

Mukul Dalal and Others

Vs

Union of India and Others

Criminal Appeals Nos. 305, 306 and 307 of 1988

(CJI R.S. Pathak, Ranganath Misra, B.C. Ray JJ)

04.05.1988

JUDGMENT

RANGANATH MISRA, J. –

1. Special leave granted in each of the three cases.
2. A common question arising for consideration in these appeals is as to the justifiability of the appointment by the State of Special Public Prosecutors and Assistant Public Prosecutors under Sections 24 and 25 respectively of the Code of Criminal Procedure, 1973 at the cost of the private complainants.
3. In criminal appeal arising out of SLP (Cri) No. 3027 of 1986 the appellants are facing prosecution for charges of forgery and cheating before the Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Bombay. On December 4, 1979 the Government of Maharashtra appointed an Assistant Public Prosecutor for conducting the said case for the prosecution in exercise of powers under Section 25(1) of the Code of Criminal Procedure. In the connected criminal appeal [arising out of SLP (Cri) No. 3048 of 1986] the appellant is accused of an offence punishable under Section 409 read with Section 120-B and 34 of the Indian Penal Code and is facing his trial in the court of the same Metropolitan Magistrate. On August 3, 1983, the State of Maharashtra in exercise of powers under Section 24(8) of the Code of Criminal Procedure has appointed two advocates as Special Public Prosecutors for conducting the prosecution. In the other connected criminal appeal arising out of SLP (Cri) No. 703 of 1987 the appellants are being tried for offences punishable under Sections 506(ii), 337, 354, 504, 498-A, read with Sections 114 and 34 of the Indian Penal Code in the court of the same Metropolitan Magistrate, 40th court, Girgaum, Bombay. By notifications dated December 4, 1979, August 3, 1983 and July 17, 1985, the Government of Maharashtra in exercise of powers under Section 24(8) of the Code appointed two advocates as Special Public Prosecutors for conducting the prosecution. the notifications were assailed in a group of writ petitions before the Bombay High Court and Division Bench of that court by a common judgment dated July 2, 1986, rejected the writ petitions and upheld the appointments. That common judgment of the High Court is assailed in this batch of appeals. Since common questions have been raised and argued at a time, this judgment shall dispose of all the three appeals.
4. The impugned appointments have been made either in exercise of powers under Section 24 or Section 25 of the Code of Criminal Procedure of 1973. Section 24 deals with Public Prosecutors while Section 25 makes provisions for Assistant Public Prosecutors. While sub-section (1) of Section 24 enables the Central Government or the State Government to appoint a Public Prosecutor or an Additional Public Prosecutor for the purposes of High Courts, sub-section (2) makes provision

for appointment of one or more Public Prosecutors for the purposes of conducting of cases in any district or local area and sub-sections (4), (5), (6) and (7) deal with the modality of such appointments, sub-section (8) provides :

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.

Section 25 deals with the appointment of Assistant Public Prosecutors. Sub-section (1) provides :

The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

The provisions contained in these two sections in the Code of 1973 correspond to Section 492 of the old Code which dealt with the appointment of Public Prosecutors.

5. Challenge by the appellants to the notifications in question is on the ground that the Code confers a special status on the Public Prosecutor; wherever it has been considered necessary, law has prescribed the interest to be represented by the Public Prosecutor and it would not be in proper exercise of power by the State Government to make appointment of a Special Public Prosecutor to support a private transaction and provide for his remuneration from private source. The High Court referred to some decisions of the different courts supporting and opposing the view canvassed before it and came to hold :

According to us, the conduct of prosecution by a lawyer appointed and paid by the private party does not affected his capacity and ability to perform his role as a Public Prosecutor. To accept such a proposition is to invalidate all private prosecutions.

Negativating the plea advanced by the appellants, the High Court has further held :

For the reasons given above, with respect, it is not possible for us to agree that a pleader engaged by a private person is a de facto complainant and cannot be expected to be as impartial as a pleader appointed by the State to conduct public prosecution. On the other hand, we are of the view that as stated earlier, permission to engage an advocate should be given freely to the complainant. The complainant has much a right as the accused to represent his case effectively before the court.

The High Court also negated the challenge against the appointment of the Assistant Public Prosecutors under Section 25 by holding :

Hence the absence of provision such as Section 24(8) will not bar appointment of an Assistant Public Prosecutors specially to conduct a case or class of cases.

While dealing with the matter at a different place in the judgment the High Court observed :

But apart from this, we are view that guidelines or no guidelines, whenever there is a request made by a private party to engage an advocate of his choice to be paid for by him, the request should be granted as a rule. The complainant in such cases is either a victim of the offence or is related to the victim or otherwise an aggrieved person. He has a right to be heard and vindicated. As stated earlier, the right to be heard implies

a right to be effectively represented at the hearing of the case. He has therefore a right to engage an advocate of his choice. There is therefore no reason why the State should refuse him the permission to conduct the prosecution with the help of his advocate...

Appellants' counsel have challenged these conclusions of the High Court. 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. Section 2(u) of the Code defines the Public Prosecutor. Section 199(2), 225, 301(1), 301(2), 302, 308, 321, 377 and 378 are some of the provisions in the Code which confer a special position upon the Public Prosecutor. From the spirit contained in the scheme of the Criminal Procedure Code it is clear that it is the duty of the Public Prosecutor to support prosecutions initiated by the State. Trial before a Court of Session has to be conducted by the Public Prosecutor as required under Section 225 of the Code. Cases instituted on a police report are intended also to be handled by a Public Prosecutor. Cases instituted on a complaint; however, stand on a different footing and the complainant has choice of his own counsel. A set of rules known as Maharashtra Law Officers (Appointment, Conditions of Service and Remuneration) Rules, 1984 made in exercise of powers conferred by proviso to Article 309 read with Article 165 of the Constitution have been placed before us in course of the hearing. Chapter III of those Rules lays down qualifications of the Government Pleader and Public Prosecutor while Chapter IV prescribes the duties of the Public Prosecutor. Another set of rules known as the rules for the Conduct of the Legal Affairs of the Government, 1984, which appears to be administrative in character, was also placed before us. Chapter III of these Rules provides for Special Counsel and Special Public Prosecutors and Rule 22 thereof provides;

If in any case, civil or criminal, a request is made by any private party, interested in the case, for the appointment of its own advocate as a Special Counsel or Special Public Prosecutor, as the case may be, on the condition that the payment of fees of such advocate will be borne by that party, the Remembrancer of Legal Affairs may, after considering such case on merits, appoint such advocate for that particular case or cases.

Appellants' counsel challenged the validity of Rule 22 contended that such a rule is contrary to the spirit of the Code of Criminal Procedure and this rule affects the special status conferred on the Public Prosecutor and would cause prejudice to that public office.

6. The office of the Public Prosecutors is a public one. A learned Single Judge of the Delhi High Court in *K. C. Sud v. S. G. Gudimani* [(1981) 2 Cri LJ 1779 (Del HC)] rightly held the Public Prosecutor, the Additional Public Prosecutor and the Assistant Public Prosecutor hold an office. The learned Judge said :

It is public office of trust and therefore like any other public office, is susceptible to misuse and corruption if not properly insulated. 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. When advocates are recruited to these offices, they have certain professional and official obligations and privileges. Some State Governments have appropriately made it an express term of their appointment that they shall not accept any brief in criminal matters and shall not even in Civil matters appear in any case in which the interests of the State appear to be involved.

Similar observations were by another learned single Judge in the case of P. G. Narayanankutty v. State of Kerala [(1982) 2 Cri LJ 2085 (Ker HC)]. In this case, Bhat, J. of the Kerala High court pointed out;

Special Public Prosecutor... cannot be appointed with a view to secure convictions at all costs. Special Public Prosecutor could be appointed only when public interest demands it and not to vindicate the grievances of a private person, such as close relation of the deceased. In order that he discharges his duties properly, he should look to the State for remuneration, his services; if he looks to a private party for his remuneration, his capacity and ability to perform his role as Public Prosecutor properly will be endangered. Government cannot appoint Special Public Prosecutor on such terms, abdicating their financial responsibility or directing him to receive his remuneration from any private individual....

7. Some other High Courts have taken a different view of the matter. A Division Bench of the Gujarat High Court in Dilipbhai Chhotalal Dave v. State of Gujarat [(1971) 12 Guj LR 999] considered a case of this type where the Public Prosecutor and the Assistant Public Prosecutor were designated as Special Public Prosecutors for conducting a particular case. It was found by the court that remuneration of the advocates had been left to be fixed by agreement between them and the Central Bank of India for whom they were to appeal was to pay them directly. The High Court held :

[T]hat though the Public Prosecutor would be in charge of and is required to conduct the prosecution before the Court of Sessions, the control of proceedings before the court is ultimately in the hand of the presiding judge. It would not be unreasonable to assume that if there is unnecessary prolongation of the trial and consequential harassment of the accused at the hands of the Public Prosecutor or unfair handling of the prosecution case by the prosecutor, the court would always intervene and protect the accused and ensure a fair trial.

The Court further found that :

Rule 38 of the Gujarat Law Officers (Conditions of Service) Rules, 1965 made provision that if a Special Counsel was appointed, the terms and conditions of his employment would be such a may be determined by the State Government by an order in writing. It was open to the State Government to provide for fees of the Special Counsel appointed by it to be paid by virtue of an agreement directly arrived at between the Special Counsel and the complainant...

Some other cases taking the same view as the Gujarat High Court were also placed before us in course of the hearing.

8. The pattern that prevails in most of the States is that there is a Remembrancer of Legal Affairs who inter alia looks after the cases instituted by the State. At the district level such interest of the State is looked after by the District Magistrate. There may be instances where a case instituted on a private complaint is really a public cause. In such a case the prosecution though initiated by a private individual is really one which should be taken over by the State. If the complainant thereof approaches the State for assistance in a case of that type by appointing a Special Public Prosecutor or an Assistant Public Prosecutor to support the prosecution it would be for the Legal

Remembrancer of the District Magistrate to favourably consider such a request and it would ordinarily be expected that government would appoint a Special Public Prosecutor to take charge of the prosecution. There may also be cases of private complainants where for various other reasons it would be appropriate for the State to support the prosecution by appointing a Public Prosecutor or an Special Public Prosecutor to look after the case. Instances of this type would be cases where the victims are of economically backward classes who are not in a position to vindicate their rights through court without the assistance of the State. Here again the Public Prosecutor's services may be placed at the disposal of the complainant. It is a well known position in Criminal Jurisprudence that the State is the prosecutor and that is why the primary position is assigned to the Public Prosecutor and where the Public Prosecutor appears, the request of the complainant or the victim to be represented by any other counsel is subject to permission of the court.

9. Two questions have now to be dealt with - whether as a rule whenever there is a request made by a private complainant for the appointment of Special Public Prosecutor, should the same be accepted and whether such Special Public Prosecutor should be paid by the private party availing his services. In most of the States, as we have already observed, the Remembrancer of legal Affairs looks after the State litigations. He is a responsible officer and normally with judicial experience. When an application for the services of Special Public Prosecutor or an Assistant Public Prosecutor is made in a given case the power would be vested in him to examine the facts and take decision as to whether the case merits the appointment of a special Public Prosecutor or an Assistant Public Prosecutor. It would not be appropriate to accept the position that whenever an application is made it should be allowed and a Special Public Prosecutor should be appointed; this would be contrary to the spirit of the scheme of the Code. There may be cases where a power complainant may have begun a proceeding to victimize his opponent. If in such a case the State concedes to the request for appointment of a Special Public Prosecutor there will be travesty of justice. Without screening on the basis of guidelines prescribed or to be prescribed, the services of a Special Public Prosecutor should not be made available to a private complainant. The primacy given to the Public Prosecutor under the scheme of the Code has a social purpose and the same would be lost if the procedure adopted by Rule 22 of Maharashtra Rules referred to above is accepted or what the High Court has indicated is adopted. We are inclined to observe that the request for appointment of a Special Public Prosecutor should be properly examined by the Remembrancer of Legal Affairs and only when he is satisfied that the case deserves the support of a Public Prosecutor or a Special Public Prosecutor that such a person should be appointed to be in charge of the case.

10. The next question would be whether the Special Public Prosecutor should be permitted to be paid by the private complainant. There is considerable force in what has been stated by the Kerala High Court in the case we have referred to above. There may be certain cases where exception may be made, such as where the prosecutor is a public sector undertaking, a bank whether nationalised or not, an educational institution and the like. The rate of fees should be prescribed and the private complainant should be called upon to deposit the fees either with the Remembrancer of Legal Affairs or a prescribed State agency from where the fees would be drawn by the Special Public Prosecutor. To leave the private complainant to pay to the Special Public Prosecute would indeed not be appropriate. We would make it clear that we do not support the conclusion of the High Court that as a rule whenever there is request of appointment of Special Public Prosecutor or an Assistant Public Prosecutor, the same should be accepted. The Remembrancer of Legal Affairs should scrutinise every request, keeping a prescribed guideline in view and decide in which cases such request should be accepted, keeping the facts of such case in view. Ordinarily the special Public Prosecutor should be paid out of the State funds even when he appears in support of a private complainant but there may be some special case where the Special Public Prosecutor's remuneration

may be collected from the private source. In such cases the fees should either be deposited in advance or paid to a prescribed State agency from where the Special Public Prosecutor could collect the same. In view of these conclusions and our disagreeing with the view of the High Court, the appeals shall stand allowed. Rule 22 of the Maharashtra Rules, referred to above, in our view is bad and the State Government should properly modify the same keeping our conclusions in view. The Remembrancer of legal Affairs of the Maharashtra Government will now decide as to whether in the three cases referred to here, the services of a Special Public Prosecutor, a Public Prosecutor or an Assistant Public Prosecutor should be provided and in case he comes to the conclusion that such provision should be made, he should decide as to whether the State administration should pay for such Public Prosecutor or the private complainant should bear the same. There would be no order as to costs.

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