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A.F.R.

Court No.9
Case :- CRIMINAL REFERENCE No. - 1 of 2024
Applicant :- In Re- Procedure To Be Followed In Hearing Of Criminal Appeals
Opposite Party :- State of U.P.
Counsel for Applicant :- Suo Motu, Apoorva Tewari,Ayush Tandon,Alok Mishra,Nadeem Murtaza,Naved Ali,Rajat Gangwar,S M Singh Royekwar,Vikas Vikram Singh
Counsel for Opposite Party :- G.A.

Hon'ble Mrs. Sangeeta Chandra, J.
Hon'ble Pankaj Bhatia, J.
Hon'ble Mohd. Faiz Alam Khan,J.

1. We have heard Shri Apoorva Tiwari, Shri Nadeem Murtaza, assisted by S/Shri Wali Nawaz Khan, Harsh Vardhan Kedia and Ms. Smigdha Singh, Shri S.M. Singh Royekwar, assisted by Shri Sumeet Tahilramani, Sri Vikas Vikram Singh, Sri Naved Ali, Sri Rajat Gangwar, Sri Alok Mishra, assisted by Shri Ajeet Kumar Mishra, Sri Ayush Tandon, learned Advocates, as also Dr. V.K. Singh, learned Government Advocate, Sri Umesh Chandra Verma, learned Additional Government Advocate-I, Shri Pawan Kumar Mishra, learned Additional Government Advocate, Sri Shivendra Shivam Singh Rathore, learned counsel for the State, Shri Bhavesh Chandel and Shri Shivang Tiwari, learned counsel at length.

2. This Reference has arisen out of order dated 12.03.2024 passed in Criminal Appeal No.465 of 1999: *Surendra Prasad Misra and another Vs. State of U.P. and others,* wherein a Division Bench (hereinafter referred to as 'the Bench at Lucknow') while hearing the Appeal was apprised of two orders of Coordinate Bench (hereinafter referred to as 'the

Bench at Allahabad'), dated 18.01.2024 passed in Govt Appeal No.454 of 2022: *State of U.P. Vs. Geeta Devi and another;* and the order dated 19.01.2024 passed in Govt Appeal No.2552 of 1981: *State of U.P. Vs. Shamsuddin Khan and others.*

3. The order dated 18.01.2024 passed by the Division Bench at Allahabad in Government Appeal No. 454 of 2022 is being reproduced as under:-

> *"1. Heard learned AGA appearing for the State and learned counsel for the respondents.*
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> *2. The present Government Appeal has been filed by the State against the order of acquittal dated 7.6.2018 passed by the Additional Sessions Judge / FTC No. 3, Muzaffar Nagar in ST No. 299 of 2007, under Sections 302, 201, 364, 120B IPC (State Vs. Brajpal and others).*
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> *3. We have gone through the order dated 9.9.2022 of this Court which was passed on the appeal filed by the State against the judgment of acquittal dated 7.6.2018. By the order dated 9.9.2022, the respondents were directed to furnish personal bond with two sureties in the like amount to the satisfaction of the learned CJM. However, it appears that they could not be served and thereafter Non bailable warrants were issued and they were arrested.*
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> *4. Learned counsel submits that both the respondents are in custody since 27.11.2022 i.e for a period of one year and three months.*
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> *5. Though the Bench is not in agreement with the procedure followed by the Court that in a State appeal challenging the judgment of acquittal, the issuance of Non Bailable Warrants would interpretate that police authority will execute the same and produce the concerned person before the High Court so that some effective order be passed with regard to their bail. However, in the instant case despite acquittal, the respondents are in judicial custody for more than one year and three months because bailable warrants were not executed. It is worth noticing to reproduce Section 390 of Cr.P.C. which read a under :*
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> > *"Section 390: Arrest of accused in appeal from acquittal:- When an appeal is presented under section 378, the High Court may issue a warrant directing that the accused be arrested and*

> *brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail."*

6. Similarity, in order to procure the presence of accused persons, the Court has an alternative option to order for attachment of property of person absconding under Section 83 Cr.P.C.. Further, Section 80 of Cr.P.C. provides for arrest of person against whom warrant is issued and it provides for taking security under Section 71 of Cr.P.C for production before the Court, such person may be released under Section 81 Cr.P.C.

7. A perusal of Section 390 Cr.P.C. clearly gives power to the Court before whom a accused is brought, either to send him to prison or admit him to bail. It is also worth noticing that repeatedly such type of cases are coming where in appeal in pursuance of the Non Bailable Warrant issued by the High Court to the accused who were acquitted from the trial court re languishing in jail for more than one year because they were either not served with the warrant or could not engage Advocate in the High Court. It is held by a full Bench of Bombay High Court while interpretating provisions of Section 390 Cr.P.C. that the very purpose of this Section is to ensure presence of an accused before the Court. In view of the above, we deem it appropriate to issue a direction to the Director, Judicial Training and Research Institute, Lucknow to take online seminar of all the Chief Judicial Magistrates as well as Secretary, District Legal Services Authority and inform that :

> *(a) As and when Non Bailable Warrants are issued in appeal from acquittal and accused is brought before the CJM / Ilaka Magistrate, he will be admitted bail subject to furnishing bail bonds to their satisfaction and on undertaking that they will appear before the High Court on particular date as per the order of the Court.*
>
> *(b) Even in cases where appeal against conviction is pending before the High Court and sentence is suspended and either he or his counsel could not appear before the High Court and Non Bailable Warrants are issued on and produced before the CJM, they will be released on bail to the satisfaction of the court concerned with an undertaking that they will appear before the High Court.*

(c) The Director of the Judicial Training and Research Institute, Lucknow will conduct a survey in the State of U.P. to find out where in terms of issuance of Non Bailable Warrant either in case of bail against acquittal or in case where accused sentence is suspended, but subsequently he failed to appear, is in jail (prison) for considerable long time, they will be released on bail in same terms as mentioned in above sub para (a) and (b).

(d) Since keeping a person in judicial custody for long time without any justification violate the right of life and liberty of such person, after 30 days of this order, if still bails are not granted, this Court will impose cost of Rs. 50,000/- to be paid by the District State Legal Services Authority concerned.

8. Be whatsoever, the Court deem it appropriate to release the respondents on bail.

9. Let the respondents namely Gita Devi and Afzal be released on bail subject to the satisfaction of the court concerned.

10. Registrar General of this Court is directed to communicate this order to the Director, Judicial Training and Research Institute, Lucknow within a week from today and submit compliance report on the next date fixed.

<u>Order on Appeal</u>

List the matter 30.01.2024. "

4. The observations made by the same Bench at Allahabad in its order dated 19.01.2024 passed in Government Appeal No. 2552 of 1981 are also reproduced as under:-

"1. This Government Appeal was filed in the year 1981 challenging the judgment of acquittal passed in favour of the opposite parties.

2. As per earlier order dated 14.12.2022, non bailable warrants were issued against the accused-respondent no.1 and the Chief Judicial Magistrate concerned was directed to sent a compliance report.

3. An office report dated 20.01.2023 was later on submitted stating therein that the sureties of opposite party/respondent no.1 Shamshuddin are Bashir, who died on 08.04.2016 and Ram Kripal,

who is about 70 years old and cannot walk, whereas all sureties of respondent nos. 2 and 5 have died.

4. Thereafter again non-bailable warrants were issued against opposite party nos. 1 and 4 and the matter remains pending for considerable long time.

5. Learned counsel for respondent no.1, namely Shamshuddin Khan submits that he is in jail and presently detained in District Jail, Banda. Even thereafter the case was listed on number of occasions but it has been noticed in the order dated 10.04.2023 that respondent no.1 namely Shamshuddin Khan is not traceable though he is already lodged in District Jail, Banda. The opposite party no.1 is in the judicial custody since 23.02.2023.

6. Learned A.G.A. could not dispute the above contention.

7. Considering the facts and circumstances of the case, issuance of non-bailable-warrants to procure the presence of respondent no.1 so that he may engage a counsel and defend his case through the counsel, has no relevance. We deem it appropriate to grant bail to the accused-respondent no.1 namely Shamshuddin Khan.

8. Let opposite party no.1- Shamshuddin Khan be released on bail subject to the satisfaction of the court concerned.

9. In a Government Appeal bearing Government Appeal No. 454 of 2022 (State of U.P. Vs. Geeta Devi & Anr.), this Court in similar situation has already directed the Director, Judicial Training and Research Institute, Lucknow that an online seminar of all the Chief Judicial Magistrates through out the Sate of Uttar Pradesh regarding the procedures to be followed in the matter of grant of bail of the accused, who are in jail since long and their appeals are pending for consideration.

10. Such procedures mentioned in the above Government Appeal give discretion to the Court of Chief Judicial Magistrate specially the Ilaka Magistrate to grant bail in such cases where the purpose of issuance of non-bailable warrants is to procure the presence of the accused especially in the cases where an accused person has

acquitted from the trial court and non-bailable warrants are issued in an appeal filed by the State.

11. The Registrar General of this Court is directed to communicate this order forthwith to the Director, Judicial Training and Research Institute, Lucknow within a week from today and submit compliance report on the next date fixed.

Order on Appeal

12. List this case on 30.01.2024. "

5. The Bench at Lucknow hearing the Criminal Appeal No.465 of 1999: *Surendra Prasad Misra Vs. State of U.P. and others*, was not in agreement with the view expressed by the Coordinate Bench at Allahabad in its orders dated 18.01.2024 and 19.01.2024, and has referred the matter to the Hon'ble Chief Justice by its order dated 12.03.2024. The Division Bench at Lucknow has framed the following questions for consideration by a Larger Bench: –

"1. Whether the Chief Judicial Magistrate or any other Magistrate can enlarge an acquitted person or a person convicted of an offence on bail, even in a case, wherein an Appeal against acquittal or conviction, as the case maybe, the High Court or any other Appellate Court has issued non-bailable warrant for securing his presence without any such stipulation there in for release by the Court below, when such non-bailable warrant has been issued at a subsequent stage of Appeal and not at the admission stage?

"2. Assuming the Magistrate has jurisdiction as referred in question No.1, whether a general direction of a mandatory nature can be issued by the High Court to the Magistrate for such release, as has been done vide order dated 18.01.2024 Government Appeal No. 454 of 2022 and order dated 19.01.2024, Govt Appeal No. 2552 of 1981? does it not deprive the Magistrate of his discretion in this regard to consider such release on case to case basis in view of the law discussed?

> *"3. Whether the observations and directions as contained in the order dated 18.01.2024 in Govt Appeal No. 454 of 2022: State of U.P. Vs. Geeta Devi and another and the directions dated 19.01.2024 in Govt Appeal No. 2552 of 1981, State of U.P. Vs. Shamsuddin Khan and others are in accordance with law?*
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> *"4. What are the modes prescribed in law for securing the presence of acquitted person or one who has been convicted, in an Appeal before the High Court and what should be the course to be ordinarily adopted by the High Court in exercise of its appellate criminal jurisdiction for securing such presence to facilitate hearing of such appeals?*
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> *"5. Whether an Appeal, either against acquittal or conviction, can be heard by appointing an Amicus Curiae for the accused-respondent or the convicted appellant, as the case maybe, in the event he is not appearing in the proceedings, though his presence can be secured, without his consent and without any intimation to him, if so, under what circumstances?"*

6. After this Larger Bench was constituted and the matter came up before this Court, it was pointed out that Criminal Appeal No.465 of 1999 will remain pending during the course of arguments and till judgement is rendered in this reference, although the questions that have been referred to this Court by the Division Bench had nothing at all to do with the merits of Criminal Appeal No. 465 of 1999, but related to the general practice and procedure to be followed in hearing of criminal appeals. This Court therefore passed an order on 22.03.2024, directing the registry to separate the record of Criminal Appeal No. 465 of 1999 and send it to the appropriate Bench for decision on its own merits and to register the Reference under different cause title i.e. :-"in re-Procedure to be followed in Hearing of Criminal Appeals"

7. Also, this Court was of the opinion by a majority of 2:1, that during the pendency of the Reference, the directions by the Division Bench at

Allahabad in Government Appeal No. 454 of 2022, and Govt. Appeal No.2552 of 1981 should remain stayed and ordered accordingly.

8. We had asked all members of the Bar to address the Court with regard to the questions that were framed and referred to us as we were of the opinion that it would be of great interest to all the members of the Bar that the questions referred to us are deliberated upon with the assistance of all the members of the Bar as answers to such questions would govern the procedure to be followed by this Court in all criminal appeals in future.

9. We must at the outset express our great appreciation for the efforts made by all young members of the Bar and also by the learned Government Advocate and his team of Additional Government Advocates in helping this Court thrash out the matter threadbare, and render its answers to the questions aforesaid.

10. Sri Nadeem Murtaza has argued that several types of Appeals are provided under Cr.P.C. and besides Appeals against conviction and acquittal, Chapter 29 of the Cr.P.C. provides for other types of appeals to the High Court ,viz:-

> **Section 372** – right of victims to prefer an Appeal against acquittal or against conviction for a lesser offence or against imposition of inadequate compensation.
> **Section 374** – Appeal against conviction.
> **Section 377** – Appeals by State Government on the ground of inadequacy of sentence.
> **Section 378**- Appeals against acquittal (only with the leave of the High Court).

The Chapter with respect to Appeals in Cr.P.C. is neither absolute nor exhaustive, as many provisions relating to Appeals before the High Court are provided in Cr.P.C. outside the said Chapter as well, which are as follows: –

> **Section 86-** Appeals from orders rejecting applications for restoration of attached property.

Section 341 – Appeals with respect to offences affecting the administration of justice.
Section 449 – Appeal from orders under Section 446 (that is in cases of forfeiture of bonds).

11. It has been argued by Sri Nadeem Murtaza that questions posted by the Reference order by the Division Bench at Lucknow for consideration before this Court do not strictly come under the purview of Section 390 Cr.P.C., as the power under the Section is exercised at the time of admission of Appeal while such questions relate specifically to non-appearance of a person at a subsequent stage of an Appeal, that is when it has been admitted and the matter is ripe for final hearing.

12. With regard to directions to the CJM or any other Magistrate to enlarge an acquitted person or a person convicted of an offence on bail, even in cases where the High Court has issued non-bailable warrant is concerned, a reference has been made to Chapter VI of the Cr.P.C., which relates to processes to compel appearance which are divided into four distinct parts, i.e. A- Summons; B- warrant of arrest; C-Proclamation and Attachment; and D- other rules regarding process.

Part B of Chapter VI relating to warrant of arrest starts from Section 70 and ends with Section 81.

Section 70 provides for the form of arrest warrant and its duration. Section 70 (2) clarify that every warrant shall remain in force until the same is cancelled by the Court, which issued it or until it is executed by means of arrest of the person against whom warrant is issued .

Section 71 provides for a discretion to the Court while issuing warrant of arrest to Direct, taking of security from the arrested person for his attendance before the Court at a specified time, and in case such security is provided, the person who is arrested is to be released after compliance of the same.

Section 72 provides that warrant can be directed to one or more Police officers, and the same can be executed by all or by any one or more of them.

Section 73 provides that the Magistrate may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender, or any person who is accused of a non-bailable offence and is avoiding arrest. Section 73(3) provides that when the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest Police officer, shall cause him to be taken before a Magistrate having jurisdiction, unless security is taken under Section 71.

Section 74 provides that a warrant directed to a Police officer may also be executed by any other Police officer whose name is endorsed upon the warrant by the officer to whom it is directed.

Section 75 provides for notification of the warrant.

Section 76 provides that the Police officer or the person executing the warrant shall, without unnecessary delay, bring the person arrested before the Court before which he is required by law to produce such person. Although what would the course of law in such case be before which the arrested person is required by law to be brought is not mentioned in the Section, the proviso to the said Section clarifies that the delay in producing the person arrested in any case, shall not exceed 24 hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. It is evident that after being arrested in pursuance of a warrant, a person is required to be produced before the nearest Magistrate within 24 hours, however, Section 76 does not provide for the options/choices available to the Magistrate after production of the arrested person. Rather, Section 76 is only relatable to the powers and duties of the Police officer or the person who has arrested any person against whom the warrant has been issued.

Section 77 to Section 80 relate to arrest made outside the Local jurisdiction of the Court issuing a warrant.

Section 77 provides that warrant of arrest may be executed at any place in India.

Section 78 provides that when a warrant is to be executed outside the jurisdiction of the Court issuing it, such Court may instead of directing the warrant to a Police officer, forward it by post or otherwise to any Executive Magistrate or District Superintendent of Police or Commissioner of Police, within the local limits of the Court, within the jurisdiction of which it is to be executed. Section 78(2) provides that the Court issuing a warrant under subsection (1) shall forward, along with the warrant, the substance of the information against the person to be arrested, together with such documents, if any, as maybe sufficient to enable the Court acting under Section 81, to decide whether bail should or should not be granted to the person.

Section 79 provides for the procedure to be adopted for the execution of warrant by the Executive Magistrate or by Police officer, not below the rank of an officer in charge of a Police Station, and Section 80 provides for procedure of arrest of the person for whom the warrant has been issued.

13. Sri Nadeem Murtaza has argued that different Benches of this Court follow different standards for issuing Non Bailable Warrants and he has also placed before this Court different orders passed by the Court in Appellate Jurisdiction issuing non-bailable warrants against the convict-appellant or the respondent-accused. It has been argued that although the Supreme Court has repeatedly observed that non-bailable warrants should be issued as a last resort after the litigant fails to respond to notices/summons and bailable warrants; sometimes this Court in a routine manner has issued non-bailable warrants against the appellants and directed the Magistrate to place the appellants into custody and send them to jail when they are arrested or surrender before the Court and the

Magistrate is directed to submit his report on the date fixed in the matter. Sometimes non-bailable warrants are issued with a specific direction that as and when the appellants are arrested or surrender before the Court, they shall be enlarged on bail by the C.J.M. concerned on their furnishing two adequate sureties and a personal bond, each of them for a like amount, and on the undertaking that they will remain present before this Court on the next date fixed either personally or through Counsel. On other occasions, the Court while issuing non-bailable warrant has noticed that the Appeal is pending since long and that the appellants were released on bail but no one has appeared on their behalf to argue the matter. Sometimes, the Court has directed preparation of paper book or has summoned Trial Court record and simultaneously the Court has directed notice to be issued to the sureties under Section 446 Cr.P.C. as also issued a non-bailable warrant. Sometimes the Court has issued non-bailable warrant with a specific direction that in case such non-bailable warrant is not executed, the C.J.M. concerned shall file his personal affidavit.

14. In the case of *Raj Narayan*, Criminal Appeal No.1817 of 2003, decided on 23.06.2023 initially no one had turned up on behalf of the appellant to press the Appeal and this Court had directed bailable warrant to be issued. The office report showed that the appellant had sold his property and moved somewhere else. Fresh non-bailable warrant as well as process under Sections 82 and 83 Cr.P.C. against the appellant were issued and at the same time notice was issued to the sureties under Section 446 Cr.P.C. and the CJM was directed to take help of the Senior Superintendent of Police of the District in apprehending the appellant. The appellant was arrested and the Legal Aid Services Authority appointed an Advocate to present his case before the High Court. He informed the Court that the appellant had completed the period of his incarceration of seven years rigorous imprisonment and was released from Central Jail thereafter in 2009 itself, which fact could not be brought to the notice of the Court in the Appeal. Consequently, when no one turned up on behalf

of the appellant to the Appeal, the Court issued non-bailable warrant as well as other directions as aforesaid. In pursuance of the non-bailable warrant issued, the appellant was arrested again and sent to jail. The Court recalled its earlier order and directed release of the appellant forthwith.

15. In *Kundan Lal* Criminal Appeal No.2277 of 2008, the counsel for the appellant was present in Court, but he informed this Court that he had no contact with the appellant, and therefore, was not in a position to argue the case. The Court hence issued non-bailable warrant against the appellant. A supplementary affidavit was filed on the next date fixed, bringing on record the fact that the Criminal Appeal had been filed under Section 449 Cr.P.C. for quashing the order passed by the Trial Court by which recovery had been issued against the appellants who were only sureties of the accused. The accused had surrendered before the Trial Court and for getting bail had submitted fresh sureties of other persons.

16. In *Rajoo Alias Ramakant Vs. State of Madhya Pradesh* [1], the Supreme Court was hearing the Appeal of a person whose Appeal had been dismissed by the High Court. The Supreme Court place reliance upon observations made by it in *Sukdas Vs. Union Territory of Arunachal Pradesh,* 1986 (2) SCC 401, where the Supreme Court had reiterated the requirement of providing free and adequate legal representation to an indigent person and a person accused of an offence. An accused need not ask for legal assistance – the Court while dealing with the cases of Life imprisonment must inform him or her of the entitlement to free legal aid. A person accused of an offence which may involve jeopardy to his life or personal liberty is entitled to free legal assistance at State expense. However, certain exceptions were carved out like in cases involving economic offences or offences against the law prohibiting prostitution, or child abuse and the like, where social justice may require that free legal services need not be provided by the State. It was also observed that neither the Constitution nor the Legal Services Authorities Act, make any

distinction between a trial and an Appeal for the purposes of providing free legal aid to an accused or a person in custody.

17. Sri Nadeem Murtaza has also relied upon *Raghuvansh Dewan Chand Bhasin Vs. State of Maharashtra and others* [2]. It was argued by the Appellant that since neither Section 70, nor Section 71 of the Cr.P.C. uses the expression non-bailable, a Magistrate is not authorized to issue non-bailable warrant of arrest, even when an accused fails to appear in Court. The Supreme Court negatived the contention.

18. Relying upon *Inder Mohan Goswami Vs. State of Uttaranchal* [3], it was cautioned that before issuing non bailable warrants, the Court should strike a balance between society's interest and personal liberty and exercise its discretion cautiously. Referring to paragraph 53 of the judgement in *Inder Mohan Goswami*, the Court stated the circumstances when non-bailable warrant could be issued, for example when the Court was convinced that summons or bailable warrant would be unlikely to have the desired effect, that the person will not voluntarily appear in Court. That the Police authorities were unable to find a person.

19. In *Dhananjay Rai Alias Guddu Rai Vs. State of Bihar* [4], the Supreme Court was dealing with a case of dismissal of an appellant-convict's Appeal which was initially admitted by the High Court for hearing, but subsequently dismissed without adverting to its merits on the ground that the appellant was absconding. The Supreme Court observed that the Court could not deviate from the settled principle of law that once appellate Court had refused to dismiss the Appeal summarily, the same must be heard on merits. Sections 385 and 386 Cr.P.C. do not envisage the dismissal of the Appeal for default or non-prosecution, but only contemplate disposal on merits after perusal of the record. The plain language of Section 385 makes it clear that if the appellate Court does not consider the Appeal fit for summary dismissal, it must call for the record

and Section 386 mandates that after the record is received, the Appellate Court may dispose of the Appeal after hearing the accused or his counsel. The law clearly expects the appellate Court to dispose of the Appeal on merits not merely by perusing the reasoning of the trial Court in the judgement impugned, but by cross checking the reasoning with the evidence on record with a view to satisfy itself that the reasoning and findings recorded by the Trial Court are consistent with the material on record. The Court referred to judgement rendered in *Bani Singh Vs. State of U.P.* [11], and *Surya Baksh Singh Vs. State of U.P.* [12], and *K.S. Pandurang Vs. State of Karnataka* [13]*,* and also observed that the Court is not necessarily required to adjourn the case if both the appellant and his lawyer are absent. It can dispose of the Appeal after perusing the record and judgement of the Trial Court.

In *K. Muruganandam and others Vs. State* [5], the Supreme Court observed that the High Court cannot dismiss an Appeal against conviction, if the accused does not appear through counsel appointed by him/her. The Court is obliged to proceed with the hearing of the case only after appointing Amicus Curiae.

20. It has been argued that *Rajoo* (supra) has been quoted with approval in *Anokhi Lal Vs. State of Madhya Pradesh* [7], where referring to Article 39A, the Supreme Court observed that it provides for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The Legal Services Authorities Act 1987 has been enacted to achieve the mandate of Article 39A. Right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and is implicit in the right guaranteed by Article 21. The Supreme Court relied upon the Best Bakery case viz. *Zahira Habibullah Sheikh and another vs. State of Gujarat* [8], and judgement rendered in *Mohammad Hussain Vs. State* [9]; and emphasized that the object of criminal trial is to search for the truth,

and the trial is not a bout over technicalities and must be conducted in such manner as will protect the innocent and punish the guilty.

21. Sri Nadeem Murtaza has placed reliance upon judgement rendered by a Full Bench of the High Court of Gujarat in *Niraj Devnarayan Shukla and others Vs. State of Gujarat* [10], where considering the difference of opinion between two coordinate benches Regarding how a Criminal Appeal under Section 374 Cr.P.C. filed by a convict who is absconding at the time of final hearing has to be dealt with.

22. After answering the question, the Larger Bench also elaborated the procedure to be adopted by the High Court while dealing with a conviction Appeal, at final hearing stage, when the Advocate and/or convict is not available to assist the Court.

The Larger Bench referred to the judgement rendered in *Bani Singh Vs. State of Uttar Pradesh* [11], and *Surya Baksh Singh Vs. State of U.P.* [12], *K.S. Panduranga Vs. State of Karnataka* [13] and *Dilip S Dahanukar Vs. Kotak Mahindra Company Limited* [14], and then the Larger Bench observed in paragraph 22 as follows: –

> *"22. In view of the ratio laid down by the Apex Court, we are of the opinion that a High Court while dealing with a conviction Appeal where in the convict/Advocate is/are not available, following procedure is required to be considered at the time of final hearing:*
>
> *i. If the Advocate appearing for the appellant convict is present and is ready to proceed with the Appeal, the Court has to decide the same on merits and a reasoned judgement is to be delivered, even if the convict is absconding.*
>
> *It is needless to say that the convict should always be subjected to consequences of his abscondence.*
>
> *ii. If the convict is absconding and his Advocate is absent, and if the convict has jumped the bail/temporary bail granted by the High*

Court, the High Court itself shall take recourse provided under the provisions of the Criminal Procedure Code to secure the presence of the absconding convict and can issue non-bailable warrant, passing orders of attachment of his property, declaring him, proclaimed offender, et cetera, under Sections 82, 83, 84 and 85 of the Code of Criminal Procedure.

After exhausting all possible effort, if the convict could not be traced out, and if the High Court is satisfied and is of the opinion that the convict is recalcitrant and has shown total disrespect to the orders passed by the High Court and has jumped the bail /temporary bail, the High Court can exercise its inherent power under Section 482 of the Code and can dismiss the Appeal.

iii. If the convict was released pursuant to orders passed by the concerned department of the State/Jail Authority (like furlough leave, et cetera) and is not available at the time of hearing of the Appeal, the jail Authority shall submit a detailed report to the High Court about the steps undertaken by the concerned department/jail Authority to secure the presence of the absconding convict. If the High Court is satisfied with its report and comes to the conclusion that the convict is recalcitrant and has shown scant respect to the judicial system, his Appeal can be dismissed.

iv. If the Appeal is dismissed on the ground of non-availability of convict and subsequently, if the convict surrenders or is arrested, he may file application for restoration of his Appeal for hearing the same on merits.

23. In paragraph 23, the Larger Bench of Gujarat High Court observed–

"23. It is needless to say that if the Bench comes across a Criminal Appeal, where it finds that the case of absconding convict does not fall in any of the above referred contingencies, it can exercise its inherent powers provided under Section 482 of the Code, which would entitle it to make such orders as may be necessary to secure the ends of justice. Considering the decision by the honourable Apex Court, in the case of Bani Singh (supra), K.S. Panduranga (supra), as well as in the case of Surya Baksh Singh (supra), and considering the several decisions, we hereby hold that the ratio laid down by the Hon'ble Apex Court in the case of Bani Singh, K.S.

> *Panduranga (supra) read with Surya Baksh Singh (supra) would hold the field in case of an absconding convict and not the ratio laid down by the Court, in the case of Dilip S. Dahanukar (supra) as the same deals with Sections 357 and 374 of the Code——..”*

24. Sri Nadeem Murtaza has placed reliance upon a judgement rendered by the Supreme Court on 01.05.2024 in Criminal Appeal No.1074 of 2017: *Sharif Ahmed Vs. State of U.P.*, where it has been observed that non-bailable warrants should not be issued as a matter of course. Reliance has also been placed upon Supreme Court judgement in *Satyendra Kumar Antil vs C.B.I.* [15], and *Inder Mohan Goswami Vs. State of Uttaranchal* [3]. Even where non-bailable warrants are issued, the High Court should direct listing of such cases on a priority basis and a separate heading be created in the cause list for such appeals. Where the accused is re-arrested in pursuance of non-bailable warrants only to ensure his presence, the Magistrate should immediately send a report regarding execution of warrant and an attempt be made to decide such appeals or pass appropriate orders as expeditiously as possible. It has been suggested by Shri Nadeem Murtaza that if an accused is arrested and Magistrate has not been given any specific direction regarding enlarging such accused on bail or sending him to jail, still, there are certain exceptional circumstances where the Magistrate be allowed to consider releasing the arrested person on bail. There is no express bar under the Cr.P.C. to release such person on bail by the Magistrate and Sri Nadeem Murtaza has placed reliance upon judgement rendered in *Sarah Matthew Vs. Institute of Cardiovascular Diseases* [16], *Dhanna Lal Vs. Kalavati Bai* [17]*,* where the Supreme Court has observed that Cr.P.C. is a procedural law and it is well settled that procedural law must be liberally construed to serve as handmaiden of justice and not as its mistress.

25. Sri Apoorva Tiwari, along with Akash Singh, Shivang Tiwari, Advocates, has argued that the concept of fair trial entails familiar triangulation of interest of the accused, the victim and the society acting

through the State and the prosecuting agencies. Public interest in proper administration of justice must be given as much importance as the interest of the individual accused. Reliance has been placed on judgement rendered in *Zahira Habibulla Sheikh and another Vs. State of Gujarat* [8], *Dayal Singh Vs. State of Uttaranchal* [18], and Mohammed Firoz Vs. State of Madhya Pradesh, [19].

26. Sri Apoorva Tewari has also pointed out the observations made by the Supreme Court in the case of *State (NCT of Delhi) Vs. Shiv Kumar Yadav* [20], and reliance has been placed upon paragraphs 10 and 11 Where the Supreme Court has observed that :-

> *"fairness of trial has to be seen, not only from the point of view of the accused, but also from the point of view of the victim and the Society. In the name of fair trial, the system cannot be held to ransom, though the accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross examine the prosecution witnesses and to lead evidence in his defence."*

27. Sri Apoorva Tiwari has also placed reliance upon judgement entered in *Somesh Chaurasia Vs. State of Madhya Pradesh* [21], where the Supreme Court placed reliance upon observations made by it in *Abdul Basit Vs. Mohammed Abdul Qadir Chaudhary* [22].

In paragraph 42 and 43 of the judgement in *Somesh Chaurasia* [21], the Supreme Court had observed us: –

> *"42.This Court in Pampapathy Vs. State of Mysore, 1966 Supplement SCR 477; had held that the High Court had the power to revoke the suspension of sentence granted under sub-section (1) and (2) of Section 426 in Criminal Procedure Code, 1898, using its inherent power under Section 561A of the Cr.P.C. 1898. Where the accused were alleged to have misused their liberty while the sentence was suspended. Sub-section (1) and (2) of Section 426 Cr.P.C. 1898 are similar to Section 389 (1) of the present Cr.P.C. It may be noted that in Pampapathy the issue of cancellation of bail*

of a convict by taking recourse to Section 561A Cr.P.C., 1898, arose because the second Proviso, which now has been added to sub-Section (1) of Section 389 Cr.P.C., did not exist under the earlier legal framework. However, since the second Proviso to Sub-section (1) of Section 389 Cr.P.C. now deals with the cancellation of bail, no inherent power would be required for cancellation of suspension of a sentence and bail granted to a convicted person during the pendency of the Appeal at the appellate Court.

"43. This Court in its order passed in Ramesh Kumar Singh Vs. Jhabbar Singh 2003 (10) SCC 195 has held that if the accused misused the liberty by committing other offences during the suspension of sentence under Section 389 (1) Cr.P.C., they are not entitled to the privilege of being released on bail. In that case, the accused was convicted under Section 302 I.P.C. for killing the father of the complainant. During the suspension of his sentence, when he was out on bail, he had committed the murder of the brothers of the complainant. This Court set aside the bail that was granted to the accused by the High Court."

28. Sri Apoorva Tiwari has also placed reliance upon *Purshottam Vs. State of Tamil Nadu* [23], where the Supreme Court was considering the case of an appellant - accused who was convicted by the trial Court for offence under Section 6 of the Protection of Children from Sexual Offences Act 2012. The Appeal against conviction preferred by the appellant was admitted by the High Court in 2018 and the substantive sentence of the appellant was suspended and he was ordered to be enlarged on bail. When the Appeal came up for hearing in July 2023, his Advocate sought adjournment for four weeks. Only on the ground that the appellant is enjoying the facility of bail and that his Advocate applied for adjournment, the High Court proceeded to cancel the bail. The Supreme Court observed that-

".....in a given case if the Advocate appearing for the appellant-accused sought adjournment on untenable and unreasonable grounds, the appellate Court is well within its power to refuse the prayer for adjournment. In such a case, one of the courses suggested by a decision of this Court in the case of Bani Singh Vs.

> *State of U.P. can always be adopted by the High Court. The High Court has a discretion to appoint an Advocate to espouse the cause of the appellant when the Advocate appointed by the appellant refuses to argue the Appeal on unreasonable grounds. Though the High Court has an option of considering the merits of the Appeal and deciding the same on merits, the High Court should always adopt the first course of appointing an Advocate to espouse the cause of the appellant. Referring to the second proviso to Sub-section (1) of Section 389 of the Cr.P.C. the Court can even Suo Moto issue a a notice calling upon the accused to show cause why his bail should not be cancelled. Under no circumstances, the bail granted to an accused under subsection (1) of Section 389 can be cancelled without giving a reasonable opportunity to the accused of being heard. For the default of the Advocate appointed by the accused, the appellate Court cannot penalise the accused by proceeding to cancel his bail only on the ground that his Advocate has sought an adjournment and that also without giving an opportunity of being heard to him on the issue of cancellation of bail."*

It has also been observed in *Purshottam* (supra) that the High Court should not reject an application for suspension of sentence only because the Advocate for the accused declined to argue the Appeal on merits. When only the application for suspension of sentence is listed for hearing the Advocate for the accused is not expected to be ready to argue the Appeal on its merits.

29. Sri Apoorva Tewari has also pointed out Chapter 18 Rule 22 and Rule 41 of the High Court Rules where provisions of giving notice to the Government Advocate, to the accused-respondent, and to convict appellant has been set out and it has been provided that a list of cases ready for hearing has to be pasted on the Notice Board from time to time.

30. Sri Apoorva Tewari has also placed reliance upon *Ashish Chaddha Vs. Asha Kumari and another* [24]*,* and paragraphs 18, 27, 28 and 29 thereof, to argue that sometimes the accused may deliberately avoid appearance in Court and then take the plea of Section 303 of the Cr.P.C.

and challenge the order of the Trial Court on the ground that he was denied right to be defended by Counsel of his choice. The Court may look into the facts and circumstances of the case and then decide for itself, whether the accused was only indulging in dilatory tactics and may reject such plea.

31. In *Madan Mohan Vs. State of Rajasthan and others* [25], the Supreme Court has observed that under Section 437 to 439 of the Cr.P.C. grant or rejection of bail is the discretion of the Court considering it, the High Court cannot direct the Subordinate Court to consider and allow the bail application on the same day on which it is filed, it can only direct the accused persons to approach the trial Court for grant of bail and if any application is filed, it would be decided by the trial Court on its merits and in accordance with law expeditiously.

32. In a Full Bench decision of this Court, in *Dinesh Kumar Singh Alias Sonu Vs. State of U.P. and others*. The question formulated for consideration was: –

> *"Whether a judge of Honble High Court sitting alone or judges sitting in a Division Bench, hearing any matter in his/their determination assigned by Hon'ble the Chief Justice, can overstep into determination of another Bench, if any issue or question arises in the matter, including a question in public interest, which is not connected to the matter before him/them, and which, in his/their opinion is necessary to be decided, and further in such case where in his/their discretion, it is necessary to decide such question, what should be the procedure to be adopted?"*

33. The Full Bench in *Dinesh Singh* referred to observations made by another Full Bench of this Court in *Smt. Maya Dixit Vs. State of U.P.* [26], which had also considered the question whether a Bench conferred/assigned a particular work in terms of Chapter V of the Allahabad High Court Rules can hear matters assigned to another Bench and in paragraphs 17 and 17A observed that the Division Bench assigned with a particular work can only do the work assigned and cannot do the

work assigned to another Division Bench, even in respect of an earlier matter which it was hearing. Even if a Bench was hearing a matter assigned to it as per the roster, and if in the course of hearing, it proceeds to consider relief not sought in the petition, but which will fall within the PIL jurisdiction, then the Bench is bound to direct the Registry to place the matter before the Chief Justice for appropriate directions or before the appropriate PIL Bench. In other words, if that Bench is not assigned P.I.L. work, it cannot proceed to hear the matter.

34. In *State of U.P. and others Vs. Anil Kumar Sharma and another* [27], the Supreme Court was considering an order passed by the High Court sitting in writ jurisdiction which directed the State to amend procedure prescribed under Section 209 Cr.P.C. regarding committal of cases by Magistrate to Sessions Court by enabling the Police to file charge-sheet in connection with sessions cases directly before the Sessions Court and also considering the delay in trial due to non-arrest of accused persons by Police, it directed trial Court not to accept the charge-sheet under Section 173 Cr.P.C. unless the accused persons were produced before them and also directing photocopy machines to be installed in Police station for preparing copies of all documents required to be supplied under Section 207 Cr.P.C. to the accused persons forthwith. The Supreme Court observed that while the directions were issued with the laudable object in mind they could not have been issued as the Division Bench was not sitting in PIL jurisdiction and also the Central Government which was not even a party in the writ petition was directed to get amended the Cr.P.C.

35. Sri S.M. Singh Royekwar has argued more or less in the same terms as other Advocates, and has stated that in the matter of Appeal against conviction, if the High Court or any other Appellate Court, at a subsequent stage of the Appeal, issues non-bailable warrant for securing presence of a convict on bail, only such appellate Court has the power to enlarge the person so arrested on bail. The C.J.M. or any other Magistrate

does not have the power to enlarge such arrested person on bail. If N.B.W. is issued by the Appellate Court through the C.J.M. concerned, even then the power to enlarge the person arrested lies only with the Court. In matter of appeals against acquittal before the High Court, if the High Court issues a non-bailable warrant for securing the presence of the acquitted respondent, at a subsequent stage of the Appeal, release of such person on bail after arrest, pursuant to execution of Non Bailable Warrant by the C.J.M. will depend upon the nature/language of direction issued by the High Court under Section 390 Cr.P.C. on a case to case basis.

36. It has also been argued by Sri S.M. Singh Royekwar that no general direction of mandatory nature can be issued by the High Court to the Magistrate in all/any circumstances, even if the Magistrate has jurisdiction in limited cases in view of Section 390 Cr.P.C., for release of person arrested in an Appeal against acquittal if non-bailable warrant has been issued by the Court. As such the observations and directions issued by the Division Bench at Allahabad are not in accordance with law.

37. It has been argued by Sri Royekwar that the modes for securing the presence of acquitted person or a convicted person, released on bail, when an Appeal comes up for hearing before the Appellate Court, are governed by Chapter VI of the Cr.P.C. No uniform, straightjacket formula /course/mode can be laid down to be ordinarily adopted by the High Court in such matters for facilitating hearing of the Appeal. It would depend upon the facts and circumstances of each case.

38. It has also been argued that hearing of an Appeal against a conviction can take place by appointing an Amicus for such accused-respondent or convict-appellant, in case he has jumped bail or his Advocate fails to appear and assist the Court repeatedly during the hearing of the Appeal. Such appointment of Amicus by the Appellate Court should not be delayed and the Appellate Court should not be required to intimate

such person who has failed to appear and obtain his consent as the presence of such person cannot be easily secured. It is only in exceptional circumstances where the person who is an accused is in jail, then intimation and consent must be obtained as such person has not wilfully defaulted in appearing before the Court for expeditious disposal of the Appeal. He may be suffering from various incapacities to pursue his matter in Appeal owing to his continued incarceration.

39. Sri S. M. Singh Royekwar has pointed out a judgement rendered by the Supreme Court in the case of *Dhananjay Rai Alias Guddu Rai Vs. State of Bihar* [4], where the Supreme Court has reiterated the law as settled in the case of *Anokhi Lal Vs. State of Madhya Pradesh* [7] and observed that a Criminal Appeal can very well be decided after appointing an Amicus Curiae in case the accused or his counsel is not turning up to assist the Court. Such an exercise however, should be undertaken with care and before appointing such Amicus the accused should be put to notice either through summons or by means of issuance of bailable warrant regarding listing of the Appeal for hearing and absence of the counsel representing the accused despite knowledge of the same. The accused cannot then claim at a later stage that he was deprived of opportunity to appoint a counsel of his choice. It has also been argued that in old criminal appeals which are listed for final hearing and disposal suddenly after decades, circumstances may justify the absence of counsel to represent the Appellant and in such cases, service of bailable warrant to the appellant may facilitate engagement of a new Counsel as the appellant would derive knowledge of absence of his earlier counsel.

40. Sri S.M. Singh Royekwar has placed reliance upon a Full Bench decision of the Punjab and Haryana High Court, in *State of Punjab Vs. Bachitter Singh and others,* Criminal Appeal No.588 of 1971 rendered on 13.09.1971 and reported in 1972 (1) ILR (Punjab and Haryana). In paragraph 10, the Court was dealing with Section 427 of the old Cr.P.C.

1898, which is corresponding to Section 390 Cr.P.C. 1973, and after quoting the language of the Section, the Court observed: –

> *"It is apparent even on a cursory perusal of the language above said that there exists no statutory bar whatsoever for the release on bail of persons against whom acquittal appeals have been preferred. The Statute draws no distinction whatsoever between appeals on charges and the others. In fact, the Section makes express provision for the grant of bail pending the disposal of such Appeal. Even the issuance of a warrant in the beginning is entirely discretionary and the Appellate Court, even at the initial stage of the admission of the Appeal may well stay its hand and remain content with directing a notice, summons, or bailable borders without requiring arrest or apprehension of the respondent accused persons.– – – the intention of the legislature is highlighted and brought into bold relief when compared with similar provision, empowering the grant of bail to persons appealing against conviction. Section 426 (1) (2) Cr.P.C., is in the following terms: –*
>
>> *"426(1). Pending any Appeal by a convicted person, the appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.*
>>
>> *"426(2). The power conferred by this Section on an Appellate Court may be exercised also by the High Court in the case of any Appeal by a convicted person to a Court subordinate thereto"*
>
> *"Comparing the two provisions, it is obvious that whilst Section 426, Cr.P.C. envisages the recording of the reasons for the suspension of the sentence and the grant of bail, no such restriction or qualification has been imposed by law under Section 427, Cr.P.C 1898. A wholly unfettered power is given under Section 427 Cr.P.C. 1898, to release the accused person on bail if at all their custody has been originally directed. Again in Section 427, bail may not only be granted by the High Court itself, but it may direct that the accused person may be brought before any subordinate Court and the power to admit such person to bail may be relegated to the subordinate Courts. Hence, far*

> *from suggesting any statutory bar, the relevant provisions of Section 427 Cr.P.C. 1828, exhibit an intention of the legislature, conforming with judicial dictum that the grant of bail is the rule and its refusal is an exception."*

41. Shri Royekwar has also referred to paragraph 17 of judgement rented in *Praneeta Prakash Navage Vs. State of Maharashtra and others*[28].

42. Sri S.M. Singh Royekwar while arguing the matter has also pointed out that once the appellate Court decides to issue warrant of arrest to secure presence of the Appellant to facilitate the hearing of Appeal, it must specify a particular date by which it is returnable whether executed or not, and such cases be listed in the cause list for *priority hearing* with mention in the cause list itself whether such warrant bailable/non-bailable has been executed or not. In case a non-bailable warrant has been executed and the convict has been arrested and committed to jail, the Magistrate concerned must immediately send information to the High Court, without waiting for a specified date mentioned in the non-bailable warrant. If information regarding execution of non-bailable warrant is received by the Court, the Section should list the Appeal forthwith for appropriate orders under *priority hearing* matters without waiting for specified date mentioned in the non-bailable warrant. Such priority hearing appeals in which bailable warrants or non bailable warrants have been executed should remain on board of the Court for hearing unless otherwise directed by the Appellate Court by specific reasoned order.

43. In a case where a warrant of arrest is issued under Section 390 Cr.P.C., the High Court must specifically mention whether after its execution the accused is to be brought before it or he has to be produced before any other subordinate Court. If the accused is to be brought before the High Court, then again immediately information has to be sent on his arrest to the High Court by the Magistrate concerned and the matter be

listed in the list under the heading of "*priority hearing*". Also the High Court while issuing the warrant may direct the subordinate Court that after execution of such warrant he be released on bail or committed to prison. In case the High Court leaves it open to the Subordinate Court to decide the application as per its discretion, the High Court should specifically mention by a separate order the particulars of the case, for example, the attending circumstances in which the warrant has been issued, the nature and gravity of the offence, the relevant antecedents of the accused, the nature of evidence, the age and medical condition, if any, of the accused and the duration of pendency of the Appeal and the last date of listing of such appeal in its order. The Magistrate must immediately inform the High Court regarding the arrest of the accused once he was produced before it pursuant to such directions of the High Court.

44. Sri Naved Ali, while arguing on questions 1, 2 and 3 of the Referral order has referred to the inherent powers that can be exercised by the High Court under Section 482 Cr.P.C. and under Article 226 and 227 of the Constitution. He referred to the judgement rendered in *Popular Muthaiah Vs. State represented by Inspector of Police* [29], where the Supreme Court had observed that the High Court while exercising its Revisional or Appellate power may also exercise its inherent power, both in relation to substantive and also procedural matters, sometimes even *Suo Moto* in the interest of justice. No application is required to be filed therefor. However, power under Section 482 of the Cr.P.C. is not unlimited and has to be exercised by the Court only where the Cr.P.C. is silent. Where there is a specific provision in the Code such power will not be exercised. Power under Section 482 Cr.P.C. is exercised *Ex Debito Justitiae* and can do real and substantial justice.

45. Sri Naved Ali has argued that in *Sanjay Dubey Vs. State of Madhya Pradesh* [30]. The Supreme Court while dismissing an Appeal filed by Inspector Incharge of a Police station against whom certain observations

were made by the High Court while hearing a bail application, had observed that High Court is a Constitutional Court possessing a wide repertoire of powers. High Court has original, appellate and *Suo Moto* powers under Article 226 and 227 of the Constitution. The powers under Article 226 and 227 of the Constitution are meant for taking care of situations in which the High Court feels that some directions/orders are required in the interest of justice.

46. But in paragraph 14 of the judgement in *Sanjay Dubey* [30], the Supreme Court observed: –

> *"We are of the view that learned single Bench could have directed institution of separate proceedings taking recourse to Article 226 of the Constitution, after formulating reasons and points for consideration. Thereafter, the matter should have been referred to the learned Chief Justice of the High Court for placing it before an appropriate Bench, which would proceed in accordance withlaw, of course, after affording adequate opportunity to the person(s) proceeded against."*

47. It was argued by Sri Naved Ali that the Supreme Court recognized the inherent power of the High Court under Article 226 or 227 and even under Section 482 Cr.P.C. to issue necessary directions for the furtherance of justice. However, if any general or sweeping directions are to be issued, then the stakeholders who are being affected by it should be first heard or the question of law should be at first formulated and should be referred to the Chief Justice of that particular High Court, who would subsequently place it before the appropriate Bench.

48. Sri Naved Ali has also pointed out Chapter VI of the Cr.P.C., which deals with "*Process to Compel Appearance*". Referring to Sections 70 and 71 of the Cr.P.C. and Form 2 of Schedule II of the Cr.P.C., it has been argued that it only talks of warrant of arrest. Hence, if the High Court issuing the warrant of arrest had in its discretion directed, in specific terms that the person against whom such warrant of arrest has been made,

should execute a bond with sufficient sureties for ensuring his attendance before the Court at a specified time and thereafter, then it would be termed as a bailable warrant. However, if no such direction/endorsement/specification to take sureties has been made in terms of Section 71 of the Cr.P.C. on the warrant of arrest, then the said warrant of arrest would be deemed as a non-bailable warrant. The persons who are arrested would be brought before the Court who has issued the non-bailable warrant, and it would have an option to either send him to judicial custody/Police custody, or release him on bail. Hence, if an Appellate Court during a Criminal Appeal issues a non-bailable warrant, the power to cancel it rests only with the Appellate Court issuing it or if it is executed. The power to grant him bail lies only with the Appellate Court. The C.J.M. or any other Magistrate can only enlarge a person on bail if the appellate Court while issuing warrant of arrest specifies that sureties may be taken in the event of his arrest and in case, no such specification has been given in the warrant of arrest the Magistrate is bound to commit such person to custody and without delay, inform about its execution to the Appellate Court.

49. It has also been argued that assuming if a Magistrate is conferred with the discretionary power to grant bail, specially when the Appellate Court is seized with the hearing of an Appeal where records have been summoned, there has to be some substance of information or such documents as may be sufficient to enable the Magistrate to decide whether the bail should or should not be granted to such person when he is brought before him in execution of the warrant of arrest issued by the Appellate Court. The discretionary power of the Magistrate provided to him under Section 167 of the Cr.P.C. allows him to exercise his discretion to either remand the accused to custody or to release him on bail but to determine the course to be adopted, a copy of the "*entries in the diary*", have to be sent along with the person arrested as has been mandated under Section 167 (1) of the Cr.P.C. It has been argued that similarly, if a Magistrate

after taking cognizance issues a subsequent process/warrant of arrest to an accused person and after execution of such process, the accused person is arrested and brought before the Court issuing warrant of arrest, such Court has documents before it from which it can consider as to whether such person is to be remanded to further custody or to be granted bail under Section 437 of Cr.P.C. Even if the accused is remanded to custody under Section 209B of the Cr.P.C.., the accused has right to move a bail application under Section 439 Cr.P.C. before the Competent Court before whom the case has been committed.

50. If the warrant of arrest is to be executed outside jurisdiction in terms of Section 78 Cr.P.C., the Court issuing the warrant shall forward along with the warrant, the substance of information against the person to be arrested together with such documents, if any, as may be sufficient to enable the Magistrate to decide whether the bail should or should not be granted to such persons. On the basis of Sections 71, 78, and 81 Cr.P.C., it has been argued that if at all the discretionary powers are given to the Magistrate by means of a direction, it is imperative that he ought to have some documents/substance on the basis of which he could exercise his discretion. However, since the procedure in law does not provide any such discretion to the Magistrate who is merely complying with the execution of the warrant of arrest, issued by the appellate Court, it would not be appropriate to give any discretion to the Magistrate, except that which has already been provided under Section 71 of the Cr.P.C.

51. Reference has been made by Shri Naved Ali to the observations made by the Supreme Court in *State of U.P. Vs. Poosu and another*[31], and in *Indra Mohan Goswami and another vs. State of Uttaranchal,* reported in 2007 (12) SCC 1, where in the Courts were cautioned that-

> *"the power being discretionary must be exercised judiciously with extreme care and caution. The Court should properly balance both personal liberty and societal interest before issuing warrant. There*

> *cannot be any straightjacket formula for issuance of warrant, but as a general rule, unless accused is charged with the commission of an offence of a heinous crime, and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided"*

52. It has been further argued that however, once such discretion is exercised by the Court, after due care and non-bailable warrant are issued, there is no necessity or requirement to issue blanket directions as have been issued by the Division Bench at Allahabad, to the Magistrate to grant bail to persons against whom such non-bailable warrant have been issued. It would only lie in the domain of the Appellate Court issuing such warrant to exercise the power to extend any respite to person against whom it has issued a non-bailable warrant and not to any other inferior Court.

53. In answer to question no.4, it has been submitted by Shri Naved Ali that when an Appeal against acquittal is filed before the Appellate Court, the Court has the power to grant bail under Section 390 Cr.P.C. to the person against whom Appeal has been filed. In case of an Appeal against conviction also the appellate Court has power to suspend the sentence awarded to the accused under Section 389 Cr.P.C. and allow him to be on bail during pendency of his Appeal. In both cases, when the Court has exercised its power and has granted bail to the accused person, then it is implied that such accused person has undertaken to cooperate with the hearing of the Appeal by ensuring that his pleader will appear whenever the matter is listed and shall argue it without seeking unnecessary adjournment. However, if there is a continuous absence of Advocate, then Court should ordinarily issue a notice/summon (non coercive measure) to such a accused person, apprising him that conditions implied in the bail order have been violated by him and the Appellate Court shall consider cancelling his bail on the next date fixed or would appoint an Amicus to assist in hearing his Appeal. On the next date fixed, the Court may after

verifying the service report, cancel the bail of such accused person and go on to hear the Appeal by appointing an *Amicus Curiae*. Reference has been made by Sri Naved Ali to the judgement rendered in the case of *Kabira Vs. State of U.P.* [32], where it has been emphasized that the Court should not dismiss an Appeal merely because of non-appearance of an Advocate and instead should appoint an Amicus Curiae and then proceed to dispose of the Appeal on its merit.

54. Similar view has been taken by the Supreme Court in the case of *Mohammad Sukur Ali Vs. State of Assam* [33]; *K. Muruganandam and others Vs. State* [5].

55. It has been argued that the Supreme Court has comprehensively dealt with questions 4 and 5 in its various judgements and the same ought to be followed by this Court.

56. Sri Vikas Vikram Singh, along with Rajat Gangwar while arguing, the matter has adopted most of the submissions made by other learned Advocates and has also emphasized that the personal appearance of the accused respondent or the convict appellant is not ordinarily required in the High Court where they are represented by their Counsels. If however, in case the counsel fails to appear to assist the Court, the Court should direct issuance of summons to such person and after satisfaction of service of notice, bailable warrant may be issued. In case bailable warrants cannot be executed, then non-bailable should be issued. The warrants should be issued in vernacular language as the percentage of legal literacy in India is low. The contents of the warrant should be self-explanatory and should spell out the exact reasons for issuance of the warrant and the High Court should also provide a dedicated helpline or email address of officials responsible in the Section dealing with criminal appeals where the person against whom a warrant is issued may seek clarification, should the need arise.

57. With regard to question No.4, it has been argued by Sri Vikas Vikram Singh that an *Amicus* may be appointed by the High Court to facilitate the hearing of an Appeal. However, before doing so, intimation must be sent to the accused and should also be sent to the District Legal Services Authority. Details about District Legal Services Authority should also be sent to the accused Respondent/convict appellant and their contact number and address should also be shared so as to ensure that a *bona fide* litigant should not suffer for negligence of his/her counsel. In case after appointment of Amicus a counsel appears for the accused, then the assistance of the Amicus Curie should not be dispensed with, and he should ordinarily be allowed to continue till the end of litigation as he is a friend of the Court. If on subsequent dates, the counsel for the accused again does not appear, the Amicus should be at liberty to proceed and to argue the matter independently. Also, while engaging an *Amicus* disclosure form should be taken from him or her that there is no conflict of interest in the matter and should any such conflict arise at any time, it should be brought to the immediate notice of the Court.

58. If the Court is satisfied that an accused has been enlarged in Appeal against conviction and he is deliberately avoiding appearance so as to delay the disposal of the Appeal, the Court may proceed to decide the Appeal with the help of the *Amicus Curiae* also simultaneously take steps to cancel the bail of the accused and proceed as per the provisions of Cr.P.C. Also, it has been suggested that a separate heading for such type of cases where non-bailable warrants have been issued by the Court should be shown in the list so as to enable the Court to decide such matters on the priority basis.

59. Sri Alok Mishra, Advocate, in answer to question 1 referred to by the Division Bench at Lucknow has stated that under Section 390 Cr.P.C., the Chief Judicial Magistrate or any Magistrate can release a convict on bail and the circumstances in which the Division Bench at Allahabad

passed the orders dated 18.01.2024, and 19.01.2024 should be taken into account. In both cases, a person acquitted by a trial Court was put in custody because a non-bailable warrant was issued by the High Court without giving power to the CJM to consider the special circumstances in which the respondent/accused was placed. The acquitted person was languishing in jail only because the Appeal could not be taken up as soon as the non-bailable were executed, and this fact could not be brought to the notice of the Court in time. It has been submitted by Shri Alok Mishra that even though the Division Bench at Allahabad, while issuing mandatory directions has encroached upon the discretion to be exercised by the Magistrate under Section 390 Cr.P.C., and has also not taken into consideration the judgement of the Supreme Court in the case of *State of U.P. Vs. Poosu* [31], still the Division Bench has done substantial justice and the order passed by the Division Bench at Allahabad should not be set aside, rather it can be modified, leaving it open for the CJM to consider the facts and circumstances of each case where the respondent, an acquitted person is brought before him on execution of non-bailable warrant only because his Advocate failed to appear and assist the Court when the Appeal came up for hearing.

60. It has also been argued that in so far as question No. 4 is concerned, Sections 81, 82 and 83 of the Cr.P.C. provide the modes for securing the presence of the accused/convict and the legislature has already taken care of the situation and the Court may not be required to pass any order in this regard.

61. It has also been argued that in so far as the question regarding appointment of Amicus Curiae is concerned, the Supreme Court judgement in *Anokhi Lal Vs. State of Madhya Pradesh* [7] has dealt with the entire problem and laid down certain guidelines in paragraph 22 and 23 which must be followed by the Larger Bench and no separate orders are necessarily required to be passed.

62. Shri Alok Mishra has also placed reliance upon a judgement rendered by the Supreme Court in Criminal Appeal No.546 of 2011: *Mohd. Sukur Ali Vs. State of Assam* [33], decided on 24.02.2011, where the Supreme Court was considering the question – *"whether in a criminal case, if the counsel for the accused does not appear, for whatever reasons, should the case be decided in the absence of the counsel against the accused, or the Court should appoint Amicus Curiae to defend the accused?"*

The Supreme Court referred to a judgement rendered by the Supreme Court of United States of America in Powel v Alabama 287 U.S. 45 (1932); where it was observed: –

> *"What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired to be provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by Counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is in capable generally, of determining for himself, whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks the skill and knowledge adequately to prepare his defence, even though he may have a perfect one. He requires the guiding hand of a Counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a State or Federal Court were arbitrarily to refuse to hear a party by counsel, employed by, and appearing for him, it reasonably may not be doubted That such refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense."*

63. The above decision of the U.S. Supreme Court was cited with approval by the Supreme Court in *A.S. Mohammed Rafi Vs. State of Tamil Nadu and others* [34].

A similar view was also taken by the Supreme Court in *Man Singh and another Vs. State of Madhya Pradesh* [35], and in *Bapu Limbaji Kamble Vs. State of Maharashtra* [36].

64. Sri Ayush Tandon has drawn this Court's attention to Chapter XVIII Rule (1) and (2) of the Allahabad High Court Rules which relates to presentation of appeals and applications for revision in criminal matters. The Court may not admit an Appeal if it finds that it is not complete as requisite papers are missing or is otherwise it is not in order or has not been presented within time, and it may also decline to receive it or rejected or pass such order as it may consider fit. Where the Court finds that such petition or application is in order and has been presented in time and is accompanied by the requisite papers, it may in case of an Appeal, make an order admitting it and directing notice to be issued and in case of an application for revision, dismiss it or direct notice to be issued or pass such other order as it may think fit. The proviso to Rule (2) clarifies that nothing in the Rule shall preclude the Bench from dismissing any Appeal under Section 384 of the Cr.P.C., or require notice of an application to be issued where notice of such application has already been served upon the other party or his Advocate.

65. It has been argued that it is not always that presentation of Appeal leads to an order of admission. In case an Appeal is admitted, it is not always that a warrant or bailable or otherwise is issued. Sometimes the Court may only issue notice to the respondent while admitting the Appeal.

It has also been argued that though the Magistrate does not have power to release a person on bail, in case the High Court has ordered non-bailable warrants to be issued, he can take sureties and verify such

authorities and copies of papers may be presented to the High Court for further orders.

66. Learned Government Advocate Dr. V.K. Singh, along with Sri Umesh Verma, learned A.G.A.-1 and Sri Shivendra Shivam Singh Rathore, in answer to question No.1 framed by the Division Bench at Lucknow, referred to the Full Bench decision of the Bombay High Court in Criminal Bail Application No.265 of 2012 in Criminal Appeal No.812 of 2011: *Balakrishna Mahadev Lad Vs. State of Maharashtra* [37]. The judgement was delivered by Hon'ble Justice A.M. Khanvilkar (as he then was). It was observed by the Full Bench at Bombay High Court as follows:-

> *"Similarly, if the High Court were to issue, non-bailable warrants, recording reasons, indicative of committing the accused to prison only, even in that case, the subordinate Court, before whom the accused is produced or appears in response to warrant so issued, will have no option but to commit such accused to prison. The sessions Court, however, can exercise its judicial discretion when the High Court in its order has not indicated either way to commit the accused to prison or to admit him to bail pending the disposal of the Appeal. In other words, if the High Court, in its order merely directs initiation of action under Section 390 of the Code and if the accused is produced before the subordinate Court, it would be open to the subordinate Court, after taking into account all aspects of the matter, either to admit the accused to bail on such terms and conditions as it may deem fit, keeping in mind that the same are essential to secure the presence of the accused when required in the pending Appeal or to commit him to prison. That judicial discretion has to be exercised on the basis of settled parameters, inter-alia, keeping in mind the question, as to whether releasing the accused on bail would hamper securing his attendance pending the disposal of the Appeal, in the High Court.*

67. The Apex Court in the case of *State of U.P. Vs. Poosu and another*[31], has observed that it is not possible to computerize and reduce into immutable formula the diverse considerations on the basis of which this discretion must be exercised. By way of illustration, the Apex Court

has referred to factors such as, the nature and seriousness of the offence, the character of the evidence, interest of the public and the State. The High Court, while issuing a bailable or non-bailable warrant, also has to take into consideration the period during which the proceedings against the accused were pending in the Court below and the period which is likely to elapse before the Appeal comes up for final hearing in the High Court. The Apex Court has noted that directing rearrest of the accused even when the Appeal against acquittal is still pending for disposal or committing the accused to prison, does not in any way offend Article 21 or any other Fundamental Right guaranteed in Part III of the Constitution of India, for, it does not deprive the accused of his liberty in a manner otherwise than in accordance with the procedure established by Law."

68. With regard to question No.2, the learned A.G.A. has pointed out another paragraph of the judgement referred to hereinabove, namely *Balakrishna Mahadev Lad* [37], where it was observed: –

> *"We are of the considered opinion that Section 390 of the Court cannot be read to mean that the Sessions Judge, on production of the accused, has no option but to immediately release him on bail. Instead, we hold that the subordinate Court before whom the accused is produced first with regard to the warrant issued in terms of the order of the High Court, must exercise its judicial discretion on case to case basis and in particular keeping in mind, the order of the High Court, passed in the pending Appeal against acquittal in that regard. This would pre-suppose that the Sessions Judge, in an appropriate case, can commit the accused to prison till the disposal of the Appeal. Indeed, in that case, it will be open to the accused to question the decision of the Sessions Judge before the High Court, in which proceedings the High Court may consider the claim of the accused for grant of Bail. Thus understood, grant of bail by the subordinate Court is not a matter of right."*

69. With regard to question No.3, as referred to us, Sri Verma has argued that it would be appropriate to refer to Section 386 of the Cr.P.C. 1973, which talks about the powers of the Appellate Court, which is being reproduced hereunder: –

“**<u>Section 386, powers of the Appellate Court:-</u>**

“After perusing, such record and hearing the appellant or his pleader, if he appears, and the public prosecutor, if he appears, and in the case of an Appeal under Section 377 or Section 378, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the Appeal or may –

a. In an Appeal from an order of acquittal reverse such order and direct that further enquiry be made, or that the accused be retried or committed for trial, as the case, maybe, or find him guilty and pass sentence on him according to Law;

b. In an Appeal from a conviction –

(i) Reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction, subordinate to such appellate Court or commit for trial, or

(ii) Alter the finding, maintaining the sentence, or

(iii) Without altering the finding, alter the nature or the extent, of the sentence, but not so as to enhance the same;

c. In an Appeal for enhancement of sentence,

(i) Reverse the finding and sentence and acquit, or discharge the accused, or order him to be retried by a Court competent to try the offence,

(ii) Alter the finding maintaining the sentence,

(iii) With or without altering the finding, alter the nature or the extent of the sentence, so as to enhance or reduce the same.

d. In an Appeal from any other order, alter, or reverse such order;

e. Make any amendment or any consequential or incidental order that may be just or proper:

> Provided that the sentence shall not be enhanced, unless the accused has had an opportunity of showing cause against such enhancement:
>
> Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion, the accused has committed, than might have been inflicted for that offence by the Court, passing the order or sentence under the Appeal.

70. Sri Umesh Verma has argued that from a perusal of Section 386 of the Code, it is clear that while hearing the Appeal, the power of the High Court is very wide and there is no express/specific bar regarding the extent of such power, but as a matter of judicial discipline and propriety, the Appellate Court cannot assume extraordinary original criminal jurisdiction, not conferred in it while hearing the Criminal Appeal, as it affects the vital and valuable rights of the parties in such a manner which would cause serious injustice to them.

71. Sri Verma has pointed out that Under Chapter XVIII of the Allahabad High Court Rules, 1952, Part D, Rule 10 and Rule 11 deal with ordinary Criminal Jurisdiction of the Court other than that of Trials.

72. It has been argued by Sri Verma that the hearing of matters before Division Benches of the High Court are strictly done in accordance with the Rules governing allocation of business/roster allocation under Allahabad High Court Rules 1952, and if a particular subject matter is allocated to a particular Bench, the same must be heard and decided by that particular Bench, and not by any other Bench, and therefore, if cognizance of any matter is taken by a Bench to which the matter is not allocated by the Hon’ble Chief Justice, the order passed by that Bench would be in excess or in absence of jurisdiction and liable to be treated as a nullity.

73. It has been submitted by the learned counsel that the orders dated 18.01.2024 and 19.01.2024 at Allahabad have been passed as general directions by a Division Bench sitting in Criminal Appeal jurisdiction and, therefore, in excess of and in the absence of jurisdiction allocated to it by the Chief Justice.

74. It has also been argued that not only did the Division Bench at Allahabad exercise jurisdiction which was not vested in it by way of allocation of roster by the Chief Justice, it has passed orders which are without jurisdiction as the directions amount to taking away the discretion vested in the Magistrate under Cr.P.C. to grant or not to grant bail in serious offences.

There is a distinction between exercise of jurisdiction and existence of jurisdiction. Both are fundamentally different. Consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction may render a decision a nullity in law. The authority to decide a cause at all and not the decision rendered therein, is what makes up jurisdiction and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case shall be treated as an exercise of the jurisdiction.

75. In the matter of *Kiran Singh Vs. Chaman Paswan*, AIR 1954 Supreme Court 340, the Court observed that a defect of jurisdiction – – – strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by the consent of parties.“ The Division Bench at Allahabad was hearing a Criminal Appeal and had particularly limited jurisdiction of subject matter. It was considering the bail application during pendency of the Appeal and as such, there was no occasion for the Division Bench at Allahabad to travel beyond the subject matter, and also to pass directions on issues which were not there for its determination.

76. The Division Bench at Allahabad possibly invoked its jurisdiction conferred under Article 226, along with Section 482 of the Cr.P.C. Its directions were strictly not in accordance with the provisions of Sections 378, 386 and 390 of the Cr.P.C..

Invoking jurisdiction under Article 226 of the Constitution read with Section 482 of Cr.P.C. for issuing directions while sitting in Criminal Appeal jurisdiction was beyond the scope of jurisdiction of the Division Bench at Allahabad.

77. Shri Verma has pointed out that the directions that were issued by the Division Bench at Allahabad were without noticing the rights of the victims recognized by way of an Amendment to Section 372 with effect from 31.12.2009. A Court while hearing the bail application in a particular case does not have enough information as to issue a general mandatory direction which can have the potential to cause great harm to victims in appeals against conviction, or even appeals against a acquittal without them being afforded an actual and meaningful opportunity to place their case. In *State of Punjab Vs. Davinder Pal Singh Bhullar and others* [38], the High Court after deciding the Appeal continued to pass orders with respect to other offenders in unconnected matters, and the Supreme Court observed that such invocation of jurisdiction outside the purview of the main case was unjust. It observed *"an inherent power is not an omnibus power for opening a Pandora's box, that too for issues that are foreign to the main context. The invoking of power has to be for a purpose that is connected to a proceeding and not for sprouting an altogether new issue. A power cannot exceed its own authority beyond its own creation. – –."*

78. Such directions as have been issued by the Division Bench at Allahabad not only have far-reaching consequences on the administration of Justice, but also on the State Exchequer as the Division Bench had directed payment of costs /compensation to such prisoners who were put

behind the bars on the orders of the Court during the pendency of the Appeal.

79. The learned A.G.A. has pointed out that the answer to the question No.4 lies in Chapter VI of the Cr.P.C., wherein the Forms as well as the methods for securing the presence of the accused is prescribed. In addition, the Allahabad High Court Rules 1952, also empowered the High Court to secure presence of the accused through issuance of warrant during the pendency of the Appeal. Hence, issuing general directions to grant bail cannot be treated to be a sound exercise of power, and are liable to be set aside as being *per in-curium* that is having been issued in ignorance of statutory provisions as given under Chapter VI of the Cr.P.C., but also in ignorance of the observations made by the Constitution Bench in the case of *State of U.P. Vs. Poosu and another*[31].

80. Sri Verma, while answering question No.5 has referred to a judgement rendered by the Supreme Court in the case of *Krishna Kumar Vs. State of U.P.* in Criminal Appeal No.3757 of 2023 decided on 01.12.2023. It was observed by the Supreme Court that: –

> *"This Court has repeatedly taken the view that in a given case where an unwarranted adjournment is sought by the Advocate representing the accused in the Appeal against conviction, the Court has an option of appointing an Amicus Curiae to espouse the cause of the accused and hearing the Appeal on merits. The said course should have been adopted by the High Court."*

81. It has been argued by Sri Umesh Verma, learned A.G.A.-1 that there are four types of criminal trials in the Cr.P.C. 1973. Firstly, under Chapter 18, trial before a Court of Sessions is dealt with under Sections 225 to 237. Then under Chapter 19, Trial of warrant cases by Magistrate has been provided for in Sections 238 to 250. Likewise, under Chapter 20 Trial of Summons cases by Magistrate is provided under Sections 251 to

259, and under Chapter 21, summary trial cases are provided for in Sections 260 to 265.

"Summons cases" and "warrant cases" have been defined under Section 2 of the Code as under –

> 2(w) Summons case means a case relating to an offence, not being a warrant case;
>
> 2(x) Warrant case means a case related to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding ten years.

It has been argued that if we take into account the definition of Summons case and a Warrant case, it is evident that every Sessions Trial is a Warrant case and in case of acquittal when the Appeal is preferred by the State against the order of Sessions Judge, acquitting the accused persons, after the leave required under Section 378 sub-clause (3) is granted, a warrant of arrest is issued in terms of Section 390 Cr.P.C. by the High Court. It is a general practice adopted in the Allahabad High Court that at the first instance in an Appeal against the acquittal, bailable warrants are issued with a direction to the concerned Court to release the accused on filing of his personal bond and two sureties of the like amount to the satisfaction of the Court concerned, and only in a given case under compelling circumstances when the process of issuance of bailable warrant is being deliberately not complied with, and the orders passed by the High Court come to be frustrated, then the High Court to ensure the presence of the respondent, issues non-bailable warrant against the respondent and as such to that extent, the provision of Section 390 Cr.P.C. appears to be in tune with the scheme of the Cr.P.C. because after admission of an Appeal against acquittal and issuance of warrant/ non bailable warrant the status of the accused is restored as an accused of a warrant trial case as postulated in the judgement rendered by the Supreme Court in the case of *State of Vs. Poosu and another*[31].

82. Sri Verma has also drawn the attention of this Court to the First Schedule appended to the Cr.P.C., describing the Section, offence and punishment provided under the I.P.C. The table describes whether offence is cognizable or non-cognizable and whether bailable or non-bailable and also by what Court the offence is triable. It has also been argued that on the basis of classification of offences under the First Schedule and the Second Schedule of the Cr.P.C., it is abundantly clear that the offence under the I.P.C. or under any other laws for which punishment is of more than seven years or imprisonment for life or death has been prescribed as cognizable, non-bailable and triable by the Sessions Court (barring some exceptions like Section 467 I.P.C.). In these cases, normally the courts of Magistrate including Chief Judicial Magistrate, even at the pre-trial stage, avoid/refuse to exercise the jurisdiction to grant bail. Similarly, when in a case tried by the Sessions Court acquittal is recorded, which is challenged before the High Court by the State under Section 378 Cr.P.C. or challenged by a victim of the offence as prescribed under the amended provision of Section 372 Cr.P.C. and the High Court while entertaining the Appeal, after considering the facts and circumstances, is satisfied with the merits of that particular case admits the Appeal and directs for issuance of warrant of arrest against the accused/respondents in the light of the provisions of Section 390 Cr.P.C., it may also issue direction to the Magistrate to grant bail on certain terms prescribed in the order itself, and the concerned Court or the Magistrate is left with no option except to comply with the terms of the order issued by the High Court.

83. It has also been argued by Sri Umesh Verma that in certain special Statutes like the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act 1989, after an amendment was notified with the effect from 26.01.2016, and in another special Statute, namely National Investigation Agency Act, 2008, there is a provision for creation of special and exclusive jurisdiction in Special Courts and further a provision for special procedure for filing an Appeal from any judgement, sentence or

order, not being an interlocutory order, to the High Court, both on facts and on law. The distinction of an Appeal against a conviction or acquittal has been done away with in these special statues and as such either an accused aggrieved from an order of conviction or the State or victim/complainant, as the case maybe, feeling aggrieved by the order of a trial Court, may prefer an Appeal to the High Court under Section 14 A of the S.C./S.T. Act 1989 or under Section 21 of the National Investigating Agency Act 2008. Similarly, Special Courts for dealing with cases of M.P./M.L.A. have been created under the orders of the Supreme Court passed in a P.I.L. The special provisions regarding power and juridiction of a Special Court where a procedure is prescribed for treatment of the accused and the victim in the said special statutes, does require consideration while deciding issues involved in the instant Reference and answering the questions referred to this Full Bench.

84. Sri Umesh Verma has also drawn this Court's attention to the powers of the Appellate Court provided under Section 386 of the Cr.P.C.

It has been argued on the basis of Section 386 Cr.P.C. that it requires the presence of the appellant or a pleader/Advocate at the time of hearing of the Appeal and in case at the time of hearing of the Appeal, the appellant or his pleader does not appear to assist the Court in hearing of the Appeal the Appellate Court is empowered to issue a bailable or non bailable warrant taking into account the particular facts and circumstances of a case.

85. Sri Umesh Verma taking a divergent view to the arguments made by several other counsel who assisted this Court, argued that Chapter VI of the Cr.P.C. provides for process to compel appearance, and Part B relates to warrant of arrest, which is comprised of Sections 70 to 81. A reading of Sections 70 to 81 clearly demonstrates that they are made for the help of the Investigating Agency and the trial Court or Magistrate during the continuation of the investigation and thereafter for the assistance of the

Magistrate or the Trial Court at the stage of trial, where during the course of the proceeding at various stages, the presence of the accused is necessary. These provisions are not to be resorted to at the stage of Appeal wherein the accused after a full-fledged trial has either been convicted or acquitted. Sri Umesh Verma has drawn our attention to the language and text of various Forms of Warrant appended to the Cr.P.C. after the First and Second Schedule, which make this abundantly clear.

86. Reference has been made to Form No.2 relating to Sections 70 and 71, Form No.3 relating to Section 81. It has been argued that Sections 82 and 83 relate to proclamation of attachment of property of the accused if absconding, and have no application at the stage of hearing of an Appeal particularly in an Appeal filed against acquittal. Therefore, the directions issued by the Division Bench of this Court in paragraph 7 (a) and (b) of the judgement and order dated 18.01.2024 in the case of *State of U.P. Vs. Geeta Devi and another,* is not in accordance with the scheme of the Code and contrary to the provisions of special statutes like S.C./S.T. Act, N.I.A. Act and Special Courts created under them and also in respect of M.P./M.L.A. cases. It also violates the valuable rights of the victims of S.C./S.T. Act, 1989 and P.O.C.S.O. Act 2012, besides the victims who had been given an valuable right to prefer an Appeal against acquittal without asking for Leave to Appeal as provided in proviso to Section 372 Cr.P.C. The directions given in other sub paras, namely (c) and (d) also appear to be in excess of jurisdiction and have been passed in public interest while the Court was sitting in Criminal Appeal jurisdiction.

87. It has also been argued by Sri Umesh Verma that a Criminal Appeal is filed in the High Court against the order of the Sessions Court and not against the order of the C.J.M., the papers relating to the Criminal Appeal/ judgement in the Sessions Trial are preserved in the Court of Sessions and the CJM has no papers with him to assess the probability of the appellant accused continuing to appear before the Appellate Court or about his

future conduct and his cooperation in the disposal of the Appeal and, therefore, he cannot be given the discretion to grant bail in a case where the High Court has issued non-bailable warrants.

It has been argued that Section 81, 85 and 88 of the Cr.P.C. are meant for under trial prisoner alone.

88. Sri Umesh Verma has placed reliance upon a judgement entered in the case of *Amin Khan vs. State of Rajasthan,* where the Appellate Court had issued non-bailable warrant in the first instance looking into the heinous nature of the crime and also being *prima facie* dissatisfied with the judgement of the Trial Court. It has been submitted that if the Appellate Court has passed an order issuing non-bailable warrants, looking into the nature of the offence committed and the apparent erroneous judgement of the Trial Court, it would be a travesty of justice to allow the Chief Judicial Magistrate to grant bail to the accused. It has been emphasized that the C.J.M. can have discretion to grant bail only during trial under Sections 437 and 439 of the Cr.P.C., but when the Appeal is before the High Court, he must not be given discretion to grant bail on his own without there being a specific direction in this regard by the High Court.

89. It has been submitted that sureties submitted under Section 437-A are effective only for a period of six months and this Section was introduced only because the accused were non-traceable, after acquittal in most cases by the time the Appeal was filed before the higher Court. The counsel for the State Respondent has also pointed out Section 390 Cr.P.C. and the judgement rendered in *Surya Baksh Singh*. It has been argued that if the operation of the order of conviction is stayed by the Court on being *prima facie* satisfied with the the argument of the convicted appellant, then only because of non-appearance of the Counsel for the Appellant, it would not be proper to issue non-bailable warrants. It would be on the other hand required that Court should first cancel the bail order or issue

notice to the authorities, and then perhaps on failure of compliance of such orders and continued non-appearance of the appellant, thus, hampering the disposal of the Appeal, a non-bailable warrant could be issued. In *Surya Baksh Singh*, the Supreme Court observed that only after exhaustion of process under Section 446 of the Cr.P.C., the Court can decide the matter on merits.

90. It has also been argued by Sri Umesh Verma that an Appeal can be filed against conviction or against an acquittal or even for enhancement of sentence and under Section 384 and 385. On such Appeal being filed record should first be summoned. Referring to Sections 384, 385 and 386, the Supreme Court had in the case of *Mallikarjun* observed that summoning of records is necessary. It has also been argued that Section 437 and 439 are only confined to under trials. Also, Section 390 Cr.P.C. is applicable only at the stage of admission of the Appeal. Under Section 389, the convicting Court can release on bail and on furnishing sureties, but such sureties are only for a limited period.

91. Shri Verma has placed reliance upon judgement rendered in *Laxman Das Vs. Resham Chand Kalia and another* [39], and paragraph 24 thereof to argue that the High Court cannot command the Trial Court to grant bail and, thus, breach the independence of the Trial Court.

92. Sri Verma has buttressed his argument regarding the power of this High Court under Section 390 Cr.P.C. to suspend the order of acquittal or discharge passed by the Trial Court. He has referred to paragraph 11 of the judgement rendered in *State of Maharashtra Vs. Mahesh Kariman Tirky and others* [40], where the Supreme Court in para-11 observed that "it is not in dispute that even considering Section 390 Cr.P.C. and the decision of this Court in the *State of U.P. Vs. Poosu* [31], the Court in Appeal against acquittal may/can even suspend the order of acquittal/discharge passed by the Appellate Court…."

The principles may be said to be settled, the difficulty very often arises in their applicability. No two cases are alike. As stated by Lord Viscount Simon in 1952 (1) AER 1044 :-

> *"it must be remembered that every case is decided on its own facts, and expressions used, or even principles stated, when the Court is considering particular facts, cannot always be applied as if they were absolute rules applicable in all circumstances."*

93. Sri Verma has placed reliance upon paragraphs 355, 356, and 357 of the judgement rendered in *Laxman Das Chagan Lal Bhatia and others Vs. State* by the High Court of Bombay [41], which are as follows:

> *"355. – – – after filing the Appeal, he obtained bail from this Court. Within a short time, thereafter, he not only jumped bail, but has run away from this country and he is no longer subject to the process of this Court. The question is how his Appeal should be dealt with.*
>
> *"356. It is against all reason that this Court should be compelled to hear the Appeal on merits, even though the accused has, after obtaining bail removed himself out of the jurisdiction of this Court. If that was so, he would take a chance of success in the Appeal and return to the country triumphant if his Appeal is allowed, but if his Appeal is dismissed, he would say he cares little for the orders of the Court. Unless, therefore, there is any obligation on the Court to hear the Appeal, the Court would be justified in dismissing it only on this ground.*
>
> *"357. Section 423 (1) of the Criminal Procedure Code 1998 deals with the powers of the Court to dispose of an Appeal after it is admitted. It requires the Court to decide after perusing the record and hearing the appellant or his pleader if he appears. This Section would suggest, therefore, that even if the appellant does not appear to argue his Appeal, the Court ought to hear the Appeal on merits. It is because of this wording, that it has been held in a large number of cases that merely because the appellant does not appear, his Appeal cannot be dismissed for default. Even so, the principle of this Section cannot apply to the case of An appellant, who has obtained bail and jumped bail. Along with the Section must be read Section 561A, which speaks of the inherent power of the High Court to make such orders as maybe necessary to give effect to any order under the Code, how to prevent abuse of*

> *the process of any Court or otherwise to secure the ends of justice. It is undoubtedly an abuse of the process of this Court to obtain bail and then to leave its jurisdiction and render it impossible to enforce its orders. In as much as the other provisions of the Code do not limit this power of the High Court to prevent an abuse of the process of the Court, in our view, we will be justified in refusing to hear the Appeal on merits and dismiss it in Limine. In this connection, it may be noticed that the practice of the Court of Criminal Appeal in England, where the appellant escapes from prison and is not present at the hearing of the Appeal, is either to Adjourn the Appeal or to dismiss it according to the justice of the case. (See 1965 (3) AER 669) no doubt the English practice cannot have relevance when we have to construct the Code of Criminal Procedure. We have referred to it only to show that there can be no injustice in dismissing an Appeal, where the appellant has jumped bail and does not appear in Court. In the result, Appeal No. 625 of 1963, by accused No. 11 fails and is dismissed."*

In *Imtiyaz Raza Khan Vs. State of Maharashtra* [42], the Supreme Court was considering Article 21 and the right to proper legal representation on the part of the accused lodged in jail. The Court noted that because the Amicus Curiae does not have the advantage of having a dialogue with the accused, at times, it seriously hampers the efforts on the part of the Advocates. All such attempts to facilitate dialogue between the Counsel and his client would further the cause of justice and make legal aid meaningful. The Supreme Court observed:-

> *"We, therefore direct all Legal Services Authorities/Committees in every State to extend similar such facilities in every criminal case, wherever the accused is lodged in jail.They shall extend the facility of video conferencing between the Counsel on the one hand and the accused or anybody in the know of the matter on the other, so that the cause of justice is well served."*

94. We have heard learned counsel appearing before us at length and a perusal of the orders dated 18.01.2024 and 19.01.2024 passed by the Division Bench at Allahabad, would reveal that the said bench was not in agreement with the procedure followed by the Court in the said appeal

wherein the judgment of acquittal passed by the trial court has been challenged, as in the opinion of the division bench issuance of non-bailable warrants would mean that the police authority will execute them and produce the concerned person before the High Court. However, in the appeals before the division bench despite being acquitted by the trial court, the respondents/accused persons were in judicial custody for more than one year, as they were arrested in execution of non-bailable warrants issued by the High Court and while considering Section 390 of the Cr.P.C. and the law laid down by the Division Bench of the Bombay High Court, directed the Director, Judicial Training and Research Institute, Lucknow to impress upon the Chief Judicial Magistrates of the State to release such accused persons on bail who have been arrested in execution of non-bailable warrants issued by the trial court subject to them furnishing bail bonds and an undertaking to appear before the High Court. Similar directions were given with regard to those appellants who have been arrested in pursuance of the non-bailable warrants issued against the appellants in appeals preferred against conviction whorein sentence has been suspended by the High Court. The Division Bench at Allahabad appears to have passed above-mentioned orders in appeals preferred against acquittal of the accused persons.

95. The Division Bench at Lucknow appears to be more concerned with the far reaching consequences of the omnibus directions issued by the Division Bench at Allahabad in the above-mentioned criminal appeals and also with regard to the jurisdiction of the Magistrate to release an appellant on bail who has been arrested in execution of non-bailable warrants issued by the High Court either in appeal against conviction or in appeal against acquittal, exercising powers contained under Section 437 of the Code of 1973 and also whether general directions of such nature could have been issued in hearing of a appeal.

96. Now we proceed to consider questions referred to this bench and are of the view that question nos. 1, 2 and 3 are interconnected and must be considered conjointly, while question no.5 is with regard to the appointment of Amicus Curiae and should be dealt with separately. However, in our considered opinion, it is the question no.4 which must be dealt with precedence as all other questions appears to be emerging out of the same. We for the sake of convenience would deal the issue separately with regard to the criminal appeals filed against acquittal (U/s 372 and 378 of the CrPC) and appeal against conviction (U/s 374 CrPC).

<u>Appeal against acquittal</u>

97. In an appeal against acquittal if the same has been filed by the State under Section 378 of the Code of 1973 and after grant of necessary leave, the Court finds a *prima facie* case is emerging for reconsideration seeks presence of the accused, who has been acquitted by the trial court, Section 390 of the Cr.P.C. would come into play, which is being reproduced as under:-

> *"390. Arrest of accused in appeal from acquittal.- When an appeal is presented under Section 378, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail."*

98. Section 427 of the Code of 1898 corresponding to Section 390 of the Code of 1973, was considered in detail by Hon'ble Supreme Court in ***Poosu (supra)*** [31] and the issue before the Apex Court was whether while granting leave or to say Special Leave in certain cases the Court is having power to issue non-bailable warrants for the arrest of the accused person, who has been acquitted by the High Court and after in depth analysis of the issue, the Supreme Court was of the view that the power to cause the arrest and detention of the accused in prison, pending appeal against the order of acquittal is ancillary and necessary for the effective exercise of

jurisdiction in an appeal preferred against an order of acquittal. The Constitution Bench was also of the view that when the Court is satisfied that order of acquittal requires interference and process is required to be issued to the respondent/accused, his status as accused person would revive and his position would be the same as was before the Trial Court. However, while considering whether the presence of such accused person should be ensured by issuing bailable or non-bailable warrants, the same was left entirely on the discretion of the Court. The relevant extract of the observation of the Hon'ble Supreme Court in ***Poosu (supra)*** [31] is being reproduced as under:

> "……..w*hether in the circumstances of the case, the attendance of the accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant is a matter which rests entirely in the discretion of the Court. Although, the discretion is exercised judicially, it is not possible to computerise and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the Court would take into account the various factors such as, "the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, tampering with evidence, larger interest of the public and State"-see The State v. Capt. Jagjit Singh(2). In addition, the Court may also take into consideration the period during which the proceedings against the accused were pending in the courts below and the period which is likely to elapse before the appeal comes up for final hearing before this Court. In the context, it must be remembered that this over-riding discretionary jurisdiction under Article 136 is invoked sparingly, in exceptional cases, where the order of acquittal recorded by the High Court is perverse or clearly erroneous and results in a gross miscarriage of justice.*
>
> *"……… Nor do we (we do not) find any merit in the contention that an order directing the re-arrest and detention of an accused-respondent who had been acquitted by the High Court of a capital offence, in any way, offends Article 21 or any other fundamental right guaranteed in Part III of the Constitution. Such an order is made by this Court in the exercise of its plenary jurisdiction conferred by Article 136 and 142 of the Constitution. By no stretch*

> *of imagination can it be said that such an order deprives the accused-respondent of his liberty in a manner otherwise than in accordance with procedure established by law."*

99. Thus perusal of above constitution bench judgment rendered in Poosu (supra)[31] would reveal that in an appeal against acquittal, if the same has been preferred by the State and the Court find substance therein, it may secure the presence of the accused person by either issuing a bailable or non-bailable warrant as the case may be, depending upon the factual matrix of each case, but the ratio laid down in Poosu (supra) [31] in our considered opinion may never be construed to read in terms that a Court issuing process against an accused person acquitted by the trial court or by the High Court in an appeal preferred must necessarily issue bailable or non-bailable warrants, if his presence may be secured through any other mode e.g. summons or notice, as the case may be.

100. In our opinion the word 'may' occurred under Section 390 of the Code of 1973 may not be used as 'must' or 'shall' and in appropriate case the Court may also issue process of summons to procure the presence of the accused person before it, however, it will be within the discretion of the Court issuing process to either issue summons, bailable or non bailable warrants and in this regard no straight jacket formula of universal application may be formulated. Every criminal case is having its own factual matrix, circumstances and flavour and a decision in the back drop of the specific facts and circumstances of that case may be taken by the Court, having regard to the peculiarities of that very case.

101. Having regard to the specific facts and circumstances of a case process of summons, bailable warrants or even of non-bailable warrants may be issued under Section 390 Cr.P.C. against the accused persons to procure their presence, however, the Court issuing process would be obliged to state reasons if it chooses to issue non-bailable warrants, directly.

102. The Bombay High Court in ***Praneeta Prakash Navage v. State of Maharashtra*** [28]**,** while considering Sections 372, 378, 390 of Code of 1973 Cr.P.C. opined as under:-

> *"**16.** Thus, apart from inherent power of this Court under Section 482 of the Cr.P.C., in case of an appeal against acquittal governed by provision to Section 372 of the Cr.P.C., the power to order arrest and detention of the respondent accused in prison pending the final disposal of the appeal or directing his enlargement on bail, will have to be read as a power ancillary to and necessary for effective exercise of the power of appeal under the proviso to Section 372 of Cr.P.C. But for the existence of such an ancillary power, the right conferred by the legislature on the victim to prefer an appeal against acquittal will become ineffective and redundant. This cannot be the intention of the legislature.*
>
> *"**17.** However, while dealing with the power of issuing warrant and detaining the respondent accused in prison or enlarging him on bail, this Court will be naturally bound by the well settled law. One of the foremost considerations while exercising such power will be that an order of acquittal further strengthens the presumption of innocence of the accused. As in case of Section 390 of the Cr.P.C., it is not mandatory that at the time of admitting the appeal that power to arrest should be exercised in each case. The said power can be exercised at any stage of the appeal against acquittal. In the appeal under the proviso to Section 372, after appeal is admitted by this Court, notice of the appeal is required to be issued to the respondent accused. The question of exercising power as aforesaid, of issuing arrest warrant and detaining the respondent till disposal of the appeal or enlarging him on bail, will have to be exercised at appropriate stage after taking into consideration various aspects such as gravity of the offence, nature of the evidence adduced by the prosecution, background and criminal antecedents of the respondents, etc. No hard and fast rule can be laid down in that behalf. If after service of notice of the appeal under the proviso to Section 372, the respondent accused appears and is represented by an advocate and if there is an assurance given that the said respondent will appear at the time of final hearing, this Court can always postpone the action of issuing warrant against the concerned respondent. If this Court finds that, after service of notice of the appeal, the respondent does not cause appearance*

before the Court, at that stage, this Court can always issue warrant to the respondent and can either direct confinement of the respondent till disposal of the appeal or the release of the respondent on appropriate bail. It all depends on the facts and circumstances of each case. Suffice is to say that such a drastic power need not be exercised in every appeal at the stage of admitting the appeal, the reason being that in absence of applicability of Section 390, the exercise of the said power will be under Section 482 of the said Cr.P.C. The law is well settled that the power under Section 482 of the Cr.P.C. can be exercised sparingly and in rare cases.

***"18.** Now, we turn to the next category of appeals under the proviso to Section 372. The next category is of an order convicting the accused for a lesser offence. It is true that even in this category of appeals, inherent power as stated above can be exercised by this Court. However, in case of such appeals, there will be further constraints. If the accused has already undergone substantial sentence for the lesser offence, it will be an additional consideration for exercise of power of issuing warrant. If the respondent accused has preferred an appeal against the order of conviction and if he is enlarged on bail in such appeal, it is obvious that this Court may not exercise inherent power in the appeal preferred at the instance of the victim by ordering warrant to be issued against the respondent and directing his detention in prison.*

***"19.** As far as the third category of appeals against order of imposing inadequate compensation is concerned, we must note here that the power of issuing warrant and directing his confinement till the disposal of appeal cannot be exercised as the appeal is confined only to order granting inadequate compensation.*

***"20.** At this stage, we must add that, in case of all three categories of appeals, there is always a power conferred on this Court under Chapter VI of the Cr.P.C. to issue process for compelling the appearance of the respondent before the Court. We may hasten to add that the power under Chapter VI is of compelling the appearance before the Court and the said power is not a power to confine the respondent in custody till the disposal of the appeal. Therefore, all these three categories of appeal, if this Court finds that after service of notice appeal of the victim, the respondent has*

not caused appearance or after service of notice, respondent accused fails to appear, the Court can always take recourse to provisions of Chapter VI for procuring and compelling presence of the respondent accused before this Court.

***"23.** Considering the peculiar nature of the appeal under proviso to Section 372 of Cr.P.C., even if there is no specific direction by this Court while admitting the appeal to issue notice, it is obvious that notice of appeal will have to be served upon the respondent accused. After service of notice, the Registry will have to place such appeals before the concerned Court so that Court can ascertain whether the respondent accused has caused the appearance in the appeal on the basis of the notice of the appeal. If the Court finds that notwithstanding service of notice, the respondent has not caused appearance, this Court can always take action as we had discussed in earlier part of the judgment."*

103. The Division Bench of the Bombay High Court was of the view that in an appeal against acquittal or conviction under Section 378 or 374 of the Code of 1973 as the case may be, process under Chapter VI of the Code may be issued to compel the appearance of the accused before the Court, except in appeal against conviction in a lesser offence or appeal against inadequate compensation as the convict/ accused himself might have challenged the judgment and order of conviction by filing an appeal under Section 374 of the Code of Criminal Procedure and might have been released on bail by the appellate court., during the pendency of such appeal.

104. At this juncture it is also worthwhile to discuss the law propounded by the Hon'ble Supreme Court in ***State of Maharashtra Vs. Mahesh Kariman Tirki, (2022)10 SCC 207 has opined as under:***

"11. It cannot be disputed and it is not in dispute that even considering Section 390 Cr.P.C. and the decision of this Court in State of U.P. v. Poosu [State of U.P. v. Poosu, (1976) 3 SCC 1 : 1976 SCC (Cri) 368] , the appellate court in an appeal against acquittal may/can even suspend the order of acquittal/discharge

passed by the appellate court. Therefore, it is not disputed that this Court can suspend the judgment and order passed by the High Court acquitting/discharging the accused."

105. The Full Bench of the Bombay High Court in ***Balkrishna Mahadev Lad V. State of Maharashtra*** [37] while considering the same issue, has opined as under:-

"5.Notably, the above said observations have been made without referring to the legal position expounded by the Apex Court in the case of Poosu (supra). Indubitably, a person who is acquitted of the criminal charges, by a Court of law, should not remain in jail even for a day after acquittal. But, that does not necessarily follow that the subordinate Court, before whom the acquitted accused is produced, in connection with the order passed by the High Court in an appeal against his acquittal, cannot commit him to prison even if the fact situation so warrants.

"8. A bare perusal of this provision leaves no manner of doubt that the High Court is expected to exercise its judicial discretion on case to case basis to issue a warrant (bailable or non-bailable) directing that the accused be arrested and brought before it or be produced before the subordinate Court for compliance thereof. The opening part of this section makes it amply clear that (he judicial discretion can be exercised at any stage, after the presentation of the appeal under section 378 of the Code. Thus, presentation of such appeal is a sine qua non for exercise of this judicial discretion, in terms of section 390 of the Code."

106. In this regard the ratio settled by the Honb'le Supreme Court in ***Inder Mohan Goswami Vs. State of Uttaranchal*** [3] may be recalled wherein certain directions have been issued by the Apex Court in following paragraphs:-

"53. *Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:*

- *it is reasonable to believe that the person will not voluntarily appear in court; or*

• the police authorities are unable to find the person to serve him with a summon; or

• it is considered that the person could harm someone if not placed into custody immediately.

"54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

"55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants."

107. In ***Raghuvansh Dewanchand Bhasin Vs. State of Maharashtra*** [2], the Supreme Court placing reliance upon *Inder Mohan Gowswami* [3] observed that:-

"13. We deferentially concur with these directions, and emphasise that since these directions flow from the right to life and personal liberty, enshrined in Articles 21 and 22(1) of our Constitution, they need to be strictly complied with. However, we may hasten to add that these are only broad guidelines and not rigid rules of universal application when facts and behavioural patterns are bound to differ from case to case. Since discretion in this behalf is entrusted with the court, it is not advisable to lay down immutable formulae on the basis whereof discretion could be exercised. As aforesaid, it is for the court concerned to assess the situation and exercise discretion

> *judiciously, dispassionately and without prejudice. Viewed in this perspective, we regret to note that in the present case, having regard to nature of the complaint against the appellant and his stature in the community and the fact that admittedly the appellant was regularly attending the court proceedings, it was not a fit case where non-bailable warrant should have been issued by the Additional Chief Metropolitan Magistrate. In our opinion, the attendance of the appellant could have been secured by issuing summons or at best by a bailable warrant. We are, therefore, in complete agreement with the High Court that in the facts and circumstances of the case, issuance of non-bailable warrant was manifestly unjustified."*

108. Keeping in view the legal position discussed above, and in view of the Constitution Bench Judgment of Poosu (supra) [31] which is holding the field till today, depending upon the specific factual matrix of each case, in an appeal against acquittal, suitable process even of the nature of bailable or non-bailable warrants may be issued by the Court while securing the presence of accused persons under Section 390 Cr.P.C. and issuance of process (summons, bailable or non bailable warrants) would be the discretion of the Court.

<u>Appeal against conviction</u>

109. Section 374 of the Code of 1973 governs Appeal against the conviction and it says that an Appeal against conviction may be preferred either to the Sessions Court or High Court in the manner suggested therein.

110. In an Appeal against conviction generally the convicted appellant is already detained in prison unless he has been released on interim bail by the convicting court under Section 389(3) of the Code of 1973 and even in that case he would be required to obtain regular bail from the appellate court as he has only been released on interim bail by the convicting court only for the purpose of filing an appeal.

111. In both cases when an appellant is released on bail by the High Court, the custody of the convict is entrusted to his sureties. Here we are only concerned with those convict appellants who have been released on bail by this Court as the question we are considering relates to the course to be ordinarily adopted by the this Court for securing presence of a convict appellant who has been released on bail on default of his counsel to facilitate hearing of appeal filed by him.

112. Generally, the appeals against convictions, wherein the convict has been granted bail are listed with some amount of delay, especially the appeals pertaining to the Division Benches where the preparation of the paper book is also obligatory, having regard to the provision contained under Allahabad High Court Rules and when these appeals are listed the counsel for the appellant/ convict are generally not present and it is in the quest of providing an opportunity of being heard to the appellant coercive process of the nature of bailable or non-bailable warrants is issued by the High Court.

113. It is important to remember that Apex Court in ***Bani Singh Vs. State of U.P.*** [11] has emphasized the need of disposing criminal appeals on merits after hearing the counsel of the appellant or appellant himself and when the counsel for the appellant intentionally or unintentionally is not appearing in Court, the necessity of the presence of the appellant emerges to provide an opportunity of being heard to him. This view has been reiterated by the Hon'ble Supreme Court in the case of *K.S. Panduranga* [13] and *Surya Bux Singh* [12]. In view of the law laid down in these cases it had been settled that a criminal appeal, which has been admitted for hearing should not be dismissed for default or for non prosecution and should only be decided on merits and an opportunity for hearing would be provided to either appellant convict or to his counsel.

114. Now, the question, which stares us in the face, is as to what process be adopted against a convict appellant who is not represented by his counsel when his appeal is taken up by the Court for hearing and he has been released on bail by this Court. We may recall that in view of the law laid down in above cases in absence of his counsel opportunity of being heard is required to be provided to the appellant.

115. We may take cognizance of the fact that at High Court while releasing a convict on bail after suspending his sentence generally no condition is imposed on him to remain personally present before this court, unlike District Courts where a condition to remain personally present before the trial court or appellate court is generally placed on the appellant. In the absence of such a condition an appellant/ convict is not obliged to remain personally present before this Court on each and every date when his appeal is due to be taken up for hearing. In this scenario in the considered opinion of this Court in absence of any such condition in his bail order, the appellant may not be penalized for the default committed by his counsel.

116. Thus, if this Court requires personal presence of the convict/ appellant in order to provide him an opportunity of being heard as highlighted by the Apex Court in *Bani Singh* [11] , *Surya Bux Singh* [12] and *K. S. Panduranga* [13], a bailable warrant initially is required to be issued to such a convict appellant for his presence before this Court either to argue his case personally or to engage another counsel of his choice, but in our considered opinion at the outset without issuing a bailable warrant initially, a non-bailable warrant may not be issued against him.

117. We may reiterate that the personal liberty of a person could only be curtailed strictly in accordance with the procedure established by law and not otherwise. Hence, in absence of counsel of the appellant in an appeal against conviction wherein the appellant has been released on bail, no

warrant of arrest straightway could be issued for the presence of the appellant. Of course if such appellant, even after bailable warrant is issued is deliberately avoiding his appearance before the court, in that scenario suitable process even of the nature of non-bailable warrants or process under Sections 82 and 83 Cr.P.C. against property of the accused or under Section 446 of the Code of 1973 may be issued against him and his sureties.

It is clarified, at this juncture, that the court by virtue of power conferred under Section 439 (2) of the Code can also cancel the bail granted to an appellant if the situation so warrants, but on default of of his counsel non-bailable warrants straight away may not be issued against him.

118. Thus we answer the question no.4 in terms that having regard to the law propounded in *Poosu* (supra) [31] in an appeal against acquittal in an appropriate case coercive process even of the nature of bailable warrants or non-bailable warrants may be issued against the accused having regard to the peculiar facts and circumstances of such case, but it may not be construed that in all appeals against acquittal while summoning a person warrants would invariably be issued as in suitable cases, in the discretion of the Court summons may also be issued. However, in an appeal against conviction wherein an appellant has already been released on bail and his counsel has not appeared for arguing the appeal. Generally, no warrant of arrest could be straightaway issued against him and bailable warrants at the first instance must be issued against such convict appellant for the reason that he has already been released on bail by the court and no condition of his personal presence on each day of hearing has been imposed on him. Thus the question no.4 is answered accordingly.

119. Now, we shall consider Question Nos.1, 2 & 3 as under:-

While answering question no.4, we have already answered that in an appeal against acquittal while summoning the accused person under

Section 390 Cr.P.C. coercive process even of the nature of bailable warrant or non-bailable warrant may be issued against the appellant having regard to the peculiar facts and circumstances of each case but it may not be construed to mean that in each and every appeal against acquittal the accused person must be summoned in variably by issuing bailable or non-bailable warrants and in an appropriate case summons may also be issued and in appeal against conviction wherein an appellant has already been released on bail and his counsel is not appearing for arguing the appeal no warrant of arrest could be issued straightaway against him and only bailable warrant be issued at the first instance to ensure his representation.

120. We shall now deal with a situation where non-bailable warrants have been issued against an appellant in appeal against conviction or against accused person in appeal against acquittal, and as to whether such accused person or appellant against whom non-bailable warrants have been issued by this court, may be released on bail by the District Court or the Chief Judicial Magistrate concerned without any such stipulation occuring in the order of the High Court.

121. The Full Bench of Bombay High Court in ***Balkrishna Mahadev Lad***[37] has held as under:-

> *"……. when an accused is acquitted by the subordinate Court, after a full-fledged trial, the High Court, while issuing direction in exercise of powers under section 390 of the Code, may, in a given case, issue "bailable warrants" directing production of the accused before it or the subordinate Court for compliance thereof. If the accused is produced before the subordinate Court, pursuant to such "bailable warrants" issued by the High Court, the subordinate Court may release that accused on bail on terms and conditions which must be just and proper to secure the presence of the accused. Indeed, if the accused is unable to fulfil the terms and conditions for release on bail, the subordinate Court will be justified in directing committal of the accused to prison. However,*

he must soon thereafter intimate that fact to the High Court. Notwithstanding the power given to the subordinate Court under section 390 of the Code, it cannot direct that the accused be committed to prison even if he is capable of and willing to abide by the terms and conditions of bail. Further, if the High Court in its order issuing "bailable warrants" has already spelt out the terms and conditions then the subordinate Court cannot add to or relax such conditions, but is expected to ensure compliance of those directions of the High Court.

"10. *Similarly, if the High Court were to issue "non-bailable warrants" recording reasons indicative of committing the accused to prison only, even in that case, the subordinate Court, before whom the accused is produced or appears in response to warrant so issued, will have no option but to commit such accused to prison.*

"11. The Sessions Court, however, can exercise its judicial discretion when the High Court in its order has not indicated either way to commit the accused to prison or to admit him to bail, pending the disposal of the appeal. In other words, if the High Court, in its order, merely directs initiation of action under section 390 of the Code and if the accused is produced before the subordinate Court, it would be open to the subordinate Court, after taking into account all aspects of the matter, either to admit the accused to bail on such terms and conditions as it may be deem fit keeping in mind that the same are essential to secure the presence of the accused when required in the pending appeal or to commit him to prison. That judicial discretion has to be exercised on the basis of settled parameters and, inter alia, keeping in mind the question, as to whether releasing the accused on bail would not hamper securing his attendance pending the disposal of the appeal against acquittal in the High Court.

*****

"13. We are of the considered opinion that section 390 of the Code cannot be read to mean that the Sessions Judge, on production of the accused, has no option but to immediately release him on bail. Instead, we hold that the subordinate Court before whom the accused is produced pursuant to warrant issued in terms of order of the High Court, must exercise his judicial discretion on case to case basis and in particular keeping in mind

> ***the order of the High Court, passed in the pending appeal against acquittal in that regard. This would presuppose that the Sessions Judge, in appropriate case, can commit the accused to prison till the disposal of the appeal. Indeed, in that case, it will be open to the accused to question that decision of the Sessions Judge, before the High Court, in which proceedings, the High Court may consider the claim of the accused for grant of bail. Thus understood, grant of bail by the subordinate Court is not a matter of right."***
>
> ***(emphasis supplied)***

122. The general provisions of bail contained under Section 437 and 439 of the Code of 1973 are with regard to the grant of bail during the course of trial and suspension of sentence and consequential release of the convict on bail is enshrined under Section 389 of the Code of 1973 after his conviction by the trial court and on an appeal filed by such convict, the presence of the appellant accused is required. In appeal against acquittal if after finding substance in the appeal it is admitted or, if necessary, leave is granted and accused person acquitted by the trial court is summoned under Section 390 of the Code of 1973 to remain present before the appellate court and in appropriate cases even judgment of acquittal may be suspended.

123. It is clarified that in Code of 1973 no such nomenclature has been given as bailable or non-bailable warrants. Section 70 and 71 of the Cr.P.C. enshrined in Chapter VI of the Code of 1973 deals with the issuance of process and keeping in view the above mentioned provision it would only be the endorsement made on the warrant of arrest which could label it as either bailable or non-bailable warrant. Section 70 and 71 of Code of 1973, which appears to be relevent is reproduced as under:-

> *"70. Form of warrant of arrest and duration.—(1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court.*

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

"71. Power to direct security to be taken.—(1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state—

(a) the number of sureties;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound;

(c) the time at which he is to attend before the Court. (3) Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court."

124. Hon'ble Supreme Court in ***Raghuvansh Dewanchand Bhasin Vs. State of Maharashtra*** [2], has noticed this distinction in paragraphs no. 25, 26 of the report, the same are reproduced as under:-

"25. It is true that neither Section 70 nor Section 71 appearing in Chapter VI of the Code enumerating the processes to compel appearance as also Form 2 uses the expression like "non-bailable". Section 70 merely speaks of form of warrant of arrest, and ordains that it will remain in force until it is cancelled. Similarly, Section 71 talks of discretionary power of court to specify about the security to be taken in case the person is to be released on his arrest pursuant to the execution of the warrant issued under Section 70 of the Code. Sub-section (2) of Section 71 of the Code specifies the endorsements which can be made on a warrant. Nevertheless, we feel that the endorsement of the expression "non-bailable" on a warrant is to facilitate the executing authority as well as the person against whom the warrant is sought to be executed to make them aware as to the nature of the warrant that has been issued.

> *"26. In our view, merely because Form 2, issued under Section 476 of the Code, and set forth in the Second Schedule, nowhere uses the expression bailable or non-bailable warrant, that does not prohibit the courts from using the said word or expression while issuing the warrant or even to make endorsement to that effect on the warrant so issued. Any endorsement/variation, which is made on such warrant for the benefit of the person against whom the warrant is issued or the persons who are required to execute the warrant, would not render the warrant to be bad in law. What is material is that there is a power vested in the court to issue a warrant and that power is to be exercised judiciously depending upon the facts and circumstances of each case. Being so, merely because the warrant uses the expression like "non-bailable" and that such terminology is not to be found in either Section 70 or Section 71 of the Code that by itself cannot render the warrant bad in law. The argument is devoid of substance and is rejected accordingly."*

125. We are of the opinion that under Section 390 of the Code of 1973 the Court may direct that accused be arrested and brought before it or be produced before the subordinate court (trial court) for compliance thereof if the accused is arrested in connection with such bailable warrants issued by the court it would be lawful for the subordinate court to release him on bail and if he fails to comply with the terms, he may be confined in prison and when the High Court has issued non-bailable warrant indicating that the accused be committed to prison only, in that case the subordinate court would have no option but to commit him to custody/ prison.

126. It is further clarified that discretion may only be exercised by the trial court when the High Court has not indicated in its order either to commit the accused to prison or to admit him to bail, i. e. where the High Court has simply directed to take action under Section 390 of the Code of 1973.

127. It is clear that where the High Court has consciously issued non-bailable warrant for the confinement or arrest of an appellant, the intention of issuance of such warrant is to commit the accused/ appellant

or convict to prison and in that condition the Magistrate or the Sessions Judge as the case may be would have no jurisdiction to release such person on bail. It would be the terms of the order of the High Court under which non-bailable warrants have been issued which will govern the fate of the accused or appellant/convict and neither C.J.M. nor Session Judge would have jurisdiction to release such appellant or accused on bail irrespective of the fact whether the non-bailable warrant has been issued in an appeal against acquittal or in an appeal against conviction.

128. However, in case the appellant or accused is arrested and committed to prison as directed by the High Court, an information to that effect shall be given forthwith to the High Court of the arrest of such person by the Chief Judicial Magistrate or Session Judge concerned.

129. We are also of the considered view that stage of the appeal may not have any bearing on the discretion of the subordinate court as it would be solely for the High Court to assess the factual scenario and evidence in order to arrive at a decision as to whether a non-bailable warrant be issued in a particular case and once the non-bailable warrant has been issued by the High Court, the subordinate court would be divested of any jurisdiction to release such an appellant or accused person on bail, unless otherwise directed by the High Court.

130. So far as issuance of bailable warrant is concerned the discretion would always be of the subordinate court to release such an appellant or accused on bail subject to the condition that he will appear before the High Court on a particular day indicated by the High Court in its order. Thus question nos. 1, 2 and 3 are answered accordingly.

131. Now we shall consider the question no. 5, as under:-

132. Question no. 5, which has been framed by the Division Bench at Lucknow for consideration, may be broadly categorized in the following sub-heads:-

> *"(i) whether an appeal against conviction or acquittal can be heard by appointing amicus for convict/appellants or respondent/accused in appeal against conviction or in appeal against acquittal, as the case may be, when they are not appearing in court, without their consent?*
>
> *(ii) whether such amicus may even be appointed when the presence of a convict or accused can be secured without his consent and without any intimation to him? If so, under what circumstances?"*

133. To answer Question No. 5, first of all, we have to consider as to whether any appeal against conviction or acquittal may be heard by appointing amicus when the appellant or accused person, as the case may be, is not appearing in the court. This issue does not seem to be *res integra* any more.

134. In the case reported in ***Hussainara Khatoon Vs. State of Bihar*** [6], while considering Article 39-A of the Constitution of India, the Hon'ble Supreme Court has held in para-7 as under:-

> ***"7.*** *We may also refer to Article 39-A the fundamental constitutional directive which reads as follows:*
>
> > *"39-A. Equal justice and free legal aid.—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."*

135. In the case reported in ***(2012) 8 SCC 553*** (***Rajoo alias Ramakaant Vs. State of M.P.***) [1] the Hon'ble Supreme again emphasized the need of providing fair trial to the accused in following words.

The Supreme Court noted the constitutional amendment incorporating Article 39-A and also the promulgation of the Legal Services Authority Act, 1987 and then observed in paragraph-11 as follows:-

> ***"11.*** *It is important to note in this context that Sections 12 and 13 of the Act do not make any distinction between the trial stage and the appellate stage for providing legal services. In other words, an eligible person is entitled to legal services at any stage of the proceedings which he or she is prosecuting or defending. In fact the Supreme Court Legal Services Committee provides legal assistance to eligible persons in this Court. This makes it abundantly clear that legal services shall be provided to an eligible person at all stages of the proceedings, trial as well as appellate. It is also important to note that in view of the constitutional mandate of Article 39-A, legal services or legal aid is provided to an eligible person free of cost."*

136. Requirement of providing free & fair trial with fair and just procedure has also been highlighted by the Apex Court in the case reported in ***Khatri and others Vs. State of Bihar and others*** [43] and in the case reported in ***Suk Das Vs. UT of Arunachal Pradesh*** [44]. In these cases the trial was held vitiated as legal representation was not provided to the accused persons.

137. In the case reported in ***Zahira Habibullah Sheikh & Anr vs State Of Gujarat & Ors*** [8], Hon'ble Supreme Court has highlighted the importance of fair trial and procedure not only to an accused but to all stakeholders, including the victim of the crime.

138. Thus, it is well accepted that right to free legal aid or service is an essential ingredient of free & fair trial and procedure and is implicit under Article 21 of the Constitution of India. The trial and procedure adopted in trial or appeal must reflect and should ensure that innocent persons are protected and guilty persons are punished.

139. In the case reported in ***Bani Singh and others Vs. State of U.P.*** [11], while finding conflict between the two decisions of the Benches of the same strength i.e. in the cases ***Shyam Deo Pandey Vs. State of Bihar*** [45] and ***Ram Naresh Yadav Vs. State of Bihar*** [46]**,** the Supreme Court has resolved the same in paras 13, 14, 15 and 16 of the report, which are being reproduced herein below:-

> ***"13.*** *What then is the area of conflict between the two decisions of this Court? In Shyam Deo case [(1971) 1 SCC 855], this Court ruled that once the appellate court has admitted the appeal to be heard on merits, it cannot dismiss the appeal for non-prosecution for non-appearance of the appellant or his counsel, but must dispose of the appeal on merits after examining the record of the case. It next held that if the appellant or his counsel is absent, the appellate court is not bound to adjourn the appeal but it can dispose it of on merits after perusing the record. In Ram Naresh Yadav case [AIR 1987 SC 1500] , the Court did not analyse the relevant provisions of the Code nor did it notice the view taken in Shyam Deo case [(1971) 1 SCC 855] but held that if the appellant's counsel is absent, the proper course would be to dismiss the appeal for non-prosecution but not on merits; it can be disposed of on merits only after hearing the appellant or his counsel or after appointing another counsel at State cost to argue the case on behalf of the accused.*
>
> ***"14.*** *We have carefully considered the view expressed in the said two decisions of this Court and, we may state that the view taken in Shyam Deo case [(1971) 1 SCC 855] appears to be sound except for a minor clarification which we consider necessary to mention. The plain language of Section 385 makes it clear that if the appellate court does not consider the appeal fit for summary dismissal, it 'must' call for the record and Section 386 mandates that after the record is received, the appellate court may dispose of the appeal after hearing the accused or his counsel.* ***Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the appellate court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but***

by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. *Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav case [AIR 1987 SC 1500] that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution.*

"15. Secondly, the law expects the appellate court to give a hearing to the appellant or his counsel, if he is present, and to the public prosecutor, if he is present, before disposal of the appeal on merits. Section 385 posits that if the appeal is not dismissed summarily, the appellate court shall cause notice of the time and place at which the appeal will be heard to be given to the appellant or his pleader. *Section 386 then provides that the appellate court shall, after perusing the record, hear the appellant or his pleader, if he appears. It will be noticed that Section 385 provides for a notice of the time and place of hearing of the appeal to be given to either the appellant or his pleader and not to both presumably because notice to the pleader was also considered sufficient since he was representing the appellant. So also Section 386 provides for a hearing to be given to the appellant or his lawyer, if he is present, and both need not be heard. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing.* ***This is the requirement of the Code on a plain reading of Sections 385-386 of the Code. The law does not enjoin that the court shall adjourn the case if both the appellant and his lawyer are absent. If the court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial court.*** *We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused/appellant if his lawyer is not present.* ***If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so.*** *We are, therefore, of the*

opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav case [AIR 1987 SC 1500] did not apply the provisions of Sections 385-386 of the Code correctly when it indicated that the appellate court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent.

"16. Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again till the court issues a warrant for the appellant's presence. A complaint to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too would need the presence of the appellant for instructions and that would place the court in the same situation. *Such a procedure can, therefore, prove cumbersome and can promote indiscipline.* ***Even if a case is decided on merits in the absence of the appellant, the higher court can remedy the situation if there has been a failure of justice.*** *This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted."*

(emphasis supplied by us)

140. In the case of ***Dharam Pal and others Vs. State of Uttar Pradesh[47],*** while considering the issue of non-representation of appellant before the High Court as his counsel informed that appellant is not responding to various letters written by him and High Court decided the appeal on merits after hearing the public prosecutor.

The Supreme Court after noting the provisions of Section 385 and 386 of the Cr.P.C., observed as under:-

"Having examined the provisions under Sections 385 and 386 of the Code, as noted hereinabove, and applying the principles laid down by this Court in Bani Singh [(1996) 4 SCC 720] we are not in agreement with the argument advanced by the learned counsel for the appellants that the High Court ought not to have decided the appeal on merits in the absence of the appellants as the High Court

had no power or jurisdiction under Sections 385 or 386 of the Code to do so.

"11. *…….Even if we assume that the notice of appeal was not served on the appellants, then also, it was an admitted position that the learned counsel for the appellants appeared for them to prosecute the appeal and therefore, after appearance of the learned counsel for the appellants, it must be held that the notice of appeal was duly served. At the risk of repetition, we may note that the learned counsel for the appellants submitted before the High Court that despite repeated reminders to the appellants, the appellants were not responding and therefore, the learned counsel for the appellants expressed his inability to argue the case before the High Court.*

"13. *While dealing with the procedure for disposing of a criminal appeal, this Court in Bani Singh case [(1996) 4 SCC 720] has clearly laid down that the dismissal of an appeal for default or non-prosecution without going into the merits of the case is clearly illegal and that the appellate court must dispose of the appeal on merits after perusal and scrutiny of record and after giving a hearing to the parties, if present, before disposal of the appeal on merits. This Court, in that decision, further held that the appellate court must dispose of the appeal after perusal of the record and judgment of the trial court even if the appellant or his counsel was not present at the time of hearing of the appeal. The only exception, as we find from the aforesaid decision of this Court, is that if the appellant is in jail and his counsel is not present, the court should adjourn the case to facilitate the appearance of the appellant.*

"14. *There is yet another exception to this rule, namely, that in an appropriate case, the court can appoint a lawyer at the State's expense to assist the court. Therefore, the High Court, in our view, was justified in taking the assistance of the Assistant Government Advocate and after taking such assistance and considering the entire evidence on record, the High Court passed the judgment under appeal before us holding that the appellants were guilty of the offence, not under Sections 302/34 IPC but under Section 304 Part II IPC and directed them to undergo 7 years' rigorous imprisonment. In doing so, the High Court affirmed the findings of the trial court but differed on the point of the offence committed by*

the appellants and the corresponding punishment to be awarded to them."

141. In the case reported in (***K. Muruganandam and others v. State Represented by the Deputy Superintendent of Police and another)*** [5], while emphasizing the need that a criminal appeal should not be dismissed for non-prosecution, it was held in para-6 as under:

> *"6. It is well settled that if the accused does not appear through counsel appointed by him/her, the Court is obliged to proceed with the hearing of the case only after appointing an Amicus Curiae, but cannot dismiss the appeal merely because of non-representation or default of the advocate for the accused (see Kabira v. State of U.P. [Kabira v. State of U.P., 1981 Supp SCC 76] and Mohd. Sukur Ali v. State of Assam [Mohd. Sukur Ali v. State of Assam, (2011) 4 SCC 729])."*

142. In the case reported in ***Kabira Vs. State of Uttar Pradesh*** [32] where an appeal has been dismissed by the High Court in default of appearance of the appellant a note of caution has been given by the Hon'ble Supreme Court.

> **"***…….We are, therefore, of the view that there has not been a proper disposal of the appeal preferred by the appellant. The appeal could not be dismissed by the learned Judge for default of appearance. If the appellant was not present, the learned Judge should have appointed some advocate as amicus curiae and then proceeded to dispose of the appeal on merits. The order dated August 7, 1979 passed by the learned Judge dismissing the appeal, as also the reasoned judgment bearing the date August 7, 1979 given by the learned Judge must accordingly be set aside."*

143. The settled view appears to be that the law expects an appellate court to give hearing to the appellant or his counsel, if he is present and, also to the public prosecutor before disposal of appeal on merits as law postulates that if appeal has not been dismissed summarily under section 384 of the Code of 1973 the appellate court shall cause notice of time and place, on which the appeal would be heard, to be notified (under section 385 of Code of 1973) to the appellant or his counsel and also that law

does not enjoin that the appeal be adjourned in absence of appellant (who may be on bail) or his counsel and the same may be disposed of after perusing the record and judgment of the trial court. However, an appellant, who is in jail, would have to be given an opportunity to argue the case himself or to engage some other counsel and in appropriate cases service of counsel at State expense (Amicus) may also be provided to such an convict or accused.

144. In ***K.S. Panduranga Vs. State of Karnataka*** [13], while considering the issue as to whether in absence of counsel for the appellant the appeal may be decided on merits, without appointing any amicus and after considering the law laid down in the case of ***Mohd. Sukur Ali Vs. State of Assam*** [33]**,** *Bani Singh Vs. State of U.P.*[11], *Ram Naresh Yadav Vs. State of Bihar*[46] and ***Bapu Limbaji Kamble Vs. State of Maharashtra*** [36] opined in para-19 (19.1 to 19.6), 20 and 32 as under:-

> ***"19.*** *From the aforesaid decision in Bani Singh [(1996) 4 SCC 720 : 1996 SCC (Cri) 848 : AIR 1996 SC 2439] , the principles that can be culled out are:*
>
> ***19.1.*** *That the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;*
>
> ***19.2.*** *That the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;*
>
> ***19.3.*** *That the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;*
>
> ***19.4.*** *That it can dispose of the appeal after perusing the record and judgment of the trial court;*
>
> ***19.5.*** *That if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant-accused if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to*

assist it, nothing in law would preclude the court from doing so; and

***19.6.** That if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation.*

***20.** In Bapu Limbaji Kamble [(2005) 11 SCC 413 and Man Singh [(2008) 9 SCC 542], this Court has not laid down as a principle that it is absolutely impermissible on the part of the High Court to advert to merits in a criminal appeal in the absence of the counsel for the appellant.*

***32.** In view of the aforesaid enunciation of law, it can safely be concluded that the dictum in Mohd. Sukur Ali [(2011) 4 SCC 729] to the effect that the court cannot decide a criminal appeal in the absence of the counsel for the accused and that too if the counsel does not appear deliberately or shows negligence in appearing, being contrary to the ratio laid down by the larger Bench in Bani Singh [(1996) 4 SCC 720], is per incuriam. We may hasten to clarify that barring the said aspect, we do not intend to say anything on the said judgment as far as engagement of amicus curiae or the decision rendered regard being had to the obtaining factual matrix therein or the role of the Bar Association or the lawyers. Thus, the contention of the learned counsel for the appellant that the High Court should not have decided the appeal on its merits without the presence of the counsel does not deserve acceptance. That apart, it is noticeable that after the judgment was dictated in open court, the counsel appeared and he was allowed to put forth his submissions and the same have been dealt with."*

145. In the case reported in ***Surya Baksh Singh Vs. State of Uttar Pradesh*** [12] , the Hon'ble Supreme Court was dealing with a situation where convict and his counsel was absent and appellant's appeal was dismissed by the High Court on merits. Hon'ble Supreme Court had taken a comprehensive view of all the precedents and the law in paras-3, 6, 7, 12, 13, 14, 15, 16 and 24 which are reproduced herein below:-

*"**3.** It is necessary to distinguish dismissal of appeals in instances where steps have been taken by the court for securing the presence of the appellant by coercive means, including the issuance of non-*

bailable warrants or initiation of proceedings for declaring the appellant a proclaimed offender by recourse to Part C of Chapter VI of the Code of Criminal Procedure, 1973 ("CrPC", for short) on the one hand, and those where the appellant may incidentally and unwittingly be absent when his appeal is called on for hearing. The malaise which we are perturbed about is the wilful withdrawal of the convict from the appellate proceedings initiated by him after he has succeeded in gaining his enlargement on bail or exemption from surrender.

***"6.** Section 386 CrPC is of importance for the purposes before us. It requires the appellate court to peruse the records, and hear the appellant or his pleader if he appears; thereafter it may dismiss the appeal if it considers that there is insufficient ground for interference. In the case of an appeal from an order of acquittal (State appeals in curial parlance) it may reverse the order and direct that further inquiry be carried out or that the accused be retried or committed for trial. Even in the case of an appeal from an order of acquittal the appellate court is competent to find him guilty and pass sentence on him according to law. The proviso to this section prescribes that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such a proposal, thereby mandating that an accused must be present and must be heard if an order of acquittal is to be upturned and reversed. It is thus significant, and so we reiterate, that the legislature has cast an obligation on the appellate court to decide an appeal on its merits only in the case of death references, regardless of whether or not an appeal has been preferred by the convict.*

***"7.** Last, but not the least in our appreciation of the law, Section 482 CrPC stands in solitary splendour. It preserves the inherent power of the High Court. It enunciates that nothing in CrPC shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary, firstly, to "give effect to any order under CrPC", words which are not to be found in the Code of Civil Procedure, 1908 (hereafter referred to as "CPC"). Ergo, the High Court can, while exercising inherent powers in its criminal jurisdiction, take all necessary steps for enforcing compliance with its orders. For salutary reason Section 482 CrPC makes the criminal court much more effective and all pervasive*

than the civil court insofar as ensuring obedience of its orders is concerned. Secondly, Section 482 clarifies that CrPC does not circumscribe the actions available to the High Court to prevent abuse of its process, from the inception of proceedings till their culmination. Judicial process includes compelling a respondent to appear before it. When the Court encounters a recalcitrant appellant/convict who shows negligible interest in prosecuting his appeal, none of the sections in Chapter XXIX CrPC dealing with appeals, precludes or dissuades it from dismissing the appeals. It seems to us that passing such orders would eventually make it clear to all that intentional and repeated failure to prosecute the appeal would inexorably lead not merely to incarceration but more importantly to the confirmation of the conviction and sentence consequent on the dismissal of the appeal. Thirdly, none of the provisions of CrPC can possibly limit the power of the High Court to otherwise secure the ends of justice. While it is not possible to define the concept of "justice", suffice it to say that it encompasses not just the rights of the convict, but also of the victims of crime as well as of the law abiding section of society who look towards the courts as vital instruments for preservation of peace and the curtailment or containment of crime by punishing those who transgress the law. If the convicts can circumvent the consequence of their conviction, peace, tranquillity and harmony in society will be reduced to a chimera. Section 482 emblazons the difference between preventing the abuse of the jural process on the one hand and securing of the ends of justice on the other. It appears to us that Section 482 CrPC has not been given due importance in combating the rampant malpractice of filing appeals only for scotching sentences imposed by criminal courts.

***"12.** Indeed, the Court in Bani Singh case [Bani Singh v. State of U.P., (1996) 4 SCC 720] was not confronted by the wilful abscondence of the appellant concerned. It is noteworthy that the High Court had not taken steps calculated to secure the presence of the appellant before it. On the contrary it had palpably adopted the less tedious course of simply dismissing the appeal. Signally, the Court had observed that in order to enforce discipline the appeal could be dismissed for non-prosecution. There was no material to manifest that the appellant had abandoned his appeal or had no intention to prosecute it. In Bani Singh attention of the Court was not drawn to the views of a coordinate Bench in Kishan Singh*

[Kishan Singh v. State of U.P., (1996) 9 SCC 372] decided four years previously on 2-11-1992. Having carefully read through both the opinions we think it important to clarify that Bani Singh does not cogitate or reflect upon the options available to the Court which is faced with a recalcitrant appellant who is not prosecuting his appeal, in flagrant violation and abuse of the bail orders granted in his favour. Kishan Singh deals precisely with the options open to the appellate court at the preliminary hearing of an appeal.

***"13.** Any discourse on this aspect of the law would be incomplete without appreciating and assimilating Dharam Pal v. State of U.P.. The contention canvassed on behalf of the accused was that a miscarriage of justice had occurred since the appellant had not been served with notice of the appeal by the High Court, which nevertheless decided the appeal ex parte. Reference was made to Bani Singh, as also to Chapter XXIX of CrPC in general, and Sections 385 and 386 in particular; conspicuously Section 482 CrPC was not even mentioned. The learned counsel for Dharam Pal had expressed his inability to argue the case before the High Court. As in the case in hand, this Court had perused the impugned judgment of the High Court and found it to be well-merited and duly predicated on a careful consideration of the material on record. It was observed that:*

> *"15. ... The position, of course, would have been different if the High Court had simply dismissed the appeal without going into the merits. ... That being the position, it cannot be said that the High Court had ignored the basic principles of criminal justice while disposing of the appeal ex parte."*

***"14.** Dharam Pal [Dharam Pal v. State of U.P., (2008) 17 SCC 337] and for that matter Bani Singh [Bani Singh v. State of U.P., (1996) 4 SCC 720] or Shyam Deo Pandey [Shyam Deo Pandey v. State of Bihar, (1971) 1 SCC 855] neither proscribe the invocation of Section 482 CrPC nor opine that dismissal of an appeal under Section 482, for good reasons which are lucidly spelt out, is improper. It has not hithertofore even been considered that Section 482 CrPC should be applied in circumstances of the wilful abscondence of the appellant/convict in contumacious and deliberate disregard and disobedience of the terms and conditions on which he was enlarged on bail or exempted from surrender.*

"15. *The discussion would not be complete without noticing the orders in Parasuram Patel v. State of Orissa [(1994) 4 SCC 664] and Madan Lal Kapoor v. Rajiv Thapar [(2007) 7 SCC 623] . In neither of these cases had the appellate court taken steps available to it to ensure the attendance of the appellant. Instead, it appears that the High Court concerned had adopted the obviously less tedious approach of dismissing the appeals only because neither the appellant nor his counsel were present when the case was called on for hearing. The Court did not ruminate upon the curial malpractice which has now become endemic viz. the filing of appeals by convicts with the obvious intent to frustrate and circumvent sentences passed by criminal courts.*

"16. *We cannot close our eyes to the reality that less than twenty per cent of prosecutions are successful; the rest are futile largely because of inept, shoddy or substandard investigation and prosecution. Even in cases where the prosecution succeeds in proving the guilt of the accused, punishment is emasculated by convicts not because of their succeeding in having their conviction overturned and reversed by the appellate court, but by going underground and disappearing from society after receiving reprieve from incarceration from the appellate court. We are convinced that the interests of society at large are being repeatedly sacrificed for the exaggerated, if not misplaced concern for what is fashionably termed as "human rights" of convicts. Recent judgments of the Court contain a perceptible dilution of legal principles such as the right of silence of the accused. The Supreme Court has, in several cases, departed from this rule in enunciating, inter alia, that the accused are duty-bound to give a valid explanation of facts within their specific and personal knowledge in order to dispel doubts on their complicity. Even half a century ago this would have been a jural anathema. Given the woeful success rate of the prosecution, if even the relatively niggard number of convicts are permitted to circumvent their sentences, crime is certain to envelop society. Law is dynamic and not immutable or static. It constantly adapts itself to critically changing compulsions of society.*

"24. It seems to us that it is necessary for the appellate court which is confronted with the absence of the convict as well as his counsel, to immediately proceed against the persons who stood surety at the time when the convict was granted bail, as this may lead to his

discovery and production in court. If even this exercise fails to locate and bring forth the convict, the appellate court is empowered to dismiss the appeal. We fully and respectfully concur with the recent elucidation of the law, profound yet perspicuous, in K.S. Panduranga v. State of Karnataka."

146. Thus, apart from what has been highlighted in the case of *Bani Singh and others Vs. State of U.P.* [11], it was resolved in *Surya Baksh Singh Vs. State of Uttar Pradesh* [12] while concurring with *Bani Singh and others Vs. State of U.P.* [11] that on absence of appellant and his counsel on the date of listing, the court must at once seek the presence of the appellant in court and for this purpose may proceed against his sureties and when, even after efforts, presence of appellant could not be secured, the court may dispose the appeal on merits and when the convict is in jail the court may adjourn the hearing to facilitate the appearance of counsel and in discretion of the court Amicus may also be appointed.

147. In the case of ***Christopher Raj Vs. K. Vijayakumar*** [48], when the appeal against acquittal was decided by the High Court in absence of respondent-accused, it was highlighted in para-8 as under:-

"8. *Admittedly, the appellant-accused did not appear in the criminal appeal before the High Court. When the accused has not entered appearance in the High Court, in our view, the High Court should have issued second notice to the appellant-accused or the High Court Legal Services Committee to appoint an advocate or the High Court could have taken the assistance of Amicus Curiae. When the accused was not represented, without appointing any counsel as Amicus Curiae to defend the accused, the High Court ought not to have decided the criminal appeal on merits; more so, when the appellant-accused had the benefit of acquittal. The High Court erred in reversing the acquittal without affording any opportunity to the appellant-accused or by appointing an Amicus Curiae to argue the matter on his behalf."*

148. In another important case reported in ***Anokhilal Vs. State of Madhya Pradesh*** [7] while considering the issue of appointment of amicus, when the appellant-convict and his counsel is not appearing and providing sufficient and reasonable time to him to achieve fair trial, the Apex Court opined in paras 31 (31.1 to 31.4), which are reproduced herein below:-

> ***"31.*** *Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:*
>
> ***31.1.*** *In all cases where there is a possibility of life sentence or death sentence, learned advocates who have put in minimum of 10 years' practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.*
>
> ***"31.2.*** *In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.*
>
> ***"31.3.*** *Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard-and-fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.*
>
> ***"31.4.*** *Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the accused concerned. Such interactions may prove to be helpful as was noticed in Imtiyaz Ramzan Khan [Imtiyaz Ramzan Khan v. State of Maharashtra, (2018) 9 SCC 160 : (2018) 3 SCC (Cri) 721] ."*

149. Certain observations were made in *Anokhi Lal* which have again been explained in Criminal Appeal No.771 of 2024: *Ashok Vs. State of U.P.*, 2024 SCC OnLine 3580.

The Supreme Court while acquitting the accused, Ashok had found that there was a failure on the part of the State to provide timely legal to the Appellant. They also found the quality of legal aid given to him to be

poor. The Court referred to the observations made by it in *Hussainara Khatoon* and then *M.H. Hoskote Vs. State of Maharashtra*, 1978 (3) SCC 544, where it had been observed in paragraph-25 that :-

> *"25. If a prisoner sentenced to imprisonment, is virtually unable to exercise, constitutional and statutory right of Appeal, inclusive of Special Leave to Appeal, for want of legal assistance, there is implicit in the Court under Article 142 read with Article 21 and 39A of the Constitution, power to assign counsel for such imprisoned individual for doing complete Justice. This is a necessary incident of the right of Appeal conferred by the Code and allowed by Article 136 of the Constitution. The inference is enough that this is a State's duty and not Government charity. Equally affirmative is the implication that while legal services must be free to the beneficiary, the lawyer himself has to be reasonably remunerated for his services. Surely, the profession has a public commitment to the people, but may depend upon philanthropy of its members. Their services, specially when they are on behalf of the State must be paid for. Naturally, the State's concern is that the fees must be a reasonable sum that the Court may fix when assigning counsel to the prisoner. Of course, the Court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country while free legal services are given, it is not done in all cases, but only where public Justice suffers otherwise. That discretion resides in the Court."*

Referring to the judgement in *Anokhilal Vs. State of Madhya Pradesh* [7] and the observations made in paragraph 11 and paragraph 20 thereof, it was also observed that the time granted to the *Amicus Curiae* in some cases to prepare for the defence was completely insufficient and that the award of sentence of death resulted in deprivation of life of the accused and was in the breach of the procedure established by Law referring to the judgement in the case of *Bashera Vs. State of U.P.,* 1969 (1) SCR 32 and the judgement rendered by Andhra Pradesh High Court in *Alla Nageshwar Rao,* AIR 1957 AP 505; it was stated that mere formal compliance of the rule under which sufficient time had to be given to the

counsel to prepare for the defence would not carry out the object underlying the rule. It was further stated that opportunity must be real where the Counsel is given sufficient and adequate time to prepare. It was observed that if the trial Court makes substantial progress in the matter on the very day on which Counsel was engaged as *Amicus Curiae,* it could not be said that sufficient opportunity was given to the counsel to prepare the matter.

The Supreme Court in *Ashok* (supra) referred to paragraph 31 of the judgement rendered in *Anokhi Lal* and the observation made therein that in all cases whether there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years practice at the Bar alone be considered to be appointed as Amicus Curiae, or through Legal Services Authority to represent an accused and in all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as *Amicus Curiae.* The Supreme Court referred to Sections 303 and 304 of the Cr.P.C. and Section 340 and 341 of the Bhartiya Nagrik Suraksha Sanhita 2023 (for short 'BNSS'), which are corresponding Sections, and it was observed that it is the duty of the Court to ensure that a legal aid lawyer is appointed to espouse the cause of the accused.

In paragraph-23 of the judgement rendered in *Ashok* (supra), the Supreme Court observed as follows: –

> *A. It is the duty of the Court to ensure that proper legal aid is provided to an accused;*
>
> *B. When an accused is not represented by an Advocate, it is the duty of every public prosecutor to point out to the Court, the requirement of providing him free legal aid. The reason is that it is the duty of the public prosecutor to ensure that the trial is conducted fairly and lawfully;*
>
> *C. Even if the Court is inclined to frame charges or record examination in chief of the prosecution witnesses in a case where the accused has not engaged any Advocate, it is incumbent upon*

the public prosecutor to request the Court not to proceed without offering legal aid to the accused;

D. It is the duty of the public prosecutor to assist the trial Court in recording of the statement of the accused under Section 313 of the Cr.P.C. If the Court omits to put any material circumstance brought on record against the accused, the public prosecutor must bring it to the notice of the Court while the examination in chief of the accused is being recorded. He must assist the Court in framing the questions to be put to the accused. As it is the duty of the public prosecutor to ensure that those who are guilty of the commission of offence must be punished, it is also his duty to ensure that there are no infirmities in the conduct of the trial, which will cause prejudice to the accused;

E. An accused who is not represented by an Advocate is entitled to free legal aid at all material stages starting from remand every accused has the right to get legal aid even to file bail petitions;

F. At all material stages, including the stage of framing the charge, recording the evidence, et cetera, it is the duty of the Court to make the accused aware of his right to get free legal aid. If the accused expresses that he needs legal aid, the trial Court must ensure that a legal aid Advocate is appointed to represent accused;

G. As held in the case of Anokhi Lal, in all the cases where there is a possibility of a life sentence or for death sentence, only those learned Advocates who have put in a minimum of 10 years of practice on the criminal side should be considered to be appointed as Amicus Curiae or as a legal aid Advocate. Even in the cases not covered by the categories mentioned above, the accused is entitled to a legal aid Advocate who has good knowledge of the law and has an experience of conducting trials on the criminal side. It would be ideal if the Legal Services Authorities at all levels give proper training to newly appointed legal aid Advocates not only by conducting lectures, but also by allowing the newly appointed legal aid Advocates to work with senior members of the Bar in a requisite No. of trials;

H. The State Legal Services Authority shall issue directions to the legal services authorities at all levels to monitor the work of the

legal aid Advocates and shall ensure that the legal aid Advocates attend the Court regularly and punctually when the cases entrusted to them are fixed.

I. It is necessary to ensure that the same legal aid Advocate is continued throughout the trial, unless there are compelling reasons not to do so, or unless the accused appoints an Advocate of his choice.

J. In the cases where the offences are of a very serious nature and complicated legal and factual issues are involved, the Court, instead of appointing an empanelled legal aid Advocate, may appoint a senior member of the Bar who has a wide experience of conducting trials to espouse the cause of the accused, so that the accused gets best possible legal assistance;

K. The right of the accused to defend himself in a criminal trial is guaranteed by Article 21 of the Constitution of India. He is entitled to a fair trial. But if effective legal aid is not made available to an accused, who is unable to engage an Advocate, it will amount to infringement of his fundamental rights guaranteed by Article 21;

L. If legal aid is provided only for the sake of providing it, it will serve no purpose. Legal aid must be effective. Advocates appointed to espouse the cause of the accused must have good knowledge of criminal laws, law of evidence and procedural laws, apart from other important statutes. As there is a constitutional right to legal aid, that right will be effective only if the legal aid provided is of a good quality. If the legal aid Advocate provided to an accused is not competent enough to conduct the trial efficiently, the rights of the accused will be violated."

150. Perusal of the above law reports would evidently reveal that the Question No. 5 formulated by the Referral Court for consideration by this Bench has already been set at rest by the law laid down by the Hon'ble Supreme Court in *Bani Singh and others Vs. State of U.P.* [11], *Surya Baksh Singh Vs. State of Uttar Pradesh* [12] and *K.S. Panduranga Vs. State of Karnataka* [13], however, a distinction has been drawn by the Apex Court in *Surya Baksh Singh Vs. State of Uttar Pradesh* [12] between the convicts,

who are not having any notice of hearing of their appeals, and those who are misusing the procedure by not appearing and the ratio settled by the Hon'ble Supreme Court in these reports may be summarized as under:-

1. That the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;

2. That the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;

3. That the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;

4. That it can dispose of the appeal after perusing the record and judgment of the trial court;

5. That if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so;

6. That if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation;

7. A distinction, however, is to be made in dismissal of appeals where steps have been taken by the court for securing the presence of the appellant by issuing coercive process i.e. issuance of non-bailable warrants etc. on the one hand and those where the appellant may incidentally and unwittingly remained absent when his appeal was called on for hearing (para-3 of Surya Baksh Singh Vs. State of Uttar Pradesh [12]; and

8. On absence of appellant or his counsel in appeal against conviction and respondent and his counsel in appeal against acquittal, the court would seek his presence by issuing suitable process and may also issue notice to the sureties and if this exercise fails to locate and bring the appellant to the court, the court can pass judgment with the assistance of the public prosecutor and in its

discretion may also appoint a counsel on State expense for its assistance (amicus curiae).

151. The crux of the aforesaid observations of the three celebrated judgments rendered by the Hon'ble Supreme Court in *Bani Singh and others Vs. State of U.P.* [11]**,** Su*rya Baksh Singh Vs. State of Uttar Pradesh* [12] and *K.S. Panduranga Vs. State of Karnataka* [13], thus, covers the entire length and breadth of Question No. 5 formulated by the Division Bench at Lucknow for consideration by this Bench and no fresh exercise, in our considered opinion, is required to be undertaken by this Bench, including on one point which has been highlighted by the Division Bench at Lucknow i.e. whether the amicus curiae may be appointed even when the presence of the convict, appellant or accused-respondent may be secured and without his consent.

152. The aforesaid legal precedents would evidently canvass that the emphasis of the Apex Court has been on providing opportunity of being heard to the appellant who is willing to cooperate with the appellate court or his counsel and in this regard a process to cause his presence for the purpose of giving opportunity of being heard is required to be issued to him and when the court is satisfied that such appellant is deliberately avoiding his presence before the court, in such a situation, the court may dispose of the appeal in the manner approved by the Hon'ble Supreme Court in *Bani Singh and others Vs. State of U.P.* [11]**,** Su*rya Baksh Singh Vs. State of Uttar Pradesh* [12] and *K.S. Panduranga Vs. State of Karnataka* [13] (i.e. after perusing the record/evidence vis-a-vis judgment of the trial court with the assistance of prosecutor and Amicus, if appointed) and we do not have any reason to deviate from the settled proposition laid down by the Apex Court in the above mentioned cases, moreover, the appointment of amicus is only for the purpose to provide fair trail to the appellant and also for rendering the assistance to the Court.

153. It is to be reiterated that no ready-made formula or straight-jacket principle of universal application may be formulated in this regard to fit in every circumstance. Neither the factual matrix of two criminal cases or of appeals are same nor all the procedural complexities of appeal may be foreseen in order to cull out a ready made principle of uniform application and the court in a given situation would have to take a just and fair decision, however, the aforesaid decision of the Supreme Court would sufficiently indicate that an appellant who is avoiding his presence before the court and is not cooperating with hearing of the appeal may not be allowed to do-so and if the appellate court is satisfied that delaying tactics are being adopted by such an accused or appellant/convict, it may act in accordance with the law laid down by the Hon'ble Supreme Court in the above mentioned law reports and in this situation the appellate court would be justified in deciding the appeal on merits by perusing the judgment of the trial court and taking into account all the possible arguments which may be made by the appellant, had his counsel been present before the appellate court, however, this will not preclude the appellate court to appoint an amicus in terms of the law laid down by the Hon'ble Supreme Court in *Anokhilal Vs. State of Madhya Pradesh* [7].

154. With the observations made hereinbefore, we answer Question No. 5 accordingly.

155. In conclusion of the aforesaid discussions, the questions referred to this Bench are answered as under:-

> *Question No.(1) Whether the Chief Judicial Magistrate or any other Magistrate can enlarge an acquitted person or a person convicted of an offence on bail even in a case where in an appeal against acquittal or conviction, as the case may be, the High Court or any other appellate Court has issued non-bailable warrants for securing his presence without any such stipulation therein for release by the Court below, more so when such non-bailable warrant has been issued at a subsequent stage of appeal and not the admission stage?*

Question No.(2) Assuming the Magistrate has jurisdiction as referred in Question No. 1, whether a general direction of a mandatory nature can be issued by the High Court to the Magistrate for such release, as has been done vide order dated 18.01.2024 passed in Government Appeal No. 454 of 2022 and order dated 19.01.2024 passed in Government Appeal No. 2552 of 1981, does it not deprive the Magistrate of his discretion in this regard to consider such release on case to case basis in view of the law discussed?

Question No.(3) Whether the observations and directions as contained in the order dated 18.01.2024 passed in Government Appeal No. 454 of 2022 (State of U.P. vs. Geeta Devi and another) and the directions dated 19.01.2024 in Government Appeal No. 2552 of 1981 (State of U.P. Vs. Shamshuddin Khan and others) are in accordance with law?

Answer- Where the High Court has consciously issued non-bailable warrant for arrest of an appellant the Magistrate or the Sessions Judge as the case may be would have no jurisdiction to release such person on bail.

It would be the terms of the order of the High Court under which non-bailable warrants have been issued which will govern the fate of the accused or appellant/convict and neither C.J.M. nor Session Judge would have jurisdiction to release such appellant or accused on bail irrespective of the fact whether the non-bailable warrant has been issued in an appeal against acquittal or in an appeal against conviction.

In case the appellant or accused is arrested and committed to prison an information to that effect shall be given to the High Court pertaining to the arrest of such person by the Chief Judicial Magistrate or Session Judge concerned, forthwith.

So far as issuance of bailable warrant is concerned the discretion would always be of the subordinate court to release such an appellant or accused on bail subject to the condition that he will appear before the High Court on a particular day highlighted or indicated by the High Court in its order.

In view of above the observations and directions as contained in the order dated 18.01.2024 passed in Government Appeal No. 454 of 2022 (State of U.P. vs. Geeta Devi and another) and the directions dated 19.01.2024 in Government Appeal No. 2552 of

1981 (State of U.P. Vs. Shamshuddin Khan and others) cannot be said to be a correct appreciation of law.

Question No.(4) What are the modes prescribed in law for securing the presence of acquitted person or one who has been convicted, in an appeal before the High Court and what should be the course to be ordinarily adopted by the High Court in exercise of its appellate criminal jurisdiction for securing such presence to facilitate hearing of such appeals?

Answer- Having regard to the law propounded in *Poosu* (supra)[31] in an appeal against acquittal in an appropriate case coercive process even of the nature of bailable warrants or non-bailable warrants may be issued against the accused having regard to the peculiar facts and circumstances of each case, but it may not be construed that in all appeals against acquittal while summoning a person warrants would in variably be issued as in suitable cases, in the discretion of the Court summons may also be issued.

In an appeal against conviction wherein an appellant has already been released on bail and his counsel has not appeared for arguing the appeal. Generally, no warrant of arrest could be straightaway issued against him at the first instance for the reason that he has already been released on bail by the court and no condition of his personal presence on each day of hearing was imposed on him. A bailable warrant may be issued after the office reports that Trial Court Record has been received and paper-book has been prepared.

Question No.(5) Whether an appeal, either against acquittal or conviction, can be heard by appointing an Amicus Curiae for the accused-respondent or the convicted-appellant, as the case may be, in the event he is not appearing in the appellate proceedings though his presence can be secured, without his consent and without any intimation to him, if so, under what circumstances?

Answer- This question is no more *res integra* and has been set at rest by the Apex Court in **Bani Singh and others Vs. State of U.P.** [11]**, Surya Baksh Singh Vs. State of Uttar Pradesh** [12] **and K.S. Panduranga Vs. State of Karnataka** [13] and in **Anokhilal Vs. State of Madhya Pradesh** [7] in terms that an appellant who is avoiding his presence before the court and is not cooperating with hearing of the appeal may not be allowed to do-so and if the appellate court is satisfied that delaying tactics are being adopted by such an accused or appellant/convict, it may act in accordance with the law laid

down by the Hon'ble Supreme Court in the above mentioned law reports and in this situation the appellate court would be justified in deciding the appeal on merits by perusing the judgment of the trial court and taking into account all the possible arguments which may be made by the appellant, had his counsel been present before the appellate court, however, this will not preclude the appellate court to appoint an amicus in terms of the law laid down by the Hon'ble Supreme Court in *Anokhilal Vs. State of Madhya Pradesh* (supra), specially in an appeal wherein the appellant is in jail.

We do not have any reason to deviate from the settled proposition of law as propounded by the Apex Court in the above mentioned cases, moreover, the appointment of amicus is for the purpose to provide fair trial to the appellant and also for rendering the necessary assistance to the Court, specially in a case where the convict appellant is in prison.

The Reference is answered accordingly.

156. The Reference stands ***disposed of.***

157. We once again reiterate our appreciation of the dedication with which we have been assisted by Shri Apoorva Tiwari, Shri Nadeem Murtaza, assisted by S/Shri Wali Nawaz Khan, Harsh Vardhan Kedia and Ms. Smigdha Singh, Shri S.M. Singh Royekwar, assisted by Shri Sumeet Tahilramani, Sri Vikas Vikram Singh, Sri Naved Ali, Sri Rajat Gangwar, Sri Alok Mishra, assisted by Shri Ajeet Kumar Mishra, Sri Ayush Tandon, learned Advocates, as also Dr. V.K. Singh, learned Government Advocate, Sri Umesh Chandra Verma, learned Additional Government Advocate-I, Shri Pawan Kumar Mishra, learned Additional Government Advocate, Sri Shivendra Shivam Singh Rathore, learned counsel for the State, Shri Bhavesh Chandel and Shri Shivang Tiwari. Thus we put on record our appreciation for the able assistance rendered by these Counsel.

158. Let the record of the above mentioned appeals be placed before appropriate Benches having jurisdiction in the current determination for further progress of the Appeals.

(Mohd. Faiz Alam Khan,J.) (Pankaj Bhatia, J.) (Mrs. Sangeeta Chandra, J.)

Order Date:- 22.01.2025
Rahul/MVS/Muk/Praveen

Rajoo Alias Ramakant Vs. State of Madhya Pradesh, 2012 (8) SCC 553 [1]

Raghuvansh Dewan Chand Bhasin Vs. State of Maharashtra and others, 2012 (9) SCC 791 [2]

Inder Mohan Goswami Vs. State of Uttaranchal, 2007 (12) SCC 1 [3]

Dhananjay Rai Alias Guddu Rai Vs. State of Bihar 2022 (14) SCC 95 [4]

K. Muruganandam and others Vs. State, 2021 (20) SCC 642 [5]

Hussainara Khatoon Vs. Home Secretary, State of Bihar, Patna, 1981 SC 928 (4) [6]

Anokhi Lal Vs. State of Madhya Pradesh, 2019 (20) SCC 196 [7]

Zahira Habibullah Sheikh and another vs. State of Gujarat, 2004 (4) SCC 158 [8]

Mohammad Hussain Vs. State 2012 (9) SCC 408 [9]

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Bani Singh Vs. State of Uttar Pradesh, 1996 (4) SCC 720 [11]

Surya Baksh Singh Vs. State of U.P., 2014 (14) SCC 222 [12]

K.S. Panduranga Vs. State of Karnataka, 2013 (3) SCC 721 [13]

Dilip S Dahanukar Vs. Kotak Mahindra Company Limited, 2007 (6) SCC 528 [14]

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Sarah Matthew Vs. Institute of Cardiovascular Diseases, 2014 (2) SCC 62 [16]

Dhanna Lal Vs. Kalavati Bai, 2002 (6) SCC 16 [17]

Dayal Singh Vs. State of Uttaranchal, 2012 (3) SCC 263 [18]

Mohammed Firoz Vs. State of Madhya Pradesh, 2022 (7) SCC 443 [19]

State (NCT of Delhi) Vs. Shiv Kumar Yadav, 2016 (2) SCC 402 [20]

Somesh Chaurasia Vs. State of Madhya Pradesh, 2022 (19) SCC 480 [21]

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Madan Mohan Vs. State of Rajasthan and others, 2018 (12) SCC 30 [25]

Smt. Maya Dixit Vs. State of U.P., 2010 (83) ALR 664 [26]

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Popular Muthaiah Vs. State represented by Inspector of Police, 2006 (7) SCC 296 [29]

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State of U.P. Vs. Poosu and another, 1976 (3) SCC 1 [31]

Kabira Vs. State of U.P., 1982 SCC (Criminal) 144 [32]

Mohammad Sukur Ali Vs. State of Assam 2011 (4) SCC 729 [33]

A.S. Mohammed Rafi Vs. State of Tamil Nadu and others, AIR 2011 SC 308 [34]

Man Singh and another Vs. State of Madhya Pradesh 2008 (9) SCC 542 [35]

Bapu Limbaji Kamble Vs. State of Maharashtra, 2005 (11) SC 412 [36]

Balakrishna Mahadev Lad Vs. State of Maharashtra, 2012 SCC OnLine Bombay 1490 [37]

State of Punjab Vs. Davinder Pal Singh Bhullar and others, 2011 (14) SCC 770 [38]

Laxman Das Vs. Resham Chand Kalia and another, 2018 (3) SCC 187 [39]

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Imtiyaz Raza Khan Vs. State of Maharashtra, 2018 (9) SCC 160 [42]

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Suk Das Vs. UT of Arunachal Pradesh, (1986) 2 SCC 401 [44]

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