

SHIV KUMAR
v
HUKAM CHAND AND ANR.

A

AUGUST 30, 1999

[S.P. KURDUKAR, K.T. THOMAS AND N. SANTOSH HEGDE, JJ.]

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Code of Criminal Procedure, 1973—Sections 225, 301 and 302—Prosecution by private pleaders—Whether permissible—Appellant applied for permission to his Advocate to conduct prosecution of the case—Consent of Public Prosecutor obtained—Held, private pleaders cannot conduct prosecution except before a Magistrate even with the consent of the Public Prosecutor.

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Code of Criminal Procedure, 1973—Sections 24 and 225—Public Prosecutor—Role of.

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The Appellant married his sister to son of respondent no. 1. Appellant's sister died of burn injuries four months after the marriage and on appellant's complaint, a case was registered against respondent no. 1 under Sections 302 and 120-B I.P.C. After the completion of the investigation, the police filed a charge sheet against respondent no. 1 for commission of offence under Section 304-B of the I.P.C.

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During the trial, appellant applied to the Sessions Court for allowing his Advocate to conduct the prosecution of the case under the directions of the Public Prosecutor. The said application was also endorsed by the Public Prosecutor.

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The Sessions Court allowed the application of the appellant. The revision filed by respondent no.1 before the High Court was allowed and order of the Sessions Court was set aside. Hence, the appellant filed the present appeal.

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Dismissing the appeal, the Court

HELD : 1.1. From the scheme of the Code of Criminal Procedure, 1973 the legislative intention is manifestly clear that prosecution in a sessions court cannot be conducted by any one other than the Public Prosecutor.

[86-E] H

A 1.2. 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 of Criminal Procedure a dead letter. [87-A-B]

B

C 2.1. 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 conducted 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

D 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. 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. [86-F-G]

E 2.2. 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. [86-H]

F *Queen-Empress v. Durga*, ILR (1894) All. 84; *Medichetty Ramakistiah & Ors. v. The State of Andhra Pradesh*, AIR (1959) AP 659 and *In re: Bhupalli Malliah & Ors.*, AIR (1959) AP 477, relied on.

G 3. In the Magistrate's court anybody (except a police officer below the rank of Inspector) can conduct prosecution, if the Magistrate permits him to do so. Once the permission is granted the person concerned can appoint any counsel to conduct the prosecution on his behalf in the Magistrate's court. [85-F]

H CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1048 of 1998.

From the Judgment and Order dated 28.11.96 of the Punjab and Haryana High Court in Criminal Revision. No. 739 of 1996. A

B.S. Mor, M.S. Dahiya and Ms. Kusum Singh for the Appellant.

C.S. Ashri and Mahabir Singh for the Respondents.

The Judgment of the Court was delivered by B

THOMAS, J. It is as well for the protection of accused persons in sessions trials (in India) that provision is made to have the case against him prosecuted only by a Public Prosecutor and not by any counsel engaged by the aggrieved private party. Fairness to the accused who faces prosecution is the *raison d'être* of the legislative insistence on that score. C

In this case, appellant is aggrieved because a counsel engaged by him was not allowed by the High Court to conduct prosecution in spite of obtaining a consent from the Public Prosecutor concerned. First respondent was the accused in the sessions trial wherein appellant wanted his counsel's active role to be played. Appellant and respondent are advocates practicing at the same station. The grievance of the appellant developed in the following fact situation: D

Appellant is the brother of five sisters, and the youngest among them, Suman, had secured creditable academic laurels. She was given in marriage to Dr. Dinesh Kumar Gupta (the son of the respondent). But about 4 months after her marriage she met with a tragic death by burns. On a complaint lodged by the appellant, FIR under Section 302 and 120-B of the Indian Penal Code (IPC) was registered by the local police against the respondent. But after completion of the investigation a charge-sheet was laid against him for the offence under Section 304-B of the Indian Penal Code. E F

Appellant, on his part, engaged Shri R.C. Gugnani, advocate, to appear for him in the Sessions Court during trial of the case. On 1.7.1996 when appellant was to be examined as a witness for prosecution, Shri R.C. Gugnani, advocate ventured to conduct the chief examination of that witness. It was objected to by the counsel for the accused on the premise that a private counsel cannot conduct prosecution in a sessions trial. Appellant then moved an application on the same day, the relevant portion of which reads thus: G

“That the Public Prosecutor has no objection if the case is conducted by Shri R.C. Gugnani, advocate. That as per the prevailing practice H

A being followed by this Hon'ble Court and as per provisions of Section 301(2) Cr.P.C. my counsel has a right to conduct the case under the directions of the Public Prosecutor. It is, therefore, prayed that in view of the facts stated above, necessary permission may please be given to the applicant for conducting the case under the directions of the Public Prosecutor."

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It seems, the Public Prosecutor in the trial Court endorsed the said application. The trial Court passed an order thereon, the material portion of which is the following :

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"I accept the application and allow Shri R.C. Gugnani, advocate of the complainant to conduct under the supervision, guidance and control of the public prosecutor, while conducting the same case and the public prosecutor shall retain with himself the control over the proceedings."

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Accused was not prepared to have his case prosecuted by the complainant's counsel and hence he approached the High Court in revision. The impugned order of the High Court was passed by a Single Judge. The operative portion of the said order reads thus:

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"I allow this revision and direct that the lawyer appointed by the complainant or private person in this case shall act under the directions from the Public Prosecutor and may with the permission of the court submit written arguments after evidence is closed in the case. I further direct that the Public Prosecutor in charge of the case shall conduct the prosecution. Revision petition is disposed of accordingly."

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Learned counsel for the appellant informed us that trial in the case is over by now. Nonetheless he pleaded for consideration of the issue as he feels that a decision thereon by this Court is necessary for future guidance also. He contended that Section 302(2) of the Code of Criminal Procedure (for short the 'Code') must be so construed as to enable the pleader of an aggrieved private person to conduct the prosecution in as best a manner as he deems fit. Section 301 of the Code reads thus:

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"301. *Appearance by public prosecutors.*—(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

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(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.”

Section 302 of the Code has also some significance in this context and hence that is also extracted below:

“302. *Permission to conduct prosecution.*—(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.”

It must be noted that the latter provision is intended only for magistrate courts. It enables the magistrate to permit any person to conduct the prosecution. The only rider is that magistrate cannot give such permission to a police officer below the rank of Inspector. Such person need not necessarily be a Public Prosecutor.

In the magistrate's court anybody (except a police officer below the rank of Inspector) can conduct prosecution, if the magistrate permits him to do so. Once the permission is granted the person concerned can appoint any counsel to conduct the prosecution on his behalf in the magistrate's court.

But the above laxity is not extended to other courts. A reference to Section 225 of the Code is necessary in this context. It reads thus:

“225. *Trial to be conducted by Public Prosecutor.*—In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor.”

A The old Criminal Procedure Code (1898) contained an identical provision in Section 270 thereof. A Public Prosecutor means "any person appointed under Section 24 and includes any person acting under the directions of the Public Prosecutor", (vide Section 2 (u) of the Code).

B In the backdrop of the above provisions we have to understand the purport of Section 301 of the Code. Unlike its succeeding provision in the Code, the application of which is confined to magistrate courts, this particular section is applicable to all the courts of criminal jurisdiction. This distinction can be discerned from employment of the words "any court" in Section 301. In view of the provision made in the succeeding section as for magistrate
C Courts the insistence contained in Section 301(2) must be understood as applicable to all other courts without any exception. The first sub-section empowers the Public Prosecutor to plead in the court without any written authority, provided he is in charge of the case. The second sub-section, which is sought to be invoked by the appellant, imposes the curb on a
D counsel engaged by any private party. It limits his role to act in the court during such prosecution "under the directions of the Public Prosecutor". The only other liberty which he can possibly exercise is to submit written arguments after the closure of evidence in the trial, but that too can be done only if the Court permits him to do so.

E 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
F 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
G to winch it to the force 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
H strictly to the instructions given by the Public Prosecutor.

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.

An early decision of a Full Bench of the Allahabad High Court in *Queen-Empress v. Durga*, (ILR 1894 Allahabad 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 favourable 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.”

As we are in complete agreement with the observation of a Division Bench of the High Court of Andhra Pradesh in *Medichetty Ramakistiah & Ors. v. The State of Andhra Pradesh*, AIR (1959) A.P. 659 we deem it fit to extract the said observation:

“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

A 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.”

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Another Division Bench of the same High Court in *re Bhupalli Malliah & Ors.*, AIR (1959) A.P. 477 had in fact deprecated the practice of Public Prosecutor's sitting back and permitting private counsel to conduct prosecution, in the following terms:

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“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.”

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

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“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.”

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We, therefore, conclude that the High Court in the impugned order has correctly approached the issue and it does not warrant any interference. We, therefore, dismiss this criminal appeal.

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B.K.M.

Appeal dismissed.