

(2012) 11 GUJ CK 0040

Gujarat High Court

Case No: Special Criminal Application No. 53 of 2012 with Miscellaneous Cri. Appli. No. 13062 of 2012 in Spl. Cri. Appli. No. 53 of 2012 with Miscellaneous Cri. Appli. No. 8497 of 2012 in Spl. Cri. Appli. No. 53 of 2012

Lalji @ Lalo Chhaganbhai Dabhi

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision: Nov. 5, 2012

Acts Referred:

- Constitution of India, 1950 - Article 21, 226, 227
- Criminal Procedure Code, 1973 (CrPC) - Section 24(8), 482
- Penal Code, 1860 (IPC) - Section 302

Citation: (2013) 1 GLR 452 : (2013) 2 RCR(Criminal) 479

Hon'ble Judges: Rajesh H Shukla, J

Bench: Single Bench

Advocate: N.D. Nanavati, with P.B. Khandheria, for the Appellant; A.C. Raval, Assistant Public Prosecutor for Respondent No. 1 and R.J. Goswami, for the Respondent

Final Decision: Dismissed

Judgement

Rajesh H. Shukla, J.

Draft amendment is granted. Learned Counsel is directed to carry out amendment. Rule. Learned A.P.P. Ms. A. C. Raval for the respondent No. 1-State and learned Counsel, Mr. R. J. Goswami for the respondent No. 5 waive service of notice of Rule.

2. The present petition has been filed by the petitioner under Art. 226 and/or 227 of the Constitution of India as well as under Sec. 482 of the Code of Criminal Procedure, 1973 for the following prayers:

A. To issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction quashing and setting aside the order (Annex. A) passed by the respondent No. 2 on 16-6-2010 bearing Resolution No. APT/332010/VIP-119/H by the Legal Department appointing Special Prosecutor in

the case arising out of I.C.R. No. 45 of 2011, registered at Jetpur Taluka Police Station, District Rajkot, for the reasons stated in the Memo of petition and in the interest of justice.

B. Pending admission, hearing and final disposal of the above Special Criminal Application to stay the execution, implementation and operation of the impugned order dated 16-6-2010 (Annex. A) bearing Resolution No. APT/332010/VIP-119/H by the Legal Department appointing Special Public Prosecutor in the cases arising out of I.C.R. No. 45 of 2011, registered at Jetpur Taluka Police Station, District Rajkot and further be pleased to restrain the Special Public Prosecutor from appearing in the cases arising out of the I.C.R. No. 45 of 2011, registered at Jetpur Taluka Police Station, District Rajkot for the reasons stated in the Memo of Petition and in the interest of justice.

C. The Hon"ble Court may kindly be pleased to grant any other appropriate relief as the nature and circumstances of the case may require.

3. Heard learned Counsel appearing for the respective parties.

4. Learned Sr. Counsel, Shri N. D. Nanavati appearing with learned Counsel, Mr. P. B. Khandheria for the petitioner referred to die papers including the Government Resolution at Annexure-A dated 16-6-2010 and submitted that the appointment of a Special Public Prosecutor for conducting the case against the present petitioner-accused is motivated by extraneous consideration. He has also submitted that this Resolution regarding the appointment of a Special Public Prosecutor has been stayed as per the order of the High Court passed in the present proceeding dated 2-2-2012, and therefore, no action could have been taken. He submitted that in spite of that, as subsequently one Mr. Niranjana S. Daftary, who was appointed as Special Public Prosecutor declined and he resigned, another Advocate, one Mr. Dipak B. Trivedi, the respondent No. 5 herein was appointed vide Government Order dated 18-5-2012 and the said facts have been brought on record by way of draft amendment. Learned Sr. Counsel, Shri Nanavati, therefore, submitted that if during the pendency of the interim relief, without making a reference to any pending petition, fresh resolution is issued, it would be subterfuge. He further submitted that no affidavit has been filed by the State.

5. Learned Sr. Counsel, Shri Nanavati submitted that as per Sec. 24(8) of the Code of Criminal Procedure, 1973, the State Government is empowered to make such an appointment, however, such power cannot be exercised in arbitrary manner by adopting pick and choose method. He submitted that the petitioner-accused is facing charge under Sec. 302 of the Indian Penal Code and there are many such cases, and therefore, there was no need to make appointment of a Special Public Prosecutor. In support of his submission, he has also referred to and relied upon the judgment of this Court in case of Dilipbhai Chhotalal Dave v. State of Gujarat, reported in 1971 GLR 999 and pointedly referred to Paragraph No. 18, wherein it has

been observed that

Before we part with this case, we may observe that Sec. 492(1) of the Criminal Procedure Code confers upon the State Government very wide powers as regards the appointment of the Public Prosecutors. It would not be reasonable to assume that when the State Government appoints generally for any local area any person to be a Public Prosecutor, the person so appointed is well-equipped and competent to conduct prosecution in all trials before the Courts of Session or the Magistrate's Courts in that area.

6. Then he emphasised further observations that:

In our opinion, it would be desirable for the State Government to lay down appreciate norms or standards regarding the appointment of Special Public Prosecutor for any particular case or for any particular class of cases in the light of aforesaid legislative object so that no accusation may be made against the State Government of exercising its powers of appointment of Special Public Prosecutor arbitrarily or unreasonably or discriminatively at the behest of influential or affluent complainants who can afford to engage the services of highly paid Counsel even in cases which may not warrant the appointment of Special Counsel.

7. Therefore, emphasising these observations, he submitted that no rules or norms or guidelines have been framed, and therefore, such appointment is illegal. He has also referred to the order of this Court in Special Criminal Application No. 705 of 2004 (Coram: M. R. Shah, J.) dated 29-12-2011 and submitted that in this judgment also, earlier judgment reported in case of [Dilipbhai Chhotatalal Dave Vs. State of Gujarat and Others](#), has been considered and the directions have been given and still no further progress is made. Therefore, he submitted that even the resolution which refers to V.I.P. would indicate that such an appointment has been made at the instance of V.I.P. persons, and therefore, it is illegal. He has also referred to the judgment of the Hon'ble Apex Court in case of [Mukul Dalal and Others Vs. Union of India \(UOI\) and Others](#), and emphasised the observations made in Paragraph No. 9. Therefore, he submitted that such an appointment has to be considered keeping in mind the concept of fair trial. He, therefore, submitted that the appointment of a Special Public Prosecutor in the case against the petitioner-accused is illegal and the present petition may be allowed.

8. Learned A.P.P. Ms. A. C. Raval appearing for the respondent No. 1-State of Gujarat referred to the provisions of Sec. 24(8) of the Code of Criminal Procedure, 1973, which has been quoted in the present petition also and submitted that it empowers the Central Government as well as State Government to make appointment for the purpose of any case or any class of cases of Special Public Prosecutor for the effective conduct of the trial in the interest of justice. She submitted that the prosecution is a function of the State and is obliged to prosecute the persons, who are alleged to have involved in the offence for the ultimate object of the rule of law

and public interest. She, therefore, submitted that the person like the petitioner, who is accused in the case, cannot have any grievance if the Special Public Prosecutor is appointed for the effective trial and conduct of the case. She submitted that he has option of appointing his defence Counsel as he likes and the trial would be conducting by presiding judicial officer, and therefore, if the Special Public Prosecutor is appointed to assist the Court effectively and to represent the case of the State, no grievance could be made. It was submitted that several opportunity has been given and he has every opportunity, and therefore, the submissions regarding the concept of fair trial are without any basis. She has also submitted that it is like making a submission that State should appoint Public Prosecutor as liked or desired by the accused so that the case is not effectively represented and he gets acquittal. She submitted that ultimate underlying object is that he should get the benefit of acquittal for poor representation or ineffective representation of the State or the prosecution, which cannot be permitted. Learned A.P.P. Ms. Raval also submitted that if such arguments are accepted, it would be against the public interest and there is no violation of any of his right or fundamental right and such petition is misconceived. She submitted that in our criminal justice system, the accused is having sufficient protection but such cases as and by way of abuse of process of Court to gain undue advantage in the proceeding cannot be permitted.

9. Learned Counsel, Mr. R. J. Goswami for the respondent No. 5 submitted that the person like the petitioner, who is accused in a serious case, has no say in the matter as to which Prosecutor should take his case, otherwise, it would lead to a situation that the Government should appoint Prosecutor with the approval of the accused, which would amount to total denial of justice to the victim and the society. He also referred to and relied upon the judgment of the Hon"ble Apex Court in case of [State of Maharashtra and Others Vs. Prakash Prahlad Patil and Others](#), and submitted that same issue was addressed referring to earlier judgment of the Hon"ble Apex Court in case of Mukul Dalal (supra) which has been relied upon by learned Sr. Counsel, Mr. Nanavati for the petitioner. He emphasised the observations made in the said judgment that --

The basic grievance of respondent No. 1 was that the appointment of respondent No. 3 as a Special Public Prosecutor was in violation of the scheme of Sec. 24(8) of the Code of Criminal Procedure, 1973 (in short "the Code") and Rule 22 of the Rules for the Conduct of the Legal Affairs of the Government, 1984 (in short "the Rules"). It was also the stand of respondent No. 1 that the view expressed by this Court in [Mukul Dalal and Others Vs. Union of India \(UOI\) and Others](#), was not kept in view while making the appointment.

10. Learned Counsel, Mr. Goswami emphasised the observation that:

In any event, the appointment of a Special Public Prosecutor to conduct a proceeding does not in any cause prejudice to the accused. In that sense, the writ

petition before the High Court was wholly misconceived. The impugned judgment of the High Court is set aside. Since, the trial appears to have been held up, we direct that the trial Court shall make all possible endeavours to see that the trial is completed expeditiously.....

11. Learned Counsel, Mr. Goswami has also referred to the judgment of this Court in Special Criminal Application No. 1203 of 2009 dated 5-11-2009 (Coram: Ravi R. Tripathi, J.) asking for similar prayer that the appointment of the Special Public Prosecutor filed by the State by Resolution may be quashed and set aside and similar submissions have been made, which have been considered. He submitted that reference to the judgment of the Hon"ble Apex Court in case of [Mukul Dalal and Others Vs. Union of India \(UOI\) and Others](#), was also made and considering the submissions, this Court has clearly made observations that it was in a different context. He emphasised the observations that -

From the discussion and the relevant observations made by Hon"ble the Apex Court, it can be seen that the question of "prejudice to the accused" was not under consideration, but what was under consideration of the Hon"ble the Apex Court was, that "a person who is appointed as a Special Public Prosecutor should have sufficient required eligibility as contemplated under Sec. 24(8) of the Code of Criminal Procedure, 1973." Under Sec. 24(8), it is provided that, "a person who has been in practice as an Advocate for not less than 10 years, can be appointed as a Special Public Prosecutor." Also, the Hon"ble the Apex Court focused on "terms and conditions on which such appointment was made." In the absence of any particular prejudice being pointed, the question of challenging the appointment of Special Public Prosecutor is totally misconceived and is only with a view to see that the proceedings below are delayed and prolonged and the complainant is dragged to this Court, causing him financial drain.

12. Reference is made in this judgment of the High Court to the order in case of Umesh Balasaheb Kalabhor v. State of Maharashtra, reported in 2008 (4) CCR 53, which has also been considered that it was with regard to the eligibility of a person as Special Public Prosecutor. Reference is made to the judgment of the Hon"ble Apex Court in case of [State of Maharashtra and Others Vs. Prakash Prahlad Patil and Others](#), , which has also been quoted in the order of this Court in Special Criminal Application No. 1203 of 2009 that -

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.

13. In view of these rival submissions, it is required to be considered whether the present petition can be entertained or not and the submissions, which have been canvassed by learned Sr. Counsel, Mr. Nanavati have any merits in the matter.

14. The submission, which has been made, is mainly focused on the appointment of a Special Public Prosecutor to conduct the trial and the case in which the present petitioner is an accused facing charge of the offence under Sec. 302 of the Indian Penal Code. The submission, which has been made making a reference to the concept of fair trial or the arbitrariness of the Government in making an appointment of the Special Public Prosecutor has no basis or foundation. The criminal jurisprudence nowhere provides for such kind of privilege or the right that the Prosecutor should be appointed as liked by the accused, meaning thereby, if a Special Public Prosecutor is appointed for conducting the trial effectively, how the rights of the accused are affected or it has nothing to do with the concept of fair trial. One fails to understand that whether any right of the accused much less any fundamental right of the accused under Art. 21 of the Constitution of India can be said to have been affected. But in fact, no prejudice can be said to have been caused to the accused. On the contrary, if such a prayer or request is granted, it would be travesty of the justice that a person, who is facing charge as accused will have say in the matter of appointment of a Special Public Prosecutor, which indirectly would suggest that he has right to interfere so that the effective trial is not conducted resulting into benefit of acquittal to the accused, which would be an antithesis to the rule of law and mockery of justice if the right of accused is permitted to be stretched in this fashion. On the contrary, in series of judgments, the Hon"ble Apex Court has made a reference to the fair trial meaning an acquittal keeping in mind the right of the victim independently or collective rights of society as a whole. The rights of the accused, therefore, have to be also balanced with corresponding rights of the victim and society in general if the rule of law is maintained and sustained. In our criminal justice system, trial is conducted according to the Code of Criminal Procedure, which is a complete Code providing for the manner in which the fair trial would be conducted at every stage taking care of the grievance of the accused and also the interest of the accused. In other words, when the Criminal Procedure Code itself by virtue of provisions of Sec. 24(8) of the Code of Criminal Procedure, 1973 empowers the Government to make such appointment of the Special Public Prosecutor, same cannot be permitted to be interpreted in this manner by making averments or allegations about the arbitrariness or the so-called fair trial without showing that how the accused is prejudiced. When no prejudice is shown to have been caused to the accused, he cannot have any say in the matter of an appointment of the Prosecutor. The State is rather under an obligation to conduct and prosecute the persons, who are accused of having committed offence in order to see that rule of law is maintained and guilty are punished to maintain faith of the people in the public interest. Therefore, it is in the public interest as well as in the interest of the

criminal justice system that the trial should be conducted effectively and if there is an appointment of the Special Public Prosecutor depending upon the facts of the case, it does not amount to any violation of any right of the accused like the petitioner and he cannot be permitted to claim by such proceeding any privilege that the prosecution or the case or the trial should be conducted in the way he desires without effective representation by the Special Public Prosecutor even if it is necessary. While making an appointment of the Special Public Prosecutor, what has been considered in the judgments, which have been cited by learned Sr. Counsel, Mr. Nanavati is in fact has a reference to the eligibility and terms and conditions of the appointment and focus was never on any such right or the grievances of the accused that the appointment of the Special Public Prosecutor is contrary to the concept of fair trial. The appointment of the Special Public Prosecutor may have a various consideration including his legal acumen, stability and minimum criteria, which was in issue as it has been discussed at length in the judgment of this Court in Special Criminal Application No. 1203 of 2009 dated 5-11-2009 (Coram: Ravi R. Tripathi, J.). The submission made by learned Sr. Counsel, Mr. Nanavati referring to Sec. 24(8) of the Code of Criminal Procedure, 1973 referring to the observations made by this Court in a judgment in case of [Dilipbhai Chhotalal Dave Vs. State of Gujarat and Others](#), were totally different as the contentions were raised with the regard to the appointment of the Special Public Prosecutor and his remuneration where the Bank was complainant and pursuant to the agreement between the complainant and the Government, remuneration was to be paid by the complainant, which was considered with reference to the Gujarat Law Officers (Conditions of Service) Rules, 1965 and in the background of that facts, the observations have been made, which has been referred by learned Counsel, Mr. Nanavati. The issue focused in the present case is totally different and it has already been in the judgment of this Court in Special Criminal Application No. 1203 of 2009 dated 5-11-2009 and specifically referring to the judgment, it has been pressed into service by learned Counsel, Mr. Nanavati in case of [Mukul Dalal and Others Vs. Union of India \(UOI\) and Others](#), that the issue was with regard to the eligibility for the appointment of an Advocate as a Special Public Prosecutor and it was not an issue with regard to any right of the accused or any prejudice to the accused if the appointment of the Special Public Prosecutor is made to conduct the trial. It is also observed in the judgment of this Court that:

From the discussion and the relevant observations made by Hon"ble the Apex Court, it can be seen that the question of "prejudice to the accused" was not under consideration, but what was under consideration of the Hon"ble the Apex Court was, that, "a person who is appointed as a Special Public Prosecutor should have sufficient required eligibility as contemplated under Sec. 24(8) of the Code of Criminal Procedure, 1973.

15. Thus, the Hon"ble Apex Court had focused on the terms and conditions on which such appointments are made and the rights of the accused under the concept of fair

trial that he has say in the appointment of the Public Prosecutor was not focused nor there was any aspect like prejudice to the accused was focused in the said judgment of the Hon"ble Apex Court in Mukul Dalal (supra). It is well accepted that the tax of law or a statute as well as judgment has to be read as a whole to cull out the ratio or the points, which have been discussed and dealt with and again it has to be read in context of the background of the facts. Therefore, if these judgments are considered, the submissions made by learned Sr. Counsel, Mr. Nanavati for the petitioner are without any merits. Thus, in a judgment in case of Mukul Dalal (supra) what is weighed with the Hon"ble Apex Court was the eligibility with regard to the appointment of a person, who was not eligible for the appointment as a Special Public Prosecutor and the terms and conditions with regard to the payment of remuneration. Gujarat Law Officers (Conditions of Service) Rules, 1965 particularly Rule 38 has not been referred to. A useful reference can also be made to the judgment of the Hon"ble Apex Court in case of [Sunil Kumar Pal Vs. Phota Sheikh and Others,](#) wherein it has been observed that "It is imperative that in order that people may not lose faith in the administration of criminal justice, no one should be allowed to subvert the legal process. No citizen should go away with the feeling that he could not get justice from the Court because the other side was socially, economically or politically powerful and could manipulate the legal process. That would be subversive of the rule of law." Thus, it is evident that whether system is heavily loaded in favour of the accused and when there is a specific provisions at different stage to give fair opportunity to the accused when he is represented by a lawyer, he cannot have a say in the matter of appointment of the Prosecutor to conduct the trial against him.

16. It may be noted that the focus or the emphasis on the criminal justice system is that people may not lose faith in the system because the other side was socially, economically or politically powerful and could manipulate the legal process in the facts of the case. In fact, it is other way round that the petitioner desires to resort to such dilatory tactics so that the trial against him is not conducted in an effectively manner and on the top of that, he can complaint of delay in the trial or if the trial is not conducted in an effective manner, he should get the ultimate benefit of acquittal. A useful reference can be made to the judgment of this Court in case of Amrutbhai Bholabhai Patel v. State of Gujarat, reported in 2000 (3) GLR 2667, wherein the High Court has also considered the similar contentions raised referring to the objections by the accused and the concept of fair trial. The Hon"ble High Court has also negated the similar contentions raised in the present petition.

17. Therefore, moot question, which is required to be considered is whether the petitioner can have any say in the matter for the appointment of the Special Prosecutor in Sessions Case against him particularly when no prejudice caused to him is shown. Under criminal justice system, the prosecution is at the instance of the State to punish the guilty after the trial under the said Rules like the Code of Criminal Procedure, 1973. If the Public Prosecutor is appointed for effective conduct

of the trial, it is the obligation for the State to conduct the trial effectively so that the victim also gets justice and in turn, the society as a whole gets justice and the confidence of the people in the system is maintained and the rule of law is also maintained. On the other hand, if the grievance, which has been made, is permitted to be entertained under some misconception, it would be a rather privilege to the person like the petitioner, which would be counter-productive not only to criminal justice system, but it is antithesis the rule of justice. The concept of fair trial would mean that every opportunity should be provided to the accused person and the trial should be conducted in the manner in accordance with law. It is not the case of the petitioner that any opportunity has been denied including the fact that he has right to be represented by the competent defence Counsel and the matter would be conducted by the presiding judicial officer as per the procedure established under the Code of Criminal Procedure. Therefore, he has no right to make any grievance with regard to the trial merely by making a reference to the concept of fair trial and on what basis such concept can be resorted without having any prejudice caused to him. Therefore, the grievance that the appointment of the Special Public Prosecutor in his case should not be made and the appointment of the Special Public Prosecutor is out of political reasons is thoroughly misconceived. It is well accepted that in many cases, the services of such Public Prosecutor is taken so that appropriate assistance is rendered to the Court. Therefore, the accused cannot have say in the matter as to which Prosecutor should conduct the trial of the case where he is facing trial as accused. If such submissions are to be entertained, it would be counter-productive to the public interest inasmuch as the accused may not like effective trial by a competent Prosecutor result into benefit of acquittal to the accused. Thus, underlying purpose of the present petitioner appears to be such that the prosecution should not be by a competent Prosecutor as a result of which, he can get benefit of acquittal, which would not be in the interest of public and the interest of criminal justice system. The trial against the accused like the petitioner may be conducted in accordance with law after providing every opportunity in compliance with the fair trial and there is no justification for making any such grievance for the appointment of the Special Public Prosecutor. The criminal justice system obliges to the State to conduct trial and assist the Court effectively in order to do complete justice and maintain faith of the people in the system. Therefore, any such arguments, which have been made, have no basis and when it has not been shown that any prejudice is caused to the petitioner-accused, the present petition cannot be entertained and deserves to be dismissed. Accordingly, present petition stands dismissed. Rule is discharged. Interim relief stands vacated. In view of dismissal of aforesaid Special Criminal Application No. 53 of 2012, Misc. Criminal Application No. 13062 of 2012 for joining party and Misc. Criminal Application No. 8497 of 2012 filed for appropriate orders stand disposed of.