

SUPREME COURT OF INDIA

Jayendra Saraswati Swamigal @ Subramaniam

Vs.

State of Tamil Nadu

Crl.A.No.2008

(K.G. Balakrishnan CJI., R.V. Raveendran and Dr. Mukundakam Sharma JJ.)

22.07.2008

JUDGMENT

K.G. Balakrishnan, CJI.

1. Leave granted.
2. The appellant herein is one of the accused in a Crime registered by Vishnu Kanchi Police Station at Tamil Nadu. The police after investigation filed final report on 21-1-2005 and the case was committed to the Principal Sessions Judge- Chinglepet and was registered as Session Case No. 197/05. The appellant then moved this Court under Section 406 of *Code of Criminal Procedure, 1973* (hereinafter referred to as Cr.P.C.) seeking transfer of the case to any other State. The appellant alleged in the Transfer Petition that he was being unnecessarily harassed by the State of Tamil Nadu and that he would not get a fair trial. This Court in *SRI JAYENDRA SARASWATHI SWAMIGAL (II), T.N. v. STATE OF TAMIL NADU*¹ considered the matter in detail and reached the following conclusion in paragraph 24 of the judgment:

"Taking into consideration the entire facts and circumstances of the case and the material on record, we have no hesitation in holding that the petitioner and other co-accused of the case have a reasonable apprehension that they will not get justice in the State of Tamil Nadu. We would like to clarify here that we are casting no reflection on the district judiciary in the State of Tamil Nadu. But it is the actions of the prosecuting agency and the State machinery, which are responsible for creating a reasonable apprehension in the mind of the petitioner and other co-accused that they will not get justice if the trial is held in any place inside the State of Tamil Nadu. We are, therefore, of the opinion that the interest of justice requires that the trial may be transferred to a place outside the State of Tamil Nadu."

Thus, the Sessions Case No. 197/2005, pending before the Principal Sessions Judge, Chinglepet, was transferred to the court of Principal District and Sessions Judge, Pondicherry and was numbered as Sessions Case 94/2005.

3. The Home Department of the State of Tamil Nadu on 25-11-2005 appointed one Special Public Prosecutor and four Additional Special Public Prosecutors for conducting the trial of the Sessions case pending before the Principal District and Sessions Judge, Pondicherry. The appellant herein filed a petition before the Sessions court challenging the appointment of the Public Prosecutors by the State of Tamil Nadu and contended that the Special Public Prosecutor appointed by State of Tamil Nadu has no right to conduct the prosecution of the Sessions case pending before the Pondicherry court, outside the State of Tamil Nadu. The Principal Session Judge, Pondicherry, by an order dated 25-1-2006, held that under Section 24 of the Cr.P.C. the State of Tamil Nadu has the power to appoint the Special Public Prosecutor for conducting the trial of the case and the State had not lost its right to appoint the Public Prosecutor, merely on account of transfer of the case to the Sessions court at Pondicherry. The court also noticed the fact that this Court, while transferring the Sessions case at Pondicherry, had not specifically directed that the State of Tamil Nadu shall not appoint a Public Prosecutor to conduct the case.

4. The appellant preferred a Revision Petition challenging the order passed by the Principal District and Sessions Judge, Pondicherry. The High Court of Madras confirmed the decision of the Sessions court and held that the offence had been committed within the State of Tamil Nadu, the investigation was done by the Tamil Nadu police and the committal proceedings had also taken place in the court at Tamil Nadu and hence the Government of Tamil Nadu had the domain over that sessions case and unless this Court, considering the special circumstances, directs in a particular case, appointment of a Special Public Prosecutor by the State to which the case has been transferred in the interest of justice, the transferee State cannot normally venture to appoint any Special Public Prosecutor to handle the case which it received as per the orders of this Court. The High Court was also of the view that it would be unjust to direct the transferee State Government to open the purse strings to meet out the expenditure for the appointment of a Special Public Prosecutor.

5. The appellant has challenged the order passed by the Sessions court as well as the High Court by which the Special Public Prosecutor and Additional Special Public Prosecutors were appointed to conduct the trial of the case.

6. We heard the counsel for the appellant as well as counsel for the State of Tamil Nadu. The counsel for the appellant contended that the appointment of the Public Prosecutor is to be made by the State as per the procedure prescribed under Section 24 of Cr.P.C. It is pointed out that the Government of Pondicherry has total authority to appoint a Public Prosecutor or Additional Prosecutor or a Special Public Prosecutor to conduct a criminal case pending before any of the Sessions divisions of the State of Pondicherry which was formerly a Union Territory, now being a separate State and the Tamil Nadu Government has no right to appoint any prosecutor - either a Public Prosecutor or a Special Public Prosecutor - to conduct a trial of a case pending before the Principal Sessions Judge, Pondicherry. The counsel for the respondent on the other hand contended that this court while ordering the case transfer to the State of Pondicherry had not specifically directed that trial should be conducted by the prosecutor appointed by the Government of Pondicherry and therefore,

State of Tamil Nadu has got the authority to appoint a Public Prosecutor to conduct the trial of such a case. It was argued that the incident had taken place in the State of Tamil Nadu and that being an offence committed against the State of Tamil Nadu that State alone could appoint the Public Prosecutor to conduct the prosecution of the case unless specifically otherwise directed by this Court while transferring the case under Section 406 of the Cr.P.C.

7. For the purpose of understanding the scheme of appointment of a Public Prosecutor to conduct the trial it is necessary to look into various provisions of Chapter II of the Cr. P.C. Section 6 of Cr.P.C. prescribes that in every State there shall be following classes of criminal courts: Courts of Sessions, Judicial Magistrate of the First Class (and in any Metropolitan area, Metropolitan Magistrate), the Judicial Magistrate of the second class and Executive Magistrate. Section 7(1) prescribes that every State shall have a session's division or shall consist of several sessions' divisions and every session's division shall, for the purposes of the Code, be a district or consist of districts. It also prescribes that every metropolitan area shall be a separate session's division and district. Sub-section (2) provides that the State may alter the limits of such division and districts after consultation with the High Court. Section 9 requires that the State Government shall establish a court of sessions for every session's division, and every court of sessions shall be presided over by a Judge to be appointed by the High Court. Section 10 deals with the constitution of the Assistant Sessions Judge and Section 11 deals with the constitution of the court of Judicial Magistrates. Section 12 deals with the appointment of Chief Judicial Magistrate and Additional Chief Judicial Magistrate. Sections 16, 17 and 18 deal with the constitution of the various Metropolitan Magistrates' courts and Section 20 deals with appointment of Executive Magistrate. Section 24 deals with the appointment of Public Prosecutors. "Public Prosecutor" has been defined under Section 2(u) of the Cr.P.C:-

"Public Prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor."

Section 24 (1) deals with the appointment of Public Prosecutor or Additional Public Prosecutor for conducting any prosecution, appeal or other proceedings on behalf of the Central Government or State Government in the High Court. Sub-section (3) of Section 24 requires that for every district, the State Government shall appoint a Public Prosecutor and one or more Additional Public Prosecutors. Sub-sections (3) to (7) deal with appointment of Public Prosecutor, Additional Public Prosecutor for the district. The power of appointment is given to the State Government and such appointment should be from a panel of names prepared by the District Magistrate in consultation with the Sessions Judge. Sub-section (7) of Section 24 provides that a person shall be eligible to be appointed as a Public Prosecutor or as 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. A conjoint reading of all these provisions would clearly show that the State Government has the power of appointment of Public Prosecutor or Additional Public Prosecutor for each district or court of Sessions in the sessions division in the State to conduct any prosecution, appeal or other proceedings pending before the

courts in that State. 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 under Section 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 affected. 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.

8. Sub-section (8) of Section 24 of Cr.P.C. is a special provision regarding the appointment of a Special Prosecutor. This power can be exercised by the Central Government and the State Government for the purpose of any case or class of cases, and a person who has been in practice as an advocate for not less than ten years may be appointed as a Special Public Prosecutor. These powers are also to be exercised by the State Government of the transferee court where the sessions case is pending. Of course, the Transferee State can appoint any person having qualification prescribed under sub-section (8) of Section 24 of the Cr.P.C.

9. The purpose of transfer of the criminal case from one State to another is to ensure fair trial to the accused. In this case, the main ground on which the transfer of the sessions case was ordered from the Sessions court of Chinglepet in Tamil Nadu to the Principal District and Sessions Judge, Pondicherry, was that the action of the prosecution agency had created a reasonable apprehension in the mind of the accused-appellant that he would not get justice if the trial was held in the State of Tamil Nadu. The Public Prosecutor plays a key role during trial of a Sessions case. Though the Sessions Judge has got a supervising control over the entire trial of the case, it is the Public Prosecutor who decides who are the witnesses to be examined on the side of the prosecution and which witness is to be given up, or which witness is to be recalled for further examination. For proper conduct of a criminal case the Public Prosecutor plays a vital role. It may also be noticed herein that under Section 225 of the Cr.P.C. during every trial before the court of Sessions, the prosecution shall be conducted by the Public Prosecutor and as regards withdrawal also, the Public Prosecutor in charge of the case has to make the application for withdrawal of prosecution as per Section 321 of

the Cr.P.C. In case of acquittal of the accused the State Government may direct the Public Prosecutor to file an appeal.

10. As is evident from various provisions of the Cr.P.C., the State Government of Tamil Nadu can only appoint a Public Prosecutor or an Additional Public Prosecutor or a Special Public Prosecutor under Section 24 of the Cr.P.C. to conduct the prosecution and appeal, or other proceeding in any criminal courts in respect of any case pending before the courts of Tamil Nadu and in respect of any case pending before the Courts at Pondicherry, the State Government of Pondicherry is the appropriate Government to appoint Public Prosecutor, Additional Public Prosecutor or Special Public Prosecutor.

11. 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.

12. We set aside the impugned order passed by the High Court and direct that the State of Pondicherry may continue with the prosecution of the case in accordance with the law and the Public Prosecutor or Special Public Prosecutor may be appointed by the State of Pondicherry to conduct the criminal proceedings in respect of Sessions Case No. 94 of 2005 pending before Principal & Sessions Judge of Pondicherry.

13. The Appeal is allowed to the extent indicated above.

¹(2005) 8 SCC 771