



The Role of Prosecution in the Criminal Justice System in India: An Analytical Audit

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Abstract

The criminal justice system consists of the police, prosecution, courts and correctional administration. Each of these components in the system is to work in synchronization with each other. The harmonization among these organs will only make the success of the criminal justice system possible. The prosecution system which is considered as the crucial wing of the system has to play its role independent from any outside influence. The prosecutor is considered as the minister of the justice on whom there is always the burden of impartiality. This research paper will analytically emphasize the position, appointments and role of the prosecutors in the criminal justice system. It will also bring to light the critique of the role of the prosecutors and the challenges faced by them while performing their duties. The paper concludes with some valuable suggestions, which will contribute to the smooth functioning of the criminal justice system in general and the prosecution system in particular.

Keywords: Criminal Justice System, Adversarial system, Police, Investigation, Trial and coordination.

1. Introduction

The origin of crime as a complex socio-legal problem is as old as human civilisation.¹ Whenever men and women formed themselves into an organised society, the need for criminal law has been felt.² Criminal law includes both substantive and procedural laws. The substantive criminal law determines the rights and duties of the parties in a case and procedural or adjective law sets the law enforcement machinery into action. The existing criminal law enforcement machinery primarily consists of three main components including police, courts, and correctional administration. The court itself consists of judges, prosecutors and defence counsels. For the smooth functioning of this system, all these components have to work together for maintaining the rule of law in society.

The police are the first members of the criminal justice system to arrive on the scene of an incident, and they collect material evidence using the law and their professional skills, after which the matter is transferred to a court of law for legal procedures. If the investigating officer neglected some material evidence, there is a good likelihood they will vanish with the time

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¹ Mehraj ud Din Mir, *Crime and Criminal Law in India* 9 (Deep and Deep Publications, New Delhi, 1985).

² R.C. Nigam, *Principles of Criminal Law* 3 (Asia Publications, Bombay, 1965).



(progressive change),³ which may prove fatal even leading to the acquittal of the accused person. TAs a result, the function of the investigating officer in a criminal inquiry is critical in proving the case against the accused. The Code of the Criminal Procedure, 1973 divides crimes into two broad categories: cognizable and non-cognizable offences. According to Section 41⁴ of the CrPC, the police have the authority to investigate the case *suo motu* in the event of a cognizable offence and to collect the necessary evidence to successfully prosecute the perpetrator. If the offender is unknown, the investigation becomes more difficult, requiring the police to use their professional knowledge and the assistance of informants to identify the perpetrator and his motivation for committing the crime.⁵

The next critical position in the criminal justice system is that of the prosecutor. Every organised society has a well-developed prosecution system to prosecute those who break the society's established legal rules. However, the criminal justice system in common law countries such as India differs from that in civil law countries. However, under both systems, this office is the

³ Law of progressive change in forensics means "everything changes with the passage of time. In other words, nothing is permanent-immutable or invariable. The rate of change varies tremendously with different objects. The scene of occurrence undergoes rapid changes. The weather, the vegetable growth, and the living beings (especially human beings) make extensive changes, in comparatively short periods. Longer the delay in examining the scene, the greater will be changes. After some time, the scene may become unrecognizable. For example, a road accident scene on a busy road will lose all material evidence if the same is not processed at once.

⁴ Section 41 of the Code of Criminal Procedure, 1973 provides: When police may arrest without warrant.

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110.

⁵ Radheshyam Prasad, "Prosecutors as Gate Keepers of Criminal Justice Administration in India" 8 *Dr. Ram Manohar Lohiya National Law University Journal* 222 (2008).



focal point. It is regarded as a power centre since it holds significant authority. It is the repository for the public's authority to commence and withdraw criminal prosecutions.⁶

As per Section 24⁷ and 25⁸ of the Code of Criminal Procedure, prosecutors including Public Prosecutors, Additional Public Prosecutors and Special Public Prosecutors are to conduct

⁶ K. N. Chandrasekharan Pillai, "Public Prosecution in India" 50 *JILI* 629 (2008).

⁷ Section 24 of the Code provides:

(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district: Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless

his name appears in the panel of names prepared by the District Magistrate under sub- section (4).

(6) Notwithstanding anything contained in sub- section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre: Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub- section (4).

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub- section (1) or sub- section (2) or sub- section (3) or sub- section (6), only if he has been in practice as an advocate for not less than seven years.

(8) 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.

(9) For the purposes of sub- section (7) and sub- section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.]

⁸ Section 25 of the Code provides: (1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

(1A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the Courts of Magistrates.]

(2) Save as otherwise provided in sub- section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case; Provided that a police officer shall not be so appointed-

(a) if he has taken any part in the investigation into the offence with respect to which the accused being prosecuted; or

(b) if he is below the rank of Inspector.



prosecutions and criminal proceedings in High Courts and Sessions Courts and Assistant Public Prosecutors are appointed for conducting prosecutions in the Magistrate's Courts.⁹

1.1 Independence of Prosecution

A prosecutor defends the state's interests, not the police, and ensures that the prosecution is conducted fairly. The objective of any criminal trial is to investigate the crime and decide the accused's guilt or innocence, and it is the prosecutor's primary responsibility to assist the court in determining the truth of the case. As a result, the prosecutor is required to carry out his duties in a fair, fearless, and responsible manner. However, these expectations must be balanced against the realities of the criminal justice system.¹⁰ The prosecutor must play an independent role at every step of the criminal proceeding to obtain the desired results. In *Union of India v. Sushil Kumar Modi*¹¹ the Hon'ble Supreme Court of India has quoted the following words of Lord Denning¹² in *R v. Metropolitan Police Commissioner*¹³ as to the independent role of police:

"I have no hesitation, however, in holding that, like every constable in the land, he should be, and is independent of the executive. He is not subject to the order of the Secretary of State...I hold it to be the duty of the Commissioner of the Police, as it is of every Chief constable to enforce the law of the land. He must take steps so to post his men that crimes may be detected, and those honest citizens may go about these affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things, be not the servants of anyone, save the law itself. No Minister of the Crown can tell him that he must, or must not keep observation on this place or that; or that he must nor prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and the law alone."

The Hon'ble Supreme Court of India, after quoting the above observations, observed:

"According to the Code of Criminal Procedure, 1973, the formation of the opinion as to whether or not there is a case to place the accused of the trial is that of the police officer making the investigation and the final steps in the investigation is taken only by the police and by no other authority. This must be borne in mind as also that the scope and purpose of a proceeding like the present are to ensure proper and faithful performance of its duty by the police officer, by resort to the prerogative writ of mandamus."

⁹ *Supra* note 5 at 223.

¹⁰ *Ibid.*

¹¹ (1997) 4 SCC 770.

¹² Lord Denning was perhaps the greatest law-making judge of the century and most controversial. His achievement was to shape the common law according to his own highly individual vision of society. Lord Denning was one of the most celebrated judges of his time. He is popular as dissenting judge.

¹³ (1968) 1 All ER 763.



Thus, it becomes imperative for the police to enforce the law without any executive influence. Likewise, the prosecutor as well is required to discharge his duty without any influence. The job of the prosecutor who is considered as the *Minister of Justice* is to assist the State in the administration of justice. The independence of the prosecutor's function stands at the heart of the rule of law. As has been rightly observed by Avory J. in *R v. Banks*¹⁴ that “prosecutors are the gatekeepers in the criminal justice system. It is now a well-settled rule that prosecutors are independent of the police and the courts. While the police, the Courts and the prosecutors have responsibilities to each other, each also has legal duties that separate them from others. The prosecutor does not direct police investigations, nor does he advise the police. The Government should ensure that prosecutors are independent of any executive influence, and can discharge their professional duties and responsibilities without any interference.”¹⁵

Even with regard to the withdrawal of prosecution under Section 321¹⁶ of the Code of Criminal Procedure, 1973, the Hon'ble Supreme Court of India in *Balvant Singh v. State of Bihar*¹⁷ has pointed out that “it is the statutory duty of the prosecutor alone to apply his mind and decide about the withdrawal of prosecution and this power is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side”. Again, in *Subhash Chander v. State*,¹⁸ the Supreme Court has stated that “it is the prosecutor alone and not any other executive authority that decides the withdrawal of prosecution. Consent will be given by

¹⁴ (1916) 2 KB 621.

¹⁵ Law Commission of India, 197th Report on Public Prosecutor's Appointments, (July, 2006).

¹⁶ Section 321 of the Code of Criminal Procedure, 1973, provides: The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time 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: Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.

¹⁷ AIR 1977 SC 2265.

¹⁸ AIR 1980 SC 434.



the prosecutor only if public justice in the larger sense is promoted rather than subverted by such withdrawal. In doing so, he acts as a limb of the judicial process, and not as an extension of the executive. He has to decide about the withdrawal by himself, even where displeasure may affect his continuance in office. None can compel him to withdraw a case. The Prosecutor is an officer of the Court of law and is responsible to the Court.”¹⁹

1.2 Role of the Prosecution in the Criminal Justice System

To analyse the role of the prosecutor in the criminal justice system, it is worthwhile to mention the work of Christmas Humphrey²⁰ published in *Criminal Law Review* (1955) which has been quoted in the 197th Law Commission of India Report on Public Prosecutors Appointments (2006):

"The Prosecutor has a duty to the state, to the accused and the Court. The Prosecutor is all times a minister of justice, though seldom so described. It is not the duty of the prosecuting counsel to secure a conviction, nor should any prosecutor even feel pride or satisfaction in the mere fact of success. Still less should he boast of the percentage of a conviction secured over a period. The duty of the prosecutor or I see it, is to present to the tribunal a precisely formulated case for the Crown against the accused person, and to call evidence in support of it. If a defence is raised incompatible with his case, he will cross-examine dispassionately and with perfect fairness, the evidence so-called, and then address the tribunal in reply, if he has the right, to suggest that his case is proved. It is not a rebuff to his prestige if he fails to convince the tribunal of the accused person guilty. His attitude should be so objective that he is, so far as humanly possible, indifferent to the result. It may be argued that it is for the tribunal alone, whether magistrate or jury to decide guilt or innocence."

The Law Commission of India in its 154th Report²¹ has quoted a very articulate observation of the Kerala High Court given in *Babu v. State of Kerala*²² to the following effect:

Prosecutors are the ministers of Justice whose job is none other than assisting the State in the administration of Justice. They are not representatives of any party. Their job is to assist the Court by placing before the Court all relevant aspects of the case. They are also not there to see the culprits escape conviction."

The Prosecution is one of the most significant branches of the criminal justice system, and its job is critical to the system's effective operation. The executive's duty to prosecute an offender

¹⁹ *Supra* note 15.

²⁰ Christmas Humphreys was an English Scholar and barrister who prosecuted several controversial cases in the 1940s and 1950s, and later became a judge at the Old Bailey. Apart from his writings on law, he has also written a number of works on Buddhism and is best-known British convert to Buddhism during his times.

²¹ Law Commission of India, 154th Report on the Code of Criminal Procedure, 1973 (22 August, 1996).

²² 1984 Cr LJ 499 (Ker.).



is carried out through the institution of the Prosecution. The prosecutor is appointed by the state and is in charge of prosecuting cases on its behalf. While it is the prosecutor's obligation to ensure that the trial results in a conviction, he does not need to be overly preoccupied with the outcome. He is a Court-appointed neutral officer who is expected to offer a true picture to the Court of Law. Even while he represents the State, it is also his responsibility to ensure that the accused is not treated unfairly. Despite being an executive officer, the prosecutor is a court officer who is obligated to help the court. The prosecutor represents the state, which is dedicated to the administration of justice rather than advancing the interests of one side at the expense of the other. He must be honest and impartial so that even the accused are treated fairly. When a case is dropped from prosecution, the prosecutor has a big say. He should only prosecute in exceptional circumstances, lest the public's faith in the administration of justice is shattered.²³ The role and functions of the prosecutor in the criminal justice system have been highlighted by the Hon'ble Supreme Court of India in *Shiv Nandan Paswan v. State of Bihar & Others*²⁴ as under:

- a) That the Prosecution of an offender is the duty of the executive which is carried out through the institution of the Prosecutor.
- b) That the withdrawal from prosecution is an executive function of the Prosecutor.
- c) That the discretion to withdraw from prosecution is that of the Prosecutor and that of none else and he cannot surrender this discretion to anyone.
- d) That the Government may suggest to the Prosecutor to withdraw a case, but it cannot compel him and ultimately the discretion and judgement of the Public Prosecutor would prevail.
- e) That the Prosecutor may withdraw from prosecution not only on the ground of paucity of evidence but also on other relevant grounds to further the broad ends of public justice, public order and peace.
- f) That the Prosecutor is an officer of the Court and is responsible to it.”

1.2.1 Role of a Prosecutor in Pre-Trial Stage

The expression trial as such was neither defined in the Code of Criminal Procedure, 1872 nor it has been defined in the subsequent codes of 1882, 1898 and 1973. To retrieve the meaning of these expressions one is required to resort to the dictionary meanings. According to Stroud's Judicial Dictionary²⁵, trial means the conclusions by the competent court, of question in issue

²³ Madan Lal Sharma, "The Role and Function of Prosecutor in the Criminal Justice" 192,193, 107th International Training Course Participants Paper at *United Nations Asia and Far East Institute*, (1997).

²⁴ AIR 1983 SC 1994.

²⁵ Stroud's Law Dictionary is a law dictionary first published in 1890 by Frederick Stroud, a Barrister and Recorder of Tewkesbury, England. He is also known for his writings like *County Court Practice in Bankruptcy and Practical Law Affecting Bills of Sale*.



in any legal proceedings. As per Wharton's Law Lexicon²⁶ trial means the hearing of a case, civil or criminal before a judge who has jurisdiction over it. Thus, the expression trial has no universal meaning but has to be given that meaning which the particular context in which it is used demands.²⁷

In the pre-trial stage, the role of a prosecutor is minimal. During this stage, the police are competent to make the arrest, conduct search(s) record confession(s) and statements of the witnesses. However, a police officer cannot investigate a non-cognizable offence without the prior sanction of the court. The investigations in India are conducted as per the provisions of Chapter XII of the CrPC, 1973.²⁸ After the investigation is done, the police officer is required to submit a final police report to the court. The prosecutor has the following role in the pre-trial stage: (1) He appears in the court and obtains an arrest warrant against the accused person; (2) He obtains search warrant(s) from the court for searching the specific premises for collecting evidence; (3) He obtains police custody remand for the custodial interrogation of the accused person (Sec. 167); (4) If an accused person is not traceable, he initiates proceedings in the court for getting him declared a proclaimed offender (Sec. 82) and, thereafter, for the confiscation of his movable and immovable assets (Sec 83); and (5) He records his advice in the police file regarding the viability/advisability of prosecution.

If a prima facie case is established against the accused person after the investigation is completed, a charge sheet is filed in court through the prosecutor's office. At this point, the prosecutor's view on whether a prima facie case has been established is sought. The prosecutor's input and brief notes are often taken into consideration to improve the quality of the inquiry. The police authorities, however, have the final say on whether or not to bring a case to trial. If the investigating officer (IO) and the prosecutor disagree about whether or not the case should be prosecuted, the District Superintendent of Police makes the final decision.²⁹

²⁶ Wharton's Law Lexicon is considered as the epitome of the Law of the England. John Wharton was a prominent American Lawyer whose work was steeped in the classic era of Broadway theatre.

²⁷ S.N. Misra, *The Code of Criminal Procedure 1973* 10 (Central Law Publications, Allahabad, 15th edn., 2008).

²⁸ The final police report is submitted to the court under Sec. 173 of the Code of Criminal Procedure, 1973.

²⁹ *Supra* note 23 at 194.



1.2.2 Role of a Prosecutor during the Trial Stage

During the trial stage, the prosecutor plays an unrivalled role to represent the state than the government or police. It is the impartial role of the judge and prosecutor which decides the fate of the trial. In the actual trial, there are various stages and, in each trial, the prosecutor plays a pivotal role. After the charge sheet is filed in the court of law, the case is handed over to the prosecuting officer. The court on taking cognizance of the case frames the charges against the accused person if a *prima facie* case is made out. The court proceeds then to record the prosecution evidence and the statement of the accused. Eventually, court hears the final arguments from both the side and makes the judgement public.

Further during the trial, the prosecutor has the authority to withdraw a case from the trial as per Section 321 of the Code of Criminal Procedure.³⁰ Section 321 provides “for the withdrawal from prosecution does not indicate as to the grounds on which the prosecutor may make the application or the consideration on which the court is to grant its consent. The initiative is that of the prosecutor and what the court has to do is only to give its consent and not to determine any matter judicially.”³¹ In *Sheo Nandan Paswan v. State of Bihar*³², it was held that “the judicial function 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 prosecutor has not been improperly exercised or that it is not an attempt to interfere the normal course of justice for illegitimate reasons.”

The Supreme Court in *Subash Chander v. The State*³³ has held that “under Section 321 withdrawal of prosecution is exclusively the jurisdiction of the prosecutor. No executive authority has the power to withdraw the prosecution. But the prosecutor too can withdraw it with the consent of the court. The consent of the court under Section 321 as a condition for withdrawal is imposed as a check on the exercise of that power. The consent, according to the Supreme Court, will be given only if public justice in the larger sense is promoted rather than subverted by such withdrawal. The Prosecutor has to act independently and apply his mind judicially. He has to act, in doing so, as a limb of the judicative process not as an extension of

³⁰ *Supra* note 13.

³¹ *Supra* note 27 at 452.

³² 1987 Cr LJ 793 (SC).

³³ AIR 1980 SC 423.



the executive. The decision to withdraw must be of the prosecutor, not of other authorities, even of those whose displeasure may affect his job status.” Again, in *Rahul Agarwal v. Rakesh Jain*³⁴, “the permission for withdrawal of the prosecution was granted on the ground that the case was pending for a long time and accused was not a habitual criminal. The case was posted for examination of the accused and no inquiry was made as to why the case was pending. It was held that the order permitting withdrawal of prosecution when prosecution evidence was about to be over at any point in time, is not proper. It was also held that the permission for withdrawal of the prosecution can be granted only in the interest of justice and for valid reasons. It may thus be granted in a case that is likely to end in acquittal and continuance of case is only causing severe harassment to the accused, or to bring about harmony between the parties. Discretion to permit withdrawal of prosecution should not be exercised to stifle prosecution at the instance of aggrieved parties. Even if Government directs prosecutor to withdraw prosecution the court must consider all the relevant circumstances and find out whether withdrawal would advance the cause of justice.”

1.2.3 Role of a Prosecutor in Post-Trial Stage

After the completion of trial and pronouncement of judgement by the competent court, the aggrieved party may go into appeal before the appellate court. On appeal to the higher court, the prosecutor plays an important role. As per the provisions of Section 374 of the Code of the Criminal Procedure, “Any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court and any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than seven years has been passed against him or any other person convicted at the same trial may appeal to the High Court, or if any person is convicted by the Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class or the Second class may appeal to the Court of Sessions.”

The prosecutor as per section 377 of the CrPC also plays a pivotal role, “when the State Government may, in any case of conviction on trial held in any Court other than High Court, direct the prosecutor to present an appeal against the sentence on the ground of its inadequacy

³⁴ 2005 Cr LJ 963 (SC).



to upper court.³⁵ Again Section 378 of the CrPC provides that the District Magistrate or the State Government may, in any case, direct the prosecutor to present an appeal to the superior court.³⁶

1.3 Critique of the Role of Prosecution in the Criminal Justice System

The prosecuting officers in the criminal justice administration are not the pawns in the hands of the government. They are required to play their role in an impartial and unbiased manner. The prosecutor has to represent the state than the government. He must be the defender of the cause of his client as efficiently and effectively as possible. However, in the performance of his

³⁵ Section 377 of the Code of Criminal Procedure provides:

(1) Save as otherwise provided in Sub-Section (2), the State Government may in any case of conviction on a trial held by any Court other than a High Court, direct the Public prosecutor to present an appeal against the sentence on the ground of its inadequacy—

a. to the Court of session, if the sentence is passed by the Magistrate; and
b. to the High Court, if the sentence is passed by any other Court”;

c. in Sub-Section (3), for the words “the High Court”, the words “the Court of Session or, as the case may be, the High Court” shall be substituted.

(2) If such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment, constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy.

(3) When an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence.

(4) When an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal.

³⁶ Section 378. provides for appeal in case of acquittal.

(1) Save as otherwise provided in sub- section (2) and subject to the provisions of sub- sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court² or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub- section (3), to the High Court from the order of acquittal.

(3) No appeal under sub- section (1) or sub- section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub- section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub- section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub- section (1) or under sub- section (2).



duties, it is an obligation on him to work in synchronization with the other wings of the criminal justice system. When the researcher approached the different stakeholders (respondents groups for empirical study) for their opinion regarding the coordination between the police and prosecution, the majority of them are of the inference, that there is a lack of cooperation between the different wings of the prosecution in general and police and prosecution in particular.

The prosecution and investigation no doubt are the two different aspects of the criminal justice system. The role of the police in the criminal justice system is important because he is the first who reaches the scene of the occurrence and while applying the law and his professional expertise collects material evidence based on which the case is sent to the court for legal trial. If the police investigating officer ignores certain evidence which subsequently disappears or gets destroyed then it may prove fatal to the case in hand. The police and the prosecution sometimes lack coordination on investigative issues. Their acts are independent of each other as investigation work is outside the court, whereas the role of the prosecutor is inside the court. It is also true that they are interdependent, hence they should act in harmonizing the things in the delivery of justice.³⁷

As per the National Crime Records Bureau (NCRB) report, Crime in India, 2018, the conviction rate in the country is less than 50% which is very lower than countries like the USA (85%), China (99.9%), UK (84.5%), Israel (93%), Japan (99.5%) and Russia (99.78%). The reasons for the low conviction rate in the country may be many, but it has been time and again highlighted by the courts in India that prosecution also does not play its role as per the mandate of law. The Hon'ble Supreme Court of India in the *Best Bakery case*³⁸ has criticized the role of the prosecutor for opposing the issuance of arrest warrants against the accused persons before a Mumbai court. The Court has observed that such a person should not continue as the public prosecutor for the state.

Again, in *Jayalalitha's Disproportionate case*³⁹ when the public prosecutor stated, he has no objection to granting of conditional bail to the convicts has put the impartiality and independence of judicial system into question. The Court has held that the public prosecutor is

³⁷ *Supra* note 5 at 229.

³⁸ *Zahira Habibullah H. Sheikh v. State of Gujarat*, 2005 Cr LJ 2050 (S.C.).

³⁹ *State Of Karnataka v. Selvi J. Jayalalitha & Ors*, (2017) 6 SCC 263.



appointed by the state to perform the functions of the state. But when the public prosecutors which is one of the most important branches of our legal system, acts on behalf of wrongdoers then the impartiality and purity of judiciary come into question.”

Regarding the misuse of the power of withdrawal from prosecution by the prosecutors under Section 321 of the CrPC, Hon'ble Supreme Court in *Sheo Nandan Paswan v. State of Bihar and others*⁴⁰ have opined that “Section 321 of the Code enables the Public Prosecutor to withdraw from the prosecution with the consent of the Court. Before the prosecutor makes an application under Sec. 321 of the CrPC, the Prosecutor has to apply his mind judiciously to the facts of the case without being subject to any executive influence.”

1.4 Problems of the Prosecutors in the Criminal Justice System

In our country, the criminal justice system is based on the idea that any crime committed against citizens is a crime against the state. The state takes on the burden of prosecuting perpetrators on behalf of the victims based on this premise. Although Indian prosecutors are nominally independent, they are subjected to a variety of unlawful influences and pressures.⁴¹ The problems of the prosecutors in India can be summed up in the following heads:

I. Lack of Coordination between the Police and Prosecution

The success of the justice delivery system in any part of the world depends upon the coordination between its various organs. The Police and Prosecution have to work independent from each other, but both must supplement and complement each other. The Police force which is vested with the powers to register the case and initiate the investigation does not perform its duty with utmost responsibility.⁴² The investigation part of any case is crucial to determine its success. During empirical study as well, when prosecuting officers were asked about the same, they commented that in a large number of the cases investigation done by the police is not up to the expected level which becomes an easy ground for the defence counsels to get the acquittal of their clients.

II. Overburdened Prosecution

⁴⁰ (1983) 1 SCC 438.

⁴¹ Bikram Jeet Batra, “Public Prosecution in Need of Reform”, *India Together*, July 5, 2005, available at: <<http://indiatogether.org/prosecute-government>> (last visited on June 10, 2019).

⁴² *Lalita Kumari v. State of U.P.* AIR 2012 SC 1515.



There is a large number of pending trials in the subordinate courts. As has been rightly put by Madam Lal Sharma "the exact number of prosecutors in the country is not known. Experience, however, shows that the prosecutors are overburdened with cases and their number is not adequate to efficiently handle the cases entrusted to them. It is difficult to fix a norm as to the number of cases to be entrusted to a prosecutor as it would depend on the nature of the case. Further, the performance of a public prosecutor is largely dependent on the performance of the presiding officer and other collateral factors. While there is a case for increasing the number of criminal courts, there is equally a case for increasing the number of prosecutors. As a norm, at least two prosecutors of the appropriate level should be attached with each court."⁴³ However, in practice, the situation is troublesome. During the fieldwork, it has been found at various stations one prosecutor is posted at two places.

III. Lack of Proper Training

The Prosecutors who play the important role in the justice delivery system are recruited from the open market, and they are entrusted with the cases without any institutional training. Madan Lal Sharma observes "they learn by experience, but that takes time and, in the meanwhile, the cases suffer. It is suggested that a national level training institution should be set up for the prosecutors to impart them proper training. The duration of the training could be one and a half years. Six months could be earmarked for training in law; four months for attachment with a police station; four months for attachment with a competent magistrate; and the remaining four months for attachment with a senior and experienced public prosecutor. The proposed institutional training could be supplemented with refresher courses from time to time."⁴⁴

IV. Lack of Infrastructure

The prosecuting officers need good knowledge of the law to face experienced defence counsels. To imbibe such knowledge, it becomes imperative to have a well-equipped library (including a digital legal database) in the office of the prosecutor. The lack of such law books and online legal databases most often becomes a hurdle in the proper functioning of the prosecuting officers.

V. Executive and Political Influence

⁴³ *Supra* note 23 at 198.

⁴⁴ *Ibid.*



The prosecutor is the officer of the court whose job is to assist the court in the administration of justice. He represents the state and not the police or government. His role should be impartial and independent from any outside influence. The shimmering example of outside influence on investigating officers and prosecutors can be seen in the *Jain Hawala case*⁴⁵. In this case “the bureaucrat-politician-criminal nexus had used all means necessary to thwart the investigation and prosecution of corruption cases by the Central Bureau of Investigation. The Court monitored the progress of these cases and passed detailed directions on the functioning of various agencies involved and even warned the minister in charge to avoid interfering with the investigation and prosecution”.⁴⁶

1.5. Concluding Remarks

In the closing remarks, a prosecuting officer is frequently depicted as a Minister of Judicial who is responsible for ensuring the purity and fairness of the criminal justice system. The purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to establish the fault or innocence of the accused, and it is the duty of the Prosecutor to represent not the police or executive but the State, and this duty should be discharged by him fairly and fearlessly and with full sense of responsibility and accountability.

⁴⁵ *Vineet Narain v. Union of India*, (1998) 1 SCC 226.

⁴⁶ *Supra* note 41.