
(1993) 02 KL CK 0055
In the High Court Of Kerala
Case No : Criminal R.P. 762 of 1992

State of Kerala

APPELLANT

Vs

R. Balakrishna Pillai and Others

RESPONDENT

Date of Decision : 03-02-1993

Acts Referred:

Constitution of India, 1950 — Article 32
Criminal Procedure Code, 1973 (CrPC) — Section 321
Penal Code, 1860 (IPC) — Section 109, 120B, 161, 201, 301
Prevention of Corruption Act, 1988 — Section 5(1), 5(2)

Citation : (1993) 1 KLJ 593

Hon'ble Judges : Chettur Sankaran Nair, J

Bench : Single Bench

Advocate : M. Ratna Singh, State Prosecutor, for the Appellant; G. Ramaswamy, Thomas V. Jacob, James Koshy, K.L. Narasimhan, Anil Xavier, S. Narayanan Poti, Raghava Kurup, Pirappancode V. Sreedharan Nair, K. Jagadishchandran Nair, G. Janardhana Kurup and A.K. Sreenivasan, for the Respondent

Judgement

Chettur Sankaran Nair, J.—This Revision Petition by the State of Kerala is directed against an Order of the Special Judge (Idamalayar Investigations) Ernakulam, declining consent to withdraw from prosecution of sixth accused in C.C. 1/91. Twenty two persons were charged with offences punishable under Sections 120-B, 161, 409, 420, 430, 301 and 201 read with Section 109 of the Indian Penal Code, and also u/s 5(2) read with Section 5(1)(c) and (d) of the Prevention of Corruption Act. The allegation was that Respondents 1, 2 and 5 to 13 entered into a conspiracy to award a contract to the remaining accused, with a view to benefit themselves and the contractors, causing loss to the State Exchequer. Accused No. 1 was the Minister for Electricity, A-6 the Power Secretary, and A-2, A-5 and A-7 to A-13 other public servants at the material time.

2. The Public Prosecutor in charge of the case, moved Crl. M.P. No. 79/92 to withdraw from the prosecution against the sixth accused. The Leader of

Opposition in the Kerala Legislative Assembly, Shri V.S. Achuthanandan sought, impleadment in that petition, claiming an interest in the matter. The Court below neither allowed, nor refused impleadment. Yet, accepting the contentions of the non party, consent was refused. Shri V.S. Achuthanandan filed Crl. M.P. No. 2449/92 before this Court, seeking impleadment in these proceedings.

3. Though withdrawal was sought on the ground of insufficiency of evidence, other grounds like considerations of public policy, and need to sustain the morale of the civil services, were pressed into service before this Court. According to the State Prosecutor, prosecution, was launched out of political vendetta.

4. Paragraph (21) of the Revision Petition reads:

It is submitted that the criminal case was initiated against the 6th Respondent and Ors. on political reasons. The Left Democratic Front Government had political score to settle with the first Respondent and the launching of the prosecution was motivated by political vendetta. Ext. P-1 report makes it clear that the charges levelled against the Respondents will not stand on going through the entire evidence. The Public Prosecutor considered all these aspects and was himself satisfied that the Respondents, especially the 6th Respondent is fully innocent to the charges levelled against him. The then Director General of Police while submitting the factual report (Ext. P-1) has also considered the aspect of demoralisation of senior officers, political vendetta involved in the case, and all such relevant aspects involving public policy before filing the petition for withdrawing from the prosecution.

5. The nature and width of the power exercised by the Public Prosecutor and the Court, in the matter of withdrawing from prosecution, comes into sharp focus. The locus standi of a third party or a non party in an application u/s 321 of the Code of Criminal Procedure, also arise for consideration.

6. The State Prosecutor submitted that the Court below misdirected itself in law, and usurped a jurisdiction it did not possess. Shri G. Ramaswamy, Senior Advocate and Sarvashri S. Narayanan Poti, G. Janardhana Kurup, K.L. Narasimhan, James Koshy, N. Raghava Kurup, Pirappancode V. Sreedharan Nair, K. Jagadishchandran Nair, Thomas V. Jacob and A.K. Sreenivasan, appearing for Respondents endorsed the submissions made by the State Prosecutor, while Shri Kallada Sukumaran who filed the application for impleadment supported the order of the Court below.

7. The Public Prosecutor exercises a power in the nature of a prerogative. In Criminal Law, the State and its instrumentalities enjoy prerogatives, akin to crown prerogatives in England. The power exercised by the Public Prosecutor u/s 321 of the Code of Criminal Procedure is in the nature of such a prerogative. The State may advise him in this regard, but he must exercise his mind independently, and he ought not to act under dictation. If he acts honestly, his act cannot be questioned. The limited role of the Court is only supervisory, and not adjudicatory or appellate in character.

8. This is the law laid down by the Supreme Court in a long line of decisions. In *State of Punjab Vs. Surjit Singh and Another*, a Constitution Bench of the Court said:

In cases in which the Public Prosecutor appears, it is for him to decide whether he would continue with the prosecution or withdraw from it. This power cannot be subject to the wishes of a third person, even though he might be interested directly in the case.

(emphasis supplied)

Again in *Rajender Kumar Jain and Others Vs. State Through Special Police Establishment and Others*, , it was observed:

The Public Prosecutor is an officer of the Court. He sets the criminal law in motion in the Court, for the people. So it is he that is entrusted with the task of initiating the proceedings for withdrawal from the prosecution.

Still later in *Sheonandan Paswan Vs. State of Bihar and Others*, the Court by majority held that the competent authority to move for withdrawal is the Public Prosecutor, and that the Court has only the limited power to examine whether the Public Prosecutor in charge of the case had acted in good faith.

The Public Prosecutor should normally be credited with fairness, in exercise of his power u/s 321... To contend that the Court when it exercises its limited power of giving consent u/s 321 has to assess the evidence and find out whether the case would end in acquittal or conviction, would be to rewrite Section 321 Code of Criminal Procedure and to concede to the Court a power which the scheme of Section 321 does not contemplate.... All that is necessary to satisfy the section, is to see that the Public Prosecutor acts in good faith.

(emphasis supplied)

It is not for the Court to decide whether withdrawal is justified on the facts, or whether the offence involved is so serious as to merit punishment: These, are matters for the Public Prosecutor to consider As long as he acts in good" faith in seeking withdrawal from prosecution, so long his action is not liable to be challenged. Every system must work on trust. The Court even where it is required to act as a watch dog, is not required to act like a hound.

9. Power, u/s 321 of the Code of Criminal Procedure can be exercised, even in cases where evidence is sufficient to warrant conviction. In *Rajender Kumar Jain and Others Vs. State Through Special Police Establishment and Others*, the Apex Court said:

Paucity of evidence is not the only ground on which the Public Prosecutor may withdraw from the prosecution. We have often known how expedient and peceSsary it is in the public interest for the Public Prosecutor to withdraw from prosecutions arising out of mass agitations, communal riots, regional disputes, industrial conflicts, student rarest, etc... An elected Government, sensitive and

responsive to the feelings and emotions of the people, will be amply justified if for the purpose of creating an atmosphere of good will or for the purpose of not, disturbing a calm which has descended it decides not to prosecute the offenders involved or" not to proceed further with t prosecutions already launched.

(emphasis supplied)

The Majority opinion in Sheonandan Paswan Vs. State of Bihar and Others, , reiterated this view:

... paucity of evidence is not the only ground....political purposes and political vendetta afford sufficient ground for withdrawal.

(emphasis supplied)

When the State has confessed political vendetta, there is no need to make a further enquiry into the reason. The Public Prosecutor is well within his rights, in withdrawing from a prosecution launched for political reasons, and motivated by vendetta. There is no profit in saying as Counsel for the non-party says, that the "L.D.F. Government initiated the prosecution" and that "the present U.D.F. Government decided to withdraw from it". Government is a perennial constitutional entity, though the personnel that man it, or policies that guide it, may change. Acts of the "earlier" Government take no precedence over acts of the "present" Government. Experiences of life reveal that the earth belongs in usufruct to the living.

10. The files produced before me indicate that the Administrative Department decided to launch a prosecution. It is seen that the Director General of Police felt that there were no grounds to launch a prosecution against some of the accused, including the 6th accused. The Law Secretary, too, thought so. But, the Administrative Department said:

Law Department is not part of the Government.

According to 6th accused, the Leader of Opposition was annoyed with him, for imposing a huge fine on an abkari contractor, close to him. This allegation is denied. The correctness of this need not be decided. But the keenness of the Government to launch a prosecution, waving away the Law, Department as an alien, shows that vendetta alleged by the Prosecutor cannot be dismissed out of hand. That is all that needs be considered in deciding if the Public Prosecutor acted honestly.

11. Another ground stated for withdrawal is that fear of prosecution has affected the morale of senior civil servants and that the situation has to be remedied. They hesitate to take decisions for fear of reprisals, says the State Prosecutor. Officers in the higher echelons of civil service, should be fearless and must display initiative. While they should be accountable, they should not be put under the Sword of Damocles. That will make civil services counter-productive or dysfunctional, reducing its members to the position of quill-pushers. The ground

of policy stated in support of withdrawal, is thus well justified. I am not unaware, that the petition filed before the Court below was cryptic. But, when grounds are pleaded in this Court, they must be considered, more so, when the Court below viewed the whole matter, in the wrong perspective.

12. While the Court below was to exercise a supervisory jurisdiction and ascertain whether the Public Prosecutor acted bona fide, it went far beyond into an adjudicatory process. In paragraphs 14, 15 and 16 of its order, the Court below considered the charges against the accused and stated:

One Anr. important allegation against the 6th accused is that he even tried to scuttle the judicial enquiry ordered by the Government. In the face of these serious allegations against the 6th accused, I am not persuaded to hold that the learned Prosecutor applied his mind as a free agent.

The Court thought that the Prosecutor did not act properly, because in its "view" and in the face of "serious allegations" it was "not persuaded" to agree with the Public Prosecutor. This is clear misdirection in law. The views of the Court below, nor its persuasions, nor the seriousness of the charges do not matter. What mattered was, whether the Public Prosecutor acted in good faith in coming to the conclusion to which he came. Shri G. Ramaswamy submitted that the Court below was carried away by the enormity of the charges. Perhaps, as Baron Alderson stated in *Reg v. Hedge* 1838 (2) Lewin 227.

the mind is apt to take a pleasure in adapting circumstances to one Anr. , even by straining them a little... The more ingenious the mind, the more likely it is to consider such matters and mislead itself.

Prejudice generated by, the enormity of the charges, played, high by Counsel for a non-party, persuaded the Court below to wrong conclusions. Nothing is easier than making allegations, and few things are more difficult than disproving them. Judicial process should not sail with the winds of prejudice. That has happened, and hence the order under challenge is vitiated by misdirection.

13. Relying on the decision of a Constitution Bench of the Supreme Court in *S. Pratap Singh Vs. The State of Punjab*, Counsel for Respondents submitted further, that this Court should quash the charges. The Supreme Court observed:

We consider that when a Court is satisfied that there is an abuse or misuse of power and its jurisdiction is involved, it is incumbent on the Court to afford justice to the individual.

Shri Ramaswamy would say that a drop of poison in the milk will make the milk poisonous, and that the poison of venuetta vitiates the prosecution. Counsel for first accused Minister, accused 2, 5 to 10, 12 and 13 added that these accused stand in the same position of sixth accused, and that the prosecution against all of them being impelled by vendetta, should either be quashed, or ordered to be withdrawn. I do not think that it is proper to "adopt either of these courses. There is no motion to quash the prosecution. As far as withdrawal is concerned,

it is for the Government to the extent it concerns it, and for the Public Prosecutor to the extent it concerns him, to consider whether the prosecution against the Minister, the officials and any other person should be withdrawn, having regard to the state of affairs revealed, from Ground No. 21.

14. The next question relates to the locus standi of a third party or non-party in proceedings u/s 321 of the Code of Criminal Procedure. Shri V.S. Achuthanandan, as already stated, has filed Srl. M.P. No. 2449/92 for impleading him as a party to this Criminal Revision Petition. Dealing with a similar application, which was neither allowed nor rejected, the Court below in paragraph (5) of its order observed:

...where public interest is involved, a third party like Opposition Leader of the State Legislative Assembly, is well within his right to oppose the move to Withdraw the prosecution....

(emphasis supplied)

These facile assumptions regarding "public interest" and "right", militate against principle and precedent. There is no "public interest", the State being the "Master of the litigation" for purposes of Section 321 of the Code of Criminal Procedure Sheonandan Paswan Vs. State of Bihar and Others, and there is no right in a third party State of Punjab Vs. Surjit Singh and Another, . Public interest litigant is an alien figure on the landscape of criminal justicing system. The Supreme Court had never recognised locus standi in third parties in criminal law. In Thakur Ram Vs. The State of Bihar, the Court observed:

In a case which has proceeded on a police report, a private party has really no locus standi... Barring a few exceptions in criminal matters, the party who is treated as the aggrieved party, is the State which is the custodian of the social interests of the community at large....

Even in public interest litigations where the rigours of locus standi relent, , warning, signals have been flashed, in S.P. Gupta Vs. President of India and Others, The Court said:

But we must be careful to see that the member of the public, who approaches the Court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or, other oblique consideration. The Court must not allow its process to be abused by politicians and Ors. to delay legitimate administrative action, or to gain a political objective.

15. As far as locus standi u/s 321 of the Code of Criminal Procedure is concerned the position is well settled by a long line of decisions. A Constitution Bench of the Supreme Court said in State of Punjab Vs. Surjit Singh and Another,

It is for the Public Prosecutor to decide whether he would continue or withdraw... the power cannot be subject to the wishes of third person, even though he might be interested.

(emphasis supplied)

16. The Court below as also Counsel for Petitioner-non party (Petitioner in Crl. M.P. No. 2449/92) relied on the minority decision in Sheonandan Paswan Vs. State of Bihar and Others, ; to contend for locus standi. It was argued that a minority opinion is entitled to weight. There can be no doubt about this. Any observation of the Apex Court, in any context, is entitled to the highest respect. But, when there are two views, the majority view must prevail. The further argument that the majority opinion does not disapprove of the minority opinion, is bereft of merit. In paragraph 74 (the majority opinion), it was observed:

The State is the Master of the litigation in criminal cases... A private complaint can still be filed, if a party is aggrieved by the withdrawal of the prosecution

(emphasis supplied)

It follows that:

(a) State is the only Authority (other than the court giving consent) for purposes of Section 321;

(b) a third party/non party has no locus standi, for that reason; and

(c) that even if a private party has a grievance, his remedy (which means his only remedy) is by way of a private complaint;

17. Thus, there is no room for doubt, or debate regarding locus standi. It has been the law since State of Punjab Vs. Surjit Singh and Another, that,

the power (under Section 321) cannot be subject to the wishes of a third person, even though he might be interested.

The view in Surjit Singh and in Sheo Nandan finds reaffirmation in Janata Dal Vs. H.S. Chowdhary and Others, , Simranjit Singh Mann Vs. Union of India and another, and in second Janata Dal Vs. H.S. Chowdhary and Others, . In Simranjit Singh Mann Vs. Union of India and another, , the Supreme Court held that seven by invoking Article 32 of the Constitution (which itself is a fundamental right), a third party cannot question the legality, validity or correctness of an order of a criminal Court. It was observed:

Even if there are million questions of law to be deeply gone into and examined in a criminal case of this nature, registered against specified accused persons, it is for them and them alone to raise all such questions and challenge the proceedings ... and not for third parties under the garb of public interest litigation.

(Emphasis supplied)

In the recent decision in Janata Dal Vs. H.S. Chowdhary and Others, , the Court noticed the earlier decisions in extenso and held that a third party has no locus standi in a criminal proceeding. The Court quoted the observation noticed above,

and held:

...it is needless to emphasize that the requirement of locus standi of a party to a litigation is mandatory.

The tenor of law has been the same for over a quarter century, from Surjit Singh to Simranjit Singh and Janata Dal. It must therefore be held that a third party has no locus standi in a criminal case. The petition for impleadment filed by the Leader of Opposition in the Kerala State Legislative Assembly, notwithstanding the important position he holds, has to be dismissed.

18. Allowing third parties to enter the arena of criminal justice, would be to destroy institutional perspectives that have been built over the years. The pristine criminal law was an eye for an eye-it was private vengeance. Later years witnessed changes, that made the criminal justice system an objective system, manned by statutory functionaries. J.L.L.J. Edwards in "Law Officers of the Crown" has traced the growth of the office of the Public Prosecutor in England. He noticed that in early days, prosecution of offences was left in the hands of private Counsel. This led to a situation which Lord Chief Justice Campbell described as follows:

The criminal law is most shamefully perverted to serve private purposes.

The winds of change swept the landscape. The office of the Lord Advocate was established in Scotland. Ireland followed with crown solicitors. "Public Prosecutions" Bill was introduced in England in 1873. The then Attorney General, Sir John Holkers tried a new experiment, and the Office of the Solicitor of Public Prosecutions emerged. This, in fullness of time became the Office of the Director of Public Prosecutions. Enactment of the Prosecution of the Offenders Act, 1884, and the appointment of Sir Augustus Stephenson as Director of Public Prosecution followed by Sir Hamilton Cuffe, heralded a new era. Kenny's outline of Criminal Law and the decisions in *Seneviratne v. R.* 1936 (3) A.E.R. 36, *Ballison v. Caffory* 1965 (1) Q.B. 348 and *Habeeb Mohammad Vs. The State of Hyderabad*, sketch the history and development of the institution. State is now recognised as the Guardian of Criminal Justice. It is a State preserve. If these institutional perspectives are overturned, and criminal law were to be privatised, it will revert to the pristine rule of an "eye for an eye". No civilised system can permit this.

19. If the reasoning of the Court below, or Shri Kallada Sukumaran is extended to its logical conclusion, a private party may bring witnesses at a trial, with the sole View, of settling private scores and personal vendetta. Perjury and passions may prevail, polluting the clear stream of Justice. The criminal justice system, without its sense of objectivity will be "Hamlet without the Prince of Denmark".

20. It is not as if in *A.R. Antulay Vs. Ramdas Srinivas Nayak and Another*, a different note was struck permitting private individuals to participate in criminal trials. All that the Court said was that any person can set the criminal law in

motion, and not that he can participate in the process of adjudication. That is how the Supreme Court read the decision in Janata Dal Vs. H.S. Chowdhary and Others,

21. For the foregoing reasons, the Criminal Revision Petition is allowed and the order of the Court below is set aside. The application Crl. M.P. 79/92 in C.C. 1/91 will stand allowed. Crl. M.P. No. 2449/92 in C.R.L. R.P. 762/92 will stand disposed. The competent authority will consider whether, for the reasons stated in Grounds 3, 6 and 21 of the Revision Petition, the prosecution should be continued against any or all of the accused.

22. Towards the close of the arguments, Shri Kallada Sukumaran filed Crl. M.P. 2538/92 and stated that sanction had been accorded to prosecute accused 1, 2 and 6 to 12. This was in answer to a contention that the prosecution was launched, without prior sanction. I consider it unnecessary to examine this question in these proceedings. It is for the Government to do so.