

2010 (2) MWN (Cr.) 273

**IN THE HIGH COURT OF MADRAS
(Madurai Bench)**

M.M. Sundresh, J.

Cr.L.O.P.(MD) No.5474 of 2010

7.7.2010

Sathyavani Ponrani

.....*Petitioner*

Vs.

1. Samuel Raj. 2. The State, through the Inspector of Police, Umachikulam P.S.
.....*Respondents*

Cr.P.C., Ss.301 & 24(8), Proviso to & 438

Maintainability of Application seeking to intervene in Anticipatory Bail Application —
Whether victim entitled to be heard and take part in Criminal proceeding.

**CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Sections 301, 24(8) & 438 —
CONSTITUTION OF INDIA, Articles 14, 21, 38 & 39-A — Application seeking to
intervene in Anticipatory Bail Application — Maintainability of — Dismissal of
intervening Application, without even numbering, as not maintainable in view of
provision contained in Section 301, Cr.P.C. — Legality of — Whether victim/*de facto*
Complainant entitled to be heard and take part in Criminal proceedings —
Considering Constitutional provisions as also principles laid down by various
judgments, *held*, victim got every right to take part in prosecution — Procedural law
will have to provide a method for dispensation of justice by which truth emerges —
Section 301 cannot be interpreted to hold it as bar for hearing a victim in Application
under Section 438 — Restriction under Section 301 not applicable to procedure under
Section 438 — Section 301, therefore, not a bar for entertaining Application to
intervene in Application filed under Sections 437 or 438 — Section 301 & Proviso to
Section 24(8) are mutually complimentary and not conflicting with each other,
therefore, no bar for engaging a lawyer to assist prosecution — Discretion of Court in
invoking Proviso under Section 24(8) is a judicial discretion — Judicial discretion will
have to be exercised keeping in mind objects and reasons for introduction of Proviso to
Section 24(8) which provides adequate opportunity to victim to take part in Criminal
proceedings — Engaging a Lawyer in accordance with Proviso to Section 24(8) would
mean permitting him to argue along with Public Prosecutor or to examine a witness —
Court not to allow any plea contrary to case of prosecution at instance of victim while
assisting prosecution — Court can reject a request for engaging a lawyer by victim if
same lacks *bona fides* — Word “Victim” includes a legitimate and genuine person
representing a victim — Application seeking permission under Proviso to Section 24(8)
cannot be rejected without even numbering same, but should be considered on merits
— Rejection of such Application must be supported by reasons — Accused/1st
Respondent having already withdrawn Application for anticipatory bail before
Sessions Court and having been already granted anticipatory bail before High Court,**

question of allowing Petition does not arise for consideration — However, liberty given to Petitioner to file Application seeking to intervene, if any Application for Anticipatory Bail/Bail filed in future.
(Paras 30, 32-39, 52, 58, 70 to 72)

- a. On a consideration of the above said principles and after analysing the provisions *vis-a-vis* the various judgments, the following conclusions are arrived at:
- i. Section 301, Cr.P.C. is not a bar for entertaining an Application to intervene in an Application filed under Section 437 or 438, Cr.P.C.
 - ii. Section 301 and Proviso under Section 24(8) are mutually complimentary and not conflicting with each other and therefore, there is no bar for engaging a lawyer to assist the prosecution.
 - iii. The discretion of the Court in invoking Proviso under Section 24(8) is a judicial discretion.
 - iv. The judicial discretion of the Court will have to be exercised keeping in mind the objects and reasons for the introduction of Proviso to Section 24(8) which is to provide an adequate opportunity to the victim to take part in the Criminal proceeding.
 - v. Engaging a lawyer in accordance with Proviso under Section 24(8) would mean permitting him to argue along with the Public Prosecutor and also in a given case even to examine a witness, of-course with the permission of the Court.
 - vi. The Court shall not allow any plea contrary to the case of the prosecution at the instance of the victim while assisting the prosecution.
 - vii. The Court can reject a request for engaging a lawyer by the victim if it is of the opinion that it lacks *bona fides*.
 - viii. While considering the Application, the Court has to keep in mind, the nature of the offence, the injuries suffered by the victim, the position of the victim as well as the Accused and the circumstances under which the offence has been committed.
 - ix. The word 'victim' would also include a legitimate and genuine person representing a victim.
 - x. When an Application is filed by any other person other than the guardian seeking to represent the victim, the Court has to consider the *bona fides*, legitimacy and genuineness of the representative capacity while deciding such an Application.
 - xi. In a given case the Trial Court can also call upon a victim to engage a lawyer if in its opinion the same is required for the proper conduct of the case.
 - xii. In a given case the Court can on its own appoint a lawyer if it is of the opinion the same is required for the proper conduct of case.
 - xiii. When an Application is made seeking permission under Proviso to Section 24(8) the same cannot be rejected without even numbering the same but should be considered on merits.
 - xiv. An order rejecting an Application seeking permission to assist the prosecution must be supported by reasons. [Para 71]

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Section 438 — Scope of — Anticipatory Bail — Concurrent jurisdiction conferred upon Sessions Court and High Court to consider Application for anticipatory bail — Consideration of Application is discretion of Court concerned, but discretion is judicial discretion — Court exercising judicial discretion has to consider material before it, as produced by prosecution, Accused and victim, and has to find out whether a case has been made out — Therefore, it is for Accused to satisfy Court about need to grant anticipatory bail — Person seeking anticipatory bail has to make out a case.
(Paras 11 to 13)

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Section 301 — Scope of — Private person instructed Pleader to prosecute a person in Court — Role of — Such Pleader to act only under directions of Public Prosecutor and may submit written arguments after evidence is closed — Role of Pleader very much limited under Section 301 as much as he can only act under directions of Public Prosecutor and can submit written statements after evidence is closed — Provision introduced on premises that offence is one against State and it is responsibility of State to punish Accused for having committed offence against Society. (Paras 14 to 17)

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Section 302 — Scope of — Section gives power to person seeking to conduct prosecution either by himself or through his pleader with permission of Court — Court concerned, if satisfied, can give permission to any person to conduct prosecution. (Para 17)

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Section 24(8), Proviso to [as inserted by Cr.P.C. (Amendment) Act, 2008 (5 of 2009) w.e.f. 31.12.2009] — Scope and ambit of — Proviso introduced in order to help victims to give a more active role in dispensation of justice — Purpose of Proviso is to have active participation of victim in justice delivery system — Victim, being affected party, sets Criminal law in motion — Court concerned can permit victim to engage an Advocate of his choice to take part in Criminal proceeding and assist prosecution. (Paras 18 to 20, 22)

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Section 24(8), Proviso to — Advocate engaged by a victim — Role of — Extent — Three different roles to be performed by Advocate so engaged : (i) to render assistance to victim — (ii) to assist prosecution by assisting Public Prosecutor who conducts prosecution — (iii) to assist Court being officer of Court — Roles complimentary to each other — Proviso speaks about assistance to prosecution, therefore, implies that role of Prosecutor also to be shared by victim's Counsel by way of assisting prosecution even if to a limited extent. (Paras 21 to 27)

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Sections 301 & 24(8), Proviso to — Comparison between — Provisions complimentary to each other and not conflicting — Proviso to Section 24(8) in other words an expansion of S.301 — Both to be read together — Legislature taken into consideration Section 301 while introducing Proviso to Section 24(8) — Even if Proviso to Section 24(8) encroaches upon restrictions imposed under Section 301, has to be given effect to considering legislative intent. (Paras 28 to 39)

WORDS & PHRASES — “Advocate”, “Pleader” — Definition of, under Sections 24(8) & 301, Cr.P.C., respectively — Scope of — Word “Advocate” as incorporated in Section 24 would mean “to have effective assistance” — Definition of word “pleader” is wider and to be read in context of Section 301 — Definition of word “Advocate” would mean active participation in prosecution through Counsel. (Para 28)

INTERPRETATION OF STATUTES — Proviso to Section — To be construed upon its own terms — Merely because a Proviso is likely to curtail power of other provisions same cannot be held to be invalid — Proviso is independent of main provision, therefore, to be applied giving its full meaning. (Para 32)

INTERPRETATION OF STATUTES — Purposive, Harmonious and Literal Construction — In order to interpret a provision, Statement of Objects and Reasons to be looked into — When two provisions are stated to be in conflict with each other, principle of Purposive Construction to be adopted so as to make both provisions workable — Interpretation to give meaning to Purpose and Object sought to be achieved — Court, in order to give proper interpretation, will have to find out intention of legislature and avoid construction which leads to absurdity by making provisions nugatory — A statute to be read in its entirety and not in isolation — And, a Proviso of law to be seen in context in which it was introduced — Literal interpretation not only way of interpretation — One has to consider circumstances under which provision of law was made to find out actual meaning. (Paras 40 to 51)

WORDS & PHRASES — “Victim”, definition of — Word “Victim” to be given a wider definition to mean not only victim but any one associated or assisting victim or who sets Criminal law into motion or even a third party with public interest — “Victim” would mean a person who represents victim like a natural guardian or other guardian or guardian of person of unsound mind or even a third party, when victim is poor illiterate and dependent and not able to prosecute on his own. (Paras 53 to 56)

CONSTITUTION OF INDIA, Articles 14, 21, 38 & 39-A — Access Jurisprudence — Right to free and fair investigation and trial — Enshrined in Articles 14, 21, 38 & 39-A and a Constitutional as well as fundamental right — Free access to justice integral to core right to equality — Duty of State to ensure free and fair investigation and trial to every citizen — Such a right not confined to Accused only but also to victim — Therefore, right not only Constitutional but also a human right — Any procedure which comes in way of a party in getting a fair trial would be in violation of Article 14 — Conducting a free and fair trial is duty of Court. (Paras 2 to 8, 66-69 & 63)

AUTHORITIES REFERRED

| | |
|--|----|
| <i>G.P. Singh : Principles of Statutory Interpretation, 12th Edition</i> | 49 |
| <i>Justice V.R. Krishna Iyer : Equal Justice and Forensic Process</i> | 6 |

CASES REFERRED

| | |
|--|----|
| <i>A. Manjula Bhashini v. A.P. Women’s Coop. Finance Corpn. Ltd., 2009 (8) SCC 431</i> | 42 |
| <i>Attorney-General of the Gambia v. Pierra Sarr N’ Fie</i> | 53 |
| <i>Bangalore Water Supply v. A. Rajappa, AIR 1978 SC 548</i> | 46 |
| <i>C.S.Y. Sankar Rao v. State, 2010 (1) CRIMES 554</i> | 31 |
| <i>Captain Amarinder Singh v. Parkash Singh Badal, 2009 (6) SCC 260</i> | 2 |
| <i>Chandra Mohan v. State of Uttar Pradesh, AIR 1966 SC 1987</i> | 47 |
| <i>Chern Taong Shang v. Commander S.D. Baijal, 1988 (1) SCC 507</i> | 41 |
| <i>Delhi Domestic Working Women’s Forum v. Union of India, 1995 (1) SCC 14</i> | 21 |
| <i>Devender Pal Singh v. State of NCT of Delhi, 2002 (5) SCC 234</i> | 3 |
| <i>Gangadhar Janardan Mhatre v. State of Maharashtra, 2004 (7) SCC 768</i> | 62 |
| <i>Guisseppi v. Walling, 144F (2d) 608 (pp 620)</i> | 48 |
| <i>K.P. Varghese v. ITO, 1981 (4) SCC 173</i> | 40 |
| <i>Kunhiraman v. State of Kerala, 2005 MLJ (CrL.) 741</i> | 30 |
| <i>Nirmal Singh Kahlon v. State of Punjab, 2009 (1) SCC 441</i> | 69 |
| <i>Puran v. Rambilas, 2001 (6) SCC 338</i> | 55 |
| <i>R. Rathinam v. State, AIR 2000 SCC 1851</i> | 55 |
| <i>R.L. Arora v. State of U.P., AIR 1964 SC 1230</i> | 51 |
| <i>S. Nagaraj v. B.R. Vasudeva Murthy, 2010 (3) SCC 353</i> | 50 |
| <i>S.J.K. International v. State, Govt. of NCT of Delhi, 2001 CrL. L.J. 1264</i> | 59 |

| | |
|--|--------|
| <i>Shri Gurbaksh Singh Sibbia v. State of Punjab</i> , 1980 (2) SCC 565 | 12 |
| <i>State of Kerala v. B. Six Holiday Resorts (P) Ltd.</i> , 2010 (5) SCC 186..... | 32 |
| <i>State of U.P. v. Anil Singh</i> , 1988 Supp SCC 686..... | 5 |
| <i>Stirland v. Director of Public Prosecutor</i> , 1944 (2) All. ER 13..... | 4 |
| <i>Surjit Singh v. Mahanagar Telephone Nigam Limited</i> , 2009 (16) SCC 722..... | 51 |
| <i>Tashi Delek Gaming Solutions Ltd. v. State of Karnataka</i> , 2006 (1) CTC 208 (SC) | 68 |
| <i>Tika Ram v. State of Uttar Pradesh</i> , 2009 (10) SCC 689 | 43 |
| <i>Zahira Habibulla H. Sheikh v. State of Gujarat</i> , 2004 (4) SCC 158 | 64, 67 |
| <i>Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra</i> , 2010 (5) SCC 246 | 45 |

C. Muthu Saravanan, Advocate for Petitioner.

S. Devasena, Advocate for Respondent No.1; L. Murugan, Government Advocate (Crl. Side) for Respondent No.2.

Finding — Cr.O.P. disposed of with direction — M.Ps. closed.

Prayer: Petition filed Under Section 482, Cr.P.C. to call for the records and set aside the order dated 26.04.2010 passed by the Principal District and Sessions Judge, Madurai made in unnumbered Petition in Cr.M.P. No.1519 of 2010 and direct the Principal District and Sessions Judge, Madurai to permit the Petitioner to put forth her arguments in the Anticipatory Bail Petitions filed by the Respondent 1 in Cr.M.P. No.1519 of 2010.

JUDGMENT

1. The one and only issue which is of considerable public importance that arises in this case is as to whether a victim is entitled to be heard and take part in a Criminal proceeding or not.

2. In *Captain Amarinder Singh v. Parkash Singh Badal and others*, 2009 (6) SCC 260, the Hon'ble Apex Court has observed that fair trial is the first imperative in the dispensation of justice. The purpose of Criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. Free and fair trial is *sine qua non* of Article 21 of the Constitution. If the Criminal trial is not free and fair and biased, judicial fairness and the Criminal Justice would be at stake, shaking the confidence of the public in the system which would ultimately result in its collapse.

3. The Hon'ble Apex Court in *Devender Pal Singh v. State of NCT of Delhi and another*, 2002 (5) SCC 234 has observed as follows:

“Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape

than punish an innocent. Letting the guilty escape is not doing justice according to law.”

4. Viscount Simon in *Stirland v. Director of Public Prosecutor*, 1944 (2) All. ER 13 has held as follows:

“A Judge does not preside over a Criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. ... Both are public duties...”

5. The said observation has been quoted with approval by the Hon'ble Apex Court in *State of U.P. v. Anil Singh*, 1988 Supp SCC 686 and in *Devender Pal Singh v. State of NCT of Delhi and another*, 2002 (5) SCC 234.

6. Justice V.R. Krishna Iyer in his Book “*Equal Justice and Forensic Process*” has observed thus:

“Access Jurisprudence, for us a constitutional fundamental, has many dimensions. It is narrow and pedantic to regard it merely as a wider rule of standing or mode of informal excitation of judicial jurisdiction through letters to the Judges, etc. Its circumambience spreads out to reach relief to the littlest citizen denied his or the weakest group their right, freedom and

redressal of wrong. Every measure in this range of operations from awakening the victims of injustice, assisting them to mobilise legal resources for demanding justice, affording public initiation and intervention in ensuring that the just shall win and the unjust shall lose, minimising technicalities by using informal procedures and a host of other steps like forbiddance of the rich from cornering all judicial time by forensic orality unlimited and by Appeals, Revisions and Reviews *ad libitum* in an endless escalation and priority for the litigation of groups whose minimal staying power makes urgent justice a super-value and these are integral to the People's Jurisprudential Processes."

7. The crucial significance of access jurisprudence has been best expressed by Cappelletti in the following way:

"The right of effective access of justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice thus be seen as the most basic requirement – the most basic 'human-right' - of a system which purports to guarantee legal rights."

8. Keeping the above said principles coupled with the message conveyed by the Constitution under Articles 14, 21, 38 and 39A of the Constitution of India in view, this Court will have to examine the issue that has arisen for consideration.

9. The facts of the case in a nutshell are as follows:

9.1. The Petitioner is the father of the deceased. He married off his daughter to the First Respondent's son on 02.07.2009. Unfortunately, the Petitioner's daughter died by committing suicide. Thereafter, the

Petitioner gave a Complaint which has been registered in Crime No.361 of 2010 against the First Respondent, his wife and son for the alleged offence under Section 304-B and 498-A, IPC. The First Respondent filed an Anticipatory Bail Application in Cr. M.P. No.1519 of 2010 and an Application was filed by the Petitioner seeking to intervene in order to put forth his objections. The said Application was dismissed even without numbering by the Principal District and Sessions Judge, Madurai holding that such an Application is not maintainable in view of the provision contained under Section 301 of the Criminal Procedure Code. After the dismissal of the said Application the First Respondent has withdrawn the Anticipatory Bail Application and filed another Application before the Hon'ble High Court and thereafter granted anticipatory bail on a consideration of the materials available before it.

10. The learned Counsel for the Petitioner submitted that even though the First Respondent has been granted anticipatory bail the order passed by the learned Principal District and Sessions Judge, Madurai is illegal and the same is liable to be set aside. More so, the said order will stand in the way of the Petitioner in opposing the Application for bail or anticipatory bail as the case may be for the other Accused. It is further submitted by the learned Counsel that in as much as a legal issue has been raised the same has to be decided. Considering the said submissions and the issue involved, this Court is of the view that the same has to be decided by this Court. Scope of Section 438 of the Code of Criminal Procedure:

11. Under Section 438 of the Code of Criminal Procedure, concurrent jurisdiction has been conferred upon the Sessions Court as well as the High Court to consider an Application for anticipatory bail. The said

consideration of the Application is the discretion of the Court concerned. However the said discretion is a judicial discretion. When a Court exercises discretion which is judicial in nature, the Court has to consider the materials before it, which can be produced by the prosecution, Accused, as well as the victim. While considering the said request for anticipatory bail, the Court has to find out whether a case has been made out by the Accused. Therefore it is for the Accused to satisfy the Court about the need to grant an anticipatory bail.

12. In *Shri Gurbaksh Singh Sibbia and others v. State of Punjab*, 1980 (2) SCC 565, a Larger Bench of the Hon'ble Apex Court has considered the Scope of Section 438, Cr.P.C. The Hon'ble Apex Court has observed as follows:

“35.....Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.”

13. Therefore, on a consideration of the above said principles, a person seeking anticipatory bail will have to make out a case. Scope of Section 301 of the Code of Criminal Procedure:

14. Section 301 is defined under Chapter 24 of the Code of Criminal Procedure. The said section is a general provision for the Appearance of the Public Prosecutor regarding inquiries and trials.

15. In order to examine the Scope of Article 301, Cr.P.C., it is useful to extract the same and accordingly the same is extracted hereunder:

“301. *Appearance by Public Prosecutors.* —
(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or Appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.”

16. A reading of the said Section would show that in a Court of Session it is only the Public Prosecutor who shall conduct the prosecution. However if a private person instructs the pleader such a pleader so instructed shall act only under the directions of the Public Prosecutor and with the permission of the Court may submit written arguments after the evidence is closed. Therefore, the role of pleader is very much limited under Section 301, Cr.P.C. in as much as he can only act under the directions of the Public Prosecutor and can submit written arguments after the evidence is closed.

17. The said provision has been introduced on the premises that an offence is one against the state and therefore it is the responsibility of the state to punish the Accused having committed the offence against the society. It is further seen that under Section 302 of the Code of Criminal Procedure, a person conducting the prosecution may do so personally or by a pleader. Therefore under Section 302, Cr.P.C. power has been given to a person seeking to conduct prosecution either by himself or through his pleader with the permission of the Court. A further reading of the said Section would clearly indicate

that the Court concerned can give permission to any person to conduct the prosecution if it is satisfied.

Scope of Section 24(8) of the Code of Criminal Procedure:

18. Section 24 is a specific provision under Chapter 2 of the Code of Criminal Procedure. Section 24 of the Code of Criminal Procedure speaks about the Appointment and Functions of Prosecutors. Proviso to Section 24(8) has been inserted by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009) with effect from 31.12.2009 which is extracted hereunder:

“24(8). The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor:

[Provided that the Court may permit the victim to engage an Advocate of his choice to assist the prosecution under this sub-section.]”

Section 2(q) defines “pleader” as thus:

“2(q) “pleader”, when used with reference to any proceeding in any Court, means a person authorised by or under any law for the time being in force, to practise in such Court, and includes any other person appointed with the permission of the Court to act in such proceeding”

19. In order to appreciate the scope and ambit of Proviso under Section 24(8) the objects and reasons of the (Amendment) Act, 2008 (5 of 2009) will have to be seen, the same is extracted hereunder:

“2. The Notes on Clauses explain, in brief, the various provisions of the Bill. Amendment Act 5 of 2009-Statement of Objects and Reasons: The need to amend the Code of Criminal Procedure, 1973 to ensure

fair and speedy justice and to tone up the Criminal Justice System has been felt for quite sometime. The Law Commission has undertaken a comprehensive review of the Code of Criminal Procedure in its 154th Report and its recommendations have been found very appropriate, particularly those relating to provisions concerning arrest, custody and remand, procedure for summons and warrant-cases, compounding of offences, victimology, special protection in respect of women and inquiry and trial of persons of unsound mind. Also, as per the Law Commission’s 177th report relating to arrest, it has been found necessary to revise the law to maintain a balance between the liberty of the citizens and the society’s interest in maintenance of peace as well as law and order.

2. The need has also been felt to include measures for preventing the growing tendency of witnesses being induced or threatened to turn hostile by the Accused parties who are influential, rich and powerful. At present, the victims are the worst sufferers in a crime and they don’t have much role in the Court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the Criminal justice system. The application of technology in investigation, inquiry and trial is expected to reduce delays, help in gathering credible evidences, minimise the risk of escape of the remand prisoners during transit and also facilitate utilisation of police personnel for other duties. There is an urgent need to provide relief to women, particularly victims of sexual offences, and provide fair-trial to persons of unsound mind who are not able to defend themselves.

3. The Code of Criminal Procedure (Amendment) Bill, 2006 seeks to achieve the above objectives.”

20. A perusal of the said objects and reasons would exemplify that the said Proviso has been introduced in order to help the victims to give a more active role in the

dispensation of Criminal justice. In other words, the purpose of the Proviso is to have active participation of the victim in the Justice Delivery System. After all it is he who sets the Criminal law into motion and it is he who is the affected party. A reading of the said Proviso under Section 24(8) of the Code of Criminal Procedure would clearly show that the Court concerned can permit the victim to engage an Advocate of his choice to assist the prosecution.

Role of the Lawyer:

21. In *Delhi Domestic Working Women's Forum v. Union of India and others*, 1995 (1) SCC 14, the Hon'ble Apex Court was dealing with the legal assistance to be provided to a victim of rape. The Hon'ble Supreme Court in the said case has held that the victim of a sexual assault case will have to be informed by the police about her right to be represented by a lawyer. It is further observed in the said judgment that the Complainant is entitled to be provided with the legal assistance of a lawyer who is well acquainted with the Criminal Justice System. Such a lawyer appointed for the Complainant would have to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her both in the Police Station and in the Court. He also has to provide assistance so as to enable her to get help such as mind Counseling or medical assistance. It was also observed that a duty is cast also on the Court upon an Application by the Police to appoint a lawyer. The directions issued by the Hon'ble Apex Court are extracted hereunder:

"15. In this background, we think it necessary to indicate the broad parameters in assisting the victims of rape.

(1) The Complaints of sexual assault cases should be provided with legal representation. It is important to have someone who is well-

acquainted with the Criminal Justice System. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the Police Station and in Court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind Counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the Complainant's interests in the Police Station represent her till the end of the case.

(2) Legal assistance will have to be provided at the Police Station since the victim of sexual assault might very well be in a distressed state upon arrival at the Police Station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of Advocates willing to act in these cases should be kept at the Police Station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The Advocate shall be appointed by the Court, upon Application by the Police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, Advocates would be authorised to act at the Police Station before leave of the Court was sought or obtained."

22. Therefore, a reading of the above said judgment would show that even in the absence of Proviso under Section 24(8) considering the nature of offence, the Hon'ble Apex Court was pleased to issue directions fixing the duty upon the police and the Court to provide necessary legal assistance to the victim concerned. Hence,

on a consideration of the above said principle of law and on a reading of the Proviso under Section 24(8), this Court is of the opinion that an advocate engaged by a victim will have to be permitted to take adequate part in a Criminal proceedings thereby performing his role as an Advocate representing the victim.

23. The *Black Dictionary* defines the “Assistance of Counsel” as under:

“Representation by a lawyer, esp. in a Criminal case.”

24. Therefore, an Advocate so engaged has to perform three different roles. He has to render assistance to the victim who engaged him to assist the prosecution, secondly to assist the prosecution by assisting the Public Prosecutor who conducts the prosecution and to assist the Court being the officer of the Court. Hence, an Advocate so engaged by the victim or a victim has to perform the above said three roles which are complimentary to each other.

25. The word “Assist” is defined in *Black Dictionary* as follows:

“Assist. To help; aid; succor; lend countenance or encouragement to; participate in as an auxiliary. To contribute effort in the complete accomplishment of an ultimate purpose intended to be effected by those engaged.”

26. Proviso of Section 24(8), Cr.P.C. speaks about the assistance to prosecution. Therefore it implies that the role of the Prosecutor is also to be shared by the victim’s Counsel by way of assisting the prosecution even if it is to a limited extent.

27. The word “engage” has been defined in *Black Dictionary* as follows:

“to employ or involve oneself; to take part in; to embark on”.

From the above definitions it is seen that the definition of word “engage” would mean to make oneself involve into a particular activity and to take part. Therefore, the word “engage” has got a wider import than the word instruct. Comparison between Section 301 and Proviso under Section 24(8) Cr.P.C.:

28. The Provision under Section 24(8) and Section 301 of the Code of Criminal Procedure are rather complimentary to each other rather than conflicting. Proviso to Section 24(8) of the Criminal Procedure Code is in other words an expansion of Section 301 of the Code of Criminal Procedure. Both Proviso under Section 24(8) and Section 301, Cr.P.C. will have to read together. Engaging of an Advocate should only mean “to have an effective assistance”. That is a reason why the word ‘Advocate’ has been incorporated under Section 24. The definition of a ‘pleader’ is wider which has to be read in the context of Section 301, Cr.P.C. and the definition word “Advocate” would mean an active participation in the prosecution through a Counsel. Therefore in order to appreciate the same this Court will have to look into the object and reasons as well as a simple interpretation of the provisions. The legislature has taken into consideration of Section 301, Cr.P.C. while introducing the Proviso to Section 24(8).

29. Hence on a reading of Section 301 together with Proviso under Section 24(8), Cr.P.C., this Court is of the opinion that they are only complimentary with each other by providing more access to an aggrieved party to assist the prosecution.

30. Section 301, Cr.P.C. also cannot be interpreted to hold that it would be a bar for hearing a victim in an application of Section 438, Cr.P.C. for the reasons no enquiry, trial or Appeal is involved. Therefore, the

restriction under Section 301 cannot be made applicable to the procedure under Section 438, Cr.P.C. In this connection it is useful to refer the judgment of Kerala High Court rendered in *Kunhiraman v. State of Kerala*, 2005 MLJ (CrL.) 741 wherein it has been held as follows:

“9..... A reading of Section 301, Cr.P.C. would go to show that this section relates to mainly the role of Prosecutors and their right to appear, etc. in an “inquiry, trial or Appeal” before a Court. It also lays down the limited role of private persons in such matters. But, the said section has no application to the present case because the present proceedings is neither an “inquiry, trial or Appeal”. The cases at hand are applications for anticipatory bail. Those are not Appeals, and no enquiry or trial is involved in these cases. Section 301 applies only in cases where there is “inquiry, trial or Appeal” and hence it has no application to an Application for anticipatory bail. The restrictions and bar under Section 301, Cr.P.C. cannot be applied to proceedings under Section 438, Cr.P.C.

10. Therefore, with due respect, I hold that I cannot place reliance upon the above decisions in the present context. Section 438, Cr.P.C. refers to an Application for anticipatory bail. No “inquiry, trial or Appeal” as contemplated by the Code is involved in the matter. Section 438, Cr.P.C. can be invoked by the Court on an Application made by a person who is apprehending arrest in a non-bailable offence. On such application being made, if the Court “thinks fit” direct that the Accused be released on bail in the event of his arrest. It is clear from the said section that it is only the satisfaction of the Court that is relevant and crucial for giving a direction under Section 438, Cr.P.C. The relief under Section 438 can be granted provided the Court “thinks fit”.

11. When can the Court “think it fit” to grant anticipatory bail? The Court will have to consider the relevant facts relating to the case to arrive at such satisfaction. Details of

the case have to be obtained from the case diary which will be available with the Prosecutor. The Court may look into the case diary produced by the Prosecutor, though the section does not provide for perusal of documents. Though the section does not specify that a notice should be given to the Public Prosecutor, the Court normally gives notice to the Public Prosecutor. The Court hears Petitioner and the Prosecutor though the Section does not state that they should be heard. But, all these are done with a view to ascertain the relevant facts which will help the Court to take a right decision in the matter. All these will be essential for the Court to “think it fit” to invoke Section 438 and exercise the powers under the said Section.

12. Therefore, no Court dispense with a notice to the Prosecutor in an Application under Section 438 of the Cr.P.C., though the Section does not have distinctively contemplate issuance of notice to Prosecutor or hearing of either the Prosecutor or the Petitioner. There is nothing in the Section to indicate that the said power can be exercised by hearing the Petitioner and the Public Prosecutor alone. So, if the Court feels that one more person viz., the injured or the aggrieved must also be heard, no provision in the Code prohibits the Court from doing so. Anyway, prohibition and restrictions in Section 301 and other related provisions apply not to an Application under Section 438, Cr.P.C. The power vested in the Court under Section 438, Cr.P.C. can be exercised by hearing the Petitioner as well as such other party as the Court may deem fit and proper, depending on the facts and circumstances of each case.”

31. The said view was also supported by the recent judgment of the Andhra Pradesh High Court in *C.S.Y. Sankar Rao v. State*, 2010 (1) CRIMES 554. After considering the said judgments, this Court is in respectful agreement with the same.

32. A Proviso as in the present case will have to be construed upon his own terms.

Merely because a Proviso is likely to curtail the power of the other provisions the same cannot be held to be invalid. In other words, a Proviso is independent of the main provision and therefore the same has to be applied and given its full meaning. Therefore this Court is of the opinion that even assuming that Proviso to Section 24(8) encroaches upon the restrictions imposed under Section 301 for the arguments sake, it has to be given effect to. The said principle of law has also been considered by the Hon'ble Apex Court in *State of Kerala v. B. Six Holiday Resorts (P) Ltd.*, 2010 (5) SCC 186 wherein the Hon'ble Apex Court has held as follows:

32. A Proviso may either qualify or except certain provisions from the main provision; or it can change the very concept of the intendment of the main provision by incorporating certain mandatory conditions to be fulfilled; or it can temporarily suspend the operation of the main provision. Ultimately the Proviso has to be construed upon its terms. Merely because it suspends or stops further operation of the main provision, the Proviso does not become invalid. The challenge to the validity of the Proviso is therefore rejected.”

33. Role of the prosecution is to prove the charges. There is a difference between a Public Prosecutor and a Prosecutor. Any lawyer can be a prosecutor. Inasmuch as the Proviso to Section 24(8) which speaks about rights of a victim by way of assistance by engaging a lawyer the same cannot be curtailed as long as it is not contrary to the case of the prosecution.

34. A lawyer engaged to assist the prosecution under Section 24 is not under the control of the Public Prosecutor but his role is to assist the prosecution. The discretion of the Court is a judicial discretion while permitting the victim to engage a lawyer to assist the prosecution.

The very purpose of engaging a lawyer would amount to assisting the victim.

35. Section 301, Cr.P.C. speaks about the power of the Public Prosecutor to conduct the prosecution. A conjoint reading of Sections 301 and 24(8) would make it clear that it is the Public Prosecutor who conducts the case but it does not mean that a lawyer engaged by a victim shall not be allowed to supplement the conducting of the case by the Prosecutor. A lawyer has to render his assistance in three different ways. He has to render assistance to the victim, to the prosecution and as an officer of the Court.

36. It is the sole prerogative of the public prosecutor to pick, choose and examine a prosecution witness. However if the public prosecutor fails in the above mentioned duty either accidentally or designly in the opinion of the Court, then in such a circumstance it can permit a victim's lawyer even to examine a witness. Such a power can also be exercised by the Court for the purpose of conducting a free and fair trial and in the interest of justice.

37. Therefore, this Court is of the opinion that a combined of Section 301 and Proviso under Section 24(8) would make it clear that a lawyer can be engaged to argue and in an appropriate case with the permission of the Court to examine the witness.

38. Further a reading of the above said provisions would show that Section 301 speaks about the instructing a pleader whereas Section 24(8) Proviso speaks about engaging a lawyer. Therefore under Section 301 a party can instruct whereas under Section 24(8) Proviso a victim can engage a lawyer and conduct the case along with the Public Prosecutor.

39. Hence, considering the same, this Court is of the opinion that the Proviso

under Section 24(8) will have to be given its full and actual meaning, considering the legislative intent for its introduction.

Statements and Objects:

40. It is a well settled principle of law that in order to interpret the provision in a given case, the statements and objects can also be looked into. In *K.P. Varghese v. ITO*, 1981 (4) SCC 173, the Hon'ble Apex Court has observed as follows:

“36. In *K.P. Varghese v. ITO*, 1981 (4) SCC 173 this Court while rejecting the argument of the Revenue that Rule of Strict Construction should be applied for interpreting Section 52(2), referred to the Statement of Objects and Reasons contained in the Bill presented before Parliament, speech made by the Finance Minister and observed: (SCC p.184, para 8)

“8. ...Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible.”

41. Similarly in *Chern Taong Shang v. Commander S.D. Baijal*, 1988 (1) SCC 507, it is held as follows:

“37. In *Chern Taong Shang v. Commander S.D. Baijal*, 1988 (1) SCC 507, the Court referred to the object sought to be achieved by enacting the Maritime Zones of India

(Regulation of Fishing by Foreign Vessels) Act, 1981 i.e. preventing the illegal poaching of fishes by foreign vessels including foreign vessels chartered by Indian parties by providing deterrent punishment to protect Indian fishermen and observed: (SCC p.516, para 26)

“26. It is pertinent to mention that in interpreting a statute the Court has to ascertain the will and policy of the legislature as discernible from the object and scheme of the enactment and the language used therein. Viewed in this context it is apparent that the said Act has been made with the sole purpose of preventing poaching of fishes by foreign vessels chartered by Indian citizens within the exclusive economic zone of India as specified in Rule 8(1)(q) of the Maritime Zone of India Rules as amended in 1982 as well as in breach of provisions of the said Act and the terms and conditions of permit issued under Section 5 of the said Act.

38. In *Utkal Contractors and Joinery (P) Ltd. v. State of Orissa*, 1987 (3) SCC 279 the Court interpreted the provisions of the Orissa Forest Produce (Control of Trade) Act, 1981 and observed: (SCC pp.288-89, para 9)

“9. ... A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the Preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at

generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use necessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something. Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. Parliament does not indulge in legislation merely to state what it is unnecessarily to state or to do what is already validly done. Parliament may not be assumed to legislate unnecessarily.”

39. In *Gurudevdatla VKSSS Maryadit v. State of Maharashtra*, 2001 (4) SCC 534] a Three-Judge Bench of the Hon'ble Supreme Court interpreted the provisions of the Maharashtra Cooperative Societies Act, 1960, the Maharashtra Cooperative Societies (Second Amendment) Ordinance, 2001 and observed: (SCC pp.549-50, paras 19 & 21)

“19. Further, after introduction of the Bill and during the debates thereon before Parliament, if a particular provision is inserted by reason of such a debate, question of indication of any object in the Statement of Objects and Reasons of the Bill does not and cannot arise. The Statement of Objects and Reasons needs to be looked into, though not by itself a necessary aid, as an aid to construction only if necessary. To assess the intent of the legislature in the event of there being any confusion, Statement of Objects and Reasons may be looked into and no exception can be taken thereto - this is not an indispensable requirement but when faced with an imperative need to appreciate the proper intent of the legislature, statement may be looked into but not otherwise.

.....

21. While the Statement of Objects and Reasons in the normal course of events cannot be termed to be the main or principal aid to construction but in the event it is required to discern the reasonableness of the classification as in *Shashikant Laxman Kale v. Union of India*, 1990 (4) SCC 366, Statement of Objects and Reasons can be usefully looked into for appreciating the background of the legislature's classification.”

42. The pronouncement of the Apex Court in *A. Manjula Bhashini v. A.P. Women's Coop. Finance Corpn. Ltd.*, 2009 (8) SCC 431 wherein it has been observed as follows:

“40. The proposition which can be culled out from the aforementioned judgments is that although the Statement of Objects and Reasons contained in the Bill leading to enactment of the particular Act cannot be made the sole basis for construing the provisions contained therein, the same can be referred to for understanding the background, the antecedent state of affairs and the mischief sought to be remedied by the statute. The Statement of Objects and Reasons can also be looked into as an external aid for appreciating the true intent of the legislature and/or the object sought to be achieved by enactment of the particular Act or for judging reasonableness of the classification made by such Act.”

43. The Apex Court in *Tika Ram v. State of Uttar Pradesh*, 2009 (10) SCC 689 also took note of the statement of objects and reasons while construing the provisions of the Land Acquisition Act. Therefore considering the objects and reasons which led to the introduction of the Proviso under Section 24(8) this Court is of the opinion that the same has to be construed to mean that the victim or a victim will have to be permitted to assist the prosecution by engaging a lawyer of his choice. Principles of purposive, harmonious and literal constructions:

44. When there are two provisions which are stated to be in conflict with each other then the Principle of Purposive Construction will have to be adopted so as to make both the provisions workable. In other words such an interpretation will have to give meaning to the purpose and the object that is sought to be achieved. In order to give a proper interpretation the Court will have to find out the intention of the legislature and avoid a construction which will lead to absurdity by making the provisions nugatory.

45. A statute has to be read in its entirety and not in isolation. Further a provision of law has to be seen in the context in which it is introduced. In a recent judgment in *Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra*, 2010 (5) SCC 246, the Hon'ble Apex Court has observed as follows:

“74. Before we proceed to analyse the provisions of the two statutes in order to ascertain whether they are repugnant or not, we may note that it is well settled that no provision or word in a statute is to be read in isolation. In fact, the statute has to be read as a whole and in its entirety. In *RBI v. Peerless General Finance & Investment Co. Ltd.*, 1987 (1) SCC 424, this Court while elaborating the said principle held as under: (SCC p.450, para 33)

“33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then Section by Section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context,

its scheme, the Sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.”

46. In *Bangalore Water Supply v. A. Rajappa*, AIR 1978 SC 548, the Hon'ble Apex Court has observed as follows:

“Perhaps with the passage of time, what may be described as the extension of a method resembling the “armatures rule” in the constitution of wills. Judges can more frankly step into the shoes of the legislature where an enactment leaves its own intentions in much too nebulous or uncertain a state.”

47. In *Chandra Mohan v. State of Uttar Pradesh*, 1967 (1) SCR 77 : AIR 1966 SC 1987, the Hon'ble Apex Court has observed that:

“The fundamental rule of interpretation is that in construing the provisions of the Constitution or the Act of the Parliament, the Court “will have to find out the express intention from the words of the Constitution or the Act as the case may be” and eschew the construction which will lead to absurdity and give rise to practical inconvenience or make the provisions of the existing law nugatory.”

48. Justice Frankin in *Guisseppi v. Walling*, 144F (2d) 608 (pp 620), has observed as follows:

“The necessary generality in the wordings of many statutes, and ineptness of drafting in others frequently compels the Court, as best at they can, to fill in the gaps, an activity which no matter how one may label it, is in part legislative. Thus the Courts in their way, as

administrators, in their way perform the task of supplementing statutes. In the case of Courts we call it “interpretation” or “filling the gaps” in the case of administrators we call it “delegation” or authority to supply the details.”

49. Justice G.P. Singh in *Principles of Statutory Interpretation, 12th Edition* at P.298 Says Thus:

“... a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context permits reference to other statutes in *pari materia i.e.* statutes dealing with the same subject-matter or forming part of the same system.”

Sections 79-A, 79-B and 80 of the Land Reforms Act, therefore, have to be read together with Section 95 of the Land Revenue Act as all these provisions deal with the same subject-matter, namely, agricultural lands. We, therefore, hold that the law permitted the grant of the agricultural land in favour of the Sangha for house sites on payment of conversion fine and the grant made by the State Government in favour of the Sangha by the Order dated 15.06.1979 was not void ab initio on this count.”

50. The said observations of the Justice G.P. Singh was quoted with approval by a recent judgment of the Apex Court in *S. Nagaraj v. B.R. Vasudeva Murthy*, 2010 (3) SCC 353 while construing the Principle of Harmonious Construction.

51. A literal interpretation is not the only way of interpretation. One has to consider the circumstances under which a provision of law has been made to find out the actual meaning. In this connection, the following passage in *R.L. Arora v. State of U.P.*, AIR 1964 SC 1230 is extracted hereunder:

“9. ... Further, a literal interpretation is not always the only interpretation of a provision in a statute and the Court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something

implicit behind the words actually used which would control the literal meaning of the words used in a provision of the statute. It is permissible to control the wide language used in a statute if that is possible by the setting in which the words are used and the intention of the law-making body which may be apparent from the circumstances in which the particular provision came to be made.”

The said ratio laid down by the Hon'ble Apex Court has been quoted with approval in *Surjit Singh v. Mahanagar Telephone Nigam Limited*, 2009 (16) SCC 722.

52. Hence, on a consideration of the above said principles and applying the same to the issue involved, this Court is of the opinion that there cannot be any bar for a victim to engage a lawyer and permit him to conduct the case by way of assisting the prosecution.

Definition of Victim:

53. To participate in a Criminal proceeding one need not be a victim alone. The word ‘victim’ will have to be given a wider interpretation to mean not only the victim but any one who is associated or assisting the victim or who sets the Criminal law into motion or even in a given case a third party with Public interest. In a case where the Victim is no more it cannot be said no Application can be filed by any body seeking to invoke the Proviso to Section 24(8) of the Code of Criminal Procedure. Moreover, when a victim is not capable of prosecuting a case then he has to be represented by another person. Lord Denning, in the notable case of the *Attorney-General of the Gambia v. Pierra Sarr N' Fie*, spoke thus:

“...the words ‘person aggrieved’ are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him”

54. Similarly Prof. S.A. de Smith takes the same view:

“All developed legal systems have had to face the problem of adjusting conflicts between two aspects of the public interest - the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the desirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the Courts in matters that do not concern him.”

55. In *R. Rathinam v. State*, AIR 2000 SCC 1851 the Hon'ble Supreme Court has permitted lawyers to file an application for cancellation of bail even though they do not have anything in the case personally. The said judgment of the Apex Court was quoted with approval in *Puran v. Rambilas*, 2001 (6) SCC 338, wherein the Apex Court has observed as follows:

“14. Mr Lalit next submitted that a third party cannot move a Petition for cancellation of the bail. He submitted that in this case the prosecution has not moved for cancellation of the bail. He pointed out that the father of the deceased had moved for cancellation of the bail. He relied upon the cases of *Simranjit Singh Mann v. Union of India*, 1992 (4) SCC 653 and *Janata Dal v. H.S. Chowdhary*, 1991 (3) SCC 356. Both these cases dealt with Petitions under Article 32 of the Constitution of India whereunder a total stranger challenged the conviction and sentence of the Accused. This Court held that neither under the provisions of the Criminal Procedure Code nor under any other statute is a third-party stranger permitted to question the correctness of the conviction and sentence imposed by the Court after a regular trial. It was held that the Petitioner, who was a total stranger, had no *locus standi* to challenge the conviction and the sentence awarded to the convicts in a Petition under Article 32. The principle laid down in these cases has no Application to the facts of the present case. In this case the Application for cancellation of bail is not by

a total stranger but it is by the father of the deceased. In this behalf the ratio laid down in the case of *R. Rathinam v. State by DSP*, 2000 (2) SCC 391 needs to be seen. In this case bail had been granted to certain persons. A group of practising Advocates presented Petitions before the Chief Justice of the High Court seeking initiation of *suo motu* proceedings for cancellation of bail. The Chief Justice placed the Petitions before a Division Bench. The Division Bench refused to exercise the *suo motu* powers on the ground that the Petition submitted by the Advocates was not maintainable. This Court held that the frame of sub-section (2) of Section 439 indicates that it is a power conferred on the Courts mentioned therein. It was held that there was nothing to indicate that the said power can be exercised only if the State or investigating agency or a Public Prosecutor moves a Petition. It was held that the power so vested in the High Court can be invoked either by the State or by any aggrieved party. It was held that the said power could also be exercised *suo motu* by the High Court. It was held that, therefore, any member of the public, whether he belongs to any particular profession or otherwise could move the High Court to remind it of the need to exercise its power *suo motu*. It was held that there was no barrier either in Section 439 of the Criminal Procedure Code or in any other law which inhibits a person from moving the High Court to have such powers exercised *suo motu*. It was held that if the High Court considered that there was no need to cancel the bail then it could dismiss the petition. It was held that it was always open to the High Court to cancel the bail if it felt that there were sufficient reasons for doing so.”

56. A reading of the above said judgment would clearly show that in a given case even a third party could be permitted to file appropriate Application to cancel the bail. Therefore, the definition of victim would mean a person who represents the victim like a natural guardian or other guardian or a guardian of a person of unsound mind or even a third party, when the

victim is so poor, illiterate and dependent to the extent of requiring support from others and not able to prosecute on his own.

Reasons for the victim's participation:

57. It is to be seen that an Application for anticipatory bail is normally filed at the stage of investigation. It is the informant who is the best person to furnish the materials before the Court so as to enable the Court to come to conclusion as to whether an Application for anticipatory bail is to be granted or not. It is further to be seen that a victim is a part of the Criminal justice. The case of the prosecution primarily based upon the victim or the person who sets the case in motion. After all the prosecution takes up the case of the victim and such a victim is part of the society. While a decision of the competent Criminal Court does not affect the society directly it does so for the victim.

58. When a bail or anticipatory bail is granted by a Court of session the same is amenable to be cancelled at the instance of the *de-facto* Complainant before the High Court under Section 482, Cr.P.C. Similarly, in a Criminal proceedings which is sought to be quashed the *de-facto* Complainant is to be heard. A Transfer Application can also be filed by a victim. If that is the position it cannot be said that such a person shall not be allowed to conduct the prosecution along with the Public Prosecutor by supporting the case of the prosecution. Further such situations as envisaged earlier would not arise if only a victim is allowed to participate in a Criminal proceeding before the Trial Court.

59. In *S.J.K. International v. State, Govt. of NCT of Delhi*, 2001CrL. L.J. 1264 the Hon'ble Apex Court was pleased to observe that when a Complaint initiated at

the behest of the *de-facto* Complainant is sought to be quashed by the Accused person then the said *de-facto* Complainant is entitled to be heard. The said ratio laid down by the Hon'ble Apex Court has been followed in the subsequent decisions.

60. Therefore, considering the above said factors, this Court is of the opinion that no prejudice would be caused and in the interest of justice with a view to sustain the public confidence in the Criminal jurisprudence a victim will have to be permitted in a given case to engage a lawyer and present his case along with the Public Prosecutor.

61. The issue can be looked from the another angle as well. When a Complaint is given and the same is closed by forwarding the report by the Police that no case has been made against the proposed Accused the Magistrate concerned after the receipt of the notice under Section 173(2) of the Cr.P.C. will have to issue notice to the informant when he decides not to take cognizance and to drop proceedings against the said Accused.

62. The Hon'ble Apex Court in *Gangadhar Janardan Mhatre v. State of Maharashtra*, 2004 (7) SCC 768 has observed that on the basis of the police report the informant is entitled to get a notice from the Magistrate. Therefore when the informant is made to be heard at the stage of investigation then it cannot be said after the Complaint has been taken on file the said informant cannot be allowed to take part in the prosecution.

Role of the Court:

63. An investigation is different from prosecution. An investigation is done by the concerned police whereas prosecution is done before the Court of competent

jurisdiction. A prosecution is wider in the sense that even during the investigation process the Court and the Public Prosecutor have roles to play when the matter comes before the Court. Hence once the matter comes before the Court then it is under its control. Conducting a free and fair trial is the duty of the Court. The Court has to consider the request objectively for engaging a lawyer. Therefore when such a permission is granted by exercising its power the same can also be exercised by the Court on its own volition if it is satisfied that further assistance is required, by calling the victim to engage a lawyer of his choice. It would also mean that if it is of the opinion that in a given case an assistance to prosecution is necessary for the free and fair conduct of the proceeding then on its own motion a lawyer can be appointed to assist the prosecution. Such a power can be exercised since it is the duty of the Court to ensure that free and fair trial takes place.

Role of the Public Prosecutor:

64. A Public Prosecutor is an officer of the Court but there are instances in which the Public Prosecutor is either not competent or acts only on the instruction given by the State, as found by the Hon'ble Supreme Court in *Zahira Habibulla H. Sheikh v. State of Gujarat*, 2004 (4) SCC 158. It is also to be noted more often than not a Public Prosecutor may not be aware of the facts which the victim is in possession of. Further a Public Prosecutor is instructed by police and not by the victim. It could also be seen that in a changing society the nature of offences also get changed according to the situation. That is a reason why number of special enactments have been made such as Dowry Prohibition Act, Negotiable Instruments Act, and Domestic Violence Act which can be said as apart

from offence against the society are also personnel in nature inasmuch as it is the victim who can bring-forth the alleged offence in a better way. As observed by the Hon'ble Apex Court in the judgment referred above, justice should need not be done but appears to be done. Further inasmuch as the victim seeks to assist prosecution there cannot be any prejudice since what is sought to be made is only to assist the prosecution and not to replace the prosecution. Moreover in view of the huge inflow and pendency of cases, at times it may be possible for a Public Prosecutor to concentrate fully on a single case.

65. The Public Prosecutor conducts the prosecution whereas a victim ventilates his grievance. A Public Prosecutor conducts the case with a sense of detachment whereas the victim is attached to the case. A decision made in a case does not impact a Public Prosecutor which is not the case with the victim who is the affected party.

Free and Fair Investigation and Trial and Article 14, 21 and 39 of the Constitution of India:

66. Free and Fair Investigation and Trial is enshrined in Article 14, 21 and 39-A of the Constitution of India. It is the duty of the state to ensure that every citizen of the country should have the free and fair investigation and trial. The Preamble and the Constitution are compulsive and not facultative, in that free access to the form of justice is integral to the core right to equality, regarded as a basic feature of our Constitution. Therefore such a right is a constitutional right as well as a fundamental right. Such a right cannot be confined only to the Accused but also to the victim depending upon the facts of the case. Therefore such a right is not only a

constitutional right but also a human right. Any procedure which comes in a way of a party in getting a fair trial would in violation of Article 14 of the Constitution.

67. The Hon'ble Apex Court in *Zahira Habibulla H. Sheikh v. State of Gujarat*, 2004 (4) SCC 158 has observed as follows:

“36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all-comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the Accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a Criminal trial. Denial of a fair trial is as much injustice to the Accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the Accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.”

68. Similarly in *Tashi Delek Gaming Solutions Ltd. v. State of Karnataka*, 2006 (1) CTC 208 (SC) : 2006 (1) SCC 442, the Hon'ble Apex Court has observed as follows:

“37. If the agent was to be prosecuted for violation of the term of the notification, he could challenge the validity thereof. A fortiori, a *quia timet* application would also be maintainable. A person must be held to have access to justice if his right in any manner whether to carry on business is infringed or there is a threat to his liberty. Access to justice is a human right.

38. In *Dwarka Prasad Agarwal v. B.D. Agarwal*, 2003 (6) SCC 230 this Court opined: (*SCC pp.245-46, para 38*)

“A party cannot be made to suffer adversely either indirectly or directly by reason of an order passed by any Court of law which is not binding on him. The very basis upon which a judicial process can be resorted to is reasonableness and fairness in a trial. Under our Constitution as also the international treaties and conventions, the right to get a fair trial is a basic fundamental/human right. Any procedure which comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution of India. Right to a fair trial by an independent and impartial Tribunal is part of Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* [see *Clark (Procurator Fiscal, Kirkcaldy) v. Kelly*, 2003 (1) All ER 1106(PC)].”

69. In *Nirmal Singh Kahlon v. State of Punjab*, 2009 (1) SCC 441, the Hon'ble Apex Court was pleased to observe that the right to fair investigation and trial is applicable to the Accused as well as the victim and such a right to a victim is provided under Article 21 of the Constitution of India. The observation of the Hon'ble Apex Court is extracted hereunder:

“28. An Accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an Accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and

preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation. When serious allegations were made against a former Minister of the State, save and except the cases of political revenge amounting to malice, it is for the State to entrust one or the other agency for the purpose of investigating into the matter. The State for achieving the said object at any point of time may consider handing over of investigation to any other agency including a Central agency which has acquired specialisation in such cases.”

70. Therefore on a consideration of the above said constitutional provisions, this Court is of the opinion that the victim has got every right to take part in the prosecution. A procedural law will have to provide a method for the dispensation of justice by which the truth emerges. In other words, a procedural law will be in aid of the Justice Delivery System.

Conclusion:

71. On a consideration of the above said principles and after analysing the provisions *vis-a-vis* the various judgments, the following conclusions are arrived at:

- i. Section 301, Cr.P.C. is not a bar for entertaining an Application to intervene in an Application filed under Section 437 or 438, Cr.P.C.
- ii. Section 301 and Proviso under Section 24(8) are mutually complimentary and not conflicting with each other and therefore, there is no bar for engaging a lawyer to assist the prosecution.
- iii. The discretion of the Court in invoking Proviso under Section 24(8) is a judicial discretion.
- iv. The judicial discretion of the Court will have to be exercised keeping in mind the objects and reasons for the

introduction of Proviso to Section 24(8) which is to provide an adequate opportunity to the victim to take part in the Criminal proceeding.

v. Engaging a lawyer in accordance with Proviso under Section 24(8) would mean permitting him to argue along with the Public Prosecutor and also in a given case even to examine a witness, of-course with the permission of the Court.

vi. The Court shall not allow any plea contrary to the case of the prosecution at the instance of the victim while assisting the prosecution.

vii. The Court can reject a request for engaging a lawyer by the victim if it is of the opinion that it lacks *bona fides*.

viii. While considering the Application, the Court has to keep in mind, the nature of the offence, the injuries suffered by the victim, the position of the victim as well as the Accused and the circumstances under which the offence has been committed.

ix. The word ‘victim’ would also include a legitimate and genuine person representing a victim.

x. When an Application is filed by any other person other than the guardian seeking to represent the victim, the Court has to consider the *bona fides*, legitimacy and genuineness of the representative capacity while deciding such an application.

xi. In a given case the Trial Court can also call upon a victim to engage a lawyer if in its opinion the same is required for the proper conduct of the case.

xii. In a given case the Court can on its own appoint a lawyer if it is of the opinion the same is required for the proper conduct of case.

xiii. When an Application is made seeking permission under Proviso to Section 24(8) the same cannot be rejected without even numbering the same but should be considered on merits.

xiv. An order rejecting an Application seeking permission to assist the prosecution must be supported by reasons.

72. Coming to the facts of the case, inasmuch as the 1st Respondent has already been granted anticipatory bail and he has already withdrawn the Application for anticipatory bail before the District Principal and Sessions Court, Madurai, the question of allowing the present Petition does not arise for consideration. However, if

any Application is filed and pending or to be filed in future by the other Accused persons either seeking anticipatory bail or bail as the case may be, the Petitioner is given liberty to file appropriate Application seeking to intervene in the said Application. As and when such an Application is filed, the concerned Court is directed to number the said application and permit the Petitioner to intervene and decide the Application for bail or anticipatory bail on merits in accordance with law.

73. The Criminal Original Petition is hereby disposed of with the above directions. Consequently, the connected Miscellaneous Petitions are closed.

2010 (2) MWN (Cr.) 294 (SC)

**IN THE SUPREME COURT OF INDIA
Markandey Katju and A.K. Patnaik, JJ.**

S.L.P. (Crl.) No.3224 of 2010

3.5.2010

Mukesh Kishanpuria

.....*Petitioner*

Vs.

State of West Bengal

.....*Respondent*

Bail

Interim Bail pending disposal of regular Bail Application — Grant of — Power — Power to grant interim bail inherent in power to grant bail.

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Sections 438, 437 & 439 — Anticipatory Bail — Rejection — SLP against — No reason to grant anticipatory bail on basis of materials on record — Petitioner can file regular Bail Petition along with Application for Interim Bail pending disposal of regular bail — Power to grant regular bail includes power to grant interim bail pending disposal of regular Bail Application — Power inherent in power to grant bail particularly in view of Article 21, Constitution — In view of Article 21, a person should not be compelled to go to jail, if he can establish *prima facie* that in facts of case he is innocent — Application for interim bail directed to be decided on same day of its filing pending final disposal of regular Bail Application. (Paras 3 to 5)