Bombay High Court Mr. Balasaheb Rangnath Khade vs The State Of Maharashtra & Ors on 21 September, 2011 Bench: V.M. Kanade, A.M. Thipsay 1 APEAL Nos.991/11, 992/11 331/11 & 854/11

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.991 OF 2011
WITH
CRIMINAL APPEAL NO.992 OF 2011

Mr. Balasaheb Rangnath Khade ... Appellant.

V/s

The State of Maharashtra & Ors. .... Respondents.

Mr. R.V. Bansode for the appellant.

Mr. P.A. Pol, P.P. & F.R. Shaikh, APP for the State.

Mr. A.V. Anturkar, Senior Counsel appointed as amicus curiae.

Mr. Sanjog Parab, advocate appointed as amicus curiae.

WITH
CRIMINAL APPEAL NO.331 OF 2011

Nilesh Nana Harkulkar .... Appellant

V/s

Appaswamy Sabarimuutu
Harijan & Ors .... Respondents.

Mr. A.P. Mundargi, Senior Counsel i/b Ms. Swapna Kode for
the appellant.

Mr. P.A. Pol, P.P. & F.R. Shaikh, APP for the State.

Mr. A.V. Anturkar, Senior Counsel appointed as amicus

curiae.

Mr. Sanjog Parab, advocate appointed as amicus curiae.

WITH
CRIMINAL APPEAL NO.854 OF 2011

Manohar Jaya Shetty ig .... Appellant.

v/s

State of Maharashtra
(Through MRA Marg Police Station)
and Anr. ..... Respondents.

Mr. Shirish Gupte, Senior Counsel i/b Ms. Racheeta Dhuru for the appellant.

Mr. S.V. Marwadi with Ms Sunita Sharma Tiwari & Vinay Kutti for respondent No.2.

Mr. P.A. Pol, P.P. & F.R. Shaikh, APP for the State.

Mr. A.V. Anturkar, Senior Counsel appointed as amicus curiae.

Mr. Sanjog Parab, advocate appointed as amicus curiae.

CORAM: V. M. KANADE &
A.M. THIPSAY, JJ.

DATE : 21st September, 2011 APEAL Nos.991/11, 992/11 331/11 & 854/11 ORAL JUDGMENT: (Per V.M. Kanade, J.) 1. An interesting question which falls for consideration before this Court is:- "Whether a"victim" can file an appeal against the order of acquittal passed by the Trial Court without filing an application for leave to file appeal in this Court?" 2. By virtue of Amendment Act No. 5 of 2009, inter alia, provisions of section 372 of the Criminal Procedure Code ("Cr.P.C.") were amended and a proviso was added to the said section providing for an appeal against the order of conviction and two other categories of cases. Section 372 of Cr.P.C with added proviso reads as under:- "372. No appeal to lie unless otherwise provided.- No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code APEAL Nos.991/11, 992/11 331/11 & 854/11 or by any other law for the time being in force: [Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.]" SUBMISSIONS: 3. On the one hand, it has been submitted by number of Senior Counsels, that this proviso cannot be read in isolation and the proviso will have to be read in the context of Chapter XXIX and the procedure which has to be followed while filing an appeal, as laid down under the said Chapter. It is, therefore, submitted that though a separate provision has not been made in section 378 of Cr.P.C., in cases where an appeal is filed by the victim against the order of acquittal, he should obtain leave of this Court as is done by the two 1 Ins. by Act 5 of 2009 sec. 29 (w.e.f. 31.12.2009) APEAL Nos.991/11, 992/11 331/11 & 854/11 categories of appeals which are mentioned in sub-sections (1) and (2) of Section 378. 4. Shri Marwadi, the learned Counsel appearing on behalf of Respondents in Criminal Appeal No.854 of 2011 submitted, firstly, that if the provisions which are laid down in Chapter XXIX are not taken into consideration or are not read alongwith the proviso, it would lead to an anomalous situation. He then submitted that no period of limitation is prescribed in the proviso in respect of appeals which are to be filed by the victim in the said categories of cases mentioned in the proviso. Secondly, he submitted that there is no corresponding provision as contemplated under section 390 of the Cr.P.C. and, therefore, even if this Court entertains the appeal under the proviso filed by the victim, the Court would not have benefit of directing action being taken under section 390. Thirdly, he submitted that the legislature has merely provided that the right is being given to the victim by virtue of the proviso and, therefore, the proviso, though created substantive right, the procedure as APEAL Nos.991/11, 992/11 331/11 & 854/11 to how the appeal is to be filed has to be construed from the provisions which are given in Chapter XXIX. He

fairly invited our attention to the two judgments of the learned Single Judges of this Court and one judgment of the Division Bench of the Delhi High Court in which a view has been taken that leave as contemplated under sub-section (3) of Section 378 is not necessary. He also submitted that the Delhi High Court also has taken into consideration the question about limitation in filing such cases. 5. Shri Parab, the learned Advocate who has been asked to assist this Court on this point, relying on the judgments of Gauhati High Court, Gujarat High Court, Patna High Court and Punjab and Haryana High Court submitted that in all these cases, the said High Courts also have taken the view that while entertaining the appeal of victim, it is necessary to first obtain the leave of the Court. 6. Shri Shirish Gupte, the learned Senior Counsel submitted that, according to him, in construing the said APEAL Nos.991/11, 992/11 331/11 & 854/11 proviso and the other provisions under the said Act, it was necessary to file an application for leave. He submitted that while interpreting the proviso to the section, one has to take into consideration the real purpose for which the proviso is inserted but, at the same time, it is submitted that the proviso in this case did not create unqualified right in favour of the victim and for the purpose of interpreting the real meaning of the proviso, guidance has to be taken from the main section. Secondly, he submitted that the proviso to section 372 does not make any distinction between right to prefer an appeal against the order of acquittal and the right to prefer an appeal against the order of conviction. He further submitted that the said proviso also does not limit the procedure laid down under Chapter XXIX of the Cr.P.C. and, lastly, he submitted that the proviso has to be read as a substantive provision but so far as procedural part is concerned, reliance has to be placed on further procedure which has to be followed in case of filing appeals under Chapter XXIX. Shri Gupte, the learned Senior Counsel, then invited our attention to provisions of section 378, sub-section APEAL Nos.991/11, 992/11 331/11 & 854/11 (1) and (2) and also to sub-section (3). He submitted that though no consequential amendment was made to section 378 after the proviso was added to section 372, the procedure which is prescribed under sub-sections (3), (4) and (5) has to be read into the said proviso. He then submitted that so far as the period of limitation is concerned, the said proviso to section 372 cannot be read in isolation and that the proviso, therefore, has to be read alongwith the other provisions which are mentioned in Chapter XXIX. He submitted that Privy Council and the Apex Court had an occasion to consider the real purpose and meaning which had to be given to the proviso to the section and, in this context, he relied upon the judgment of the Privy Council in Madras & Southern Mahratta Ry. Co. Bezwada Municipality1, judgment of the Apex Court in Dwarka Prasad vs. Dwarka Das Saraf2, judgment of the Apex Court in S. Sundaram Pillai etc. vs. V.R. Pattabiraman 3 and one another judgment of the Apex Court in Maulavi Hussein Haji Abraham Umarji vs. State of Gujarat and another 4. 1 AIR (31) 1944 Privy Council 71 2 AIR 1975 SC 1758 3 AIR 1985 SC 582 4 AIR 2004 SC 3946 APEAL Nos.991/11, 992/11 331/11 & 854/11 7. Shri Ashok Mundargi, the learned Senior Counsel submitted that no leave is necessary in cases of appeals which are filed by the victim. He submitted that the proviso to main section

372 carved out an exception to the normal rule which stated that no appeal could be filed unless as stated in the said Chapter. ig He submitted that the proviso carved out an exception and in cases of appeals filed by the victim, the restriction of the procedure in the said Chapter is not required to be followed. He invited our attention to the provisions of section 378. He submitted that leave could be obtained only in cases which are mentioned in sub-section (1) and (2) of section 378. He submitted that even while considering the type of leave which is to be taken, sub- section (4) states that in cases of appeal filed by the State against the order of acquittal, leave has to be taken, whereas in cases of appeals by the complainant, special leave has to be taken by the complainant. He submitted that, therefore, distinction is made in cases of leave to be taken by the State and in cases of special leave to be APEAL Nos.991/11, 992/11 331/11 & 854/11 obtained by the complainant. He submitted that, though, no distinction is made very often by the Court while granting leave in both these cases, the legislature in its wisdom had thought it fit to make that distinction in the said two provisions. He submitted that the legislature in its wisdom had thought it fit not to put any such restriction in respect of cases where appeal is filed by the victim. He also invited our attention to the aims and objects of the Amendment Act and pointed out that the said amendment was made to give effect to the aims and objects which were mentioned before the amendment was made and the legislature, therefore, had thought it fit to bring the victim's appeal on par with the appeal filed by the accused. He submitted that the legislature, at the same time, did not believe that the victim or any of his relatives should be given any kind of right to dabble in investigation or in the trial and that right was specifically given to the State which had every right in investigation of the case and in the prosecution and the only amendment which was made in Section 24 of the Cr.P.C. in respect of the right of the prosecution to conduct the case APEAL Nos.991/11, 992/11 331/11 & 854/11 was that the victim could then apply and assist the Public Prosecutor. He submitted, therefore, even in that provision the only thing which the victim could do was to assist the Public Prosecutor. 8. Shri Anil Anturkar, the learned Senior Counsel who has been appointed as amicus curiae submitted, firstly, that while construing the proviso which is inserted by the Amendment Act, Heydon's rule has to be followed and, therefore, it is necessary to take into consideration the historical background and the mischief which is sought to be remedied by the said proviso. He submitted that for that purpose it is necessary to take into consideration what was the position prior to the introduction of the said section. He submitted that prior to the proviso being inserted, the victim practically had no right whatsoever either in the Trial Court or before the Appellate Court and, at the highest, he had a right to file revision which could be entertained by the Court. In this connection he invited our attention to the observations made by the Apex Court in Zahira Habibulla H. APEAL Nos.991/11, 992/11 331/11 & 854/11 Sheikh and another vs. State of Gujarat and others 1 which is known as "Best Bakery Case" particularly in paras 22, 54, 56 and 68 and also to the judgment of the Apex Court in V.K. Ashokan Vs. Assistant Excise Commissioner and Others2. He also relied on the Law Commission Report and

the observations made by the Law Commission in the said Report. Secondly, he submitted that right of appeal is a substantive right. He then invited our attention to the provisions of Section 374 and submitted that the wording used in the said Section is that the accused may file appeal to the Supreme Court. He submitted that if comparison is made with the provisions in the proviso, the word used in the proviso is "shall". He submitted that, similarly, the legislature had not given any right to the victim to file an appeal against the order of inadequate sentence and that right was only given to the State under section 377. He submitted that, therefore, the legislature had given right of appeal only in three cases. He also invited my attention to the judgment of the Full Bench of this Court in Rahul Sharad 1 (2004) 4 SCC 158 2 (2009) 14 SCC 85 APEAL Nos.991/11, 992/11 331/11 & 854/11 Awasthi vs. Ratnakar Trimbak Pandit & others1 and more particularly para 11 of the said judgment. He also invited our attention to the judgments in S. Sundaram Pillai vs V.R. Pattabiramam 2 and in Kunhayammed and Others vs. State of Kerala and another3 REASONS: 9. After having heard the Counsel on both sides at length, I respectfully agree with the view taken in the the two judgments of the learned Single Judges of this Court and one judgment of the Division Bench of the Delhi High Court that leave as contemplated under sub-section (3) of Section 378 is not necessary when the victim prefers an appeal against any order passed by the Court acquitting the accused or convicting him for a lesser offence or imposing inadequate compensation. 10. Since my learned brother is taking a contrary view, I 1 2004(5) Bom. C.R. 50 2 AIR 1985 SC 582 3 (2000) 6 SCC 359 APEAL Nos.991/11, 992/11 331/11 & 854/11 proceed to give my reasons for my view concurring with the view taken by the two learned Single Judges of this Court and that of the Division Bench of the Delhi High Court. 11. In my view, there is much substance in the submissions advanced by the learned Senior Counsel Shri Mundargi and the learned Senior Counsel Shri Anil Anturkar. In my view, the said submissions will have to be accepted for the following reasons. 12. Before, I consider the rival submissions, it is necessary to take into consideration the Amendment Act No.5 of 2009. It is a settled position in law that, while construing and interpreting the provisions of the statute, it is profitable and useful to look at the objects and reasons of the Act since the intention of the legislature is reflected in it while bringing about the said amendment in the statute. The normal rule is that if the language used in the amendment is plain and unambiguous then, in such cases, plain gramatical meaning has to be given to the said amendment and the courts APEAL Nos.991/11, 992/11 331/11 & 854/11 should refrain itself from adding or subtracting something in the said amendment. Similarly, the Privy Council and the Apex Court in several cases have examined what is the true import and meaning of the proviso to the section, which is introduced by way of amendment. There are several judgments of the Apex Court wherein it has been held that while interpreting any particular provision or proviso, it is necessary to consider what was the mischief which was prevailing before the amendment was made and what was the mischief which was sought to be remedied by the said amendment. 13. The Apex Court in B.K. Ashokan vs. Assistant Excise Commissioner and Others 1 has considered

the settled principle of interpretation of statute when an amendment is made to the Act or when a new enactment is made and it is observed that Heydon's rule is often utilized in interpreting the same. The Apex Court in para 37 of the said judgment has observed as under:- 1 (2009) 14 SCC 85

"37. It is a settled principle of

interpretation of statute that when an amendment is made to an Act, or when a new enactment is made, Heydon's rule is often utilized in interpreting the same. [See Philips Medical Systems (Cleveland) Inc. v. Indian MRI Diagnostic and Research Ltd. [(2008) 10 SCC 227 : (2008)3 SCC (Cri) 764 : (2008) 13 Scale 1]." For the purpose of construction of Rule 6(30), as it stands now, the Court is entitled to look to the legislative history for the purpose of finding out as to whether the mischief prior to such amendment is sought to be rectified or not. Applying Heydon's rule, we have no other option but to hold that such was the intention on the part of the rule-making authority." 14. It will be necessary to examine what was the law before the amendment Act was passed. It is common ground that prior to the said proviso being inserted, a victim did not have any right in the entire process of investigation and prosecution of the accused. At the highest, he would have APEAL Nos.991/11, 992/11 331/11 & 854/11 right to file revision application against the order of acquittal, and, in the revision also, the power of revisional court under section 401 was very restricted and sub-section (3) of Section 401 clearly lays down that the revisional court cannot convert the order of acquittal into the order of conviction and, therefore, the only relief which could be claimed by the victim in revision was to order either re- inquiry or re-trial and remand. The Apex Court, therefore, in several cases had to intervene and had to transfer the investigation and in some cases transferred the cases to some other State in order to ensure that there is fair trial and even the victim is properly represented. The Apex Court in Zahira Habibulla H. Sheikh and another vs. State of Gujarat and Others1 which is known as "Best Bakery Case" transferred the trial from the State of Gujarat to the State of Maharashtra and the said case was heard and decided in the State of Maharashtra. While deciding the said case the Apex Court has observed as under:- "22. It was submitted by the appellants that 1 (2004) 4 SCC 158 APEAL Nos.991/11, 992/11 331/11 & 854/11 in view of the atmosphere in which the case was tried originally there should be a direction for a trial outside the State in case this Court thinks it so appropriate to direct, and evidence could be recorded by video conferencing so that a hostile atmosphere can be avoided. It is further

submitted that the fresh investigation should be directed as investigation already conducted was not done in a fair manner and the prosecutor did not act fairly. If the State's machinery fails to protect citizen's life, liberties and property and the investigation is conducted in a manner to help the accused persons, it is but appropriate that this Court should step in to prevent undue miscarriage of justice that is perpetrated upon the victims and their family members." "54. Though justice is depicted to be blind- folded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the Court away from the truth of the cause or lis before it, in APEAL Nos.991/11, 992/11 331/11 & 854/11 disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of Courts and erode in stages faith inbuilt in judicial system ultimately ig destroying the very justice delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings." "56. As pithily stated in Jennison v. Backer [(1972) ALL ER 997]: All ER p.1006d),"The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope". Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or APEAL Nos.991/11, 992/11 331/11 & 854/11 can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble (2003 (7) SCC 749)." "68. If one even cursorily glances through the records of the case, one gets a feeling that the justice delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge. The investigation appears to be perfunctory and anything but impartial without any definite object of finding out the truth and bringing to book those who were responsible for the crime. The public prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court. The Court in turn appeared to be a silent spectator, mute to the manipulations and APEAL Nos.991/11, 992/11 331/11 & 854/11 preferred to be indifferent to sacrilege being committed to justice. The role of the State Government also leaves much to be desired. One gets a feeling that there was really no seriousness in the State's approach in assailing the Trial Court's judgment. This is clearly indicated by the fact that the first memorandum of appeal filed was an apology for ig the grounds. A second amendment was done, that too after this Court expressed its unhappiness over the perfunctory manner in which the appeal was

presented and the challenge made. That also was not the end of the matter. There was a subsequent petition for amendment. All this sadly reflects on the quality of determination exhibited by the State and the nature of seriousness shown to pursue the appeal. Criminal trials should not be reduced to be the mock trials or shadow boxing or fixed trials. Judicial Criminal Administration System must be kept clean and beyond the reach of whimsical political wills or agendas and properly insulated from discriminatory standards or yardsticks of the type prohibited by the mandate of the Constitution." APEAL Nos.991/11, 992/11 331/11 & 854/11 15. It would also be relevant at this stage to refer to the judgment of the Apex Court in Suga Ram alias Chhugaram vs. State of Rajasthan and Others1 In the said case, initially, an appeal against acquittal was filed by the State and revision application was also filed by the victim. This was prior to the proviso being inserted by the Amendment Act No.5 of 2009. The matter then went to the Apex Court and the Apex Court even at this stage set aside the order of acquittal which was passed in the said appeal and the consequently dismissed the revision application filed by the victim since the appeal against acquittal was dismissed and the matter was remanded with direction to the High Court to consider it in accordance with law. In Suga Ram alias Chhugaram (supra) the Apex Court in para 9 has observed as under:- "9."29..... 30..... 31. It is to be seen whether the broad 1 (2006) 8 SCC 641 APEAL Nos.991/11, 992/11 331/11 & 854/11 spectrum spread out of Article 136 fills the bill from the point of view of "procedure established by law". In express terms, Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on this Court to interfere in suitable cases. The discretionary dimension is considerable but that relates to the power of the Court. Article 136 is a special jurisdiction. It is residuary power; it is extraordinary in its amplitude, its limits, when it chases injustice, is the sky itself. This Court functionally fulfills itself by reaching out to injustice wherever it is and this power is largely derived in the common run of cases from Article 136. Is it merely a power in the court to be exercised in any manner it fancies? Is there no procedural limitation in the manner of exercise and the occasion for exercise? Is there no duty to act fairly while hearing a case under Article 136, either in the matter of grant of leave or, after such grant, in the final disposal of the appeal? There cannot be even a shadow of doubt that there is a procedure necessarily implicit in the power vested in this Court. The founding fathers unarguably intended in the APEAL Nos.991/11, 992/11 331/11 & 854/11 very terms of Article 136 that it shall be exercised by the judges of the highest Court of the land with scrupulous adherence to settled judicial principles, well established by precedents in our jurisprudence." 16. The law Commission in its 154th Report has laid special emphasis in Chapter XV on the subject of Victimology and has observed that right from the ancient Babylonian Code of Hammurabi (about 1775 BC), it has been observed that victim of crime was left with no remedy except to sue for damages in the civil court. It is also noted that in Anglo- Saxon legal system an English Magistrate advocated state compensation to be given to the victims of crime and, accordingly, programme was set up in Britain in the year 1964. A reference also was made to the declaration made by

the General Assembly of the United States Nations in its 96th plenary meeting on 29th November, 1985, laying down basic principles of justice for victims of crime and abuse of power, recognizing that millions of people throughout the world suffer harm as a result of crime and the abuse of APEAL Nos.991/11, 992/11 331/11 & 854/11 power and that the rights of these victims have not been adequately recognized and that frequently their families, witnesses and other who aid them are unjustly subjected to loss, damage or injury. In this Report, apart from referring to earlier Law Commission Reports, reference is also made to Justice V.R. Krishna Iyer, Human Rights- A Judge's Miscellany (1995); V.N. Rajan Victimology in India (1995); R.I. Mawby and S. Walklate, Critical Victimology (1994); Law Reform Commission of Canada (1974) and other essays and reports on this subject. 17. The celebrated "Heydon's Rule" or "Mischief Rule" reads as under:- "1st - What was the law before making of the Act, 2nd - What was the mischief and defect for which the previous law did not provide. 3rd - What remedy the Parliament had resolved and appointed to cure the APEAL Nos.991/11, 992/11 331/11 & 854/11 disease of the commonwealth, and 4th - The true reason of the remedy." (Principles of Statutory Interpretation by Justice G.P.Singh, 11th Edition 2008.) 18. It appears that as a result of prevailing conditions as they existed prior to the amendment when instances had come to light where ig the accused, who had tremendous influence, both, political, financial and otherwise, could get away after committing crime and the victim was very often was left without remedy either of filing appeal or challenging the inadequate compensation which was awarded, the legislature appears to have taken cognizance of the pronouncements and observations made by the Apex Court in various judgments; one of which is referred to herein (Best Bakery Case) and passed Amendment Act which takes into consideration various aspects which may be seen from the Statement of Objects and Reasons which reads as under:- "Statement of Objects and Reasons.- The need to amend the Code of Criminal Procedure, 1973 to ensure fair and speedy APEAL Nos.991/11, 992/11 331/11 & 854/11 justice and to tone up the criminal justice system has been felt for quite sometime. The Law Commission has undertaken a comprehensive review of the Code of Criminal Procedure in its 154th report and its recommendations have been found very appropriate, particularly those relating to provisions concerning arrest, custody and remand, procedure ig for summons and warrant-cases, compounding of offences, victimology, special protection in respect of women and inquiry and trial of persons of unsound mind. Also, as per the Law Commission's 177th report relating to arrest, it has been found necessary to revise the law to maintain a balance between the liberty of the citizens and the society's interest in maintenance of peace as well as law and order. 2. The need has also been felt to include measures for preventing the growing tendency of witnesses being induced or threatened to turn hostile by the accused parties who are influential, rich and powerful. At present, the victims are the worst sufferers in a crime and they don't have much role in the Court proceedings. APEAL Nos.991/11, 992/11 331/11 & 854/11 They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system. The application of technology in investigation, in-

quiry and trial is expected to reduce delays, help in gathering credible evidences, minimise the risk of escape of the remand prisoners during transit and also facilitate utilisation igof police personnel for other duties. There is an urgent need to provide relief to women, particularly victims of sexual offences, and provide fair-trial to persons of unsound mind who are not able to defend themselves. 3. The Code of Criminal Procedure (Amendment) Bill, 2006 seeks to achieve the above objectives." [Emphasis supplied] The Statement of Objects and Reasons also makes a reference to the Law Commission's 154th Report and its recommendations and it is observed that these recommendations have been found to be very appropriate, particularly relating to the provisions of arrest, custody and remand, procedure for summons and warrant-cases, APEAL Nos.991/11, 992/11 331/11 & 854/11 compounding of offences, victimology, special protection in respect of women and inquiry and trial of persons of unsound mind. It is also observed that the need has also been felt to include measures for preventing the growing tendency of witnesses being induced or threatened to turn hostile by the accused parties who are influential, rich and powerful. It was also felt, therefore, that certain rights and compensation should be provided to the victim so that there is no distortion of the criminal justice system. It is also observed that application of technology in investigation, inquiry and trial is expected to reduce delays, help in gathering credible evidences, minimise the risk of escape of the remand prisoners during transit etc and urgent need to provide relief to women, particularly victims of sexual offences. The Amendment Act which is called the Code of Criminal Procedure (Amendment) Act, 2008 was passed on 7/1/2009 and the various provisions of the Code have been amended in order to ensure that intention of the legislature is fulfilled by carrying out these amendments. Before, therefore taking into consideration the said provisions of APEAL Nos.991/11, 992/11 331/11 & 854/11 Section 372 and the proviso which has been inserted, it is necessary to keep in mind that prior to the said amendment being brought in force, no right of appeal was given to the victim and proviso, therefore, gives right to victim in three cases viz. in cases where the accused is acquitted or is convicted for a lesser offence or where the compensation which is imposed is found to be inadequate. ig No right, however, has been given in cases where inadequate sentence is imposed or awarded by the Trial Court and that right is retained by the State by virtue of Section 377. 19. Another aspect which needs to be considered and, in my view, has not been considered by the various High Courts and a reference of which is made in the foregoing paragraphs where it has been held that application for leave to file appeal even by the victim is necessary. It has to be noted here that a proviso to main section also can create a substantive right in favour of class of persons and, in the present case, the proviso has created substantive right in favour of victim which has been defined within the meaning APEAL Nos.991/11, 992/11 331/11 & 854/11 of clause (wa) mentioned in Section 2 of the Amendment Act. What is the meaning and real intent of the provision has been the subject matter of discussion in various cases and right from Privy Council to some of the latest judgments of the Apex Court, this question has been considered. In this context it will be relevant to note the observations made in the Book "Principles of

Statutory Interpretation" 11th Edition 2008 by Justice G.P. Singh, which read as under:- "(a) Its real nature The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment 1 As stated by LUSH, J.:"When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject- 1 Kedarnath Jute Manufacturing Co. Ltd. vs. Commercial Tax Officer, AIR 1966 SC 12, p.14 (para 8) ..... Romesh Kumar Sharma v. Union of Inida, (2006) 6 SCCC 510 (para 12) : (2006) 7 JT 209 : (2006) 5 SLT 602." APEAL Nos.991/11, 992/11 331/11 & 854/11 matter of the proviso." 1 In the words of LORD MACMILLAN: "The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. 2. The proviso may, as LORD MACNAGHTEN laid down, be"a qualification of the preceding enactment which is expressed in terms to general to be quite accurate". The general rule has been stated by HIDAYATULLAH, J., in the following words:"As a general rule, a proviso is added to an enactment to qualify or create an exemption to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule." 4 And 1 "Mullins v. Treasurer of Survey, (1880) 5 QBD 170 p. 173; referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha, AIR 1961 SC 1596, p. 1600 ..... (2004) 1 SCC 574, pp.578, 579 : (2003) 10 JT 383; Romesh Kumar Sharma vs. Union of India, Supra" 2 Madras & Southern Maharatta Rly. Co. Ltd. v. Bezwada Municipality, AIR 1944 PC 71, p. 73 .....(2004) 1 SCC 574, pp.578, 579 : (2003) 10 JT 383; Romesh Kumar Sharma vs. Union of India, Supra" 3 Local Govt. Board vs. South Stoneham Union, (1909) AC 57, p. 62 (HL) 4 "Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha AIR 1961 SC 1596, p.1690 ..... (2003) 10 JT 383." APEAL Nos.991/11, 992/11 331/11 & 854/11 in the words of KAPUR, J. "The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment." The learned Author has further observed in Synopsis 9 at clause (f) as under:- (f) At times a fresh enactment ....."The insertion of a proviso by the draftsman is not always strictly adhered to its legitimate use and at times a section worded as a proviso may wholly or partly be in substance a fresh enactment adding to and not merely excepting something out of or qualifying what goes before 1"..... From the aforesaid observations, it can be seen that a 1 "Rhondda Urban District Concil v. Taff Vale Rly. Co., (1909) AC 253. p. 258 (LORD LOREBURN, L.C.);..... AIR 1961 SC 1596, p. 1600 :..... AIR 1964 SC 1413 pp. 1417, 1418 : ..... AIR 1985 SC 709." APEAL Nos.991/11, 992/11 331/11 & 854/11 proviso can be added to main section either for the purpose of clarification or also for the purpose of creating a substantive right in a party. Similarly, the Apex Court in S. Sundaram Pillai vs. V.R. Pattabiraman 1 has observed that the proviso may have four different purposes: "(1) qualifying or excepting certain provisions

from the main enactment; (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable; (3) it may be embedded in the act itself as to become an intergral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and 1 AIR 1985 SC 582 APEAL Nos.991/11, 992/11 331/11 & 854/11 (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision. The above summary cannot however be taken as exhaustive and ultimately a proviso like any other enactment ought to be constructed upon its terms [See title 9(h) Broad general rule of construction, p.204]" Shri Shirish Gupte, the learned Senior Counsel relied on the following judgment viz (1) The Madras Southern Mahratta Ry. Co. vs, Bezwada Municipality 1, (2) Dwarka Prasad vs. Dwarka Das Saraf2 and (3) Maulavi Hussein Haji Abraham Umarji vs. State of Gujarat and another 3. In my view, observations made by the Privy Council and by the Apex Court are to be read in context of the facts of that case and the said paragraphs cannot be read in isolation and in my view the said observations are in addition to cases where 1 AIR (31) 1944 Privy Council 71 2 AIR 1975 SC 1758 3 AIR 2004 SC 3946 APEAL Nos.991/11, 992/11 331/11 & 854/11 proviso creates a substantive right and, therefore, the observations made in the said judgment do not assist the submission made by Shri Gupte that leave is necessary in a case of an appeal filed by a victim. Normally, a proviso is meant to be an exception to something within igthe main enactment or to clarify something enacted therein which but for the proviso would be within the purview of the enactment. 20. Keeping in view the aforesaid principles which are laid down in the judgments on which reliance has been placed, it is apparent that the proviso which is an insertion to main Section 372 was to create a substantive right of appeal in favour of the victim in three categories of cases and, secondly, to also create an exception to the general rule which is enunciated in Section 372 which states that no appeal shall be filed except as laid down in the said Chapter under the Code. It is apparent, therefore, that by virtue of the proviso, procedure as laid down in Section 378 Cr.P.C. is APEAL Nos.991/11, 992/11 331/11 & 854/11 not required to be followed in respect of an appeal against acquittal by a victim. If the legislature wanted that the rights of the victim to file appeals in these three cases should be circumscribed by further fetter or procedural provision, it could have made a consequential amendment in Section 378. The fact that no such consequential amendment has been made itself clearly discloses the intention of the legislature that the said appeals were not subjected to the limitations which were imposed on the other categories of appeals. 21 Much reliance was placed by the learned Senior Counsel Shri Gupte appearing to canvass the case of leave being necessary on the provisions of Section 378. Section 378 of Cr.P.C. reads as under:- "378. Appeal in case of acquittal.- [(1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5),- (a) the District Magistrate may, in any case, direct the Public Prosecutor to present an APEAL Nos.991/11, 992/11 331/11 & 854/11 appeal to the Court of Session from an order of acquittal passed by a Magistrate

in respect of a cognizable and non-bailable offence; (b) 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 a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.] (2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal- (a) to the Court of Sessions, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence; (b) to the High Court from an original or APEAL Nos.991/11, 992/11 331/11 & 854/11 appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Sessions in revision.] (3) [No appeal to the High Court] under sub- section (1) or sub-section (2) shall be entertained except with the leave of the High Court. (4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court. (5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal. (6) If, in any case, the application under sub- section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2)." APEAL Nos.991/11, 992/11 331/11 & 854/11 22. Perusal of the said section clearly discloses that two channels are provided in respect of appeals which are to be filed either by the State Government or by the Central Government under Section 378 sub-sections (1) & (2) and in respect of the appeals which are filed by the State against the order of acquittal or by the original complainant. It is further provided that ig either leave or special leave respectively has to be obtained and in the cases of the first two categories, as laid down under Section 378 (1) and (2), leave has to be obtained. Similarly, by virtue of sub-section (4) of section 378 in cases where an order is passed in any case instituted upon complaint, a complainant can present an appeal provided High Court grants special leave to appeal in an application to that effect filed by the complainant. The said provision, therefore, clearly contemplates that in respect of cases filed under sub-section (1) and (2) leave has to be obtained under sub-section 3 of the said section and in cases where complainant wishes to file appeal against acquittal he has to seek special leave to appeal. The provisions of this section, therefore, in my view, cannot be APEAL Nos.991/11, 992/11 331/11 & 854/11 read into the proviso to Section 372. It is well settled position in law that while interpreting the proviso, it is not open for the Court to add

or subtract something from the said proviso. 23. It is also strenuously urged by Shri Marwadi, the learned senior Counsel who advocated the same view that no provision of limitation has been prescribed and that there is no provision for the arrest or action which is normally taken under section 390 in case of appeal against acquittal as is provided under Section 378(5) & (6). The said submission cannot be accepted. Perusal of the Amendment Act clearly reveals that in order to ensure that person who is acquitted does not abscond and his presence is properly secured, apart from inserting proviso to section 372, new section has been added viz Section 437-A which reads as under:- "437-A. Bail to require accused to appear before next Appellate Court.- (1) Before conclusion of the trial and before disposal of APEAL Nos.991/11, 992/11 331/11 & 854/11 the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months. (2) If such accused fails to appear, the bond stand forfeited and the procedure under section 446 shall apply.". The said provision, obviously, has been inserted in order to ensure that even after the accused is acquitted, the Court which passes the said order is expected to direct the accused to execute a bond with or without sureties which would continue for a period of six months. The intention, obviously, was to ensure that if a victim files appeal, the Appellate Court can, thereafter, if it finds that the appeal has to be entertained, can impose fresh conditions on the acquitted accused. So far as the question of limitation is concerned, it is well settled position in law that whenever APEAL Nos.991/11, 992/11 331/11 & 854/11 statute does not prescribe period of limitation, in such cases, the Courts have to interpret the said provision to mean that the appeal which is provided under the said statute should be filed within a reasonable period of time. There are several judgments of the Apex Court and this Court on this aspect and, therefore, merely because the period of limitation is not prescribed under the Act, that cannot make the provision redundant. 24. It is also strenuously urged that it is the sovereign function of the State to prosecute the accused on behalf of the society and that if such an interpretation is given to the proviso to section 372, then the right of the State would become subsidiary and right of the victim would be put on higher pedestal. The said submission also is without any substance. The said submission has been made without taking into consideration the power of the legislature or assembly in controlling the procedure which is to be followed by the Courts and the State. The subject "Criminal Procedure" is found in Concurrent List of Schedule-VII and, APEAL Nos.991/11, 992/11 331/11 & 854/11 as a result, the Parliament and Assembly of the State has the exclusive right to lay down the procedure which has to be followed by the prosecution. The State, therefore, cannot abrogate to itself any right which is higher than the right conferred by the Constitution on the Parliament and the Assembly. The legislature, in its wisdom and in view of the power which is given to it under Item No.2 of the Concurrent List has every right to lay down the rights and procedure which is to be followed. It is apparent therefore that the amendment which was passed

by the Parliament was within its legislative competence and, therefore, to say that sovereign right of the State is taken away, cannot be accepted. Reliance was placed by the learned Counsel on the Division Bench Judgment of the Gujarat High Court in Bhikhabhai vs. State1 in which it has been observed as under:- ....."As per the provision of the Code of Criminal Procedure the right as existed to the victim in the trial Court is to assist the Public Prosecutor as per the 1 Misc. Application No.5522/2009 with Appeal No.783 of 2010 APEAL Nos.991/11, 992/11 331/11 & 854/11 provision of Section 24(8) of Cr.P.C. such may be available to the victim in the event the State has already preferred appeal with the leave and such leave is granted and the appeal has been admitted by this Court. However, if the right is read to the victim in-absolute, such may leave the room for permitting the victim to take revenge or may also leave room for the other circumstances of exploitation of the situation by the victim inspite of the fact that the State is already pursuing the matter properly of a criminal prosecution. Under these circumstances, it can be concluded that if the State has not preferred appeal against the order of acquittal or if the leave is not granted and the appeal of the State is not entertained, the victim may claim right of preferring the appeal in-absolute, but such right of preferring the appeal may not be available if the appeal of the State is already admitted and the leave has been granted against the order of acquittal of the State. In any case, APEAL Nos.991/11, 992/11 331/11 & 854/11 even if it is read for the sake of consideration that the victim has absolute right to prefer appeal then also the judicial discretion would demand that when the State has already preferred appeal against the order of acquittal and the leave has been granted by this Court and the appeal has been admitted against the order of acquittal, preferred by the State, it would not be a case to entertain the another appeal of the victim by this Court and the only observation deserves to be made is to enable the victim to assist the Public Prosecutor as per the provision of Section 24(8) Cr.P.C., at the time of final hearing of the appeal and/or by making the submission before the Court with the P.P. against the order of acquittal."..... I humbly beg to differ with the view and the observations made by the Division Bench of the Gujarat High Court. Firstly, it appears that the legislative competence of the APEAL Nos.991/11, 992/11 331/11 & 854/11 Parliament in making amendment in respect of the procedure which is prescribed under the Code of Criminal Procedure was not brought to the notice of the Court. Secondly, it has to be noted that so far as criminal trial is concerned, the amendment further clarifies that at the stage of trial, the State alone is competent to carry out the investigation and further prosecution and, at that stage, the victim does not have any right. This, obviously, reflects the intention of the Parliament that at the initial stage of investigation and prosecution and even at the hearing of the criminal trial, at the best, the victim can appoint his advocate only to assist the Public Prosecutor. A classification, therefore, has been clearly made by the Parliament in respect of the right which is to be given to the victim at the stage of trial and, at that stage, the Parliament has reiterated by making amendment to section 24 that only assistance can be provided to the Public Prosecutor. This has been done for obvious reasons. Firstly, the State, as an impartial in-

vestigator, can investigate into offence and bring out the correct position before the Court and the prosecution APEAL Nos.991/11, 992/11 331/11 & 854/11 also can ensure that proper material is produced before the Court in order to find out the truth in respect of the said criminal case. However, after taking into consideration the existing prevalent position, the Parliament thought it fit to give some additional rights to the victim for preferring an appeal. It is, therefore, not possible to accept the observations made by the Gujarat High Court and the question of sovereign right of the State does not arise since it is controlled by the provisions which are made by the Parliament pursuant to the power which is given to it under Concurrent List of Schedule-VII to the Constitution of India. Secondly, what is not considered by the Division Bench of the Gujarat High Court in the said case is that refusal to grant leave by the High Court for filing an appeal against the order of acquittal does not amount to merger of the order of the High Court refusing leave with the Order of the Trial Court. This position is quite well settled and, therefore, even if leave is refused to the State, a victim can still file an appeal in view of the substantive right which is given to him APEAL Nos.991/11, 992/11 331/11 & 854/11 and urge on the grounds of appeal which are available to him. The Apex Court in Kunhayammed and Others vs. State of Kerala and another 1 has observed while considering the exercise of jurisdiction conferred on the Supreme Court by Article 136 of the Constitution of India that when a Petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that the case for invoking appellate jurisdiction of the Court was not made out and, therefore, the order refusing to grant leave passed by the High Court on an application filed by the State seeking leave to file appeal does not merge with the order passed by the Trial Court and, therefore, it is always open for the victim to file an appeal even after leave to file appeal is refused on an application filed by the State. 25. It was also vehemently urged that if a victim is permitted to file appeal, it would open flood-gates and it would put a heavy burden on the Court and the pendency of cases would increase. In my humble view, this aspect cannot be taken into consideration while interpreting the 1 (2000) 6 SCC 359 APEAL Nos.991/11, 992/11 331/11 & 854/11 provision or proviso in a Statute and only the intention of the legislature has to be ascertained. It is not open for the Court to consider what should be and what should not be the procedure or right which is conferred by a Statute since it is entirely for the legislature to consider and decide the substantive or procedural rights which are created by a Statute more particularly in cases where constitutional virus of the provision is not challenged before the Court. It was also contended by the learned Counsel that whilst interpreting the statute, one must bear in mind that the interpretation which leads to anomalous or absurd situation has to be avoided, though an ambiguity occurs when a particular provision, though plain in itself, is incompatible with the other provisions of the statute. No doubt, if the plain language of a provision in the statute lends to contradiction or absurdity then courts, in such cases, would frown upon literal rule of interpretation. However, in the instant case, no such absurdity, or anomaly or incompatibility can be noticed which is apparent on the plain reading of section 372. It would not be appro-

priate to read APEAL Nos.991/11, 992/11 331/11 & 854/11 into the section possible anomaly, absurdities or incompatibility which are based on the views and opinion of the court. To do so would be a clear transgression to the salutary role of the courts in interpreting the statute based on sound judicial principles and will amount to interpreting the statute on one's own perception and opinion. The court while interpreting a statute should try to sustain its ig validity and give such meaning to the provisions which advance the object sought to be achieved by the amendment. The court cannot approach the enactment with a view to pick holes or to search for any defects of drafting which make its working impossible and efforts should be made in construing different provisions so that each provision will have its play and in the event of any conflict a harmonious construction should be given. 26. I am fortified in my view by two judgments of the two learned Single Judges of this Court. The learned Single Judge of this Court (Coram: R.C. Chavan, J.) by order dated 04/08/2011 in Criminal Appeal (Stamp) No.978 of 2010 APEAL Nos.991/11, 992/11 331/11 & 854/11 (Roma Sukhjitsingh Saini vs. Nirmalsingh Habhansingh Saini & Others) and in Criminal Application No.5485 of 2010 (The State of Maharashtra vs. Nirmalsingh Harbhajansingh Saini & 3 others) has also, after taking into consideration similar arguments which were advanced, observed in para 6 as under:- "6. To sum up, since an appeal by a victim is not subject to any limitation in respect of time within which it could be filed, as also any requirement of obtaining prior leave for filing an appeal, the appeal has to be entertained. Hence, admit. Call for the R & P. Since the learned Advocate for the respondents on the record states that he would be representing the respondents, action under Section 390 of Cr.P.C. Is dispensed with." Similarly, another learned Single Judge of this Court (Coram: U.D. Salvi, J.) by order dated 20/04/2011 passed in Criminal Appeal No.241 of 2011 (Suhas Bhaskar Musale vs. APEAL Nos.991/11, 992/11 331/11 & 854/11 Sameer Anant Nalawade & Anr) also has taken a similar view. After taking into consideration various provisions of the Code and also the judgments of the Apex Court, the learned Single Judge in para 17 of the order has observed as under:- "17. In view of the above, it needs to be held that no leave is necessary for preferring an appeal by the victim under the proviso to Section 372 of the Code of Criminal Procedure, 1973 against any order passed by the court acquitting the accused or convicting for lesser offence or imposing inadequate compensation." 27. The Division Bench of the Delhi High Court in Kareemul Hajazi vs. State of Nct of Delhi & Others (CRL.MA 13541 OF 2010 IN CRL.A. 940 OF 2010) by order dated 07/01/2011 while considering the question of limitation has observed in para 11 as under:- "11. From the above discussion, it is clear APEAL Nos.991/11, 992/11 331/11 & 854/11 that appeals have been provided for under Sections 374, 377 and 378 of the Code in respect of appeals against conviction, inadequacy of sentence and acquittals, respectively. Now, with the introduction of the proviso to Section 372, a victim has also been given the right of appeal in respect an order of acquittal, a conviction for a lesser offence and for inadequacy of compensation. However, while specific periods of limitation have been prescribed for the earlier three kinds of appeals either in the Code itself or by virtue of the Limitation Act, 1963, there is no period of limitation prescribed

for the filing of an appeal by a victim under the proviso to Section 372. Therefore, as is well established, a reasonable period would have to be inferred from the statutory provisions [See: State of Punjab and Ors. vs. Bhatinda District Coop. Milk P. Union Ltd.: 2007 (11) SCC 363 para 17: It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend APEAL Nos.991/11, 992/11 331/11 & 854/11 upon the nature of the statute, rights and liabilities thereunder and other relevant factors and Government of India v. Citedal Fine Pharmaceuticals, Madras and Ors: 1989(3) SCC 483 para 6: In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable period wold depend upon the facts of each case]" The Division Bench of the Delhi High Court then proceeded to observed in para 12 of its judgment as under:- "12 In the present case, we tend to agree with the submissions made by the learned counsel for the respondents 2 to 4 that the reasonable period of limitation for filing of an appeal by a victim ought to be regarded as 60 days from the date of order appealed from. We say this because under Section 374 read with Article 115(b)(i) of the Limitation Act, the convicts right of appeal to the High Court bears a limitation period of 60 days. APEAL Nos.991/11, 992/11 331/11 & 854/11 Similarly, even the States appeal with regard to inadequacy of sentence under Section 377 read with Article 115(b) of the Limitation Act in respect of an appeal to the High Court is required to be filed within 60 days. Furthermore, the application seeking special leave to appeal by the complainant under Section 378(4) read with Section 378(5) has to be filed within 60 days in all cases where the complainant is not a public servant. Of course, the period of limitation where the complainant is a public servant is much longer, i.e six months. Furthermore, the limitation for an appeal by the State Government or by the Central Government under Section 378(1) and (2) is 90 days as pointed out above. It is clearly discernible from the above that the period of limitation,which has been prescribed for public servants and / or the State Government and the Central Government is greater than the period of limitation, which has been prescribed in respect of convicts and complainants. Therefore, since the victim is in similar position to that of complainant and is a APEAL Nos.991/11, 992/11 331/11 & 854/11 private individual, a lesser period of limitation than that provided to the State Government/Central Government ought to be considered as reasonable. It is in this background that we accept the views of the learned counsel for the respondents 2 to 4 that the reasonable period of limitation for a victims appeal should be 60 days from the date of the order appealed from." 28. There are other judgments of the other High Courts on which reliance was placed. The Division Bench of Gauhati High Court in Shri Gauranga Debnath, Father of Pooja Debnath (Das) Maharani (Chaygharia) vs State of Tripura & Ors (C.M. Appl (Crl) 89 of 2011 in Crl. A.No.13 of 2011) has in para 20 of its order made a passing reference as under:- "20. . . . . ."The main provision of Section 372 provides that no appeal shall lie from the order of acquittal except as provided for by this Code or by any other law for the time being in force. So by the proviso, a right to file an appeal

has been conferred on the victim against the order APEAL Nos.991/11, 992/11 331/11 & 854/11 of acquittal, but the procedure for filing such appeal will be the same as provided under Section 378 of the Code.“..... With utmost respect, in my view, the Division Bench of the Gauhati High Court has not taken into consideration various aspects which have been enunciated above and has merely made a passing observation. I respectfully disagree with the said passing observation made by the Division Bench of the Gauhati High Court. Similarly, in Smt. Ram Kaur @ Jaswinder Kaur vs. Jagbir Singh alias Jabi and Others (Crl. Appeal No.205-DB of 2010), Punjab & Haryana High Court by its order dated 01/04/2010 also has taken the view that leave is necessary. In this Judgment also the Division Bench has observed as under:- .....”By Proviso to Section 372 of the Code, a right has been conferred upon the victim to prefer an appeal against the order of acquittal being sufferer from the act or omission of the offender. But APEAL Nos.991/11, 992/11 331/11 & 854/11 such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.....Therefore, even if the victim has a right to prefer an appeal against the order of acquittal, he has to seek the leave of the High Court to prefer such appeal." With utmost respect, the Division Bench of the Punjab & Haryana High Court has neither taken into consideration the effect of the proviso and true meaning which has to be given to the provision nor the objects and reasons or other aids which are to be considered while interpreting the said proviso. Similarly, in Guru Prasad Yadav son of late Lakhan Yadav vs. The State of Bihar and others (CR APP (DB) No. 582 of 2011), the Patna High Court by its order dated 02/08/2011 has also taken the similar view. I respectfully disagree with the said view. APEAL Nos.991/11, 992/11 331/11 & 854/11 29. I am of the view, therefore, that proviso confers an independent substantive right in favour of the victim in three categories of cases and an exception is also carved out of the general rule which provides no appeal can be filed except as provided in the said Chapter and since the proviso makes exception to the said rule, it will not be proper for this Court to add or subtract something to read into section 378 or other provisions of Cr.P.C something which is not there in the Amendment Act. In my humble view, two-fold purpose which the proviso seeks to achieve is firstly that it creates a substantive right in favour of “victim” and, secondly, makes an exception to the general rule provided under section 372 regarding appeal being filed only in accordance with the provisions made in Chapter XXIX. In this view of the matter, it is not necessary to obtain leave from the High Court in case of the victim filing an appeal in three types of cases as provided in proviso to section 372 of the Criminal Procedure Code. 30. Since my learned brother is disagreeing with the APEAL Nos.991/11, 992/11 331/11 & 854/11 view which I have taken, he is giving his dissenting judgment. (V.M. KANADE, J) Per A.M. THIPSAY, J. (dissenting) 31. I have had the benefit of hearing the opinion dictated by my learned brother on his view on the relevant aspect. In spite of the profound respect which I have for his vast experience, legal acumen and knowledge, I am unable to subscribe to the view expressed by him. 32. The controversy is : ‘whether in an appeal against acquittal filed by the victim, which lies to the High Court, leave of the High Court would be nec-

essary before such appeal is entertained?' 33. My learned brother has expressed a view by meticulously considering all the relevant provisions, that no such leave would be APEAL Nos.991/11, 992/11 331/11 & 854/11 necessary. However, I disagree with that view. In my opinion, the requirement of leave, as envisaged in sub-section (3) of Section 378 of the Code of Criminal Procedure (hereinafter 'the Code' for brevity) in respect of an appeal against acquittal, cannot be dispensed with, merely because such appeal has been filed by a 'victim', as defined in Section 2(wa) of the Code, by virtue of the right conferred upon a victim by the proviso to Section 372. Therefore, with all the humility at my command, I beg to express my view, with reasons, which have weighed with me in expressing a disagreement with my esteemed brother. 34. It would be proper to begin by stating why the controversy arises, so that the issues involved can be seen in proper perspective. 35. A Proviso to section 372 of the Code has been inserted by section 29 of the Code of Criminal Procedure (Amendment) Act, 2008 (Act No. 5 of 2009) with effect from 31st December, 2009. It provides that the victim shall have a right to prefer an appeal against any order passed by the court-APEAL Nos.991/11, 992/11 331/11 & 854/11 (i) acquitting the accused, or (ii) convicting the accused for lesser offence, or (iii) imposing inadequate compensation. 36. The said Proviso also provides that such appeal shall lie to the Court to which the appeal ordinarily lies against the order of conviction of such Court. 37. Thus, the proviso confers a right on a 'victim' to file three types of appeals, one of which is the appeal in case of acquittal. 38. Chapter XXIX of the Code deals with 'appeals'. Section 378 deals with 'Appeal in case of acquittal'. Under sub-section (3) thereof, an appeal to the High Court against acquittal cannot be entertained without the leave of the High Court. This sub-section covered all types of appeals against acquittal that would lie to the High Court, till a new category of 'appeal against acquittal by victim' was created by APEAL Nos.991/11, 992/11 331/11 & 854/11 the said proviso. However, Section 378 was not amended in consequence of the insertion of proviso to Section 372. The proviso creating a right in favour of the victim in respect of three types of appeals, did not provide whether or not leave of the High Court would be required in case of appeal against acquittal that can be filed in the High Court at the instance of the victim. It is this position that has given rise to the aforesaid difference in opinion. 39. The view that no leave would be necessary, is basically based on the reasoning that it is not so mentioned in the said proviso. The other view is based on the fact that if all appeals coming to the High Court against acquittal require leave of the High Court, there is no reason to believe that the Legislature intended to exclude or exempt the victim's appeal, though against acquittal, from such requirement. 40. I am of the opinion that the view that no leave is necessary would lead to several anamolies and absurdities. I am also of the opinion that the intention of the legislature (which is to be ascertained in accordance with the well settled and accepted principles relating to APEAL Nos.991/11, 992/11 331/11 & 854/11 Interpretation of Statutes) while inserting to said proviso could not have been to do away of the requirement of leave in case of an appeal by victim to the High Court against acquittal. 41. It would be useful to refer to the legislative history in respect of 'appeals against acquittal'

and some features that were peculiar to appeals against acquittal, when the new Code was brought into force in 1974. The first such feature would be that the appeal against acquittal, even if filed by the State, could not be filed without obtaining leave of the High Court. The second such feature would be that the appeal against acquittal would lie only to the High Court. Thus, even against an order of acquittal passed by the Magistrate, appeal would not lie to the Court of Sessions, but would lie only to the High Court. The provisions in the new Code i.e the present Code in that regard were based on 48th Report of Law Commission. The Law Commission, with respect to appeal against acquittal, inter alia, observed that in most of the common law countries the general rule was not to allow the appeal against acquittal. Though the Law Commission felt it necessary to provide for appeal against acquittal, it APEAL Nos.991/11, 992/11 331/11 & 854/11 was thought that such an appeal should be allowed only if the High Court grants leave to file such appeal. This is what the Law Commission has observed:- "56. An unlimited and general right given as in India in respect of appeals against acquittals is, thus, rare in Anglo-American countries. It is for this reason that a re-examination of the subject appeared necessary. While one may grant that cases of unmerited acquittals do arise in practice, there must be some limit as to the nature of cases in which the right should be available. For, in our view, proper regard should be had to the need for putting reasonable limits on the period for which the anxiety and tension of a criminal prosecution should be allowed to torment the mind of the accused. There is a qualitative distinction between conviction and acquittal, and appeals against acquittals should not be allowed in the same unrestricted manner as APEAL Nos.991/11, 992/11 331/11 & 854/11 appeals against convictions." th [48 Report] 42. It is with these considerations that it was recommended that appeals against acquittals, even at the instance of the Central Government or the State Government, should be allowed only if the High Court would grant special leave. 43. The Law Commission further observed that the amendment which was being proposed would not be so radical a departure, as might appear at the first sight. 44. The reason for stipulating the requirement of leave is clear also from the following observations of the Joint Committee made while suggesting some changes, as proposed in the original bill of 1973 Code. "The Committee was given to understand that in some cases this executive power to file appeals APEAL Nos.991/11, 992/11 331/11 & 854/11 against an order of acquittal was exercised somewhat arbitrarily. It would therefore be desirable and expedient to provide for a check against arbitrary action in this regard. The committee has therefore provided that an appeal against an order of acquittal should be entertained by the High Court only if it grants leave to the State Government in this behalf." [Taken from Sohoni's Code of Criminal Procedure, th 20 Edition, Page 4788] 45. Since after the insertion of the proviso by the Act 5 of 2009, the provisions of Section 378 were not amended, the position that the State's Appeal to the High Court against an order of acquittal cannot be entertained without leave has not undergone any change. Since the said provision has been retained, it is obvious that the legislature did not intend to change the legal position regarding the requirement of leave in case of Appeal filed by

the State against an order of acquittal. APEAL Nos.991/11, 992/11 331/11 & 854/11 46. I would now point out to what extent anamolies and absurdities would arise if the view against requirement of leave is taken. These anamolies and absurdities can themselves lead to a conclusion that the Legislature never intended such results. Sub-section (4) of Section 378 reads as under : "(4). If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court." 47. Thus, a private complainant who files complaint and prosecutes the accused; and who is aggrieved by the order of acquittal would also need leave - rather special leave - of the High Court before his appeal APEAL Nos.991/11, 992/11 331/11 & 854/11 is entertained by the High Court. This position has not undergone any change even after the insertion of the proviso to Section 372 by the Act No.5 of 2009. Now, usually, the complainant and victim would be one and the same person, though not always. The absurdity resulting from the view that victim's Appeal would not require leave can be illustrated by giving an example. Let's take a case where a person is assaulted and files a private complaint in respect of the offence punishable under section 307 of the I.P.C. against the assailants. If, after trial, the accused is acquitted and the complainant intends to file an Appeal, he would require the 'special leave' of the High Court under sub-section (4) of Section 378. Can he then, by claiming to be a victim, be able to file an Appeal without obtaining such leave? 48. If the interpretation that the victim need not obtain any leave from the High Court for filing an appeal against acquittal is accepted, it would lead to absurdity inasmuch as if the complainant files an appeal as 'the complainant', he would be required to obtain such leave but the complainant, if he describes himself as a 'victim', can straight away avoid the scrutiny which is expected to be done by the High APEAL Nos.991/11, 992/11 331/11 & 854/11 Court at the initial stage. In my view, this would be plainly anomalous and unreasonable. 49. We may take yet another example. Suppose, the State prefers an Appeal against acquittal in the High Court and seeks leave, but the High Court, on considering the merits of the matter refuses such leave. If the view that the victim's Appeal would not require the leave of the High Court is to be accepted, it would mean that the victim can even thereafter file an Appeal, which will have to be entertained even though previously leave had been refused to the State to file such an Appeal. The absurdity of such a consequence is obvious and does not require any further elucidation, but such a consequence is inevitable if the view against requirement of leave is to be accepted. It would be relevant in this context that under sub-section (6) of Section 378, a case where an application for leave made by a private complainant is rejected by refusing leave, no Appeal in that case from the order of acquittal shall lie under sub-section (i) or sub-section (ii) thereof. This removes the doubt, if any, with respect to the policy of the Legislature not to subject an accused to the plurality of Appeals against acquittal. APEAL Nos.991/11, 992/11 331/11 & 854/11 50. That such an anomalous situation would arise if the view against requirement of leave is taken was noticed in the course of

hearing. The learned Counsel who supported such view have rather conceded that such anomalous situation would arise. However, an attempt was still made to justify the view against requirement of leave on the ground that the Proviso to Section 372 does not speak of leave. It was submitted that the language of the Proviso is plain and unambiguous and since it does not speak of leave, the Court cannot read the requirement of leave therein. 51. In my opinion, reading the requirement of leave in the Appeal filed by a victim against acquittal which lies to the High Court is not in any manner inconsistent or contrary to the well accepted principles of interpretation of Statutes. On the contrary, in my opinion, saying that 'leave is not necessary 'because the Proviso which speaks of such Appeal does not mention so', would be, in effect, a refusal to interpret the relevant statutory provisions in accordance with the well settled principles of interpretation. APEAL Nos.991/11, 992/11 331/11 & 854/11 52. It is well settled that a statute has to be read as a whole. A particular provision in a statute is to be construed in the light of all other provisions in the statute and any provision in the statute is to be construed harmoniously with the rest of the provisions. Since some arguments were advanced claiming that the view regarding requirement of leave would be contrary to the principles of interpretation of Statutes, by claiming that 'since the language of the proviso is plain and unambiguous, effect must be given to the only meaning which it conveys, irrespective of the consequences', it would not be out of place to discuss the relevant principle. The principle that where the meaning is plain, the Courts are not to subtract or add anything to that, is well settled. But the plain meaning implicit in this principle is not from the grammatical point of view. A study of reported authorities shows that ambiguity may occur not necessarily because of any grammatical problem or any ambiguity in the structure of the sentence grammatically, but that the ambiguity would occur also when a particular provision, though plain in itself, is incompatible with other provisions in the same statute. APEAL Nos.991/11, 992/11 331/11 & 854/11 53. In the case of Tirath Singh Vs. Bachittar Singh & Ors., reported in AIR 1955 SC 830, the Supreme Court of India observed as follows : "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence." (Para 7 of the reported Judgment). 54. Again, in the case of British Airways Plc. Vs. Union of India & Ors., reported in AIR 2002 SC 391, the Supreme Court of India observed as follows : "It is a cardinal principle of construction of a APEAL Nos.991/11, 992/11 331/11 & 854/11 statute that effort should be made in construing the different provisions so that each provision will have its play and in the event of any conflict, a harmonious construction should be given." 55. It was further clarified that a particular provision cannot be picked up and interpreted to defeat another provision made in that behalf under the statute. Their Lordships clearly laid down that while interpreting a statute, the Courts are required to keep in mind the consequences which are likely to flow upon the intended interpretation. 56. In the case of Manik Lal

Majumdar & Ors. Vs. Gouranga Chandra Dey & Ors., reported in (2005) 2 SCC 400, the Supreme Court of India observed as follows : "8. It is a well-settled principle that the intention of the legislature must be found by reading the statute as a whole and in order to ascertain the APEAL Nos.991/11, 992/11 331/11 & 854/11 meaning of a clause in a statute, the court must look at the whole statute, at what precedes and what succeeds and not merely the clause itself. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed, but to the entire statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs." 57. In the case of Kailash Chandra & Anr. Vs. Kukundi Lal & Ors., reported in AIR 2002 SC 829, the Supreme Court of India observed as follows : "10. A provision in the statute is not to be read in isolation. It has to be read with other related provisions int he Act itself, more particularly, when the subject matter dealt with in different sections or parts of the same statute is the same APEAL Nos.991/11, 992/11 331/11 & 854/11 or similar in nature." 58. It is not necessary to multiply the authorities as the principle that every clause of a statute is to be construed with reference to the context and other clauses of the Act so as to make, as far as possible, a consistent enactment of the whole statute, is well settled. 59. It is also well settled that a construction which results in hardship, serious inconvenience, injustice, absurdity or anamoly or which leads to inconsistency or uncertainty and friction in the system, which the statute purports to regulate, has to be rejected and preference should be given to that construction which avoids such results. 60. The proviso to Section 372 cannot be construed as overriding the provisions of sub-section (3) and/or sub-section (4) of Section 378, or the principle contained therein. The scope of a proviso is normally to qualify the main enactment. The proviso has been added to the main part of Section 372 which provides that 'there shall be no APEAL Nos.991/11, 992/11 331/11 & 854/11 Appeal from any judgment or order of a Criminal Code, except as provided for by the Code or by any other Law for the time being in force'. In my opinion, the proviso only carves out an exception to the main provision and lays down that the victim shall have a right to file the types of Appeals mentioned therein, even if it is not provided 'elsewhere' in the Code . 61. I have emphasized the word 'elsewhere'. If the proviso is to be construed as the provision creating and dealing with such appeals and as a complete Code in itself, then it becomes superfluous and its insertion below the main portion of section 372 becomes meaningless. 62. The proviso, in my opinion, just recognizes a right of the victim to file three types of appeals and lays down that such appeals would be maintainable, even though the various provisions in the Code dealing with appeals, do not expressly provide for such appeals. 63. When we, sitting as a Division Bench, differed in our view, realizing that the issue involved was of some significance, some APEAL Nos.991/11, 992/11 331/11 & 854/11 learned members of the Bar were requested to assist us as 'amicus curie' as has been already mentioned by my Learned Brother. The Learned Counsel have brought to our notice several decisions of the High Courts dealing directly with the issue before us and holding that leave would be necessary, which had not been noticed by any of us, when

the difference in our views, initially, surfaced. Though my Learned Brother has referred to all the said Judgments, he has not been able to agree with the view taken therein. 64. Since judgments dealing with the issue directly have been brought to our notice, it would be appropriate to refer to the observations made therein. In the case of Smt. Ram Kaur @ Jaswinder Kaur Vs. Jagbir Singh alias Jabi and Others, C. M. Appl (Crl) 89 of 2011 in Criminal Appeal No. 205 of 2010, a Division Bench of the Punjab and Haryana High Court had occasion to deal with the very issue and this is what the Court opined : "By proviso to Section 372 of the Code, a right has been conferred upon the APEAL Nos.991/11, 992/11 331/11 & 854/11 victim to prefer an appeal against the order of acquittal being sufferer from the act or omission of the offender. But such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court. The main provision of Section 372 provides that no appeal shall lie from the order of acquittal except as provided for by this Code or by any other law for the time being in force. So, by the Proviso, a right to file an appeal has been conferred on the victim against the order of acquittal, but the procedure for filing such appeal will be the same as provided under Section 378 of the Code. Therefore, even if the victim has a right to prefer an appeal against the order of acquittal, he has to seek the leave of the High APEAL Nos.991/11, 992/11 331/11 & 854/11 Court to prefer such appeal." 65. In the case of Guru Prasad Yadav vs The State of Bihar and Ors,CR.APP (DB) NO.582 OF 2011, again, a Full Bench of the Patna High Court has also taken the same view : "Prior to introduction of the said proviso to Section 372 of the Code, the victim as such did not have any statutory right of appeal. Section 374 of the Code has provided for a convicted right of appeal against conviction. .... Apart from this, under Section 378 two steams of appeals against acquittal were provided. The first stream was of appeal against the acquittal by the State Government/ APEAL Nos.991/11, 992/11 331/11 & 854/11 Central Government and the same would fall under sub-section (1) and (2) of section 378. However, before such an appeal is entertained, leave of the High Court has to be taken by virtue of provision of section 378(3). The other stream is in the case of complaint wherein, by virtue of section 378(4), the complainant has to seek special leave to appeal from the High Court. Here, I may point out that in case special leave application filed by the complainant is rejected, then this also precludes the State Government/ Central Government from filing an appeal against acquittal under Section 378(1) and (2). This clearly stipulates in section 378(6) of the Code. By proviso to section 372 of the Code, a right has been conferred to the victim to prefer APEAL Nos.991/11, 992/11 331/11 & 854/11 an appeal against the order of acquittal being sufferer from the act or commission of the offender. The main provision of section 372 provides that no appeal shall lie from the order of acquittal as provided for by this Court or by any other law for the time being in force. So, by the proviso, a right to file an appeal has been conferred upon the victim against the order of acquittal, but the procedure for filing such appeal will be the same as provided under Section 378 of the Code. Therefore,

even if the victim has a right to prefer an appeal against the order of acquittal, he has to seek leave of the High Court to prefer such an appeal." 66. In the case of Bhikhabhi vs State,CR.MA/5522/2009 (DB), APEAL Nos.991/11, 992/11 331/11 & 854/11 again, a Division Bench of the High Court of Gujarat has also taken the same view : "If the State is to prefer appeal against the order of acquittal it has to follow the procedure as laid down under Section 378 of Cr.P.C., namely, that unless the leave is granted by the High Court, such appeal would not be entertained. It is only after the application for leave is made and such leave is granted by the High Court, the appeal shall be entertained by the High Court against the order of acquittal. If the right of the State to prefer appeal against the order of acquittal is controlled by provision of Section 378 Cr.P.C., the victim who otherwise can not claim higher pedestal in the criminal prosecution, cannot be heard to say that merely because the proviso is amended in section 372, such right of preferring appeal APEAL Nos.991/11, 992/11 331/11 & 854/11 with the victim is in-absolute and not controlled by any provision of Section 378. If such a contention is accepted, the consequence could arise of treating the status of victim in any criminal prosecution higher than that of the State which can never be the intention of the legislative body nor can be allowed to be maintained in a welfare State where the right of the victim as well as of the accused are required to be balanced and the State is dominion of the criminal prosecution." 67. No Judgments dealing with the issue directly and taking a contrary view, have been pointed out to us, except two Judgments delivered by two Hon'ble Single Judges of this Court, with which I respectfully disagree. Both the learned Single Judges have taken a view against the requirement of leave basically because the proviso to Section 372 of the Code does not speak so. I respectfully disagree with the learned Single Judges of this Court. If such a view is to be APEAL Nos.991/11, 992/11 331/11 & 854/11 adopted, it would mean that the proviso is a complete Code in respect of the Appeals filed by victims and that the Appeals by the victims including one against the acquittal, which lies to the High Court, would not be governed by any other provisions in the Code. 68. Mr. Marwadi rightly contended, that if such a view is taken, then the action under Section 390 of the Code also cannot be taken in an Appeal filed by the victim in as much as the said Section refers only to an Appeal presented under Section 378. 69. It cannot be seriously suggested that other provisions in the Code will not be applicable to the appeals filed by the victim, purportedly 'under proviso to section 372'. Once an appeal filed by the victim is entertained, the procedure which the High Court would be required to follow would be the same as in case of other types of appeals against acquittal, even though the relevant provisions would speak only of appeals by State, or by a complainant and not of an appeal by victim. In fact, powers of the appellate court and even the provision as to how the memorandum of appeal should be drafted APEAL Nos.991/11, 992/11 331/11 & 854/11 would all be applicable to the appeals filed by the victim also. It cannot be urged that the provisions regarding Appeals, as are found in the Code, will not be applicable to an Appeal filed by a victim and that such Appeal would be governed only by the provisions of the proviso to Section 372. Apart from the difficulty of resorting to the pro-

visions of Section 390 if such view is taken, there would be other complications also as the opening part of Section 386 and sub-section (1) of Section 394 also refers to Appeals under Section 378; and if the Appeal against acquittal filed by the victim is to be taken out of the purview of the applicability of the provisions of Section 378, then even the provisions of Section 386 or 394 cannot be applied to such Appeals. I do not think that, that it would be so, can be very seriously contended. 70. Once it is accepted that the proviso would not be exclusive with respect to all the matters arising out of appeals filed by the victim, reference to the provisions of section 378, so far as the appeal against acquittal is concerned, becomes inevitable and it is not possible to hold that the legislature wanted to give a go-bye to those provisions. APEAL Nos.991/11, 992/11 331/11 & 854/11 71. There was an argument that there is no real anomaly in as much as the legislature had intended to provide a right to the victim which would be higher than the right of the State. I am unable to accept such a view. Mr. A.V. Anturkar contended that the legislature intended to place the right of the victim on par with that of a convict, who can Appeal against the sentence without requiring leave. It is pointed out that there has been a realization of the plight of the victims who were neglected and it is, therefore, that the legislature has created an unfettered right in favour of the victims. 72. It is true that lately it has been realized that in the criminal justice system, the victims, who were the actual sufferers were often neglected. Cases were noticed where the State had failed to challenge the order of acquittal, even though the acquittal would be unmerited. The victim had no remedy in such cases except by filing a revision application; and that the remedy of filing a revision was not adequate as the revisional court would not re-appreciate the entire evidence and, further, under section 401 of the Code, the judgment of acquittal APEAL Nos.991/11, 992/11 331/11 & 854/11 could not be converted into judgment of conviction in revisional jurisdiction. The rights of the victim could be sometimes defeated by State machinery itself, for various considerations which may not be strictly legal. Though the private complainant who had prosecuted the accused had a right to Appeal against an acquittal (though by seeking Special Leave of the High Court), the First Informant in a State case had no such right. It is, in this context, it was thought necessary to provide a right to the victim to approach the Court and to challenge an unfair order of acquittal by which the victim feels affected. However, it is not possible to accept that the legislature wanted to go to the other extreme and wanted to put the right of appeal created in favour of the victims for the first time, beyond the scrutiny by the High Court at the initial stage. The claim that 'victim's right was intended to be placed above the right of the State and, that, therefore, the restriction placed over the right of the State has deliberately not been placed in respect of an appeal against acquittal by victim' does not stand to reason. If that would be so, that would change the basic concept of criminal jurisprudence and control of the State over the prosecution. If the legislature, indeed, wanted to effect such a change, there would APEAL Nos.991/11, 992/11 331/11 & 854/11 have been many more amendments, amending several other provisions. 73. The scheme of the provisions of the Code would indicate that the position that State is in-charge of

the prosecutions has remained unchanged. At the stage of trial, the State will have primacy. A reference to some of the provisions in the Code would remove the doubt, if any, in that regard. First of all, ordinarily, prosecutions are to be conducted by the Public Prosecutor and not by private Counsel. Under section 225, in the Court of Sessions, prosecution shall always be conducted by Public Prosecutor. In the Magistrates' Courts, prosecution by private Counsel can be conducted only with the permission of the Magistrate. It has been held that the role assigned to the private counsel would ordinarily be of assisting the Public Prosecutor and permission to a private Counsel can be given by the Magistrate only in exceptional cases where there would be reason to believe that the Public Prosecutor in charge of the matter would be unable to discharge his function efficiently, properly or honestly. APEAL Nos.991/11, 992/11 331/11 & 854/11 74. Even otherwise, that the legislature wanted to change the basic concepts of criminal jurisprudence cannot be lightly accepted. 75. Incidentally, it may be observed that the Amendment Act (Act No.5 of 2009) which introduced the proviso to section 372, also caused amendment to section 24 of the principal Act and a proviso was added to sub-section (8) of section 24. The relevant part of Section 24 reads as under : "24. Public Prosecutors.- (1) 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, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be. APEAL Nos.991/11, 992/11 331/11 & 854/11 (Sub-sections (2) to (7) omitted as not relevant). (8) The Central Government or the State Government may appoint, for the purpose of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as Special Public Prosecutor: Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section. 76. The claim that the legislative intent was to weaken the control of the State over prosecutions, or at any rate, give a stronger and more effective role to the victim than that of State, in the Criminal Justice System cannot stand in the face of the subordinate role ascribed to the APEAL Nos.991/11, 992/11 331/11 & 854/11 Advocate engaged by the victim by the same Act which added the proviso to Section 372. The subordinate role of the Advocate engaged by the victim cannot be reconciled with the proposition that the rights of the victim were to be more clear and uncontrolled than the rights conferred upon the State. Moreover, if that was so, the requirement of leave in sub-section (4) of Section 378 in respect of an Appeal filed by a complainant does not stand to reason. The least the legislature could have done if it really intended to place the right of the victim above the rights of the State to do away with the requirement of leave under sub-section (4) of Section 378 in case of a private complainant who is often the victim and, in any case, on par with the victim. 77. It will not be out of context to observe that before the amendment of Section 378 by the Act No.25 of 2005, Appeal against acquittal would lie only to the High Court. By the said Amendment Act, for the first time, appeal against acquittal could be filed before the Court of Sessions also. Sub-section (3) of Section 378 of the

Code before the said amendment read as under:- APEAL Nos.991/11, 992/11 331/11 & 854/11"378. Appeal in case of acquittal (1)..... (2)..... (3) No appeal under sub-section (1) or sub- section (2) shall be entertained except with the leave of the High Court. (5)..... (6)....." 78. After the said amendment, the words "No appeal" appearing in sub-section (3) were modified and substituted by the words "No appeal to the High Court". This aspect is quite significant. This makes the legislative intent clear viz. to require the leave of the High Court in case of appeals against acquittals that would be coming before it. This shows that even while not laying down the requirement of leave in respect of the Appeals against acquittal coming to the Court of Sessions, the legislature consciously retained the requirement of leave so far as the appeals coming to the High Court against acquittals were concerned. APEAL Nos.991/11, 992/11 331/11 & 854/11 79. There is also one more aspect of the matter. The victim may not be a witness at all as regards the involvement of the accused in a given case, as it is well known that in many cases it is not the victim who implicates any accused. This is more common in cases of pick-pocketing, bag lifting, house breaking etc. where the culprit is not seen by the victim. The victim merely reports the matter to the police and the police, after investigation, ascertain who the offender is. The investigating agency collects evidence against the offender who is then prosecuted. If such victim, who has not played any role in levelling accusation against the accused is allowed to challenge the acquittal by straight away getting his appeal placed before the High Court, when the State, that has concluded, after investigation, the accused to be the person the culprit, is required to obtain leave before the order of acquittal is challenged, all that can be said is that it would not be logical. 80. The suggestion that requirement of leave of the High Court would take away the valuable right conferred on the victim does not APEAL Nos.991/11, 992/11 331/11 & 854/11 appeal to me. It is not possible to hold that in cases where there would be merit in the appeal, High Court would refuse leave. The requirement of leave existed in the Statute to avoid frivolous and vexatious appeals from being filed. If this Court, at this stage, is expected to scrutinize the merits of the matter before directly entertaining the appeal even when such appeal is filed by the machinery of the State, it would not be possible to accept that the legislature by enacting the said proviso intended to do away with such scrutiny when the appeal would be filed by the victim. 81. On a careful consideration of all the relevant provisions, it appears to me that where the appeal against acquittal has been first time introduced in the Court of Sessions, there would be no requirement of leave because Section 378 of the Code does not say so. At the same time, that while providing for appeal to the Court of Sessions, legislature did not amend the provision requiring the State and/or the complainant to obtain leave of the High Court is significant. Thus, even when the legislature did not lay down the requirement of leave in case of appeals against acquittal that would lie APEAL Nos.991/11, 992/11 331/11 & 854/11 to the Court of Sessions, the legislature still retained the provision for obtaining leave, in case of appeals to the High Court. Obviously, there would be no danger of any meritorious appeal being thrown away as the High Court would be competent to judge the merit

thereof and can be trusted for properly scrutinizing the matter before the appeal is entertained. This would not affect the genuine victim or any meritorious appeal in any manner whatsoever. 82. Undoubtedly, there has been change in the approach towards the rights of victim and there has been a recognition of the victim's sufferings which, at times, are not redressed at the hands of the State. Therefore a right has been rightly created in favour of the victim which victim can exercise where the State machinery does not act in a proper manner and does not file an appeal even when the acquittal would be unmerited. The question of conferring right on the victim arose only because it was felt that the State machinery, at times, does not file an appeal even when the acquittal would be unmerited. If the victim is given a right to approach the High Court that would take care of the grievance of the victim and it is not necessary that the APEAL Nos.991/11, 992/11 331/11 & 854/11 scrutiny by the High Court which is implicit in the matter of granting leave should be dispensed with for protecting the right of the victim. At the cost of repetition, it may be observed that a genuine victim or appeal having merit can never be thrown out by the High Court by refusing to grant leave. It is not possible to hold that scrutiny of the matter at this stage by the High Court would create some difficulties for the victim or that it would be oppressive or it would amount to taking away right of the victim. The requirement of leave does not take away the right given to the victim. Even if the right is conditioned by some procedural requirement before it is effectively exercised, it would not negative the right. 83. The right which has been conferred upon victim by proviso to section 372 cannot be considered as a complete Code in itself and does not deal with only the appeals against acquittal. As already observed, there would be three types of appeal which the victim can bring. This would be the right of the victim generally. So far as the right to bring appeal against acquittal is concerned, the same would be governed by the provisions of Section 378 of the Code and when APEAL Nos.991/11, 992/11 331/11 & 854/11 such appeal lies to the High Court, requirement of leave must be read into it. This, in no way, would offend the language used in the proviso as the language cannot be construed as laying down that such right would not be subject to any scrutiny . It would also not lead to any unjust or absurd result. On the contrary, it would prevent the anomaly that would occur if the other interpretation, namely, that leave is not required, is accepted. Thus, in my opinion, when an appeal against acquittal is filed by the victim in the High Court, leave of the High Court similar to the leave mentioned in the provisions of sub-section (3) and (4) of Section 378 would be required before the appeal is entertained. 84. The opposition to the view that leave would be required on the ground that the legislature intended to secure the rights of the victims is difficult to understand. The victims' rights were not being denied or defeated because the State was unable to procure leave of the High Court while challenging the orders of acquittal. The victims' rights were being defeated because no appeals against acquittal were being filed by the State even where the acquittal would be unjustified and APEAL Nos.991/11, 992/11 331/11 & 854/11 contrary to law. 'Requirement of leave' was not the 'mischief' which was sought to be remedied by enacting the proviso to Section 372. From this angle also, placing

emphasis on the victim's plight and the denial of their right as a justification for taking a view against the requirement of leave is not logical. 85. For all these reasons, I do not agree with the view expressed by my learned brother. In my opinion, though in view of the proviso to Section 372 of the Code, a victim is entitled to file an appeal, inter alia, against an order of acquittal, if such appeal is to lie to the High Court, the victim would be required to obtain the leave of the High Court in the same way as has been contemplated under sub-sections (3) and (4) of Section 378 of the Code. (A.M. THIPSAY, J.) 86. We must express our gratitude to the learned Senior Counsels who have assisted us in this case. Shri Marwadi, the learned Counsel, Shri Shirish Gupte, the learned Senior Counsel, Shri A.P. Mundargi, the learned Senior Counsel, the APEAL Nos.991/11, 992/11 331/11 & 854/11 learned Advocate Shri Parab and Shri Anturkar, the learned Senior Counsel have assisted this Court on this very crucial issue. ORDER OF THE COURT 87. Since we have expressed difference of opinion on the issue involved in this case and as there are conflicting views, in view of provisions of Section 392 of the Criminal Procedure Code and Rule 6 of Chapter-I of the High Court (Appellate Side) Rules, it would be appropriate if the matter is placed before the Hon'ble Chief Justice so that appropriate steps can be taken by the Hon'ble Chief Justice as to whether the matter should be placed before another learned Single Judge or larger Bench or before the Full Bench since the important question of law needs to be decided. Office is therefore directed to place the matter alongwith our judgments before the Hon'ble Chief justice. (A.M. THIPSAY, J.) (V. M. KANADE, J.)