



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 63 OF 2022

Asha Shivaji More

Age : 42 Years, Occu. : Service,
Residing at : Near Laxmi Printing
Press, Dina Bama Patil Marg,
Ram Maruti Nagar, Balkum,
Thane (W) – 400 608.

...Appellant

vs.

1. The State of Maharashtra
[Through Kapurbawadi Police Station,
At Thane, Thane – 400 607.

2. Masaji Genu Kale
Residing at : Chandradeep Bungalow,
Muktai Nagar, Near S.M.I.T. College,
Shivaji Nagar, Jalgaon.
Permanent Resident of :-
Shreeram Chandrama Apartment,
Flat No. 403, Survey No.35/1/2,
Mumbai – Satara Road, Baner,
Pune – 45.

...Respondents

**ALONG WITH
CRIMINAL APPEAL NO. 1299 OF 2022**

Sumera Abdul Ali

Age : 59 Years, Residing at :
3, Reshma Apartments,
Nargis Dutt Road, Bandra (West),
Mumbai : 400 050.

...Appellant

vs.

1. Umesh Madhukar Thakur
Residing at : Satirje, Alibag,
Raigad.

Satish Sangar

1/19

2. Sandesh Krishna Patil
Residing at : Kolgaon,
Alibag, Raigad.
3. Rajan Laxman Patil
Residing at : Kolgaon,
Alibag, Raigad.
4. Swapnil Vijay Thakekar
Residing at : Ali14bag,
Raigad.
5. The State of Maharashtra ...Respondents

Ms.Jaimala Ostwal a/w Ms.Seema Chopda – Advocates for Appellant in Criminal Appeal No.63 of 2022 .

Mr.Amol Patankar a/w Mr.Aditya Sawant a/w Mr.Vatsal Thakkar – Advocates for Respondent No.2 in Criminal Appeal No.63 of 2022.

Mr.Karan Kadam a/w Mr.Ishwar Nankani and Ms.Rhea Sinkar i/b. M/s. Nankani & Associates – Advocates for Appellant in Criminal Appeal No. 1299 of 2022.

Mr.Kuldeep Patil i/b. Ms.Saili N. Dhuru – Advocate for Respondent Nos. 1 to 4 in Criminal Appeal No. 1299 of 2022.

Mr.H.J.Dedhia – APP for Respondent – State in both the Criminal Appeals.

CORAM : S. M. MODAK, J.

**RESERVED ON : 13TH FEBRUARY, 2023 &
9TH AUGUST 2023**

PRONOUNCED ON : 11TH AUGUST, 2023

JUDGMENT :

Criminal Appeal No.1299 of 2022

1. I have heard learned Advocate Mr.Karan Kadam for the Appellant, Mr.Kuldeep Patil – learned Advocate for Respondent Nos.1 to 4 and learned APP Shri.H.J.Dedhia for Respondent – State.

Satish Sangar

2/19

2. In this Appeal, an objection is taken about maintainability of the present appeal by the Respondents who are original Accused. They were acquitted by the Court of JMFC – Alibag for the offences punishable under Sections 379, 323, 427 read with Section 34 of the Indian Penal Code, 1860 [“IPC”]. It is not the victim / First-Informant who has challenged the correctness, but it is the State who has preferred an Appeal to the Court of Session - Alibag by way of Regular Criminal Appeal No.139 of 2011. It was filed as per the provisions of Section 378(1)(a) of the Code of Criminal Procedure, 1973 [“Cr.PC.”]. The said Appeal was dismissed on 21st January 2019.

3. Now, the State has kept quiet and it is the turn of First Informant / victim to challenge the correctness of the judgment of acquittal. The Respondents’ contention is that forum for an Appeal by the victim is correlated to the forum provided for an Appeal by the Accused against the order of conviction. He mean to say that if there is no remedy of an Appeal provided for (when Appellate Court alters the acquittal into conviction, but a remedy of Revision is provided), how can the victim may challenge the judgment of acquittal passed by the Appellate Court? Whereas, the Appellant’s

contention is the provisions of proviso to Section 372 of the Code provides such remedy.

4. The facts of the case are as follows :-

- (a) F.I.R. lodged at Alibag Police Station, Raigad on 25th May 2004 by Sumera Abdul Ali.
- (b) It is registered under Sections 379, 323, 427 read with 34 of the IPC.
- (c) After investigation, charge-sheet was filed against Respondent/accused and case is registered as S.C.C. 229 of 2004 (Page No. 35).
- (d) After evidence the Court of JMFC – Alibag delivered the judgment on 28th March, 2011 and acquitted the Accused.
- (e) State preferred an Appeal for setting aside order by way of Criminal Appeal No. 139 of 2011.
- (f) The Court of Additional Sessions Judge as per the judgment dated 21st January, 2019 has confirmed the acquittal.

Criminal Appeal No.63 of 2022

5. I have heard learned Advocate Ms.Seema Chopda for the Appellant, Mr.Amol Patankar for Respondent No.2 and learned APP Shri.H.J.Dedhia for the Respondent – State.

The facts in this Appeal are as follows :-

- a) F.I.R. lodged at Kapurbawdi Police Station, Thane on 01st April, 2011 by the Appellant Asha Shivaji More.

- b) It is registered under Sections 354, 509 of IPC.
- c) After investigation, charge-sheet was filed against Respondent/Accused and case is registered as S.C.C. No.16641 of 2012. (page no. 24).
- d) After evidence, the Court of J.MF.C., Thane delivered the judgment on 25th February, 2019. It is in two parts :-

Respondent was convicted for an offence punishable under Section 509 of the Indian Penal Code.	Whereas he was acquitted for an offence punishable under Section 354 of the Indian Penal Code.
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- e) Respondent Accused preferred an Appeal for his conviction under Section 509 of IPC [being Criminal Appeal No. 38 of 2019 (page no.16)].
- f) The Court of Additional Sessions Judge as per the judgment dated 03rd December, 2021 has set aside the conviction and acquitted Respondent for the offence under Section 509 of IPC.
- g) Whereas still, there are two Criminal Appeal Nos. 51 of 2019 and 69 of 2019 which are still pending in Court of Session.
- h) Appeal No.69 of 2019 by the State is against the judgment of acquittal for the offence punishable under Section 354 of IPC. Whereas, another Appeal No.51 of 2019 is preferred by the victim/ First-

Informant for enhancement of the sentence which was awarded for the offence under Section 509 of the Indian Penal Code.

6. Learned Advocate Shri.Kuldeep Patil for Respondent Nos.1 to 4 took an objection that the present Appeal is not maintainable.

7. In both these Appeals, question arisen is common. That is to say, about maintainability of the Appeal by the victim against the judgment of acquittal passed by the Appellate Court. Hence, I am deciding them by common order.

8. So, the issue involved before this Court is :-

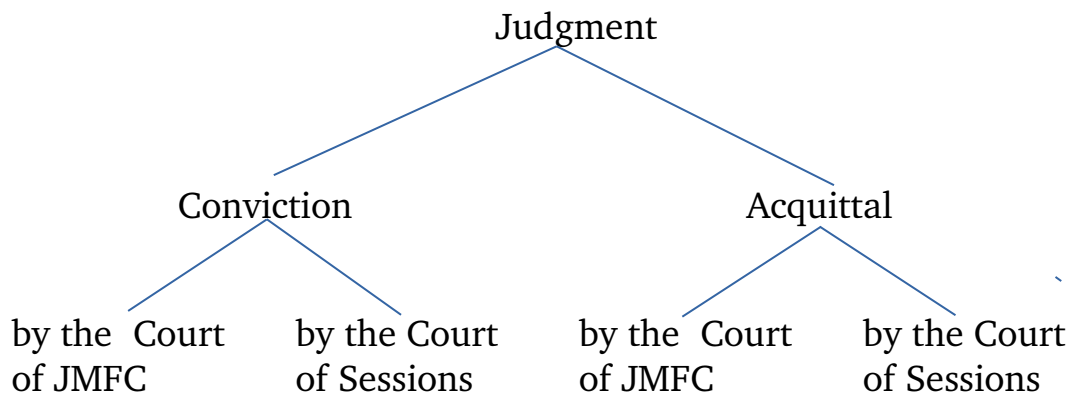
“Whether an Appeal filed by the victim against the judgment of acquittal by the Appellate Court is maintainable particularly when Accused cannot file an Appeal when he is convicted by the Appellate Court either by confirmation / reversal, (but, he can file Revision)?

9. Both the sides relied upon various judgments delivered by Hon’ble Supreme Court / other High Courts. But, the issues involved therein were different. *“When victim / First Informant intends to prefer an Appeal against the judgment of acquittal delivered by the Appellate Court, whether an Appeal is maintainable*

to this Court?” was not at all involved in those cases. When the judgment of acquittal is passed by the trial Court, there is no much controversy about forum for preferring an Appeal under the proviso to Section 372 of the Code. It is either Court of Session / High Court. There are different forums provided for preferring an Appeal to higher Courts. It altogether depends upon the following factors :-

- (a) What is the nature of order – acquittal or conviction ?
- (b) It is passed by which Court ?
- (c) Who intends to prefer an Appeal ?

It can be better explained with the help of a table :-



PART – I

The judgment of conviction is passed by the Court of JMFC :-

Appeal by the accused	Appeal by the State	Appeal by the victim
<u>Lies to Court of Sessions</u>	<u>Lies to Court of Sessions</u>	<u>Lies to Court of Sessions</u>

Section 378(3)	Section 377(1)(a) if sentence is inadequate	Section 372 (proviso)
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PART –II

When judgment of acquittal is passed by the Court of JMFC

Appeal by the accused	Appeal by the State	Appeal by the victim
No question of preferring an Appeal But if convicted lies to Court of Sessions	<p style="text-align: center;">Types of offence</p> <div style="display: flex; justify-content: space-around;"> <div style="text-align: center;"> <p><u>bailable</u></p> <p>and</p> <p><u>non cognizable</u></p> <p>↓</p> <p><u>lies to the High Court</u></p> <p>↓</p> <p>S.378 & (1)(b)</p> </div> <div style="text-align: center;"> <p><u>non bailable</u></p> <p>and</p> <p><u>cognizable</u></p> <p>↓</p> <p><u>lies to the Court of Sessions</u></p> <p>↓</p> <p>S.378 (1)(a)</p> </div> </div>	It will lie before the Court of Sessions As per S.372 (proviso)

So, in above contingency, there will be two forums, one is the Court of Sessions (appeal by victim) and another is High Court (if bailable and non cognizable). However, this issue is not involved in this

Appeal. We are concerned when the judgment is delivered by the Appellate Court i.e Court of Sessions. Two contingencies :-

Judgment of acquittal

Appeal by the accused	Appeal by the State	Appeal by the victim
No question of preferring an Appeal ↓ But if convicted /confirmed ↓ There is no provision for an appeal	<u>lies to the High Court</u> S.378(1)(b) word Appellate order	S.372 (proviso) is the relevant provisions ↓ There is no remedy of an appeal to an accused against the conviction judgment by the Appellate Court ↓ <u>Issue is there</u>

Judgment of conviction

Appeal by the accused	Appeal by the State	Appeal by the victim
No remedy revision under Sec.397 lies	Only for inadequate sentence under Sec.377(1)(b) <u>lies to the High Court</u>	S.372 (proviso) ↓ Only when Conviction for lessor Inadequate Compensation

		<p>offence is there</p> <p style="text-align: center;">↓</p> <p><u>But here there is no appeal provided to accused in case of conviction</u></p> <p style="text-align: center;">↓</p> <p><u>So whether victim can prefer an appeal ?</u></p>
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10. Controversy arises when the judgment of acquittal is passed by the Appellate Court. Controversy also arises when accused is convicted by the Appellate Court. Because there is no remedy of an appeal provided to the accused. Because, forum for victim's Appeal is correlated to the forum for an Appeal against the judgment of conviction passed by the Appellate Court. If we scan the provisions of the Code, we do not find any provision for preferring an Appeal against the judgment of conviction/acquittal passed by the Appellate Court. There is only remedy of Revision available.

11. Similar controversy was involved before learned Single Judge of this Court in case of ***Sau. Jayashree Sunil Mali V/s. State of Maharashtra and Ors.***¹. There was prosecution for the offences punishable under Sections 498-A, 323, 504, 506 read with 34 of IPC

¹ Criminal Appeal No.41 of 2016 : 1st December, 2016 : Bombay High Court

launched by the Police. The Respondents were acquitted by the Court of JMFC – Nashik. The State preferred an Appeal before the Court of Additional Sessions Judge – Nashik. It was dismissed on 30th June, 2015. On this background, the First-Informant preferred an Appeal to High Court against the said judgment. The issue of maintainability of an Appeal has cropped up in that matter. Learned Single Judge interpreted the phrase ‘any order’ liberally. Right to prefer an Appeal given to the victim cannot be circumscribed by holding that said right is qualified upto a particular stage only. (Para No.12). Appeal was held maintainable subject to obtaining a leave under Section 378(3) of the Code. (Para No.15).

12. However, after this judgment was delivered, there are many judgments pronounced either by Hon’ble Supreme Court or by other High Courts. Though in none of these judgments except in case of *Tuklal Yadav V/s. State of Jharkhand*², the present controversy was involved. The controversy was :-

“which is a forum for an Appeal by the victim against the judgment of acquittal passed by the trial Court”.

The relevant observations are as follows :-

2 2018 All. M.R. (Cri) 579

“In cases of the appellate judgments/orders of acquittal passed by the Courts of Session, the informant, whether he is a victim or not, shall have no right to challenge the same under the Proviso to section 372 of the Cr. P.C., 1973 in view of the expression in the Proviso “such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court”, there being no provision for any appeal to the High Court against the orders/judgments of conviction passed by the Magistrates. As such, no question survives to decide whether such appeals shall be heard by a Single Judge, or by a Division Bench.” [Paragraph 16(A)]

Other Judgments

13. In case of ***Satya Pal Singh V/s. State of Madhya Pradesh and Others***³, the appeal was preferred before the High Court by father of the deceased. It was against the judgment of acquittal by the Court of Additional Session Judge. So, it was not an appeal against the acquittal judgment of the Appellate Court. It was held that even though proviso to Section 372 of the Code does not contain provision of obtaining leave, still leave is required and matter was remanded to High Court.

³ 2015 AIR (SCW) 6251

14. Whereas, in case of *Mallikarjun Kodagali (Dead) represented through Legal Representatives V/s. State of Karnataka and Others*⁴, the issue was which date is relevant for deciding maintainability of the appeal by the victim, that is to say date of the offence or date of the judgment of acquittal. It was held that it is the date of judgment of acquittal that is relevant. Because, on that date, victim gets right to prefer an appeal. Furthermore, the appeal was preferred against the judgment of acquittal by the trial Court and not by the Appellate Court.

15. In case of *Joseph Stephen and Others V/s. Santhanasamy and Others*⁵, there was a judgment of acquittal for the offences punishable under Sections 307, 506(ii) of IPC. Victim's criminal Appeal before the Court of Session was dismissed. Whereas, for offences under Sections 324, 326 of IPC, the Accused were convicted and it was set aside by the Sessions Court. Both these judgments were challenged by the victim before the High Court by way of Revision Application. The order of acquittal was converted into an order of conviction. Now, on this background, when Accused approached the Hon'ble Supreme Court, the impugned order was set

4 Criminal Appeal Nos.128182 of 2018 : 12th October, 2018 : Supreme Court

5 2022 SCC OnLine SC 90

aside. One of the reason was order of acquittal cannot be converted into an order of conviction by exercising revisional powers. The matter was remanded. The issue of maintainability of an Appeal against the judgment of acquittal passed by the Appellate Court was never the issue.

16. In case of *Anand Singh V/s. The State of Maharashtra*⁶ the Division Bench of this Court, dealt with two Appeals. One by the Accused against the order of conviction by the Court of Session and another by the victim for enhancement of the sentence. The victim's Appeal was dismissed because such contingency is not provided as per the proviso to Section 372 of the Code.

17. The judgment in case of *Balasaheb Rangnath Khade V/s. State of Maharashtra and Others*⁷ was on the point of necessity of leave if the Appeal is preferred by the victim. There were two different opinions expressed by two learned Judges of Division Bench of this Court. Whereas, third Judge concurred with the view expressed that after obtaining a leave, Appeal is maintainable. But, it was against the judgment of acquittal passed by the Court of Session and not by the Appellate Court.

6 Criminal Appeal No. 467 of 2012 : dated 10th June, 2022 : Bombay High Court

7 2012 SCC OnLine Bom 635

18. Whereas, Full Bench of Punjab and Haryana High Court in case of *M/s. Tata Steel Ltd. V/s. M/s Atma Tube Products Ltd., and Ors.*⁸, the scope of Appeal to be preferred by the victim against the judgment of acquittal was elaborately discussed. In Para No.100, various contingencies are discussed. They are as follows :-

- (a) An Appeal preferred by the **State** and its forum.
- (b) An Appeal preferred by the **Accused** against the judgment of conviction and the forum.
- (c) An Appeal preferred by the **victim** against the judgment of acquittal and the forum.

19. It is important to note that as per the proviso, the forum for an Appeal by the victim against the judgment of acquittal is correlated to the forum provided for an Appeal by the Accused against the judgment of conviction. In one of the contingencies, State's Appeal against the acquittal lies before the High Court. Whereas, an Appeal by the Accused if convicted lies before the Court of Session. In that contingency, an Appeal preferred by the victim will lie before the Court of Session. So, against the same order of acquittal, two Courts are dealing with those Appeals. This piquant situation is cleared by interpreting the provisions in such a way so as to avoid inconvenience to the victim. So to say, it was observed that

8 2013 SCC OnLine P&H 5834

the State's Appeal against the acquittal will have to be transferred to the Court of Session for joint hearing along with the victims Appeal. (Para Nos.104 to 106). However, in that case also, the issue about maintainability of an Appeal against the judgment of acquittal by the Appellate Court was not involved.

20. The Full Bench of Punjab and Haryana High Court considered the judgment given by the High Court of Uttarakhand in case of *Bhagwant Singh V/s. Commissioner of Police*⁹. The High Court of Uttarakhand has observed that the word 'ordinarily' has to be interpreted flexibly and it can be changed in an exceptional circumstances. It means, the victim's Appeal will ordinarily lie to the Court wherein an Appeal against the order of conviction lies. The Full Bench of Punjab and Haryana Court has disapproved this interpretation. (Para No.102).

21. If an overview of above decisions is taken, what we find is that different Courts have considered different phrases / words from the proviso to Section 372 of the Code of Criminal Procedure. As said above, in none of the judgments delivered by the Hon'ble Supreme Court, this issue was directly involved. For ready reference,

9 (1985) 2 SCC 537

those judgments and others are reproduced as below :-

- (a) In ***Bhagwant Singh*** (*supra*), the High Court of Uttarakhand interpreted the word 'ordinarily' as depending upon the facts and circumstances.
- (b) The Full Bench of Punjab and Haryana High Court in case of ***M/s. Tata Steel Ltd.*** (*supra*), in order to deal with anomaly opined that Appeal pending before High Court at the instance of State has to be transferred to the Court of Session.
- (c) Learned Single Judge of this Court in case of ***Sau. Jayashree Sunil Mali*** (*supra*), interpreted the word 'any order' means order passed at any stage of the proceeding.
- (d) The High Court of Jharkhand in ***Tuklal Yadav*** (*supra*) held that an Appeal against the order of acquittal passed by the Appellate Court as not maintainable.

22. It is true that Appeal is a creature of statute. There is no Appeal provided against the judgment of conviction passed by the Appellate Court. Because, an Appeal against conviction passed by the trial Court is only provided under Section 374 of the Code of Criminal Procedure, 1973. If such judgment is passed by the Appellate Court, there is no Appeal provided to the Accused person. He can only file a Revision. If such is the position, whether the Appeal at the instance of the victim against the order of acquittal

passed by the Appellate Court will be maintainable ? I respectfully disagree with the view taken by the learned Single Judge. Learned Single Judge has emphasized on the word '*any order*'. He mean to say, even an order passed by the Appellate Court. But, I think forum for this Appeal is correlated to forum for an Appeal provided to the Accused against the judgment of conviction. If such forum is not there, how an Appeal against the judgment of acquittal passed by the Appellate Court will be maintainable?.

23. So also, there is a controversy when the Appellate Court convicts the accused, whether victim can prefer an Appeal under Section 372 proviso of the Code (for inadequate compensation/for higher sentence) ? This issue has not cropped up in these Appeals. But, when reference is to be made and issue is connected, let that controversy be also decided.

24. So, I am of considered opinion that the issue needs to be decided by a Larger Bench. I think on following issues, a deliberation by a Larger Bench is necessary :-

- (A) If there is no Appeal provided in the Code of Criminal Procedure, against the judgment of conviction passed by the Appellate Court, in such a contingency :-

- (a) whether an Appeal by the victim against the judgment of acquittal passed by the Appellate Court is maintainable ?
- (b) when convicted by the appellate court, whether the victim can by way of an appeal ask for:--
 - i) more compensation if it is inadequate or
 - ii) higher sentence ?
- (B) Whether the word '*order*' used in proviso to Section 372 of the Code of Criminal Procedure, 1973 includes '*any order*' including the order passed by the Appellate Court thereby acquitting/convicting the Accused person ?
- (C) If an Appeal will not be maintainable, what is the remedy for the victim ?

25. Hence, I request learned Registrar (Judicial-I) to place these matters before the Hon'ble Chief Justice for constitution of a Larger Bench for deciding above issues.

26. Considering this, the decision in these Appeals is kept pending and they be decided after the decision will be given by a Larger Bench.

[S. M. MODAK, J.]