

Sikkim High Court Damber Bahadur Chettri vs State Of Sikkim on 29 June, 2002 Equivalent citations: 2005 CriLJ 808 Author: R Dayal Bench: R Dayal JUDGMENT Ripusudan Dayal, C.J. 1. All these three appeals are directed against the judgment dated 20-8-2001 by the Court of the Special Judge (Human Rights) at Namchi in Criminal (Human Rights) Case No. 11 of 1996 whereby all the three appellants who were police constables were convicted under Section 342 and Section 304, Part II read with Section 34 of the Indian Penal Code and the order dated 23-8-2001 whereby each of them was sentenced to undergo simple imprisonment for four years under Section 304, Part II read with Section 34 of the Code and to undergo simple imprisonment for six months under Section 342 read with Section 34 of the Code. Both the sentences were directed to run concurrently. 2. All the three appellants were attached to the Gyalzing Police Station in Dec. 1993. Prosecution case is that they wrongly confined Bimal Tamang alias Dhanraj Tamang of Darap Busty, West Sikkim in the Police Station during the night falling between 7th and 8th Dec. 1993 and caused injuries to him resulting in his death in the night falling between 8th and 9th Dec. 1993 at 00.30 hrs. FIR was registered on 11-12-1993 at 1730 hrs on the report, of the District Magistrate, West Sikkim to the effect that an information has been received from the Superintendent of Police, West vide Memo No. 720/SD (W) dated 8-12-1993 regarding the death of the deceased in Gyalzing Hospital in the night of 8th Dec. 1993 under suspicious circumstances and inquest was accordingly conducted under Section 179, Cr.P.C. by the Additional District Magistrate, West and the preliminary report of the inquest revealed that there was a prima facie case of wrongful confinement and culpable homicide not amounting to murder against the appellants. The complainant, as District Magistrate of West, taking cognizance of the case under Section 324/304, IPC directed the office-in-charge, Gyalzing Police Station Gyalzing to register a case against the appellants and to take up further investigation. 3. The deceased Bimal Tamang was a resident of Gyalzing where he resided with his mother Doma Tamang P.W. 7 and younger brother Bal Bahadur Tamang P.W. 8. Some times, he used to go to Darap and when he did so, he used to live in the house of his uncle, Passang Tesering. His father Chaturay Tamang P.W. 3 along with his step mother Menuka Tamang P.W. 2 also resided at Darap. Prosecution case is that on 7-12-1993, the deceased was at Darap and he came to Gyalzing by Tata Truck bearing No. SK-03/0111 in the night on or after 9 pm. Thereafter, the appellants wrongly confined him at the Gyalzing Police Station and caused injuries to him during the night. They released him in the morning on the next day i.e. 8-12-1993 at about 6 a.m. Thereafter, he went to his house at Gyalzing. He was admitted to the Gyalzing Hospital in the afternoon near about 4 p.m. He died during the night of 8th and 9th. Dec. 1993 at about 0030 hrs at the Hospital. Autopsy on his body was conducted on 10-12-1993 by Dr. S.D. Sharma P.W. 10 who was the Medico Legal Consultant at the S.T.N.M. Hospital, Gangtok on being called to the District Hospital, Gyalzing, vide his report Exhibit P1. Autopsy started at 1300 hrs and concluded at 1425 hrs. He found the following external injuries on the body of the deceased : 1. Healing superficial laceration with brown soft scab 2 cm. x .5 cm vertically placed over

the medial end of the left eye brow. 2. Extra vassasion of blood bluish brown in colour over both eye lids of left eye. 3. Healing abrasion with brown soft scab over lateral end of the right eye brow in an area of .5 cm. x .5 cm. 4. Healing contused abrasion 1 x 1 cm with soft brown scab over upper part of right cheek. 5. Healing contused abrasion 1 x .5 cm. with soft brown scab 2 cm. behind injury No. 4 6. Healing abrasion with soft brown scab .5 cm x .5 cm. over the root of right ear. 7. Healing superficial laceration in an area of 2 x 1 cm. with soft brown scab over the left parietal area. 8. Healing abrasion 2 x 1 cm. with soft brown scab over the right scapular region. 9. Healing abrasion 1 x 1 cm. with soft brown scab over the spinal column in the area of D-10. 10. Healing abrasion 3 x 1 cm. with soft brown scab over the left shoulder posteriorly. 11. Healing abrasion 1 x 1 cm. with soft brown scab over the right shin. 12. Healing abrasion 1 x .5 cm. over the right knee with soft brown scab. He also detected the internal injuries of extra vassasion of the blood in the scalp in an area of 3 x 2 cm. over the parietal region and subsarchnoid, haemotoma over the brain and the right temporo parietal region. There was oedema of the brain also. In his opinion cause of death was coma as a result of intranial haemorrhage following blunt injury to the head. The injuries detected were more than 28 to 48 hours old prior to the death. In the cross examination, he admitted the suggestion that the injuries had been caused on the body of the deceased three to five days prior to his conducting the autopsy. He also admitted in the cross-examination that there was no visible external injury on the scalp in the area where extra vassion of blood was detected on opening of the scalp. He also admitted in the cross-examination that intracranial haemorrhage could be caused by fall also. However, in the reexamination he stated that all the injuries both external and internal found on the body of the deceased could not be produced by a single fall. He also stated that it was not possible for a single fall to produce haemorrhage intracranially without fracture of the skull bone.

4. Case of the appellants is that they were not present in the Police Station on 7-12-1993 after 7.30 when their duty was over, and as such they could not have assaulted the deceased. Their further case is that the deceased boarded the truck after 8.30 pm. or 9 p.m. on 7-12-1993 and then he was heavily drunk and in a very bad shape of health and he fell from the truck near the Gyalzing Police Station, whereupon he was brought to the Police Station to help him.

5. The learned trial Court disbelieved the case of the appellants observing that if the deceased had suffered injuries as a result of the fall, the proper course for the police people would have been to take him to the hospital and not to the Police Station. He noted the discrepancies in the evidence produced by the prosecution but explained them away by observing that the police witnesses were helping the appellants who were also police personnel. He also took note of the fact that the entries in the General Diary of 7-12-1993 and 8-12-1993 had been changed to help the appellants. 6. It has been submitted by the learned counsel for the appellants that the deceased was having a swollen face and other injuries and was also in a high state of intoxication when he boarded the truck on 7-12-1993 at Darap. Further, he has submitted that the deceased fell from the truck near the Gyalzing Police Station and since there was no blood and no

fracture visible, he was brought to the Police Station for help and no injuries were caused if the injuries caused at the Police Station, there is no evidence to connect the appellants to the alleged assaults. 7. During trial, the prosecution produced twelve witnesses including Nodup Wangdi Bhutia P.W. 12, who was posted during 1993 and 1994 as Inspector in the Crime Branch and who took up the investigation on 3-1-1994 and submitted the charge sheet. One other witness produced is Shri G.P. Upadhyaya P.W. 4, District Magistrate, Gyalzing, West Sikkim. He has stated that on 9th or 10th December, 1993 he received a telephonic information from the Superintendent of Police, West stating that the deceased who was in police custody in the previous night had died in the hospital where he had been taken. He further stated that the Superintendent of Police told him that he was under pressure from the public that as the cause of death of the deceased was torture in police custody, there should be a thorough inquiry. Thereupon, he ordered a Magisterial inquiry and ordered the Addl. District Magistrate, West Shri A.K. Chettri to conduct inquest on the body. The Addl. District Magistrate conducted the inquest and submitted his report. Thereafter, a case was registered on his order. The fact that the prosecution was conducted in a slipshod manner is clear from the fact that neither the complaint made by the District Magistrate to the Officer-in-Charge, Gyalzing Police Station has been exhibited nor the inquest report nor the report, of the magisterial inquiry. Formal FIR has also not been exhibited. The Superintendent of Police has also not been examined. Though the deceased was in the Police Station during the night between 7th and 8th Dec. 1993, no entry was admittedly made in the General Diary to that effect. Even the entries in the General Diary were changed for 7th and 8th Dec. 1993. It appears that Shri S.K. Baniya P.W. 1 who was the In-Charge of the Gyalizing Police Station at the relevant time was the main culprit. But, as submitted by the learned counsel for the parties during arguments, he has already died and so now no action is possible against him. Shri S.K. Baniya P.W. 1 deposed that on 7-12-1993 he was in the Police Station but he left the police station after the evening roll call and that on next morning, i.e. on 8-12-1993 he came to the Police Station at 8 a.m. and conducted the morning roll call. He further stated that, on enquiry, he found that nobody had been detained in the Police Station and no incident had taken place. Thus, according to his evidence, he was away from the Police Station when the deceased was at the Police Station and he had not come to know about the presence of the deceased even at 8 a.m. on 8-12-1993, which is utterly unbelievable. He has further deposed that after the roll call, he went to the Superintendent of Police quarter to inform him that he was proceeding to Gangtok for giving evidence before the Sessions Judge, Gangtok and gave the charge of the Police Station to the Second Officer-in-Charge. S.I. Tshering Sherpa PW 11. He has further deposed that while he was in the Sessions Court he received a Wireless Message from the Superintendent of Police, West to the effect that there was some trouble in the Police Station and that he must report back immediately. Thereupon, he rushed back to the Police Station and came to know that the deceased Bimal Tamang who had been detained in the Police Station in the night of 7-12-1993 had been tortured in the Police Station

resulting in his death. He also deposed that on his return from Gangtok he found that the General Diary entry made by him before leaving for Gangtok on 8-12-1993 was already seized by the Superintendent of Police, West but on seeing the General Diary entries in the office of the Superintendent of Police he found that the two entries for 7th and 8th Dec. 1993 had been changed and on enquiry, the Second Officer-In-Charge, Tshering Sherpa, P.W. 11 told him that the General Diary was written afresh for those two days but he did not know the details. During cross -examination, he stated that on 7-12-1993 he left the Police Station at about 6 p.m. after the roll call. Though this witness P.W. 1 has stated that it was the Second Officer-in-Charge, Tshering Sherpa who told him that the General Diary entries had been written afresh for 7-12-1993 and 8-12-1993 no such question was put to him when he entered the witness box as P.W. 11. Tshering Sherpa P.W. 11 has stated that on 8-12-1993, he took over the charge of Gyalzing Police Station from S.I. S.K. Baniya and when he took over the charge no one mentioned to him about the deceased having been detained in the Police Station the previous night and there was no General Diary entry in this connection. He has further deposed that he received a telephonic message from the In-Charge, Gyalzing Out Post. Shri Topgay Wangchuk Bhutia at about on 8.30 p.m. 8-12-1993 to the effect that the deceased who was said to have been assaulted by the police in the previous night at the Gyalzing Police Station was admitted in the Government Hospital, whereupon he immediately rushed to the hospital where the deceased was lying unconscious state. Evidence shows that though there was admittedly tampering with the general diary entries, no attempt was made to show the details of tampering and also as to who was responsible for the same. 8. P.W. 2 and P.W. 3 are the step mother and the father respectively of the deceased Menuka Tamang P.W. 2, the step mother, has deposed that during Dec. 1993 there was a Mela going on at Darap and at the relevant time the deceased Dhan Raj Tamang had come to Darap. She has further deposed that on 7-12-1993 between 8.30 p.m. and 9.00 p.m., she saw the deceased in a Tata truck which was parked a little ahead from her shop at Darap and which was visible from her shop. She also saw the accused Sukraj Subba in the truck. She stated in the cross-examination that there were other passengers also in the Tata truck and that she did not see the deceased drunk on that night, Chaturay Tamang P.W. 3 has deposed that there was Mela going on in Darap in December 1993. Dhanraj Tamang the deceased used to live at Gyalzing with his first wife and whenever he used to come to Darap he used to live with Passang Tshering Tamang, the brother of the witness. Further, he has deposed that on 6th morning one Roka havaladar who had stayed on the 2nd floor of the building called him to his room and when he went there he saw the havaladar shouting at the deceased regarding one case between him and Durga Prasad Lingden. He further deposed that on 7th evening his son, the deceased, boarded the tata which was leaving for Gayzing and at that time the deceased was all right. He further stated there were other persons also in the truck. In the cross-examination, he stated that he did not know whether his son was drunk that night. However, he admitted that his son used to drink. Thus, his evidence to lo the effect that, Roka Havaladar had shouted at the deceased

on 6th morning regarding a case which the deceased was having with Durga Prasad Lingden and that the deceased was alright when he boarded the Tata truck. Roka havaldar, namely, D.S. Roka has been examined on behalf of the appellants as D.W. 2. He has deposed that he came to Darap on 5-12-1993 at about 5.45 p.m. and he stayed at the house of Vice President of the Panchayat, Pema Dendrup, on the second floor. Chaturey Tamang the father of the deceased also resided in the same building on the ground floor. Further, he has stated that the deceased had filed a complaint against Durga Prasad Lingden of Darap and he had been deputed to enquire about the same. On 6-12-1993 he asked the father of the deceased about the whereabouts of the deceased and the deceased came to him in a drunken condition at about 7.45 hrs. He also stated that he saw his swollen face and bruise marks over his eyes and he was not in steady condition, and he (the witness) shouted at the deceased telling him that if he continued to drink like that, he would be definitely beaten up by the people. He further stated that he could not enquire into the complaint as the deceased was not in fit condition. Thus it would appear from the evidence of Chaturary Tamang P.W. 3 and D.S. Roka D.W. 2 that D.S. Roka had shouted at the deceased on the morning of 6-12-1993 in connection with the complaint which the deceased had made against, Durga Prasad Lingden. 9. Another set of witnesses consisting of P.W. 5 P. W. 6 and P.W. 9 of the rank of constable attached to the Gyalzing Police Station at the relevant time have been produced to prove that the appellants had caused injuries to the deceased person. P.W. 5 Gunjaman Rai was the Writer Constable. He has deposed that while he was in the Gyalzing Police Station, he heard the people shouting "Manchay Maryo Manchay Maryo" (a man died, a man died) whereupon he went to the road and found that a Tata truck had stopped on the road and the deceased was lying on the road. He further deposed that the appellant Sukraj Subba was also there in the tata truck with other people. He enquired of the driver of the truck whether the person lying on the road had fallen down from the Tata truck, whereupon the driver expressed his ignorance but, accused Sukraj Subba told him that the person lying on the road was not in the Tata. Further, he deposed that the person lying on the ground was fully drunk and Sukraj Subba took the deceased to the Police Station. Further, he deposed that at the Police Station the deceased was beaten by two of the appellants. According to his statement in the chief, appellant Inder Kumar Sharma gave the deceased a slap and kick. He also saw the appellant Sukraj Subba giving the deceased one kick and one slap. Further, he deposed that the deceased was kept in the Police Station during the night but no entry in the General Diary was made about the detention. In the cross-examination, he took a complete about turn and admitted, the suggestion that he did not see the victim being assaulted by the appellants with his own eyes. P.W. 6 Harka Bahadur Thami was also al the Police Station at the relevant time. According to his testimony, he suddenly heard the voice of Sukraj Subba from the road side saying "Manchay Maryo, Manchay Maryo". Hearing his voice, he went to the road and stopped the Tata truck. On enquiry, the tata driver expressed his ignorance whether the person was on the backside of his Tata or not. But he saw a person lying flat on the

road about ten feet away from the Tata. That person was lying unconscious. Appellant Sukraj Subba said that the man lying on the road did not come on the tata. Thereafter, the witness continued, Sukraj Subba took him to the Police Station and he was kept in the Police Station that night. Thereafter, he saw the accused Sukraj Subba scolding that man. Further, he stated that the man, that is the deceased, was drunk and shouting. He further stated that he saw the appellant Dambar Bahadur Chettri giving two slaps to the deceased. This witness also took a complete about turn in his cross-examination by saying that he did not see the person who had assaulted the deceased as he was making his bed and only heard the sounds of slaps. He also admitted in the cross-examination that it is true that he did not see the appellant Dambar Bahadur Chettri assaulting the deceased. Further, he stated that the deceased was taken to the Police Station as usual, as he was drunk. He also stated that the deceased was neither handcuffed, nor lodged in the hazat and was given blanket for sleeping in the night. P.W. 9 is Som Bahadur Subba. He was working at the relevant, time as Home Guard and was posted at the Gyalzing Police Station. He has deposed that on 7-12-1993 at about 9 pm. when he was on duty in the Police Station he heard the people shouting on the road saying that a man had fallen down. Thereupon, he rushed to the road side and found one Tata truck parked there and also saw the deceased lying on the road. Further, he deposed that all the appellants had gone to the road side where a number of people had gathered and the deceased was on the road drunk and was brought to the Police Station. Further, he stated in the examination-in-Chief that all the accused persons gave slaps to the deceased. In the cross-examination, he also took a complete about turn and stated that it is true that he had not seen the accused persons slapping the deceased with his own eyes as he had gone to sleep. He has also admitted that after the deceased was brought to the Police Station, electricity in the Police Station were off. 10. The remaining witnesses, namely, Doma Tamang PW-7 and Bal Bahadur Tamang PW-8 are the mother and younger brother respectively of the deceased. Doma Tamang has deposed that the deceased came home at Gyalzing on 8-12-1993 at about 6.30 a.m., and told her that during the previous evening he had been arrested by the police and assaulted and that once he tried to escape but he was caught and detained in the custody for the whole night and in the Police Station he was tortured by three constables. Further, the deceased told her that in the morning he was asked to go home. She noticed that his face was swollen up and there were bruises all over his head and body. She found him in a serious condition and unable to control his urine and stool. She has further deposed in the examination-in-chief that the deceased was taken to the hospital and admitted there at about 2 p.m., where he was given treatment and the deceased breathed his last at about 2 a.m., in the night. In the cross examination, she stated that she had gone to work in a building as a labourer at about 7 a.m. and returned from the work at about 4 p.m., on the day the deceased was admitted in the hospital. There is thus a slight discrepancy in her statement. If she had returned from her work at about 4 p.m., the deceased could be taken to the hospital only after 4 p.m., and not at 2 p.m., as stated in the chief. However, this discrepancy is of no

significance on the merits of the case. Her statement falls short of implicating the appellants to the wrongful confinement or beating of the deceased. He has deposed that the deceased came home at Gyalzing on 7-12-1993 at about 6.30 a.m., with his face swollen up and injuries all over it. After coming home the deceased went to bed and did not accept anything to eat. He left for his work at about 8.30 and returned home at about 4.30 p.m. Then he found that the condition of the deceased had deteriorated. The deceased was not able to control his stool and urine and also was not able to speak properly. He was detirous and spoke out incoherently. Then he took the deceased to the hospital in a vehicle and admitted him there where he was given treatment. The condition of the deceased became very serious at midnight resulting in his death. In the cross-examination, he has stated the deceased did not tell him anything about the incident. 11. As regards the defence evidence, appellant Damber Bahadur Chettri has entered the witness box as DW-4. Besides three other witnesses, namely, Bhim Kumar Pradhan DW-1, D. S. Roka DW-2 and Upendra Prasad DW-3 were examined. The appellant, Damber Bahadur Chettri has deposed that he attended his duty at the Police Station on 7-12-1993 and was relieved of duty at 7.30 p.m. by night duty persons and thereafter, he went with Havaladar D. S. Roka DW-2 and Writer Constable Gunjaman Rai PW-5. According to his testimony, he along with D. S. Roka DW-2 went to the house of the latter for food as he used to take food at his place on monthly payment basis, since he was a bachelor and alone. He further deposed that he did not go to the Police Station thereafter, on that date. The testimony of D. S. Roka DW-2 has earlier been dealt with in another aspect of the case. On this aspect, he stated that he completed his duty on 7-12-1993 at 7.30 p.m. and after completing his duty he went with Writer Constable Gunjaman Rai PW-5 and the appellant Damber Bahadur Chettri. He corroborated the testimony of Damber Bahadur Chettri DW-4 by saying that the latter who was a bachelor used to take meals in his (witness) quarter and as such both left for his (witness) quarter where both took meals at about 10 p.m. Thereafter, Dhan Bahadur Chettri left his house. Bhim Kumar Pradhan DW-1 who was also a constable attached to the Gyalzing Police Station has deposed that he returned to Melli school on 7-12-1993 via Darab Busty where he returned at about 8 p.m., while the mela was going on. At Darab, he found one Tata about to leave for Tikjuk side where Gyalzing Police Station is situated and he also took a lift in that truck. He further stated that in the truck Dala there were about 22/23 passengers. The truck left at around 8.20 p.m. Accused Sukraj Subba who was moving about at Darab in a Drunken state, also got into the truck. He also saw the deceased at Darab Busty in a drunken state and being lifted and made to board the truck dala. Further, he has deposed that when the truck was about to reach Tikjuk Police Station the passengers shouted "Manchi Larao Manchi Marayo". Thereupon, the driver stopped the truck and he himself and Sukraj Subba got down from the truck. Other passengers also got down from the truck. From the Tikjuk Police Station Constable Harka Bahadur Thami PW-6 and Home Guard Indra Kumar Sharma appellant came to the spot to see the deceased. The deceased was lying about ten feet from the place where the truck was stopped by the

driver. He has further deposed that on the spot he saw some injury marks on the back of the deceased. Further, he has stated that the people gathered there advised and asked the police personnel to help the deceased by taking him to the Police Station and not to allow him to proceed to Gyalzing, as there was every chance of his falling from the Tata dala. Thereafter, he left for his quarter. In the cross-examination he stated that the truck reached the Tikjuk Police Station at about 9 p.m. The other witness produced by the appellants is Upendra Prasad DW-3. He has deposed that in 1993 he went to Darap Mela to purchase empty bottles along with his brother who used to sell chana-bhujia. He also stated that he returned to Gyalzing from Darap mela in a truck which he boarded at about 7.30 p.m. There were about 15/16 persons including two police personnel. Further, he has deposed that when the truck reached near the Gyalzing Police Station there was noise saying that someone had fallen out from the Dala. Then, the truck was stopped and the person who had fallen was taken away by two police personnel to the Gyalzing Police Station. Appellant Damber Bahadur Chettri in his statement recorded under Section 313 of the Code of Criminal Procedure stated that he was not in the Police Station during the night of 7-12-1993 and his stand has been of ignorance on all the material facts. The appellant Sukraj Subba denied that he also travelled in the truck. His statement appears to be incorrect in view of the evidence given by DW-1 Bhim Kumar Pradhan, Menuka Tamang PW-2, Gunjaman Rai PW-5 and Harka Bahadur Thami PW-6. To all the material questions he has taken the stand of ignorance. The other appellant, namely, Inder Kumar Sharma has also taken the stand of ignorance almost on all the material questions. 12. It would thus appear from the evidence on record that the prosecution has failed to prove beyond reasonable doubt that the deceased was wrongfully confined in the Police Station by the three appellants. Though it would appear from the evidence of G. P. Upadhyaya PW-4 who was the District Magistrate and also the evidence of S. K. Baniya PW-1 who was the Officer-in-Charge, Gyalzing Police Station that the deceased had been detained in the Police Station during the night of 7-12-1993 and was tortured there but that was only on the basis of the information received. Doma Tamang PW-7, the mother of the deceased, deposed that the deceased had told her on 8-12-1993 morning that he had been arrested by the police and was kept in custody during the night and was tortured by three constables but her evidence falls short of saying that it was the three appellants who were involved in the torture. However, there is no doubt that the deceased stayed at the Police Station during the night between 7-12-1993 and 8-12-1993. It is difficult to believe that with the injuries which were found on his body after post-mortem, any reasonable police officer would keep such a person in the Police Station for his welfare. The natural response of an honest police officer in such a situation would be to take such a person to the hospital for treatment. In the circumstances, it would appear that some police officers kept the deceased at the Police Station and assaulted him. But there is no reliable evidence to prove that any of the appellants wrongfully confined him and caused any specific injury to him. It is difficult to believe the statement of S. K. Baniya PW-1 that he was not aware of the detention of the deceased

during the night falling between 7-12-1993 and 8-12-1993 at the Police Station and that injuries were caused to him. Gunjaman Rai PW-5, Harka Bahadur Thami PW-6 and Som Bahadur Subba PW-9 deposed in the examination-in-chief that the appellants caused injuries to the deceased but retracted from their statements in the cross-examination. The right of cross-examining a prosecution witness which an accused has under Section 138 of the Evidence Act is a valuable right as it affords to him an opportunity to show that the statement made by the witness in the chief against him is of little or no value and so where a prosecution witness during cross-examination introduces statements either directly or in a subtle manner contradicting in effect what he had stated in his examination-in-chief, there would ordinarily be no justification for preferring his statement in the chief to that made in his cross-examination unless the prosecution cross-examines the witness with the leave of the Court under Section 154 of the Act and is able to show that the statement made in his cross-examination on behalf of the accused should not be relied upon. Here, the public prosecutor did not even care to cross-examine, with the leave of the Court, P. Ws. 5, 6 and 9 even when they had made statements during cross-examination on behalf of the accused directly contradicting their statements made in favour of the prosecution in the chief. To say in such situation that their statements in the cross-examination made in favour of the accused should be ignored and those made in the chief should be relied upon simply because the witnesses and the accused being police personnel the former were helping the accused would be to virtually deny to the accused their valuable right of cross-examination of the prosecution witnesses. That a party calling a witness may be permitted by the Court to cross-examine the witness after he has been 'cross-examined by the adverse party is clear from *Dahyabhai v. State of Gujarat*, AIR 1964 SC 1563. So, in view of the fact that these witnesses took a diametrically opposite stand in the cross-examination from what they had stated in the examination-in-chief and as the prosecution did not make even an attempt to bring on record, by cross-examining them, facts which would show that their statements made in the chief should be preferred to those made in the cross-examination by the accused, it is not possible to say that the statements made by them in the chief should be preferred and not those made in their cross-examination. As such, there is no evidence to prove beyond reasonable doubt that it were the appellants who had caused injuries to the deceased. There is absolutely no reliable evidence to prove that there was common intention of all the three appellants to wrongfully confine the deceased or to cause injuries to him resulting in culpable homicide not amounting to murder. It is well-established that common intention presupposes prior concert. It requires a pre-arranged plan because before a person can be vicariously convicted for the criminal act of another, the act must have been done in the furtherance of common intention of them all. There must have been a prior meeting of minds. Several persons can simultaneously attack a man and each may have the same intention to kill and each individually can inflict a blow, yet none would have the common intention required by Section 34 because there was no prior meeting of minds to form a pre-arranged plan. In that case each would be individually liable for whatever

injury he has caused but none would be vicaciously convicted for the act of any of the others and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of culpable homicide. In the instant case the prosecution has failed to prove beyond reasonable doubt that any of the appellants wrongfully confined the deceased in the Police Station. Prosecution has also failed to prove that any of the appellants caused any specific injury to the deceased and also their common intention. Therefore, there is no choice except to acquit the appellants. 13. It would appear that the witnesses, Gunjaman Rai PW-5, Harka Bahadur Thami PW-6 and Som Bahadur Subba PW-9 have intentionally given false evidence making mockery of the trial by taking diametrically opposite stand in their cross-examination from what they took in their examination-in-chief. Their statements made in the examination-in-chief and the cross-examination are wholly irreconcilable. If police personnel thwart the administration of justice or obstruct the Court in coming to a correct conclusion by deliberately giving false evidence, it is a serious matter deserving severe action against them. Therefore, I am of the opinion that it would be expedient in the interests of justice and also to eradicate the evils of perjury to issue notice to these witnesses to show cause why they should not be prosecuted for having given false evidence under Section 193 of the Indian Penal Code. Gunjaman Rai PW-5 stated in his examination-in-chief "I saw Indra Kumar Sharma accused No. 3 giving a slap and a kick to the victim. I also saw accused No. 2 Sukraj Subba giving one kick and one slap to the victim". This statement made in the examination-in-chief is diametrically opposite to what he stated in his cross-examination "It is true that I did not see the victim being assaulted by the accused persons with my own eyes". I am of the opinion that either of these statements or both are false and were made by him believing the same to be false. Similarly, Harka Bahadur Thami PW-6 has deposed in his examination-in-chief "I saw accused Damber Chettri giving two slaps to that man." In the cross-examination, he stated : "It is true I did not see accused Damber assaulting the deceased". I am of the opinion that either of these statements or both are false and were made by him knowing the same to be false. Similarly, PW-9 Som Bahadur Subba stated in his chief : "At that time all the accused persons gave slaps". In the cross-examination, he stated : "It is true that I had not seen the accused persons slapping the drunken man with my own eyes as I have gone to sleep". Either of these statements or both are false and he made them knowing to be false. 14. In the result, the appeals are allowed, the impugned judgment and order of the learned trial Court are set aside and all the appellants are acquitted of the offences under Sections 342 and 304, Part II read with Section 34 of the Indian Penal Code. They are in custody. They be released forthwith, if not required in any other case. Issue notices to Gunjaman Rai PW-5, Harka Bahadur Thami PW-6, and Som Bahadur Subba, PW-9 to show cause by 5th August. 2002 why they should not be prosecuted under Section 193 of the Indian Penal Code for giving false evidence, as stated earlier.