

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.379 OF 2022

- 1) Shivaji S/o Rajaram Take,
Age-68 years, Occu:Agri.,
R/o-Take Wasti, Jeur Baibati,
Tq-Newasa, Dist-Ahmednagar,
- 2) Sharad S/o Shivaji Take,
Age-35 years, Occu:Agri.,
R/o-Take Wasti, Jeur Baibati,
Tq-Newasa, Dist-Ahmednagar.

...PETITIONERS

VERSUS

- 1) The State of Maharashtra,
Through Secretary,
Law and Judiciary Department,
Madam Kama Marg, Hutatma Rajguru
Chowk, Mantralaya, Mumbai-400 032,
- 2) Ujwala S. Pawar,
Age-Major, Occu:Lawyer,
Office: 10, Prabha Tara Apt.,
Apte Road, Shivaji Nagar, Pune-5.

...RESPONDENTS

...
Mrs. Pooja V. Langhe Advocate for Petitioner.
Mr.M.M. Nerlikar, A.P.P. for Respondent No.1 -State.
Mr.N.N. Bhagwat Advocate h/f. Mr. C.K. Shide Advocate
for Respondent No.2.
...

WITH

CRIMINAL APPLICATION NO.1086 OF 2022
IN
CRIMINAL WRIT PETITION NO.379 OF 2022

- 1) Shrikant S/o Sambhaji Take,
Age-23 years, Occu:Student,
R/o-Bhingar, Tq-Nagar,
Dist-Ahmednagar.

...APPLICANT

VERSUS

- 1) Shivaji S/o Rajaram Take,
Age-68 years, Occu:Agri.,
R/o-Take Wasti, Jeur Haibati,
Tq-Newasa, Dist-Ahmednagar,
- 2) Sharad S/o Shivaji Take,
Age-35 years, Occu:Agri.,
R/o-Take Wasti, Jeur Haibati,
Tq-Newasa, Dist-Ahmednagar.
- 3) The State of Maharashtra,
Through Secretary,
Law and Judiciary Department,
Madam Kama Marg, Hutatma Rajguru
Chowk, Mantralaya, Mumbai-400 032,
- 4) Ujwala S. Pawar,
Age-Major, Occu:Lawyer,
Office: 10, Prabha Tara Apt.,
Apte Road, Shivaji Nagar, Pune-5.

...RESPONDENTS

...
Mr. Tushar Shinde Advocate for applicant.
Mrs. Pooja V. Langhe Advocate Respondent Nos.1 and 2.
Mr.M.M. Nerlikar, A.P.P. for Respondent No.3.
Mr.N.N. Bhagwat Advocate h/f. Mr. C.K. Shide Advocate
for Respondent No.4
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE OF RESERVING JUDGMENT : 20th DECEMBER 2022

DATE OF PRONOUNCING JUDGMENT : 23rd JANUARY 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

. Rule. Rule made returnable forthwith. Heard learned counsel for the parties finally, by consent.

. Present petitioners are the original accused persons who are challenging the Notification dated 30th September 2021 issued by respondent No.1 appointing respondent No.2 as a Special Public Prosecutor to conduct the Sessions Case bearing No.12 of 2020 before the learned Additional Sessions Judge, Newasa, District-Ahmednagar, which is filed against the petitioners. The petitioners are also challenging the order passed on 11th February 2022 below Exhibit-101 passed by the learned Additional Sessions Judge-2, Newasa in the said Sessions Case wherein they had taken objection for the appointment of respondent No.2.

2. The factual matrix leading to the petition, are that informant Ravindra Shankar Gosavi has filed the First Information Report vide Crime No.652 of 2019 with Newasa Police Station alleging that in all four accused persons have

committed the offence of murder of Advocate Sambhaji Rajaram Take and Santosh Sundar Ghune by means of various weapons and also caused grievous injuries to other two persons. The said offence came to be registered under Sections 302, 307, 341, 201, 324, 323, 504, 506 read with Section 34 of the Indian Penal Code. Informant Ravindra Gosavi had moved an application to assist the Public Prosecutor under Section 301 of the Code of Criminal Procedure through respondent No.2 and also moved an application for assist to Public Prosecutor in bail application by separate application when the matter was before the learned Additional Sessions Judge, Newasa. Respondent No.2 had filed Vakalatnama on behalf of the informant. Both the applications, i.e. application Exhibit-65 and 72 were allowed by the learned Additional Sessions Judge-2, Newasa on 26th July 2021 and permission was granted to file written arguments only after conclusion of evidence. Respondent No.2 had filed written notes of arguments and it is stated that she had also advanced the oral arguments before the trial Court, thereby she had taken active participation in prosecuting the case. However, later on informant has succeeded to get the appointment of respondent No.2 as Special Public Prosecutor and he has deposited the amount / fees towards respondent No.1 and then Notification

regarding the appointment of respondent No.2 was issued by respondent No.1 on 30th September 2021.

3. The petitioners are objecting the appointment of respondent No.2 as Special Public Prosecutor on the ground that she had represented the original informant on the earlier stages by taking active part and therefore, as Public Prosecutor her conduct is prejudiced to the accused persons and would be with bias mind. The petitioners had, therefore, moved application Exhibit-101 before the learned Additional Sessions Judge for reconsidering the appointment of the Special Public Prosecutor. However, that application came to be rejected.

4. Learned Advocate appearing for the petitioners has vehemently submitted that the Notification is the outcome of getting the appointment of respondent No.2 by the informant by hook or crook. The role of the prosecutor is not as mouthpiece of the investigating agency. It is the duty of the Public Prosecutor to ensure that the accused is tried fairly. When respondent No.2 had already represented informant, it cannot be said that she would be the instrumentality for fair trial. Learned Advocate for the petitioners has taken us through the record which is with the

trial Court i.e. Exhibit-65, Exhibit-72, Notification dated 30th September 2021, application Exhibit-101 and the order passed by the learned Additional Sessions Judge, Newasa while dismissing the said application. She has drawn our attention to the decision in **Jayesh Pratap Doshi vs. State of Maharashtra, 2011 (1) AIR Bom. R 339**, wherein this Court after relying upon the decision of the **Hon'ble Supreme Court in Mukul Dalal vs. Union of India, 1988 (3) Bom.C.R. 410 (S.C.)**, observed that, in **Mukul Dalal's case** (supra), the Hon'ble Supreme Court expected the State to examine the request made by the private parties for appointment of Special Public Prosecutor on the basis of the guidelines prescribed, particularly in view of the fact that the Office of the Public Prosecutor is a public office of the trust and appointment to this Office is required to be made in the public Interest. It was further observed that, Rule 22 of the Conduct Rules governing appointment of Public Prosecutor was found to be bad and the State Government was directed by the Hon'ble Apex Court to modify the same keeping the exposition in the said case in view. Therefore, Rule 22 of the Conduct Rules was amended by the State Government on 4th April 2002 and again on 13th September 2004. Those amended rules have been quoted in this case.

Thereafter, this Court in **Jayesh Pratap Doshi** (supra), after relying upon the decision in **Prakash Pralhad Patil vs. State of Maharashtra, 2008(2) Bom.C.R. (Cri.) 850** and also taking note of the State's appeal challenging the decision in **Prakash Patil** by this Court i.e. in **State of Maharashtra vs. Prakash Pralhad, 2010, Cri. L.J. 466**, was of the opinion that the guidelines issued in **Prakash Pralhad Patil** (supra) still govern and the judicial review of the issue of appointment of Special Public Prosecutor can be gone into by the High Court. Those guidelines were issued in order to offer transparency and accountability of the public. Those guidelines required that Remembrancer of Legal Affairs (for short "RLA") has to get himself satisfied about the necessity of the appointment of Special Public Prosecutor having regard to the nature of the case, gravity of the matter and public interest involved in the case in which a request has been made for such appointment and to ensure that such satisfaction reflects in the order recorded in writing while approving the appointment. This Court **Jayesh Pratap Doshi** (supra) also observed that, "In the first place, each proposal for appointment of Special Public Prosecutor will have to be examined by the Appropriate Authority on its own merits. Further, as observed earlier, what is important is the

decision-making process and not the merit of the decision and, therefore, no parallel can be drawn on the basis of merit between the decisions regarding appointment of Special Public Prosecutors in the said two cases.” Therefore, after considering all the material, this Court had quashed and set aside the appointment of the Special Public Prosecutor made in the case before it.

5. Learned Advocate for the petitioners has then taken us through the decision in ***Prakash Pralhad Patil*** (supra) and the guidelines those have been framed in respect of appointment of the Special Public Prosecutor.

6. Learned Advocate for the petitioners further relied on the decision in ***Umesh Balasaheb Kalabhor vs. State of Maharashtra and others, 2008(3) Mh. L.J. (Cri.) 406***, wherein also the appointment of Special Public Prosecutor in a Sessions Case was challenged and after going through the record when it was found by this Court that the satisfaction of RLA is not seen from the record, it was held that the order is vitiated on the ground of non compliance of all the requirements of Rule 22(1) of the Rules.

7. Learned Advocate for the petitioners further relied on the decision in ***Dr. Tera Chinnappa Reddy vs. Government of Andhra Pradesh and others, 2014, Cri, L.J. 2071*** (Andhra Pradesh High Court), wherein it was held that:-

“ Appointing the complainant’s counsel, as a Special Public Prosecutor, would undoubtedly cause a reasonable apprehension in the mind of the accused that he may prosecute the case, on behalf of the State, in a biased manner. Such an appointment would not be in furtherance of the larger public interest of ensuring a fair and impartial trial. ”

. It was further observed in ***Dr. Tera Chinnappa Reddy*** (supra) that interest of the State and the complainant are not always the same. Though accused in criminal case cannot dictate who should prosecute him on behalf of the State, yet it will have to be seen that it will not be desirable to allow private passions and prejudices to creep into the conduct of a criminal trial when it can be avoided.

8. Learned Advocate for the petitioners has further relied on the decision in ***Rajendra Nigam vs. State of M.P. and others, 1998 Cri. L.J. 998 (Madhya Pradesh High Court)***, wherein it

was observed that, Special Public Prosecutor need not be appointed in ordinary circumstances. Without disclosing special reasons, order appointing a Special Public Prosecutor is illegal. Similar view has been taken by the Kerala High Court in ***P.G. Narayankutty vs. State of Kerala, 1982 Cri. L.J. 2085.*** Learned Advocate further relied on the decision in ***Poonamchand Jain vs. State of M.P., (2001) Cri. L.J. 3113,*** wherein it was observed by the High Court that there was no material showing that public prosecutor who was in-charge of case was incompetent to conduct trial or other aspects disqualified him to fulfill duty cast on him and no special circumstances existing for appointment of Special Public Prosecutor, such order was held to be liable to be quashed. It was also held that opinion of the State Government that crime is a heinous one is not a justifiable and reasonable ground for appointment of special public prosecutor. Further, in ***Devineni Seshagiri Rao vs. The Government of A.P. and others, 2004 Cri. L.J. 52,*** it was held that, appointment of Special Public Prosecutor is prerogative of State and the complainant cannot name any person to be appointed as Special Public Prosecutor. Similar view has also been taken in ***Abdul Khader Musliar vs. Government of Kerala, Laws(Ker)-1992-11-2,***

and ***Madho Singh and another vs. State of Rajasthan and others, 2002, Cri. L.J. 1694.***

9. Learned Advocate appearing for the petitioners, therefore, submitted that the facts of the case are not such that the Public Prosecutor at Newasa is not qualified or sufficient to handle the case. Further, respondent No.2 is ordinarily practicing at Pune. Though it is stated that she served as District Government Pleader at Pune, it cannot be the proper qualification for her to get appointment as Special Public Prosecutor in the Sessions Case in which the petitioners are accused. Respondent No.2 has already appeared for the informant and had taken active part and therefore, there is reasonable apprehension in the mind of the petitioners that there will not be a fair trial. Under such circumstances, appointment of respondent No.2 deserves to be quashed and set aside.

10. Per contra, learned APP representing the State has advocated that all the rules and regulations while appointing respondent No.2 as Special Public Prosecutor have been followed. There was satisfaction of RLA before the approval. The facts in the case in hand would show that how brutally a legal

practitioner was murdered. The First Information Report was lodged by one Ravindra Shankar Gosavi, who was the friend of deceased Sambhaji Rajaram Take. The murder weapon was axe. In the said incident, Santosh Sundar Ghune has also expired and the incident had taken place at 10.00 a.m. In the same incident, informant Ravindra Gosavi also received grievous injuries. One Ashok Vishnu Shinde had also received the injuries in the said incident. He has also pointed out that the injured persons had sustained grievous injuries and were admitted in Intensive Care Unit. Definitely the offence will have to be categorized in heinous and serious offence and the said offence had taken place within the area of Newasa Police Station and therefore, public interest has been generated. The draft charge was given to the trial Court long ago and now the accused persons finding various ways to protract the trial. Application Exhibit-101 was the outcome of the same. It has been rightly rejected by the learned Additional Sessions Judge-2, Newasa. The accused cannot decide who should conduct the prosecution case. The State has authority and power to appoint Special Public Prosecutors. Reliance has been placed by the learned APP on the observations in ***R. Balakrishna Pillai vs. State of***

Kerala, 1999 Cri. L.J. 1286 (Kerala High Court) in Para

Nos.19 and 21, which reads thus:-

“ 19. There cannot be any two opinion that the duty of the prosecution is not to secure, by any unfair means conviction in a case, but to bring out the real untarnished truth. The apprehension of bias, in our opinion, is not only premature but also baseless. The grievance, at this stage, appears to our mind as only imaginary since the trial is yet to commence. We need not say or reiterate that a Public Prosecutor can function or discharge his duties as a Prosecutor only within the framework of Section 24 and other allied provisions of the Code. He cannot misuse or abuse his official position or travel beyond his arena of jurisdiction or power vested in him. Above all, the Presiding Officer is there to protect the interest of both parties. No Presiding Officer will allow any question which is not germane to the question at issue and will not allow any unwanted questions to be put to the witnesses. Therefore, we are of the opinion that the apprehension expressed by the appellant is nothing but imaginary. ”

“ 21. We are of the opinion that the State Government has made the appointment of the third respondent under the statutory powers conferred on it. It is the discretionary power vested in the Government. The Government is the largest litigant in the country. The Government, like any other private party, can choose and appoint authorise any advocate to appear on their behalf in any Court of law. It is not open to an accused in the case to suggest to the

Government that it should not appoint/authorise the third respondent as their counsel since there is enmity between him and the third respondent which has nothing to do with the conduct of the case by the third respondent. It is also not in dispute that in no proceedings in the Idamalayar case the third respondent appeared against the interest of the State/prosecution. There is no basis for the allegation that the third respondent has been appointed to vindicate the grievance of the third party for whom he had been appearing. The said allegation is not only baseless but also unsupported by any materials on record. ”

11. Learned APP further relied on the decision in ***Varada Rama Mohana Rao vs. State of Andhra Pradesh, 2004(4) SCC 427***, wherein it was held that the appellant has failed to show that prejudice would be caused to him by appointment of Special Public Prosecutor. Further, reliance has been placed on the decision in ***Nemi Chand vs. State of Rajasthan and others, 2006 Cri. L.J. 4258*** (Rajasthan High Court), wherein it has been held that the contention of the learned counsel for appellant that appointment of advocate representing complainant as Special Public Prosecutor would affect fair trial was devoid of merit, when Advocate on behalf of the complainant can address the Court along with the Public Prosecutor, he can also be appointed as Special Public

Prosecutor. The only embargo provided by Section 24(8) of the Code of Criminal Procedure is that he should have 10 years standing as an advocate. It is submitted by the learned APP that respondent No.2 is covered under the said parameters. Learned APP also relied on the decision of this Court in ***Omparakash Baheti and others vs. State of Maharashtra and others, 2006 Cri. L.J. 3105***, wherein also mere fact that a particular advocate appeared on behalf of the complainant prior to his appointment to assist the Public Prosecutor was held to be not a bar to the State to appoint him as Special Public Prosecutor.

12. Learned APP has further submitted that in ***State of Maharashtra and others vs. Prakash Pralhad Patil and others, AIR 2010 SC 463*** i.e. the decision challenging ***Prakash Pralhad Patil (supra)***, the Hon'ble Apex Court observed that:-

“ The Courts cannot be called upon to undertake governmental duties and functions. Courts should not ordinarily interfere with a policy decision of the State. While exercising power of judicial review the court is more concerned with the decision making process than the merit of the decision itself. ”

13. Learned APP further pointed out that the decision taken by this Court was quashed and set aside in its entirety when it was found that on the petition filed by the close relative of the victim decisions were taken at various levels of the Government. It was then observed that, in any event, the appointment of a Special Public Prosecutor to conduct a proceeding does not in any way cause prejudice to the accused. According to the learned APP, therefore, the guidelines issued in **Prakash Pralhad Patil** (supra) no longer withstand in view of setting aside the said decision. Learned APP has also relied on the decision in the case of **Azeez vs. the State of Kerala and others, 1984 Cri. L.J. 1059**, and **Annop vs. State of M.P. and others, 2006 Cri. L.J. 2061**, wherein on the facts of the case it was held that there is no prejudice to the accused.

14. It will not be out of place to mention here that separate application i.e. Criminal Application No.1086 of 2022 has been filed by the son of the deceased to intervene. He had filed the said application for appointment of Special Public Prosecutor and accordingly respondent No.2 came to be appointed. Hence the concerned applicant was allowed to intervene and submissions on behalf of his Advocate are also heard. He has also filed the

written notes of arguments. We do not want to reproduce the contents of the written notes of arguments. Suffice it to say that he is advocating that the matter is serious and his father was brutally murdered by the accused. Though respondent No.2 was representing him earlier that does not estop respondent No.1 from appointing respondent No.2 as Special Public Prosecutor. No prejudice would be caused to the accused persons. Respondent No.2 has sufficient qualifications and standing as well as experience. She cannot abuse her official position. He has expressed faith in respondent No.2 and submitted that if the matter is allowed to be conducted by respondent No.2, there would be justice.

15. At the outset, we would like firstly taken note of a fact which is undisputed that application for assist to PP was filed by the original complainant Ravindra Shankar Gosavi under Section 301 of the Code of Criminal Procedure on 23rd July 2021. Prior to that at Exhibit-65 application was also filed seeking permission to assist PP to oppose bail application, on 30th June 2021. The Vakalatnama is at Exhibit-74. By order dated 26th July 2021 the applications filed by original informant, Ravindra Gosavi at Exhibit-65 and 72 came to be allowed. It appears that,

thereafter on 30th September 2021, respondent No.1 appointed respondent No.2 as Special Public Prosecutor in Sessions Case No.12 of 2020 pending before the learned Additional Sessions Judge, Newasa and Notification to that effect was issued by the Section Officer, Law and Judiciary Department. Thereafter application Exhibit-101 was filed on behalf of the accused before the learned Additional Sessions Judge, objecting the said appointment and for issuing directions to reconsider the appointment of respondent No.2 and to restrain respondent No.2 from conducting the matter till reconsideration. Say of the Special Public Prosecutor was taken, which is at Exhibit-102 and by order dated 11th February 2022, the learned Additional Sessions Judge-2, Newasa rejected the said application.

16. On the basis of the decisions relied upon by all the parties, what is emerging, and as per the procedure that has been laid down under the Code of Criminal Procedure is that a case has to be conducted by a Public Prosecutor. There are powers to the State as well as the Central Government under Section 24 of the Code of Criminal Procedure to appoint Special Public Prosecutor. It is then required to be seen as to whether a High Court can interfere or have a judicial review on the issue of appointment of

Special Public Prosecutor. Definitely the observations from **State of Maharashtra vs. Prakash Pralhad Patil** (supra) that this Court cannot be called upon to undertake governmental duties and functions, will have to be borne in mind. But at the same time it has been further observed that while exercising power of judicial review the court is more concerned with the decision making process than the merit of the decision itself. Thus, it can be definitely said that such decisions are liable to be judicially reviewed in a petition when a person is alleging that his constitutional rights are affected by such decision of the State. Every accused and every litigant has constitutional right of fair trial and procedure and therefore, in this case the facts mandate that we should consider and discern those facts which weighed respondent No.1 to appoint respondent No.2.

17. We may not go into the aspect, as to whether in view of decision of setting aside the Judgment and order of this Court in **Prakash Pralhad Patil** (supra) by the Hon'ble Supreme Court, the guidelines those were issued have also been washed away or no longer binding. However, we must take note of the decision in **Mukul Dalal vs. Union of India** (supra) and Rule 22 of the Conduct Rules as amended by the State Government on 4th April

2002 and again on 13th September 2004. Proviso to Rule 22(1) of the Conduct Rules in respect of engagement of Special Public Prosecutor provides that no order under said sub-rule regarding appointment of a Special Public Prosecutor shall be made unless, for the reasons to be recorded in writing, the Remembrancer of Legal Affairs is satisfied, having regard to the nature of the case, gravity of the matter and public interest involved in the matter that such appointment is necessary. We agree to the observations in **Jayesh Doshi vs. State of Maharashtra** (supra) that the decision making process in respect of appointment of Special Public Prosecutor to ensure transparency and accountability towards the public. Here, it will not be out of place to mention that at every District place and Sessions Division where there is establishment of Sessions, Government has appointed Public Prosecutors. Definitely they would be appointed taking into consideration the eligibility, experience and ability to handle all those cases which are triable by the Court of Sessions. When such application for appointment of Special Public Prosecutor is made then apart from other criterias, it will have to be considered by the State Government that such case whether cannot be handled by the Public Prosecutor who is attached to the concerned Court or Division. In other words, the

State Government will have to consider those special reasons about the necessity to appoint a Special Public Prosecutor and such necessity should reflect in the order / note-sheets while making the appointment. The satisfaction of the Member Secretary and RLA on the point of said special reasons carries importance.

18. We have considered those decisions, aforesaid, where it was held that merely because the person now appointed as Special Public Prosecutor had appeared for the complainant earlier, his appointment cannot be quashed only on that count. We agree to those decisions, however, when such appointment is made, whether proper procedure has been followed and satisfaction has been recorded, would definitely be within the judicial review of this Court. We also state that the papers with the Law and Judiciary Department for the appointment of such Special Public Prosecutor may not be accessible to the petitioners and therefore, there may not be such grounds, yet when objection is raised and the matter comes before us to consider, whether there was such necessity or not, then even in absence of those pleadings this Court would be required to consider those papers from Law and Judiciary Department to see

where there was satisfaction and adherence to the procedure. The observations in respect of duties of Public Prosecutor, in the aforesaid decisions, need not be reproduced and it has been reiterated in many cases that the job of the Public Prosecutor so also that of the Special Public Prosecutor while representing a case for the prosecution is not to seek conviction only nor he / she is a mouthpiece of the investigating agency or the informant. The main duty is to present the prosecution case and give a fair trial to the accused.

19. We also make it clear that we are not considering the submissions on behalf of the petitioners that as respondent No.2 was representing the informant, she would proceed with the matter in a biased manner. No material to that effect has been produced and another fact is that the petitioners are from Newasa whereas respondent No.2 is from Pune. The facts of the case definitely disclose that it was a brutal murder and murder is one of the heinous crime. Not only one but two persons are stated to have been killed and as against two others there was an attempt to commit murder. Therefore, there is definitely seriousness / gravity in the matter and the said offence is stated to have been committed in broad daylight. In spite of these

facts, it is now considered, as to whether there was justifiable reason for respondent No.1 to appoint respondent No.2.

20. We had called the original file from Law and Judiciary Department, together with its notings. Perusal of the said file would show that Shrikant Sambhaji Take i.e. applicant in Criminal Application No.1086 of 2022 and son of the deceased, had made application for appointing respondent No.2 as Special Public Prosecutor, on 8th July 2021. The endorsement below said application would show that the original informant – Ravindra Shankar Gosavi has given consent and made application to that effect, which is annexed thereto. Perusal of the application by Ravindra Shankar Gosavi (informant) also bears date as, 8th July 2021. Further there is another annexure which is addressed to the Desk Officer, Law and Judiciary Department, which is in the tabular form. It is signed by the son of the deceased and is dated 8th July 2021. In the said tabular form, in Column No.8, it is mentioned that they are annexing the declaration by respondent No.2 along with affidavit that no offence is pending against her. The important point to be noted is that in the said file, we could find the consent, affidavit and declaration given by respondent No.2 and it is dated 17th June 2021. The question

that comes into mind is, as to how these documents, which are signed by respondent No.2, carry the earlier date than the application by the son of the deceased or informant. We could not find any reason for the same, but it appears that the said tabular form appears to be a standard format though not declared or prescribed by the State and when such documents are required to be submitted, it could have been submitted by the informant and the son of the deceased along with their application itself. When they were having desire to get respondent No.2 appointed, it appears that they have taken those documents from her in advance. In fact the State Government should make rules to that effect also, as to whether such documents should accompany the application or that consent, affidavit and declaration would be sought by the State Government after the receipt of such application by it.

21. The facts further disclose that the application by the son of the deceased was filed, as aforesaid, on 08-07-2021 / 09-07-2021 to the State Government and as aforesaid, the Notification appointing respondent No.2 as Special Public Prosecutor has been issued on 30th September 2021. Exhibit-65 seeking permission for assisting the APP came to be filed on 30th June

2021, that means it was prior to the application to the State Government. But Exhibit-72 seeking permission to assist the prosecution in bail application was filed on 23rd July 2021 i.e. after the application to the State Government dated 8th July 2021. Both these applications i.e. Exhibit-65 and 72 came to be decided by the concerned Judge on 26th July 2021. Under such circumstance, reference of applications Exhibit-65 and 72 appears to be not made in the said application dated 8th July 2021. The appointment of respondent No.2 appears to have taken long time and therefore, till then respondent No.2 has assisted the prosecution. It cannot be in anticipation that application would be allowed she would have kept quiet. As there is constitutional right to the accused to get the Advocate appointed of his choice, definitely there is some right, may be in a restricted way, even to the informant by seeking permission of the State Government to get an Advocate of his choice also. Of course, ultimate decision will have to be taken by the State Government, taking into consideration the rules and the regulations. The informant's / victim's right is not unfettered. So also, in the above said catena of Judgments it has been held that only in deserving cases the State should appoint a Special Public Prosecutor. After the application was received in the present

case, respondent No.1 had called the opinion of the Public Prosecutor of Ahmednagar District.

22. In **Umesh Balasaheb Kalabhor vs. State of Maharashtra and others** (supra), the fact is that the director of the prosecution had called upon the Public Prosecutor and Assistant Director of Prosecution, Pune District to submit his report and in his report to the Director of Prosecution it was opined that appointment of the Special Prosecutor as requested, was not in public interest and therefore, this Court had held that such appointment cannot be allowed to be sustained. Further, in that case the order suffered from reasons to be recorded in writing. Herein this case the file shows that a detailed reasons have been given.

23. In **Jayesh Pratap Doshi vs. State of Maharashtra** (supra) also it was held that the guidelines in **Prakash Pralhad Patil vs. State of Maharashtra** (supra) were not followed. In fact in that case also the Assistant Public Prosecutor, Mazgaon Court had given opinion that the case did not involve public interest. Therefore, when the facts of the case in hand differ, advantage of those decisions cannot be given to the petitioners.

The Hon'ble Apex Court in ***State of Maharashtra vs. Prakash Pralhad*** (supra), found that on a petition filed by close relatives of a victim decision was taken at various levels and it was then observed that the appointment of a Special Public Prosecutor to conduct the proceeding does not in any way cause prejudice to the accused. Those observations are binding on this Court. Even if we consider the learned Single Judge Bench decisions of other High Courts, referred above, on the basis of facts of each case which have been scrutinized by those Benches, they have come to the conclusion differently. No general statement can be made that merely because respondent No.2 had represented the informant at a particular level / stage it will cause prejudice to the accused persons. The informant or the victim could not have waited till the decision by the State Government for the appointment of respondent No.2 as Special Public Prosecutor. In fact it had no guarantee at all and therefore, might be, to protect the interest of the informant and the victim, application Exhibit-72 was filed because Exhibit-65 was still pending for the decision of the Court when the application was made by the informant / victim to the State Government.

24. Under such circumstance, taking into consideration the original file from the Law and Judiciary Department, we not find that the decision by respondent No.1 to appoint respondent No.2 as Special Public Prosecutor suffers from mala fides. The order of appointing respondent No.2 as a Special Public Prosecutor also takes note that the State Government has considered the case of massacre and the offence which raise serious questions, planned murders committed with common intention and it arrived to the conclusion that these points were involved in the facts of the case. The entire charge-sheet was also considered and therefore, the case was held to be of public interest as well as serious in nature.

25. We, therefore, do not find any illegality in the impugned Notification dated 30th September 2021 issued by respondent No.1 appointing respondent No.2 as Special Public Prosecutor. We also do not find any error or illegality in the order passed below Exhibit-101 by the learned Additional Sessions Judge-2, Newasa on 11th February 2022 in Sessions Case No.12 of 2020. There is no merit in the writ petition and it deserves to be rejected.

26. Accordingly, the Writ Petition stands rejected. Rule stands discharged.

27. Criminal Application No.1086 of 2022, for intervention, stands allowed and disposed of.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/JAN23