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W.P. No.24097 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Reserved on</i>	20.01.2023
<i>Pronounced on</i>	10.03.2023

CORAM:

THE HONOURABLE Ms.JUSTICE R.N.MANJULA

W.P. No.24097 of 2021

M.Dasarathan

...

Petitioner

/vs/

1. The Home Secretary
Government of Tamil Nadu,
Secretariat, Chennai.
 2. The Director General of Police,
Mylapore, Chennai – 600 004.
 3. The Superintendent of Police,
Vellore District, Vellore.
 4. The District Collector,
Vellore District, Vellore.
- Respondents

....

Writ Petition is filed under Article 226 of the Constitution of India to issue a writ of Mandamus directing the first respondent to appoint a Special Public Prosecutor to conduct the case in S.C. No.240/2018 on the file of Principal District Judge, Vellore, on the basis of the representation



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given by the petitioner on 16.09.2021.

For Petitioner ... Mr.D.Rajagopal

For Respondents ... Mr.A.Gopinath
Govt. Advocate (Crl.Side)

ORDER

This Writ Petition has been filed seeking a writ of mandamus to direct the first respondent to appoint a Special Public Prosecutor to conduct the case in S.C. No.240/2018 on the file of Principal District Judge, Vellore, on the basis of the representation given by the petitioner on 16.09.2021.

2. The case of the prosecution as seen in the charge sheet in S.C. No.240/2018 is that the deceased Mahendran was the father of the petitioner and he was a Block Development Officer at Anaicut. On the day of the occurrence Mahendran was at the Block Development Office, Anaicut to get a deal done. While he was discussing with the officials about the bill at the Block Development Office, the accused with a common object of causing death to the petitioner's father Mahendran formed an unlawful assembly among themselves and stabbed and inflicted



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cut injuries on Mahendran by using deadly weapons. The deceased ran into the computer room in the Block Development Office with injuries, fell down and died on spot in a pool of blood. On the complaint given by the petitioner a case was registered against the accused in Cr. No.64/2018 by the first respondent. After investigation, charge sheet was filed against the accused in S.C. No.240/2018 for the offences under Section 147, 148, 302, 506(ii), 149, 120(b) IPC and the case has been taken cognizance by the learned Judicial Magistrate, Vellore and the same was committed to the learned Principal Sessions Judge, Vellore.

3. It is alleged that after P.W.1 was examined, he was not cross-examined for several hearings. The first accused Manimaran is a highly influential person in the ruling political party and he was holding a post of Chairman, Anaicut Panchayat. Thiru. Parthiban, the District Public Prosecutor at Vellore, was also holding a post of Secretary of District DMK- Advocates Wing. Both the first accused Manimaran, and the District Prosecutor worked together for various reasons in view of their political connection. Hence it is not proper in the interest of justice to



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allow the present Prosecutor to appear in a case where his close associate is an accused. Hence the petitioner had given a representation on 16.09.2021 to the respondent to appoint a Special Public Prosecutor to conduct the trial in the case.

4. Since his representation was not considered and the case is being adjourned for several hearings, the petitioner had filed this petition seeking direction to the first respondent to appoint a Special Public Prosecutor to conduct the case in S.C. No.240/2018.

5. Heard Mr.D.Rajagopal, learned counsel for the petitioner and Mr.A.Gopinath, learned Government Advocate (Crl.side).

6. The learned counsel for the petitioner submitted that Article 21 of the Constitution of India provides a right of free and fair trial for the aggrieved; the long association between the District Public Prosecutor and the first accused will not ensure a fair and free trial in this case; there is every likelihood for bias in the mind of District Public Prosecutor in



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favour of the first accused; there is a reasonable apprehension in the minds of the petitioner that the district prosecutor might take side with the accused. The judgement of the Supreme Court held in the case of ***K.Anbzhagan Vs. Superintendent of Police*** reported in **(2004) 3 Supreme Court Cases 767** is relied; the way in which the accused got adjournment in S.C. No.240/2018 from February 2018 to till date for cross examination would only show that the case will not be progressed in the manner it ought to be; the State is empowered to appoint a Special Public Prosecutor if the person to be appointed has been in legal practise as an Advocate for not less than ten years; so the first respondent should be directed to appoint a Special Public Prosecutor to conduct this case.

7. The learned Government Advocate (Crl.side) submitted that the suitable orders may be passed considering the submission of the petitioner.

8. It is needless to state that the duty of the Prosecutor is to ensure a free and fair trial by being impartial. The Prosecutor has to present the full and complete material facts before the Court and assist the court for



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rendering justice by making proper appreciation of the materials placed.

The State has got a solemn duty to exercise the its powers to ensure law and justice and earn the trust of the public. In this regard the Hon'ble Supreme Court in *Vineeth Narain Vs. Union of India* reported in (1998) **1 SCC 226** has issued directions to the State to take steps for the constitution of able and impartial agency comprising persons of unimpeachable integrity to perform functions akin to the Director of Prosecution in England.

9. Some serious questions were dealt by the Hon'ble Supreme Court with regard to the improper conduct of trial by the Public Prosecutors and the perfunctory investigation carried out by the investigation agency in the case of *Zahira Habibulla H.Sheikh and another Vs. State of Gujarat and others* reported in **2004 SCC OnLine SC464 (Best Bakery case)**. Incidentally it has been observed that if proper evidence was not adduced and relevant materials were not produced, the Court can not be magnanimous in permitting such mistakes. The failure on the part of the Prosecutor should not result in miscarriage of justice. In the said



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judgment it is held as under:

“55. The courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself.”

10. So at any point of time, the prosecuting agency should not be allowed to conduct a mock fight by having hand in glove with the accused. The observations made in paragraph '56 & 57' of the above said case are vital to the issue in hand. Paragraph '56' & '57' reads as below:

“ 56. As pithily stated in Jennison v. Bakers: (All ER p. 1006d)
“The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.” Courts have to ensure that accused persons are punished and that the might or Authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be



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held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, courts have to deal with the same with an iron and appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice.

57. This Court in Vinnet Narain V. Union of India has directed that steps should be taken immediately for the constitution of able and impartial agency comprising persons of unimpeachable integrity to perform functions akin to those of the Director of Prosecution in England. In the United Kingdom, the Director of Prosecution was created in 1879. His appointment is by the Attorney General from amongst the members of the Bar and he functions under the supervision of the Attorney General. The Director of Prosecution plays a vital role in the prosecution system. He even administers "Witness Protection Programmes". Several countriesrd. The example Australia, Canada and USA have even legislation in Witness Protection Programmes are imperative as well as imminent in the context of the alarming rate of somersaults by witnesses with ulterior motives and along those personal gain or fear for security. It would be a welcome step if something along those lines is done in our country. That would be a step in the right direction for a fair trial, Expression of concern merely in words without really the mind to concretise it by positive action would be not only useless but also amounts to betrayal of public confidence and trust imposed."



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11. In view of the public importance felt in this case, the first respondent is called upon to answer some specific questions raised by this court in the order dated 23.09.2022. For a better understanding and they are reproduced as under:

“(i) What is the procedure being adopted while appointing a Special Public Prosecutor under Section 24(8) Cr.P.C for a case or cases?”

“(ii) Whether the Rules are in place for appointment of Law Officers in District level similar to the Appointment of Law Officers of High Court of Madras and its Bench at Madurai (Appointment) Rules, 2017?”

“(iii) Whether the Government is following the directions of the Hon'ble Supreme Court given in the judgment of Ashwini Kumar Upadhyay Vs. Union of India [(2019) 11 SCC 683] when the contingencies arise for appointment of Special Public Prosecutors for Special Courts or for a Special Cases?”

“(iv) Who is monitoring the performance of prosecuting officers appointed under Section 24 Cr.P.C at the District level?”



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(v) Whether any performance review is being done on the performance of the prosecuting Officers, who do not fall under the category of regular cadre of prosecuting officer?

(vi) If there is no such review mechanism or monitoring method, what would be the probable suggestion the Government would make in this regard for making the prosecuting officers accountable.”

12. The first respondent State has filed its reply affidavit, by stating that the appointment of Special Public Prosecutor is done as per Section 24(8) Cr.P.C from among the advocates who have practised for not less than ten years; such appointments for Special Public Prosecutor to conduct trial in any specific case is done consulting the district collector and based up on his recommendation; the Public Prosecutors at the District level will be appointed in accordance with Section 24(4) Cr.P.C., by consulting with the Sessions Judge and in this regard the Government has issued guidelines through Government Letter No. 73194/Courts-VIA/2017-1, dated 12.12.2017; the Government has issued Standing Orders for appointing prosecuting officers in the Courts subordinate to High Courts vide Government Order G.O.Ms. 4054, Homes Department



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dated 18.11.1961. With regard to the appointment of Special Public Prosecutors for M.Ps/ M.L.As Special Courts, the guidelines given by the Apex Court in Ashwini Kumar's case is followed; a Government letter has been sent to the Director of Prosecution to review the performance of Special Public Prosecutors including the Public Prosecutors along with the District Magistrate, at least twice in a year and to take necessary action to obtain a monthly report from the District Collector and the officer in charge of prosecution for implementing Rule 4(2) and Rule 4(4) of Scheduled Caste / Scheduled Tribe Prevention of Atrocities Rules, 1995.

13. The first respondent State has rightly understood the predicament of the petitioner and came forward to appoint a special public prosecutor for conducting the case in S.C. 240 of 2018. Hence the petitioner's grievance has been reasonably redressed by the State by appointing Tmt.Sathiya, Special Public Prosecutor, POCSO Special Court, Vellore, as the Special Public Prosecutor for conducting the prosecution in S.C.No.240 of 2018 thorough G.O.(D)No.601 Home (Courts-VI) Department dated 30.11.2022 and G.O.(D)No.11 Home (Courts-VI)



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Departed dated 05.01.2023. The copies of the same have already been sent to Principal District Judge, Vellore, in order to enable the Court to continue the proceedings in S.C.No.240 of 2018. However, the matter was kept pending, just in order to deal with certain larger issues.

14. In the reply of the first respondent it is stated that the appointment of Prosecuting Officers have been done only in accordance with sec. 24 Cr.P.C. The method for appointing the Public Prosecutors at District level have been prescribed under Sections 24(4), 24(5) & 24(6) Cr.P.C which are extracted hereunder:

“Sec.24. (4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre: Provided that where, in the opinion of the State Government, no suitable



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person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

[Explanation.—For the purposes of this sub-section,— (a) “regular Cadre of Prosecuting Officers” means a Cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;

(b) “Prosecuting Officer” means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.]”

15. As per the above provisions, the District Magistrate shall consult the Sessions Judge while preparing the panel of names. The eligibility requirement for appointment is prescribed under Section 24(7) Cr.P.C and it reads as under:

“Sec.24.

... (7) A person shall be eligible to be appointed as a Public Prosecutor or 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.”



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16. For appointment of Special Public Prosecutors, the eligible candidates ought to have completed ten years of practice as an Advocate.

Section 24(8) Cr.P.C. reads as under:

“ Sec.24.

.. (8) 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: 2 [Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.]”

17. Section 24(8) Cr.P.C. is in continuation of the earlier sub-clauses of sec.24, it can not be read in isolation or in alienation to the earlier consultation process provided under sec.24(4). It is obviously for the reason that the Session Judges before whom the advocates appear can have an idea about their competence and ability. And the Sessions Judges of the districts alone can be the appropriate authority to recommend an eligible advocate for the purpose of appointing as the Special Public Prosecutor under Sec.24(8) Cr.P.C., A District Collector who is involved in District Administration cannot know the competence or the conduct of an Advocate. Whatever he can know is only through the Curriculum Vitae



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of the advocates and the direct knowledge about their performance can not be obtained by the District Collector, without consultation with the respective Sessions Judges.

18. However, as stated already, for appointment of Public Prosecutors at the District level rules have not been framed so far. It is obligatory on the part of the State to ensure fairness in selection by framing rules for appointment of the Public Prosecutor at the District level also. From the reply of the first respondent, it is seen that the performance of the Prosecuting Officers at the district level is being monitored by the District Collectors. Again the District Collectors who do not have legal expertise is called upon to monitor the performance of the Prosecuting Officers.

19. In the reply submitted by the first respondent Government it is stated that a Government letter was sent to the Director of Prosecution to review the performance of Special Public Prosecutors including the Public Prosecutors along with the District Magistrate, at least twice in a year and to take necessary action to obtain a monthly report from the District Collector and the officer in charge of prosecution for implementing Rule



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4(2) and Rule 4(4) of Scheduled Caste / Scheduled Tribe Prevention of Atrocities Rules, 1995. Except the Public Prosecutors who have been appointed to handle the cases falling under the Scheduled Caste / Scheduled Tribe Prevention of Atrocities Rules, 1995, the other Public Prosecutors and Additional Public Prosecutors functioning at the district levels at various Courts are not expected to send any monthly report of their performance to any one. As they do not fall under the radar, there can not be any accountability. This gap has to be addressed appropriately in order to see the standards of Criminal Justice Delivery System does not deteriorate.

20. So for as the appointment of law officers for the High Court of Madras is concerned there are well framed rules under the Law officers of High Court of Madras and its Bench at Madurai Appointment Rules 2017 and the same has been notified vide G.O.Ms.No.369 Public Law Officers Department dated 29.04.2017.

21. As per the rules for appointing the law officers in the High



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Court, there shall be a Selection Committee consisting of Advocate General as Chairman and Secretary (Public), Secretary (Home), Secretary (Law) as its members. The panel of advocates shall be forwarded by the Advocate General to the Government and the Government shall place the same after scrutiny before the Selection Committee. After appreciating and ascertaining the qualification, experience, legal knowledge and other academic documents along with the behaviour and antecedents, the Selection Committee will recommend the candidates to be appointed as law officers for specific posts.

22. Section 25 Cr.P.C. speaks about the appointment of Assistant Public Prosecutors and 25-A Cr.P.C. contemplates the formation of the Director of prosecution and Deputy Director of Prosecution for reviewing the functions of the Public Prosecutors, Additional Public Prosecutors, and Assistant Public Prosecutors who were appointed in accordance with Section 24 and 25 Cr.P.C.

23. At some point of time in the State of Tamil Nadu, police



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officers have been appointed as the directors of prosecution. In the case of **S.Tamilarasan Vs State of Tamil Nadu, (W.P. (MD) No.222 of 2009)**, a Division bench of this Court vide its order dated 26.11.2009 set aside the appointment of police officers to the post of Directors of Prosecution and directed the State Government to make those appointments in accordance with Sec.25-A(2) Cr.P.C. As per Sec.25-A (3), the Director General of Prosecution is also under the administrative control of the Home Secretary and not above his authority.

24. The Public Prosecutor and Additional Public Prosecutors of the High Court are selected by a High Level Selection Committee comprising the Advocate General, Public Secretary, Home Secretary and Law Secretary. But they have not been kept under the administrative control of an authority above the Director of Prosecution. The Director General of Prosecution also comes under the administrative control of the Home Secretary. This anomalous situation has been effectively tackled in some States by adopting slightly different methods.



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25. A State amendment to Section 25-A (2) and (5) Cr.P.C has been brought in the State of Karnataka in order to fill up the posts of Director and Deputy directors of Prosecution in accordance with the Recruitment Rules prescribed under the Karnataka Civil Services Act 1978. The prosecuting officers selected under the said rules have been placed under the control of the Director of Prosecution and the other Prosecuting Officers appointed under sec.24 are brought under the control of the Advocate General.

26. The State of Kerala has a post by name Director General of Prosecution and whose appointment is upheld by the High Court of Kerala in *Thankappan Vs. State of Kerala* in *W.P.(C) No.8844 of 2011* by holding that the said appointment is done within the Executive Power of the State under Article 162 of Constitution of India. Director General of Prosecution can be a better authority to supervise the prosecuting Officers appointed in accordance with sec.24 Cr.P.C.

27. The State of Tamil Nadu can also undertake the task of raising



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the standards of Criminal Justice Delivery System by upgrading the supervisory mechanism, by tactfully removing the anomalies in the structure by invoking the powers of the State under Article 162 of the constitution of India and also by promptly framing rules for the appointment of the Prosecuting Officers at the District level. Only an effective review mechanism can improve the quality of the performance of the prosecuting officers.

With the above observations and suggestions made, this Writ Petition is **disposed**. No costs.

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Index: Yes / No
Speaking order / Non-speaking order
bkn



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To:

1. The Home Secretary
Government of Tamil Nadu,
Secretariat, Chennai.
2. The Director General of Police,
Mylapore,
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3. The Superintendent of Police,
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4. The District Collector,
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5. The Public Prosecutor,
High Court of Madras.



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R.N.MANJULA, J.,

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