

Ajay Kumar Vs. State and anr.

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Court : Delhi

Decided On : May-22-1985

Reported in : 1986CriLJ932; 1986RLR41

Judge : H.L. Anand, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 2(4) and 482

Appeal No. : Criminal Miscellaneous (Main) Appeal No. 1161 of 84

Appellant : Ajay Kumar

Respondent : State and anr.

Advocate for Pet/Ap. : Madan Bhatia,; P.P. Malhotra,; J.U. Khan,;

Judgement :

H.L. Anand, J.

(1) The petition under Section 482 of the Code of Criminal Procedure, by Ajay Kumar, raises the question as to the validity and propriety of appointment of an Advocate of an aggrieved party as a Special Public Prosecutor in a Criminal trial. The following facts provide the backdrop.

(2) Ajay Kumar, petitioner and certain other persons are facing trial in the Court of the Additional Sessions Judge on charges, inter alia, of murder of Mukesh on

October 6, 1982 in the Palika Bazar Market. The aggrieved party who are said to be 'rich, well-connected and influential', had engaged Bawa Gurcharan Singh, an eminent criminal lawyer, as their counsel to oppose the plea of the accused persons for bail as also to assist the prosecution in the conduct of the eventual trial. By a notification of May 5, 1983, Delhi Administration appointed Bawa Gurcharan Singh aforesaid as Special Public Prosecutor for conducting the case on behalf of. Delhi Administration at a professional 'fee of Re. II- only as accepted by him, in his letter of April 18, 1983'. One of the accused Sudhir Kumar was discharged by the learned Addl. Sessions Judge. The Administration challenged the order in this Court under Section 397 of the Code in criminal revision no. 145/83. This petition was filed on behalf of the Administration by the aforesaid Advocate. The impugned order of the learned Addl. Sessions Judge discharging Sudhir Kumar was set aside by this Court. While hearing the aforesaid petition, which was rather hotly contested, I got the impression that the. learned Counsel appearing for the Administration was not always able to keep his dual capacity as Special Public Prosecutor and a retained Counsel of the aggrieved party distinct. I also expressed my doubt as to the propriety of appointing a partisan Counsel as Special Public Prosecutor in a criminal trial. This is wht I said:

4.The conduct of proceedings on behalf of the prosecution in .the court below and in this Court did not have their routine course. Special Public Prosecutor was appointed on behalf of the prosecution, who appeared for it at the stage of consideration of charge, as indeed, in the proceedings before this Court. The Special Public Prosecutor was none other than the senior counsel retained by the aggrieved party. He had apparently been appointed by the Administration at the request of the aggrieved party presumably because the conduct of investigation had been criticised by them on the ground that undue pressure had been brought on the investigating agency on behalf of Sudhir Kumar, which also explains why the investigation was transferred around the 9th of December, 1982. The appointment of a Special Public Prosecutor to conduct a trial or other proceedings is, at times, and may be resorted to and there are cases presenting legal problems of unusual complexity of which otherwise involve influential or controvertial personalities or which may tend to generate public controversy, and would eminently justify such a departure without necessarily rejecting on the calibre,

competence or integrity to the ordinary prosecuting staff, but such a course in ordinary cases may cause an unnecessary reflection on the efficiency, competence and even integrity of such staff, and may even have a demoralising influence. In any event, it would be a salutary principle not to appoint a nominee of one of the groups of factions as a Special Prosecutor in hotly contested proceedings. A certain amount of objectivity and detachment is expected of a public prosecutor, which is perhaps an extension (it the principle that State action in all situations must be 'just and fair', unaffected by partisan considerations and free from the possible taint of revenge or vendetta and guided solely by larger public interest. Counsel, who holds the brief of one of the groups or factions, unfortunately may not always be able to keep his conflicting identities and loyalties apart or insulate his actions and conduct from being influenced by partisan considerations, personal feelings and group emotions and counsel in the present case, apparently in spite of his best efforts to the contrary, was not always able to keep his dual capacity distinct, with the result that at least in this Court, a measure of exaggeration, both in the contentions at the bar, as also in the contents of the petition, of the affidavit in support of it, and the tenor of the language used in them, appear to confirm the worst fear of an overlapping of the two distinct capacities, thereby tending to cause an unfortunate dilution of the true impartial role of a public prosecutor.

(3) In a written reply to the present petition by Bawa Gurcharan Singh, who appeared for himself, as also for the Delhi Administration, to defend the validity of his appointment as a Special Public Prosecutor, an embarrassment which the Delhi Administration could have perhaps avoided if it had asked the Standing Counsel to appear for it, it was contended that the aforesaid observations were 'uncalled for' as the question as to the propriety of the appointment as a Special Public Prosecutor was not canvassed in the earlier proceedings in this Court and there was, therefore, no occasion for the respondents to make their submission with regard to the question. It is no doubt true that in the earlier proceedings the only question was with regard to the validity of the discharge of and of the accused persons, who prima facie appeared to be at the centre of the controversy. There was, therefore, no doubt no occasion for me to consider the question of propriety of appointment in depth or to rule on it. These observations, however, did not

purport to consider or to decide the question. These observations were made because in the context of a measure of exaggeration both in the contention on behalf of the Administration at the bar, as also in the contents of that petition, the affidavit in support of it, and the tenor of the language, used in them, a doubt lingered in my mind, while deciding the matter, that it was perhaps not proper to appoint a partisan counsel as a Special Public Prosecutor because a certain amount of objectivity and detachment was expected of a Public Prosecutor as a State functionary and, therefore, part of the judicature system which it may not be possible for a partisan Counsel to ensure in spite of his best effort. That only appeared to me to be a grey area apart from the provocation for the observations at the hearing to which I gave expression so that the question may perhaps be considered and decided in an appropriate case as a matter of principle apart from the situation that may obtain a particular case. Be that as it may, in these casual observations, petitioner, in the present proceedings, found a convenient springboard for further proceedings either with the bona fide object of a ruling on the propriety of the practice or with the ulterior object of either delaying the trial or eliminating from it the Special Public Prosecutor, who appeared to them to be comparatively more aggressive in the pursuit of the prosecution case at the trial. The appointment was made in May. 1983 and these observations were made on March 9, , The present petition was filed on October 27, 1984. Petition challenging the appointment prima facie, therefore, appeared to me to be belated. I, however, admitted the petition partly because it raised a question of principle and also because the observations of this Court itself contained a possible direction that the controversy could take. I, however, suspected the motive of the petitioner in raising the controversy at the belated stage when the trial was already in progress and, therefore, turned down the plea of stay of proceedings. It was, however, hoped that the matter would be decided at an early date but the nature of the point raised, the appearance of eminent Counsel on both sides, and the anxiety to hear the learned Counsel on the various facets of the concept of a fair trial at length resulted in a rather protracted trial of the petition.

(4) Mr. Madan Bhatia, who appeared for the petitioner, raised the challenge to the validity of the appointment on the impressive edifice of the constitutional guarantee that all State action, including a criminal trial by the Judicial Wing of the State,

must be 'just, fair and reasonable' and urged that, having regard to the peculiar position of a Public Prosecutor in the judicature system obtaining in this country, as an emanation of the concept of rule of law, and of fair trial embodied in the Constitution, an impartial and unbiased prosecutor was a necessary concomitant of the Court system. He, therefore, urged that where a known partisan counsel, who had been retained and paid by the aggrieved party, was appointed as a Special Public Prosecutor by the Administration to conduct a criminal trial, it was not only tantamount to abdication by the State of its function as an impartial prosecutor, actuated by larger public interest that crime must be detected and appropriately punished, unaffected by party or group rivalries, sentiments, emotions and loyalties, but would also be incompatible with the further requirement that State action must not only be just, fair and reasonable and, therefore, the trial must not only be just and fair but must also appear to be so and that if the appointment of a partisan counsel as a Special Public Prosecutor was reasonably likely to cause apprehension in the mind of the accused that he would not be fairly treated at the hands of such a Public Prosecutor and if in the totality of circumstances, there was a reasonable possibility of a bias. it would lend a vitiating element to the trial. Counsel, therefore, urged that such an appointment would not be merely improper but must be struck down as being contrary to the constitutional edict and, therefore, void.

(5) On the other hand, Bawa Gurucharan Singh, appearing for himself and the Delhi Administration, sought to defend the appointment on the grounds that the State had an untrammelled power to appoint any legal practitioner as a Special Public Prosecutor irrespective of whether he had been retained as a Counsel for the aggrieved party and that there was no question of bias or any possibility of bias or any denial of a fair trial or the appearance of such a denial merely because the State clothed a private Counsel of the aggrieved party with the authority and status of a State functionary because any responsible Counsel once he has been appointed a Special Public Prosecutor by the State would be expected to rise to the occasion and confine himself to the material on record brought out in the course of investigation irrespective of the source from which he has been paid the remuneration or of his commitment to or links with the aggrieved party or group. It was further urged by him that he was fully conscious of the onerous responsibility

be carried as a Special Public Prosecutor, that his appointment had nothing to do with the aggrieved party, even though he had been retained and paid by the aggrieved party but had been appointed by the Administration because of grave allegations of partiality against the investigative branch of the Administration, and that this was not the only case in which he had been appointed a Special Public Prosecutor on the same terms as in this case and cited number of earlier instances in which he had been asked to take up similar responsibility. It was further urged by him that, having regard to the nature of the functions of the Special Public Prosecutor, there was no possible scope for him to travel beyond the records and that in any event the independence and impartiality of the Court was a built in safeguard against any bias by the Special Public Prosecutor or of even a possibility of such a bias.

(6) In the course of their elaborate arguments, learned Counsel on both sides, as usual, relied on a large number of decisions and sought support even from common precedents.

(7) It would be useful to clear the ground for any possible factual controversy. The facts and circumstances leading to the appointment are, by and large, beyond controversy. The murder was allegedly committed on October 6, 1982. Bawa Gurucharan Singh was retained almost at the outset by the aggrieved family not only to oppose the plea of the accused persons for bail, but also to represent them, to the extent possible throughout the trial. He had also admittedly received from them 'his full remuneration for the entire work, including the trial'. He had been consistently appearing for the aggrieved family in opposing the bail applications and in generally advising them as to the conduct of investigation. It is also beyond doubt that he had been appointed a Special Public Prosecutor for the conduct of the case as a professional fee of Re. 1 in terms of his own letter of April 18, 1983 and he had accepted the nominal fee, not out of any humane consideration or because of any ideological commitment or affinity but because he honestly believed that he had been amply paid by the aggrieved party initially for the whole trial. There was, however, a controversy between the parties if the appointment was made 'at the instance' of the aggrieved party or 'independently of it' by the Delhi Administration because Bawa Gurucharan Singh is admittedly an

eminent criminal lawyer, known for his competence, aggressive pursuit of the assignments that undertakes, and of his integrity. According to him, Delhi Administration wanted to appoint a Special Public Prosecutor because allegations had been made on behalf of the aggrieved party of partiality towards the accused persons on the part of the investigating agency and impliedly because the aggrieved party had, therefore, lost confidence in the impartiality of the ordinary prosecuting channel to ensure even handed justice to the accused persons. According to him, it was a sheer coincidence that he happened to be a retained counsel for the aggrieved party but the appointment 'was not made because of it' and that when he was, retained by the aggrieved party, the question as to the appointment of a Special Public Prosecutor for the trial was independently engaging the attention of the Delhi Administration, either because of allegations of partiality in the course of investigation, or because the murder had generated considerable public interest and controversy. According to the petitioner, however, the appointment was made 'at the instance' of the aggrieved party. This controversy is, however, not material for the decision of the question as to the validity of the appointment or as to its priority because if the retained counsel of a party is appointed as a Special Public Prosecutor, who had been paid by the aggrieved party for the trial, and is not to get any other remuneration from the Administration, except the token fee of Re. 1, it would make little difference if the appointment was 'at the instance' of the aggrieved party or 'independently of the aggrieved party'. If a Counsel is a partisan Counsel because he is retained as a counsel by the aggrieved party and has been paid by the aggrieved party for the trial, he would not cease to be so merely because appointment was not made 'at the instance' of the aggrieved party but because of any objective considerations, like the allegations of partiality on the part of the Investigating agency, or because of the eminence of the Counsel or his competence or integrity or because even otherwise, it was a fit case in which the Administration thought the conduct of the trial must be entrusted to a Special Public Prosecutor. Conversely, if an eminent counsel, who is competent and a person of integrity, is appointed by the Administration as a Special Public Prosecutor in a controvertial trial and is adequately paid out of the State ex chequer, his appointment would not necessarily be vitiated or considered improper merely because his name was

suggested by the aggrieved party. Nothing would, therefore, turn on the circumstances if the appointment was made at the instance of an aggrieved party or not. It is the other factors that are more important, and are perhaps determinative, notably, that he is a retained counsel of the aggrieved party and has received a payment from that party for the entire work, including the work he is now supposed to carry out for the Administration.

(8) It may be useful to dispose of a preliminary question as to the maintainability of the petition under Section 482. While there is considerable divergence between the comparative scope of Article 226 and 227 of the Constitution, on the one hand, and of the inherent powers of this Court u/s. 482 of the Code, on the other, there is a measure of convergence in that the two may, in certain situations overlap. The preliminary question was not raised on behalf of the Administration, presumably because it would only lead to unnecessary duplicity of proceedings, and if the Administration has to defend the appointment and the conduct of the trial by the Special Public Prosecutor, whether on a challenge under Article 226 of the Constitution or Section 482 of the Code, it might as well meet the challenge, whichever pedestal it has been counted on rather than raise a technical question as to the appropriate proceedings for the purpose. In any event, where a Special Public Prosecutor has been appointed for a particular trial and there is either a challenge to the validity of the appointment or a controversy is raised as to whether the conduct of the trial by such a Public Prosecutor would tend to vitiate the trial, the validity of the order or the conduct of the trial by the Special Public Prosecute could no doubt be assailed in proceedings under Article 226 of the Constitution. But that by itself would not be a ground to oust the inherent powers of the Court u/s 482 so long as such powers could be invoked to secure 'the ends of justice'. If the fair trial of an accused is within the legitimate parameters of 'ends of justice' or, of the proper process of any criminal court, and if conduct of the trial by a Public Prosecutor is capable of lending a taint of illegality or unfairness to a trial, it would be the legitimate concern of this Court under Section 482 of the Code, as distinct from Article 226 of the Constitution, to consider the challenge so as to ensure that the ends of justice would be secured. While the concession on behalf of the Administration relieves me of the obligation to subject this aspect to any elaborate treatment, I have little doubt in my mind that any matter, which is likely to

vitiating the trial, whether the bias of a Presiding Officer or that of a Public Prosecutor, or the likelihood of any of these, this Court could give appropriate directions to ensure a fair trial. True, the validity of a trial could be tested on the conclusion of the trial in appropriate proceedings under the Code, including the invocation of the inherent powers of the Court, but that by itself would be no ground to throttle, at the threshold, a petition based on the allegations that the conduct of the trial by a Special Public Prosecutor, in certain circumstances, may vitiate the trial or that such Public Prosecutor was not entitled to have the conduct of the trial, whatever may be the ultimate decision of the Court in the petition on the various questions in controversy.

(9) What then is the genesis of the concept of a fair trial? The concept of a fair trial has a very impressive ancestry, is rooted in history, enshrined in the Constitution, sanctified by religious philosophy and juristic doctrines and embodied in the statute intended to regulate the course of a criminal trial. Its broad features and ingredients have, in course of time, been concretised into well recognised principles, even though there are grey areas, which call for further legal thought and research.

(10) Justice between man and man in the ultimate analysis a divine prerogative. Divinity is where the ultimate seat of justice is located. That is where justice is eventually done. Part of that process is perhaps beyond limited human perception. At some stage in the history of human evolution the divine function was claimed by the monarch with his material might and the king, therefore, symbolised the seat of justice on earth as if by divine mandate, which probably was the basis of the doctrine of 'divine rights of kings'. The monarch's function to do justice between man and man, in course of time, devolved on ordinary men of clay, which became the king's judges to dispense justice in the name of the monarch. But the judicial decision of the king, who was only a human being, as indeed the king's men, must be guarded against the human frailties of 'fear, favor, ill-will or affection' from which the divine power was immune. It was, therefore, essential that the human agency, through which the divine function was sought to be carried out, must transcend the obvious human frailties, and raise itself to the level of the divine to be able to do true justice between the parties. That is the divine origin of the

concept of the duty to be 'just, fair and reasonable' as indeed, the concept of a fair trial. The concept had also its historic basis in that it was civilized man's abhorrence for the cult of violence and violent retribution for the crime. It was also a human reaction to inhuman treatment of the criminal, the echo of which was to be found in the notorious star chambers. A fair trial for the criminal was civilised society's answer to it, and its solution to the problem posed by public trial and lynching of the criminal. If the criminal was to be punished, he must, of course, have a fair trial. The need to have a fair trial was, in course of time, recognised by juristic doctrines and embodied in civilised constitutional law, as indeed, in the statutes dealing with the procedure for the trial of offences. The duty to be 'just and fair' was a built-in safeguard because the trial had to be by the judicial wing of the State, which was under an institutional duty to administer justice without 'fear, favor, ill-will or affection'. The further justification for the concept of a fair trial is provided by the fact that the trial is by the judicature system, which is only the judicial wing of the State. If all State action must be 'just, fair and reasonable', it follows that the State trial of the criminal must also be just, fair and reasonable for the duty to be just, fair and reasonable pervades all facets of the State action. In course of time, perhaps the duty to be just, fair and reasonable would have to cross various other frontiers and would perhaps transcend numerous barriers to be made a universal duty, irrespective of whether the action is a State action, or is exercise of power wielded by business, or a part of the political process. In short, the doctrine that all State actions should be just, fair and reasonable is an attempt to divines all actions through the human instrumentality in public interest and for a truly ethical social order.

(11) What then are the prominent features and important ingredients of the concept of a fair trial? The concept of a fair trial has not been static but has been a dynamic one, which has been evolving and has grown over the years. Thanks to juridical research, development of jurisprudence, judicial innovations, and newly emerging situations, which called for expansion of the horizons of the concept, leading to new dimensions of human freedom, the concept, as known to law and legal philosophy today, has many facets, as indeed, numerous grey areas. A fair trial in modern parlance must be a trial, based on an equally fair investigation on the basis of material which is before-hand disclosed to the accused, in public

place, exposed to public gaze, by a judge who is bound by oath to do justice 'without fear, favor, ill-will or affection', in an environment which is free from hostility, or bias, by judicial vision which is not clouded by elements that may sully the judicial stream, such pre-conceived notions, religious, parochial, ideological, communal, caste, class or political commitments or affiliations' on the basis of evidence of witnesses, who are truthful, and in a manner which guarantees to the person accused the essential procedural safeguards, such as the right to cross-examine, right to counsel of his choice, if necessary, at State expense, right to produce witnesses, as also other material, and generally the right to be fully heard. It must above all be a speedy trial without being a rushed one. A delayed or a rushed trial equally suffer from the vice of denial of justice. A facet of the fair trial is, and this is the crowning glory of the judicial system, that the trial must not only be fair but must also appear to be so. The appearance facet of the trial is as important as the reality of it and, in a sense, even more important so that if an impartial observer of the scene honestly felt or reasonably believed that the accused was not being fairly tried, there would be a denial of a fair trial. This principle is at times stretched further. If accused himself came out of the court room and reasonably believed that he had been unfairly desalt with. there was perhaps no fair trial. The fair trial is a concept which is not merely confined to the procedural safeguards but must extend also to the substantive content or the trial. In this wider meaning the concept could encompass not only the manner of the trial but also the ultimate decision at the trial. This is important because a fair trial would cease to be a fair trial if it led to an unfair conclusion. Thus the conviction of an innocent person at a trial, which otherwise satisfied all the requirements of a fair trial, would be a negation of a fair trial. Similarly, affair conclusion may be arrived at even in a trial, which was not fair. There are various components of the judicial process. It involves the executive wing of the State, the judicial wing of the State, as indeed the legislative wing of the State. In every trial all these are on trial along with the accused. Was the trial based on a just and fair and truthful investigation? This would be a trial of the investigational limb of the State. Was the prosecuting branch of the State acting in a just and fair manner in the conduct of the trial? Were the witness at the trial true to the oath by which they bound themselves? Each of them are also on trial. So is the Presiding Officer at every

trial. Was he just and fair in the way he conducted the trial and ruled on the conclusion of it? In a sense the entire system is on trial. An accused may be sent to jail as the conclusion of a trial. But that may mean a censure of the system or of some of the components that make up a trial. An accused may be acquitted but some or all of the components at the trial may be completely condemned.

(12) There are however, important grey areas in the concept of a fair trial which throw up new problems for justice and judicial thought. Is there a conflict between the claim of a fair trial and the right to media exposure of the trial and if such exposure is conducive to or impedes a fair trial? What about public demonstrations at or near the place of trial and if they lend a vitiating element to the trial? If the criminal and the crime are the product a decadent socio-economic order, isn't the criminal himself, in a sense a victim of his own crime. If crime is the symptom of a sick society, is it fair to put the criminal on trial, rather than deal with the conditions and the environment which produce and give him nourishment? If the crime is the result of a sick mind. won't the hospital or a school be the proper place for a criminal rather than a court of law, and incarceration in jail, which would transform an initiate into a hardened criminal? What about the other victims of the crime? Can a trial be said to be fair which devotes no attention to the victims, of the crime? A question is often asked if in the present climate of murder and time has come when we might as well stop shedding any more tears for the criminal and devote some attention to the victims of crime. Could a trial, which concentrates on the welfare of the criminal, and where everybody involved works over-time to ensure that he has a fair trial, and is fairly dealt with both before, during and after the trial, be said to be fair to the victim as well? To whom should the trial be fair? Shouldn't a fair trial be fair to all concerned, including the public cry for protection of life and property from the marauder of law? What about trials, which for a variety of constraints, and compulsions, cannot be held in a public place in true public gaze and to which entry must of necessity be restricted for reasons of security

(13) Is the concept of a fair trial a mere flight of a philosophic mind, a utopia or a reality? Does the concept merely embody an ideal to be attempted even though not necessarily capable of being achieved within our life-times? All fair trials are

necessarily legally valid, but is the reverse necessarily true? If the concentrates of a fair trial is perhaps an ideal, a legally valid trial must perhaps be its nearest approximation. Does a legally valid trial merely satisfy the minimum requirements, though not all the attributes, of a fair trial? Take the requirement of a speedy trial. Have we ever heard of a speedy trial during the last many decades? Having regard, therefore, to a variety of constraints, there is a real distinction between a 'fair trial' and a trial which is 'legally valid', though not necessarily fair by ideal standards. An average trial in this country may not be as bad as a Kafkan trial, but every trial has some Kafkan shade or the other, even though that does not prevent it from being considered a legally valid trial.

(14) Access to justice and the consequential right to a fair trial, though part of the fundamental human rights, guaranteed by the Constitution, and incorporated in the statute regulating the procedure for the conduct of a trial, and sought to be reinforced by high sounding principles of fair play is, however, by no means easy and does not necessarily have a smooth or straight course. The course of justice and fair trial are beset with numerous impediments which tend to sully the course of justice and put obstructions in the path of a fair trial. These impediments stem both from internal and external sources. There are internal obstacles which flow from the surroundings, the infrastructure, as also the laws, rules, procedure, the practice and the conventions, all of which collectively form part of the justice system. The defective laws, dilatory procedures, improper & illegal practices, corruption of the court system, the incompetence or lack of probity of the judicial and other court personnel, the bias, the prejudice that they may nurture, the ill-will or affection, for one side or the other, that they may nurse, the hostility against or the tilt for one or the other of the parties, based on improper motivations, whether of political affiliation, religious, communal, regional, caste or other affinities, tend to subvert the system. The internal factors take myriad forms, which vary from 'class, caste and cousin' psychosis to transfer of Judges, officials, cases, changes of roster, and tempering with the system of listing, for ulterior objects, unconnected with the exigencies of administration of justice. Sometimes, the caste or class composition of Judges determines for the litigants the section of the bar which would be) best suited to be entrusted with the brief before such Judges. Courts, presided over by certain Judges come, in course of time, to acquire an association

with certain tilts, preferences and prejudices, having regard to the background and known attitudes of Judges to man and matters. In their anxiety to serve the interest of the clients by means, fair or foul, unscrupulous members of the Bar adopt ingenious methods to make sure that their cases are listed before Judges of their choice. All these are capable of lending a vitiating element to the proceedings, which are sought to be manipulated by these devices and factors. There are then external factors, which tend to disturb the course of justice. There are compulsions flowing from those in authority or centres of power, pressures from influential quarters, mild friendly suggestion based either on veiled threats of reprisal or tacit promise of a reward. Some of these incentives, compulsions, and pressures are obvious, while there are others, which are more sophisticated and almost indiscernible, sometimes too subtle to be perceived, much less detected. The institution of an independent Judiciary is no doubt a great bulwark against both internal and external pressure and, therefore, a built-in safeguard that justice would be administered without 'fear or favor, ill-will or affection'. Unfortunately, however, there has been a growing realisation in practically all democratic systems, governed by the rule of law, that the independence of the Judiciary may perhaps be a myth rather than a reality. There are, it is said, independent and fearless Judges but there has been no dearth of Judges who are neither independent nor fearless. There may be those who are still afraid of the 'stick' and lured by the 'carrot'. It is nevertheless a beautiful myth because it sustains the democratic system and maintains faith of the people in the institution, which if shaken may induce the people to take to the streets for justice. The image of the judiciary has no doubt suffered but that is true of all institutions. It is good to remember that all institutions are value based and have a purpose and usefulness. No institution is bad. But whatever you do, you are bound to get bouquets as well as brick-bats. Ours is an age of battered images. The image of the government is sullied by the dirty politicians hungering for power to enrich himself at the cost of the public. The image of business is sullied by the unscrupulous businessman. The image of the bureaucracy is sullied by the corrupt among its ranks. Even the image of the Judiciary has not been spared and is sullied by Judges whose ambition overstrips, either their principles or their talent. In the ultimate analysis, the black sheep in all these institutions also have a role to play, in that, their

misdeeds provide the occasion for a reappraisal and the reason for the cleaning for the augean stables. This may perhaps be taking too charitable view of it but that is what it is

(15) What then is the position of a public prosecutor in the criminal court system and how far can his association with one or the other of the parties be capable of lending vitiating element to the trial. The public prosecutor is a functionary of the State appointed to assist the court in the conduct of a trial, the object of which is basically to find the truth and to punish the accused if he is found guilty according to the known norms of law and procedure. It is no part of his obligation to secure conviction of an accused, in any event, or at all costs. Nor is he intended to play a partial role or become party to the persecution of the accused or lend support, directly or indirectly, to a denial of justice or of fair trial to the accused. His plain task is to represent the State's point of view on the basis of the material which could be legitimately brought before the Court at the trial. If all State actions must be just, fair and reasonable, he would be under no less duty as a functionary of the State to discharge his functions as a public prosecutor in an equally just, fair and reasonable manner irrespective of the outcome of the trial. In that sense, he is part of the judicature system, and an upright public prosecutor has no friends and foes in Court. He has no prejudices, pre-conceived notions, bias hostility or his own axe to grind. He represents public interest, but is not a partisan in the narrow sense of the term.

(16) Is the position of a public prosecutor any different than of counsel, who appear for parties in a court of law. The answer is both in the affirmative and the negative. An advocate of the court is in theory an officer of the Court and whatever be the side he is engaged to represent he has his higher duty to the court in assisting the court in finding out the truth and in placing before the Court the point of view of his client honestly and fairly and to desist from making any misrepresentation or attempt to mislead the court. The advocate's duty to the court transcends the limited and narrow loyalty to the client, who engages him to protect his interest. Every advocate, therefore, has a dual capacity. He represents his client but that does not dilute his higher duty to the court. He is, however, partisan counsel in a sense not only because he is paid for the work by the client but also

because an advocate, in actual practice, does not necessarily conform to the noble theory by which his conduct is sought to be disciplined. The duty of an ordinary advocate and a public prosecutor are, therefore, co-extensive to the extent that both have a common duty to the court and must, therefore, place their respective points of view before the Court in a fair and reasonable manner but the similarity ends there. A public prosecutor has no client or constituency apart from the State and State is not a party like any other party. He is not paid by an individual who may be aggrieved or by the accused who is on trial. He, therefore, does not have the disability of a dual personality, which is certainly true of an ordinary advocate, who is torn, in the thick of his practice in Court, between the wider loyalty to public interest, to the court system, claim of straight and rigid adherence to truth and discipline on the one hand, and his narrow, as also monetary, association with the individual litigant or the institution, whom he represents on the other. An advocate-client relationship introduces a personal element from which the public prosecutor must be considered immune. He is above the personal loyalty. He does not have a dual capacity.

(17) Is the position of a public prosecutor any different merely because he is not the ordinary functionary of the State. but has been supplanted either at the instance of an aggrieved party, or a fending faction, or even if appointed independently of the aggrieved party had prior association with the party, and has been amply rewarded by it, as in the present case? Can such a public prosecutor be said to be as well insulated against pressure of an aggrieved party as an ordinary public prosecutor would be or is at least expected to be but, what is more important would his background not give the appearance of partiality or generate an apprehension of hostility in an Impartial observer of the scene, as indeed, in the accused, who is so vitally interested in the fairness of a trial? Would this feature of the public prosecutor be capable of vitiating the trial or create an atmosphere which may smack of likelihood of or reasonable probability of bias. In seeking answers to these questions, it is necessary to keep in mind the clear distinction between the 'reality' of affair trial and the 'appearance' that it is just, fair and reasonable. The concept of equality before the law and equal protection of the laws is in practice fairly diluted when it comes to the right of representation in a court of law. Money and influence do play more than their due roles, The decision

of a cause in a court of law is essentially determined by the law, as indeed, the facts of the case. Nevertheless, where an over-burdened special public prosecutor is pitched against eminent, competent, and influential members of the bar with better training, specialised skills, able research and other faculties and aids, the fight cannot but be described as unequal. What makes the position worse, is the declining moral standards of some of the services. There is, therefore, a wide feeling among the public that the representation for the State is comparatively less effective and may also be easily tampered with through a variety of nefarious influences. If in that kind of an environment an influential or well-to-do aggrieved family feels impelled to engage a counsel of their own choice in whose competence and probity they have full faith and approach the State to engage such a counsel without any burden on the exchequer, it would be difficult to fault such an appointment even though one may not be happy that the State is unable to pay for proper legal services. The accused is no doubt vitally interested in the trial for it may result not only in his condemnation but even of deprivation of his freedom. The accused and the victim are not at par and a criminal trial is not a forum for personal vengeance. It is essentially a State action to punish crime. There is, therefore, no other party involved but with all the concern for a fair trial and humane and civilised conditions in which the accused is treated, both during the investigation in the course of trial, and after conviction., it is difficult to ignore the claim of the victims or of the aggrieved party to ensure that the crime is detected, properly investigated, and the accused is effectively tried, and suitably punished. A fair trial does not necessarily mean that it must be fair only to the accused. It must be fair to the victim also. It must be fair for all. A fair trial is a concept which is much higher than the claims or ends of parties to it. If the accused has a right to counsel of his choice why should not the victims of the crime be entitled to a say in the matter of representation of the State at the trial. The motive of the State and of the victim may be different but the object is common. Moreover a party's counsel who is engaged by the State at the cost of the aggrieved party is equally bound by the higher duty to the court as also to his discipline as an advocate, and is expected to rise to the occasion and discharge his duties as a just and fair public prosecutor unmindful of the source from which the funds are made available for payment to him. The material placed on record by the investigating agency places

its own limitations on such a public prosecutor should be nevertheless carry a prejudice or a bias. Above all, there is institutional safeguard against any prejudice or bias or any vitiating elements flowing from such a public prosecutor or his association with a party or a faction in the judicial duty to shift the material and provide the necessary insulator cover against any irrelevant, improper influencing of the trial. While there is no doubt that the association of such public prosecutor may perhaps disturb or dislodge the appearance of a fair trial or create a reasonable apprehension in the mind of the accused that with a hostile and partisan counsel in the garb of special public prosecutor he would perhaps be denied justice or that trial would neither be just nor reasonable. But such fear must not be allowed to blur the judicial mind because of the institutional safeguard. It follows, therefore, that the appointment of party's counsel as a special public prosecutor does not by itself militate against the principle that State action must be just, fair and reasonable and would not, without anything more, either vitiate a trial or deprive the trial for that reason alone of the appearance of a fair trial.

(18) I have so far examined the question in its constitutional perspective and at the touch stone of the principle that such action must be just, fair and reasonable as an emanation of the fundamental rights guaranteed by Articles 14 and 21 of the Constitution of India. There are, however, two other approaches to the question. One of these is purely statutory and is based on which the special public prosecutor, who was asked by the Administration to defend the validity of his appointment, contested the petition. The other is the presidential approach on which reliance was placed on both sides

(19) The statutory approach to the question is, by and large, redundant because the challenge to the appointment was mounted on a purely constitutional edifice, which I have dispelled. The defense of the appointment on the ground that it is nevertheless consistent with the scheme of the Code of Criminal Procedure and sanctified by its provisions was really not necessary because no statutory ground was urged in support of the challenge. If the constitutional challenge to the validity of the appointment was well-founded the statutory sanction in its defense would be only illusory because an unconstitutional executive action could not possibly be validated with reference to a statute. It is the Constitution and not the statute that

would prevail in the event of a conflict, in view, however, of the fact that the major argument on behalf of the Administration turned on the scheme of the Code, a brief treatment of the subject would perhaps be not out of place. The expression 'public prosecution' is not left undefined by the Code. Section 2(u) defines the expression '(public prosecutor' as meaning 'any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor.' Section 24 of the Code, which is part of Chapter II dealing with constitution of criminal courts, and officers, deals with the subject of public prosecutor. Sub-section (1) of this Section enjoins the Central Government or the State Government to appoint a public prosecutor for every High Court 'after consultation with the High Court' for conducting in such court any prosecution, appeal or other proceedings on behalf of the Central Government or State Government, as the case may be. Sub-section (2) empowers the Central Government to appoint 'one or more Public Prosecutors' for the purposes of conducting 'any case or class of cases in any district, or local area.' Sub-section (2), however, does not make consultation with the High Court or any other authority accessory. Sub-section (3) enjoins the State Government to appoint public prosecutor or one or more additional public prosecutors for every district. Sub-section (4) enjoins the District Magistrate to prepare a panel of names of persons who are in his opinion fit to be appointed as public prosecutor or additional public prosecutor for that district 'in consultation with the Sessions Judge' and sub-section (5) provides that the State Government shall not appoint any person as public prosecutor or additional public prosecutor unless his name appears in the panel prepared by the District Magistrate under sub-section (4). Sub-section (6) provides that notwithstanding anything contained in sub-section (5), the State Government shall appoint as public prosecutor or as additional public prosecutor for a district only from among the persons constituting a regular cadre of prosecuting officers where such cadre exists unless no suitable person is available in such cadre in which case the appointment may be made out of the panel prepared by the District Magistrate under sub-section (4). Sub-section lays down the essential' qualifications for appointment as a public prosecutor or an additional public prosecutor under sub-section (1) or sub-section (2), sub-section (3) or sub-section (6). Sub-section (8), with which .we are concerned, provides that 'The Central Government or the State

Government may appoint for tile 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.' We are not concerned in this case with sub-section (9). Section 24 leaves no manner of doubt that the Central Government and the State Government have unfettered power to appoint a Special Public Prosecutor for purposes of any case if the person so appointed satisfies the qualification laid down in sub-section (8), and once a person is appointed a Special Public Prosecutor. he would be the 'public prosecutor' within the meaning of section 2(u) since he was appointed under Section 24. Chapter Xiv contains general provisions as to enquiries and trials Section 301 in this chapter provides for appearance by public prosecutors. Sub-section of this Section enables the Public Prosecutor to appear and plead without any written authority before any court in any case in his charge under inquiry, trial or appeal. Sub-section (2) of this Section provides that '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, however, empowers any Magistrate inquiring into or trying a case to permit the prosecution to be conducted by any person other than a police officer below the rank of an 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. Sub-section (2) provides that any person conducting the prosecution may do so personally or by a pleader. Chapter xviii, which deals with trial before court of Sessions, provides by section 225 that in every trial before a court of Sessions, the prosecution shall be conducted by a Public Prosecutor'.

(20) While it appears to be the measure of legislative concern for a Sessions trial, because it involves comparatively graver offences, trial in such court has to be conducted by a public prosecutor but the moment a person, who is qualified for such appointment, is appointed Special (Public Prosecutor under Sub-section (8) of Section 24, he is a Public Prosecutor by virtue of Section 2(u) of the Code. Once he has been validly appointed, even a party's counsel is clothed in the garb

of a public prosecutor he is entitled to conduct the trial. If he had not been so appointed he could have acted only under the direction of the public prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case as provided in Section 301(2). But ordinarily even such a private counsel, who acts under the directions of the Public Prosecutor, and may only, with the permission of the court, submit written argument after the evidence is closed in the case, nevertheless would be within the definition of the term 'public prosecutor' in Section 2(u) because the expression 'public prosecutor', as defined there includes any person who is 'acting under the direction of a public prosecutor'. The status of such a counsel as Public Prosecutor is nevertheless dependent on his acting under the direction of a Public Prosecutor. He is unable to have complet

(21) That leaves for consideration the numerous decisions cited at the bar by the learned Counsel on both sides.

(22) The case of *The King vs. Sussex Justice* (1) was cited on the question of bias. In this case, the Justices' clerk was present at the Justices' consultation and the clerk was interested professionally in Civil Proceedings arising out of subject-matter of the complaint. It was in these circumstances that the conviction was quashed as it was felt that it was improper for the acting clerk having regard to his firm's relations to the case to be present with the Justices when they were considering their decision. It was, however, a matter purely internal to the Justices and the presence of a Justice's clerk in the circumstances with the Justices could not possibly be equated to the appearance of a Public Prosecutor, One is part of the internal system of justice while the other is only a part ' of the larger judicature system. This case is of no assistance to the petitioner on the question of bias. The case of *The King vs. Essex Justices* (2) was cited in support of the plea of likelihood of bias. In this case, a solicitor was clerk to justices and left his business at a branch office almost entirely to his own clerk. One of the parties to the proceedings had consulted the solicitor's clerk and it was held that there was a right to take objection to the presence of the solicitor as clerk to the Justices because it would create in his mind the reasonable impression that justice was not being done. The facts of the case are, however, distinguishable because the clerk

to the Justices was not merely a part of the larger judicature system, but was immediately concerned with the work of the Justices. The clerk to the Justices could have the ear of the Justices. The position of a Public Prosecutor is clearly distinguishable. The clerk to the Justices is part of the internal court system. The Public Prosecutor could also influence the mind of the Court but, like any other counsel, in the open court and not in the privacy of the chamber of a Presiding Officer. The principle of this decision could not, therefore, be extended to the Public Prosecutor. In the case of Bhupalli Malliah and ors, (3) a Division Bench of the Andhra Pradesh High Court was called upon to construe the provisions of Section 270, 492, 493 and 4(t) of the Code of 1898 to determine the functions of the Public Prosecutor and of Counsel engaged by the complainant in a Sessions trial. It was held that having regard to the language of the Code, Section 493 merely required that the Public Prosecutor should guide the prosecution and direct the private party's advocate and that no legal principle or purpose of criminal administration was involved in excluding a counsel merely on the ground that the complainant had briefed him if he conforms to the normal standards of advocacy. It was, however, observed that on practical consideration, the office of the Public Prosecutor is not a sine-cure appointment and it is an undesirable practice to allow him unless it be on grounds of personal inconveniences or other necessity to get his duties performed by a proxy whenever a private person engages a pleader for that purpose. It was further held that the procedure followed by the Sessions Judge in that case in allowing the prosecution to be conducted by counsel engaged and briefed by the complainant in the case and not by the Public Prosecutor was in violation, of the express and mandatory provisions of the Code contained in Section 270 and that it was clear from the provisions of Section 492(2) and 493 that the counsel engaged by a private party could not plead although he could act under the directions of the Public Prosecutor. Reading clause (t) of Section 4(1) with Section. 493, it was further held that it led to the inevitable conclusion that any person engaged and briefed by private person in the case to instruct the Public Prosecutor can only so instruct and act under the directions of the Public Prosecutor and in such a case, the prosecution shall be conducted by the Public Prosecutor himself. This case, however, appears to have no relevance because the private counsel in the present case had been given an

official status by his appointment as Special Public Prosecutor u/s 24 of the Code. There is a clear distinction between a private counsel engaged to assist a Public Prosecutor and a private counsel, who has been appointed as a Special Public Prosecutor by the State. In the latter case, he is a Public Prosecutor because he has been appointed as such while in the former case, he is a Public Prosecutor because he has been acting under the direction of a Public Prosecutor. In the present case, the complainant's counsel was not merely acting under the direction of a Public Prosecutor, but had been appointed as a Special Public Prosecutor. This case is therefore, of no assistance in deciding the questions in controversy. In the case of Chenna Reddi Vtera Reddi and Anr. vs. Chillakuru Rama Chandra Reddi and anr.(4), the question before the Andhra Pradesh High Court was, if the Court had no power under the Advocates Act to prohibit the counsel appearing as an Advocate, because it was alleged by the other side that his interest would be adversely affected if the counsel was allowed to appear for the opposite party. The court declined to exercise its inherent power on the ground that the Advocates were members of a highly honourable and learned profession and it was expected that they would do nothing which would affect the reputation and good name of the profession. A hope was, however, expressed that on ethical and professional ground, if it appeared that continuance on the part of an advocate in a case was liable to objection, 'the advocate should dissociate himself keeping in view the highest traditions of the professions, and that the court must desist from any action which was likely to injure or jeopardise the interests of the profession'. This case to my mind, has no relevance to the question in controversy before me except as embodying a rule of caution and prudence. In the case of Roop K. Shorey v. The State (5), it was held by the Punjab High Court in its Circuit Bench at Delhi that Public Prosecutors were expected to act in a 'scrupulously fair manner' and present the case 'with detachment and without anxiety to secure a conviction' and that the courts trying the case 'must not permit the Public Prosecutor to surrender his functions completely in favor of a private counsel.' It was further held on the interpretation of Sections 493 and 495 of the Code of 1898, that a private counsel could be given complete charge of the prosecution case only with the permission of the court but if a private counsel acted under the guidance and control of the Public Prosecutor, he was entitled to act u/s 493 of the Code and that the

comparison of the two provisions revealed that it was only when a private counsel was entrusted with an independent charge of the case that permission of the court was necessary and that so long as he acted 'under the supervision, guidance or control of the Public Prosecutor', he could examine and cross-examine the witnesses and address arguments. This case is also of no assistance either way because in the present case, a private counsel had been appointed a Special Public Prosecutor. I am however, in respectful agreement with the observation as to what is expected of a Public Prosecutor in the conduct of a trial. In the case of Surjit Singh and another⁽⁶⁾ the question before the Supreme Court was, if a Public Prosecutor could withdraw a case pending before a Magistrate on a private complaint which was being conducted by the complainant. On an interpretation of Section 494, of the earlier Code, it was held that a Public Prosecutor can file an application u/s 494 only if he is already 'in charge of the particular case' in which the application is filed, and that if a Public Prosecutor was not in charge of a particular case, and was not 'conducting the prosecution', he would not be entitled to ask for withdrawal from prosecution. The prosecution in this case was being conducted by the complainant and the prosecuting Deputy Superintendent of Police was nowhere in the picture when he filed as application u/s 494 of the Code. The view expressed by the Punjab High Court that such a Public Prosecutor was not entitled to file an application for withdrawal was accordingly confirmed. This case appears to have no relevance to the questions in the present petition. The case of Rohtas Industries Ltd. ⁽⁷⁾, was cited to highlight the principle that statutory power is conferred on the faith that it will be exercised in a 'reasonable manner'. Reliance was placed on the observations in para 37 of the Judgment that in public regulation of this sort, there is no such thing as absolute and untrammelled 'discretion' that is that action can be taken on any ground or for any reason that can be suggested to mind of the administrator. It was further pointed out that fraud and corruption in the commission may not be mentioned in such statutes but they are always implied as exceptions, and that 'discretion' necessarily implies good faith in discharging public duty; and that there is always a perspective within which a statute is intended to operate and any clear departure from its lines or objects is just as objectionable as fraud or corruption. There is, however, no quarrel with these propositions which, with respect, underscore the

basis of the concept of rule of law. In the case of Raj Kishore Rabidas (8) a Division Bench of the Calcutta High Court held that neither under Section 492 nor under Section 4(e) of the old code was any authority given either to the State Government or to the District Magistrate under Section 10(2) to engage a lawyer, far less to make a lawyer by such engagement a Public Prosecutor. It was held that the power to appoint a Public Prosecutor can be exercised by a District Magistrate in the absence of Public Prosecutor or where no Public Prosecutor had been appointed and that the absence did not obviously include the situation when Public Prosecutor appointed in the District was not available to conduct a particular case but could only mean that he is either on leave or by vacancy in the office. It was further held that in trials in court of Sessions, Section 270 of the old Code was required to be strictly adhered to and it was pointed out that it was the duty of the Sessions Judge not to allow prosecution to be conducted by a person who is not properly appointed public prosecutor. Elsewhere, it was held that a Public Prosecutor for the State was not such a mouthpiece for his client the State, to say what it wants or its tool to do what the State directs. 'He owes allegiance to higher cause.' He must not consciously 'misstate the facts', nor 'knowingly conceal the truth'. Despite his undoubted duty to his client, the State 'he must sometimes disregard his client's most specific instructions if they conflicted with his duty in the Court 'to be fair, independent and unbiased in his views.' As an Advocate for the State, he may be ranked 'as a Minister of Justice equally with the Judge'. It was further held that there was 'failure of justice' because of the illegal appointment of a Public Prosecutor. The defense lawyer was not able to carry out his duties properly and the Judge failed to wait the prosecution evidence properly, which had caused prejudice to the accused but mere illegal appointment of Public Prosecutor would have been accruable irregularity u/s. 537 of the Code. This case turns on its own peculiar facts. The matter was before the High Court on a murder reference u/s 374 of the Criminal Code and the Court examined various facets of the trial to see if there had been failure of justice. The duly appointed Public Prosecutor had kept away from the Court and the trial had been conducted by a lawyer, who had not been properly appointed as a Public Prosecutor. While the observations of the Court with regard to the role of a Public Prosecutor are entitled to utmost respect, I see no other parallel in this case which may be of any assistance to this Court in

the present case. In the present case, a special Public Prosecutor had been validly appointed and there was no illegality or irregularity in the manner of that appointment. The Calcutta High Court relied on the observations of the Supreme Court in the case of Ram Naresh Pandey (9), where while dealing with the function of a Public Prosecutor, the Court observed that public prosecutor though an executive officer is in larger sense also 'an officer of the Court and that he is bound to assist the court with his fairly considered view and the Court is entitled to have the benefit of the fair exercise of his function'. This proposition is scarcely in doubt. The case of P. Sirajuddin (10) was cited in support of the proposition that before a public servant is publicly charged with acts of dishonesty, there must be a suitable preliminary enquiry into the allegations by a responsible officer and such enquiry must proceed in a 'fair and reasonable manner'. The enquiring officer must not act under an 'preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon curing the conviction of the said person by adopting measures which are of doubtful validity or sanction'. The 'means' adopted no less than the 'end to be achieved' must be 'impeccable'. These observations of the Supreme Court are entitled to greatest respect and are an extension of the principle that all State action must be just, fair, and reasonable and there is no quarrel with this proposition. The case of S. Parthasarathi, (11) was cited in support of the proposition that even a domestic enquiry conducted against a public servant by a biased officer vitiates the order passed on its conclusion. In paras 13 to 17 of this Judgment, Mathew J, who spoke for the Supreme Court, dealt with the question as to the test of likelihood of bias and held that if right minded persons would think that there is real likelihood of bias on the part of an enquiring officer, he must not conduct the enquiry. Nevertheless, there must be a 'real likelihood of bias' and that a 'surmise or conjecture would not be enough'. There must exist circumstances from which a reasonable man would think it 'probable or likely that the enquiring officer would be prejudiced against the delinquent'. The Court will not enquire whether he was really prejudiced. 'If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision'. This decision is, however, of no assistance in the present case because the apprehension with regard to bias is

not directed against the Judge but is attributed to the Public Prosecutor. I have already dealt with at length with the distinction. This decision is nevertheless of considerable importance in that it gives due weight, with respect, and is based on the extension of the principle that justice must not only be done but must appear to have been done.

(23) The case of Sunil Batra, (12) was cited to highlight the importance of the due process and the procedural safeguards and to reinforce the principle that the salutary requirement of these and the constitutional guarantee against any unfair treatment transcends the physical barrier of a court room and extends right inside the prison walls expanding the requirement of a fair trial even after conviction in the manner in which a convict is detained and treated. It was, inter alia, observed in that case that under Article 21, procedural fairness is badge of constitutionality if life and liberty are to be leashed or extinguished. The case of Maneka Samav Gandhi was cited to bring out the requirements of a fair and impartial trial. Speaking for the Court, Krishna Iyer, J. pointed out that the assurance of a fair trial was the 'first imperative of, the dispensation of justice' and the central criterion for the court to consider when a motion for a transfer is made is not the 'hypersensitivity' or relative convenience of a party or easy availability of legal services or like mini-grievances. Something 'more substantial, more compelling, more imperilling, from the point of public justice and its attendant environment, is necessitous if the Court is to exercise its power to transfer'. It was further pointed out that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried, although the process of justice should not harass the parties. It was further pointed out that the sophisticated process of a criminal trial certainly required competent legal service to present a party's case. If an accused person, for any particular reason, was virtually deprived of this facility, an essential aid to fair trial fails. The contention that in the prevailing environment. the petitioner in that case would not be able to get proper 'legal service' in Bombay was dispelled. The further contention that mob frenzy or public agitation in the court may deprive the petitioner of a fair trial was also dispelled and it was pointed out that 'the Magistrate was the master of the orderly conduct of all court proceedings and his authority shall no bang limp if his business is stalled by brow-beating and it was

his duty to clear the court of confusion yelling and nerve racking gesture which mar the serious tone of judicial hearing'. In the case of Russainara Khatoon it was pointed out that a procedure prescribed by law for depriving a person of his liberty cannot be reasonable, fair or just unless that procedure ensures a 'speedy trial' for determination of the guilt of such person and that 'no procedure which does not ensure a reasonably quick trial can be retarded as reasonable, fair just and it would fall foul of Article 21'. It was further observed that 'speedy trial, and by speedy trial we mean reasonably expedition trial, is an integral and essential part of the fundamental right to Life and Liberty enshrined in Article 21 of the constitution.' These observations were made in the context of a dicta that under the law, as it stood today, the Court must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties. That concept, it was pointed out, was outdated and experience has shown that it has done more harm than good. It was pointed out that new insight into the subject to pre-trial release winch has been developed in socially advanced countries, and, particularly, the United States, should now inform the decisions of our courts in regard to pre-trial release and that if the court was satisfied after taking into account the various material factors that the 'accused has his roots in the community and is not likely to abscond, it can safely release the accused on his personal bond. The case of Bachan Singh, : 1980 CriLJ636 was cited in support of the proposition that Article 21 expanded and read for interpretation purposes clearly brings out the implication that the founding fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance With the 'fair, just and reasonable procedure established by valid law.' This decision was also an authority for the proposition that the State duty to be Just fair and reasonable in the matter of treatment of crime 'did not end with the conviction but continued to regulate the manner in which the sentence Imposed on a convict was to be carried out.' In the case of Sabir, by which a Division Bench of this Court overruled the decision of a Single Judge in the case of K. C. Sood, it was laid down that there was on general authority of a Public Prosecutor and the authority or powers are confirmed in relation to the cases entrusted to him by the State Government or of which he is in charge and that there was no provision in the Code which prohibited in Public Prosecutor to appear in private cases. The

learned Single Judge had held that in all prosecutions, the State was the prosecutor and the proceedings were always treated as proceedings between the State and the accused. It had been further held that the office of a Public Prosecutor was a public office and involved duties of public nature which were of vital importance to the public. The learned Single Judge had further expressed the view that the office of a public prosecutor was an office of responsibility and was more important than any others because the holder was required to 'prosecute with detachment on the one hand and yet with vigour on the other'. The learned Judge had consequently held that the Public Prosecutor whether retained or salaried, 'could only work for one client i.e. the State, and to yield to any other position will be to damage the dignity, impartiality and efficiency of the office'. The Division Bench overruled the decision on an examination of the scheme of the Code. In the case of P.G. Narayanankutty, the learned Single Judge of the Kerala High Court was, inter alia, concerned with the question as to the propriety of a Special Public Prosecutor being appointed either without remuneration or being remunerated by a private party and observed that a Special Public Prosecutor cannot be appointed 'with a view to secure conviction at all costs'. Special Public Prosecutor could be appointed only when public interest demands it and 'not to vindicate the grievances of a private person such as close relation of the deceased'. It was further observed that in order that he discharges his duty properly, 'he should look to the State for remuneration for his services and if he looks to a private party for remuneration, his capacity and ability to perform his role as Public Prosecutor properly will be endangered'. It was held that the Government cannot appoint Special Public Prosecutor on such terms 'abdicating their financial responsibility or directing him to receive his remuneration from any private individual or expecting him to work without remuneration'. It was further observed that it could not be said that in every case, where one of the parties involved was of a particular political persuasion, no Public Prosecutor who shared the particular persuasion, should be allowed to conduct the prosecution. To accept such a state of affairs as an invariable rule would not only be contrary to sound practice, but would seriously offend the dignity of the Bar as such. In this case, the Court was really relieved of the obligation of pronouncing upon the validity of the appointment as a Special Public Prosecutor because the appointee 'gracefully

withdrew his consent for such appointment'. In this case, the learned Judge further observed that it was unfortunate that Public Prosecutors and Additional Public Prosecutors in that State were 'so ill-paid that the posts do not always attract talented lawyers and that there was a feeling that merit, talent and experience are not always the criteria behind appointments made to these posts'. It was further pointed out that 'the Public Prosecutors in the discharge of their duties had to face talented and experienced members of the Bar and complaints were not rare that at times the Prosecutors suffered from serious handicap'. It was feared that the public confidence in the institution, as indeed, even the confidence of the Government, may also be shaken at times but nevertheless, earnestness in making these posts which are sensitive posts in the field of administration of criminal justice attractive or in making proper choice of personnel, seem to be lacking which has to some extent 'affected the dignity and status of the office of the Public Prosecutor'. It was further observed that whenever the Government was satisfied that in a particular case or class of cases, appointment of a Special Public Prosecutor was necessary they must not only so appoint but also 'bear the financial burden involved in the appointment', and Government are 'not justified in abdicating their responsibility to meet the financial commitment. It was pointed out that the prosecutor was an officer of the Court expected to assist the Court in arriving at the truth in a given case. The prosecutor no doubt had to vigorously and conscientiously prosecute the case so as to serve the high public interest of finding out the truth and in ensuring adequate punishment to the offender. 'At the same time, it was no part of his duty to secure by fair means or foul conviction in any case'. He has to 'safeguard public interest' in prosecuting the case. Public interest also demands that the trial should be conducted in a fair manner, needful of the rights granted to the accused under the laws of the country, including the Code. The Prosecutor while being fully aware of his duty to prosecute the case vigorously and conscientiously, must also be prepared to respect and protect the rights of the accused. In the case of *Kadra Pahadiya*, it was held that a 'speedy trial' was a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Constitution and that an accused 'who was denied the right of speedy trial was entitled to approach the Supreme Court for the purpose of enforcing such right and the Supreme Court in discharge of its

constitutional obligation has the power to give necessary directions to the State Government and other appropriate authorities to secure this right to the accused'. The dictum of the Supreme Court laid in the case of Hussainara Khatoon (supra) was affirmed. In the case of T. V. Vatheeswaran, it was held that prolonged detention to await the execution of a sentence of death was an 'unjust, unfair and unreasonable procedure' and that the only way to undo the wrong was to quash the sentence of death. It was held that the 'dehumanising factor of prolonged delay in the execution of a sentence of death has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way as to offend the constitutional guarantee that no person shall be deprived of his life or personal liberty except according to procedures established by law, and that the appropriate relief in such case was to vacate the sentence of death'. It was further observed that delay exceeding 2 years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death, the cause of delay being immaterial. It was further held that Articles 14, 19 and 21 were not mutually exclusive and that they 'sustain, strengthen and nourish each other and were available to prisoners as well as free men'. 'Prison walls', it was pointed out, 'do not keep out fundamental rights and person under sentence of death may also claim the benefit of these rights'. The fiat of Article 21, it was pointed out, was that any procedure which deprives a person of his life or liberty must be just, fair and reasonable. 'It implies, inter alia, a right to speedy trial'. It also implied humane conditions of detention, preventive or punitive, and the procedure established by law did not end with the pronouncement of sentence. It includes the carrying out of the sentence also. In the case of Decna, the question was as to the constitutionality of hanging a convict by rope and whether this was a 'cruel and barbarous method of executing a death sentence and was violative of Article 21 of the Constitution.' It was pointed out by the majority that it was lawful to impose the sentence of death in appropriate cases. It would be equally lawful to execute a sentence in an appropriate manner. Article 21 undoubtedly has much relevance on the passing of a sentence as on the manner of executing it. therefore, a two fold consideration has to be kept in mind in the area of sentencing, Substantively, the sentence has to meet the constitutional prescription contained especially in Articles

14 and 21. Procedurally, the method by which the sentence is required by law to be executed has to meet the mandate of Article 21. The mandate of Article 21 is not that the death sentence shall not be excused but that it shall not be executed in a 'cruel, barbarous or degrading manner'. In the case of Sheonandan Paswan, the Court was concerned with the scopes of the Public Prosecutors discretion in the matter of withdrawal from prosecution and the nature and scope of the trial court's power in the matter, under Section 321 of the Code of Criminal Procedure. This case was apparently cited to bring out the importance of the office of the Public Prosecutor in that the Supreme Court laid down that the withdrawal from prosecution was an 'executive function of the Public Prosecutor' and the ultimate decision to withdraw from prosecution was his and before an application under Section 321 of the Code was made to the Court, 'it is the Public Prosecutor who was to apply his mind to the facts of the case independently without being subjected to any outside influence'. Government may suggest to the Public Prosecutor that a particular case may not be proceeded with 'but nobody can compel him to do so'. Although there is no bar in Section 321 on the Public Prosecutor to receive any instruction from Government before he files an application, if the Public Prosecutor receives such instrument, he cannot be said to act under extraneous influence. On the contrary, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from Government, since Public Prosecutor cannot conduct a case absolutely on his own or contrary to the instruments of his client, namely, the Government. Unlike the Judge, the Prosecutor is not an absolutely independent officer. He is appointed by the Government for conducting in Court any prosecution or other proceedings on behalf of Government and, there is therefore, 'a relationship of Counsel and client between the two', If the Government gives instructions to a Public Prosecutor to withdraw from the prosecution, the latter 'after applying his mind to the facts of the case may agree with the instructions and file a petition or disagree therewith and refuse to file it'. In the latter event, the Public Prosecutor will have to return the brief and perhaps to resign because 'it is the Government and not the Public Prosecutor who is in the know of the larger interest of the State'. In the case of A.R. Antulay, the question was as to the procedure to be adopted by the Judge in the trial of the two cases transferred to the High Court and as to who

should be in charge of the prosecution. It was pointed out that if the cognizance of an offence was taken u/s 8(1) of the Criminal Law (Amendment) Act, 1952 and the trial had to be held according to the procedure prescribed therein, under Section 8(3), the learned Advocate engaged by the complainant to conduct the prosecution will be deemed to be a Public Prosecutor. In such a situation there was no question of the State appointed Public Prosecutor conducting the prosecution and that it would be for the complainant to decide who would be the Advocate in charge of the prosecution and the Advocate so appointed would be deemed to be a Public Prosecutor. In the case of Sunil Kumar Pal, the accused persons were defended by the Public Prosecutor who earlier had the brief of the case with him. It was also found that the accused were supported by the ruling party in the State and when the trial was going on and the witnesses were giving evidence, there were a large number of supporters of the party who were allowed to assemble in the Court compound and who created a hostile atmosphere by shouting against the prosecution in favor of the accused. Though the brother of the deceased and the complainant as also the witnesses were intimated no steps were taken for according protection to them so that they may be able to give evidence truly and fearlessly in proper atmosphere consistent with the sanctity of the Court. Quite a few witnesses turned hostile. It was further found that when the trial was commenced, the Special Public Prosecutor who was appointed only 2 days earlier was granted adjournment for one day to prepare the case. There was in these circumstances held that the 'trial could not be regarded as fair and Just so far as the prosecution was concerned'. The entire course of events show that the conduct of the trial was 'heavily loaded in favor of the accused persons'. The trial was 'vitiated ' and acquittal of the accused was set aside. This is what the Court observed:

The order passed by the learned Additional Sessions Judge acquitting respondents Nos. 1 to 9 obviously suffers from a serious infirmity and we do not think it is possible to sustain it on any view of the matter. There can be little doubt that the trial culminating in the acquittal of respondents Nos. 1 to 9 was appallingly unfair so far as the prosecution is concerned and was heavily loaded in favor of respondents Nos. 1 to 9. It is difficult to understand how consistently with ethics of the legal profession and fair play in the administration of justice, the Public

Prosecutor of Nadia could appear on, behalf of respondents Nos. 1 to 9. The appearance of the Public Prosecutor, Nadia on behalf of the defense does lend support to the allegation of the appellant that respondents Nos. 1 to 9 were supported by the Communist Party of India (Marxist) which was at the material time the ruling party in the State of West Bengal and this would naturally give rise to apprehension in the minds of the witnesses that in giving evidence against respondents Nos. 1 to 9, they would be not only incurring the displeasure of the government but would also be fighting against it. Moreover, it cannot be disputed that when the trial was going on and the witnesses were giving evidence, the Communist Party (Marxist) who were allowed to assemble in the court compound and who created a hostile atmosphere by shouting against the prosecution and in favor of the accused. Though the appellant and the complainant as also the witnesses were intimidated, no steps were taken for according protection to them so that they may be able to give evidence truly and fearlessly in proper atmosphere consistent with the sanctity of the court. It is significant to note that quite a few witnesses turned hostile and that obviously must have been due to the fact that they apprehended danger to their life at the hands of respondents Nos. 1 to 9 and their supporters. It is also regrettable that though at the time when the trial commenced on 22nd May, 1978, Shri S. N. Ganguly, who was appointed Special Public Prosecutor to conduct the prosecution, asked for an adjournment of the trial in order to enable him to prepare the case particularly since he was appointed only on 20-5-1978, the trial was adjourned only for one day, with the result that S. N. Ganguly had to return the brief. Then late in the evening of 22nd May, 1978 Shri S. S. Sen, Additional Public Prosecutor was asked to conduct the prosecution and he had to begin the case on the very next morning on 23rd May, 1978 without practically any time for effective preparation. We have no doubt that under these circumstances the trial could not be regarded as fair and just so far as the prosecution was concerned. The entire course of events shows that the conduct of the trial was heavily Loaded in favor of respondents Nos. 1 to 9. The trial must in the circumstances be held to be vitiated and the acquittal of respondents Nos. 1 to 9 are a result of such trial must be set aside. It is imperative that in order that people may not lose faith in the administration of criminal justice, no one should be allowed to subvert the legal process. No citizen should go away with the feeling

that he could not get justice from the Court because the other side was socially, economically or politically powerful and could manipulate the legal process. That would be subversive of the rule of law. We, therefore, allow the appeal, set aside the judgment and order of the learned Additional Sessions Judge acquitting respondents Nos. 1 to 9 as also the order passed by the High Court rejecting the application of the appellant and direct that there shall be a re-trial of respondents Nos. 1 to 9 on the self-same charges for which they were tried before the learned Additional Sessions Judge. It is necessary in the interest of justice that the trial should not be conducted in Krishna Nagar because the atmosphere there appears to be surcharged against the appellant and the complainant and we would accordingly direct that the sessions case shall stand transferred to the City Civil and Sessions Court, Calcutta and it shall be tried by a City Civil and Sessions Judge to be appointed by the Chief Judge of the City Civil & Sessions Court. We would also direct that in order that there should be fair yet effective prosecution, the State Government should appoint a senior advocate practicing on the criminal side in the City Civil & Sessions Court, Calcutta as Special Public Prosecutor in consultation with the appellant and the complainant and any suggestions made by the appellant or the complainant shall be taken into consideration in making such appointment. The trial shall commence within a period of four months from today and as far as possible, it shall be completed within a further period of three months. Respondent Nos. 1 to 9 shall be arrested and produced before the police before the Chief Judge of the City Civil and Sessions Court and it will be for the learned Chief Judge or any other Judge of the City Civil and Sessions Court whom the sessions case may be assigned to decide whether bail should be granted to respondent Nos. 1 to 9 or not. Appeal allowed

(24) I have, therefore, no hesitation in holding that whatever may be my reaction as to the wisdom of the policy in appointing partisan counsel as a Special public Prosecutor, the appointment is not liable to be voided on that ground alone, whether its legality or propriety is viewed from the constitutional perspective of a fair trial or tested at the touchstone of the statutory requirements. It is also not possible to justify its annulment on any principle that could be culled out of any of the precedents, from which support was sought on behalf of the petitioner, but this conclusion should not be taken to mean either this court's approval of the policy

underlying the appointment or even of the propriety of it, or to preclude the court, now seized of the trial, or any court ' which may eventually deal with the matter, on the conclusion of the trial, to consider the question if the conduct of the trial by the Special Public Prosecutor, who had been retained and paid by the aggrieved party, caused such prejudice to the accused at the trial as may be capable of vitiating it. The casual observations made by me on the conclusion of the earlier proceedings, which became a catalyst for the present proceedings, appear to me to be fully confirmed by the precedents, which were brought out by learned Counsel for both the part's ^er an assiduous research, and I am convinced that the practice of appointing a artisan counsel as a Special Public Prosecutor or of payment to a Special Public Prosecutor by the aggrieved party deserves to be given a second look at the highest level. It certainly smacks of abdication of its obligation by the Administration and I am in respectful agreement with the observations made by the Kerala Hight Court in somewhat similar circumstances. In that case, the High Court was relieved of the obligation to rule on the validity of the appointment because the appointee 'gracefully' opted out of it. In the present case, the Administration appears to me to have compounded its earlier impropriety by asking the Special Public Prosecutor to defend the validity of his own appointment in this Court rather than leave it to the Standing Counsel for the Administration ration to do it. If the appointment of a Special Public Prosecutor was justified because of any lack of faith in the normal prosecuting channel in the Sessions Court, or because the ordinary Public Prosecutors would not have been a fit match for the eminent defense counsel, I do not know what was found wanting by the Administration in the Standing Counsel to induce him to abdicate his functions in favor of the Special Public Prosecutor. If the Standing Counsel did not inspire the confidence of the Administration, for something that may be wanting in his ability or integrity, one would wonder why the appointment was made and as to how it passed muster roll stage of the consultation with this Court. If the Standing Counsel was fit enough, to defend the appointment, I am sure, the Special Public Prosecutor could have been saved the embarrassment of doing it. The examination of the matter by this Court also brought out an anomaly in Section 24 of the Code which would perhaps deserve some legislative thought. For appointment of a Public Prosecutor for every Hight Court, consultation with the

High Court concerned is mandatory, whatever that consultation may mean. If it is to be construed as concurrence, it is a complete safeguard against improper appointment or an appointment based on an improper policy, but if it is a mere consultation it may perhaps be illusory safeguard but it is nevertheless on occasion where the State Government or the Administration could have the benefit of the reaction of the Court on the proposed appointment or the policy underlying it. For appointment of Public Prosecutor, for the district courts, there is a provision for consultation with the Sessions Judge because the appointment has to be made from a panel to be prepared by the District Magistrate, only after such consultation. There is, however, no provision in sub-section (8) of Section 24 for consultation with the High Court or the Sessions Court, before making appointment of a Special Public Prosecutor. I am unable to see what is so 'special' about this appointment which would justify this immunity. I have no doubt in my mind that for an appointment like the present, if there was consultation with any court, there would certainly have been a second thought on the propriety of the policy which permits the appointment of a counsel on the basis that the monetary burden falls on the aggrieved party, which would be morally wrong and against public policy. If it is the obligation of the State to prosecute a criminal. I do not see why an aggrieved party, rich or poor, should be burdened with the heavy costs, even if the State is at present unable to provide any relief to the victims of crime. While parting with this case, I must express my unqualified disapproval of the policy and make a strong recommendation to the authorities that be, for a dispassionate reassessment of the policy as also for the need to streamline the Court system generally, at all levels, so as to safeguard against manipulation of proceedings from within by the various factors and devices, to which I have drawn attention in the course of the judgment, and of mending fences so that the system is able to withstand external pressures as well from any centre of power, executive or economic.

(25) The petition fails and is hereby dismissed.