

Chapter-VIII

PUBLIC PROSECUTOR AND HIS CLIENT

In the courts, the parties to a case are represented by their own lawyers. Majority of criminal cases are prosecuted by the State. The Government appoints prosecutors for conducting such cases in each court. The accused engages his own lawyer to defend the case. Thus apparently it is the Government which is the client for the Public Prosecutor. However, the relationship between prosecutor and his client, when viewed through the prism of duties of prosecutor, makes the matters a little complicated. There is certain amount of confusion that exists in this area and that is dealt with in this part of the research.

Giving advice is one function of a counsel. Every Public Prosecutor, like any other lawyer, advises his client and if the client gives the brief, he will conduct prosecution before the criminal court. Therefore, his counselling function in his office is different from his prosecuting function in his court. During his counselling function, he may have to give advice on points of law which necessarily include interpretation or construction of law. His legal opinions enable the competent authority to decide the course of action to be adopted in a given situation. His advice may have far reaching effects since his client and its hierarchy relies on it and acts upon it. Since Prosecutor is not the decision-maker, his advises to his client and his interpretations of law do not usually come up for adjudication before courts for any review. It is only the decision of his client that is prosecuted by him and reviewed by the court. When the prosecutor is functioning as advisor in his office, the question of identification of his client comes up for consideration. Is it the officer asking his advice his client or is it the officer holding

responsibility to take a decision based on the prosecutor's advice his client is to be debated. The officers seeking his advice are necessarily part of the Government machinery and the prosecutor is an appointee of the Government. Therefore, there is supposition that the Government is his client. Besides Police, there are various departments and organisations in the Government such as Forest Department, Excise Department, Civil Supplies department, Food Health Authority, Drug Authority and various other departments that seek advice from the Public Prosecutor. Each department has its own aims and objectives under law. When such of those departments seek advice, whether it is only that Department is his client. Since every public prosecution is to protect the general interest of the public, is it the general public that is the client for the Public Prosecutor.

Public prosecutor being an esteemed counsel and holds a high office and conducts prosecutions enabling the courts to determine the guilt and punish the offenders and rid the criminals off the streets and ensures safety to the persons and the property, he is a key functionary in the system and his advice is seminally important. If the prosecutor really does not know who his client is, he cannot tender suitable advice and cannot protect the real and substantial interest of his client.

In every crime, there is a victim and there is a criminal accused of that crime. Since the function of the prosecutor is to prove the case against the accused, the accused cannot be the client for the Public Prosecutor²³⁸. Thus, accused is not the client of the Public Prosecutor.

²³⁸ *Sunil Kumar Pal v. Phota Sk.* (1984) 4 SCC 533.

If victim of a crime privately prosecutes the accused in a criminal court, he engages his own counsel for conducting the prosecution. Since Public Prosecutor is not in charge of such a case, such a victim is not his client. On the other hand, if the victim reports the crime to police and the case is investigated by the police and they file charge sheet, the Public Prosecutor conducts prosecution. It seems in such a case, the victim can be said to be the client of Public Prosecutor. However, a closer look at it may not approve such assumption. In a normal client-lawyer relationship one is capable of influencing the other. Either of them shall hold a sort of control over the case pending before the court. In a prosecution of a police case, the victim cannot seek withdrawal of the case simply because the victim does not want to prosecute the case²³⁹. It is so because the de jure complainant in a police case is State and not the victim. Thus, the real victim of the crime is not the client of the Public Prosecutor. Looking from a different angle also brings out the same inference. When a non-compoundable offence is prosecuted by Public Prosecutor and the real victim and the accused arrived at peace and amicably settled out their differences and the real victim does not want the case to proceed further, yet on the basis of such facts, the Public Prosecutor is not competent to seek withdrawal from prosecution²⁴⁰. Simply, because the real victim is satisfied, the Public Prosecutor cannot act upon his wish and withdraw the case. In this view of the matter, the real victim is also not the client of the Public Prosecutor.

Since police take advice of Public Prosecutor it may seem that the police is the client for prosecutor. The Andhra Pradesh High Court held that a Prosecutor does not

²³⁹ *Thathapadi Venkata Laxmi v. State of AP*, 1991 CriLJ 749.

²⁴⁰ *State of Sikkim v. Deepan Rai*, 2001 CriLJ 3166.

merely represent the police officers or investigating officers²⁴¹. The Supreme Court held that the Government shall prepare a panel of prosecuting counsel and the CBI should take their advice during the course of investigation²⁴². If the prosecutor is to withdraw a case, he has to consult the Superintendent of Police or the District Collector and the District Magistrate before seeking consent of the court for withdrawal from prosecution. However, Public Prosecutor shall not act as a subordinate to the above authorities²⁴³. From these rulings it can be said that the police is the client for the Public Prosecutor but they alone are not the clients in any case and somebody else, besides police, is also the client for the prosecutor and therefore the prosecutor's version should not be confined to police alone while advising or prosecuting a case of police.

For conducting cases in court, Government appoints prosecutors. Therefore, it may seem that the Government is the client for the Public Prosecutor. The Supreme Court observed that the relationship between the Government and its officers is similar to the relationship between the lawyer and the private client²⁴⁴. Thus Government is the client for the Public Prosecutor. If this proposition is taken to its logical end, it must mean that like in any client and lawyer relationship, the principles of contract of agency should operate and the wish of the client shall be sought to be materialised by his lawyer. Further, the client must be capable of directing what his lawyer should and should not do. If police and the Government are the clients for the Public Prosecutor they shall be in a position to command their lawyer who is Public Prosecutor. However, the Supreme

²⁴¹ *Katasani Siva Reddy v. Govt. of AP*, 2004 (1) ALD (Cri) 43 (AP).

²⁴² *Vineet Narain v. Union of India* 1998 CriLJ 1208.

²⁴³ Order 583 of Part I, Vol .II, *The Andhra Pradesh Police Manual*, 2002, The Director General of Police, Andhra Pradesh, Hyderabad.

²⁴⁴ *State of U.P v. U.P State Law Officers Association*, AIR 1994 SC 1654.

Court held that a Superintendent of Police cannot command the prosecutor and he can only recommend his opinion²⁴⁵. The Supreme Court also held that the Government cannot compel the prosecutor but can only suggest its wish to the prosecutor²⁴⁶. Thus, the police and the Government, though appears to be clients of Public Prosecutor cannot command him and therefore cannot be said to be the clients of Public Prosecutor in the normal sense of understanding of client & lawyer relationship.

As long as the Public Prosecutor is functioning well and is competently and efficiently conducting the cases, the accused, the victim, the police, the Government are not his real clients. However, if the Public Prosecutor is found inefficient or deficient in rendering his professional duties, any of them could seek that the prosecutor is relieved of his control over the case. For instance, even in a police case where the prosecution is conducted by the Public Prosecutor, the victim can approach the Magistrate and seek permission to conduct the prosecution all by himself or can engage a counsel to conduct the prosecution in the place of the Public Prosecutor. If the court thinks that the cause of justice would be served better by granting such permission, the courts would generally grant such permission²⁴⁷. In the legal services market, the aggrieved party always prefers the best talent. When a prosecutor is not conducting the case expeditiously and remains a mute spectator to evasive conduct of the accused, the aggrieved victim could seek entrustment of the case to another prosecutor and the Government can relieve the case from the prosecutor of that court and entrust it to another prosecutor²⁴⁸. Thus, the victim, though not the client of the Public Prosecutor is still competent to displace the Public

²⁴⁵ *Balwant Singh v. State of Bihar* (1997) 4 SC 448.

²⁴⁶ *Rajendra Kumar Jain v. State through Special Police Establishment*, 1980 Cri.LJ 1084.

²⁴⁷ *M/s J.K. International v. State Govt. of NCT of Delhi* 2001 AIR SCW 907.

²⁴⁸ *Katasani Siva Reddy v. Govt of A.P.* 2004 (1) ALD (Cri) 43 (AP).

Prosecutor from conducting a case. While it is the Government which files criminal cases and appoints Public Prosecutors to conduct cases in the courts situate within a State, if the accused apprehends that he will not get justice because of the actions of the prosecuting agency the Supreme Court could transfer the case to another State. In such a case, the prosecution has to be conducted by the prosecutors appointed by the transferee State and the transferor State holds no control over those prosecutors of transferee State²⁴⁹. Thus, the accused, though not the client of the Public Prosecutor, is still capable of preventing the Public Prosecutor in charge of a case from conducting prosecution against him.

In a normal client-lawyer relationship, only the client holds the control over his lawyer and the adverse party holds no control over such lawyer. However, the above rulings would disclose that the control over a case by a Public Prosecutor is, in a given situation, determined by persons who are not his clients. These facts would disclose the unique status of Public Prosecutor and the difficulty in determining who his client is.

Despite attempts to find out the identity of the prosecutor's client, the position is still hazy and far from settled. However, there is global unanimity about the complexion of Public Prosecutor and his client. For instance, in New Zealand, it is stated that the prosecutor is neither the lawyer for the victim, nor a lawyer for the police. He acts on behalf of the community and has a responsibility to ensure that Justice is done in fair and balanced way²⁵⁰. In Canada, it is stated that the role of prosecutor excludes any notion of winning or losing. His function is a matter of public duty than which in civil life there

²⁴⁹ *Jayendra Saraswati Swamigal @ Subramanian v. State of Tamil Nadu*, 2008 (3) ALT (Cri) (SC).

²⁵⁰ *R.V.Roulson* (1976) 2 NZLR 644 at 654.

can be none charged with greater responsibility²⁵¹. In the United States of America, it is said that prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty²⁵². In India too, though certain times inconsistent, it is held that while discharging his duties, the Public Prosecutors shall keep in mind the larger factor of administration of Justice, not political favours nor party pressures nor like concerns²⁵³. That the Government lawyer represents the interest of general public before the court of law²⁵⁴. That the relationship between the Public Prosecutor and the Government is not merely professional engagement between a client and his lawyer. Prosecutor holds public office, derives powers from statute and discharges duties provided under law. While discharging duties the guiding consideration must be the interest of administration of Justice. His functions relate to a public purpose. All powers vested in him are meant to be exercised for public good and promoting the public interest. Being holder of a public office he is trustee whose highest duty is to the people of the country and, therefore, every act of him is in discharge of public duty meant ultimately for public good.

International documents also indicate similar expressions. Article 13 (b) of the United Nations guidelines on the role of prosecutors, Article 3(e) and (f) of International Association of prosecution's standards of professional responsibility and statement of the essential duties and right of procedures state that the prosecutors must act objectively and also remain unaffected by individual or sectional interests and public or media persons. They must have regard only to public interest.

²⁵¹ R.V.Boucher (1954) 110 CCC 263 at 270.

²⁵² *Berger v. United States* 295 U.S. 78 (1935).

²⁵³ *Balwant Singh v. State of Bihar* (1997) 4 SCC 448.

²⁵⁴ *State of U.P v. Johrimal* (2004) 4 SCC 714.

The above referred school of thought identifies the society and societal interests as the client for the Public Prosecutor. Therefore, either in advising an officer of the Government or the police or the Government or in conducting a prosecution in a court of law the prosecutor should discharge his functions in the best interest of the public at large. This school of thought prompted H.Richard Ceviller to say that prosecutors have no clients. His professional decisions are not dictated by the personal, political preferences of the client²⁵⁵. Similar view was held in India too in some quarters saying that the Public Prosecutors are not representatives of any party and their job is to assist the court²⁵⁶.

When public interest is said to be the client, it brings up further dilemmas into focus. The prosecutor is either an appointed public servant as in the case of an Assistant Public Prosecutor or a selected counsel from a panel as in the case of a Public Prosecutor. In India either of these prosecutors is not elected by the public through ballot as in the United States of America. It is normally understood in Indian democracy that the will and aspirations of the public are represented by their elected representatives thereby meaning the members of Parliament and members of Legislative Assemblies of States. From them the political executive viz., cabinet and the Government is made and its actions are deemed to be the actions of public. It is therefore, for the Government to decide what is in the public interest and what is not in the public interest. It is only they who are accountable to the public for their actions and inactions. The entire bureaucracy is to act according to the directions of the Government. The institution of Public

²⁵⁵ H.Richard Ceviller, *Virtual Justice – The flawed prosecution of crime in America*, page 157, Yale University Press, 1996.

²⁵⁶ *Babu v. State of Kerala* 1984 CriLJ 499 at 502.

Prosecutors is not accountable to the parliament. Then, it seems theoretically not correct to state that the Public Prosecutor, not being an elected person, can be permitted to decide what is in the best interest of the public, even by discarding what is suggested by the elected Government. It is also seldom clear what action the public interest require. Each prosecutor may have a different conception of the public interest. Each department in the State has its own constitutional means to protect its prerogatives. Therefore, the prosecutor should not be endowed with the power to block it or blur it. An official or public organisation that substitutes its own judgement for one reached through the appropriate democratic channels is behaving unconstitutionally²⁵⁷.

The degree of autonomy conferred on the Public Prosecutor is not matched by the relevant law though his client is said to be the society at large and not the Government. Unlike the judge, the Public Prosecutor is not an absolutely independent officer. He is an appointee of the Government. It is the State which initiates the prosecution and prosecutor has no role in that process. The Public Prosecutor is essentially a counsel for the State to conduct prosecution on behalf of the State. Even while exercising powers of withdrawal from prosecution, the Public Prosecutor cannot move the court in certain cases without the permission of the Government²⁵⁸. In the absence of any functional autonomy, expecting an unelected and merely salaried Public Prosecutor to represent the public interest does not appear agreeable. To make him a torch bearer of public welfare,

²⁵⁷ See generally for an interesting exposition – Government counsel and their obligations, Harvard law Review Page 1409 at 1413, Vol. 121. (name of the author is not available in the journal and hence could not be mentioned here).

²⁵⁸ *Sheo Nandan Paswan v. State of Bihar*, 1987 Cri.LJ.793 at 815, 816.

the prosecutor must be endowed with many more powers over the whole gamut of prosecution from the time it is filed till the time it is finally disposed off.

To sum up, the victim, the police, the Government appear to be the clients of the prosecutor but the real client is the public in general as made out by judicial precedent in India. The problems in making the public a client for the prosecutor throws open more fundamental questions. Moreover the principle of protection of public interest can be monitored, perhaps among structural prosecutors in the hierarchy and not among many other prosecutors like Assigned prosecutors, Departmental prosecutors, Private prosecutors. The researcher submits that there is every need for the law makers to clarify who the client is for the Public Prosecutor and to bring all sorts of prosecutions under the supervision of Directorate of prosecutions, in the interest of public.
