

(1995) 11 BOM CK 0061

In the Bombay High Court

Case No : Criminal Revision Application No. 8 of 1995

Narayan Naguash Porob

APPELLANT

Vs

State and others etc.

RESPONDENT

Date of Decision : 16-11-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 321
Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 323

Citation : (1997) BomCR(Cri) 859 : (1996) CriLJ 1376

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Advocate : S.D. Lotlikar, for the Appellant; G.U. Bhobe, Public Prosecutor and L.V. Talaulikar, for the Respondent

Judgement

1. This Petition is filed by a de facto complainant against the Order of the learned Judicial Magistrate, First Class, Bicholim in Criminal Case No. 2/S/1993 dated 31-10-1994 whereby the prosecution against the respondents Nos. 2 to 20 was allowed to be withdrawn at the instance of the Public Prosecutor.

2. The accusation against the respondents Nos. 2 to 20 was that they, with deadly weapons, formed an unlawful assembly and criminally trespassed into the Temple of Devi Kelbar, abused with filthy words and threatened the petitioner with dire consequences. They were charge-sheeted by Bicholim Police under Sections 143, 147, 148, 332, 323, 437, 504 and 506 r/w Section 149 IPC. The incident is alleged to have occurred on 9-3-1992 in the premises of the aforesaid Temple. While so, the Under Secretary (Home) Government of Goa, Home Department (General) Panjim vide his letter No. 2/14/93-HD(a) dated 9-3-1994 informed the Director of Prosecution that the Government has decided to withdraw from prosecution the above referred case pending before the Judicial Magistrate, First Class, Bicholim, against Satyawan Gawas and others, namely, respondent Nos. 2 to 20. It is also in pursuance of this letter that the Director of Prosecution seems to have written a letter dated 31-3-1994 to the Assistant

Public Prosecutor, Civil and Criminal Courts, Bicholim, requesting to move an application to the Court immediately for withdrawal of the case and intimate the order in the Court to be informed to the Home Department. It appears that on the basis of this correspondence, the Assistant Public Prosecutor, Bicholim has made an application before the learned Judicial Magistrate, First Class, Bicholim in C.C. No. 3/S/93 on 8-4-1994 saying that the Government has decided to withdraw the above case from prosecution. While the said petition was pending, the learned Assistant Public Prosecutor filed an application on 26-8-1994 amending the aforesaid application for withdrawing the prosecution giving certain grounds for withdrawal of the prosecution. In that application the learned Assistant Public Prosecutor has enumerated the grounds for the withdrawal as follows :-

- i) There are lapses in the investigation and the cases are not likely to result into conviction.
- ii) The cases have arisen due to the dispute over the Mahajanship of Devi Kelbai Devasthan, which is pending in the Court and matter pertaining to inclusion of names of the Villagers in the Membership of Mahajan is pending with the Dy. Collector, Mapuca.
- iii) The role played by each of the Accused, in the crowd of 400 or so, is not identified.
- iv) Administration of justice, will not suffer due to the withdrawal of the cases.

After hearing the parties, the learned Magistrate has passed the order under revision on 31-3-1994 according sanction for withdrawal of prosecution.

3. Mr. Lotlikar, the learned counsel for the petitioner, impugned the order on several grounds. He submits that the application does not disclose any satisfaction entered into by the Public Prosecutor based on which alone an application for sanction of withdrawing the prosecution could be ordered. He argues that the grounds for withdrawal of prosecution were given by the Government and not by the Public Prosecutor and this fact is clear from the correspondence that has ensued between the Under Secretary (Home) and the Director of Prosecution.

4. Mr. Lotlikar further argued that assuming that the Government can take initiative to withdraw the prosecution, any of the grounds stated in the application as amended, do not justify according sanction of withdrawing the prosecution. He relies on the decisions of the Supreme Court in Bansi Lal Vs. Chandan Lal and Others, and Sheonandan Paswan Vs. State of Bihar and Others, . He also brought to my notice a decision of this Court rendered by a learned single Judge in Navnitdas Girdharlal Ramaya v. Kundalikarao Khanderao Shinde which is reported in 1979 (83) Bom LR 215. Referring to these decisions, it is clear that even though the Government can initiate action for withdrawing the prosecution, Section 321 of the Code of Criminal Procedure mandates that it

is on the basis of the subjective satisfaction of the prosecutor alone that the prosecution could be withdrawn. In *Sheonandan Paswan Vs. State of Bihar and Others*, , it was held that though withdrawal from prosecution is an executive function of the Public Prosecutor for which statutory discretion is vested in him, the discretion is neither absolute nor unreviewable but it is subject to the Court's supervisory function. In para 53 of the above judgment it is held :

"53. Section 321 of the Code enables the Public Prosecutor or Assistant Public Prosecutor in charge of a case to withdraw from the prosecution with the consent of the Court. The appellant submits, in our opinion correctly, that before an application is made u/s 321 of the Code, the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any outside influence; and secondly, that the Court before which the case is pending cannot give its consent to withdraw without itself applying its mind to the facts of the case."

It is clear from the above observations of the Supreme Court, that the paramount factor in considering an application for withdrawal of prosecution is that the grounds stated therein must be formulated as a result of subjective satisfaction of the Public Prosecutor after duly applying his mind to the facts of the case. Though Section 321 of Criminal Procedure Code does not prohibit the State Government to request or suggest to withdraw the prosecution, the ultimate discretion to be exercised in those cases essentially is that of the Public Prosecutor. Relying on the above decisions, the counsel for the petitioner submits that on going through the original application which was made by the Public Prosecutor before the Court, it is seen that it does not indicate any application of mind by the Public Prosecutor. She appears to have acted as Post Office of the State Government. As soon as she gets information from the Home Secretary through the Director of Prosecution, she made an application to withdraw the same without stating any grounds therein. It is only by an afterthought that amendment application was filed to bring it within the four corners of Section 321 of the Criminal Procedure Code.

5. The learned counsel for the respondents, Mr. Talaulikar, submits that the grounds mentioned in the application for withdrawal as amended are quite genuine and relevant for withdrawing the prosecution. He mainly contended that the withdrawal of the prosecution will bring peace and tranquillity in the premises of the Temple out of which the dispute has arisen. He also submits that all the disputes which were pending in the Civil Court between the parties in respect of the Management of the Temple have been decided in favour of the respondents and by virtue of such decision, the peace and tranquillity of the premises of the Temple has been restored. He further contended that unless the prosecution is withdrawn, peace and tranquillity which was restored will be again disturbed and, therefore, in the interest of justice, the Court was justified in according sanction to withdraw the prosecution. He also cited the decisions of Supreme Court in *Mohd. Mumtaz v. Smt. Nandini Satpathy*, and *Sheonandan Paswan Vs. State of*

Bihar and Others, in support of his contention.

6. It may be true that the dispute is with regard to the Management of the Temple and the offence alleged against the respondents is, no doubt, very serious as far as the premises in which it was alleged to have been committed are concerned. At the same time, I cannot agree with the contention of the learned counsel for the respondents that the peace and tranquillity has been restored and that unless the prosecution is withdrawn that situation could not be continued. The very objection from the complainant against the withdrawal of the prosecution will go to show that the situation has not been changed. One can understand if the situation has become normal by concerted efforts of the parties concerned, both the complainant and the accused, and on that ground a sanction could be obtained for withdrawal of prosecution is justified, even though the strict rule of subjective satisfaction of the Prosecutor could not be manifest in the application for that purpose. But here, in this case, it clearly manifests in the adamant attitude of the parties which still continues and the situation is not at all conducive for a permanent peace and solution to the problem that is going on between the parties. Therefore, the contention of the learned counsel for the respondents on that score cannot be accepted. It is pertinent to note that in the application also it was not made clear whether the withdrawal was sought for the purpose of bringing desirable peace in the premises of the Temple. The ground stated in the application is that there are lapses in the investigation which may not result in conviction and the dispute which was going on in respect of the inclusion of the names of the villagers and Mahajans is pending before the Deputy Collector of Mapusa. Very interesting ground stated in the petition is that the role played by each of the accused in the crowd of 400 or so is not identified and the administration of justice will not suffer due to the withdrawal of the case. I cannot, for the moment, conceive the relevancy of these two grounds for withdrawal of the prosecution. However, it is clear that the dispute which ensued the prosecution of this case is still in existence, at least in the premises of the Temple in all its seriousness and those disputes are potential enough to hamper the peace and tranquillity of the Temple premises. It is pertinent to note that the ground shown in the petition to withdraw the prosecution is not that pendency of prosecution stands in the way of bringing an amicable settlement between the rival groups and bringing peace in the vicinity of the Temple. I do not think that atmosphere has come in this case enabling the prosecution to withdraw. I do not think that the Prosecution has taken the relevant and cardinal principle involved in this case into consideration before making the application for withdrawal, he has not disclosed in the petition that a durable peace will prevail in the locality if the prosecution is withdrawn. While sanctioning withdrawal of prosecution, the Prosecutor and also the Court should satisfy themselves that, taking into account the circumstances of the case, the offence which was committed and the basic dispute that was involved in the offence were set at right and how far the withdrawal of the prosecution will help to solve the dispute of these things are relevant to be considered for giving sanction to the withdrawal of the

prosecution. I find from the records that the idea to withdraw the prosecution was originated from the Government and, as contended by the counsel for the petitioner, the Prosecutor was only acting as Post Office to convey that idea to the Court. Of course, the application was subsequently amended. I can only take that amendment as a matter of curing that defect of the petition which has come as an afterthought. Therefore, I do not think that going by the decision of the Supreme Court that relevant principle has been applied either by the Prosecutor or by the Court below in according sanction to the withdrawal of the prosecution. Decisions of the Supreme Court referred to by the Counsel for the respondents will not also help to sustain the order of withdrawal.

7. It is pertinent to note the principles laid down by this Court in a decision of the learned Single Judge reported in *Navnitdas Girdharlal Ramaya v. Kundalikarao Khanderao Shinde* 1979 (83) Bom LR 215. In that case, the learned Judge was examining the scope of Section 321 of Criminal Procedure Code. Certain observations were made by the learned Judge in that decision about the role of the Prosecutor and the Court in dealing with the applications for withdrawal of prosecution, which are worth quoting here :

"The public prosecutor is the master of the situation till the stage of making an application for withdrawal from prosecution. Though the first signal or the initiative may come from the executive, the responsibility in terms of the very statute in question is of the prosecutor" in charge of a case." Executive and/or administrative directions and instructions should not grip the prosecutor into helplessness, feeling compelled to act at the behest of the executive. Though the law ex facie is in general terms and its perimeter consequently wide, power thereunder is not to be exercised merely because the executive so desires and directs. The expediency of discontinuing a prosecution by withdrawing therefrom must be carefully analysed and weighed against the expediency of continuing it. The prosecutor must act his own part and perform his duty objectively. He must independently apply his mind to all the factors and materials and come to his own judgment therefrom."

I do not think that the Prosecutor has applied his mind taking into consideration the principle laid down by the Court in the above judgment.

8. The learned Judge also highlighted in that judgment the role of the Court :

"If the public prosecutor makes an application, the function of the Court in that behalf then commences, not ends. It is a judicial function. Merely because withdrawal is asked for, the Court is not obliged and enjoined to grant it. Power of withdrawal under S. 321 of the Code of Criminal Procedure is not in pari materia with the authority to enter a nolle prosequi which per se halts and ends a trial. Order below such an application is not to be passed mechanically and/or by way of a mere consequential seal to a fait accompli. The requirement of Court's consent is a visible inbuilt judicial safeguard in S. 321 of the Code.

The Court must consider whether justice - the touchstone of every judicial

process will be better served or adversely affected by the grant or refusal of permission. The Court must judicially evaluate the facts and circumstances and satisfy its own judicial conscience that the executive function of the public prosecutor has been properly exercised and that it is not an attempt to wrongly stall the course of justice for reasons extraneous to the case and still it into silence."

I feel that these principles have been given a go-by by the Court below. The Court has not evaluated all the facts and circumstances of the case which should not have been treated as a normal criminal offence against which the respondents were charged. The Court ought to have considered that the offence had taken place in the premises of the Temple where the peace and tranquillity should always prevail uninterruptedly. It is not a place where the people should act according to their commotion and a fit of anger. In such a situation, as I pointed out earlier, the Court ought to have taken into consideration that if the application is allowed, how far it will help bringing peace and tranquillity in the premises of the Temple. There cannot be any other ground to justify a withdrawal, taking into account the facts of this case. So long as that factor has not been taken into consideration, I do not think, notwithstanding any other justification, according sanction to withdraw the case by the Court below is at all justified.

9. In the result, the Revision Application is allowed and the Rule is made absolute. The Order under revision is set aside. The trial Court is directed to proceed with the case according to law.

10. Revision allowed.