CHAPTER – III
THE POSITION OF PROSECUTOR UNDER
INDIAN LAW – A HISTORICAL SURVEY

(A) Penal Administration and Prosecution System in Ancient India:

Hindu Period

In olden days the aim and object of the Criminal Justice System was to provide speedy remedy with minimum cost to the aggrieved person. There were very wide definitions of an offence and no particular procedure for investigation and detection of the criminals was provided however, with the help of secret agents, law enforcement agencies use to conduct interrogation and administer torture to seek the truth. King was responsible for any miscarriage of justice. Justice was done in absence of King by his order and under his name. Special Judicial Officers were called as Mahadandadhikari or Nyaymimansak. Appeal in such cases lay with the King.

There is no reference in Smritis about lawyer as representative of a party to the suit or a complaint. However person who is well versed in the law of Smritis and the procedure of the Court were appointed as representatives of the accused. The Security Officer with the help of witnesses who arrested and investigated the accused conducted prosecution’s cases. Therefore, there were no agencies of prosecution or a lawyer in modern sense. Witnesses were tested by various ordeals i.e. by balance, by fire, by water, by poison. A farmer could swear by his cattle.

While delivering justice, King used to take the help of councilors who acted as advisors of the King. These councilors were learned in Vedas and well acquainted with the laws. They were famous for truthfulness and impartiality, even occasionally opposed the view of the King whenever King wanted to proceed illegally.

38 V. D. Kalshreshtha, Landmark in Indian Legal and Constitutional History 7 (Eastern Book Company, Lucknow, 7th Ed., 1997)
The burden of proof was on the person who submitted the case, before the Court or who wants relief generally by the prosecution. Courts were after the search of truth. However, silence was culpable. In such cases, Manu declared that accused or complainant must speak out properly. Accordingly man becomes sinner if he observes silence or speaks falsely. The quantum of punishment to the criminals was as per the gravity of crime 40.

(B) Islamic Period:

The downfall of Hindu Kingdom began to an end in 11th century defeated by Turkish race by Mohamad Gazani and Mohamad Ghori.

The origin and fountainhead of the Mohammedan criminal law was Koran. The King appointed judges after serious deliberations and mature considerations. There was quick and impartial decision. Therefore, Hindu and Muslim laws were largely governed by the rule of law. King could alone set up Courts. This period makes the beginning of new era in legal history of India.

In this period, Kazi used to record the depositions of prosecution witness. Accused were represented before Court through experts, i.e. Vakils and Fatwa-e-firozshahi, Fatwa-e-Alamgiri states the duties of Vakils and Vakil-e-Sarkar. Ibu Bata-ta Judge of that time of Mohamad Taghlaque mentioned in his book about Vakils and legal profession which had specialised knowledge of laws.

From the period of Jahangir (1605 to 1628) a Public Prosecutor was known as mohtasib. He was attached to every Court instituted for prosecution against the accused and represented the State. Accused remained present alongwith his counsel.

Hanafi law in three categories classified evidence.

1) Tawatur (Full corroboration)

40 N. K. Datta, Origin and Development in Criminal Justice System in India pp. 50-51 (Deep and Deep Publication, New Delhi, 1990)
2) Ehad, i.e. testimony of single witness.
3) Iqrar, i.e. admission including confessions

Generally Tawatur was preferred. Those who believed in God were competent witnesses. They could not be rejected unless proved to be otherwise. Oaths were administered to all witnesses. Two women witnesses required to prove the facts and for the same evidence of one man were sufficient. The testimony of one woman was recognized, only where woman alone were expected to have a special knowledge.41

Principles of Estoppels and Double Jeopardy:

The principal of estoppels and double Jeopardy, both the principals were recognized in criminal trial. If the specific findings were recorded earlier before the Court of Competent Jurisdiction, in such event, case could not be tried again on the same facts, time and place. Moreover, it was not permissible to convict a person in respect of which an order of acquittal or conviction already had been recorded. There was no trial by ordeal. However, in non-Muslim States it was continued.42

There were certain categories of persons, which were treated, as incompetent as witnesses. Blind, insane, deaf, dumb, slaves, gamblers, drunkards, liars, idiots, public mourners, criminals and their near relatives were the incompetent witness.

(C) Maratha Period:

There were also the prosecutors in the cases of Sessions triable offences, during the period of Chhatrapati Shivaji (From 1650 to 1708), Shahu Maharaj From 1708 to 1750, Peshwas from 1750 to 1818. The King was the final authority of Law and Justice. Nyayadhish and Panditrao were under the

42 Ibid. 4, P. 25.
King. Justice was based on fair play. Ordeals and oaths were allowed. Separate Ministry of justice was installed.43

(D) English Period:

When the East India Company started its rule in India, it gave rise to preparation of different laws. The Mughal emperor granted the right of Self Government to the Company, by issuing Farmans (order) and this proved a turning point in the legal history of India. Thus, the company became a Juristic person. It was a fundamental breakthrough from our past practices.

For the first time in 1861, a Code of Criminal Procedure was passed with a view to provide a procedure for conducting a criminal case.44 Thereafter, similar provisions have been repeated in the courts when it was revised and updated. According to the provisions of Criminal Procedure Code every criminal trial was to be conducted before the Court of Sessions by Public Prosecutor was a mandatory.45

The absence of Public Prosecutor in the Sessions Trial was a serious defect in the Criminal Procedure Code. The provisions of sections 32 and 39(9) of 1872 and 529 of 1882 and 1898 cured this defect or irregularity. The Charter of 1868 granted legislative power to Company to establish Courts of judicature similar to England, for the administration of Criminal Justice.46

In the initial days of British Rule persons well acquainted with good English were given sanad to practice in Law Courts i.e. Civil, Criminal and Revenue. Law examination was introduced in 1862. The Judicial Commissioner was the examiner.

There was Public Prosecutor to conduct the criminal cases on behalf of the State. There were police sub-inspectors. They conducted criminal cases

43 B. A. Masodkar, National Jurisprudence Pp. 49,50 (Shriram Trust, Amravati Publication, 1974)
44 Section 360 of the Criminal Procedure Code
45 This provision was directory under the Criminal Procedure Code prior to 1882
for the State in the Court of Judicial Magistrate First Class. In complicated cases, his task was assigned to Magistrate and at the same time lawyer of repute was appointed to conduct serious Criminal cases on behalf of the State.

The system of appointment of Public Prosecutor started in 1873 in Sessions Triable cases and in the Court of Judicial Magistrate, the Police sub-inspector used to conduct the prosecution. Government could appoint their counsel in deserving cases else Investigating Officer or a person of the rank of Deputy Superintendent of Police grade conducted it, as there was no definition under any of the Section about Public Prosecutor. Under section 247 at the opening of the Sessions Trial by the prosecutor when jury or judge was ready to hear the case. The prosecutor opened his case and examined his witness. Under section 251 prosecutors had a right to cross-examine the defence witness. Under section 232 Public Prosecutor has a right to reply, if accused had submitted any document before the Court. But under section 296 applications to Session Court or High Court could be preferred by Private Prosecutor and also tried by him. Under sections 57, 58 and 202 the Governor General in Council could appoint Public Prosecutor (afterward in 1937 it was repealed) generally or in any case or for specified class of cases in any local area. The District Magistrate of Sub-Divisional Magistrate could in the absence of Public Prosecutor appoint one not being the officer of Police below the rank of Inspector or as prescribed by Governor General in council in this behalf to be a Public Prosecutor for the purpose of any case. Under section 60, the Public Prosecutor, pleaded in all Courts in cases under his charge and any pleader privately instructed to use to work under his direction. Effect of withdrawal of prosecution under section 61, permission to conduct prosecution (detailed in Act of 1898) only in sections 57, 58, 202, power to appoint Public Prosecutor was mentioned and under section 60 Public Prosecutor, could plead in all Courts in cases under his charge without Vakalatnamas or warrant of attorney under section 59 permission to conduct prosecution and no person other than the Advocate General was standing counsel, Government Solicitor, Public Prosecutor or other Officer, generally or specially empowered by the State Government, in this behalf were entitled to
do so without such permission\(^47\). Prosecuting Jamadars were in the Court of Executive Magistrate. In the Act of 1872, of Criminal Procedure Code under section 235 Session Trial was to be conducted by the Public Prosecutor appointed by the State Government\(^48\). Under section 296 private prosecutor (counsel) could conduct the case only if the Court granted permission. The Governor General in council may appoint (in 1937 it was repealed) generally or in any case or for specified class of cases in any local area one or more officers to be called Public Prosecutor.

In the Act of 1882, Criminal Procedure Code there was a provision of Public Prosecutor and under section 4 (m) definition of the Public Prosecutor was given. However, in the Court of Magistrate, there was no provision to appoint prosecutor. The whole Code of 1882 re-enacted in Act of 1898 which continued upto 23\(^{rd}\) of Jan. 1974. Thus, to handle the State case prosecuting Inspectors or Sub-inspectors were appointed from the police under the provision of Bombay Police manual 1940. However, as they came from Executive Branch of Police, they were not competent to conduct prosecution as per the norms of Indian Evidence Act 1872 in comparison with private counsel. Moreover, the Court’s work and legislation were in English. Therefore, in 1943 as per Bombay Police Manual under rules 60 some practicing lawyer on Civil and Criminal side having 3 years experience were appointed and termed as prosecuting Inspector. In old Madhya Pradesh the Inspector General of Police throughout the State appointed them. Prosecuting Inspectors were under the Control of Superintendent of Police within the district.

In those days, prosecuting Inspectors used to wear Khaki uniform having 3 bronze stars on the shoulder as good as Inspector of Police. This was a position in old Madhya Pradesh up to 1956-1957. Thereafter Vidarbha region was attached to Maharashtra. Therefore, as a Bombay prosecutors used to wear black coat, white Shirt with tie and white Pant i.e. the same as the uniform of lawyer except band of advocate. As there was a control of police, over the prosecutors therefore they were called as Police Prosecutors,

\(^47\) Ibid. 13. P. 5332
\(^48\) Ibid. 13. P. 4912
and had to dance as per the whims of the police. However, in the Code of Criminal Procedure Code 1973 under section 24 for the Public Prosecutor etc. and under section 25 are added as per the recommendation of 41st report of the Law Commission for Assistant Public Prosecutors to conduct the Prosecution in the Courts of Judicial Magistrates. The designation of police prosecutors had been changed, as Assistant Public Prosecutor and they were not to be under the control of Police Authority. The Director of public Prosecution was the head of the Assistant Public Prosecutor branch moreover as per 1978 amendment to the section 24(5) of the Code of Criminal Procedure and Additional Public Prosecutors has to be taken from the Cadre of Assistant Public Prosecutors provided that in the opinion of the State Government if no suitable person was available in such cadre then only from the persons constituting such panel by District Magistrate under clause 4 of the Criminal Procedure Code. The idea was that the duty of the prosecutor is not to earn convictions but to help the Court to come to real justice. So also it was decided that under the provision of section 24(8), the Central or the State Government in their cases may appoint for a case or class of cases Special Public Prosecutor which under section 24 (8) of the Code and it is not violative of article 14 of our constitution. In combined reading of sections 24 and 25 show that for conducting the prosecution in all Courts the State is empowered to appoint Public Prosecutor or Additional Public Prosecutor or Special Public Prosecutors. While for conducting the prosecutions in the Magistrate's Courts, the State Government is empowered to appoint one or more Assistant Public Prosecutor held in Vijay Valia and others V/s State of Maharashtra49 however the Government of Maharashtra did not act accordingly.

Benefits of new provision:

By this provision dual purpose was served. First Assistant Public Prosecutor worked with zeal for further promotions and second, conducts cases in Court of Judicial Magistrate First Class for prosecutions without any

49 1986 Crn. L. J., p. 2093 (Bombay High Court)
pressure of Police so as to earn convictions by hook or crook. The purpose for appointment of prosecutors for common good i.e. salus populi suprema lex will exist in real sense.

Permission to conduct prosecution:

However, under old Act of 1898 it is the discretion of the Magistrate to grant or refuse permission to conduct prosecution by any person other than police Officer (below the rank prescribed by the Governor General in Council). The Act of 1872 was repealed, as there was no uniform law up to 1881. Therefore, Code of 1882, which gave for the first time a uniform law of Criminal Procedure for the whole of India both in presidency towns and in the mofussil, was introduced. The definition of Public Prosecutor was given under section 4 (m) of the Code. In order to remove ambiguity in this regard, this code was supplanted by a new Code on 1st day of July 1898. The prime object of the Code was to ensure that the accused person should get a full and fair trial along with certain well established and well understood lines according to the notions of natural justice. A prosecution conducted by counsel engaged and briefed by complainant and not by Public Prosecutor is in violation of express mandatory provision of section 270 Criminal Procedure Code. As per 1898’s Code of Criminal Procedure under section 270 every trial before the Court of Sessions prosecution was to be conducted by Public Prosecutor. It was highly undesirable for the prosecution in Session Court to be conducted by Officer of the Police. However, under section 286 Public Prosecutor opens the prosecution case before the Jury by giving outline of the evidence and the leading features of the case, he proposes to prove. So that jury may see if there is any discrepancy in support of it and that it is wholly proper for the Public Prosecutor, to open any matter before jury. The prosecutor shall then examine his own witnesses under section 286(2) and under section 290 the Public Prosecutor has to cross-examine the defence

witness so as to test or lower down his credibility. This was substituted by the provincial Government in 1937, which was substituted by A.O. 1950 and thereafter by State Government.

Conclusion :-

In this chapter No.3 light has been thrown how the penal administration and prosecution system was working in our country. On whom burden of proof lied in evidence in ancient time in Hindu period and in Hindu, Muslim, Mughal, Maratha period. How the evidence led by prosecutor side and defence side. Change of Criminal Procedure Code from 1961 to 1973 has also been mentioned. Prosecution can only be conducted by Prosecutor on behalf of the State. Private lawyer not allowed to conduct the Prosecution because State require justice.

After independent as per the 41st report of Law Commission, the designation of Police Prosecutor has changed as Assistance Public Prosecutor in the Code of 1973 and Prosecutors not under the control of Police Department. The State Government can appoint Public or Assistant Public Prosecutor under the control of Director of Prosecution who is responsible to the government directly.