

Poonamchand Jain Vs State of M.P. and Others

Court: Madhya Pradesh High Court

Date of Decision: Jan. 23, 2001

Acts Referred: Constitution of India, 1950 " Article 226, 227
Criminal Procedure Code, 1973 (CrPC) " Section 24, 24(8), 301(2), 439
Penal Code, 1860 (IPC) " Section 302, 304B, 34, 498A

Citation: (2001) 5 MPHT 579 : (2001) 2 MPLJ 61

Hon'ble Judges: Dipak Misra, J

Bench: Single Bench

Advocate: S.L. Kochar, for the Appellant; Sunil Choubey and P.N. Pathak, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Dipak Misra, J.

Invoking the extra ordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India the petitioner has prayed for issue of

writ of certiorari for quashment of order passed by the State Government vide Annexure-P. 1.

The facts as have been depicted are that the petitioner alongwith some other family members was charge-sheeted in respect of offences punishable

under Sections 302, 498A and 304B/34 of the Indian Penal Code (in short "the I.P.C.") in Crime No. 81/2000 pending before the learned Chief

Judicial Magistrate, Shahdol. It is averred in the writ, petition that the deceased Jyotsna was married to the son of the petitioner and she expired on

28-4-2000 under unnatural circumstances. The further allegation of the prosecution is that said Jyotsna was illtreated for demand of dowry and

death had occurred due to asphyxia caused by strangulation. On the basis of the said allegations criminal law was set in motion by the parents and

brother of the deceased. The petitioner alongwith his family members were arrested. When the matter stood thus the brother of the deceased

submitted an application on 2-2-2000 before the District Magistrate, Shahdol, the respondent No, 2 herein, for appointment of a Special Public

Prosecutor for conducting the case and expressed his willingness to pay the fees of such Special Public Prosecutor. On the basis of the aforesaid

application the District Magistrate vide Annexure P. 2 appointed the respondent No. 3 as the Special Public Prosecutor. It is further averred that

on the basis of the aforesaid order the respondent No. 3 appeared before the learned Sessions Judge on behalf of the State and vehemently

opposed the bail application preferred u/s 439 of the Code of Criminal Procedure (hereinafter referred to as "the Code") filed by the co-accused

Kumari Sonal Jain, an unmarried girl. The learned Sessions Judge permitted the respondent No. 3 to conduct the case on behalf of the State and

rejected the application as per Annexure P. 3. It is set forth in the writ petition that the District Magistrate as well as respondent No. 3 realised that

the District Magistrate had no jurisdiction u/s 24(8) of the Code to appoint a private counsel as a Special Public Prosecutor and accordingly the

respondent No. 2 moved the State Government for appointment of respondent No. 3, a lawyer of the choice of the complainant as Special Public

Prosecutor, The State Government accepted the recommendation and by order dated 1 -7- 2000 appointed Shri Deep Narain Pathak,

respondent No. 3, as the Special Public Prosecutor. It is urged in the writ petition that the appointment of respondent No. 3 is unjust, and

improper and suffers from the vice of non-ascribing of reason. It is also put forth that the complainant is entitled to engage a private advocate of his

choice as per the provisions enshrined u/s 301(2) of the Code but at his instance the State Government without special reasons could not have

appointed respondent No. 3 to conduct the sessions trial. It has also been averred that as per the M.P. Zila Yojna Samiti Adhiniyam, 1995 the

power u/s 24 of the Code to appoint Public Prosecutor and Additional Public Prosecutor has been delegated to the president of Zila Yojna Samiti,

a nominated Minister of the State Government (who has also exercised jurisdiction in appointment of Public Prosecutor and Additional Public

Prosecutor) and, therefore, the present appointment contained in Annexure P.1 by another Authority is sensitively susceptible.

A counter affidavit has been filed by the respondents 1 and 2 that the Collector moved the State Government for appointment of Special Public

Prosecutor and the recommendation of the Collector was accepted in view of the special circumstances obtaining in the case. It is put forth that the

State Government has unfettered right to appoint Special Public Prosecutor as per Section 24(8) of the Code read with Rule 30 of M.P. Law

Department Manual. It is averred in the affidavit that the State Government is not required to assign any reasons for appointment of Special Public

Prosecutor in the order of appointment itself. In justification of the appointment it has been pleaded that the State Government after receiving the

recommendations for appointment of Special Public Prosecutor in the case considered the matter objectively and called upon the Collector to

narrate special circumstances that may warrant appointment of Special Public Prosecutor and on consideration of the correspondence dated 31-5-

2000 of the District Magistrate the State Government came to the conclusion that it was a fit case where an appointment of Special Public

Prosecutor was warranted and accordingly appointed respondent No. 3 who is an experienced lawyer.

A return has been filed by the respondent No. 3 contending, inter alia, that the petitioner has not approached this Court with clean hands inasmuch

as there has been a considerable length of delay in assailing the order of appointment. It is put forth by him that he has been appearing for the State

as a Special Public Prosecutor right from the beginning and none of the accused persons have ever raised any objections with regard to his

appointment. The respondent No. 3 has also narrated his experience in the return and has indicated that he was appointed as a Special Public

Prosecutor in S.T. No. 60/99. It has also been pleaded that the respondent No. 3 had pointed it out to the District Magistrate vide his

communication dated 4-2-2000. Annexure R-3/2, that the appointment order should come from the State Government. It has been further set

forth that he is not the choice of the complainant. It has been further pleaded that as the brother of the deceased expressed his apprehension to the

District Magistrate in getting justice as the accused persons are very rich and influential persons of Shahdol he had requested for appointment of

Special Public Prosecutor and the State Government keeping in view the past experience of respondent No. 3 appointment him as the Special

Public Prosecutor and there is no illegality in passing of the said order.

I have heard Mr. S.L. Kochar, learned counsel for the petitioner. Mr. Sunil Choubey, learned P.L. for respondents Nos. 1 and 2 and Mr. P.N.

Pathak learned counsel for respondent No. 3. Assailing the order passed vide Annexure P. 1 it is contended by Mr. Kochar, that the said order

being sans reasons is unsustainable. It is urged by him that the recommendations of the Collector are general in nature and do not make out a

special case for appointment of a Special Public Prosecutor. The learned counsel has also highlighted that the factual matrix does exposit that the

respondent No. 3 is the counsel of the choice of the complainant who is bent upon getting the petitioner and the other accused persons convicted

at any cost and, therefore, the order passed by the State Government is untenable. Learned counsel in support of his submissions has placed

reliance on the decisions rendered in the cases of Mukul Dalal and Others Vs. Union of India (UOI) and Others, , Sunil Kumar v. State of M.P.

and Ors. 1992 MPLJ 772, Shyam Ramkishan Sharma and Ors. v. State of M.P. and Ors., 1999 (2) MPLJ 703, and Shiv Kumar Vs. Hukam

Chand and Another, . Mr. Kochar has also canvassed that the Authority who has appointed the Special Public Prosecutor vide Annexure P. 1

does not have the jurisdiction in view of M.P. Zila Yojna Samiti Adhiniyam, 1995.

Mr. Choubey learned P.L., resisting the aforesaid submissions has contended that the State Government has considered the entire scenario in

proper perspective and appreciating the situation has appointed the Special Public Prosecutor and hence, no fault can be found with it. It is further

proponed by him that the State Government has the jurisdiction to appoint though such power has been delegated under M.P. Zila Yojna Samiti

Adhiniyam, 1995.

Mr. Pathak learned counsel appearing for respondent No. 3 has argued that the order passed by the State Government need not reflect the

reasons in the order itself and the Court can appreciate the facts and circumstances from other documents brought on record. It is also urged by

him that the petitioner has assailed the order after charge has been framed and there being delay the petitioner is not entitled to any relief in exercise

of equitable jurisdiction of this Court.

Before I advert to appreciate the obtaining factual matrix of the case it is apposite to discuss the law governing the field. The Code empowers the

State Government to appoint a Special Public Prosecutor u/s 24(8) but there are no guidelines in the Code for making such appointment. A

controversy relating to appointment of Special Public Prosecutor in connection with Maharashtra Law Officer (Appointment, Conditions of

Service and Remuneration). Rules, 1984 came up for consideration before the Apex Court in the case of Mukul Dalal and Ors. (supra) wherein

their Lordships observed as under:

....When an application for the services of a Special Public Prosecutor or an Assistant Public Prosecutor is made in a given case, the Power would

be vested in him to examine the facts and take decision as to whether the case merits the appointment of a Special Public Prosecutor or an

Assistant Public Prosecutor. It would not be appropriate to accept the position that whenever an application is made it should be allowed and a

Special Public Prosecutor should be appointed; this would be contrary to the spirit of the scheme of the Code, there may be cases where a

powerful complainant may have begun a proceeding to victimize his opponent. If in such a case the State concedes to the request for appointment

of a Special Public Prosecutor there will be travesty of justice. Without screening on the basis of guidelines prescribed or to be prescribed, the

service of a Special Public Prosecutor should not be made available to a private complainant. The primacy given to the Public Prosecutor under

the Scheme of the Code has a social purpose and the same would be lost if the procedure adopted by Rule 22 of Maharashtra Rules referred to

above is accepted or what the High Court has indicated is adopted. 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.

It is relevant to state here that the Apex Court held Rule 22 of the Maharashtra Rules as ultra vires.

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. Narayanankutty

Vs. State of Kerala and Others, (Kerala High Court) and Mukul Dalal (Supra) came to hold that only in exceptional cases and for reasons to be

recorded the State Government can exercise its powers u/s 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 Prabhu Dayal Vs. State, 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.

It is worth noting here that in the case of Rajendra Nigam Vs. State of Madhya Pradesh and Others, 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. and Ors. 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 Shayam 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.

Now to the respective contentions. Mr. P.N. Pathak, learned counsel for respondent No. 3, in support of order has contended that the petitioner

had not taken action till charge was framed and woke up after the respondent No. 3 functioned for sometime. Submission of learned counsel is that

as there has been belated approach the order need not be interfered with by this Court. Resisting the aforesaid submission it is contended by Mr.

Kochar that the trial has not commenced, and therefore, the delay cannot be an impediment for interference.

Having heard learned counsel for the parties I am of the considered opinion that there is no inordinate delay in seeking quashment of the order

passed vide Annexure-P-1 and the delay, as put forth by the counsel for the respondent, would not be an impediment for disposal of the case on

merits inasmuch as the trial is yet to commence.

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 CCR 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 provision 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 in charge of the case is not competent to conduct the trial or there are other aspects which disqualify him to fulfil 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 spacious 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.

In view of the preceding analysis, the impugned order dated 1-7-2000, Annexure-P-1, the appointment of respondent No. 3 as a special public

prosecutor is quashed. However, it is observed that the respondent No. 3 may assist the prosecution in accordance with the provision enshrined

u/s 301(2) of the Code and act under the direction of the duly appointed public prosecutor with the permission of the Court.

Resultantly, the writ petition is allowed without any order as to costs.