Amrut/Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION (MAIN) NO.437 OF 2021 (Filing No.)

THE STATE OF GOA,
Through C.I.D. C.B., … Applicant/
North Goa, Goa. Appellant

Versus

TARUNJIT TEJPAL
s/o Inderjit Tejpal,
r/o 12 Link Road,
Jangpura Extension,
New Delhi -14. …Respondent

Mr. Tushar Mehta, Solicitor General of India, Mr. Devidas J. Pangam, Advocate General of State of Goa with Mr. Shubham Priolkar, Additional Government Advocate, Mr. Shailendra Bhobe, Public Prosecutor, Mr. Francisco Tavora, Special Public Prosecutor, Mr. Pravin Faldessai, Additional Public Prosecutor, Mr. Rajat Nair, Mr. Kanu Agarwal, Mr. V. R. Solanki, and Ms. Cyndiana Silva, Advocates for the Applicant/Appellant.

Mr. Amit Desai, Senior Advocate with Mr. Ankur Chawla, Mr. Raunaq Rao, Mr. Gopal Krishna Shenoy, Ms. Manali Kamat, and Ms. T. Souto, Advocates for the Respondent.

AND

CRIMINAL WRIT PETITION NO.26 OF 2022

TARUN JIT TEJPAL
Son of Inderjit Tejpal,
Aged 58 years, residing
at 497, Calizor, Moira,
Bardez Goa 403 507
Presently at New Delhi. …Petitioner

Versus

1. STATE OF GOA
   Through Police Inspector
   C.I.D. C.B. North Goa,
   Old G.M.C. Building,
   Ribandar Goa.

2. THE PUBLIC PROSECUTOR
   High Court Complex,
   Porvorim Goa. ...Respondents

Mr. Amit Desai, Senior Advocate with Mr. Ankur Chawla, Mr. Raunaq Rao, Mr. Gopal Krishna Shenoy, Ms. Manali Kamat, and Ms. T. Souto, Advocates for the Petitioner.

Mr. Tushar Mehta, Solicitor General of India, Mr. Devidas J. Pangam, Advocate General of State of Goa with Mr. Shubham Priolkar, Additional Government Advocate, Mr. Shailendra Bhobe, Public Prosecutor, Mr. Francisco Tavora, Special Public Prosecutor, Mr. Pravin Faldessai, Additional Public Prosecutor, Mr. Rajat Nair, Mr. Kanu Agarwal, Mr. V. R. Solanki, and Ms. Cyndiana Silva, Advocates for the Respondents.

CORAM: **M. S. SONAK &**
R. N. LADDHA, JJ
Reserved on : **19th April 2022**
Pronounced on: **23rd April 2022**

ORDER (Per M. S. Sonak, J)

1. Heard the learned counsel for the parties.

2. This order disposes of an application under Section 378(3) of the Code of Criminal Procedure, 1973 (Cr.P.C.) seeking leave to appeal the judgment and order dated 21.05.2021 in Sessions

Case No.10/2014 made by the learned Additional Sessions Judge, Mapusa Goa (impugned judgment and order). By this judgment and order, the Respondent was acquitted of the offenses punishable under Sections 354, 354A, 354B, 376(2)(f), 376(2)(k), 341, and 342 of the Indian Penal Code (I.P.C.).

3. Since the Respondent had objections to the maintainability and merits of such application, Mr. Amit Desai, learned Senior Advocate for the Respondent, was heard first. Mr. Desai argued the matter on 11.04.2022 and 12.04.2022. Mr. Tushar Mehta, learned Solicitor General of India, argued on 13.04.2022 and very briefly on 19.04.2022. Mr. Desai rejoined on the rest part of 19.04.2022. The matter was reserved for orders on the said date.

4. Mr. Desai made several submissions without prejudice to one another on maintainability. First, he submitted that there was no decision of the State Government to direct the Public Prosecutor to institute the application/appeal. If any, the decision/direction was null because the same was arrived at in breach of mandatory procedures prescribed under Section 378(1) of Cr.P.C., Home Department Order dated 03.01.2008 and the Citizen's charter of Directorate of Prosecution. Second, he submitted that the Public Prosecutor and the Director of Prosecution were bypassed in the decision-making process.

Instead, the Advocate General, a stranger to such a decision-making process, initiated the process. Third, he submitted that the involvement of a Public Prosecutor and the Director of Prosecution are safeguards for protecting the Respondent who has been acquitted of an offense, and bypassing such statutory functionaries renders the decision/direction a nullity. The application based upon any such alleged decision/direction is therefore incompetent, and such application must be dismissed as not maintainable even without adverting to its merits.

5. Mr. Desai also submitted that the decision/direction, if any, is a nullity because it is a product of the non-application of mind and failure to take into account the relevant considerations. He pointed out that the impugned judgment and order was pronounced on 21.05.2021 by merely declaring that the Respondent was acquitted of the offenses. Even before any copy or certified copy of impugned judgment and order running into almost 527 pages could be obtained by the State Government or its officers, this application was lodged in a hurry on 24.05.2021. He pointed out that even the evidence, in this case, runs into over 6000 pages. He submits that the State Government and its officers could have never considered all this material given the time constraints, indicating non-application of mind and eschewing relevant considerations. He, therefore, submitted that

the decision/direction, if any, is a nullity, and based thereon, this application was incompetent.

6. Mr. Desai, without prejudice to the above, submitted that the direction, if any, was not to the Public Prosecutor but the Additional Public Prosecutor. He submitted that such a direction is contrary to the scheme of Section 378 read with Section 2(u) and Section 24 of Cr.P.C. that contemplates a direction only to the Public Prosecutor and not to any other officer like the Additional Public Prosecutor. He submitted that neither the Public Prosecutor nor the State filed the application through its Public Prosecutor, nor was such an application signed by the Public Prosecutor. He referred to the cause title of the application in which the applicant/appellant is described as "THE STATE OF GOA through C.I.D. C.B., North Goa, Goa." He also submitted no valid material to establish that Mr. Pravin Faldessai was appointed as an Additional Public Prosecutor on 24.05.2021. He also submitted that the application was not supported by any affidavit even though the Bombay High Court Appellate Side Rules mandate the same. Finally, he proposed that the application was incompetent for all these reasons and ought to be dismissed without even adverting to its merits or demerits.

7. Mr. Desai relied on ***Dr. J. M. Almeida Vs State***[1]***, Nazir Ahmad Vs King Emperor***[2]***, State of Kerala Vs Krishnan***[3]***, State Vs Devi Singh***[4]***, Uday Pratap Singh and others Vs State of Bihar and others***[5]***, State, GNCT Delhi Vs Yogesh Kochar***[6]***, Mansukhlal Vithaldas Chauhan Vs State of Gujarat***[7]***, K. K. Mishra Vs State of Madhya Pradesh***[8]***, Arun Kumar Vs Union of India***[9] in support of his contentions.

8. Mr. Tushar Mehta, learned Solicitor General of India, countered the above contentions by referring to the material on record. He pointed out that the Home Department Order dated 03.01.2008 was withdrawn within two months of its issue by yet another Home Department Order dated 03.03.2008, duly published in the Official Gazette. He submitted that there was a decision/direction of the State Government. Further, such decision/direction was legal, valid, and based on overwhelming material possessed by the State Government and the opinion of its Law Officers. He submitted that any judicial review of such a

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1 1980 CrLJ 145
2 AIR 1936 PC 253
3 1981 SCC OnLine Ker 199
4 1965 SCC OnLine Raj 181
5 1994 Supp (3) SCC 451
6 2021 SCC OnLine Del 2999
7 (1997) 7 SCC 622
8 (2018) 6 SCC 676
9 (2007) 1 SCC 732

decision/direction by going into the files, notings, and opinions might be counterproductive and was beyond the scope of preliminary objections that can generally be urged to resist an application seeking leave to appeal an acquittal.

9. Mr. Mehta made a brief reference to the reasons that prompted the State Government to decide to institute the application. He submitted that the direction based thereon warranted no interference whatsoever. He pointed out that the so-called procedural deficiencies referred to by Mr. Desai did not exist and, in any case, were not sufficient to sustain preliminary objections. He submitted that in such matters, the position after a return is filed must be considered and not the position at the stage of the institution of application. He submitted that this principle is well settled in matters where a writ of habeas corpus is applied, and the same principle should apply to a matter of this nature as well.

10. Mr. Mehta submitted that this was a fit case for grant of leave because there are some fundamental errors in approach and appreciation of evidence by the learned Additional Sessions Judge. He submitted that crucial evidence had been ignored and well-settled principles were not followed. Finally, he proposed that leave must be granted if a *prima facie* case is made out or if

arguable issues arise. For all these reasons, Mr. Mehta submitted that the preliminary objections should be rejected and leave be granted to appeal the impugned judgment and order acquitting the Respondent.

11. Mr. Mehta relied upon ***Rajiv Agarwal Vs Union of India and Another***[10] and ***Central Bureau of Investigation Vs A. Raja and others***[11] decided by the learned Single Judge of Delhi High Court; ***Lal Singh Vs State of Punjab***[12]***, Mohinder Singh Vs State of Punjab***[13]***, Prem Singh Vs State of Haryana***[14] ***, State of Maharashtra Vs Sujay Mangesh Poyarekar***[15] and ***Col. Dr. B. Ramachandra Rao vs The State Of Orissa And Ors***[16,] in support of his submissions.

12. Mr. Desai, by way of rejoinder, did submit that the Respondent was not strictly speaking seeking any judicial review of the decision/direction of the State Government to institute this application. But he maintained that there was no such

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10 W.P. (C) 7978/2020 & W.P.(C) 8021/2020 & CM No.26125/2020 decided on 23.11.2020

11 Cri. M.A. 13703/2020 & Cri. M.A. 13851/2020 & Cri. M.A. 14091/2020 in CRL. L. P. 185/2018 decided on 23.11.2020

12 1981 SCC OnLine P&H 92

13 (1985) 1 SCC 342

14 (2013) 14 SCC 88

15 (2008) 9 SCC 475

16 1972(3) SCC 256

decision/direction, and in any case, such decision/direction was a nullity and based thereon, no such application was competent. Mr. Desai reiterated his earlier submissions and submitted that there was no case made out for grant of any leave, even on merits. He submitted that there are no glaring errors or substantial or compelling reasons to displace the presumption of innocence that now stands doubly fortified by a well-reasoned acquittal recorded by the learned Additional Sessions Judge. He submits that no leave should be granted even if two reasonable conclusions are possible based on record evidence. He submits that the view taken by the learned Additional Sessions Judge on a detailed analysis of the voluminous evidence on record was a correct or, in any case, a plausible view that ought not to be disturbed by granting leave to appeal. Mr. Desai submitted that the decisions relied upon by Mr. Mehta were quite distinguishable and provided no answers to the preliminary objections as raised.

13. Mr. Desai submitted that the requirement of obtaining leave under Section 378(3) of Cr.P.C. before an appeal against acquittal is entertained was an additional safeguard provided by the Legislature to an accused who has been acquitted of a crime. He submitted, therefore, that reasons to indicate why such leave was being granted are necessary as a matter of principle even though he fairly accepted that he was unable to cite any precedent

in support. Mr. Desai submitted that the preliminary objections should be upheld and this application dismissed based on all this. In any case, he proposed that leave to appeal should be rejected even on merits.

14. We have perused the record to evaluate the rival contentions, including the impugned judgment and order made by the learned Additional Sessions Judge.

15. The record indeed bears out that the learned Sessions Judge pronounced the impugned judgment and order on 21.05.2021 by declaring that the Respondent stands acquitted of the offenses alleged against him. Though the certified copy was applied for by the applicant/appellant on 21.05.2021 itself, before the same could be delivered, this application was instituted on 24.05.2021 in this Court.

16. The application is duly signed by Mr. Pravin Faldessai, Additional Public Prosecutor. As some controversy was raised at the Bar about whether the signature was that of Mr. Faldessai, we verified the position from Mr. Faldessai in the hearing, and he confirmed this position. The presentation forms by which this application/appeal was presented also bear the signatures of Mr. Faldessai, Additional Public Prosecutor. Based on the above

record that we have verified and ascertained, the contentions about Mr. Faldessai, Additional Public Prosecutor, either not having signed the application or not having presented this application, cannot be accepted.

17. The application describes the applicant in the cause title as "THE STATE OF GOA through C.I.D. C.B., North Goa, Goa." However, that does not go to the root of the maintainability of this application. Section 378(1)(b) provides that the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an order of acquittal passed by any Court other than the High Court. Furthermore, section 382 of Cr.P.C. provides that every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented directs otherwise) be accompanied by a copy of the judgment or order appealed. Since the application is signed and presented by the Additional Public Prosecutor, the contention about the improper presentation cannot be accepted. However, the argument that the Additional Public Prosecutor was not entitled to sign or present such an application is discussed later in this order.

18. Similarly, the contention about Mr. Faldessai not being validly appointed as an Additional Public Prosecutor under Section 24 of Cr.P.C. cannot be accepted. The record bears out that Mr. Pravin Faldessai was initially appointed as an Additional Public Prosecutor on 30.10.2015. After that, by order dated 19.04.2016, his term was extended for one year. Then, by further order dated 01.01.2017, his tenure was extended from 01.11.2016 without specifying any outer limit. Based on this material, we have no reason to hold that Mr. Faldessai was not appointed as an Additional Public Prosecutor as of 24.05.2021 when the application was instituted or presented in this Court.

19. No affidavit accompanies the application. However, Rule 10 of Chapter II, Rule 11 of Chapter III, and Rule 1 of Chapter XXVI of the Bombay High Court Appellate Side Rules, 1960 relied upon by Mr. Desai nowhere mandate that an application seeking leave to appeal against acquittal has to be accompanied by an affidavit. Moreover, no other provisions were shown to us supporting such an alleged requirement.

20. The orders dated 11.08.2009 and 13.08.2009 by the learned Single Judge of this Court (N. A. Britto, J) were made in *Criminal Writ Petition No.52 of 2009*. The rules concerning filing of appeals and filing of writ petitions are not the same.

Besides, the order dated 11.08.2009 merely adjourns the matter to enable the Petitioner to file a fresh affidavit. Even the order dated 13.08.2009 takes on record the new affidavit to support the petition.

21. Therefore, based upon rules or orders, we cannot hold that this application is incompetent because any affidavit did not accompany the same. Further, we must add that the Investigating Officer has ultimately filed an affidavit on behalf of the State Government, addressing the Respondent's preliminary objections. Therefore, lacunae, if at all, also stand suitably redressed.

22. On the issue of whether the State Government has any decision to institute an application seeking leave to appeal, we find from the record that the State Government, on 24.05.2021, indeed decided to institute this application/appeal. This decision is in the form of notings/endorsements in the files and below the note forwarded by the Advocate General, State of Goa. The decision is in the form of signatures/endorsements of the Chief Minister and other officials of the State Government. Therefore, it is futile to contend that there is no decision at all taken by the State Government to direct the Additional Public Prosecutor to institute/present this application.

23. Mr. Desai could not point out any provisions in the Criminal Procedure Code or the Rules of Business prescribing any definite format in which such decision to appeal against an acquittal was required. Therefore, in the absence of any statutory structure, we cannot accept that the decision in the files or below the notings of the Advocate General amounts to no decision at all or that this application was instituted in the absence of any decision from the State Government.

24. Smt. Sunita Sawant, Deputy Superintendent of Police, Security Unit, Altinho, Panaji Goa, filed an affidavit on 17.09.2021. In paragraph 8, she has stated that on 24.05.2021, the Government had already directed the learned Additional Public Prosecutor to present an application for leave to appeal before the High Court, and how, on the same day, i.e., 24.05.2021, the application for leave to appeal along with a memorandum of appeal was filed before this Court. Again, in paragraph 13 of her affidavit, she has reiterated that the Government had explicitly directed Mr. Pravin Faldessai, Additional Public Prosecutor, to file the present application for leave to appeal.

25. The Respondent filed an additional affidavit dated 17.09.2021 on 27.10.2021 in response to Smt. Sunita Sawant's

affidavit (described as a rejoinder). Though there is a response to several paragraphs of such affidavit (rejoinder), there is no specific response to what is set out in paragraphs 8 and 13 of such affidavit (rejoinder).

26. The Respondent has responded to paragraph 6 of Smt. Sunita Sawant's affidavit (rejoinder). But the response is too inferential. We are not inclined to hold that there was no communication of the State Government's direction to the Additional Public Prosecutor before this application/appeal was filed in this Court. Therefore, the objection that this application/appeal was instituted/presented by the Additional Public Prosecutor even before the decision/direction to institute the same was communicated to him cannot be accepted.

27. Another aspect of maintainability is whether the decision/direction to the State Government was a nullity because of any alleged breach of mandatory procedures prescribed in Section 378 of Cr.P.C., Home Department Order dated 03.01.2008 Citizen's charter of Directorate of Prosecution. Mr. Desai also submitted that such a decision/direction is a nullity because the same was a product of the non-application of mind. He offered that this application/appeal was quite incompetent if

the same was based upon a decision/direction that was itself a nullity.

28. The argument based on the Home Department Order dated 03.01.2008 fails because the Home Department itself withdrew the said order by yet another order issued on 03.03.2008 and published in the Official Gazette dated 13.03.2008, with immediate effect. Perhaps the Respondent was unaware of this last order though the same was published in the Official Gazette.

29. The argument based on the Citizen's charter of the Directorate of Prosecution also cannot be accepted. Firstly, this charter contains no mandatory procedures required by the State Government to exercise its powers under Section 378 of Cr.P.C. On the contrary, the charter assists the Directorate of Prosecution and informs the public about its functioning. Furthermore, nothing in this charter is intended to prescribe some procedures at variance with those prescribed under the Code of the Criminal Procedure. Therefore, even assuming that the files may not have moved from one office to the other in terms of the charter, we cannot infer any breach of mandatory procedure, thereby vitiating the decision seeking leave to institute the appeal against the acquittal of the Respondent.

30. Since no case involving a breach of any mandatory procedures was made out, the principles in *Taylor Vs. Taylor* (supra), *Nazir Ahmad* (supra), ***Brajendra Singh Yambem Vs. Union of India and another***[17] will not apply. All these cases refer to the well-established principle of law that if the manner of doing a particular act is prescribed under any statute, then the act must be done in that manner or not at all.

31. However, Mr. Desai, with his forensic skill, submitted that both the Public Prosecutor and the Directorate of Prosecution play a vital role in the administration of the criminal justice system. Therefore, any decision that affects a person's liberty without the involvement of these functionaries would be null. Mr. Desai reasoned that a decision or direction to appeal against an acquittal has severe consequences for the accused, acquitted after a full trial. He submitted that there is already a presumption of innocence, and this presumption is now further fortified by the acquittal recorded by a competent Court after a full trial. He submitted that all these are safeguards for the acquitted Respondent's protection. Such safeguards cannot be diluted, bypassing Public Prosecutor and/or the Directorate of Prosecution.

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17 (2016) 9 SCC 20

32. Mr. Desai submitted that the entire purpose of reference to a Public Prosecutor in Section 378(1) of Cr.P.C. was to associate the stature, the role, and the functions of an independent Public Prosecutor with the decision making process. He submits that all this has been a casualty in the present case, and therefore, the decision/direction to institute this application/appeal is a nullity.

33. There is no question of undermining the position held by a Public Prosecutor or a Directorate of Prosecution in the administration of criminal justice. Undoubtedly, both these functionaries have been assigned an essential and salutary role in the administration of criminal justice. However, the provisions of the Code (Cr.P.C.) are quite clear as to what this role is. For example, when it comes to withdrawal from the prosecution, only the Public Prosecutor or the Assistant Public Prosecutor in charge of the case may withdraw from the trial with the consent of the Court. In such a situation, the Public Prosecutor must independently apply his mind and decide whether or not to withdraw from the prosecution. There are similar provisions to be found in the Code (Cr.P.C.).

34. Similarly, the role and the functions of a Directorate of Prosecution are also referred to in Section 25A of the Cr.P.C. In this case, however, the statutory scheme for the institution of

appeals in cases of acquittal is to be found in Section 378 of Cr.P.C., which, as rightly submitted by Mr. Desai, is to be construed along with the provisions in Section 2(u) and Section 24 of Cr.P.C.

35. Section 378(1)(b) provides that the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than the High Court. There is nothing, at least in the provisions of Section 378(1) of Cr.P.C., that requires, much less mandates, the involvement of either a Public Prosecutor or the Directorate of Prosecution even before the State Government decides to direct the Public Prosecutor to present an appeal to the High Court against an acquittal. Therefore, based either on the Citizen's charter or position and the stature of a Public Prosecutor or the Directorate of Prosecution, we do not think that the State Government's decision to direct its Public Prosecutor to present an appeal against the acquittal can be questioned simply because the Public Prosecutor or the Directorate of Prosecution may not have been involved in the decision making. While the involvement of the Public Prosecutor or the Directorate of Prosecution may always be desirable before the State Government decides, assuming there is no such involvement in a given case, we do not think that the

decision to direct the Public Prosecutor to present the appeal can be declared as a nullity.

36. The next contention to be considered is whether the decision/direction of the State Government to direct the Additional Public Prosecutor to institute this application/ appeal is a nullity because the same is allegedly the product of non-application of mind and the failure to take into account the relevant considerations. As noted earlier, Mr. Desai had submitted that such a decision was allegedly taken on 24.05.2021 even before the copy of the 527 paged impugned judgment and order was available with the State Government or its officers. Concerning the file notings and other information the Respondent obtained through the R.T.I., Mr. Desai had submitted that all this material does not reflect any application of mind to relevant considerations that should generally inform the decision-making process in such serious matters. He also proposed that since the Advocate General, State of Goa, was admittedly not appointed as a Public Prosecutor under Section 24 of the Cr.P.C., the initiation of the process by him and the decision based upon his note also rendered such decision/direction a nullity. In short, despite clarifying in the rejoinder that the Respondent was not, strictly speaking, seeking

some sort of a judicial review, in effect, a judicial review in a different form was pressed.

37. The first issue is whether, in a matter of this nature and at this stage, it would be appropriate to subject the decision to such intense judicial review on the grounds urged. But without going into this issue, based on the material on record, we do not think any case is made out to infer non-application of mind rendering such decision a nullity. We shall indicate briefly our reasons for so holding.

38. In this case, the impugned judgment and order was indeed pronounced on 21.05.2021, and even before its copy could be obtained, the decision to appeal was taken on 24.05.2021. Though valid in some circumstances, the contention about haste and the inference of non-application of mind cannot be mechanically drawn in all events and purposes. The context and circumstances are important. Such matters, therefore, will have to be examined on a case-to-case basis, mainly because deciding whether or not to institute an appeal is a purely administrative decision. A range of considerations is available to the State Government to decide whether or not to institute an appeal against an order of acquittal. It is neither necessary nor feasible to

enumerate the range of considerations that can be validly taken into account for arriving at such a decision.

39. A State Government may legitimately entertain a perception that such an acquittal must be tested before the High Court. Second, it may legitimately entertain a perception that there was clear and compelling evidence on record, based upon which no acquittal was possible. Third, the State Government may legitimately entertain a perception that the Sessions Court may not have appropriately appreciated the law, particularly on the onus of proof or the credence to a victim's testimony. Finally, the State could have legitimately entertained a perception that such a decision was necessary to protect the victim's identity. Of course, as offered by Mr. Dessai, it is also possible that such a decision can, in a given case, be actuated by some extraneous or even malafide considerations. None were at least suggested in the course of arguments. But then, all this can certainly be examined when the Court considers the application for leave judicially. No leave will be granted if the material or the circumstances establish such a case.

40. Incidentally, this application was instituted on 24.05.2021 without a copy of the impugned judgment and order. However, on 27.05.2021, this Court was informed that specific paragraphs

of the impugned judgment and order referred to the victim's husband and mother and the email Id of the victim herself. Accordingly, on 27.05.2021, this Court ordered such references found in paragraphs 55, 177, and 182 of the impugned judgment and order to be redacted. Further, the trial court was directed to redact such reference and other similar references wherever found in the order while uploading the impugned judgment and order.

41. Mr. Desai's contention based on impugned judgment and order running into 527 pages or recorded evidence running into 6000 pages makes no difference. The documented evidence running over 6000 pages was already available to the State Government. Even based upon the same, there is nothing wrong if the State Government believed that this acquittal was required to be tested before the High Court. At this stage, we are only concerned with the decision to institute an appeal or an application seeking leave to appeal against acquittal. Ultimately, whatever the perception or reasons that may have prompted the State Government to take such a decision, the High Court will have to determine whether any case is made out for grant of such leave and, consequently, for the entertainment of the appeal.

42. Therefore, we do not think that such a decision of the State Government should be subjected to some intense judicial

scrutiny at this stage. However, even if such a decision is upheld, under no circumstances does that preclude this Court from determining whether or not any case has been made out for grant of leave in terms of Section 378(3) Cr.P.C. This aspect will be decided by this Court applying the well-settled principles governing the entertainment of such matters.

43. Usually, the State Government would decide on whether to institute an appeal against an acquittal or not after obtaining a copy of the acquittal order and examining the reasonings therein. However, this does not mean that a decision to institute such an appeal, even before obtaining the copy of the acquittal order, becomes a nullity. The acquittal order, in this case, does run into 527 pages. However, as was pointed out by Mr. Mehta, the documented evidence running into over 6000 pages was already available to the State Government and its officials. Therefore, if the State Government, based upon the material it already had and upon the advice of the Advocate General, who, as pointed out by Mr. Mehta, has a constitutional duty to advise the State Government, decides to institute an appeal against an acquittal, we do not think that such a decision can be declared as a nullity.

44. Ultimately, in such matters, whatever the reasons that may have prompted the State Government to institute the appeal, such

reasons matter a little to a Court that is ultimately required to determine whether any leave is to be granted judicially. Therefore, upholding the purely administrative decision of the State Government by itself will not detract from our judicial function of determining whether any case is made out for grant of such leave sought for in pursuance of such decision/direction. Accordingly, whether or not such leave is to be granted will have to be decided by this Court applying the well-settled principles governing the grant or refusal of leave.

45. In at least two cases decided by the learned Single Judge of the Delhi High Court cited before us, it was held that any judicial review of the decision to institute an appeal against acquittal would be somewhat counterproductive and way beyond the scheme of Section 378 of Cr.P.C. Independent of such a viewpoint, we found no reasons to nullify the decision to appeal the acquittal based on evaluating the material placed before us.

46. In *Rajiv Agarwal* (supra), the learned Single Judge of Delhi High Court rejected contentions similar to those now raised by Mr. Desai. The Delhi High Court considered the scheme of Section 378 of Cr.P.C. and how it contemplates a direction by the Government to the Public Prosecutor to institute an appeal. But the Court held that how and why the Government has formed an

opinion to file an appeal is certainly beyond the scope of Section 378(2) of Cr.P.C. How it has arrived at a decision and whether the files and notings reflected the detailed discussions which have taken place and the reasons had been given after analyzing the judgment to file the appeal is not even concern of acquitted defendant. The Government and its officials are free to decide and take an independent decision on whether it is a fit case to file an appeal against the order of acquittal. No shackles or restraints can be put upon the Government as neither the statute nor common sense permits the same. The Court is not supposed to sit over the decision taken by the Government and examine the notes and opinion to find out whether the decision of the Government to file the appeal is just, proper and fair, and the impugned judgment has been adequately analyzed. Suppose the Court has to examine all the concerned papers, opinions, notings, and files and to decide whether the decision to file the appeal is correct first; the whole purpose of hearing the appeal will stand defeated as the Court will then render the decision based on the notings/opinions in the Government files. This certainly was never the Legislature's intention, and neither has it been so provided in Section 378(2) of Cr. P.C.

47. The Delhi High Court also held that if the contention of the acquitted defendant is to be accepted, it will lead to an absurd

situation, i.e., even before filing the appeal, the decision of the Government will be challenged by way of the writ petition and the Court will have first to give its findings whether the opinion framed by its Law Officers is correct and filing of an appeal is justified. The Court held that such an interpretation was neither contemplated nor can be given the unambiguous language of Section 378(2) of Cr.P.C.

48. The Delhi High Court finally held that there could not be any judicial review of any notings/drafts/opinions given by the Government officials or Law Officers, which resulted in the filing of an appeal. Therefore, it is while hearing the appeal only that the Court will apply its judicial mind and pass a reasoned order on whether the appeal filed by the appellant is maintainable or not.

49. The Court further opined that if the contentions of the acquitted defendant were to be accepted, it would lead to chaos because whenever a criminal case or appeal is filed in Court, a writ will also be filed by the aggrieved person/accused/respondent calling for the police/Government records and expecting the Court to go through the internal notings and first to satisfy itself whether there was sufficient application of mind by the police officers/ Government officials and, thus, no criminal case or

appeal will be able to proceed further as Court will first have to examine the internal documents of the Government and give its findings. The Court held that this indeed was not the intention of the Legislature, and it would not only result in a delay of the proceedings but will, in fact, bring to a halt the criminal administration of justice.

50. Similarly, in *A. Raja* (supra), the learned Single Judge of Delhi High Court has held that provisions of Section 378 of the Criminal Procedure Code do not even require the State to supply a response with all notings, files, or proceedings that have culminated into the decision to file an appeal. Moreover, the procedural part which has resulted in the formation of opinion by the Government is the internal proceedings of the Government. Whether the Government's decision to file an appeal is correct or not will be determined by the Court while deciding the leave petition after hearing the learned counsel for the parties and after going through the evidence and not based on notes, drafts, or opinions in Government files.

51. Even the Full Bench of Punjab and Haryana High Court in *Lal Singh* (supra) has held that the Government has to form an opinion that the judgment of acquittal deserves to be appealed against or not, and Section 378(1) of the Criminal Procedure

Code does not even remotely refer to the process for the formation of such an opinion or decision to do so. It only contemplates the presentation of appeal on the direction of the Government through the medium of the Public Prosecutor. The ultimate decision, i.e., the whole process starting from the consideration of the judgment through the channel of various officials, is not contemplated by any statutory provisions. It was held that the presentation of the appeal to the High Court and not the preceding steps leading to the same, i.e., the decision of the State Government, etc., is what is contemplated under Section 378 of the Criminal Procedure Code.

52. The Full Bench agreed that such decisions are administrative. The subjective satisfaction of the State Government, whether a particular judgment of acquittal calls for being challenged by way of appeal and the process by which such satisfaction or decision is to be arrived at, is neither governed nor prescribed by any statutory provision, far less any specific section of the Code itself. Therefore, the Full Bench concluded that these are the matters entirely governed by the general executive power of the State Government under Article 162 of the Constitution of India and thus purely administrative.

53. The Full Bench also held that it would seem that there is no statutory provision in the Code that mandates or obliges the State Government to examine every or any judgment of acquittal. Therefore, it would follow that the State Government may, at its discretion, consider or even refuse to consider or examine a judgment to arrive at an opinion on whether it should be appealed against or not. The ordinary practice and process for preferring appeals against acquittal, namely that the Public Prosecutor conducting the case would opine, and the District Magistrate may recommend the filing of the appeal thereunder to the Government, and the State would then proceed to form its opinion to prefer an appeal is plainly not prescribed by any statutory provision as such. It is a practice or procedure under the inherent executive functions of the State under Article 162 of the Constitution of India. Similarly, the ultimate decision or the subjective satisfaction of the Government as also the whole process beginning from the consideration of the judgment through the channel of recommendatory officials has not been laid out either in the Code itself or by any other statutory rule on the point but is wholly circumscribed by the purely executive power of the State.

54. The Full Bench held that Section 378(1) does not either in express or implied terms advert to the process of the formation of

the State's opinion or its culmination one way or the other. What, therefore, deserves highlighting is the fact that any words about the formation of an opinion are conspicuous by their very absence in Section 378(1) of the Criminal Procedure Code. Again, this provision does not even mention any decision of the State Government consequent thereto. Therefore, the very absence of the word 'opinion' or 'decision' in the statute has to be given its necessary import.

55. The Full Bench has also held that the State Government's date and time of such a purely administrative decision are of little relevance in determining the material issue as to when the power under Section 378 of the Code would stand exhausted. The Full Bench also held that Section 378 of the Criminal Procedure Code visualizes a direction to the Public Prosecutor to present an appeal to the High Court; plainly, the presentation of the appeal is the dominant objective, and the direction to the Public Prosecutor is only a mode of achieving the same. The direction to the Public Prosecutor cannot be divorced from the presentation of an appeal, and it would be hyper-technical to dissect it from the same and treat it as an independent entity. To put it in other words, the essence of Section 378(1) is the presentation of the appeal to the High Court and not the preceding steps leading to the same, namely, the process of the formation of the opinion, the

subjective satisfaction or the decision of the State Government or the consequential direction to present such an appeal. Therefore, it follows that the date and the time of the direction alone to the Public Prosecutor for presenting the appeal is a matter of little or no significance for determining as to when the power under Section 378 would exhaust itself.

56. In ***Mohinder Singh & Ors. Vs. State of Punjab***[18], the Hon'ble Supreme Court was concerned with the order of the High Court that, on its own or perhaps at the instance of the acquitted accused, refused to entertain an appeal against acquittal on the ground that there was no proper direction by the Government for filing an appeal. The Court held that there was undoubtedly a direction to the Public Prosecutor to file the appeal against the acquitted accused.

57. The Hon'ble Supreme Court did not approve the action of the High Court to reopen the matter to find out the manner and the various stages through which the sanction to file an appeal was channelized. The Court held that this was not proper for the High Court to have done so. The Court further held that whenever a Government seeks opinion, it consults various agencies, namely, Advocate General, Public Prosecutor, Legal

18 1985 (1) SCC 342

Remembrancer, and others. Afterward, the Government passes the order through the Secretary-in-charge. The Hon'ble Supreme Court disapproved of the High Court going deeper into the matter by making a roving inquiry about what had happened when the matter was considered and how the case was shaped.

58. While reversing the High Court, the Supreme Court held that various agencies may have expressed different views on whether or not an appeal against acquittal should be filed. But by and large, the final decision taken by the Under-Secretary prevailed, as a result of which the Public Prosecutor was authorized to file an appeal in the High Court against all the accused. Therefore, the High Court erred in holding that the appeal was not properly presented in such a situation.

59. In the present case, the Respondent, by referring to the notings in the files or to the movement of the files, seeks to challenge the decision of the State Government to institute this application/appeal. However, applying the law laid down in *Mohinder Singh* (supra), such an attempt will have to be resisted because there is not much qualitative difference between the reasoning that was reversed by the Hon'ble Supreme Court in *Mohinder Singh* (supra) and the reasoning now put forth before us by the Respondent in support of the contention that the

decision of the State Government to institute this application was itself a nullity.

60. For all the above reasons and additionally, also having regard to the legal position explained by the Delhi High Court, Punjab & Haryana High Court, and the Hon'ble Supreme Court, the institution of this application cannot be held incompetent on the alleged ground that the State Government's decision was a nullity being a product of non-application of mind or failure to take into account some of the relevant considerations.

61. The last contention on the issue of maintainability was that, in this case, the direction issued was to the Additional Public Prosecutor and not the Public Prosecutor. Mr. Desai emphasized that Section 378(1)(b) Cr.P.C. refers to "*Public Prosecutor*" and not to "*Additional Public Prosecutor.*" He submitted that in the scheme of Cr.P.C. or, for that matter, in the larger scheme of administration of the criminal justice system, the Public Prosecutor has a unique role. Therefore, the Legislature advisedly required the State Government interested in questioning an acquittal to direct only the Public Prosecutor to present an application seeking leave to appeal in Section 378(3) of Cr.P.C.

62. Mr. Desai submitted that if the Legislature intended to permit even an Additional Public Prosecutor to present such application or appeal, the Legislature would have said so in definite terms. Mr. Desai also referred to the definition of "*Public Prosecutor*" in Section 2(u) of Cr.P.C. and the scheme of the provisions in Section 24 of Cr.P.C. He submitted that even Section 24(1) of Cr.P.C. requires that for every High Court, the Central Government or the State Government shall, after consultation with the High Court, "*appoint a Public Prosecutor*" and may also appoint one or more Additional Public Prosecutors.

63. Mr. Dessai submits that it is quite clear that even after the State Government decides to institute an appeal against acquittal, the direction has to go only to a Public Prosecutor and not to an Additional Public Prosecutor to present such application/ appeal. On the other hand, Mr. Desai submits that any direction to an Additional Public Prosecutor is null. Therefore, presenting an application/appeal by an Additional Public Prosecutor is quite incompetent.

64. Section 378 Cr.P.C., no doubt, speaks of the Public Prosecutor presenting an appeal to the High Court against an acquittal based upon the direction of the State Government. However, the expression "*Public Prosecutor*" has been defined

under Section 2(u). There is nothing in the provisions of Section 378 of Cr.P.C. to suggest that the context requires that the definition of the expression "*Public Prosecutor*" in Section 2(u) of Cr.P.C. should not apply to the expression "*Public Prosecutor*" under Section 378 of Cr.P.C.

65. Section 2(u) of Cr.P.C. defines the expression *"Public Prosecutor*" and the same reads as follows:

> *"2(u) "Public Prosecutor" means any person appointed under section 24, and includes any person acting under the directions of a Public Prosecutor."*

66. Therefore, if the definition of the expression "*Public Prosecutor*" as found in Section 2(u) of Cr.P.C. is juxtaposed in Section 378(1)(b) of Cr.P.C., then any person appointed under Section 24 of Cr.P.C. will have to be regarded as a "*Public Prosecutor*" for Section 378 of Cr.P.C.

67. The definition in Section 2(u) of Cr.P.C. is in two parts. The first part provides that the expression "*Public Prosecutor*" means 'any person' appointed under Section 24. This is followed by a comma (,) and the inclusive part of the definition that refers to any person acting under the direction of a Public Prosecutor.

68. Mr. Desai, based upon the order appointing Mr. Pravin Faldessai as Additional Public Prosecutor, did attempt to contend that Mr. Faldessai was to work under the administrative control of the Advocate General and not act under the direction of a Public Prosecutor. Based on this, Mr. Desai attempted to urge that Mr. Pravin Faldessai was not a Public Prosecutor as defined under Section 2(u) of Cr.P.C. But in this case, we are not concerned with the later and the inclusive part of the definition of the expression '*Public Prosecutor'* in Section 2(u) of Cr.P.C. Even if we were to assume that there was no material that Mr. Faldessai was acting under the directions of a Public Prosecutor, the material on record establishes that Mr. Faldessai was appointed under Section 24 of Cr. P.C. Therefore, he is included in the first part of the definition in Section 2(u) of Cr.P.C. that defines a Public Prosecutor to mean "*any person appointed under Section 24*".

69. Thus construed, Mr. Pravin Faldessai was nevertheless a Public Prosecutor as defined under Section 2(u) of Cr.P.C. Consequently, the directions issued to him by the State Government and his institution of this application based upon such directions was in accord with the scheme of the provisions in Section 378(1)(b) r/w Section 2(u) and Section 24 of Cr.P.C.

70. There is nothing in the text or the context of section 378 of Cr.P.C. to exclude the definition in clause 2(u) of Cr.P.C. The object of providing a definition is to avoid the necessity of frequent repetitions in describing all the subject matter to which the word or expression so defined is intended to apply. [See ***Nahalchand v. Pancholi Co-operative Housing Society: AIR 2010 SC 3607***]. For instance, The Hon'ble Supreme Court held that when the word *'securities*' has been defined under the Securities Contracts (Regulations) Act,1956, its meaning would not vary when the same word is used at more than one place in the same statute, as otherwise, it will defeat the object of the definitive section. [See ***Bhagwati Developers v. Peerless 2013(9) SCC 584.****]*

71. Further, the definition in section 2(u) is in the form of '*means and includes'*, where again, the natural meaning of the '*means*' part of the definition is not narrowed down by the '*includes*' part. The definition of '*owner*' in Bihar Taxation on Passengers and Goods carried by Public service Motor Vehicles) Act, 1961 means the owner and includes bailee of a public carrier vehicle or manager acting on behalf of the owner. *In* ***Jagir Singh v. State of Bihar, A.I.R. 1976 SC 997***, the Court held that the definition could not be applied to exclude the actual owner and free him from liability. Even the word *'any*' also connotes

extension for *'any'* is a word of extensive meaning, and *prima facie*, its use excludes limitation as was held in ***Associated Indian v. W.B small Industries Development Corporation, 2007(3) SCC 607***. Section 2(u) also uses the expression '*any person appointed under section 24'.* Given this definition clause, the Legislature may not have thought it necessary to specify that even any Additional Public Prosecutor appointed under section 24 Cr. P. C. qualifies as a Public Prosecutor for purposes of Section 378 Cr.P. C.

72. Now coming to the decisions relied upon by Mr. Desai, we think that most of such decisions were distinguishable.

73. *Dr. J. M. Almeida* (supra) was a case where the learned Judicial Commissioner found that Mr. J. Dias, who presented the application seeking leave to appeal against acquittal, was only a Government Advocate and not a Public Prosecutor appointed under Section 24 of Cr.P.C. Despite this position, the learned Judicial Commissioner accepted the application/appeal because it was found that it was not a case where the Public Prosecutor was duly appointed but was not associated with preferring the appeal. Instead, it was found that it was a clear case where the performance of the statutory requirement was an impossibility because there was no existing Public Prosecutor at the time of

filing the appeal. In the present case, Mr. Pravin Faldessai is a validly appointed Public Prosecutor in terms of Section 2(u) read with Section 24 of Cr.P.C., and the application/appeal has been filed and presented by him.

74. In *Krishnan* (supra), the issue involved was whether the State could direct the Advocate General or the Additional Advocate General to present an appeal under Section 378(1) of Cr.P.C. without appointing them as Public Prosecutor under Section 24(1) of Cr.P.C. Admittedly, in the said matter, Advocate General or the Additional Advocate General had not been appointed as Public Prosecutor or Additional Public Prosecutor under Section 24 of Cr.P.C. It is not as if the application/appeal was filed or presented by the Advocate General in the present case. The application/appeal is filed/instituted by the Additional Public Prosecutor, a Public Prosecutor in terms of Section 2(u) read with Section 24 of Cr.P.C. Therefore, even the decision in *Krishnan* (supra) is inapplicable or, in any case, distinguishable.

75. In ***the Deputy Superintendent and Remembrancer of Legal Affairs, Bengal Vs. Gaya Prosad***[19] , the Division Bench of Calcutta High Court, was concerned with an appeal filed on behalf of the Government of Behar and Orissa against an order of

19 AIR 1914 Cal 560

acquittal presented by the Deputy Legal Remembrancer Bengal acting on behalf of the Legal Remembrancer of Bengal. The Division Bench found that the Deputy Legal Remembrancer who had presented the appeal was never appointed as Public Prosecutor, and therefore, the appeal instituted by him was incompetent. But, again, the facts in the present case are not at all comparable.

76. In *Devi Singh* (supra), the learned Single Judge of Rajasthan High Court was concerned with an appeal against acquittal presented by the Assistant Government Advocate on behalf of the State of Rajasthan. The Court found that the appeal was presented on 12.04.1963, and it was conceded that as of 12.04.1963, there was no direction from the State Government for filing the appeal. Consequently, the ex post facto sanction for filing the appeal was issued only on 30.10.1963. In such facts, the learned Single Judge of Rajasthan High Court held that the appeal which the Assistant Government Advocate presented on 12.04.1963 was incompetent and *ex post facto* sanction was of no avail because by then, the period of limitation for filing the appeal had already expired. But, again, no such issue arises in the present case. We have already held that the Additional Public Prosecutor instituted the application/appeal on 24.05.2021 based on the

direction of the State Government of the same date that was duly communicated to him.

77. *Uday Pratap Singh* (supra) was relied upon for the proposition that an executive order cannot, by operating retrospectively, destroy any right which had been crystallized. This principle does not attract any aspect of the present case because the decision to institute application/appeal has not been given any retrospective effect. This decision incidentally has not even destroyed any alleged right of the Respondent. The Respondent does not have a right that the State Government should not even decide to institute an appeal against his acquittal. The Respondent does not have any right that the Public Prosecutor should not even present an application seeking leave to appeal to this Court. Therefore, the decision in *Uday Pratap Singh* (supra) can be of no assistance to the Respondent's cause.

78. In *Yogesh Kochar* (supra), the learned Single Judge of Delhi High Court was concerned with a revision petition filed by the State against the order dated 30.08.2017 passed by the Additional Sessions Judge in Criminal Appeal No.67/2016 acquitting the accused/Respondent. The Court held that the revision petition was not maintainable because the State could have resorted to the remedy in section 378 Cr. P.C. Moreover, section 401(4) of

Cr.P.C. provides that where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. This decision, therefore, has no applicability in deciding whether this application/appeal is maintainable or not.

79. In ***State vs. Mushtaq Ahmed***[20] the Division Bench, found that the Public Prosecutor or the Advocate General had filed an appeal against an acquittal without any direction from the Government. Even after inquiries by the Bench, no such direction was produced. Therefore, in the absence of any direction from the Government, the Division Bench held that the appeal was not competent. Such is not the position in the present case, and therefore even this decision is inapplicable.

80. In ***Mansukhlal Vithaldas Chauhan vs. State of Gujarat***[21]***,*** the issue involved was the validity of "a sanction" under Section 197 of Cr.P.C. to prosecute a divisional accountant–a Government servant under the provisions of the Prevention of Corruption Act. In this context, the Hon'ble Supreme Court held that the validity of a sanction depends on the application of mind by the sanctioning authority to the facts of the case and the material and evidence collected during the

20 1988 (1) Crimes 322 (J & K)

21 1997 (7) SCC 622

investigation. The Court also held that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether the prosecution should be sanctioned or not. The mind of the sanctioning authority should not be under pressure by any external source to make a decision one way or the other. Since the Hon'ble Supreme Court found that the sanctioning authority had not independently applied its mind but had acted under dictation, the sanction was vitiated.

81. In the present case, Section 378 of Cr.P.C. does not contemplate any sanction from any authority before deciding to institute an appeal against an acquittal. Therefore, an attempt to introduce the requirement of "*sanction*" or "*previous sanction*" in Section 378(2) of Cr.P.C. by way of interpretation was resisted by the learned Single Judge of the Delhi High Court in paragraph 81 of *A. Raja (supra)*. The learned Single Judge observed that the words "*previous sanction*" are conspicuously absent in Section 378(2) of Cr.P.C. Similarly, even the expressions like "*formation of opinion*" or "*how it is arrived at*" are conspicuously absent in Section 378(2) of Cr.P.C.

82. Apart from the reasoning above, we think that the issue of *"sanction*" under Section 197 of the Prevention of Corruption Act or under any other similar provision is not comparable to the

point of deciding whether or not to prefer an appeal against an acquittal. Therefore, these two decisions cannot be subjected to the same test of judicial review. In any case, we have already found that even the decision of instituting an appeal against acquittal, in the present case, cannot be said to be a product of non-application of mind or the result of the State Government acting under the dictation of some extraneous authority. Therefore, even the decision in *Mansukhlal (supra)* can be of no assistance to the Respondent in the present matter.

83. We do not think that this application can be dismissed on the preliminary grounds urged on behalf of the Respondent for all the above reasons. Accordingly, the motion seeking such dismissal is hereby rejected. We come to the application's merits seeking leave to appeal against the impugned judgment and order in terms of Section 378(3) of Cr.P.C.

84. In ***State of Maharashtra vs. Sujay Poyarekar***[22], the Hon'ble Supreme Court, after referring to the provisions of Section 378(3) of Cr.P.C., has held that in deciding the question of 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

22 2008 (9) SCC 475

not whether the order of acquittal would or would not be set aside.

85. The Hon'ble Supreme Court held that it could not 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 allowed by the trial court must be allowed. But at that stage, the Court would not enter into the 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. [see paragraph 21] Mr. Desai contended that this Court should consider a grant of leave only if the State succeeds in making out a case of "perversity" and not otherwise. Accordingly, this contention stands against the Respondent in paragraph 21 of *Poyarekar (supra)*.

86. *Poyarekar (supra)*, refers to ***Sita Ram vs. State of U.P.***[23], in which the Hon'ble Supreme Court held that a single right of appeal is more or less a universal requirement of the guarantee of life and liberty rooted in the concept that men are fallible and that making assurance doubly sure, before irrevocable deprivation of life or liberty comes to pass, a full-scale reexamination of the

23 1979 (2) SCC 656

facts and the law is made an integral part of fundamental fairness or procedure. After such reference, the Hon'ble Supreme Court held that it was aware and mindful that such observations were made in connection with an appeal at the instance of an accused. The Hon'ble Supreme Court proceeded to add that the principle underlying the above rule lies in the Doctrine of Human Fallibility that "Men are fallible" and "Judges are also men." Keeping in view the said object, this principle had to be understood and applied.

87. In *Poyarekar (supra)*, the Hon'ble Supreme Court held that every crime is considered an offense against society as a whole and not against an individual. However, it is the individual who is the ultimate sufferer. Therefore, the Hon'ble Supreme Court held that it is the duty of the State to take appropriate steps when an offense is committed.

88. Paragraph 24 of *Poyarekar* (supra) is important in the context of appreciating the consideration that must go into deciding whether leave is to be granted or refused in terms of Section 378(3) of Cr.P.C., and therefore, this paragraph is transcribed below for the convenience of reference:-

> *"**24.** .....no leave should be refused by the appellate Court against an order of acquittal recorded*

> *by the trial court. We only state that in 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 reappreciation, 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."*

89. Thus, the test at the stage of consideration of an application for grant of leave to appeal in terms of Section 378(3) of Cr.P.C. is not whether the acquittal recorded by the trial Court is *"perverse*" or whether a certain case has been made out for setting aside of the acquittal. As explained by the Hon'ble Supreme Court in *Poyarekar* (supra), upon application of mind, the Court has to 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. While it is not the law that the Appellate Court should never refuse leave against

acquittal recorded by the trial Court, the Hon'ble Supreme Court has held that in such cases, the Appellate Court must consider the relevant material, sworn testimonies of the prosecution witnesses, and record reasons why leave sought should not be granted, and the order of acquittal recorded by the trial Court should not be disturbed. *At the same time, however, if arguable points have been raised, if the material on record discloses deeper scrutiny and reappreciation, review, or reconsideration of evidence, the appellate Court must grant leave as sought and decide the appeal on merits.*

90. *Poyarekar* (supra) is also an authority for the proposition that where the appellate Court declines leave under Section 378(3) of Cr.P.C., it must record its reasons (maybe in brief) in support of its decision. Mr. Desai submitted that this principle should apply even where the Appellate Court decides to grant leave to appeal under Section 378(3) of Cr.P.C. He relied on the ***State of Orissa Vs. Dhaniram Luhar***[24], in support of this submission.

91. Now *Dhaniram Luhar* (supra) is also an authority for the proposition that the appellate Court must record the reasons for refusing leave under Section 378(3) of Cr.P.C. In paragraph 6, the

24 (2004) 5 SCC 568

Hon'ble Supreme Court held that the trial Court was required to appraise the entire evidence and then conclude carefully. If the trial Court was at the lapse in this regard, the High Court was obliged to undertake such an exercise by entertaining the appeal. In the facts before the Hon'ble Supreme Court, it was found that the questions involved before the trial Court were not trivial. The effect of the admission of the accused in the background of the testimony of official witnesses and the documents exhibited needed adjudication in an appeal. Moreover, the Hon'ble Supreme Court found that the High Court had not given any reasons for refusing to grant leave to file an appeal against acquittal and the High Court was completely oblivious to the fact that by such refusal, close scrutiny of the order of acquittal, by the appellate forum has been lost once and for all.

92. In *Dhaniram Luhar* (supra), the Hon'ble Supreme Court, therefore, held that the reasons, howsoever brief, must be given by the High Court for refusal to grant leave under Section 378(3) Cr.P.C. The absence of reasons renders the High Court's order unsustainable. The reason is the heartbeat of every conclusion, and without the same, the order becomes lifeless. Hence, the right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements

of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "*inscrutable face of a sphinx*" is ordinarily incongruous with a judicial or quasi-judicial performance.

93. Now, while there can be no dispute whatsoever that reasons howsoever brief are must when the appellate Court declines leave under Section 378(3) of Cr. P.C. We are not too sure whether such principle should apply when leave is to be granted under Section 378(3) of Cr.P.C. However, deferring to the submission of Mr. Desai, we propose to indicate most briefly the reasons on account of which we propose to grant leave to appeal under Section 378(3) of Cr.P.C.

94. As indicated in *Poyarekar* (supra), if arguable points have been raised and the material on record warrants deeper scrutiny and reappreciation, review, or reconsideration of evidence, the appellate Court must grant leave as sought and decide the appeal on merits. At this stage, the appellate Court must apply its mind and consider whether a *prima facie* case has been made out and not whether the order of acquittal would or would not be ultimately set aside after the final hearing of the appeal.

95. *Poyarekar* (supra) also lays down that the Court would not enter into minute details of the prosecution evidence at this stage. Further, the test for the grant of leave is not whether the acquittal order is "*perverse*." The observations in paragraph 22 of *Poyarekar* (supra), in the context of earlier observations in *Sita Ram Vs State of U.P.* (supra) applying also to a case of an appeal against acquittal, will also have to be borne in mind.

96. Therefore, by applying the above principles, we are satisfied that the case has been made out for grant of leave under Section 378(3) of Cr.P.C. in this matter. For this purpose, we have perused the impugned judgment and order and the reasoning reflected therein.

97. According to us, the reasoning line reflected in the acquittal order requires deeper scrutiny and reappreciation. Though Mr. Desai pointed out that the learned Additional Sessions Judge had upheld most of the prosecution's objections based on Section 53A of the Evidence Act, from the line of reasoning in the acquittal order, we believe that further examination is necessary to determine whether the material that Section 53A of the Evidence Act shuts out as irrelevant, has impacted the acquittal. However, this is mainly in the context of some observations and comments in the acquittal order that need not be elaborated.

98. Further, we believe that deeper scrutiny and reappreciation may be necessary of the evidence of the Respondent's SMS, Whatsapp, and Email messages sent to the victim. This examination, we believe, is essential for several reasons that need not be elaborated. Suffice to state that this evidence has to be evaluated from the context of corroboration of the victim's testimony in the matter. Based on this evidence, perhaps, some of the learned Additional Sessions Judge inferences about the victim's conduct may also need a revisit. The inference from the victim's conduct of consulting some lawyers before lodging her complaint may also require a revisit. Finally, the contention about the alleged admissions in the messages or the proper scope of such statements also requires consideration. These are brief reasons, not intended to be exhaustive for a moment. These reasons are indicated in deference to the submissions of Mr. Desai. But at this stage, we might have only preferred to record that a *prima facie* case has been made out and arguable issues arise in the matter.

99. At this stage, we do not think that it would be appropriate to give any elaborate reasons other than those referred to above because, as was explained by the Hon'ble Supreme Court, the test at this stage is 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 ultimately be set aside. At this stage,

the Court is also not expected to go into the minute details of the prosecution evidence. At this stage, if the material on record discloses the necessity of deeper scrutiny and reappreciation, review, or reconsideration of evidence, the appellate Court must grant leave as sought for and decide the appeal on merits.

100. Therefore, for all the above reasons, we not only reject the preliminary objections raised on behalf of the Respondent regarding the maintainability of this application but further allow the application and grant leave under Section 378(3) of Cr.P.C. because we are satisfied that a *prima facie* case has been made out and arguable points have been raised in the matter.

101. In the present case, we find that a composite application has been filed seeking leave to appeal under Section 378(3) of Cr.P.C. and to appeal against the impugned judgment and order. Rule 19 of Chapter XXVI of the Bombay High Court Appellate Side Rules, 1960, *among other things,* provides that an application for leave under Section 378(3) should be a composite application giving necessary facts and circumstances of the case along with the grounds which may be urged in the appeal with a prayer to entertain the appeal. If the leave to appeal is granted, the composite application presented shall be entered in the register of appeals and numbered accordingly.

102. The above Rule 19 was considered by the Division Bench of this Court in the ***State Vs Sunny Singh Khanuja and another Criminal Misc. Application No.154 of 2010 and Stamp Number Main No.1534 of 2010*** (A. S. Oka, J as His Lordship then was and F. M. Reis, J). The order holds that though the title of the rule indicates that it applies to appeals against acquittals by private parties, on a plain reading of the rule, it is apparent that it applies to all applications filed under Section 378(3) of the Code where there is a prayer for grant of leave. The Bench held that given Rule 19, there is no requirement to file a separate memorandum of appeal. The application under Section 378(3) should be a composite application giving necessary facts and circumstances of the case and the grounds that may be urged in the appeal. If the Court grants the leave to appeal, the composite application must be entered in the register of appeals and the said application must be numbered as an appeal. Therefore, the Registry was directed to accept a composite application under Section 378(3) as contemplated by Rule 19, without insisting on the appellant filing a separate memorandum of appeal.

103. In ***Manikrao and others Vs Vasantrao Vishwasrao Charjan and others***[25]**,** another coordinate Bench (B. P.

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Dharmadhikari and P. N. Deshmukh, JJ), in the context of Rule 19 of Chapter XXVI, observed that after leave is granted in terms of provisions contained in High Court Appellate Side Rules (supra), the petition seeking leave itself becomes an appeal as the High Court entertains it.

104. There are instances before this Bench where no sooner leave to appeal under Section 378(3) is granted, the appeal itself is admitted with a direction for action under Section 390 of Cr.P.C. [*See* ***Criminal Application (Main) No.3 of 2015 decided on 09.02.2015, Criminal Application (Main) No.84 of 2015 decided on 13.04.2015, Criminal Application (Main) No.307 of 2014 decided on 06.04.2015*** *].*

105. Even in the ***State of Rajasthan Vs. Ramdeen and others***[26]***,*** the Hon'ble Supreme Court held that it would be perfectly in order under the law if a composite application is made, giving the necessary facts and circumstances of the case and the grounds that may be urged in the appeal with a prayer for leave to entertain the appeal. As a matter of law, an application for leave to entertain the appeal does not need to be lodged first, and only after the grant of leave by the High Court an appeal may be preferred against the order of acquittal.

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26 (1977) 2 SCC 630

106. Therefore, now that we have granted leave under Section 378(3) of Cr.P.C., we admit the appeal and direct the Registry to enter the application in the register of appeals and number the same accordingly. In short, the Registry should take further steps as required by Rule 19 of Chapter XXVI of the Bombay High Court Appellate Side Rules, 1960, at the earliest.

107. Section 390 of Cr.P.C. provides that when an appeal is presented under Section 378, the High Court may issue a warrant directing that the accused be arrested and brought before it, or any subordinate Court and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail. However, the power to issue a warrant is discretionary.

108. The record bears out that the Respondent had been enlarged on bail subject to certain terms and conditions. There is nothing on record to suggest that the Respondent had at any stage breached the terms and conditions subject to which he was enlarged on bail. Therefore, according to us, no case is made out for issuing any warrant under Section 390 of Cr.P.C., but at the same time, we direct the Respondent to appear before the Trial Court within 15 days from today so that the Trial Court can

admit him to bail on the similar terms and conditions subject to which he had been admitted to bail during the trial.

109. Upon Respondent appearing before the trial Court within 15 days from today and the trial Court admitting him to bail, the trial Court should make appropriate orders for the release of the Respondent's passport, which is presently in the custody of the Registry of the trial Court, for the limited purpose of enabling the Respondent to renew the same. The trial Court should also make proper orders to ensure that the Respondent redeposits the renewed passport in the Trial Court's Registry no sooner than renewed. The Respondent's motion for ad-interim relief in Criminal Writ Petition No.26 of 2022 is also partially addressed as above. Accordingly, a formal rule is issued in the Criminal Writ Petition.

110. The Appeal and the Criminal Writ Petition are ordered to be tagged and placed for a final hearing once the paper books are prepared.

R. N. LADDHA, J **M. S. SONAK, J**