

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A.1284/2019 & CRL.M.A. 40100/2019

PRAVINDER KANSAL ..... Appellant Through Mr. C.L. Gupta , Advocate with Mr. Mandeep, Advocate.  
versus THE STATE OF NCT OF DELHI & ANR. .... Respondents Through Mr. Amit Gupta, APP for the State  
with SI Vineet Kumarr, PS Prashant Vihar. % Date of Decision: 27th November, 2019

CORAM: HON'BLE MR. JUSTICE MANMOHAN HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J (Oral):

1. Present appeal has been filed under Section 372 Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.')

2. on behalf of the complainant (father of the deceased) challenging the order on sentence dated 17th August, 2019 passed by ASJ/Special Judge (NDPS), North District, Rohini Courts, Delhi in Sessions Case No. 58259/2016 arising out of FIR No.742/2007 registered with Police Station Prashant Vihar. The Trial Court had convicted the accused (respondent No. 2) in the said case under Sections 302/364A/201 IPC and sentenced him to imprisonment for life under Sections 302 and 364A IPC and imprisonment for seven years under Section 201 IPC. CRL. A. No.1284/2019 Page 2 of 13

3. Learned counsel for the appellant contends that the sentence awarded to the convict is inadequate and needs to be enhanced to death penalty.

4. At this stage, it is pointed out to the learned counsel for the appellant that the present appeal is not maintainable as the same has been filed under Section 372 Cr.P.C. and the said provision does not contemplate an appeal by the victim/complainant against inadequate sentence.

5. Mr. C.L. Gupta, learned counsel for the appellant states that there needs to be a balance between the rights of an accused and that of the victim so that the proceedings are fair to both of them. He submits that the Supreme Court in Mallikarjun Kodagali (Dead), represented through Legal Representatives vs. State of Karnataka & Ors, 2018 (14) SCALE 32 has observed that the victim should be heard by the Court before awarding an appropriate punishment/sentence to the accused person. He contends that the logical sequitur of the observations made by the Supreme Court in Mallikarjun Kodagali (supra) is that a victim has an inherent right to challenge the Trial Court order awarding inadequate sentence.

6. He further contends that since the victim has a right to appeal against an order when the convict has been convicted for a lesser offence, the victim should be deemed to have a right to file an appeal against an order when the convict has been awarded a lesser sentence. He relies upon the judgment of this Court in Jagmohan Bhola vs Dilbagh Rai Bhola and Ors. CrI. A. No. 793 of 2010, which was followed in a subsequent judgment by this Court in Shikha Beniwal vs State and Anr. Cr. A. No. 1320 of 2012. The relevant portion of the judgment in Shikha Beniwal (supra) is reproduced hereinbelow:- CRL. A. No.1284/2019 Page 3 of 13

7. "15. The question, therefore, which falls for consideration is whether the victim has the right to approach the Court for enhancement of sentence.

8. 16. In Jagmohan Bhola (supra) although the issue was whether leave to appeal was required to be obtained by a victim for preferring an appeal u/s 372 of the Code but the observations of Division Bench of this Court are material which are as under:- "...The proviso to Section 372 is a special provision and it deals with three different situations, namely, appeals against acquittal, conviction for a lesser offence and inadequacy of

compensation. The proviso to Section 372 is not limited to appeals against acquittals. All the appeals, whether they are against acquittal or conviction for a lesser offence or inadequate compensation, have been placed on the same footing. So, while a parallel is sought to be drawn by the learned counsel for the respondents between an appeal under the proviso to Section 372 with an appeal against acquittal under Section 378, it cannot be forgotten that the appeal under the proviso to Section 372 is not limited to appeals against acquittals but also concerns itself with appeals against conviction for lesser offence which is akin to the State's appeals for enhancement of sentence under Section 377 which, in turn, does not require any leave of the High Court to be taken. Similarly, there is no requirement under the statute for leave to be taken in respect of an appeal in respect of inadequate compensation. All these three circumstances have been placed on the same footing under the proviso to Section 372 and, therefore, no limitation with regard to the requirement of taking leave or special leave of the High Court before an appeal is presented to it by a victim can be read into the proviso to Section 372." 17. In view of these observations, an appeal filed by the complainant victim against conviction for enhancement of sentence being akin to the State's appeal for enhancement of sentence u/s 377 is maintainable." CRL. A. No.1284/2019 Page 4 of 13 6. Mr. C.L. Gupta prays that the aforesaid right should be read into the statute by way of judicial interpretation. Consequently, according to him, the present appeal is maintainable. 7. Per contra, Mr. Amit Gupta, learned APP for the State submits that the present appeal is not maintainable and in support of his submission he relies upon the judgments in Raj Singh vs State of Punjab and Ors. 2014 SCC OnLine P&H 16699, Virender Bidhuri vs the State (NCT of Delhi) and Anr. 2014 SCC OnLine Del 6863 and Baldev Sharma vs Gopal and Anr. 2017 SCC OnLine Raj 3005. 8. Keeping in view the contrary opinions rendered by the learned Single Judges of this Court with regard to maintainability of an appeal preferred by a victim challenging the Trial Court order awarding inadequate sentence, it is necessary to consider the law on this issue. 9. It is settled law that an appeal is a creature of a statute and cannot lie under any inherent power. The language of Section 372 Cr.P.C. is explicit and it states in categorical terms that no appeal shall lie until and unless specifically provided for. Section 372 Cr.P.C. reads as under:- "372. No appeal to lie, unless otherwise provided. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or any other law for the time being in force. Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court." (emphasis supplied) CRL. A. No.1284/2019 Page 5 of 13 10. Consequently, the proviso to Section 372 Cr.P.C. confers upon the victim the right to prefer an appeal against an order of the criminal Court in the following three instances only:- a) Acquittal of the accused person; b) Conviction of the accused person for a lesser offence; and c) Imposition of inadequate compensation. 11. It is relevant to note that the 'Committee on Reforms of Criminal Justice System' had recommended in its final report dated March 2003 that the victims should also be granted the „right to prefer an appeal against adverse order passed by the Court imposing inadequate sentence". However, while passing the Code of Criminal Procedure (Amendment) Act 2008, Parliament in proviso to Section 372 Cr.P.C. did not confer a right on the victim to prefer an appeal against an order imposing inadequate sentence. The omission to permit a victim to file an appeal against an order imposing inadequate sentence is indicative of the legislative intent. Consequently, the submission of the learned counsel for the appellant that the aforesaid right should be read into the statute by way of judicial interpretation is

untenable in law. 12. The Supreme Court in National Commission for Women vs State of Delhi and Anr. (2010) 12 SCC 599, while examining Section 372 Cr.P.C., has categorically observed that though the provision does confer a right of appeal on the victim, yet it does not envisage an appeal against inadequate sentence. The relevant portion of the said judgment is reproduced hereinbelow:- CRL. A. No.1284/2019 Page 6 of 13 "8. Chapter XXIX of the Code of Criminal Procedure deals with "Appeal(s)". Section 372 specifically provides that no appeal shall lie from a judgment or order of a criminal court except as provided by the Code or by any other law which authorises an appeal. The proviso inserted by Section 372 (Act 5 of 2009) with effect from 31-12-2009, gives a limited right to the victim to file an appeal in the High Court against any order of a criminal court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation. The proviso may not thus be applicable as it came in the year 2009 (long after the present incident) and, in any case, would confer a right only on a victim and also does not envisage an appeal against an inadequate sentence. An appeal would thus be maintainable only under Section 377 to the High Court as it is effectively challenging the quantum of sentence." (emphasis supplied) 13. This Court in a catena of judgments has also held that an appeal by the victim under Section 372 Cr.P.C. is not maintainable if it only challenges the order on sentence on the ground that it imposes inadequate punishment. The relevant portion of the judgements of this Court are reproduced hereinbelow:- A) Ashok Malhotra Vs. State (Govt. of NCT Delhi) and Another, 2019 SCC OnLine Del 10864 wherein it has been held as under:- "19. The proviso to Section 372 of the CrPC does not contemplate an appeal against an order of a Court imposing an inadequate sentence/punishment. It is well settled that there is no inherent right of an appeal and the said right is a statutory right and is available only if it is conferred by a statute. In several decisions, an appeal has been described as a creature of a statute. (See: Hindustan Petroleum Corporation Ltd. v. Dilbahar Singh: (2014) 9 SCC 102). In National Commission for Women (supra), the Supreme Court had observed that "an appeal is a creature of a statute and cannot lie under any inherent power". In view of the above, the contention that CRL. A. No.1284/2019 Page 7 of 13 respondent no. 2 has an inherent right to appeal against an order of a court imposing inadequate punishment on the accused, is unmerited. 20. The proviso to Section 372 of the CrPC provides a limited right to the victim to file an appeal. The plain language of the said proviso indicates that it does not contemplate an appeal against an inadequate sentence." (emphasis supplied) B) Virender Bidhuri vs the State (NCT of Delhi) and Anr. (supra) wherein it has been held as under:- "11. The proviso to Section 372 Cr PC admits of only strict construction and with none of the conditions provided therein having been satisfied in the present case, the appeal by Respondent No. 2 under Section 372 Cr PC was not maintainable before the learned ASJ....." (emphasis supplied) C) Shakeel Ahmed vs State (NCT of Delhi) & Ors. wherein it has been held as under:- "23..... Also, this Section confers a right only on a victim and does not envisage an appeal against an inadequate sentence. The special leave petition challenging the order of High Court was filed by National Commission of Woman and not by the victim which was held to be not maintainable. xxxx xxxx xxxx xxxx 25. The right to appeal u/s 372 Cr.P.C is available to the victim against the order of acquittal or conviction for a lesser offence or imposing inadequate compensation....." (emphasis supplied) 14. The learned counsel for the appellant has relied on the judgment of a Coordinate Bench of this Court in Jagmohan Bhola (supra), wherein a contrary view was taken and the same was followed subsequently by the CRL. A. No.1284/2019 Page 8 of 13 learned Single Judge of this Court in Shikha Beniwal (supra). 15. However, perusal of the Division Bench judgment in Jagmohan Bhola (supra) shows that the

judgment of the Supreme Court in *National Commission for Women vs State of Delhi and Anr.* (supra) was not placed before it for consideration. Also, the specific issue with respect to the maintainability of an appeal filed by victim against inadequate sentence never arose for consideration in *Jagmohan Bhola* (supra). The Supreme Court in *State of U.P. and Another vs Synthetics and Chemicals Ltd. and Another* (1991) 4 SCC 139 while reiterating *Municipal Corporation of Delhi vs Gurnam Kaur* (1989) 1 SCC 101 has held that when the particular point of law involved in the decision is not perceived by the court or present to its mind, the decision passes off as sub-silentio and has no precedential value. The relevant portion of the said judgment are reproduced hereinbelow:- “40. „Incuria“ literally means „carelessness“. In practice per incuriam appears to mean per ignoratum. English courts have developed this principle in relaxation of the rule of stare decisis. The „quotable in law“ is avoided and ignored if it is rendered, „in ignoratum of a statute or other binding authority“. (*Young v. Bristol Aeroplane Co. Ltd.* Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In *Jaisri Sahu v. Rajdewan Dubey*, this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding. 41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of CRL. A. No.1284/2019 Page 9 of 13 law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. “A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind.” (*Salmond on Jurisprudence 12th Edn.*). In *Lancaster Motor Company (London) Ltd. v. Bremith Ltd.*, the Court did not feel bound by earlier decision as it was rendered „without any argument, without reference to the crucial words of the rule and without any citation of the authority“. It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur*. The bench held that, „precedents sub-silentio and without argument are of no moment“. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In *B. Shama Rao v. Union Territory of Pondicherry* it was observed, „it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein“. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.” (emphasis supplied) 16. It is pertinent to note that the decision in *Shikha Beniwal* (supra) had not been followed by the same learned Single Judge in the subsequent judgment in *Shakeel Ahmed* (supra), which has been discussed above. Consequently, the judgments in *Jagmohan Bhola* (supra) and *Shikha Beniwal* (supra) offer no assistance to the appellant. CRL. A. No.1284/2019 Page 10 of 13 17. This Court clarifies that in its previous judgment in *Mahesh Rai vs State (Govt. of NCT of Delhi)* 2019 SCC OnLine Del 8516, wherein the victim as well as the State had filed an appeal for enhancement of sentence, this Court had no occasion to consider the issue

of maintainability as it was never raised in those appeals. In any event, in that case, the State had filed an appeal for enhancement of sentence, which was maintainable. 18. The Division Bench of High Court of Punjab and Haryana in *Raj Singh vs State of Punjab and Ors.* (supra) has also held that there is no provision for filing an appeal by a 'victim' against an inadequate sentence. The relevant portion of the said judgment is reproduced hereinbelow:- ".....Insofar as the inadequate sentences are concerned, the proviso to Section 372 of the Code of Criminal Procedure („Cr.P.C.“ for short) may be noticed, which reads as follows:- XX XX XX XX XX "Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court." XX XX XX XX XX In terms of the above proviso, the „victim“ has a right to prefer an appeal against the order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation. There is no provision for filing an appeal by a „victim“ against inadequate sentence. Besides, a „victim“ can also make a prayer for inadequate compensation. The Supreme Court in the case of "National Commission of Women v. State of Delhi", 2010 (4) RCR (Criminal) 758 has held that the proviso inserted to Section 372 Cr.P.C. with effect from 31.12.2009 gives a limited right to the „victim“ to file an appeal in the High Court against any order of a Criminal Court acquitting the accused or convicting him for a lesser offence or CRL. A. No.1284/2019 Page 11 of 13 the imposition of inadequate compensation. It does not envisage an appeal against inadequate sentence. Therefore, the prayer for enhancement of sentence being inadequate is not tenable." (emphasis supplied) 19. The Full Bench of the Rajasthan High Court in *Baldev Sharma vs Gopal and Anr.* (supra) has relied upon the Supreme Court judgment in *National Commission for Women vs State of Delhi and Anr.* (supra) to hold that the victim has no right to challenge the order on sentence on ground of it being inadequate. The relevant portion of the said judgment is reproduced hereinbelow:- "The following five points have been referred to a Larger Bench:— xxxx xxxx xxxx xxxx (v) Whether the victim can prefer an appeal for enhancement of the sentence when no such express right has been conferred under the proviso to Section 372 Cr. P.C. 2. Learned counsel for the parties state that points at serial No. 1, 3 to 5 need not be answered for the reason in the decision reported as (2015) 15 SCC 613, *Satya Pal Singh v. State of M.P.*, the Supreme Court held that the proviso to Sec. 372 of the Code of Criminal Procedure cannot be read as conferred upon the victim a right to prefer an appeal against an order acquitting the accused or convicting the accused for a lesser offence or imposing inadequate compensation. The right is to file an application seeking leave to appeal. In the decision reported as (2010) 12 SCC 599, *National Commission of Women v. State of Delhi*, it has been held that a victim has no right under the proviso to challenge the sentence on ground of it being inadequate." (emphasis supplied) CRL. A. No.1284/2019 Page 12 of 13 20. The Full Bench of the Gujarat High Court in *Bhavuben Dineshbhai Makwana vs State of Gujarat and Ors.* 2012 SCC OnLine Guj. 5764 while discussing the scope of appeal by a victim under Section 372 CrPC has held that the victim has no right to prefer an appeal against 'inadequacy of sentence'; a right which is available only to the State. The relevant portion of the said judgment is reproduced hereinbelow:- "18. We further find that in taking the above view, the Division Bench in the above matter failed to take into consideration the fact that the scope of Appeal at the instance of the victim is different from that of an Appeal filed by the State. It appears that the victim (as defined in Section 2(wa) of the Code) shall have a right to prefer an Appeal in the following 3 types of cases: (i) Acquittal of the Accused (ii) Convicting of the Accused for a lesser offence (iii) Imposing

inadequate Compensation 18.1. In other words, the victim has no right to prefer an Appeal against „inadequacy of sentence“, a right which is available only to the State. The State, however, does not have any right to file any Appeal against “inadequacy of Compensation”, a right, which is available only to a victim. 19. The term „inadequacy of sentence“ has a special connotation and a distinct statutory demarcation if the provisions of Section 375(d) and Section 377 of the Code are compared. Scheme of Section 377, which provides for right of Appeal to the State/Prosecution, is entirely different from the right of Appeal conferred upon a victim under the Proviso to Section 372 of the Code. Under the scheme of Section 377 not only the State/Prosecution can file an Appeal based upon inadequacy of sentence, but even the Accused can plead for his acquittal or for reduction of the sentence as contemplated under Section 377(3) of the Code. 20. As against this, if the scheme of Proviso to Section 372 of the Code is compared, only a victim has an absolute right to file an Appeal challenging imposition of inadequate Compensation in CRL. A. No.1284/2019 Page 13 of 13 addition to the right of Appeal against acquittal and also challenging the conviction based on lesser offence. There is, however, no provision in the entire Code empowering the State Prosecution to file an Appeal against an order imposing inadequate Compensation. 21. In light of different types of right of Appeal provided to the victim and to the State/Prosecution, it will not be proper to hold that the right of either of them is dependent upon the other. To put it differently, only victim can file an Appeal against an order of imposing „inadequate Compensation“ in addition to his right of Appeal against acquittal and convicting the Accused for a lesser offence and therefore, to club his right and make it dependent upon the exercise of right of Appeal at the instance of the State would be not only be unworkable, but would run contrary to the scheme and lead to absurdity.” (emphasis supplied) 21. In view of the aforesaid mandate of law and for the reasons as explained above, this Court is of the view that the present appeal is not maintainable. Accordingly, present appeal and pending application are dismissed.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

NOVEMBER 27, 2019