

(2022) 08 CAL CK 0008

In the Calcutta High Court

Case No : W.P.A. No. 6315 Of 2021, CAN 1, 2, 3 Of 2021

Afjal Ali Sha @ Abjal Shoukat Sha

APPELLANT

Vs

State Of West Bengal And Others

RESPONDENT

Date of Decision : 02-08-2022

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Code Of Criminal Procedure, 1973 — Section 321
Indian Penal Code, 1860 — Section 120B, 302
Arms Act, 1959 — Section 25, 27
Code Of Criminal Procedure, 1898 — Section 494

Citation : (2022) 08 CAL CK 0008

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Rajdeep Majumder, Moyukh Mukherjee, Aniruddha Bhattacharyya, Anirban Ray, Raja Saha, Shayak chakraborty, Protik Dhar, Goutam Dey, D. Sarkar, K. Kumar, Ankita Ghosh

Final Decision : Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. The respondent no. 5 Anisur Rahaman and others were undergoing trial, inter alia for the alleged murder of one Kurban Sha. Charges had been framed on March 13, 2020 by the Additional Sessions Judge, Third Court at Tamluk, Purba Medinipur under Sections 302 and 120B of the Indian Penal Code and under Sections 25 and 27 of the Arms Act. The case was registered as Sessions Case No. 33 of 2020. The original writ petitioner, one Jahar Sha, who was the nephew of the deceased and the de facto complainant, had preferred an application under Article 227 of the Constitution of India, giving rise to C.R.R. No. 1395 of 2020, seeking expeditious trial. Vide Order dated October 6, 2020, a co-ordinate Bench of this Court disposed of the same by directing expeditious hearing.

2. Subsequently, vide Memo No. 1188-C/RO/W-14/2021 dated February 26,

2021 the Government of West Bengal, through the Legal Remembrancer and Ex-officio Secretary to the Government of West Bengal, Judicial Department, instructed the concerned Public Prosecutor conducting Sessions Case No. 33 of 2020 to withdraw the same under the provisions of Section 321 of the Code of Criminal Procedure.

3. The de facto complainant Jahar Sha filed the instant writ petition challenging the said memo and asking for consequential reliefs. Vide Order dated March 2, 2021, the writ petition was disposed of by setting aside the impugned memorandum as well as the consequential action taken in the meantime pursuant to such memorandum by the Public Prosecutor and the order passed by the Additional District and Sessions Judge, Third Court at Tamluk, Purba Medinipore.

4. Assailing the said order dated March 2, 2021, an appeal bearing FMA No. 471 of 2021 was preferred by Anisur Rahaman, the present respondent no. 5. The Division Bench taking up the same, vide Judgment and Order dated April 13, 2021, was pleased to dispose of the appeal and all connected applications, inter alia granting leave to Afjal Ali Sha, alias Abjal Shaukat Sha, who had applied for being added as a party to the appeal, to renew his prayer for addition before the learned Single Judge. The matter was, accordingly, remanded to the writ court.

5. On April 19, 2021 one Afjal Ali Sha, alias Abjal Shaukat Sha, the full-blooded brother of the victim, filed an application for being added as a party to the present writ petition, giving rise to CAN 1 of 2021. It was alleged in the said application, inter alia, that the original writ petitioner Jahar Sha had stopped interacting with the family of the deceased and had turned volte-face by filing an affidavit before the Trial Court supporting the bail prayer of Respondent No. 5 Sk. Md. Anisur Rahaman.

6. When the application came up for hearing, the original writ petitioner submitted before the court that he wanted to withdraw the writ petition. Upon hearing parties, vide Order dated April 28, 2021, leave was granted to the writ petitioner to withdraw from the appeal, his name was expunged and the applicant Afjal alias Abjal was added as a party and transposed as the writ petitioner in the present writ petition.

7. The said order was also challenged by Anisur Rahaman (the present respondent no. 5) in MAT 550 of 2021. On July 2, 2021, the said appeal and connected application were dismissed on contest, on the observations as made in the said Judgment and Order.

8. The learned Senior Advocate appearing for the Respondent no. 5/accused Anisur Rahaman submits that the impugned memo culminated in an order of the Additional Sessions Judge dated March 2, 2021. The said order having not been challenged before any competent superior forum, the present challenge to the memo leading thereto has become infructuous.

9. The learned Senior Advocate next places reliance on a five-Judge Bench decision of the Supreme Court rendered in *Sheonandan Paswan v. State of Bihar and Others*, reported at (1987) 1 SCC 288, in support of the proposition that the State is the master of the litigation in criminal cases and that it is the prerogative of the State and the discretion of the Public Prosecutor to seek withdrawal of a criminal proceeding under Section 321 of the Code of Criminal Procedure at any time before the judgment is pronounced.

10. The learned Senior Advocate for the respondent no. 5 cites *Central Board of Dawoodi Bohra Community and Another v. State of Maharashtra and Another* to contend that the law laid down by the Supreme Court in a decision delivered by a Bench of larger strength (in the present case, in *Paswan's Case*) is binding on any subsequent Bench of lesser or coequal strength.

11. It is, thus, argued that in the absence of any material to show that the Public Prosecutor did not act as per his free will and in view of sufficient grounds having been made out in the application and the order of the Additional Sessions Judge under Section 321, Criminal Procedure Code, there is no scope for the writ court to interfere with such exercise of power by the Additional Sessions Judge.

12. Learned counsel for the State, while supporting the impugned memo and consequential order accepting the same, places *State of Orissa v. Chandrika Mohapatra and Other*, reported at (1976) 4 SCC 250, wherein it was observed that the paramount consideration in such cases must be the interest of administration of justice and no hard and fast rule can be laid down nor can any categories of cases be defined in which consent should be granted or refused. By relying on the previous dictum of the Supreme Court in the context of Section 494 of the Criminal Procedure Code, 1898, which was similar in scope to the present Section 321 of the 1973 Code, the Supreme Court held that the initiative is that of the Public Prosecutor and what the court has to do is only to give its consent and not to determine any matter judicially. The judicial function implicit in the exercise of judicial discretion for granting the consent would normally mean that the court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. The magistrate's functions were held to be supplementary, intended to prevent abuse.

13. Learned counsel for the State also places reliance on *Paswan's Case* to reiterate that it would be acting against the mandate of Section 321 to find fault with the Magistrate in such cases, unless the order discloses that the Magistrate has failed to consider whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law.

14. Next citing *Rajinder Kumar Jain v. State through Police Establishment and Others*, reported at (1980) 3 SCC 435, learned counsel contends that the court's jurisdiction under Section 321 is supervisory and it has only to see if the Public

Prosecutor has applied his independent mind in the broader interest of public justice and for that purpose can ascertain the reasons for the withdrawal move but cannot reappreciate the grounds of the same. Such decision was also rendered taking into consideration Section 494 of the 1898 Code. It was further observed that the Public Prosecutor may withdraw from the prosecution of a case not merely on the ground of paucity of evidence but also in order to further the broad ends of public justice and that such broad ends of public justice may well include appropriate social, economic and political purposes.

15. It is next contended by the State that the High Court does not act as a court of appeal against the decision of a court or tribunal to correct errors of fact and does not by assuming jurisdiction under Article 226 of the Constitution trench upon an alternative remedy provided by statute for obtaining relief. The jurisdiction under Article 226 is sparingly exercised, only when a statutory or fundamental right is violated.

16. To stress on the limited scope of interference under Article 226, learned counsel for the State places reliance on Mohan Pandey and Another v. Usha Rani Rajgaria and Others [(1992) 4 SCC 61], Thansingh Nathmal v. Superintendent of Taxes, Dhubri and Others [AIR 1964 SC 1419] and PNB v. Atmanand Singh and Others [(2020) 6 SCC 256].

17. Learned counsel appearing for the petitioner submits that this is a fit case for interference under Article 226 of the Constitution of India. The State Government not only instructed the Public Prosecutor (PP) to withdraw the case against the accused persons, but forwarded a copy of the memo to the trial court as well. Such instruction was given without disclosing any reason whatsoever, totally overlooking the gravity of the offence.

18. One Sk. Imran Ali, the secretary of the victim and a key witness in the trial, and his driver were abducted during pendency of the writ petition, en route to the trial court, and was subsequently recovered by the police, it is submitted. The bail applications of the accused persons, including respondent no. 5, were repeatedly rejected by different Benches of this Court.

19. Learned counsel for the petitioner argues that respondent no. 1, the State, which is having the carriage of prosecution, swiftly investigated the case, filed charge sheet and caused framing of charges in less than six months from the date of murder; however, soon before the West Bengal State Legislative Assembly Elections, which were to be held in the first part of 2021, as the respondent no. 5 suddenly joined back the ruling party of the State, the State suddenly did a volte-face and issued a notification for withdrawal of prosecution under Section 321 of the Code of Criminal Procedure (CrPC), that too, at a stage when trial had commenced and recording of evidence was in progress.

20. The de facto complainant Jahar Sha was actively pursuing the cause of the victim's family by opposing the bail applications of the accused in this court and also challenged the impugned notification under Section 321 dated February 26,

2021 in the present writ petition, which was allowed on March 2, 2021 by this court, inter alia setting aside the notification and any action taken thereon.

21. However, the de facto complainant then turned volte-face and filed an affidavit on March 15, 2021 before the trial Judge indicating his no objection to bail being granted to respondent no. 5.

22. On April 13, 2021 the Division Bench remanded the matter to the Single Judge only on the ground that respondent no. 5 was not heard before setting aside the said notification. However, status quo was granted as on the day when the writ petition was disposed of.

23. Subsequently Jahar Sha sought to withdraw the writ petition under political pressure, it is alleged by the transposed petitioner, thus necessitating the entry of the transposed petitioner to take up the cudgel against the withdrawal of prosecution.

24. Learned counsel for the petitioner stresses the turn of events and submits that the trial Judge-in-charge (as the regular trial Judge was on leave) preponed the trial date and, in breakneck speed, allowed the prayer for withdrawal on March 2, 2021, on the very day when the writ petition had been fixed for hearing by the Single Judge. Although the impugned memo was given on February 26, 2021, the application under Section 321 of the CrPC was moved and allowed during the course of hearing in this Court.

25. That apart, the respondent no. 5 has been kept in luxury in the jail hospital since long. On the other hand, vital witnesses, including the transposed petitioner, are being framed in false criminal cases, it is alleged.

26. A transfer petition bearing Transfer Petition (Criminal) No. 409 of 2021 was preferred by the petitioner before the Supreme Court seeking transfer of the trial to another State.

27. Surprisingly, although the State is contesting the present writ petition in support of the withdrawal of charges against respondent no. 5 and other accused, in the same breath, the prosecution of the trial is being proceeded with at hectic speed. The State prosecution and the accused respondent no. 5 have already cross-examined such witnesses. Most of the prosecution witnesses, it is submitted, have been gained over and have turned hostile. However, the State prosecution has not asked for such witnesses to be declared hostile.

28. Thus, learned counsel for the petitioner alleges, the State is hand-in-gloves with the accused and is attempting to somehow conclude the trial by producing gained-over witnesses in order to arrive at an acquittal of the accused persons, including respondent no. 5, which end could not be achieved by withdrawal of charges. The transfer petition pending in the Supreme Court is thereby sought to be avoided by conclusion of the trial at record speed.

29. Learned counsel for the petitioner places reliance on Abdul Wahab v.State of

Kerala, reported at (2018) 18 SCC 448, where the Supreme Court held that the PP had acted like a post office and the Chief Judicial Magistrate had passed an order not within the parameters of Section 321 CrPC, without applying the real test stipulated under the said section and the decisions of the Supreme Court.

30. The petitioner next relies on *Bairam Muralidhar v. State of A.P.*, reported at (2014) 10 SCC 380, where the Supreme Court observed that the central question is whether the PP has really applied his mind to all the relevant materials on record and satisfied himself that the withdrawal from the prosecution would subserve the cause of public interest or not and that it is the obligation of the PP to state what material he has considered, which has to be set out in brief.

31. Again relying on *Bansi Lal v. Chandan Lal* [(1976) 1 SCC 421], learned counsel for the petitioner reiterates that the essential consideration which is implicit in the grant of the power under Section 321 is that it should be in the interest of administration of justice.

32. Learned counsel for the petitioner also cites *Balwant Singh v. State of Bihar*, reported at (1977) 4 SCC 448 where it was held that the sole consideration for the PP when he decides to withdraw from a prosecution is the larger factor of the administration of justice – not political favours nor party pressures nor like concerns. Public interest is the paramount consideration. If some policy consideration bearing on the administration of justice justifies withdrawal, the Court may accord permission; not if no public policy bearing on the administration of justice is involved. The Court has to be vigilant when a case has been pending before it, it was held, and not succumb to executive suggestion made in the form of application for withdrawal with a bunch of papers tacked on. Moreover, the State should not stultify the Court by first stating that there is a true case to be tried and then making a volte face to the effect that on a second investigation the case has been discovered to be false.

33. *Abdul Karim v. State of Karnataka*, reported at (2000) 8 SCC 710, is then relied on by the petitioner. *Paswan's Case* (supra) was relied on by the Supreme Court and the criteria of withdrawal under Section 321, CrPC were laid down. It was held that the application under Section 321 must aver that the PP is, in good faith, satisfied, on consideration of all relevant material, that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice. The Supreme Court went on to hold that true, the power of the court under Section 321 is supervisory but that does not mean that while exercising that power, the consent has to be granted on mere asking. The court has to examine that all relevant aspects have been taken into consideration by the PP and/or by the Government in exercise of its executive function.

34. Learned counsel appearing for the petitioner then relies on *Rahul Agarwal v. Rakesh Jain* [(2005) 2 SCC 377], where the Supreme Court again reiterated that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the PP to withdraw the prosecution and an application

is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice.

35. Lastly, the petitioner places reliance on *S.K.Shukla v. State of U.P.* reported at (2006) 1 SCC 314, where *Paswan's Case* (supra) was again considered and interpreted. The PP, it was held by the Supreme Court, cannot act like a postbox or act on the dictates of the State Government but has to act objectively as he is also an officer of the court. At the same time, the court is also not bound by that but is free to assess whether a *prima facie* case is made or not. The court, if so satisfied, can also reject the prayer.

36. Upon hearing learned counsel and going through the entire materials on record, I come to the following decision:

37. The law is clear on the subject. *Paswan's case* was undoubtedly a landmark judgment on the scope of Section 321, CrPC and laid down the roadmap for the PP as well as the court. The principles set out in the said judgment have not only been reiterated but explained and elaborated further by the Supreme Court in several subsequent and more contemporary judgments. Judicial opinion has somewhat crystallized to lay down certain cardinal principles governing the withdrawal of prosecution under Section 321 of the CrPC. Those may be summarized as follows:

(i) The withdrawal should be only in the interest of justice and subserve public interest;

(ii) The PP does not act as a mere postbox or act on the dictates of the State Government but has to act objectively as he is also an officer of the court;

(iii) Even if the Government directs the PP to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice.

38. The facts of the present case are to be judged on the aforesaid touchstones to ascertain whether the proper parameters of Section 321, CrPC were adhered to.

39. Certain features of the case catch the eye even at first glance.

40. The State, in spite of pursuing the withdrawal of prosecution before all forums, has been expediting the prosecution at break-neck speed, which is *ex facie* counter-productive in the context of withdrawal. Coupled with such fact, it is noteworthy that a vast majority of the prosecution witnesses back-tracked and became renegades during the course of trial; however, astonishingly, the said witnesses were never declared hostile by the State prosecution, which has the obvious effect of sabotaging the trial which the State itself was prosecuting in hot haste.

41. One cannot lose sight of the fact that it has been alleged on oath by the

petitioner, and not denied in clear terms, that the accused respondent no. 5 is a political turncoat. When the charges were initially levelled, the State itself wished Godspeed to the prosecution, which is reflected from the pace at which investigation was concluded and trial commenced. Yet, when the respondent no. 5 allegedly leaned in favour of the ruling party of the State, the prosecution beat a hasty retreat by seeking to withdraw the prosecution, which would have the effect of the accused being discharged scot-free without trial. Thus, the ground of malicious political vendetta, projected by the State as reason for withdrawal of prosecution is belied, since the ruling party remained the same from the inception of trial till date.

42. If the prayer for non-prosecution was refused by the court, the accused could always be ultimately discharged if the charges were not proved against him. However, if prosecution is withdrawn, even if the charges might have been ultimately proved against the accused, conviction would not stand a remote chance.

43. The attending circumstances of the present case do not inspire much confidence in the bona fides of the State and PP behind the withdrawal. Sk. Imran, a remaining key witness, was apparently abducted and recovered by the police. The de facto complainant, who had pursued the prosecution all along, up to the extent of moving this court in writ jurisdiction and having the withdrawal reversed through court, all on a sudden changed course and did a veritable volte face by giving no objection to the bail petition of the accused.

44. Several Benches of this court, on different occasions, consistently refused the bail petition of the respondent no. 5 and other co-accused persons. Such rejections, even if having no binding value in the present matter, are persuasive enough to be factored in as circumstantial corroboration of the dubious conduct of the prosecution.

45. Mere lip-service to the settled legal criteria in the application under Section 321, CrPC does not, by itself, lend sanctity to the motive behind non-prosecution. Rather, the dubious manner in which the application was shifted back early at the behest of the State and allowed by the trial Court on the very same date when the present writ petition was fixed and was being taken up for hearing by this court in the first round of litigation, even after the trial court being informed and well aware of such fixation in this court, evokes suspicion about the motive rather than confidence in the application being moved by the PP in good faith.

46. Political favours and party pressures or like concerns have been deprecated in no uncertain terms by the Supreme Court in *Balwant Singh* (supra) by none else a luminary than Krishna Iyer, J. In fact, the reliance of respondent no. 5 on the majority view of *Paswan's Case* is rather misplaced, in the light of the parameters of Section 321, CrPC having been elaborately laid down by the Supreme Court itself in umpteen subsequent judgments, some of which are cited by the petitioner and discussed above. Despite less Bench-strength, all the

subsequent judgments have considered, relied on, reiterated, yet elaborated the texture of Paswan's Case. Thus, judicial propriety demands that this court follows the said judgments and not discard the yardsticks set forth therein on the perceived altar of Paswan's Case.

47. The surrounding circumstances and varied developments in the instant case, as discussed above, all cast a shadow of doubt on the motive behind the State's fiat to withdraw prosecution against the respondent no. 5 and the other co-accused persons in the case. No ingredient of public justice and/or interest of administration of justice has been made out at all for withdrawing prosecution against the accused persons, that too at an advanced stage of trial.

48. Just as political vendetta has been belied as a ground for withdrawal in the instant case, the averment in the application under Section 321, CrPC to the effect that the respondent no. 5 has not previously been accused of any serious offence is also fraught with untruth, since the respondent is not only a history-sheeter during the same political regime which now seeks to withdraw prosecution against him, but has been charged with heinous crimes such as murder, rape, etc. Such antecedents, without anything else, do not justify the argument that the withdrawal was for public interest or in the interest of proper administration of justice.

49. The State's argument, that the withdrawal is in public interest, is betrayed by the events as traced out above. Rather, the communication of the State instruction to the trial court simultaneously with the PP and the concurrent haste adopted in the trial, despite witness after witness turning hostile but not being declared so, while in the same breath seeking withdrawal of prosecution, does not augur well in favour of the bona fides of the prosecution.

50. The other argument of the respondent no. 5, that the present writ petition is a non-starter in the absence of challenge to the order under Section 321, CrPC, though specious, is still-born, since the impugned memo logically culminated in the application and the order under the said provision and is a continuum of the same cause of action. In fact, in the first round of litigation before remand, the writ petition had been allowed by setting aside not only the impugned memo but all consequential action.

51. Hence, it would only subserve justice, good conscience and public interest if the trial of the respondent no. 5 and other accused persons is conducted properly and with the same zeal as the withdrawal of prosecution has been pursued, and not vice versa.

52. In the light of the above observations, WPA 6315 of 2021 is allowed, thereby setting aside the impugned Memo No. 1188-C/RO/W-14/2021 dated February 26, 2021 issued by the Government of West Bengal, through the Legal Remembrancer and Ex-officio Secretary to the Government of West Bengal, Judicial Department as well as all action taken in pursuance thereof, including the application and trial Court's order under Section 321 of the Criminal Procedure

Code.

53. There will be no order as to costs.

54. Urgent certified copies, if applied for, be supplied to the parties upon compliance of all requisite formalities.