

(2022) 07 SHI CK 0004

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No.1930 Of 2022

Tarsem Kumar

APPELLANT

Vs

State Of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 06-07-2022

Acts Referred:

Constitution Of India, 1950 — Article 19, 20, 21
Code Of Criminal Procedure, 1973 — Section 2(u), 24, 91, 161, 164, 165, 172(2),
173, 173(3), 173(5), 173(6), 199(2), 207, 208, 225, 243, 301(1), 301(2), 302, 308,
311, 321, 377, 386, 439(2)
Indian Penal Code, 1860 — Section 147, 149, 332, 353, 452, 506
Prevention Of Damage To Public Property Act, 1984 — Section 3

Citation : (2022) 07 SHI CK 0004

Hon'ble Judges : Tarlok Singh Chauhan, J;Chander Bhusan Barowalia, J

Bench : Division Bench

Advocate : Anup Rattan, Ashok Sharma, Rajinder Dogra, Shiv Pal Manhans,
Bhupinder Thakur, Yudhbir Singh Thakur, Rajat Chauhan, Naresh Kaul, Tarun K.
Sharma

Judgement

Tarlok Singh Chauhan, J

1. How some of the Public Prosecutors have over a period of time shamelessly started hobnobbing with some of the politicians to procure and secure orders of transfer of their convenience is best illustrated in the instant case.
2. Both the petitioner as also the private respondent are Public Prosecutors and have at different times procured D.O. Notes from the local M.L.A. for securing their transfers.
3. According to the petitioner, respondent No.3, who is a local M.L.A., issued a Demi-Official (D.O.) Note No. 379104 on 15.03.2022 for transfer of the petitioner at the behest of respondent No.2.
4. On the other hand, the defence of respondent No.2 is that the petitioner vide notification dated 06.08.2018 had been transferred from Nurpur to Dalhousie,

but he managed to get his transfer cancelled through Demi-Official (D.O.) Note No. 66623 dated 20.08.2018 issued by the local M.L.A. It is further averred that the petitioner managed his transfer thereafter on 15.01.2020 through three Demi-Officials (D.O.s) Notes in the year 2019 that too in condonation of his short stay against Sh. Bhupinder Chand vide DO No. Secy/CM-17006/2017-VIP-A-145598, dated 10/07/2019, DO. No. Secy/CM-H0503/2017-DEP-A-189798, dated 10/12/2019, DO.No.Secy/CM/ 17010/2017-VIP-A-190708, Dated 13/12/2019, from ADA office Nurpur to ADA office Kangra under District Attorney, Kangra at Dharamshala. However a very important averment has been made in para-6 of the reply which reads as under:-

"6. That it is important to submit here that the proposal for transfer of petitioner from Nurpur to Kangra (ADA office, where his wife was already ADA) was given by the MLA Sh. Rakesh Pathania, in condonation of short stay against Sh. Bhupinder Chand, who himself was booked under FIR No.110/13 dated 26/04/2013 u/s 452, 147, 149, 353, 332, 506 IPC & 3 Prevention of Damage to Public Property Act in case titled as "State vs. Rakesh Pathania & others", pending adjudication before the Ld. Court of JMFC, Nurpur. The petitioner being incharge of the prosecution case at that time, procured the DO note from Sh. Rakesh Pathania, who himself was undergoing trial in the said court and managed his transfer at his choice of station with his Wife (Shveta Ji).

The act of obtaining DO Note from the person who is facing prosecution, is certainly a misconduct on the part of public servant. So the petitioner has not come before this Hon'ble court with clean hands."

5. The local M.L.A., who has been arrayed as respondent No.3, has also filed his reply and it shall be apt to reproduce paras-2 to 5 of the reply, which read as under:-

"2) That replying Respondent is elected public representative and is serving to the people of Nagrota Constituency. It is pertinent to submit here that the husband of Respondent No.2 is working in Dr. RPGMC Tanda as Cardiologist, which falls in Nagrota Bagwan constituency and being public representative of the said Constituency, the replying Respondent often requires help from the husband of respondent No.2 for the emergent treatment and consultation of his constituents. It is pertinent to mention here that Respondent No.2 and her Husband are not my constituents, as there is no political mileage in helping Respondent No.2 but only to serve the poor people of my constituency replying Respondent issued the DO note in favour of Respondent No.2 so that husband of Respondent No.2 can serve the patients in healthy atmosphere.

3) That in the Month of March when Replying Respondent visited Tanda Medical College to know the requirements of all departments and their needs as well as grievances. The replying Respondent came to know about the health and medical history of Respondent No.2 through her husband Dr. Naresh Rana who made a representation for redressal of grievances before the respondent No.3 and being

elected member of the legislative assembly the replying respondent issued DO Note and same has been duly considered by the Hon'ble Chief Minister of Himachal Pradesh and transfer order has been passed for the redressal of grievances.

4) That it is further submitted that wife of the petitioner is working as ADA in ADA office Kangra since 2016 and replying Respondent is fully aware that she is having a child who is 2 years old and knowing the medical history of Respondent No.2 replying Respondent on humanitarian grounds and in the capacity of public representative recommended the D O Note for transfer. It is pertinent to submit here that distance between Kangra and Dharamshala is only 18 Km.

5) That it is pertinent to submit here that the petitioner approached the replying Respondent after receiving his transfer order Dt. 30/30/2022 and falsely misrepresented the facts to replying Respondent that he has received the consent of Respondent No.2 for mutual adjustment and has convinced Respondent No.2 to stay in Dharamshala, in the office of Deputy Commissioner (Kangra at Dharamshala) for six months and after that both of them i.e. petitioner and his wife (Ms. Shaveta) will get themselves transferred to Palampur or some other District. The petitioner himself has called Respondent No.3 telephonically and has personally met Respondent alongwith some supporters of the constituency of respondent No.3 and requested for DO Note regarding cancellation of transfer order Dt. 30.03.2022 and on the request of petitioner replying Respondent issued D.O. Note No.Secy/CM-17015/2017-VIP-A-388062, Dated: 07-04-2022 (copy of which is annexed as Annexure R-3/1). It is further submitted that DO note for cancellation of transfer order dated 30-03-2022 has been issued at the request of petitioner who has fraudulently misrepresented the facts before Respondent No.3.

Hence, the petition of the petitioner may kindly be dismissed in the interest of justice and equity."

6. The Public Prosecutors are appointed under Section 24 of the Code of Criminal Procedure which provides as under:-

"1[24. Public Prosecutors.

(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

2[Explanation.-For the purposes of this sub-section-

(a) "regular Cadre of Prosecuting Officers" means a Cadre of Prosecuting Officer which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;

(b) "Prosecuting Officer" means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.]

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or 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.

1[Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.]

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or

as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.]”

7. A Public Prosecutor is one, who should necessarily conduct the case of the prosecution with a sense of impartiality and fairness.

8. In the words of Crompton J., in R.V. Puddick (1865) 4 F and F 497 at page 499, Public Prosecutors “should regard themselves rather as Minister of Justice assisting in its administration than as Advocates” which was adopted by the Court of Criminal Appeal in R.V. Banks, 1916 2 KB 621.

9. A learned Division Bench of the Andhra Pradesh High Court in Medichetty Ramakistiah and others vs. The State of Andhra Pradesh, AIR 1959 AP 659 after relying upon the aforesaid observations proceeded further to observe as under:-

“10.....A prosecution, to use a familiar phrase, ought not to be a persecution. The principle that the Public Prosecutor should be scrupulously fair to the licensed and present his case with detachment and without evincing any anxiety to secure a conviction, is based upon high policy and as such courts should be astute to suffer no inroad upon its integrity. Otherwise there will be no guarantee that the trial will be as fair to the accused as a criminal trial ought to be. The State and the Public Prosecutor acting for it are only supposed to be putting all the facts of the case before the Court to obtain its decision thereon and not to obtain a conviction by any means fair or foul. Therefore, it is right and proper that courts should be zealous to see that the prosecution of an offender is not handed over completely to a professional gentleman instructed by a private party.”

10. The Delhi High Court in the case of Ajay Kumar vs. State and another, 1986 Criminal Law Journal, 932, dealing with the role of a Public Prosecutor held that the Public Prosecutor is a functionary of the State appointed to assist the court in the conduct of a trial, the object of which is basically to find the truth and to punish the accused if he is found guilty according to the known norms of law and procedure. It is no part of his obligation to secure conviction of an accused, in any event, or at all costs. Nor he is intended to play a partial role or become party to the persecution of the accused or lend support, directly or indirectly, to a denial of justice or of fair trial to the accused. His plain task is to represent the State's point of view on the basis of the material which could be legitimately brought before the Court at the trial. Thereafter, the Court went on to make very pertinent observations which read as under:-

“15. What then is the position of a public prosecutor in the criminal court system and how far can his association with one or the other of the parties be capable of lending vitiating element to the trial. The public prosecutor is a functionary of the State appointed to assist the court in the conduct of a trial, the object of which is basically to find the truth and to punish the accused if he is found guilty according to the known norms of law and procedure. It is no part of his

obligation to secure conviction of an accused, in any event, or at all costs. Nor is he intended to play a partial role or become party to the persecution of the accused or lend support, directly or indirectly, to a denial of justice or of fair trial to the accused. His plain task is to represent the State's point of view on the basis of the material which could be legitimately brought before the Court at the trial. If all State actions must be just, fair and reasonable, he would be under no less duty as a functionary of the State to discharge his functions as a public prosecutor in an equally just, fair and reasonable manner irrespective of the outcome of the trial. In that sense, he is part of the judicature system, and an upright public prosecutor has no friends and foes in Court. He has no prejudices, pre-conceived notions, bias hostility or his own axe to grind. He represents public interest, but is not a partisan in the narrow sense of the term.

16. Is the position of a public prosecutor any different than of counsel, who appear for parties in a court of law. The answer is both in the affirmative and the negative. An advocate of the court is in theory an officer of the Court and whatever be the side he is engaged to represent he has his higher duty to the court in assisting the court in finding out the truth and in placing before the Court the point of view of his client honestly and fairly and to desist from making any misrepresentation or attempt to mislead the court. The advocate's duty to the court transcends the limited and narrow loyalty to the client, who engages him to protect his interest. Every advocate, therefore, has a dual capacity. He represents his client but that does not dilute his higher duty to the court. He is, however, partisan counsel in a sense not only because he is paid for the work by the client but also because an advocate, in actual practice, does not necessarily conform to the noble theory by which his conduct is sought to be disciplined. The duty of an ordinary advocate and a public prosecutor are, therefore, co-extensive to the extent that both have a common duty to the court and must, therefore, place their respective points of view before the Court in a fair and reasonable manner but the similarity ends there. A public prosecutor has no client or constituency apart from the State and State is not a party like any other party. He is not paid by an individual who may be aggrieved or by the accused who is on trial. He, therefore, does not have the disability of a dual personality, which is certainly true of an ordinary advocate, who is torn, in the thick of his practice in Court, between the wider loyalty to public interest, to the court system, claim of straight and rigid adherence to truth and discipline on the one hand, and his narrow, as also monetary, association with the individual litigant or the institution, whom he represents on the other. An advocate-client relationship introduces a personal element from which the public prosecutor must be considered immune. He is above the personal loyalty. He does not have a dual capacity.

17. Is the position of a public prosecutor any different merely because he is not the ordinary functionary of the State. but has been supplanted either at the instance of an aggrieved party, or a fending faction, or even if appointed independently of the aggrieved party had prior association with the party, and

has been amply rewarded by it, as in the present case ? Can such a public prosecutor be said to be as well insulated against pressure of an aggrieved party as an ordinary public prosecutor would be or is at least expected to be but, what is more important would his background not give the appearance of partiality or generate an apprehension of hostility in an Impartial observer of the scene, as indeed, in the accused, who is so vitally interested in the fairness of a trial? Would this feature of the public prosecutor be capable of vitiating the trial or create an atmosphere which may smack of likelihood of or reasonable probability of bias. In seeking answers to these questions, it is necessary to keep in mind the clear distinction between the "reality" of affair trial and the "appearance" that it is just, fair and reasonable. The concept of equality before the law and equal protection of the laws is in practice fairly diluted when it comes to the right of representation in a court of law. Money and influence do play more than their due roles, The decision of a cause in a court of law is essentially deter mined by the law, as indeed, the facts of the case. Nevertheless, where an over-burdened special public prosecutor is pitched against eminent, competent, and influential members of the bar with better training, specialised skills, able research and other faculties and aids, the fight cannot but be descried as unequal. What makes the position worse, is the declining moral standards of some of the services. There is, therefore, a wide feeling among the public that the representation for the State is comparatively less effective and may also be easily tampered with through a variety of nefarious influences. If in that kind of an environment an influential or well-to-do aggrieved family feels impelled to engage a counsel of their own choice in whose competence and probity they have full faith and approach the State to engage such a counsel without any burden on the exchequer, it would be difficult to fault such an appointment even though one may not be happy that the State is unable to pay for proper legal services. The accused is no doubt vitally interested in the trial for it may result not only in his condemnation but even of deprivation of his freedom. The accused and the victim are not at par and a criminal trial is not a forum for personal vengeance. It is essentially a State action to punish crime. There is, therefore, no other party involved but with all the concern for a fair trial and humane and civilised conditions in which the accused is treated, both during the investigation in the course of trial, and after conviction., it is difficult to ignore the claim of the victims or of the aggrieved party to ensure that the crime is detected, properly investigated, and the accused is effectively tried, and suitably punished. A fair trial does not necessarily mean that it must be fair only to the accused. It must be fair to the victim also. It must be fair for all. A fair trial is a concept which is much higher than the claims or ends of parties to it. If the accused has a right to counsel of his choice why should not the victims of the crime be entitled to a say in the matter of representation of the State at the trial. The motive of the State and of the victim may be different but the object is common. Moreover a party's counsel who is engaged by the State at the cost of the aggrieved party is equally bound by the higher duty to the court as also to his discipline as an advocate, and is expected to rise to the occasion and discharge his duties as a just and fair

public prosecutor unmindful of the source from which the funds are made available for payment to him. The material placed on record by the investigating agency places its own limitations on such a public prosecutor should be nevertheless carry a prejudice or a bias. Above all, there is institutional safeguard against any prejudice or bias or any vitiating elements flowing from such a public prosecutor or his association with a party or a faction in the judicial duty to shift the material and provide the necessary insulator cover against any irrelevant, improper influencing of the trial. While there is no doubt that the association of such public prosecutor may perhaps disturb or dislodge the appearance of a fair trial or create a reasonable apprehension in the mind of the accused that with a hostile and partisan counsel in the garb of special public prosecutor he would perhaps be denied justice or that trial would neither be just nor reasonable. But such fear must not be allowed to blur the judicial mind because of the institutional safeguard. It follows, therefore, that the appointment of party's counsel as a special public prosecutor does not by itself militate against the principle that State action must be just, fair and reasonable and would not, without anything more, either vitiate a trial or deprive the trial for that reason alone of the appearance of a fair trial."

11. Commenting upon the role of the Public Prosecutor, a learned Single Judge of the Rajasthan High Court in Phool Singh vs. The State of Rajasthan and others, 1993 Criminal Law Journal 3273 observed that a Public Prosecutor is a public servant. The office of the Public Prosecutor involves duties of public nature and is of vital interest to the public. In criminal cases, the State is the prosecutor and not the complainant. The role of the Public Prosecutor in any criminal trial, whether at the instance of the State or of a private party, is to safeguard the interest of the complainant as well as the accused. It is apt to reproduce para-8 of the judgment which reads as under:-

"8. A Public Prosecutor is a public servant. The office of Public Prosecutor involves duties of public nature and is of vital interest to the public. In criminal cases, the State is the prosecutor. The State through the Public Prosecutor is the party and not the complainant. The role of the Public Prosecutor in any criminal trial, whether at the instance of the State or of a private party, is to safeguard the interest of the complainant as well as the accused. The right to be heard includes a right to be represented by an able spokesman of one's confidence. This right belongs both to the accused and the complainant. It is not only the accused, who is in need of an assistance and protection of his rights, but also the complainant. In fact, it is to vindicate the rights and grievances of the complainant and through him, of the State, that the prosecution is launched whether by the State or by the private party. The object and purpose of criminal prosecution is to bring home the guilt of the accused and to ensure that he is adequately punished. The prosecutor has, therefore, to discharge his duties diligently, without fear or favour and without ill-will or mala fide. A prosecutor, who fails in and neglects his duties cannot import effective and substantial service to the administration of justice. In the discharge of his duties as a

prosecutor, he is ordained by law, by professional ethics and by his role as an officer of the Court, to employ only such means as are fair and legitimate, and to desist from resorting to unjust and wrongful means. This so whether the prosecutor is private or appointed by the State and whether he is paid by the State or his appointment is made at the request of a private party as a Special Public Prosecutor and the State requires such private party to pay his remuneration. The duties of the prosecutor and the requirements of a fair trial do not vary from case to case. Moreover, there is always the Court to safeguard the interests of the accused and the complainant, to control the proceedings and to check the omissions and commissions of the prosecutor. It is needless to mention that the Court is not a moot spectator in a criminal trial, but an active participant therein. Therefore, by no stretch of imagination, it can be held that where Special Public Prosecutor is appointed whether paid by the State or the Private Party, the prosecution and the trial should be presumed to be biased, partial or unfair."

12. The Public Prosecutor is expected to be scrupulously fair and completely detached without evincing any anxiety while performing his duties. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies, but to the accused as well. The Prosecutor does not represent the investigating agency but represents the State.

13. In *Hitendra Vishnu Thakur vs. State of Maharashtra and others* (1994) 4 SCC 602, it was held as under:-

"23.....A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation....."

14. Commenting upon the expected attitude of the Public Prosecutor while conducting prosecution, the Hon'ble Supreme Court in a Bench comprising of Hon'ble three Judges in *Shiv Kumar vs. Hukam Chand and another*, (1999) 7 SCC 467, held as under:-

"13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a sessions court cannot be conducted by any one other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a sessions court. A Public

Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.

14. It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter."

15. In *Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others* (2004) 4 SCC 158, the Hon'ble Supreme Court held as under:-

"43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness."

16. The Hon'ble Supreme Court in *State of U.P. and another vs. Johri Mal* (2004) 4 SCC 714 observed that "only when good and competent counsel are appointed

by the State, the public interest would be safeguarded. The State while appointing the public prosecutors must bear in mind that for the purpose of upholding the rule of law, good administration of justice is imperative which in turn would have a direct impact on sustenance of democracy" Thereafter, a very pertinent observation was made to the effect that "no appointment of public prosecutor or district counsel should, thus, be made either for pursuing a political purpose or for giving some undue advantage to a section of people. Retention of its counsel by the State must be weighed on the scale of public interest. The State should replace an efficient, honest and competent lawyer, inter alia, when it is in a position to appoint a more competent lawyer".

17. A learned Single Judge of the Karnataka High Court has elaborately considered the status and responsibilities of the Public Prosecutor in case K.V. Shiva Reddy vs. State of Karnataka and others, 2005 Criminal Law Journal 3000 in paras 13, 15 and 17 which read as under:-

"13. On the role of the Prosecutor it was held that, he is an officer of the Court expected to assist the Court in arriving at the truth in a given case. The Prosecutor no doubt, has to vigorously and conscientiously prosecute the case so as to serve the high public interest of finding out the truth and in ensuring adequate punishment to the offender. At the same time, it is no part of his duty to secure by fair means or foul conviction in any case. He has to safeguard public interest in prosecuting the case; public interest also demands that the trial should be conducted in a fair manner, heedful of the rights granted to the accused under the laws of the country including the Code. The Prosecutor, while being fully aware of his duty to prosecute the case vigorously and conscientiously, must also be prepared to respect and protect the rights of the accused.

15. A Public Prosecutor has no client or constituency apart from the State and State is not a party like any other party. He is not paid by an individual who may be aggrieved or by the accused who is on trial. He, therefore, does not have the disability of a dual personality, which is certainly true of an ordinary Advocate, who is torn, in the thick of his practice in Court, between the wider loyalty to public interest, to the Court system, claim of straight and rigid adherence to truth and discipline on the one hand, and his narrow, as also monetary, association with the individual litigant or the institution, whom he represents on the other. An Advocate-client relationship introduces a personal element from which the Public Prosecutor must be considered immune. He is above the personal loyalty. He does not have a dual capacity.

17. Public Prosecutors were expected to act in a "scrupulously fair manner" and present the case "with detachment and without anxiety to secure a conviction" and that the Courts trying the case "must not permit the Public Prosecutor to surrender his functions completely in favour of a private Counsel". Public Prosecutor for the State was not such a mouth piece for his client the State, to say what it wants or its tool to do what the State directs. "He owes allegiance to

higher cause". He must not consciously "misstate the facts", nor "knowingly conceal the truth". Despite his undoubted duty to his client, the State, "he must sometimes disregard his client's most specific instructions if they conflicted with the duty in the Court to be fair, independent and unbiased in his views".

18. It needs to be noticed that the learned Single Judge had formulated six points for consideration which are as under:-

"(1) What is the status, responsibilities of a Public Prosecutor in a criminal trial?

(2) How and under what circumstances a Special Public Prosecutor could be appointed?

(3) How, the remuneration is to be paid to the Special Public Prosecutor?

(4) Whether the accused has a right to challenge the order of appointment of a Special Public Prosecutor?

(5) Whether the impugned order appointing the second respondent as the Special Public Prosecutor is liable to be quashed?

(6) Whether this writ petition is liable to be dismissed on the ground of delay, laches, suppression of material facts, etc.?"

19. While answering points No. 1 to 3 as regards Public Prosecutor, it was observed as under:-

"25. Point Nos. (1), (2) and (3):-

STATUS

The words "Public Prosecutor" has been defined under the Code. Section 2(u) of the Code states that "Public Prosecutor" means any person appointed under Section 24 and includes any person acting under the directions of Public Prosecutor. Therefore, the words "Public Prosecutor" includes Public Prosecutor, Additional Public Prosecutor, Special Public Prosecutor and' a Pleader instructed by a private person under Section 301(2) of the Code. The office of the Public Prosecutor is a public one. He is a public servant. Special status and position as well as great powers have been conferred on the office of Public Prosecutor. Under the Criminal Procedure Code, the Public Prosecutor has a special status and his is a statutory appointment. Under some of the provisions made in the Code, he receives special recognition. Sections 199(2), 225, 301(1), 301(2), 302, 308, 321, 377 and 386 are some of the provisions in the Code which confer a special position upon the Public Prosecutor. He is a part of the judicial system. He is an officer of the Court and must act independently and in the interests of justice. The primacy given to the Public Prosecutor under the Scheme of the Code has a social purpose. The office of the Public Prosecutor involves duties of public nature and of vital interest to the public. In criminal cases the State is the Prosecutor. The State by Public Prosecutor is the party and not the complainant. The Prosecutor is bound by law and professional ethics and by his role as an

officer of Court to employ only fair means. Public Prosecutor must remind himself constantly of his enviable position of trust and responsibility.

RESPONSIBILITIES:-

26. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts of the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court to the investigation agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial, the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence Counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the Court, if it comes to his knowledge.

27. It is an office of responsibility more important than many others because the holder is required to prosecute with detachment on the one hand and yet with vigour on the other. An upright Public Prosecutor has no friends and foes in Court. He has no prejudices, preconceived notions, bias, hostility or his own axe to grind. He represents public interest. He has no client or constituency apart from the State. He is above the personal loyalty. He does not have a dual capacity. He has to safeguard public interest in prosecuting the case. Public interest also demands that the trial should be conducted in a fair manner, heedful of the rights granted to the accused under the laws of the country including code. It is no part of his obligation to secure conviction of an accused in any event or at all costs. Nor is he intended to play a partisan role or become party to the prosecution of the accused or lend support, directly or indirectly to a denial of justice or of fair trial to the accused."

20. In *Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi)* (2010) 6 SCC 1, the Hon'ble Supreme Court observed as under:-

"197. In the Indian Criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.

198. A person is entitled to be tried according to the law in force at the time of commission of offence. A person could not be punished for the same offence twice and most significantly cannot be compelled to be a witness against himself

and he cannot be deprived of his personal liberty except according to the procedure established by law. The law in relation to investigation of offences and rights of an accused, in our country, has developed with the passage of time. On the one hand, power is vested in the investigating officer to conduct the investigation freely and transparently. Even the Courts do not normally have the right to interfere in the investigation. It exclusively falls in the domain of the investigating agency. In exceptional cases the High Courts have monitored the investigation but again within a very limited scope. There, on the other a duty is cast upon the prosecutor to ensure that rights of an accused are not infringed and he gets a fair chance to put forward his defence so as to ensure that a guilty does not go scot free while an innocent is not punished. Even in the might of the State the rights of an accused cannot be undermined, he must be tried in consonance with the provisions of the constitutional mandate. The cumulative effect of this constitutional philosophy is that both the Courts and the investigating agency should operate in their own independent fields while ensuring adherence to basic rule of law.

199. It is not only the responsibility of the investigating agency but as well that of the Courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of bias mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society.”

21. In *Deepak Aggarwal vs. Keshav Kaushik and others* (2013) 5 SCC 277, the Hon’ble Supreme Court reiterated the observations made in *Manu Sharma’s* case.

22. The role of the Public Prosecutor came up before the Andhra Pradesh High Court in Writ Petition No. 21280 of 2019 in case titled *Katari Praveen vs. State of Andhra Pradesh*, decided on 18.01.2021, wherein the matter was considered and examined in detail and it was held that an ideal Public Prosecutor must consider himself/herself as an agent of justice in India. It shall be apt to reproduce para-21 of the judgment which reads as under:-

“21. Sri N. Ranga Reddy, learned counsel for the third respondent contended that the third respondent is honest advocate who had previous experience on civil and criminal side while discharging his duties as Additional Public Prosecutor in the Court of Assistant Sessions Judge, Chittoor during the period 2012-2015 and now appointed as Additional Public Prosecutor to conduct cases registered under POCSO Act, discharging his functions as effectively as possible. Hence, he is more competent than Sri S. Venkata Narayana, who is a Cadre Public Prosecutor. However, the petitioner or the accused have no choice to select their own men as Public Prosecutor(s) to conduct prosecution in the sessions case and denied the alleged pendency of contempt before this Court and complaint made by Sri B. Krishna Murthy before A.P. Bar Council and requested to dismiss the writ petition.”

23. Thereafter, the Court proceeded to elaborate on the responsibilities and duties of the prosecution in para-29 of the judgment which reads as under:-

"29. The role of the Prosecutor is not to single-mindedly seek a conviction regardless of the evidence but his/her fundamental duty is to ensure delivery of justice. The Indian judiciary interpreted role, responsibilities and duties of prosecution as follows:

a) The ideal Public Prosecutor is not concerned with securing convictions, or with satisfying departments of the State Governments with which she/he has been in contact. He must consider herself/himself as an agent of justice. The Courts have ruled that it is the duty of the Public Prosecutor to see that justice is vindicated and that he should not obtain an unrighteous conviction.

b) Public Prosecutor should not exhibit a seemly eagerness for, or grasping at a conviction" The purpose of a criminal trial being to determine the guilt or innocence of the accused person, the duty of a Public Prosecutor is not to represent any particular party, but the State. The prosecution of the accused persons has to be conducted with utmost fairness. In undertaking the prosecution, the State is not actuated by any motives of revenge but seeks only to protect the community. There should not therefore be "a seemly eagerness for, or grasping at a conviction.

c) A Public Prosecutor should not by statement aggravate the case against the accused, or keep back a witness because her/his evidence may weaken the case for prosecution. The only aim of a Public Prosecutor should be to aid the court in discovering truth. A Public Prosecutor should avoid any proceedings likely to intimidate or unduly influence witnesses on either side.

d) A Public Prosecutor should place before the Court whatever evidence is in her/his possession .The duty of 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 the possession of the prosecution, whether it be in favour of or against the accused and to leave the court to decide upon all such evidence, whether the accused had or had not committed the offence with which he stood charged. It is as much the duty of the Prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice.

e) The duty of the Public Prosecutor is to represent the State and not the police. A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure, 1973. She/he is not a part of the investigating agency. She/he is an independent statutory authority. She/he is neither the post office of the investigating agency, nor its forwarding agency; but is charged with a statutory duty.

f) The purpose of a criminal trial is not to support at all cost a theory, but to investigate the offence and to determine the guilt or innocence of the accused

and the duty of the Public Prosecutor is to represent not the police, but the State and her/his duty should be discharged by her/him fairly and fearlessly and with a full sense of responsibility that attaches to her/his position.

g) Time and again, the Courts have held that prosecution should not mean persecution and the Prosecutor should be scrupulously fair to the accused and should not strive for conviction in all these cases. It further stated that the courts should be zealous to see that the prosecution of an offender should not be given to a private party. The Court also said that if there is no one to control the situation when there was a possibility of things going wrong, it would amount to a legalised manner of causing vengeance.

h) A Public Prosecutor cannot appear on behalf of the accused .It is inconsistent with the ethics of legal profession and fair play in the administration of justice for the Public Prosecutor to appear on behalf of the accused.

i) No fair trial when the Prosecutor acts in a manner as if he was defending the accused, It is the Public Prosecutors duty to present the truth before the court. Fair trial means a trial before an impartial Judge, a fair Prosecutor and atmosphere of judicial calm. The Prosecutor who does not act fairly and acts more like a counsel for the defense is a liability to the fair judicial system.

j) If there is some issue that the defense could have raised, but has failed to do so, then that should be brought to the attention of the court by the Public Prosecutor The Supreme Court stated that the duty of the Public Prosecutor is to ensure that justice is done. It stated that if there is some issue that the defense could have raised, but has failed to do so, then that should be brought to the attention of the court by the Public Prosecutor. Hence, she/he functions as an officer of the court and not as the counsel of the State, with the intention of obtaining a conviction. The District Magistrate or the Superintendent of Police cannot order the Public Prosecutor to move for the withdrawal, although it may be open to the District Magistrate to bring to the notice of the Public Prosecutor materials and suggest to her/him to consider whether the prosecution should be withdrawn or not. But, the District Magistrate cannot command and can only recommend."

24. Further observations made by the Court in paras-30 to 39 are equally educative and informative which read as under:-

"30. To discharge the duties of Public Prosecutor as enumerated above, though elliptic, procedure is prescribed in Section 24 of the Cr.P.C which deals with appointment of public prosecutors in the High Courts and the district by the central government or state government. Sub-section (3) says down that for every district, the state government shall appoint a public prosecutor and may also appoint one or more additional public prosecutors for the district. Sub-section (4) requires the district magistrate to prepare a panel of names of persons considered fit for such appointment, in consultation with the sessions judge. Sub-section (5) explains an embargo against appointment of any person

as the public prosecutor or additional public prosecutor in the district by the state government unless his name appears in the panel prepared under sub-section (4). Sub-section (6) provides for such appointment wherein a state has a local cadre of prosecuting officers, but if no suitable person is available in such cadre, then the appointment has to be made from the panel prepared under subsection (4). Subsection (4) says that a person shall be eligible for such appointment only after he has been in practice as an advocate for not less than seven years.

31. In *R. Rathinam vs. State* AIR 2000 SCC 1851 the Supreme Court permitted a lawyer to file an application for cancellation of bail. This view was approved by the Apex Court in *Puran vs. Rambilas* (2001) 6 SCC 338. In *R. Rathinam's* case (supra) the Apex Court held that the frame of sub-Section 2 of Section 439 Cr.P.C. indicates that it is a power conferred on the court mentioned therein. It was held that there was nothing to indicate that the said power could be exercised only if the State or investigating agency or the Public Prosecutor moved an application. It was held that the power so vested in the High Court can be invoked by any aggrieved party he can address the court.

32. The Apex Court in *Dawarika Prasad Agarwal vs. B.D. Agarwa* (2003) 6 SCC 230 held that party can not be made to suffer adversely either directly or indirectly by reason of an order passed by any court of law which is not binding on him. The very basis upon which a judicial process can be resorted to is reasonableness and fairness in a trial. The fair trial is a fundamental right of every citizen including the victim of the case under Article 21 of our Constitution as held in *Nirmal Singh Kahlon vs. State of Punjab* (2009) 1 SCC 441.

33. On the careful scrutiny of the criminal procedure, I find that Legislature has not framed any section by which mechanism has been given that in what manner, the appeal and prosecution applications are to be conducted. However, the hallmark of criminal justice system is to conduct fair trial, which is a fundamental right guaranteed under the Constitution of India.

34. From the scheme of the Code, the legislative intention is manifestly clear that prosecution in a sessions court cannot be conducted by any one other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a sessions court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial, the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit

case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.

35. It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter. (vide *Shiv Kumar v. Hukam Chand* (1999) 7 SCC 467.

36. The Full Bench of the Allahabad High Court in *Queen Empress v. Durga* 1894 ILR (All) 84 has pinpointed the role of a Public Prosecutor as follows:

"It is the duty of a Public Prosecutor to conduct the case for the Crown fairly. His object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that justice is vindicated: and, in exercising his discretion as to the witnesses whom he should or should not call, he should bear that in mind. In our opinion, a Public Prosecutor should not refuse to call or put into the witness box for cross examination a truthful witness returned in the calendar as a witness for the Crown, merely because the evidence of such witness might in some respects be favorable to the defence. If a Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if put into the witness box, he is not bound, in our opinion, to call that witness or to tender him for cross examination."

37. The Division Bench of the High Court of Andhra Pradesh in *Medichetty Ramakistiah & Ors. vs. The State of Andhra Pradesh* AIR 1959 (AP) 659 observed as follows:

"A prosecution, to use a familiar phrase, ought not to be a persecution. The principle that the Public Prosecutor should be scrupulously fair to the accused and present his case with detachment and without evincing any anxiety to secure a conviction, is based upon high policy and as such courts should be astute to suffer no inroad upon its integrity. Otherwise there will be no guarantee that the trial will be as fair to the accused as a criminal trial ought to be. The State and the Public Prosecutor acting for it are only supposed to be putting all the facts of the case before the Court to obtain its decision thereon and not to obtain a conviction by any means fair or foul. Therefore, it is right and proper that courts should be zealous to see that the prosecution of an offender is not handed over completely to a professional gentleman instructed by a private party."

38. Equally forceful is the observation of Bhimasankaram, J. for the Division Bench in *Medichetty Ramakistiah* (cited supra) which is worthy of quotation here:

"Unless, therefore, the control of the Public Prosecutor is there, the prosecution by a pleader for a private party may degenerate into a legalized means for wreaking private vengeance. The prosecution instead of being a fair and dispassionate presentation of the facts of the case for the determination of the Court, would be transformed into a battle between two parties in which one was trying to get better of the other, by whatever means available. It is true that in every case there is the overall control of the court in regard to the conduct of the case by either party. But it cannot extend to the point of ensuring that in all matters one party is fair to the other."

39. Keeping in view the role of Public Prosecutor to conduct fair prosecution, the Government may entrust conduct of prosecution in a particular case. Prosecution cannot be entrusted mechanically at the whim and caprice of any individual by the Government at the instance of any person who is interested over any conviction or acquittal of the accused."

25. The role of the Public Prosecutor has been highlighted by the Hon'ble Supreme Court in a recent judgment rendered by three Hon'ble Judges in *Manoj and others vs. State of Madhya Pradesh*, Criminal Appeal No. 248/2015, decided on 20.05.2022, wherein it was observed as under:-

"170. Before proceeding to consideration of the question of sentence, this court finds it necessary to briefly highlight the role of the public prosecutor and trial court in a criminal trial, so as to safeguard the rights of the accused. The concealment of DW-1's role in this case's investigation (her analyzing of call detail records of the deceased and in connection to Neha – which was not produced in trial; tip-off allegedly received regarding Neha's whereabouts and what she would be wearing; participating in Neha's arrest, and subsequent involvement on 23.06.2011 in recoveries of articles) points to concerning gaps in the manner of investigation carried out initially, or at the very least, an untruthful recollection and presentation of it, for the purposes of trial. As elaborated earlier, these facts prompted this court to draw adverse inferences against the prosecution's version of Neha's arrest. Other circumstances have been proved sufficiently to conclude their guilt and result in conviction.

However, it is appropriate to also point out that concealment of DW-1's role and failure to include the call detail records, could have severely prejudiced the accused, had these other circumstances not been made out. Therefore, at this juncture, it is pertinent to note and reiterate the role of the public prosecutor, and trial court, in arriving at the truth by way of fair disclosure and scrutiny by inquiry, respectively.

171. A public prosecutor (appointed under Section 24 CrPC) occupies a statutory office of high regard. Rather than a part of the investigating agency, they are instead, an independent statutory authority (*Hitendra Vishnu Thakur v. State Maharashtra*, (1994) 4 SCC 602) who serve as officers to the court (*Deepak Aggarwal v. Keshav Kaushik*, (2013) 5 SCC 277). The role of the public

prosecutor is intrinsically dedicated to conducting a fair trial, and not for a "thirst to reach the case in conviction". This court in *Shiv Kumar v. Hukam Chand* (1999) 7 SCC 467 further held that

"....if an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused..."

In *Siddharth Vasisht @ Manu Sharma v. State of NCT Delhi* 2010 6 SCC 1 (hereafter 'Manu Sharma') it was concluded that:

"187. Therefore, a Public Prosecutor has wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the court in order for the determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the Prosecutor to be lax in any of his duties as against the accused."

172. In *Manu Sharma*, the appellants in question had argued that the right to fair trial included a wide duty of disclosure on the public prosecutor, such that non-disclosure of any evidence – whether or not relied upon by the prosecution – must be made available to the defence. This court considered Section 207 and 208 CrPC, Rule 1677 of the Bar Council of India Rules (which is limited to evidence on which prosecutor proposes to rely on), and English law. The common law position culled out was that subject to exceptions like sensitive information and public interest immunity, the prosecution should disclose any material which might be exculpatory to the defense. Such a position, however, was not accepted by this court, in its totality. It was held that such obligations are on a different footing in India, given the fundamental canons of our criminal jurisprudence founded on Articles 20 and 21 of the Constitution, which require not just the investigating agency, but also courts in their own independent field, to ensure that investigation is fair and does not hamper the individual's freedom, except in accordance with law, i.e., ensure adherence to the rule of law. Relevant extracts that merit repetition:

"199. It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society.

201. Historically but consistently the view of this Court has been that an investigation must be fair and effective, must proceed in proper direction in

consonance with the ingredients of the offence and not in haphazard manner. In some cases besides investigation being effective the accused may have to prove miscarriage of justice but once it is shown the accused would be entitled to definite benefit in accordance with law. The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and

21 and expansive power of the police to make investigation. These well-established principles have been stated by this Court in *Sasi Thomas v. State* [(2006) 12 SCC 421 : (2007) 2 SCC (Cri) 72] , *State (Inspector of Police) v. Surya Sankaram Karri* [(2006) 7 SCC 172 : (2006) 3 SCC (Cri) 225] and *T.T. Antony v. State of Kerala* [(2001) 6 SCC 181 : 2001 SCC (Cri) 1048] .

202. In *Nirmal Singh Kahlon v. State of Punjab* [(2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523] this Court specifically stated that a concept of fair investigation and fair trial are concomitant to preservation of the fundamental right of the accused under Article 21 of the Constitution of India. We have referred to this concept of judicious and fair investigation as the right of the accused to fair defence emerges from this concept itself. The accused is not subjected to harassment, his right to defence is not unduly hampered and what he is entitled to receive in accordance with law is not denied to him contrary to law."

173. The scheme of the CrPC under Chapter XII (information to police and powers to investigate) is clear – the police have the power to investigate freely and fairly; in the course of which, it is mandatory to maintain a diary where the day-to-day proceedings are to be recorded with specific mention of time of events, places visited, departure and reporting back, statements recorded, etc. While the criminal court is empowered to summon these diaries under Section 172(2) for the purpose of inquiry or trial (and not as evidence), Section 173(3) makes it clear that the accused cannot claim any right to peruse them, unless the police themselves, rely on it (to refresh their memory) or if the court uses it for contradicting the testimony of the police officers.

174. In *Manu Sharma*, in the context of policy diaries, this court noted that "the purpose and the object seems to be quite clear that there should be fairness in investigation, transparency and a record should be maintained to ensure a proper investigation". This object is rendered entirely meaningless if the police fail to maintain the police diary accurately. Failure to meticulously note down the steps taken during investigation, and the resulting lack of transparency, undermines the accused's right to fair investigation; it is up to the trial court that must take an active role in scrutinizing the record extensively, rather than accept the prosecution side willingly, so as to bare such hidden or concealed actions taken during the course of investigation. (Role of the courts in a criminal trial has been discussed in *Zahira Habibulla H. Sheik vs. State of Gujarat*, 2004 4 SCC 158.)

175. In the present case, the trial court ought to have inquired more deeply into

the role of DW-1, given that by her own deposition she had admitted to analyzing call detail records and involvement in Neha's arrest – all of which had been suppressed by the prosecution side, for reasons best known to them. In this context, a reading of Section 91 and 243 CrPC as done in Manu Sharma, is important to refer to:

"217. ..Section 91 empowers the court to summon production of any document or thing which the court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code. Where Section 91 read with Section 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross-examination or the production of any document or other thing for which the court has to pass a reasoned order."

176. The court went on to elaborate on the due process protection afforded to the accused, and its effect on fair disclosure responsibilities of the public prosecutor, as follows:

"218. The liberty of an accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (sic Code) gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.

219. The role and obligation of the Prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English system as afore referred to. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the Prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the accused copies of the police report, first information report, statements, confessional statements of the persons recorded under Section 161 whom the

prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression "documents on which the prosecution relies" are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170(2) of the Code.

220. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially.

222. The concept of disclosure and duties of the Prosecutor under the English system cannot, in our opinion, be made applicable to the Indian criminal jurisprudence *stricto sensu* at this stage. However, we are of the considered view that the doctrine of disclosure would have to be given somewhat expanded application. As far as the present case is concerned, we have already noticed that no prejudice had been caused to the right of the accused to fair trial and non-furnishing of the copy of one of the ballistic reports had not hampered the

ends of justice. Some shadow of doubt upon veracity of the document had also been created by the prosecution and the prosecution opted not to rely upon this document. In these circumstances, the right of the accused to disclosure has not received any setback in the facts and circumstances of the case. The accused even did not raise this issue seriously before the trial court.

(emphasis supplied)

177. In this manner, the public prosecutor, and then the trial court's scrutiny, both play an essential role in safeguarding the accused's right to fair investigation, when faced with the might of the state's police machinery.

178. This view was endorsed in a recent three judge decision of this court in Criminal trials guidelines regarding Inadequacies and Deficiencies, in re v. State of Andhra Pradesh, (2021) 10 SCC 598. This court has highlighted the inadequacy mentioned above, which would impede a fair trial, and inter alia, required the framing of rules by all states and High Courts, in this regard, compelling disclosure of a list containing mention of all materials seized and taken in, during investigation- to the accused. The relevant draft guideline, approved by this court, for adoption by all states is as follows:

"4. SUPPLY OF DOCUMENTS UNDER SECTIONS 173, 207 AND 208 CR.PC

Every Accused shall be supplied with statements of witness recorded under Sections 161 and 164 Cr.PC and a list of documents, material objects and exhibits seized during investigation and relied upon by the Investigating Officer (I.O) in accordance with Sections 207 and 208, Cr. PC.

Explanation: The list of statements, documents, material objects and exhibits shall specify statements, documents, material objects and exhibits that are not relied upon by the Investigating Officer."

179. In view of the above discussion, this court holds that the prosecution, in the interests of fairness, should as a matter of rule, in all criminal trials, comply with the above rule, and furnish the list of statements, documents, material objects and exhibits which are not relied upon by the investigating officer. The presiding officers of courts in criminal trials shall ensure compliance with such rules."

26. Discussion on the subject would not be complete in case we do not refer to the order passed by the learned Division Bench of this Court (Coram: Hon'ble Mr. Justice Deepak Gupta and Hon'ble Mr. Justice Rajiv Sharma, as his Lordships then were), in CWP No.7656 of 2012, where the question arose whether the Public Prosecutors/District Attorneys should be kept posted at one place for an indefinite period and it was observed as under:-

"This case raises an important question as to whether the Public Prosecutors/District Attorneys should be kept posted at one place, for an indefinite period. The policy of transfer applies to the Public Prosecutors/District Attorneys also. There is no reason why they should not be posted out after three years.

In fact, this Court is, *prima facie*, of the opinion that keeping in view the nature of the job, performed by the Public Prosecutors/ District Attorneys, they should not be posted in their home districts or stations, where they have practiced as Lawyers. We are saying this because the people practicing as Lawyers develop relationships. When a person remains posted as Public Prosecutor/District Attorney at one station, for a sufficient long period, certain friendships are developed. At the same time, with certain people relations become strained. Therefore, there is a need that the Public Prosecutors/District Attorneys should also be posted out of their stations to fresh stations, so that the litigant public do not have the impression that if a particular Lawyer is engaged, the Public Prosecutor/District Attorney will help him or will oppose him more of strongly.

The Secretary (Home), in consultation with the Secretary (Law), shall personally examine this matter and shall, by next date, frame a Policy and place it before this Court as to how the Public Prosecutors/District Attorneys are going to be transferred from one place to another.

The Policy should not only be made transparent, but it should also be ensured, as this Court has observed in other cases, that all the Public Prosecutors/District Attorneys serve in tribal areas, hard stations, soft stations etc., in turn."

27. As observed by the Hon'ble Supreme Court in Hitendra Vishnu Thakur's case (*supra*) and other cases that a Public Prosecutor (appointed under Section 24 Cr.P.C.) occupies a statutory office of high regard. Rather than a part of the investigating agency, they are instead an independent statutory authority, who serve as Officers to the Court. The role of the Public Prosecutor is intrinsically dedicated to conduct a fair trial and, therefore, it does not behove well that these Attorneys be seen hobnobbing with the politicians or socializing with the public. The conduct and behaviour expected of them is nothing short of that expected of a Judicial Officer. The object and purpose especially of criminal prosecution where the role of the prosecutor assumes a greater importance is to bring home the guilt of the accused and to ensure that he is adequately punished. The Prosecutor has, therefore, to discharge his duties diligently without fear or favour and without ill-will or malice. A Prosecutor, who fails and neglects his duties cannot import effective and substantial service to the administration of justice. It is in discharge of the duties as a Prosecutor, he is ordained by law, by professional ethics or by his role as an Officer of the Court, to employ only such means as are fair and legitimate, and to desist from resorting to unjust and wrongful means. But, unfortunately, in the instant case, both the petitioner as well as private respondent have been complacent in tarnishing the image of the prosecution.

28. The working of the Prosecutors has to be free from any executive or political interference. The concept of independence of Prosecutors being a wider concept indicates an independent functioning of every Prosecutor free of fear, interference and breaches. Therefore, the conduct of every Prosecutor should be above reproach. He should be conscientious, studious, thorough, courteous,

patient, punctual, just, impartial, sans political or partisan influences. He should deal with his appointment as a public trust and should not allow other affairs or private interests to be interfered with his official duties, nor, he should administer the office for the purpose of advancing his personal ambitions or increasing his popularity. If he compromises with his office, its rippling effects would be both disastrous as well as deleterious.

29. It has specifically come on record that a criminal case is pending against one of the M.L.A.s, who issued a D.O. Note in favour of 2nd respondent in that very Court where 2nd respondent has been posted. We really wonder whether with these falling standards can the public repose any trust or confidence on the Prosecutor as being fair and impartial as against the standards as are expected of a Public Prosecutor. We leave it as that.

30. Reverting back to the facts, since both the petitioner as also the private respondent are beneficiaries of the D.O. Notes, they are directed to be posted out of district Kangra.

31. Since, the working of the Public Prosecutor is intrinsically connected with the Court and is not a part of the investigating agency and is rather an independent statutory authority, we direct that henceforth no Public Prosecutor, Assistant District Attorney and District Attorney shall be transferred on the basis of the D.O. Notes and their transfers shall be effected strictly in accordance with the Comprehensive Guidelines, 2013, for regulating the transfers of the employees, that too, only by the Administrative authority.

32. With the aforesaid observations, the instant petition is disposed of, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

33. Since, both the petitioner as well as private respondent have feigned ignorance regarding the working and ethics of the Department and the conduct as is expected of them and as their conduct otherwise is not befitting to that of a Public Prosecutor, we gather an impression that probably such Public Prosecutors, who are now being inducted in service, are not at all aware of the status they hold and the conduct and behaviour that is expected of them by virtue of their office alone.

34. Therefore, let all the Public Prosecutors inducted in service over the last 15 years, irrespective of their ranks as A.P.P. or P.P., undergo a refresher course designed, laying special emphasis on ethics, morality and conduct expected of a Public Prosecutor in the Himachal Pradesh Judicial Academy, Shimla. Such courses be designed by the Director, Himachal Pradesh Judicial Academy, within a period of four weeks and thereafter the Assistant Public Prosecutors/Public Prosecutors be provided training/ refresher courses on batchwise basis stretched over a period of two months.

35. Let a copy of this order be sent to the following:-

- (i) The Additional Chief Secretary(Home), to the Government of Himachal Pradesh.
- (ii) The Director, Himachal Pradesh Judicial Academy, Shimla, 16 Mile, Shimla-Mandi National Highway, District Shimla-171014.
- (iii) The Director, Prosecution, H.P., Shimla.