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Prosecutors As Gate Keepers of Criminal Justice Administration in India

by
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I. INTRODUCTION

A crime is a wrong not only against the individual victim but also against the society at large. Criminal Justice System plays a significant role to control crime and punish criminals. Generally, this system refers to the various agencies of government charged with enforcing law, adjudicating crime, correcting criminal conduct and isolating hard core criminals. India follows the adversarial model of the Criminal Justice System. This system is essentially played role in crime control in the society. Society considers some behaviours so dangerous and destructive that it either strictly controls their occurrence or outlaws them absolute. It is the job of the various agencies of Criminal Justice System like the Police, Bar, Judiciary and Prison Authority to control and prevent further occurrence in the future. Criminal Justice System of India has suffered a major setback due to increase of crimes, excessive delay in disposal of cases which resulted into pendency of millions of cases in the Courts. According to National Crime Records Bureau (NCRB) report of 2015 the conviction rate in criminal cases has declined in last four decades. These all situations have caused the performance of the system worse instead of improvement. Indeed, it is the matter of worry and requires an urgent review to bring qualitative improvement in the working of the Criminal Justice System.

The Police are the first person of the Criminal Justice System to arrive on the scene and while applying law and his professional knowledge collects evidence on the basis of which the case is sent to the court of law for legal battles. If the police officer investigating a crime has ignored certain evidences then it might get disappeared subsequently or destroyed, which may prove fatal even leading to acquittal of the accused. Thus, the role played by the police during the investigation of a crime is the most crucial in proving



the case against the accused. The Code of Criminal Procedure (hereafter 'the Code') has divided crimes in two broad categories, namely, cognizable and non-cognizable. The police are empowered to investigate the case *suo motu* in the occurrence of cognizable offence and also to collect necessary evidence to prosecute the culprit successfully¹. If the offender is not known then the work of investigation becomes complex which requires the police to use its professional knowledge and utilize the services of the informants to find out the culprit and his motive behind committing of the crime.

The next important role played in the Criminal Justice System is public prosecutors. According to the pattern set by the Code, Public Prosecutors (including Additional PPs and Special PPs) are to conduct prosecutions and other criminal proceedings in Sessions Court and High Courts and Assistant PPs are appointed for conducting prosecutions in the Magistrate's Courts. A Public Prosecutor represents the State in whose name the prosecution is conducted and according to prevailing practices, "in respect of cases initiated on police reports, the prosecution is conducted by the

Assistant PP and in cases initiated on a private complaint, the prosecution is either conducted by the complainant himself or by his duly authorized counsel². He represents the State and not the victim throughout the proceeding of the court. He reviews the evidences brought before them by Police to decide whether to file charges or drop the case. It is the duties of the Prosecutors to present all evidences in the court, question witnesses and also decide (at any point after charges have been filed) whether to negotiate plea bargaining with the accused. They have great discretion, to make choices about how to prosecute the accused. Therefore they are often referred as 'ministers of justice' and 'gatekeepers' of the Criminal Justice System.

A Public Prosecutor represents the State in whose name the prosecution is conducted and he does not represent the Police. The purpose of a criminal trial is to investigate the offence and to determine the guilt or the innocence of the accused and it is the duty of PP to aid the court in discovering the truth of the case. Therefore he is expected to discharge his duty fairly, fearlessly and with full sense of responsibility. But "these expectations need to be weighed against the ground realities in which the prosecution system operates. Problems in the selection and training of PPs, their poor service conditions and lack of independence and supervision have all led to prosecution being branded as "the weakest link of the criminal justice system"³. This paper analyses the process of appointment of Public Prosecutors, terms and conditions of their services, and their role in the Criminal Justice System of India.



II. APPOINTMENT OF PUBLIC PROSECUTERS

There are four categories of PPs have been described in the Code of Criminal Procedure.

- (i) Assistant Public Prosecutors (APPs)
- (ii) Public Prosecutors (PPs)
- (iii) Additional Public Prosecutors (Additional PPs)
- (iv) Special Public Prosecutors (SPPs)

Assistant Public Prosecutors (APPs) are appointed by the State Government in every district for the conducting prosecutions in the Court of Magistrates⁴. In addition to this, the Central Government may also appoint one or more APPs for the purpose of conducting any case or class of cases in Magisterial Court⁵. Although it is not expressly provided in the provision that the APPs should be legally qualified, but qualified legal Practitioners are appointed for this post. In the State of Uttar Pradesh, they are inducted through written examination. Section 25 of the Code also provides the occasion when a police officer can be appointed as PP but in practice, generally it is not followed in most of the States.

A person who has the practice as an advocate for more than seven years is eligible for the appointment as a PP or Additional PP⁶. In 1978, the Code was amended which introduced the cadre appointments of PPs. The States that maintained a "regular cadre of prosecuting officers" were required by the Code to treat that as the only source for their appointment. This resulted into replacement of all empanelled prosecutors with new cadre of salaried PPs. The idea was to improve accountability and create promotion opportunities for prosecutors⁷. The District Magistrate, in the consultation with the Sessions Judge, prepares a panel of persons who are, in his opinion, fit to be appointed as the PP or Additional PP. Such persons are appointed for a fixed tenure. In case the State maintains a regular cadre of PPs, the State Government shall appoint a

PP and Additional PP only from among the persons constituting such cadre. The Code also provides that the Central Government or State Government also appoints for the purposes of any case or class of cases, an advocate who has been in practice for not less than ten years as Special Public Prosecutor (SPP)⁸.



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In *Mary Joosa v. State of Kerala*⁹, it has been held that nothing in Section 24 restrict the power of the State Government to appoint SPP in public interest. It can also refuse to appoint a SPP in a particular case for sufficient reason.

“The appointment of a SPP amounts to a deviation from the general norm (of using PPs) and is therefore resorted to only under special circumstances and only when public interest so demands. Several times, the request for appointment of a SPP may come from the victim of the crime, but the law as laid down by the Supreme Court makes it clear that such request cannot be granted on a routine basis. The application for appointment of a SPP has to be properly examined by the Government, in most cases through the Remembrance of Legal Affairs in the State and should be granted only after being satisfied that the material on record justifies the need for a SPP. It has also been clarified that even though the request may have been initiated by the complainant the costs of the SPP are to be borne by the Government”¹⁰.

III. DIRECTORATE OF PROSECUTION

Earlier, the prosecution was the part of police department and coming under the control of the Superintendent of Police of the District hence there was complaint for lack of independency in the working of PPs. So in the new Code, the prosecution wing was completely detached from the department of police and an independent department was made. The Code was further amended in 2005 on the recommendation of Malimath Committee and a new section 25A was added in the Code. This amendment has facilitated to establish a Directorate of Prosecution (DoP) in every States by the respective State Government. DoP has a Director and as many Deputy Directors of Prosecution as it thinks fit which functions under the Head of the Home Department of the State.

This section further provides that the all Deputy Directors of Prosecution function under the Director of Prosecution. “A person is eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment is made with the concurrence of the Chief Justice of the High Court”¹¹.

“Every PP, Additional PP and Special PP appointed by the State Government under Sub-Section (1), or as the case may be, Sub-Section



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(8), of section 24 to conduct cases in the High Court are subordinate to the Director of Prosecution. In the similar way every PP, Additional PP and Special PP appointed by the State Government under Sub-Section (3), or as the case may be, Sub-Section (8), of section 24 to conduct cases in District Courts and every Assistant PP appointed under Sub-Section (1) of section 25 to conduct cases in the Court of Magistrate are subordinate to the Deputy Director of Prosecution”¹².

Directorate of Prosecution as an independent department is accountable for prosecution of criminal cases investigated by the police. Section 25A (7) of the Code provides that the powers and functions of the Director and the Deputy Directors of Prosecution. It also provides the State Government may, by notification, specify the areas for which each of the Deputy Directors of Prosecution will function. Generally DoP has the following responsibilities—

- (i) Advising the police on cases for possible prosecution
- (ii) Reviewing cases and evidences submitted by the Police
- (iii) Framing and filing of charges in the Court
- (iv) Preparation of the Cases
- (v) Presentation of the cases in the Court
- (vi) Exercising close supervision and scrutiny of the works of Prosecutors

IV. ROLE OF PROSECUTION IN CRIMINAL JUSTICE SYSTEM

PPs are appointed by the State Government to represent the interests of the State and not the present Government of the State. But they find difficult to maintain this notion as their appointment is done by the Government for a particular tenure. They are mostly reshuffled with the change of the Government. Under these circumstances they are still required to act impartially in the delivery of justice. The purpose of a criminal trial is to investigate the offence and to determine the guilt or the innocence of the accused and it is the duty of PP to aid the court in discovering the truth of the case. Therefore he is expected to discharge his duty fairly, fearlessly and with full sense of responsibility.

Under the Code, the prosecutor plays role during investigating as well as after completion of the investigation when the matter has been admitted by the court. They review the evidence brought before them by the police and to decide whether to frame the charges against accused or drop the case.



They need to present all evidences in the court, question witnesses, and also decide (at any point after charges have been framed) whether to negotiate plea bargaining with accused. They have great discretion, to make choices about how to prosecute the accused. They should not act single mindedly seeking conviction of the accused but they should assist the court in discovering the truth to ensure the delivery of justice. Therefore, it is the responsibilities of PPs to act in an impartial, truthful and fair manner.

In case of commission of cognizable offence, the police are empowered to initiate investigations *suo motu* but in case of non-cognizable offenses they require order from the Court. They have other investigative power which includes arrest, search, seizure and interview suspects and witnesses. Though prosecutors have no powers to initiate and conduct investigation, it is the duty of the prosecution to provide legal advice if the police seeks during investigation. Accordingly the police comply with the legal advice given by prosecutors. PP also appears in the court to obtain arrest warrant of the accused, search warrant to search specific premises to collect evidences, custody remand of the accused for police interrogation under section 167 of the Code. However, prosecutors have no legal authority to direct or supervise the police. If there are cogent evidences are available then charge sheet against accused is filed by the police through PP in the court. In this way the PP has close supervision during the investigation to get the relevant evidences.

Prosecution is conducted by the PP in every trial before the Court of the Session¹³.

He opens the case for the prosecution of the accused before the Court with relevant evidences brought before him to prove the guilt of the accused. On such occasion, he has great discretion, to make choices about how to prosecute the accused. It is the duty of the PP to produce all evidences in the Court and if there is no substantial evidence is against the accused, the Court discharges the accused¹⁴. He plays as an anchor throughout the all stages of the trial leading either discharge or acquittal of the accused. It is not the duty of the PP to obtain conviction by hook or by crook. He should not act single mindedly seeking conviction of the accused but he should assist the Court in discovering the truth to ensure that the justice is dispensed at the end of the day. In this way he can truly be called as the gate keeper of the criminal justice system.

Section 309 of the Code provides that every inquiry or trial of the proceedings shall be held as expeditiously as possible and minimum adjournment or orders of postpone are to be given. As PP plays an important role during trial of the case, he should also facilitate the court for speedy trial of the case without unwarranted adjournments.



The PP has also the power to withdraw any case from prosecution with the consent of the Court under Section 321 of the Code. With the consent of the Court, the PP or APP in charge of the case may 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, at any time before the judgment is pronounced. Such withdrawal leads into either discharge of the accused if it is made before a charge has been framed or acquittal if a charge has been framed or no charge is required under this Code. This is the discretionary power of the PP and no Government can compel the PP to do so. The Court should also check that the PP has applied his unbiased mind in doing so. In this way PP should act as a free agent without any influence of irrelevant and extraneous considerations in doing so.

V. CRITICISM ON THE ROLE OF PUBLIC PROSECUTORS

In last four decades, the conviction rate has been surprisingly decreased in India according to the report of National Crime Records Bureau (NCRB), 2015. The conviction rate in India is much lower than other countries like UK, USA, France and Japan. It is only 40% whereas it is over 80% in these countries. However this report also states that there is slight increase in the conviction rate (46.9%) in 2015 but there is dip in conviction rate in offences like murder and sexual assault (rape)¹⁵. There may be several reasons for the drop in the conviction rate and one among these is from prosecution side. The low conviction rate is due to either high rate of acquittal/discharge of the accused during proceeding if PPs are not performing well their role or non-production of relevant evidences by the police or more withdrawal of the cases under Section 321 of the Code. There are also pressures from the State Government on PPs in the disposal of the cases by virtue of being as their appointing authority. In such condition, it may not be possible for PPs to act in impartial, truthful and fair manner. Here, it is also to be noted that the State Government may advice to the PP to withdraw a case but cannot compel him to do so and ultimately the discretion of PP prevails in the withdrawal of the cases. However it is duty of the Court also to check that the PP has applied his unbiased mind in doing so.

Another prominent criticism is related with the poor co-operation and co-ordination between prosecutions with police. Prosecution and investigation are two different

aspects in the administration of criminal justice and as discussed earlier, the role of the police in the criminal justice system is important because he the first man who arrives on the scene and while applying law and his professional knowledge collects evidences on the basis of which the case is sent to the court of law for legal battles. If the police

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officer investigating a crime ignored certain evidence, which subsequently disappeared or got destroyed then it may prove fatal some times, leading to even acquittal of the accused. Thus, their role during the investigation of a crime is very crucial in proving the case against the accused. The police and the prosecution sometimes lack co-ordination on investigative issues. Their acts are independent to each other as investigation work is outside the court whereas role of Public Prosecutor is inside the court. It is also true that they are interdependent on each other hence they should act in harmonizing way in delivery of justice. Normally the role of Public Prosecutor commences after investigating agency presents the case in the court on completion of investigation.

In *R. Sarla v. T.S. Velu*¹⁶, the Supreme Court has observed that these two agencies of criminal justice system have nothing to do with the work of each other. This has adversely affected the quality of trials leading into deterioration and hurt the administration of justice adversely. In a recent case the Apex Court has again shown dissatisfaction on the poor co-ordination between investigation method of police and presentation of the case by the prosecution¹⁷. There was complete lack of coordination between these two specialized agencies in this case of a gruesome rape, mutilation and murder of a minor girl. Justice Kehar of the Supreme Court has expressed a deep concern over these two agencies and directed that on completion of the investigation, the PP should apply his independent mind and he should rectify all shortcomings by asking further investigation, if necessary.

The role of the PPs has been criticized by the Supreme Court in *Zahira Habibulla H. Sheikh v. State of Gujarat*¹⁸, popularly known as 'BEST BAKERY' case. In this case, the Supreme Court ordered retrial of the matter in the High Court of Maharashtra, and observed in Gujarat that, "*The Public Prosecutor appears to have acted more as a defense counsel than one whose duty was to present the truth before the Court*".

In *Azeez v. State of Kerala*¹⁹, the High Court of Kerala has equated the role of PP with any other counsel and viewed that "*Every counsel appearing in a case before the court is expected to be fair and truthful. He must, of course, be champion of the cause of his client as efficiently and effectively as possible, but fairly truthfully*".

In *Vineet Narain v. Union of India*²⁰, the Supreme Court focused that the CBI has failed to investigate properly the offences involving high political

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dignitaries. The Hon'ble Supreme Court emphasized the need to ensure that "*there are no arbitrary restrictions to the initiation of Investigations or launching of prosecutions*".

In *Jitendera Kumar v. State (NCT of Delhi)*²¹, Delhi High Court has observed that the PP plays important role in maintaining purity and impartiality in the field of

administration of Criminal Justice on behalf of the State. So they are also known as "Minister of Justice".

The Supreme Court of India has observed in *S.B. Shahane v. State of Maharashtra*²² that "irrespective of the executive or judicial nature of the office of the public prosecutor, it is certain that one expects impartiality and fairness from it in criminal prosecution".

In *Mukul Dalal v. Union of India*²³ the Supreme Court has again categorically held that "the office of the public prosecutor is a public office and the primacy given to him under the scheme of the Code has a social purpose. But the malpractice of some public prosecutors has eroded this value and purpose".

It is also equally true that there is lack of infrastructures for PPs in the Courts especially in the Courts of Magistrates and Session's courts which have gripped another reason for low conviction rate in criminal cases. They are offered low salary and allowances and also got less promotional avenues. They are also not provided with accommodation, transport facilities, separate chamber in the court's premises, clerical staffs, peon, security staffs etc. Their numbers are also very less in compare to the pending cases in the Court which resulted into overburden with cases. It has also been observed that PPs are entrusted with cases straightaway without undergone adequate institutional training. Under these circumstances they find difficulty in handling of adequate cases.

VI. CONCLUSION

It is the duty of Bench, Bar, Police, Society, Corporate law firms, Law Institutions, Teachers, and all other Stakeholders of Criminal Justice System to bring Transparency and Accountability in Justice Administration System in India. In this system, the prominent role is played by the Police, Prosecution, Judge and Defense lawyer and they all need to play their respective role in providing fair and speedy justice to accused as well as victim (on behalf of the State). They all have to act like in a relay race where all the components of the system have to play their respective role

by supplementing the efforts of each other. Therefore, the Criminal Justice Administration needs to be evaluated as a whole and not its components separately. As discussed above, Public Prosecutors plays important role from beginning to till the end of a criminal proceeding (i.e. the time of filling charge sheet to till final disposal of the case). It is not always necessary that all trial of the cases will lead into conviction of the accused. They are also regarded as the officers of the Court so it is their paramount duty to find the truth of the offence committed by the accused. They should not obtain conviction by hook or by crook rather he should assist the Court in discovering the truth to ensure that the justice is dispensed at the end of the day. So they are, often regarded as 'Gate Keeper' or 'Minister of Justice' in the Criminal Justice System.

It is the cardinal principle of the criminal justice that an accused must be presumed innocence till his guilt is proved beyond all reasonable doubt and it is the duty of the prosecution to prove. A reasonable doubt should not be an imaginary or frivolous doubt. It must not be based on prejudice rather it should be based on reason and common sense. It should be logically derived from the evidences. Each and every essential ingredients of the offence charged must be proven by the prosecution otherwise the case will fail. Keeping in view of above principle, the PP must carefully examine all the relevant evidences and should produce to the Court. He should be the

agent of the justice and not the agent of the appointing authority i.e. the State Government of the day. Therefore he should discharge his duty fairly, fearlessly and with full sense of responsibility.

Now, the prosecution wing is completely detached from the department of police and functions independently without any fear and biases. The co-ordination between prosecutions and investigating authorities is required to be enhanced in order to get fair and speedy justice. The success of prosecution depends on quality of evidences gathered by the police during investigation. If the police are unable to collect the requisite evidences against the accused then the prosecution is simply blamed in case of discharge/acquittal of the accused. Since the Police are not well versed with quality of evidences, they should seek advice from prosecution immediately and PP should advise them stressing on legal importance of collection of particular evidences. Police department has got its own internal administration. Generally, the police act at their own guided principles and directions of superior officers and position is almost same during investigation of the crime. If there is lack of desired evidences, the Judge/Magistrate may direct the PP to further investigate the case and PP advises the same to police. In this way these two wings need a better co-operation and co-ordination with each other.



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PPs should be provided with accommodations and separate chambers in the courts' premises with all necessary infrastructures. Policy should be made for the promotional avenues of APPs and also their number to be increased in the light of piling up of pending cases. It is suggested that though they are law graduates but they still required training how to handle the cases expeditiously, during their induction. Regular refresher courses should also be organized for them to equip them with modern technology of investigation, plea bargaining and process of speedy disposal of cases.

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¹ Section 41 of the Code of Criminal Procedure, 1973 (hereafter referred as the Code).

² Kelkar R.V., *Criminal Procedure*, 6th edition 2014, p. 22, EBC.

³ Smriti Parsheera, "Reforms of Prosecution in the Indian Criminal Justice System", published in <https://ajayshahblog.blogspot.in/2015/05> (accessed on 11 Jul 2016).

⁴ Section 25 of the Code.

⁵ Section 25 (IA).

⁶ Section 24(7).

⁷ Explanation of Section 24.

⁸ Section 24(8).

⁹ 1997 SCC OnLine Ker 117 : 1997 Cri LJ 4678.

¹⁰ Smriti Parsheera, "Reforms of Prosecution in the Indian Criminal Justice System", published in <https://ajayshahblog.blogspot.in/2015/05> (accessed on 11 Jul 2016).

¹¹ Section 25A(2).

¹² Sections 25A(5) and (6).

¹³ Section 225.

¹⁴ Section 227.

¹⁵ <http://ncrb.nic.in/>, accessed on 08 October 2016.

¹⁶ (2000) 4 SCC 459 : AIR 2000 SC 1731.

¹⁷ *State of Gujarat v. Kishanbhai*, (2014) 5 SCC 108.

¹⁸ (2004) 4 SCC 158.

¹⁹ 1984 SCC OnLine Ker 46 : 1984 Cri LJ 1059.

²⁰ (1996) 2 SCC 199.

²¹ 1999 SCC OnLine Del 910.

²² 1995 Supp (3) SCC 37 : (1995) SCC (Cri) 787.

²³ (1988) 3 SCC 144.

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