

(2014) 03 PAT CK 0067
In the Patna High Court
Case No : Cr. Misc. No. 28174 of 2011

Nawal Kishore Rai

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 24-03-2014

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 321, 482
Penal Code, 1860 (IPC) — Section 109, 147, 148, 149, 307

Citation : (2015) 1 PLJR 244

Hon'ble Judges : Rakesh Kumar, J

Bench : Single Bench

Advocate : S.N.P. Sinha, Mukesh Kumar and J.N. Sinha, Advocates for the Appellant; D.K. Sinha, J. Narayan and Nirmala Kumari, Advocates for the Respondent

Judgement

Rakesh Kumar, J.—The petitioner, who is one of the F.I.R. named accused in Dumra P.S. Case No. 111 of 1998 corresponding to Sessions Trial No. 573 of 2004 registered under Sections 147, 148, 149, 452, 323, 324, 325, 326, 307, 333, 353, 337 & 427 of the Indian Penal Code and Section 27 of the Arms Act, 1959, has approached this Court, invoking its inherent jurisdiction under Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."), with a prayer to set aside an order dated 19.5.2011 passed by Sri N.K. Tiwary, learned Addl. Sessions Judge, Fast Track Court-I, Sitamarhi (hereinafter referred to as "Addl. Sessions Judge"). By the said order, learned Addl. Sessions Judge has rejected the petition filed by the Public Prosecutor under Section 321 of the Cr.P.C. for withdrawal of the prosecution. Short fact of the case is that on the basis of typed report of Executive Magistrate, Sitamarhi, the aforesaid First Information Report was got registered against number of accused persons, including the petitioner, on an allegation that the petitioner, who was Member of Legislative Assembly, Pupri, one Ex-M.L.A. Anwarul Haque and their bodyguards were seen while resorting to firing. It was alleged that number of members of a political party,

namely; Janta Dal and one another political party had attacked on the premises of Sitamarhi collectorate and in the said occurrence, several public servants including the Collector, had received injuries and huge Government properties and private properties were damaged by the members of such mob. After registering F.I.R., the police thoroughly investigated the case and chargesheet was submitted. Subsequently, the case was committed to the court of sessions and charges were framed. However, while the case was pending before the court below at the stage of evidence, the Government of Bihar took a decision for withdrawal of the prosecution and thereafter, instruction was issued to the District Magistrate of Sitamarhi for taking appropriate action and finally, the Public Prosecutor filed a petition on 8.12.2010 under Section 321 of the Cr.P.C. for withdrawal of the prosecution mainly on two grounds. Firstly, that more than twelve years of occurrence had lapsed and social harmony had prevailed and secondly, that all the involved public servants and witnesses have been transferred from this place to other place and most of them by now retired from the sessions and it would be difficult to trace out their present address and as such, it is very difficult to produce them before the court below without further delay and entailing heavy cost on the State exchequer. After perusing the petition and hearing the parties, the learned Addl. Sessions Judge by order dated 19.5.2011 refused to accord consent and dismissed the application, which was filed for withdrawal. Of course, against the refusal to accord consent, the State would have come to this Court for assailing the order, but in this case, petition has been filed by one of the accused, who was an M.L.A. at the time of occurrence.

2. Sri S.N.P. Sinha, learned senior counsel, who was assisted by Sri Mukesh Kumar, learned counsel for the petitioner assailing the impugned order submits that there was no reason for the learned Addl. Sessions Judge to refuse to grant consent for withdrawal of petition, since in the light of proper administration of justice, it was necessary for the State to withdraw the prosecution, which was filed by the Public Prosecutor assigning cogent reason. He submits that once a petition for withdrawal was filed by the Public Prosecutor, in normal course, the learned Addl. Sessions Judge was required to grant consent, but in the present case, contrary to the settled principle, the learned Addl. Sessions Judge has rejected the same. In support of his argument, Sri Sinha has relied on a judgment of the Apex Court, reported in Sheonandan Paswan Vs. State of Bihar and Others, . He has also relied on Vijay Kumar and Others Vs. State, . While referring to Vijay Kumar's case {supra}, Sri Sinha has specifically referred to paragraph Nos. 3, 6 and 10, which are as follows:--

"3. Complaints remained pending since 1994 and till the year 2000 no meaningful progress was made. On 10.11.2000, an application was moved by the public prosecutor under Section 321 of the Code of Criminal Procedure, 1973 seeking permission to withdraw the prosecution.

6. Aggrieved by the said dismissal of the revision petition, present petitions have

been preferred by the petitioners.

10. M.N. Sankarayarayanan Nair Vs. P.V. Balakrishnan and Others, . Accused persons were charged for offences under Sections 467, 478, 420 read with Section 109 of Indian Penal Code. An application was moved by the public prosecutor seeking withdrawal from the prosecution of accused persons. Withdrawal was sought on following grounds:--

- (i) No likelihood of case being successful.
- (ii) Interest of public policy.
- (iii) Subject-matter of case decided in a civil suit.
- (iv) Delay in trial.
- (v) Securing evidence involves heavy expenses for State.
- (vi) Case is of civil nature.

Sessions Court granted permission to the prosecution as prayed for. Order of Sessions Court was upheld by the High Court as also Supreme Court. In para 5 of the judgment, Hon''ble Supreme Court observed as under:--

"(5).....Though the Section is in general terms and does not circumscribe the powers of the Public Prosecutor to seek permission to withdraw from the prosecution the essential consideration which is implicit in the grant of the power is that it should be in the interest of administration of justice which may be either that it will not be able to produce sufficient evidence to sustain the charge or that subsequent information before prosecuting agency would falsify the prosecution evidence or any other similar circumstances which it is difficult to predicate as they are dependent entirely on the facts and circumstances of each case. Nonetheless it is the duty of the Court also to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished merely because the Government as a matter of general policy or expediency unconnected with its duty to prosecute offenders under the law, directs the public prosecutor to withdraw from the prosecution and the Public Prosecutor merely does so at its behest.....?"

3. Taking aid from the judgment, referred above, Sri S.N.P. Sinha, learned senior counsel appearing on behalf of petitioner submits that it was prerogative of the State Government to withdraw the prosecution, which has been refused by the learned Addl. Sessions Judge. According to Sri Sinha, the order impugned is liable to be set aside.

4. In this case, Sri Jeetendra Narayan, learned counsel has appeared on behalf of victims of the case and he submits that victims were represented before the court below also and filed a detailed reply on their behalf refuting the claim of the Public Prosecutor for withdrawal of the prosecution. He submits that the filing

of petition for withdrawal was politically motivated. He submits that even before the court below, it was stated that since the accused had shifted their loyalty to the ruling party, a petition for withdrawal of prosecution under Section 321 of the Cr.P.C. was got filed before the court below without any reasonable ground. There were two main grounds for filing petition by the Public Prosecutor for withdrawal of prosecution. First ground was that more than twelve years of occurrence had lapsed and social harmony had prevailed upon there is absolutely no malice and grudge in the public against the State machinery and every thing is functioning quite normally and public peace be, restored and the second ground is that all the involved public servants and witnesses have been transferred from this place to other place and most of them have by now retired from sessions and it is very difficult to trace out their present address and as such, very difficult to produce them before the court below without further delay and entailing heavy cost of the State exchequer. It was submitted that both the grounds were found untrue by the learned Addl. Sessions Judge. He submits that after rejection of the petition, the witnesses had appeared before the trial court and the then Collector, Sitamarhi was examined as P.W. 1. However, on the request of the defence his cross-examination was deferred. The learned Addl. Sessions Judge had also noticed argument advanced by the defence side that withdrawal petition was not filed for compelling consideration and administration of justice rather it was merely an act of political favour to the accused persons who have recently shifted their loyalty to the ruling party. He further submits that the Public Prosecutor, only on dictate of the State Government without applying his mind, had filed the petition for withdrawal. He highlights that the Collector of the district, vide letter dated 6.12.2010, had directed the Public Prosecutor to withdraw the prosecution and without wasting any time, on 8.12.2010 (i.e. within two days from such direction), the Public Prosecutor filed petition for withdrawal of prosecution and as such, the application for withdrawal was also required to be rejected on the ground of non-application of mind by the Public Prosecutor.

5. It is a peculiar case, in which though before the court below, the Public Prosecutor had filed a petition for withdrawal of the prosecution under Section 321 of the Cr.P.C. however, before this Court by filing a counter affidavit, the District Magistrate has virtually supported the order passed by the learned Addl. Sessions Judge, whereby, he had refused to grant consent for withdrawal of the prosecution. The present petition was required to be outrightly rejected on the ground that the petitioner, who was accused in the case, was not having any locus to maintain the present petition. However, on merit also the Court is satisfied that the learned Addl. Sessions Judge has committed no error in refusing to grant consent and rejecting the petition, which was filed for withdrawal on behalf of prosecution. The petitioner has brought on record the copy of the application dated 8.12.2010 filed by the Public Prosecutor, as Annexure-"2" to the supplementary affidavit. In the petition, primarily two grounds were taken for withdrawal of the prosecution, which are as follows

(paragraphs 3 & 4 of the application):--

"3. That more than 12 years of the occurrence have lapsed and social harmony has prevailed upon with absolutely no malice and grudge in the public against the State Machinery and every thing is functioning quite normally and public peace has been restored.

4. That all the involved public servant and the witnesses have been transferred from this place to other place and most of them have by now retired from sessions and it is very difficult strake out their present address and as such very difficult to produce them before court without further delay and entailing heavy cost of the State exchequer."

6. Since before the learned Addl. Sessions Judge, victims had intervened and opposed the prayer for withdrawal, the plea of the Public Prosecutor that social harmony had prevailed has itself been falsified. With regard to second ground that witnesses had already been transferred appears to be of no significance.

7. So far as plea of lapse of twelve years is concerned before the court below, it was pointedly argued on behalf of victims that till the date of hearing of petition for withdrawal, no summon had ever been issued to any of the witnesses at their permanent address, as mentioned in the case diary. Moreover, pendency of the case for about 12 years is not an exception in the State of Bihar. The learned Addl. Sessions Judge has beautifully discussed both the grounds raised by the Public Prosecutor in the petition and rejected the same. It would be appropriate to quote relevant paragraphs of the order passed by the learned Addl. Sessions Judge, which is as follows:--

"Conclusively, every crime is an offence against the society. Now the point of consideration is what valid reason can be made out on behalf of the prosecution to withdraw the case. It has been held out in a case reported by the Hon"ble Apex Court that in matter of withdrawal of the cases, the Public Prosecutor should act as per his own discretion. He can never command but commend. According to the Public Prosecutor, the witnesses are beyond the approach of the State, in this context, it may be stated that most of the witnesses of this case appeared and opposed the withdrawal application. It will go to show that the stand of the Public Prosecutor in this regard is not justified. Moreover, most of the aggrieved person/witnesses were/are the public servants and therefore, they were within the easy reach of the State and in such circumstances if the State comes with a plea that the witnesses are not traceable, it means that the State intends to misdirect the course of the justice and has not come forward bona fide.

In fact, the aggrieved persons of this case, have vehemently opposed the application for withdrawal filed on behalf of the Public Prosecutor. It goes to further show that the harmony in between the parties, is not going to be restored from withdrawal of the case. The law is very clear that withdrawal of prosecution can be allowed only in the interest of justice. Even if the Govt. direct

the Public Prosecutor 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. If the case is likely to end in acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal of prosecution. The discretion u/sec. 321 of the Cr.P.C. is to be carefully exercised by the court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the State for redressing their grievance. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished. Punishing the person who perpetrated the crime is an essential ingredient for the maintenance of Law & Order and peace in the society. Therefore, withdrawal of prosecution shall be permitted only when valid reasons are made out for the same.

Admittedly, most of the person aggrieved/prosecution witnesses have vehemently opposed the withdrawal application u/sec. 321 of the Cr.P.C.; it means that they are going to support the prosecution in course of the trial and therefore, it cannot be said that the case is going to end in acquittal of the accused and punishing the person who perpetrated the crime to maintain Law & Order and peace in the society, is the ultimate goal of any criminal justice, and, therefore it is hard to accept that the case is going to cause the mere harassment to the accused.

From the aforesaid facts, circumstances of the case as well as discussions made above, I arrived at the conclusion that it is not a fit case in which the Withdrawal application of the prosecution dated 8.12.2010 u/sec. 321 of the Cr.P.C., is permitted and in the result, the said application dated 8.12.2010 is hereby rejected."

8. After examining the order of the learned Addl. Sessions Judge, as quoted here-in-above, I am satisfied that petition for withdrawal was not filed by the Public Prosecutor for advancement of administration of justice, rather the Public Prosecutor, who is competent to file a withdrawal petition under Section 321 of the Cr.P.C., had exercised his power improperly and to defeat the object of criminal law, which requires logical end of a criminal case. There is no dispute in respect of proposition of law laid down in Sheonandan Paswan Vs. State of Bihar and Others, and Vijay Kumar and Others Vs. State, , on which, learned senior counsel for the petitioner has placed heavy reliance. However, the judgment of Sheo Nandan Paswan (supra) was earlier reviewed and it was finally settled by the Constitution Bench of the Hon"ble Supreme Court, reported in Sheonandan Paswan Vs. State of Bihar and Others, . The Constitution Bench of the Apex Court reiterated the earlier proposition of law, however; it was clarified that the

court at the time of considering petition for withdrawal under Section 321 of the Cr.P.C. is required to examine as to whether the Public Prosecutor acts in good faith and it is proper or not. It would be better to quote paragraph-70 of the said judgment, which is as follows:--

"70. 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. 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 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."

9. On perusal of the order passed by the learned Addl. Sessions Judge, this Court is satisfied that the filing of the petition for withdrawal by the Public Prosecutor was an attempt to interfere with the normal course of justice. Moreover, in the present case, of course withdrawal petition was filed by the Public Prosecutor before the court below on instruction of the Government of Bihar, while replying to averments made in the writ petition, in its counter affidavit filed on behalf of District Magistrate, Sitamarhi, the order passed by the learned Addl. Sessions Judge was not only supported, rather it has been reiterated to prosecute offenders only. Two paragraphs of the counter affidavit of the District Magistrate would suffice the intention of the State in the present matter, which are as follows (paragraphs-15 & 17 of the counter affidavit:--

"15. That in reply to the statements made in para No. 19 it is submitted that every trial of cases entails some time, but for that the law breakers cannot be let off scot free without trial as "law is blind". The allegation of petitioner in this para that accused were involved in this case on behalf of political opponents is false and misconceivers.

17. That in reply to the statements made in para No. 21 it is submitted that offenders of such serious nature of crimes perpetrated against the State and its subject, must be brought to book, by law irrespective of political and social consideration as a check against recurrence of such incidents. So that people may repose confidence in the State machinery which is responsible for maintaining law and order and public peace and frequently."

10. In view of the aforesaid facts and circumstances as well as detailed reasons assigned by the learned Addl. Sessions Judge in its impugned order, this Court is of the opinion that the impugned order warrants no interference and the petition stands dismissed. The interim order of stay dated 16.9.2011 stands vacated.

11. Keeping in view the fact that the petitioner was a Member of Legislative Assembly and some other important persons are also accused in the case and the fact that in this case, occurrence had taken place in the year 1998, while

dismissing the present petition, it is desirable to direct the trial court to proceed with the case expeditiously so that trial may come to its logical end preferably within a period of nine months from the date of receipt/production of a copy of this order. The learned trial court is required to proceed with the case on day to day basis. The Government of Bihar through its Chief Secretary is directed to render full assistance to the trial court for early conclusion of the trial and ensure production of witnesses before the trial court as and when required by the trial court. Let a copy of this order be communicated to the Chief Secretary, Govt. of Bihar forthwith.