
(1981) 11 MP CK 0004
In the Madhya Pradesh High Court

Purshottam Vijay and etc.

APPELLANT

Vs

The State and Others

RESPONDENT

Date of Decision : 05-11-1981

Acts Referred:

Constitution of India, 1950 — Article 356
Criminal Procedure Code, 1973 (CrPC) — Section 253, 293, 321, 338, 35
Penal Code, 1860 (IPC) — Section 120B, 409, 419, 420, 465
Prevention of Corruption Act, 1988 — Section 5

Citation : (1982) CriLJ 243 : (1983) 28 MPLJ 694

Hon'ble Judges : C.P. Singh, J

Bench : Single Bench

Judgement

C.P. Singh, J.

These two revision petitions are being decided together because they arise out of the same order of the First Additional Sessions Judge, Indore, in Special Criminal Case No. S of 1978, of 6-6-1980 purporting to act u/s 321(b) of the Cr. P. C, allowing the Additional Government Pleader to withdraw from the prosecution and acquitting the accused-non-applicants of offences they were earlier charged with.

The relevant facts in short are as follows:

During 1969-70 the accused non-applicant No. 2 Suresh Seth was the Mayor of the Indore Municipal Corporation, the accused non-applicant No. 3 Pushpakumar Dixit, the Commissioner in the Corporation, the accused-non-applicant No. 4 Himmatsingh, an employee in it and the accused-non-applicant No. 5 Rameshchandra Dave, a local businessman. The Special police Establishment, Bhopal on 8-12-1978 put up a charge-sheet before the Sessions Judge, Indore, alleging that the accused-non-applicants 2, 3 and 4 in the capacity of public servants entered into a conspiracy with the accused-non-applicant No. 5 Rameshchandra Dave and without following the prescribed legal procedure prepared or got prepared some false documents so that they could be used as

genuine. In order to cheat the Corporation and to convert to their own use, Rs. 1,36,675-50/- were paid to the accused-non-applicant Rameshchandra Dave as the price of the 12 Road Rollers worth in fact only Rs. 24,491-20, they thereby committing the offences punishable Under Sections 120B/419, 420 or 409, 465 and 471 I- P. C. and Section 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act (against the alleged Public servants).

The Sessions Judge registered it as a Special Case No. 6 of 1978. There being more Special Judges than one for the area within which these offences were allegedly committed, the case was made over by the order dated 2-2-1979 by the Sessions Judge to Mr. M. V. Apte, First Additional Sessions Judge by the State for trying the case, vide Order No. Fa-6-2/79/B/21 dated (?) January 1979. Mr. M. V. Apte, during the course of hearing of the case decided some interlocutory applications and on 12-11-1979 framed charges charging each of the accused-non-applicants Suresh Seth, Pushpakumar Dixit, and Himmat Singh with offences punishable Under Sections 120B and 409 IPC and Section 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act and the accused-non-applicant Rameshchandra with the offences punishable Under Sections 120B, 419, 420, 465 and 471 IPC.

Thereafter it appears that Mr. M. V. Apte was transferred and the case was adjourned from time to time in the expectation of a Special Judge vice Mr. M. V. Apte being specified by the State Government. During all this period Mr. M. D. Chandwaskar, the non-applicant No. 6 in Criminal Revision No. 254 of 1980 continued appearing for the State as Public Prosecutor and the proceedings on some dates were kept on being signed by the First Additional Sessions Judge, Indore as appears from the seal but all along in the expectation of a Special Judge being specified to try the case by the State Government.

It was in this context that on 6-6-1980 Mr. D. K. Tantra, Additional Public Prosecutor for the State submitted an application before Miss Usha Shukla, First Additional Sessions Judge, Indore (who had been signing the proceedings on some earlier dates), u/s 321 Cr. P. C, praying for the complainant-State to be permitted to withdraw the prosecution. The grounds for withdrawal were:

- (i) That Section 75(3) of the M. P- Municipal Corporation Act authorizes the Commissioner to enter into a contract without inviting tenders;
- (ii) Earlier when the matter was sent to the Vigilance Commission, in its opinion no case was made out against Mr. Suresh Seth. It was even approved by the Law Secretary. The matter, however, was taken up again in 1977 culminating in the present proceedings after a lapse of about 8 years indicating that the prosecution was full of political overtones;
- (iii) Mr. Suresh Seth having again been elected as a member of the Legislative Assembly On behalf of Congress (I) the popular will was in his favour and the other accused were simply municipal servants carrying out the orders of the Corporation;

(iv) The prosecution did not have sufficient evidence to bring the charge home against the accused; and

(v) That the State thought that it would not be in the public interest to pursue the prosecution further.

This application was accompanied by a special application for hearing the case that very day (otherwise the date fixed in the case was 23-6-1980). This application being allowed, the learned Additional Sessions Judge after hearing Mr. Tantra in the presence of the accused-non-applicants Rameshchandra and Himmatsingh, Mr. M. A. Khan, learned Counsel for the accused-non-applicant Suresh Seth, and Mr. M. G. Upadhaya learned Counsel for the accused-non-applicant Pushpakumar Dixit, finding that Mr. Tantra was in charge of the case allowed the application (Under Section 321 Criminal Procedure Code) on the grounds that "the offences of which the accused persons were charged could not be substantiated and that it would be in the public interest to permit the Public Prosecutor to withdraw the prosecution. The accused persons consequently were acquitted and set at liberty."

The learned Counsel for the accused-non-applicants have raised the preliminary objection about the competency of either of the petitioners Purshottam "Vijay" and Badrinarayan Sukhla to present the revision petitions. The learned Counsel for the petitioners on the other hand rely upon the decision in Navnitdas Girdharlal Ramaya Vs. Kundalikrao Khanderao Shinde and Others, .

The facts in Navnitdas Girdharlal Ramaya Vs. Kundalikrao Khanderao Shinde and Others, are easily distinguishable. In that case Navnitlal was a private complainant. Such is not the situation here. Neither of the petitioners was a complainant in the case. But the observations of the learned Judge in that case are apt and have relevance to the decision of these petitions. The learned Judge in that case had first referred to the decisions of the Nagpur High Court in Satwarao Nagorao Hatkar v. Kanbarao Bhago Rao Hatkar ILR (1939) Nag 393 : 1938-39 Cri LJ 458 and a Full Bench of the Kerala High Court in Dy. Accountant General (Admn) Office of the Accountant General, Kerala Trivandrum Vs. State of Kerala and Others, with which he agreed and the decision to the contrary by a Division Bench of the Patna High Court in Gulli Bhagat Vs. Narain Singh, laying down as follows (at p. 1245):?

Finally there is a deeper and indeed a fundamental reason for non-interference which turns upon the position of a private prosecutor in prosecution for cognizable offences. In my opinion, the private prosecutor has no position at all in the litigation. The Crown is the prosecutor and the custodian of the public peace and if it decides to let an offender go, no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance.

He then went on to observe (at p. 1245): "The proposition is, indeed, too broadly stated. The reason? private vengeance ? may, in a given case, be a good ground

on merits for not interfering with the impugned order. But to refuse interference only because of locus would, with great respect, not be the correct legal approach in matters relating to administration of criminal -justice ? in which field, irrespective of a private complainant's locus, the community at large is also concerned and may. in a given case, have a vital locus. Again, if one could go to the police or even to a magistrate and file a criminal complaint, whether directly affected thereby or not, why should one, on the ground of locus, be prevented or debarred from challenging a withdrawal from prosecution only because one is a private complainant? This is not to say that Court must interfere. That will depend on the facts and circumstances of each case. Indeed it would, in a given case, be perfectly open not to interfere. But to refuse to touch merits because of locus may, in many an other wise serious matter, jeopardise the cause of criminal justice. With respect, therefore, I find myself unable to agree with the unqualified dictum laid down in the aforesaid Gulli Bhagat's case 1924 25 Cri LJ 446 (Pat) and would prefer to follow the ratio to the contrary laid down by the Kerala High Court in the case of the Deputy Accountant General v. State 1969 Cri LJ 966 (FB) (supra)." I am in respectful agreement with these observations.

The Nagpur High Court in Satwarao Nagorao Hatkar v. Kanbarao Bhago Kao Hatkar 1938 39 Cri LJ 458 (supra) which has already been referred to laid down that:

It is competent for a private person to apply in revision against an order of discharge...after the withdrawal of a prosecution.

Similarly a Full Bench of the Kerala High Court also in Deputy Accountant General v. State 1969 Cri LJ 966 (supra) held that the High Court can be expected to exercise its revisional powers even suo motu and the locus standi of the persons bringing the matter to the notice of the High Court could be of no consequence. ;

Without going into the question of locus standi which is generally dependent upon the question whether the person invoking the aid of the High Court is a person aggrieved, suffice it to say, that the doctrine of locus standi even of a stranger is gradually gaining ground, provided he is not a busybody or mischievous intruder. Lord Denning while considering the question of locus standi with regard to granting certiorari, mandamus Or prohibition has observed that the Courts of common law "have always kept their options open. They have held that it is in the discretion of the Court whom it shall hear: and whether to grant such a remedy or not. The tendency in the past was to limit them to persons who had a particular grievance of their own over and above the rest of the public. But in recent years there hag been a remarkable series of cases in which private persons have come to the Court and have been heard. There is now a much wider concept of locus standi when complaint, is made against a public authority. It extends to anyone who is not a mere busybody but is coming to the Court on behalf of the public at large."" (Lord Denning in the Discipline of Law at page 117). But those observations were confined to prerogative writs (now replaced by orders with the same names) of certiorari. mandamus and prohibition aimed

at restraining the abuse or misuse of power by a public authority. Here I am concerned with the powers of the High Court u/s 397 read with Section 401 Cr. P. C., at the instance of neither of whom is a mere busybody Or a total stranger. Purshottam Vijay of them is an Indian citizen resident of Indore, a tax payer and a public worker. The other petitioner also apparently has the same qualifications except that he does not claim to be a public worker.

"The power of revision in criminal cases vesting in the High Court, though wide and also exercisable suo motu is a power which, generally speaking, is narrower and more limited than its appellate power, though in certain respects it has a somewhat wider scope. It is discretionary and cannot be invoked as of right such as is the case of appellate power. Broadly stated, the object of conferring revisional power on the High Court under S- 435 and Section 439 Cr. P. C. is to clothe the highest court in a State with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. The error or defect may arise from misconception of law, irregularity of procedure, misreading of evidence, misapprehension or misconception about law or facts, mere perversity or even undue hardship or leniency.

The real core of this power is that its exercise is justified only to set right grave failure of justice and not merely to rectify every error however inconsequential. Merely because the lower Court has taken a wrong view of law or misapprehended the evidence on the record cannot by itself justify interference on revision unless it has also resulted in grave injustice. It is no doubt not possible and is also not practicable to lay down any rigid test of uniform application and the matter has to be left to the sound judicial discretion of the High Court in each case to determine if it should exercise its extraordinary power of revision to set right injustice. Administration of criminal justice is as a matter of general policy a function which the State performs and private parties who may be inspired by a feeling or spirit of vengeance or vindictiveness are ordinarily not encouraged to prosecute criminal proceedings except when for special reasons the cause of justice so demands. The High Court is, therefore, ordinarily disinclined to interfere with the orders of subordinate criminal courts in which the State is the prosecutor at the instance of private parties except where for some exceptional reason it considers proper to do so in the larger interests of justice." (Per Dua, J. in Pratap Vs. State of U.P. and Others, .

Even though the foregoing observations were made while His Lordship was dealing with Sections 435 and 439 of the old Cr. P. C, those observations hold good also while interpreting Section 397 read with S- 401 Cr. P. C. together. u/s 401, Criminal P. C. in the case of any proceeding the record of which has been called for by itself or which has been reported for orders. Or which otherwise comes to its knowledge the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance the sentence, and, when the Judges

composing the Court of Revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 429. These powers do not create any right in the litigant but only conserve the power of the High Court to see that justice is done in accordance with the recognised rules of criminal jurisdiction and that subordinate Courts do not exceed their jurisdiction or abuse their powers vested in them by the Code. The object of revisional jurisdiction is to confer upon superior criminal courts a kind of paternal Or supervisory jurisdiction. And the idea is to correct miscarriage of justice which may arise from misconception of law. or irregularity of procedure, or neglect of proper precaution or apparent harassment of (sic) treatment and the like.

From the nature of these powers, it follows that the High Court can act either of its own motion or on the motion of even a stranger, who may be instrumental in bringing to the knowledge of the High Court a matter which otherwise the High Court may not have known. Of course, the normal course for the High Court to be seized of a matter is either at the instance of the prosecutor or the accused or the High Court itself but in some rare cases information may be received by the High Court even from a stranger. Thus, the High Court can interfere on information contained even in the newspaper or a placard on a wall or on an anonymous postcard, provided it considers that sufficient ground has been established to justify its so doing. At the same time the High Court has to be loath to take action on an application for revision presented by a third party on its own responsibility and without authority from either of the parties. It becomes the duty of the High Court to see that a stranger to the proceedings does not employ his information as an instrument of vengeance on the accused Or attempt to serve his own private end. An application by a third party, therefore, merely serves the function of bringing the matter to the knowledge of the Court and in such a proceeding his counsel should not expect to be heard. (See *Shailabala Devi Vs. Emperor* .

Thus, irrespective of the question of the petitioners having locus standi the questions which they have raised in their petitions are important enough as would have led this Court even suo motu to take their cognizance.

The order in question has been challenged on a number of grounds. First of them is that Miss Usha Shukla, First Additional Sessions Judge, Indore did not have jurisdiction to pass the order.

Section 6 of the Criminal Law Amendment Act, 1952 lays down that (1) the State Government may, by notification in the official gazette, appoint as many Special Judges as may be necessary for such area or areas as may be specified in the notification to try the following offences, namely:?

(a) an offence punishable u/s 161, Section 162, Section 163, Section 164. Section 165 or Section 165A of the I. P- C. or Section 5 of the Prevention of Corruption Act, 1947;

(b) any conspiracy to commit or any attempt to commit or any abetment of any

of the offences specified in Clause (a).

(2) a person shall not be qualified for appointment as a Special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Cr. P. C, 1898.

The State Government did vide notification No. 2C097-9170-XXI-B dated 9-9-1960, while exercising the powers conferred under Sub-section (1) of S- 6 of the Criminal Law Amendment Act, appoint all the Additional Sessions Judges of the sessions division (including sessions division Indore) to be the Special Judges in their respective sessions divisions for the trial of offences specified therein. Miss Usha Shukla, therefore, by virtue of this notification did become a Special Judge. But this provision has to be read along with Section 7 of the Criminal Law Amendment Act, 1952 laying down as follows:?

(1) Notwithstanding anything contained in the Cr. P. C, 1898, or in any other law the offences specified in Sub-section (1) of Section 6 shall be triable by Special Judges only.

(2) Every offence specified in Sub-section (1) of Section 6 shall be tried by the Special Judge for the area within which it was committed, or where there are more Special Judges than one for such area, by such one of them as may be specified in this behalf by the State Government.

(3) When trying any case, a Special Judge may also try any offence other than an offence specified in Section 6 with which the accused may, under the Cr. P. C, 1898, be charged at the same trial.

Both these provisions have to be construed harmoniously and have to be given effect to. *Generalia specialibus non derogant* (General things do not derogate from special things) and *Generalibus specialia derogant* (Special things derogate from general things). Section 7 (2) of the Criminal Law Amendment Act requires that where there are more Special Judges than one for. such area (the case shall be triable) by such one of them as may be specified in this behalf by the State Government. There is no dispute that there are more than one Special Judge in the Indore sessions division, and Miss Usha Shukla as such has not been specified in this behalf by the State Government to try the case in which she came to pass the impugned order. Indeed as the narrative of facts indicates Miss Usha Shukla earlier to the passing of the impugned order had been adjourning the case from time to time in the expectation that she may be specified in this behalf by the State Government.

On the other hand, it is also not disputed as already stated that the Sessions Judge, Indore by his order of 2-2-1979 had made over the case (Special Case No. 6 of 1978) to Mr. M. V. Apte, First Additional Sessions Judge, after he had been appointed Special Judge by the State Government for trying the case vide order No. Fa-6-2/79/B/21 dated(?) Jan. 1979 under powers exercisable by the State Government u/s 7 (2) of the Criminal Law Amendment Act. That order has

so far been not repealed-It cannot be denied that the function exercisable u/s 321 Cr. P. C by a Magistrate or a Judge is judicial in nature. If that Magistrate or Judge suffers from lack of jurisdiction, the order passed by him or her does not amount to an order in law.

No doubt their Lordships of the Supreme Court in Gokaraju Rangaraju Vs. State of Andhra Pradesh, recognized the de facto doctrine laying down that it was well established that the acts of the officers de facto performed by them within the scope of their assumed official authority, in the interest of the public or third persons and not for their own benefit, are generally as valid and binding. as if they were the acts of officers de jure. But the facts of that case are easily distinguishable. In the case before me, as already pointed out, Miss Usha Shukla, the First Additional Sessions Judge had been signing a number of proceedings with the expectation that, she would be appointed the Special Judge for trying that particular case. That, however, did not happen. She all of a sudden assumed jurisdiction to deal with the case on the very date the application had been made even though the case otherwise had stood adjourned to 23-6-1979.

Their Lordships of the Supreme Court in Gokaraju Rangaraju v. State of A. P. (supra) were concerned with the numerous judgments pronounced by the Judge whose jurisdiction was being challenged before their Lordships, entailing titles settled, declarations made, rules issued, injunctions and decrees granted and even executed. Their Lordships of the Supreme Court in that case were confronted with the questions: What was to happen to the sentences imposed? Are convicted offenders to be set at liberty and to be tried again? Are acquitted accused to be arrested and tried again? and in their opinion therefore the matter of public policy was clearly involved in that case. In the case before me such is not the situation. "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." (Per Lord Halsbury L. C. Quinn V- Leathern 1901 AC 495 , "The only use of authorities or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him" (Per Sir George Jessel, M. R., In Re Hallett (1880) 13 Ch.D 696 . The law in our country is the same.

The facts of the case of Shri-krishna v. State of M. P. 1975 Jab LJ 13 are again distinguishable on facts. In that case the required notification regarding the appointment of Mr. S. R. Ghanekar, Second Additional Sessions Judge, Indore as a Special Judge had in fact been published on 26-1-1968, though it was a delayed publication. In the case before me there is no notification at all specifying Miss Usha Shukla to be a Special Judge. Moreover, in that case no objection was raised before the learned Special Judge at any stage of the trial that due to non-publication of the notification in the official gazette he had no jurisdiction to try the case. In the case before me as just shown by the previous proceedings not only the Judge herself but also the accused persons had manifested that the proceedings were being adjourned from time to time in the

expectation of some Judge being specified u/s 7 (2) of the Criminal Law-Amendment Act. The signing or proceedings by Miss Usha Shukla was only in nature of a ministerial act as distinguished from a judicial act. There being more than one Special Judge it could also not be assumed that it would have been only Miss Usha Shukla who could have been specified the Special Judge for the case. It could as well be that someone else among the Special Judges could have been so specified.

The argument by the learned Counsel for the accused-non-applicants that Miss Usha Shukla was successor-in-office within the meaning of Section 35(1) Cr. P. C, itself begs the question whether Miss Usha Shukla was the successor-in-office. She could not have been one in the absence of a notification (or order) by the State Government u/s 7 (2.) of the Criminal Law Amendment Act.

The next ground attacking the order is that Mr. Tantra could not have presented the application in question. Section 321 Cr. P. C. clearly contemplates an application by the Public Prosecutor; or Assistant Public Prosecutor; but the further qualification is that he must be in charge of the case. Mr. Tantra admittedly only on the date of the presentation of the application on 6-6-1979 had appeared before the Judge, but before that date on every other date, it was Mr, M. D. Chandwaskar, who had been conducting the prosecution. There is no documentary evidence that Mr, Tantra had appeared derivatively for Mr. Chandwaskar, Or that Mr. Chandwaskar was ill on that date, though there appears a reference in the impugned order regarding Mr. Tantra's submission that Mr. Chandwaskar, Public Prosecutor was away on leave and that he was in charge of the case. Their Lordships of the Supreme Court in State of Punjab Vs. Surjit Singh and Another, laid down that "the reasonable interpretation to be placed u/s 494, in our opinion, is that it is only the Public prosecutor, who is in charge of a particular case and is actually conducting the prosecution, that can file an application under that section, seeking permission to withdraw from the prosecution. If. a Public Prosecutor is not in charge of a particular case and is not conducting the prosecution, he will not be entitled to ask for withdrawal from prosecution, u/s 494, Cr. P. C".

It could as well be, as argued by the learned Counsel for the petitioners, that Mr. Tantra, in order to steal a march over Mr. Chandwaskar the Public Prosecutor in charge of the case, brushing aside Mr, Chandwaskar too eagerly grabbed the opportunity and proceeded to comply with the directions of the Home Secretary, Bhopal contained in the wireless message as follows:

IND DE BPL OR NR 1573 GR 81 TO: DISTT MAGISTRATE INDORE IF: SUPDT. OF POLICE INDORE FM: HOME SEC. BHOPAL NO. 1951/80/X-I 5/6/80.

Reference your memorandum Number 786/jC/80/dated 22nd April 1980 Reg. Criminal case against Shri Suresh Seth ex-Mayor and three others (.) Govt. have decided to withdraw the case No. 6/78 in the court of first ADJ Indore u/s 49/120B/465/471 IPC put up by the Sp. Police Establishment. Bhopal against

Shri Suresh Seth ex-Mayor Municipal Corporation, Indore and three others (.) the Govt. Pleader should take action for moving the Court to permit withdrawal of the case (.) para (?) formal orders from Law Deptt. follow (.)

On the other hand, Mr. Tantra's action could be construed typical of a conscientious officer who without wasting any time discharged his duties with promptitude. The fact, however, remains that apparently the application for withdrawal had not been made by the Public Prosecutor in charge of the case.

The terms of Section 321 Criminal P. C are clear that it is not obligatory for the Public Prosecutor to withdraw from the prosecution. It gives the Public Prosecutor a discretion whether to withdraw or not to do so. It may sometimes become necessary for him, therefore, to consult the District Magistrate or other authorities before exercising his discretion. (See generally M.N. Sankarayan Nair Vs. P.V. Balakrishnan and Others, . From the records in this case, it is not clear whether Mr. Chandwaskar would in fact have exercised his discretion of withdrawing from the case.

By nolle prosequi in England is meant a stay of proceedings entered by the leave of the Attorney General at anytime before the judgment. But it is not equivalent to an acquittal and is no bar to a new indictment for the same offence. This power of Attorney General is not subject to any control by the Courts. Either the prosecution or the accused person can apply to the Attorney General for his direction that a nolle prosequi be entered and such application is made quite informally, e. g. by letter (see generally Section 293 ? Heading "Nolle prosequi" at page 113 ? Archbold ? Criminal Pleading Evidence and Practice ?35th Edition). But the proceedings u/s 321 Criminal p. C. are regulated by the term of the section. The provisions contained u/s 321 Cr. p, C, therefore, only have an outward similarity with nolle prosequi based on common law of England.

That takes us to the next ground regarding the necessity of consent by the Court. No doubt the section gives a wide discretion to the Court either to grant or withhold consent. But like all judicial discretions it must not be exercised arbitrarily Or fancifully but only on sound legal principles. Their Lordships of the Supreme Court in The State of Bihar Vs. Ram Naresh Pandey, laid down that "the judicial functions, therefore, implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive functions of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. In this context it is right to remember that the Public Prosecutor though an executive officer is, in a larger sense, also an officer of the Court and that he is bound to assist the Court with his fairly-considered view and the Court is entitled to have the benefit of the fair exercise of his function. It has also to be appreciated that in this country the scheme of the administration of criminal justice is that the primary responsibility of prosecuting serious offences (which are classified cognizable offences) is on the executive authorities. Once information of the commission of any such

offence reaches the constituted authorities, the investigation, including collection of the requisite evidence, and the prosecution for the offence with reference to such evidence, are the functions of the executive. But the Magistrate also has his allotted function in the course of these stages.

For instance, in the course of investigation, a person arrested must be brought before him within 24 hours. Continuance of the arrested person in detention for purposes of investigation from time to time has to be authorised by him. A search can be conducted on the issue of warrant by him. Statements of witnesses and confessions may be recorded by him. In an appropriate case he can order investigation or further investigation. In all these matters he exercises discretionary functions in respect of which the initiative is that of the executive but, the responsibility is his. His discretion in such matters has necessarily to be exercised with reference to such material as is by then available and is not a *prima facie* judicial determination of any specific issue. The Magistrate's functions in these matters are not only supplementary, at a higher level, to those of the executive but are intended to prevent abuse. Section 494, Cr. P. C., requiring the consent of the Court for withdrawal by the Public Prosecutor is more in line with this scheme, than with the provisions of the Code relating to inquiries and trials by Court. It cannot be taken to place on the Court the responsibility for *prima facie* determination of a triable issue.

For instance the discharge that results therefrom need not always conform to the standard of "no *prima facie* case" Under Sections 209(1) and 253(1) Cr. P. C. or of "groundlessness" Under Sections 209(2) and 253(2) Cr. P. C. This is not to say that a consent is to be lightly given on the application of the Public Prosecutor, without a careful and proper scrutiny of the grounds on which the application for consent is made. What the Court has to determine, for the exercise of its discretion in granting or withholding consent, is not a triable issue on judicial evidence. It is not correct to say that where the application is On the ground of inadequacy of evidence requiring judicial consideration it would be manifestly improper for the Court to consent to withdrawal before recording the evidence and taking it into consideration. To hold so would be engrafting on the wide terms of Section 494, Cr. P. C. an exception Or a proviso limited to such a case. This would not be a permissible construction of the section. But such evidence as may already have been recorded by the time the application is made can be looked into and considered in such cases, in order to determine the impropriety of the withdrawal as amounting to abuse or an improper interference with the normal course of justice. Hence where an application for withdrawal u/s 494. Cr. P. C. is made on the ground of insufficiency or meagreness of reliable evidence that is available, it is not an improper exercise of discretion for the Court to grant consent before evidence is taken, if it was reasonably satisfied otherwise, that the evidence is actually taken, is not likely to result in conviction."

One of the reasons for according her consent by the learned Judge is that the offences of which the accused persons were charged could not be substantiated.

This reason on the face of the record does not appear to be good; for we have seen that the charges were framed against the accused non-applicants and no progress had since then been made. There was, therefore, no material before the learned Judge to reason out that the offences of which the accused persons were charged, could not be substantiated. (See Bansi Lal Vs. Chandan Lal and Others, .

The second reason for according consent is that it would be in the public interest to permit the public prosecutor to withdraw the case. The term "Public interest" is vague. It is most difficult to define, though in a set of circumstances, it may be easy to comprehend. In Rajender Kumar Jain and Others Vs. State Through Special Police Establishment and Others, after reviewing several earlier decisions of the Supreme Court, their Lordships of that Court gathered as follows (para 13);?

("Thus, from the precedents of this Court; we gather).

1. Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the executive.

The withdrawal from the prosecution is an executive function of the Public Prosecutor.

The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.

The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.

The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes sans Tammani Hall enterprises,

The Public Prosecutor is an officer of the court and responsible to the Court.

The Court performs a supervisory function in granting its consent to the withdrawal.

The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous consideration. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

We may add, it shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The Court has a responsibility and a stake in administration of criminal justice and so has the

public Prosecutor, its "Minister of Justice". Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of Section 321, Criminal Procedure Code. The independence of the judiciary requires that once the case has travelled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case."

The learned Judge having failed to lay down facts constituting public interest, merely the election of one of the accused to the State Legislative Assembly and the other accused being simply municipal servants carrying out the order of the Corporation do not in themselves constitute public interest.

Finally Mr. Chhazed contends that as there was no elected Government at the time the wireless message had been sent to withdraw the case. No withdrawal could have legally taken place. There is no doubt that on 5-6-1979 when the message was sent which led Mr. Tantra to present the application before the First Additional Sessions; Judge, the President of India under Article 356 of the Constitution had assumed to himself the functions of the Government, powers of the Governor and other authority in the State and there was no elected Government as exists otherwise, but from this it does not follow that all the functions of the State had come to an end. They were being exercised according to law, and the wireless message is one of incidents of those functions being exercised. In the absence of any evidence extraneous to the wireless message, it would be of no avail to speculate about the motive of the Government preceding the sending of the wireless message which Mr. Chhazed seems to do in his address.

To conclude, irrespective of the question of the petitioners having locus standi the questions which they have raised in their petitions are important enough as would have led this Court even suo motu to take their cognizance. It was only Mr. M. V- Apte. who out of several special Judges had been specified by the State Government to try the special case No. 6 of 1978. That notification was neither expressly nor impliedly repealed specifying Miss Usha Shukla as a Special Judge for the trial of that case. It was the Public Prosecutor Mr. Chand-waskar, who had been in charge of the case and not Mr. Tantra, who could not have ordinarily submitted an application u/s 321 Cr. P. C Since the application was submitted by Mr. Tantra. it is not clear whether Mr. Chandwaskar had exercised his discretion. The act of according consent by the Judge being a judicial act, the consent could have been accorded only on sound legal reasons which remain unspelt in the order of the Judge.

The order in question is set aside. The records of the case be sent back to the trial Court, from where they were earlier called, for further progress in the case according to law.