2025 INSC 120

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 5560-5561 OF 2024

MAHABIR & ORS. **….Appellant(s)**

VERSUS

STATE OF HARYANA **….Respondent(s)**

J U D G M E N T

J.B. PARDIWALA, J.

1. Since the issues raised in both the captioned appeals are the same and the challenge is also to the self-same judgement and order passed by the High Court, those were taken up for hearing analogously and are being disposed of by this common judgement and order.

2. We may clarify that the Criminal Appeal No. 5560 of 2024 arises from the judgement and order passed by the High Court, reversing the acquittal and holding the appellants herein guilty of the offence of murder. Whereas Criminal

Appeal No. 5561 of 2024 arises from the order of sentence, which ultimately came to be passed by the High Court.

3. These appeals arise from the judgement and order passed by the High Court of Punjab and Haryana at Chandigarh dated 27.08.2024 in Criminal Revision Application No. 194 of 2006 by which the criminal revision filed by the original *de facto* complainant against the judgment and order of acquittal passed by the trial court came to be allowed and the appellants herein were held guilty of the offence of murder punishable under Section 302 of the Indian Penal Code (for short, "the IPC") and sentenced to undergo rigorous imprisonment for life and fine of Rs. 50,000/- each and further, rigorous imprisonment for 3 months in default of payment of fine.

4. *"There is no higher principle for the guidance of the court than the one that no act of courts should harm a litigant and it is the bounden duty of the courts to see that if a person is harmed by a mistake of the court he should be restored to the position he would have occupied, but for that mistake."*

5. The above is aptly summed up in the maxim *"actus curiae neminem gravabit*". It implies that judicial actions should not unfairly harm any party and that courts should act judiciously to prevent errors that could lead to injustice. (***Jang Sing v. Brij Lal and Others*** reported in AIR 1966 SC 1631).

6. We need not delve much into the facts of the present case as our order dated 13.12.2024 gives more than a fair idea as to how these appeals have come up before us. The order reads thus:

"3. The three appellants herein along with three other co-accused were put to trial for the offence of murder punishable under Section 302 read with Section 148 and 149 of the Indian Penal Code, 1860. On conclusion of the trial, the Trial Court held two co-accused guilty of the alleged crime, whereas the other four, including three appellants herein, came to be acquitted.

4. The State did not deem fit to challenge the acquittal of the three appellants herein. One of the convicts went in appeal before the High Court and the father of the deceased in turn invoked the revisional jurisdiction of the High Court under Section 401 read with Section 397 of the Code of Criminal Procedure, 1973 seeking to challenge the acquittal of the three appellants herein. It appears that the appeal filed by one of the convicts against his order of conviction came to be dismissed despite the fact that the convict had already passed away.

5. In the revision application, which was filed by the father of the deceased, the High Court held all the three appellants herein guilty of the alleged offence of murder and sentenced them to undergo life imprisonment. We are informed that they were taken into custody on the very same day the judgment was pronounced by the High Court and now they are serving the sentence as imposed by the High Court.

6. We are not able to understand, on what basis the High Court in exercise of its revisional jurisdiction under Section 401 read with Section 397 of the Code of Criminal Procedure could have converted the finding of acquittal into one of conviction. Sub-Section (3) of Section 401 reads thus: "(3) Nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction."

7.There is one another feature which has disturbed us. According to the learned counsel the High Court proceeded ex-parte without issuing notice to the three appellants herein in the revision petition, who had already been acquitted by the Trial Court.

8. We are also informed that the father of the deceased, who had filed the revision application before the High Court had also passed away much before the judgment of the High Court.

9. Issue notice to the State of Haryana, returnable on 19th December, 2024.

10. In such circumstances referred to above, all the three appellants are ordered to be released on bail. The substantive order of sentence passed by the High Court is suspended till further orders. Accordingly, IA No. 285726/2024 stands disposed of.

11. Registry to call for the records and proceedings of the Sessions Case No. 4 of 1988/2005, disposed of by Additional Sessions Judge, Rewari, from the High Court of Punjab & Haryana at Chandigarh."

CASE PUT UP BY THE APPELLANTS HEREIN

7. The case pertains to an incident dated 13.03.1998. It was a day of Holi festival. The incident was first reported by one Dharampal to the police at 2:55 p.m. on 13.03.1998 itself within two hours of the incident, stating that one Om Parkash s/o Shiv Lal (Complainant) and Om Parkash S/o Chandgi Ram (deceased) had assaulted him, Murti w/o Ram swarup and Usha, W/o Dayanand respectively. Dharampal alleged that the two assailants climbed on to the roof of his house and caught hold of him and in the scuffle, both of them fell down from the roof and both of them also suffered injuries.

8. However, the complaint lodged by Dharampal referred to above was neither investigated nor any FIR was registered, for the reasons best known to the Police.

9. Instead, an FIR came to be registered on the statement of the above-mentioned Om Parkash S/o Shiv Lal (the Complainant) on 14.03.1998 i.e. one day later, implicating *inter alia,* the appellants herein. This was followed by a further statement dated 15.03.1998, naming Dharampal and Sri Chand, a senior citizen who walked with the aid of a walking stick (baint) as accused.

10. Upon appreciation of oral as well as documentary evidence adduced in the trial, the Sessions Court held that the prosecution had failed to prove its case against

the appellants/accused *viz*. Mahabir, Raj Kumar, Dayanand and Krishan Kumar beyond reasonable doubt, and accordingly, acquitted them *vide* its judgment and order dated 05.10.2005 passed in Sessions Case No. 4 of 1998/2005. The Sessions Court, however, convicted Dharampal of the offence under Section 302 read with Section 34 IPC. Since co-accused Sri Chand passed away during the trial, the proceedings against him stood abated.

11. No appeal was preferred by the State of Haryana against the said judgment dated 05.10.2005 acquitting the appellants herein.

12. On 19.01.2006, Chandgi Ram, father of deceased Om Parkash, preferred Criminal Revision being CRR-194-2006 (O&M), seeking to challenge the acquittal of the appellants *viz*. Mahabir, Raj Kumar, Dayanand and Krishan Kumar**.**

13. The convict Dharampal filed Criminal Appeal being CRA-752-DB-2005 (O&M) against the judgment of conviction dated 05.10.2005 and order on sentence dated 08.10.2005.

14. Accused Raj Kumar s/o Raghbir Singh passed away on 24.02.2015. The order dated 07.11.2019 indicates that service could not be effected upon the appellants (respondents in the said Revision Petition, CRR-194-2006), due to non-payment of process fee**.** As on 12.07.2022 too, the appellants who were respondents in the revision petition were not served with the copy of the revision petition**.** The counsel for the revisionist also informed the High Court that he had no instructions in the matter. In December 2023, the revisionist

Chandgi Ram passed away; thus, there was no revisionist before the High Court from the date of demise onwards, as well as, on the date of final hearing. In February 2024, the convicted-accused, Dharam Pal, also passed away. Hence, his conviction appeal also stood abated, however, the same was not brought to the notice of the High Court by the State.

15. On 21.08.2024, the High Court passed an order that since the revisionist was not being represented by any counsel, the Court was appointing legal aid counsel to assist the Court on behalf of the revisionist in the revision petition. The Court further directed that the legal aid counsel be supplied with the Paper book. On behalf of the accused (appellants), a counsel was appointed to assist the Court (without any corresponding order to supply the paper book to him). Arguments were heard on the same day. The revision petition and the conviction appeal were decided by the High Court and by a common judgment and order dated 27.08.2024, the CRA-752-DB-2005 filed by Dharampal was dismissed (O&M) and CRR-194-2006 (O&M) was allowed.

16. After coming to know about the judgment reversing the acquittal, the appellants surrendered/were taken into custody.

17. In such circumstances referred to above, the appellants are here before this Court with the present two appeals.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

18. Ms. Indira Unninayar, the learned counsel submitted that despite an express statutory bar on reversing a finding of acquittal the High Court in violation of this statutory bar, reversed the acquittal into a conviction.

19. She submitted that the High Court in exercise of its revisional jurisdiction has undoubtedly the power to set aside the acquittal, but such interference is called for only in exceptional cases and that too only for the purpose of re-trial. However, it is not permissible to convert such acquittal to conviction. The only course left to it in such exceptional cases, is to order retrial, which, was not done.

20. She submitted that no right of appeal was available to the victim in law at the time the revision was filed and therefore, there was no scope for the court to even treat the revision as an appeal that 'lay under the Code of Criminal Procedure (for short, "the CrPC" or "Code")' at the time as provided for under Section 401(5) above.

21. Despite an express statutory bar on any order being passed to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence, the High Court proceeded to hear and pronounce its judgment without adhering to the above. The above was also in violation of the principles of natural justice, the right to access the criminal justice system, and the constitutional right of the accused to be represented by

a counsel of their choice under Articles 21 & 22(1) read with 20(3) respectively of the Constitution of India. Yet the matter proceeded without service upon the accused.

22. The revision petition was filed on 19.01.2006. However, the High Court's order dated 07.11.2019, indicates that - Service could not be effected upon the appellants who were respondents in the said revision petition, CRR-194-2006, due to non-payment of process fee.

23. The order dated 12.07.2022 reflects that the appellants who were respondents in the revision petition were not served with the copy of the revision petition, as of 12.07.2022. The counsel for the revisionist had also informed the High Court that he had no instructions**.**

24. The order dated 21.08.2024 reflects that - since the revisionist was not represented by a validly engaged counsel, the High Court appointed a legal aid counsel to assist the Court on behalf of the deceased revisionist. The said counsel was supplied with the paper book. Arguments were heard on the same day and judgment was reserved.

25. By way of abundant caution, the appellants had approached the Registry of the High Court to obtain a 'Copy of Service Report in CRR-194-2006' on 3.10.2024 and the Registry replied on 14.10.2024 that 'Required doc not available on DMS' and 'No Service Report is available in CRR-194-2006 in this file'.

26. Neither the Counsel appointed by the Court had a chance to peruse the record and prepare for any arguments to assist the Court, nor did he had any occasion or opportunity to confer/contact/consult with the appellants herein to seek instructions for defending their acquittal and contesting the revision petition, as he was appointed and asked to represent the accused/respondents there and then, on the very same day, that the arguments were heard and judgement reserved.

27. The above was in gross violation of the principles of natural justice as well as the appellants' constitutional right to be represented by a counsel of their own choice under Articles 21 & 22(1) respectively of the Constitution of India.

SUBMISSIONS ON BEHALF OF THE STATE OF HARYANA

28. The learned counsel appearing for the State submitted that the High Court in exercise of its revisional jurisdiction under Section 401 read with Section 397 of the CrPC could not have reversed the acquittal and passed an order of conviction. However he submitted that as sub section (5) to Section 401 provides that if an appeal lies under the CrPC, but an application for revision had been made to the High Court by any person and if the High Court is convinced that such application had been filed under the erroneous belief that no appeal lies thereto, then in the interest of justice the High Court can treat the application for revision as an appeal and deal with the same accordingly.

29. According to the learned counsel appearing for the State, the High Court in the case on hand, could have invoked sub section (5) of Section 401 and with the aid of the proviso to Section 372 of the CrPC could have treated the revision filed by the *de facto* complainant as an appeal. However, even for the purpose of invoking sub section (5) to Section 401 CrPC, the High Court has to pass an appropriate order in that regard.

30. The learned counsel appearing for the State went to the extent of submitting that although the proviso to Section 372 CrPC was introduced sometime in 2009, i.e., after the judgment of acquittal yet the High Court could have given retrospective effect to the proviso to Section 372 and should have treated the revision application filed by the *de facto* complainant as an appeal under Section 372 of the CrPC.

ANALYSIS

31. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgment and order of conviction in exercise of its revisional jurisdiction under Section 401 read with Section 397 of the CrPC.

RELEVANT PROVISIONS OF LAW

32. Section 397 CrPC reads thus:-

> *"**397. Calling for records to exercise powers of revision.**—(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself; 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, and may, when calling, for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record.*
>
> *Explanation.—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.*
>
> *(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.*
>
> *(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by* the other of them."

33. Section 401 CrPC reads thus:-

> *"**401. High Court's powers of revision.**—(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307, and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.*

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of Justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

34. Section 401(3) says – *"Nothing in this section shall be deemed to authorize a High Court to convert a finding of appeal into one of conviction."*

    i. Thus, the bar is categorical and express.

35. Section 401(5) says – *"Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do so, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."*

    i. For the High Court to treat the revision as an appeal, all of the above conditions were required to be fulfilled.

ii. And a reasoned, speaking order was required to be passed recording that they were fulfilled.

iii. However, no such procedure was adopted.

36. The general provision on appeals is Section 372 Cr PC which says – *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.*

i. Thus, no appeal was permissible other than provided for, in law.

37. The Proviso to the above had not yet come into effect as on 19.01.2006 when the revision petition was filed, for it was added only w.e.f. 31.12.2009. The Proviso says – *[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.]*

i. Thus, the statutory right of appeal by a victim against such acquittal arose only from the date of the amendment w.e.f. 31.12.2009. As the said revision was filed by the father of the deceased on 19.01.2006 well before the above amendment, such right was not available at the relevant point of time.

ii. Therefore, the very first condition under Section 401(5) itself would not have been possible to be fulfilled, i.e. the right of the victim to appeal <u>*did not lie under the Code*</u> at the time of filing the revision petition.

38. As regards appeals against acquittals, the relevant provision for appeals, and specifically for appeal to the High Court, are detailed out below:

a. Section 378. Appeal in case of acquittal – Section 378 (1) says – *Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5), -*

b. The relevant section pertaining to an appeal to the High Court is Section 378(1)(b) which says – *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.].*

i. Thus, only the State had the statutory right to appeal against the order of acquittal in 2006, and

ii. Indisputably, the State did not file appeal challenging the said order of acquittal.

PRECEDENTS EXPLAINING THE POSITION OF LAW

39. This Court in ***Bindeshwari Prasad Singh v. State of Bihar (now Jharkhand) & Anr.*** reported in (2002) 6 SCC 650, laid down that there is a limit on the

powers of the High Court as a Revisional Court, prohibiting it from converting a finding of acquittal into one of conviction. Para 12 reads thus: -

> *"**12.** We have carefully considered the material on record and we are satisfied that the High Court was not justified in reappreciating the evidence on record and coming to a different conclusion in a revision preferred by the informant under Section 401 of the Code of Criminal Procedure. Sub-section (3) of Section 401 in terms provides that nothing in Section 401 shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction. The aforesaid sub-section, which places a limitation on the powers of the revisional court, prohibiting it from converting a finding of acquittal into one of conviction, is itself indicative of the nature and extent of the revisional power conferred by Section 401 of the Code of Criminal Procedure. If the High Court could not convert a finding of acquittal into one of conviction directly, it could not do so indirectly by the method of ordering a retrial. It is well settled by a catena of decisions of this Court that the High Court will ordinarily not interfere in revision with an order of acquittal except in exceptional cases where the interest of public justice requires interference for the correction of a manifest illegality or the prevention of gross miscarriage of justice. The High Court will not be justified in interfering with an order of acquittal merely because the trial court has taken a wrong view of the law or has erred in appreciation of evidence. It is neither possible nor advisable to make an exhaustive list of circumstances in which exercise of revisional jurisdiction may be justified, but decisions of this Court have laid down the parameters of exercise of revisional jurisdiction by the High Court under Section 401 of the Code of Criminal Procedure in an appeal against acquittal by a private party. (See D. Stephens v. Nosibolla [1951 SCC 184 : AIR 1951 SC 196 : 1951 Cri LJ 510] , K. Chinnaswamy Reddy v. State of A.P. [AIR 1962 SC 1788 : (1963) 1 Cri LJ 8] , Akalu Ahir v. Ramdeo Ram [(1973) 2 SCC 583 : 1973 SCC (Cri) 903], Pakalapati Narayana Gajapathi Raju v. Bonapalli Peda Appadu [(1975) 4 SCC 477 : 1975 SCC (Cri) 543 : AIR 1975 SC 1854] and Mahendra Pratap Singh v. Sarju Singh [AIR 1968 SC 707 : 1968 Cri LJ 665] .)"*

40. This Court in ***Joseph Stephen & Ors. v. Santhanasamy & Ors.*** reported in (2022) 13 SCC 115, laid down that on a plain reading of sub-section (3) of

Section 401 CrPC, it has to be held that sub-section (3) of Section 401 CrPC prohibits/bars the High Court to convert a finding of acquittal into one of conviction. Para 10 reads thus:-

> *"**10.** Applying the law laid down by this Court in the aforesaid decisions and on a plain reading of sub-section (3) of Section 401CrPC, it has to be held that sub-section (3) of Section 401CrPC prohibits/bars the High Court to convert a finding of acquittal into one of conviction. Though and as observed hereinabove, the High Court has revisional power to examine whether there is manifest error of law or procedure, etc. however, after giving its own findings on the findings recorded by the court acquitting the accused and after setting aside the order of acquittal, the High Court has to remit the matter to the trial court and/or the first appellate court, as the case may be."*

41. This Court in ***Joseph Stephen*** (supra), holds that first, the High Court has to pass a judicial order to treat an application for revision as petition of appeal. The High Court has to pass a judicial order because sub-section (5) of Section 401 CrPC provides that if the High Court is satisfied that such revision application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do. While treating the application for revision and to deal with the same as a petition of appeal, the High Court has to record the satisfaction as provided under sub-section (5) of Section 401 CrPC. Para 14 reads thus:-

> *"**14.** Now so far as the power to be exercised by the High Court under sub-section (5) of Section 401 CrPC, namely, the High Court may treat the application for revision as petition of appeal and deal with the same accordingly is concerned, firstly the High Court has to pass a judicial order to treat the application for revision as petition of appeal. The High Court has to pass a judicial order because sub-section (5) of Section 401 CrPC*

provides that if the High Court is satisfied that such revision application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do. While treating with the application for revision as petition of appeal and deal with the same accordingly, the High Court has to record the satisfaction as provided under sub-section (5) of Section 401 CrPC. Therefore, where under the CrPC an appeal lies, but an application for revision has been made to the High Court by any person, the High Court has jurisdiction to treat the application for revision as a petition of appeal and deal with the same accordingly as per sub-section (5) of Section 401 CrPC, however, subject to the High Court being satisfied that such an application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do and for that purpose the High Court has to pass a judicial order, may be a formal order, to treat the application for revision as a petition of appeal and deal with the same accordingly."

42. This Court in ***Ganesha v. Sharanappa & Anr.*** reported in (2014) 1 SCC 87, in para 11, clarifies that :

> *"... Interference with the order of acquittal is called for only in exceptional cases – where there is manifest error of law of procedure resulting into miscarriage of justice, and, where the acquittal has been caused by shutting out evidence which otherwise ought to have been considered or where material evidence which clinches the issue has been overlooked. In such exceptional cases, the High Court can set aside an order of acquittal, but it cannot covert it into one of conviction. The only course left to the High Court in such exception cases, is to order retrial*".

43. This Court in ***Santhakumari & Ors. v. State of Tamil Nadu & Ors.*** reported in (2023) 15 SCC 440, laid down that the order passed by the High Court is in the teeth of the provisions of sub-section (2) of Section 401 of the CrPC as interpreted by this Court in ***Manharibhai Muljibhai Kakadia & Anr.***

v. Shaileshbhai Mohanbhai Patel & Ors. reported in (2012) 10 SCC 517. Paras 5 and 6 respectively read thus:-

> *"**5.** Having considered the submissions, since it is not in dispute that the proposed accused were not served notice of the revision proceedings, the order passed by the High Court is in the teeth of the provisions of sub-section (2) of Section 401 of the Code as interpreted by this Court in Manharibhai Muljibhai Kakadia [Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel, (2012) 10 SCC 517 : (2013) 1 SCC (Cri) 218] .*
>
> ***6.** The decision in Manharibhai Muljibhai Kakadia [Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel, (2012) 10 SCC 517 : (2013) 1 SCC (Cri) 218] has also been followed in Bal Manohar Jalan v. Sunil Paswan [Bal Manohar Jalan v. Sunil Paswan, (2014) 9 SCC 640 : (2014) 5 SCC (Cri) 256] , wherein it was held : (Bal Manohar Jalan case [Bal Manohar Jalan v. Sunil Paswan, (2014) 9 SCC 640 : (2014) 5 SCC (Cri) 256] , SCC p. 644, para 9)*
>
> *"9. In the present case challenge is laid to the order dated 4-3-2009 at the instance of the complainant in the revision petition before the High Court and by virtue of Section 401(2) of the Code, the accused mentioned in the first information report get the right of hearing before the Revisional Court although the impugned order [Sunil Paswan v. State of Bihar, 2011 SCC OnLine Pat 600] therein was passed without their participation. The appellant who is an accused person cannot be deprived of hearing on the face of the express provision contained in Section 401(2) of the Code and on this ground, the impugned order [Sunil Paswan v. State of Bihar, 2011 SCC OnLine Pat 600] of the High Court is liable to be set aside and the matter has to be remitted.""*

44. The decision in ***Manharibhai Muljibhai*** (supra) was referred to and relied upon in ***Bal Manohar Jalan v. Sunil Paswan & Anr.*** reported in (2014) 9 SCC 640, wherein it was *inter alia,* held that "*The appellant who is an accused person cannot be deprived of hearing on the face of the express provision*

contained in Section 401(2) of the Code and on this ground, the impugned order of the High Court is liable to be set aside…".

45. This Court in ***Nandini Satpathy v. P.L. Dani & Anr.*** reported in (1978) 2 SCC 424 held that the right to consult an advocate of choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied such right. The spirit and ethos of Article 22(1) is that it is fundamental to the rule of law that the service of a lawyer shall be available for consultation to the accused person under circumstances of near custodial interrogation. Moreover, the right against self-incrimination is best practiced & best promoted by conceding to the accused, the right to consult a legal practitioner of his choice. Lawyers' presence is a constitutional claim in some circumstances of our country, and in the context of Article 20(3), is an assurance of awareness and observance of the right to silence.

46. Thus, it is as clear as a noonday that the High Court committed an egregious error in reversing the acquittal and passing an order of conviction in exercise of its revisional jurisdiction and that too without affording any opportunity of hearing to the appellants herein.

47. We could have closed this matter at this stage; however, we would like to explain the position of law in so far as the applicability of sub section (5) to Section 401 of the CrPC read with the provision to sub section 372 of the CrPC is concerned.

IS THE PROVISO TO SECTION 372 CRPC RETROSPECTIVE IN OPERATION?

48. A very fabulous argument was canvassed on behalf of the State that the proviso to Section 372 of the CrPC is retrospective in operation. Therefore, although the revision was filed in 2006, yet as it came to be decided in 2014, the proviso to Section 372 CrPC was applicable. The High Court could have treated the revision application as an appeal under Section 372 at the instance of the complainant. If the High Court would have treated it as an appeal, then it would have been within its jurisdiction to reverse the acquittal and passed an order of conviction.

49. It seems one and all are under a serious misconception of law.

50. Insofar as the statutes regulating appeal are concerned, the law is well settled that the right to file an appeal is a statutory right and it can be circumscribed by the conditions of the statute granting it. As was observed by this Court in ***Government of Andhra Pradesh & Ors. v. P. Laxmi Devi*** reported in (2008) 4 SCC 720 and ***Super Cassettes Industries Ltd. v. State of Uttar Pradesh & Anr.*** reported in (2009) 10 SCC 531, it is not a natural or inherent right and cannot be assumed to exist, unless provided by a statute.

51. Therefore, the scheme of right of appeal under Chapter XXXIX of the CrPC, which provides the right to file appeals including abatement of appeals, should be understood on the basis of the above golden rules of statutory interpretation.

52. Comparing Section 404 of CrPC 1898 with Section 372 of CrPC, would indicate that the main provision is intact, insofar it provides that no appeal shall lie from any judgment or order of a criminal court, except as provided by this Code or by any other law for the time being in force. The significant development that has taken place in this provision is that a 'proviso' was added by the Amending Act No. 5 of 2009, which provides 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 passed by such Court'.

53. Therefore, by the aforesaid provision a right has been created in favour of the victim, which was not existing earlier in the Code, i.e., that a 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 .The plain reading of the statement of objects and reasons for introducing the proviso to Section 372 CrPC makes it clear that it wanted to confer certain rights on the victims. It has been noted therein that the victims are the worst sufferers in a crime, and they don't have much role in the court proceedings. They need to be given certain "rights" and compensation, so that there is no distortion of the criminal justice system. This, by itself, is clear that the object of adding this proviso is to create a right in favour of the victim to prefer an appeal as a matter of right. It not only extends to challenge the order

of acquittal, but such appeal can also be filed by the victim if the accused is convicted for a lessor offence or if the inadequate compensation has been imposed.

54. Thus, it is clear as per the golden rule of interpretation, that the 'proviso' is a substantive enactment, and is not merely excepting something out of or qualifying what was excepting or goes before. Therefore, by adding the 'proviso' in Section 372 of CrPC by this amendment, a right has been created in favour of the victim.

55. The relevant statutory provisions are excerpted for convenience. First, Section 2(wa) of the CrPC defines "*victim*" as:

> *"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."*

56. The second provision is Section 372 of the CrPC, which stipulates that:

> *"No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or any other law for the time being in force."*

57. The third statutory provision is the proviso to Section 372 CrPC, which was introduced in 2008, conferring upon victims, the right of appeal in these terms:

> *"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."

LEGISLATIVE HISTORY

58. A victim-oriented approach to certain aspects of criminal procedure was advocated in the Law Commission of India's 154th Report, 1996, which noted that *"increasingly, the attention of criminologists, penologists and reformers of criminal justice system has been directed to victimology, control of victimization and protection of the victims of crimes."* (Chapter XV, Paragraph 1) While focused on issues of compensation, the Law Commission Report cited the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power for its definition of "victim":

> *"persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws." (Chapter XV, Paragraph 6.2).*

59. The said report prompted the Code of Criminal Procedure (Amendment) Bill of 2006. Its Statement of Objects and Reasons noted that:

> *"... The Law Commission has undertaken a comprehensive review of the Code of Criminal Procedure in its 154th report and its recommendations have been found very appropriate, particularly those relating to provisions concerning arrest, custody and remand, procedure for summons and warrant-cases, compounding of offences, victimology, special protection in respect of women and inquiry and trial of persons of unsound mind. .."*

60. It also noted that:

> *"At present, the victims are the worst sufferers in a crime and they don't have much role in the court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system."*

61. The definition of "victim", as well as the proviso to Section 372 was eventually inserted into the Code of Criminal Procedure through the Code of Criminal Procedure (Amendment) Act, 2008 (Act No. 5 of 2009). The Amendment inserts victim-oriented provisions at a number of places in the CrPC. For instance, a proviso to Section 157(1) is added, stipulating that:

> *"Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality."*

62. Through a new Section, 357A(1), it is provided that

> *"Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who, require rehabilitation."*

IS PROVISO TO SECTION 372 AN EXCEPTION?

63. The victims' right to appeal has been framed in the language of a proviso to Section 372 of the CrPC. As held in ***A.N. Sehgal & Ors. v. Raje Ram Sheoran & Ors.*** reported in AIR 1991 SC 1406, it is well-accepted that normally, a proviso "*carves out an exception to the main provision to which it has been enacted as a proviso and to no other*." This, however, is subject to context. This

Court, in ***S. Sundaram Pillai & Ors. v. V.R. Pattabiraman & Ors.*** reported in AIR 1985 SC 582, held that a proviso may be of four different types : in one set of circumstances,

> *"it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself;"*

64. Emphasizing that undue importance should not be given on the appellation (explanation, proviso, saving clause, etc) and rather, the intent of the law maker should be given effect, this Court, in ***State of Bombay & Anr. v. United Motors (India) Limited & Ors.*** reported in (1953) 1 SCC 514 ruled that:

> *"... It may be that the description of a provision cannot be decisive of its true meaning or interpretation which must depend on the words used therein but, when two interpretations are sought to be put upon a provision, that which fits the description which the Legislature has chosen to apply to it, is, according to sound canons of constructions, to be adopted, provided of course, it is consistent with the language employed in preference to the one which attributes to the provision a different effect from what it should have according to its description by the Legislature."*

65. The aforesaid thought was brought home in ***State of Kerala & Anr. v. B. Six Holiday Resorts Private Ltd. & Ors.*** reported in (2010) 5 SCC 186, where this Court held as follows:

> *"32.A proviso may either qualify or except certain provisions from the main provision; or it can change the very concept of the intendment of the main provision by incorporating certain mandatory conditions to be fulfilled; or it can temporarily suspend the operation of the main provision. Ultimately the proviso has to be construed upon its terms".*

66. It is the intention of the legislature, therefore, which is paramount.

67. In the present context, given the text of Section 372 and the scheme of the Act, it is clear that the proviso establishes an independent right, and must be interpreted within that framework. Section 372 forbids appeals unless otherwise authorized by the Code, or by another law. The proviso, however, states that the victim shall have the right to appeal under certain circumstances. Given the rule enacted in Section 372, it cannot be said that the proviso to that provision carves out an exception to the rule. According to the rule in Section 372, appeals must be in accordance with the Code; according to the proviso - *which is itself part of the Code* - victims have the right to appeal under certain circumstances. At various other places in the CrPC, appeal procedures are specified. For instance, Section 378 stipulates the procedure in case of appeals from acquittal, and Section 378(3) specifies that "*no appeal under sub-section (1) or sub-section (2) shall be entertained except with leave of the High Court*." The proviso to Section 372 dispenses with the requirement of leave in case it is the victim who is appealing. From the scheme of the Act, therefore, it seems clear that the proviso is better understood to be one of the many provisions governing appeals under Chapter 29 of the CrPC. While Section 372 enacts that no appeal shall lie except as provided for by the Code, it refers to the various provisions of Chapter 29, *including* the proviso, each of which prescribe the requirements and procedures for appeals under different circumstances. The

proviso, therefore, is not an exception to Section 372, but a stand-alone legal provision.

68. This Court in the case of ***Mallikarjun Kodagali (Dead) represented through Legal Representatives v. State of Karnataka & Ors.*** reported in (2019) 2 SCC 752, after discussing various judgments of different High Courts, observed in para 72, as under:

> *"72. 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 appeal under the proviso to Section 372 CrPC. 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 31.12.2009 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."*
>
> (Emphasis supplied)

69. In ***Hitendra Vishnu Thakur & Ors. v. State of Maharashtra & Ors.*** reported in (1994) 4 SCC 602, one of the questions which this Court was examining was whether clause (*bb*) of Section 20(4) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 introduced by an Amendment Act governing Section 167(2) CrPC in relation to TADA matters was in the realm of procedural law

and if so, whether the same would be applicable to pending cases. Answering the question in the affirmative this Court speaking through A.S. Anand, J. (as His Lordship then was), held that Amendment Act 43 of 1993 was retrospective in operation and that clauses (*b*) and (*bb*) of sub section (4) of Section 20 of TADA apply to the cases which were pending investigation on the date when the amendment came into force. The Court summed up the legal position with regard to the procedural law being retrospective in its operation and the right of a litigant to claim that he be tried by a particular Court, in the following words:

> *"(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.*
>
> *(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.*
>
> *(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.*
>
> *(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.*
>
> *(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in*

operation, unless otherwise provided, either expressly or by necessary implication."

(Emphasis supplied)

70. We may also refer to the decision of this Court in ***Sudhir G. Angur & Ors. v. M. Sanjeev & Ors.*** reported in (2006) 1 SCC 141, where a three-Judge Bench of this Court approved the decision of the Bombay High Court in ***Shiv Bhagwan Moti Ram Saraoji v. Onkarmal Ishar Dass*** reported in AIR 1952 Bom 365 and observed:

> *"11. ... It has been held that a court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted. We are in complete agreement with these observations. ..."*
>
> (Emphasis supplied)

71. In ***Ramesh Kumar Soni v. State of Madhya Pradesh*** reported in (2013) 14 SCC 696, this Court reiterated the aforesaid principle with approval.

72. In view of the aforesaid, it is very much clear that the amendment so made in Section 372 CrPC by adding a proviso in the year 2009 creating a substantive right of appeal is not retrospective in nature. A statute which creates new rights shall be construed to be prospective in operation unless otherwise provided, either expressly or by necessary implication. It is, therefore, clear that in the year 2006 when the judgement of acquittal was passed, the de facto complainant had no right to challenge the impugned order passed in 2006 by

way of filing the appeal. In such circumstances sub section (5) of Section 401 CrPC has no application in the present case.

73. There is yet one another shocking aspect of the matter, we need to take cognizance of.

74. It appears that the High Court relied upon the police statement of PW-7 recorded under Section 161 of the CrPC instead of his oral testimony before the trial court.

75. The PW-7 Om Parkash s/o Durga Ram, turned hostile and was cross examined by the Public Prosecutor under Section 145 of the Evidence Act. While discussing the evidence of PW-7 as recorded by the trial court, the High Court observed thus:-

i. "*Resultantly, the answer meted to question No. 1 (supra), qua his only intimating the police, that both the parties were throwing brickbats from the top of the houses, is to be construed to be a pretextual or prevaricated version qua the crime event.*"

ii. *"Cumulatively hence, since the deposition embodied in the examination-in-chief of PW-7, becomes contradicted from his previously made statement in writing to the police. Resultantly when during the course of his cross-examination, he omitted to make any speakings, that his previously made statement, thus was concocted or manufactured by the investigating officer concerned, nor when he stated that he had never made any previous statement in respect of the crime incident to the police officer concerned. Therefore, the consequential effect thereof is that, the previously made statement by the witness (supra) to the police officer concerned, was both genuine and a true reflection of the*

crime incident. Contrarily, the statement made by the witness (supra) before the learned trial Judge concerned, was an engineered and concocted version vis-à-vis the crime incident. In sequel, since the previously made statement by the witness (supra) to the police officer concerned, for the reasons (supra) is a truthful reflection of the crime event, thereby immense credence is to be assigned thereto, rather than to the ill resilings therefrom by the witness (supra). Resultantly thereby the prosecution has been able to prove the genesis of the prosecution case. The said reason becomes founded upon the principle of law that even if the prosecution witness turns hostile yet when during the course of his being cross-examined by the Public Prosecutor concerned, he is proven to be ill- resiling from his previously made untutored statement to the police officer concerned, thereupon the resilings as made by the prosecution witness in his examination-in-chief, vis-à-vis, his previously made statement to the police officer concerned, are ill-resilings therefrom, thus thereto no credence is to be assigned, rather credence is to be assigned to the evidently untutored and undoctored version comprised in his previously made statement in writing to the police officer concerned."

(Emphasis supplied)

76. Whereas Section 162 of the CrPC expressly provides that the statements recorded under Section 161 of the CrPC shall not be used for any purpose save as provided in Section 162, and the Proviso to Section 162 clearly says that, any part of the statement, if duly proved, may be used by the accused, to contradict such witness in the manner provide in Section 145 of the Evidence Act. And when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but only for the purpose of explaining any matter referred to in the cross-examination.

77. We may remind the High Court of the observations made by this Court (a 3-Judge Bench speaking through one of us, J. B. Pardiwala, J.) in ***Anees v. State***

Government of NCT reported in 2024 SCC OnLine SC 757. We quote some of the observations made in paras 62 and thereafter from 63 onwards till 69:

> *"**62.** ... There could be innumerable reasons for a witness to resile from his/her police statement and turn hostile. Here is a case in which a five-year-old daughter might have resiled thinking that having lost her mother, the father was the only person who may take care of her and bring her up. However, why she turned hostile is not important. What is important is the role of the public prosecutor after a prime witness, more particularly a child witness of tender age, turns hostile in a murder trial. When any prosecution witness turns hostile and the public prosecutor seeks permission of the trial court to cross-examine such witness then that witness is like any other witness. The witness no longer remains the prosecution witness.*
>
> *xxx xxx xxx*
>
> ***63.** Section 162 Cr.P.C. bars the use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated therein. The statement made by a witness before the police under Section 161(1) Cr. P.C. can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) Cr.P.C. The statements under Section 161 Cr. P.C. recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose : (i) of contradicting such witness by an accused under Section 145 of the Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the re-examination of the witness if necessary.*
>
> ***64.** The court cannot suo motu make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words 'if duly proved' used in Section 162 Cr. P.C. clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway, nor can be looked into, but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the Investigating Officer. The statement before the Investigating Officer can be used for contradiction but only after strict compliance with Section 145 of the Evidence Act,*

that is, by drawing attention to the parts intended for contradiction.

65. *Section 145 of the Evidence Act reads as under:*

> ***"145. Cross-examination as to previous statements in writing.***— *A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."*

66. *Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need of further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter, when the Investigating Officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the Investigating Officer who, again, by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145*

of the Evidence Act, that is, by drawing attention to the parts intended for contradiction." [See : V.K. Mishra v. State of Uttarakhand : ((2015) 9 SCC 588]

***67.** In the case at hand, not only proper contradictions were not brought on record in the oral evidence of the hostile witnesses, but even those few that were brought on record, were not proved through the evidence of the Investigating Officer. Does the State expect Section 106 of the Evidence Act to come to its aid in every criminal prosecution. At times, such procedural lapses may lead to a very serious crime going unpunished. Any crime committed against an individual is a crime against the entire society. In such circumstances, neither the public prosecutor nor the presiding officer of the trial court can afford to remain remiss or lackadaisical in any manner. Time and again, this Court has, through its judgments, said that there should not be any element of political consideration in the matters like appointment to the post of public prosecutor, etc. The only consideration for the Government should be the merit of the person. The person should be not only competent, but he should also be a man of impeccable character and integrity. He should be a person who should be able to work independently without any reservations, dictates or other constraints. The relations between the Public Prosecution Service and the judiciary are the very cornerstone of the criminal justice system. The public prosecutors who are responsible for conducting prosecutions and may appeal against the court decisions, are one of judges' natural counterparts in the trial proceedings and also in the broader context of management of the system of criminal law.*

***68.** A criminal case is built upon the edifice of evidence (whether it is direct evidence or circumstantial evidence) that is admissible in law. Free and fair trial is the very foundation of the criminal jurisprudence. There is a reasonable apprehension in the mind of the public at large that the criminal trial is neither free nor fair with the Prosecutor appointed by the State Government conducting the trial in a manner where frequently the prosecution witnesses turn hostile.*

***69.** Over a period of time, we have noticed, while hearing criminal appeals, that there is practically no effective and meaningful cross-examination by the Public Prosecutor of a hostile witness. All that the Public Prosecutor would do is to confront the hostile witness with his/her police statement recorded under*

Section 161 of the Cr. P.C. and contradict him/her with the same. The only thing that the Public Prosecutor would do is to bring the contradictions on record and thereafter prove such contradictions through the evidence of the Investigating Officer. This is not sufficient. The object of the cross-examination is to impeach the accuracy, credibility and general value of the evidence given in-chief; to sift the facts already stated by the witness; to detect and expose the discrepancy or to elicit the suppressed facts which will support the case of the cross-examining party. What we are trying to convey is that it is the duty of the Public Prosecutor to cross-examine a hostile witness in detail and try to elucidate the truth & also establish that the witness is speaking lie and has deliberately resiled from his police statement recorded under Section 161 of the Cr. P.C. A good, seasoned and experienced Public Prosecutor will not only bring the contradictions on record, but will also cross-examine the hostile witness at length to establish that he or she had actually witnessed the incident as narrated in his/her police statement."

(Emphasis supplied)

78. Thus, this Court took a serious notice of lack of thorough cross-examination by Public Prosecutors in criminal appeals, specifically with hostile witnesses. The prosecutors often only confront them with their police statement, aiming to highlight contradictions but not fully explore the witness's testimony. The Court emphasized that the purpose of cross-examination is to challenge the accuracy and credibility of the witness's statement, uncover hidden facts, and establish if the witness is lying. Public Prosecutors should conduct detailed cross-examinations to reveal the truth and establish the witness's first hand knowledge of the incident described in their police statement.

79. In the decision referred to above the Court noted that after the witness was declared hostile, all that the Public Prosecutor had done was to put few

suggestions to her for the purposes of cross-examination. Even proper contradictions were not brought on record.

80. This Court explained that the trial courts cannot independently use statements made to the police that have not been proven, nor can it base its questions on such statements if they conflict with the witness's testimony in court. The phrase 'if duly proved' in Section 162 of the CrPC indicates that the statements of witnesses recorded by the police cannot be immediately admitted as evidence or examined. They must first be proven through eliciting admissions from the witness during cross-examination and also during the cross-examination of the Investigating Officer. While statements made to the Investigating Officer can be used for contradiction, this can only be done after strict compliance with Section 145 of the Evidence Act. This requires drawing attention to the specific parts of the statement intended for contradiction. This is what is required under Section 145 of the Evidence Act but even where a witness is confronted by his previous statement and given an opportunity to explain that part of the statement that is put to him does not constitute substantive evidence.

81. There is a catena of decisions laying down the principle in law that the material elicited as contradiction by use of Section 145 of the Indian Evidence Act is not substantive evidence. Even in regard to the statement recorded under Section 164 of the CrPC by authorised Magistrate, it has been held accordingly.

Therefore, the fact that the contradictions are proved through the investigating officers though the witnesses have denied having made such statements, does not translate the contradictions into substantive evidence. Unless there is substantive evidence, it cannot be acted upon legally particularly to base a conviction.

UNLAWFUL DETENTION OF THE APPELLANTS FOR A PERIOD OF THREE MONTHS

82. This Court in ***D.K. Basu v. State of West Bengal*** reported in (1997) 1 SCC 416 observed as under:—

> *"**44.** The claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortious acts of the public servants. Public law proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 32 or Article 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the courts under the public law jurisdiction for penalising the wrongdoer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen."*
>
> (Emphasis supplied)

83. In ***Nilabati Behera v. State of Orisa & Ors.*** reported in (1993) 2 SCC 746, while dealing with the power of a constitutional court to award compensation rather than relegating such person to file a suit for recovery of damages, this Court observed as under:—

> *"**22.** The above discussion indicates the principle on which the court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was indicated in* Rudul Sah *[(1983) 4 SCC 141 : 1983 SCC (Cri) 798 : (1983) 3 SCR 508] and certain further observations therein adverted to earlier, which may tend to minimise the effect of the principle indicated therein, do not really detract from that principle. This is how the decisions of this Court in* Rudul Sah *[(1983) 4 SCC 141 : 1983 SCC (Cri) 798 : (1983) 3 SCR 508] in that line have to be understood and* Kasturilal *[(1965) 1 SCR 375 : AIR 1965 SC 1039 : (1965) 2 Cri LJ 144] distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son."*
>
> (Emphasis supplied)

84. The principle as aforesaid is now well established that in cases where there can be no dispute of facts, the constitutional courts have the power to award compensation in case a person has been deprived of his life and liberty without following the procedure established by law.

85. The learned counsel appearing for the appellants vehemently submitted that the appellants are in their 60s and 70s. 26 years after the incident, and nearly 20 years after their acquittal, the appellants were unjustly subjected to rigorous imprisonment for over 3 months, due to the impugned judgment and order,

before they came to be released by this Court on bail vide order dated 13.12.2024. She highlighted the following for the purpose of making good her case for awarding appropriate compensation to each of the three appellants.

a. The appellants and their respective families suffered shock, trauma and despair, upon they being taken in sudden custody after being acquitted twenty years ago, for a crime that they had not committed.
b. The appellants have had to suffer the ignominy of incarceration, with its concomitant physical, mental and emotional hardship.
c. The appellants were wrongly denied their liberty, dignity and reputation as they were branded as criminals for this period.
d. The appellants live within a small community in their village, and today, they face social stigma as well, for the above reasons.
e. It is, therefore, only just and proper that their positions be duly vindicated, their names be cleared, and that they be properly compensated as well, for their unjust denial of liberty, dignity and reputation.
f. This step by the Court would enable a sense of restoration of justice and dignity within themselves and among their community.

86. This Court in ***D.K. Basu*** (supra), while dealing with the aspect of 'torture', held:

"10. 'Torture' has not been defined in the Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of human civilisation.

'Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone, paralysing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself.' — Adriana P. Bartow

11. No violation of any one of the human rights has been the subject of so many conventions and declarations as 'torture' — all aiming at total banning of it in all forms, but in spite of the commitments made to eliminate torture, the fact remains that torture is more widespread now than ever before. 'Custodial torture' is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward — flag of humanity must on each such occasion fly half-mast.

12. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma, a person experiences is beyond the purview of law."

87. From the above, it is quite vivid that emphasis has been laid on mental agony when a person is confined within the four walls of the police station or lock up.

88. In ***Kiran Bedi v. Committee of Inquiry & Anr.*** reported in (1989) 1 SCC 494, this Court reiterated the following observation from the decision in ***D.F. Marion v. Davis*** reported in 55 ALR 171 : 217 Ala 176 (1927):

> *"25. ... 'The right to the enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty, and property.'"*

89. Reputation of an individual is an insegregable facet of his right to life with dignity. In a different context, a two-Judge Bench of this Court in ***Vishwanath Agrawal v. Sarla Vishwanath Agrawal*** reported in (2012) 7 SCC 288, has observed:

> *"55. ... reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity."*

90. The most disturbing feature of this litigation is the order passed by the High Court on quantum of sentence. In para 2, the High Court has observed thus:

> *"Learned State counsel submits that the instant case is the rarest of rare case, whereby, capital punishment is required to be imposed upon the present convicts/accused. However, in the facts and circumstances of the present case, the above submission is liable to be rejected."*

91. The Public Prosecutor instead of assisting the learned Judges in the right direction by pointing out the correct position of law went to the extent of praying before the Court that the appellants herein deserved capital punishment. It is a different thing that the High Court rejected the prayer of the Public Prosecutor.

92. Such is the standard of the Public Prosecutors in the High Courts of the country. This is bound to happen when the State Governments across the country appoint AGPs and APPs in their respective High Courts solely on political considerations. Favouritism and nepotism is one additional factor for compromising merit. This judgement is a message to all the State Governments that the AGPs and APPs in respective High Courts should be appointed solely on the merit of the person. The State Government owes a duty to ascertain the ability of the person; how proficient the person is in law, his overall background, his integrity etc.

93. Time and again this Court has observed in so many of its decisions that such appointments be it in the High Court or in the district judiciary should be only taking into consideration the merit of the candidate and no other consideration should weigh in such appointments.

94. Public Prosecutor holds a "Public Office". The primacy given to him under the Scheme of CrPC has a "special purpose". Certain professional, official obligations and privileges are attached to his office. His office may also be termed as an office of profit as he remains disqualified to contest the election so long he holds the office though permanency is attached to the office and not to the term of his office. His duties are of public nature. He has an "independent and responsible character". He holds the public office within the scope of a "quo warranto proceedings". Prosecutor is not a part of investigating agency but is an "independent statutory authority". He performs statutory duties and

functions. He holds an office of responsibility as he has been enclothed with the power to withdraw the prosecution of a case on the directions of the State Government.

95. The Criminal law enforcement system investigates crimes and prosecutes offenders. It must also protect valued rights and freedoms, and convict only the guilty. The prosecutor must recognize these different and competing interests. He should strike a fair balance between the competing interests of convicting the guilty, protecting citizens' rights and freedoms and protecting the public from criminals. Prosecutors should ensure that prosecutions are conducted in a diligent, competent and fair manner. The importance of the office of the Public Prosecutor cannot be overemphasized. The Public Prosecutor must be a person of high merit, fair and objective, because upon him depends to a large extent the administration of criminal justice. The office of the Public Prosecutor is a public office and the incumbent has to discharge statutory duties. The person appointed as Public Prosecutor must, therefore, be one who is not only able and efficient, but also enjoys a reputation and prestige which satisfy his appointment as a Public Prosecutor. The duty of the prosecutor is to assist the Court in reaching a proper conclusion in regard to the case which is brought before it for trial. The prosecutor has to be fair in the presentation of the prosecution case. He must not suppress or keep back from the court evidence relevant to the determination of the guilt or innocence of the accused. He must present the complete picture, and not a one sided picture. He must not be partial

to the prosecution or to the accused. He has to be fair to both sides in the presentation of the case.

96. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts of the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court to the investigation agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial, the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the court or defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the Court, if it comes to his knowledge.

97. Law Officers are one of the important wheels of the chariot, driven by the Judges to attain the cherished goal of human being to secure justice against the wrong doers. The main object of the State is to curb the crime, investigate and prosecute the offenders and punish them, with a view to maintain law and order, amity and harmony, tranquillity and peace. The various provisions of the CrPC and the Rules provide the manner and procedure by which the Public Prosecutor should be appointed and provide assistance to the Courts. The object of the CrPC and the Rules is to appoint the best among the lawyers as the Public Prosecutor to provide assistance to the Court. The people have the vital interest in the matter.

98. Judges are human beings and at times they do commit mistakes. The sheer pressure of work at times may lead to such errors. At the same time, the defence counsel as well as the Public Prosecutor owes a duty to correct the Court if the Court is falling in some error and for all this, we hold the State Government responsible. It is the State Government who appointed the concerned Public Prosecutor. The State Government should be asked to pay compensation to the three appellants herein.

99. For all the foregoing reasons, the appeals succeed and are hereby allowed. The impugned judgment and order passed by the High Court is hereby set aside. The State Government shall pay Rs. 5,00,000/- each to the three appellants towards compensation within a period of four weeks from today failing which we shall take appropriate action against the responsible officer.

100. The bail bonds furnished by the appellants herein stand discharged.

101. Registry shall notify this matter once again before this Bench after four weeks to report compliance of payment of compensation as awarded.

……..J.
(J.B. PARDIWALA)

…….J.
(R. MAHADEVAN)

New Delhi;
January 29, 2025.