

Amit Pathania And Another vs Union Of India And Others on 21 September, 2022

Bench: Chief Justice, Sindhu Sharma

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

CJ Court

Case No.WP(C)PIL No. 43 of 2019

WP(C) No. 4330 of 2019

WP(C) No. 4563 of 2019

Reserved on: 7.03.2022

Pronounced on: 21.09.2022

Amit Pathania and another

.... Petitioner/Appellant(s)

Through:-

Sh. A.P. Singh, Advocate

Sh. Jagpaul Singh, Advocate

Sh. S. S. Ahmed, Advocate

V/s

Union of India and others

.....Respondent(s)

Through:-

Sh. Raman Sharma, AAG

Sh. Sanchit Verma, Advocate

CORAM :

HON'BLE THE CHIEF JUSTICE

HON'BLE MRS. JUSTICE SINDHU SHARMA, JUDGE
JUDGMENT

Per Sharma-J

01. In anticipation of the enforcement of the Jammu & Kashmir Reorganization Act, 2019, the Government of Jammu and Kashmir vide order No. 1104-Home of 2019 dated 30.10.2019, accorded sanction to the establishment of Directorate of Prosecution and creation of separate Prosecution Service to be known as Jammu & Kashmir Prosecution Service, comprising of the members of the Jammu & Kashmir Police (Gazetted) Service (Prosecution Wing) and Prosecuting Officers (Non-Gazetted) as its members. By the impugned order No. 1104-Home of 2019 dated 30.10.2019, sanction was accorded to :-

"6. Now, therefore, sanction is hereby accorded to:

(i) establishment of a Directorate of Prosecution, headed by a Director General (Prosecution), consisting of such posts as may be prescribed;

(ii) creation of a separate prosecution service, to be known as the „Jammu & Kashmir Prosecution Service , comprising the members of the Jammu and Kashmir Police (Gazetted) Service [Prosecution Wing] and the Prosecuting Officers (Non-Gazetted), as per Annexure, Thereupon, the said persons shall cease to be the Police Officers and, accordingly, excluded from the ambit of the Jammu and Kashmir Police (Gazetted) Service and the Police Rules;

(iii) provision of allowances, other facilities and benefits, as per their present entitlement, notwithstanding such exclusion. However, appropriate orders shall be issued separately, to provide for such allowances or equivalent thereto:

(iv) notification of recruitment rules, providing for method of recruitment and service conditions of the members of the Prosecution Service, after due consideration of the requirement for fresh creation of posts and promotional avenues, apart from provision of reserves to meet the requirement of the Anti Corruption Bureau, Vigilance Commission, Training Institutes and various Police formations, etc..."

02. The Government vide order No. 01-Home of 2019 dated 31.10.2019 issued the following orders:-

"In the interest of administration, it is hereby ordered that the following Deputy Directors (Prosecution) [DDsP] of the J&K Prosecution Service shall oversee the functioning of the Public Prosecutors (PPs)/Additional Public Prosecutors (APPs)/Assistant PPs in the areas of jurisdiction, as indicate against each, till further orders....."

03. Accordingly, seven persons were appointed as Deputy Directors (Prosecution) [DDsP] for different Districts. Subsequently, the Government issued two notifications on 31.10.2019, in exercise of the powers conferred under Section 24 of the Code of Criminal Procedure, 1973 and vide S.O. 05 dated 31.10.2019, appointed Chief Prosecuting Officers (CPOs) of the Jammu & Kashmir Prosecution Service as Public Prosecutors (PPs)/Additional Public Prosecutors (APPs) and posted them in different Districts in Courts of Sessions Judge and Additional Sessions Judge as mentioned in the notification. By this order, 39 persons were appointed on the post of Public Prosecutors (PPs)/Additional Public Prosecutors (APPs).

04. By another notification i.e., S.O. 06 of even date, in exercise of the powers conferred under Section 25 of the Code of Criminal Procedure, 1973, Senior Prosecuting Officers and Prosecuting Officers of the Jammu and Kashmir Prosecution Service were appointed as Assistant Public Prosecutors (APPs). By this order, as many as 54 persons were appointed in the Courts of Chief Judicial Magistrates and Sub-Judges, who were exercising the powers of the Judicial Magistrates and 82 persons were posted in the Courts of Munsiff Magistrate as well as Munsiff Mobile Magistrate.

05. The grievance of the petitioners as projected by learned counsel Sh. A.P. Singh, appearing on behalf of the practicing Advocates are; that there was no regular cadre of Prosecution Service in the

erstwhile State of Jammu & Kashmir and, therefore, the benefit of Sub-section (9) of Section 24 of Cr.P.C. cannot be extended to those, who have been appointed as Public Prosecutors and Additional Public Prosecutors. It is further argued that since Sub-section (9) of Section 24 of Cr.P.C. has no independent existence because the same was introduced along with Sub-section (6) of Section 24 of Cr.P.C. as there is no regular cadre of prosecuting officers as contemplated by the Criminal Procedure Code, therefore, benefits of the same cannot be granted to the erstwhile prosecutors, as they do not form a regular cadre.

o6. It is also submitted that in "K. J. John, Assistant Public Prosecutors vs. State of Kerala and others", 1994 SCC 191, the Apex Court has held that a combined reading of Sub-section (6) and Sub-section (9) of Section 24 of Cr.P.C. gives a clue to the intention of the legislature in determining the scope of the expression "regular cadre of Prosecuting Officers" occurring in sub-section (6). The intention of introducing sub-section (6) and the deeming fiction in sub-section (9) was in order to safeguard the promotional rights of Prosecuting Officers in such of the States where there is already in existence regular cadre consisting of a hierarchy of Prosecuting Officers going to the top level of Additional Public Prosecutors and Public Prosecutors.

o7. These contentions of learned counsel for the petitioners, have no substance in view of the fact that Sub-section (6) of Section 24 of Cr.P.C. has been substituted by Sub-Section (6A), which reads as under:-

Jammu & Kashmir. In its application to the Union Territory of Jammu & Kashmir in Section 24 of the Code of Criminal Procedure, 1973 (2 of 1974), after sub-section (6), insert the following sub-section, namely Section 6A:-

"(6A) Notwithstanding anything contained in sub Section (1) and sub-section (6), the Government of the Union Territory of Jammu and Kashmir may appoint a person who has been in practice as an Advocate for not less than seven years as Public Prosecutor or Additional Public Prosecutor for High Court and for the District Courts and it shall not be necessary to appoint Public Prosecutor or Additional Public Prosecutor for the High Court in consultation with High Court and Public Prosecutor or Additional Public Prosecutor for the District Court from amongst the person constituting the cadre of Prosecution for the State of Jammu and Kashmir."

o8. It is clear from sub-section (6) that the word „regular cadre has been omitted by using the words „from amongst those persons constituting the cadre of prosecution for the State of Jammu & Kashmir . Since, in the State of Jammu & Kashmir, the Prosecution Wing of Police comprised of Prosecuting Officers, Senior Prosecuting Officers and Chief Prosecuting Officers by using expression from the cadre of Prosecuting Officer in the State from amongst the persons constituting the cadre of State of Jammu & Kashmir shows that the judgment in the case of K. J. John (supra) has no application in so far as sub-section (6) is concerned. Similar amendments were made in respect of the State of Tamil Nadu by substituting sub-Section (6A). So far as application of Sub-section (9) of Section 24 of Cr.P.C. is concerned, it is, as such, applicable to the Prosecuting Officers. Sub-section (9) of Section 24 of Cr.P.C. reads as under:-

"(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."

09. In view of the above and considering the observations of their lordships made in the judgment of K. J. John (supra), when we consider the provisions of Sub-section (6) of Section 24 of Cr.P.C. which makes it incumbent to appoint Public Prosecutors and Additional Public Prosecutors only from regular cadre of Prosecuting Officers, it can only be applied in case of such regular cadre which may go up to the level of Public Prosecutors, is not applicable in the present case, because sub- section (6) of Section 24 of Cr.P.C. has been substituted by sub-Section (6A) in the Union Territory of Jammu & Kashmir and reference is specifically made to the persons constituting the cadre of prosecution for the State of Jammu & Kashmir.

10. Learned counsel for the petitioners argued that only a person who has been in practice as an Advocate for seven years would be eligible to be appointed as Public Prosecutor and Additional Public Prosecutor, similarly, only a person who has been in practice for more than ten years would be eligible for appointment as Deputy Director (Prosecution) are contrary to the legislature intention of Sections 24, 25 and 25(A) of Cr.P.C, as all the persons who have been appointed are not eligible to hold the post.

11. It is also not correct to say that Public Prosecutors could be appointed only if they possess seven years practice as an Advocate as provided in sub-sections (7) and (8) because sub-section (9) of Section 24 Cr.P.C. cannot be ignored, which provides that a person who has rendered service as Public Prosecutor, Additional Public Prosecutor, 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. Moreover, the expression "there exists a regular cadre" has been omitted in sub-section 6(A), therefore, all appointments have been made as per the amended provision.

12. Sh. A. P. Singh, learned counsel, next argued that the appointment of the Deputy Directors is contrary to Section 25A of Cr.P.C. but this argument ignores the State amendment by which sub-sections (1) and (2) of Section 25(A) of Cr.P.C. have been substituted with the following observations:-

Jammu & Kashmir. In its application to the Union Territory of Jammu & Kashmir, in Section 25A of the Code of Criminal Procedure, 1973 (2 of 1974), for sub-sections (1) and (2), substitute,-

(1) The Government of the Union Territory of Jammu & Kashmir shall establish a Directorate of Prosecution consisting of a Director General of Prosecution and such other officers, as may be provided in rules to be framed by the said Government; and

(2) The Post of Director General of Prosecution and all other officers, constituting the prosecution cadre, shall be filled in accordance with the rules to be framed by the said government.

13. Learned counsel for the petitioners also argued that as per sub- section (2) of Section 25 of Cr.P.C., no Police officer shall be eligible to be appointed as Assistant Public Prosecutor. This provision, however, has no application to the facts of the case because the State Government has issued an order separating the Prosecution Wing from police and making them subordinate to the Directorate of Prosecution.

14. The main argument of learned counsel for the petitioners is that by order dated 31.10.2019, members of the Police Department constituting Prosecuting Wing cannot be made Public Prosecutors and Additional Public Prosecutors and Assistant Public Prosecutors. However, the Police investigation being part of the Police Department, prosecution has always been a part of the Police Department though named as Prosecution Wing, its independence, however, was ensured by the State by constituting Directorate of Prosecution, but still it cannot be denied that the Prosecution Wing remained a part of the Police Department, but with the establishment of Directorate of Prosecution by order dated 30.10.2019, the Prosecution wing has been separated by bringing it directly under the Directorate of Prosecution. So it is wrong to state that they still continued to be Police Officers though the intention of the legislature is clear with the substitution of sub-section (6A) of Section 24 of Cr.P.C. and much of force of the argument made by the petitioners is taken away by sub-section (9) of Section 24 of Cr.P.C.

15. Learned counsel for the petitioners further submitted that all the officers, right from the Director Prosecutions to the Additional Prosecution Officers, have been appointed by Inspector General of Police or Director General of Police. These Police officers cannot be appointed as Public Prosecution Officers in view of the observation made by their lordship of Hon ble Supreme Court in S. B. Shahane & ors. vs. State of Maharashtra & anr., AIR 1995 SC 1628. However, the Supreme Court has clarified the same in Para-14 of the judgment which reads as under:-

"14. No doubt, when the scheme of the provision in Section 25 of the Code as also the scheme contained in Section 24 of the Code are seen, a police Prosecutor cannot even become eligible for being appointed as Assistant Public Prosecutor on regular basis, but that question has since not been raised for our consideration in this appeal and further since the appointments of the appellants and other similarly situated police Prosecutors as Assistant Public Prosecutors are made under the notification issued as far back as in the year 1974, we refrain from expressing that question at this distance of time."

In view of the above clarification, the same are not the findings of the Court.

16. We have considered all the submissions with reference to the amended provisions and are of the considered view that none of the submissions are justified in view of the amended provisions of the Code of Criminal Procedure, 1973, as applicable to the Union Territory of Jammu and Kashmir and

all appointments have been made as per the amended provisions.

17. This takes us to the writ petition [WP(C) No. 4563 of 2019] which has been filed by those appointed as Assistant Public Prosecutors under Section 25 of the Cr.P.C., 1973. Their main grievance is that they are Police Officers governed by the Police Rules and by virtue of their appointment as Assistant Public Prosecutors, their condition of service has been changed without offering them any opportunity to say whether they want to continue as Prosecuting Officers and Senior Prosecuting Officers or preferred to join as Assistant Public Prosecutors. However, it is not possible to say how the condition of their service has been changed because they were appointed as Public Prosecutors by the State and the nature of the job remained the same. Though nomenclature has been changed even their allowances and perks have remained same by virtue of order constituting the Jammu and Kashmir Prosecuting Service.

18. Moreover, in rest of the Country, Code of Criminal Procedure, 1973 was enforced in 1974 and in Jammu & Kashmir with effect from 31.10.2019, so the Prosecution Service came only after the Reorganization Act.

19. It has been organized by establishing the Directorate of Prosecution. Even otherwise, it is the command of Sections 24, 25 and 25A of Cr.P.C., 1973. The nomenclature has been changed because of statutory conditions prescribed in the Cr.P.C. Whether there will be change in their conditions of service or increase in pay scale, is a matter which is yet to be decided by the department and in case, they suffer from any disadvantage, at the time of fixation of their pay scale or seniority, they will be entitled to challenge the same.

20. At present, this writ petition is premature, as there is nothing to show how they are likely to suffer because the change in their status from the Police Officers to Assistant Public Prosecutors, which is, in fact, for their betterment. This petition is, therefore, premature and does not hold any merit at this stage.

21. In view of the aforesaid discussion, all these petitions are found to be without any merit and are, accordingly, dismissed.

(SINDHU SHARMA)
JUDGE

(PANKAJ MITHAL)
CHIEF JUSTICE

JAMMU
21.09.2022
RAM MURTI

Whether the judgment is speaking	:	Yes
Whether the judgment is reportable	:	Yes