

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION NO. 10489 of 2021

In

R/CRIMINAL APPEAL NO. 837 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE SAMIR J. DAVE

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

CENTRAL BUREAU OF INVESTIGATION THROUGH K.K.
SHUKLA S/O AMARNATH SHUKLA

Versus

RAM AVTAR AGARWAL

Appearance:

MR. B. B. NAIK, SR. ADVOCATE, and MR DEVANG NANAVATI,
SENIOR ADVOCATE, AMICUS CURIAE

MR RC KODEKAR(1395) for the Applicant(s) No. 1

MR MITESH AMIN, PUBLIC PROSECUTOR

MR PARAM BUCH for the Respondent(s) No. 4, 6

MR HARDIK A DAVE(3764) for the Respondent(s) No. 2

MR.KUNAL R.DESAI(3899) for the Respondent(s) No. 7

PARTY IN PERSON(5000) for the Respondent(s) No. 1

MS MONALI BHATT, APP for the Respondent(s) No. 8

CORAM:HONOURABLE MR. JUSTICE SAMIR J. DAVE

Date : 21/10/2022

ORAL JUDGMENT

1. Present Criminal Misc. Application has been filed by the applicant-original complainant under Section 378 (4) of the Code Criminal Procedure, 1973 seeking leave to appeal challenging the impugned judgment and order of acquittal passed in CBI Special Case No.62 of 2003 by learned Special Judge, CBI Court No.2, Ahmedabad dated 30.11.2018, on the grounds stated in the application.
2. Heard learned Special Public Prosecutor Mr. R. C. Kodekar for the applicant- CBI at length.
3. During the course of hearing, a specific query was put by the Court that whether is there any provision to file separate application for leave to appeal by the State or not?
4. In response to the same, learned Senior Advocate Mr. B. B. Naik and learned Senior Advocate Mr. Devang Nanavati were appointed as Amicus Curiae, whereas learned Public Prosecutor Mr. Mitesh Amin has assisted the Court for adjudication of this issue.

5. Heard learned advocates for the respective parties.
6. It is beneficial to refer to the judgment of the Hon'ble Supreme Court in the case of **the State of Rajasthan Vs. Ramdeen and Ors.**, reported in **AIR 1977 SC 1328**, wherein the Hon'ble Apex Court has held as under:

8. The matter will, therefore, have to be decided in terms of Section 378 (1) and (3) of the Code of Criminal Procedure, 1973. Section 378(1), so far as it is material for our purpose, provides that the State Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal. Sub-section (3) of that section provides that such an appeal shall not be entertained except with the leave of the High Court. Under the law it will be perfectly in order if a composite application is made giving the necessary facts and circumstances of the case along with the grounds which may be urged in the appeal with a prayer for leave to entertain the appeal. It is not necessary, as a matter of law, that an application for leave to entertain the appeal should be lodged first and only after grant of leave by the High Court an appeal may be preferred against the order of acquittal. If such a procedure is adopted, as above, it is likely, as it has happened in this case, the appeal may be time-barred if the High Court takes more than ninety days for disposal of the application for leave. The possibility that the High Court may always in such cases condone the

delay on application filed before it does not, in law, solve the legal issue. The right conferred by section 378(1), Cr.P.C., upon the State to prefer an appeal against acquittal will be jeopardized if such a procedure is adopted, for in certain cases it may so happen that the High Court may refuse to exercise its discretion to condone the delay. The right conferred under the section cannot be put in peril by an interpretation of section 378, Cr.P.C. which is likely to affect adversely or even perhaps to destroy that right.

9. Besides, under article 114 of the Limitation Act, in an appeal from an order of acquittal by the State, the period of limitation is ninety days from the date of the order appealed from; where- as in an appeal from an order of acquittal, in any case instituted upon complaint, the period is thirty days from the date of the grant of special Leave. Thus there is a clear distinction between the two types of appeals with regard to terminus a quo under Article 114. It is therefore, not necessary to wait until the grant of leave by the High Court to present a memorandum of appeal against acquittal at the instance of the State. Thus appeal can be filed by the State within ninety days from the date of the order of acquittal and a prayer may be included in that appeal for entertaining the appeal under sub-section (3) of section 378, Cr. P.C. If the leave sought for is not granted by the High Court, the appeal is not entertained and stands dis- missed.

10. We are, therefore, clearly of opinion that the application for leave to appeal, which was made by the State in this case, is equivalent to a memorandum of appeal under section 373 (1) read with sub-section (3) of that section of the Code of Criminal Procedure 1973. The fact that the application mentioned section 378(3) is not decisive of the true character of the applicant on which to all intents and purposes was a memorandum of appeal. There was There was therefore, no need for presentation of a second petition of appeal nor for an application for condonation of delay in this case. The petition of appeal was filed within time and the High Court committed an error of law in dismissing the same as time-barred."

7. It is also necessary to refer to the judgment of the Full Bench of the Hon'ble Apex Court in the case of **State of Madhya Pradesh Vs. Dewadas** reported in **AIR 1982 SC 800**, wherein the Hon'ble Apex Court has held as under:

"10. Under the scheme of the Code, the State Government or the Central Government may prefer an appeal under sub-sec. (1) or sub-sec. (2) of sec. 378 of the Code, but such appeal shall not be entertained unless the High Court grants 'leave' under sub-sec. (3) thereof. The Words 'No appeal under sub-sec. (1) or sub-sec. (2) shall be entertained' used in sub-sec. (3) of sec. 378 create a qualified bar to the entertainment of an appeal filed by the

State Government or the Central Government under sub-sec. (1) or sub-sec. (2) from an order of acquittal passed in a case instituted otherwise than upon a complaint. The Code, by enacting sub-sec. (3) of sec. 378, therefore, brought about a change in that there is no longer an unrestricted right of appeal against the orders of acquittal passed in such cases. The making of an application for grant of leave to appeal by the State Government or the Central Government under sub-sec. (3) of sec. 378 is, however, not a condition precedent to the entertainment of such an appeal. The prayer for grant of leave under sub-sec.(3) may, as it should, be contained in the petition of appeal filed u/s. 382 of the Code.

11. There is no warrant for the view expressed by the High Court in Narendrasingh's case (1974 MPLJ (Notes) 102) that the legislative object in re-enacting the provisions of sec. 417 of the old Code with the addition of the new provision contained in sub-sec. (3) of sec. 378 of the Code, was that there was to be a preliminary scrutiny of a State appeal by the Court even prior to the stage of admission, requiring the Court to consider at the very outset whether the appeal should be entertained or not, and that it was only after the appeal was entertained with the leave of the Court that it was to be heard for admission under sub-sec. (1) of sec. 384 read with sub-sec. (1) of sec. 385 of the code. The High Court appears to rest its decision more on the Report of the Law Commission than the actual language of sub-sec. (3) of

sec. 378 of the Code, in coming to the conclusion that sub-sec. (3) contemplated two stages. Sub-sec. (3) of sec. 378 is not susceptible of any such construction. The Law Commission in its 48th Report had observed :-

"While one may grant that cases of unmerited acquittals do arise in practice, there must be some limit as to the nature of cases in which the right should be available."

And, keeping in view the general rule in most common law countries not to allow an unrestricted right of appeal against acquittals, it recommended :-

"With these considerations in view, we recommend that appeals against acquittals u/s. 417, even at the instance of the Central Government or the State Government, should be allowed only if the High Court grants special leave.

It may be pointed out that even now the High Court can summarily dismiss an appeal against an acquittal, or for that matter, any criminal appeal. (Section 422, Criminal P. C.).

Therefore, the amendment which we are recommending will not be so radical a departure as may appear at the first sight. It will place the State and the private complainant on equal footing.

Besides this, we ought to add that u/s. 422 of the Code, it is at present competent to the appellate Court to dismiss the appeal both of the State and of the complainant against acquittal at the preliminary hearing."

The recommendations of the Law Commission were not, however, fully carried into effect. Sub-sec. (3) of sec. 378 of the Code was introduced by Parliament to create a statutory restriction against entertainment of an appeal filed by the State Government or the Central Government under sub-sec. (1) or sub-sec. (2) of sec. 378 from an order of acquittal passed in a case instituted otherwise than upon complaint. At the same time, Parliament re-enacted sub-secs. (3) and (4) of sec. 417 as sub-secs. (4) and (5) of sec. 378, which deal with an order of acquittal passed in any case instituted upon a complaint. The result of this has been that there is a difference in the procedure regulating entertainment of State appeals against acquittals under sub-sec. (1) or sub-sec. (2) of sec. 378 and appeals against acquittals filed by a complainant under sub-sec. (5) of sec. 378. On a comparison of the language employed in sub-sec. (3) and sub-sec. (4) of sec. 378, it is clear that the legislature has chosen to treat State appeals in a manner different from appeals by A complainant in the matter of preferring appeals against acquittals. In the case of an appeal

from an order of acquittal passed in a case instituted otherwise than upon complaint preferred by the State Government or the Central Government under sub-sec. (1) or sub-sec. (2) of sec. 378, the Code does not contemplate the making of an application for leave under sub-sec. (3) thereof, while the making of an application under sub-sec. (4) of sec. 378 is a condition precedent for the grant of 'special leave' to a complainant under sub-sec. (5). The difference in language used in sub-sec. (3) and sub-sec. (4) of sec. 378 manifests the legislative intent to preserve a distinction between the two classes of appeals by prescribing two different procedures in the matter of entertainment of appeals against acquittals. It, therefore, follows that the State Government or the Central Government may, while preferring an appeal against acquittal under sub-sec. (1) or sub-sec. (2) of sec. 378, incorporate a prayer in the memorandum of appeal for grant of leave under sub-sec. (3) thereof, or make a separate application for grant of leave under sub-sec. (3) of sec. 378, but the making of such an application is not a condition precedent for a State appeal.

8. It is also required to be noted the judgment of the Full Bench of this Court in the case of **State of Gujarat vs. Kailashchandra Badriprasad**, reported in 2000 (3) GLR

2487, wherein this Court has observed as under:

“(25.) Sub-sec. (3) of Sec. 378 only states that the appeal shall not be entertained except with the leave of the Court. There is no question of making an application for leave as it is required to be made under sub-sec. (4) of Sec. 378. Sub-sec. (4) of Sec. 378 requires an application by the complainant for grant of special leave to appeal from the order of acquittal. Sub-sec. (5) provides that such application shall not be considered for grant of special leave to appeal from an order of acquittal by the High Court after the expiry of six months where the complainant is a public servant and 60 days in every other case computed from the date of that order of acquittal. Thus, reading sub-sec. (3) on one hand and sub-secs. (4) and (5) together, it is clear that so far as appeal under sub-secs. (1) or (2) of Sec. 378 is concerned, it requires no separate application and prayer for leave to appeal can be made in the appeal memo itself or can be made at the time of admission orally. While sub-sec. (5) provides the period for making an application in case of an order of acquittal in a complaint case only. It appears that this distinction was not brought to the notice of the Division Bench for construing the provisions contained in Sec. 378.

(27.) The Apex Court in case of **State of Rajasthan V/s. Ramdeen & Ors., reported in AIR 1977 SC 1328**, has held that the application for leave to appeal, which was made by the

State was equivalent to a memorandum of appeal under Sec. 378(1) read with sub-sec. (3) of that Section. The fact that the application mentioned Sec. 378(3) was not decisive of the true character of the application which to all intents and purposes was a memorandum of appeal. There was, therefore, no need for presentation of a second petition of appeal nor for an application for condonation of delay. The appeal was filed within time. The Apex Court pointed out that the High Court committed an error of law in dismissing the same, as time-barred.

(30.) Thus, considering the language as it appears in sub-sec. (1) and sub- sec. (3) of Sec. 378 of the Code on one hand, and sub-sec. (4) and (5) of Sec. 378 of the Code on the other hand, it becomes clear that separate application is to be made only in case where an appeal is preferred against the order of acquittal which is delivered in case instituted otherwise than on a police report. There being" no specific provision for making an application under sub- sec. (3), it is not necessary that the State should prefer separate application."

9. It is also required to be noted the relevant Rules of the Gujarat High Court Rules, 1993 as under:

"260. Contents of memorandum of appeal. – The memorandum of appeal shall be made in the form of a petition in writing giving the grounds of objection

numbered consecutively, and the grounds upon which the leave, if any, of the Appellate court is sought. It shall also show that the appeal is within time, and shall be accompanied by a certified copy of the judgment and the sentence or order of the Court, and also of the certificate of the Judge who tried the case that it is a fit case for appeal, when such certificate has been given.

264. Filing of Appeals.— All appeals-Civil or Criminal, shall be filed in the office of the Registrar and shall be accepted, if within time, and are other wise in conformity with the rules.”

10. Having heard learned advocates for the parties as also the law laid down by the Hon’ble Apex Court, this Court is of the clear opinion that the application for leave to appeal, which was made by the State in this case, is equivalent to a memorandum of appeal under Section 373(1) read with sub-section (3) of that section of the Code of Criminal Procedure 1973. The fact that the application mentioned section 378(3) is not decisive of the true character of the application which to all intents and purposes was a memorandum of appeal. There was therefore, no need for presentation of a second petition of appeal.
11. In view of the above discussion and observations and

aforesaid judgments of the Hon'ble Apex Court, this Court has also considered the view taken by the Full Bench of this Court and it is the opinion of this Court that there is no requirement to file separate leave to appeal application in all the appeals filed by the State under section 378(4) of the Code of Criminal Procedure.

12. Accordingly, the application for leave to appeal is granted.

MEHUL B. TUVAR

Sd/-
(SAMIR J. DAVE,J)