** reported in **A.I.R. 1958 Allahabad 467** lays down that under Section 27 of the Evidence Act that part only of the information given by an accused is admissible as distinctly relates to the facts recovered. Unless, therefore, the exact words used by an accused in giving the information are known, the Court is not in a position to decide to what extent the particular statement is admissible in evidence. The practice of not recording the actual words by the Investigating Agency was, therefore, disapproved. In the case of **Panchu Gopal Das –vs- The State** reported in **A.I.R. 1968 Calcutta 38**, somewhat similar observations were made. It was observed that it is only proper for prosecution if they want to adduce evidence under Section 27 of the Evidence Act which is an exception to the power enjoined by Section 25 of the Evidence Act, to prove by production of the written record only of so much of the statement as led to the discovery of article. It is unsafe to rely on the oral statement without corroboration by any written record of any such statement contemporaneously made, even if admissible.

34.In the case of **Bahadul –vs- State of Orissa** reported in **A.I.R. 1979 S.C. 1262**, the Hon'ble Supreme Court had held as under :

" As regards the production of the tangia by the accused before the police, the High Court seems to have relied on it as admissible under Section 8 of the Evidence Act. As there is nothing to show that the appellant had made any statement under Section 27 of the Evidence Act relating to recovery of this weapon hence the factum of recovery thereof cannot be admissible under Section 27 of the Evidence Act.**"**

35.In the instant case as per prosecution case, the appellants while in custody is alleged to have made a joint disclosure statement before Rajinder Mallick and Pabitra Adhikari. Though they have been examined as P.Ws. 7 and 14, they are silent with regard to the making of the disclosure statement by the appellants.

36.The question arising in the present case is as to the admissibility of a joint disclosure statement stated to have been made by the appellants and the alleged recovery in pursuance thereof.

37.In Rex v. Gokul Chand Dwarkadas Morarka, Criminal Appeals No. 454 and 464 of 1949 decided on 11.1.1950, a question arose before the Hon'ble Supreme Court-whether the joint statement attributed to the two accused in that case was admissible in evidence without specifying what statement was made by a particular accused which led to discovery of the relevant fact. It was held that a joint statement by more than one accused was not contemplated by Section 27, Evidence Act.

38.A Division Bench of the High Court of Andhra Pradesh in KanuruYanadi Changaiah v. State of A.P. 1985 Cri LJ 1822 while dealing with a similar question has held that where several accused were charged with the offence of dacoity and no separate statements of such accused were recorded, their joint statement recorded leading to the recovery of stolen articles is inadmissible in evidence and no reliance can be placed upon any recoveries alleged to have been made in pursuance of such joint statement.

39.In Raghava Nadar Reghu v. The State, 1988 Cri LJ 1364, a Division Bench of the High Court of Kerala also has the occasion to deal with a similar question. In the said case three accused were charged with the offence of murder. As per the prosecution case in pursuance of a joint statement made by such three accused weapons of offence were recovered. The trial Court did not rely on such joint statement and the recoveries alleged to have been effected in pursuance thereto.

40.The High Court in appeal held that the trial Court rightly did not rely on such joint statement and the recoveries alleged to have been made in pursuance thereof.

41.A similar question again arose before the Hon'ble Supreme Court in Mohd. Abdul Hafeez v. State of Andhra Pradesh AIR 1983 SC 367: (1983 Cri LJ 689). In that case four accused were tried for the offence of robbery punishable under Section 392 read with Section 34 Indian Penal Code. During the course of investigation three accused made a joint statement before the investigation officer leading to the recovery of a ring, which was sold by them to a jewellery. The trial Court as well as the High Court relying upon such evidence convicted and sentenced the accused therein. In appeal before the Hon'ble Supreme Court by the principal accused who was charged with the substantive offence under Section 392, Indian Penal Code, it was held that if evidence otherwise confessional in character is admissible in evidence under Section 27, Evidence Act, it is obligatory upon the investigating officer to state and record who gave the information; when the investigating officer is dealing with more than one accused what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against that person.

42.It was further held that the evidence that one accused along with all other gave information leading to recovery of robbed articles and the evidence of receiver of robbed property that accused No. 1 to 3 asked him to produce the ring when they came with the police party do not present any incriminating evidence against the accused.

43.In the instant case, no disclosure statement was recorded. There is nothing to suggest which particular information was given by a particular appellant. Nor there is evidence to show as to which particular article was recovered in pursuance of the information given by which of the appellant.

44.In view of the above legal position and from our independent analysis of the prosecution evidence which we have already discussed earlier, we have to hold that this circumstance cannot be deemed to have been proved beyond shadow of reasonable doubt.

CIRCUMSTANCE NO. 4.

45.Learned counsel for the State strenuously urged before us that the deceased and the appellant Dilip Mallick were last seen alive on 2.2.2004 upto 2 p.m. when the appellant Dilip Mallick took the deceased from his house and thereafter the deceased was not seen alive by any one till the recovery of beheaded body of the deceased at about 12.30 hours on 3.2.2004.

46Learned counsel, therefore, submitted that in the facts of the case, in absence of any explanation offered by the appellant Dilip Mallick, an inference must be drawn against the appellant Dilip Mallick which itself is a serious

incriminating circumstance against him.

47.The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 of the Evidence Act does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. This principle has been succinctly stated in Naina Mohd. reported in AIR 1960 Mad 218.

48.A similar view was also taken in **Sahadevan –v- State** in **(2003) 1 SCC 534** and in the **State of Rajasthan –v- Kashi Ram** reported in **(2007) 1 SCC (Cri) 688**.

49.In Sahadevan –v- State the prosecution established that the deceased was seen in the company of the appellants from the morning of 5.3.1985 till at least 5 p.m. on that day when he was brought to his house and thereafter his dead body was found in the morning of 6.3.1985. In the background of such facts the Hon'ble Court observed:-

" Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 Code of Criminal Procedure they have not taken any specific stand whatsoever.**"**

50.There is considerable force in the argument of the learned counsel for the State that in the facts of this case as well it should be held that the appellant Dilip Mallick having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since the appellant Dilip Mallick failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.

51.From the circumstances which we have already discussed above, it cannot be inferred that there was plan or meeting of mind of the appellants Hira Routh and Khogesh Bansfore to commit the offence for which they were charged with the aid of Section 34 of the Indian Penal Code. From the circumstances appearing on record, no common intention can be inferred.

52.In our view, the cumulative effect of circumstantial evidence in this case stated by us in the preceding paragraph of our judgment falls far short of the test required for sustaining conviction of the appellants, Hira Routh and Khogesh Bansfore. We have serious doubt as to the prosecution version in respect of the appellants Hira Routh and Khogesh Bansfore and once the case is in the region of suspicion, the benefit will go to the appellants Hira Routh and Khogesh Bansfore.

53.In view of the foregoing discussion, we are of the view that the prosecution has failed to complete the chain of circumstances holding Hira Routh and Khogesh Bansfore guilty of the crime beyond reasonable doubt and the learned trial Court was not justified in convicting these two appellants. The appeal being No. CRA 260 of 2005 preferred by the appellants Hira Routh and Khogesh Bansfore, therefore, succeeds and is allowed. The orders of conviction and sentence passed by the learned trial Court in respect of appellants Hira Routh and Khogesh Bansfore are set aside and these two appellants are acquitted from the charges framed against them.

54.It appears from the record that these two appellants Hira Routh and Khogesh Bansfore are now in jail. They are directed to be released forthwith from custody, if not required to be detained in connection with other case.

55.On consideration of the circumstances noted above which have been established by the prosecution, we have no hesitation to hold that the prosecution has proved reliable and formidable circumstances forming into a complete chain and pointing unerringly to the irresistible conclusion that the deceased Sambhu Mallick was murdered by none other then the appellant Dilip Mallick.

56.Guilt of the appellant Dilip Mallick so far as offence punishable under Section 302 of Indian Penal Code is concerned, has been established. So far as offence under Section 201 read with Section 34 of Indian Penal Code is concerned, the circumstances referred to above do not establish it beyond shadow of reasonable doubt. Consequently, the order of conviction passed by the learned Trial Court against the appellant Dilip Mallick for the offence punishable under Section 201 read with Section 34 of Indian Penal Code is set aside.

57.It is seen from the impugned judgment and orders of the Learned Trial Court that no separate sentence has been awarded and a combined sentence for Sections 302/201/34 of Indian Penal Code has been awarded. The same is contrary to law and it shows non-application of mind on the part of Learned Trial Judge.

58.Under the facts and circumstances of the case, the appellant Dilip Mallick though charged under Section 302/34 of Indian Penal Code, no prejudice will be caused if he is alone convicted without the aid of Section 34 as the participation of other two co-accused has not been proved beyond reasonable doubt. (Lok Pal Singh –vs- State of M.P., 1985 (Supp) SCC 76 relied upon)

59.Accordingly, we convict the appellant Dilip Mallick under Section 302 of Indian Penal Code. As regards sentence for the ends of justice and crime prevention, we sentence the appellant Dilip

Mallick to suffer rigorous imprisonment for life and also to pay fine of Rs. 5,000/-, in default of payment fine to suffer further rigorous imprisonment for six months. Fine, if realised, shall be paid to the wife of the deceased by way of compensation.

60.The appellant Dilip Mallick is now in jail. He is directed to serve out the remainder part of his sentence as indicated above.
61.The appeal preferred by the appellant being No. C.R.A. 326 of 2005 is accordingly disposed of.

62.The learned Trial Court is directed to issue necessary revised jail warrant against the appellant Dilip Mallick as required under Rules.
63.Lower Court records with a copy of this judgment to go down forthwith to the Court of learned Trial Judge for information and necessary action.

Urgent xerox certified copy of this judgment, if applied for, be supplied to the learned counsel for the parties upon compliance of all formalities.

(Kishore Kumar Prasad, J.)
I agree.
(Ashim Kumar Banerjee, J.)