

## **S.Ganapathy vs N.Senthilvel on 5 April, 2016**

**Equivalent citations: 2017 CRI. L. J. 602, (2016) 166 ALLINDCAS 442 (MAD), (2016) 3 MAD LJ(CRI) 641, (2018) 71 OCR 486, (2016) 2 NIJ 610, (2016) 3 BANKCAS 621, (2016) 2 MADLW(CRI) 26, 2016 (4) KLT SN 73 (MAD)**

**Bench: V.Ramasubramanian, N.Kirubakaran, S.Vaidyanathan**

Before the Madurai Bench of Madras High Court

Dated : 05.04.2016

Coram

The Honourable Mr.Justice V.RAMASUBRAMANIAN,  
The Honourable Mr.Justice N.KIRUBAKARAN  
and  
The Honourable Mr.Justice S.VAIDYANATHAN

Crl.A(MD) No.99 of 2015

Crl.A.(MD)Nos.347 of 2010, 348 of 2011, 18 of 2012, 336 and 337 of 2013, 64, 196, 284 and 302 of 2014, 21, 46, 55, 57, 58, 60, 99, 100, 101, 115, 143, 241 and 297 of 2015  
and Crl.R.C.(MD).Nos.382 of 2012 and 315 of 2015

AND

MP (MD) No.1 of 2015 in Crl.OP (MD) SR.No.54 of 2015 in Crl.A(MD)SR.21127 of 2014,  
MP(MD)No.1 of 2014 in Crl.A(MD)SR.No.3609 of 2014  
M.P.(MD)No.1 of 2015 in Crl.OP(MD)SR.No.5475 of 2015 in Crl.A(MD)[SR]No.41188 of 2014,  
MP(MD)No.1 of 2014 in Crl.A.(MD) No. SR 6289 of 2014,  
MP(MD)No.1 of 2014 in Crl.A(MD)No.SR 6836 of 2014,  
MP(MD) No.1 of 2015 in Crl.OP(MD) SR.No.6999 of 2015,  
MP (MD)No.1 of 2014 in Cr.A.(MD) SR.No.9195 of 2014,  
MP(MD)No.1 of 2015 in Crl.OP(MD) SR 11154 of 2015,  
MP(MD)No.1 of 2015 in Crl.OP(MD) No.SR 13013 of 2015 in Crl.A(MD) SR.No.13012 of 2015,  
MP(MD)No.1 of 2015 in Crl.OP(MD)SR.NO.15264 of 2015,  
MP(MD)No.1 of 2015 in Crl.OP(MD) SR.No.20277 of 2015 in Crl.A(MD)SR.No.20089 of 2015,  
MP (MD) No.1 of 2012 in Crl.A. (MD) No.SR 21757 of 2012,  
MP (MD) No.1 of 2015 in Crl.A.(MD)SR.No.22547 of 2014,  
MP(MD)No.1 of 2013 in Crl.A(MD)SR.No.35519 of 2013,  
MP (MD) No.2 of 2015 in Crl.RC(MD)SR.No.35959 of 2014  
MP(MD)No.1 of 2013 in Crl.A(MD)SR.No.40383 of 2013

MP(MD).No.1 of 2014 in CrI.A.(MD)SR.No.41392 of 2013

AND

CrI.OP(MD)No.10762 of 2015 in CrI.A(MD)No.SR 11019 of 2015,  
CrI. OP (MD). No. 18479 of 2014 in CrI. A (MD) [SR]. No. 23860 of 2014,  
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CrI. OP (MD). No. 6835 of 2015 in CrI. A (MD) [SR]. No. 38577 of 2014,  
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CrI.OP(MD)No.7605 of 2015 in CrI.A(MD)[SR]No.12833 of 2015,  
CrI.OP(MD) No.7620 of 2015 in CrI.A(MD)[SR]No.13252 of 2015,  
CrI.OP(MD) No.7648 of 2015 in CrI.A(MD)[SR] No.11108 of 2015,  
CrI.OP(MD).No.7649 of 2015 in CrI.A(MD)[SR] No.11110 of 2015,  
CrI.OP.(MD) No.7650 of 2015 in CrI.A.(MD)[SR]No.11112 of 2015,  
CrI.OP(MD)No.7651 of 2015 in CrI.A(MD)[SR] No.11114 of 2015,  
CrI.OP(MD) No. 7652 of 2015 in CrI.A(MD)[SR]No.11116 of 2015,  
CrI.OP(MD)No.7653 of 2015 in CrI.A(MD)[SR]No.11118 of 2015,  
CrI.OP(MD) 7654 of 2015 in CrI.A(MD)[SR] No.11120 of 2015,  
CRL.OP.(MD).No. 7655 of 2015 in CrI.A(MD)[SR] No.11122 of 2015,  
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CrI.OP(MD)No.7747 of 2015 in CrI.A(MD)[SR]No.12073 of 2015, ,  
CrI.OP(MD) No.7960 of 2015 in CrI.A.(MD)[SR]No.5638 of 2015,  
CrI.OP(MD)No.9791 of 2015 in CrI.A(MD)SR 16347 of 2015  
CrI.OP(MD)No.10567 of 2015 in CrI.A(MD)SR 18058 of 2015,  
CrI.OP(MD)No.10661 of 2015 in CrI.A(MD)SR No.16581of 2015,  
CrI.OP(MD)No.10662 of 2015 in CrI.A(MD)SR.No.16589 of 2015  
CrI.OP[M]No.12179 of 2015 in CrI.A(MD)SR.No.16369 of 2015,  
CrI.O.P.(MD)No.13994 of 2015 in CrI.A.(MD).SR.No.23622 of 2014  
CrI.O.P.(MD)No.13995 of 2015 in CrI.A.(MD).SR.No.18387 of 2015  
CrI.OP.(MD)No.8002 of 2015 in CrI.A.(MD).SR.No.30097 of 2014  
CrI.OP.(MD)No.8175 of 2015 in CrI.A.(MD)SR.No.38175 of 2014  
CrI.OP(MD)No.8851 of 2015 in CrI.A.(MD)SR.No.23420 of 2014  
CrI.OP(MD).No.12747 of 2015 in CrI.A.(MD).SR.No.21542 of 2014  
CrI.OP(MD).No.10734 of 2014 in CrI.A.(MD)SR.No.18221 of 2014  
CrI.O.P.(MD).No.19499 of 2012 in CrI.A.(MD).SR.No.34433 of 2012  
CrI.O.P.(MD)No.13436 of 2015 in CrI.A.(MD)SR.No.22650 of 2015  
CrI.O.P.(MD).No.13675 of 2015 in CrI.A.(MD)SR.No.18385 of 2015  
CrI.OP.(MD)No.13676 of 2015 in CrI.A.(MD).SR.No.10351 of 2011  
CrI.O.P.(MD).No.20373 of 2015 in CrI.A.(MD)SR.No.33802 of 2015  
CrI.O.P.(MD)No.20384 of 2015 in CrI.A.(MD)SR.No.29553 of 2015  
CrI.O.P.(MD)No.20522 of 2015 in CrI.A.(MD).SR.No.29539 of 2015  
CrI.O.P.(MD)No.20986 of 2015 in CrI.A.(MD).SR.No.14041 of 2015  
CrI.OP(MD).No.15906 of 2011

S.Ganapathy  
Vs.  
N.Senthilvel

...Appellant  
...Respondent

Prayer : Appeal is filed under Section 378 of the Code of Criminal Procedure to call for the records and set aside the Judgment passed in C.C.No. 337 of 2013, dated 17.06.2014 on the file of the Judicial Magistrate No.1, Tirunelveli.

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:COMMON JUDGMENT

Crl.A.(MD).No.99 of 2015 was directed against the judgment of the learned Judicial Magistrate No.1, Tirunelveli in C.C.No.337 of 2013 dated 17.6.2014, in and by which, the respondent in the appeal was acquitted on finding that the respondent/accused was not guilty of an offence under Section 138 of the Negotiable Instruments Act, 1881.

2. The appellant in the present appeal was the complainant before the Lower Court. As against the acquittal, he filed the present appeal under Section 378 of Cr.P.C. The papers in the appeal were presented before this Court on 20.10.2014. The Registry raised an objection as to how the appeal was maintainable, as it was filed beyond 60 days as laid down under Section 378(5) of Cr.P.C.

3. The counsel for the appellant produced a copy of the judgment of the Supreme Court in A.V.Murthy Vs.B.S.Nagabasavanna [2002 (2) SCC 642] to contend that the complaint was not based upon a dishonoured cheque drawn in respect of a debt or a liability payable under contract and hence, not legally enforceable and such a claim was prohibited under law. Perhaps the Registry, convinced of such a representation, numbered the appeal and it was directed to be posed along with Criminal Appeal (MD) Nos. 100 and 101 of 2015 by a learned Single Judge having the roster. When these three matters were grouped and posed before the learned Judge (Nagamuthu,J) on 20.4.2015, he passed the following order:-

?Considering the complicated question of law involved in these matters, the Registry is directed to issue notice to all the recognized Bar Association of Madurai Bench to make their submissions on the following issue:

In the private complaint cases, for the victims, whether the right of appeal as provided in proviso to Section 372 of the Code of Criminal Procedure is available or the only option for them is to seek leave under Section 378(4) Cr.P.C ??

4. On 27.4.2015, several other appeals as well as unnumbered appeals were also tagged together and came to be posed before him. Altogether, there were 10 criminal appeals and 27 unnumbered criminal appeals, in which, criminal original petitions alone were numbered, were before him. On that day, the learned Judge, after hearing counsels for parties, framed several questions and directed the matters to be placed before the learned Chief Justice with a request to constitute a Full Bench to go into the matter. The questions framed by him were as under:

?1. Whether a victim of a crime, who has prosecuted an accused by way of a private complaint, does not have statutory right of appeal against acquittal under proviso to Section 372 of the Code of Criminal Procedure ?

2. Whether a complainant, in a private complaint case, who is not a victim, has got the remedy to seek only leave to file appeal under Section 378(4) of the Code of Criminal Procedure in the event of acquittal of the accused ?

3. In a private complaint case, if a victim does not happen to be a complainant and in the event of acquittal, whether he has got right of appeal under proviso to Section 372 of the Code of Criminal Procedure or he has to seek leave to file appeal under Section 378(4) of the Code of Criminal Procedure ?

4. Whether a victim in a case instituted on a police report, has a better place in the criminal justice delivery system than a victim in a private complaint case ?

5. Whether the term ?victim? as defined in Section 2(wa) of the Code of Criminal Procedure excludes a complainant in a private complaint case, though he has suffered loss or injury on account of the offence committed against him ? and

6. Whether the view held in the judgment of this Court in Selvaraj Vs.Venkatachalapathy, reported in 2015 (1) MWN (Cr) DCC 26 (Mad.), reflects correct exposition of law or the same requires to be overruled ??

5. The aforesaid referral order is since reported in S.Ganapathy Vs. N.Senthilvel [2015 (1) L.W. (Cr.) 553]. The learned Judge surveyed several decisions of the other High Courts and the Supreme Court with reference to the interpretation of Proviso to Section 372 and Section 378 (4) of Cr.P.C. In so far as the sixth question posed by him was concerned, in para 41 of the order, he had observed as follows:

?In view of the discussions made thus far, with due respect, I regret, I find it very difficult to persuade myself to fall in line with the view taken by this Court in Selvaraj's case and also the Judgments of various courts, holding the view that the

victim cum complainant has got no right to file appeal under Proviso to Section 372 of the Code of Criminal Procedure. I agree with the view taken by various High Courts, taking the view that the complainant, who happens to be a victim, has got right of appeal under Proviso to Section 372 of the Code of Criminal Procedure.?

6. In Selvaraj, another learned Single Judge namely P.R.Sivakumar,J dealt with the case of a complainant having filed an appeal before the Sessions Court under Section 372 and got the Trial Court's order reversed. As against the conviction by the Sessions Court, the accused in that case filed an appeal before the High Court and the complainant filed a revision under Section 397 complaining that the sentence imposed on the accused was inadequate and sought for enhancement of punishment. The learned judge allowed the appeal of the accused and dismissed the revision filed by the complainant. In para 19 of the order, he gave the following reason, which was not acceptable to the Referral Judge :

?I am of the considered view that the term 'victim' found in the Proviso to Section 372 Cr.P.C shall not include a victim, who is a complainant in a complaint case and that the term 'victim' used in the said Proviso shall be confined to the victims in cases instituted otherwise than on a complaint. In the case on hand, the criminal case was instituted on the file of the trial Court on a complaint made by the respondent/complainant. In fact, the offence is a non-cognizable offence and hence, there can be no other mode of institution of the criminal case than by preferring a complaint to the Magistrate. The offence alleged is one punishable under Section 138 of the Negotiable Instruments Act, 1881. As the case ended in acquittal before the trial Court, the remedy available to the respondent herein (complainant) was to approach this Court (High Court) under Section 378(4) within the period stipulated in Section 378(5) seeking Special Leave to file an appeal against acquittal. Instead of adopting such a procedure, the respondent herein (complainant) chose to prefer an appeal under the Proviso to Section 372 Cr.P.C before the Sessions Court and the learned Appellate Judge either without considering the scope of the Proviso to Section 372 or in an erroneous interpretation of the said provision, assumed jurisdiction and decided the appeal which went against the appellant herein (accused). The appellant is right in challenging the judgment of the learned lower Appellate Judge on the ground of absence of jurisdiction. On the other hand, the respondent (complainant) who has approached a wrong Court with an appeal under Section 372 has chosen to prefer a revision against the judgment of the appellate Court expressing grievance over the alleged inadequacy of punishment. The appeal is bound to succeed and the revision is bound to fail.? (emphasis added)

7. The learned Chief Justice, by his order dated 18.6.2015, directed the matters to be listed before a Full Bench. Subsequently, when 26 other criminal appeals (both numbered and unnumbered) were put up before the Judge in-charge of administration in the Madurai Bench at the relevant time, he, by an order dated 7.7.2015, directed those matters also to be listed along with the batch of these cases. Hence, those cases are also tagged together in order to answer the order of reference.

## HISTORICAL BACKGROUND

8. Perhaps it was in 2009 that for the first time the Parliament realized the need to think of victims under the criminal justice system. The need for making several amendments under the Central Act 5/2009 arose due to the development of public opinion on the need for victims to be given due place. Dr. Justice A.S. Anand, the Former Chief Justice of India, in his Shri P. Babulu Reddy Foundation Lecture on 'Victims of Crime' (Hyderabad, 28th of September 1997), made a passionate plea for improving victimology in our country. On the question of victims in criminal law, he observed :-

'The term victim is lacking descriptive precision. It implies more than the mere existence of an injured party, in that innocence or blamelessness is suggested as well as a moral claim to a compassionate response from others...

'there is an urgent need for giving a well-defined status to the victim under the criminal law. His interest in getting the offender punished cannot be ignored or completely subordinated to the interest of the State. Otherwise, the victim will remain discontented and may develop a tendency to take the law into his own hands in order to seek revenge.'

9. Among the several deficiencies found in the existing justice delivery system, he also made a pertinent comment on the lack of right of a victim to appeal against a judgment acquitting an offender in the following lines:-

'Even after the case ends up in a conviction, it is the State which defends the judgment of the trial court in appeal, if any, filed against the conviction and sentence. The victim of crime has hardly any role to play in the whole proceedings except that he may, if alive, be examined by the prosecution as a witness. Under the Cr.P.C., a victim of crime has got a very limited right of revision and that too under exceptional circumstances.

It humiliates and frustrates a victim of crime when the offender goes unpunished or is let off with a relatively minor punishment as the present system pays no attention to his injured feelings. Imposition of appropriate punishment on the criminal is the response of the courts to the society's cry for justice. Indifference to the rights of the victim of crime is fast eroding the faith of the society in general and the victim of crime in particular in the criminal justice system and this has already given rise to the incidents of crime and lawlessness, in the form of terrorism, which is raising its ugly head to settle private and political scores over the adversary with the barrel of gun.'  
(see : 'Victims of Crime - The Unseen Side' Dr. J.S. Anand, (1998) 1 SCC (Jour) 3)

10. It is needless to explain the importance of the provision for an appeal either under the Civil Law or under the Criminal Law. The Supreme Court, while dealing with the issue, reiterated its importance in its judgment in State of Maharashtra Vs. Sujay Mangesh Poyarekar [2008 (9) SCC

475] as follows:-

"In *Sita Ram & Others Vs. State of Uttar Pradesh* [1979 (2) SCC 656], this Court held that a single right of appeal is more or less a universal requirement of the guarantee of life and liberty rooted in the concept that men are fallible, judges are men and making assurance doubly sure, before irrevocable deprivation of life or liberty comes to pass, a full-scale re-examination of the facts and the law is made an integral part of fundamental fairness or procedure.

We are aware and mindful that the above observations were made in connection with an appeal at the instance of the accused. But the principle underlying the above rule lies in the doctrine of human fallibility that 'Men are fallible' and 'Judges are also men'. It is keeping in view the said object that the principle has to be understood and applied."

Now, every crime is considered as an offence against the Society as a whole and not only against an individual even though it is an individual who is the ultimate sufferer. It is, therefore, the duty of the State to take appropriate steps when an offence has been committed."

11. In what was known as the Best Bakery's case, the Supreme Court heavily came down upon the role of the Investigating Agency and the lethargy of the State in protecting the lives of the citizens. It held as follows:

"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 lie before it, in 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 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."

It further held :-

"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.

In a country like us with heterogeneous religions and multiracial and multilingual society which necessitates protection against discrimination on the ground of caste or religion taking lives of persons belonging to one or the other religion is bound to have dangerous repercussions and reactive effect on the society at large and may tend to encourage fissiparous elements to undermine the unity and security of the nation on account of internal disturbances. It strikes at the very root of an orderly society, which the founding fathers of our Constitution dreamt of.?

When fences start to swallow the crops, no scope will be left for survival of law and order or truth and justice. Public order as well as public interest become martyrs and monuments." (See : Zahira Habibulla H Sheikh And Anr vs State Of Gujarat And Ors. reported in 2004 (4) SCC 158)

12. Perhaps in order to meet these criticisms and to provide a new status to the victims, the Parliament thought fit to introduce a provision granting right to a victim to prefer appeals against orders passed by the courts acquitting accused or if it had convicted anyone for lesser offence or had imposed an inadequate penalty or compensation.

13. Almost all the cases, which are before us, arose out of private complaints filed under Section 138 of the Negotiable Instruments Act, 1881. Until the introduction of this provision, the matter relating to dishonour of negotiable instruments were dealt with as a civil matter and aggrieved parties moved the civil courts. By the introduction of Section 138 of the Negotiable Instruments Act, it has now become a crime and if proved, punishable with imprisonment.

14. However, under Section 142, the taking cognizance of the offence has been defined and only upon a complaint made by the payee or holder in due course, the Court can take cognizance of any offence. Section 142 of the Negotiable Instruments Act reads as follows:-

?142 Cognizance of offences. ?Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)?

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under Clause (c) of the Proviso to Section 138 Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall try any offence punishable under Section 138.?



15. More often, the police never receives a complaint on the basis of a dishonoured negotiable instrument and hence the aggrieved person invariably files a private complaint under Section 200 of Cr.P.C., and thus, becomes a private complainant.

16. Before the insertion of the Proviso to Section 372, a complainant, who was aggrieved by the acquittal of the accused, could have moved the High Court under Section 378(4), subject to the limitation prescribed under Section 378(5) of Cr.P.C. As can be seen from those provisions, a complainant will have to seek a special leave to appeal from the order of acquittal. Under Section 378(6), if the grant of special leave to appeal is refused, no appeal will lie to the High Court. If he has no appellate remedy as a matter of right, then he can move the Sessions Court with a revision petition under Section 397. He could also move the High Court for a revision under Section 401 of Cr.P.C.

17. In such cases, the Court can satisfy itself only as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court. But in a regular Appeal, the acquittal of an accused can be considered in a larger canvas. With the introduction of the amendment to Section 372, there is scope for an appeal, but, the proviso to Section 372 restricts the right of filing an appeal only on a victim and not anyone else.

18. The term 'victim' is defined under Section 2(wa) of Cr.P.C., which was also inserted by the very same amendment under Central Act 5/2009. The said Section reads as follows:-

'Section 2(wa) : ?victim? means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression ?victim? includes his or her guardian or legal heir.'

19. The Code nowhere defines the term ?complainant?. But, an inference can be drawn from the definition of the term ?complaint?, which is given under Section 2(d) of the Code, which reads as follows:-

' ?Complaint? means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.'

20. Whether a complainant, who is also a victim, should seek special leave, from the High Court as provided under Section 378(5) of the Code or whether as a matter of right, he can avail a statutory right of appeal is one question, which arises herein. In the cases arising out of Section 138 of the Negotiable Instruments Act, invariably it is the complainant (either as a victim of the offence or otherwise), who sets the law in motion. But, in the case of other offences under the Indian Penal

Code or other Enactments, the position may not be the same. In those cases, the law could be set in motion either on a police report or through a private complaint. Hence, an interpretation of Section 372 vis- -vis Section 378(4) in these matters will also have a bearing on the other types of offences also.

21. In these batch of cases, we are not concerned with the merits of the issues raised in those appeals. We make it clear that we have not gone into the merits of either the facts involved in the appeals or the legal issues raised therein. We have also not gone into the question of maintainability of each appeal separately. As and when the matters are listed before the appropriate Bench, the learned judges will certainly make their rulings either on the maintainability of the unnumbered appeals as well as numbered appeals and in case they were held to be maintainable, they will also decide the same on merits. It is suffice to state that at this stage, we are only considering the interpretation of the Proviso to Sections 372 and 378(4) of the Cr.P.C and have answered the questions posed by the Referral Judge.

22. Since, in this case, this Court is concerned with the interpretation of Sections 372 and 378 of Cr.P.C, it is necessary to extract them in its entirety:

?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.?

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 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 provision of Sub-Section (3), also direct the Public Prosecutor to present an appeal-

(a) to the Court Session, 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 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.] (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 the order of acquittal shall lie under Sub-Section (1) or under Sub-Section (2)."

23. The history of the amendment made to the first clause of proviso to Section 372 was set out by the Division Bench of the Patna High Court in its judgment in Parmeshwar Mandal Vs. State of Bihar [2014 Crl.L.J 1046], which is as follows:-

?It may be point out that, the first clause of the said proviso is verbatim copy of the recommendations of the Malimath Committee, submitted as far back as in the year 2003. In the report, Justice Malimath extensively dealt with precarious position of victim in criminal justice system of the Country and made recommendations, which included recommendations to vest the victim also with a right to appeal. This very recommendation was finally adopted in the form of amendment in Section 372 of the Code. Hence, clearly it could not be the intention of the Legislature to vest this right of appeals in only those victims in whose cases the occurrence had happened after the amendment. If that could be accepted as a necessary condition for exercise of the right by a victim, then, for years to come, this right of the victim to prefer an appeal in terms of the said proviso would have remained illusory, in spite of the amendment. The 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 Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 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 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?

24. In this regard, it is necessary to refer to the decision of the Supreme Court interpreting Section 378(4) in the light of the amendment made to the Code by Central Act 25 of 2005. The Supreme Court, vide its judgment in Subhash Chand Vs. State (Delhi Administration) [2013 (2) SCC 17], held that a complainant of an offence can file an appeal only in the High Court after getting a special leave. It was further held as follows :

?Mr.Malhotra is right in submitting that it is only when Section 147 of the Criminal Procedure Code, 1898 was amended in 1955 that the complainant was given a right to seek special leave from the High Court to file an appeal to challenge an acquittal order. Section 147 was replaced by Section 378 in the Code. It contained similar provision. But, Act No.25 of 2005 brought about a major amendment in the Code. It introduced Section 378(1)(a) which permitted the District Magistrate, in any case, to 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. For the first time a provision was introduced whereunder an appeal against an order of acquittal could be filed in the Sessions Court. Such appeals were restricted to orders passed by a Magistrate in cognizable and non-bailable offences. Section 378(1)(b) specifically and in clear words placed a restriction on the State's right to file such appeals. It states that the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of 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 Sessions Court in revision. Thus, the State Government cannot present an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. We have already noted Clause 37 of the 154th Report of the Law Commission of India and Clause 37 of the Code of Criminal Procedure (Amendment) Bill, 1994 which state that in order to guard against the arbitrary exercise of power and to reduce reckless acquittals Section 378 was sought to be amended to provide appeal against an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence. Thus, this step is taken by the legislature to check arbitrary and reckless acquittals. It appears that being conscious of rise in unmerited acquittals, in case of certain acquittals, the legislature has enabled the District Magistrate to direct the Public Prosecutor to present an appeal to the Sessions Court, thereby avoiding the tedious and time consuming procedure of approaching the State with a proposal, getting it sanctioned and then filing an appeal.

It is true that the State has an overall control over the law and order and public order of the area under its jurisdiction. Till Section 378 was amended by Act 25 of 2005 the State could prefer appeals against all acquittal orders. But the major amendment made in Section 378 by Act 25 of 2005 cannot be ignored. It has a purpose. It does not throw the concern of security of the community to the winds. In fact, it makes filing of appeals against certain types of acquittal orders described in Section 378(1)(a) easier, less cumbersome and less time consuming??..

??we conclude that a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court.?

25. A Division Bench of the Delhi High Court in *Chattar Singh Vs. Subhash & Ors.* [176 (2011) DLT 356] made a narrow reading of the word 'victim' limiting it to persons suffering direct and proximate physical harm and also narrowly read the term 'legal heir' limiting it to the lines of succession under the personal law. The correctness of the view taken by the Division Bench and also on the question of locus-standi of private parties maintaining appeals under the Proviso to Section 372 of Cr.P.C., was referred to a Larger Bench in the case of *Ramphal Vs. State & Ors.* The Full Bench answered that reference on 28.5.2015 (though subsequent to the date of reference made by the learned Judge in this case). The Full Bench of the Delhi High Court, vide its judgment reported in 221 (2015) DLT LNIND : 2015 DEL 3471, held as follows:-

? 'victim' can possibly also comprehend those who suffer proximate physical or emotional harm such as fiancés, live-in partners, etc. To restate the correct position, there has to be a relationship between the injury and the person who suffered it i.e. the 'victim'. Consequently, the injury (to the victim who suffers it has to be proximate; it cannot be remote. At the same time, given the nature of what is 'injury' (under Section 44, IPC) the enquiry of proximity would be fact dependent. Courts would assess such issues, based on established principles, and balancing the facts on a case to case basis. To conclude the discussion, it is also emphasized that where the victim is unable (by reason of trauma, shock or other disability) to make a choice of preferring an appeal, those who are in a position to do so on her or his behalf (and who might also have suffered some proximate harm) ? such as relatives, foster children, guardians, fiancé or live-in partners etc., can maintain an appeal under the proviso to Section

372.?

25.(a) On the question as to who can be a legal heir to pursue the remedy under Section 372 Cr.P.C, the Full Bench answered as follows:-

?The object of the Act being the prevention of distortions of the criminal justice system, it is clear that the state interest is to prevent the subversion of justices in cases where the State chooses not to appeal an acquittal. This does not mean, of course, that the appeal procedure is open to anyone and everyone. The interest of

preventing distortions and ensuring justice must be balanced ? as has been pointed out ? against the longstanding principles of criminal procedure that form the underlying legal context, such as the right of the accused to a fair trial, and the double presumption of innocence. This is the rationale for the class of persons who are competent to maintain an appeal has been restricted to victims, and their guardians and legal heirs. This aim of this limitation is to establish a threshold of proximity, which is used to achieve the balance between competing interests...?

?The Court holds that developing a case-by-case proximity test for the meaning of ?victim? and an understanding of ?legal heirs? that tracks the relevant personal law, but is not limited to only those legal heirs entitled to succeed the property, achieves an adequate balance between the two interests. So long as the existence of a legal relationship is established between the (deceased) victim and the one who seeks to appeal under proviso to Section 372, sufficient locus standi has to be conceded?..?

?The anxiety of Parliament to confine the right of appeal to a restricted category of cases is evident from the subject-object predicate, i.e. the nexus between the ?victim? and ?injury? is apparent from the fact that appeals are admitted to only those injured by the crime or offence (?means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged?), where ?injury? is defined by Section 44 of the IPC, as discussed earlier. In this first sense, the class of persons, i.e victims being those suffering loss or injury, is clear enough; only the actual victim, wherever available, directly affected by the crime or offence (?act or omission?) attributable to the offender (?accused person?) are conferred the right to appeal. The second part of the definition (the ?pull in? if one may use that expression) is the associative part, in that, by way of the expression ?includes?, Parliament sought to bring in those persons and individuals who are not per se victims of the crime, but associated with her (or him). This was necessary because if the victim were no longer alive (because of the crime itself, such as murder, homicide, etc.), and the victim who suffered ?harm to the mind?, as a loved one of the victim simpliciter, was also unavailable to exercise the right to participate in the trial, then such persons would be considered as suffering ?loss? as well as ?injury?, and thus would be deemed victims. It is merely in this associative sense that such persons are entitled to appeal against an acquittal, and, therefore, the legal heirs cannot possibly exclude victims who have suffered ?injury? that is direct and proximate ?harm to the mind?. The structure of the definition in Section 2 (wa), shows that Parliament's primary concern was to enable only victims who suffered ?injury?, be it physical or emotional (in its most direct and proximate sense, as opposed to those who were merely inconvenienced or whose injury or loss was remote), the participative rights within the criminal trial process, only in the absence of whom, the ?legal heirs? would be allowed.?

26. The Full Bench summarized its finding on the true definition of the word 'victim' found under Section 2(wa) as well as the result that may flow due to multiplicity of filing, in paras 53 and 54 as

follows:-

53. To summarize, the conclusions from the above discussion are:

(i) "victim" in Section 2(wa), by virtue of being defined as "a person who has suffered any loss or injury" must include a person who has suffered "harm caused to the mind", given that Section 2(y) of the Code of Criminal Procedure incorporates the definition of "injury" in Section 44 of the IPC into the Code.

(ii) The "means X and includes Y" clause in Section 2(wa) cannot be interpreted so as to result in the included meaning Y excluding the actual meaning X of the term being defined; thus "legal heirs" who are included within the definition of the term "victim" cannot exclude those who actually fall within the definition of "victim" by virtue of emotional harm suffered, such as the father or siblings of a deceased victim or other categories of persons (based on proximity) noted previously .

(iii) The laws of inheritance, which decide one's "legal heirs", are not intended to be solely determinative of the entitlement to exercise the rights of the victim, in the criminal trial/appeal, on his/her death, application of Heydon's mischief rule, given that the object of the 2008 Amendment Act was to ensure the involvement of the victim, who has a presumably personal interest in the fair and efficient prosecution of the trial/appeal. Resultantly, it is impermissible for an appellate court to shut out an appeal by a "legal heir" based only on her/his not being an immediate heir, or being lower down in hierarchy vis- -vis entitlement to the crime victim's estate.

54. As a concluding remark on the specter of uncertainty (of defending multiple appeals) which would possibly hover over, and weigh down those acquitted of offences goes, this Court is in agreement with the view of the Punjab and Haryana High Court that all such 'victims' or 'legal heirs' appeals would be heard together, and the issue can be resolved by proper docket management. The court is reminded of the view in *Pakala Narayana Swamy Vs. Emperor* AIR 1939 PC 47 that "... in truth when the meaning of words is plain, it is not the duty of the Courts to busy themselves with supposed intentions" - and one may add in the context, imagined difficulties.?

27. The view taken by the Full Bench of the Delhi High Court with reference to right of filing an appeal under the proviso to Section 372 as of right was not accepted by the Hon<sup>ble</sup> Supreme Court. In its judgment in *Satyapal Singh Vs. State of M.P. & Ors.* [2015 (4) MLJ (Crl.) 219 (SC)], in para 11, it observed as follows:-

?The Full Bench of the High Court of Delhi after examining the relevant provisions under Section 2(wa) and proviso to Section 372 of Cr.P.C., 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 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) of Cr.P.C. to seek the leave of the High Court as

required under Sub-Section (3) of Section 378 of Cr.P.C. to prefer an appeal under proviso to Section 372 of Cr.P.C. The said view of the High Court is not legally correct for the reason that the substantive provision of Section 372 of Cr.P.C. clearly provides that no appeal shall lie from any judgment and order of a Criminal Court except as provided for by Cr.P.C. Further, Sub-Section (3) to Section 378 of Cr.P.C. provides that for preferring an appeal to the High Court against an order of acquittal it is necessary to obtain its leave.?

Further, it also held thus :

?Thus, from a reading of the above-said legal position laid down by this Court in the cases referred to supra, it is abundantly clear that the proviso to Section 372 of Cr.P.C. must be read along with its main enactment i.e., Section 372 itself and together with Sub-Section (3) to Section 378 of Cr.P.C. otherwise the substantive provision of Section 372 of Cr.P.C. will be rendered nugatory, as it clearly states that no appeal shall lie from any judgment or order of a Criminal Court except as provided by Cr.P.C.

Thus, to conclude on the legal issue, it was held thus :

?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 proviso to Section 372 of Cr.P.C. without obtaining the leave of the High Court as required under Sub-Section (3) to Section 378 of Cr.P.C.?, 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) of Cr.P.C., under proviso to Section 372, but only after obtaining the leave of the High Court as required under sub-Section (3) to Section 378 of Cr.P.C. 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.?

28. A Division Bench of the Himachal Pradesh High Court, in its judgment in Joginder Singh Vs. State of Himachal Pradesh through its Secretary (Home) [2013 (2) CrLCC 566 : 2013 (3) Crimes 160], held as to how the procedure for filing appeal under the Proviso to Section 372 should be regarded and observed as follows:-

?We are of the considered view that though the proviso to Section 372 of the Code does give a right to the victim to file an appeal, this proviso cannot be read in isolation. It has to be given a meaning which fulfils the intention of the Legislature. The Proviso to Section 372 of the Code does not lay down the procedure as to how, in what manner, and most importantly within which time the appeal has to be filed...



As pointed out above the proviso to Section 372 of the Code does not lay down the procedure for filing the appeal. To us the reasoning of the Punjab and Haryana and Patna High Courts appeals more than that of the Bombay and Delhi High Courts. In addition to the reasoning given by these Courts we would like to add that even if the victim has a right to prefer an appeal, the procedure of filing an appeal must be governed by Section 378 the Code except in so far as Section 372 of the Code specifically provides the forum for appeal?.

Coming to Sub-Section (4) of Section 378 of the Code, we find that if an order of acquittal is passed on a case instituted upon 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 expressing 'leave to appeal' and it appears to us 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 a similar question ? Can the victim be placed on a higher pedestal than the complainant? More often than not, the victim and the complainant are likely to be one and the same person?.

We answer the question by holding that when a victim files an appeal against the acquittal of the accused in the High Court then he is required to obtain leave to appeal before his appeal is entertained. It is made clear that no leave to appeal would be required if the appeal lies to the Sessions Court or even in an appeal filed to the High Court where the only issue is with regard of the adequacy of the compensation.?

29. A Full Bench of the Gujarat High Court, vide its judgment in Bhavuben Dineshbhai Makwana Vs. State Of Gujarat [2013 CrL.L.J 4225], dealt with similar issues and answered the questions as follows:-

'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?

In the circumstances, the very basic premise upon which the law is laid down in Bhikhabhai (supra), i.e. the rights of both State and victim are similar and therefore, the right of one (victim) can be dependent upon exercise of the right by the other (State) is, in our opinion, not correct and against the plain and simple language used by the legislature in the proviso to Section 372. Similarly, Section 24(8) of the Code has nothing to do with the right of appeal conferred upon the victim and by taking aid of that section, the substantive right conferred upon a victim cannot be made conditional?

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 Section 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.

If the ?victim? happens to be the complainant, he being the complainant is required to take leave as there is no consequential amendment of Section 378 of the Code.

If the victim also happens to be the complainant and the appeal is against acquittal, he is required to take leave as provided in Section 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.?

30. In Parmeshwar Mandal, a Division Bench of the Patna High Court also dealt with similar issues and answered the queries as follows:

"In the circumstances, after consideration of the entire matter, conclusions of this Court are as follows:-

(1) - By virtue of the Proviso, as inserted in Section 372 of the Code of Criminal Procedure, 1973 by the Criminal Procedure Code (Amendment) Act, 2008 (Act 5 of 2009), a "victim" has been put at a higher pedestal, than a prosecuting agency or a complainant, in the matter of preferring an appeal against any order of a criminal court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation. This Proviso gives an unqualified "right" to a "victim" to prefer an appeal in its terms, as against the enabling Sections 377 and 378, which only give liberty to a District Magistrate, the State Government, the Central Government and the complainant, as the case may be, to prefer an appeal against an order of sentence on the ground of its inadequacy or against an order of acquittal.

(2) - The right of a "victim" to prefer an appeal in terms of the said proviso to Section 372 is an unqualified right and no "leave to appeal" or "special leave" is required to be obtained by him/her for the purpose, as required by the State or the complainant for

maintaining an appeal in terms of Section 378 of the Code.

(3) - No limitation of time has been provided by the Legislature for exercise of such a right of appeal by the "victim" in terms of the said Proviso. Hence, in the fact and circumstances of each case, the Court has to determine as to whether the appeal was entertainable, or not, on the ground of absence of bonafide explanation for delay by the appellant. The limitation laid down by the Full Bench of Punjab and Haryana High Court is a judicial fiat and not based on interpretation of the provisions of the Code or the Limitation Act, 1963. Hence the same is applicable only within the territorial jurisdiction of that High Court and not beyond.

(4) - However, in view of the legal presumption of innocence in favour of the accused, the yardsticks laid down by judicial pronouncements for consideration of appeals under Section 378 shall be applicable in case of an appeal under the said proviso to Section 372.

(5) - The expression - long after the present incident - used under brackets by the Apex Court in paragraph 5 of its judgment in case of National Commission for Women Vs. State of Delhi and another [AIR 2011 SC (Sup.) 392] : [(2010) 122 SCC 599] is only an obiter dictum of the Court and it does not lay down a law in terms of Article 141 of the Constitution of India.

(6) - Proviso to Section 372 of the Code came into operation w.e.f.

December 31, 2009. Hence, in absence of any legislative intent to the contrary, in all cases, in which a judgment and order has been passed by a criminal court on and after that date, a right accrues to the "victim" to prefer appeal in terms of the said Proviso, irrespective of the date of occurrence and any subsequent event in the case prior to such judgment and order.

(7) - If the subject of the crime is dead or incapacitated to the extent or suffers from such a disability that he/she cannot take steps to exercise his/her right under the Proviso to Section 372, any of his/her next of kin, who can establish before the Court, to its satisfaction, that the crime had caused "loss" or "injury" to him/her also, besides to the subject of the crime, can maintain an appeal under the said proviso.

(8) - The "loss" and "injury" to an appellant before it (if he/she is other than the de-facto sufferer) has to be assessed by the Court in each and every case in the backdrop of definition of "injury" Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 provided in Section 44 of the Indian Penal Code, and not beyond it, before entertaining the appeal, in terms of the proviso to Section 372 on merits.

(9) - If any person prefers an appeal in terms of the proviso to Section 372, solely on the basis of his status as a "guardian" or a "legal heir", he/she will have to establish the legal basis of his/her such status in reference to the law, as may be applicable in the matter, with all its limitations and

qualifications, or otherwise also (e.g. judicial order).

(10) - Once an appeal preferred in terms of the said proviso to Section 372, against an order is entertained by an appellate court on merit, to whatever result, no fresh/second appeal by any party/person can/should be entertained against the same order.

(11) - No distinction can be made between a case instituted by a complainant/ informant with the police and by a complainant before the Court directly, and an absolute right of a victim (a complainant or not) to file an appeal under Proviso to Section 372 does not get fettered by any other section of the Code contained in Chapter XXIX, which includes Section 378."

31. Since, subsequent to the Full Bench reference, the Supreme Court in Satyapal Singh interpreted these provisions, we are duty bound to follow the same to the extent it binds us. With that in mind and in the light of the above legal precedents and the discussion, we answer the questions posed by the Referral Judge as follows:-

(1) A victim of the crime, who has prosecuted an accused by way of a private complaint, has a statutory right of appeal within the limits prescribed under Section 372 of Cr.P.C.

(2) A complainant (in a private complaint), who is not a victim, has a remedy and can file an appeal in the event of acquittal of the accused after obtaining leave to appeal under Section 378(4) of Cr.P.C (3) In a private complaint, even if the victim is not a complainant, he has a right to appeal under the proviso to Section 372 of Cr.P.C., but he has to seek leave as held by the Supreme Court in Satyapal Singh.

(4) The term 'victim' has been correctly interpreted by the Full Bench of the Delhi High Court in Ramphal and we are in agreement with the same.

(5) A victim (as defined under Section 2(wa) of the Cr.P.C does not cease to be a victim merely because he also happens to be a complainant and he can avail all the rights and privileges of a victim also and (6) The decision of the Single Judge in Selvaraj holding that the term 'victim' found in Section 372 excludes a complainant, is not legally correct and in a given case, a complainant, who is also a victim, can avail right granted under Section 372 of Cr.P.C.

32. The questions posed are answered accordingly. All these matters are directed to be listed before the appropriate Court for their disposal in accordance with the opinion expressed hereunder.