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S.B. SHAHANE AND ORS.

v.

THE STATE OF MAHARASHTRA AND ANR.

APRIL 21, 1995

B

[KULDIP SINGH AND N. VENKATACHALA, JJ.]

*Code of Criminal Procedure, 1973:*

C

*Section 25—Assistant Public Prosecutors—Appointment of—State Government's Notification—Personnel of Police Department—Appointment as Assistant Public Prosecutor without severance of administrative and disciplinary control of Police Department—Held failure of statutory obligation imposed by Section 25(3)—Court's Directions for setting up of separate cadre of Assistant Public Prosecutors—Creation of separate prosecution department—Exclusion of administrative and disciplinary control of Police Department over Assistant Public Prosecutors.*

D

*Administration of Criminal Justice:*

E

*Criminal Trial—Investigating Department and Prosecution Department—Separation of—Need and object.*

F

By a notification dated 1st April, 1974 issued under Section 25 of the Code of Criminal Procedure, 1973 the Government of Maharashtra appointed the appellants, who were the personnel of its police department functioning under the control of its head, the Inspector General of Police, as Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates without bringing about their severance from the police department.

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The appellants filed an application before the High Court for a direction to the State for their exclusion from the Police Department so as to free them from the administrative and disciplinary control of the Inspector General of Police and to create a separate cadre of Assistant Public Prosecutors for them under a separate Prosecution Department, making its head directly responsible to Government. The High Court dismissed the application against which the appellants preferred appeal

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before this Court.

Allowing the appeal and setting aside the judgment of the High Court, this Court

**HELD : 1.** The Government of Maharashtra which made the appointments of Assistant Public Prosecutors by issue of notification dated 1st April, 1974 under Section 25 of the Code of Criminal Procedure could not have allowed the Assistant Public Prosecutors appointed thereunder to continue as personnel of its Police Department and to continue to function under the control of the head of Police Department, the Inspector General of Police. [682-B, C]

**2.** The mandate of sub-section (3) of Section 25 of the Code of Criminal Procedure, 1973 implies that the State Government or Central Government which appoints Assistant Public Prosecutors for the purpose of conducting prosecutions in Magistrates' courts in District, must put them in an independent cadre and create a separate independent Prosecution Department, having its own hierarchy of officers made directly responsible to the concerned Government. [678-H, 676-C, 675-E, F]

**3.** When Assistant Public Prosecutors are appointed under Section 25 of the Code of Criminal Procedure for conducting prosecutions in courts of Magistrates in a District fairly and impartially, separating them from the officers of the Police Department and freeing them from the administrative or disciplinary control of officers of the Police Department, the inevitable consequential actions required to be taken by the State Government which appoints such Assistant Public Prosecutors, in as much as, taking of such actions are statutory obligations impliedly imposed upon it under sub-section (3) thereof. When such consequential actions are taken by the State Government in respect of large number of persons appointed as Assistant Public Prosecutors, it becomes necessary for putting them on a separate cadre of Assistant Public Prosecutors and creating a separate prosecution department as suggested by the Law Commission in its 14th Report making those Assistant Public Prosecutors subject to control of their superiors in the hierarchy in matters of administration and discipline, with the head of such Prosecution Department being made directly responsible to the State Government in respect of conduct of prosecutions by the Assistant Public Prosecutors of his department. [681-D to G]

**4.** Since the aforesaid notification issued by the Government of Maharashtra merely appoints the appellants and others, as mentioned in

- A Schedule to the notification, the prosecutors of the Police Department as Assistant Public Prosecutors without freeing such Assistant Public Prosecutors from the administrative and disciplinary control of the Police Department to which they belonged earlier, and without creating a separate department of prosecution for them with the head of that department or departments being made directly responsible to the Government,
- B the Government of Maharashtra has failed to discharge its statutory obligation impliedly imposed upon it in that regard under sub-section (3) of Section 25 of the Code. [681-G, H, 682-A, B]

- C 5. The Government of Maharashtra is directed to constitute a separate cadre of Assistant Public Prosecutors either on district-wise basis or on state-wise basis, by creating a separate Prosecution Department for them and making the head to be appointed for such Department directly responsible to the State Government for their discipline and the conduct of all prosecutions by them before the Magistrates' courts and further free such Prosecutors fully from the administrative and disciplinary control of
- D the Police Department or its officers. [682-H, 683-A]

14th Report of the Law Commission of India, referred to.

- E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 676 of 1982.

From the Judgment and Order dated 31.7.81 of the Bombay High Court in S.C.A. No. 317 of 1979.

- F S.V. Deshpande and Mrs. Anuradha Rastogi for the Appellants.
- S.K. Dholakia and A.S. Bhasme for the Respondents.

The Judgment of the Court was delivered by

- G VENKATACHALA, J. Judgment dated 31st July, 1981, by which a Division Bench of the High Court of Judicature at Bombay, Nagpur Bench, rejected the Special Leave Application No. 317 of 1979 filed under Article 226 of the Constitution of India by the appellants herein, is appealed against by them in this Civil Appeal by special leave.

- H The appellants and the Police Prosecutors appointed by the Inspector General of Police or Commissioner of Police in the State of

Maharashtra under rule 60 of the Bombay Police Manual, 1959 - "the Manual". On their appointment, they became the personnel of the Maharashtra State's Police Department (Establishment) under the control of the head of the Department, the Inspector General of Police, as provided for under rule 32 of the Manual. After the coming into force of the Code of Criminal Procedure, 1973 - "the Code", the Government of Maharashtra issued a Notification dated 1st April, 1974, which read thus:

"In exercise of the powers conferred by section 25 of the Code of Criminal Procedure, 1973 (II of 1974), the Government of Maharashtra hereby appoints, with effect from 1st April, 1974 the officers specified in column (2) of the Schedule hereto appended, who are Police Prosecutors, to be Assistant Public Prosecutors also, for conducting prosecutions in the Courts of Magistrates in the District (including Greater Bombay) or Districts, respectively, specified against them in column (4) of the said Schedule."

When the above notification was issued by the Government of Maharashtra under section 25 of the Code appointing the Police Prosecutors of its Police Department as the Assistant Public Prosecutors to conduct prosecutions in courts of Magistrates, without bringing about their severance from the Police Department, the appellants filed the aforesaid Special Leave Application seeking from the High Court issuance of a direction to the Government of Maharashtra for their exclusion from its Police Department so as to free them from the administrative and disciplinary control of the Inspector General of Police, the head of the Police Department and create a separate cadre of Assistant Public Prosecutors for them under a separate Prosecution Department, making its head directly responsible to Government. When that application was rejected by the Division Bench of the High Court, the judgment of that rejection is questioned by the appellant in this appeal by special leave.

We have heard arguments of learned counsel for the parties. A short question which needs our answer for deciding this appeal in the light of the arguments is the following:

When by its notification dated 1st April, 1974 issued under section 25 of the Code, the Government of Maharashtra appointed the Police Prosecutors, who were the personnel of its Police Department functioning under the control of its head the Inspector

A General of Police, as Assistant Public Prosecutors, could it have allowed such Assistant Public Prosecutors to be the personnel of the police Department and continue to function under the control of its head, the inspector General of Police?

B Section 25 of the Code which has formed the basis for the Government of Maharashtra to issue the notification adverted to in the above question, reads thus:

Section 25 of the Code:

C "25. Assistant Public Prosecutors. - (1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

D (1-A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the Courts of Magistrates.

E (2) Save as otherwise provided in sub-section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case:

F Provided that a police officer shall not be so appointed -

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

G (b) if he is below the rank of Inspector."

H As the above Section was undisputedly inserted by the Parliament in the Code because of the fault found by the Law Commission in the conduct of prosecutions in Magistrates' courts of the country by Police Prosecutors and remedial suggestions made by it in its 14th Report, we can, to our

advantage, advert to them at the first instance, thus:

"Para 12. - Police Prosecutors and their functioning - It is obvious that by the very fact of their being members of the Police Force and the nature of the duties they have to discharge in bringing a case in court, it is not possible for them to exhibit that degree of detachment which is necessary in a prosecutor. It is to be remembered that a belief prevails amongst the Police Officers that their promotion in the Department depends upon the number of convictions they are able to obtain as prosecuting officers. Finally, they only control or supervision of the work of these prosecuting officers is that exercised by the Department Officials."

"Para 15. - Suggested remedial measure - We therefore suggest that as a first step towards improvement, the prosecuting agency should be completely separated from the Police Department. In every district a separate prosecution department may be constituted and placed in charge of an official who may be called a 'Director of Public Prosecutions'. The entire prosecution machinery in the District should be under his control. In order to ensure that he is not regarded as a part of the Police Department he should be independent official directly responsible to the State Government. The departments of the machinery of the Criminal Justice, namely, the Investigation Department and the prosecuting department should thus be completely separated from each other."

It becomes clear from what is stated by the Law Commission in para 12 above that the conduct of prosecutions in Courts in India, as prevailed then, was carried on by police officers who were designated as Police Prosecutors. Those Police Prosecutors were functioning under the administrative and disciplinary control of the superior officers of the police force or department itself. Since their promotions to the higher posts in the department depended on the number of convictions they were able to obtain from courts in the prosecutions conducted by them, they were not able to exhibit the needed degree of detachment expected of prosecutors. In other words, the Law Commission strongly felt the need of Prosecutors conducting the prosecutions in courts independently of the Police Department that had investigated the cases in respect of which prosecutions were launched or of officers of the Police Department who were very much

A interested in such investigations so as to conform to the basic salutary rule of prosecution of criminal cases that the prosecutors must conduct the prosecutions fairly and impartially.

B Then, we find from para 15 above, the remedial measures suggested by the Law Commission for conducting prosecutions by prosecutors fairly and impartially. Firstly, it suggested that the Police Department shall not continue as the prosecuting agency as the practice prevailed. Secondly, the prosecuting agency must have its own prosecution department separate and distinct from the Police Department, of which it was a part. Thirdly, the Prosecutors of prosecution departments must have their own heads  
C who can exercise administrative and disciplinary control over them being directly responsible to the Government concerned. It is ultimately, suggested in unequivocal terms that the machinery of criminal justice though comprised of Investigation Department and the Prosecuting Department, there should be complete separation between them. The object of such separation suggested is obviously to see that the officers of the Police  
D Department who will have investigated the cases to be prosecuted in courts shall have no manner of control or influence over the prosecutors who conduct the cases in courts based on the investigations made by the Police Department.

E We have now to see whether the Parliament has sought to effectuate the aforesaid remedial measures relating to separation of prosecution agency from investigation agency, both of which formed parts of the Police Department, before enacting Section 25 of the Code. Section 25 pertains to Assistant Public Prosecutors, as becomes clear from its heading. The  
F mandate of sub-section (1) as seen therefrom, is that the State Government shall appoint for every district in the State one or more Assistant Public Prosecutors for conducting prosecutions in courts of Magistrates. In other words, a statutory obligation is imposed by that sub-section on the State Government, in unequivocal terms that it shall appoint one or more  
G Assistant Public Prosecutors in every district exclusively for the purpose of conducting prosecutions in the courts of Magistrates in such district. Insofar as sub-section (1-A) is concerned, the obligation similar to that imposed on the State Government under sub-section (1) is imposed on the Central Government with regard to appointment of Assistant Public Prosecutors for conducting its cases in courts of Magistrates in the districts.  
H Then, comes the mandate of sub-section (2) of Section 25 of the Code

which, as seen therefrom, makes police officers even ineligible, as a rule, for appointment as Assistant Public Prosecutors. No doubt, an exception is made to that rule, as found in the proviso to sub-section (3) thereof, because sub-section (3) permits appointment of any other person as Assistant Public Prosecutor in the district for the purpose of any particular case that may include a Police Officer. Since such appointment of a police officer as Assistant Public Prosecutor is envisaged for want of other suitable person to meet some unavoidable contingency or due to unavailability of regularly appointed Assistant Public Prosecutor, as seen from the proviso to sub-section (3), special care is required to be taken to see that such officer is not below the rank of an Inspector who had not taken any part in the investigation into the offence with respect to which the accused has to be prosecuted. Indeed, the proviso also emphasises the need of keeping the officer entrusted with the duty of conducting a prosecution, beyond the reach of police officers concerned with investigation of the case requiring prosecution. The mandate of sub-section (3), therefore, implies that the State Government or Central Government which appoints Assistants Public Prosecutors for the purpose of conducting prosecutions in Magistrates' courts in District, must put them in an independent cadre and create a separate independent Prosecution Department, having its own heirarchy of officers made directly responsible to the concerned Government.

Thus, when all the sub-sections of Section 25 of the Code are seen as a whole, it becomes clear therefrom, that there is a statutory obligation imposed on the State or the Central Governments, as the case may be, to appoint one or more Assistant Public Prosecutors in every district for conducting the prosecutions in the Magistrates' courts concerned, and of making such Assistant Public Prosecutors independent of the Police Department or its officers entrusted with the duty of investigations of cases on which prosecutions are to be launched in courts, but constituting a separate cadre of such Assistant Public Prosecutors and creating a separate Prosecution Department for them, its head made directly responsible to the Government for such department's work.

The independence of Assistant Public Prosecutors sought to be achieved under the Scheme of the provisions in Section 25 of the Code is also sought to be achieved in respect of Public Prosecutors, becomes obvious from the scheme of the provisions in Section 24 of the Code which

A runs, thus:

Section 24 of the Code :

B "24. Public Prosecutors. - (1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution; appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

C (2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district, or local area.

D (3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

E Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

F (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.

G (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).

H (6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre or 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 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). A

(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. B

(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." C

When Assistant Public Prosecutors are appointed under Section 25 of the Code for conducting prosecutions in courts of Magistrates in a District fairly and impartially, separating them from the police officers of the Police Department and freeing them from the administrative or disciplinary control of officers of the Police Department, are the inevitable consequential actions required to be taken by the State Government which appoints such Assistant Public Prosecutors, in as much as, taking of such actions are statutory obligations impliedly imposed upon it under sub-section (3) thereof. When such consequential actions are taken by the State Government in respect of large number of persons appointed as Assistant Public Prosecutors, it becomes necessary for putting them on a separate cadre of Assistant Public Prosecutors and creating a separate Prosecution Department as suggested by the Law Commission in its Report making those Assistant Public Prosecutors subject to control of their superiors in the heirarchy in matters of administration and discipline, with the head of such Prosecution Department being made directly responsible to the State Government in respect of conduct of prosecutions by the Assistant Public Prosecutors of his department. Since the aforesaid notification dated 1st April, 1974 issued by the Government of Maharashtra under Section 25 of the Code merely appoints the appellants and others, as mentioned in Schedule to the notification, the police prosecutors of the Police Department as Assistant Public Prosecutors without freeing such Assistant Public Prosecutors from the administrative and disciplinary control of the Police H

- A Department to which they belonged earlier, and without creating a separate department of prosecution for them with the head of that department or departments being made directly responsible to the Government, the Government of Maharashtra has failed to discharge its statutory obligation impliedly imposed upon it in that regard under sub-section (3) of Section 25 of the Code. We, therefore, answer the question, in the negative
- B by holding that the Government of Maharashtra which made the appointments of Assistant Public Prosecutors by issue of notification dated 1st April, 1974 under Section 25 of the Code, could not have allowed the Assistant Public Prosecutors appointed thereunder to continue as personnel of its Police Department and to continue to function under the control
- C of the head of Police Department, the Inspector General of police.

Since the High Court has failed to hold that there was an obligation on the part of the Government of Maharashtra, which issued the aforesaid notification under Section 25 of the Code, appointing officers or prosecutors of the Police Department as Assistant Public Prosecutors to

D free them from the administrative and disciplinary control of the Police Department and its officers, by creating a separate cadre and department for them, as was sought in the application of the appellants filed before the High Court, the judgment of the High Court under appeal becomes unsustainable.

E No doubt, when the scheme of the provision in Section 25 of the Code as also the scheme contained in Section 24 of the Code are seen, a police prosecutor cannot even become eligible for being appointed as Assistant Public Prosecutor on regular basis, but that question has since

F not been raised for our consideration in this appeal and further since the appointments of the appellants and other similarly situated police prosecutors as Assistant Public Prosecutors are made under the notification issued as far back as in the year 1974, we refrain from expressing our view on that question at this distance of time.

G In the result, we allow this appeal, set aside the judgment of the High Court under appeal, make the *rule nisi* issued on the application of the appellants before the High Court absolute and direct the Government of Maharashtra to constitute a separate cadre of Assistant Public Prosecutors either on district-wise basis or on state-wise basis, by creating a separate

H Prosecution Department for them and making the head to be appointed

for such Department directly responsible to the State Government for their discipline and the conduct of all prosecutions by them before the Magistrates' courts and further free such Prosecutors fully from the administrative and disciplinary control of the Police Department or its officers, if they still continue to be under such control. No costs. A

T.N.A.

Appeal allowed. B