
(1988) 11 KL CK 0033
In the High Court Of Kerala
Case No : Criminal R.P. No. 636 of 1988

Madan Gopal

APPELLANT

Vs

State and two others

RESPONDENT

Date of Decision : 17-11-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 203, 227, 24, 245, 257
Penal Code, 1860 (IPC) — Section 304(A)

Citation : (1988) 2 KLJ 821

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : V. Bhaskara Menon Public Prosecutor, C.K. Shevasankara Panicker, P.G. Parameswara Panicker, M.N. Sukumaran Nair, B. Raman Pillai and G. Rajagopalo Rao, for the Appellant;

Final Decision : Dismissed

Judgement

S. Padmanabhan, J.—Second respondent is a Doctor employed in Government Service and third respondent is a private medical practitioner running a hospital. They were, charge-sheeted and tried in C.C. No. 203 of 1987 before the Judicial First Class Magistrate, Cochin for an offence punishable u/s 304(A) of the Indian Penal Code. Revision is against the order allowing the application filed by the Assistant Public Prosecutor in charge of the case u/s 321 of the Code of Criminal Procedure to withdraw the prosecution. Petitioner is the defacto complainant and husband of the deceased. The circumstances under which respondents 2 and 3 happened to be prosecuted are these. Mala, wife of the petitioner, became pregnant and she was taken to the second respondent on 24-2-1983 for consultation and prenatal treatment. That was during the second month of her pregnancy. On examination, second respondent diagnosed that Mala had Ventricular Septal defect. But petitioner or Mala were not informed of it or directed to take her for examination by a Cardiologist. Treatment by second respondent continued till 21-9-1983, on which day she gave birth to a cyanosed baby and she also died. Delivery was in the private hospital run by the third

respondent, where she was admitted as directed by the second; respondent. Respondents 2 and 3 purposely suppressed facts even at the time of admission for confinement and said that the case of Mala is a normal delivery case. Due to the culpable suppression, she could not get expert medical attention. She was not given proper medical attention also. That is the cause of death. It amounts to culpable negligence.

2. Petitioner claims to have filed a complaint to the City Commissioner of Police, Cochin on 14-10-1984. Since there was no action, he again filed another petition on 30-10-1984. There is nothing in the case diary to show that there was a complaint filed on 14-10-1983. When called upon by the second respondent, the police reported that such a petition is not traceable. Action was taken only on the petition filed on 30-10-1984, which was claimed by the petitioner himself only to be a reproduction of an earlier petition filed on 14-10-1983, which is also not traced. On the petition filed on 30-10-1984 itself action was taken only very late. Case was registered and investigation started only late in 1985.

3. Against the third respondent, practically there is not even a serious allegation involving an offence u/s 304(A). Against the second respondent, the main allegation is that she deliberately suppressed information regarding the defective heart diagnosed by her by examination on 24-2-1983. But the petitioner admits that defective heart was noted by the second respondent in the prescription given by her that day. Only allegation seems to be that it was not personally explained and a direction was not given to consult a Cardiologist. It is true that there is the opinion by CW 4, a Cardiologist, that expert treatment, if available, could have sometimes saved her. But the statement given by CW 20, Dr. Santha, during investigation shows that she examined Mala on 10-6-1983 and she informed Mala and the petitioner that she had a damaged heart. Deliberate suppression, which is the foundation of death by rash and negligent act, is therefore of doubtful sustenance. Except the statements of CWS 4 to 7 that if a Cardiologist and Paediatrician attended this calamity would not have happened and the statement of CW 8, the Cardiologist in the "Lakshmi Nursing Home" run by the third respondent, that he was not consulted, there is nothing serious collected by investigation to connect the accused to establish an offence u/s 304(A). The only other allegation is a statement by respondents 2 and 3 that Mala's is a normal case of delivery. On that statement by itself, even if correct, a charge u/s 304(A) may not stand.

4. It was in these circumstances that the Government informed the Assistant Public Prosecutor about its no objection in withdrawing from the prosecution and the Assistant Public Prosecutor filed the application. In his application he said that he went through the records and applied his mind to the facts and came to the conclusion that there is no scope to proceed with the case. In arriving at that conclusion, he expressed his impression that most of the witnesses may not support the prosecution case and even otherwise much scope for conviction is not there. He opined that proceeding with the case will only be waste of time and

money for the State. These grounds were accepted by Court and withdrawal allowed. The question is whether interference is justified.

5. No unfettered or unrestricted power is conferred on the Public Prosecutor (which includes Assistant Public Prosecutor also) to apply for withdrawal from the prosecution. The power can be exercised only with the consent of the Court so that the Court can ensure that the power is not abused or misused or exercised in an arbitrary or fanciful manner. Once the charge sheet is filed and the prosecution is initiated, it is not left to the sweet will of the State or the Public Prosecutor to withdraw from the prosecution. The Court is entrusted with the control over the prosecution when an accused is placed for trial. The even course of criminal justice cannot be thwarted by the executive. Once prosecution is launched, its relentless course cannot be halted except on sound considerations germane to public justice. *Subhash Chander Vs. State (Chandigarh Administration) and Others*, -and *Sheonandan Paswan Vs. State of Bihar and Others*, Public Prosecutor can apply for withdrawal only on the basis of certain legitimate grounds. The power to apply for withdrawal from prosecution can be exercised only in furtherance of justice. It should be in the interest of administration of justice.

6. The degree of autonomy conferred on the Public Prosecutor vis-a-vis the Government while filing an application for withdrawal can be operationalised into three questions, (i) Does Section 321 permit a Public Prosecutor to withdraw from a case without seeking the opinion of the Government, (ii) Whether Section 321 empowers the Public Prosecutor to refuse to withdraw from prosecution despite the advise of the Government; and (iii). When the Public Prosecutor withdraws from the prosecution on the advise and direction of the Government does he act contrary to the requirement of Section 321? The decisions of the Supreme Court were not uniform or consistent in the respect. *The State of Bihar Vs. Ram Naresh Pandey*, quoted with approval in *Sheonandan Paswan Vs. State of Bihar and Others*, followed AIR 1938 266 (Privy Council) and seems to suggest that the prosecution for an offence is the function of the executive and the Public Prosecutor is really an executive officer who is conducting the prosecution on behalf of the M.N. *Sankarayarayanan Nair Vs. P.V. Balakrishnan and Others*, impliedly accepted Governmental directive in the matter of withdrawal from prosecution by the Public Prosecutor as legitimate. *State of Orissa Vs. Chandrika Mohapatra and Others*, also accepted that the policy decision for withdrawal from the prosecution can be made by the State though the application for withdrawal has to be made by the Public Prosecutor. The reason is that every offence has social or economic cause behind it and if the State feels that elimination or eradication of the social or economic cause behind it would be better served by not proceeding with the prosecution, the State should be at liberty to withdraw.

7. But this view underwent a change for sometime *Balwant Singh and Others Vs. State of Bihar*, took the view that the Public Prosecutor is the primary authority

to decide and his statutory responsibility of withdrawal is not negotiable and cannot be bartered away in favour of those who are above him on the administrative side and it is not proper that he is ordered about. This decision for the first time made the Public Prosecutor autonomous of the executive in the matter of withdrawal. The same view was followed in Subhash Chanter's case (A.I.R 1980 S.C. 423) holding that the Public Prosecutor is not the executive and his discretion to withdraw or not to withdraw must be independent and in doing so, he acts as a limb of the judicative process not as an extension of the execution. Direction for withdrawal to the Public Prosecutor from any source was deprecated.

8. But the view again changed in *Rajender Kumar Jain and Others Vs. State Through Special Police Establishment and Others*, . The Governmental rule in the administration of criminal justice was recognised and it was observed that an elected Government, sensitive and responsive to the feelings and emotions of the people will be amply justified if for the purpose of creating an atmosphere of goodwill or for the purpose of not disturbing the calm which has descended it decides not to prosecute the offenders or not to proceed with the prosecution already launched, The decision even said that nobody other than the Government can and should decide in the first instance whether it should be baneful or beneficial to launch or continue prosecution and on that advice the Public prosecutor may act where large and sensitive issues of public policy are involved. Advice of the Government can be had in two ways. It can be on the Public Prosecutor seeking the same or the advice coming from the Government at its own initiative Public Prosecutor is not an absolutely independent officer. He is the appointee of Government u/s 24 of the Code of Criminal Procedure for conduction in Court any prosecution or other proceedings on behalf of the Government concerned. There is the relationship of counsel and client. The Public Prosecutor cannot act without instructions.

9. The object of Section 321 is to reserve power to the executive Government to withdraw any criminal case on larger grounds of public policy such as inexpediency of the prosecution for reasons of State broader public interests like maintenance of public peace and harmony, social, economic and political; changed political and social situation; avoidance of destabilization-of stable Government and the like. Even in case of availability of clinching evidence and sure chances of conviction, withdrawal on these grounds is possible. Paucity of evidence, possibility of the witnesses not supporting the prosecution, chances of prosecution failing and turning out to be a waste of time and energy all come within the justifiable arena on which an exhaustive list cannot be given.

10. There is nothing wrong if the Government takes a decision to withdraw and communicates the direction to the Public Prosecutor. But the Public Prosecutor must consider the grounds independently and take the decision to withdraw" only if he is independently satisfied that these grounds are legitimate. If he is not satisfied of the grounds, he can inform the Government so and refuse to move

the Court. Sometimes in that process he may have to incur the displeasure of the executive Government and he may have to forfeit his job by removal or resignation. But that contingency cannot operate as a justification for a move for withdrawal in a case where on his application of mind the Public Prosecutor feels that withdrawal is not justified in public interest. But the mere fact that withdrawal was on the advise or direction of the Government will not vitiate the move provided there is the independent application of mind and satisfaction of the Public Prosecutor. That will be the position even in cases where the Public Prosecutor moves the Government and obtain permission or direction and then moves the Court. But the application must be on grounds which advance public justice and there can be no withdrawal without consent of the Court. The real question is whether the considerations are germane and the actual decision came from the Public Prosecutor or he was only obeying orders dictated to him and acting on improper grounds.

11. Section 321 does not give any indication as to the grounds on which the Public Prosecutor may apply, or the considerations on which the Court is to grant its consent. The initiation is that of the Public Prosecutor. What the Court has to do is only to give its consent and not determine any matter judicially. The judicial function 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 is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. It is not necessary for the court to assess the evidence to discover whether the case would and in conviction or acquittal, The function of Court is to give consent. Court is not obliged to assign reasons before giving consent. That does not mean that consent is a matter of course When the Public Prosecutor makes the application for withdrawal after taking into consideration all the materials before him, the Court exercises its judicial discretion by considering such materials for giving or declining consent. Court need not give a detailed order. All that the Court has to see, is whether the Public Prosecutor acted in good faith and the exercise of his discretion was proper. This will be clear from a comparison of the wordings of Sections 320 and 321 with those in Sections 203, 227, 245, 257, and 258 Cr.P.C. which relate to the manner in which Courts have to exercise their discretion. In the former two sections the words used are "permission of Court" or "consent of Court". Section 320 is one which is kindred to Section 321. But in the latter sections, the words used are "is of opinion that there is no ground for proceeding", "considers that there is no sufficient ground for proceeding" "no case made out", "Satisfies that there are sufficient grounds" and "for reasons to be recorded." All these sections require a reasoned judicial order whereas Sections 320 and 321 contemplates only consent or permission in a supervisory manner as distinguished from an adjudicatory manner (Sheonandan Paswan Vs. State of Bihar and Others, The safeguard in Section 320 confers that power to see that the accused do not by unfair or deceitful means, secure a composition of the offence.

12. The State is the master of the litigation in criminal cases. By the exercise of the functions u/s 321 the accountability of the concerned persons does not disappear. The magisterial functions in these matters are not only supplementary, at a higher level, to those of the executive but are intended to prevent abuse. When the State on proper grounds wants to back out from proceeding with the prosecution and the Public Prosecutor after due application of mind moves for withdrawal and the Court gives consent on consideration of the relevant factor the defacto complainant cannot successfully oppose that move. He can only bring to the notice of this Court that the considerations which weighed with the Government, the Public, Prosecutor and the Court are not germane and consent was not properly given. He can still file a private complaint, as held in *Sheonandan Paswan Vs. State of Bihar and Others*, with the possible risk of a suit for malicious prosecution if his complaint is bereft of any basis. The *State of Bihar Vs. Ram Naresh Pandey*, may even indicate that a private complainant may not have a locus standi. When the executive authorities invested with the primary responsibility of prosecuting serious offences which are classified as cognizable offences, decide to withdraw on grounds which the court feels germane, a private individual who claims to be aggrieved by the offence cannot successfully persuade the Court for a direction to compel the State to proceed with the case against its wishes. I can understand the feelings of the petitioner on account of the death of his wife, which he believes to be on account of the culpable negligence of the doctors. He feels that the withdrawal is motivated and influenced and actuated by reasons not germane. But there is no material to justify his apprehensions. He has filed many original petitions and even suits unsuccessfully. I have already discussed the legitimacy of the request of the Assistant Public Prosecutor and found it to be genuine. The trial court has exercised its judicial discretion properly. No interference is called for.

The criminal revision petition is dismissed.