

(2002) 05 DEL CK 0293
In the Delhi High Court
Case No : C.W.P. No. 4235 of 1996

Jayadeva Prasad

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 31-05-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 24, 24(8), 24(9), 25, 25(2)

Citation : (2002) 05 DEL CK 0293

Hon'ble Judges : S.B. Sinha, C.J.; A.K. Sikri, J

Bench : Division Bench

Advocate : D.S. Choudhary, for the Appellant; H.S. Phoolka, Senior Advocate, Sanjeev Sachdeva, Priya Puri and Israil, for the Respondent

Judgement

S.B. Sinha, C.J.—In this writ petition, which is by way of a public interest litigation, filed by two Public Prosecutors working in the Central Bureau of Investigation (in short, "CBI"), a prayer had been made to direct the respondents to separate the Public Prosecutors from the Administrative and Disciplinary Control of the Police Officers by Constituting separate Prosecution Branch with its independent head known as "Director of Prosecution" directly answerable to the Central Government by way of writ, order and/or direction in the nature of Mandamus.

2. The first petitioner was appointed as Public Prosecutor with respondent No. 2, i.e., CBI on 29.03.1975. He was appointed to the upgraded post of Public Prosecutor in CBI on 16.02.1984. He was given substantive appointment to the post of Public Prosecutor in CBI. He filed representation on 08.09.1995 stating that the Public Prosecutors be freed from the Administrative and Disciplinary Control of the Police Officers in the light of the judgment of the Apex Court in S.B. Shahane and others Vs. State of Maharashtra and another, . An original application filed by him before the Central Administrative Tribunal, Principal Bench, New Delhi (in short, "the Tribunal") marked as No. 1342 of 1996 had

been rejected on the ground that it had no jurisdiction over the said matter. Thereafter, this writ petition has been filed.

3. We may, however, notice that the second petitioner filed an application for impalement, which was registered as Camino. 2443 of 1999 and allowed by a learned Single Judge of this Court vide order dated 15.04.1999.

4. It is not in dispute that the Supreme Court in Writ Petition No. 340-343 of 1993 had directed that "steps should be taken immediately for the constitution of an able and impartial agency comprising persons of impeccable integrity to perform functions akin to those of the Director of Prosecution in U.K. On the constitution of such a body, the task of supervising prosecution launched by CBI, Enforcement Directorate shall be entrusted with it".

5. Pursuant to or in the furtherance of the aforementioned directions of the Supreme Court, the Government of India constituted an independent Review Committee vide Office Memorandum dated 04.02.1999 in terms whereof the Committee was to examine the issues arising out of and in the light of the directions of the Supreme Court.

6. On or about 31.10.2000, the said independent Review Committee submitted its report identifying the issues involved therein, which led to the Government in taking decision by setting up a separate prosecuting agency in terms of Office Memorandum dated 09.07.2001, the principal provisions thereof are:-

"4. The Government has, Therefore, on the basis of the Report submitted by the Independent Review Committee, taken the following decisions in so far as the prosecution set up in the Central Bureau of Investigation(CBI) is concerned:

(a) A Directorate of Prosecution may be constituted in the CBI to supervise the work of prosecution. This may be done by reconstituting the existing Legal Division in the CBI as the Directorate of Prosecution;

(b) With the constitution of the Directorate of Prosecution, the work of prosecution (as well as supervision of cases pending in Courts) will be vested in the new Directorate. The Director of Prosecution would-be the Chief functionary of the prosecution wing of this responsible for prosecution of cases instituted by CBI in Courts.

5. It is further decided that the Director of Prosecution will be vested with the power of direction and control over the prosecution offices. However the Director, CBI will continue to exercise general superintendence over the prosecution wing. 6. It is decided that the duties of the Director of Prosecution will include:-

(a) Supervising and monitoring the conduct of prosecution in courts;

(b) Preferring as well as appearing in appeals, revisions, etc. on behalf of the CBI in Appellate and Revisional Courts;

(c) Giving advice to Police Officers on all matters relating to criminal offences

during investigation and trial;

(d) advising on the feasibility of filing appeals, revisions, etc.;

(e) Preparing a panel of Special Counsels to conduct prosecutions, appeals or revisions on behalf of the Government with the approval of the Government and operating the same; and

(f) Selecting retainer counsel for High Courts.

7. It is decided that the Annual Confidential Report (ACR) of the Director of Prosecution will be written by the Secretary, Department of Legal Affairs. However, a report from the Director, CBI commenting on his performance should also form a part of the Annual Confidential Report. The Director of Prosecution will write the ACRs of the Law Officers under him.

8. Accountability Mechanism : The Supreme Court had directed that in the case of every prosecution which results in the discharge or acquittal of the accused, responsibility should be fixed for dereliction of duty, if any, of the officer concerned. In such cases, the Court had directed that direct action should be taken against the officer when found guilty of dereliction of duty. The Government has examined the recommendations of the Committee in this regard and has decided as follows:-

8.1. Important Cases : Important cases of the Chisholm are properly categorized in order to closely monitor them. The criteria for identifying such important cases should be on the basis of the amount involved, status of the accused, the sensitive nature of the investigation involving elected representative etc and would broadly follow the directions of the Crime Manual.

8.4. Disagreement between prosecution and investigating wings : In important cases where the Director, CBI disagrees with the advice of the Director of Prosecution, the matter may be referred to the Attorney General of India for his views. Thereafter, the decision taken by Director, CBI, keeping in view the opinion of the Attorney General would be deemed to be final.

8.5. Monitoring effective prosecution : There should be a mechanism drawn up by the CBI for reporting at half-yearly intervals the details of the important cases resulting in acquittal (or otherwise) to the Department of Personnel & Training. Further, the details of the cases relating to general crimes would also be intimated to the Ministry of Home Affairs simultaneously.

9. The CBI shall bring in the necessary changes in the CBI Crime Manual etc. in order to implement the above decisions.

10. It is also decided to accept the Independent Review Committee's recommendation that the procedure be reviewed after a period of three years to bring in further improvement, if any."

In this view of the matter, Mr. Phoolka, the learned counsel appearing on behalf

of the respondents, would submit that this writ petition has become in fructuous.

7. Mr. D.S. Choudhary, the learned counsel appearing on behalf of the petitioner, on the other hand, however, would submit that the administrative control of the investigating agency over the Prosecutors would be apparent from the fact that not only appointments are being made by the Administration Wing of CBI, but even after issuance of the aforementioned Office Memorandum dated 09.07.2001, office orders are being issued by the Superintendent of Police (in short, "SP"). Some such office orders have been annexed with the reply to the additional affidavit filed on behalf of the respondent No. 2 herein being dated 20.11.2001, 29.11.2001 and 31.01.2002.

The learned counsel would contend that the Legal Division had all along been one of the six divisions of CBI and thereafter by re-designating the said Legal Division as Prosecution Division the need for impartiality emphasized by the Apex Court in S.B. Shuman's case (Supra) had not been eroded.

The learned counsel pointed out that even the control of the Public Prosecutors by and large is still with the Police Officers. The learned counsel would contend that even adverse remarks had been recorded by the police authorities.

According to the learned counsel, the purpose and object of the recommendations of the 14th Law Commission wouldn't be achieved unless and until Public Prosecutors reappointed strictly in terms of Sections 24 and 25 of the Code of Criminal Procedure.

The learned counsel would contend that the authorities created under the Statute must, Therefore, be subjected to the control of another authority created by a statute and not by a non-statutory authority.

In support of the aforesaid contentions, strong reliance has been placed on *Jai Pal Singh Naresh and Others Vs. State of U.P. and Others*, ; *Lakhan Lal & Vijaya Narain Shukla and Anr. v. The State of Bihar and Ors.* 1992 (2) PLJ 340; *Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others*, ; and *Krishan Singh Kundu Vs. State of Haryana and Others*, .

8. There cannot be any doubt whatsoever that having regard to the terms of the Apex Court, as noticed hereinbefore, the respondents were bound to take effective steps for separating the prosecuting agency from that of the investigating agency.

But the question, which arises for consideration herein, would be as to whether this Court in exercise of its jurisdiction under Article 226 of the Constitution of India can issue any other or further directions(s) despite the fact that according to the respondents the directions of the Supreme Court has been complied with.

9. The report of the Committee has not been placed before us. However, from the Office Memorandum dated 09.07.2001, it appears that the Committee identified the following issues:-

- "(a) Amendments required, if any, in the legal framework;
- (b) Suitability or otherwise of a common prosecution agency for all investigating agencies, i.e., the CBI, Enforcement Directorate, etc.
- (c) Organizational Structure/Power/Functions/Duties etc. of the proposed Agency/Directorate; and
- (d) Coordination and cooperation between the Directorate of Prosecution and investigating agencies."

The Central Government agreed with the said recommendations to the effect that keeping in view the spirit of the judgment of the Supreme Court, it was necessary to make the system of prosecution more able, impartial and strict, but not necessarily independent. The Government also agreed that there need to be a greater impartiality, efficiency and accountability of the prosecuting agency working within the existing parameters. It was also pointed out that as an important direction of the Court in the judgment related to the fixing of responsibility after review wherever a prosecution resulted in discharge or acquittal, better coordination and not separation is required between the prosecution and investigation functions.

10. However, as noticed hereinbefore, a post of Director of Prosecution has been created to supervise the work of prosecution. The office of Director of Prosecution although had been reconstituted from the existing Legal Division, its supposed to be an independent one as the said work vests in the new Directorate. Director of Prosecution would be the chief functionary of the prosecution wing. The Director of Prosecution is to be selected by a Selection Committee. The tenure of Director of Prosecution would be three years. He has been vested with the power of direction and control over the prosecution officers. The Director, CBI will only continue to exercise general superintendence over the prosecution wing also. As noticed hereinbefore, Para 6 of the said Office Memorandum dated 09.07.2001 specifies duties of the Director of Prosecution.

An important provision has also been inserted therein, namely, in the event there is disagreement between prosecution and investigation wings, the matter would be required to be referred to the Attorney General for his views and a decision has to be taken by the Director, Beekeeping in view that the opinion of the Attorney General would be final.

11. Although it cannot be said that in terms of the said Office Memorandum dated 09.07.2001, a complete separation of prosecuting agency from the investigating agency has been made out, but we must also record that, according to the learned counsel for the respondents, the same is at its infancy stage and such improvement in the system as maybe found to be necessary would be made.

12. The Apex Court in its decision in S.B. Shahane's case (Supra) stated:-

"15. In the result, we allow this appeal, set aside the judgment of the High Court under appeal, make the rulings issued on the application of the appellants before the High Court absolute and direct the Government of Maharashtra to constitute a separate cadre of Assistant Public Prosecutors either on district-wise basis or on stage-wise basis, by creating a separate Prosecution Department for them and making the head to be appointed for such Department directly responsible to testate Government for their discipline and the conduct offal prosecutions by them before the Magistrates" courts and further free such prosecutors fully from the administrative and disciplinary control of the Police Department or its officers, if they still continue to boulder such control. No costs."

13. Yet again in Vineet Narain and Others Vs. Union of India (UOI) and Another, , as regards Prosecution Agency, it was observed:-

"IV. PROSECUTION AGENCY

1. A panel of competent lawyers of experience and impeccable reputation shall be prepared with the advice of the Attorney General. Their services shall be utilized as prosecuting counsel in cases of significance. Even during the course of investigation of an offence, the advice of a lawyer chosen from the panel should be taken by the CBI/Enforcement Directorate.

2. Every prosecution which results in the discharge or acquittal of the accused must be reviewed by a lawyer on the panel and, on the basis of the opinion given, responsibility should be fixed for dereliction of duty, if any, of the officer concerned. In such cases, strict action should be taken against the officer found guilty of dereliction of duty.

3. The preparation of the panel of lawyers with the approval of the Attorney General shall be completed within three months.

4. Steps shall be taken immediately forth constitution of an able and impartial agency comprising persons of unimpeachable integrity to perform functions akin to those of the Director of Prosecution in U.K. On the constitution of such a body, the task of supervising prosecutions launched by the CBI/Enforcement Directorate shall be entrusted to it.

5. Till the constitution of the aforesaid body, Special Counsel shall be appointed forth conduct of important trials on the recommendation of the Attorney General or any other law officer designated by him."

14. It is true that the need to separate prosecution from investigation had been felt by the Judiciary for a long time.

15. In Jai Pal Singh Naresh"s case (Supra) , the Allahabad High Court stated the law in the following terms:-

"7. ... The purpose of Section 25(2) waste 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 Policy Department and thereby to nullify the legislative intent and purpose as contained in Section 25(2) of the Code."

... .. "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 them but that does not mean that the police officers to whom immediate disciplinary control 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're subordinate officers to them and they're 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*, . "

The aforesaid principles were reiterated by the Punjab & Haryana High Court in *Krishan Singh Kundu*'s case (Supra) .

16. In *Lakhan Lal & Vijaya Narain Shukla*'s case (Supra) , a Division Bench of Patna High Court held:-

"... The State Government shall pass appropriate orders freeing the petitioner from the administrative control of the Inspector-General of Police by appointing some other competent authority to exercise administrative control over them, within a period of three months from the date of receipt by the State Government of the directions of this court as given in this judgment. ..."

17. In *R. Sarla v. T.S. Velu and Ors.*, AIR 2000 SC 1731, it is stated:-

"7. Mr. S. Sivasubramaniam, learned Senior counsel, who argued for the appellant, contended that learned single Judge had seriously erred in directing the Investigating Officer to submit the amended charge-sheet in accordance with the opinion of the Public Prosecutor. Shri V. Balachandran, learned counsel arguing for the first respondent tried to support the impugned order on the premise that there is nothing objectionable for the Investigation Officer to consult the Public Prosecutor before laying a report u/s 173(2) of the Code.

14. Following the above, a two-Judge Bench of this Court has stated in *Abhinandan Jha and Others Vs. Dinesh Mishra*, as follows:

"We have already pointed out that the investigation, under the Code, takes in several aspects, and stages, ending ultimately with the formation of an opinion by the police as to whether, on the material covered and collected case is made out to place the accused before the Magistrate for trial, and the submission of either a charge-sheet, or a final report independent on the nature of the opinion, so formed. The formation of the said opinion, by police, as pointed out earlier, is the final step in the investigation, and that final step is to be taken only by the police and by no other authority."

18. In *R. v. Metropolitan Police Commissioner*, (1968) 1 All ER 763, Lord Denning has said:-

"I have no hesitation, however, in holding that like every constable in the land, he should be, and is, independent of the executive. He isn't subject to the orders of the Secretary of State ... hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No minister of the crown can tell him that he must or mustn't keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.

19. However, there cannot be any doubt that the policy decision was taken by the Central Government only in pursuance of the directions of the Supreme Court in the case of *S.B. Shahane's case* (Supra) . For the said purpose, as noticed hereinbefore, an agency, i.e., Directorate of Prosecution has been set up which by and large would be an independent authority.

20. By reason of the aforementioned policy decision, the Central Government has substantially complied with the directions of the Apex Court, although we wish that there should have been a complete separation of prosecution from the investigation. However, there cannot be any doubt whatsoever that co-ordination between the two branches is absolutely necessary so as to bring out the desired result.

21. The submission of the learned counsel for the petitioner to the effect that even after the aforementioned policy decision, their ACRs would be written by the Police Department appears to be unfounded having regard to para 7 of the said Office Memorandum dated 09.07.2001. We may notice that in *State of Haryana Vs. P.C. Wadhwa, IPS, Inspector General of Police and Another*, it was observed:-

"The "reporting authority" may be either immediately superior to the member of the Service or such other authority as may be specifically empowered in this behalf by the Government. The expression "immediately superior" obviously indicates that the reporting authority should be the immediate superior officer in the same Service to which the member of the Service belongs. The positions the same as in the cases of "reviewing authority" and "accepting authority""

In that case, writing of CR by the Home Secretary was held to be improper. However, in the instant case, the immediate superior being the Director of Prosecution, whose an independent authority, the apprehension of the petitioner that their ACRs would still be written by the Police Officers is wholly unfounded.

22. It is true that the Director of Prosecution has yet not been appointed in terms of the said policy, but as has rightly been pointed out by Mr. Phoolka the present incumbent of the post had been appointed only as stopgap arrangement. The order dated 18.01.2002 reads thus:-

"In pursuance of Govt. of India, D.P. & Trg.O.M. No. 201 / 5 / 2000 - AVD. 11 dated 9th July, 2001, the existing Legal Division of Central Bureau of Investigation is reconstituted as the Directorate of Prosecution. The Legal Adviser, CBI is redesignated as Director of Prosecution. Shri S.K. Sharma, Legal Adviser, CBI will function as the Director of Prosecution till such time a regular Director of Prosecution is selected and appointed by the Govt. of India in accordance with the procedure laid down in para 4 (c) of the Govt. of India, D.P. & Trg. O.M. dated 9th July, 2001 referred to above.

2. A detailed order regarding the functioning of the Directorate of Prosecution and duties / functions, responsibilities of various officers in the Directorate of Prosecution will be issued in due course.

3. This issues with the approval of Director CBI."

Thus, there cannot be any doubt whatsoever that the Legal Adviser, CBI has been re-designated as the Director of Prosecution till such time a regular Director of Prosecutions selected and appointed by the Government of India in the interim of the said Office Memorandum dated 09.07.2001.

23. So far as office orders issued by the Police Department, as noticed hereinbefore, are concerned, records have been placed before us to show that all the aforementioned orders are being routed through Director, CBI as Director of Prosecution, CBI is yet to be notified as an appointing authority and, thus, such office orders are being passed by the appointing authority for the time being.

24. In that view of the matter, we are of the opinion that no illegality can be said to have been committed by the respondents herein.

25. We amy, however, notice a disturbing feature. From the Office Memorandum dated 15.11.2001, it appears that the Government has decided that the Officers of the rank of Additional Secretary to the Government of India, Joint Secretary and Legal Adviser in the Department of Legal Affairs of the Ministry of Law, Justice & Company Affairs would be eligible for consideration for appointment to the post of Director of Prosecution, CBI.

"(a) Officers of the rank of Additional Secretary to the Government of India in the Department of Legal Affairs of the Ministry flaw, Justice and Company Affairs who are eligible for appointment as Special Public Prosecutor within the meaning of Sub-sections(8) and (9) of Section 24 of the Code of Criminal Procedure, 1973.

(b) Officers of the rank of the Joint Secretary and Legal Adviser (Grade-I officers of the Indian Legal Service) in the Department of Legal Affairs of the Ministry of Law, Justice and Company Affairs with at least three years service in that grade who are eligible for appointment as Special Public Prosecutors within the meaning of Sub-sections (8) and (9)of Section 24 of the Code of Criminal Procedure, 1973."

We fail to understand as to why Officers of the rank of Joint Secretary in the Department of Legal Affairs of the Ministry of Law, Justice & Company Affairs, who may or may not have any legal training, should be appointed tithe said post. We are of the view that the Central Government should bestow serious consideration to amend the said order and in place of Joint Secretary and Legal Advisor, experienced Director of Prosecutions, who are already working in different States or persons having experience of the kind should be considered for appointment to the said post.

26. With the aforementioned observations and directions, this writ petition is disposed of. No costs.