

HIGH COURT OF MADHYA PRADESH :
JABALPUR

BEFORE HON'BLE SHRI JUSTICE SANJAY YADAV

Writ Petition No.439/2015

Dr. P.S. Thakur

versus

State of M.P. & others

Shri Anil Khare, learned Senior Counsel with Shri H.S. Chhabra, learned counsel for petitioner.

Shri A.P. Singh, learned counsel for State of M.P. and its functionaries.

Shri Naman Nagrath, learned Senior Counsel with Shri R.P. Singh, learned counsel for respondent No.3.

Shri T.S. Ruprah, learned Senior Counsel with Shri U.S. Tiwari, learned counsel for respondent No.4

Reserved on : **29.06.2016**

Date of decision : **12.07.2016**

ORDER

1. An FIR dated 13.2.2013 at 23:30 hours at Police Station City Kotwali Sagar by Rammilan Dubey, Head Constable 901 on behalf of Anoop Kumar, son of Rajababu Dubey, led to registration of an offence under Section 302 read with Section 34 of the Indian Penal Code against Dr. P.S. Thakur and one Martand Singh

Thakur.

2. The commission of crime reported was due to death of one Abhishek Dubey. Material on record reveals that both the accused absconded which led the police to take steps under Section 83 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') whereon order was passed on 18.5.2013 by the Chief Judicial Magistrate Sagar. Later, by an order-dated 12.11.2013 passed in Misc. Criminal Case No.13433/2013 on an application under Section 438 of the Code, the petitioner was granted benefit of anticipatory bail and was directed to join the investigation and fully co-operate with the investigation. The arrest memo on record reveals that the petitioner remained absconded from 13.2.2013 to 27.11.2013.

3. The FIR borne out from the complaint which led to registration of an offence under Section 302 read with 34 IPC reads thus -

“मैं पुलिस चौकी तिली अस्पताल थाना गोपालगंज सागर मे प्रआर. के पद पर पदस्थ हूं आज दिनांक 13-02-13 करीब 23.00 बजे थाना कोतवाली के स.उ. नि. एस.सी. श्रीवास्तव ने मुझे एक देहाती नालसी धारा 302, 34 IPC के असल नम्बर पर कायमी हेतु दी है जो पेश करता हूं कायमी की जाये देहाती नालसी नकल जेल है— देहाती नालसी थाना कोतवाली जिला सागर अप.क्र. 0/13 धारा 302, 34 IPC घटना दिनांक समय 13-02-13 के 20:30 बजे, घटना स्थल होटल राम सरोज पैलेश परिषर तिलकगंज सागर दिनांक समय रिपोर्ट 13-02-13 के 23:00 बजे नाम फरियादी अनूप कुमार दुबे s/o राज बाबू दुबे उम्र 35 साल

जवाहरगंज परकोटा सागर नाम मृतक अभिषेक दुबे s/o राज बाबू दुबे उम्र 30 साल जवाहरगंज परकोटा सागर नाम आरोपी 1. डाक्टर पी.एस. ठाकुर 2- मार्तण्ड सिंह ठाकुर कायमीकर्ता एस.सी. श्रीवास्तव थाना कोतवाली जिला सागर, विवरण मैं ठेकादारी व कृषि का कार्य करता हूं, मैं और मेरे साथ मे सुरेन्द्र चौबे, बृजेश दुबे, विनोद गुरु, धर्मेन्द्र गुरु एवं मेरे चाचा का लडका श्याम जी दुबे अनीश रावत की बारात मे होटल राम सरोज पैलेश तिलकगंज गये थे, वहां पर डाक्टर पी.एस. ठाकुर एवं मार्तण्ड सिंह ठाकुर (माउजर) लिए थे गाना चल रहा था मुन्नी बदनाम हुई, उस पर पी.एस. ठाकुर जो माउजर लेकर डान्स कर रहे थे डान्स पर से अभिषेक दुबे और पी.एस. ठाकुर डाक्टर की झूमा झटकी होने लगी, तभी मार्तण्ड सिंह ने कहा कि बहुत उडता है, मारो साले को इतने मे पी.एस.ठाकुर ने गोली चलाई जो सीधे अभिषेक दुबे के सीने मे लगी उस समय राजेश्वर सेन, ब्रजेश दुबे, दीपक दुबे, श्याम जी दुबे, राजेश रजक, आनन्द दुबे आदि लोग थे जिन्होने सम्पूर्ण घटना देखी है। मौके पर अभिषेक दुबे गंभीर रुप से घायल हो गया, तो उसे विनोद गुरु, लाल टवेरा से श्याम जी दुबे, राजेश्वर सेन गाडी मे डालकर जिला अस्पताल सागर लाये। डाक्टर पी.एस. ठाकुर वहां से भाग गया। हम लोगो ने अभिषेक दुबे को अस्पताल लाया भर्ती करया, डाक्टर द्वारा तिली अस्पताल मे चेक कर बताया कि इसकी मृत्यु हो गई है। इस घटना मे पी.एस. ठाकुर द्वारा घटना समय जान बूझकर अभिषेक दुबे को गोली मारी है, जिससे अभिषेक दुबे की मृत्यु हुई है, रिपोर्ट करता हूं, कार्यवाही की जाये। हस्ताक्षर अपठनीय अनूप कुमार दुबे 13.02.13 हस्ताक्षर अपठनीय एस.सी. श्रीवास्तव 13.02.13”

4. That, before committal of the proceedings to the Court of Session, i.e. during pendency of the matter before Judicial Magistrate First Class, the complainant filed an application on 2.2.2014 addressed to the District Magistrate, Sagar requesting for appointment of one

Satish Chandra Rawat as Special Public Prosecutor by invoking powers under sub-section (8) of Section 24 of the Code. The applicant also proposed to bear the expenses of the Special Public Prosecutor.

5. At this stage, it is pertinent to note that the said application by the complainant was endorsed by the Minister, Panchayat and Rural Development, Social Justice, specially abled welfare, co-operation, Govt. of Madhya Pradesh and though a feeble submissions were made that a political interference has been sought; however, the submissions were not carried further in absence of any pleadings therefor and non-impleadment of the concerned Minister. Be that as it may.

6. The application routed through the District Magistrate, culminated into an order-dated 27.8.2014 passed by the State Government appointing one Shri Satish Chandra Rawat, Advocate Sagar as Special Public Prosecutor on the terms and conditions contained in the Department of Law and Legislative Affairs's Order No.17(ई)/60/95/21-ब.दो dated 23.11.2006 as amended on 15.11.2007 on State Govt. expenses. For a ready reference, the order is reproduced -

“फा0क्रमांक 1(सी)/25/21-ब(दो)/2014, राज्य शासन, दण्ड प्रक्रिया संहिता, 1973 (क्रं0 2 सन् 1974) की धारा 24(8) द्वारा प्रदत्त शक्तियों को प्रयोग में लाते

हुए, सत्र न्यायालय सागर के न्यायालय में विचाराधीन सत्र प्रकरण क्रमांक 114/2014 मध्यप्रदेश शासन विरुद्ध पी.एस.ठाकुर एवं अन्य में राज्य शासन की ओर से पैरवी करने हेतु श्री सतीश चन्द्र रावत, अधिवक्ता सागर को एतद्द्वारा, विशेष लोक अभियोजक नियुक्त करता है।

श्री सतीश चन्द्र रावत, अधिवक्ता सागर को उपरोक्त प्रकरण में विशेष लोक अभियोजक के रूप में पैरवी करने के फलस्वरूप इस विभाग के आदेश क्रमांक 17(ई)60/95/21-ब(दो) दिनांक 23.11.2006 में किये गये संशोधन आदेश दिनांक 15.11.2007 में वर्णित शर्तों के अधीन फीस का भुगतान शासन द्वारा किया जायेगा।”

7. It is this order which is being challenged by the petitioner on the following grounds -

- (a) That State has not assigned any reasons for appointment of Special Public Prosecutor.
- (b) The impugned order is a non-speaking order.
- (c) The impugned order will cause serious prejudice to the petitioner because the Special Public Prosecutor is of the choice of the complainant.
- (d) The appointment is on mere asking and in a mechanical manner.
- (e) That because the complainant and the Special Public Prosecutor are close relatives, the petitioner apprehends that he will be deprived of fair trial if the Special Public

Prosecutor is continued.

(f) That it is not shown that existing Public Prosecutor who was handling the matter is not competent to deal with the same. And, the appointment of Special Public Prosecutor despite the objection raised by existing Public Prosecutor would demoralize the public prosecutor-in-charge of prosecution in the Session Court.

(g) That, the basic precept that the Public Prosecutor should be unbiased and independent, has been given the go-bye by appointing public prosecutor of complainant's choice.

(h) There being no exceptional circumstances, the appointment of Special Public Prosecutor is not tenable.

8. To substantiate these submissions, besides the note-sheets maintained by the Department of Law and Legislative Affairs, obtained through application under the Right to Information Act, 2005, reliance is placed on the decision in **Paras Kumar Jain v. State of M.P. 2012 (3) MPLJ 223** and the judgments relied therein.

9. Besides, State of M.P., the complainant and Special Public Prosecutor who are impleaded, have filed their respective reply, denying adverse allegations and defending the appointment. Whereas, the State

Government placing reliance on the very note-sheets which the petitioner has filed, has to submit that the decision for appointment of Special Public Prosecutor was taken after objectively considering the report furnished by the District Magistrate and the Superintendent of Police, Sagar. It is submitted that there being the circumstances warranting appointment of Special Public Prosecutor, State Government is justified in appointing Shri Satish Chandra Rawat as Special Public Prosecutor. It is further contended that the competency of the Special Public Prosecutor has never been questioned even by the public prosecutor who had expressed his reservation, nor is there any allegation in the petition regarding competency. As to contention that the Special Public Prosecutor who has been appointed is the close relative of the complainant which will jeopardise the trial, learned Government Advocate relying on the uncontroverted contention made by respondent No.3 in his reply contends that there is no relationship between the complainant and Special Public Prosecutor. It is urged that since there is no relationship between the two and no instances have been shown as to the Special Public Prosecutor representing the complainant in any matter prior to his appointment by the State as Special Public Prosecutor, petitioner's apprehension about the trial being jeopardized is ill-found as there is no cogent material on record to substantiate the

same. It is submitted that the State with an object to have a fair trial in the given facts deliberated upon, appointed the Special Public Prosecutor. Learned Government Advocate further deny the petitioner's contention that Special Public Prosecutor has been appointed to secure the conviction. It is urged that as the petitioner, an accused, has a right of fair trial, the victim also has the same right and merely because a person whose name has been suggested, is appointed as Special Public Prosecutor, his appointment cannot be said to be on a mere asking, as the decision is taken only after the District Magistrate and Superintendent of Police gave their opinion. There being no allegation against these two officers nor the competency of the Special Public Prosecutor who is appointed is being questioned, the apprehension that the petitioner will not get justice is ill-found. Accordingly, the State seeks dismissal of the petition.

10. Reply is filed by the complainant, whereby he denies any relationship between the complainant and the Special Public Prosecutor. In paragraph 5 of the reply, the complainant has given reasons which led him to believe and apprehend that his cause of justice may get prejudiced at the hand of existing Public Prosecutor, it is stated :-

“.. It is pertinent to mention here on behalf of answering respondent that he has right to fair and free trial and as he had no faith in the

earlier Public Prosecutor looking to the bitter experience of the answering respondent, at the time of cross-examination, examination-in-chief in other cases, as a result of which, the Prosecution Agency has failed to establish its case beyond reasonable doubt, as a result of which, the accused concerned were discharged/acquitted by the trial Court, hence the answering respondent No.1 and 2 assigned the reason that the case is serious in nature.”

11. Respondent-complainant has also placed reliance on the findings recorded by the Chief Judicial Magistrate, Sagar on an application under Section 82 of the Code whereon by order-dated 18.5.2013, the CJM, Sagar found :-

“विचार किया गया । चूंकि आरोपीगण न्यायालय द्वारा जारी गिरफ्तारी वारंट पर गिरफ्तार नहीं हुए, उनके द्वारा अपने को छिपाया गया तथा वे फरार है । इसके संबंध में धारा 82 द.प्र.सं. के अंतर्गत उद्घोषणा भी जारी की गई । जिसका प्रकाशन भी हुआ, जिसके समाचार पत्र की प्रति केस डायरी के साथ प्रस्तुत की गई है । आरोपी धारा 82 द.प्र.सं. के अंतर्गत जारी उद्घोषणा के पश्चात् भी हाजिर नहीं हुए है । ऐसी स्थिति में धारा 83 द.प्र.सं. के अंतर्गत उनकी संपत्ति की कुर्की का आदेश दिया जाता है । आदेश इस निर्देश के साथ दिया जाता है कि आरोपीगण की केवल व्यक्तिगत संपत्ति ही कुर्क की जावे, साथ ही आदेश किया जाता है कि ऐसी संपत्ति जो राजस्व देने वी है वह कलेक्टर के माध्यम से कुर्क की जावे । जहां तक आरोपी की ओर से इस आशय

का आवेदन प्रस्तुत किया गया है कि अपराध के संबंध में जांच अतिरिक्त पुलिस अधीक्षक द्वारा की जा रही है इस कारण कोई आदेश न दिया जावे इस संबंध में पुलिस थाना कोतवाली द्वारा प्रतिवेदन दिया गया है कि जांच चल रही है, परंतु उनकी गिरफ्तारी करने से रोकने हेतु कोई निर्देश नहीं है । ऐसी स्थिति में जो आपत्ति धारा 83 द.प्र.सं के संबंध में की गई है, वह उचित नहीं है ।

धारा 83 द.प्र.सं के अंतर्गत जो आपत्ति श्रीमति लक्ष्मी ठाकुर द्वारा पेश की गई है । उसके संबंध में जांच श्री अनूप त्रिपाठी न्या. मजि. प्रथम श्रेणी की ओर समुचित निराकरण हेतु भेजी जाती है ।

पुलिस थाना कोतवाली की ओर से प्रस्तुत की गई प्रार्थना धारा 83 द.प्र.सं स्वीकार की जाती है तथा मात्र आरोपीगण की व्यक्तिगत संपत्ति के संबंध में धारा 83 द.प्र.सं के अंतर्गत संपत्ति कुर्की करने का आदेश दिया जाता है । ”

12. It is contended that even after the order-dated 18.5.2013, two accused including the petitioner did not surrender. And, it was only when they had an anticipatory bail order in the hand, the petitioner surrendered on 27.11.2013. All these eventualities, it is urged, has given rise to an apprehension that the accused being an influential person and capable of even influencing the conduct of trial at the hand of existing Public Prosecutor that he requested for appointment of a most competent lawyer as a Special Public Prosecutor. It is submitted that the petitioner did not exert any pressure as has been

argued on behalf of petitioner. As to the competency of the State Government, it is not disputed on behalf of complainant that it is the State Government which has sole discretion to appoint Special Public Prosecutor which being satisfied that the circumstances so warrants and having appointed the Special Public Prosecutor need not be interfered with as due process has been followed.

13. Special Public Prosecutor whose appointment has been questioned has also filed the reply. In paragraph 4 of his reply, it is stated that he is not related to either the complainant or any of his family members. It is also stated that he is also not related to the Rawat Family in whose marriage celebration the alleged incident occurred. It is further stated in paragraph 6 of his reply that “the petitioner has not alleged any allegation against the answering respondent about his conduct of fairness and impartiality. The function of Public Prosecutor is to conduct the trial with all fairness and impartiality. There are no allegation of any apprehension with regard to these two elements in the writ petition”. It is further stated in paragraph 7 of his reply that he has been public prosecutor in the Session Court, Sagar for over 35 years during which period he has conducted numerous important and sensational criminal trials and that the State previously has appointed him Special Public Prosecutor in five cases. It is stated that his impartiality and fairness in

conducting the criminal trials is undisputed.

14. The petitioner though filed the rejoinder to the reply filed by respondent No.3 but has chosen not to controvert the stand taken by respondent No.4.

15. In its rejoinder to the return filed by respondent No.3, the petitioner in paragraph 6 of the rejoinder has contradicted the stand of respondent No.3 about the competency of the existing public prosecutor. It is stated that these were not the reasons given by the respondent-complainant in his application for appointment of Special Public Prosecutor. However, an averment of relationship of respondents No.3 and 4 is reiterated but no details are given as to how they are related except that they are cousin brothers. Whereas, respondent No.4 in his reply denied any sort of relationship either with respondent No.3 or even those where the marriage has solemnized. The averments are not controverted by the petitioner. That, vide I.A. No.12798/2015 the petitioner has brought on record additional documents which include the objection raised by him before the State Government on 14.10.2014 and the proceedings drawn thereon, to state that they are not taken to logical end. As to these objections, it is for the State Government to consider the same. And, it being not the claim of the petitioner that the State Government be directed to take a decision on the objection raised. The objections are left to be dwelt by the

State Government. For the present, since relief sought in present petition is being perused, the matter is heard and decided after considering the rival contentions.

16. There can be no cavil to the proposition that the Public Prosecutor does not represent the investigating agencies, but the State. And, that he is an important officer of the State, acting independently, fairly and bring all relevant facts before the Court so that truth prevails and justice is done to all the parties including the victim (please see. Hitendra Vishnu Thakur vs State of Maharashtra (1994) 4 SCC 602, Shiv Kumar vs Hukum Chand (1999) 7 SCC 467, Manu Sharma vs State (NCT of Delhi) (2010) 6 SCC 1. That, the appointment of Special Public Prosecutor could be in cases in which the Govt. on the basis of material on record and nature of the case objectively exercise the discretion. (please see Sunil Kumar v. State of M.P. 1992 MPLJ 772).

17. It is also trite, as has been spelt out in Rajendra Nigam vs State of M.P. 1998 Cri LJ 998 that, “The philosophy involved which can be discerned from the sub-section is two fold. *First*, if there should be special circumstance for making such appointment. *Second*, for appointing a Special Public Prosecutor, Government shall consider a more experienced advocate for the assignment.

The very idea behind conferment of the power on a Special Public Prosecutor is to meet special situations. In other words, a Special Public Prosecutor is not to be appointed in ordinary circumstance.

18. These stipulations though are not provided under the Statute, but are carved out from various judicial pronouncement to meet out the ends of justice to both the victim as also the accused. In this context, it was observed in **Mukul Dalal v. Union of India (1988) 3 SCC 144** that “The primacy given to the Public Prosecutor under the scheme of the Code has a social purpose. ... we are inclined to observe that the request for appointment of a Special Public Prosecutor should be properly examined by the Remembrancer of Legal Affairs and only when he is satisfied that the case deserves the support of a Public Prosecutor or a Special Public Prosecutor that such a person should be appointed to be in charge of the case.”

19. Thus, the appointment as such of a Special Public Prosecutor is not thwarted. What has been discouraged is non-consideration of the circumstance leading to request for appointment. Therefore, the competent authority has been cautioned to be careful while considering the request for appointment. In each of the cases relied upon by the petitioners, the observations are in the context of the given facts in respective cases. Each of the observation,

however, aims at that role of a Public Prosecutor and the care to be taken by the State Government while considering the request for appointment of a Special Public Prosecutor. Thus, a decision to appoint or not to appoint a Special Public Prosecutor has to be examined in the light of given facts.

20. In the case at hand, as evident from the impugned order that the State Government does not abruptly take a decision, but takes an action on the basis of the report furnished by the District Magistrate and the Superintendent of Police. There is no allegation against these two officers that they acted with any malice. Thus, a proper procedure has been adopted by the State Government before taking a decision for appointment of Special Public Prosecutor, after satisfying itself that the case deserves to be conducted by Special Public Prosecutor. In this context, reference can be had of a decision in **State of Maharashtra v. Prakash Prahlad Patil (2009) 12 SCC 159**, wherein it is held -

“5. The scope for judicial review has been examined by this court in several cases. It has been consistently held that the power of judicial review is not intended to assume a supervisory role or don the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the supreme lex to other organs of the State. A mere wrong decision, without

anything more, in most of the cases will not be sufficient to attract the power of judicial review. The supervisory jurisdiction conferred upon a court is limited to see that the authority concerned functions within its limits of its authority and that its decisions do not occasion miscarriage of justice.

6. The courts cannot be called upon to undertake governmental duties and functions. Courts should not ordinarily interfere with a policy decision of the State. While exercising power of judicial review the court is more concerned with the decision making process than the merit of the decision itself.

7. In the instant case, acting on a petition filed by close relatives of a victim decisions have been taken at various levels. The High Court was not justified to pick up stray sentences from the records to conclude that there was non-application of mind. In any event, the appointment of a Special Public Prosecutor to conduct a proceeding does not in any way cause prejudice to the accused. In that sense the writ petition before the High Court was wholly misconceived. ..”

21. Be it noted that the verdict in **Prakash Prahlad Patil** (*supra*) is in the context of the case wherein several accused were facing trial and though initially it was not disclosed that respondent No.1 was related to one of the accused opposing the appointment of respondent No.3 as Special Public Prosecutor at the instance of brother and son of victim. Whereas, in the present case, appointment

is primarily opposed on the ground of close relationship which may cause prejudice. However, since the petitioner fails to establish the relationship between the complainant and the Special Public Prosecutor and that there is no allegation against the competency of the Special Public Prosecutor nor could it be established as to what prejudice would be caused to the petitioner with the appointment of respondent No.4 as Special Public Prosecutor, the State is well within its right in appointing respondent No.4 as Special Public Prosecutor.

22. In view whereof, since no relief can be granted to the petitioner, petition is **dismissed**. However, no costs.

(SANJAY YADAV)
JUDGE

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