

HIGH COURT OF MADHYA PRADESH BENCH AT INDORE
(S.B.: HON. SHRI JUSTICE PRAKASH SHRIVASTAVA)

Writ Petition No. 2122/2017

Pawan Kumar Saraswat and another

Petitioners

Vs.

State of Madhya Pradesh and others

Respondents

Shri Gagan Parashar learned counsel for petitioners.

Shri Mukesh Parwal learned counsel for
respondent/State.

Shri Girish Desai learned counsel for respondent no.4.

Whether approved for reporting :

ORDER

(Passed on 11/12/2017)

Being aggrieved with the order dated 22/2/2017 passed by Additional Secretary Law and Legislative Affairs Department of the State under Section 24(8) of Cr.P.C. appointing respondent no. 4 as Special Public Prosecutor in Sessions Case No. 9608906/16 (crime No. 459/16) the petitioners have approached this court by way of present writ petition.

2/ Petitioner no. 2 is facing trial in the aforesaid crime number for offence under Sections 306, 201 and 34 IPC and according to petitioner the impugned order has been passed illegally in colourable exercise of power.

3/ Learned counsel for petitioners submits that respondent no.

4 had appeared for the complainant in the earlier proceeding, therefore, he will not be fair and impartial in conducting the trial and that as per impugned order respondent no. 4 will be paid remuneration by complainant which is illegal and that serious prejudice will be caused to petitioners in case if the trial is conducted by respondent no. 4.

4/ Learned counsel for State has supported the impugned order submitting that the order has been passed in due exercise of power under Section 24(8) of Cr.P.C.

5/ Learned counsel for respondent no. 4 has also supported the impugned order and has submitted that mere appearance of respondent no. 4 earlier for the complainant or payment of fee by the complainant is not sufficient ground to set aside the impugned order and there is nothing to presume that respondent no. 4 will not conduct trial in fair and impartial manner.

6/ I have heard the learned counsel for the parties and perused the record.

7/ The role of a public prosecutor is to produce complete and correct facts before the court in unbiased manner and to ensure fair trial. Sub-section 8 of Section 24 of Cr.P.C. empowers the state government to appoint Special Public Prosecutor who has been in practice as an advocate for not less than 10 years but while doing so state cannot ignore the impartial role of a public prosecutor. The power conferred on the State under this sub-section is to be exercised judiciously and for valid reasons. The State cannot appoint a Special Public Prosecutor in a mechanical manner merely on asking by the complainant. It is not the scheme of the provision that duly appointed public prosecutor can be replaced by a Special Public Prosecutor merely on the wish of a party without application of mind.

8/ Supreme court in the matter of **Mukul Dalal and others Vs.**

Union of India and others reported in (1988) 3 SCC 144 taking note of the fact that office of public prosecutor is public one has held that while considering the application for appointment of Special Public Prosecutor it is required to be examined whether the case merits the appointment of a Special Public Prosecutor and the proposition that whenever an application is made it should be allowed and a Special Public Prosecutor should be appointed is contrary to the spirit of the scheme of the Code. It has been noted that there may be cases where a powerful complainant may begin a proceeding to victimize his opponent and if in such a case the state concedes to the request for appointment of a Special Public Prosecutor there will be travesty of justice.

9/ The Division Bench of this court in the matter of **Sunil Kumar @ Chander Salariya Vs. State of MP and others reported in 1992 MPLJ 772** has held that State can exercise the power under Section 24(8) of Cr.P.C. only in exceptional cases and for the reasons to be recorded and if the appointment order does not disclose any reason for appointment of Special Public Prosecutor and the order further reads that government would not pay any fees to the public prosecutor, the conclusion would be that the public prosecutor was appointed not for any necessity but to please and satisfy the relations of the deceased.

10/ Following the said decision this court in the matter of **Rajendra Nigam Vs. State of Madhya Pradesh and others reported in 1998 Cri.L.J. 998** has held that Special Public Prosecutor is not to be appointed in ordinary circumstances and order appointing Special Public Prosecutor without disclosing special reason is unsustainable.

11/ In a subsequent judgment in the matter of **Poonamchand Jain Vs. State of MP and others reported in 2001(5) MPHT 579**, this court has taken note of the role of the public prosecutor

and has held that he is duty bound to present the complete and truthful picture of the case from all quarters and it is his obligation to assist the court in a dispassionate and disinterested manner and it is not expected of a public prosecutor to achieve conviction at all cost. While noting the earlier judgment in the matter of Poonamchand Jaina (supra) it has been held as under:

“7. A Division Bench of this Court in the case of Sunil Kumar (Supra) placing reliance on the decision rendered in the case of [P.G. Narayan Kutty v. State of Kerala](#), 1982 Cr.L.J. 2085 (Kerala High Court) and Mukul Dalai (Supra) came to hold that only in exceptional cases and for reasons to be recorded the State Government can exercise its powers under [Section 24\(8\)](#) of the Code and appoint a Public Prosecutor. In this context I deem it apposite to refer to a passage from the decision rendered in the case of [Prabhudayal v. State](#), 1986 Cr.L.J. 383 wherein a learned Judge of the Delhi High Court observed as under :-

The prosecutor has to be fair in the presentation of the prosecution case. He must not suppress or keep back from the Court evidence relevant to the determination of the guilt or innocence of the accused. He must present a complete picture and not one sided picture. He must not be partial to the prosecution or to the accused. He has to be fair to both sides in the presentation of the case.

8. It is worth noting here that in the case of [Rajendra Nigam v. State M.P.](#), 1988 Cr.LJ 998 it has been observed that Special Public Prosecutor should not be appointed in ordinary circumstances and the appointment should disclose reasons there for. At this juncture I may profitably refer to the decision rendered in the case of [Arun Sonkar v. State of M.P.](#) rendered in W.P. 1257 of 1998 wherein this Court quashed the order of appointment on the ground that no reasons had been ascribed to make out a special case justifying the appointment of a Special Public Prosecutor. In the case of Shyam Ramkrishna Sharma (Supra), S.P. Khare, J. quashed the appointment of the Special Public Prosecutor on the ground that the said counsel had already been engaged by the complainant at an earlier

stage. The learned Judge opined that the counsel engaged by the complainant cannot be appointed as a Special Public Prosecutor.

11. The second contention of the learned counsel relates to adequacy of reasons. Submission of Mr. Kochar is that the order passed vide Annexure-P-1 does not disclose any acceptable reason and hence, it is vulnerable in law. Per contra, the learned counsel for the respondents have placed heavy reliance on Annexure-R-1 to highlight that the order on the face of it need not disclose reasons and the same can be gathered from other documents. In justification of the aforesaid submission they have drawn the attention of this Court to Annexure-R-1, the recommendation of District Magistrate, Shahdol. On a careful perusal of Annexure-P-1 it is luminously clear that the State Government has not ascribed cogent reasons for appointment of a Special Public Prosecutor except mentioning that the crime in question had occurred under special circumstances. On a scrutiny of Annexure-R-1 it transpires that the District Magistrate had indicated that the deceased had died under unnatural circumstances and there was tension in the township of Shahdol and the media had demanded that strong action should be taken against the accused persons. The District Magistrate has also stated that the accused persons are influential and rich people. He also mentioned that the parental house of the deceased is in the State of Bihar. It has further been mentioned that the brother of the deceased had made a request for appointment of a Special Public Prosecutor. The District Magistrate has also suggested that if the State Government is not inclined to pay the fees of the Special Public Prosecutor, the brother of the deceased is prepared to meet the same. The moot question that requires determination is whether there are justifiable grounds for appointment of a Special Public Prosecutor. At this juncture I may make it clear that I am not going to deal with the proposition whether the order in itself should indicate reasons or not. I will advert myself to the recommendations of the District Magistrate which is the foundation for appointment of the Special Public Prosecutor. As has been stated earlier the District Magistrate has referred to the tension in the locality at the time of death of the

deceased, the issue taken up by the media and the nature of the crime. In this context I may profitably refer to a decision rendered in the case of [Abdul Kadir v. State of Kerala](#) (1993) 1 SCR 346 wherein it has been observed that merely because the crime is heinous is not a special ground for appointment of a Special Public prosecutor. It is to be borne in mind that a Special Public Prosecutor is not to be appointed on mere asking on behalf of the complainant. It is to be kept in mind that when there is appointment of a Special Public Prosecutor there is ouster of the public prosecutor who is appointed in accordance with the provisions [of the Code](#). The Public Prosecutor has a different role to play and is duty bound to present the complete and truthful picture of the case from all quarters. It is his obligation to assist the Court in a dispassionate and disinterested manner. It is not expected of a public prosecutor to achieve conviction at all cost. It cannot be forgotten that a crime committed is not against an individual but against the community at large. In the administration of criminal justice the public prosecutor represents the society in entirety. The collective reposes intrinsic faith in the public prosecutor and ordinarily there should be no interference in the functioning of the public prosecutor unless there are special and strong reasons. In the case at hand the brother of the deceased initially made an application to the District Magistrate who without apprising himself about his authority appointed respondent No. 3 as the Special Public Prosecutor. Thereafter, a recommendation was sent to the State Government to appoint a Special Public Prosecutor on certain grounds. The State Government has acted on the proposal without scrutinising the factual matrix in a mechanical manner. It is not borne out on record that the public prosecutor who is incharge of the case is not competent to conduct the trial or there are other aspects which disqualify him to fulfill the duty cast on him. The circumstances do not exposit that special circumstances exist for appointment of a special public prosecutor. The suggestion given by the District Magistrate that the complainant was ready to pay the remuneration of the Special Public Prosecutor is also indicative of the fact that it is the complainant who had initiated the whole proceeding for appointment of the Special Public Prosecutor. The opinion of the State Government is that

the crime is a heinous one is not a justifiable and reasonable ground for appointment of respondent No. 3 as a special public prosecutor. The tension and pressure of media are also not germane to the issue. That apart, the fact that parental house of the deceased is in the State of Bihar cannot be construed as a special circumstance for appointment of respondent No. 3. The dislodging of duly appointed public prosecutor should not be done lightly and for spurious reasons. There is scintilla of doubt that the State Government enjoys the authority for appointment of a Special Public Prosecutor but it must do so by ascribing reasons and by objectively assessing the facts and circumstances.”

12/ Not merely this it is also the settled position in law that Special Public prosecutor should ordinarily be paid from funds of the State and only in special cases the remuneration of special public prosecutor can be collected from the private sources. Clarifying this position, the Supreme court in the matter of Mukul Dalal (supra) has held as under:

“10. The next question would be whether the Special Public Prosecutor should be permitted to be paid by the private complainant. There is considerable force in what has been stated by the Kerala High Court in the case we have referred to above. There may be certain cases where exception may be made, such as where the prosecutor is a public sector undertaking, a bank whether nationalised or not, an educational institution and the like. The rate of fees should be prescribed and the private complainant should be called upon to deposit the fees either with the Remembrancer of Legal Affairs or a prescribed State agency from where the fees would be drawn by the Special Public Prosecutor. To leave the private complainant to pay to the Special Public Prosecutor would indeed not be appropriate. We would make it clear that we do not support the conclusion of the High Court that as a rule whenever there is request of appointment of a Special Public Prosecutor or an Assistant Public Prosecutor, the same should be accepted. The Remembrancer of Legal Affairs should scrutinise every request, keeping a prescribed guideline in view and decide in which cases such request

should be accepted, keeping the facts of such case in view. Ordinarily the Special Public Prosecutor should be paid out of the State funds even when he appears in support of a private complainant but there may be some special case where the Special Public Prosecutor's remuneration may be collected from the private source. In such cases the fees should either be deposited in advance or paid to a prescribed State agency from where the Special Public Prosecutor could collect the same. In view of these conclusions and our disagreeing with the view of the High Court, the appeals shall stand allowed. Rule 22 of the Maharashtra Rules, referred to above, in our view is bad and the State Government should properly modify the same keeping our conclusions in view. The Remembrancer of Legal Affairs of the Maharashtra Government will now decide as to whether in the three cases referred to here, the services of a Special Public Prosecutor, a Public Prosecutor or an Assistant Public Prosecutor should be provided and in case he comes to the conclusion that such provision should be made, he should decide as to whether the State administration should pay for such Public Prosecutor or the private complainant should bear the same. There would be no order as to costs."

13/ The Division Bench of this court in the matter of Poonamchand Jain (supra) has opined that if the complainant was ready to pay the remuneration of the special public prosecutor that would also be indicative of the fact that it was the complainant who had initiated the whole proceeding for appointment of the special public prosecutor.

14/ This court also vide order dated 19/1/2012 passed in WP No. 6743/2011 in the case of **Paras Kumar Jain and another Vs. State of MP and others** has held that special public prosecutor is expected to act independently and state must assign reasons for appointing special public prosecutor. In that matter it has been held as under:

9/ The Public Prosecutor is an important officer of the State. He is expected to act independently. He has much larger responsibilities to discharge than merely to ensure the conviction of the accused. His duty is to act fairly and bring all relevant facts before the Court so that truth prevails and justice is done to all the parties including the victims. The Supreme Court in the matter of **Sidharth Vashisht Alias Manu Sharma Vs. State (NCT of Delhi) reported in 2010(6) SCC 1** while taking into consideration earlier judgments on the point in respect of role and duties of the Public Prosecutor, has observed as under :-

“185. A Public Prosecutor is appointed under Section 24 of the Code of Criminal Procedure. Thus, Public Prosecutor is a statutory office of high regard. This Court has observed the role of a Prosecutor in Shiv Kumar v. Hukam Chand (1999) 7 SCC 467 as follows :

“13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to which it to the force and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.”

186. This Court has also held that the Prosecutor does not represent the investigating agencies, but the State. This Court in *Hitendra Vishnu Thakur v. State of Maharashtra* (1994) 4 SCC 602 held: (SCC pp. 630-31, para 23)

“23. A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Criminal Procedure Code. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A Public Prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation.”

187. Therefore, a Public Prosecutor has wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the court in order for the determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the Prosecutor to be lax in any of his duties as against the accused.”

10/ This Court in the matter of *Poonamchand Jain vs. State of M.P. and others* reported in 2001(2) M.P.L.J. 61 has noted role of the Special Public Prosecutor as under :-

“11. It is to be borne in mind that a Special Public Prosecutor is not to be appointed on mere asking on behalf of the complainant. It is to be kept in mind that when there is appointment of a Special Public Prosecutor there is ouster of the Public Prosecutor who is appointed in accordance with the provisions of the Code. The Public Prosecutor has a different role to play and is duty bound to present the complete and truthful

picture of the case from all quarters. It is his obligation to assist the Court in a dispassionate and disinterested manner. It is not expected of a public prosecutor to achieve conviction at all costs. It cannot be forgotten that a crime committed is not against an individual but against the community at large. In the administration of criminal justice the public prosecutor represents the society in entirety. The collective reposes intrinsic faith in the public prosecutor and ordinarily there should be no interference in the functioning of the public prosecutor unless there are special and strong reasons

- 11/ The Special Public Prosecutor performs a similar role and discharges the same responsibilities as that of public prosecutor, therefore, it can not be ignored that he has to act fairly and only that Advocate should be appointed as Special Public Prosecutor who is expected to assist the court in a unbiased and fair manner. For this reason the Special Public Prosecutor can not be appointed by the State in a mechanical manner merely on the asking of a party but State is required to consider all the relevant circumstances while passing an order under Section 24(8) of the Cr.P.C.
- 12/ The similar issue had come up before this Court in the matter of **Mohammad Sartaj vs. The State of M.P. and others reported in 2005 Cri.L.J. 2133**, where the appointment of the Special Public Prosecutor was challenged on the ground that with the efforts of the younger brother of the deceased-victim, the advocate, who had defended the victim in so many cases, was appointed as Special Public Prosecutor which was prejudicial to the interest of the accused persons. This Court has noted the duties and responsibilities of the Special Public Prosecutor and has held that the position of a Public Prosecutor is one of trust and duly appointed Public Prosecutor in charge of the case, can not be ousted in a light manner. This Court in the matter of Mohammad Sartaj (supra) has held that :-

“10. It is to be borne in mind that the Public Prosecutor has been assigned a centripodal and pivotal role to conduct the prosecution under the Code. The language of Section 225 of the Code is indicative of the fact that the Public Prosecutor has the prerogative of conducting the prosecution. On a reading of Section 321 it is luminescent that the Public Prosecutor has an extremely significant role in the withdrawal of the

prosecution. His opinion is of immense importance and its import can never be marginalised. A Public Prosecutor has to assist the Court to arrive at correct, sound, truthful and appropriate conclusion. He has a statutory responsibility and his function rests on a high pedestal and stands on a different position than the advocate who represents a private complainant. Many a jurist has opined that the position of the Public Prosecutor is one of trust. He represents the State and the State has a different role. On a first glance it may give an impression that the Public Prosecutor has not other duty but to obtain a verdict against the accused. But on a proper penetration into his role and deeper probe as regards his statutory duty it is clear as crystal and as plain as plain can be that he is a highly responsible officer of the Court to assist the Court to arrive at the truth and to subserve the cause of justice which is 'truth in action'.

11. The present factual matrix has to be tested on the anvil of the aforesaid enunciation of law. In the case at hand no reasons have been indicated. The ouster of the Public Prosecutor has been founded on no base. The duly appointed Public Prosecutor under the provisions of the Code seems to have been ousted in an extremely light manner. It cannot be forgotten that the Public Prosecutor enjoys the statutory power and collective reposes faith in him. There is no material to show that the Public Prosecutor who is in charge of the case is not competent to conduct the trial or there are other aspects which disqualify him to fulfill the duty cast on him. On the contrary instances have been given that the respondent No.4 has been defending the deceased and his brother.”

- 13/ This Court in the matter of **Radheshyam vs. State of M.P. and others reported in 2000(4) M.P.H.T. 124** while considering the issue of appointment of relative of the complainant as Special Public Prosecutor, has taken the view that the Special Public Prosecutor can be appointed to protect the interest of the State in administration of criminal justice, and independent, impartial and lawyer of status and repute should be appointed, and he is expected not to act as protagonist. This Court in the matter of Radheshyam (supra) has taken note of the earlier decisions on the point as under :-

- “7. In case of Prabhat Agrawal Vs. State of M.P. and others, reported in 1999 (1) MPLJ 23 Short Note 36, it has been held by this Court that the Criminal Procedure Code empowers the State Govt. to appoint a Special Public Prosecutor under Section 24(8) of the code but has not provided any guidelines for making such appointments. It is, however, settled that Special Prosecutor should not be appointed on mere asking of the complainant. Such appointment, resulting in ouster of the regularly appointed public prosecutor creates feeling of distrust and thereby demoralises the Public Prosecutor as a class. The role of Public Prosecutor is difficult from the role of counsel or Advocate engaged by a party. He represents the State in administration of criminal justice. The Court has to grind against a criminal trial being converted into an individual contest between the accused and the complainant. Special Public Prosecutor can be appointed only for very special and strong reasons. Where there was no cogent, strong and valid reasons for appointing advocate who had earlier been engaged by and appearing for the complainant, as a Special Public Prosecutor on his mere asking and to be paid by him, the order was liable to be set aside.
8. In the case of Shyam Ramkrishan Sharma and others Vs. State of M.P. and others, reported in 1992(2) MPLJ 703, this Court has held that when an Advocate is engaged by the complainant in the Sessions case cannot legitimately be expected to act with impartiality and detachment which is expected of a Public Prosecutor. The apprehension entertained by the petitioners was reasonable. In this case this aspect of the case was also considered that when a Special Public Prosecutor is appointed by the State to conduce the case it should not be subjected to judicial review but the learned Judge found that such an order suffers from infirmity on the ground that counsel already engaged by the petitioner could not be appointed as a Special Public Prosecutor on the analogy that as the counsel engaged by the complainant cannot act as Public Prosecutor but can only act as per Section 301(2) of the Code to assist the Public Prosecutor.
9. In case of Sunili Kumar @ Chander Salariya and others Vs. State of M.P. and others, reported in 1992 MPLJ 772, the Division Bench of this Court had an occasion to consider the matter of appointment of Special Public

Prosecutor made by the State Govt. and it was held that Special Public Prosecutor can be appointed by the State Govt. only in the exceptional cases and for the reasons to be recorded and in the light of the provisions of Section 301 of the Cr.P.C. The State Govt. can exercise its power under Section 24(8) of the Cr.P.C. and appoint a Special Public Prosecutor only in exceptional cases and for the reasons to be recorded. The appointment made of a particular lawyer as a Special Public Prosecutor not of any necessity, but just to please and satisfy the relations of the deceased is not proper and the appointment was set aside and liberty was granted to the Special Public Prosecutor to assist in the manner provided in Section 301 (2) of Cr.P.C.”

14/ Similar issue came up in the matter of **Prabhat Agrawal Vs. State of M.P. and others reported in 1999(1) MPLJ Note 36**, where this Court had set aside the appointment of the advocate engaged by the complainant as Special Public Prosecutor on mere asking of the complainant by observing that Special Public Prosecutor can be appointed only for very special and strong reasons.”

15/ On examining the present case in the light of aforesaid judicial pronouncements, it is noticed that in the impugned order dated 22/2/17 while appointing respondent no. 4 as special public prosecutor no reasons whatsoever have been assigned to show the need for appointment of special public prosecutor and merely it has been mentioned that case is treated to be a special case but that alone is not sufficient.

16/ The record further reflects that respondent no. 4 was the counsel for complainant in M.Cr.C. No. 9147/16 in the same criminal case and in sessions trial also he had appeared as counsel for complainant. The impugned order also states that remuneration of respondent no. 4 will be paid by complainant which cannot be approved in view of above judgments.

17/ In the aforesaid circumstances, I am of the opinion that the impugned order appointing respondent no. 4 as special public prosecutor cannot be sustained.

18/ The writ petition is accordingly allowed and impugned order dated 22/2/2017 is set aside.

C.c. as per rules.

(Prakash Shrivastava)
Judge

BDJ