
(2008) 11 SHI CK 0011
In the High Court Of Himachal Pradesh

Balak Ram, Rajiv Kumar Goel and Others and Bhupinder
Singh Thind

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision : 10-11-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 321

Citation : (2009) CriLJ 2011 : (2009) 1 ShimLC 189

Hon'ble Judges : Dev Darshan Sud, J

Bench : Single Bench

Judgement

Dev Darshan Sud, J.—These four revision petitions are beings disposed of by a common judgment as the same point of law is involved. These petitions challenge the order passed by the learned Special Judge (Forest), Shimla on applications moved u/s 321 of the Code of Criminal Procedure (hereinafter referred to as the "Code") seeking withdrawal from prosecution, which applications were dismissed by the learned Special Judge (Forest) on 27.4.2006.

2. This litigation has a chequered history. It is undisputed before me that prior to the present petitions, the State had preferred Criminal Revision Petition Nos. 46 and 117 of 2006 challenging the same order(s) on a number of grounds. These revisions remained pending on the record of this Court for a long period of time and on 7.1.2008, the petitions were withdrawn. It is also undisputed that these revision petitions were barred by time and delay was condoned. On 30.5.2007 the Hon''ble Chief Justice ordered:

As the arguments were in progress, I realized that in this matter where the petitioner is assailing the impugned order and undoubtedly the respondents would also be assailing the same because in the peculiar facts and circumstances of this case, the respondents would be supporting the petitioner, I thought that this Court must have the assistance of an Amicus Curiae. At my request, Mr. Ajay Mohan Goel, Advocate has very kindly agreed to assist this Court as Amicus Curiae.

The Registry is directed to provide Mr. Goel the complete set of papers of this case.

List on 13th August, 2007.

3. Ultimately, on 7.1.2008, Criminal Revisions No. 46 of 2007 and 117 of 2006 were dismissed as withdrawn. The Court records:

Mr. Negi submits that the Government of Himachal Pradesh has decided to withdraw these petitions. He also submits that a communication was sent to Shri Anoop G. Chaudhary, learned Senior Advocate informing him about the aforesaid and requesting him not to appear in these cases. Intimation to the same effect was sent to Shri Navlesh Verma, Advocate also. In view of this development Shri Navlesh Verma, Advocate, informed me that he has already decided to withdraw from these cases and sought my permission to this effect. Mr. Verma is permitted to withdraw from these cases.

As requested by Mr. Negi, learned Deputy Advocate General the petitions are dismissed as withdrawn.

Learned Counsel for the respondents submit that because of the aforesaid intervening and supervening development the respondents have now decided to file their separate, independent Revision Petitions assailing the order passed by the learned Court below impugned in these petitions. They also submit that alongwith the proposed Revision Petitions the respondents would also be filing applications for condonation of delay it is entirely up to the respondents to adopt any course of action available to them under law, if so advised. As far as this Court is concerned, it has no comments to offer qua the aforesaid submissions.

The petitions are dismissed as withdrawn. The record be sent back to the learned Court below where the parties through their learned Counsel are directed to appear on 5th March, 2008.

In view of the dismissal of both the petitions all pending applications are also dismissed.

4. All the accused have now preferred separate petitions in this Court, challenging the legality of the same orders passed by learned Special Judge (Forest) on a number of grounds as pleaded. These petitions were barred by time and on the averments made in the applications for condonation of delay inter alia that, the State was pursuing the cases in which event no individual petitions were filed and the withdrawal/abandonment of the petitions has adversely affected their rights, delay deserves to be condoned, the applications were allowed. The State opposed these revisions on the question of maintainability urging that second revision against the same order is not maintainable. This submission deserves to be rejected out right as a petition which has been withdrawn without being disposed of on merits cannot be treated as a bar u/s 397 (3) of the Code.

5. I have heard learned Counsel appearing for the parties.

The question for determination is whether the orders passed by the learned Special Judge (Forest) satisfy the adjudication of the mandatory requirements of Section 321 of the Code or not. The facts are not being discussed as the orders show that the learned Judge has only touched some of the allegations made against each of the accused and then concludes that the discussion of the evidence suggests that the accused is prima facie involved in the offences as alleged. The learned Court also purportedly considers, though cursorily, the decisions of the Supreme Court in Balwant Singh and Others Vs. State of Bihar, , Rahul Agarwal Vs. Rakesh Jain and Another, , Abdul Karim Vs. State of Karnataka and Others Etc. Etc., , and holds that the Court has to examine that all the relevant aspects have been taken into consideration before granting permission to the Public Prosecutor to withdraw. The Court then observes in Case No. 1-S/7 of 2003 that:

15.... that learned Public Prosecutor was more convinced by extraneous considerations than the facts of the case....

6. To say the least, the learned Court has not at all confined its judgment within the parameters of the law as settled by a series of decisions of the Supreme Court clearly defining the ambit and scope of the powers and jurisdiction of the Court u/s of the Code or consideration of relevant factors as settled by a Constitutional Bench of the Court in Sheonandan Paswan Vs. State of Bihar and Others, . None of the mandatory conditions imposed by law have been considered. It is also not clear or manifest as to whether the public prosecutor has discharged the statutory duty imposed on him by law.

7. The judgment shows that both the Court and the Public Prosecutor have acted outside the ambit of law. Each one has been eager to outdo the other to assert his primacy of statutory authority to guide the course of the prosecution without in any manner looking to the precedents which impose a solemn duty both on the Court and the Public Prosecutor to act primarily in the public interest. The application, which has been filed on record, is a detailed compendium on the purported grounds on which the Public Prosecutor seeks withdrawal. Whether these grounds exist and satisfy the test laid down by the Supreme Court in its various decision, is a question which remains unanswered.

8. Adverting to the law, in The State of Bihar Vs. Ram Naresh Pandey, , considering the powers for withdrawal from prosecution as embodied in Section 494 of the Code of Criminal Procedure, 1898 (in pari materia to Section 321 of the Code of 1974). The Court held:

2.... The legal question that arises from the above is whether where an application for withdrawal u/s 494, Code of Criminal Procedure is made on the ground of insufficiency or meagreness of reliable evidence that is available, it is an improper exercise of discretion for the Court to grant consent before evidence is taken, if it was reasonably satisfied, otherwise that the evidence, if actually

taken, is not likely to result in conviction.

3. Section 494, Criminal Procedure Code runs as follows:

any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution any person either generally or in respect of any one or more of the offences for which he is tried: and upon such withdrawal,-

(a) If it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences.

The Section is an enabling one and vests in the Public Prosecutor the discretion to apply to the Court for its consent withdraw from the prosecution of any person. The consent, if granted, has to be followed up by his discharge or acquittal as the case may be. The Section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations on which the Court is to grant its consent. There can be no doubt, however, that the resultant order on the granting of the consent, being an order of "discharge" or "acquittal" would attract the applicability of correction by the High Court under Sections 435, 436 and 439 or 417, Criminal Procedure Code. The function of the Court, therefore, in granting its consent, may well be taken to be a judicial function. It follows that in granting the consent the Court must exercise a judicial discretion. But it does not follow that the discretion is to be exercised only with reference to material gathered by the judicial method. Otherwise the apparently wide language of Section 494, Criminal Procedure Code would become considerably narrowed down in its application. In understanding and applying the Section, two main features thereof have to be kept in mind. 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. As the Privy Council has pointed out in *Faqir Singh v. Emperor* AIR 1933 P 226 at p. 269 (A).

It (Section 494, Criminal Procedure Code) gives general executive discretion (to the public prosecutor) to withdraw from the prosecution subject to the consent of the Court, which may be determined on many possible grounds.

The judicial function, therefore, implicit in the exercise of the 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. In this context it is right to remember that the Public Prosecutor though an executive officer as stated by the Privy Council in AIR 1938 266 (Privy Council) is, in a larger sense, also an officer of the Court and that he is bound to assist the Court with his fairly considered

view and the Court is entitled to have the benefit of the fair exercise of his function. It has also to be appreciated that in this country the scheme of the administration of criminal justice is that the primary responsibility of prosecuting serious offences (which are classified as cognizable offences) is on the executive authorities. Once information of the commission of any such offence reaches the constituted authorities the investigation including collection of the requisite evidence and the prosecution for the offence with reference to such evidence, are the functions of the executive. But the Magistrate also has his allotted functions in the course of these stages. For instance, in the course of investigation a person arrested must be brought before him within 24 hours (Section 61, Criminal P.C.). Continuance of the arrested person in detention for purposes of investigation from time to time has to be authorised by him (Section 167, Criminal P.C.). A search can be conducted on the issue of warrant by him (Section 94, Criminal P.C.). Statements of witnesses and confessions may be recorded by him (Section 164, Criminal P.C.) In an appropriate case he can order investigation or further investigation (Sections 155(2) and 202, Criminal P.C.). In all these matters he exercises discretionary functions in respect of which the initiative is that of the executive but the responsibility is his. His discretion in such matter has necessarily to be exercised with reference to such material, as is by then available and is not a prima facie judicial determination of any specific issue. The Magistrate's functions in these matters are not only supplementary, at a higher level to those of the executive but are intended to prevent abuse. Section 494, Criminal Procedure Code, acquiring the consent of the Court for withdrawal by the Public Prosecutor is more in line with this scheme, than with the provision of the Code relating to inquiries and trials by Court. It cannot be taken to place on the Court the responsibility for do prima facie do termination of a triable issue. For instance the discharge that results therefrom need not always conform to the standard of "no prima facie case" under Sections 209(1) and 253(1), Criminal P.C. or of "groundlessness" under Sections 209(2) and 253(2), Criminal P.C. This is not to say that a consent is to be lightly given on the application of the Public Prosecutor, without a careful and proper scrutiny of the grounds on which the application for consent is made."

This proposition was reaffirmed by the Court in Balwant Singh's case *supra*, holding:

2. ...The statutory responsibility for deciding upon withdrawal squarely vests on the public prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side. The Criminal Procedure Code is the only master of the public prosecutor and he has to guide himself with reference to Criminal Procedure Code only. So guided, the consideration which must weigh with him is, whether the broader cause of public justice will be advanced or regarded by the withdrawal or continuance of the prosecution. As we have already explained, public justice may be a much wider conception than the justice in a particular case. Here, the public prosecutor is ordered to move for withdrawal. This is not proper for a District Magistrate to do.

Indeed, it is not proper to have the public prosecutor ordered about. It is entirely within the discretion of the public prosecutor. It may be open to the District Magistrate to bring to the notice of the public prosecutor materials and suggest to him to consider whether the prosecution should be withdrawn or not. He cannot command where he can only commend.... We think that surrender of discretion by the public prosecutor and the Magistrate are unfortunate. The Court has to be vigilant when a case 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 make a volte-face to the effect that on a second investigation the case has been discovered to be false. In these circumstances, we refuse leave.

9. In *Rajender Kumar Jain and Others Vs. State Through Special Police Establishment and Others*, , the Court followed the decision in *Naresh Panday's* case, reaffirming the decision in *M.N. Sankaranarayanan Nair v. P.V. Balakrishnan* AIR 1972 SC 476 , *State of Orissa Vs. Chandrika Mohapatra and Others*, and *Balwant Singh and Others Vs. State of Bihar*, , and laid down the principles of law to be complied with before permission to withdraw the prosecution is granted. The Court held:

13. Thus, from the precedents of this Court; we gather:

1. Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.
2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.
3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.
4. The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.
5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes sans Tammany Hall enterprises.
6. The Public Prosecutor is an officer of the Court and responsible to the Court.
7. The Court performs a supervisory function in granting its consent to the withdrawal.
8. The Court's duty is not to re-appreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor, applied his mind as a free agent, uninfluenced by irrelevant

and extraneous consideration. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

13 (A) We may add, it shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The Court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its "Minister of Justice". Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of Section 321, Criminal Procedure Code. The independence of the judiciary requires that once the case has traveled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case.

10. A Constitutional Bench in *Sheonandan Paswan Vs. State of Bihar and Others*, has laid down the parameters within which the powers u/s 321 can be invoked. This Constitutional Bench, decision was followed in *Abdul Karim v. State of Karnataka*, (2000) 8 SCC 710 holding:

18. The law as it stands today in relation to applications u/s 321 is laid down by the majority judgment delivered by Khalid, J. in the Constitution Bench decision of this Court in *Sheonandan Paswan Vs. State of Bihar and Others*, . It is held therein that when an application u/s 321 is made, it is not necessary for the Court to assess the evidence to discover whether the case would end in conviction or acquittal. What the Court has to see is 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. The Court, after considering the facts of the case, has to see whether the application suffers from such improprieties or illegalities as would cause manifest injustice if consent was given. When the Public Prosecutor makes an application for withdrawal after taking into consideration the material before him, the Court must exercise its judicial discretion by considering such material and, on such consideration, must either give consent or decline consent. The Section should not be construed to mean that the Court has to give a detailed reasoned order when it gives consent. If, on a reading of the order giving consent, a higher Court is satisfied that such consent was given on an overall consideration of the material available, the order giving consent has necessarily to be upheld. Section 321 contemplates consent by the Court in a supervisory and not an adjudicatory manner. What the Court must ensure is that the application for withdrawal has been properly made, after independent consideration by the Public Prosecutor and in furtherance of public interest. Section 321 enables the Public Prosecutor to withdraw from the prosecution of any accused. The discretion exercisable u/s 321 is fettered only by a consent from the Court on a consideration of the material before it. What is necessary to satisfy the Section is to see that the Public Prosecutor has acted in good faith and the exercise of discretion by him is proper.

19. The law, therefore, is that though the Government may have ordered, directed or asked a Public Prosecutor withdraw from a Prosecution to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that the public interest will be served by his withdrawal from the prosecution. In turn, the Court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently thereto, that the Public Prosecutor, acting in good faith, is of the opinion that his withdrawal from the prosecution is in the public interest, and that such withdrawal will not stifle or thwart the process of law or cause manifest injustice.

20. It must follow that the application u/s 321 must aver that the Public Prosecutor 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 material that the Public Prosecutor has considered must be set out, briefly but concisely, in the application or in an affidavit annexed to the application or, in a given case, placed before the Court, with its permission, in a sealed envelope. The Court has to give an informed consent. It must be satisfied that this material can reasonably lead to the conclusion that the withdrawal of the Public Prosecutor from the prosecution will serve the public interest; but it is not for the Court to weigh the material. The Court must be satisfied that the Public Prosecutor has considered the material and, in good faith, reached the conclusion that his withdrawal from the prosecution will serve the public interest. The Court must also consider whether the grant of consent may thwart or stifle the course of law or result in manifest injustice. If, upon such consideration, the Court accords consent, it must make such order on the application as will indicate to a higher Court that it has done all that the law requires it to do before granting consent.

11. Ghanshyam Vs. State of M.P. and Others, reaffirms these principles holding:

14. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else> and so, he cannot surrender that discretion to anyone. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant factors as well in order to further the broad ends of justice, public order, peace and tranquility....

12. Precedent, need not, be multiplied any further as the law on this point is well settled. This Court, in State of H.P. v. Tara Singh and Ors. 1994 (Suppl.) S.L.C. 144, after a detailed discussion of the case law, held:

13. The majority view clearly brings out that what is envisaged by Section 321, Cr.P.C. as far as it relates to the Public Prosecutor, is that on being instructed by the State to withdraw from a prosecution he has a discretion in the matter and cannot surrender it to someone else and that he may withdraw from prosecution not only on the ground of paucity of evidence but also on other relevant grounds in order to further the broad ends of public justice, public order of peace. The

Public Prosecutor should not feel compelled to withdraw from the prosecution merely because the Government has asked him to do so.

14. This would presuppose that apart from the instructions received from the Government the Public Prosecutor should be in possession of some material on the basis whereof he may apply his mind as a free agent, uninfluenced by irrelevant and extraneous considerations, to the question whether withdrawal would further the ends of public justice, order and peace or not. The material taken into consideration by him should be such which can be placed by the Public Prosecutor before Court, while seeking its consent, for its perusal. Such material cannot be one which is only within the personal knowledge of the Public Prosecutor for such material cannot be placed for objective consideration before the Court.

15. The Court is not to re-appreciate the grounds which led the Public Prosecutor to request withdrawal from prosecution, yet, it should be in a position to consider whether there was application of mind by the Public Prosecutor to relevant material as a free agent or not. The Court is to exercise its judicial discretion by considering the material which was taken into consideration by the Public Prosecutor and then gave its consent or decline to do so. The Court is not to give its consent as a matter of course. This would imply existence of material de hors the personal knowledge of the Public Prosecutor which can be looked into by the Court before exercising its discretion either way.

13. The judgments clearly impose a statutory and solemn duty both on the Public Prosecutor and the Court to follow the mandatory requirements as laid down. I do not find from the judgments as to what prompted the Public Prosecutor to move for withdrawal, what were the submissions made by him except the fact that he claimed total independence from the executive, what, was the public interest involved, whether the applications were a mere ruse to stifle prosecution, whether discretion was exercised by the public prosecutor independently etc. are all facts which have been left in the realm of obscurity. Which of the grounds as specified in the application constituted sufficient grounds in law for withdrawal from prosecution is not clear. The learned Court on the other hand, reproduces some allegations and holds sufficiency of evidence as a mere ground for rejection permission and further condemns the Public Prosecutor as being influenced by extraneous considerations. What, those considerations are, what was the material before the learned Court to have come parameters of law.

14. I have not touched upon the relevant merits of the submissions on merits made by the petitioners the respondent-State of their rival contentions as that was the statutory duty of the Sessions Judge to determine. When a statute imposes a duly mandated to be performed in a particular manner, the Court or any other person on whom such duty is imposed, must exercise that in conformity with the statutory provisions as interpreted by the Courts. It is not merely sufficient to invoke the words of the statute and then say that the

mandatory conditions have been complied with. Such compliance must manifest itself either from a discussion of the facts or law and it is not merely sufficient to reproduce some head notes of a judgment without in any manner co-relating them with the arguments advanced or the facts of the record. Any other course would be an abdication of the statutory mandate. In this view of the matter, it was the primary duty of the learned Sessions Judge to have undertaken this exercise and a solemn and statutory duty of Public Prosecutor to have acted within the ambit of law. These revisions are accepted to the extent that order passed by the learned Special Judge (Forest) is quashed and set aside. A direction issued that he shall hear the parties in accordance with law on the question as to whether permission is to be granted to the Public Prosecutor to withdraw from the case or not. While doing so, the Court will keep in mind the principles of law as detailed in the judgments considered and followed by this Court. The prosecutor shall also act in consonance with the principles of law as settled by the Supreme Court.

15. Parties to appear before the learned Special Judge (Forest) on 28.11.2008.