

(1997) 05 MP CK 0058

In the Madhya Pradesh High Court

Case No : Writ Petition No. 266 of 1996

Rajendra Nigam

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 06-05-1997

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 24, 24(8), 301, 301(2)
Dowry Prohibition Act, 1961 — Section 3, 4, 6(2)
Penal Code, 1860 (IPC) — Section 406, 498A, 6(2)

Citation : (1998) CriLJ 998

Hon'ble Judges : R.S. Garg, J

Bench : Single Bench

Advocate : Manish Datt, for the Appellant; Rakesh Jain and P.D. Gupta, for the Respondent

Final Decision : Allowed

Judgement

R.S. Garg, J.—By this petition under Article 226 of the Constitution of India, the petitioner challenges the order dated 21 -9-95, by which the respondent No. 3 Shri Sharad Chandra Chaturvedi, Advocate has been appointed as a Special Public Prosecutor u/s 24(8) of the Code of Criminal Procedure, 1973. Petitioner v. State of Madhya Pradesh and Ors., Respondents. Criminal Procedure for conduct of criminal case No. 169/94 (State of M.P. v. Rajendra Nigam @ Rajan Nigam).

2. The petitioner submits that criminal case No. 169/94 is pending in the Court of Shri P. C. Mishra, Judicial Magistrate First Class, Jahalpur for trial of the offence punishable u/s 498A of IPC. The respondent No. 4 is the complainant in the said case. On report of respondent No. 4, the police registered the offence and on conclusion of the investigation filed the charge-sheet. The learned Judicial Magistrate, Ist Class framed the charges u/s 498A of Indian Penal Code read with Section 3/4 of Dowry Prohibition Act. In the said case, the State was being represented by A.P.P. Shri Anupam Pathak. On 22-7-95, an application u/s 301(2) of the Code of Criminal Procedure was filed for appointment of the

respondent No. 3 to assist the prosecution. The said application was allowed being unopposed. On 22-7-95 evidence of respondent No. 4 was recorded and the case was adjourned to 5-9-95. The case was adjourned to 1-11-95 at the request of the complainant. According to the petitioner, respondent No. 4 and her father approached respondents Nos. 1 and 2 to appoint respondent No. 3 as a Special Public Prosecutor u/s 24(8) of the Code of Criminal Procedure. The State conceding to the request of the complainant and her father, issued the order on 21-9-95 and appointed the respondent No. 3 as Special Public Prosecutor. The petitioner submits that appointment of Shri Sharad Chandra Chaturvedi, respondent No. 3 is per se illegal and contrary to the provisions of law. It is submitted by them that because of the appointment of respondent No. 3 they would not get a fair and impartial trial. Respondent No. 3 is interested in getting the petitioner convicted. It is also submitted that the respondent No. 3 has been appearing in other cases instituted against the petitioner by respondent No. 4, therefore, he would not be a fair prosecutor, but infact would be a prosecutor, to see that the petitioner is convicted. The petitioner submits that in Civil Suit No. 75-A/94 {Smt. Monisha Nigam v. Rajendra Nigam} the respondent No. 3 is appearing as a counsel for the complainant. The said civil suit is pending in the Court of Addl. District Judge, Jabalpur. Various other disputes are pending in the different Courts at the instance of the respondent No. 4 and in each of such dispute whether civil or criminal, the respondent No. 3 is representing the respondent No. 4. The petitioner submits that if respondent No. 3 is permitted to act as a Special Public Prosecutor, they would be denied a fair trial. It is also submitted that a Public Prosecutor is to be appointed u/s 24 of the Code, but under the provisions of Section 301 a person engaged by the private party can help and assist the Public Prosecutor or with the permission of the Court may submit written arguments after evidence is closed. The petitioner submits that appointment of the respondent No. 3 is neither fair nor proper and the same deserves to be quashed. The respondent No. 3 has sent a letter to the Addl. Registrar (Judl.) stating that he is a formal party, he is concerned only with the procedure which is apparent on the face of the record, the order of the appointment is available on the records, therefore, he be not insisted to file an affidavit. The respondent No. 3 does not say anything about the merits of the matter. The respondent No. 4 has filed the return inter alia pleading that the allegations made against the respondent No. 3 are malicious. It is submitted by respondent No. 4 that the respondent No. 3 is appearing in other cases, therefore, he has a better study of the case. The interest of respondent No. 3 in the case cannot be dubbed, as personal interest. Allegations, though are not specific against the A.P.P., but it is sought to be said that the A.P.P. could have brought out the truth more succinctly and in a better way by which the trial could have been fair and impartial. It is submitted by the respondent No. 4 that the respondents Nos. 1 and 2, after appreciating the facts in their true perspective, rightly passed the order appointing the respondent No. 3 as a Special Public Prosecutor. Regarding the pendency of the litigation and appointment of the respondent No. 3 as counsel for respondent No. 4 in various cases the facts have

been admitted. It is: submitted by respondent No. 4 that if the State is not able to discharge its functions fully for one reason or the other, the complainant has to suffer the consequences, therefore, appointment of respondent No. 3 is to advance the interest of justice. It is also contended that the parties cannot object to the appearance of particular counsel in a particular case if the State has allowed a particular lawyer to appear for the complainant because the accused has a liberty to be represented by a counsel of his choice. The respondents submit that respondent No. 4 is entitled to be represented by a Special Public Prosecutor so that her interest does not unnecessarily suffer.

3. It is not disputed that under Order Annexure 4 dated 21-9-95, the respondent No. 3 has been appointed as a Special Public Prosecutor with the condition that the fees shall not be paid to the respondent No. 3 by the Government.

4. The question for consideration before the Court is whether the respondents Nos. 1 and 2 are justified in appointing the respondent No. 3 as a Special Public Prosecutor. In the matter of Mukul Dalal and Others Vs. Union of India (UOI) and Others, the Supreme Court observed as under :-

To leave the private complainant to pay to the Special Public Prosecutor would indeed not be appropriated. We would make it clear that we do not support the conclusion of the 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. The Remembrance of Legal Affairs should scrutinise every request, keeping a prescribed guideline in view and decide in which cases such request should be accepted, keeping the facts of such case in view. Ordinarily the Special Public Prosecutor should be paid out of the State funds even when he appears in support of a private complaint but there may be some special case where the Special Public Prosecutor's remuneration may be collected from the private source. In such cases the fees should either be deposited in advance or paid to a prescribed State agency from where the Special Public Prosecutor could collect the same.

In the instant case, the appointment order when it says that fees shall not be paid by the State Government to the Special Public Prosecutor, it certainly runs counter to the observations made by the Supreme Court. The respondents Nos. 1 and 2 have not filed their return to support the order of the appointment. It is not in dispute that the respondent No. 4 approached the State Govt. which conceding to the request, appointed the respondent No. 3 merely on the request of the complainant. The order of the appointment does not show the reasons for which Special Public Prosecutor has been appointed. The order merely says that the State Govt. in exercise of the powers u/s 24(8) of Code of Criminal Procedure appoints the respondent No. 3 as a Special Public Prosecutor. The offence whether it is ordinary or heinous would not provide a foundation nor would make a recommendation to the State that a particular lawyer be appointed as a Special Public Prosecutor. The State must show the reasons which persuaded it to appoint a Special Public Prosecutor, the affect of which was to dislodge a duly

appointed public prosecutor.

4A. In the matter of Govind v. State of M.P. M. P. No. 1667/93 decided on 13-5-1994, by this Court, following the observations made in the case of Mukul Dalal and Others Vs. Union of India (UOI) and Others, , has quashed the order of the appointment of Special Public Prosecutor.

5. In the matter of Sunil Kumar v. State of M.P. 1992 MPLJ 772, a Division Bench of this Court has observed that only in exceptional cases and for reasons to be recorded, the State Govt. can exercise its powers u/s 24(8) of the Code of Criminal Procedure and appoint a Special Public Prosecutor. The Court was also of the opinion that the appointment order did not disclose any reasons for appointment of the Special Public Prosecutor and the order further read that the Government would not pay any fees to the Special Public Prosecutor would show that the Special Public Prosecutor was appointed not for any necessity, but just to please and satisfy the relations of the deceased. The Court was also of the opinion that a Special Public Prosecutor cannot be appointed just for the sake of making, but the order must stand on a proper foundation. In the instant case also the order Annexure 4 is conspicuously silent as to why a duly appointed Public Prosecutor has been dislodged and Special Public Prosecutor was appointed. The order does not show that what persuaded the State Government to appoint the Special Public Prosecutor and for what reasons the fees to the Special Public Prosecutor was not required to be paid by the State exchequer.

6. Placing reliance on Azeez Vs. State of Kerala and Others, it was contended that a person who has appeared in civil suit can still act truthfully and fairly to advocate the cause in a criminal case. It is also submitted, placing reliance on Vijay Valia and etc. Vs. The State of Maharashtra and etc., that the accused cannot claim that prosecution should be conducted by a particular prosecutor only. Placing reliance upon the judgment of Delhi High Court in the matter of Ajay Kumar Vs. State and Another, it was submitted that there is no bar under the law for appointing the counsel of the private party as a Special Public Prosecutor, the same would not be invalid whether it is tested at touch stone of fair trial or tested at touch stone of statutory requirement. The contention of the respondents basically is that if the accused has a liberty to appear through a particular counsel of his choice, then he cannot compel the State Govt. to represent its interest or the interest of the complainant through some public prosecutor.

7. The question before this Court is not only regarding the appointment of a particular counsel. This Court, at this stage is not to consider whether the State has powers to appoint a Special Public Prosecutor or not. The question before this Court is whether the appointment of respondent No. 3 is legal or not. Section 24(8) provides that the State Govt. may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

8. The request for appointment of Special Public Prosecutor should be properly examined by the Remembrancer of Legal Affairs on the basis of the guidelines and only when he is satisfied that the case deserves the support of a Special Public Prosecutor, only then a Special Public Prosecutor or a named person should be appointed to be incharge of the case. It would not be appropriate to accept the position that whenever a request is made to the State, it should be allowed and a Special Public Prosecutor should be appointed. Ordinarily, the Special Public Prosecutor should be paid out of the State funds even when he appears in support of a private complainant, but there may be some special cases where the remuneration may be collected from the private source. To leave the private complainant to pay the Special Public Prosecutor would indeed not be appropriate. In the matter of P.G. Narayanankutty Vs. State of Kerala and Others, , it is clearly laid down that a Special Public Prosecutor cannot be appointed with a view to secure convictions at all costs. Special Public Prosecutor can be appointed only when the public interest demands it and not to induct the grievance of a private person but such as the complainant, etc.

9. In the matter of Abdul Khader Musliar Vs. Government of Kerala and Others, Kerala High Court has observed that the mere fact that the accused in a particular case are engaging a leading criminal lawyer is hardly sufficient to make it a special situation warranting appointment of a Special Public Prosecutor. If the norm is accepted by Government that a Special Public Prosecutor shall be appointed when accused engages a competent or leading advocate, it is likely to bring about anomalous situation because in very many sessions trials accused would engage leading criminal lawyers to defend them. The Government in such case would be obliged to appoint Special Public Prosecutor in all such cases where a leading lawyer is defending the accused, if such a norm is accepted. The Court further observed that quite evidently that is not the purpose for which Section 24(8) of the Code is provided. The philosophy involved which can be discerned from the sub-section is two fold. First it there should be special circumstances for making such appointment. Second for appointing a Special Public Prosecutor, Government shall consider a more experienced advocate for the assignment. The very idea behind conferment of the power on a Special Public Prosecutor is to meet special situations. In other words, a Special Public Prosecutor is not to be appointed in ordinary circumstances. In the instant case applying the above principles, it does not appear that the case is of special importance or there are special reasons for appointing the Special Public Prosecutor. The order of the appointment issued by the State Govt. does not justify itself when it is tested at touchstone of fair trial or at touchstone of statutory requirements.

10. It would be important to mention and consider that the respondent No. 3 is appearing for respondent No. 4 in Civil Suit No. 75-A/94, moved various applications in the said matter, appeared in civil revision No. 1573/95, also appearing in a private complaint instituted by the respondent No. 4 for charges punishable u/s 406, IPC read with Section 6(2) of the Dowry Prohibition Act,

pending before the Judicial Magistrate Ist Class, Jabalpur (Shri Umesh Shrivastava) as criminal case No. 97/95, in civil suit No. 62-B/94 a matter relating to Guardian and Wards Act. Though this Court is not saying anything against the respondent No. 3, but as his appointment is under challenge, the Court has to consider that the justice should not only be done, but it should appear to have been done. The appointment of respondent No. 3 as a" Special Public Prosecutor would certainly lead to an apprehension in the mind of the accused that in place of a prosecutor, a prosecutor has been appointed.

11. In view of the above discussion and the legal position, the order Annexure IV deserves to and is accordingly quashed. The respondent No. 3 shall be at liberty to assist the Public Prosecutor and shall be entitled to all the benefits flowing from provisions of Section 301(2) of the Code of Criminal Procedure. He may assist the prosecution and act under the directions of the duly appointed Public Prosecutor with the permission of the Court.

12. The petition is allowed. There shall be no orders as to cost.