

(1999) 09 MP CK 0077

In the Madhya Pradesh High Court

Case No : Writ Petition No. 3760 of 1999

Shyam Ramkishan Sharma and Others

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 10-09-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 24(8), 301(2)

Penal Code, 1860 (IPC) — Section 147, 149, 333, 395, 397

Citation : (2000) 1 MPHT 478

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

Advocate : Amit Verma, for the Appellant; V. Awasthy, Dy. Government Advocate, for the Respondent

Judgement

S.P. Khare, J.—This is a petition under Article 226 of the Constitution of India challenging the order dated 5-4-1999 (Annexure P-7) by which Shri Mahboob Ansari, Advocate has been appointed as Special Public Prosecutor u/s 24(8) of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as the Code) to conduct Sessions Trial No. 38 of 1999 pending before VI Additional Sessions Judge, Bhopal.

2. The petitioners are facing prosecution under Sections 147, 333/149 and 395/397, Indian Penal Code on the charges that they have voluntarily caused grievous hurt to Shri I.D. Saxena, Excise Officer and for committing dacoity in respect of a Pistol belonging to Shri Pankaj Tiwari, Excise Sub-Inspector on 8-10-1998 while they were discharging their official duties. The Excise Officer is said to have been badly injured while he was apprehending the offenders engaged in the trade of illicit liquor. During the course of the trial Shri Mahboob Ansari, Advocate appeared on behalf of the complainant and filed an application u/s 301(2) of the Code and he was permitted to act under the directions of the Public prosecutor by the trial Court. Thereafter by the impugned order dated 5-4-1999 Shri Mahboob Ansari has been appointed as Special Public Prosecutor.

The order shows that the Special Public Prosecutor has been appointed keeping in view the facts of the case and the gravity of the charges. The case was found to be of special nature. By this order it was also directed that payment of professional fee to Shri Mahboob Ansari shall be made from the State ex-chequer.

3. The petitioners' case is that the Public Prosecutor should be an independent person and in this case Shri Ansari having already been engaged by the complainant cannot be expected to act independently. He cannot be fair in presentation of the prosecution case and it would be prejudicial to the interest of the accused.

4. The learned counsel for the petitioners has placed reliance on *Sunil Kumar v. State of M.P.* 1992 MPLJ 772 and *Prabhat Agarwal v. State of M.P.* 1999 (1) MPLJ , in support of the plea that an Advocate engaged by the complainant cannot be appointed as a Special Public Prosecutor u/s 24(8) of the Code.

5. Section 24(8) of the Code provides that the State Government 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. It cannot be gainsaid that it is the duty of the Public Prosecutor to be fair and impartial to both sides in the presentation of the case. His duty as a public prosecutor is not merely to secure the conviction of the accused at all costs but to place before the Court whatever evidence is in his possession, whether it be in favour or against the accused and to leave the Court to decide upon all such evidences whether the accused had or had not committed the offence with which he stood charged. He has to be fair and just. He should prosecute with earnestness and vigour and he is bound to assist the Court with his fairly considered view and the fair exercise of his judgment.

6. In *Mukul Dalal and Others Vs. Union of India (UOI) and Others*, it has been held that the request for appointment of a Special Public Prosecutor should be properly examined. The primacy given to the Public Prosecutor has a social purpose. The Special Public Prosecutor should be appointed keeping in view the facts of the case. In *Sunil Kumar v. State of M.P.* 1992 MPLJ 772 it has been held by a Division Bench of this Court 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 Special Public Prosecutor. The same view has been taken in *Neeti Bhan Vs. Miss Hill Education Society and Others*, .

7. In the present case, it is an admitted fact that Shri Ansari had been engaged by the complainant in the sessions case and, therefore, he could not legitimately be expected to act with impartiality and detachment which is expected of a Public Prosecutor. The apprehension entertained by the petitioners is reasonable. Though the facts of the case are such in which the State Government could appoint a Special Public Prosecutor to conduct the case and it could not be subjected to judicial review but the impugned order suffers from this infirmity

that a counsel already engaged by the complainant has been appointed as a Special Public Prosecutor. As a counsel engaged by an accused cannot act as a Special Public Prosecutor. So also the counsel engaged by the complainant cannot be appointed as a Special Public Prosecutor. He can act only as per Section 301(2) of the Code. In view of the admitted facts there is no need of calling a return as the infirmity is obvious.

8. The impugned order dated 5-4-1999 is quashed. The State Government may appoint some other Advocate as Special Public Prosecutor in this sessions case, if it considers necessary to do so. The regular Public Prosecutor will conduct the sessions case until a Special Public Prosecutor is appointed so that there is no delay in the trial of the case. A copy of this order be sent to the trial Court and to the Law Department of the State Government forthwith.