

Crl. Appeal No. 30 of 2016
Smt. Renu Meena v. State of Sikkim & Ors.
With
Crl. Appeal No.22 of 2017
State of Sikkim v. Gurmey Wangchuk Wazalingpa @ Gyurmee & Ors.

THE HIGH COURT OF SIKKIM: GANGTOK (Criminal Appeal Jurisdiction)

Dated: 12th September, 2019

**DIVISION BENCH: THE HON'BLE MR. JUSTICE VIJAI KUMAR BIST, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**

Crl. Appeal No. 30 of 2016

Smt. Renu Meena,
W/o Shri B.S. Meena,
R/o D-46, Sidharth Nagar Opposite,
Malviya Nagar, Sector-6,
Jaipur, Rajasthan.

.... Appellant

Versus

1. State of Sikkim.
2. Mr. Gurmey Wangchuk Wazalingpa,
Son of Mr. Topjor Dorjee,
R/o New Market,
Gangtok, East Sikkim.
3. Mr. Bidhan Pradhan,
Son of Late K. K. Pradhan,
R/o Lower Arithang,
Gangtok, East Sikkim.
4. Mr. Roden Wangdi Sherpa,
Son of Mr. Sonam Wangdi,
R/o 26/2/ Harka Dhoj Lama Road,
Darjeeling,
West Bengal,
A/p C/o Lakpa Doma Bhutia,
Hidden Forest Area,
Sichey, Gangtok, East Sikkim.
5. Mr. Sonam Namgyal,
S/o Mr. Pema Wangchuk,
R/o Ralong House,
Bakthang, Lower Burtuk,
East Sikkim.

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6. Mr. Ugen Namgyal Basi,
S/o Late Phiflstok Namgyal Basi,
R/o Sichey,
Near Sishu Bhavan, Gangtok,
East Sikkim.
 7. Mr. Karna Hang Subba,
S/o Mr. Hans Pal Subba,
R/o Lall Bazar, Gangtok,
East Sikkim.
 8. Mr. Purba Tamang,
S/o Mr. C.B. Tamang,
R/o 3rd Mile, J.N. Road,
Gangtok, East Sikkim.
- Respondents

Application under Section 372 of the Code of Criminal
Procedure, 1973.

Appearance:

Mr. Santosh Kumar, Mr. Madhurendra Sharma and Ms. Pritima Sunam, Advocates for the Appellant.

Dr. (Ms.) Doma T. Bhutia, Public Prosecutor, Mr. S. K. Chettri, and Ms. Pollin Rai, Assistant Public Prosecutors for the Respondent No.1.

Mr. Ajay Rathi, Ms. Phurba Diki Sherpa, Ms. Renuka Chettri and Mr. Aditya Makkhim, Advocates for Respondent Nos.2 and 3.

Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan and Mr. Saurav Singh, Advocates for Respondent Nos. 4 and 5.

Mr. Tashi Norbu Basi, Advocate for Respondent No.6.

Mr. Jorgay Namka, Ms. Panila Theengh and Mr. Simeon Subba, Advocates for Respondent Nos. 7 and 8.

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State of Sikkim

Appellant

Versus

1. Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee,
S/o Mr. Topjor Dorjee,
R/o New Libing House, Gangtok,
East Sikkim.
2. Mr. Bidhan Pradhan,
S/o Late K.K. Pradhan,
R/o Lower Arithang,
Gangtok, East Sikkim.
3. Mr. Roden Wangdi Sherpa,
Son of Mr. Sonam Wangdi Sherpa,
R/o 26/2/ Harka Dhoj Lama Road,
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Hidden Forest Area, Sichey,
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5. Mr. Sonam Namgyal,
S/o Mr. Pema Wangchuk,
R/o Ralong House,
Bakthang, Lower Burtuk,
East Sikkim.
6. Mr. Karna Hang Subba,
S/o Mr. Hans Pal Subba,
R/o Lall Bazar, Gangtok,
East Sikkim.
7. Mr. Purba Tamang,
S/o Mr. C.B. Tamang,
R/o 3rd Mile, J.N. Road,
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.... Respondents

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**Appeal under Section 378 of the Code of Criminal
 Procedure 1973.**

Appearance:

Dr. (Ms.) Doma T. Bhutia, Public Prosecutor. Mr. S. K. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors for the Appellant.

Mr. Ajay Rathi, Ms. Phurba Diki Sherpa, Ms. Renuka Chettri and Mr. Aditya Makkhim, Advocates for Respondent Nos.1 and 2.

Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan and Mr. Saurav Singh, Advocates for Respondent Nos. 3 and 5.

Mr. Tashi Norbu Basi, Advocate for Respondent No.4.

Mr. Jorgay Namka, Ms. Panila Theengh and Mr. Simeon Subba, Advocates for Respondent Nos. 6 and 7.

J U D G M E N T
 (12.09.2019)

Bhaskar Raj Pradhan, J

1. This judgment will decide two criminal appeals preferred against the judgment of acquittal dated 29.07.2016 passed by the learned Sessions Judge, Special Division-II, East Sikkim at Gangtok in Sessions Trial No. 09 of 2015 (State v. Gurmey Wangchuk Wazalingpa & Ors.) whereby all the accused persons were acquitted of the charges levelled against them. Criminal Appeal No. 30 of 2016 has been preferred by Renu Meena the mother of the deceased. Criminal Appeal No. 22 of 2017 has been preferred by the State of Sikkim. As both the criminal

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appeals seek to assail the acquittal of the Respondents we shall dispose both the appeals by this common judgment.

The First Information

2. On 19.05.2013 First Information Report (FIR) No.107/2013 (exhibit-7) was registered on the information given by Sameer Pradhan (P.W.1) (the informant) posted at Sadar Police Station, Gangtok.

3. The FIR reported that on 19.05.2013 around 0910 hours vide General Diary No.780 call book intimation was received from Central Referral Hospital, (CRH) Tadong, East Sikkim stating that the dead body of one Rakshit Meena (deceased) was brought to CRH by three friends on 19.05.2013 at 0740 hours. It was further stated that on the basis of said information Sadar Police Case No. 36/2013 dated 19.05.2013 under Section 174 Code of Criminal Procedure, 1973 (Cr.P.C.) was registered and the case endorsed to the informant for investigation. It was reported that the informant visited CRH and conducted the inquest on the dead body. It revealed multiple injuries. During investigation statement of Anirban Neogi (P.W.22) was recorded which revealed that on the evening of 18.05.2013 at 2000 hours the deceased along with Anirban Neogi (P.W.22) went to Café Live & Loud, Tibet Road, Gangtok. Thereafter, at 2200 hours they were joined by their four friends namely Aditya Verma

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(P.W.8), Amber Chandra (P.W.23), Arindam Parmar (P.W.21) and Divit Vinod (P.W.9). At around 0130 hours the deceased and his friends were assaulted by six unknown persons on the stairs of Café Live & Loud. Thereafter, the six unknown persons ran away through their two cars: one Skoda and another Audi. The injured deceased and his friends somehow ran to Hotel Santiniketan located at Arithang, Gangtok and could not come out from there due to fear of life. At the hotel room the condition of the deceased deteriorated. At 0500 hours on 19.05.2013 the friends of the deceased took him to STNM Hospital Gangtok and thereafter to CRH where he was declared brought dead. The dead body of the deceased was forwarded for autopsy. On the basis of the aforesaid facts the informant reported, an FIR was registered against the six unknown persons.

Charge-sheet

4. A charge-sheet dated 16.08.2013 was submitted before the Court of the learned Chief Judicial Magistrate finding *prima-facie* case against Gurmey Wangchuk Wazalingpa @ Gyurmee (Accused No.1), Bidhan Pradhan (Accused No.2), Roden Wangdi Sherpa (Accused No.3), Ugen Namgyal Basi (Accused No.4) and Sonam Namgyal (Accused No.5) under Section 302, 325, 323, 500 read with Section 34 of the Indian Penal Code, 1860 (IPC) and against Karna Hang Subba (Accused No.6) and Phurba

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Tamang (Accused No.7) under Section 302, 325, 201 read with Section 109 and 34 IPC.

5. At the trial an application was filed by Bidhan Pradhan (Accused No.2) under Section 91 Cr.P.C. for production of medical history/record of the deceased. The learned Principal Sessions Judge vide order dated 09.04.2014 allowed the said application and issued summons to the Medical Superintendent of the CRH requiring him to appear before the Court on 21.04.2014 and to produce the medical records/history of the deceased. Thereafter, Dr. Samsher Singh (C.W.1) was examined as a Court witness and the medical records of the deceased were exhibited as exhibit-C1 and C2.

6. A supplementary charge-sheet dated 24.09.2014 was filed with the finding that the deceased did not suffer from Haemophilia. A second supplementary charge-sheet dated 28.08.2015 was filed upon receipt of expert opinion on the hard disc containing CC TV footage and Sony Digital Camera containing photographs.

7. Another petition under Section 45 of the Indian Evidence Act, 1872 was also filed by Bidhan Pradhan (Accused No.2) and Ugen Namgyal Basi (Accused No.4) with the prayer to direct Dr. Ashok Kumar Samanta (P.W.34) who had conducted the autopsy of the deceased to place fresh opinion with regard to

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the cause of death in view of the ailment suffered by the victim during his life time. The said petition was rejected vide order dated 27.10.2014.

Charges

8. On 05.03.2015 the learned Principal Sessions Judge, East Sikkim at Gangtok framed charges against Accused No.1 to 5 under Section 302/34 IPC for the murder of the deceased; Section 325/34 IPC for causing grievous hurt to Arindam Parmar (P.W.21); Section 323/34 IPC for causing hurt to Divit Vinod (P.W.9); Section 506/34 IPC for threatening the deceased and his friends with injury with intent to cause alarm by challenging them to a physical fight which they were not legally bound to do and against Karna Hang Subba (Accused No.6) and Phurba Tamang (Accused No. 7), the employees of Café Live & Loud, under Section 176 IPC for not giving information to the police about the assault.

The Trial

9. During the trial forty five witnesses were examined by the prosecution. Five witnesses were friends of the deceased who were present when the alleged assault took place at Café Live & Loud. Seven staff of Café Live & Loud and nine guests present that night were also examined. On completion of the trial the

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accused person's statement under Section 313 Cr.P.C. was recorded and thereafter judgment delivered on 29.07.2016.

The Sessions Court's conclusions

10. The learned Sessions Judge after examining the evidence came to the conclusion that the prosecution had failed to prove the charges against the accused persons beyond reasonable doubt and as such they were entitled to acquittal. The learned Sessions Judge held that there was no evidence to establish the presence of the accused persons at Café Live & Loud and their involvement in the scuffle; the prosecution had failed to establish the cause of death being homicidal; Gurmey Wangchuk Wazalingpa (Accused No.1) had already left Café Live & Loud prior to the incident; the Test Identification Parade (TIP) was defective; persons having similar physique, built, height and belonging to the same race or community were not mixed with the accused persons; the prosecution witnesses i.e. Aditya Verma (P.W.8), Divit Vinod (P.W.9), Arindam Parmar (P.W.21), Anirban Neogi (P.W.22) and Ambar Chandra (P.W.23) (jointly referred to as eyewitnesses) who identified the accused persons during the TIP had occasion to see the accused persons prior to the TIP during the time of their arrest and hence it was not free from doubt and unworthy of credence; there was clinching evidence that the deceased had a fall inside the bathroom which

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might have led the deceased to sustain injury in his lower lobe of his lung due to the impact of floating rib; the injuries at serial no. 1 to 4 on the deceased were only scratches and not sufficient to cause death whereas the injury at serial no.5 was due to the impact of fall in the bathroom causing the laceration; such laceration, in a haemophilic patient, if not given prompt medical aid would result in excessive internal bleeding leading to accumulation of the 1200 ml of blood on the thoracic cavity which pressurised the lungs and caused its collapse; the evidence of Dr. Bidita Khandelwal (P.W.28), Dr. S. K. Dewan (P.W.29) and Dr. Shamsheer Singh (C.W.1) establishes that the deceased was suffering from haemophilia A, factor VIII and died due to his ailment but not due to the assault by the accused persons; the prosecution has failed to establish that the death was homicidal or the motive for the commission of murder to attract the provision of 302 IPC; similarly, there is no evidence to establish common intention.

11. The learned Sessions Judge also came to the conclusion that there was no evidence to establish criminal intimidation by the accused upon the deceased and his friends; the evidence of Divit Vinod (P.W.9) reflects that there was no fight inside or outside the Café Live & Loud and Anirban Neogi (P.W.22) also categorically admitted the fact that the deceased had fallen on the floor of the bathroom of the hotel during the period 2 a.m.

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till the morning soon after the incident; Dr. Ashok Kumar Samanta (P.W.34) admitted that in the autopsy report (exhibit-31) there was no mention of the age of injury to ascertain the time of death; Aditya Verma (P.W.8), Divit Vinod (P.W.9), Arindam Parmar (P.W.21), Ambar Chandra (P.W.23) have admitted that there were no external injuries noticed on the body of the deceased soon after the incident when they reached the hotel and thoroughly checked the body and therefore, the injury could have been caused in between 2 a.m. till morning at the hotel room and there was no evidence to prove the charge of assault and causing injury to Divit Vinod (P.W.9) and Arindam Parmar (P.W.21) and thus the charge stood not proved.

The rival contentions

12. We have heard Mr. Santosh Kumar, learned Counsel for the Appellant in Criminal Appeal No.30 of 2016 who is the mother of the deceased. We have also heard the learned Additional Advocate General for the State of Sikkim and the learned Counsel for the Respondents at great length. We have considered the detailed written submissions filed by the learned Counsel for Renu Meena-the mother of the deceased.

13. Mr. Santosh Kumar and the learned Additional Advocate General submitted that while dealing with an appeal against acquittal this Court has full powers to review the evidence on

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which the order of acquittal was found and reach its independent conclusion as to whether or not the order of acquittal was justified. Defect in investigation by itself cannot be ground for acquittal. There is a legal obligation on the Court to examine the prosecution evidence *dehors* such lapses. It is nearly impossible in any criminal trial to prove all the elements with a scientific precision and a criminal Court could be convinced of the guilt only beyond the range of reasonable doubt. Merely because there is an inconsistency in evidence it is not sufficient to impair the credit of a witness. While appreciating the evidence of witness, the Court has to assess whether read as a whole, it is truthful. Statement of hostile witness is not to be brushed aside in *toto* and the Court can consider it to corroborate other evidence on record. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny. The evidence adduced by the eyewitnesses does not suffer from any material discrepancy and there is no material to show that they had falsely implicated the accused persons. The presence of eyewitnesses at the scene of the occurrence and the identification of the accused persons by them and other witnesses cannot also be doubted. The medical evidence amply corroborates the evidence of the eyewitnesses. The injuries

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found on Arindam Parmar (P.W.21) and Divit Vinod (P.W.9) corresponds to the overt act of assault by the accused persons. Their evidence, as injured witnesses, must be considered reliable since it comes with a built-in guarantee of their presence. When there are number of assailants, meticulous exactitude of individual acts cannot be given by eyewitnesses. The finding of the learned Sessions Judge that death is not homicidal in nature is manifestly illegal. When eyewitnesses account is credible and trustworthy medical opinion pointing to alternative possibilities cannot be accepted. As post-mortem lividity was seen on the back, *rigor mortis* was detected all over the body and semi digested food material was found in the stomach at the time of the start of autopsy there could be no doubt in the prosecution case regarding the manner in which the incident happen. The finding of the learned Sessions Judge that the deposition of Moti Lall Pradhan (P.W.44) and Mordent Thapa (P.W.45) cast a cloud in the case of the prosecution is legally infirm. Failure to trace the Audi car and find out the registered owner cannot be a ground of acquittal. The Skoda was recovered from Sonam Namgyal (Accused No.5) and although Lakpa Doma Bhutia (P.W.4) was declared hostile the Court could consider her evidence for the purpose of corroboration. The story of the deceased falling in the bathroom has been taken out of context and the learned Sessions Judge

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has adopted a hyper technical approach to come to its conclusion. The fact that the death was homicidal is proved by the inquest report, evidence of the eyewitnesses and the evidence of Sangay Doma Bhutia (P.W.3). The Test Identification Report (exhibit-27) reflects that the eyewitnesses have identified the accused persons and the said report stands proved. The evidence of Bachu Singh Meena (P.W.43) bolsters the case of the prosecution. It was the Appellant's case that the findings recorded by the learned Sessions Judge resulting in acquittal of the accused persons is contrary to the weight of evidence adduced and facts established in trial and is conjectural based on surmises and unfounded assumptions.

14. The learned defence Counsel pleaded that if the view taken by the trial Court is a reasonably possible view, the High Court cannot set it aside and substitute it by its own view merely because that view is also possible on the facts of the case. The High Court has to bear in mind that presumption of innocence of the accused persons is strengthened by their acquittal and unless there are strong and compelling circumstances which rebut that presumption and conclusively establish the guilt of the accused persons, the order of acquittal cannot be set aside. Unless the order of acquittal is perverse, totally against the weight of evidence and rendered in complete breach of settled principles underlying criminal jurisprudence, no interference is

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called for with it. Crime may be heinous, morally repulsive and extremely shocking, but moral considerations cannot be a substitute for legal evidence and the accused persons cannot be convicted on moral considerations. Suspicion however strong and grave cannot take the place of proof. Graver the crime greater the scrutiny. If two views are possible, one favouring the accused persons should be adopted. Major contradictions in ocular and medical evidence would tilt the balance in favour of the accused. The foremost aspect to be proved in a case under Section 302 IPC is that it was homicidal. Clear, cogent and unimpeachable evidence is required before the accused persons are condemned as convicts. Reasonable doubt is not an imaginary, trivial or a mere probable doubt, but a fair doubt that is based upon reason and common sense. The identification of an accused in the Court is substantive piece of evidence and the identification during the Test Identification Parade is only corroborative.

15. The principles enunciated by the Supreme Court in the judgments¹ relied upon by the parties and as submitted above are well settled. The present appeals are required to be examined in the light of the above principles.

¹ Judgments cited by :

Mr. Santosh Kumar:- (1) Khurshid Ahmed v. State of Jammu & Kashmir (2018) 7 SCC 429; (2) C. Muniappan v. State of T.N. (2010) 9 SCC 567; (3) Raja v. State of Karnataka (2016) 10 SCC 506; (3) State of Haryana v. Bhagirath (1999) 5 SCC 96; (4) Zahira Habibullah Sheikh (5) v. State of Gujarat (2006) 3 SCC 374; (5) Bhagwan Jagannath Markad v. State of Maharashtra (2016) 10 SCC 537.

Mr. K. T. Bhutia:- Tomaso Bruno & Anr. v. State of U.P. (2015) 7 SCC 178; Madho Singh v. State of Rajasthan (2010) 15 SCC 588; P.K. Narayanan v. State of Kerala (1995) 1 SCC 142; Shaikh Umar Ahmed Shaikh & Anr. v. State of Maharashtra 1998 CRI.L.J. 2534.

Mr. Ajay Rathi:- Sujit Biswas v. State of Assam (2013) 12 SCC 406; State of Uttar Pradesh v. Wasif Haider & Ors. (2019) 2 SCC 303; Suchand Pal v. Phani Pal & Anr. (2013) 11 SCC 527; K. Venkateshwarlu v. State of Andhra Pradesh (2012) 8 SCC 73; Navaneethakrishnan v. State by Inspector of Police AIR 2018 SC 2027.

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The eyewitnesses account

16. The fact that Aditya Verma (P.W.8) along with his friends Arindam Parmar (P.W.21), Ambar Chandra (P.W.23) and Divit Vinod (P.W.9) had gone to Café Live & Loud on 18.05.2013 has been established by their testimonies in Court. Their testimonies also establishes that the deceased and Anirban Neogi (P.W.22) were also there. The evidence of these five eyewitnesses thus would be vital for the prosecution case.

17. According to Aditya Verma (P.W.8) they all sat together at Café Live & Loud and at around 12:30 a.m. one local boy met Anirban and asked for a fight. Anirban told them about the challenge. In order to avoid the fight they left the Café at around 1:30 a.m. and on reaching the staircase towards the exit they saw some of the boys standing at the exit. They started basting them. Thereafter, they ran away. After about 5-10 minutes they realized the deceased was not with them and therefore went back to see him and found him sitting at the road side. Thereafter, they took him to hotel Santiniketan which was booked by them for nights rest. Aditya Verma (P.W.8) did neither identify any of the accused as the unknown persons who basted them nor identify the person who asked Anirban Neogi (P.W.22) for a fight.

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18. Divit Vinod (P.W.9) deposed that they celebrated Arindam's birthday party till 1:00 a.m., rested for half an hour and thereafter planned to go back to the hotel. As they came out of the pub a group of boys attacked them and they ran away and stayed in a safe place. Thereafter, they realized that the deceased was left behind and so they went back and saw the deceased sitting on the road side after which they took him to the hotel. Divit Vinod (P.W.9) did not identify any of the accused persons in Court as the group of boys who attacked them.

19. Arindam Parmar (P.W.21) deposes that Anirban was called by one unknown boy in Café Live & Loud and told him that he wants to fight with all of them. Apprehending danger they left Café Live & Loud. At the exit those unknown boys chased them and they ran away during which time he sustained injury on his nose and hid behind a taxi at the adjacent taxi stand. After ten minutes they went back, saw the deceased sitting at the place of occurrence and asked what happened to him. He told them that he was severely beaten by those unknown boys. They asked him to go to the hospital for medical treatment. The deceased told them that those unknown boys might be searching for them and they should go to the hotel. Accordingly, they went to the hotel. Arindam Parmar (P.W.21) neither identified the accused persons as the unknown boys who

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chased them nor the unknown boy who wanted to fight with him.

20. Anirban Neogi (P.W.22) deposed that they were enjoying at the pub till 1:30 a.m. Thereafter they left the pub. On reaching the gate the accused persons attacked them and ran away. He was hiding behind a car which was parked nearby. The other friends were hiding in other places. After about ten to fifteen minutes they went back to the place and saw the deceased sitting down. He complained that he got beaten very badly. The deceased told them that they should go back to the hotel as they were searching for them. Thereafter, they went back to hotel Santiniketan. Anirban Neogi (P.W.22) did not identify the accused persons in Court.

21. With regard to the deceased their deposition reflects that none of them specified what transpired with the deceased except Ambar Chandra (P.W.23). Ambar Chandra (P.W.23) deposed that some unknown boys assaulted the deceased on his leg. Ambar Chandra (P.W.23) also did not identify the accused persons as the unknown boys who assaulted the deceased on his leg. Arindam Parmar (P.W.21) further deposed that when they found the deceased sitting they asked him what happened and he said that he was beaten by unknown boys. Anirban Neogi (P.W.22) states that the deceased told them that

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he got beaten very badly. The deposition of the eyewitnesses reflects that some unknown boys had attacked them. However, none of the eyewitnesses could identify nor attempted to identify any of the accused persons in Court.

22. However, the incident is said to have taken place in a crowded Café. Seven staff members of Café Live & Loud who were present that night were also examined as prosecution witnesses.

The version of the staff members of Café Live & Loud

23. Out of them, Ritesh Rai (P.W.5) who was on duty at the cash counter; Prashant Gurung (P.W.15)-the disc jockey; Bijay Gurung (P.W.16)-working in the bar section; Sanila Rai (P.W.17) a waitress, all knew the accused persons. Adrien Limboo (P.W.18) a waiter; Rubina Rai (P.W.26) and Roshan Rai (P.W.35) the steward were also present that night. However, none of the seven staff members stated that the accused were present or involved in any scuffle during their working hours. Ritesh Rai (P.W.5) only stated that one person informed him that a fight was going on outside Café Live & Loud but when he went outside he did not see what happened. Who was the person who told Ritesh Rai (P.w.5) is unknown even to the investigating agency. Roshan Rai (P.W.35) knew Karna Hang Subba (Accused

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No. 6) and Phurba Tamang (Accused No.7) but did not even depose about their involvement.

24. Besides the eyewitnesses, five friends of the deceased and the seven staff members of Café Live & Loud nine guests who had visited Café Live & Loud were also examined.

The version of the guests at Café Live & Loud

25. Uttam Pradhan (P.W.6), an actor did not know the accused persons. He had gone to Café Live & Loud with his friend Arjun Chapagai and Sameer Gazmere (P.W.7). They sat there and discussed the script of their upcoming movie and left at around 11:30. According to this witness he was there for five to six hours. Students of Manipal took photographs with him in their mobile phones. These students were fully drunk. Three of them had visited the wash room. There were no abnormal activities there. He was sitting at the table next to the wash room. He was sure that the persons from Manipal were not interrupted and disturbed or threatened by any person. None of the accused persons had followed the said students to the wash room. He had not seen the accused persons there.

26. Sameer Gazmere (P.W.7) also did not know the accused persons. He was with Uttam Pradhan (P.W.6) and Mr. Chapagai that night. During cross-examination he admitted that there was no incident inside or outside.

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27. Pema Lhamu Bhutia (P.W.10), Chimey Zangmo Topden (P.W.11), Pema Dechen Wangmo Chingapa (P.W.12), Gawa Choden Dahdul (P.W.13), Rinzing Choden Dahdul (P.W.14), Chepel Topden (P.W.31) and Jigme Lachungpa (P.W.32) had all visited Café Live & Loud that night. Pema Lhamu Bhutia (P.W.10), Chimey Zangmo Topden (P.W.11), Pema Dechen Wangmo Chingapa (P.W.12), Gawa Choden Dahdul (P.W.13) neither identified the accused persons nor had anything to depose about the incident.

28. Rinzing Choden Dahdul (P.W.14) knew the accused persons but deposed that she along with her cousin had gone to Café Live & Loud, danced till 1:00 a.m. and thereafter, went home. She was declared hostile and cross examined. She denied that some unknown boys had asked for beer.

29. Chipel Topden (P.W.31) also identified all the accused persons. She deposed that on 18.05.2013 at around 10:00 p.m. she along with Gyrmey Wangchuk Wazalingpa (Accused No. 1), his family members and friends had gone to Café Live & Loud for a night out. At the restaurant she met many of her friends including Jigmi Lachunga (P.W.32) and his wife. At around 12:30 a.m. on 19.05.2013 after having food and wishing Jigmi Lachungpa (P.W.32) good night they left Café Live & Loud after

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which Gurmey Wangchuk Wazalingpa (Accused No.1) dropped her at her residence.

30. Jigmi Lachungpa (P.W.32) also knew the accused persons. He had visited Café Live & Loud with his wife on 18.05.2013 at around 10:30 p.m. for dinner. At the restaurant they met the Accused No.1 and Chipel Topden (P.W.31). At 12 to 12:30 a.m. on 19.05.2013 after wishing them good night both Accused No.1 and Chipel Topden (P.W.31) left the Café. During his cross-examination he deposed that till 1:30 a.m. on 19.05.2013 he had not seen the rest of the accused persons nor witnessed any incident or commotion inside or outside the premises of Café Live & Loud. He was also not declared hostile.

31. The prosecution witness i.e. the staff of Café Live & Loud and the other guests present that night failed to corroborate the version of the incident the eyewitnesses deposed about. They, except one were also not declared hostile and cross-examined by the prosecution. Their evidence is binding upon the prosecution.

The inquest report

32. The informant exhibited the inquest report (exhibit-1) as the one he had prepared and also identify his signature thereon. However, he did not depose about the contents of inquest report (exhibit-1).

The autopsy report

33. The post-mortem was conducted by Dr. Ashok Kumar Samanta (P.W.34) on 19.05.2013.

34. The external injuries detected were:-

- (1) abrasion of size 4 cm x 1 cm situated transversely over right supra orbital ridge, 2 cm above and lateral to right eyebrow (lateral end)
- (2) a contused abrasion of size 1 cm x 0.5 cm situated over medial side of right lower leg, 5 cm above medial malleolus;
- (3) small abrasion measuring 1 cm x 1 cm situated over the back of chest, about 6 cm below left scapula inferior angle.

35. The internal injuries detected were:

- (1) Contusion of size 0.5 cm x 0.5 cm on the inner aspect of both upper and lower lips at its middle;
- (2) Lacerated injury of lower lobe of left lung with collapse of both lungs;
- (3) The thoracic cavity contained about 1200 ml of fluid blood and contained some clots also;
- (4) Multiple contusion with clots were seen at the hilar region of left kidney and on perinephric fatty tissue.

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36. On examination of the stomach, it contained 100 ml of liquid semi digested food material and had smell of alcohol.

37. Dr. Ashok Kumar Samanta (P.W.34) opined that all the injuries described in the external and internal parts were ante mortem in nature and could have been caused by hard and blunt force impact. He opined that the cause of death of the deceased was due to haemorrhagic shock as a result of injuries sustained during life. He exhibited the autopsy report (exhibit-31).

38. During cross-examination Dr. Ashok Kumar Samanta (P.W.34) admitted that the time of death which is vital is not reflected in the report; injury No.1 is a small abrasion/scratch on the forehead; injury No.2 and injury No.3 are small scratches only; injury No.4 is a simple injury; all the injuries are not injuries to cause death; abrasions are caused as a result of fall on hard surface, being dragged, finger nails, thorns etc.; injury No.1 to 4 are abrasions which have been caused by force directed tangential to the body and not at right angle; there was no rib fracture; injury No.3 and injury No.5 are not co-related with each other and his findings regarding them were based on assumption and presumption as he could not find sufficient external injury to explain injury No.5; normally both the lungs do not collapse at a time, but in case of collapse of

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both the lungs it is a case of emergency as the lungs which are required for respiration would not be able to function and the person could die of asphyxia within two to four minutes; haemorrhagic shock is caused by severe loss of blood; deceased was a registered haemophilic patient and he had himself registered at CRH for ready reference and help in case of emergency; deceased was suffering from haemophilia A factor VIII; at the time of autopsy examination he was not aware of this condition of the deceased and his report (exhibit-31) does not suggest so; haemophilia A is related to inherent blood disease and haemophilic patient suffers from excessive bleeding; haemophilic patient should avoid consumption of alcohol and physical activities; his report (exhibit-31) does not mention the age of injuries and injury No.1 to 4 can be caused due to fall on hard or slippery surface like bathroom floors; there were chances of lacerated injury of lower lobe of left lung being caused due to impact of floating rib which might have caused the lacerated injury as mentioned in the report (exhibit-31) if the victim had a fall on a hard or slippery surface like bathroom floor; the accumulated blood could be the result of the injury in the left lung due to the impact of the floating rib. Dr. Ashok Kumar Samanta (P.W.34) admitted that the injuries at serial No.1 to 4 would be noticed on general examination by a lay person.

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39. Dr. Shamsheer Singh (C.W.1) the Medical Superintendent of CRH produced the record of the medical file of the deceased and admitted that the deceased was suffering from genetic bleeding disorder.

40. Dr. Bidita Khandelwal (P.W.28) the Professor and Head of the Department, Department of Medicine, CRH confirmed that the deceased had attended medicine OPD of CRH on 05.05.2011 where he had come with a medical certificate from a registered medical practitioner from outside certifying that he has haemophilia A and was to be given injection Factor VIII 750 international unit during active bleeding. Accordingly to Dr. Bidita Khandelwal (P.W.28) the deceased wanted the same to be documented in his medical file. As he had a valid certificate certifying his disease and the treatment being given, she documented the same in the file since in case of active bleeding prompt treatment could be given. During her cross-examination she admitted that if prompt treatment is not given to the patient in case of active bleeding it could be fatal or serious.

41. Dr. S. K. Dewan (P.W.29) also confirmed that the medical record of the deceased at the CRH revealed that he was a known case of haemophilia A on injection Factor VIII. He had clinically examined the deceased on 03.10.2012 when he came to his clinic complaining about pain in his knees and found that

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he had swelling on both the knee joints. He advised the deceased to have protective medical measures in the form of knee brace.

42. In view of the overwhelming evidence of qualified medical practitioners produced by the prosecution with the medical records of the deceased showing that he was in fact suffering from haemophilia we are not inclined to accept the contention of the Appellant that the oral evidence of his father i.e. Bachu Singh Meena (P.W.43) stating that he was not, should be accepted. It is a cardinal principle of criminal jurisprudence that the prosecution is bound by the evidence it leads and that when two views are possible the one in favour of the accused persons should be accepted.

43. The autopsy report (exhibit-31) and the deposition of Dr. Ashok Kumar Samanta (P.W.34) proves that the injury No.1 was caused on the right supra orbital ridge; the injury No.2 was caused over the medial side of the right lower leg and injury No.3 was caused over the back of the chest.

44. Aditya Verma (P.W.8) during cross-examination admitted that after reaching the hotel from Café Live & Loud, they thoroughly checked the body of the deceased but did not see any injury at all. Arindam Parmar (P.W.21) admitted in his cross-examination that what he had stated to the police that

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after returning to the hotel they had examined the deceased and found no external injuries on his person was true. Anirban Neogi (P.W.22) admitted in cross examination that after returning from café Live & Loud they laid the deceased down and checked his whole body and he did not have any external injuries.

45. Aditya Verma (P.W.8), Arindam Parmar (P.W.21) and Anirban Neogi (P.W.22) were not declared hostile. Their evidence that they had examined the body of the deceased at hotel Shantiniketan and found no injuries is binding upon it. Although the internal injuries would not have been seen and the injuries on the leg and on back of the chest could be hidden behind the clothes the deceased was wearing, the injury on the right supra orbital ridge 2 cm above and lateral to right eye brow measuring 4 cm and 1 cm should have been visible to his friends who were with him. The prosecution has failed to explain this.

46. Ambar Chandra (P.W.23) admitted in cross-examination that the deceased had fallen on the floor of the bathroom. When questioned, Divit Vinod (P.W.9) could not say as to whether the deceased had a fall inside the bathroom. Both the witnesses were also not declared hostile by the prosecution and therefore, their evidence is binding upon it. However, the probability of

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the deceased having fallen on the floor of the bathroom and sustaining injuries both in the front and the back of his body is unlikely.

The medical examination of two accused persons

47. Dr. Sangita Pradhan (P.W.38) was posted as the Senior Medical Officer at STNM Hospital on 19.05.2013 when Bidhan Pradhan (Accused No.2) and Roden Wangdi Sherpa (Accused No.3) were brought for medical examination. According to her she did not see any external injuries on Bidhan Pradhan (Accused No. 2). However, she found swelling with bruise over right frontal region, linear abrasion over back of chest extending from left side of chest to right side of chest about 12 cm. Roden Wangdi Sherpa (Accused No.3) was treated for his injuries and advised to get review from the surgical department. During cross-examination Dr. Sangita Pradhan (P.W.38) agreed to the suggestions that the injuries on Roden Wangdi Sherpa (Accused No.3) could be caused due to fall on hard surface. She also admitted that both the accused persons did not smell of alcohol. The fact that the said two accused persons were medically examined on 19.05.2013 by Dr. Sangita Pradhan (P.W.38) is evidenced by the contemporaneous medical examination reports (exhibit-36 for Bidhan Pradhan (Accused

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No.2) and exhibit-37 for Roden Wangdi Sherpa (Accused No.3) which she exhibited.

48. Neither the prosecution nor the eyewitnesses have explained the injuries on Roden Wangdi Sherpa (Accused No.3). In fact the version of the eye witnesses was that the unknown boys attacked them. There is no mention of the eye witnesses or anyone else getting into a brawl with the unknown boys and any of the accused getting injured. Roden Wangdi Sherpa (Accused No.3) was given an opportunity to explain the injuries found on his body by Dr. Sangita Pradhan (P.W.38) when he was examined under Section 313 Cr.P.C. However, he chose not to do so by simply stating "*I do not know*".

49. The FIR (exhibit-7) lodged by the informant alleged that the deceased and his friends were assaulted by six unknown persons after which they ran away. The testimonies of the eyewitnesses who were present at Café Live & Loud does not show that they and the unknown persons had a scuffle or that any of the unknown persons were also injured. The story as narrated by Aditya Verma (P.W.8) and Arindam Parmar (P.W.21) is that while they were enjoying at Café Live & Loud one local boy/unknown boy asked Anirban Neogi (P.W.22) for a fight. Anirban Neogi (P.W.22) however, is completely silent on this aspect. According to him as they were leaving the pub the

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accused persons attacked them and ran away. None of the witnesses attribute any motive or reason for the attack. The prosecution has failed to establish as to what exactly transpired that night with cogent evidence. The presence of the deceased and his friends at Café Live & Loud that night is established. However, except for Gurmey Wangchuk Wazalingpa (Accused No.1) whose presence at Café Live & Loud that night is established by the testimonies of Chipel Topden (P.W.31) and Jigmi Lachungpa (P.W.32) the presence of the rest of the accused persons has not been established. Chipel Topden (P.W.31) and Jigmi Lachungpa (P.W.32) however, have deposed that Gurmey Wangchuk Wazalingpa (Accused No.1) left with Chipel Topden (P.W.31) at around 12:30 a.m. on 19.05.2013. The evidence of the eyewitnesses reflects that the incident happened around 1:30 a.m. on 19.05.2013. Jigmi Lachungpa (P.W.32) admitted during cross-examination that he had not witnessed any incident that night till 1:30 a.m. He went on further to state that none of the other accused persons were seen by him at Café Live & Loud that night. The prosecution story that the deceased, while in Café Live & Loud, started interacting with some of the local girls known to the accused persons present there which infuriated them remained a charge-sheet allegation. The eyewitnesses did not even depose about it in Court.

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50. It was the prosecution's case that after the incident the accused persons got into two vehicles i.e. Audi and Skoda and ran away. The eyewitnesses did not state anything about it. The sole seizure witness to a Skoda vehicle seizure was Lhakpa Doma Bhutia (P.W.4) who however, turned hostile. During her cross-examination by the prosecution she admitted signing on the seizure memo (exhibit-11). However, during her cross-examination she admitted that she did not go through the seizure list; police did not read over the contents; she did not scribe the date mentioned below her signature; she did not know that it was for the seizure of the vehicle; Sonam Namgyal (Accused No.5) was inside the "*hazat*" when she was made to sign on the seizure list. The identification of the Audi car allegedly used by the accused persons to run away after the incident still remains unknown. The prosecution also failed to establish the alleged fact that the unknown persons ran away in Audi and Skoda cars.

51. The prosecution seized the hard disc containing CC TV footage and one Sony digital camera containing photographs. Dharmendra Kumar Sharma (P.W.41) deposed that on 21.05.2013 the police seized the hard disc from one lady at Café Live & Loud in his and Pravhat Chamling's (P.W.39) presence. The seizure memo (exhibit-38) was signed by him and the hard disc marked as M.O. X1X. Pravhat Chamling (P.W.39) deposed

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that he had also witnessed the seizure of the hard disc. The said hard disc was sent for forensic examination. Dr. M. Baskar (P.W.42) the expert from CFSL, Chandigarh deposed that the CC TV footage retrieved was provided in the DVD-R. He admitted that the hard disc and the Sony digital camera were forwarded for forensic examination after a year. The learned Sessions Judge has held that the same was displayed in Court in the presence of the defence but no incriminating evidence could be gathered against the accused persons and to the contrary that there is evidence that the deceased and the eyewitnesses were intoxicated and that the accused persons presence is not seen in the CC TV footage.

Test Identification Parade

52. On 29.05.2013 the learned District & Sessions Judge (P.W.24) conducted the Test Identification Parade (TIP) of the accused persons. The memorandum of TIP (exhibit-27) records the details of how he conducted the same. Gyurmee W. Wazalingpa (Accused No.1), Ugen Namgyal Basi (Accused No.4), Roden Wangdi Sherpa (Accused No.3), Bidhan Pradhan (Accused No.2) and Sonam Namgyal (Accused No.5) (the five accused persons) were to be identified. They were to be identified by the eyewitnesses. There was no TIP done for Karna Hang Subba (Accused No.6) and Phurba Tamang (Accused

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No.7). According to the memorandum the five accused persons were placed for identification separately along with other inmates. About nine jail inmates were lined up along side each of the five accused persons who had similar built, height, colour and other physical features. The five accused persons were asked to place themselves in the position most suited to them during their turn. All the inmates (including the five accused persons) were given different batch numbers to be displayed. The eyewitnesses were separately called one by one to the room and few questions put to them. There was no occasion for the eyewitnesses to see the five accused persons while they were being lined up. The five accused persons did not have any objection to their identification. After following the procedure as narrated in the memorandum Ambar Chandra (P.W.23) identified the five accused persons. Arindam Parmar (P.W.21) and Divit Vinod (P.W.9) could not identify Gyurmee W. Wazalingpa (Accused No.1) but identified the rest of the four. Anirban Neogi (P.W.22) could not identify Gyurmee W. Wazalingpa (Accused No.1) and Ugen Namgyal Basi (Accused No.4). He identified the rest of the three accused persons. Aditya Verma (P.W.8) identified Roden Wangdi Sherpa (Accused No.3) and Bidhan Pradhan (Accused No.2). He could not identify the other accused persons.

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53. The learned District & Sessions Judge (P.W.24) who conducted the TIP however, admitted during cross-examination by the learned Senior Counsel for Roden Wangdi Sherpa (Accused No.3) and Sonam Namgyal (Accused No. 5) that most of the inmates who were lined up along with the five accused persons were not of the 'Bhutia' community. He admitted that he did not ask the eyewitnesses whether they had visited the Police Station and seen the accused persons. He admitted that he could see from the records that there was no person from the 'Bhutia' community placed alongside Ugen Namgyal Basi (Accused No.4). He admitted that the inmates who were lined up with Bidhan Pradhan (Accused No.2) were not from the same ethnic community.

54. Mordent Thapa (P.W.45) took over the investigation of the case from Police Inspector (PI) Moti Lall Pradhan (P.W.44) as per the order of the Superintendent Police. He had requisitioned for the TIP. During cross-examination he admitted that he had not filed any document stating that other persons who were paraded during TIP were of the same physique and height. He admitted that the same set of persons was used for the five TIPs conducted. He admitted all other persons lined up during the TIP were from different community and had different physique, complexion and description and as a result they were easily distinguishable from the five accused persons.

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55. Aditya Verma (P.W.8), Divit Vinod (P.W.9) and Anirban Neogi (P.W.22) deposed in Court that they had identified some of the boys in the State Jail during the TIP whereas Arindam Parmar (P.W.21) and Amber Chandra (P.W.23) stated that they had “*identified them*” without specifying who they identified.

56. Aditya Verma (P.W.8) during cross-examination admitted that on 19.05.2013 he, Arindam Parmar (P.W.21), Anirban Neogi (P.W.22), Divit Vinod (P.W.9) and Ambar Chandra (P.W.23) had gone to the Sadar Police Station and had seen the accused persons who were brought to the Police Station after sometime. Divit Vinod (P.W.9), Arindam Parmar (P.W.21) and Anirban Neogi (P.W.22) also confirmed that on 19.05.2013 they along with Ambar Chandra (P.W.23) and Aditya Verma (P.W.8) were present in the Police Station on 19.05.2013. Anirban Neogi (P.W.22) admitted during cross-examination that on 19.05.2013 they were present at the Sadar Police Station from 10 a.m. to 6 p.m. approximately. Ambar Chandra (P.W.23) admitted that they were at the Police Station from 10:30 a.m. till the evening around 5-6 p.m. on 19.05.2013. Arindam Parmar (P.W.21) admitted that on 19.05.2013 they had stayed at the Police Station from morning till evening. He also admitted that he and his friends were going in and out of the Station House Officer’s office on the said day.

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57. It is well settled that substantive evidence of identification of an accused is the one made in the Court. None of the eyewitnesses who were present with the deceased on 18.05.2013 at Café Live & Loud identified any of the accused persons in Court. The FIR (exhibit-7) was lodged against unknown persons. When an FIR is lodged against unknown persons TIP is held for the purpose of testing the veracity of the witnesses about their capability of identifying the accused persons who were unknown to them. On 19.05.2013 the eyewitnesses who were with him on the night of 18.05.2013 at Café Live & Loud admitted that they were at the Police Station for a long period of time. Aditya Verma (P.W.8) categorically admitted that he, Arindam Parmar (P.W.21), Anirban Neogi (P.W.22), Divit Vinod (P.W.9) and Ambar Chandra (P.W.23) had gone to the Sadar Police Station and had seen the accused persons who were brought to the Police Station after sometime. The TIP was admittedly conducted on 29.05.2013. We are of the considered view that this admission is fatal to the identification of some of the accused persons during the TIP as the said prosecution witnesses had occasion to see all the accused persons just ten days prior to the TIP and therefore, their faces and appearance would have been fresh in their memory. In any event the result of the TIP is only corroborative evidence. The admissions made by the learned District & Sessions Judge

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(P.W.24) and the Investigating Officer-Mordent Thapa (P.W.45) during cross-examination that persons with similar features and physical attributes were not placed alongside the said five accused persons of whom the TIP was conducted would also negatively impact the credibility of the TIP.

Identification of the accused persons in Court

58. If the presence of Roden Wangdi Sherpa (Accused No.3) had been established his failure to explain the injuries detected on his person on the same day would have raised probable doubt upon him but suspicion however strong cannot take place of proof. Further the prosecution has failed to bring out what actually transpired that night at Café Live & Loud.

59. In re: **Abdul Sayeed v. State of M.P.**² cited by Mr. Santosh Kumar the Supreme Court was examining a case in which seventeen accused, armed with deadly weapons, were alleged to have assaulted several persons. The prosecution examined twelve witnesses including three eyewitnesses. The trial Court convicted some accused persons separately under Sections 148, 147, 302, 324 of the IPC and one under Section 304 Part II, 323 and 147 IPC. All the convicts filed criminal appeals before the High Court. The State also filed an appeal against the acquittal of some accused. The judgment of the High Court was assailed

² (2010) 10 SCC 259

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before the Supreme Court by the Appellants therein. Out of the seventeen accused persons ten stood acquitted by the Courts below. The Supreme Court held that in cases where there are a large number of assailants, it can be difficult for a witness to identify each assailant and attribute a specific role to him. The Supreme Court held that in the said case a very large number of assailants had attacked the deceased causing injuries with deadly weapons to them and the incident stood concluded within a few minutes; and it is natural that the exact version of the incident revealing every minute detail i.e. meticulous exactitude of individual acts cannot be given by the eyewitnesses. This was not a case in which none of the eyewitnesses had identified any of the assailants like the present one.

60. None of the eyewitnesses who were together at Café Live & Loud on 18.05.2013 have identified the accused persons in Court. Anirban Neogi (P.W.22) has however, stated that the “*accused persons attacked us*” without identifying them in Court. During cross-examination he denied the suggestion that he did not identify “*some accused persons in the State Jail*”. During the TIP it is seen that he had not identified Gurmey W. Wazalingpa (Accused No.1) and Ugen Namgyal Basi (Accused No.4). Mr. Santosh Kumar drew the attention of this Court to the fact that Anirban Neogi (P.W.22) had stated “*accused*

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persons attacked us” and therefore submitted that it was substantial identification in Court. Anirban Neogi (P.W.22) did not identify any of the accused persons as the ones who attacked them. Even during the TIP (which has no legal value due to the fact that the eyewitnesses had occasion to see the accused persons ten days prior to the TIP) he had not identified all the accused persons. Further, amongst the accused persons on the dock were Karna Hang Subba (Accused No.6) and Phurba Tamang (Accused No.7) who were charged only for concealing information about the incident. Therefore, to hold the other accused persons guilty of murder on the basis of this statement of Arindam Neogi (P.W.22) would not, in our view, be termed identification beyond reasonable doubt.

61. Consequently, it is seen that in spite of investigation and trial the identification of the unknown boys who assaulted the deceased remains unknown. It is probable that the deceased got injured as a result of assault. It is evident that the deceased died as a result of excessive bleeding from the laceration of the left lobe of the left lung. Haemophilia may have aggravated the condition of the deceased as 1200 ml of blood was seen in the thoracic cavity, ultimately resulting in the death. The external injury on the right orbital ridge, right leg, back of the chest and inner aspect of both the lips were not capable to cause death. These injuries also could not have resulted in the laceration on

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the lower lobe of the left lung. According to Dr. Ashok Kumar Samanta (P.W.34) the lacerated injury on the lobe of the left lung could not have been caused by the impact causing the abrasion measuring 1 cm x 1 cm situated over the back of the chest of the deceased. The failure of the prosecution to establish and explain if there was any fatal blow has led the defence to put up a theory of fall in the bathroom and probabalise it by the evidence of the eye witnesses-all friends of the deceased. The autopsy report does not suggest any fatal external injury. These failures enure in favour of the accused persons.

62. During the trial the prosecution also examined Bachu Singh Meena (P.W.43)-father of the deceased. According to him on 19.05.2013 at around 0200 hours the deceased called him on one of his mobile phone and told him after having informed his wife-the Appellant in Criminal Appeal No. 30 of 2016 that he had gone to Café Live & Loud to celebrate birthday of his junior fellow student. The deceased told him that he was brutally assaulted by some five-six local guys when he along with his friends were coming down the stairs. The deceased also informed him that after the sudden assault, his friends could escape and he was left alone. He was brutally beaten and seriously injured. The deceased also told him that he had narrated about this incident to his cousin Manasi Saraswat who had called him over his phone. Bachu Singh Meena (P.W.43)

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asked the deceased about the miscreants who assaulted him and he was informed that they were “*Guirmey, Bidhan, Sonam, etc.*” He asked the deceased to keep the phone with him and told him that he was trying to get something managed to enable him to go back to the hotel. After some 10-12 minutes he got a call from Anirban Neogi (P.W.22) who told him that he along with his friends were hiding behind a car park nearby out of fear as Anirban Neogi (P.W.22) the deceased and his friends were attacked. Anirban Neogi (P.W.22) and his friends also told him that the miscreants caught hold of the deceased and started beating him brutally. They kicked the deceased on his chest and stomach several times till he fell unconscious. He asked Anirban and his friends to take the deceased to some hospital. They told him that they do not have vehicle and they could be attacked again. Thereafter, he called Jitendra Kumar, a Professor in SMIT-the local guardian of deceased who also confirmed that he too was told by some students after the brutal assault and that he was trying to get some medical help for the deceased. Thereafter, he got a call from the hostel mate of the deceased i.e. Ayush Anand Sinha (P.W.36). Ayush Anand Sinha (P.W.36) also told him that the deceased had called him and told him about the brutal assault and his condition was critical. Bachu Singh Meena (P.W.43) asked Ayush Anand Sinha (P.W.36) to get in touch with Jitendra Kumar and go to where

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the deceased was lying unattended. In the meanwhile his wife got a phone from Manasi Saraswat who told her that she had called the deceased and he had told her about the brutal assault. Thereafter, around 0845 hours in the morning he got a phone call from Jitendra Kumar and Anirban Neogi (P.W.22) that the deceased was taken by his friends to STNM Hospital but since no bed was available he was thereafter taken to CRH. After some months of the incident he visited SMIT Campus and met the friends of the deceased. He asked them as to why the accused had assaulted them. The eye witnesses told him that they did so to establish their supremacy over the outsider students. The eye witnesses told him that they had identified all the accused persons in the TIP. They told him that they had come to know that the accused persons were at the police station for interrogation when the statement of the eye witnesses students were recorded by the police. However, these students did not have any idea regarding the presence of the accused at the police station during that period. He also deposed that the deceased was not suffering from haemophilia and both he and his wife do not have any history of haemophilia.

63. Bachu Singh Meena (P.W.43) admitted in cross-examination that his phone was not seized by the police; he was a Police Officer under the IPS cadre and then posted as IGP,

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Security in the State of Bihar; his deposition was based on what was told to him by eye witnesses and Jitendra Kumar on the phone; his statement under Section 161 Cr.P.C. was recorded in August 2014; he had not mentioned about Manasi Saraswat in his statement to the police; his call details were not sought for; he had not stated that the eye witnesses had told him that they had identified the accused persons in TIP in his statement to the police. He denied that the deceased was haemophilic. He admitted that various statements made by him in his examination-in-chief were not found in his statement to the police.

64. We are of the view that it could be probable that the deceased had in fact called his father after the incident. It could equally be possible that he did not. However, in a criminal case that too for a grave offence of murder the prosecution must establish facts with cogent evidence leaving no room for doubt. Bachu Singh Meena's (P.W.43) deposition was recorded on 13.06.2016. His evidence reflects that the police recorded his statement only in August, 2014. If in fact the deceased had named the assailants to Bachu Singh Meena (P.W.43) it would be equally improbable that he would have withheld this information from the police for more than a year. In any case when the eyewitnesses have failed to identify the accused persons in Court leave alone name them it would be impossible

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to saddle the accused persons for the offences alleged on the deposition of a person who says he heard the deceased name “*Gurmey, Bidhan and Sonam etc.*” to him. Manasi Saraswat, Jitendra Kumar and Renu Meena-the mother of the deceased who were mentioned in his deposition were not examined. Anirban Neogi (P.W.22) did not corroborate Bachu Singh Meena’s (P.W.43) evidence that he had phoned him and told him about the attack. Neither the call details of the mobile phone of the deceased nor of Bachu Singh Meena (P.W.43) have been produced.

65. Ayush Anand Singh (P.W.36) deposed on 02.12.2015. According to him the deceased called him and asked for help because he was thrashed by some people who he did not know. He also did not report about the call. Although he stated that the deceased had named “*Sonam*” as one of the assailant he admitted that he had not stated so in his statement to the police. He admitted that his statement to the police was given by Bachu Singh Meena (P.W.43)-the father of the deceased. The statement of Ayush Anand Singh (P.W.36) does not help the prosecution.

66. The establishment of the identity of the accused persons in a criminal case is paramount to the prosecution. More so in a case of a heinous offence. It is well settled that the Court must

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be absolutely certain that it was the accused persons and no others who are guilty of the offences alleged. In the present case the FIR alleged that six unknown person assaulted the deceased and his friends. The charge-sheet however, charged the seven accused persons for murder and other offences. The learned Principal Sessions Judge however, framed charge of murder only against five accused persons and the other two accused persons for withholding information from the police only. The allegation was of a group of boys assaulting another group of boys. As per the version of the eyewitnesses the attack was sudden and immediately thereafter, the assailants ran away. The eyewitnesses failed to identify any of the accused person in Court. Even the identification during the TIP has been rendered worthless in view of the fact that the eyewitnesses had occasion to see the accused persons at the Police Station before the TIP.

The charge under Section 302 IPC

67. To establish the offence of murder what is necessary is to prove the intention of causing death. It could also amount to murder if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or if it is done with the intention of causing bodily injury to any person and the bodily

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injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or if the person committing the act knows that it is so imminently dangerous that it must, in all probability, caused death or such bodily injury as is likely to cause death, and commits such act without an excuse for incurring the risk of causing death or such injury. The evidence led by the prosecution taken in its entirety does not establish a case of murder.

The charge under Section 325/34 IPC

68. The accused persons were charged for causing grievous hurt to Arindam Parmar (P.W.21). Arindam Parmar (P.W.21) deposed that he sustained injury on his nose when he was running away after being chased by the unknown boys. Dr. R. Singh (P.W.40) deposed that he found abrasion of 3 cm on lateral wall of right nostril and tenderness on nasal bridge. During cross-examination he admitted that the nasal bone is the softest bone in a human being and can be fractured due to fall. The prosecution therefore, failed to bring home the charge under Section 325/34 IPC against the accused persons.

The charge under Section 323/34 IPC

69. The accused persons were also charged for causing hurt to Divit Vinod (P.W.9). Divit Vinod (P.W.9) did not state that he got hurt during the attack. The medical report of Divit Vinod

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(P.W.9) (exhibit-46) was not proved by its maker and instead exhibited by Moti Lal Pradhan(P.W.44)-the Investigating Officer. The prosecution has failed to prove the charge under Section 323/34 IPC for causing hurt to Divit Vinod (P.W.9).

70. A submission was made by Mr. Santosh Kumar that Arindam Parmar (P.W.21) and Divit Vinod (P.W.9) being injured witnesses must be considered reliable as their evidence comes with a built in guarantee of their presence at the scene of the crime relying upon the judgment of the Supreme Court in re: ***Abdul Sayeed & Ors. (supra)***. This would be true if they had deposed that the injuries were sustained by them during the attack and identified the assailants. They did not say or do so. Although their presence at Café Live & Loud has been proved the fact that they suffered those injuries due to the attack by the accused persons has not been proved.

The charge under Section 506/34 IPC

71. Whoever threatens another with any injury to his person, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation as defined in Section 503 and is made punishable under Section 506 IPC. There must be a person

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who threatens and a person who is threatened. The prosecution has failed to prove who was the person who threatened. The person who was allegedly threatened was Anirban Neogi (P.W.22) as per Aditya Verma (P.W.8) and Arindam Parmar (P.W.21). However, Anirban Neogi (P.W.22) did not depose about being threatened. The prosecution has failed to establish the charge under Section 506/34 IPC.

The charge under Section 176 IPC

72. Karna Hang Subba (Accused No.6) and Phurba Tamang (Accused No.7) were charged under Section 176 IPC. The allegation was that they being employees of Café Live & Loud were present on 19.05.2013 at around 1:00 a.m. outside the Café and were therefore legally bound to give information to the police regarding the incident that occurred but intentionally omitted to do so. Roshan Rai (P.W.35) identified them as bouncers of Café Live & Loud but did not depose about their presence on 19.05.2013. None of the other prosecution witnesses have deposed about their presence on 19.05.2013. The prosecution has failed to establish their presence on 19.05.2013. In fact Jigmi Lachungpa (P.W.32) the guest at Café Live & Loud on 19.05.2013 who identified them categorically stated that he did not see them although he was there till 1:30 a.m. of 19.05.2013. This prosecution witness was not declared

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hostile and his evidence is binding upon it. Consequently, no case under Section 176 IPC has been made out against Karna Hang Subba (Accused No.6) and Phurba Tamang (Accused No.7).

73. Having examined the evidence produced by the prosecution we are of the considered view, conscious about the scope of our consideration in an appeal against acquittal, that the judgment of the learned Sessions Judge does not merit a reversal. Resultantly the acquittal of the accused persons by the learned Sessions Judge's judgement dated 29.07.2016 is upheld. Both the Criminal Appeals are dismissed.

74. Certified copies of the judgment be sent forthwith to the Court of the learned Sessions Judge, Special Division-II, East Sikkim at Gangtok.

(Bhaskar Raj Pradhan)
Judge
12.09.2019

(Vijai Kumar Bist)
Chief Justice
12.09.2019