

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 8th SEPTEMBER, 2017

**DIVISION BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**

Crl.L.P. No.02 of 2017

Appellant : State of Sikkim

versus

Respondents :

1. Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee,
Aged about 31 years,
S/o Topjor Dorjee,
R/o New Market,
Gangtok,
East Sikkim.
2. Mr. Bidhan Pradhan,
Aged about 32 years,
S/o Late K. K. Pradhan,
R/o Lower Arithang,
Gangtok,
East Sikkim.
3. Mr. Roden Wangdi Sherpa,
Aged about 32 years,
S/o Sonam Wangdi,
Resident of 26/2, Harka Dhoj Lama Road,
West Bengal,
At present C/o Lakpa Doma Bhutia,
Hidden Forest Area,
Sichey, Gangtok,
East Sikkim.
4. Mr. Ugen Namgyal Basi,
S/o Late Phinstok Namgyal Basi,
R/o Sichey, Near Sishu Bhawan,
Gangtok,
East Sikkim.
5. Mr. Sonam Namgyal,
Aged about 31 years,
S/o Pema Wangchuk,
R/o Ralang House,
Bakthang, Lower Burtuk,
East Sikkim.

State of Sikkim vs. **Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others**

6. Mr. Karna Hang Subba,
S/o Hans Pal Subba,
R/o Lall Bazar,
Gangtok,
East Sikkim.
7. Mr. Phurba Tamang,
S/o C. B. Tamang,
R/o 3rd Mile,
J. N. Road,
Gangtok,
East Sikkim.

Application under Section 378(3)
of the Code of Criminal Procedure, 1973

Appearance

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors for the State-Appellant.

Mr. Ajay Rathi, Ms. Phurba Diki Sherpa and Mr. Pramit Chhetri, Advocates for Respondents No.1 and 2.

Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan, Advocate for Respondents No.3 and 5.

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

Mr. Jorgay Namkha, Ms. Panila Theengh and Ms. Tashi Doma Sherpa, Advocates for Respondents No.6 and 7.

O R D E R

Meenakshi Madan Rai, J.

1. The State-Appellant is before this Court, aggrieved by the Judgment and Order of acquittal, dated 29-07-2016, passed by the Learned Sessions Judge, Special Division – II, at Gangtok, East Sikkim, in Sessions Trial Case No.09 of 2015 (***State of Sikkim vs. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others***), whereby the Respondents No.1 to 5 were acquitted of the offences under Sections 302/323/325/506/34 of the Indian Penal Code (for short

State of Sikkim vs. Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others

“the IPC”) and the Respondents No.6 and 7 from the charges under Sections 176/34 of the IPC.

2. The facts summarised for the present purposes are that, on 18-05-2013, the deceased, Rakshit Singh Meena @ Rakshit Meena, along with one Anirban Neogi (P.W.22), went to Café Live & Loud, at Tibet Road, Gangtok, at around 8 p.m. and were later joined by their friends, namely, Aditya Verma (P.W.8), Ambar Chandra (P.W.23), Arindam Parmar (P.W.21) and Divit Vinod (P.W.9), at around 10 p.m. At around 01.30 a.m., on 19-05-2013, the deceased and his friends, all students of Sikkim Manipal Institute of Technology (SMIT), Majitar, Rangpo, East Sikkim, were assaulted by six unknown persons, on the stairs and outside the said Café, who after the assault made good their escape in two vehicles. The injured deceased and his friends returned to their hotel at Arithang, Gangtok. At around 5 a.m., due to the deteriorating condition of the deceased, he was taken to STNM Hospital, Gangtok, and thereafter to Central Referral Hospital, Tadong, where he was declared “brought dead”. The Prosecution case is that the Respondents No.1 to 5 herein are the assailants and the indiscriminate assault inflicted by them on the PWs mentioned hereinabove and the deceased, led to the fatality.

3. By filing this Application under Section 378(3) of the Code of Criminal Procedure, 1973 (for short “the Cr.P.C.”), the State-Appellant seeks Leave to Appeal against the impugned Judgment. The grounds raised by Learned Additional Public

State of Sikkim vs. **Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others**

Prosecutor was that the impugned Judgment was passed mainly on the ground that the testimony of the witnesses suffered from substantial infirmities and inconsistencies and were not sufficient to convict the Respondents who were extended the benefit of doubt. On the contrary, the evidence of five witnesses, being P.Ws 8, 9, 21, 22 and 23, relied on by the Prosecution, corroborate each other, with regard to the incident and the assault by the Respondents, which led to the death of Rakshit Singh Meena @ Rakshit Meena, the victim. Walking this Court through the evidence of the said witnesses at length, it was contended that a closer scrutiny of the evidence, so furnished by the Prosecution, would clearly indicate that the Respondents had been identified by the witnesses, emphasis was laid on the evidence of P.W.22. That, although the Learned Trial Court had opined in its Judgment that the place of occurrence was also not specified, however, the witnesses have clearly described the location as well as the time of the offence, which has been consistent. That, the Learned Trial Court had held that the witnesses were unable to throw light on the physical and mental condition of the deceased or for that matter unable to identify the Respondents and failed to describe their physical features of the said accused persons, the Respondents herein. That, such an observation seriously prejudices the Prosecution case. Considering the time of the offence, it suffices that they were able to identify the Respondents as the persons who perpetuated the offence that relevant night. The Learned Trial Court erred in discarding the identification of the accused persons, the

State of Sikkim vs. Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others

Respondents herein. The evidence on record infact forms a complete chain of evidence which leads to the irresistible conclusion that the Respondents were responsible for the offence. The Learned Trial Court thus failed to appreciate the Prosecution evidence in its correct perspective as required by Law and erroneously acquitted the accused persons, hence, there being questions which require consideration by this Court, the Leave to Appeal be granted.

4. Resisting the arguments put forth by Learned Additional Public Prosecutor, Learned Counsel for the Respondents No.1 and 2 would urge that there was no error in the finding of the Learned Trial Court. That, the evidence of the witnesses leads to a clear conclusion that none could identify the accused persons besides the Prosecution case has to stand on its own legs. Hence, in the absence of any specific evidence against the Respondents No.1 and 2 and in the absence of identification or proof of any assault, the Petition be dismissed.

5. Learned Counsel for the Respondents No.3, 4, 5, 6 and 7, had no objection to the Petition, conceding that on the same issue an Appeal being Crl.A. No.30 of 2016 (***Renu Meena vs. State of Sikkim and Others***) has been filed by the mother of the victim and already admitted by this Court, vide Order dated 16-02-2017.

6. We have heard Learned Counsel at length and given anxious consideration to their submissions. We have also perused the pleadings and documents annexed thereto.

State of Sikkim vs. **Mr. Gurmei Wangchuk Wazalingpa @ Gyurme and Others**

7. In order to appreciate the matter at hand, we may extract the relevant Section of the Cr.P.C. Section 378(3) reads as follows;

"378. Appeal in case of acquittal.—.....

(3) No appeal under sub- section (1) or sub- section (2) shall be entertained except with the leave of the High Court.

....."

8. The provision for seeking Leave to Appeal is to ensure that no frivolous Appeal are filed against orders of acquittal as a matter of course. The Hon'ble Supreme Court in ***Khumbha Ram vs. State of Rajasthan and Others***¹ relying on the decision of ***State of Rajasthan vs. Sohan Lal***², held that;

"10.

"3. ... The State does not in pursuing or conducting a criminal case or an appeal espouse any right of its own but really vindicates the cause of society at large, to prevent recurrence as well as punish offences and offenders respectively, in order to preserve orderliness in society and avert anarchy, by upholding the rule of law."

9. Further, in ***State of Rajasthan vs. Firoz Khan alias Arif Khan***³ the Hon'ble Supreme Court in an Appeal, filed by the State of Rajasthan, against the final Judgment and Order of the High Court of Rajasthan, in Crl. Leave to Appeal No.227 of 2005, dated 28-10-2005, which had dismissed the Application filed by the Appellant, i.e., the State of Rajasthan, seeking Leave to file Appeal under Section 378(3) of the Cr.P.C., observed as follows;

¹ (2016) 15 SCC 613

² (2004) 5 SCC 753

³ (2016) 12 SCC 734

State of Sikkim vs. Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others

"10. The question as to how the application for grant of leave to appeal made under Section 378(3) of the Code should be decided by the High Court and what are the parameters which the High Court should keep in mind remains no more res integra. This issue was examined by this Court in *State of Maharashtra v. Sujay Mangesh Poyarekar* [(2008) 9 SCC 475]. C.K. Thakker, J. speaking for the Bench held in paras 19, 20, 21 and 24 as under: (SCC pp.482-83)

"19. Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal 'shall be entertained except with the leave of the High Court'. It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.

20. In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether a prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.

21. It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial court must be allowed by the appellate court and every appeal must be admitted and decided on merits. But it also cannot be overlooked that at that stage, the court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded by the trial court could not be said to be "perverse" and, hence, no leave should be granted.

* * *

24. We may hasten to clarify that we may not be understood to have laid down an inviolable rule that no leave should be refused by the appellate court against an order of acquittal recorded by the trial court. We only state that in

State of Sikkim vs. Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others

such cases, the appellate court must consider the relevant material, sworn testimonies of prosecution witnesses and record reasons why leave sought by the State should not be granted and the order of acquittal recorded by the trial court should not be disturbed. Where there is application of mind by the appellate court and reasons (may be in brief) in support of such view are recorded, the order of the court may not be said to be illegal or objectionable. At the same time, however, if arguable points have been raised, if the material on record discloses deeper scrutiny and reappraisal, review or reconsideration of evidence, the appellate court must grant leave as sought and decide the appeal on merits. In the case on hand, the High Court, with respect, did neither. In the opinion of the High Court, the case did not require grant of leave. But it also failed to record reasons for refusal of such leave." "

10. On the principles enunciated hereinabove, while considering the matter at hand, we find that the offence under which the Respondents No.1 to 5 were booked are Sections 302/323/325/506/34 of the IPC and under Sections 176/34 of the IPC against the Respondents No.6 and 7. Needless to add that, the offence under Section 302 of the IPC is a heinous offence, and the life of the young victim herein has been snuffed out.

11. After a careful and meticulous consideration of the relevant material and evidence on record, we find that arguable points have been raised by the Appellant which are not trivial, consequently, the material furnished before us requires deeper scrutiny and consideration.

12. Consequently, the Leave to Appeal is allowed.

State of Sikkim vs. Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others

13. Crl.L.P. stands disposed of accordingly.

Sd/-
(**Bhaskar Raj Pradhan**)
Judge
08-09-2017

Sd/-
(**Meenakshi Madan Rai**)
Judge
08 -09-2017

Approved for reporting : **Yes**

Internet : **Yes**