
(2009) 03 DEL CK 0317

In the Delhi High Court

Case No : Writ Petition (Criminal) 535 of 2005

Vishal Yadav and Another

APPELLANT

Vs

LT. Governor and Another

RESPONDENT

Date of Decision : 16-03-2009

Acts Referred:

Citation : (2010) 6 RCR(Criminal) 2998

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Sumit Kumar, for the Appellant; Mukta Gupta, Senior Standing Counsel for State, P.K. Dey and Kaushik Dey, in Crl. M.A. No. 5479/2005, for the Respondent

Judgement

S. Muralidhar, J.

Crl. M.A. 5479/2005

For the reasons stated in the application it is allowed and the complainant is permitted to address arguments in the present petition. The application is disposed of.

W.P.(CRL) 535/2005

1. This petition under Article 226 of the Constitution seeks the quashing of a letter No. F8/119/2002/HP-II/1084 dated 9th March 2005 of the Govt. of the National Capital Territory of Delhi(GNCTD) Home (Police-II) Department addressed to Ms. Mukta Gupta, Standing Counsel (Crl), GNCTD informing her that the competent authority had "now directed that all matter emanating from FIR No. 192/2002 entitled State v. Vikas Yadav which come before the Hon"ble High Court of Delhi would be conducted, prosecuted and defended by Ms. Mukta Gupta, Standing Counsel (Crl.) in the Hon"ble High Court of Delhi".

2. The background to the filing of the above petition is that the petitioners Vishal Yadav and Vikas Yadav are accused in FIR No. 83/2002 which was registered on

the basis of a complaint filed by Neelam Katara the mother of the deceased Nitish Katara u/s 364/302/201 IPC.

3. Neelam Katara filed Transfer Petition (Crl) No. 449 of 2002 in the Supreme Court for transfer of the trial of the case from the Sessions Court in Ghaziabad to the Sessions Court in Delhi. This petition was allowed by the Supreme Court by an order dated 23rd August 2002 which reads as under:

This application is an application for transfer of the case of an unfortunate mother whose son is alleged to have been killed. From the narration of facts as well the materials on record we are of the considered opinion that the atmosphere at Ghaziabad is not congenial for continuance of the criminal proceedings and the apprehension of the mother cannot be said to be unfounded. In the aforesaid circumstances, and in the interest of justice we direct, after hearing the learned Counsel for the petitioner as well as the learned Counsel appearing for the State and other respondents that the Criminal Case No. 192/2002 entitled State v. Vikas Yadav; Police Station - Kavi Nagar, Ghaziabad pending before the court of District and Sessions Judge, Ghaziabad, U.P. be transferred to the Sessions Court in Delhi.

An application which has been filed for direction to the media is withdrawn with liberty to the petitioner to move before an appropriate forum.

The Transfer Petition is accordingly disposed off.

4. By a further order dated 25th October 2002 the Supreme Court clarified that all bail applications pending before the High Court at Allahabad would transfer to the corresponding courts in Delhi.

5. Upon transfer of the case from Ghaziabad it was renumbered as Sessions Case No. 78 of 2002. Shri S.K. Saxena was appointed as Special Prosecutor by the State of U.P. for conducting trial before the Sessions Court at Delhi. It is stated that Shri Saxena also appeared on behalf of the State of UP before this Court in Crl.M (M) No. 1503/2003 and 1506/2003 seeking interim bail which was rejected by an order dated 14th October 2003.

6. It is stated that on 28th January 2004 Shri S.K. Saxena was removed as Special Prosecutor and this was challenged by Neelam Katara by filing Writ Petition (Crl) No. 25 of 2004 in the Supreme Court. The apprehension expressed by Neelam Katara was that at a stage when the trial of the sessions case was almost complete, the removal of the Special Prosecutor would affect the fair trial of the case. The Supreme Court observed that Shri Saxena had himself not challenged the impugned order. It accordingly concluded that he was perhaps not willing to continue as Special Prosecutor. In the circumstances, the Supreme Court observed that it did not wish to set aside the order dated 28th January 2004 as the case could be handled by any other able prosecutor. It was further observed by the Supreme Court as under:

The counsel for the Delhi Government submitted that as the Sessions Case is

being trial (sic tried) by the Sessions Judge at Patiala House, Special Prosecutor could be appointed by the Delhi Government. The Government of Delhi is having a panel of names, and among these one Shri K.K. Singh, senior Prosecutor is available for conducting the case as a Special Prosecutor. The counsel for the accused submitted that accused may not have any objection if Shri K.K. Singh being appointed as a Special Prosecutor. That State of Delhi fix the remuneration payable to the Special Prosecutor Shri K.K. Singh and the same shall be paid by the State of U.P. The trial is to be expedited and be completed at the earliest.

Respondent No. 3 is a unnecessary party. His name is deleted.

The writ petition is disposed of.

7. As far as the proceedings in the High Court are considered it appears that for some time it was the State of UP through its counsel which was contesting the petitions filed by the accused including CrI.M.C. No. 2159 of 2004 which was dismissed by a learned Single Judge of this Court. On 23rd August 2004 Bail Application No. 1215 of 2004 seeking interim bail was dismissed and that was contested by State of UP through its counsel.

8. Bail Application No. 2070 of 2004 filed by Vishal Yadav was contested by the State of Delhi represented by Ms. Mukta Gupta its standing counsel. That was dismissed by learned Single Judge of this Court on 4th January 2005. However on 18th March 2005 in relation to the said order the following clarification order was passed by this Court:

CrI. M.(A) No. 4066/05 in Bail Appl. No. 2070/04

Heard.

Bail Application No. 2070/04 moved by Vishal Yadav was disposed of vide an order dated 4th January, 2005. Due to mistake, in the title of the case, instead of State of U.P., State of Delhi finds mention. This mistake is directed to be rectified by mentioning State of U.P. in place of State of Delhi.

The application is disposed of.

Dasti.

9. On 3rd March 2005 Criminal Revision Petition No. 94 of 2005 filed by the Petitioners herein was heard by this Court after notice. The order passed by this Court that day in the said revision petition reads as under:

03.03.2005

Present: Mr. R.K. Jain, Sr. Adv. With Mr. Rajneesh Chopra and

Ms. Geetka Panwar for the petitioner.

Mr. Sandeep Singh for State of U.P.

Mr. V.K. Malik for State of Delhi.

Crl. R.P. No. 94/2005 & Crl. M.A.1645/2005

Mr. Malik states that State of Delhi be also impleaded as a party in this petition and Ms. Mukta Gupta has already been appointed special public prosecutor in this matter. Let a copy of that order be placed on record. Renotify on 10 March 2005.

On the next date of hearing application of the accused for examining Ms. Bharti Yadav by way of video conferencing shall be considered.

10. It appears that thereafter on 9th March 2005 the impugned letter was written to Ms. Mukta Gupta, Standing Counsel (Crl.), Govt. of NCT of Delhi by the Deputy Secretary (Home). The said letter reads as under:

No.F8/119/2002/HP-II/1084

Government of NCT of Delhi

Home (police-II) Department

5th Level, "C" Wing, Delhi-Sachivalaya, I.P.

Estate, New Delhi

Dated: 9/3/05

To,

Ms. Mukta Gupta,

Standing Counsel (Crl.)

Govt. of NCT of Delhi,

Chamber No. 422, High Court of Delhi,

New Delhi.

Sub:- Criminal Revision No. 94/05 Vishal Yadav and Ors. v. State.

Madam,

May please refer to your letter No. SC/2005/1199 dated 04.03.2005 on the subject cited above.

The Hon''ble Supreme Court of India vide its order dt. 23rd August 2003 had in transfer petition (Crl.) No. 449/2002 directed the transfer of criminal case No. 192/2002 entitled State v. Vikas Yadav from the court of District and Sessions Judge, Govt. of U.P. to the Session Court in Delhi. Sh.K.K. Singh, Addl. Public Prosecutor, from the cadre of prosecution from Delhi, was appointed as the prosecutor for conducting the matter in the Hon''ble Session Court.

The competent authority has now directed that all matter emanating from FIR No. 192/2002 entitled State v. Vikas Yadav which come before the Hon''ble High

Court of Delhi would be conducted, prosecuted and defended by Ms. Mukta Gupta, Standing counsel (Crl.) in the Hon'ble High Court of Delhi.

(V.B. SAXENA)

Deputy Secretary (Home)

On the same day Mr. Sandeep Singh appearing for the State of UP filed a reply to the Criminal Revision Petition No. 94 of 2005.

11. On 18th March 2005 the Criminal Revision Petition was dismissed as withdrawn. The appearance recorded in the order of this Court shows that for the Respondent, counsel for the State of Delhi appeared.

12. The present petition was filed by the Petitioners on 19th April 2005 challenging the impugned order dated 9th March 2005 appointing Ms. Mukta Gupta as Standing Counsel. Among the grounds raised in the petition are that, the insistence of the GNCTD to appear and prosecute the Petitioners "is obviously malafide and is in derogation of well accepted/established norms of impartiality and natural justice". It is further contended that since crimes are local in nature, the transfer of the trial to another jurisdiction does not oust the jurisdiction of the State in which the offence was committed and which is therefore entitled to prosecute the offender. It is further contended by Mr. Sumeet Verma, learned Counsel appearing for the Petitioners that notwithstanding the fact that the trial of the criminal case was transferred to the Sessions Court at Delhi, the State of UP alone was the prosecuting agency. It is contended that the order dated 26th March 2004 passed by the Supreme Court does not confer any right on the GNCTD to appoint a public prosecutor to defend the case filed by the petitioners in the High Court since in any event it was not a necessary party to the case.

13. Mr. Sumeet Verma further relies upon the interim order passed in the present petition on 20th April 2005 where it was directed by this Court that "till the next date of hearing whatever cases/proceedings would be conducted, prosecuted and defended by Ms. Mukta Gupta, standing counsel (Crl.) for the State in the High Court of Delhi in relation to FIR No. 192/2002 titled as State v. Prakash Yadav pursuant to the order dated 9.3.2005, it shall be so conducted, prosecuted and defended by her on behalf of the State of U.P. and not on behalf of the Government of NCT of Delhi."

14. Learned Counsel also refers to the fact that GNCTD has filed an appeal seeking enhancement of the sentence awarded by the trial court to the Petitioners and this also shows that the GNCTD is displaying extraordinary interest in the matter and in a manner prejudicial to the Petitioners. Reference is also made to the orders passed by the Supreme Court in SLP (Crl.) No. 5368 of 2008 (which was an SLP challenging an order dated 10th July 2008 passed by the High Court of Judicature at Allahabad in Crl. Appeal No. 4158 of 2008 filed by Vikas Yadav) in which it was observed by the Supreme Court that the GNCTD will be treated as a party Respondent in that case alone. Mr. Verma also refers to the

order dated 2nd December 2008 passed by the Division Bench of this Court in Crl. Appeal No. 910 of 2008 filed by Vikas Yadav which was subsequently challenged by the complainant Neelam Katara in the Supreme Court by way of CRLMP. No (s). 2960-2961/2009 in Special Leave to Appeal (Crl.).... of 2009.

15. Ms. Mukta Gupta appearing for the Respondent submits that the orders passed by the Supreme Court have clarified that the GNCTD was a necessary party and should be impleaded as such. She refers to the orders passed in the present petition recording the submission on behalf of the Petitioners that they would seek clarification from the Supreme Court. Reliance is placed on the judgments of the Supreme Court in Hanumant Dass Vs. Vinay Kumar and Others, and Jayendra Saraswati Swamigal @ Subramaniam Vs. State of Tamil Nadu, .

16. Supplementing the above submissions of Mr. P.K. Dey that u/s 24(1) read with Section 2(q) CrPC, the appointment of a public prosecutor has to be made in consultation with the High Court. In the instant case that would mean the High Court of Delhi. Reference is made to the provisions u/s 378(2)(b) CrPC which shows that a mandamus can be issued to the prosecutor for filing an appeal in the High Court from "an original or appellate order of an acquittal passed by any Court...". It is submitted that in the instant case the order passed by the Sessions Court in Delhi had to be appealed against only in the Delhi High Court and a direction in that regard can and has been issued by the GNCTD.

17. Having considered the submissions of learned Counsel for the parties, this Court finds no merit in any of the contentions advanced on behalf of the Petitioners. It is plain that at the stage of the order passed by the Supreme Court on 26th March 2004 in the Writ Petition (Crl.) No. 25 of 2004 a concession was made by the accused that they would not have any objection if Shri K.K. Singh, Senior Prosecutor in the panel of the GNCTD is appointed as a Special Prosecutor. The trial was completed on that basis and the Petitioners were convicted by the Sessions Court in Delhi.

18. Much is made by the learned Counsel for the Petitioners of the order dated 3rd March 2005 passed by this Court in Criminal Revision Petition No. 94 of 2005 recording the submission that Ms. Mukta Gupta had already been appointed as counsel by the GNCTD to appear in the case. It was contended that inasmuch as the impugned order appointing her was passed only on 9th March 2005 such submission could not have been made to this Court and therefore was misleading. It is further contended that the impugned letter dated 9th March 2005 shows that it was in response to a letter written by Ms. Mukta Gupta.

19. This Court is unable to appreciate the purport of the above submission for the simple reason that Ms. Mukta Gupta is in any event the Standing counsel (Crl.) for the GNCTD and has been defending the cases of the GNCTD in all criminal matters in this Court. The impugned order shows that the GNCTD only clarifies that "all matters emanating from FIR No. 192/2002 which come before this Court would be conducted, prosecuted and defended by Ms. Mukta Gupta,

Standing counsel (CrI.)." As long as the GNCTD has been impleaded as a party to the Criminal Revision Petition No. 94 of 2005 it is plain that the Standing counsel appearing for GNCTD would have to defend the said petition on behalf of the GNCTD. The impleading of the GNCTD as party in the revision petition was inevitable. The submission that Ms. Mukta Gupta had already been appointed Special Public Prosecutor was neither misleading nor prejudicial to the case of the Petitioners in any manner whatsoever.

20. The allegation in the petition that the appointment of Ms. Mukta Gupta reflected the unusual interest of the GNCTD in prosecuting the Petitioners has not been substantiated in any manner whatsoever by the Petitioners. It is a bald allegation which deserves rejection. The reliance placed by the petitioners on the interim order dated 20th April 2005 passed by this Court is really to no avail. It was obviously only a prima facie view of the matter. In view of the later order of the Supreme Court, the said interim order cannot really determine the issue.

21. As regards the GNCTD being a necessary party, the order dated 2nd December 2008 passed by the Division Bench of this Court in Criminal Appeal No. 910 of 2008 clarifies the position as under:

The Division Bench of Allahabad High Court while dismissing the appeal as not maintainable had also held that the Additional Sessions Judge, Delhi who tried the case was not acting as a Judge of State of U.P while holding the trial and was thus not subordinate to the Allahabad High Court but it continued to be subordinate to the Delhi High Court. It was also held that if while hearing the appeal High Court is to direct prosecution in respect of an offence covered by Section 195 of the Criminal Procedure Code of any person connected with the trial, in respect of the offences committed in relation to the trial, it will only be Delhi High Court which will initiate appropriate actions. The appellant has impleaded State of U.P as the respondent. Though the learned Counsel for the appellant has vehemently opposed the impleadment of Government of National Capital Territory of Delhi as a party and has referred to various orders passed from time to time by the Delhi High Court or Supreme Court in support of his contention that Government of NCT of Delhi is neither necessary nor proper party, but a perusal of the said orders, as a matter of fact, shows that in none of the orders relied upon such an observation that the Government of NCT of Delhi is not a necessary party or is not to be heard has been passed. As a matter of fact it would be expedient and in the interest of justice to hear the Government of NCT of Delhi because the trial was conducted by the Court of Sessions in Delhi.

Considering the entirety of the facts and circumstances, we are of the opinion that it will be appropriate to hear the Government of National Capital Territory also for the disposal of the present appeal.

The learned Counsel, Mr. Vikas Singh who appears on behalf of State of U.P has no objection in case the Government of National Capital Territory of Delhi is also issued the notice and is heard for the decision of this appeal.

Consequently, notices are issued to the State of U.P and Government of National Capital Territory of Delhi. Notices are accepted by Mr. Kamendra Mishra Advocate on behalf of State of U.P and by Ms. Mukta Gupta, Standing Counsel on behalf of Government of NCT of Delhi. Admit.

It is plain therefore that the GNCTD having been made a party to the appeal, Ms. Mukta Gupta was entitled to appear both as Standing Counsel for the GNCTD and further having been duly authorized in that behalf.

22. The aforementioned order dated 2nd December 2008 was no doubt challenged by the complainant Neelam Katara in the Supreme Court. Her SLP was disposed of by the Supreme Court on 2nd March 2009 by the following order:

Permission to file SLP is granted.

Heard learned Counsel for the petitioner.

Learned Counsel for the petitioner contends that the State of U.P. is unnecessary party in the case filed by the accused before the High Court and NCT of Delhi alone should have been made a party by the impugned order. The High Court was pleased to implead NCT of Delhi as party respondent before the High Court in the pending matter. The case was tried before the Additional Sessions Judge, Patiala House, New Delhi, and the appeal is preferred before the Delhi High Court and NCT of Delhi is a party. Of course Public Prosecutor appearing for the State of Delhi will assist the court in the appeal filed by the accused.

The special leave petitions are disposed of accordingly.

23. The aforementioned order of the Supreme Court lays to rest any controversy whether the GNCTD is a necessary party or not. The order of the Division Bench of this Court of 2nd December 2008 has not been upset by the Supreme Court. It has also been clarified that "Of course, Public Prosecutor appearing for the State of Delhi will assist the Court in the appeal filed by the accused."

24. In *Hanumant Dass v. Vinay Kumar*, the trial of the criminal case was transferred from the Court of the Sessions Judge, Dharamshala, Himachal Pradesh to the Court of the Sessions Judge, Gurdaspur in Punjab. Against the conviction by the latter court, the accused filed an appeal in the High Court of Punjab & Haryana which set aside the conviction and acquitted the accused. The complainant then appealed to the Supreme Court and it was contended that the High Court could have not allowed the appeal in the absence of any notice to the State of Himachal Pradesh. It was pointed out that the accused had only impleaded the State of Punjab as a party. After referring extensively to the corresponding provisions of the Code of Criminal Procedure 1898 and in particular Section 432(7) thereof which defines "appropriate Government", the Supreme Court observed as under (AIR @ p.1055):

14. According to this section the appropriate Government is the Government of the State of conviction and not the Government of the State where the offence

was committed. A somewhat similar question came up for consideration in the State of Madhya Pradesh v. Ratan Singh and Ors. [1976] Suppl. S.C.R. 552 where the respondent was convicted and sentenced to imprisonment for life by a court in the State of Madhya Pradesh. At his request he was transferred to a jail in the State of Punjab, to which State he belonged. He applied to the Government of Punjab that under the Punjab Jail Manual he is entitled to be released since he had completed more than 20 years of imprisonment. The application was sent to the Government of Madhya Pradesh, which rejected it. In a writ petition filed by him the High Court of Punjab and Haryana held that the State of Punjab was the appropriate authority to release him and directed the State of Punjab to consider the matter. This Court in appeal observed "a perusal of this provision clearly reveals that the test to determine the appropriate Government is to locate the State where the accused was convicted and sentenced and the Government of that State would be the appropriate Government within the meaning of "Section 401 of the CrPC. Thus since the prisoner in the instant case was tried, convicted and sentenced in the State of Madhya Pradesh, the State of Madhya Pradesh would be the appropriate Government to exercise the discretion for remission of the sentence u/s 401(1) of the CrPC...." That was a case based on Section 401 of the old Criminal Procedure Code, but the CrPC, 1973 has put the matter completely beyond any controversy and reiterated the provisions of Section 402(3) in Sub-section (7) of Section 432.

25. In Jayendra Saraswati Swamigal, the trial of the criminal case was transferred from Tamil Nadu to Pondicherry. The question arose whether the Government of Tamil Nadu could appoint the Public Prosecutor u/s 24 CrPC. In answering the question in negative, the Supreme Court observed as under:

The power of the State Government to appoint a Public Prosecutor and Additional Public Prosecutor would extend only for conducting any prosecution, appeal or other proceedings in the courts within the State. As per the procedure prescribed u/s 24, the State of Tamil Nadu can appoint a Public Prosecutor to conduct criminal cases in any of the court in that State. Such powers cannot be exercised by the State Government to conduct cases in any other State. Once the case is transferred as per Section 406 of the Cr.P.C. to another State, the transferor State no longer has control over the prosecution to be conducted in a court situated in a different State to which the case has been transferred. It is the prerogative of the State Government to appoint a Public Prosecutor to conduct the case which is pending in the sessions division of that State. Of course, this Court while passing order of transfer, can give an appropriate direction as to which State should appoint the Public Prosecutor to conduct that particular case. Such orders are passed having regard to the circumstances of the case and the grounds on which the transfer has been effected. This Court can certainly give directions irrespective of the provisions contained in Section 24 of the Cr.P.C. But so far as this case is concerned, nothing had been stated in the order of the transfer. The provisions contained in the Section 24 of Cr.P.C. shall prevail and it

is for the appropriate State Government within whose area the trial is conducted to appoint Public Prosecutor under Sub-sections (3) to (7) of Section 24 of the Cr.P.C. is the Government of the State to which the case has been transferred. However, we make it clear that the State of Pondicherry can appoint any counsel as Public Prosecutor having requisite qualifications as prescribed under Sub-section (8) of Section 24 of Cr.P.C. whether he is a lawyer in the State of Pondicherry or any other State. As it is a criminal case registered by the State of Tamil Nadu the expenses for conducting the trial are to be borne by the State of Tamil Nadu. The Advocate fees payable to the Public Prosecutor, Additional Public Prosecutor or Special Public Prosecutor by the State of Pondicherry shall be borne by the State of Tamil Nadu and the Home Departments of the two States may undertake consultations with each other and an appropriate decision may be taken by the concerned authorities in this regard.

26. There is accordingly no merit in the contention that the GNCTD ought not to have been made a party or that the impugned order appointing Ms. Mukta Gupta to defend the case of the GNCTD in all proceedings emanating from FIR No. 192 of 2002 is erroneous in law.

27. For all of the aforementioned reasons, there is no merit in this petition and it is dismissed as such.

28. This Court has only decided the specific contention raised by the Petitioners on the validity of the letter dated 9th March 2005 issued by the GNCTD. No observation in this order is intended to prejudice the rights and contentions of the Petitioners in the appeal filed by them before this Court which is pending before the Division Bench.