



2024:KER:41667

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 12TH DAY OF JUNE 2024 / 22ND JYAISHTA, 1946

WP(CRL.) NO. 204 OF 2023

PETITIONER:

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BY ADV P.V.JEEVESH

RESPONDENTS:

- 1 THE UNION OF INDIA
THROUGH THE CABINET SECRETARY,
CABINET SECRETARIAT, SOUTH BLOCK,
RASHTRABHATHI BHAVAN, NEW DELHI, PIN - 110004
- 2 THE SECRETARY
MINISTRY OF LAW AND JUSTICE, 4TH FLOOR,
A- WING, RAJENDRA PRASAD ROAD,
SHASTRI BHAVAN, NEW DELHI, PIN - 110001
- 3 THE SECRETARY
MINISTRY OF HOME AFFAIRS, SOUTH BLOCK,
RASHTRABHATHI BHAVAN, NEW DELHI, PIN - 110004
- 4 THE CENTRAL BUREAU OF INVESTIGATION
6TH FLOOR, LODHI ROAD, PLOT NO. 5-B,
JAWAHARLAL NEHRU STADIUM MARG, CGO COMPLEX,
NEW DELHI, PIN - 110003
REPRESENTED THROUGH ITS DIRECTOR,
- 5 THE CENTRAL BUREAU OF INVESTIGATION
REPRESENTED BY THE SUPERINTENDENT OF POLICE,
CBI, X7JV+755, CBI ROAD, KATHRIKADAVU,
KALoor, KOCHI, KERALA, PIN - 682017
- 6 STATE OF KERALA
REPRESENTED THROUGH THE CHIEF SECRETARY,
GOVT.SECRETARIAT, THIRUVANTHAPURAM,
PIN - 695001



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7 THE LAW SECRETARY
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM, KERALA,
PIN - 695001

8 THE STATE POLICE CHIEF
VAZHUTHAKADU, THIRUVANANTHAPURAM,
KERALA, PIN - 695010

BY ADVS.

SRI.SREELAL N.WARRIAR, SC, CBI - R4 & R5
SRI.GRASHIOUS KURIAKOSE, ADGP - R6, R7 & R8
SRI.RENJIT GEORGE, SR.PUBLIC PROSECUTOR

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR
ADMISSION ON 12.06.2024, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:



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JUDGMENT

Dated this the 12th day of June, 2024

This Writ Petition (Criminal) has been filed under Article 226 of the Constitution of India and the prayers are as under:

- “1. *Issue a writ of mandamus or any other writ directing the 1st, 2nd, 3rd and 5th respondents to take decisions on exhibits P2, P3, P4 and P6 representations, seeking appointment of the public prosecutor, in a time-bound manner.*
2. *Call for all the records lead to exhibit P6, issue a writ of certiorari, and quash the same.*
3. *Issue an appropriate writ to the respondents 1 to 7 to withdraw exhibit P7 order of appointment, published in Gazette notification, dated 2/11/2022.*
4. *To issue any other appropriate writ, order or direction as this Hon'ble Court may deem fit in the appropriate stage.”*

2. Heard the learned counsel for the petitioner, the learned Additional Director General of Prosecution and the



learned Senior counsel appearing for the Central Bureau of Investigation (CBI).

3. It is submitted by the learned Senior counsel for the CBI that, as per Sections 2 and 3 of the Delhi Special Police Establishment Act, 1946, CBI was entrusted with investigation of this crime and the investigation started and final report filed arraying accused Nos.1 to 4. Thereafter, as directed by the court, further investigation has been going on to find out involvement of any other persons. According to the learned Senior counsel for the CBI, the victim or the representatives of the victim have no right to seek appointment of a Special Public Prosecutor and the same is absolutely a power vested with the Central Government or the State Government as the case may be. It is also submitted that since the investigation is now at the helm of CBI, Central Government alone has the power to appoint a Special Public Prosecutor in this matter. It is also submitted that the victim's right in the matter of appointment of a lawyer



of his choice is subject to proviso to Section 24(8) of Cr.P.C. He has highlighted the decision of this Court in **Jigesh P. and Another v. State of Kerala and Another**, reported in **2013 (1) KHC 601]** with reference to paragraph No.23 and the same reads as under:

“After the conclusion of the arguments, the learned counsel for the petitioner sought to cite one more decision, as reported in Centre for PIL and Another Vs. Union of India (UOI) and Another, 2011 KHC 4206 : 2011 (4) SCC 1 : 2011 (1) KHC SN 45 : 2011 (1) KLT 973 : ILR 2011 (1) Ker. 1001 : AIR 2011 SC 1267. That was a case with regard to the appointment of the Central Vigilance Commission under the Central Vigilance Commission Act, 2003, where “unimpeachable institution and personal integrity” was held as of paramount consideration. The factual position dealt with in the said case with reference to the relevant provisions of the Central Vigilance Commission Act, 2003 and the recommendation made by the High Power Committee without considering the sanction already given by the Government to prosecute the person concerned under the



relevant provisions of the Prevention of Corruption Act read with Section 120(b) of IPC. After elaborate discussion, it was held as an instance that impaired the recommendation of the Committee, to be held as "non est" and accordingly, it was set aside. What has been highlighted in the said decision all throughout, is in respect of the transparency of the institution/CVC and the proceedings and it no way deals with the requirements of a person to be appointed as a Special Public Prosecutor u/s 24(8) of Cr.P.C. The petitioners are not justified in drawing analogy to the appointment of a Special Public Prosecutor u/s 24(8) of the Cr.P.C., to the selection and appointment of the "Central Vigilance Commission" under the Central Vigilance Commission Act, 2003 and there is an ocean of difference between the requirements and the duty to be performed under the two different enactments. As it stands so, the reliance sought to be placed on the above verdict is rather wrong and misconceived. This Court is of the firm view that, it is not for the accused to dictate terms as to who should be engaged/appointed as the Prosecutor/Special Public Prosecutor to conduct the prosecution.



This Court also finds support from the view taken by the Madhya Pradesh High Court in this regard, as reported in Annop v. State of M.P. And Another, 2006 KHC 2464 (2006 (Crl.L.J. 2061). The jurisdiction of this Court to examine the correctness and sustainability of the order passed u/s 24(8) of Cr.P.C. by way of juridical review, cannot be exercised, as if it were an Appellate Authority/Appellate Court. No interference is possible, unless such decision taken by the Government is per se arbitrary and against the public interest. This is more so, in view of the law declared by the Apex Court as reported in State of U.P and Another v. Johri Mal, 2004 KHC 993 : 2004 (4) SCC 714 : AIR 2004 SC 3800 : 2004 (3) SLR 734 : 2004 (19) AIC 69 (SC) : 2004 (3) LLN 13.”

4. On perusal of the Judgment, this Court dealt with the right of an accused to appoint a Special Public Prosecutor and held that it is not for the accused to dictate terms as to who should be engaged/appointed as the Prosecutor/Special Public Prosecutor to conduct prosecution.



Section 24(8) of Cr.P.C provides that the Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor. Proviso to Section 24(8) of Cr.P.C. says that the court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub section.

5. Thereafter, it is submitted by the learned Senior counsel for CBI that the main prayer in this writ petition is to set aside Ext. P7 whereby the Central Government appointed Adv.Arun Antony and Adv.Sunil Varma as Special Public Prosecutors in this case. Now as recommended by the State Government, Adv.Pius Mathew, Thrissur has been proposed by CBI for appointment of Special Public Prosecutor and thereby the main prayer has become infructuous. It is pointed out by the learned Senior Counsel for CBI further that now the matter pending before the Central Government to finalise appointment of Adv.Pius Mathew as the Special Public



Prosecutor in the present case.

6. Though it is argued by the learned Senior counsel for the CBI that the entire prayers in this writ petition have become infructuous, as far as the 1st prayer is concerned, the same is to consider Exts.P2, P3, P4 and P6 representations filed by the petitioner seeking appointment of Special Public Prosecutor in this case referring Adv.Rajesh M Menon as the choice of the petitioner as pointed out by the learned counsel for the petitioner. Further the Central Government not so far appointed Adv.Pius Mathew as the special Public Prosecutor.

7. According to the learned Senior counsel for the CBI, Adv.Rajesh M.Menon has been appearing for the petitioner before the special court representing the petitioner and the appointment of Adv.Rajesh M.Menon as the Special Public Prosecutor is zealously opposed by the CBI for the said reason.

8. Coming to the history of the case, in the first round of litigation, all accused were acquitted since the



investigation was found to be defective and the prosecution was not successful. Thereafter, this Court ordered further investigation and the CBI filed final report arraying accused Nos.1 to 4 in this case. Now further investigation also is going on. This is the context in which the petitioner, who is the mother of the victims, insists a lawyer of her choice to be appointed as the Special Public Prosecutor in the instant case to ensure effective prosecution without malafides. Therefore, the bonafide intention of the mother of the victims, who suffered negative verdict during the earlier stage, to have effective further investigation and eventful prosecution by appointing a Special Public Prosecutor to whom she had belief and confidence could not be faulted at all.

9. Apart from the objection raised by the learned Senior Counsel for CBI to appoint Adv.Rajesh M.Menon, the learned ADGP also would submit that since the trial has to take place in CBI Court, Ernakulam, somebody in Ernakulam district is to be appointed and appointment of Adv.Rajesh



M.Menon is not feasible to the present case. The learned ADGP filed names of 4 advocates for appointment of Special Public Prosecutor, in case the petitioner is not satisfied with Adv.Pius Mathew, the Special Public Prosecutor now appointed. The panel submitted by the learned ADGP includes: (1) *Adv.Anil Kumar V.N., Former CBI Prosecutor*, (2) *Adv.A Muhammed, Former Deputy Director of Prosecution*, (3) *Adv.John S.Ralf* and (4) *Adv.V.N.Pratheesh Kurup*. The petitioner is not satisfied by appointing anybody from the panel also and it is so submitted by the learned counsel for the petitioner.

10. While analysing the power as regards to appointment of Public Prosecutor or Special Public Prosecutor as provided under Section 24(8) of Cr.P.C., the said power is absolutely vested with the Central Government or the State Government, as the case may be. It is not in dispute that the accused has no power to seek appointment of Public Prosecutor of his choice and if such pleas are



allowed, the same would impeach the fundamental tenets of criminal jurisprudence. But the contention raised by the learned Senior Counsel for the CBI that as per the ratio in **Jigesh P. and Another's** case (supra) that the victim also has no say in the matter of appointment of Public Prosecutor or Special Public Prosecutor cannot be countenanced since the said decision, in no way, would suggest such a ratio. Further, it is also not correct to say that a victim or somebody on behalf of the victim cannot and must not request the appointing authority to consider a lawyer who has competence to act as a Public Prosecutor or Special Public Prosecutor. Therefore, a victim or somebody on behalf of victim can request for appointment of a lawyer of his/her choice for appointment of Public Prosecutor or Special Public Prosecutor, though, indubitably, appointment of Public Prosecutor or Special Public Prosecutor in the absolute power of the appropriate Government. But that does not mean that while exercising the power to appoint Public



Prosecutor or Special Public Prosecutor the appropriate Government should negate the request of the victim or somebody on behalf of the victim. To put it otherwise, appropriate Government has the power to consider the representation and appoint Public Prosecutor or Special Public Prosecutor, as requested by the victim or somebody on behalf of the victim in an appropriate case, taking note of the grievance of the party, who makes the request. Further the Government can consider the genesis of the prosecution case and its aftermath to ensure fair investigation as well as meaningful prosecution. The ordeals of the victim or somebody on behalf of the victim may also to be considered.

11. Having appraised the rival contentions, the petitioner, who is the mother of the victims, who suffered a lot in an earlier round of litigation, ended in acquittal of the accused, because of ineffective prosecution, wants Adv.Rajesh M.Menon, who conducted Madhu murder case at Attapadi, Palakkad (a very important case), as the Special



Public Prosecutor of her choice. However, the learned Senior Counsel appearing for CBI and the learned ADGP opposed the said contention. According to the learned Senior Counsel for the CBI, Adv.Pius Mathew, now proposed for appointment, is a competent lawyer to conduct the case. The petitioner is not at all satisfied with this name.

12. This is a matter, where the apprehension of the petitioner, who is the mother of the victims, is having force since her attempt to get justice in the matter of death of her children failed, in the first round of litigation. Therefore, the request made by the learned counsel for the petitioner/mother of the victims to appoint Adv.Rajesh M.Menon, who, in fact, is competent to deal with complex cases of this nature, should have predominance and the same need not be brushed aside.

13. To sum up, at present the petitioner wants to consider her representations, Exts.P2, P3, P4 and P6, pending before the respondents concerned. Though the



learned senior counsel for the CBI argued that the writ petition has become infructuous, the said contention cannot be appreciated for the simple reason that the Central Government not so far finalised the appointment of Adv.Pius Mathew and decision in this regard is awaiting. Therefore, at the time when the Central Government considers appointment of Special Public Prosecutor in the present case the Central Government could very well consider the representations filed by the petitioner also.

14. Thus, while holding that, appointment of Public Prosecutor or Special Public Prosecutor is the absolute power of the appropriate Government, it is ordered that the respondents concerned may consider prayers in Exts.P2, P3, P4 and P6 representations, in consideration of the plight of the petitioner in the facts of the given case, so as to appoint Adv.Rajesh M.Menon as the Special Public Prosecutor in the present case.



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15. An appropriate decision in this matter shall be taken within a period of three months from the date of receipt of a copy of this judgment.

This writ petition stands disposed of as indicated above.

**Sd/-
A. BADHARUDEEN
JUDGE**

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APPENDIX OF WP(CRL.) 204/2023

PETITIONER EXHIBITS

- EXHIBIT P1 THE TRUE COPY OF THE COMMON JUDGMENT IN CRL.A.NO.1357/2019 AND CONNECTED CASES DATED 6/1/2021 OF THIS HON'BLE COURT
- EXHIBIT P2 THE TRUE COPY OF THE REPRESENTATION WITH POSTAL RECEIPT, DATED 16.1.2023, SUBMITTED BY THE PETITIONER TO THE 1ST RESPONDENT.
- EXHIBIT P3 THE TRUE COPY OF THE REPRESENTATION WITH POSTAL RECEIPT DATED 16/1/2023, SUBMITTED BY THE PETITIONER TO THE 2ND RESPONDENT
- EXHIBIT P4 THE TRUE COPY OF THE REPRESENTATION WITH POSTAL RECEIPT, DATED 16/1/2023, SUBMITTED BY THE PETITIONER TO THE 3RD RESPONDENT
- EXHIBIT P5 THE TRUE COPY OF THE ACKNOWLEDGMENT RECEIPT OF RECEIVING EXHIBIT P2 REPRESENTATION
- EXHIBIT P6 THE TRUE COPY OF THE REPRESENTATION WITH POSTAL RECEIPT, DATED 16/12/2022, SUBMITTED BY THE PETITIONER TO THE 5TH RESPONDENT
- EXHIBIT P7 THE TRUE COPY OF THE APPOINTMENT ORDER PUBLISHED IN GAZETTE NOTIFICATION, DATED 2/11/2022

RESPONDENTS EXHIBITS : NIL