

Raj Kishore Rabidas Vs. the State

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Court : Kolkata

Decided On : May-10-1968

Reported in : AIR1969Cal321,1969CriLJ860

Judge : Amaresh Roy and ;S.N. Bagchi, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 4(1), 10(2), 90, 154, 270, 286, 290, 340, 344, 367, 423, 492(1), 492(2) and 537; ;[Constitution of India](#) - Articles 22(1) and 226; ;[Evidence Act, 1872](#) - Sections 3, 45, 56, 57, 59 and 114

Appeal No. : Death Ref. No. 6 of 1967 and Criminal Appeal No. 308 of 1967

Appellant : Raj Kishore Rabidas

Respondent : The State

Advocate for Def. : S.N. Banerjee and ;Arun Kumar Mukherjee, Adv.

Advocate for Pet/Ap. : Chitta Ranjan Das, Adv.

Disposition : Appeal allowed

Judgement :

Amaresh Roy, J.

1. This Death Reference under Section 374 Criminal P. C. has been submitted by the learned Additional Sessions Judge, 7th Court at Alipore, Shri P.K. Banerjee

and arises out of the Trial No. 1 of May, 1867, in which Raj Kishore Rabidas was tried for an offence of murder punishable under Section 302, I. P. C., and the trial Court has sentenced him to death under that section. From that order of conviction the condemned prisoner has preferred an appeal from jail which is Criminal Appeal No. 308 of 1967. The Death Reference and that appeal were heard together. The learned Deputy Legal Remembrancer Mr. S.N. Banerjee appeared for the State. The learned Advocate Mr. Chittaranjan Das has appeared on behalf of the defence before us.

2. The prosecution case is that on Amrani Bera Road, Barrackpore, Nepal Chandra Dey had a tea shop. The accused Raj Kishora Rabidas is a cobbler and used to carry on his trade at a street junction which is the junction of Amrani Bera Road and S.N. Banerjee Road. That place is near Nepal's tea shop. In that shop Subhas Chandra Bose was an employee. On the other side of the road there was another tea shop owned by one Banamali Adhikari. Amal Kumar Mukherjee who was a dealer in green vegetables used to live in that tea shop of Banamali Adhikari. Subhas and Amal were friends. The accused Raj Kishore Rabidas used to sleep in the night near Banamali's tea shop. In the night of 17th Chaitra, 1372 B. S. corresponding to 1st of April, 1966, Subhas and Amal after finishing their meals at about 11 P.M. went to see a jatra performance about a mile away from Amrani Bera Road.

3. Nepal also took his meal at about the same time with Subhas and as usual Nepal had gone to sleep on his bed spread over two benches on an open space covered by tin shed to the south of his tea shop. Subhas left the keys of the shop under his pillow and set out with his friend Amal to witness the jatra-performance. It is stated that these boys returned at about 1-30 a.m. After they had approached Amrani Bera Road from the eastern side they noticed somebody to get up from the other side of Nepal's tea shop and proceed towards the junction of Amrani Bera Road and S.N. Banerjee Road on the north. In their view that man took out something from a box hanging on the wall on the road junction and began to proceed towards Nepal's shop. That man eventually came to the open space where Nepal was sleeping. Subash and Amal were under the impression that he was an ordinary thief. So they slowly went near him. Then they realised that the

man was none other than the accused Raj Kishore. According to the prosecution, the accused had in fact brought out his chisel for the purpose of killing Nepal. Immediately he plunged the chisel into the chest of Nepal several times while Subash and Amal looked on in amazement. When Nepal shrieked, Subhas asked the accused what he was doing. The accused then became aware of their presence and charged at them. The two boys then took to their heels. Subash ran straight into the house of a neighbour. The accused pursued him. It is stated that Nepal, though he was fatally injured, also ran after the accused. Amal also fled. Thereafter, according to the prosecution story, attracted by the shouts of Subash and Amal some neighbours came and they found Nepal running behind the accused and then falling down on the street. The accused hid himself in the house of Dipen Chakraborty and was apprehended by those neighbours and then was handed over to a constable attached to the police outpost nearby. In the meantime Nepal was taken to the hospital in a rickshaw by P. W. 1 Subash, where Nepal was admitted for treatment.

4. Subash after reaching Nepal to hospital went to the police station and lodged an F.I. R. which is Ext. 1/1. That information was recorded in the Titagarh Police Station at 2-30 A.M.

5. Investigation was taken up by Sub-Inspector Arabinda Kumar Ghosh and he set out at 2-30 A.M. He first went to the hospital and having learned that Nepal's condition was so serious that he could not be interrogated, he came to the place where the occurrence of stabbing had taken place, and made seizures of a yellow chaddar and a kantha which he had found spread on two benches in a tin shed having no wall. But in the seizure list the place is mentioned as open shop of Nepal Chandra Dey. That seizure is evidenced by Ext. 2/1 which bears the time 4-30. A.M. The police officer also made a rough sketch map of the surroundings, Ext. 4 in which the tin shed is marked 'A' and the tea shop of Nepal is marked 'B'. He examined several persons that very night. In the meantime injured Nepal died in the hospital at 3-16 A.M. An inquest on the dead body was made by the Investigating Police Officer himself. The dead body was sent to the morgue at 11-15 a.m. on 1st of April, 1966 and post-mortem examination was held by Dr. Braja Ballav Basak Medical Officer of the Police Case Hospital at Barrackpore (P. W. 8)

at 4-30 P.M. that very day.

6. Dr. A.N. Chakraborty, S.D. M.O. who had examined and treated Nepal in the hospital found the following injuries on the person of Nepal:

Injuries: (1) One incised wound 1' x 1/4' cutting the muscles ribs and intercostal spaces on left side of the chest 2' away from the mid-sternal line on 3rd and 4th ribs (mid clavicular line) with beveling inwards towards sternum, direction long axis of the chest.

(2) One incised wound 1/5' x 1/5' skin deep half an inch below injury No. 1.

(3) One incised wound 1/5' x 1/5' skin deep one-fourth inch below injury No. 2.

(4) One incised wound 1 1/2' x 1/4' muscle deep on the left side of the back, inner side of left shoulder blade 5' below the upper border of the shoulder, direction -- long axis on the back with beveling towards mid-line.

7. Dr. Braja Ballav Basak (P. W. 8) who held the Post-mortem examination on the dead body of Nepal described condition of the subject as stout, rigor mortis present all over, mouth closed, teeth and tongue intact, eyes half open, conjunctiva hazy, pupils dilated, nails anaemic, and he described the wounds as-

(1) One incised wound (punctured) 1' x 1 1/4' gaping x chest cavity deep of 214 lying obliquely at the left 3rd inter space about 1' lateral to the margin of the manubrium sternum--cut the 3rd left rib at the costo-chondran junction and then punctured the pericardium and the upper part of the anterior wall right ventricle by a slit opening of about 1/4' and chest cavity was full of dark clotted blood of about 8 oz.

(2) Two small incised wounds each about 1/4' x 1/6' x muscle deep at the 4th inter costal space about 1/2' away and below the injury No. 1.

(3) One incised wound 1 1/2' x 1/4' x muscle deep at the left infra-scapular angle,

8. At 7 A. M. on 1-4-68 the alleged weapon with which Nepal was attacked was seized from the garden near the house of Dipen Chakraborty. In the seizure list

(Ext. 3/1) that weapon was described as 'one chisel the iron part of which is about 5 inches long and the wooden part is about 2 inches long. The width is 1 inch, stains like blood appears at the top, found buried under earth near the garden to the south of Dipen Babu's house'. That chisel is Ext. II. Some earth (control) was also seized under that seizure list.

9. That chisel (Ext. II) and earth and chaddar (cuttings) were sent to the Chemical Examiner and the report of the Chemical Examiner and the Serologist showed that blood was detected in each of those three articles, but origin of that bloodstains on chisel and earth could not be determined because of disintegration. Stains on the cuttings of the chaddar were, however, found to be human blood. That report is Ext. 5. Kantha seized was never sent to Chemical Examiner, although that was said to be bloodstained,

10. At the close of the investigation a charge sheet for alleged offence under Section 302, I. P. C., was submitted. Before the Magistrate two witnesses were examined as eye-witnesses who are Subash and Amal, P. Ws. 1 and 2 respectively. On consideration of the deposition of those two witnesses and the other relevant materials produced before the Magistrate he committed the accused to be tried in the Court of session on a charge under Section 302, I. P. C., by his Order dated 10th of April, 1967. In the Court of Session the learned Additional Sessions Judge framed the charge in these terms :

'That you, on or about the 17th day of Chaitra 1372 B. S. corresponding to 1st April 1966 at Amrani Bera Road within police station Titagarh did commit murder by intentionally or knowingly causing the death of Nepal Chandra Dey and thereby committed an offence punishable under Section 302 of the Indian Penal Code and within cognizance of this Sessions Court.

And I hereby direct that you be tried by the Court on the said charge'.

11. Trial opened in the Court of Session on 10th of May, 1967. At that trial for the prosecution appeared Shri S.N. Majumdar who has been described in the order sheet as Assistant P. P. For the accused at the commencement of the trial appeared Shri Sushil Kumar Banerjee, who has been described in the order sheet

as a 'Panel Lawyer'. He was engaged to defend the accused at State cost,

12. Before us Mr. Chittaranjan Das, learned Advocate who has appeared on behalf of the condemned prisoner Raj Kishore Rabidas, has drawn our attention to the representations before the trial Court for raising two points. One is based on Section 270 of the Code of Criminal Procedure which provides that in every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor. The manner of appointment of the learned lawyer who conducted prosecution in the Sessions Trial was made a point for contending that he was not a properly appointed Public Prosecutor as defined in the Code of Criminal Procedure. The other branch of this part of his argument concerns defence lawyers made available to the accused at trial. Mr. Das's contention is based on what appears from the order sheet of the trial showing that on 10-5-67 when the trial opened and also on 11-5-67 the accused was being represented by Shri Sushil Kumar Banerjee, On those two days of the trial first six witnesses for prosecution were examined. Some cross-examination was directed to P. Ws. 1, 2 and 3 but cross-examination was declined in respect of P. Ws. 4, 5 and 6. On the next day of the trial i. e.. 12-5-67 the order recorded shows the circumstances in which another lawyer Shri Sourindra Mohan Bose was appointed to defend the accused. That order is in these terms:

'3. 12-5-67. Accused is produced from custody. Hearing resumed. It transpires that Shri Susil Kumar Banerjee, defence Advocate appointed by the State, is absent He has not turned up till 11 O'clock. The P. P. wants time to contact him. Time is allowed. At 12 noon the P. P. informs the Court that Shri Banerjee is ill. He cannot come today nor there is any certainty whether he would be able to come tomorrow. Witnesses are present and the trial should proceed.

Shri Sourindra Mohan Bose, Panel Lawyer, is found in Court. He is appointed to defend the accused at State cost in place of Shri Susil Kumar Banerjee. Inform the District Magistrate, 24-Parganas.

Trial begins, the following witnesses are examined, cross-examined and discharged'. On that day important witnesses including the two doctors (P. Ws. 7 and 8) and Investigating Officer (P. W. 11) were examined. Some cross-

examination was made of P. W. 7 and also P. W. 8. When P. W. 11 was examined on 12-5-67 the lawyer for the defence Shri Sourindra Mohan Bose made a request to defer cross-examination of that witness to the next day for the reason that the learned lawyer was appointed in the case only on that day. That prayer was allowed. On the next day i. e. 13-5-67 hearing was resumed and on that day only Shri Susil Kumar Banerjee returned the papers which presumably were the brief for the defence lawyer and those papers were then made over to defence lawyer Shri Sourindra Mohan Bose. In those circumstances Investigating Officer (P. W. 11) was cross-examined and it was concluded on that very day. Statement of the accused under Section 342 Criminal P. C., was recorded and arguments of both sides were heard on the same day, 19-5-67, was then fixed for delivery of judgment.

13. From these features appearing in the order-sheet of the trial and the records Mr. Das has contended that there was practically no defence of the accused at the trial because the learned defence lawyer Shri Sourindra Mohan Bose had, not been put in possession of any brief when he was asked to cross-examine the two important witnesses -- the doctors (P. Ws. 7 and 8) and although on the day he had to cross-examine the Investigating Officer (P. W. 11) he got the possession of the brief, he had no opportunity at all to study the brief for conducting effective cross-examination of those important witnesses. In those circumstances, it is contended that the arguments also could not have been of any effect or value for raising proper defence on behalf of the accused who was being tried on a charge of murder. By raising these contentions Mr. Das has emphasised that though he is raising the point regarding representation of parties at the trial in the Court of Session as a point of law sufficiently strong in itself to vitiate the trial as a matter of law, he is not urging it as a mere technicality only but also as a point of substance on the merits of the case, because the materials brought in evidence show, according to him, that prosecution was not only not producing all the witnesses and materials before the Court but also prosecution was not eliciting materials and essential information from important witnesses who had been examined so much so that this was a case where for any effective defence the lawyer representing the accused needed sufficient opportunity and time to study the brief for not only exposing the contradictions and incongruities appearing in the prosecution

evidence but also for eliciting essential information by effective cross-examination of the several important witnesses examined in the case. On the merits of the prosecution evidence appearing on the record Mr. Das also addressed arguments in support of his contention that the appellant is entitled to acquittal on merits. But that is the second branch of his argument which we will deal with after we have dealt with the first branch of his argument based on the manner of representation of the parties at the trial.

14. Taking up his point that Section. 270 Cr. P. C. has been violated Mr. Das has contended that the lawyer who conducted prosecution in the Sessions Trial Shri S.N. Majumdar was not a properly appointed public prosecutor. He has been described in the order sheet of the trial as A. P. P. Reading those abbreviations as 'Assistant public prosecutor', Mr. Das has pointed out that the Code of Criminal Procedure by definition and relevant provisions speaks of public prosecutor' only. Assistant public prosecutor is unknown to law. He has referred to the definition of 'public prosecutor' given in Section 4, Sub-section (1) Clause (t) of the Code and also to Section 492 of that Code for showing howsoever appointed or engaged, the designation in either of these two provisions in the Code is 'public prosecutor'.

15. To meet this contention of Mr. Das the learned Deputy Legal Remembrancer Mr. Sambhu Nath Banerjee appearing for the State has produced before us the document by which Shri S.N. Majumdar was authorised to conduct the prosecution in this trial. That document is in a form printed in Appendix 'E' of the Legal Remembrancer's Manual and bears the date 6-5-67 and is signed by the Additional District Magistrate, 24-Parganas. The material part of that document is in these terms :--

Shri S.N. Majumdar Sr. A. P. O. is hereby engaged on behalf of the State/Accused in the Court of the Sessions Judge, Alipore....' Above that recital appears the particulars of the case which can be read as- 'State v. Raj Kishore Rabidas under Section 302 I. P. C.'

Taking this authority given by the Additional District Magistrate as an exercise of power of a District Magistrate under Section 10 Subsection (2) of the Code of Criminal Procedure, it can only be a purported exercise of the power given by Sub-

section (2) of Section 492 Cr. P. C. That is what the learned D. L. R. has asked us to hold though the document itself does not in any part mention that it was by exercise of powers under Section 492, Sub-section (2), Cr.P.C.

16. On the face of it that document does not appoint the learned lawyer named in it to be Public Prosecutor. By the terms of the document we have quoted above, he was only 'engaged on behalf of the State/accused'. It does not, therefore, conform to the terms of Sub-section (2) of Section 492 Cr. P. C. That sub-section is in these terms:

'....The District Magistrate or subject to the control of the District Magistrate, the sub-divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below (such rank as the (Provincial Government) may prescribe in this behalf) to be the Public Prosecutor for the purpose of any case).'

17. Moreover, that power can be exercised by a District Magistrate in the absence of Public Prosecutor or where no Public Prosecutor has been appointed. That absence does not obviously include the situation when Public Prosecutor appointed in the District is not available to conduct a particular case, but can only mean that he is absent either on leave or by vacancy in the office.

18. Section 492 Cr. P. C. in both the subsections speaks of appointment of Public Prosecutor. Definition in Section 4 (1) (t) includes any person acting under the directions of a 'Public Prosecutor'. In neither of those provisions can be found any authority given either to the State Government or the District Magistrate or, for the matter of that, the Additional District Magistrate acting under Sub-section (2) of Section 10 Cr. P. C. to engage a lawyer, far less to make a lawyer by such engagement a Public Prosecutor. The combined effect of those provisions in the Code has been clearly pointed out by a judgment of single Judge in this Court in the case of V.K. Godhwani v. State, reported in : AIR1965 Cal79 . That was pronounced in 1963. Importance of adhering to the mandatory provision in Section 270 Cr. P. C. was considered by a Division Bench of this Court in the case of Panchugopal v. State and judgment in that case has been reported in : AIR1968 Cal38 . The relevant part of that judgment is at paras 16 and 17; at page 42 of the

Report which clearly shows the view of law that in trials in Courts of Session outside the High Court in exercise of Original Criminal Jurisdiction Section 270 Cr. P. C. requires to be strictly adhered to. In the present case the authority issued by the Additional District Magistrate shown to us by the learned D.L.R. has not appointed the learned Advocate Shri S.N. Majumdar as Public Prosecutor and therefore Section 270 Cr. P. C. has not been complied with. An essential necessity for a fair trial has therefore been violated. In our view that is reason enough for quashing this trial for non-compliance with the mandatory provision of the Code which is based on the principles needed to be adhered to for fair and impartial trial, particularly in a trial on a capital charge where the accused person has not appointed a lawyer for his own defence.

19. The learned Deputy Legal Remembrancer was unable to locate in the Legal Remembrancer's Manual any particular provision under which the Form under Appendix 'E' was prescribed. In the present state of that publication no one can be expected to do so, because the main body of that useful volume has been completely lost in the forest of many Correction Slips, and yet, no one can be sure that they contain all the up-to-date corrections and amendments. By taking immense pains, however, Mr. Banerjee was able to draw our attention to Para 9 of Part VI in Chapter II at page 32 of the first volume of the Manual as a relevant provision on the subject. So we need say a few words about that para 9.

20. In its original shape in the publication of the Manual in 1930, para 9 was in these terms :--

'Whenever the Public Prosecutor of the district is not available for the purpose of conducting prosecution in Magistrate's court, the Magistrate of the district may engage any pleader of sufficient standing at the bar to take up the duties of the Public Prosecutor subject to the sanction of the Legal Remembrancer who will settle his fees at the recommendation of the district authorities. Such, sanction of the Legal Remembrancer is not necessary when the employment of the outside pleader is made for sessions cases, appeals or revisions at the usual rate of fee'. That text has been amended later (date not known) when para 9 was substituted and paras 9-A and 9-B were added. Para 9 so amended reads :--

'(i) When the normal amount of work is more than the Public Prosecutor can perform, the District Magistrate may, in consultation with the District Judge, form a panel of pleaders at the headquarters for the conduct of criminal business. The number of pleaders who will constitute the panel shall be approved by the Legal Remembrancer and shall not be altered without his approval.

(ii) The District Magistrate may, after consulting the District Judge, appoint any pleader to the panel, and may remove any pleader from it with the approval of the L. R.

(iii) The rates of daily fee payable to each panel pleader shall be fixed by the District Magistrate after approval by the Legal Remembrancer. Such rate shall not exceed the rate payable to the Public Prosecutor.' This change is significant. In its original form para 9 spoke of District Magistrate engaging any pleader to take up duty of the Public Prosecutor subject to sanction of the Legal Remembrancer, though such sanction was not necessary when employment of outside pleader is made for sessions cases. That was directly in conflict with provisions of Section 492 (2) and Section 4 (1) (t) Cr. P. C. as has been explained in the two decisions of this Court referred to above.

21. In amended para 9 Clause (i) provides for forming a panel of lawyers in consultation with the District Judge and Clause (ii) provides for appointing any lawyer to the Panel and removal of any from the Panel, after consulting the District Judge.

22. What is significant is that the provision which spoke of District Magistrate engaging a pleader to take up duties of Public Prosecutor has been obliterated. In that amended form para 9 has no conflict with Section 492 (2) or Section 4 (1) (t) Cr. P. C. but it does not contain any authority to engage a lawyer by using the form in Appendix 'E' of the Manual. That provision in L. R.'s Manual now enables the Public Prosecutor of the District to engage a lawyer from the panel for acting under the directions of the Public Prosecutor to conduct prosecution in a Sessions Trial in which the Public Prosecutor cannot personally appear. By such engagement by Public Prosecutor, the panel lawyer is, and without it, he is not a Public Prosecutor by definition in Section 4 (1) (t), Cr.P.C. Adherence to that correctitude is essential

for compliance with the provision in Section 270, Cr.P.C. In that amended form para 9 of Chapter II of Part VI of the Manual makes it possible to adhere to Rule 1 in Chap, XI of the Manual that provides that Courts should provide advocates or pleaders for defence when necessary. This Court should do by selecting a panel lawyer through the Public Prosecutor, and not through District Magistrate or Additional District Magistrate.

23. The Form in Appendix 'E' may have been prescribed in the background of original text of para 9. It was not a valid appointment of a Public Prosecutor at any time. After para 9 has been amended, that form has no relation with or basis in what appears as para 9 in the Correction Slip. Yet the Form has been retained in the Manual and is being used at the teeth of the provision of the Code of Criminal Procedure. Whether that Form is needed for executive use in the office of the Accountant-General for passing bills is no concern of Courts. It has no validity or force in Courts and must be rejected as an authority for any lawyer to act as a Public Prosecutor in Sessions trial.

24. We notice with great concern that although law on this subject was clearly Stated in the decisions of this Court which we have mentioned above, the illegal practice has continued to be indulged in not only in the present case but also in many cases that have come to our notice in recent past. The Sessions Judges appear to have ignored the illegality by neglecting the requirement of law contained in Section 270, Cr.P.C. and in the executive offices of the State there has been lack of care and caution in an important matter which is a necessity of law not only for ensuring a fair trial, but also for the legality of the trial itself in the Court of Session.

25. The persistence with which the illegal practice has been adhered to in all the districts of West Bengal makes it incumbent on this Court to direct that all Judges presiding on Sessions trial must be alive to this aspect. If at the opening of the trial Public Prosecutor of the District is not appearing to conduct prosecution, the Judge need have to ascertain and put on the record in the order-sheet the manner in which the lawyer appearing to conduct the case for prosecution has been appointed or engaged. If the appointment is not in accordance with the provision of

Section 492, Cr.P.C., or the engagement for the acting is not by the Public Prosecutor of the district for conducting prosecution by acting under the directions of a Public Prosecutor as mentioned in Section 4(1)(t), Cr.P.C., then it will be the duty of the presiding Judge not to allow prosecution to be conducted by such a person who is not properly appointed Public Prosecutor. That is a necessity for the legality of the trial as enjoined by Section 270, Cr.P.C. An omission on the part of the presiding Judge to perform that duty may itself be a reason for quashing the trial, whatever the result that may have been obtained in the trial. If the State that is conducting the prosecution does not obey this warning in the future conduct of prosecutions in Sessions trials, it will do so at the peril of the prosecution and the trial itself.

26. The other part of Mr. Das's contention in this branch of his argument concerns the manner in which a lawyer was provided to the accused at the State cost. We have already mentioned that Shri Susil Kumar Banerjee a panel lawyer was engaged in the same manner in a form in Appendix 'E' of the L.R.'s Manual signed by Additional District Magistrate. On the third day of the trial, i.e., on 12th of May 1967, Shri Banerjee was absent. At the first sitting of the Court on that day no one had any information and the Public Prosecutor wanted time to contact him. At 12 noon of that day the Court was informed that Shri Banerjee had fallen ill and there was no certainty whether he will be able to come to Court on the next day also. In that situation the Court ruled that the trial should proceed. Only reason for that ruling appears in the order-sheet is that witnesses were present. We must say at once that we do not appreciate that reason to be sufficient or proper for insisting that the trial, which was one on a charge of murder punishable with death, should proceed in the absence of the defence lawyer, who had suddenly fallen ill. Adjourning a Sessions trial is a serious matter indeed, but absence of defence lawyer for the reason of sudden illness is no less. In the present trial it was much more important that the person on trial facing a capital charge should have the assistance of a lawyer who had opportunity to prepare the brief for proper defence by effective cross-examination, than the trouble and cost to which State would have been subjected by an adjournment of the trial. The learned Additional Sessions Judge has shown lack of appreciation of the essential necessities that need be adhered to in all criminal trials in general, and more so in trials on charges

of major offences like murder in particular. We draw the attention of the learned Additional Sessions Judge to the judgment of the Supreme Court in the case of Janardan Reddy v. State of Hyderabad, reported in : [1951]2SCR344 . In that case the Supreme Court, while laying down that it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented, the trial should be held to be vitiated, also laid down that a Court of Appeal or Revision is not powerless to interfere if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial.

27. No doubt, that the learned Additional Sessions Judge took the step of appointing another panel lawyer Shri Sourindra Mohan Bose who was found present in Court to defend the accused instantly and proceed to examine important witnesses including the two doctors (P.Ws. 7 and 8) who testified to the nature of the injuries found on the victim and the investigating Police officer (P.W. 11). But it is also clear that the learned lawyer so appointed to defend the accused could not even be furnished with brief, far less any opportunity or time to prepare himself. It has been contended in some cases that in such situation it is much safer and better for the accused to go undefended at the trial because it may be expected that he then may draw the active, watchful and energetic attention of the presiding Judge to test prosecution witnesses by questions and check prosecution counsel against any unfairness or over-zealousness to introduce inadmissible or prejudicial evidence. There is much force and cogency in that argument because a show of defence is not a substitute for effective defence; and it is much worse than none, as it may turn out to be a false show and in effect tend to neutralise a stronger force that an alert Judge is expected to be. For the Prosecutor representing the State also it is improper and unfair to insist on continuation of the trial in such situation by instantly providing another lawyer to defend the accused, without giving that lawyer the papers and brief or time and opportunity to prepare the case. That often may turn out to be, and in the present case it may have been, as we will presently discuss, a booby-trap for the accused and the State has the look of hunting with the hound and masquerading to run with the hare by engaging a lawyer for defence as a mere show and useless as effective defence.

28. This Court had occasion to pronounce a judgment upon consideration of such situation in the case of : AIR1968 Cal38 . In that judgment the relevant part of the Supreme Court decisions reported in : [1951]2SCR344 was quoted and also a passage from the Division Bench decision of Kerala High Court reported in AIR 1963 Ker 54, Mohammad Kunnummal v. State of Kerala, was quoted. We respectfully agree with the view of law expressed in that passage occurring in the judgment delivered by Anna Chandi, J., in that case in these words:--

'Before we part with the case we have to strike a note of warning against the practice of some of the Sessions Judges appointing raw and inexperienced juniors to defend the accused in capital cases. If, however, such inexperienced advocates alone are available to defend such unfortunate accused, the Court has a primary duty to come to the aid of the accused by putting timely and useful questions and warning the advocates from treading on dangerous grounds. In this case it is really unfortunate that the Court has instead freely made use of the defects resulting from the inexperience of the advocates to build up the case against the accused.'

In the present case on careful examination of the records of the trial, we have unhappily failed to find anything to indicate that the learned Additional Sessions Judge in this trial was even aware or alive to what the learned Judge Anna Chandi J. in Kerala High Court has pointed out to be the primary duty of the Court to come to the aid of the accused by putting timely and useful questions. Unfortunately in this case also the Court has instead freely made use of the defects that resulted from unpreparedness of the lawyer who appeared to defend the accused, if not from his inexperience. Those will be revealed presently when we will discuss evidence as it appears in the records in this case. But here we unhesitatingly say what was said in the judgment of this Court reported in : AIR1968 Cal38 that these 'are characteristics which undoubtedly need be remembered by us when considering the evidence on the whole to assess its value and reliability for deciding whether or not any real prejudice has been caused to the accused or the accused was so handicapped for want of proper legal aid so much so that the proceedings against him may be said to be a negation of a fair trial sufficient to require use of the power of this Appellate Court to interfere with the conviction and sentence. The fact that there was a lawyer engaged by the State to defend the

accused at the trial does not relieve the Appellate Court of the duty to examine if there was real prejudice to the accused'.

29. To that we may add that the loud feature in the manner of continuing the trial in the absence of the defence lawyer who had the brief, by setting up another defence lawyer who had not the brief, and the characteristic appearing in the record of the depositions of witnesses examined for prosecution, heightened by omission of the trial Judge to expose by timely and proper questions the mysteries of carefully chosen technical language, in totality appears to be a negation of a fair trial. That by itself and independently is sufficient in our view to require use of the power of the Appellate Court to interfere with conviction and sentence and to quash this trial.

30. Question then arises whether by quashing the trial a new trial should be directed. For ascertaining whether there is sufficient material to justify a retrial and what should be the proper order, examination of evidence given in the case is necessary. So we proceed to consider the evidence.

31 to 44. [After discussing evidence, his Lordship proceeded:--]

45. We notice with regret that these features appearing in the evidence given by prosecution and revealed by little cross-examination that could be made by the defence lawyer who had no opportunity to study the brief, did not attract the notice of the learned Additional Sessions Judge for asking any timely question during examination of the witnesses in box and the paucity of material information on crucial points thereby appearing have been turned by the learned Judge against the accused in his judgment by which he has assigned the unfortunate man to the hangman's rope.

46. The undercurrent in the whole judgment of the trial Judge appears to be complete negation of the presumption of innocence of the accused which is 'like a golden thread webbing throughout the texture of a criminal trial'. Not only so, the judgment reveals from the beginning to end a strong presumption of absolute truthfulness of all the prosecution witnesses, particularly P.Ws. 1 and 2 who are the only two eye-witnesses. There is no such presumption in our law and that was

laid down by judgments of this Court decades ago, one in the case of Emperor v. Tazem Ali, which was an appeal from a trial by Jury. That case is reported in : AIR1931 Cal796 . Rankin, C. J., delivering the judgment said at p. 1101 of the report (of ILR Cal) = (at p. 799 of AIR):

'In my opinion, a Jury cannot be required to make the presumption against an accused person that the particular statements of a particular witness are true; still less can it be required to make such a presumption as regards the prosecution witnesses as a body or the prosecution evidence as a whole. The Jury should be told that it is their duty to consider carefully and to say whether they are convinced by the prosecution evidence and that, if they are not convinced, there is no law which obliges them to convict. If they do in such a case convict, they stand without excuse before the law.' That view of law has been followed in this Court ever since. It applies with greater emphasis to trials by Judge without the aid of Jury.

47. The learned Deputy Legal Remembrancer in the best traditions of the Bar and the accustomed fairness of a prosecutor (both of which have been always a pride of legal system of India, adopted from the Anglo-Saxon system), showed his own unhappiness about the manner in which prosecution has been conducted in the trial Court and also the glib credulity on which the judgment is based. But he said that it has been so, because there was not effective cross-examination on very material points and the learned trial Judge had not before him any definite defence case or criticism of prosecution evidence. That may be so; but that does not, relieve the trial Judge of his responsibility to weigh the probability of prosecution evidence, which he has to do for arriving at the decision whether prosecution allegations have been proved by the standard laid down in Section 9 Of the Evidence Act. In so weighing probability of prosecution allegations, of necessity, other probabilities also appearing from the evidence brought before the Court have to be considered for comparative assessment which of the probabilities should be accepted as fact proved. If, from the evidence, any probability consistent with, innocence of the accused is equally strong as the probability pointing to his guilt, then on the strength of presumption of innocence in favour of the accused, prosecution has failed to prove its allegations. Even if the probability consistent with innocence is not equally strong with other probability of his guilt, yet

probability of innocence is such as would cast a doubt, then it may be a case of reasonable doubt, benefit of which must go to the accused. That being so, it is incumbent duty of the Judge to consider all the probabilities that appear from the evidence before him and he cannot afford to be credulous and not consider reasonable probabilities only because accused was undefended or defence lawyer did not make a point of such probability in cross-examining witnesses or making suggestions or when arguing the defence case. A Judge should not imagine or speculate on hypothetical defences not urged at the Bar. But that does not connote that he may neglect to consider a probable defence appearing from evidence, only because it was not hurled at him. As a Judge of fact he must consider evidence given in the case from all viewpoints.

48. Necessity for assessing the reliability of the two eye-witnesses (P.Ws. 1 and 2) by probabilities appearing for the prosecution evidence that was given at the trial was most pronounced because of the nature of the medical evidence given through the two doctors (P.Ws. 7 and 8). P.W. 8 Dr. Braja Ballav Basak, M.O. of the Police Case Hospital at Barrackpore, held the post-mortem examination. In describing the first wound in his deposition he has given the information that it was incised wound (punctured), chest cavity deep of 2 1/4 inches long obliquely at the left interspace about 1 inch lateral to the margin of the manuvrium sternum. It had cut the third left rib at the costo-chondran junction and also made a slit opening of about 1/4 inch in the anterior wall of the right ventricle, obviously of the heart. Although these informations were given regarding that injury, he has not expressly mentioned the direction of the wound. From the fact, however, that the weapon, had entered at the third intercostals space and cut the third left rib and then through the pericardium, it reached the heart causing injury to the right ventricle, give unmistakable indication that the journey of the weapon inside the chest cavity was downwards, though not exactly vertical, but obliquely. The other major injury described as the third injury by this doctor mentions only the location of the incised wound at the left infra-scapular angle. Obviously, it was in the back, but the doctor has not said So expressly, nor has he given any indication about the direction of that injury. Leaving the direction of those two injuries so vague and by omitting to say that the third injury was on the back, in his examination-in-chief, Dr. Basak (P.W. 8) expressed his opinion that all the injuries were on the chest of the man

and the man must have been lying on his back while injuries were dealt. In cross-examination, however, Dr. Basak had to admit that injury No. 3 was on the back side and that injury could be caused either from the backside or from the left side of the victim. That admission was directly in conflict with the opinion expressed by this witness in his examination-in-chief that the man must have been lying on his back when this injury also was inflicted. Neither this loud incongruity in the testimony of the Medical Expert nor the astonishing vagueness about the directions of the two major injuries appearing in his deposition attracted the notice of the learned trial Judge. This was an instance where a fair prosecutor should have asked questions in examination-in-chief. It was also an instance where timely question by the presiding Judge was a necessity. Yet we see that both the prosecutor and the Judge failed to do their duty.

49. In the deposition of the other doctor P.W. 7 Dr. A.N. Chakraborty, Sub-Divisional Medical Officer of the hospital mentioned the direction of both the major injuries to be long axis of the chest in one case and long axis on the back in the other. That other injury Dr. Chakraborty (P.W. 7) clearly mentioned to be on the left side or the back. The direction of both the major injuries being almost vertically downwards along the axis of the chest, slightly oblique and one being on the front of the chest and the other on the back, question inevitably arises whether that was consistent with the version of the two alleged eye-witnesses (P.Ws. 1 and 2) that they saw those stab injuries being inflicted when the victim Nepal was lying on his bed spread on the two benches. Unfortunately that question had not arisen in the mind of the defence lawyer who cross-examined the two Medical Experts (P.Ws. 7 and 8) on a day when he was not even in possession of the brief and so had not the opportunity of studying the injury report and the post-mortem examination report on which the testimony of the two doctors was based. The learned Additional Sessions judge also has completely neglected that important aspect both at the time when the witnesses were being examined before him and in his judgment delivered more than a week after the close of the evidence. The admission of Dr. Basak (P.W. 8) that the injury on the back could not have been inflicted when the victim was lying on his back, which admission is fully supported by the position and direction of that injury described by Dr. Chakraborty (P.W. 7) belies not only the glib opinion of Dr. Basak expressed in his examination-in-chief,

but also completely negatives the story of P.Ws. 1 and 2 that they saw the accused to plunge the chisel into the body of Nepal when he was asleep in his bed. In that posture described by P.Ws. 1 and 2, which Dr. Basak (P.W. 8) sought to support in his examination-in-chief, would most probably, if not inevitably, give the direction of the injury No. 1 inwards and backwards. Even if after that first injury was inflicted, the victim turned on his side, the injury on the back if inflicted in that posture was only likely to be also inward and forward, because it was on the back. But none of the two Medical Experts have supported that direction of the two major injuries. On the contrary, the direction expressly mentioned by Dr. Chakraborty (P.W. 7) and appearing from the testimony of Dr. Basak (P.W. 8), though he did not say so expressly, is almost vertically downwards in both the major injuries. That direction is only consistent with the probability that those two injuries could not have been inflicted when the victim was lying on bed, either on chest or on his back, and that those were inflicted when he was in a standing posture.

50. The two other injuries minor in nature have been described by both the doctors (P.Ws. 7 and 8), one being only half inch below injury No. 1 and the other being 1/4 inch below that other minor injury. Both the minor injuries are incised wounds about 1/5th inch by 1/5th inch by skin deep. Being skin deep, these two injuries cannot be stabbing blows inflicted by the sharp weapon like the chisel (Ext. II). Each of them has the look of a drawn injury and both are on the front of the chest. That characteristic of those two injuries very strongly support the probability that after the first major injury was inflicted in the course of struggle and the assailant was manoeuvring the weapon to deliver the other major injury on the back, the sharp edge of the weapon had brushed against the body of the victim in the front in course of that struggle. That is the only probability which is consistent with the total effect of the description of the injuries given by both the doctors, though in vague language, and their location and direction. That is enough for complete disbelief of the two eye-witnesses that they saw the injuries being inflicted by this accused, Raj Kishore in the manner described by them.

51. Before we leave the subject of medical evidence we need also mention a serious doubt that we very unhappily entertain if the vagueness and omissions we

have mentioned above were intentional or unintentional. The degree of vagueness is not so much in the deposition of Dr. Chakraborty (P.W. 7) who had examined the injured man in the hospital before investigation started. But vagueness and omissions are most pronounced in the deposition of Dr. Basak (P.W. 8) who held the post-mortem examination of the dead body after investigation had started. Is that difference in degree of vagueness between the two doctors referable to the injury report in case of P.W. 7 and post-mortem report in case of P.W. 8 by reference to which each of them must have deposed in Court? Post-mortem report made by P.W. 8 has been kept on record and printed in the Paper Book, but injury report or hospital papers of P.W. 7 have not been included in record and is not available to us for aid to understanding the deposition of the doctor.

52. Another feature in the deposition of P.W. 8 who held the post-mortem examination barely 13 hours after the death of the victim is that it mentions that rigor mortis was present all over. But no information has been vouchsafed to enable the Court to ascertain if there was any element of cadaveric rigidity or spasm present in what was being described as rigor mortis. It is well known that cadaveric spasm occurs in cases in which death was immediately preceded by a state of great nervous tension or excitement caused either by terror or struggle. Both struggle and terror and also excitement were implied in prosecution case itself, because P.W. 2 spoke of shouts Nepal saying 'Bachao, bachao' and he ran after the assailant even after receiving mortal injuries. Indeed, we have no material in evidence if P.W. 8 Dr. Basak was qualified in medical science to distinguish cadaveric spasm which is not rigor mortis. In his deposition besides saying that he is M.O., Police Case Hospital, he does not even say that he is a medical graduate, far less does he mention his qualifications and experience in anatomy, physiology or surgery. The lawyer for prosecution has not elicited any fact that may show that he is an expert whose opinion will be admissible in evidence under Section 45 of Evidence Act. The learned trial Judge has completely neglected that absence of evidence on that provable fact. Both of them have assumed too much in favour of prosecution on that essential point of fact. Law does not permit any assumption without evidence on material point of competence of the witness who offers opinion for consideration against an accused.

53. The other witnesses--P.Ws. 3, 4, 5 and 6--all came on hearing the shouts of P.Ws. 1 and 2 and heard the story from those two witnesses. It is no wonder that those persons who arrived on hearing shouts followed the lead of P.Ws. 1 and 2 to think that Raj Kishore was the assailant and arrested him. Of those P.Ws. 3 and 4 have already been discussed in the earlier part of the judgment. P.W. 3 saw Subhas running followed by the accused and Nepal. It is quite consistent with the probability that Subhas may have been the assailant and Raj Kishore was chasing to catch him. P.W. 4 arrived at a later stage and heard the story given out by P.Ws. 1 and 2. He proved nothing against Raj Kishore except arrest. P.W. 5 Ram Charan Ram who is a person mentioned in the First Information Report and also occurs very loudly in the testimony of P.Ws. 1 and 2 proves nothing at all. He only saw that Nepal was lying in front of his house with bleeding injuries. P.W. 6 is the constable Sachindra Nath Pal to whom the accused Raj Kishore was made over after his arrest. He also does not prove any material fact to implicate Raj Kishore with the alleged offence.

54. The learned Additional Sessions Judge has made a loud point against the accused by the fact that he had hid himself. If hiding themselves by P.Ws. 1 and 2 in the manner they have spoken of is probable, then in the reversed position that Raj Kishore instead of being the assailant was chasing the assailant, hiding of Raj Kishore must equally be probable. That Raj Kishore is a cobbler and the weapon produced is a cobbler's chisel is of no significance at all, because, according to the prosecution, that weapon was taken from a box hanging on the wall outside from where any one could have taken. Moreover, although the witnesses have said that they have seen Raj Kishore using such weapon, none of them has definitely identified it as the weapon either belonging to or used by Raj Kishore. We had the weapon produced before us. It is astonishingly new, so much so that the paint on the wooden handle is looking very fresh and the top of that wooden portion where no paint was put, even today has a look of freshly chiseled wood. It bears no mark of having been put to use either in the cobbler's trade or in any manner at all. This was the weapon that was seized not at the time when Raj Kishore was arrested, not at the time when the investigating officer first appeared on the scene soon after 2-30 a.m., not at the time when the investigating officer had seized the kantha and chaddar at 4-30 a.m., but long hours after, at 7 a.m. On 1st of April,

daylight was available from 5 a.m. at least. The time-lag does not rule out the possibility of the weapon being lodged by somebody else other than Raj Kishore. The exact place of its find we have already discussed remains uncertain as is the place from where Raj Kishore was arrested by the neighbours. Find of blood on the wooden handle of this weapon also does not lead to anywhere in fixing the guilt on Raj Kishore, because from the wounds of Nepal much blood must have flowed as would give opportunity of smearing the weapon with blood, if one wanted to.

55. To crown all such neglect of materials in evidence that should have been considered in favour of the accused and also of omissions and incongruities that should have been considered against the prosecution, we have to notice that in the first paragraph of the narration in F.I.R. (Ext. 1/1) along with full name of the accused, who was produced, his father's name, all details of village, police station and district of which he is a native have been mentioned as part of statement of Subhas (P.W. 1) who lodged that information at 2-30 a.m. on 1st April, 1966.

Those astonishing details of parentage and native address of the cobbler Raj Kishore do not at all fit with the prosecution version that this F.I.R. was lodged and recorded at 2-30 a.m. on the information of Subhas (P.W. 1), because it is not at all probable that he could have had ready all those informations about the accused Raj Kishore at that hour immediately after the occurrence. Those informations were obviously ascertained afterwards in course of investigation by Police. Inclusion of these details unmistakably shows that some time after police had taken up investigation, carefully ratted narration was recorded including in it informations gathered by investigation and giving a version of the happenings according to the understanding of the investigating Police officer at that stage of investigation. That explains why the episode involving a man named Samaresh and barking puppies disturbed by Raj Kishore finds so prominent a place in the F.I.R. (Ext. 1/1) but has completely vanished in his deposition in Court, as has also the story of arrest of Raj Kishore by a man named GOUT and another person with the help of Subhas (P.W. 1), Amal (P.W. 2) and Jaladhar occurring in F.I.R. Careful comparison of testimony of P.W. 1 with the story in F.I.R. shows clearly that it was not the narration of Subhas (P.W. 1) alone that has been recorded in Ext. 1/1, but a made-up and edited version of what may have been collected from

several persons, many of whom have not even been examined as witnesses in the trial.

56. At the trial a changed version of the story has come according to the understanding of the prosecutor or those of the investigating Police officer at that stage. The witnesses examined were endeavouring to narrate a new story and because it was new, between the versions of different witnesses, not only substantial differences have appeared on many points, but also direct contradictions are seen even in the essentially material parts of the story.

57. Nothing is more reprehensible than to cook a story for recording an F.I.R. and attempt to improve the cooking of the story at the trial stage in any case. It is more reprehensible when it is done to foist a charge of murder. Many of the features inevidence we have discussed above bear unmistakable testimony of that crude cooking. We must record emphatic condemnation of the performances of prosecution in the case and express our deep disappointment at callousness of the trial Judge revealed in the record.

58. This state of evidence has led us to the conclusion that upon the evidence produced by prosecution at the trial despite the handicap to which defence had been subjected at the trial, not only the prosecution has failed to prove the offence against Raj Kishore by any reliable evidence, but also there are materials in the evidence which very strongly point to his innocence. In such circumstances there is no reason for sending the case back for retrial because that would only open the door for the possibility of prosecution endeavouring to brush up the defects so loudly appearing in the evidence given in this trial. On the strength of the prosecution evidence itself Raj Kishore is entitled to be acquitted.

59. We, therefore, allow the appeal, set aside the order of conviction and sentence and acquit Raj Kishore.

60. As we are acquitting Raj Kishore by setting aside the sentence of death passed against him, the Reference made by the learned Additional Sessions Judge for confirmation of the death sentence passed by him must necessarily be rejected. We do so.

Bagchi, J.

61. I entirely agree with the judgment rendered by my Lord in the case under appeal, and with the order passed in the Death Sentence reference case, rejecting the reference acquitting the accused Raj Kishore of the charge under Section 302 of the Indian Penal Code, upon setting aside his conviction under that section. I would, however, add a few words of my own to follow up the points upon which my Lord has given judgment.

62. Section 4, Sub-section (1), Clause (t) of the Code of Criminal Procedure, 1898, herein referred to in this judgment as 'Code', defines 'Public Prosecutor'. Public Prosecutor is one who is so appointed under Section 492 of the Code and is also one, who is acting under the directions of the Public Prosecutor in any case in Courts other than the High Court in exercise of its original Criminal Jurisdiction.

Section 492 of the Code provides by Sub-sections (1) and (2) for appointment of Public Prosecutor.

Section 492 (1).--The Central Government or the State Government may appoint generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

Section 492 (2).--The District Magistrate, or, subject to the control of the District Magistrate, the Sub-Divisional Magistrate may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below such rank as the State Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case.

In any local area, generally, or in any case, or for any specified class of cases, the Central or the State Government, as the case may be, may appoint one or more officers to be called 'Public Prosecutors'. Sub-section (1), therefore, empowers only the Government alone to appoint 'Public Prosecutor'. In absence of the Public Prosecutor or Prosecutors appointed under Sub-section (1), or where no Public Prosecutor has been appointed by the Government under Subsection (1), the District Magistrate, or the Sub-Divisional Magistrate, subject to the control of the

District Magistrate, may appoint 'any other person' to be Public Prosecutor for the 'purpose of any case'. It is to be noted that the Government may appoint Public Prosecutor or Prosecutors generally, or in any case, or for any specified class of cases for any local area, but the District Magistrate or the Sub-Divisional Magistrate may, under Sub-section

(2) of Section 492 of the Code, appoint any person other than the Public Prosecutor or Prosecutors appointed under Sub-section

(1) to be the Public Prosecutor for the purpose of any case, but not generally, Or for specified class of cases; and either of the two aforesaid authorities, therefore, can appoint any person to be Public Prosecutor only for the purpose of any case if and when the Public Prosecutor or Public Prosecutors appointed under Sub-section

(1) of Section 492 of the Code are either absent, or no such Public Prosecutor has been appointed by the Government under Sub-section

(1) of the Code, but not under any other situation. Now, Public Prosecutor, or Public Prosecutors, appointed under Sub-sections

(1) and

(2) of Section 492 of the Code then become 'Public Prosecutor' within the definition as under Section 4

(1) (t) of the Code. Situations may, and often arise where the Public Prosecutor, or Public Prosecutors, appointed either under Sub-section

(1) or Sub-section

(2) may not, for various compelling reasons, appear personally as Prosecutor in a case for the State, but can still direct any person acting as Prosecutor in such case for the State. Such person so acting under the direction of a Public Prosecutor of either of those two categories is also a Public Prosecutor, but he need not be appointed a Public Prosecutor either under Sub-section

(1) or under Sub-section

(2) of Section 492 of the Code. So, a Public Prosecutor appointed either under Sub-section (1), or Sub-section

(2) of Section 492, and a person acting as Prosecutor for the State in any case under the direction of a Public Prosecutor, appointed either under-Sub-section

(1) or Sub-section

(2) of Section 492 come within the definition of Public Prosecutor' as under Section 4

(1) (t) of the Code. Any person acting as Prosecutor for the State in any case under the direction of any person, appointed Public Prosecutor under Section 492 of the Code, need not, therefore, be appointed a Public Prosecutor in such case either under Sub-section

(1) by the Government or under Sub-section

(2) by the District Magistrate or the Sub-Divisional Magistrate. If and when the District Magistrate or the Sub-Divisional Magistrate, as the case may be, appointed any person to be a Public Prosecutor in any case under Sub-section

(2) of Section 492 of the Code what must have had happened in such a situation was either that there had been no appointment of Public Prosecutor by the Government under Sub-section

(1) in the case or generally for the local area, or that if appointed, he was absent in the sense that he was not in a position even to direct any person acting as Prosecutor for the case on behalf of the State, being either away from the local area of his appointment, or being so ill, as made him incapable for giving such person direction for acting as Prosecutor in the case for the State. The Sub-section

(2) of Section 492 of the Code, therefore, contemplates either of the two situations on the happening of which only the District or the Sub-Divisional Magistrate, as the

case may be, may appoint a Public Prosecutor, but not under any other situation.

63. In a case before the Sind Chief Commissioner's Court, *Emperor v. Deep Chand*, AIR 1930 Sind 156, a trial came near its conclusion. At that stage, the case was transferred to a Court situated in another local area, for trial. Before transfer the case was conducted for the State by the Public Prosecutor appointed for the local area within which the Court was situated under Section 492 (1) of the Code by the Government. For the local area where the Court on transfer was trying the case, no Public Prosecutor had been appointed by the Government under Section 492 (1) of the Code, The District Magistrate in such a situation appointed a Sub-Inspector of Police under Section 492 (2) of the Code to conduct the case for the State before the transferee Court. The appointment was thus held to be valid.

64. In the present case we take judicial notice of the fact that in 1966-67 and even to this day, there has been for the district of 24 Parganas, a Public Prosecutor appointed generally by the State Government under Section 492 (1) of the Code. So, we cannot accept that during 1966-67 there had been no appointment of Public Prosecutor generally for 24 Parganas district by the State Government. So, one of the two situations as envisaged by Section 492 (2) of the Code, being non-appointment of Public Prosecutor, generally for 24 Parganas, did not and could not arise in 1966-67 when the trial of the accused before the learned Additional Sessions Judge had been held. So, there must have had arisen the other situation as contemplated by Section 492 (2) of the Code, being that the Public Prosecutor appointed generally for 24 Parganas by the State Government under Section 492 (1) of the Code, must have had been absent in the sense that he was either away from the local area of 24 Parganas or, being present in the local area was so circumstanced that he was not even in a position to direct any person acting as prosecutor in the case, being thereby notionally absent, wherefor engagement had to be made of A.P.P., Shri Mazumdar as Public Prosecutor in the case by the Additional District Magistrate, 24 Parganas, under Section 492 (2) of the Code. The A.P.P. Shri Mazumdar, without being appointed a Public Prosecutor by the Additional District Magistrate under Section 492 (2) of the Code, could have functioned as Public Prosecutor as defined under Section 4 (1) (t) of the Code in

the case, if only he was directed by the Public Prosecutor, appointed generally for 24-Parganas by the State Government under Section 492 (1) of the Code, to act in the case in question as prosecutor for the State, put as Shri Mazumdar was engaged as public prosecutor in the case by the Additional District Magistrate under Section 492 (2) of the Code, the Public Prosecutor for 24-Parganas appointed generally by the State Government must have had been either away from the local area, or had been so circumstanced that even being physically present in the local area, had neither the physical ability, nor the mental capacity and alertness to direct any person to act as prosecutor for the State in the case, necessitating thereby for the appointment of Shri Mazumdar as a Public Prosecutor in the case by the Additional District Magistrate under Section 492 (2) of the Code. The learned Deputy Lethal Remembrancer Mr. Banerjee produced before us a printed form, duly filled in, and signed by Additional District Magistrate, 21 Parganas without scoring out the superfluous and irrelevant words, wherein it appears that Shri Mazumdar A.P.P. is engaged on behalf of the State/accused in the Court of Sessions Jack's, Alipore in the case the State v. Raj Kishore Rabidas. The abbreviation A.P.P. may conceivably mean either Assistant Public Prosecutor, or Additional Public Prosecutor or Associate Public Prosecutor. The abbreviation 'A.P.P.' may connote that Shri Mazumdar was already one of the Public Prosecutors having had been so appointed by the State Government under Section 492 (1) of the Code, since the State Government may generally, or in any case, or in specified class of cases appoint, for any local area, one or more officers to be called 'Public Prosecutors'. Accordingly, there could then be no scope for his further appointment by the Additional District Magistrate as Public Prosecutor in the case under Section 492 (2) of the Code. If Shri Mazumdar was not already appointed as an 'A.P.P.' what was then he, when he had been engaged in the case by the Additional District Magistrate? He was, as Paras. 9-A and 9-B of the Legal Remembrancer's Administrative Manual enjoin (quoted by my Lord elaborately in his judgment) a member in the panel of pleaders at Head Quarters of 24-Parganas for conducting the State's Criminal Business. Therefore, he was in the category of any person, eligible under the administrative arrangement, set up by the State Government for acting under the direction of the Public Prosecutor, so appointed under Section 492 of the Code, within the clause

and includes any person acting under the direction of the Public Prosecutor' as occurring in Section 4 (1) (t) of the Code. In such a situation, the Additional District Magistrate had no legal authority to issue the engagement slip, quoted in my Lord's judgment, engaging senior A.P.P. Shri Mazumdar in the case, presumably under the provisions of Section 492 (2) of the Code. If Shri Mazumdar was a senior member enlisted in the administrative panel of lawyers, he was then in the category of any person eligible for acting as a prosecutor for the State in the case, and that only under the direction of the Public Prosecutor appointed under Section 492 of the Code, provided of course, the Public Prosecutor, appointed generally for 24-Parganas had not been, at the relevant time of engagement of Shri Mazumdar, absent in the sense I have already explained. The learned Deputy Legal Remembrancer, Mr. Banerjee, however, could not and did not tell us while producing the engagement slip before us that the Public Prosecutor, appointed generally for 24-Parganas by the State Government under Section 492 (1) of the Code was absent, at the time when Shri Mazumdar's engagement had to be made, in the sense I have already explained hereinbefore. So, if Shri Mazumdar was at the time of his engagement in the category of 'any person' within Section 4 (1) (t) of the Code having had been enlisted administratively in the panel of eligible lawyers, he could be engaged for acting in the case as 'Public Prosecutor' within the provisions of Section 4 (1) (t) of the Code, it and when he was so directed by the Public Prosecutor to act as such for the State in the case before the learned Additional Sessions Judge, 24-Parganas. But his engagement for acting as public prosecutor in the case does not appear to have had been directed by the Public Prosecutor appointed generally for 24-Parganas by the State Government under Section 492 (1) of the Code. So, Shri Mazumdar's engagement for acting, as he had acted, as Public Prosecutor in the case on the authority of the engagement slip made and signed by the Additional District Magistrate, 24-Parganas, can neither be accepted as valid under Section 4 (1) (t) of the Code nor under Section 492 (2) of the Code. A Division Bench of this Court in the case of Anurupa Debi v. Ramlal Rajghoria reported in : AIR1952 Cal395 , had to consider a very peculiar circumstance surrounding the appointment of a public prosecutor in a case. The complainant in the case applied to the Additional District Magistrate of 24-Parganas for appointment of a gentleman of his choice as public prosecutor in the

particular case. The Additional District Magistrate appointed the nominee of the complainant as a public prosecutor in the case on fees to be paid by the complainant. Sometime after the order of appointment the Legal Remembrancer of the State Government appointed that very gentleman as a public prosecutor in the case on fees to be paid by the Government. The Sub-Divisional Magistrate who was in seisin of the case was moved by the complainant for appointment of the gentleman who had already been appointed a public prosecutor in the case by the Additional District Magistrate for conducting that particular case as the prosecutor but the learned Sub-Divisional Magistrate refused to comply with such prayer and engaged the Court Sub-Inspector to act as public prosecutor in the case. In the revisional proceedings before this Court, the Division Bench had to set aside the order of the Sub-Divisional Magistrate, observing that the Sub-Divisional Magistrate had no jurisdiction to ignore the order of appointment of public prosecutor in the case, made by the Additional District Magistrate under Section 492 (2) of the Code. But, it would not appear from the judgment that the Division Bench found the order of appointment of public prosecutor passed by the Additional District Magistrate, under Section 492 (2) of the Code a valid order under the law. It does not also appear from the judgment that there was either no public prosecutor, appointed under Section 492 (1) of the Code, or if appointed, was absent in the sense I have already explained in this judgment within the scope and content of the expression 'in absence of the public prosecutor, or where no public prosecutor has been appointed', as occurring in Section 492 (2) of the Code. The judgment on the other hand shows in clear and unmistakable terms that at the request of the complainant, the Additional District Magistrate had appointed a nominee of the complainant, an Advocate of Alipore, a public prosecutor in the particular case on fees to be paid by the complainant. So, that was not a case where there was no public prosecutor appointed under Section 492 (1) of the Code, nor was it a case where public prosecutor so appointed was absent in the sense I have already explained in this judgment earlier. But, in this case, the public prosecutor appointed generally for 24-Parganas by the State Government under Section 492 (1) of the Code could not be found by us to have had been absent in the sense I have already explained, when Shri Mazumdar a senior A.P.P. was engaged in the case by the Additional District Magistrate. So, in

this case it was the public prosecutor appointed generally for 24-Parganas who alone was competent to direct Shri Mazumdar for acting as public prosecutor in the case and the Additional District Magistrate had no statutory authority under Section 492 (2) of the Code to engage Shri Mazumdar as public prosecutor in the case. The Division Bench in Anurupa Debi's case, : AIR1952 Cal395 , had not to consider such situation as has arisen in the present case within the scope and contents of the provisions of Section 4 (1) (t) of the Code. Therefore, that decision is not an authority for the proposition now before us. If Shri Mazumdar was an enlisted lawyer as Paragraphs 9-A and 9-B of the Legal Remembrancer's Manual contemplate, he could be engaged for acting as public prosecutor in the case only under the direction of the public prosecutor, 24-Parganas appointed generally by the State Government under Section 492 (1) of the Code. In that case Shri Mazumdar's acting as prosecutor in the case for the State would have made him a public prosecutor under Section 4 (1) (t) of the Code. Shri Mazumdar did not, however, come within the conditions laid down in Section 4 (1) (t) of the Code read with Section 492 (2) of the Code. If and when a person is a public prosecutor within the definition as in Section 4 (1) (t) of the Code, he gets certain privileges and protections such as those under Sections 493 and 494 and other sections of the Code as discussed hereunder.

Section 493 :-- The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein, under his directions.

Section 494 :-- Any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried, and, upon such withdrawal,

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences.

Section 270 of the Code empowers only the public prosecutor to conduct prosecution at the trial before a Court of Sessions in the moffusil but none else. It is only the public prosecutor lawfully appointed that can open the prosecution case and examine the prosecution witnesses at the Sessions trial before the Sessions Judge (Section 286 of the Code), but none else. Against the order of acquittal the State Government may direct a public prosecutor to present appeal to the High Court from the original and the appellate order of acquittal (Section 417 (1) of the Code). It is only a public prosecutor lawfully appointed may with the consent of the Court withdraw from the prosecution but none else.

(Section 494 of the Code). How grave and inalienable are the duties and responsibilities of the public prosecutor in the matter of applying for withdrawal from prosecution has been emphasised in the two decisions of highest authorities in India. In the case of *State of Bihar v. Ram Narsh* reported in : 1957 CriLJ567 , his Lordship Jagannadhadas, J., held as follows :

'The judicial function, therefore, implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the public prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. In this context it is right to remember that the Public Prosecutor though an executive officer as stated by the Privy Council in AIR 1938 PC 266, is, in a 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.'

In the case of *Faqir Singh v. Emperor* reported in AIR 1938 PC 206 at p. 269 Lord Wright, J., held as follows:

'Section 194 gives a general executive discretion to withdraw from the prosecution subject to the consent of the Court, which may be determined on many possible grounds, one of which no doubt is that the person in respect of whom the charge is

withdrawn may be willing to give evidence'. The Court is required to see while giving consent to the withdrawal from prosecution at the initiative of the public prosecutor, that the public prosecutor appointed according to law was applying for withdrawal from prosecution in fair exercise of his function, not only as an executive officer representing the State as prosecutor in the case, but also as an officer of the Court, bound as he is to assist the Court with his fair views in every case where he is appearing for the State. It would be, therefore, apposite to say that a public prosecutor for the State is not such a mouthpiece for his client the State, to say what it wants or his tool to do what the State directs. He owes allegiance to higher cause. He must not consciously misstate the facts, nor knowingly conceal truth. Despite his undoubted duty to his client, the State, he must sometimes, disregard his client's most specific instructions if they conflict with his duty to the Court to be fair, independent and unbiassed in his views. As an Advocate for the State, he may be ranked as a minister of justice equally with the Judge.

65. When any person appears before any inferior criminal Court for representing the State as public prosecutor in the case it is highly desirable, as has been observed in the judgment of my Lord, that the Court should ascertain from such person so appearing the circumstances under which he comes to represent the State as public prosecutor and should put on the record the circumstances so ascertained by the Court regarding the authority of the person appearing as public prosecutor for the State Government in the case, since the public prosecutor is not required by Section 493 of the Code to file any vakalatnama or power of attorney while appearing as public prosecutor in a case, provided of course, such public prosecutor has been lawfully appointed under Section 492 of the Code, or acting lawfully under the direction of the public prosecutor, appointed under Section 492 of the Code, within the meaning of Section 4 (1) (t) of the Code. My Lord as Judge-in-Charge of the English Department of the High Court would be pleased to draw the attention of the inferior criminal Courts in the State as to the desirability of placing facts in the record of a case indicating the legal authority of any person other than the public prosecutor appointed under Section 492 (1) of the Code appearing as public prosecutor in the case representing the State, so that in this Court, in a situation as has arisen in this case, and had arisen in several other

cases in one of which I had the pleasure of associating myself with the judgment rendered by my Lord, much of the arguments of lawyers could be spared economising time and labour and the matter could be adequately dealt with from the materials appearing in the record of the cases. In the present case, the learned Deputy Legal Remembrancer came to our great assistance in solving a very naughty problem relating to the engagement of Shri Mazumdar a 'panel lawyer' as public prosecutor in the case. Without his assistance we could not delve deep into the mysteries of engagement of 'A.P.P.'s' as public prosecutor in the moffusil criminal Courts, particularly in Court of Session. In the present case, apart from the illegal appointment of Shri Mazumdar as public prosecutor, which could have been condoned as a curable irregularity under Section 537 of the Code on the authority of the decision of the Privy Council in the case of *Adan Haji Jama v. The King*, reported in AIR 1948 PC G3, the very unfairness in the representation, not only of the State by the public prosecutor but also of the condemned prisoner by the lawyer, engaged by the State at the expense of the State at the trial had entered as a vice into the carriage of the proceedings at the trial before the Court of Session as has been elaborately discussed by my Lord in his judgment. So, the illegality of the appointment of the public prosecutor and his management of the case for the prosecution and the manner of performance of his duties by the learned defence lawyer under adverse circumstances before the Court of Session, contributed to the unfairness of the trial prejudicing the prisoner at bar and leading to the failure of justice. A person accused of an offence, under Article 22(1) of the [Constitution of India](#) has a right to be defended by a lawyer of his choice. Section 340 (1) of the Code enjoins that in any proceeding before a criminal Court the accused, as of right, may be defended by a pleader. My Lord has pointed out that the learned Additional Sessions Judge engaged one 'panel lawyer' present in Court during trial to defend the condemned prisoner who was unbriefed and as such thoroughly unprepared. My Lord has pointed out the circumstances under which the learned Advocate Mr. Bose was appointed to defend the condemned prisoner, and how much handicapped he was in presenting the case for the accused before the Court at the trial. There was in fact denial of proper and effective representation of the accused at the murder trial before the learned Additional Sessions Judge. The learned Judge also failed in his duty by not

eliciting out facts from the prosecution witnesses which would have turned the scale in favour of the accused. The entire trial, therefore, was infected with the virus of 'unfairness'. The philosophy of fairness at the trial found expression in a memorable judgment of Taft, C. J. of the Supreme Court of America. The learned Judge expressed himself in the words, which I cannot help quoting here:

'Every procedure which would offer a possible temptation to the average man to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law'.

(*Tumey v. Chio*, (1926) 273 US 510, at p. 532 per C. J. Taft). My Lord has pointed out how unfairness at the trial made the learned Judge even forget the fundamental principles which he had to follow, such as the presumption of innocence of the accused and the burden of proof on the prosecution to establish the guilt of the accused beyond reasonable doubt. Therefore, not only the illegality of the appointment of the public prosecutor and the manner of appointment of the defence lawyer and his performance before the Additional Sessions Judge affected the fairness of the trial but had entered as a vice in the proceedings of the trial before the Court of Session, wherefor the condemned prisoner was materially prejudiced, thereby causing failure of justice. So, as has been observed by my Lord unfairness at the trial would have been the sufficient ground for this Court to set aside the conviction and sentence and to acquit the prisoner of the charge.

66. As regards the medical evidence my Lord has been pleased to point out that the medical evidence directly conflicts with the oral evidence of the alleged two eye-witnesses -- P. Ws. 1 and 2. In a decision in the case of *Surjan v. State of Rajasthan* (see observation at p. 422 (432?)) reported in : 1956 CriLJ815 , their Lordships have been pleased to lay down that when medical evidence is in conflict with the oral testimony of eye-witnesses, it gets better of the evidence of eye-witnesses and discredits the eye-witnesses.

My Lord has observed and with which I fully agree that the two eye-witnesses P. Ws. 1 and 2 have been totally discredited by the evidence of the medical expert. Such a salient feature of weakness in the prosecution evidence was lost sight of

by the learned trial Judge. Therefore, the medical evidence as adduced by two experts clearly established that the manner in which the deceased Nepal was struck allegedly by the condemned prisoner could not have been, seen at the place, time and in the manner as alleged by P. Ws. 1 and 2. The learned Judge forgot while weighing and appreciating the evidence of the two alleged eye-witnesses, P. Ws. 1 and 2 that even though they claimed to be eye-witnesses, the circumstances that appear in evidence particularly in Expert's opinion to which my Lord has made copious reference in his part of the judgment, needed as a rule of prudence, corroboration of the evidence of such alleged eye-witnesses; and for authority of such a proposition, I may refer to a decision of the Supreme Court in *Lachman Singh v. State* reported in : 1952 CriLJ863 . In that case, the evidence of the medical expert ran counter to the evidence of the eye-witnesses as in this case, and instead of corroborating the evidence of eyewitnesses, the medical expert's opinion contradicted the same. The learned Judge in this case failed to weigh and appreciate the oral evidence in its total perspective, and did not find whether the oral evidence of the alleged eye-witnesses had corroboration in material particulars from other direct or circumstantial evidence. In such a context as that appearing in this case, their Lordships in *Lachman Singh's case*, : 1952 CriLJ863 (Supra) laid down that it would be proper for the appellate Court not to rely upon the oral evidence of eye-witnesses implicating the particular accused unless there is some circumstantial evidence to support it. We respectfully accept such principle, which should have been followed by the learned trial Judge in this case. What was necessary was that the testimony of the alleged eye-witnesses should have corroboration in material particulars from such circumstances as would have lent assurance to the evidence of the alleged eyewitnesses before the Court to establish beyond reasonable doubt that the accused was really concerned in the offence charged. The learned trial Judge took the alleged conduct of the condemned prisoner such as his hiding as a circumstance pointing to his guilt. My Lord has already pointed out that the bidding of the accused could not be a circumstance consistent only with his guilt, but could also be a circumstance equally consistent with his innocence. Such a situation brings a reasonable doubt as to the guilt of the accused for the offence charged. Therefore, the learned Judge made a complete error in weighing and appreciating the

evidence of the two alleged eye-witnesses, when the only circumstance upon which the learned Judge relied as a piece of corroboration of the evidence of the alleged eye-witnesses could be consistent not only with the guilt of the accused but also equally with his innocence. The learned Judge, however, overlooked the contradiction between the evidence of two Medical Experts and the oral testimony of two alleged eye-witnesses -- P. Ws. 1 and 2. Accordingly there looked reasonable doubt as to the veracity of the two alleged eye-witnesses.

67-68. I would now point out some of the other circumstantial features of negative character in the evidence which would clearly show that if anyone else could be involved in the murder it was not the condemned prisoner. (His Lordship after going through these features, proceeded).

69. The merits of the case as appearing in evidence have been discussed threadbare by my Lord. My analysis of some features in the evidence also leads me to justify a finding that, if anybody murdered Nepal, it could not be the condemned prisoner. The place wherefrom the chisel Ext. II was recovered even now remains a mystery. The seizure list opens with the words 'seized from the garden of D. Chakravorty'. The last line of the seizure list says 'near the garden of D. Chakravorty'. According to P. W., D. Chakravorty, the prisoner was arrested at a place at the back of his house near the gate. He never speaks of a garden. The Investigating Officer comes and says in his evidence that he recovered the chisel Ext. II from the place where the accused was arrested. So, there is a reasonable doubt as to spot wherefrom the chisel was recovered. As I have already pointed out, P. W. 1 said that he heard Samaresh crying aloud 'Look here, Raj Kishore was teasing the puppies'. While lodging First Information Report P. W. 1 turned his face away from that part of the story in his evidence when he said that he saw an unknown man taking out a chisel from a box hanging on the wall of the house of the first floor of the verandah on which Samaresh was standing, crying aloud. The chain of circumstances, leading to the recovery of the chisel Ext. II if could be linked from the time of the alleged taking out of the chisel from the box, right upto the alleged finding of it, near the garden, could possibly have roped the prisoner provided of course, the P. Ws. would have identified the chisel Ext. II having had been used as his tool of his trade by the prisoner. P. Ws. 1 and 2 gave a picture

before the trial Judge to indicate as if the chisel Ext. II was a cobbler's chisel used as such. My Lord has pointed out, and we have all seen the chisel Ext. II in this Court. It would look as if it had been purchased very recently from a shop and could never be used by a cobbler even for a day. Now, P. W. 1 came to rope in Raj Kishore who is a cobbler saying he saw an unknown man taking a chisel from a box hanging on the wall of a house but I have already pointed out that such a box was never looked for, nor recovered by the Investigating Officer. So, a chisel that was in the box, and the box at least could have been recovered and identified to be the box of the prisoner, containing tools of the craft, there could be, then, possibly, a link between the prisoner and the chisel Ext. II, provided of course, the P. Ws. would have identified the chisel, Ext. II as had been, used as his tool by the prisoner. But that link was not established by any of the prosecution witnesses. The Investigating Officer spoke nothing of the box, nor the Investigating Officer brought any witness of the locality other than P. Ws. 1 and 2 who could have said whether or not the chisel Ext. II was ever seen by any one of them at any time being used by the cobbler prisoner, who was a daily visitor to the tea shop of Nepal and his associates and who used to reside very close to Nepal's tea shop keeping the tools of his craft, as alleged, in a box hanging from the wall of a house on the first floor of which the mysterious Samaresh cried out to P. W. 1 'Look here, Raj Kishore was teasing the puppies'. That mysterious Samaresh was attempted to be served with the summons as a witness by the Investigating Officer. Was that due performance of his duty by the Public Prosecutor? The evidence of Daroga is '1 attempted to serve summons on Samaresh but could not find him'. That was spoken of in the judgment of the learned Judge as sufficient proof for the prosecution's inability to produce such a material witness. How he was material? In the first information, it was stated by P. W. 1 though he did not speak it out in evidence, that Raj Kishore's name was first called out and he was recognised by Samaresh who shouted 'Look here Raj Kishore was teasing the puppies', thereby revealing in that statement that one Samaresh was the first man who identified the man, who is now the condemned prisoner Raj Kishore before us. Did the prosecution do its duty by simply communicating through the Investigating Officer an information that he attempted to serve summons on Samaresh but could not find him? But Ganga, P. W. 3 gave out that he did not know the whereabouts of

Samaresh. He had no business to volunteer that statement. It was the duty of the Investigating Officer to find out the whereabouts of Samaresh, and it was the duty of the prosecution to pray for a warrant and a proclamation to be issued by the Court for compelling production of Samaresh, a material witness. My Lord has pointed out in his judgment how the prosecution failed in its primary duty, in not exhausting all available legal processes for causing production of Samaresh who could have greatly helped the cause of justice. This is one of the instances indicating the failure of the Public Prosecutor in discharging his legal function. The most material witness Samaresh was to have been produced by the prosecution and a mere attempt to serve summons upon him should not have persuaded the trial Judge to hold that the prosecution had proved its inability for sufficient cause to produce Samaresh. It is he who first, as P. W. 1 gave out, called out the name of the condemned prisoner, The entire chain of circumstances narrated by P. W. 1 pivoted on the story 'Look here, Kaj Kishore was teasing the puppies'. If in the witness box Samaresh would have said that he was nowhere near about the scene and had not called out saying 'Look here, Raj Kishore is teasing the puppies', the whole prosecution story would have then at once fallen down like a house of cards. Accordingly, the learned Judge while holding that the prosecution proved the reason for non-production of Samaresh before the Court as a witness failed to note that the prosecution made no attempt whatsoever to have before the Court the evidence of Samaresh who was a very material witness in the case. Such failure of the prosecution to bring such a material evidence may be due to the failure of the Public Prosecutor of 24-Parganas to give proper directions to the A.P.P. in conducting the case, which he could have given had he had engaged the A.P.P. to act as a Public Prosecutor in the case under his directions, as required by Section 4 (1) (t) of the Code. The Public Prosecutor generally appointed for the State for 21-Parganas is in charge of all the prosecution cases particularly sessions cases, and if he engages more than one Public Prosecutors in Sessions Cases under trial he has the duty to give directions in all such cases placed on trial at least before the Court of Session as to how the cases are to be conducted by producing material witnesses and supplying material information to the Courts in such cases in order that the cause of justice might be furthered, instead of being retarded, as had happened in the present case.

70. Finally, I would say that in the present case there had been a complete failure of justice at the trial and the prosecution failed to prove beyond reasonable doubt that it was the condemned prisoner and none else that had committed the alleged murder of the deceased Nepal.

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