(1975) 08 AHC CK 0007

Allahabad High Court

Case No: None

Jai Pal Singh Naresh and Others	APPELLANT
Vs	
State of U.P. and Others	RESPONDENT

Date of Decision: Aug. 6, 1975

Acts Referred:

- Constitution of India, 1950 - Article 226, 235, 309
- Criminal Procedure Code, 1973 (CrPC) - Section 24, 25
- Police Act, 1861 - Section 2, 7

Citation: (1976) CriLJ 32

Hon'ble Judges: K.N. Singh, J

Bench: Single Bench

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.N. Singh, J.
This is a petition under Article 226 of the Constitution for quashing the Government Order dated 15th March, 1975, placing the assistant Public prosecutors under the administrative and disciplinary control of the Superintendent of Police at the district level and the Inspector General of Police at the State level.

2. Prior to the enforcement of the Code of Criminal Procedure, Act II of 1974, the prosecuting agency in the District consisted of the Assistant Public Prosecutor, Public prosecutor and Senior public prosecutor. They were enrolled as members of the police force u/s 2 of the Police Act. For purposes of disciplinary and administrative con-control they were members of the police force and liable to departmental trial and punishment u/s 7 of the Police Act for remissness and negligence in the discharge of their duties. Since they were members of the police force, the administrative and disciplinary control was being exercised over them by the Superintendent of Police in the District and by other higher police authorities,

namely. Inspector General of Police and Deputy Inspector General of Police. The functions and duties of the Assistant Public prosecutors were prescribed by paragraphs 25 to .19 of Chapter III of the U.P. Police Regulations. Public prosecutors were appointed u/s 492 of the Code of Criminal Procedure, 1898. The Code of Criminal Procedure. 1973 (Act No. II of 1974) was enacted by the Parliament which was enforced with effect from 1st April, 1974. Section 25 of the 1974 Act provided that no police officer shall be eligible for appointment as Assistant Public Prosecutor except in the circumstances enumerated in Sub-section (3). After the enforcement of the Code of Criminal Procedure, 1973. the State Government issued a notification dated 27th March, 1974, declaring that all the appointments of Senior Public Prosecutors and Assistants Public Prosecutors made under the Police Act, 1861, shall cease with effect from 1-4-1974, and the said posts in the police establishment shall stand abolished. The notification further repealed the provisions contained in the Police Regulations in so far as they contained provisions for the Public prosecutors. On the same day, the State Government in exercise of its powers under Article 309 of the Constitution framed and enforced the U.P. (Assistant Public Prosecutors) Appointment Rules, 1974. On 1st June, 1974, the Government issued orders transmitted through wireless message placing the public prosecutors under the District Magistrates for administrative and disciplinary control. Later, a formal Government order was issued on 15th June, 1974, which stated that the Senior Public prosecutors, Public Prosecutors and Assistant Public Prosecutors would be under the Administrative and disciplinary control of the District Magistrate at the District level. In pursuance of that policy, another Government Order was issued on 21st August. 1974, directing that the character roll and other service records of the Public Prosecutors should be transferred by the Police Department to the District Magistrates.

3. Later on. the State Government had a second thought and it reversed its earlier decision and snide an order on 15th March, 1975, resenting the Government order dated 15th June 1974, and directing that henceforth the Public Prosecutors. Senior Public Prosecutors and Assistant Public Prosecutors shall be under the control of Superintendent of Police a the District level and the Inspector General of Police at the State level, for purposes of administrative and disciplinary matters. The petitioners are Assistant Public Prosecutors, After the issue of the notification dated 27th March, 1974, and the enforcement of the Appointment Rules they ceased to be officers of the Police Department and they opted for the new service created under the said Appointment Rules and they have been subject to the administrative and disciplinary control of the District Magistrates in pursuance of the Government Order dated 15th June, 1974, Aggrieved by the Government Order dated 15th March, 1975, the petitioners have approached this Court challenging the validity of the said order

4. learned Counsel for the petitioners urged that the impugned order of the Government dated 15th March, 1975, has been issued in violation of Section 25 of

the 1974 Act as well as Rule 5 of the Appointment Rules. It is urged that on the recommendation of the Law Commission, it was realised that the prosecuting agency should be independent from the Police Department which was responsible for the maintenance of law and order and prevention and investigation of crimes and it was with that end in view that the Parliament enacted the Act of 1974 to ensure that the Public Prosecutors and Assistant Public Prosecutors are not members of the Police Department so that they may be free from the control of the authorities of the Police Department. The policy so laid down by the Parliament has been nullified by the issue of the Government Order dated 15th March, 1975.

5. It is not in dispute that prior to 1st April, 1974, Public Prosecutors and Assistant Public Prosecutors were members of the Police force as constituted u/s 2 of the Police Act, 1861, and they were under the administrative and disciplinary control of the Superintendent of Police, Deputy Inspector General of Police and the Inspector General of Police. The Law Commission of India in its XIV Report while dealing with the reforms of Judicial Administration considered the question of prosecuting agency. In paragraph 12 of Chapter XXXV, Vol. II, the Law Commission noted the limitations of Public prosecutors. It observed :

It is obvious that by the very fact of their being members of the Police force and the nature of the duties they have to discharge in bringing a case to court, it is not possible for them to exhibit that degree of detachment which is necessary in a Prosecutor. It is to be remembered that a belief prevails among police officers that their promotion in the department descends upon the number of convictions they are able to obtain as prosecuting colliers. Finally, the only county or supervision of the work of these prosecuting officers is that exercised by the departmental officials.

The above paragraph projected the defect of the system which prevailed at that time. After considering a number of suggestions, the Law Commission further made its suggestions in paragraph 15 of its report in the following words:

We therefore suggest that as a first step towards improvement, the prosecuting agency should be completely separated from the police department. In every district a separate prosecution department may be constituted and placed in charge of an official, who may be called a "Director of Public Prosecutions." The entire prosecution machinery in the District should be under his control. In order to ensure that he is not regarded as a part of the police department he should be an independent official directly responsible to the State Government. The departments of the machinery of the Criminal justice, namely, the investigation department and the prosecuting department should thus be completely separated from each other.

The Law Commission thus recommended that the prosecution agency should be separated and made independent from Police Department and it should not be amenable to the administrative control of the Police Department. Recommondations of the Law Commission were accepted by the Central Gov-"

eminent. In order to effectuate the suggestions made by the Law Commission, the Parliament whole enacting the Criminal Procedure Code (II of 1974) inserted Section 24 making provision for appointment of Public Prosecutors by the Central Government and the State Government in the High Court and in the District Courts. The appointment of public prosecutors in case of High Court is to be made by the appropriate Government in consultation with the High Court, whereas in the District appointment is to be made by the State Government out of a panel of names prepared by the District Magistrate in consultation with the Sessions Judges. No person is eligible to be appointed as public prosecutor unless he has been in practice as Advocate for not less than 7 years. Thus Section 24 ensures that a member of the Bar alone can be appointed public prosecutor both at the High Court and the District Court. Section 25 confers power on the State Government to appoint Assistant Public Prosecutors to conduct prosecutions in the Court of Magistrates. Public Prosecutors appointed in the district are required to conduct prosecution of criminal cases before the Sessions Judge''s Court while Assistant Public Prosecutor are required to conduct prosecution in the Magistrate''s Courts. Since the interpretation of Section 25 is relevant for the purposes of this case, it is necessary to set out the section. It read thus:
25 (1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the courts of Magistrates.

(2) Save as otherwise provided in subsection (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case:

Provided that a police officer shall not be so appointed

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

(b) if he is below the rank of Inspector.

Sub-section (1) of the section confers power on the State Government to appoint one or more Assistant Public Prosecutors in every district for conducting the prosecution in Magistrates'' courts. Sub-section (2) lays down a prohibition that no police officer shall be eligible for appointment as Assistant Public Prosecutor. Subsection (3) lays down that in a case where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case. The use of the words "any particular case" and "in charge of that case" are significant. The power conferred under Sub-section (3) can be exercised in exceptional cases for conducting a particular case. This power cannot be exercised for making general

appointments to conduct cases before the Magistrate''s Corm. The proviso to Sub-section (3) lays down that a Police Officer shall not be so appointed if he has taken any part in the investigation of the offence in respect of which the accused is being prosecuted or if be is below the rank of Inspector. The proviso read with Sub-section (3) makes it clear that in exceptional circumstances the District Magistrates may appoint a Police Officer who may not have taken part in the investigation of the offence for conducting a particular criminal case in the Court of Magistrates. The scheme as unfolded by Section 25 of the Act makes the legislative intent clear that the prosecuting agency should be free from Police department which is generally entrusted with the task of maintenance of law and order and prevention and investigation of crimes. The suggestion made by the Law Commission was implemented by the Parliament in enacting Sub-section (2) (which?) imposed ban on the appointment of Police Officers as Public Prosecutors. The purpose behind this enactment was that the defects which had been noted and found in existence by the Law Commission should not recur and the prosecuting agency should be free from the administrative and disciplinary control of the Police Department and it was for that reason that Sub-section (2) laid down that no police officer shall be eligible to be appointed as public prosecutor. In pursuance of the policy laid down by the Parliament the State Government issued the notification dated 27th March, 1974, and framed service rules setting up a separate cadre of Public Prosecutors. The Government Order dated 15th June, 1974, placed the Public Prosecutors under the District Magistrate for purposes of administrative and disciplinary control. These steps were taken to implement the policy of the legislature as enacted in Section 25 of the Code but later on the Government reversed this policy and issued the impugned order dated 15th March, 1975, placing the petitioners under the administrative and disciplinary control of Superintendent of Police and Inspector General of Police.

6. The question then arises as to whether the Government Order dated 15th March, 1975, has been issued under the Appointment Rules as notified on 27th March, 1974. The petitioners have, to doubt, no right to choose the authority which may have administrative control over them, nor they can claim any right to insist that the State Government should entrust this matter to a particular authority. The State Government as the appointing authority has power to entrust the disciplinary and administrative control to any authority it deems fit and proper, but in doing that the State Government cannot nullify the legislative policy as contained in Section 25 of the Code. The legislative history and the above discussion would show that Section 25(2) was enacted by the Parliament to ensure indepenence of prosecuting agency from the Police Department and it was for that reason that a police officer was declared ineligible for appointment as a Public Prosecutor. If the recommendations of the Law Commission and the Statement of Objects and Reasons of the Bill in respect of the Code of Criminal Procedure is taken into account, there can be no manner of doubt that the Parliament intended that Public Prosecutors should be

free from the control of the Police Department. If the Assistant Public Prosecutors are placed under the administrative and disciplinary control of the Superintendent of Police who is the principal police officer at the district level, the legislative purpose would be defeated.

7. Learned Standing Counsel urged that Section 25(3) itself contemplated that a police officer can legally be appointed as Assistant Public Prosecutor. Parliament never intended that there should be complete separation of the prosecuting agency with the Police Department or that the officers of the Police Department should have no control over the Assistant Public Prosecutors. He placed reliance upon Rule 5 of the appointment Rules to support his contention. Rule 5 lays down :

5. Disciplinary control over the Assistant Public Prosecutors:

The immediate disciplinary control over the Assistant Public Prosecutors, senior grade, first grade and second grade, shall be exercised by such authority or authorities in the district as the State Government may, from time to time, specify in that behalf and the inter be relationship between these officers shall be governed by such rules or general orders as the State Government may from time to time make in that behalf.

Under the aforesaid rule the State Government is empowered to issue orders specifying the authority which may have immediate disciplinary control over the Assistant Public Prosecutors at the district level. It is urged that since the State Government was invested with the power of appointing authority to have immediate disciplinary control over the Assistant Public Prosecutors, it was permissible for the State Government to entrust disciplinary control over the Assistant Public Prosecutors to the Superintendent of Police and the Inspector General of Police. No doubt, Rule 5 confers power on the State Government to entrust the administrative and disciplinary control over the Assistant Public Prosecutors to any authority under Rule 5 of the Appointment Rules but while exercising that power it cannot ignore Section 25(2) of the Act, and the legislative history and the Parliament''s intention and the purpose which was sought to be achieved by the said enactment. The purpose of Section 25(2) was to secure independence of prosecuting agency from Police Department, that purpose would be defeated if the Assistant Public Prosecutors are placed under the disciplinary control of the officers of the Police Department. Rule 5, therefore, does not confer power on the State Government to entrust disciplinary control over the prosecuting agency to the Police department and thereby to nullify the legislative intent and purpose as contained in Section 25(2) of the Code.

8. Learned Standing Counsel urged that the Assistant Public Prosecutors do not become members of the Police force nor they lose their independence merely because the administrative and disciplinary control is entrusted to Superintendent of Police and the Inspector General of Police. He further urged that the State

Government being the appointing authority has the ultimate control over the Assistant Public Prosecutors and the Superintendent of Police and the Inspector General of Police will have power to superviser the working of the Assistant Public Prosecutors in day to day matters and they will have no right to dismiss or remove the petitioners from service. Therefore, the impugned order is not in violation of Section 25 of the Code. The question then arises what is the scope of "administrative and disciplinary control". In common parlance this expression means immediate supervision in matters relating to the work and functioning of the Assistant Public Prosecutors which may include power to call for explanation, suspension and awarding minor punishments namely, withholding of increment, promotion and imposition and recovery of losses which the Government may suffer from the negligence of the officers. The expression "control" occurring in Article 235 of the Constitution was interpreted by the Supreme Court in The State of West Bengal Vs. Nripendra Nath Bagchi, . The Supreme Court observed that the word "Control" even though not defined in the Constitution indicates that it meant disciplinary control or disciplinary jurisdiction. The Court observed that in considering the scope of the word "Control" aid can be taken from the history which lay behind the enactment of Article 235 of the Constitution, that was permissible to find out the meaning of the expression ""Control", and recourse may legitimately be had to the prior state of law, the evil sought to be removed and the process by which the law was evolved. After examining the legislative history, the Supreme Court observed that Article 235 was framed to effectuate a purpose namely to secure independence of the subordinate judiciary, thereafter it held that the word "Control" occurring in Article 235 included disciplinary control, if that was not so the very object of securing the independence of the subordinate judiciary from the executive would be frustrated.

9. Applying the principles laid down by the Supreme Court and having regard to the legislative history and the object and purpose which was sought to be achieved by the enactment of Section 25(2), there can be no manner of doubt that if administrative and disciplinary control over the public prosecutors was entrusted to the officers of the ''Police Department, the very purpose for which Section 25 was enacted would be frustrated. This position is not altered merely because the State Government is invested with the powers of ultimate control to pass orders to dismiss or remove a public prosecutor. The State Government appoints Assistant Public Prosecutors and it can alone dismiss or remove hem but that does not mean that the police officers to whom immediate disciplinary con-not has been entrusted will cease to have any right to exercise powers over the Assistant Public Prosecutors, Once the Police Officers are entrusted with those powers they will have jurisdiction to regulate and control the working of. Assistant Public Prosecutors. It is difficult to accept the contention that even |though the Assistant Public Prosecutors would be subordinate to police officers in administrative and disciplinary matters, they would be independent in discharge of their duties and functions. Once they are liable to answer to the Superintendent of police and Inspector General of Police, in

substance they are subordinate officers to them and they would be liable to carry out their orders and directions. The State Government while exercising its power of dismissal or removal is bound to be affected by the reports and opinion of those Police officers who have administrative and disciplinary control over the public prosecutors, therefore the contention that since the ultimate control vests with the State Government the immediate control of Police officers would not affect the independence of the prosecuting agency is fallacious. Similar contention was rejected by the Supreme Court in The State of West Bengal Vs. Nripendra Nath Bagchi, .

10. In view of the above discussion, I am of the opinion that the impugned order is inconsistent with the provisions contained in Section 25 of the Code. I, therefore, allow the petition and quash the Government Order dated 15th March, 1975. There will be no order as to costs.