

(2003) 08 AP CK 0118

In the Andhra Pradesh High Court

Case No : Writ Petition No. 7026 of 1999

Devineni Seshagiri Rao

APPELLANT

Vs

The Govt. of A.P. and Others

RESPONDENT

Date of Decision : 13-08-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 24(8)

Citation : (2003) 2 ALD(Cri) 637 : (2004) CriLJ 52

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : G. Padmanabha Reddy, for G. Peddababu, G.P, for the Appellant; A. Shrinivasa Prasad, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—The petitioner figured as an accused in Crime No. 498 of 1998 of Machavaram Law and Order Police Station, Vijayawada. He is accused of having committed offence u/s 302 read with Section 34 of the Indian Penal Code (IPC) and Section 27 of the Arms Act. The 3rd respondent lodged a complaint stating that the petitioner murdered his brother by name P. Ramakrishna.

2. The 3rd respondent submitted a representation to the 1st respondent, the Government of Andhra Pradesh, requesting them to appoint the 2nd respondent herein as Special Public Prosecutor to conduct the case in Cr. No. 498 of 1998. Acceding to the request of the 3rd respondent, the 1st respondent issued G.O. Ms. No. 217, Law Department, dated 10-10-1998, appointing the 2nd respondent as Public Prosecutor, in exercise of power u/s 24(8) of Cr.P.C. (hereinafter referred to as "the Code" for short). The said order is challenged in this writ petition.

3. The petitioner contends that the 2nd respondent appeared in several cases for the deceased P. Ramakrishna. According to him, it is the 2nd respondent's acquaintance with and proximity to the deceased and his family, that prompted

the 3rd respondent to make a request to the 1st respondent to appoint the 2nd respondent as Special Public Prosecutor. The petitioner expressed apprehension about the independent functioning of the 2nd respondent as Special Public Prosecutor. Legal aspects of the matter are also canvassed.

4. In the counter affidavit filed by the 1st respondent, it is stated that the Government has inherent right to appoint Special Public Prosecutor u/s 24(8) of the Code, and that no exception can be taken to the appointment of the 2nd respondent. It is alleged that the apprehension expressed by the petitioner is without basis. They reiterate that the Public Prosecutor is not expected to take sides and that he is the Minister of Justice, as far as the case is entrusted to him or concerned.

5. Sri C. Padmanabha Reddy, learned Senior Counsel, appearing for the petitioner, submits that the office of Public Prosecutor is of special significance. According to him, the Public Prosecutor is not supposed to act in a partisan manner, with an endeavour to procure conviction. The learned counsel submits that such being the sacred duties of a Public Prosecutor, appointment of an Advocate as a Public Prosecutor, at the instance of a complainant, that too, of an Advocate who appeared for the deceased and acquainted with his family, cannot be sustained. He has placed reliance upon the judgment of this Court in D. Brahmanandam v. State of Andhra Pradesh (1986) 1 Andh LT 141 and of Supreme Court in Mukul Dalal and Others Vs. Union of India (UOI) and Others, .

6. Learned Government Pleader for Home, on the other hand, submits that the appointment of the 2nd respondent was strictly in accordance with the provisions of Section 2(8) of the Code and no exception can be taken to the impugned order. He submits that though the 3rd respondent had made a specific request for appointing the 2nd respondent as Special Public Prosecutor, the Government had examined the matter dispassionately and it was only having regard to the standing and experience of the 2nd respondent, that he was appointed as a Special Public Prosecutor. To sustain the impugned order, he has placed reliance up on two recent judgments rendered by this Court in Tummuri Veerashekara Rao v. State of A.P., W.P. No. 8004 of 2002 dated 23-9-2002 and G. Daniel v. Government of A.P., W.P. No. 13637 of 2003, dated 29-7-2003.

7. Through the impugned order in G.O. Ms. No. 217 dated 10-10-1998, the 1st respondent appointed the 2nd respondent as a Special Public Prosecutor. The relevant portion of the order is very brief and it is beneficial to extract the same. It reads as under :

"In view of the representation of Sri P. Sai Babu, Managing Director, Siti Cable Network (P) Ltd. Vijayawada, in the reference read above, Government hereby appoint Sri Kilaru Banerjee, Advocate as Special Public Prosecutor in Cr. No. 498/98 of Machavaram Police Station, Vijayawada, to conduct prosecution in the courts.

2. Sri Kilaru Banerjee, Advocate, shall be paid remuneration of Rs. 100/- (Rupees

one hundred only) for appearance per day as per the orders issued in G.O. Ms. No. 187. Lalw (L) Department, Dated 15-7-1997."

Consequential notification was issued u/s 24(8) the Code. This G.O., is challenged on several grounds of facts and law.

8. On facts, it is alleged that the 2nd respondent, who was appointed as a Special Public Prosecutor, has appeared in several cases as Advocate for the deceased, who is none other than the brother of the 3rd respondent. In proof of the same, particulars of registration of a Caveat by the 2nd respondent on 4-4-1995 on behalf of M/s. Master Channel Community Network Private Ltd. represented by its Managing Director P. Ramakrishna (deceased), in the Court of Principal Senior Civil Judge, Vijayawada is filed. It is the case of the petitioner that it is on account of the acquaintance of the 2nd respondent with the deceased and his family that the 3rd respondent has requested for his (2nd respondent's) appointment as Special Public Prosecutor.

9. The legal submission advanced on behalf of the petitioner is to the effect that it is the prerogative of the State to appoint Public Prosecutor, on being satisfied about the ability and competence of the incumbent, and not at the request of the complainant. According to him, the various sub-section of Section 24 of the Code do not permit the appointment of a Special Public Prosecutor, just on the request made by the complainant. However, the respondents try to justify the appointment.

10. One of the important sovereign functions of the State is to prosecute the offenders and violators of law. This is an inevitable attribute of sovereign functions. Under no form of Government, prosecution is permitted to be conducted by an agency, other than the State. In the entire Criminal Justice System, as framed under the Code and other ancillary Enactments, the Public Prosecutor is assigned a pivotal role. In a way, it can be said that he is conferred the status of the Master of the Prosecution. Section 225 of the Code confers the prerogative of conducting the prosecution upon the Public Prosecutor. In the matter of withdrawal of prosecution, his opinion becomes important. u/s 301 of the Code, he is conferred the primacy in cases where private persons instruct their respective pleaders to prosecute any person, in the Court. Such pleaders are required to act only under the directions of the Public Prosecutor or the Assistant Public Prosecutor as the case may be. Section 302 of the Code emphasises the primacy accorded to the Public Prosecutor even in the matter of grant of permission by the Magistrate, to any person other than the Police Officer to conduct the prosecution. Sections 306 and 307 of the Code confer the power upon the trial Courts to tender pardon to an accomplice, with a view to obtain evidence in the case. However, on a Certification by the Public Prosecutor to the effect that the tender of pardon was vitiated by any factors, such as, concealment of essential facts or giving of false evidence, the tender becomes almost inoperative and the accomplice is liable to be tried for the offence. This is contemplated u/s 308 of the Code. u/s 377, the opinion of the Public Prosecutor

becomes vital for the purpose of preferring appeals by the State.

11. So far as the method and manner of functioning of the Public Prosecutor is concerned, it is a settled position that he is not expected to take sides or to act as an Agent of the State. His duty is to assist the Court in arriving at an appropriate conclusion. He is not expected to secure convictions at any cost. The role of a Public Prosecutor was aptly described by Lord Blackburn, J., in *R. v. Berens*, (1865) 4 F & F 842 (at 852), way back in 1865 to the effect that the prosecuting counsel occupies a kind of judicial position. He is to conduct the cases at his discretion, but with a feeling of responsibility. It was observed that though it may appear that the Prosecutor tries to obtain a verdict, what in fact he does is only to assist the Court in fairly putting the case and nothing more. The Public Prosecutor was treated as part of the Court and was required to act in a quasi-judicial capacity. Several jurists have expressed their views about the nature of functions to be discharged by Public Prosecutor, which are almost similar in substance.

12. It is for these reasons that Section 24 of the Code prescribes a detailed procedure for the purpose of appointment of Public Prosecutors, be it in the High Court or in the Districts. For the purpose of their appointment, panels are required to be prepared by the District Magistrate, in consultation with the Sessions Judge. This consultation process is not an empty formality. It is only when the Sessions Judge and the District Magistrate are satisfied that the persons hold the professional ability as well as other characteristics of a Public Prosecutor that they include the names of the persons in the panel. There is a clear prohibition u/s 5 that no person shall be appointed by the State Government as Public Prosecutor or the Additional Public Prosecutor, unless his name appears in the panel prepared u/s 24(4).

13. Appointment of Special Public Prosecutor is provided for under Sub-section (8) of Section 24 of the Code. This appointment is for the purpose of any case or class of cases. Though the consultation process for preparation of panel as required for the purpose of appointment of Public Prosecutors or the Additional Public Prosecutors is dispensed with in case of appointment of Special Public Prosecutor, the stating as an Advocate of not less than 10 years is prescribed therefor. Dispensing with the consultation process does not tantamount relieving the State from its obligations to satisfy itself as to the ability and attributes of the incumbent. In a way the burden of State Government in the matter of appointment of Special Public Prosecutor to satisfy itself as to the ability of the incumbent is much more, since it does not have the benefit of the opinion of the Sessions Judge and the District Magistrate.

14. Before the State Government resorts to the appointment of a Special Public Prosecutor, it has to satisfy itself as to the special nature of the case or class of cases in respect of which the Special Public Prosecutor is sought to be appointed. From the point of view of Section 24(8), a case does not become special just on the request by or persistence of a complainant. The State Government is

required to apply its mind and arrive at a conclusion that the concerned case has special significance and that the regular Public Prosecutor or Additional Public Prosecutor attached to the Court cannot effectively prosecute the matter. This satisfaction is purely subjective in nature. The Government does not owe an obligation to record reasons in support of this conclusion. However, satisfaction as such has to exist. It cannot be inferred only from an order appointing Special Public Prosecutor. It has to precede that.

15. A perusal of the impugned G.O. discloses that the only basis for the 1st respondent to appoint the 2nd respondent as the Special Public Prosecutor was the request made by the 3rd respondent. Apart from that, not a semblance of reason is offered to justify the appointment. As observed earlier, it is the ultimate prerogative of the State to identify a case for appointment of Special Public Prosecutor and to select a person of its choice as Public Prosecutor, However, if the appointment is solely on the basis of a request made by a complainant, situation emerges where the State ceases to be on hold of the prosecution. The power to decide the contours of prosecution starts sliding into the hands of the complainant or the counsel of his choice. To that extent, the institution of Public Prosecutor tends to become privatised.

16. It has come on record that the 2nd respondent had appeared as an Advocate for the person who is said to have been killed by the petitioner herein. This fact is not disputed by respondents 2 and 3. In Brahmanandam case (1986 (1) Andh LT 141) (supra), Justice Jagannadha Rao (as he then was), was dealing with almost an identical case. His lordship referred to the attributes of the office of the Public Prosecutor, as observed in various English and Indian decisions; and ultimately summed up as under :--

"The Prosecuting Counsel stands in a position different from that of an advocate who represents the complainant. He does not represent either the defacto complainant or the police. He is a representative of the State and is part of the Court and in that sense called a minister of justice. His function is to assist the Court in arriving at the truth. It is not his duty to obtain a conviction at any cost but simply to lay before the Court the whole of the facts of the case and the law. The State too has no interest in procuring a conviction. Its only interest is that the guilty must be punished and justice should be done. It is regarded as proper for the prosecution to acquaint the defence as to any relevant information so that the defence may have the opportunity to use it if they so desire and so that no unfairness is meted out to the accused (See also Kenny's Outlines of Criminal Law, 19th Ed (196) (p.611-612). The position of the prosecutor is thus quasi-judicial and one of trust."

In the context of the facts of that case, it was held that a reasonable apprehension has arisen in the mind of the accused and thereby it was not at all permissible for appointing as a Special Public Prosecutor at the instance of the complainant. The order of the Government appointing a Special Public Prosecutor was set aside.

17. The learned Government Pleader for Home, had placed reliance upon the judgments of this Court in Tummuri Veerashekara Rao's case (supra) and G. Daniel's case (supra). In these two cases, the appointment of Special Public Prosecutors under G.O.Rt. No. 209 dated 19-2-2002 and G.O.Rt. No. 942 dated 19-5-2003 respectively were in question. They were identical in the sense that the appointments were made at the request of the complainants in the respective cases and the remunerations to the Special Public Prosecutors were directed to be paid by the complainants. The writ petitions were dismissed and the respective G.Os., were upheld.

18. In Tummuri Veerashekara Rao's case (supra), reliance was placed upon the judgment of the Supreme Court in Mukul Dalal and Others Vs. Union of India (UOI) and Others, in upholding the G.O. appointing the Special Public Prosecutor. In Daniel's case (supra), reference was made to the judgment of this Court in Brahamanandam's case (1986 (1) Andh LT 141) (supra) (by mistake referred to as Public Prosecutor v. C.S. Satyanarayana, which occurred at the end of the report in (1986) 1 Andh LT 141. However, on finding the factual allegations similar to the one in Brahamanandam's case (supra) the G.O., was upheld.

19. To understand the purport of these two cases, the law laid down by the Supreme Court in Mukul Dalal and Others Vs. Union of India (UOI) and Others, needs to be referred to. In that case, the appointment of Special Public Prosecutor under Sections 24(8) and 25(1) of the Code and the Maharashtra Law Officers (Appointment, Conditions of Service and Remuneration) Rules 1984 (hereinafter referred to as "the Rules") fell for consideration. The Supreme Court considered two issues that arose for its consideration, viz.

(a) whether the request made by a private complainant for appointment of a Special Public Prosecutor should be accepted as a Rule, and

(b) whether the Special Public Prosecutor so appointed shall be paid by the private party availing his services.

Rule 22 of the Rules provided for both the contingencies. The Hon"ble Supreme Court had set aside the Rule. As regards the 1st issue, it observed as under :

"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 power(ful) 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 services of a Special Public Prosecutor should not be made available to a private complainant. The primacy given to the Special 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 further held that --

"We would make it clear that we do not support the conclusion of the High Court (Bombay 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."

20. Coming to the 2nd issue, the Supreme Court took note of the divergent opinions among the High Courts as regards permissibility or otherwise of payment of remuneration to the Special Public Prosecutor by a private party. In P.G. Narayanankutty Vs. State of Kerala and Others, the Kerala High Court took the view that permission accorded to a private party for payment of remuneration to the Special Public Prosecutor would endanger the very existence of the institution of Public Prosecutor. Dealing with the issue, the Supreme/Court observed as under :--

"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."

21. From the above observations, it is evident that the request of the complainants for appointment of Special Public Prosecutors cannot be acceded to, as a matter of course, and that the Special Public Prosecutors should not be permitted to be paid their remuneration by the complainants. The only exceptions as regards payment of fee are cases where the Public Sector Undertakings and the other Institutions like banks, propose to prosecute the cases. Individuals per se were prohibited from making payments to the Special Public Prosecutors.

22. However, this important aspect does not appear to have been brought to the notice of this Court when the two judgments, referred to above, were rendered. Therefore, I am not persuaded to accept that the conclusions arrived at therein conform to the law declared by the Supreme Court.

23. The office of the Public Prosecutor is unique in its nature and status and it cannot be permitted to be controlled by, or slipped into the hands of private

individuals. Request can certainly be made by a complainant, in a given case, for appointment of Special Public Prosecutor. However, it shall not be open to the complainant to name a person of his choice for such appointment. The question as to whether or not it is necessary to appoint a Special Public Prosecutor in a case, and if so the person to be appointed as such shall be within the discretion and prerogative of the State. The State cannot surrender its discretion to the choice of an individual. The exercise, and the conclusion arrived at in this regard, are required to be evident from the order of appointment itself. They cannot be inferred from silence or supported by remarks in the note files.

23A. Neither from the impugned order nor from the file circulated to this Court, it is evident that the Government had exercised its discretion in the manner as required under the Code in the matter of appointment of the 2nd respondent as Special Public Prosecutor. On the other hand, they reflect that the 2nd respondent came to be appointed, only on the request made by the 3rd respondent. Such a course of actions is impermissible in law.

24. Though the petitioner cannot have a right to choose a person of his choice to act as Special Public Prosecutor, he can certainly raise an objection for the appointment of any individual as Special Public Prosecutor. There used to be some doubt as to whether an accused has locus standi to raise such an objection for the appointment of a Special Public Prosecutor. That controversy was resolved by this Court in *Brahmannandam* case (1986 (1) Andh LT 141) (*supra*) and it was ultimately held that an accused has the locus standi to challenge the appointment of a Special Public Prosecutor if the circumstances warrant. Such locus standi was conferred on the accused on the principle that fairness in the prosecution should not only be ensured, but should also appear to exist. A genuine and reasonable apprehension in the mind of the accused as regards independence of Special Public Prosecutor cannot be brushed aside. As observed earlier, the petitioner has categorically pleaded and placed relevant material before this Court, to the effect that the 2nd respondent appeared for the deceased in several cases. That being the case, the apprehension of the petitioner cannot be said to be without any basis.

25. Therefore, the impugned order is set aside and the writ petition is allowed. It shall, however, be open to the 1st respondent to appoint a Special Public Prosecutor in accordance with the principles discussed above.