

Mallikarjun Kodagali (Dead) ... vs The State Of Karnataka on 12 October, 2018

Equivalent citations: AIR 2018 SUPREME COURT 5206, 2019 (2) SCC 752, AIR 2019 SC(CRI) 195, (2018) 4 MAD LJ(CRI) 744, (2019) 73 OCR 370, (2019) 1 CRILR(RAJ) 47, (2018) 2 MADLW(CRI) 675, (2018) 14 SCALE 32, 2019 (1) SCC (CRI) 801, (2018) 4 RECCRIR 781, (2018) 4 KER LT 682, (2019) 1 KER LJ 292, (2019) 1 KANT LJ 1, 2019 CRILR(SC&MP) 47, (2018) 4 PAT LJR 235, (2019) 198 ALLINDCAS 183 (SC), (2018) 4 CRIMES 194, (2018) 4 ALLCRILR 817, 2019 CRILR(SC MAH GUJ) 47, (2019) 1 ALD(CRL) 165, (2018) 4 CURCRIR 379, (2018) 4 CRIMES 123, (2018) 3 GUJ LH 609, (2018) 4 JLJR 244, 2019 (2) KCCR SN 99 (SC), 2019 (1) AKR 89, AIRONLINE 2018 SC 284

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Bench: Deepak Gupta, Madan B. Lokur

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REPOR

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NOS. 1281-82 OF 2018
(ARISING OUT OF S.L.P. (CRL.) NOS. 7040-7041 OF 2014)

Mallikarjun Kodagali (Dead) represented
through Legal Representatives

...Appel

Versus

State of Karnataka & Ors.

...Respo

JUDGMENT

Madan B. Lokur, J.

1. Leave granted.

2. The rights of victims of crime is a subject that has, unfortunately, only drawn sporadic attention of Parliament, the judiciary and civil society. Yet, it has made great progress over the years. It is our evolving and developing jurisprudence that has made this possible. But we still have a long way to

go to bring the rights of victims of crime to the centre stage and to recognise them as human rights and an important component of social justice and the rule of law.

Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014)

3. The travails and tribulations of victims of crime begin with the trauma of the crime itself and, unfortunately, continue with the difficulties they face in something as simple as the registration of a First Information Report (FIR). The difficulties in registering an FIR have been noticed by a Constitution Bench of this Court in *Lalita Kumari v. Government of Uttar Pradesh*.¹ The ordeal continues, quite frequently, in the investigation that may not necessarily be unbiased, particularly in respect of crimes against women and children. Access to justice in terms of affordability, effective legal aid and advice as well as adequate and equal representation are also problems that the victim has to contend with and which impact on society, the rule of law and justice delivery.

4. What follows in a trial is often secondary victimisation through repeated appearances in Court in a hostile or a semi-hostile environment in the courtroom. Till sometime back, secondary victimisation was in the form of aggressive and intimidating cross-examination, but a more humane interpretation of the provisions of the Indian Evidence Act, 1872 has made the trial a little less uncomfortable for the victim of an offence, particularly the victim of a sexual crime. In this regard, the judiciary has been proactive in ensuring that the rights of victims are addressed, but a lot more needs to be done. Today, the rights of an accused far outweigh ¹(2014) 2 SCC 1 Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) the rights of the victim of an offence in many respects. There needs to be some balancing of the concerns and equalising their rights so that the criminal proceedings are fair to both.² The Courts have provided solace to the victim with monetary compensation, but that is not enough. ³ There are victim compensation schemes in force due to the mandate of Section 357A of the Code of Criminal Procedure, 1973 (the Cr.P.C.) but even that is not enough, though they are being implemented in several parts of the country. We are of the view that the judiciary is obliged to go and has gone beyond merely awarding compensation and has taken into consideration the larger picture from the perspective of the victim of an offence, relating to infrastructure in court buildings and has recommended and implemented some recommendations such as the construction of child friendly courts and courts that address the concerns of vulnerable witnesses.⁴ The Courts have done and are continuing to do their best for the victims of crime.

5. In *Sakshi v. Union of India*⁵ this Court passed significant directions for holding in camera proceedings, providing for a screen between the accused and the victim and placed restrictions, in a sense, on ²*Girish Kumar Suneja v. Central Board of Investigation*, (2017) 14 SCC 809 ³*Hari Singh v. Sukhbir Singh*, AIR 1988 SC 2127; *Bodhisattwa Gautam v. Subhra Chakroborty*, AIR 1996 SC 922; *Ankush Shivaji Gaikwad v. State of Maharashtra*, (2013) 6 SCC 770 ⁴*Sampurna Behura v. Union of India*, (2018) 4 SCC 433 ⁵(2004) 5 SCC 518 Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) the cross examination of witnesses. It is true that these directions have been passed in a case relating to sexual offences but the trend of this Court has been to show concern for the rights of victims of an offence and to address them.

6. Parliament also has been proactive in recognising the rights of victims of an offence. One such recognition is through the provisions of Chapter XXIA of the Cr.P.C. which deals with plea bargaining. Parliament has recognised the rights of a victim to participate in a mutually satisfactory disposition of the case. This is a great leap forward in the recognition of the right of a victim to participate in the proceedings of a non-compoundable case. Similarly, Parliament has amended the Cr.P.C. introducing the right of appeal to the victim of an offence, in certain circumstances. The present appeals deal with this right incorporated in the proviso to Section 372 of the Cr.P.C.

7. In other words, a considerable amount has been achieved in giving life to the rights of victims of crime, despite the absence of a cohesive policy. But, as mentioned above, a lot more still needs to be done.

8. Among the steps that need to be taken to provide meaningful rights to the victims of an offence, it is necessary to seriously consider giving a hearing to the victim while awarding the sentence to a convict. A victim Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) impact statement or a victim impact assessment must be given due recognition so that an appropriate punishment is awarded to the convict. In addition, the need for psycho-social support and counselling to a victim may also become necessary, depending upon the nature of the offence. It is possible that in a given case the husband of a young married woman gets killed in a fight or a violent dispute. How is the young widow expected to look after herself in such circumstances, which could be even more traumatic if she had a young child? It is true that a victim impact statement or assessment might result in an appropriate sentence being awarded to the convict, but that would not necessarily result in 'justice' to the young widow - perhaps rehabilitation is more important to her than merely ensuring that the criminal is awarded a life sentence. There is now a need, therefore, to discuss these issues in the context of social justice and take them forward in the direction suggested by some significant Reports that we have had occasion to look into and the direction given by Parliament and judicial pronouncements.

9. The rights of victims, and indeed victimology, is an evolving jurisprudence and it is more than appropriate to move forward in a positive direction, rather than stand still or worse, take a step backward. A voice has been given to victims of crime by Parliament and the judiciary Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) and that voice needs to be heard, and if not already heard, it needs to be raised to a higher decibel so that it is clearly heard.

10. With this background, we need to consider the questions that arise before us consequent to the introduction of the proviso to Section 372 of the Cr.P.C. with effect from 31st December, 2009. The questions are somewhat limited: Whether a 'victim' as defined in the Cr.P.C. has a right of appeal in view of the proviso to Section 372 of the Cr.P.C. against an order of acquittal in a case where the alleged offence took place prior to 31st December, 2009 but the order of acquittal was passed by the Trial Court after 31st December, 2009? Our answer to this question is in the affirmative. The next question is: Whether the 'victim' must apply for leave to appeal against the order of acquittal? Our answer to this question is in the negative.

Factual narrative

11. The appellant (Kodagali – now dead but represented by his legal representatives) was the victim of an attack on the night of 6 th February, 2009. He lodged a First Information Report with the police and after investigations, necessary proceedings were taken before the District and Sessions Judge, Bagalkot against the accused persons under several sections of the Indian Penal Code (the IPC).

Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014)

12. In S.C. No. 49 of 2010 the District and Sessions Judge, Bagalkot (Karnataka) acquitted the accused by a judgment and order dated 28 th October, 2013.

13. Aggrieved thereby, Kodagali preferred an appeal in the High Court being Criminal Appeal No. 100016 of 2014. The appeal was preferred under the proviso to Section 372 of the Cr.P.C. but it was dismissed as not maintainable by a judgment and order dated 10 th June, 2014. It was held by the High Court that the proviso to Section 372 of the Cr.P.C. came into the statute book with effect from 31st December, 2009 but the incident had occurred well before that date. Therefore, the appeal was not maintainable. Reliance was placed by the High Court on National Commission for Women v. State of Delhi and another⁶

14. Kodagali then preferred another appeal in the High Court being Criminal Appeal No. 100119 of 2014. This appeal was filed under the provisions of Section 378(4) of the Cr.P.C. By a judgment and order dated 4th July, 2014 the High Court held that the appeal was not maintainable. The view taken by the High Court was on a plain reading of Section 378(4) of the Cr.P.C., namely, that the appeal was not filed in a case instituted upon a complaint before a Magistrate. 6(2010) 12 SCC 599 Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014)

15. Under these circumstances, Kodagali is before us challenging the judgment and orders dated 10th June, 2014 and 4th July, 2014. It is his contention that he has been left with no remedy against the acquittal of the accused. His submission is that one of the accused is a Member of the Legislative Assembly and it is for this reason that the State did not challenge the acquittal. It is not necessary for us to go into the merits of the controversy or the allegations made by Kodagali. Suffice it to say, we are only concerned with the question whether the appeal filed by Kodagali under the proviso to Section 372 of the Cr.P.C. was maintainable or not.

Victims of crime and their rights

16. In recent times, four Reports have dealt with the rights of victims of crime and the remedies available to them. The first Report in this sequence is the 154th Report of the Law Commission of India of August 1996. While this Report did not specifically deal with the right of a victim of crime to file an appeal, it did discuss issues of victims of crime, compensation to be paid to the victim and rehabilitation of the victim including the establishment of a Victim Assistance Fund.

17. The second important Report is the March 2003 Report of the Committee on Reforms of Criminal Justice System commonly known as Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos.

7040-7041 of 2014) the Report of the Justice Malimath Committee. In the Chapter on Adversarial Rights, it is recommended under the sub-heading of Victims Right to Appeal as follows:

“2.21. The victim or his representative who is a party to the trial should have a right to prefer an appeal against any adverse order passed by the trial court. In such an appeal he could challenge the acquittal, or conviction for a lesser offence or inadequacy of sentence, or in regard to compensation payable to the victim. The appellate court should have the same powers as the trial court in regard to assessment of evidence and awarding of sentence.”

18. Thereafter, in the substantive Chapter on Justice to Victims, it is noted that victims of crime, in many jurisdictions, have the right to participate in the proceedings and to receive compensation for injury suffered. It was noted as follows:

“6.3 Basically two types of rights are recognized in many jurisdictions particularly in continental countries in respect of victims of crime. They are, firstly, the victim’s right to participate in criminal proceedings (right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth) and secondly, the right to seek and receive compensation from the criminal court itself for injuries suffered as well as appropriate interim reliefs in the course of proceedings.”

19. Following up on this, and extending the rights of victims of crime, it was observed in paragraph 6.5 that “The right of the victim should extend to prefer an appeal against any adverse order passed by the trial court. The appellate court should have the same powers to hear appeals against acquittal as it now has to entertain appeal against conviction. Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) There is no credible and fair reason why appeals against acquittals should lie only to the High Court.”

20. On this basis, the Justice Malimath Committee made the following recommendation enabling the victim of a crime to prefer an appeal. The recommendation (made in the Chapter having the same heading) reads as follows:

“The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.”

21. The third Report worth considering is the July 2007 Report of the Committee on the Draft National Policy on Criminal Justice also known as the Professor Madhava Menon Committee. While this Committee does not specifically deal with providing a right of appeal to the victim of a crime, it does refer to victim orientation to criminal justice and providing for a balance between the constitutional rights of an accused person and a victim of crime. One of the suggestions given by the Committee is to permit the impleadment of a victim in the trial proceedings. Obliquely therefore, it follows that if a victim is impleaded as a party to the trial proceedings, the victim would certainly

have a right to file an appeal against an adverse order, particularly an order of acquittal. Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014)

22. The fourth Report that deserves a mention is the 221 st Report of the Law Commission of India April 2009. In this Report, the recommendation of the Law Commission of India was to the effect that as the law stands, an aggrieved person cannot file an appeal against an order of acquittal. However, a revision petition can be filed. The powers of a revisional court are limited and the process involved is cumbersome and it also involves a wastage of money and time. It was, therefore, recommended by the Law Commission that against an order of acquittal passed by a Magistrate, a victim should be entitled to file an appeal before the revisional court. It was also recommended that in complaint cases also an appeal should be provided in the Sessions Court instead of the High Court. In all such cases, the aggrieved person or complainant should have the right to prefer an appeal, though with the leave of the Appellate Court. The view of the Law Commission was expressed in the following words:

“2.9 All appeals against orders of acquittal passed by Magistrates were being filed in High Court prior to amendment of section 378 by Act 25 of 2005. Now, with effect from 23.06.2006, appeals against orders of acquittal passed by Magistrates in respect of cognizable and non-bailable offences in cases filed on police report are being filed in the Sessions Court, vide clause (a) of sub-section (1) of the said section. But, appeal against order of acquittal passed in any case instituted upon complaint continues to be filed in the High Court, if special leave is granted by it on an application made to it by the complainant, vide sub-section (4) of the said section.

Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) 2.10 Section 378 needs change with a view to enable filing of appeals in complaint cases also in the Sessions Court, of course, subject to the grant of special leave by it.

2.11 Further, at present, against orders of acquittal passed by Magistrates (where the offence is cognizable and non-bailable) or by Sessions Courts, appeal in cases filed on police reports can be filed only at the instance of the District Magistrate or the State Government, as the case may be, vide sub-section (1) of section

378. In such matters, the aggrieved person or the informant cannot himself file an appeal. However, he can prefer a revision.

If the revisional Court finds that the accused has been wrongly acquitted, it cannot convict him in view of sub-section (3) of section 401, but it has to remand the case. It is a cumbersome process and involves wastage of money and time. This provision also needs a change and in such matters also, where the District Magistrate or the State does not direct the Public Prosecutor to prefer appeal against an order of acquittal, the aggrieved person or the informant should have the right to prefer appeal, though with the leave of the Appellate Court. This will also give an opportunity to the aggrieved person to challenge the findings of fact recorded by lower court. Also, this will introduce more transparency and accountability in the lower judiciary, as at present, the percentage of

acquittal is quite high.”

23. It is, apparently, on the basis of all these Reports and other material that Section 372 of the Cr.P.C. was amended on 30th December, 2009 with effect from 31st December, 2009. Section 372 of the Cr.P.C. as it stands today reads as follows:

“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 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.” Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) Decision in the case of the National Commission for Women

24. In National Commission for Women, the victim, a young lady aged 21 years committed suicide on or about 14 th April, 2003. She left behind a note in which she stated that the accused had physical relations with her and held out a promise of marriage but later backed off. He had exploited her and therefore she was committing suicide.

25. The Trial Judge relied on the dying declaration and convicted the accused by his judgment and order dated 21 st April, 2008. The accused preferred an appeal in the Delhi High Court which acquitted him of an offence under Section 306 of the IPC while maintaining his conviction under Section 376 of the IPC. The sentence was reduced to that already undergone which was about five years and six months. The judgment and order of the High Court is dated 9th February, 2009.

26. Feeling aggrieved by the decision of the High Court, the National Commission for Women preferred a petition for special leave to appeal admittedly invoking the inherent powers of this Court. In that context this Court held that in view of Section 372 of the Cr.P.C. no appeal shall lie from a judgment or order by a criminal Court except as provided by the Cr.P.C. or by any other law which authorises an appeal. The proviso Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) to Section 372 of the Cr.P.C. gives a limited right to the victim to file an appeal in the High Court against any order of a criminal Court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation. This Court then observed as follows:

“The proviso may not thus be applicable as it came in the year 2009 (long after the present incident) and, in any case, would confer a right only on a victim and also does not envisage an appeal against an inadequate sentence.”

27. It was further held that an appeal being the creation of a statute, it would not be maintainable under any inherent power. Article 136 of the Constitution does confer discretionary power on this Court to entertain a petition at the behest of the State or an affected private individual but to permit

anybody or an organisation pro bono publico to file an appeal would be a dangerous doctrine and would cause utter confusion in the criminal justice system. On this basis it was held that the special leave petition filed by the National Commission for Women was not maintainable.

28. The thrust of the decision of this Court, which appears to have been misunderstood by the High Court, is with regard to entertaining a petition under Article 136 of the Constitution by a third party. As far as criminal matters are concerned, this Court undoubtedly held that permitting a third party to prefer a petition under Article 136 of the Constitution would be CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) dangerous and would cause confusion. The reasoning of this Court was not directed towards the proviso to Section 372 of the Cr.P.C. It is only in passing that this Court observed that on the facts of the case, the proviso to Section 372 of the Cr.P.C. might not be applicable since it came into the statute book after the incident.

29. The decision of this Court in National Commission for Women is quite clearly distinguishable and reliance on this decision by the High Court is inapposite.

Decisions of the Full Bench

30. The interpretation of the proviso to Section 372 of the Cr.P.C. has been considered in Full Bench decisions rendered by a few High Courts.

31. Among the first few Full Bench decisions that addressed this issue was the judgment of the Gujarat High Court in Bhavuben Dineshbhai Makwana v. State of Gujarat & Ors.⁷ The questions framed for consideration in this case were:

(i) Whether an appeal filed by the victim, invoking his right under proviso to Sec. 372 of Cr.P.C, challenging acquittal, or conviction for a lesser offence, or awarding inadequate compensation, is not maintainable, on the ground that the State has filed an appeal against the same order and for the same purpose?

(ii) Whether an appeal filed by the State should not be entertained, on the ground that the appeal preferred by the victim 7MANU/GJ/1137/2012 - Criminal Appeal No. 238 of 2012, decided on 23 rd October, CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) invoking his right under proviso to Sec. 372 of Cr.P.C., against the same order, is admitted by the Court?

(iii) If the victim prefers an appeal before this Court, challenging the acquittal, invoking his right under proviso to Sec. 372 of Cr.P.C., whether that appellant is required to first seek leave of the Court, as is required in case of appeal being preferred by the State?

32. While discussing these issues, the Full Bench observed that the Legislature had conferred a substantive statutory right of appeal and such a right could not be diluted by a judicial pronouncement since the right of a party to file an appeal is an independent, substantial and

statutory right.

33. Analysing the proviso to Section 372 of the Cr.P.C. and juxtaposing it with Section 377 of the Cr.P.C. the Full Bench noted that the victim has no right to prefer an appeal against “inadequacy of sentence”, a right available only to the State and the State does not have any right to file any appeal against “inadequacy of compensation”, a right available only to a victim. Noting the availability of different rights, it was held:

“In light of different types of right of appeal provided to the victim and to the State/Prosecution, it will not be proper to hold that the right of either of them is dependent upon the other. To put it differently, only victim can file an appeal against an order of imposing ‘inadequate compensation’ in addition to his right of appeal against acquittal and convicting the accused for a lesser offence and therefore, to club his right and make it dependent upon the exercise of right of appeal at the instance of the State would be not only be unworkable, but would run contrary to the scheme and lead to absurdity.” CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014)

34. The Full Bench then concluded that the correct position in law would be that the right to file an appeal by the victim of an offence is an independent and statutory right not subservient to the rights of the State to file an appeal. It was further concluded that each victim has an independent right of appeal and in a given case, the grievance of different victims may be completely different. It was held as follows:

“In our opinion, the correct law, as emerging from the scheme of the Code, would be that the right of a victim to prefer an appeal (on limited grounds enumerated in proviso to Sec. 372 of the Code) is a separate and independent statutory right and is not dependent either upon or is subservient to right of appeal of the State. In other words, both the victim and the State/prosecution can file appeals independently without being dependent on the exercise of the right by the other. Moreover, from the act or omission for which the accused has been charged, there may be more than one victim and the loss suffered by the victims may vary from one victim to the other victims. Therefore, each of such victims will have separate right of appeal and in such appeals, the grievance of each of the appellant may be different. For instance, in an act of arson when a joint property of different persons has been set on fire, the loss suffered by each of the co-sharers may be different. In such a case, each co-sharer has a separate right of appeal and such right of one does not depend even on the filing of such appeal by another victim.”

35. The first two questions were accordingly answered by the Gujarat High Court by holding that the appeals filed by the victim were maintainable.

36. On the third question, the Full Bench noted that if the victim restricts the appeal to the grievance to inadequacy of the compensation or CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos.

7040-7041 of 2014) punishment for a lesser offence, it does not become an appeal against acquittal but the appeal is really directed against “any other sentence or order not being an order of acquittal” within the meaning of Art. 115(b) of the Limitation Act, 1963 and thus, no question of taking special leave arises. The Full Bench took the view that for the purposes of Section 378(4) of the Cr.P.C. a victim who is not a complainant will not come within the purview of that section and would not be required to take recourse to the provision of special leave as provided therein. It was held:

“Therefore, in the case before us, the legislature while conferring the right of appeal upon the victim, who is not a complainant, not having imposed any condition of taking leave or special leave, we cannot infer such condition and impose the same upon the victim, although, the legislature was quite conscious of existence of such provision in case of an appeal by a complainant and has retained that provision without consequential amendment thereby making its intention clear that the provision of special leave is not applicable to an appeal preferred by a victim against acquittal if he is not the complainant.” The third question was then answered in the following words:

“If the victim also happens to be the complainant and the appeal is against acquittal, he is required to take leave as provided in Sec. 378 of the Criminal Procedure Code but if he is not the complainant, he is not required to apply for or obtain any leave. For the appeal against inadequacy of compensation or punishment on a lesser offence, no leave is necessary at the instance of a victim, whether he is the complainant or not.”

37. In our opinion, the Gujarat High Court made an artificial and unnecessary distinction between a victim as a victim and a victim as a complainant in respect of filing an appeal against an order of acquittal. *Crl. Appeal Nos. _____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014)* The proviso to Section 372 of the Cr.P.C. does not introduce or incorporate any such distinction.

38. The next significant decision has been rendered by the Division Bench of the Calcutta High Court in *Mahafuja Banu v. Md. Asadul Islam & State*.⁸ In this case, the prosecutrix lodged a complaint on 13th December, 2003 and the judgment and order of acquittal was delivered by the Trial Court on 22nd December, 2009. An appeal to the High Court was (presumably) filed only after 31st December, 2009. While considering the maintainability of the appeal, the High Court referred to the decision of the Gujarat High Court in *Bhavuben Dineshbhai Makwana*.

39. Reference was also made to a Division Bench decision of the Agartala Bench of the Gauhati High Court in *Gouranga Debnaiah v. State of Tripura*.⁹ In that case the alleged offence took place on 14 th November, 2006 and the judgment of acquittal was delivered on 30 th September, 2010. The High Court held that the appeal against acquittal filed by the victim was maintainable. It was held that if the interpretation given to the proviso to Section 372 of the Cr.P.C. is that the right to appeal accrued on the date of the incident, then it would unreasonable and unfair, more so since the proviso to Section 372 of the Cr.P.C. is given prospective effect. *8(2013) 1 Cal LT 109 92011 (4) GLT 379 Crl. Appeal Nos. _____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014)*

40. Reference was also made to a decision by a learned Single Judge decision of the Kerala High Court in T. Balakrishnan Master v. K.M. Ramachandran Master.¹⁰ In that case it was held that the proviso to Section 372 of the Cr.P.C. confers on the victim a substantive right to prefer an appeal in certain circumstances. The right is dependent on the judgment rendered by the Court and not in relation to the incident that gave rise to the prosecution.

41. The Calcutta High Court also considered the question whether there is finality attached to the judgment of acquittal and whether that finality could be disturbed on the basis of a right subsequently conferred on the victim. It was held that the judgment of acquittal had not attained finality in that the victim had a right to file a revision petition and the State had the right to file an appeal. All that the proviso to Section 372 of the Cr.P.C. had done was to replace the right of a revision with the right to appeal.

42. While it is true that there is a qualitative difference between a revision and an appeal, the Calcutta High Court drew attention to the 221st Report of 30th April, 2009 of the Law Commission. This Report noted the distinction and observed that the revision process was 10CrL. M.A. No. 7423 of 2011, decided on 22nd September, 2011 - MANU/KE/1620/2011 CrL. Appeal Nos._____/2018 (@ S.L.P. (CrL.) Nos. 7040-7041 of 2014) cumbersome and involved a wastage of time and money. It was, therefore, recommended by the Law Commission that the aggrieved person should have the right to prefer an appeal, though with the leave of the Appellate Court. This would also give the aggrieved person an opportunity to challenge the findings of fact recorded by the Trial Court.

43. On the basis of the above decisions and the reasons given, the Calcutta High Court concluded that there was nothing to suggest that the victim could exercise the right to appeal under the proviso to Section 372 of the Cr.P.C. only if it existed on the date of the “cause of action” (the alleged offence or incident) or the date on which the complaint was lodged.

44. After a short hiatus, this issue again came up for consideration and this time before the Full Bench of the Punjab and Haryana High Court in Tata Steel v. Atma Tube Products Ltd.¹¹ The decision is much more than elaborate and only two of the seven questions framed for consideration are relevant for the present discussion. These two questions are:

(1) Whether the ‘rights’ of a victim under the amended Cr. P.C. are accessory and auxiliary to those perceived to be the exclusive domain of the ‘State’?

(2) Whether proviso to Section 372 CrPC inserted w.e.f.

December 31, 2009 is prospective or retrospective in nature and whether a revision petition pending against an order of acquittal 11(2014) 173 (1) PLR 1 CrL. Appeal Nos._____/2018 (@ S.L.P. (CrL.) Nos. 7040-7041 of 2014) before the insertion of the said proviso, can be converted into an appeal and transferred to the Court of competent jurisdiction?

45. In answering the first question, the High Court noted that the scheme of the Cr.P.C. provides, after various amendments, the right of appeal to the accused; the State; the victim and the

complainant in complaint cases. It was observed that if a victim also happens to be the complainant in a police case, then that victim is not required to take leave under Section 378 of the Cr.P.C. to file an appeal against an order of acquittal. To this extent, the Full Bench of the Punjab and Haryana High Court differed with the view taken by the Full Bench of the Gujarat High Court in Bhavuben Dineshbhai Makwana.

46. The reasons for disagreement stem from the fact that the Legislature was aware of the provisions of the existing statute including the fetter imposed on the State in filing an appeal against an order of acquittal. However, that fetter was not placed on the right to appeal given to a victim under the proviso to Section 372 of the Cr.P.C. The view of the Full Bench of the Punjab and Haryana High Court was that if such fetter were to be placed on the right of the victim, it would amount to rewriting the proviso to Section 372 of the Cr.P.C. and would also defeat the legislative will. The Punjab and Haryana High Court expressed its opinion in the following words:

Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) “The Court shall always presume that while amending or bringing a new enactment, the Legislature was fully aware of the provisions of the existing Statute. The Parliament had thus full knowledge of the fetters imposed by it on the presentation of appeals by the State or a complaint through Section 378(3) & (4) of the Code, yet it gave the right to appeal to a ‘victim’ free from any obstacle under proviso to Section 372 of the Code. The legislative policy to grant unconditional right to appeal to a ‘victim’ is thus writ large. It would indeed not only amount to re- writing the proviso to Section 372 but would also defeat the legislative will if the restrictions expressly embedded in Section 378(3) & (4) are impliedly planted into proviso to Section 372 of the Code also. Since leave to appeal under Section 378(3) is confined only to such appeals which are presented by the State or Central Governments under sub-Section (1)(b) or sub-Section (2)

(b) of Section 378 of the Code, with due regard at our command, we are unable to agree with the view taken by the Division Bench of this Court in Smt. Ram Kaur's case (supra) 12 that a ‘victim’ shall be required to seek leave/special leave to appeal while exercising his/her right to appeal under proviso to Section 372 of the Code and overrule the same to that extent. On the same analogy, we express our inability to agree with the view taken by the Patna High Court in Guru Prasad Yadav's case (supra).¹³ The cumulative effect of the above discussion is that the right(s) of a ‘victim’ under the amended Code are substantive and not mere *brutam fulmen* hence these are not accessory or auxiliary to those of the State and are totally incomparable as both the sets of rights or duties operate in different and their respective fields. We thus hold that a ‘victim’ is not obligated to seek ‘leave’ or ‘special leave’ of the High Court for presentation of appeal under proviso to Section 372 of the Code.”

47. With regard to the second question, the High Court concluded that the right to appeal is a substantive right. Consequently, the inescapable conclusion would be that the right to appeal given to a victim would be prospective and enforceable with effect from 31 st December, 2009 only. 12Smt.

Ram Kaur @ Jaswinder Kaur v. Jagbir Singh alias Jabi and others, MANU/PH/4500/2010 decided on 1st April, 2010 13Guru Prasad Yadav v. State of Bihar, Criminal Appeal No. 582 of 2011 CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) This would be irrespective of the date of registration of the FIR or the date of the occurrence. The High Court held as follows:

“Since right to appeal is a substantive right and it cannot be inferred by implication unless the Statute expressly provides so, the only inescapable conclusion would be to hold that the right to appeal given to a ‘victim’ under proviso to Section 372 of the Code is prospective and has become enforceable w.e.f. December 31, 2009 only. A ‘victim’ is entitled to prefer appeal in respect of any type of order referred to in the proviso to Section 372 if such order has been passed on or after December 31, 2009 irrespective of the date of registration of FIR or the date of occurrence etc. To be more specific, it is clarified that it is the date of passing of the order to be appealed from and not any other fact situation, which shall determine the right to appeal of a ‘victim’. As a corollary thereto, it is held that the remedy availed by a ‘victim’ including revision petition against acquittal of the accused by an order passed before December 31, 2009, cannot be converted into an appeal under proviso to Section 372 and it shall have to be dealt with in accordance with the parameters settled for exercising revisional jurisdiction by a superior Court.”

48. The Full Bench of the Delhi High Court also considered this issue in Ram Phal v. State & Ors.¹⁴ The question considered by the Delhi High Court was:

“Whether the appellate remedy [under the proviso to Section 372 of the Cr.P.C.] is available with respect to only such offences which were committed as on the date when the appellate right was conferred by law or the appellate right would be available with respect to the date of the decision or the appellate remedy is without any reference to the two points of time i.e. the date when the offence was committed or when the appellate right was conferred by law, (Act No.5 of 2009 with effect from 31.12.2009).”

49. While answering the question, the Delhi High Court referred to 142015 (151) DRJ 562 CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) Tata Steel decided by the Punjab & Haryana High Court. The Delhi High Court referred to the conclusion that a victim “is entitled to prefer appeal in respect of any type of order referred to in the proviso to Section 372 if such order has been passed on or after December 31, 2009 irrespective of the date of registration of FIR or the date of occurrence etc.”

50. Reference was also made to the Division Bench of the Patna High Court in Parmeshwar Mandal v. State of Bihar¹⁵ and parts of the following passages were referred to and relied upon. It was said in Parmeshwar Mandal:

“Proviso to Section 372 of the Code is in two parts. First clause of the said proviso begins with ‘provided that’ and ends with ‘Inadequate compensation’ and creates a

right in the victim to prefer appeal against any order passed by a court either (i) acquitting the accused or (ii) convicting for a lesser offence or

(iii) imposing inadequate compensation. Thereafter, by inserting conjunction 'and', another clause has been added in the same sentence by which forum for preferring such appeal has been identified, which relates to procedural part of law. Thus, the said proviso contains both substantive part, creating right in the victim to prefer an appeal, and procedural part, by identifying the forum for filing such an appeal. It is not in dispute that the substantive part of law operates prospectively, unless made retrospective, and the procedural part is presumed to be retrospective within its defined limits.

xxx xxx xxx xxxThe Central Government, by Notification No. S.O. 3313(E) dated 30th December, 2009, appointed 31st day of December 2009, as the date for the Act. 5 of 2009 to come into force, which was published in Gazette of India, Ext., Pt.II, S.3(ii), dated 30-12-2009. Hence, in absence of any express intention notified by the Legislature to the contrary, it has to be concluded 152014 (1) PLJR 377 CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) that the right of victim, to prefer an appeal in terms of said proviso to Section 372, became available to the victim(s) of all cases in which orders were passed by any criminal court acquitting the accused or convicting him for a lesser offence or imposing inadequate compensation, on or after 31st of December, 2009. In other words, date of judgment of a criminal court has to be necessarily treated as the relevant date for applying the test of maintainability of appeal by the victim under three contingencies laid down under the proviso to Section 372 of the Code, irrespective of the date of occurrence, institution of the case, cognizance or commitment.”

51. The Delhi High Court held that in light of the settled law as explained above, it was in respectful agreement with these decisions.

52. The Full Bench of the Rajasthan High Court in Baldev Sharma v. Gopal & Ors¹⁶ considered (amongst others) the following two questions:

(i) Whether the proviso to Section 372 as introduced by the amending Act No. 5 of 2009 which has been brought into effect on 31.12.2009 can be given effect to in cases where the offence occurred prior to 31.12.2009 and thereby given the right of appeal to the victim in the event; (a) whether the court below has acquitted the accused or (b) has convicted the accused for a lesser offence or (c) has imposed inadequate compensation. Though the judgment in such cases may have been passed by the court below after 31.12.2009.

(ii) Whether the appeal by the victim under proviso to Section 372 is also required to be dealt with in the same manner as an appeal filed by the State under Section 378 Cr.P.C. and the provisions of Section 378 are required to be read into the provisions

of Section 372 Cr.P.C. with regard to appeals filed by the victims.

53. It was held, relying upon the same passages in Tata Steel and Parmeshwar Mandal that “judgments passed on or after the said date 162017 (3) RLW 2604 (Raj.) CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) [31st December, 2009] are the ones in respect whereto, irrespective of the date of the offence, the victim can avail the right to file an application seeking leave to appeal.” Division Bench decisions

54. Among the first few decisions rendered by the Division Bench of the High Court was the judgment and order passed by the Division Bench of the Gauhati High Court in Gouranga Debnaih. In this case, the alleged incident took place on 14th November, 2006 and the judgment and order of acquittal was passed by the Trial Court on 30 th September, 2010. On the question of the maintainability of the appeal under the proviso to Section 372 of the Cr.P.C. the Division Bench framed the following question for consideration: “Whether he [the victim] has any right to prefer an appeal against the impugned judgment and order of acquittal taking the benefit of proviso to Section 372 of the Code which has been inserted by way of amendment giving effect and if so, the present condonation petition is maintainable?”

55. In answering this question, the Gauhati High Court expressed the view that has already been adverted to above and need not be repeated here. This is what the High Court had to say:

“Now question is whether an appeal can be preferred for an incident that happened prior to giving effect of the amendment of CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) the Code. There is no doubt that if a Court considers that from the date of incident, the right to appeal accrued, then obviously that would be unreasonable and unfair, more so, when the amendment is given prospective effect and that would also go against the law of limitation as prescribed under Article 114 of the Limitation Act. In this case it is not necessary for us to discuss even that aspect, as right to appeal of the petitioner accrued only after the decision in the sessions case by the trial Court i.e. the date on which the judgment was delivered i.e. on 30.9.2010.”

56. In Parmeshwar Mandal an appeal was filed by a victim in the High Court against a judgment and order of acquittal dated 28 th August, 2012. The Division Bench of the High Court sought assistance on the maintainability of the appeal. After hearing arguments, the Court noted the distinction in the language of Section 372 of the Cr.P.C. and the language of Sections 377 and 378 of the Cr.P.C. The High Court noted that Section 372 of the Cr.P.C. was framed in affirmative terms. Moreover, the use of the word ‘shall’ in the proviso to Section 372 of the Cr.P.C., in contradistinction to the use of the word ‘may’ in Sections 377 and 378 of the Cr.P.C. gives a clear indication that the right of a victim to file an appeal was placed on a higher pedestal than the rights of the State, or even the accused. This is what the High Court had to say in this regard:

“What is significant to notice is that this right to appeal, which is clearly in affirmative terms, has been given to the victim by inserting the said proviso in

Section 372 itself, which is the opening section of the Chapter, and not by any insertion in Sections 377 or 378, which deal with appeals against inadequate sentence and acquittal. In contradistinction to wordings of Sections 377 and 378, which are apparently enabling provisions, and only give a liberty to the District Magistrate, State Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) Government, the Central Government, and the complainant, to prefer an appeal by use of the word ‘may’, a victim, under the said proviso to Section 372 has been given a right to prefer appeal by use of the expression ‘shall have a right to appeal’. It is also significant to notice that, whereas in Section 378, grant of leave has been made a condition precedent for entertaining any appeal against acquittal preferred under sub-sections (1) and (2), and grant of special leave for entertaining an appeal by a complainant preferred under sub-section (4), there is no such qualification prescribed in the said proviso to section 372 for a victim to maintain his appeal against an order of acquittal, or against a conviction for a lesser offence or against imposition of inadequate compensation..... Hence, in the opinion of this Court, the Legislature, by a conscious act, has put the right of a victim to prefer an appeal under the Code, in terms of the said proviso to Section 372, at a much higher pedestal than the right of a prosecuting agency or a complainant to present an appeal. Any otherwise intention of the Legislature is ruled out from the fact that, had it been so, it would have inserted a new sub-section in Sections 377 or 378, putting his right, with limitations and qualifications, at par with that of the prosecuting agency or the complainant, instead of inserting this right of victim in the opening section of the chapter itself.”

57. Thereafter, the High Court gave its reasons and conclusion for holding that the date of judgment of a criminal court has to be necessarily treated as the relevant date for applying the test of maintainability of appeal by the victim under three contingencies laid down under the proviso to Section 372 of the Cr.P.C. irrespective of the date of occurrence, institution of the case, cognizance or commitment. The Delhi High Court had referred to the relevant passages of the judgment of the Patna High Court and we have extracted these passages above and they need not be repeated here.

58. The Division Bench of the Kerala High Court dealt with this issue Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) in Vanaja K.C. v. State of Kerala & Ors.¹⁷ In this case the alleged offence or incident took place on 27 th January, 2005 and the judgment of acquittal by the Trial Court was rendered on 24 th February, 2010. The question considered by the High Court was:

“Whether the victim gets a right of appeal under the proviso to Section 372 Cr.P.C. in a case where the date of occurrence was before and the judgment was pronounced after the date of commencement of Act 5 of 2009?”

59. The Division Bench relied upon an earlier decision of the High Court in Balakrishnan Master which referred to the letter and spirit of the law. The following passage from the decision of the Kerala High Court is instructive:

“The question is whether the right of appeal conferred on the victim by the proviso to Section 372 of the Code, has to be determined with regard to the date of order of acquittal or conviction of the accused for a lesser offence or order providing inadequate compensation, or, with respect to the date of incident giving rise to the prosecution of the accused. What is conferred by the Amendment Act 5 of 2009 on the victim is a substantive right to prefer an appeal in certain circumstances as specified, and that alone. Act 5 of 2009 has come into effect from 31.12.2009. Such right is available to a victim where a judgment is rendered by the court on or after 31.12.2009, provided, any one of the three circumstances covered by the proviso is involved in the case. The right is dependent on the judgment rendered by the court and not in relation to the incident which gave rise to the prosecution of the accused, whether or not it was at the instance of the victim..... Where there is no doubt that what is conferred under the proviso to Section 372 of the Code enabling the victim to prefer an appeal in the circumstances specified is a substantive right conferred on him by the Statute its effect cannot be nullified taking a view that the applicability of the proviso inserted has to 17ILR 2016 (2) Kerala 713 Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) be reckoned with reference to the date of incident in the case which led to the prosecution of the accused. Any such view would be against the letter and spirit of the aforesaid proviso and also the very purpose for which a right of appeal is conferred on the victim, illustrating and defining the person falling thereunder, and specifically limiting to what situation such a right could be exercised.”

60. Reference was also made to Parmeshwar Mandal wherein it was held that the intention of the Legislature was not to vest the right of appeal in only those victims in whose cases the occurrence was after the amendment to the Cr.P.C. If that proposition were to be accepted, then for years to come, the right of the victim to prefer an appeal in terms of the proviso would remain illusory (given the delay in disposal of cases).

61. On the basis of these decisions it was held that the appeal filed by the victim would be maintainable since the judgment of acquittal passed by the Trial Court was post 31st December, 2009.

62. There are decisions rendered by learned Single Judges of a few High Courts, but it is not necessary to further burden this judgment with an analysis of those decisions (we have referred to one of them). Suffice it to say that the decisions have more or less followed the reasons and conclusions arrived at in the Full Bench decisions rendered by different High Courts.

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63. Broadly speaking, in the above cases, the view expressed by the High Courts is that if the judgment of the Trial Court is delivered after the proviso came into force, that is, after 31 st December, 2009 then, irrespective of the date of the offence, the victim can avail a right of appeal. In some of the decisions it has been held that the right of appeal is not an absolute right conferred

on the victim, but it is subject to an application seeking special leave to appeal.

Dissenting decisions

64. In *D. Sudhakar v. Panapu Sreenivasulu @ Evone Water Sreenivasulu and Ors.*¹⁸ the Andhra Pradesh High Court dismissed an appeal filed by the victim of an offence against an order of acquittal dated 30th November, 2011 on the ground that it was not maintainable. The High Court relied upon the observation made by this Court in National Commission for Women for this conclusion. Reference was also made, incidentally, to a decision of the learned Single Judge of the Kerala High Court in *John v. Shibu Cherian*¹⁹ which also held to the same effect.

65. A similar view was expressed by the Division Bench of the Chhattisgarh High Court in *Bhisam Prasad Bareth v. Dinesh Mahant & Ors.*²⁰ relying upon the decision of this Court in National Commission 18MANU/AP/1172/2012 decided on 7th December, 2012 19MANU/KE/1839/2011 decided on 5th August, 2011 20MANU/CG/0079/2012 decided on 15th March, 2012 CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) for Women. It may be mentioned here that the appeal filed in the Chhattisgarh High Court was against an order of acquittal passed on 18th March, 2009 in respect of an incident that occurred on 5th March, 2008 both dates being well before the insertion of the proviso to Section 372 of the Cr.P.C.

66. In the dissenting set of decisions, the view taken by the High Courts is to the effect that if the incident or the offence occurred prior to 31st December, 2009 the victim cannot file an appeal under the proviso to Section 372 of the Cr.P.C. regardless of the date of decision of the Trial Court.

67. An analysis of the decisions rendered by various High Courts indicates that the overwhelming view is that the date of the judgment and order passed by the Trial Court is the relevant date for determining the applicability of the proviso to Section 372 of the Cr.P.C. and if, as in the present case, the judgment and order is post 31st December, 2009 then the victim can prefer an appeal to the High Court.

Another view expressed by this Court CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014)

68. In *Satya Pal Singh v. State of Madhya Pradesh & Ors.*²¹ this Court gave what appears to be a rather expansive interpretation to the proviso to Section 372 of the Cr.P.C. and concluded as follows:

“This Court is of the view that the right of questioning the correctness of the judgment and order of acquittal by preferring an appeal to the High Court is conferred upon the victim including the legal heir and others, as defined under Section 2(wa) Cr.P.C. under the proviso to Section 372, but only after obtaining the leave of the High Court as required under sub-section (3) of Section 378 Cr.P.C.”

69. In this case the offence occurred on or about 19th July, 2010 and the decision of the Trial Court was delivered on 13th June, 2013. On a plain reading of the cited passage, it does appear that the

date of the alleged offence and the judgment and order of the Trial Court is not relevant, meaning thereby that even if the offence was committed prior to 31 st December, 2009 and the judgment and order was rendered prior to 31 st December, 2009 the victim could prefer an appeal to the High Court after obtaining leave. This is not so, and therefore the misunderstanding of the expansive nature of the view expressed.

70. The two decisions of this Court mentioned above arise in two different fact situations. In National Commission for Women the offence and the judgment of the Trial Court were before 31 st December, 2009. In Satya Pal Singh, the offence and the judgment of the Trial Court were 21(2015) 15 SCC 613 CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) after 31st December, 2009. None of these situations arise in the present appeals in which the offence was said to have been committed before 31 st December, 2009 while the judgment of the Trial Court was delivered after 31st December, 2009. We are concerned in these appeals only with the maintainability of an appeal by the victim under the proviso to Section 372 of the Cr.P.C. where the alleged offence was committed before 31 st December, 2009 and the judgment and order has been delivered by the Trial Court post 31st December, 2009. Therefore, none of the two decisions of this Court are of any real assistance to us. Our conclusions

71. It was submitted by learned counsel for the accused that the right to file an appeal is a substantive right and it should not be easily recognized unless specifically conferred by statute. We agree. There is no doubt that from the time of the Constitution Bench decision of this Court in Garikapati Veeraya v. N. Subbiah Choudhry²² it has been held that the right to appeal is not a mere matter of procedure but is a substantive right. We are bound by this decision as well as other decisions following this view. The question is whether this substantive statutory right has been conferred on the victim in a case such as the present. 221957 SCR 488 CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014)

72. It was also submitted by learned counsel for the accused that in the present fact situation, if we were to hold that Kodagali was entitled to file an appeal against the acquittal of the accused, then we would be giving retrospective effect to the proviso to Section 372 of the Cr.P.C. It was submitted that if Parliament intended to confer a statutory right of appeal on a victim with retrospective effect, it would have specifically said so. Since the proviso to Section 372 of the Cr.P.C. was not specifically given retrospective effect, it must operate prospectively and the crucial date in a case such as the present would be the date of the alleged offence.

73. To counteract this, it was submitted by learned counsel for Kodagali that the view expressed by this Court in National Commission for Women was only an obiter and is not binding upon this Court. It is not necessary for us to go into this aspect of the matter since we are of the view that the decision rendered in National Commission for Women has been misunderstood and misinterpreted and is clearly distinguishable on facts. Even otherwise, the decision has been rendered by a Bench of the two learned judges and while the view expressed therein certainly has great persuasive value but it would not be binding on a Bench of three Judges. Besides, the obiter dicta of this Court would not bind us.

74. What is significant is that several High Courts have taken a consistent view to the effect that the victim of an offence has a right of CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) appeal under the proviso to Section 372 of the Cr.P.C. This view is in consonance with the plain language of the proviso. But what is more important is that several High Courts have also taken the view that the date of the alleged offence has no relevance to the right of appeal. It has been held, and we have referred to those decisions above, that the significant date is the date of the order of acquittal passed by the Trial Court. In a sense, the cause of action arises in favour of the victim of an offence only when an order of acquittal is passed and if that happens after 31st December, 2009 the victim has a right to challenge the acquittal, through an appeal. Indeed, the right not only extends to challenging the order of acquittal but also challenging the conviction of the accused for a lesser offence or imposing inadequate compensation. The language of the proviso is quite explicit, and we should not read nuances that do not exist in the proviso.

75. In our opinion, the proviso to Section 372 of the Cr.P.C. must also be given a meaning that is realistic, liberal, progressive and beneficial to the victim of an offence. There is a historical reason for this, beginning with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the United Nations in the 96th Plenary Session on 29th November, 1985. The Declaration is sometimes referred to as the Magna Carta of the rights of CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) victims. One of the significant declarations made was in relation to access to justice for the victim of an offence through the justice delivery mechanisms, both formal and informal. In the Declaration it was stated as follows:

“4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014)

7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.”

76. Putting the Declaration to practice, it is quite obvious that the victim of an offence is entitled to a variety of rights. Access to mechanisms of justice and redress through formal procedures as provided for in national legislation, must include the right to file an appeal against an order of acquittal in a case such as the one that we are presently concerned with. Considered in this light, there is no doubt that the proviso to Section 372 of the Cr.P.C. must be given life, to benefit the victim of an offence.

77. Under the circumstances, on the basis of the plain language of the law and also as interpreted by several High Courts and in addition the resolution of the General Assembly of the United Nations, it is quite clear to us that a victim as defined in Section 2(wa) of the Cr.P.C. would be entitled to file an appeal before the Court to which an appeal ordinarily lies against the order of conviction. It must follow from this that the appeal filed by Kodagali before the High Court was maintainable and ought to have been considered on its own merits.

78. As far as the question of the grant of special leave is concerned, once again, we need not be overwhelmed by submissions made at the Bar. Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) The language of the proviso to Section 372 of the Cr.P.C. is quite clear, particularly when it is contrasted with the language of Section 378(4) of the Cr.P.C. The text of this provision is quite clear and it is confined to an order of acquittal passed in a case instituted upon a complaint. The word ‘complaint’ has been defined in Section 2(d) of the Cr.P.C. and refers to any allegation made orally or in writing to a Magistrate. This has nothing to do with the lodging or the registration of an FIR, and therefore it is not at all necessary to consider the effect of a victim being the complainant as far as the proviso to Section 372 of the Cr.P.C. is concerned. Final order

79. For the reasons mentioned above, the appeals are allowed and the judgment and orders passed by the High Court are set aside and the matters are remitted back to the High Court to hear and decide the appeal filed by Kodagali against the judgment and order of acquittal dated 28th October, 2013 passed by the District and Sessions Judge, Bagalkot (Karnataka) in S.C. No.49 of 2010.

.....J
(Madan B. Lokur)

New Delhi;
October 12, 2018

.....J
(S. Abdul Nazeer)

Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) REPORTABLE
IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NOS. 2018 (ARISING OUT OF S.L.P. (CRL.) NOS. 7040-
7041 OF 2014) MALLIKARJUN KODAGALI (DEAD) REPRESENTED
THROUGH LEGAL REPRESENTATIVES ...APPELLANT(S) Versus
THE STATE OF KARNATAKA & ORS. ...RESPONDENT(S) J U D G M E N T Deepak Gupta, J.

1. I have had the privilege of going through the detailed and erudite judgment of my brother Justice Lokur. I am in complete agreement with my learned brother that the pain which the victim of a criminal offence suffers should be understood by the courts and keeping in view the emerging trends in law, the rights of the victim should not be trampled. Victims must be treated Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) with sensitivity, compassion and respect. They also must be permitted to access justice because it is sometimes found that the investigating and prosecuting agencies do not follow up cases with the zeal which is required. Therefore, I fully agree with my learned brother that the proviso to Section 372 of Code of Criminal Procedure, 1973 (for short 'CrPC') must be given a meaning that is realistic, liberal, progressive and beneficial to the victims of the offences.

2. However, at the same time, one cannot ignore the rights of the accused and the procedure prescribed by law. I am unable to agree with my learned brother that a victim can file an appeal in the High Court without seeking leave to appeal in terms of Section 378(3) of CrPC.

3. Sections 372 and 378 of CrPC read 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 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 Crl. Appeal

Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.]” xxx xxx xxx “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),□

1. the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non□bailable offence;

2. 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□

2. to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non□bailable offence;

3. 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.

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(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)." The proviso to Section 372 was added by way of amendment inserted by Act 5 of 2009 with effect from 31.12.2009.

4. As far as the present case is concerned, the offence took place on 06.02.2009 i.e. prior to 31.12.2009 and the order of acquittal was passed by the trial court on 28.10.2013. I am in agreement with my learned brother that the right to file an appeal to the victim will arise only on the date when the judgment is CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) passed by the trial court because then alone the victim has a right to urge that the acquittal is wrong or that the sentence awarded to the accused is not commensurate with the offence which the accused may have committed. Therefore, I have no doubt that the victim has a right to appeal and to that extent the judgment of the High Court is liable to be set aside.

5. My only difference of opinion is with regard to the conclusion drawn in the judgment of my learned brother that the victim, even in appeal filed in the High Court, is not required to seek leave of the High Court. In my considered view, this matter is, in fact, no longer res integra. This Court has specifically dealt with this issue in Satya Pal Singh v. State of M.P. and Others²³, wherein it held as follows:

"10. The Full Bench of the High Court of Delhi in Ram Phal v. State, 2015 SCC Online Del 9802, after examining the relevant provisions under Section 2(wa) and the proviso to Section 372 CrPC, in the light of their legislative history has held that the right to prefer an appeal conferred upon the victim or relatives of the victim by virtue of the proviso to Section 372 is an independent statutory right. Therefore, it has held that there is no need for the victim in terms of definition under Section 2(wa) CrPC to seek the leave of the High Court as required under sub-section (3) of Section 378 CrPC to prefer an appeal under the proviso to Section 372 CrPC. The said view of the High Court is not legally correct for 23 (2015) 15 SCC 613 CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) the reason that the substantive provision of Section 372 CrPC clearly provides that no appeal shall lie from any judgment and order of a criminal court except as provided for by CrPC. Further, sub-section (3) of Section 378 CrPC provides that for preferring an appeal to the High Court against an order of acquittal it is necessary to obtain its leave.

xxx xxx xxx xxx xxx xxx

15. Thus, to conclude on the legal issue:

“ whether the appellant herein, being the father of the deceased, has statutory right to prefer an appeal to the High Court against the order of acquittal under the proviso to Section 372 CrPC without obtaining the leave of the High Court as required under sub□ section (3) of Section 378 CrPC ? ” this Court is of the view that the right of questioning the correctness of the judgment and order of acquittal by preferring an appeal to the High Court is conferred upon the victim including the legal heir and others, as defined under Section 2(wa) CrPC, under the proviso to Section 372, but only after obtaining the leave of the High Court as required under sub□ section (3) of Section 378 CrPC.

The High Court of M.P. has failed to deal with this important legal aspect of the matter while passing the impugned judgment and order.”

6. The only issue with which I am dealing is whether a victim while filing an appeal under Section 372 of CrPC in the High Court against the acquittal of an accused is required to obtain leave of the court under Section 378(3) CrPC. Prior to the amendment of Section 372 of CrPC the victim had no right to file Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) an appeal. The traditional view has always been that the State represents the victim of the crime. Criminal offences have always been treated to be offences against the State and it is the State alone which investigated and prosecuted such cases. In case the State machinery does not take action on the complaint of the victim, the said victim has a right under Section 156 of CrPC to approach the court. Under Section 156(3) CrPC, the magistrate may order an investigation to be done by the police. Once the investigation is done, then again the victim has no hand in the investigation except to assist the investigating officer and to bring evidence to the notice of the investigating officer. After investigation, the investigating officer files a final report under Section 173 CrPC. The investigating officer may come to the conclusion that either no offence is made out or may file report showing what offences are made out in which case the court proceeds further. Even in those cases where the investigating agency files a report that no criminal offence is made out, the victim has a right to object to the report and he can argue before the court that a case is made out on the basis of the evidence Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) collected or he can even urge that the police must be directed to carry out further and more investigation.

7. Chapter XXIX of the CrPC deals with appeals. Appeals against acquittal are governed by Section 378 of CrPC. As per sub-section (1) of this section only a District Magistrate or the State as the case may be is entitled to direct the Public Prosecutor to file an appeal. Sub-section (2) deals with cases investigated under the Delhi Special Police Establishment Act, 1946 and in these cases the Central Government may also direct the Public Prosecutor to file an appeal. I am concerned mainly with sub-section (3) of Section 378 of CrPC, which provides that no appeal to the High Court either under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court. Sub-section (4) deals with appeals filed by the complainant in case the order of acquittal is passed in a case instituted upon a complaint. In such cases if the appeal has to be filed in the High Court it cannot be entertained unless the High Court grants special leave to appeal from the order of acquittal. Sub-section (5) provides the limitation for filing the petition for Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) grant of special leave to appeal in terms of sub-section (4). Sub-section (6) lays down that in case the application for special leave to appeal filed by a complainant under sub-section (4) is refused then no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2). An analysis of Section 378 of CrPC clearly shows that the CrPC envisaged and granted a predominant role to the State. It was the State alone which was entitled to file an appeal.

The only exception was in complaint cases where the complainant could file an appeal. He also had to seek special leave to appeal in case the appeal lay to the High Court.

8. Interestingly, Section 372 of CrPC which was amended in the year 2008 to give a right to the victim is a negative section which specifically provided, before its amendment, that no appeal would lie from any judgment or order of a criminal Court except as provided for by the CrPC or by any other law in force. The Legislature while giving a victim the right to appeal did not, for reasons best known to it, give this right to file appeal to the victim under Section 378 of CrPC or any other specific section. Surprisingly this right to the victim was given as a proviso to Crl. Appeal Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014) Section 372 of CrPC. This proviso is not very happily worded. Be that as it may, the fact is that a victim now has a right to appeal under this proviso. He can file the appeal against the following orders:□

(i) any order passed by a Court acquitting the accused;

(ii) any order passed by a Court where the accused is convicted of a lesser offence but the victim feels that he should have been convicted for a higher offence. Obviously the appeal lies against the acquittal of the accused for a higher offence;

(iii) an appeal lies where the victim is not satisfied by the quantum of compensation awarded.

9. Dealing with the issue, as to whether a victim should seek leave to appeal, one must first understand the concept behind introducing the concept of leave to appeal, especially when the appeals are filed in the High Courts. The presumption of innocence which is attached to every accused gets fortified and strengthened when the said accused is acquitted by the trial CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) Court. Probably, for this reason, the law makers felt that when the appeal is to be filed in the High Court it should not be filed as a matter of course or as matter of right but leave of the High Court must be obtained before the appeal is entertained. Therefore, the High Court would at the initial stage of deciding whether the leave is to be granted or not go into the merits of the case. Only if arguable points are involved, the High Court normally grants leave to appeal. This would not only prevent the High Court from being flooded with appeals but more importantly would ensure that innocent persons who have already faced the tribulation of a long drawn out criminal trial are not again unnecessarily dragged to the High Court.

10. At this stage, it would also be pertinent to mention that under Section 378 of CrPC an appeal against the order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offences lies to the Sessions Court and no leave to appeal is required. From the Court of Magistrate it is only appeals in respect of offences which are non-cognizable and bailable i.e. less serious offences which would lie to the High Court. In such cases, leave to appeal is a pre-requisite. This was CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) done with a view to ensure that the persons who had faced trial for relatively lesser offences should not have to bear the expenses of an appeal in the High Court. The other appeals which lie to the High Court are appeals from the Court of Sessions. These are serious criminal matters and relate to much graver offences. Here the concept of leave to appeal was probably introduced because these cases are decided by relatively senior Judges i.e. Sessions Judges. The Legislature felt that in such cases also the appeals against acquittals must be scrutinized with greater care.

11. As pointed out above, even a complainant when he files an appeal against an order of acquittal in a case instituted upon a complaint is required to obtain special leave to appeal. It is true that the proviso to Section 372 of CrPC does not indicate that a victim while filing an appeal in the High Court must file a petition for leave to appeal before his appeal can be entertained.

12. I am of the considered view that though the proviso to Section 372 of CrPC does give a right to the victim to file an appeal, this proviso cannot be read in isolation. It has to be given CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) a meaning which fulfills the intention of the

Legislature. The proviso to Section 372 of CrPC does not lay down the procedure as to how, in what manner, and within which time the appeal has to be filed. An appeal, being a creature of the statute, it is also necessary to prescribe the limitation and procedure for filing the appeal.

13. Adverting to sub-section (4) of Section 378 of CrPC, if an order of acquittal is passed on a case instituted upon a complaint then the High Court before entertaining an appeal by the complainant must grant special leave to appeal. The expression "Special leave to appeal" has no different meaning than the expression "leave to appeal" and it appears to me that the word "special" has been added only to distinguish "leave to appeal" sought by the complainant from the "leave to appeal" sought by the State. Thus, in a complaint case where the complainant has set the wheels of the Court in motion even if the complainant files the appeal he must obtain special leave to appeal. This again gives rise to an interesting question—Can the victim be placed on a higher pedestal than the complainant? More often than not, the CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) victim and the complainant are likely to be one and the same person.

14. In case, I accept the proposition that the victim need not seek leave to appeal in case the appeal is to be filed in the High Court there shall be another anomalous situation. Supposing there are two victims in a case and one of the victims files a complaint and sets the wheels of justice moving and the case is tried as a complaint case. In case the accused is acquitted and the victim who is the complainant wants to file an appeal in the High Court, he will have to seek special leave to appeal whereas the victim who had not even approached the Court at the initial stage will be entitled to file an appeal without seeking leave to appeal. This could not have been the intention of the Legislature.

15. I am fully conscious of the changes in criminal jurisprudence referred to by my learned brother and the expanding rights of the victim, which the victim must have. At the same time, these rights must be balanced with the rights of the accused. According to the records of National Crime Record CrI. Appeal Nos._____/2018 (@ S.L.P. (CrI.) Nos. 7040-7041 of 2014) Bureau, the conviction rate in the country in 2016 was only 21.25% and 78.75% cases ended in discharge or acquittal. One cannot lose sight of the fact that out of these 78.75% cases in which acquittal was recorded, there may be many cases which are totally false.

16. It may be that many people are set free because of poor investigation and on account of indifferent prosecution. At the same time, it is not uncommon for individuals to file false cases. In fact, this Court has noted the misuse of Section 498A of Indian Penal Code, 1860 in the case of Rajesh Sharma v. State of U.P.²⁴ and of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 in the case of Dr. Subhash Kashinath Mahajan v. State of

M a h a r a s h t r a 2 5 . T h e r e f o r e , w h i l e interpreting the law one cannot shut one's eyes to the fact that a large number of false cases are filed and appeals will more likely than not be filed in such cases when the acquittal of the accused is ordered.

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17. One also cannot be oblivious to the fact that one of the bedrocks of our criminal jurisprudence is that every person is presumed innocent unless found guilty. This presumption of innocence gets strengthened when the person is acquitted. Therefore, the legislature felt that before a person who has been acquitted after a protracted trial is called to face proceedings in the High Court in an appeal, the High Court should look into the matter and first decide whether there are sufficient reasons to grant leave to file appeal or not. This is, in a manner of speaking a preliminary hearing to decide whether the matter is worth looking into or not.

I see no reason why such scrutiny should not be done in appeals filed by the victim. The victim cannot be placed on a higher pedestal than the State or the complainant.

18. The right of the victim to file an appeal is not taken away or in any manner weakened only because he has to seek leave to appeal. If Sections 378(3), 378(4) and 372 of CrP C are read together, it is clear that the victim is also required to apply for leave to appeal before his appeal can be entertained.

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19. Though the victim has rights, one cannot forget that a victim who may have suffered, may also seek revenge. Therefore, an obligation has been cast upon the State to prosecute the accused. In fact, even now a trial under the CrPC has to be conducted by the Public Prosecutor or Assistant Public Prosecutor. No private lawyer can be engaged to conduct the trial under Section 301(2) of CrP C . A private person including the victim, can only instruct a pleader to act on his behalf in court but the prosecution has to be conducted either by the Public Prosecutor or Assistant Public Prosecutor and the pleader engaged by the private person can only act as per the directions of the Public Prosecutor or Assistant Public Prosecutor . The reason behind this is that the victim may fabricate evidence or hide true facts whereas the Public Prosecutor or Assistant Public Prosecutor is expected to be fair to the court, to the accused and to the victim.

20. On the one hand are the rights of the victim and on the other hand, is the well settled principle of criminal jurisprudence that every man is presumed to be innocent till proved guilty.

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Therefore, though the victim may have a right to file an appeal, this right of filing an appeal vested in the victim, cannot be larger than the right of filing an appeal which inheres in the State and the complainant in a complaint case. Therefore, I am of the view that when the victim files an appeal against acquittal in the High Court he has to seek leave to appeal under Section 378(3) CrPC.

.....J. (DEEPAK GUPTA) New Delhi October 12, 2018 Crl. Appeal
Nos._____/2018 (@ S.L.P. (Crl.) Nos. 7040-7041 of 2014)