against an order of the Commissioner under section 263(1) of the Act. In case he proceeds thereunder after hearing the assessee in pursuance of the notice given by him, then the appeal filed by the assessee under secion 253(1)(c) of the Act, cannot be treated on the same footing as an appeal against the order of the Appellate Assistant Commissioner passed in assessment proceedings, where both the parties have been given the right of appeal. In this view of the matter, the argument raised on behalf of the Revenue, that in appeal, the Tribunal may uphold the order appealed against on the grounds other than those taken by the Commissioner in his order, is not tenable. Under section 263 of the Act, it is only the Commissioner who has been authorised to proceed in the matter and, therefore, it is his satisfaction according to which he may pass necessary orders there under in accordance with law. If the grounds which were available to him at the time of the passing of the order do not find mention in his order appealed against, then it will be deemed that he rejected those grounds for the purpose of any action under section 263(1) of the Act. In this situation, the Tribunal while hearing an appeal filed by the assessee cannot substitute the grounds which the Commissioner himself did not think proper to form the basis of his order.

14. As a result of the above discussion, in our opinion, the Tribunal was not competent to take into consideration the fact of increase in the number of adult partners from 10 to 11, when the Additional Commissioner had not, in fact, relied upon the said change in holding the Income-tax Officer's order, dated October 20, 1978, to be erroneous. Thus, the answer to the said question is in favour of the assessee and against the Revenue.

15. The references stand answered accordingly with no order as to costs.

N. K. S.

FULL BENCH

Before S. S. Sandhawalia C.J. and P. C. Jain and J. M. Tandon, JJ.

LAL SINGH,—*Petitioner.*

versus

STATE OF PUNJAB ETC.,—*Respondents.*

Civil Writ Petition No. 2421 *of* 1980.

April 8, 1981.

Constitution of India 1950—*Article* 162—*Code of Criminal Procedure (II of* 1974)—*Section* 378—*Decision by Government to file*

an appeal against an order of acquittal—Appeal not actually filed—Such decision subsequently reviewed and Government deciding not to file an appeal—State Government—Whether competent to review its earlier decision—Exercise of power under section 378—When can be said to have been exhausted.

Held, that the process of the formation of the opinion as also the decision by the State Government to prefer an appeal against an order of acquittal is purely administrative and derive its source from the general executive power of the State under Article 162 of the Constitution of India 1950. Consequently, the date and time of such a purely administrative decision is of little relevance in determining the crucial issue as to when the power under section 378 of the Code would stand exhausted.

(Para 24).

Held, that the corner stone of section 378(1) of the Code of Criminal Procedure 1973 is the vesting of the right of appeal against the judgment of acquittal in the State Government and the presentation of the same to the High Court through the medium of the Public Prosecutor. Both the right and the prescribed mode are intended to culminate in the presentation of the appeal. It would, therefore, appear to be manifest that the very essence of section 378(1) is the presentation of the appeal in the High Court and not the procedural steps leading to the same, namely, the consideration of the judgment of acquittal, the process of the formation of opinion by the State Government and its decision with regard thereto including the direction to the Public Prosecutor. It is only when this final step, namely, the presentation of the appeal has been made in the High Court that the right and the process envisaged by section 378 of the Code completes itself. Once that is done, it is at this point of time that the statutory administrative power conferred by section 378 would exhaust itself. To put it more succinctly, the exercise of the statutory administrative power extends only to the point of presentation of the appeal in the High Court whereafter the matter enters squarely and irrevocably in the judicial field. The true terminus of the statutory administrative power under section 378(1) of the Code is the actual presentation of the appeal in the High Court and not its subsequent admission or consideration on merits. Thus, it is held that the State Government can review or recall its decision under section 378 of the Code to prefer an appeal against an order of acquittal before it is actually presented in the High Court.

(Paras 26, 28 and 29).

Petition under Article 226 of the Constitution of India praying that the relevant records be summoned and appropriate writ, direction or order particularly a writ in the nature of a writ of certiorari

be directed to issue quashing the impugned order of the first respondent and directing it to direct the Public Prosecutor to present an appeal to the High Court and implement the earlier orders to that effect. Any other writ, order or direction and any other relief deemed fit and proper together with costs hereof be also awarded to the Petitioner.

It is further prayed that filing of the typed copy of the Annexure P-2 on Judicial Paper be dispensed with.

M. N. Phadke, Harbans Singh and J. S. Narang with him, *for the Petitioner.*

M. J. S. Sethi, Additional A.G. (Pb.), Sarwan Singh, Raj Kiran with him, *for the Respondents.*

JUDGMENT

S. S. Sandhawalia, C.J.

1. Whether the State Government can review or recall its decision under section 378 of the Code of Criminal Procedure, 1973 to prefer an appeal against an order of acquittal, before its actual presentation in the High Court is the somewhat significant question which falls for determination before this Full Bench.

2. The facts giving rise to the issue, though of somewhat political prominence, lie in a narrow compass. On the Baisakhi day of April 13, 1978, a gruesome incident took place near the Railway Stadium, Amritsar, in which as many as 17 persons, including Dharamvir Singh, the son of Lal Singh, petitioner, lost their lives. Consequent thereto a criminal case was registered in which Baba Gurbachan Singh (now dead) the then Head of the Narankari Sect, and sixty respondents were challaned and committed to Session to stand their trial on the charges of murder, criminal conspiracy and other allied offences. Later, under the orders of the Supreme Court of India the case was transferred to the Court of Session at Karnal for trial. Mr. R. S. Gupta, the learned Session Judge, Karnal, by his judgment, dated January 4, 1980, acquitted all the accused persons.

3. The petitioner avers that he is an illiterate old man of about 70 years, who has suffered a cruel blow by the death of his son and

is otherwise unaware of the intricate procedure of law and statutory requirements. He had first learnt that the State Government had decided to appeal against the order of acquittal. However, later he had come to know that no such appeal was being preferred under the orders of the Government. The copy of the letter of the District Magistrate, Amritsar, dated April 18, 1980, to the effect that the Government has given its decision that the case was not fit for filing an appeal which is annexure P/1 to the writ petition.

4. Aggrieved by the alleged reversal of the decision of the State Government to file an appeal, the petitioner has preferred this writ petition under Article 226 of the Constitution of India for quashing the said order and seeking a *mandamus* against it for directing its Public Prosecutor to present an appeal to the High Court in implementation of its earlier orders.

5. The writ petition is resisted on behalf of the respondent-State first on the preliminary ground of the absence of any *locus standi* in the writ petitoner the bar of limitation for presenting the appeal, and the existence of an alternative remedy by way of filing a revision petition against the order of acquittal. On merits the broad factual position is admitted. The specific stand taken is that it is within the power of respondent-State to review and alter a decision taken by the earlier Government to present an appeal and this decision was taken *bona fide* after consulting the legal experts and then approved by the Governor in Council during the President's Rule. It has been categorically averred that in fact the decision not to present an appeal was taken by the respondent-State before the limitation for filing the same had expired. It is then averred that the Government under the President's Rule had the fullest jurisdiction to supersede and revoke the earlier orders of the Government and could in any case alter or review an executive order passed by itself or the earlier Government in order to rectify an erroneous decision already taken. It is claimed that the decision of not filing an appeal is valid and within jurisdiction and further it had been found that there was little chance of the appeal to succeed and it was not in public interest to pursue the matter any further. All allegations of any extraneous considerations for varying the earlier decision to present an appeal are denied. Any violation of Articles 14 and 19 of the Constitution or any infraction

of the basic structure of the Constitution of India are strongly controverted.

6. A written statement has also been filed on behalf of respondents Nos. 2 to 4 and 6 to 61, but in view of the basic legal issues involved it is unnecessary to advert to the averments therein.

7. It would be plain from even the aforesaid resume that the factual foundation laid by the averments in the writ petition was rather sketchy and inevitably the reply on behalf of the State was equally ambivalent. We were, therefore, compelled to call for and examine the record of the case. After some initial hesitation on behalf of the respondent-State, this was unreservedly made available. Therefrom it emerges that the judgment of the Sessions Judge, Karnal, acquitting the private respondents was rendered on January 4, 1980 and it became the subject-matter of examination by then elected government almost immediately and a special Public Prosecutor rendered an opinion on January 13, 1980 suggesting the filing of an appeal. This received concurrence of the Home Department on January 15, 1980 and was placed before the then Chief Minister, who set his seal of approval thereon on that very date. However, instead of giving any direction to the then Public Prosecutor to present an appeal against the judgment of acquittal, a suggestion was made in the Ministry for the engagement of an outside counsel of eminence for conducting the appeal. It calls for pointed notice that the popular Ministry was dismissed on 16th February, 1980 and the Presidents' Rule was imposed with effect therefrom. It would appear that certain representations meanwhile were received apparently from the members of the Narankari Sect seeking a recall of the decision to prefer an appeal. On February 23, 1980, the Governor ordered that the matter be examined expeditiously and consequently it was decided that the opinion of some renowned criminal lawyer be obtained in this context. However, a new Advocate-General took over under the President's Rule and on March 15, 1980 he rendered an opinion that the chances of an appeal against the judgment of acquittal for success were slim and that it would not be advisable to file the said appeal. The matter thereafter was considered by a Committee including the Adviser to the Governor, which decided that no appeal need be filed. This decision was taken on April 1, 1980 prior to the expiry of the period of limitation for preferring the appeal.

8. It would be plain from the above that in practical terms the crux of the matter now is whether the order of the former Chief Minister, dated January 15, 1980 approving the filing of the appeal was final and sacrosanct and the subsequent decision of the Government on April 1, 1980 not to prefer the appeal is without jurisdiction and therefore, *non est.*

9. To clear the deck for a proper perspective of the issues involved, it first calls for notice that ultimately it is the accepted position that the aforesaid decisions of the Government in this context were administrative in nature in sharp contradistinction from being quasi-judicial. Though in the initial flush of argument Mr. Phadke, for a moment had attempted to contend that the exercise of the powers under section 370 of the Code was quasi-judicial in nature, he quickly and fairly retreated from this stand when posed with the necessary implications and the practical realities thereof. We, therefore, proceed on the basic and the admitted postulate that the exercise of the power under section 378 of the Code is administrative in nature and not quasi-judicial.

10. However, even the firm assumption that the power under section 378 of the Code is administrative would not bring one anywhere near the solution of the controversy. Even within the ambit of the exercise of an administrative power, different legal results may well ensue from dissimilar situations. It is not our desire to attempt any doctrinaire or exhaustive classification of the exercise of administrative power in its generality. However, both on principle and authority there now appears to be a sharp line of distinction betwixt decisions of the State Government which are purely administrative in nature passed under the umbrella of the executive powers vested in it by Article 162 of the Constitution of India as against the exercise of the power, though administrative in nature, but conferred by a specific provision of a statute itself. It is not in serious dispute and is virtually the common case that the decisions of the former category which are purely and inherently administrative in the exercise of the executive power under Article 162 of the Constitution of India involve no sanctity or finality and would, therefore be both reviewable and recallable. This indeed is so by the very nature of things because otherwise the very functioning of the Government would be hamstrung and fossilised if each and every administrative order or decision of this nature

under Article 162 were to become final and beyond the pale of review or reconsideration. It seems unnecessary to labour this point because of the following observations of the final Court in *S. R. Verma and others* v. *The Union of India and others* (1):—

> "* * *, we do not think that the principle that the power to review must be conferred by statute either specifically or by necessary implication is applicable to decisions purely of an administrative nature. To extend the principle to pure administrative decisions would indeed lead to untoward and startling results. Surely any Government must be free to alter its policy or its decision in administrative matters. If they are to carry on their daily administration they cannot be hide-bound by the rules and restrictions of judicial procedure though of course they are bound to obey all statutory requirements and also observe the principles of natural justice where rights of parties may be effected."

Coming now to the second category where the decision, though administrative (in contra-distinction to the quasi-judicial) is in exercise of the powers flowing from a specific provision of the statute itself, it has been authoritatively held that it cannot be recalled or reviewed except in accordance with the provisions of the very statute from which they derive source. If such a statute provides expressly or by necessary intendment for a review and recall, then alone and in accordance therewith can the earlier exercise of the statutory power be reconsidered. In the absence of such a provision there is no inherent power to repeatedly review or recall such a statutory administrative order or decision and the power having once been exercised would exhaust itself.

11. Now apart from the sound principle that the exercise of a statutoryy power must be necessarily governed by the provisions of such a statute itself and must carry with it a degree of finality, there is also a long line of precedent in support of the same. In view of what follows it is unnecessary to advert in detail to the authorities and it suffices to mention that the observations in *Patel Narshi Thakershi and others* v. *Pradyumansinghji Arjunsinghji* (2), *State*

(1) (1980) 2 S.L.R. 335.

(2) A.I.R. 1970 S.C. 1273.

of *Bihar* v. *D. N. Ganguly and others*, (3), *Hardyal Rai* v. *The State of Punjab and others* (4), (*unreported*) *Venkatesh Yeshwant Deshpande* v. *Emperor*, (5), *Bherumal* v. *Motumal and another*, (6) and *Kanta Devi and another* v. *State of Rajasthan and others* (7), lend direct or tacit support to this view.

12. Within this Court the issue has been directly settled by the Division Bench judgment in *Surjit Singh* v. *State of Punjab*, (8). The question therein was the review or recall of the earlier order under section 197 of the Code of Criminal Procedure declining to grant the sanction for the prosecution of the petitioner. It was held that even though the order under section 197 of the Code was an administrative order, the State Government had no power to review or recall the same and grant a fresh sanction for the prosecution. On the larger question it was observed as follows:—

> "* * *. Same is the position here that there is no specific provision empowering the State Government to pass a second order on the same facts either expressly or by necessary implication. There may be difference in passing an administrative order in exercise of its statutory authority under a specific statute in contradiction to its purely administrative or executive authority under Article 162 of the Constitution. Therefore, the general power of the Government to rescind or vary its order has to be kept at a different level than the orders which the Government has the authority to pass on the basis of a statute framed by Parliament or the State Legislature."

It would be manifest from the above that there is thus a clear distinction betwixt a purely administrative order or decision under Article 162 of the Constitution as against a statutory administrative order deriving its source from a particular provision of an enactment.

13. Before proceeding further it may well be pointed out that the admission of this case for a hearing by the Full Bench was

(3) A.I.R. 1958 S.C. 1018,
(4) C.W. 1084 of 1962 decided on 25th August, 1964.
(5) A.I.R. 1938 Nagpur 513.
(6) A.I.R. 1956 Ajmer 67.
(7) A.I.R. 1957 Raj. 134.
(8) (1980) 1 I.L.R. (Pb. & Haryana) 11.

necessitated basically because of a challenge posed to the correctness of the view in *Surjit Singh's case* (supra) at the motion stage itself on behalf of the respondents. However, during the course of the hearing before us learned counsel for the respondent-State raised no meaningful argument nor posed any serious challenge to the ratio of the said case and in fact placing reliance thereon attempted to bring his case within the ambit thereof. We see no reason whatsoever to differ from the considered opinion in *Surjit Singh's case* which is to be necessarily affirmed in the above context.

14. Once the view in *Surjit Singh's case* is accepted it deserves highlighting that primary reliance was placed thereon by Mr. Phadke for contending that the decision of the Chief Minister, dated January 15, 1980 of the former elected Government was final. Learned counsel went the whole hog in submitting that the very moment the State Government takes a decision to prefer an appeal, or negatively not to file an appeal, against an order of acquittal, the said decision would become sacrosant and beyond the pale of any subsequent reconsideration. In concrete terms the argument was that the very administrative decision of the person authorised to decide the matter on behalf of the State Government is in itself the last and the concluding stage of the exercise of the statutory power under section 378(1) and there being no provision in the Code which either directly or indirectly authorises its review or recall. the same would achieve finality forthwith. According to Mr. Phadke the mere decision to prefer (or not to prefer) an appeal under section 378 is itself conclusive and the question of further giving a direction to the Public Prosecutor to do so and the actual presentation of the appeal in the High Court would be merely a consequential routine. Counsel then submitted that there could be no review or recall of a decision to prefer an appeal, once taken. Indeed he went to the length of urging that once a decision of the Government to prefer an appeal was taken the same would even be enforceable by a mandamus from the Court to take the necessary procedural steps of directing the Public Prosecutor to present the appeal in case anyone of them fails to perform what counsel termed as a statutory duty to do so.

15. An interesting corollary to the main argument aforesaid of Mr. Phadke was that section 378 of the Code which vested the right of preferring an appeal against acquittal in the State Government

only was not merely a statutory power simpliciter but one coupled with a duty. The submission was that this power is in the nature of trust in the State Government to advance the interests of justice and present an appeal where a criminal has escaped the long arm of the law through a patently erroneous judgment. The significant argument was that this being the nature of the power, once the decision to file an appeal was taken it was at once coupled with the statutory duty to direct the Public Prosecutor to present an appeal in accordance with the section itself.

16. As against the aforesaid twin argument the equally dogmatic stance taken on behalf of the respondent-State by its learned Additional Advocate-General is that both the formation of its opinion and the decision to prefer an appeal is outside the pale of section 378 of the Code and the power thereunder does not exhaust itself till the appeal preferred by the Public Prosecutor has been actually admitted to a hearing on merits by the High Court.

17. It would thus be manifest that two sharply divergent stands are taken by the parties. On behalf of the petitioner, it is the claim that at the very moment the decision to prefer or to order an appeal is taken by the State Government through the person authorised to do so, the power under section 378 of the Code would stand exhausted. On the other hand the firm position of the respondents is that not even when the appeal is presented but only when under section 378(3) of the Code leave has been granted by the High Court and the same is admitted for a hearing, would the exercise of the power under section 378 be complete. Till that time according to the respondents, the State Government would be within its rights to review or recall its earlier decision on the point.

18. In view of the above the real issue now crystallises itself into the question—at what point of time the exercise of the power conferred by section 378 of the Code is in real essence complete and consequently stands exhausted. To put it in other words at what stage would the exercise of the power under section 378, Criminal Procedure Code, become irrevocable and sacrosanct.

19. Inevitably the aforesaid issue of the rival stands of the parties must be tested on the anvil of the statute itself and it is, therefore, apt to read the relevant provisions of section 378 at this stage:—

> "S. 378(1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the

State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any other than a High Court or an order of acquittal passed by the Court of session in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section (3), to the High Court from the order of acquittal.

(3) No appeal under sub-section (1) of sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a Public servant, and sixty days in every other case, computed from the date of that order of acquittal.

"(6) If in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (3)."

20. Now a close perusal of the language of the aforesaid provision and deeper analysis thereof would indicate that the issue of the irrevocability of the action thereunder may be considered

with regard to four distinct stages which for clarity's sake may be classified as under:—

(i) the very date and the moment of the decision by the State Government to prefer or not to prefer an appeal against an order of acquittal ;

(ii) the date and time when an express direction is issued to the Public Prosecutor to present the appeal ;

(iii) the date and time when the Public Prosecutor in pursuance of the said direction actually presents an appeal in the High Court ; and

(iv) when the appeal is actually admitted for a hearing on merits.

21. Now examining the matter against a slightly broader canvass, it calls for notice that Chapter 29 of the Code deals with the preferring, the prosecution and the final adjudication of appeals against both the judgments of conviction and acquittal by criminal Courts. That such a right of appeal is purely statutory would be evident from the language of section 372 of the Code—

> "No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force."

Though even on principle it can hardly be disputed that there is no inherent or vested right of appeal and the same is necessarily a creature of the statute, the aforesaid provision makes it particularly plain that the appeals against a criminal judgment can lie only in accordance with either the provisions of the Code or any other statutory enactment having binding force. Adverting specifically to appeals against the judgments of acquittal it would appear that such a right of appeal is vested exclusively in the State (i.e. either the State Government or the Central Government, as the case may be) with the solitary exception of those cases which had been instituted upon a private complaint. Sub-section (4) of section 378 of the Code provides for the presentation of an appeal against acquittal in cases instituted upon a complaint by the private

complainant himself, if special leave therefore is granted by the High Court. Barring this, the right of appeal against an order of acquittal is exclusively vested in the State Government under sub-section (1) and in the Central Government under sub-section (2) of section 378 of the Code. Referring to section 378 (1), with which we are directly concerned, it would appear to be plain from this provision that it vests the right of appeal against an order of acquittal in the State Government and provides the basic procedure for the presentation of the same.

22. Now it is axiomatic that before the power or the right to present an appeal against an order of acquittal under section 378 (1) is exercised, the State Government must arrive at a clear opinion that the judgment of acquittal deserves to be appealed against. The formation of such an opinion must inevitably precede the presentation of an appeal. What deserves highlighting here is the basic fact that section 378 (1) does not even remotely make mention of the process for the formation of such an opinion nor of the decision to do so. It only envisages the presentation of appeal on the direction of the State Government through the medium of the Public Prosecutor. This being patently so the learned Additional Advocate General seems to be on a firm footing in his submission that both the process of the formation of an opinion for preferring an appeal against the judgment of acquittal as also a positive decision to this effect is inherently administrative in nature. The subjective satisfaction of the State Government whether a particular judgment of acquittal calls for being challenged by way of appeal and the process by which this satisfaction or decision is to be arrived at is neither governed nor prescribed by any statutory provision far less any specific section of the Code itself. Therefore, it would appear that the mode of the formation of the opinion and the ultimate decision in this regard by the State Government is within the ambit of and entirely governed by the general executive power of the State Government under Article 162 of the Constitution of India and is thus purely administrative.

23. Viewed from another angle it would seem that there is no statutory provision in the Code (nor has any such, provision in any other enactment been brought to our notice) which mandates or obliges the State Government to examine every or any judgment of acquittal. It would follow, therefore, that the

State Government may in its discretion consider or even refuse to consider or examine a judgment for the purpose of arriving at an opinion whether it should be appealed against or not. The ordinary practice and process for preferring appeals against acquittal, namely, that the Public Prosecutor conducting the case would opine and the District Magistrate may recommend the filing of the appeal thereunder, to the Government and the State would then proceed to form its opinion to prefer an appeal is plainly not prescribed in terms by any statutory provision as such. It is a practice or procedure under the inherent executive functions of the State under Article 162 of the Constitution of India. Similarly, the ultimate decision or the subjective satisfaction of the Government as also the whole process beginning from the consideration of the judgment through the channel of recommendatory officials is not one which has been laid out either in the Code itself or by any other statutory rule on the point but is wholly circumscribed by the purely executive power of the State. Section 378(1) does not either in express or implied terms adverts to the process of the formation of the State's opinion or its culmination one way or the other. Reference in this connection may instructively be made to the observations of their Lordships of the Supreme Court in *Barium Chemicals Ltd.* v. *Company Law Board* (9). What, therefore, deserves Highlighting is the fact that any words about the formation of an opinion are conspicuous by their very absence in section 378(1) of the Code. Again it does not even make a mention of any decision of the State Government consequent thereto. Therefore, the very absence of the word 'opinion' or 'decision' in the statute has to be given its necessary import.

24. To conclude on this aspect we would hold that the process of the formation of the opinion as also the decision by the State Government to prefer an appeal against an order of acquittal is purely administrative and derives its source from the general executive power of the State under Article 162 of the Constitution of India. Consequently, the date and time of such a purely administrative decision is of little relevance in determining the crucial issue as to when the power under section 378 of the Code would stand exhausted.

25. Coming now to the mode of presenting of an appeal against the order of acquittal it calls for notice that the statute visualises a

(9) A.I.R. 1967 S.C. 205.

direction to the Public Prosecutor to present an appeal to the High Court. Plainly the presentation of the appeal is the dominant objective and the direction to the Public Prosecutor is only a mode of achieving the same. The direction to the Public Prosecutor cannot be divorced from the presentation of an appeal and it would be hypertechnical to dissect it from the same and treat it as an independent entity. To put it in other words the essence of section 378(1) is the presentation of the appeal to the High Court and not the preceding steps leading to the same, namely, the process of the formation of the opinion, the subjective satisfaction or the decision of the State Government or the consequential direction to present such an appeal. Therefore, it follows that the date and the time of the direction alone to the Public Prosecutor for presenting the appeal is a matter of little or no significance for determining as to when the power under section 378 would exhaust itself.

26. From the aforesaid line of reasoning it would follow that the corner-stone of section 378(1) is the vesting of the right of appeal against the judgment of acquittal in the State Government and the presentation of the same to the High Court through the medium of the Public Prosecutor. Both the right and the prescribed mode are intended to culminate in the presentation of the appeal. It would, therefore, appear to be manifest that the very essence of section 378(1) is the presentation of the appeal in the High Court and not the procedural steps leading to the same, namely, the consideration of the judgment of acquittal, the process of the formation of opinion by the State Government, and its decision with regard thereto including the direction to the Public Prosecutor. It is only when this final step, namely, the presentation of the appeal has been made in the High Court that the right and the process envisaged by section 378 of the Code completes itself. Once that is done, it is at this point of time that the statutory administrative power conferred by section 378 would exhaust itself. To put it more succinctly the exercise of the statutory administrative power extends only to the point of presentation of the appeal in the High Court whereafter the matter enters squarely and irrevocably in the judicial field.

27. Now the analogy of a person preferring an appeal generally and of a private complainant seeking leave to appeal under section 378(4) of the Code would again be not altogether inapt. It is true that the status of the State and that of a private citizen is not

quite identical. Nevertheless, there is both merit and plausibility in the stand of the learned Additional Advocate General that in preferring an appeal against acquittal under section 378(1) of the Code, the State Government would be and should be, in no worse position than a private complainant seeking his redress by way of a similar appeal under section 378(4) of the Code. Just as a private complainant after arriving at a decision to prefer an appeal and even going to the extent of engaging and briefing his counsel to prefer the same can retract from the brim by counter-manding the filing thereof. Similarly the State would be in no worse position till such an appeal has been actually presented in the High Court under section 378(1) of the Code. In the very nature of things there cannot be a possible bar in the way of a private complainant to recall his instructions to his counsel for presenting an appeal under section 378(4). Therefore, section 378(1) of the Code may be construed as nothing more than a statutory equivalent of the litigant engaging or instructing its counsel to prefer an appeal against acquittal because by law the power to prefer the same has been vested exclusively in the State alone for challenging an order of acquittal apart from its concurrent exercise in cases instituted upon complaints.

28. We are unable to appreciate or subscribe to the extreme position taken on behalf of the respondent-State that it is only when the appeal against acquittal is actually admitted for a hearing on merits in the High Court that the power under section 378 would exhaust itself. As has already been noticed the moment an appeal has been presented in the Registry of the High Court the matter may well be out of the administrative field and comes squarely within the judicial arena. To contend that even thereafter the statutory administrative power under section 378 of the Code would continue and the appeal may be recalled or withdrawn at the behest of the State Government appears to us as untenable. Indeed such a stand would involve the continuous reviewing and recalling af even an appeal presented in the High Court till such time when limitation for preferring the appeal expires. It is evident that neither section 378 nor any other provision in the Code expressly provides for the withdrawal of an appeal by the State Government or even by a private citizen after the same has been filed. Judicial opinion in this context appears to be stringent and it is well settled that a criminal appeal once preferred can neither be withdrawn nor fall in default merely because of the absence of the appellant or his counsel. Within this

jurisdiction the observations of the Full Bench in *Emperor* v. *Ghulam Mohammad*, (10) may be recalled :—

> "From all these considerations, it appears clear to me that the Legislature has never contemplated any withdrawal of an appeal once lodged whether by the accused or by the Crown and that once the appeal has been lodged and admitted, it is not in the power of any Court nor in the power of the appellant to allow the appeal to be withdrawn. The Court is bound once the appeal is admitted to proceed under section 421 or under sections 422 and 423 to decide the appeal on the merits. I therefore, consider that there is no force in the second contention raised by the respondent and would answer the second question referred to the Full Bench in the negative."

In view of the above we are inclined to hold that the true terminus of the statutory administrative power under section 378(1) of the Code is the actual presentation of the appeal in the High Court and not its subsequent admission or consideration on merits.

29. In the ultimate analysis we would render the answer to the legal question posed at the very outset in the affirmative and hold that the State Government can review or recall its decision under section 378 of the Code to prefer an appeal against an order of acquittal before it is actually presented in the High Court.

30. Applying the aforesaid rule it would be manifest that the writ petition cannot succeed. It is virtually the admitted position that herein far from there being any actual presentation in the High Court even a formal direction to the Public Prosecutor to do so had not as yet been made. The respondent-State, therefore, acted within its jurisdiction in taking the considered subsequent decision on 1st April, 1980, not to file the appeal. The writ petition is consequently without merit and is dismissed but a view of the meaningful legal issue arising herein we will leave the parties to bear their own costs.

P. C. Jain, J.—I agree.

J. M. Tandon, J.—I agree.

N.K.S.

(10) AIR 1942 Lahore 296.