

(2023) 02 KL CK 0228

In the High Court Of Kerala

Case No : Criminal Revision Petition Nos.591, 593, 754 Of 2022

P.N. Krishnakumar

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 22-02-2023

Acts Referred:

Constitution of India, 1950 — Article 136
Code of Criminal Procedure, 1973 — Section 321, 451, 452
Indian Penal Code, 1860 — Section 34, 427, 447
Prevention of Damage to Public Property Act, 1984 — Section 3(1)
Wild Life Protection Act, 1972 — Section 2(2), 2(7), 2(11), 2(14), 2(32), 2(36), 39,
40, 40(1), 40(2), 40(2A), 40(4), 49A, 49B, 51(1)(1A), 52, 57

Citation : (2023) 02 KL CK 0228

Hon'ble Judges : A.Badharudeen, J

Bench : Single Bench

Advocate : Nireesh Mathew, S.Sreekumar, Gracious Kuriakose, Abraham P.Meachinkara, Sahl Abdul Kader, Arun Paul Jacob, Alen J. Cheruvil, M.V.Lalu Mathews, Margaret Maureen Drose, Jayakrishnan P.R., Thomas George

Final Decision : Dismissed

Judgement

A.Badharudeen, J

1. CrI.R.P.No.754/2022 has been filed by the State of Kerala represented by the Range Forest Officer, Kodanad, Ernakulam district, challenging order dated 09.06.2022 in CMP.628/2020 in C.C.No.358/2019 pending before the Judicial First Class Magistrate Court-III, Perumbavoor. Respondents 1 to 3 herein are respondents 1, 2 and 4 in the above case. Respondents 4 and 5 are third parties/intervenors in the Revision Petition.

2. The 1st respondent/1st accused has filed CrI.R.P.No.593/2022 challenging the same order. Similarly, CrI.R.P.No.591/2022 has been filed by the 2nd accused also challenging the same order.

3. Heard the learned Additional Director General of Prosecution Shri Gracious

Kuriakose, learned Senior Counsel Shri S.Sreekumar, appearing for the 1st respondent; Advocate Nireesh Mathew appearing for the 2nd respondent and Dr.Abraham P.Meachinkara appearing for the intervenors.

4. Bereft of unnecessary embellishments, the factual matrix of the prosecution in nutshell is that the Divisional Forest Officer, Malayattoor and the Forest Range Officer, Kodanad, along with staff, had detected possession of two pairs of elephant tusks by the 1st accused and seized the same. It was found that two tusks fixed on a rosewood stand and another two tusks fixed on both sides of a mirror, at the residence of the accused No.1 at 4 pm on 21.12.2011 at Thevara, Kochi. The Divisional Forest Officer, Malayattoor had verified the said tusks and prepared a mahazar, in the presence of witnesses, on the same day from 10 a.m to 4 p.m. A receipt dated 21.12.2011 was executed by one MJ Antony for the proper custody of the said tusks in question, being the representative of A1.

5. The complainant, in this case, alleges that the 1st accused at the time of the seizure, did not have a certificate of possession as mandated under the Wildlife (Protection) Act, 1972, the act of the accused persons are sufficient to invoke penal consequences since they had contravened the provisions of the Act regarding declarations to be made pertaining to the control, custody, or possession of any captive animal specified in the Schedule I of the Act or animal article, trophy, the prohibition of trade or commerce in trophies, animal articles etc. derived from certain animals, the prohibition of dealing in trophies, animal articles, attempts and abatement among other requirements of law. Accordingly, an occurrence report was lodged on 12.06.2012 and on the said premise, the prosecution registered O.R.No.14/12 of Mekkappala Police Station alleging commission of offences punishable under Sections 39, 40(2), (2A), 49A, 49B, 52, 57 r/w Section 2(2)(7)(11)(14)(32)(36) punishable under Sections 51(1)(1A) of Wild Life Protection Act, 1972. On completion of investigation, the Form II report against accused Nos.1 to 4 was laid before Court below on 02.12.2015 by the Range Forest Officer, Kodanadu.

6. The learned Magistrate took cognizance of the case and proceeded against the accused.

7. During pendency of the case, the Assistant Public Prosecutor filed a petition under Section 321 of Cr.P.C, to accord sanction to withdraw the case as against all the accused persons in the interest of justice.

8. Third party interveners, who are respondents 4 and 5, objected withdrawal of the case.

9. The reasons for withdrawal of prosecution, as could be read out from the averments in the C.M.P.628/2021 in para.3 and 4 of the petition are as under:

"3. Accused No.1 approached the State Government by offering his willingness to declare possession of the two pairs of the Elephant tusks in question if he is permitted to do so. In exercise of the special powers under section 40(4) of the

State Government had vide a notification GO (Rt) 538/2015/F&WLD dated 16/12/2015 accorded sanction to the said accused to declare possession after completing the mandatory provisions under the act. The legality of the possession of the said two elephant tusks in question as per the letter dated 01/06/2015 by A1 was accepted by the competent authority under the Wild Life (Protection) Act 1972 by issuing a certificate of ownership in Form No.16 (No.BD C2-504/14, OCT No.01/14 dated 16/1/2016) of the Principal Chief Conservator of Forests (Wildlife) & Chief Wildlife Warden, Kerala as per the Government order vide GO (Rt) 538/2015/F&WLD dated 16/12/2015. Therefore the possession and custody of the two pairs of elephant tusks in question by the A1 become legal as on date. Here it is pertinent to note that 40(1) of the Wildlife Act by way of an exemption provides 30 days from the date of commencement of the Act to a person to declare the animal article or trophy in his possession. But section 40(4) provides power to the State government to extend the aforesaid 30 days specified in 40(1) through notification, in relation to person or persons. This power can be exercised by the State Government specifically to any particular person or all persons in general. If the said power is exercised by the State Government, in relation to any person by extending for him to the period allowed for declaration of ownership and such person declares the same, it will make the position available under section 40(1) of the Wild Life (Protection) Act 1972. Thus the declaration made by the Accused No.1 was in pursuance of the notification GO (Rt) 538/2015/F&WLD dated 16/12/2015 granting a period of time prescribed by the Government to make such declaration, that will definitely relate back to the commencement of the Wild Life (Protection) Act retrospectively as provided under 40(4) of the said Act. Hence illegality if any as alleged in the possession of the said two pairs of the elephant tusks in question become legalized and the possession will have to be considered as lawful ab initio as per the legitimate supremacies of the sovereign Government.

4. The Government by issuing a certificate of ownership in Form No.16 (No.BD C2-504/14, OCT No.01/14 dated 16/1/2016) of the Principal Chief Conservator of Forests (Wildlife) & Chief Wildlife Warden, Kerala is fairly estopped from contradict, deny or declare to be false the previous statement made by him in the Court that clearly dealt with Section 115 of the Indian Evidence Act 1872. So the Government now cannot go back from that ownership certificate and GO (Rt) 538/2015/F&WLD dated 16/12/2015 granting a period of time prescribed by the Government to make a declaration to prove that the fact or state of circumstances stated in the said certificate and Government order was not true. The said documents are having the genuine status of a promissory estoppel by the sovereign. Estoppel is a doctrine based on fairness which is an equitable principle, is not merely a technical rule of evidence; rather it has an important purpose to serve in the administration of justice by preventing inconsistency and unacceptable conduct. As the ultimate object of the law is to secure justice, the courts in recent times have liberally relied on the principle of estoppel, to render justice between the parties. The Supreme Court of India in P. Power Corporation

Ltd. v. Sant Steel, (2008) 2 SCC 777 at para.35, Page 803 has constantly reminded the Government of its duty to keep its promises and the necessity of such an obligation. If the Government offers certain benefits to attract the entrepreneurs, and the entrepreneur acts on those beneficial offers. Thereafter, if the Government withdraws the benefit and the credibility of the Government will be seriously affected and it will show the short-sightedness of the Government. Therefore, in order to keep the faith of the people and in the interest of good Governance, Government should not be allowed to revert from its promises. So the Prosecutor after applying his free mind in the matter considers that a withdrawal from the prosecution in the said circumstances is necessarily based on equity and good conscience to meet the broad ends of justice. The court further in the above case P Power Corporation Ltd. v. Sant Steel, (2008) 2 SCC 777 at para.24, Page. 443 held that 'the law cannot acquire legitimacy and gain social acceptance unless it accordance with the moral values of society, and constant endeavor of the courts and legislature, must therefore, be to close the gap between law and morality. The doctrine of promissory estoppel is a significant contribution in that direction. The rule of promissory estoppel is founded on equity and it is invoked to remove partiality, unfairness and arbitrariness. Morality flows through the entire doctrine of promissory estoppel. The doctrine compels a person or administrative authority to fulfill his promise and does it disapproved of dishonesty. The moral value upon which the doctrine is based is the touchstone of good law and in the absence of such moral values the gap between law and morality will increase and it will not be able to gain social acceptance'. Thus, the court must give effect to a doctrine where justice and equity so requires. The further conduct of this criminal trial may go against the manifest good faith amongst parties as far as the certificate of ownership in Form (No.16 No.BD C2-504/14, OCT No.01/14 dated 16/1/2016) issued by the Government to A1 is not at all from the part of an appropriate Government."

10. In para.5, it has been contended further as under:

"The principle "Ex post facto" law is also known as "Nullum crimen, nulla poena sine praevia lege poenali" embodied in our supreme law, the Constitution of India also outspreads and protects positively the eventualities happened in this prosecution. A law may have an ex post facto effect without being technically ex post facto. For example, when a law repeals a previous law, the repealed legislation no longer applies to the situations it once did, even if such situations arose before the law was repealed. As discussed above, before issuance of a certificate of ownership in Form No.16 (No.BD C2-504/14, OCT No.01/14 dated 16.01.2016) of the Principal Chief Conservator of Forests (Wildlife) & Chief Wildlife Warden, Kerala from the time of detecting the offence or beyond the incidence spotted by the authorized officer was an offence in the eyes of law. But definitely after the certificate of ownership in Form No.16 (No.BD C2-504/14, OCT No.01/14 dated 16.01.2016) and particularly after the GO (Rt) No.538/2015/F&WLD dated 16.12.2015 granting a period of time prescribed by the Government to make a declaration to A1 by the competent authority the

occurrence in question now at the time the prosecution ripened for trial become no offence in the eyes of the penal law in dominance. Now the question is whether the accused can be tried against a fact in issue which is not culpable presently when he is tried for a penal sanction. Here the intention of the lawmaker in incorporating the doctrine of "Ex post facto" is evidently safe the accused from the penal apparatus of the state. XXX XXX"

11. The learned ADGP argued at length to convince this Court that the court below went wrong in disallowing the application. It is argued that the purpose of enactment of the Wild Life Protection Act, 1972 is to avoid killing of wild life. In the case on hand, 2 tusks found in possession of the 1st accused derivated from a captive elephant led to registration of this crime. Therefore, the possession of 2 tusks left by a captive elephant and withdrawal of prosecution initiated for the said occurrence would not defeat intention of the legislation in any manner and, therefore, in the interest of public, withdrawal petition should have been allowed by the trial court and, therefore, the order requires interference. He also submitted that the interveners objected prosecution withdrawal merely to get public media attention, since the 1st accused in this case is, Shri Mohanlal, a famous film actor.

12. The learned Magistrate considered the petition after hearing the learned Prosecutor and the third party intervenors and dismissed the application.

13. Three decisions reported in [(1983) 1 SCC 177], T.Barai v. Henry-Ah Hoe & anr.; [2012 (4) KLT 895], Prasanth v. Food Inspector, Kannur Municipality and [(2004) 3 SCC 609], Basheer v. State of Kerala, were highlighted to support withdrawal of the case.

14. The learned ADGP relied on para.148 of a decision of the Apex Court reported in [1983 KHC 434 : (1983) 1 SCC 438 : AIR 1983 SC 194], Sheonandan Paswan v. State of Bihar & Ors. to contend that the Court's jurisdiction in dealing with the application under S.321 of the Code is only to see whether the Public Prosecutor had applied for withdrawal in the interest of Public justice, or he has done so actuated by improper or oblique motive, that a substantial amount of loan has already been realised, that the continuance of the criminal case in the circumstances of this case would be only an exercise in futility at the cost of Public money and time.

15. The learned counsel also placed decision of this Court reported in [1991 KHC 225 : 1991 (1) KLT 881 : 1991 (2) KLJ 47], Saramma Peter v. State of Keala to contend that the Public Prosecutor has power to seek withdrawal of prosecution.

16. Supporting the argument mooted by the learned ADGP, the learned Senior Advocate Sri S.Sreekumar placed latest decision of the Apex Court reported in [2021 KHC 6332 : AIR 2021 SC 3954 : ILR 2021 (3) Ker. 567], State of Kerala v. K.Ajith & Ors. and emphasised the principle governing withdrawal of prosecution contemplated under Section 321 of Cr.P.C. In State of Kerala v. K.Ajith & Ors. (supra), the Apex Court considered its earlier decisions dealing with Section 321

of Cr.P.C. The learned Senior Counsel read out the observations of the Honourable the Chief Justice as well as the other 2 Judges who rendered judgment in *Sheonandan Paswan v. State of Bihar & Ors.* (supra). The observation of the Chief Justice for the minority, as pointed out by the learned Senior Counsel, is as under:

"20. Both, Justice Khalid in his majority opinion and Justice Venkataramiah (as the learned Chief Justice then was) in his concurring opinion, held that this Court must be circumspect in interfering with the concurrent findings of the Courts below, allowing or dismissing the withdrawal petition. Highlighting that this Court is not a Court of facts and evidence it was observed:

"89. An order passed under S.321 comes to this Court by special leave, under Art.136 of the Constitution of India. The appeal before us came thus. It has been the declared policy of this Court not to embark upon a roving enquiry into the facts and evidence of cases like this or even an order against discharge. This Court will not allow itself to be converted into a Court of facts and evidence. This Court seldom goes into evidence and facts. That is as it should be. Any departure from this salutary self – imposed restraint is not a healthy practice and does not commend itself to me. It is necessary for this Court to remember that as an Apex Court, any observation on merits or on facts and evidence of a case which has to go back to the courts below will seriously prejudice the party affected and it should be the policy of this Court not to tread upon this prohibited ground and invite unsavoury but justifiable criticism. Is this Court to assess the evidence to find out whether there is a case for acquittal or conviction and convert itself into a Trial Court? Or is this Court to order a retrial and examination of hundred witnesses to find out whether the case would end in acquittal or conviction? Either of these conclusions in the case is outside the scope of S.321. This can be done only if we rewrite S.321." (emphasis supplied)."

17. The 2 Judges rendered the majority opinion held as under:

"21. The decision in *Sheonandan Paswan* (supra) has held the ground since then. An instance of its application was when this Court dealt with the withdrawal of prosecution of an MLA for offences involving misappropriation of public money. In *Yerneni Raja Ramchandar v. State of Andhra Pradesh & Ors.* (2009 KHC 921 : (2009) 15 SCC 604 : 2009 (2) KLD 569 : 2009 (3) Guj LH 243), the appellant, an MLA, was accused of fabricating hospital records to repeatedly claim medical reimbursement for a sum of Rs.2,89,489, Rs.1,33,939, and Rs.1,22,825/- from the Government. Amounts of Rs.2,89,489, Rs.60,000, and Rs.60,000 were sanctioned by the Government time and again in response to these requests. Charges of misappropriation were levelled against him. Since the appellant was an MLA, the matter was referred to the Ethics Committee of the Legislative Assembly, where the appellant tendered an apology and refunded Rs.60,000 to the Government. Pursuant to this, the Ethics Committee recommended a withdrawal of the prosecution against the appellant. The State Government also issued an order requiring the District Collector to direct the Prosecutor to

withdraw the case. Multiple applications for withdrawal of prosecution were made, which were dismissed by the Magistrate. These, however, were ultimately allowed by the High Court. In refusing to allow the withdrawal of the prosecution against the appellant, this Court opined that in view of decision in Sheonandan Paswan (supra), the power of judicial review of the High Court was limited. It could have only interfered if there was an error of law committed by the Magistrate. Further, the Court also considered the implication of the disciplinary action taken by the Ethics Committee of the Legislative Assembly on the withdrawal of prosecution under S.321 of the CrPC. Justice SB Sinha, speaking for the two – Judge Bench, held that

“15. The Ethics Committee of the legislation of the State of Andhra Pradesh was empowered to deal with the disciplinary action or otherwise which may be taken against the Members of the Legislative Assembly. A criminal case against a Member of the Legislative Assembly, ordinarily, should be allowed to be continued on its own merit, particularly, in the light of the facts of the present matter wherein the High Court had refused to interfere at the earlier stages of the proceedings. We have also noticed herein before that the High Court, in fact, had not only been monitoring the investigation, but also directed the learned trial Judge to complete the trial within a period of three months. The action on the part of the State to issue the said government order despite the earlier orders of the High Court must be considered keeping in view the said factual matrix.

[xxxx xxxx xxxx]

18. The government order was issued even according to the State in terms of the recommendations made by the Ethics Committee alone. [,,,] The Ethics Committee had no jurisdiction to make such recommendations. If the State had acted on the basis of recommendations made by a body who had no role to play, its action would be vitiated in law, recommendations of the Ethics Committee being unauthorised, the action of the State would attract the doctrine of malice in law.

19. Even otherwise, the action on the part of the State, in our opinion, suffers from malice on fact as well. The State is the protector of law. When it deals with a public fund, it must act in terms of the procedure established by law. In respect of public fund, the doctrine of public trust would also be applicable so far as the State and its officers are concerned. It could not, save and except for very strong and cogent reasons, have issued the said government order despite the orders of the High Court.” (emphasis supplied)

18. In fact, in State of Kerala v. K.Ajith & Ors' case (supra) in para.23 the Apex Court set out the principles on withdrawal of prosecution under Section 321 of Cr.P/C as under:

“The principles which merge from the decisions of this Court on the withdrawal of a prosecution under Section 321 of the CrPC can now be formulated

- (i) Section 321 entrusts the decision to withdraw from a prosecution to the public prosecutor but the consent of the court is required for a withdrawal of the prosecution;
- (ii) The public prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice;
- (iii) The public prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution;
- (iv) While the mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the public prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons;
- (v) In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature. Before deciding whether to grant its consent the court must be satisfied that:
 - (a) The 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.
 - (b) The application has been made in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law;
 - (c) The application does not suffer from such improprieties or illegalities as would cause manifest injustice if consent were to be given.
 - (d) The grant of consent sub-serves the administration of justice; and
 - (e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law which the public prosecutor is duty bound to maintain.
- (vi) While determining whether the withdrawal of the prosecution subserves the administration of justice, the court would be justified in scrutinizing the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated; and
- (vii) in a situation where both the trial judge and the revisional court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would exercise caution before disturbing concurrent findings. The Court may in exercise of the well-settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent."

19. In this case the Apex Court considered dismissal of petition filed by the

prosecution to withdraw a case emanated from Crime No.236/2015 of Museum Police Station alleging commission of offences under Section 447, 427 r/w 34 of Indian Penal Code and Section 3(1) of the Prevention of Damage to Public Property Act, 1984. The facts of the case is that on 13.3.2015, when the Finance Minister was presenting the budget for the financial year 2015-2016 in Kerala Legislative Assembly, the accused persons, who at the time were members of the legislative assembly belonging to the party in opposition disrupted the presentation of the budget, mounted over to the Speaker's dais and damaged furniture and articles including the Speaker's chair, computer, mike, emergency lamp and electronic panel, and thereby caused a loss of Rs.2,20,093/-. The Apex Court considered dismissal of the said petition by the trial court as well as the High Court and upheld the finding of the trial court as well as the High Court holding that the questions of insufficiency of evidence, the admissibility of evidence, absent certifications etc. are to be adjudged by the trial court during the stage of trial.

20. It was observed further that as held by the Constitutional Bench in *Sheonandan Paswan v. State of Bihar & Ors.* (supra) it is not of the duty of the court in an application under Section 321 of Cr.P.C to adjudicate upon evidentiary issues and examine admissibility or insufficiency of evidence. The learned Senior Counsel submitted that since the trial court dismissed the application based on the observation that the legality of the ownership certificate subsequently issued is a matter under consideration before the Division Bench of this Court in W.P(C).No.27187/2019, this Court would await disposal of the Writ Petition or to remand back the petition to the trial court for fresh consideration.

21. Per contra, Dr.Abraham P.Meachinkara filed an argument note and also a detailed counter while resisting the contentions mainly with reference to the merits of this case. It is argued by the learned counsel for the petitioner that a reading of the petition filed by the learned ADGP would go to show that no grounds stated as settled by the Apex Court to withdraw the prosecution in this matter. According to the learned counsel, the Apex Court considered the scope of Section 321 Cr.P.C right from [(1977) 4 SCC 448], *Balwant Singh & Ors. v. State of Bihar*. It is argued further that Section 321 Cr.P.C can be invoked especially in situations as under:

- (i) Communal feuds which may have been amicably settled should not re-erupt on account of one or two prosecution pending;
- (ii) Labour disputes which might have given rise to criminal cases, when settled, might probably be another instances where the interest of public justice in the broader connotation may perhaps warrant withdrawal from the prosecution; and
- (iii) other instances also may be given where public justice may be served by withdrawal even apart from the merit of the case. It is argued further that the Court has to make an effort to elicit the reasons for withdrawal and satisfy itself that the Public Prosecutor too was satisfied that he should withdraw from the

prosecution for good and relevant reasons.

22. According to the learned counsel, it is well settled principle that the court while considering the request to grant permission should not do so as 'necessary formality-the grant of it for the mere asking' as held in [(1972) 1 SCC 318], *M.N.Shankarayarayanan Nair v. P.V.Balakrishnan*. In [AIR 1987 SC 877], *Sheonandan Paswan v. State of Bihar* it was held that the judicial function implicit in exercise of the judicial discretion for granting the consent 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. It was further argued that this Court in [1996 Cri.L.J. 3883], *Yohanan alias Pappachan v. State of Kerala & anr.* held that a case once filed cannot be mechanically withdrawn and it is a well settled principle that continuation of prosecution to its logical end is the rule and withdrawal of a case is an exception, which could be resorted to only sparingly. If withdrawal is allowed in a routine manner, the confidence of the public in the judicial system will be lost. Further it was argued that a Full Bench of this Court in [1969 Cri.L.J 966], *Dy.Acctt. General v. State*, held as well as referred in [1991 Cri.L.J 3211], *Sarama Peter & Ors. v. State of Kerala* that the power must be exercised in the light of his own judgment and not at the dictation of some other authority.

23. He argued further that in para.7 of the decision reported in [(1996) 2 SCC 610], *R.M.Tewari v. State of NCT of Delhi*, the Apex Court further held with respect to judicial discretion as under:

"..... it is therefore, clear that the designated Court was right in taking the view that with' from prosecution is not to be permitted mechanically by the court on an application for that purpose made by the Public Prosecutor. It is equally clear that the Public Prosecutor also has not to act mechanically in the discharge of his statutory function under section 321 Cr.P.C on such a recommendation being made by the Review Committee; and that it is the duty of Public Prosecutor to satisfy himself that it is a fit case for withdrawal from prosecution before he seeks the consent of the court for that purpose."

24. It is further argued that the point of law pertaining to this case is confined to Section 40 of the Wild Life (Protection) Act, 1972. Therefore Section 40 is extracted hereunder:

(i) Section 40(1) of the Act requires 'Every person having at the commencement of this Act the control, custody or possession of any captive animal specified in Schedule I or Part II of Schedule II, or any uncured trophy derived from such animal or salted or dried skin of such animal or the musk of a musk deer or the horn of a rhinoceros, shall, within thirty days of the commencement of this Act, declare to the Chief Wildlife Warden or the Authorized Officer the number and description of animal or article of the foregoing description under his control, custody or possession and the place where such animal or article is kept'. The

1st Accused has chosen to declare the articles only after a Criminal Case as OR 14 of 2012 of Mekkappala Forest Station is registered against him under the provisions of the Wildlife (Protection) Act, 1972.

(ii) Section 40(2) of the Act restricts as 'No person shall, after the commencement of this Act, acquire, receive, keep in his control, custody, or possession, sell, offer for sale or otherwise transfer or transport any animal specified in Schedule I or Part II of the Schedule II or any uncured trophy or meat derived from such animal, or the salted or dried skins of such animal or the musk deer or the horn of a rhinoceros, except with the previous permission in writing of the Chief Wild Life Warden or the authorized officer'.

(iii) Section 40(2A) states that 'No person other than a person having a certificate of ownership, shall, after the commencement of Wildlife(Protection) Amendment Act 2002 acquire, receive, keep in his control, custody or possession any captive animal, animal article, trophy or uncured trophy specified in Schedule I or Part II of Schedule II, except by way of inheritance'.

(iv) Section 40(2B) of the Act provides that 'Every person inheriting any captive animal, animal article, trophy or uncured trophy under sub-section(2A) shall, within ninety days of such inheritance make a declaration to the Chief Wild Life Warden or the authorized officer and the provisions of section 41 and 42 shall apply as if the declaration had been made under sub-section (1) of section 40. Provided that nothing in sub-section (2A) and (2B) shall apply to the live elephant'.

(v) Further, section 40(3) of the Act provides that 'Nothing in sub-section (1) or sub-section (2) apply to a recognized zoo subject to the provisions of section 39-I or to a public museum.

(vi) Section 40(4) of the Act states that 'The State Government may by notification, require any person to declare to the Chief Wildlife Warden or the authorized officer any animal or animal article or trophy (other than a musk of a musk deer or horn of a rhinoceros) or salted or dried skins derived from an animal specified in Schedule I or Part II of Schedule II in his control, custody or possession in such form, in such manner, and within in such form, in such manner, and within such time as may be prescribed'. This clause seeks to amend Section 40 of the Act to provide that the transfer captive animals (other than live elephants), animal article, trophy or uncured trophy specified in Schedule I or Part II of Schedule II shall be recognized only where such transfer is effected by way of inheritance.

(vii) Notification as defined in the Act under Section 2(22) means a notification published in the official Gazette.

(viii) On a plain reading of sub-section (1), (2), (2A), (2B)(3) and (4) of Section 40 of the Act, State Government can exercise power under Section 40(4) only in the case of bonafide inheritance, after proper and effective inquiry as stipulated

under Section 41 of the Act and publication of Notification in the official Gazette.

(ix) There is no Gazette Notification in this case hence the alleged Certificate of Ownership has no legal sanctity and is void abinitio.

(x) Public Prosecutor cannot rely on the illegal Certificate of Ownership granted to 1st Accused and as the matter is pending consideration before the Hon'ble High Court of Kerala.

(xi) The Ivory possessed by the 1st Accused is a Thondy materials involved in OR 14 of 2012 of Mekkappala Forest Station which is at the disposal of the Trial Court only. Section 50(3A) and Section 50(4) of the Act, 1972 and Sections 451 and 452 of Code of Criminal Procedure 1973 requires that articles seized shall be dealt with by the Magistrate in accordance to law. In this case, neither four elephant tusks and thirteen items of wildlife artifacts made of Ivory were seized nor produced before Magistrate Court.

(xii) Learned Prosecutor has not mentioned about the pendency of two Writ Petitions WPC No.11074 of 2019 and WPC No.27187 of 2019 challenging the Certificate of Ownership to 1 st Accused."

25. While allaying the controversy in view of the rival contentions on the premise as to whether the court below went wrong in dismissing the application filed by the learned Public Prosecutor to withdraw the case by invoking the power under

Section 321 of Cr.P.C, it is apposite to refer Section 321 of Cr.P.C. The same is as under:

"321. Withdrawal from prosecution. The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of 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: Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while

acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."

26. In fact, Section 321 of Cr.P.C does not provide any grounds for seeking withdrawal. But the principles set out in the judicial pronouncements discussed herein above will govern the issue. Therefore, valid grounds for seeking withdrawal shall be public policy, interest of administration, expediency to proceed with the prosecution for reasons of State and paucity of evidence. The above broad principles have been specifically formulated by the Apex Court in Ajith Kumar's case (*supra*), as already pointed out. It is also to be noted that the learned Public Prosecutor may withdraw from prosecution not merely on ground of paucity of evidence but also on broad principles of public justice. The mere fact that permission was given by the Government to proceed for withdrawal and the Court must take effort to elicit reasons for withdrawal so as to ensure that the Public Prosecutor was satisfied with the withdrawal of prosecution for good and relevant reasons. Similarly, while granting consent, the Court must be satisfied that the Public Prosecutor has not improperly exercised his power or the same is not an attempt to interfere with the normal course of justice. Further the Court has to see that the Public Prosecutor made application in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law. That apart, the court has to see that the permission has not been sought with an ulterior motive concocted with the vindication of the law that the Public Prosecutor is duty bound to maintain and the Court would be justified in its scrutinizing the nature and gravity of the offence and its impact upon public life, especially where matters involving public fund and public trust are implicated.

27. Keeping the above principles in mind, when petition filed by the Public Prosecutor is perused, one could see that accused No.1 approached the State Government by offering his willingness to declare possession of 2 tusks of elephant in question, if he was permitted to do so. Accordingly, in exercise of the special powers under Section 40(4) of the Wild Life Act, 1972 the State Government issued notification G.O(Rt).No.538/2015/F&WLD dated 16.12.2015 and granted sanction after complying with the mandatory provisions under the Act, 1972. Thereafter, the legality of possession of the 2 pairs of elephant tusks in question by the 1st accused was accepted by the competent authority by issuing a certificate of ownership in form No.16 dated 16.12.2016 of the Principal Chief Conservator of Forest (Wild Life) and the Chief Wild Life Warden, Kerala as per order dated 16.12.2015. The further contention was that since such a certificate of ownership was issued, State of Kerala was estopped from contradicting, denying or declaring to be false the previous statements made by the Public Prosecutor in court and in order to get good faith of the people and

public interest for the Government, the Government should not be allowed to revert from its promises. Therefore, in order to manifest good faith amongst the people, certificate of ownership has been issued and thereby sought permission to withdraw the prosecution.

28. Coming to Section 40 (1) of the Wild Life Protection Act, 1972, every person having at the commencement of this Act the control, custody or possession of any captive animal specified in Schedule I or Part II of Schedule II, 1[or animal article, trophy or uncured trophy] derived from such animal or salted or dried skins of such animal or the musk of a musk deer or the horn of a rhinoceros, shall, within thirty days from the commencement of this Act, declare to the Chief Wild Life Warden or the authorised officer the number and description of the animal, or article of the foregoing description under his control, custody or possession and the place where such animal or article is kept. As per Section 40(2), no person shall, after the commencement of this Act, acquire, receive, keep in his control, custody or possession, sell, offer for sale or otherwise transfer or transport any animal specified in Schedule I or Part II of Schedule II or any uncured trophy or meat derived from such animal, or the salted or dried skins of such animal or the musk of a musk deer or the horn of a rhinoceros, except with the previous permission in writing of the Chief Wild Life Warden or the authorised officer. However, an exception is carved out in Section 40(4) of the Wild Life Act whereby the State Government may, by notification, require any person to declare to the Chief Wild Life Warden or the authorised officer 4[any animal or animal article] or trophy (other than a musk of a musk deer or horn of a rhinoceros) or salted or dried skins derived from an animal specified in Schedule I or Part II of Schedule II in his control, custody or possession in such form, in such manner, and within such time, as may be prescribed. Therefore, if a person having at the commencement of this Act, the control, custody and possession specified in such form the scheduled I or Part II of schedule II shall have to make arrangements to declare the same within 30 days from the commencement of this Act. Since the Act came into force in the year 1972 w.e.f 01.06.1973, such declaration should have been made on or before 01.07.1973 and not thereafter, as mandated under Section 41 of the Act, 1972. As per Section 42 after commencement of the Act, no person shall acquire, receive and keep in control, custody or possession of the same or stands or transported with previous permission in writing of the Chief Wild Life Conservator otherwise officer. As per Section 40(2A) introduced by Act 16 of 2003, no person other than a person having a certificate of ownership, shall, after the commencement of the Wild Life (Protection) Amendment Act, 2002 acquire, receive, keep in his control, custody or possession any captive animal, animal article, trophy or uncured trophy specified in Schedule I or Part II of Schedule II, except by way of inheritance. Section 40(2B) provides that every person inheriting any captive animal, animal article, trophy or uncured trophy under sub-section (2A) shall, within ninety days of such inheritance make a declaration to the Chief Wild Life Warden or the authorised officer and the provisions of sections 41 and 42 shall

apply as if the declaration had been made under sub-section (1) of section 40, provided that nothing in sub-sections (2A) and (2B) shall apply to the live elephant.

29. Similarly, as per Section 40(4) of the Act, the State Government may, by notification, require any person to declare to the Chief Wild Life Warden or the authorised officer [any animal or animal article] or trophy (other than a musk of a musk deer or horn of a rhinoceros) or salted or dried skins derived from an animal specified in Schedule I or part II of Schedule II in his control, custody or possession in such form, in such manner, and within such time, as may be prescribed. Therefore, in order to make declaration under Section 40(4), the State Government shall issue notification, then also, the person who is competent to declare in so far as item specified in Schedule I or part II of Schedule II shall be persons having control, custody or possession in such manner and within such time, as may be prescribed. Relying on Section 40(4), the learned counsel for intervenors submitted that since the 1st or 2nd accused did not have the control, custody or possession in such form, in such manner as prescribed under Section 40(4) of the Act, they could not declare even by invoking power under Section 40(4) of the Act.

30. That apart, it has been contended by the learned counsel for the intervenors that otherwise also no notification as mandated under Section 40(4) was effected in this case and therefore, the procedure adopted to declare the possession as valid in the present case is per se illegal. Evidently, no notification in the official gazette was published in the matter. It is relevant to note that the learned counsel for the intervenors The Controller and Auditor General of India on economic sector for the year ended March, 2017 as per Government of Kerala report No.6/18 available in the Government Website : www.agker.cag.gov.in, produced at page 93/99 as Ext.P9 in W.P(C).No.27121/2019 categorically stated that Government orders with respect to 2 elephant tusks ought to have been published by notification in the official gazette and the non declaration is in patent violation of Section 40(4) of the Wild Life (Protection) Act, 1972.

31. In fact, the grant of ownership certificate is the main challenge in W.P(c).No.27187/2019 pending before the Division Bench of this Court. Therefore, the decision of the Division Bench will be decisive in so far as the ownership certificate in dispute. As far as the question with regard to refusal of leave sought for under Section 321 of Cr.P.C is concerned, the vital question arises for consideration is whether the prosecution sought permission to withdraw from prosecution as per the settled propositions of law laid down herein above.

32. It is submitted by the learned Additional Director General of Prosecution that the interveners are interested in getting popularity and media attention in this case and they have no bona fide intention otherwise.

33. When the learned counsel for the intervenors was asked as to why the

intervenors are so particular to object withdrawal of the prosecution, or the intention is media publicity as pointed out by the learned Additional Director General of Prosecution, the learned counsel fairly submitted that law must be equal to all citizens without discrimination and withdrawing a case against the accused in the present case where 1st accused is a famous film actor is not for any other reason or in accordance with the principles settled by the Apex Court, but the reason is to give clean chit to the first accused being a film actor and the Government never exercised withdrawal of any prosecution initiated under the Forest Act, herein before.

34. Adverting to this submission, it has to be held that Law must be uniform to all, irrespective of their status as peasant, poor, middle class or higher class. Going by the settled principles as discussed in detail herein above, I don't think that the trial court addressed this question following the above principles and the trial court ventured the legality of the declaration as the sole basis, while dismissing the petition, which is the subject matter of dispute before the Division Bench of this Court.

35. Therefore, the prayer for withdrawal of prosecution of the present case sought for by the Government requires reconsideration by the trial court within the ambit of the settled principles discussed in detail herein above, for which the order required to be set aside.

36. Accordingly, Crl.R.P.No.754/2022 at the instance of the State stands allowed by setting aside the order in CMP.628/2020 dated 09.06.2022 with direction to reconsider the same by the trial court afresh following the ratio of the decisions referred herein above.

37. Crl.R.P.No.591/2022 and 593/2022 stand dismissed, since the petitioners who are accused in this case, have no right to challenge an order refusing withdrawal of prosecution, since the said procedure is the prerogative of the prosecution.

38. Parties are directed to appear before the trial court on 03.03.2023.

There shall be a direction to the trial court to hear and pass fresh orders as expeditiously as possible from the date of receipt of copy of this order, at any rate within a period of six months.