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R. S. NAYAK

v.

A.R. ANTULAY

April 5, 1984

B [D.A. DESAI, R.S. PATHAK, O. CHINNAPPA REDDY, A P. SEN AND V. BALAKRISHNA ERADI, JJ.]

Criminal Appellate Jurisdiction—Transfer of a pending criminal trial from the court of Sessions to the High Court—Procedure to be followed is the same as prescribed in chapter XIX B of the Code of Criminal Procedure—If the Cognizance of an offence is taken under section 8(1) of the Criminal Law (Amendment) Act, 1952—State need not appoint a Public Prosecutor—The complainant's advocate will the Public Prosecutor.

C

In compliance with directions given by the Constitution Bench of the Supreme Court, the Bombay High Court withdrew to itself Special Case No. 24 of 1982 and Special Case No. 5/83 pending in the Court of the Special Judge, Greater Bombay and assigned the said two cases to Mr. Justice S.N. Khatri a sitting Judge of the said court. When the cases were taken up for hearing, two preliminary contentions were raised as to whether State should appoint a Public Prosecutor to conduct the trial and what should be the procedure to be followed and from what stage of the trial. Hence the two applications for classification. The court;

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HELD : 1. The learned Judge has to hold the trial according to the procedure prescribed in chapter XIX B i.e., the procedure prescribed in section 244 to 247 (both inclusive) of the Code of Criminal Procedure. To be precise, the learned Judge has to try the case according to the procedure prescribed for cases instituted otherwise than on police report by Magistrate, The trial was to proceed from the stage when the acused was discharged. [414D-E]

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2. If the cognizance of an offence is taken under section 8(1) of the criminal law (Amendment) Act, 1952, and the trial has to be held according to the procedure prescribed therein, under section 8(3), the learned advocate engaged by the complainant to conduct the prosecution will be deemed to be a public prosecutor. In such a situation, there is no question of the State appointed Public Prosecutor to conduct, the prosecution. It is for the complainant to decide who should be his learned advocate in charge of the Prosecution. [415B-C]

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CRIMINAL JURISDICTION : Criminal Misc. Petition No. 1740 of 1984.

(For Directions)

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IN

(Criminal Appeal No. 356 of 1983)

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And

(Criminal Misc. Petition No. 2217 of 1984)

(For Directions)

IN

(Criminal Appeal No. 356 of 1983)

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Ram Jethmalani, Ms. Rani Jethmalani, Naresh Jethmalani and *J. Wad* for the Petitioner.

A. K. Sen, M. N. Shroff and *Dalveer Bhandari* for the Respondent.

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The Order of the Court was delivered by

DESAI, J. Consequent upon the order made by a Constitution Bench of this Court on February 16, 1984 in the Judgment rendered in Criminal Appeal No. 356 of 1983 and Transferred Case No. 347 of 1983 alongwith Transferred Case No. 348 of 1983, Special Case No. 24 of 1982 and Special Case No. 3/83 pending in the Court of the Special Judge, Greater Bombay (Shri R.B. Sule) were withdrawn and stood transferred to the High Court of Bombay. In compliance with the direction given in the same judgment, the learned Chief Justice of the High Court of Bombay assigned both the cases to Mr. Justice S.N. Khatri, a sitting Judge of the High Court. The learned Judge called upon the parties to appear before him on March 12, 1984. When the cases were taken up for hearing, certain preliminary objections were raised on behalf of the accused which we were told have been dealt with by the learned Judge in his order dated March 16, 1984. In respect of two issues further consideration was postponed. These issues turn upon the question of procedure to be adopted by the learned Judge in the trial of the two cases and who should be incharge of the prosecution. In our opinion, if the judgment of this Court was read with care and precision, these two questions would have hardly arisen. However, two misc. petitions were moved in this Court for clarification of the judgment so as to thwart avoidable delay in the trial of cases.

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The operative portion of the judgment which has a bearing on the question raised reads as under:

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"Therefore, Special Case No. 24 of 1982 and Special Case No. 3/83 pending in the Court of Special Judge,

A Greater Bombay Shri R.B. Sule are withdrawn and transferred to the High Court of Bombay with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court".

In the penultimate paragraph of the judgment while allowing the B appeal this Court directed as under :

"This appeal accordingly succeeds and is allowed. The order and decision of the learned Special Judge Shri R.B. Sule dated July 25, 1983 discharging the accused in Special Case No. 24 of 1982 and Special Case No. 3/83 is hereby C set aside and the trial shall proceed further from the stage where the accused was discharged."

Reading two directions together, it clearly emerges that the learned Judge has to hold trial according to the procedure prescribed in Chapter XIX-B i.e. the procedure prescribed in D Secs. 244 to 247 of the Code of Criminal Procedure, 1973. To be precise, the learned Judge has to try the case according to the procedure prescribed for cases instituted otherwise than on police report by Magistrate. This position is clear and unambiguous in view of the fact that this Court while allowing the appeal was hearing amongst others Transferred Case No. 347 of 1983 being E the Criminal Revision Application No. 354 of 1983 on the file of the High Court of the Judicature at Bombay against the order of the learned Special Judge Shri R.B. Sule discharging the accused. If the criminal revision application was not withdrawn to this Court, the High Court while hearing criminal revision application could have under Sec. 407 Code of Criminal F Procedure, 1973 transferred the Special case from which criminal revision application arose to itself for trial and in such a situation the High Court under Sec. 407 (8), Code of Criminal Procedure, 1973 would have to follow the same procedure which the Court of Special Judge would have followed if the case would not have been so transferred. It is not in dispute that the learned Special G Judge while holding the trial was required to follow the procedure prescribsd by the Code of Criminal Procedure, 1973 for trial of warrant cases by Magistrates and in the facts of this case the procedure would be in respect of cases instituted otherwise than on police report. The trial was to proceed further from the stage H when the accused was discharged. This in our opinion is obvious and needs no further clarification. Sec. 8(1) of the Criminal Law (Amendment) Act, 1952 as interpreted by this Court in Criminal

Appeal No. 247 of 1983 decided on February 16, 1984 makes this position unambiguous and abundantly clear.

The clarification in respect of the first point read with the judgment rendered in Criminal Appeal No. 247 of 1983 in which Sec. 8 (3) of the Criminal Law (Amendment) Act, 1952 had come in for interpretation, it follows as a corollary that if the cognizance of an offence is taken under Sec. 8(1) of the Criminal Law (Amendment) Act, 1952 and the trial has to be held according to the procedure prescribed therein, under Sec. 8 (3) the learned advocate engaged by the complainant to conduct the prosecution will be deemed to be a public prosecutor. In such a situation, there is no question of the State appointed public prosecutor to conduct the prosecution. It is, therefore, clarified which to some extent may appear tautologus in view of the aforementioned judgment, that it would be for the complainant to decide who would be the learned advocate incharge of the prosecution and the advocate so appointed would be deemed to be a public prosecutor.

Dr. Singhvi who appeared for the respondent-accused submitted that in the guise of a petition for clarification, it is a covert attempt to forestall or foreclose the decision on the aforementioned two points which are pending before the learned Judge before whom both the cases are pending. There was no question of deciding the aforementioned two points afresh because the answers to them are implicit in the judgments referred to above. Dr. Singhvi had nothing to say when invited by the Court about the clarification which the Court my offer in respect of the aforementioned two questions. He left us in no doubt that he does not wish to make any submission on the question of clarification in respect of the aforementioned two questions.

We note that the Government of Maharashtra has entered appearance before us through Shri A.K. Sen and Shri M.N. Shroff but no submission were made by them.

Mr. Jethmalani, learned counsel for the complainant wanted this Court to consider prayers Nos. (c) and (d) in the misc. petition which we consider for the disposal of the misc. petitions as irrelevant and we do not propose to deal with the same in these petitions.

In sum the clarification is that the learned Judge in the trial

A of the two cases pending before him has to follow the procedure prescribed in Secs. 244 to 247 (both-inclusive) included in Chapter XIX-B of the Code of Criminal Procedure, 1973. It is for the complainant to decide who should be his learned advocate incharge of the prosecution and there is no question of entrusting the trial of the two cases to a State appointed public prosecutor.

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S.R.