STATE OF MADHYA PRADESH

v.

DEWADAS & ORS.

January 29, 1982

(A.D. KOSHAL, A.P. SEN AND V. BALAKRISHNA ERADI, JJ.)

Code of Criminal Procedure, 1973 S. 378 (3)—State Government's application for leave to appeal—Hearing and disposal by Single Judge under r. 1 (q), Chapter I, Part 1 of M.P. High Court Rules—Whether legal ?

The Code of Criminal Procedure, 1973, provides *inter alia*, by sub-s. (3) of s. 378 that no appeal against an order of acquittal passed by a lower court shall be entertained under sub-s. (1) or sub-s. (2) except with the leave of the High Court.

A practice was prevalent in the Madhya Pradesh High Court, requiring the State Government or the Central Government, desirous of preferring an appeal under sub-s. (1) or sub-s. (2) of s. 378 of the Code, to make an application for leave under sub-s. (3) thereof, and it was registered as a Miscellaneous Criminal Case and treated as a petition and as such placed before a Single Judge for hearing as per r. 1 (q), Chapter I, Part I, of the Madhya Pradesh High Court Rules. It was only when the Single Judge granted leave to appeal under sub-s. (3), that the petition for leave was registered as a Criminal Appeal and placed before a Division Bench for admission under sub-s. (1) of s. 384.

The State Government of Madhya Pradesh having decided to prefer an appeal under sub-s. (1) of s. 378 filed an application for leave to appeal under sub-s. (3) setting out therein the grounds of appeal and the Single Judge who heard it refused to grant the leave. The State Government made an application for grant of certificate under Article 134 (1) (c) of the Constitution. The application was heard by a Division Bench. The contention was that there was inherent lack of jurisdiction on the part of the Single Judge to hear and decide an application for leave under sub-s. (3) of s. 378 of the Code, inasmuch as under r. 1 (q) (ii) of the Madhya Pradesh High Court Rules, Chapter I, Part 1, the matter had to be dealt with by a Bench of two Judges.

The High Court, following its earlier decision in *State of Madhya Pradesh* v. *Narendrasingh*, (1974) MPLJ (N) 102, rejected the contention, holding that the State had to obtain 'leave' of the High Court under sub-s. (3) of s. 378, before an appeal against acquittal was preferred under sub-s. (1) thereof and therefore the learned Single Judge had jurisdiction to deal with the application for leave under sub-s. (3).

In appeal to this Court the State Government contended that the making of an application for leave under sub-s. (3) of s. 378 is tantamount to filing an appeal under sub-s. (1) thereof, that the High Court could grant leave and entertain the appeal at one and the same time inasmuch as an application under sub-s. (3) would be transmuted into an appeal under sub-s. (1) when leave is granted under sub-s. (3) and, therefore, the application for leave under sub-s. (3) must have been laid before a Bench of two Judges under r. 1 (q) (ii) of the High Court Rules.

Allowing the appeal,

HELD : 1. An application for 'leave' to appeal under sub-s. (3) of s. 378 without which no appeal under sub-s. (1) or sub-s. (2) thereof can be entertained, being an integral part of the appeal, must be laid before a Bench of two Judges of the High Court under r. 1 (q) (ii), Chapter I, Part 1 of the Madhya Pradesh High Court Rules (as it stood before the amendment) and could not be heard and disposed of by a Single Judge of the High Court under r. 1 (q) of the Rules, as it stood prior to its amendment. [92 E-F; 83 D]

2. Sub-s. (3) of s. 378 was introduced by Parliament to create a statutory restriction against entertainment of an appeal filed by the State Government or the Central Government under sub-s. (1) or sub-s. (2) thereof from an order of acquittal passed in a case instituted otherwise than upon a complaint. There is a difference in the procedure regulating entertainment of State appeals under sub-s. (1) or sub-s. (2) of s. 378 and appeals against acquittals filed by a complainant under sub-s. (4) of s. 378. On a comparison of the language employed in sub-s. (3) and sub-s. (4) of s. 378, it is clear that in the case of an appeal by the State Government or the Central Government under sub-s. (1) or sub-s. (2), the Code does not contemplate the making of an application for leave under sub-s. (3) while making of an application under sub-s. (4) is a condition precedent for the grant of special leave to a complainant under sub-s. (4). The difference in language used in sub-s. (3) and sub-s. (4) of s. 378 manifests the legislative intent to preserve a distinction between the two classes of appeals by prescribing two different procedures in the matter of entertainment of appeals against acquittals. While a period of limitation has been prescribed in sub-s. (5) of s. 378 for an application of the complainant under sub-s. (4), there is no period of limitation prescribed for an application for grant of leave to appeal under sub-s. (3), obviously because the Code does not contemplate the making of an application for leave under sub-s. (3) of s. 378. It, therefore, follows that the State Government or the Central Government may, while preferring an appeal under sub-s. (1) or sub-s. (2) of s. 378 incorporate a prayer in the memorandum of appeal for grant of leave under sub-s. (3) thereof, or make a separate application for grant of leave under sub-s. (3) of s. 378, but the making of such an application is not a condition precedent for a State appeal. [90 F-H; 91 A-C; 88 G-H; 91 C-D]

State of Madhya Pradesh v. *Narendra Singh*, [1974] MPLJ (N) 102 overruled.

State of Rajasthan v. *Ramdeen & Ors.* [1977] 3 S.C.R. 139 relied on.

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 278 of 1975.

Appeal by special leave from the judgment and order dated the 16th October, 1974 of the Madhya Pradesh High Court in Misc. Criminal Case No. 786 of 1974. B

Gopal Subramaniam for the Appellant.

P.D. Sharma, for the Respondent.

The Judgment of the Court was delivered by : C

SEN, J. The short question involved in this appeal by special leave from the judgment and order of the Madhya Pradesh High Court is, whether an application for 'leave' to appeal under sub-s. (3) of s. 378 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'), without which no appeal under sub-s. (1) D or sub-s. (2) thereof can be entertained, being an integral part of the appeal, must be laid before a Bench of two Judges of the High Court, under r. 1 (q) (ii), Chap. I, Part I, of the Madhya Pradesh High Court Rules, or can be heard and disposed of by a Single Judge of the High Court under r. 1 (q) of the Rules. E

The material facts giving rise to the appeal are these. The State Government of Madhya Pradesh having decided to prefer an appeal under sub-s. (1) of s. 378 of the Code, filed an application for 'leave' to appeal under sub-s. (3) thereof, setting out therein the grounds of appeal. According to the practice prevalent in the F Madhya Pradesh High Court, the application was listed before a Single Judge, as per rule 1 (q), Chapter I, Part I of the Madhya Pradesh High Court Rules. The learned Single Judge refused to grant leave to appeal under sub-s. (3) of s. 378 on the ground that the judgment of acquittal was based on appreciation of evidence and G was not perverse or unreasonable. The State Government applied for grant of a certificate under Art. 134 (1) (c) of the Constitution. The application for grant of a certificate was placed before and heard by a Division Bench. The contention on behalf of the State Government was that an application for grant of leave under sub-s. (3) of s. 378 of the Code must be treated as a part of the appeal H preferred by the State Government under sub-s. (1) thereof, and

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therefore, should have been placed before a Bench of two Judges and consequently the order of the learned Single Judge rejecting the application for grant of leave under sub-s. (3) of s. 378 of the Code was a nullity. The Division Bench, following the decision of another Division Bench in the *State of Madhya Pradesh* v. *Narendrasingh*,(1) B rejected the contention of the State that the learned Single Judge had no jurisdiction to entertain or decide the application for leave to appeal under sub-s. (3) of s. 378 of the Code. It however, noticed the incongruity of the requirement that an appeal under sub-s. (1) or sub-s. (2) of s. 378 should be placed before a Bench of two Judges under r. 1 (q) (ii) of the Madhya Pradesh High C Court Rules and the hearing and disposal of an application for leave under sub-s. (3) thereof should be by a Single Judge, and observed :

> "The matter is being examined by the rule making Committee. It is rather anomalous that under rule 1 (q) item (ii) of Chapter I of the Madhya Pradesh High Court Rules, an appeal against acquittal filed by the State Government has to be heard by a Division Bench, still the application for leave under section 378 (3) of the Code should be laid before a Single Judge."

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As the case involved an important question relating to procedure and practice, and as the correctness of the decision of the High Court in *Narendrasingh's case* was open to question, special leave was granted by this Court.

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It appears that a practice was prevalent in the Madhya Pradesh High Court, requiring the State Government or the Central Government, desirous of preferring an appeal under sub-s. (1) or sub-s. (2) of s. 378 of the Code, to make an application for leave under sub-s. (3) thereof, and it was registered as a Miscellaneous Criminal Case and treated as a petition and as such placed before G a Single Judge for hearing as per r. 1 (q), Chap. I, Part I, of the Madhya Pradesh High Court Rules. It was only when the Single Judge granted leave to appeal under sub-s. (3), that the petition for leave was registered as a Criminal Appeal and placed before a Division Bench for admission under sub-s. (1) of s. 384 of the Code.

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(1) [1974] MPLJ (N) 102.

The contention that there was inherent lack of jurisdiction on the part of a Single Judge to hear and decide an application for leave under sub-s. (3) of s. 378 of the Code and, therefore, the proceedings were null and void is based on the provisions contained in r. 1 (q)(ii), Chap. I, Part I, of the Madhya Pradesh High Court Rules, which read as follows :

> "1. The following matters shall ordinarily be heard and disposed of by a Judge sitting alone :
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> xx xx xx xx
>
> (q) An appeal, petition or reference under the Code of Criminal Procedure, other than :
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> xx xx xx xx
>
> (ii) an appeal by the Provincial Government under section 417 of the Code from an order of acquittal."

The heading of Chap. I in which the rule fin is place is "Jurisdiction of a Single Judge and of Benches of the Court." It is urged that any breach of the rule would render the judgment a nullity. Rule 4 of the said Rules provides that 'Save as provided by law or by rules or by special orders of the Chief Justice, all matters shall be heard and disposed of by a Bench of two Judges'. By reason of s. 8 (2) of the General Clauses Act, 1897, reference to an appeal against acquittal under s. 417 (1) of the Code of Criminal Procedure, 1898 (hereinafter referred to as 'the old Code') by the Provincial Government has to be read as an appeal against acquittal by the State Government under sub-s. (1) of s. 378.

It is contended on behalf of the State Government that the making of an application for leave under sub-s. (3) of s. 378 of the Code is tantamount to filing an appeal under sub-s. (1) thereof, and the High Court can grant leave and entertain the appeal at one and the same time, inasmuch as such an application by the State Government under sub-s. (3) is transmuted into an appeal against acquittal under sub-s. (1) of s. 378, when leave is granted under sub-s. (3) and, therefore, the application for leave under sub s. (3) had to be heard by a Bench of two Judges. It is urged that a com-

A parison of the language employed in sub-ss. (3) and (4) of s. 378 would make it clear that the Parliament never intended, in the case of an acquittal, that the State Government should first make an application for leave under sub-(3) of s. 378, and then, if leave is granted, present an appeal under sub-s. (1) of s. 378. It is
B further urged that the jurisdiction of a Single Judge is limited by the words 'other than' in r. 1 (q) of the Madhya Pradesh High Court Rules, and an appeal preferred by the State Government under sub-s. (1) of s. 378 of the Code could be heard and decided only by a Bench of two Judges as required by r. 1 (q) (ii) of the Rules.

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The submission advanced on behalf of the respondents, on the other hand, is that the introduction of the new provision in sub-s. (3) of s. 378 and the use of the words 'leave of the High Court' and the word 'entertained' clearly indicates the legislative intent to prescribe for two different stages : (1) the making of an
D application for leave under sub-s. (3) of s. 378, and (2) then, if leave is granted, presenting the petition of appeal under s. 382 of the Code. It is urged that the State Government must obtain 'leave' of the High Court under sub-s. (3) of s. 378, before an appeal against acquittal is preferred under sub-s. (1) thereof, as in the case of a private complainant under sub-s. (4) of s. 378, and the
E difference in language in sub-s. (3) and sub-s. (4) is of little consequence.

In *Narendrasingh's* case, the State Government being desirous of preferring an appeal against acquittal under sub-s. (1) of s. 378,
F made an application for grant of leave under sub-s. (3) and the proposed memorandum of appeal was annexed thereto. An application was filed on behalf of the State Government stating that the prayer for grant of leave under sub-s. (3) be treated as a part of the appeal itself and not separately. It was further prayed that the case, which had originally been registered as a Miscellaneous
G Criminal Case relating to the grant of leave, should be registered as a 'Criminal Appeal'. The matter was, therefore, placed before a Division Bench. The learned Judges of the High Court referred to the report of the Law Commission[1] and observed that the legislative object in re-enacting the provisions of s. 417 of the old
H Code with the addition of the new provision contained in sub-s. (3)

(1) 48th Report, Vol. II, Chapters 30-57, paras 28-34, at pp. 810-813.

of s. 378 of the Code, was that there had to be a further scrutiny of a State appeal by the Court even prior to the stage of admission, requiring the Court to consider at the very outset whether the appeal should be entertained or not. It was only after the appeal was entertained with the 'leave' of the Court that it had to be heard for admission and it may be dismissed summarily without notice to the other side. It was further observed that the legislature brought about the change while accepting the recommendation of the Law Commission to retain the power of the High Court to dismiss State appeals summa. ily without notice to the respondents.

In substance, the decision in *Narendrasingh's* case, as expressed in the words of the learned Judges, may be thus stated :

> "(A)t the very outset on an appeal against acquittal being lodged by the State, the High Court is to consider whether leave should be granted or not. It is only when leave is granted under section 378(3) that the appeal is entertained. On the appeal being so entertained as a consequence of the grant of leave, it is to be listed for admission and in case it is not dismissed summarily under section 384 (1) notice is to be issued to the accused under section 385 (1) (iv).
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> xx xx xx xx
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> The appeal being entertained only on the grant of leave under sec. 378 (3), the matter relating to grant of leave has to be ordinarily heard and disposed of by a Single Bench of this Court according to Rules. The appeal itself being entertained only when leave is granted, there is, in fact, no appeal as such till the leave is granted, even though it may have been lodged while praying for leave. The matter has, therefore, to be initially registered only as a 'Miscellaneous Criminal Case' and it is only when the leave is granted resulting in the appeal being entertained that it can be registered as a criminal appeal. Thereafter it has to be listed before the Division Bench for admission."

In making these observations the learned Judges appear to have been swayed by a practice which was prevalent in their Court.

A The jurisdiction of the Court in these matters is, however, statutory and the Court is not entitled to go outside the provisions of a statute but must interpret them as they are.

The answer to the question involved must turn on a proper B construction of sub-s. (3) of s. 378 of the Code. Section 378 of the Code corresponds to s. 417 of the old Code, as amended in 1955. Sub-s. (1) of s. 378 of the Code is in terms the same as sub-s. (1) of s. 417 of the old Code and it provides that 'Save as otherwise provided in sub-s. (2) and subject to the provisions of sub-ss. (3) and (5), the State Government may, in any case, direct the Public C Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by a court other than a High Court'. Sub-s. (2) of s. 378 corresponds to sub-s. (2) of s. 417 and confers the right of appeal on the Central Government in certain class of cases subject to the provisions of sub-s. (3) from such an order of acquittal. Sub-s. (3) of s. 378 is a new provision D inserted to implement the recommendation of the Law Commission made in its 48th Report on Appeals against Acquittals, and provides that :

> "3. No appeal under sub-s. (1) or sub-s. (2) shall be entertained except with the leave of the High E Court."

Sub-s. (4) and sub-s. (5) deal with an order of acquittal passed in any case instituted upon a complaint. Sub-s. (4) provides that if an order of acquittal is passed in such a case, and the High Court on an application made to it by the complainant in that behalf, grants F 'special leave' to appeal from the order of acquittal, the complainant may present such an appeal to the High Court. Sub-s. (5) provides for two distinct periods of limitation. No application under sub-s. (4) for grant of special leave to appeal from an order of acquittal in a complaint case shall be entertained by the High Court at the expiry of six months where the complainant is a public ser- G vant and sixty days in other cases computed from the date of the order of acquittal. There is no period of limitation prescribed for presenting an application for grant of leave to appeal under sub-s. (3) of s. 378 from an order of acquittal passed in a case H instituted otherwise than upon a complaint, obviously because the Code does not contemplate the making of an application for leave under sub-s. (3) of s. 378 of the Code. Thus, the period of limita-

tion in such a case, is for an appeal from an order of acquittal under sub-s. (1) or sub-s. (2) of s. 378 of the Code, as prescribed by Art. 114 of the Limitation Act, 1963. The period of limitation prescribed therefor is sixty days from the date of the order appealed from.

Under the scheme of the Code, the State Government or the Central Government may prefer an appeal under sub-s. (1) or sub-s. (2) of s. 378 of the Code, but such appeal shall not be entertained unless the High Court grants 'leave' under sub-s. (3) thereof. The words 'No appeal under sub-s. (1) or sub-s. (2) shall be entertained' used in sub-s. (3) of s. 378 create a qualified bar to the entertainment of an appeal filed by the State Government or the Central Government under sub-s. (1) or sub-s. (2) from an order of acquittal passed in a case instituted otherwise than upon a complaint. The Code, by enacting sub-s. (3) of s. 378, therefore, brought about a change in that there is no longer an unrestricted right of appeal against the orders of acquittal passed in such cases. The making of an application for grant of leave to appeal by the State Government or the Central Government under sub-s. (3) of s. 378 is, however, not a condition precedent to the entertainment of such an appeal. The prayer for grant of leave under sub-s. (3) may, as it should, be contained in the petition of appeal filed under s. 382 of the Code.

There is no warrant for the view expressed by the High Court in *Narendrasingh's* case that the legislative object in re-enacting the provisions of s. 417 of the old Code with the addition of the new provision contained in sub-s. (3) of s. 378 of the Code, was that there was to be a preliminary scrutiny of a State appeal by the Court even prior to the stage of admission, requiring the Court to consider at the very outset whether the appeal should be entertained or not, and that it was only after the appeal was entertained with the leave of the Court that it was to be heard for admission under sub-s. (1) of s. 384 read with sub-s. (1) of s. 385 of the Code. The High Court appears to rest its decision more on the Report of the Law Commission than the actual language of sub-s. (3) of s. 378 of the Code, in coming to the conclusion that sub-s. (3) contemplated two stages. Sub-s. (3) of s. 378 is not susceptible of any such construction. The Law Commission in its 48th Report had observed :

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

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

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

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

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Therefore, the amendment which we are recommending will not be so radical a departure as may appear at the first sight. It will place the State and the private complainant on equal footing. Besides this, we ought to add that under s. 422 of the Code, it is at present competent to the appel- E late Court to dismiss the appeal both of the State and of the complainant against acquittal at the preliminary hearing."

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

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

In the *State of Rajasthan* v. *Ramdeen & Ors.*, (1) this Court dealt with a case where the Rajasthan High Court granted the State Government leave to appeal under sub-s. (3) of s. 378 of the Code, but dismissed the appeal filed thereafter on the ground that it had not been filed within ninety days from the judgment appealed from and was therefore barred by limitation under Art. 114 of the Limitation Act, 1963. The application for grant of leave under sub-s. (3) contained all the requisites of a memorandum of appeal and had been filed within ninety days from the date of order of acquittal but was not accompanied by a petition of appeal. It was held that an appeal under sub-s. (1) of s. 378 was an integral part of an application for leave to appeal under sub-s. (3). Accordingly, the order passed by the High Court dismissing the appeal as barred by limitation was set aside. In dealing with the question, it was observed :

> "Under the law it will be perfectly in order if a composite application is made giving the necessary facts and circumstances of the case along with the grounds which may be urged in the appeal with a prayer for leave to enter-

(1) [1977] 3 S.C.R. 139.

A tain the appeal. It is not necessary, as a matter of law, that an application for leave to entertain the appeal should be lodged first and only after grant of leave by the High Court an appeal may be preferred against the order of acquittal. If such a procedure is adopted, as above, it is likely, as it has happened in this case, the appeal may be time-barred if B the High Court takes more than ninety days for disposal of the application for leave. The possibility that the High Court may always in such cases condone the delay on application filed before it does not, in law, solve the legal issue. The right conferred by section 378 (1), Cr. P.C., upon the State to prefer an appeal against acquittal will be jeopardised if such a procedure is adopted, for in certain cases it C may so happen that the High Court may refuse to exercise its discretion to condone the delay. The right conferred under the section cannot be put in peril by an interpretation of section 378 Cr. P.C., which is likely to affect adversely or even perhaps to destroy that right." D

The view expressed by the High Court in *Narendrasingh's case* being in conflict with the decision of this Court in *Ramdeen's case* must be overruled.

E It must accordingly be held that the learned Single Judge had no competence to entertain, hear or dispose of the question of grant of leave under sub-s. (3) of s. 378, as it had virtually entailed dismissal of the appeal preferred by the State Government under sub-s. (1) thereof. The matter should have been dealt with by a Bench of two Judges in terms of r. 1 (q) (ii), Chap. I, Part I, of the Madhya F Pradesh High Court Rules.

The question at issue has now become academic. As already stated, the High Court while refusing the grant of certificate of fitness, had adverted to the fact that the matter was being examined by the Rule-Making Committee. It has since amended r. 1 (q) and G made a distinction between appeals from orders of acquittals under sub-s. (1) of s. 378 in respect of : (1) offences punishable with sentence of death or imprisonment for life and triable by Court of Sessions, and (2) other offences. All appeals falling under category (1), together with applications for leave under sub-s. (3) of s. 378, H have to be heard by a Bench of two Judges, and other appeals falling under category (2), together with applications for leave under sub-s. (3) of s. 378, are to be heard by a Single Judge.

In the result, the appeal must succeed and is allowed. The order passed by the High Court, dismissing the application for leave under sub-s. (3) of s. 378 of the Code of Criminal Procedure, 1973, filed by the State Government of Madhya Pradesh, is set aside, and it is directed that the application shall be dealt with by a Bench of two Judges as required by r. 1 (q) (ii), Chap. I, Part I, of the Madhya Pradesh High Corut Rules, prior to its amendment. A B

H.L.C. *Appeal allowed.*