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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **01.10.2019**

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

AND

THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

W.P. (MD)No.21119 of 2019

and W.M.P. (MD) No.17766 of 2019

Sivasubramanian : Petitioner

Vs.

1.The State of Tamil Nadu,
rep. by its Secretary to Government
Legal Department,
Secretariat, Chennai.

2.The Secretary,
Home Department
Secretariat, Chennai.

3.The District Collector,
Virudhunagar District,
Virudhunagar.

4.The Inspector of Police,
Rajapalayam North Police Station,
Rajapalayam,
Virudhunagar District.

5.K.Muthupandi
Public Prosecutor
Virudhunagar District at Srivilliputhur,
Virudhunagar.

: Respondents

PRAYER: Petition is filed under Article 226 of the Constitution of India praying for the issue of a Writ of Mandamus to direct the respondents 1 to 3 to appoint separate/independent Advocate as Public Prosecutor to conduct the case on behalf of the State in S.C.No.127/2015 on the file of the Principal District Sessions Judge, Srivilliputhur.

For Petitioner

: Mr.Niranjana S.Kumar
for Mr.R.Ragavendran



For Respondents

:Mr.K.Chellapandian
Additional Advocate General
assisted by
Mr.R.Anandaraj
Additional Public Prosecutor

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ORDER

S.VAIDYANATHAN, J.

AND

N.ANAND VENKATESH, J.

This writ petition has been filed seeking for a direction to the respondents 1 to 3 to appoint an independent Advocate as Public Prosecutor to conduct the case on behalf of the State in S.C.No.127/2015 pending on the file of the Principal District Sessions Judge, Srivilliputhur.

2. This case has been posted before this Bench pursuant to the orders passed by the Hon'ble Administrative Judge directing the case to be heard by this Division Bench.

3. The brief facts of the case is that the brother of the petitioner was murdered in the year 2014 and the fourth respondent police registered a case in Crime No.255/2014 for offence under Sections 147, 148, 341, 294(b), 302 and 506(ii) IPC against five accused persons. The petitioner right from the beginning apprehended that there is a political interference in this case and therefore, he was not confident with the manner in which the investigation was conducted.

4. The petitioner filed CrI.O.P.(MD) No.1206/2015 before this Court seeking for transfer of investigation. Even while the petition was pending, the investigation was completed and a final report came to be filed before the Judicial Magistrate, Rajapalayam on 24.02.2015. This Court, while disposing of the petition by an order dated 09.03.2015, has held as follows:

"7.On consideration of the rival submissions, this Court is of the view that further investigation cannot be directed towards ascertaining the truth or otherwise of each and every allegation made by the relatives of the deceased and particularly when belatedly made. From the repeated representations of the petitioner dated 19.08.2014 and 04.11.2014, it is apparent that the petitioner has not been happy with the conduct of investigation in the case. However, even in such representations, the involvement of the political rivals now informed has not been stated and immediately after the occurrence a ready and immediate motive therefor has been informed by another brother



of the deceased. We see no reason to suspect any wrong doing on the part of the investigating agency.

8.The Criminal Original Petition stands dismissed. Consequently, connected M.P.(MD) No.1 of 2015 also stands dismissed.

9.We express our concern over the conduct of the sixth respondent in preferring the final report, despite direction of this Court requiring him to hold his hands, the same having been communicated to him by none less than learned Additional Advocate General. The sixth respondent is required not to so conduct himself in future. He is directed to pay a sum of Rs.10,000/- (Rupees ten thousand only) to Anbagam, Home for Mentally Challenged, D.R.O.Colony, Madurai, within two weeks from the date of receipt of a copy of this order. As the intent of the Court is not to punish sixth respondent but to impress the need to adhere to directions of Court, the same shall not be entered in his service record."

5. It is clear from the above order that this Court did not see any scope for ordering further investigation or for doubting the investigation that has already been done and completed by the 6th respondent. This Court imposed cost only on the ground that the 6th respondent ought to have waited for the final orders to be passed in the transfer petition and he should not have hurriedly filed the final report. This order was subsequently confirmed by the Hon'ble Supreme Court in SLP (Crl.) No. 4652 of 2015 by order dated 06.07.2015.

6. The petitioner, thereafter, filed a petition under Section 156(3) read with Section 200 of the Code of Criminal Procedure for a direction to the police to register an FIR against the Investigating Officer on the ground that he has screened the true offenders. The petitioner also filed a petition seeking for further investigation under Section 173(8) of the Code of Criminal Procedure before the Judicial Magistrate, Rajapalayam. Both these petitions came to be dismissed by the Judicial Magistrate, Rajapalayam, by two separate orders passed on 07.03.2016.

7. The orders passed by the Judicial Magistrate, Rajapalayam became a subject matter of challenge before this Court in Crl.R.C.Nos.287 and 288 of 2017. This Court, after considering the entire facts and circumstances of the case and after hearing all the parties concerned, passed the following order:

"8.Be that as it may, the fact remains that the prayer of this petitioner for transfer of investigation on the ground of mala fide has been rejected by this Court and the same has also been confirmed by the Supreme Court. Hence, the same

can not be agitated again and again in different forms.



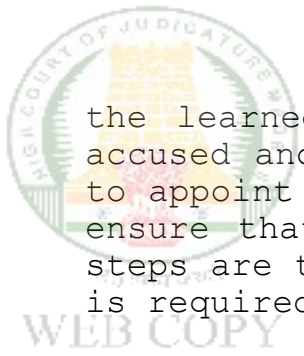
9.A prosecution of the Investigating Officer cannot be ordered by the Court under Section 156(3) of the Code of Criminal Procedure merely on such vague allegations as that would demoralise the morale of the police. Similarly, after the cognizance is taken by the Court, further investigation cannot be ordered either at the request of the de-facto complainant or the accused. In such view of the matter, the two orders passed by the Court below do not warrant interference.

10.In the result, these criminal revision cases are devoid of merits and accordingly, the same are dismissed. However, the learned Principal District and Sessions Judge, Virudhunagar District at Srivilliputhur is directed to complete the trial in S.C.No.127 of 2015 within a period of six months from the date of receipt of a copy of this order. However, the accused shall cross-examine the witnesses on the day they are examined in chief, as directed by the Supreme Court in Vinod Kumar v. State of Punjab, 2015 (1) Scale 542. If the accused adopt any dilatory tactics, it is always open to the trial Court to remand them to custody, in view of the law laid down by the Supreme Court in State of U.P. v. Shambhu Nath Singh, 2001(4) SCC 667. If the accused abscond, a fresh First Information Report can be registered against them under Section 229-A of the Indian Penal Code."

8. Pursuant to the directions given by this Court in the order referred supra, the trial Court issued summons to the witnesses in order to examine them. Since the witnesses did not appear before the Court, it is reported that witness warrant has been issued to the witnesses to ensure their presence before the Court. At this stage, the present writ petition has been filed before this Court.

9. The learned counsel for the petitioner submitted that the Public Prosecutor, who is appearing on behalf of the State before the trial Court hails from the same political party to which, the accused persons belong and it was further submitted that he is close to a sitting Minister. Therefore, he is having a personal interest in this case and if he is permitted to conduct the case on behalf of the prosecution, there cannot be a fair trial before the Court below in S.C.No.127/2015.

10. The learned counsel for the petitioner submitted that the brother of the petitioner was brutally murdered and there is a political pressure to conduct the case in a particular manner. Therefore, the witnesses will not be able to depose freely before the trial Court and they are dictated by the Public Prosecutor to depose before the Court in a particular manner. This, according to



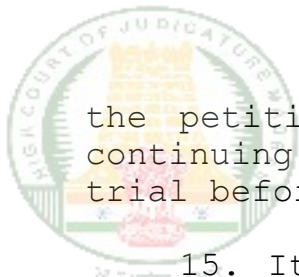
the learned counsel for the petitioner, will go in favour of the accused and ultimately justice will fail. Therefore, this Court has to appoint an independent Public Prosecutor in this case in order to ensure that the trial progresses in a proper manner and effective steps are taken during the trial to file appropriate applications as is required in law.

11. Per contra, the learned Additional Advocate General appearing on behalf of the State submitted that the petitioner has been filing one petition after another from the year 2015 onwards and he is delaying the progress in this case for the last four years. The learned Additional Advocate General brought to the notice of this Court the earlier orders that were passed by this Court and submitted that this Court has already made it very clear that the transfer of investigation, further investigation or action to be taken against the Investigating Officer, cannot be considered in view of the fact that there were no materials before the Court to give such directions. The learned Additional Advocate General submitted that the same issue cannot be again reopened in the present writ petition. The learned Additional Advocate General further submitted that this petition has been filed merely on apprehensions, without any other material. The writ petition has been filed apprehending that the Public Prosecutor will be biased and he will not proceed further with the trial in a fair manner. This apprehension has been entertained even before the trial could commence in this case and therefore, the learned Additional Advocate General submitted that this is yet another attempt made by the petitioner to stall the trial and thereby render the earlier order passed by this Court otiose. The learned Additional Advocate General sought for the dismissal of this writ petition and to further direct the trial Court to complete the proceedings as per the earlier orders passed by this Court.

12. This Court has carefully considered the submissions made on either side and the materials available on record.

13. The earlier orders that were passed by this Court have been extracted supra. In view of the earlier orders, this Court cannot again go into the issue regarding the manner, in which, the investigation was conducted and whether the case warrants any further investigation. The only issue to which this Court can go into in this writ petition is as to whether an independent Public Prosecutor has to be appointed to conduct the trial before the Court below in S.C.No.127/2015.

14. The grounds that have been raised by the petitioner is that the Public Prosecutor belongs to the same political party to which the accused persons belong. It is also stated that the Public Prosecutor is pressurising the witnesses to depose before the Court in a particular manner and thereby preventing the witnesses from appearing before the Court. By raising this apprehension,



the petitioner has attempted to impress upon this Court that by continuing the present Public Prosecutor, there will be no fair trial before the Court below in S.C.No.127/2015.

15. It is an admitted case that the trial is yet to commence. After the orders were passed by this Court in Crl.R.C.(MD) Nos.287 and 288 of 2017, wherein, directions were given to the trial Court to complete the proceedings within a time limit, summons were issued to the witnesses and since the witnesses did not appear before the Court, the witness warrant has been issued by the Court below. The allegations that have been made in the affidavit are merely based on apprehensions. The manner in which the trial is conducted by the Public Prosecutor will be known only if the trial actually begins and the case proceeds further. Even before the trial could commence, we cannot order for an appointment of an independent Public Prosecutor without any strong materials being placed before the Court. The trial Court is manned by an able Sessions Judge, who is in control of the Court and who will ensure that a fair trial is conducted in the case. Ultimately, nobody can prevent the witnesses from deposing before the Court, except the Court itself, which will have the complete control over the proceedings. It is the Court, which is going to record the evidence and the Public Prosecutor will not have any say in the said process. Therefore, even before the trial could commence, we cannot come to a conclusion that the witnesses will not be permitted to speak out before the trial Court, at the time of giving evidence.

16. After the amendment of the Code of Criminal Procedure in the year 2005, the rights of victim/de-facto complainant has been recognized by the Code and sufficient safeguards have been given in the Code of Criminal Procedure to enable the victim/de-facto complainant to participate during the proceedings. Sections 301 and 302 of the Code of Criminal Procedure clearly provides for the participation of the victim/de-facto complainant, even during trial by assisting the prosecution.

17. Useful reference can be made to the judgments of the Hon'ble Supreme Court in this regard. The Hon'ble Supreme Court in ***Dhariwal Industries Ltd., v. Kishore Wadhwani and Others***, reported in ***(2016) 3 MWN (Cr.) 161 (SC)*** has dealt with the scope of Sections 301 and 302 of the Code of Criminal Procedure. The relevant portions of the judgment is extracted hereunder:

"8.Section 301, Code of Criminal Procedure reads as follows:

"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.

(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".

9. In Shiv Kumar (supra), the Court has clearly held that the said provision applies to the trials before the Magistrate as well as Court of Session.

10. Section 302, Code of Criminal Procedure, which is pertinent for the present case reads as follows:

"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."

11. In Shiv Kumar (supra), interpreting the said provision, the Court has ruled:

"8. 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.

9. 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.

...

11. The old Code of Criminal Procedure (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)

12. 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 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 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."

12. It is apt to note here that in the said decision it has also been held that from the scheme of Code of Criminal Procedure, the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. It is because the legislature reminds the State that the policy must strictly conform to fairness in the trial of an Accused in a Sessions Court. The Court has further observed that a Public Prosecutor is not expected to show the thirst to reach the case in the conviction of the Accused somehow or the other irrespective of the true facts involved in the case.

13. In J.K. International (supra), a Three Judge Bench was adverting in detail to Section 302, Code of Criminal Procedure. In that context, it has been opined that the Private person who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do the needful in the Court in his behalf. If a Private person is aggrieved by the offence committed against him or against any one in whom he is interested he can approach the Magistrate and seek permission to conduct the prosecution



is open to the Court to consider his request and if the Court thinks that the cause of justice would be served better by granting such permission the Court would generally grant such permission. Clarifying further, it has been held that the said wider amplitude is limited to Magistrate's Court, as the right of such private individual to participate in the conduct of prosecution in the Sessions Court is very much restricted and is made subject to the control of the Public Prosecutor.

14. Having carefully perused both the decisions, we do not perceive any kind of anomaly either in the analysis or ultimate conclusion arrived by the Court. We may note with profit that in Shiv Kumar (supra), the Court was dealing with the ambit and sweep of Section 301, Code of Criminal Procedure and in that context observed that Section 302, Code of Criminal Procedure is intended only for the Magistrate's Court. In J.K. International (supra) from the passage we have quoted hereinbefore it is evident that the Court has expressed the view that a Private person can be permitted to conduct the prosecution in the Magistrate's Court and can engage a Counsel to do the needful on his behalf. The further observation therein is that when permission is sought to conduct the prosecution by a Private person, it is open to the Court to consider his request. The Court has proceeded to state that the Court has to form an opinion that cause of justice would be best subserved and it is better to grant such permission. And, it would generally grant such permission. Thus, there is no cleavage of opinion.

.....

18. We have already explained the distinction between Sections 301 & 302, Code of Criminal Procedure. The role of the informant or the Private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of Public Prosecutor. As far as Section 302, Code of Criminal Procedure is concerned, power is conferred on the Magistrate to grant permission to the Complainant to conduct the prosecution independently."

18. The next judgment to which we place reliance upon is the judgment in **Amir Hamza Shaikh and others v. State of Maharashtra and another** reported in **(2019) 3 MLJ (Cr1) 579**. The relevant portions of the judgment is extracted hereunder:

"11) In Mallikarjun Kodagali (Dead) represented through LRs v. State of Karnataka & Ors. 7, three Judge Bench of this Court considered the victim's right to file an appeal in terms of proviso to Section 372 inserted by Central Act No. 5 of 2009 w.e.f. December 31, 2009. This Court considered 154th Report of the Law Commission of



India submitted on August 14, 1996; the Report of the Committee on Reforms of Criminal Justice System commonly known as the Report of the Justice Malimath Committee; Draft National Policy on Criminal Justice of July, 2007 known as the Professor Madhava Menon Committee and 221st Report of the Law Commission of India, April, 2009, and observed as under:

"5. Parliament also has been proactive in recognising the rights of victims of an offence. One such recognition is through the provisions of Chapter XXI-A CrPC which deals with plea bargaining. Parliament has recognised the rights of a victim to participate in a mutually satisfactory disposition of the case. This is a great leap forward in the recognition of the right of a victim to participate in the proceedings of a non-compoundable case. Similarly, Parliament has amended CrPC introducing the right of appeal to the victim of an offence, in certain circumstances. The present appeals deal with this right incorporated in the proviso to Section 372 CrPC.

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8. The rights of victims, and indeed victimology, is an 7 (2019) 2 SCC 752 evolving jurisprudence and it is more than appropriate to move forward in a positive direction, rather than stand still or worse, take a step backward. A voice has been given to victims of crime by Parliament and the judiciary and that voice needs to be heard, and if not already heard, it needs to be raised to a higher decibel so that it is clearly heard."

12) The Court dealt with Justice Malimath Committee in the following manner:

"16. Thereafter, in the substantive Chapter on Justice to Victims, it is noted that victims of crime, in many jurisdictions, have the right to participate in the proceedings and to receive compensation for injury suffered. It was noted as follows:

"6.3. Basically two types of rights are recognised in many jurisdictions, particularly in continental countries in respect of victims of crime. They are, firstly, the victim's right to participate in criminal proceedings (right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth) and secondly, the right to seek and receive compensation from the criminal court

<https://hcservices.ecourts.gov.in/hcservices/> for injuries suffered as well as



appropriate interim reliefs in the course of proceedings.””

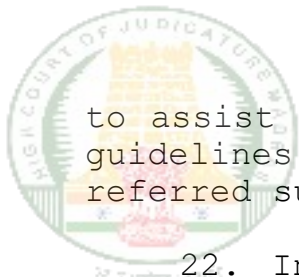
13) In J.K. International, it has been held that if the cause of justice would be better served by granting such permission, the Magistrate's court would generally grant such permission. An aggrieved private person is not altogether eclipsed from the scenario when the criminal court take cognizance of the offences based on the report submitted by the police.

14) In Mallikarjun Kodagali, this Court approved the Justice Malimath Committee, wherein the victim's right to participate in the criminal proceedings which includes right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth had been recognised.”

19. It is clear from the above judgments that the role of an informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of the Public Prosecutor. The victim/de-facto complainant has the right to participate in the criminal proceedings, which includes right to be impleaded, right to know, right to be heard and right to assist the Court in pursuit of truth. This right has been recognized by both the above judgments passed by the Hon'ble Supreme Court.

20. In the considered view of this Court, the apprehensions that have been raised by the petitioner can be sufficiently met by permitting the petitioner to file an appropriate application before the trial Court seeking to assist the prosecution. In a case of this nature, the petitioner or the counsel, who represents the petitioner, cannot be allowed to replace a Public Prosecutor and they can only be permitted to effectively assist the Prosecutor in conducting the case. By assisting the prosecution, the petitioner will be represented by a counsel and as and when the situation requires, the notice of the trial Court can be drawn to take effective steps to ensure fair trial. Ultimately, the interest of the State, interest of the victim and the interest of the accused must be balanced by the trial Court. By adopting this measure, the petitioner will be able to effectively participate during trial and nothing will happen behind the back of the petitioner, since the trial Court will take into consideration the assistance rendered by the counsel to the Public Prosecutor. This will also ensure that the trial progresses in a fair manner and ultimately, the ends of justice will be served.

21. This Court is not convinced, on the facts of the present case, to order for the appointment of an independent Public Prosecutor in the place of existing Public Prosecutor. However, in



to assist the prosecution by filing an appropriate application. The guidelines given by the Hon'ble Supreme Court in the judgments referred supra shall be borne in mind by the trial Court.

22. In the result, this writ petition is disposed of with a direction to the Court below to permit the petitioner to assist the prosecution by keeping in mind the judgments of the Hon'ble Supreme Court referred supra and the Court below shall conduct the trial proceedings on a day-today basis, as directed by this Court in its order made in Crl.R.C.(MD) Nos.287 and 288 of 2017 dated 14.03.2018 and complete the proceedings within a period of three months from the date of receipt of copy of this order. The directions given by this Court in its earlier order with regard to the judgments of the Hon'ble Supreme Court in ***Vinod Kumar v. State of Punjab (2015(1) Scale 542)*** and ***State of U.P. v. Shambhu Nath Singh (2001(4) SCC 667)***, needs no reiteration and the trial Court has to keep it in mind and effectively follow the same. The trial Court shall ensure that a fair trial is conducted and the rights of all the parties is safeguarded. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (Crl Side)

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Sub Assistant Registrar(CS)

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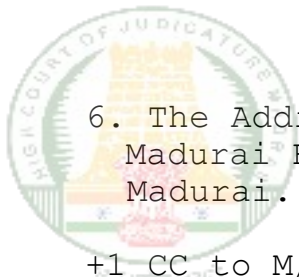
1.The Principal District and Sessions Judge,
Srivilliputhur.

2.The Secretary to Government
State of Tamil Nadu,
Legal Department,
Secretariat, Chennai.

3.The Secretary,
Home Department
Secretariat, Chennai.

4.The District Collector,
Virudhunagar District, Virudhunagar.

5.The Inspector of Police,
Rajapalayam North Police Station,
Rajapalayam, Virudhunagar District.



6. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.R. RAGAVENDRAN, Advocate (SR-90816[F] dated 01/10/2019
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