ANDHRA PRADESH HIGH COURT

Medichetty Ramakistiah

Vs.

State of A.P

Referred Trial No. 2 of 1959; Criminal Appeals Nos. 691 and 692 of 1958 and Nos. 17 and 119 of 1959

(Bhimasankaram and Basi Reddy, JJ.)

19.03.1959

JUDGMENT

Bhimasankaram, J.

1. These appeals arise out of Sessions Case No. 11/8 of 1958 on the file of the Sessions Judge, Khammam division. As two of the appellants have been sentenced to death, the sentences have been submitted to us by that Court for confirmation. We have not heard these appeals on the merits because, in our opinion, an objection taken by the learned counsel for the appellants as to the manner in which the trial was conducted must prevail and there should be a retrial of the case.

2. We may state however that our decision to direct a re-trial has not been reached without reluctance. A re-trial does not only involve fresh expenditure of public time and money; it also occasions considerable hardship to the accused by prolonging the period of uncertainty as to their fate and entailing, at least in cases where they retain counsel of their own, extra expenditure of money for them too. There will be, besides, considerable inconvenience caused to the witnesses, an inconvenience so graphically described by Bose, J., in *Sangram Singh v. Election Tribunal*[1], Fully aware as we are of these undesirable consequences, we need hardly state that we are ordering a re-trial of the case because we are convinced that it is the only course to adopt in the interest of justice.

3. Mr. Chinnappa Reddy's objection shortly stated is that contrary to the relevant provisions of the Code of Criminal Procedure, the Public Prosecutor abdicated his duty to conduct the prosecution and that a pleader, privately briefed and instructed, took complete charge of the case and effectively determined its course and that, as a consequence, there was grave prejudice to the appellants. It is frankly conceded by him that no objection to the procedure adopted was taken by his clients in the trial Court.

4. Before we take up the question of prejudice, we shall consider what the requirements of the Code are in regard to this matter.

[1] 1955 SCJ 431 at p. 439 : (AIR 1955 SC 425 at p. 432)

5. Under Section 270, Criminal Procedure Code, "in every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor", who is defined in Section 4(1)(t) of the Code. According to that part of the definition which is relevant to our purpose, he is "only person appointed under Section 492 and includes any person acting under the directions of a Public Prosecutor". Section 492, Criminal Procedure Code, empowers the State Government to appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors. It is also necessary to refer to Section 493 of the Code which is in these terms :

> "The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal; and, if any private person instructs a pleader to prosecute in any court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein under his directions."

The last section, in our opinion, while it does not interfere with the generally recognized right of a counsel to depute another professional gentleman with instructions to plead and act in a case of which he is in charge, provides for the special case where a pleader is appointed by a private party. Such pleader, it says, may act therein, subject to the superintendence and control of the Public Prosecutor.

The mere fact therefore that a pleader privately instructed has acted for the prosecution in a Sessions Case does not involve the violation of Section 270 if the conduct of the prosecution could be said to have been in the hands of the Public Prosecutor. Now what is the meaning of the words "conduct the prosecution" and how is it to be distinguished from what is meant by 'act therein' ? Is the word 'act' in the section used in contradistinction to the word 'plead' earlier used? At the first blush one is apt to think that the Legislature used the words 'plead' and 'act' in their technical connotation. We are, however, persuaded after careful consideration that the words are not so used. In *Vaz v. Emperor*[2], Reilly, J., of the Madras High Court pointed out that the word 'act' is not to be understood in the technical sense as meaning something distinct and different from the word 'plead'. To quote the exact words of the head-note in that case :

> "The word 'act' in the end of Section 493, Criminal Procedure Code, does not mean something other than examining or cross-examining witnesses or addressing the court and is not used in any technical sense in distinction from the words 'appear and plead' in the opening part of the section."

It seems to us that having regard to the object and purpose underlying the section and understood with reference to the word 'acting' used in the definition of 'Public Prosecutor', the learned Judge's interpretation is right. A person "acting under the directions of the Public Prosecutor" may, in our opinion, do everything that a pleader may do in any criminal case. He can appear, plead and act he can examine witnesses, raise and answer objections, and address arguments. So, when Section 493 authorizes a privately engaged pleader to act in the case under the directions of the Public

[2] 1930 Mad WN 769

Prosecutor, he may do everything in the case provided that it is done under the control and

direction of the Public Prosecutor.

6. Our attention has been drawn in this connection to the decision of our learned brethren Krishna Rao and Sanjeeva Row Nayudu, JJ. in *In re Bhupalli Malbah*[3], In that case, it was urged on behalf of the accused that the counsel for the complainant had, at the trial, interrupted the cross-examination of the prosecution witnesses by the accused frequently and unfairly so as to nullify the very object of cross-examination and that the procedure adopted by the Sessions Court had resulted in irreparable prejudice to the accused. Sanjeevarao Napidu, J., who wrote the leading judgment observed "that the procedure followed by the learned Sessions Judge in allowing the prosecution to be conducted by a counsel engaged and briefed by the complainant in the case and not by the Public Prosecutor is in violation of the express and mandatory provisions of the Code contained in Section 270. The learned Judge referred to Sections 492 and 493 of the Criminal Procedure Code also and proceeded to remark :

> "It is clear from these sections that the pleader engaged by the private persons cannot plead although he can act under the directions of the Public Prosecutor."

The learned Judge then referred to the definition of "Public Prosecutor" in Section 4(1)(t) and went on to say :

> "This clause has to be read with Section 493, Criminal Procedure Code, which leads us to the inevitable conclusion that any person engaged and briefed by a private person in the case, to instruct the Public Prosecutor can only so instruct, and act under the directions of the Public Prosecutor and in such a case the prosecution shall be conducted by the Public Prosecutor himself".

There is, therefore, no substance in the contention that Section 4(1)(t) enables the Public Prosecutor to abdicate his functions and allow a person briefed, by a private party interested in the result of the case, to take over charge of the case and conduct the prosecution. If such a contention were to be accepted we can even say that a Public Prosecutor can engage even an incompetent and unqualified person to conduct the cases by merely giving him directions. A situation so absurd as this calls for no comment, We wish to impress on all Courts of Session that it is the duty or the Public Prosecutors of the district appointed under Section 492, Criminal Procedure Code, to conduct the prosecutions in the Courts of Session. If such a Public Prosecutor is disabled or sick and is unable to carry on his functions, it would be his plain duty to obtain the necessary orders of the District Magistrate under Section 492(2), Criminal Procedure Code, to appoint a suitable person to act as Public Prosecutor for the purpose of the case in question. We would like to make it very clear that it is extremely undesirable and quite improper that a Public Prosecutor should be allowed to sit back, handing over the conduct of the case to a counsel, however eminent he may be, briefed by the complainant in the case."

7. Krishna Rao, J., who concurred in the conclusion, made the following observations

[3] R. T. No. 40 of 1958 : AIR 1959 And Pra 477

upon this aspect of the case :

> "On the general question whether a complainant's counsel may be allowed to conduct the

> prosecution under the Public Prosecutor's directions, I think that no exception can be taken to it under the provisions of the Criminal Procedure Code."

He referred then to the decision of Reilly, J., in 1930 Mad WN 769 and the decision of Shinde, J., in *Badrinarayan v. State*[4], Then the learned Judge remarked :

> "I do not think that any legal principle or purpose of criminal administration is involved in excluding a counsel, merely on the ground that the complainant has briefed him, if he conforms to the normal standards of advocacy. But on practical considerations, obviously, the office of Public Prosecutor is not a sinecure appointment and it is an undesirable practice to allow him unless it be on grounds of personal inconvenience or other necessity to get his duties performed by a proxy, whenever a private person engages a pleader for that purpose."

Both the learned Judges were of opinion that apart from the above objection which they thus dealt with, there was also in the case before them another ground for directing a re-trial. The dicta above-quoted cannot be treated as the Ratio Decidendi in view of the fact that the learned Judges do not speak in one voice. Sanjeeva Rao Nayudu, J., in our opinion, has not kept the distinction in mind between the conduct of a case and the acting therein under another's directions. The learned Judge's observation that the pleader briefed by a private person cannot plead although he can act seems to us, with due deference, to be erroneous, as we are in agreement with the interpretation put upon Section 493 by Reilly, J. As observed in *Bisheshar v. Rex*[5], "the rights of a complainant are only subordinate to the rights of the Crown" and to use the words of Reilly, J., in the case already cited

> "an advocate engaged by the complainant when desired by the Public Prosecutor to address the Magistrate for the prosecution, is entitled to do so." The fact that Reilly, J., was dealing with a case before a Magistrate does not for the present purposes make any difference because he was interpreting Section 493 and that section governs cases before Magistrates as well as before Courts of Session.

8. We desire to add that the view of Krishna Rao, J., that there is no statutory interdiction against a complainant's counsel acting under the Public Prosecutor's directions, appears to us to be correct. However, the learned Judge's observation :

> "On the general question whether a complainant's counsel may be allowed to conduct the prosecution under the Public Prosecutor's directions, I think that no exception can be taken to it under the provisions of the Criminal Procedure Code", has to be understood only to mean that the complainant's counsel shall

[4] AIR 1951 Mad Bha 84

[5] AIR 1949 All 213 at p. 214

> function under the directions of the Public Prosecutor but the conduct of the prosecution shall be in the hands of the Public Prosecutor, as enjoined by Section 493.

9. But what exactly does the word 'conduct' import ? It conveys the idea of leading and guiding; that is to say, the person who conducts the prosecution determines all important questions of policy involved in the course of the trial and the attitude to be adopted by the prosecution towards material objections raised or demands made by the accused with respect to the evidence. So long, therefore, as the Public Prosecutor leads and guides, in the above sense, the pleader for the private party, no objection to such a procedure could be entertained. But if in a particular case it happens that the very conduct of the prosecution is completely, left in the hands of such a pleader, then the provisions of the Code must be held to have been violated.

10. To sum up, the conduct of all prosecutions before a Court of Session shall be in the hands of a Public Prosecutor appointed under Section 492 subject to his power to instruct a duly qualified person acting under his directions, and where either before a Magistrate or before a Court of Session, a pleader is instructed by a private individual to prosecute any person in a case before any court, the pleader so instructed may act in that case subject to the over-all supervision of the Public Prosecutor. Such a pleader can conduct the examination, cross-examination and re-examination of witnesses as also address arguments to the court. These provisions do not, however, authorize the abdication of his functions by the Public Prosecutor; he should continue to be in charge of the case and to issue directions on all important matters. These provisions are clearly conceived in the public interest as well as in the interest of the accused because the position of the Public Prosecutor is it must be borne in mind, unlike that of any advocate appearing for a private party. It is well-recognized to use the words of Crompton, J., in *R. v. Puddick*[6], Public Prosecutors "should regard themselves rather as Ministers of Justice assisting in its administration than as advocates an observation which was adopted by the Court of Criminal Appeal in *R. v. Banks*[7], 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 over-all 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. 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,

[6] (1865) 4 F and F 497 at p. 499
[7] 1916-2 KB 621

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.

11. The question then in the present case is whether the circumstances indicate that the Public Prosecutor effaced himself and gave up his charge of the case to Mr. Subba Rao, who appeared for a private party.

12. Now, it is common ground that at the trial before the Sessions Judge, the Public Prosecutor did not examine the most important witnesses for the prosecution; nor did he address arguments upon the case. Mr. Subba Rao who was instructed by a private party did both. But that was not all. A demand made on behalf of the accused for the examination of certain persons whose names were mentioned in the charge-sheet as having been present at the time of the offence and who had even been served with summonses-as witnesses for the prosecution, was turned down by the court at the instance of that pleader. Further, certain objections raised by the accused to the order in which the most important witnesses for the prosecution were examined, were met by the same pleader and overruled by the Courts; as a result, two out of four such principal witnesses were examined after an interval of twenty days from the date of the examination of the other two. It was the same pleader again who raised objections successfully to certain questions sought to be put by counsel for the accused during the cross-examination of the 10th witness for the prosecution.

13. After a careful consideration of the various facts put before us, we have reached the conclusion that Mr. Subbarao not; only did the case for the Public Prosecutor but be determined, alone and without any restraint, the course which the prosecution pursued every time a choice was presented between two alternative courses. The Public Prosecutor on all such occasions would seem to have not taken any part; in truth he did not conduct the prosecution. It is no wonder therefore that no accommodation was made to the point of view urged on behalf of the accused. The trial involved a large number of accused and according to the prosecution there was quite a good number of persons available who could give evidence as to the occurrence. A case such as this calls for more than the usual, vigilance on the part of the prosecution in the exercise of its duty to be fair.

14. When a private prosecutor is in complete charge, assurance will be lacking that even material witnesses, the effect of whose testimony may be against the case for the prosecution, are likely to be called. In the present case, the complaint is made that as many as nine witnesses referred to in the charge-sheet have been withheld although all of them had been served with summonses and many of them were attending the court during the trial.

15. The result therefore is that in our opinion the irregularity in the conduct of the trial has caused prejudice to the accused and has occasioned a failure of justice. The convictions and sentences are therefore set aside and the appellants will be re-tried on charges properly framed. The appellants will be kept in remand pending the trial. The accused who have been acquitted by the Sessions' Judge will not be tried again. The appeals are accordingly allowed with the above direction. The case will go on the file of the Sessions Court, Warangal.

16. Before parting with this case, we should like to impress upon all Public Prosecutors that they are the representatives of the State and their office is one of trust and responsibility. That being so, they should do nothing to lower the dignity of the office by effacing themselves or by being content to play second fiddle in the trial of Sessions Cases.
Re-trial ordered.