Training of Public Prosecutors

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"*There is nothing scarier than a reckless prosecutor.*"

- Tucker Carlson

Prologue

State, as the prosecutor, in effect defends the public through the public prosecutor. The prosecution agency projects the entire materials collected through the person designated as a public prosecutor in terms of section of 2(u) of the Criminal Procedure Code (hereinafter 'the Code'), whose appointment is defined in Section 24 of the Code and the procedure promulgated for appointment of the public prosecutor has been elaborated and later amended through various amending statutes which shows the importance of the service of the public prosecutor. The prosecutor though he is taking out the cause on behalf of the State in fact he is espousing the cause of the public and it is not necessary to act as a police prosecutor and it is also not necessary for the prosecutor to proceed and venture only towards conviction of the accused. It is also not necessary to act as a mouth piece of the prosecution agency and he is an independent officer of the court and his duties and privileges are different than other regular civil servants.

Regular cadre of prosecutors

The public prosecutor who is in the regular cadre has been designated as the Assistant Public Prosecutor in terms of s. 25 of the Cr.P.C. and normally they will take up the work before the courts of Magistrates. By way of amendment to the proviso to sub-section 6 by inserting explanation to sub-Section 6 to section 24 that in case of regular cadre of public prosecutors, the procedure for appointment of public prosecutor as provided under Clauses 1 to 6 of the Code cannot be applied which disables the Assistant Public Prosecutors to be appointed as public prosecutors in Sessions Court as well.

But, however, there is an amendment by the Government of Tamil Nadu dispensing the proviso by retaining the power to appoint as and when the regime changes. As on today the Sessions Courts are manned by the Public Prosecutors appointed by the State by the incumbent government and not by regular cadre of prosecuting officers. But, however, section 25 A of the Cr.P.C. provides for supervision and superintendence by the Directorate of Prosecution (DoP) even as against Public Prosecutors in the Sessions Courts appointed by the State. But, till today, it is not heard of any evaluation or supervision by the DoP as against the Public Prosecutors who are serving in the Sessions Courts and they act as a separate section though the statute provides that the public prosecutor is a subordinate to the DoP. The said anomaly have not been noted by any of the agencies and the supervision may have some circumspection over the overreaching by the public prosecutors as they have no fixed tenure. Parting here with the above discussion regarding the appointment and the conduct of the cases it is pertinent to mention the statute describing the duties, responsibilities and the privileges to be gained and exercised by the prosecutors.

Albatross

The public prosecutors, either regular cadre or otherwise have the responsibility to the court as an officer of the court though they serve for the State and in fact the Assistant Public Prosecutor (hereinafter 'the APP') are paid and deemed to be servants of the government. But, the law and the courts are considering them as independent officers of the court and they are at liberty to consider the pith and marrow of the case placed before them and to decide the feasibility of continuing the same i.e. the APP has been considered by the Hon'ble High Court as independent officers and allowed them to participate in the selection of judicial appointments either for recruitment of civil judges or district judges by considering the services of the prosecutors as independent service. With the above privileges they also owe the duty towards the court and public as they are not subordinate neither to the presiding officer nor to the government in the strict sense while conducting each case and deciding the fate of the same. They act as independent officers. It is also pertinent to note that the work of the APP cannot be interfered by any person including the DoP regarding conduct of the case and they are independent as judicial officers while dealing

with the matters such as application under s.321 of Cr.P.C. (withdrawal of cases), dispensing with the witnesses, examining witnesses etc.

Nowadays, the APP are not allowed even to enter into an exercise of chief examination by delivering questions and they were not even allowed to pose questions to the witnesses and it was expected by the other side except as a introducer of witness he cannot go beyond the words of the witnesses however they are rustic, illiterate and not aware of the legal nuances. It is also a difficulty faced by the APP when they pose questions as it was projected as they are leading the witnesses. In fact, it was the duty towards the APP to lead the witnesses without putting leading questions in certain circumstances.

The APP cannot be expected to act as a mute spectator when the witnesses spills out some words out of their ignorance or ignores some facts which may be relevant to the fact in issue and the APP has every duty and responsibility to get clarified with the witnesses by posing relevant questions without leading them by leading questions (*Zahira Habibullah Sheikh v. State of Gujarat 2004 (4) SCC 158*).

Fealty in pursuit of pouncing charges:

1. Interview:

The foremost duty of APP is that to prepare the witnesses in tune with the prosecution case and nowadays when the APP calls a witness to his chambers it is labelled as tutoring. Even the courts are in aversion with regard to interview by the APP by stating that the APP cannot tutor the witness by calling him to his chambers. But, the said view may not be apposite in the day to day scenario of maiming, taming and threatening of witnesses by the hardcore criminals and also our country consists of majority of rustic villagers who doesn't know the intricacies of the legal system which is adapted in par with the Indian Evidence Act, 1872 and the burden of proof on the prosecution with the limited resource. It does not mean that when the APP requires/requests the witness to be present to assess and to tune the witnesses in par with the expectation of the requirements of law cannot be considered either as tutoring or acting as against the accused and his innocence. After all, he is doing the work of mellowing the witnesses in tune with the prosecution case and to speak within the legal parameters and he can also substantially reduce the precious time of the court by

configuring the portion or the evidence to be deposed in the court seggregating the unrelated facts which may not be useful to decide the fact in issue. This view cannot be taken as a one of an object of procuring conviction but only to inculcate the witnesses within the spheres of the legal parameters. The said view was already promulgated by the Hon'ble Supreme Court in *Hukam Singh And Ors v. State Of Rajasthan (2000) 7 SCC 490*.

> "*The situation in a case where the prosecution cited two categories of witnesses to the occurrence, one consisting of persons closely related to the victim and the other consisting of witnesses who have no such relation, the Public Prosecutors duty to the court may require him to produce witnesses from the latter category also subject to his discretion to limit to one or two among them. But if the Public Prosecutor got reliable information that any one among that category would not support the prosecution version he is free to state in court about that fact and skip that witness being examined as a prosecution witness. It is open to the defence to cite him and examine him as defence witness. The decision in this regard has to be taken by the Public Prosecutor in a fair manner. He can interview the witness before hand to enable him to know well in advance the stand which that particular person would be adopting when examined as a witness in court.*"[Emphasis supplied by the author]

The above law declared by the Hon'ble Supreme Court have been further explored by our Hon'ble High Court in *Bala v. State 2014 (1) MLJ (Crl) 385*.

> *"It may be appropriate to refer to certain provisions in the Karnataka Police Manual on this subject*.
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> *CHAPTER XXXIX # PROSECUTION OF CASES IN COURTS 1569(5) - It is essential that before the trial or inquiry commences, the Prosecutor in-charge of the case must prepare his case and know what his witnesses are going to state in the court. He should, therefore, interview each witness well in time and ascertain from him the facts to which he would testify in the court and instruct him how he should behave in the court. He should be cautioned to keep his temper, to answer questions distinctly and in a natural manner, and not to volunteer more information than is asked of him. A timid or nervous witness would need encouragement, while a self-opinionated, loquacious one must be warned against making his answers unnecessarily long or speaking about matters regarding which he has not been questioned."*
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> *Prosecutors think that it is a taboo for them to interview witnesses. This outlandish attitude ought to be effaced. The prosecutor is a responsible public servant whose duty is to adduce the best evidence in a fair manner and aid the Court of law to arrive at a just conclusion. He is a representative of the State and is a bridge between the police and the Court. He owes a public duty. Therefore, it cannot be presumed that he will tutor witnesses. Such an inference will go against the presumption that officials will act in accordance with law and not in*

> *violation thereof. However unpalatable, it is a fact that the common man shudders on receipt of summons from a Court. The entire atmosphere is surreal and scary to him that he would require to be given sufficient confidence to depose in his own simple dialect. An interview by the Public Prosecutor is an opportunity to instill confidence in the mind of witnesses to speak the truth fearlessly. We are sure that had the trial court Public Prosecutor interviewed these witnesses who are rustic persons from the same village, they would have in their own native style unfolded the truth thereby helping the Court to come to a just decision. We are constrained to acquit the appellants herein not because they are innocent as a lamb, but because there is no legal evidence to fasten criminal liability on them."*[Emphasis supplied by the author]

The above verdict requires no interpretation and the language of the Hon'ble Supreme Court, further delineated by the Hon'ble High Court, if followed that the cases which requires to be reversed on the ground of paucity, improper evidence can be minimal. Further, that it is not necessary for the APP to examine all the witnesses and can decide the feasibiltiy of examination as to the stand taken by the witness in par with the prosecution and can also inform the court as to passing of any orders in case where the investigation was not proper.

2. Examination and dispensation of witnesses:

➢ Examination of experts

The APP owe a greater responsibility than other officers of the State as they are expected to act independently on a case to case basis. The APP are afraid of dispensing witnesses when the material witnesses has not supported the case of the prosecution even when the entire prosecution rests on the ocular testimony of the witnesses. In cases where the material witnesses have performed a somersault especially in a case of direct evidence, they even refuse to dispense with the forensic expert whose evidence is covered by s.293 of Cr.P.C. and it is not necessary to examine all the witnesses for a similar fact and the law do not require numbers rather quality and witnesses cannot be counted. The said proposition can be examined with the help of an excerpt of the Hon'ble Supreme Court in *Shamsher Singh Verma v. State of Haryana 2016 (15) SCC 485*.

> *"The object of Section 294 CrPC is to accelerate pace of trial by avoiding the time being wasted by the parties in recording the unnecessary evidence. Where genuineness of any document is admitted, or its formal proof is dispensed with,*

the same may be read in evidence. Word "document" is defined in Section 3 of the Indian Evidence Act, 1872, as under: - " 'Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter. Illustration Page 7 Page 7 of 11 A writing is a document; Words printed, lithographed or photographed are documents; A map or plan is a document; An inscription on a metal plate or stone is a document; A caricature is a document."

The stipulations of the Hon'ble Supreme Court if applied uniformly in cases where the other side is not disputing the veracity of the document, the onus of proof on the party who has the burden to prove the document is relieved. Hence, the prosecutors can pore over the impact of filing applications in terms of s. 293 Cr.P.C.

➢ Whether the document can be exhibited without formal proof of examining witnesses?

The APPs can save the precious time of the courts as well as their time by not dumping all the witnesses who may not speak either about the relevant fact or the fact in issue and they can also do away with the practice of examining all the persons who has a remote role in the investigation. The APP are not in the practice of taking out an exercise of applying to the court under s. 294 Cr.P.C. by listing out the documents requiring the other side to admit or deny the genuineness of these documents. In case, if the otherside admits the same, it can be exhibited in evidence without formal examination of any witness and the prosecution can also be relieved from the responsibility of proving the said document/material by venturing into the strict rules of evidence.

The APPs can also consider the requirement of examination of any witnesses who are listed out in section 293 of Cr.P.C. and the notification issued by the government under S.293(1) (g) of the Code though their presence cannot be procured without delay and expenses.

The APP can also consider examination or non-examination of witnesses who had failed to depose evidence confine themselves to their previous statement in writing and had deposed the prosecution case in a different perspective.

3. Cross Examination:

The prosecution in day to day affairs of resiling of witnesses from their earlier version before the investigation officer, the APP seeks permission of the court to cross examine his own witness by treating him as a hostile witness. The law of the land prescribes when the witnesses are not speaking in consonance with the previous statement in writing their credibility can be impeached by contradicting their previous statement in writing. In our state that it is not new that in all days in number of cases, the witnesses are not supporting the case of the prosecution and usually the witnesses are cross examined as to their previous statements in writing either by contradicting them as to their statement under s.161 and s.154 of Cr.P.C. But, the cross examination of the APP starts like this “You xxx while being examined by the inspector of police have stated .....(reading out the entire statement under s.161 Cr.P.C.) and now you are giving a false statement before the court.” This is the normal mode adapted by the APPs. In no way it can be found fault with such an exercise and they are infact covering the entire previous statement in writing. But, however, when the witness is not capable of explaining the fact and he failed to state some facts due to ignorance, fading of memory then the role of the APP is entirely different. He may have to put specific questions, which may be leading in the cross examination and can derive affirmative answers, which can be used by the prosecution and under s.154 of the Indian Evidence Act, the law does not require to entirely scrap the evidence of the witness who failed to support the person who had called him and either party can rely upon the materials which are in consonance with their case.

The witnesses are treated as hostile due to their incapabilities of their vocal skills, it requires a versatile cross examination, which is lacking on the part of the State. For e.g. when the witness was speaking about the entire fact, but was not speaking about the accused or not identifying the accused even in the chief examination, there may be questions regarding the same without leading him but, when the witnesses have not spoken in a different direction than on outstretched by the prosecution, then the APP has to do the exercise of a counsel to defend the previous statement by contradicting the witness. For e.g. when the witness mistakenly leaves a relevant fact to be revealed and in other respects that his evidence is quite natural and acceptable. But, without such a qualifying evidence, his

evidence has to be impeached. In that situation if the APP is in a situation to treat the witness as hostile, then he has to take him in his cross examination from the starting point and has to drag him to the end where the prosecution requires.

Q: Is it not correct to state that you have seen ‘A’ cutting ‘B’ with a chopper along with ‘C’ at 8 p.m.?

A: Yes/No (if witness is really supporting the case of the prosecution and he has not spelled out the same only in view of fading of memory or ignorance then he will naturally say ‘yes’.)

There ends the matter and the entire evidence will be completed and the prosecution can even rely upon the evidence of the said witness for the purpose of recording conviction on the sole testimony of such a witness and reading out the entire statement serves no purpose.

➢ <u>The fiat of APP when the witness partially supporting the prosecution</u>:

If the witness is not speaking the truth, but, he is speaking about the relevant fact then also the duty of the APP becomes onerous for e.g. the witness wants to support or won over by the defence but, he speaks about the occurrence but not speaking about the identity of the accused, then the APP may relate the occurrence with the accused by direct questions not by reading out the statement under s.161(3) Cr.P.C. He can do the real exercise of cross examination by bringing the witness near the evidence of the other witnesses which in fact can corroborate the stand of the prosecution to that extent and to be relied upon for the purpose of proving atleast the relevant fact. The APP while cross examining a witness who partially supports the prosecution case in line with the available materials need not take out the exercise of reading out the entire previous statement in writing and to say that he has resiled from his earlier statement. The APP can avail the portions in which the prosecution can rest and after treating him as hostile, he has to pose direct questions such as (1) whether you were present at the scene of occurrence? (2) Whether there was any physical features available which may in line with the prosecution case? and other factors which may tend to corroborate the prosecution case. If the witness bluntly denies all the questions, thereafter alone, he can carry out the exercise of contradicting with the former statement in writing.

Even for contradiction, the APP has to take the exercise of contradiction within s. 145 of the Indian Evidence Act, as held by the Hon'ble Supreme Court in *V.K. Misra case (2015 (9) SCC 588)* followed by *Krishan Chander case (2016 (3) SCC 108)* that the APP has to first pose questions as to the contradictions in par with the earlier statements without showing the same to him. Thereafter, if the witness denies, he has to bring the witness the attention to that part of the statement and he can prove the contradiction. If such an exercise is carried out certainly the court can either throw out the entire evidence or in the alternative can rely upon the entire evidence of the witness though he was treated as hostile by considering his veracity. In the said background, the Hon'ble Supreme Court in the case of *Krishan Chander v. State, NCT Delhi (2016) 3 SCC 108* in para 17 have decided the parameters of cross examination of the APP as follows.

"*17. The court cannot suo motu make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 CrPC "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. The statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of the Evidence Act that is by drawing attention to the parts intended for contradiction.*

18. Section 145 of the Evidence Act reads as under:

'145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.'

19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to

the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction." (emphasis laid by this Court) Thus, the contradiction of evidence of the complainant-Jai Bhagwan (PW-2) does not prove the factum of demand of bribe by the appellant from the complainant-Jai Bhagwan as the statement recorded under Section 161 of Cr.P.C. put to him in his cross-examination was not proved by B.S. Yadav (PW-10) by speaking to those statements in his evidence and therefore, the evidence of PW-2 is not contradicted and proved his Section 161 statement in the case.

The above pronouncement spells out that the contradiction has to be in compliance of s.145 of IEA and on failure the same would warrant dislodgement of the case of the prosecution. The responsibility of the APP in fact really starts only when the witness is not able to reveal the exact facts due to his poor vocal skills, fading of memory, failure to remember the situation. In such a circumstance, the APP has to take out the exercise of either in the chief examination by posing correct questions so as to induce him to speak he ought to have deposed. In the event of failure in the chief examination, the APP can take out questions in the form of leading questions in the cross examination after treating him as hostile and he can receive answers ought to be in the chief examination. If such an exercise is carried out the judicial officers will be in a position to really assess the credibility of the witnesses and can arrive at a correct conclusion as to the believability of the witnesses.

4. Withdrawal of prosecution:

The APP, being an officer of the court, has the independency to decide regarding the withdrawal of prosecution in case the prosecution will not result in the natural course it

ought to be. The parliament consciously omitted to prescribe any configurations to invoke the power of the APP under s. 321 of Cr.P.C. The statute prescribes no module for venturing into an exercise of withdrawal of prosecution and it is within the competence and discretion of the APP to withdraw the prosecution and the law places the APPs in higher pedestal in deciding whether prosecution of a case deserves to be withdrawn or not. Except few illustrative guidelines, no statute or judge made law is available to decide under what circumstances prosecutor can exercise the power of withdrawal of prosecution and it is within his domain to decide in a case if the prosecution would fail due to paucity of evidence, failure due to the defects such as lack of sanction and in cases where the prosecution cannot succeed even if the witnesses speak in verbatim of the projected prosecution case. Though there are some guidelines, it is still within the realm of the APP and even the direction by the government for withdrawal has to be independently considered for withdrawal by the APP. There are guidelines by the State in cases where the APP can venture into withdrawal.

The Hon'ble Supreme Court in *Sheo Nandan Paswan v. State of Bihar and others 1983 (1) SCC 438* had held that the APP has to apply his mind without being influenced by any of the secondary factors and he has to independently assess as to the feasibility of withdrawal and he cannot act as a post office. The following factors can be taken into consideration for withdrawal.

- The evidence which may not be a legally sufficient to receive a logical end to the prosecution.
- The case was instituted to wreck personal vengeance and vendetta.
- The government has taken as a policy decision to bring peace and harmony among the sections of the society.
- The mother case ended in acquittal.
- The cases in which long pending warrants which was not able to be executed and the offences are summons cases.

If the APP without succumbing to any surmise as to withdrawal which may not tend him to any unwanted repulse carries out the exercise of withdrawal, the pendency of cases can really be reduced which can also be considered as a landmark in their own professional career.

In upshot

Though not it was exhaustively dealt above, APP as an independent officer of the court has a duty towards the court and also to the government and cumulatively to the public, since he is designated as such and if such responsibility with privilege reaches the consensus of meeting the real crux of the subject of prosecution, then it is certainly a boon to the justice delivery system and it is also not out of place to mention that the vacancies of the post of prosecutors in the regular cadre has to be taken note of and inspite of that, the duty towards the State and its people has to be subserved.