

(2006) 11 BOM CK 0024

In the Bombay High Court

Case No : Criminal Rev. Application No. 86 of 2004

State of Maharashtra

APPELLANT

Vs

Poonamdas Bisandas Bairagi and Others

RESPONDENT

Date of Decision : 30-11-2006

Acts Referred:

Bombay Police Act, 1951 — Section 135, 37(1)(3)
Criminal Procedure Code, 1973 (CrPC) — Section 24(8), 321, 397, 399, 494
Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 295

Citation : (2007) 3 MhLj 231

Hon'ble Judges : S.R. Dongaonkar, J

Bench : Single Bench

Advocate : Sonare, app, for the Appellant; Firdos Mirza, for the Respondent

Final Decision : Allowed

Judgement

S.R. Dongaonkar, J.—Heard learned A.P.P. for the applicant-State, none for respondent No. 1 [original complainant] and Mr. Firdos Mirza, learned Advocate for respondents No. 1-A to 22 [Accused persons].

2. This is a revision application u/s 397 read with Section 399 of Criminal Procedure Code by which the applicant- State challenges the order passed by the learned 2nd Ad-hoc Additional Sessions Judge, Buldana, in Sessions Trial No. 37/1998 below Exhibit 61 by which the application of the applicant-State / prosecution, u/s 321 of Criminal Procedure Code for grant of sanction to withdraw the prosecution, was rejected.

3. Facts leading to the filing of this revision are thus.

4. At the instance of the complainant respondent No. 1, the other respondents-accused were charge-sheeted for the offence punishable under Sections 436, 143, 147, 148, 149, 448, 295, 336, 504, 506 of Indian Penal Code and u/s 37(1) (3), 135 of the Bombay Police Act arising out of Crime No. 65/1997 of Police Station Dhamgaon being Sessions Trial No. 37/1998. When the Sessions Trial

was pending the State applied for seeking consent of the Court for withdrawal from the prosecution by application Exhibit 61. The said application was opposed by the complainant. Thereafter, after hearing the parties, the learned Trial Judge came to the conclusion that the application for withdrawal from prosecution was with political object and considering the whole facts and circumstances he came to the conclusion that the Public Prosecutor, is not justified in asking consent for withdrawal of the prosecution, he therefore refused to grant consent by rejecting that application by order dated 22-1-2004.

5. This order is challenged in this revision petition claiming the same to be illegal, improper and unjust.

6. Learned Counsel for the applicant-State has contended that the learned prosecutor while filing application for grant of consent to withdraw from the prosecution has stated that on consideration of all the related facts and circumstances of the case and after independent application of his mind to the facts of the case he has decided to withdraw from the prosecution in the above case. He has also stated in the application that in his opinion, it is necessary to withdraw from the prosecution of the accused in the interest of public, the complainant as accused are residing at Rohinkhed, in the above circumstances for maintaining law and order in the village. He has also specifically mentioned that from the record it is apparent that the conviction is far cry in the Sessions Trial and if the consent is granted to withdraw from the prosecution of the accused, then socio-personal problems would be solved. Further according to the learned Counsel, the P.P. in the said application has observed that chance should be given to the accused for uplifting their moral in the society and there will be no harm to the society at large, if the consent for withdrawal is granted. With this main contention and also submitting that the Government of Maharashtra has already instructed to withdraw from the prosecution in the matter, he had applied for consent to withdraw from the prosecution. Learned Counsel for the applicant therefore, submitted that the trial Court should have granted this application. He has relied on some authorities which are also relied by the learned Counsel for the accused who had submitted his submissions for respondent 1-A to 22.

7. None appeared for the respondent No. 1 i.e. complainant.

8. Learned Counsel for the accused - respondents, submitted that in the circumstances of the case, the learned Trial Judge should have accorded consent to withdraw from the "prosecution to the Public Prosecutor. Therefore, that application should have been allowed. He has relied on certain decisions of the Apex Court i.e. Sheonandan Paswan Vs. State of Bihar and Others, , 2000 (4) Crimes 2003 (SC), Abdul Karim etc. etc., v. State of Karnataka and ors etc. etc. and AIR 2002 SC 1192 , Ayyub etc. v. State of U.P. He has also relied on the observations of the Division Bench of this Court in State of Maharashtra Vs. Mohd. Yusuf Noormohammed and others, . According to him, as learned Public Prosecutor while applying for consent to withdraw from the prosecution has

applied his independent mind to the case. He has found that in the circumstances of the case that application for withdrawal should be made. Having formed the opinion that there is no possibility of conviction of the accused in the matter and therefore, in view of the above authorities, he submitted that the order of the learned Trial Judge is incorrect, improper and unjust at law and as such it is liable to be set aside.

9. In order to appreciate the contentions raised by learned Counsel for the parties, it is necessary to consider the facts of the case. The accused persons are 21 in number. There is a civil dispute between the parties regarding the temple. The complainant appears to be the alleged priest and it is alleged that accused persons had committed mischief by setting the temple and the house on fire for the pecuniary loss to the complainant.

10. It is necessary to bear in mind here that the complainant has not appeared, nor raised any objection for the withdrawal of the prosecution of the accused persons. However that fact by itself will result in the allowing of this application. As such I proceed to decide the same on merits.

11. The law on the point has been brought on record by citing the relevant authorities by the learned Counsel for the accused which are also relied by the learned A.P.P. for the applicant-State.

12. In Sheonandan Paswan Vs. State of Bihar and Others, the Apex Court has in paragraph 61 of the judgment has recorded grounds of assailing the order granting sanction they are thus:

(1) The withdrawal was unjustified on merits.

(2) It was against the principles settled by this Court in various decisions governing the exercise of power u/s 321, Criminal Procedure Code.

(3) Neither the Public Prosecutor nor the Special Judge applied their mind in the application for withdrawal and in the order giving consent.

(4) Shri L.P. Sinha was not competent to apply for withdrawal since Shri A.K. Datt's appointment to conduct the case u/s 24(8) of the Criminal Procedure Code had not been cancelled.

(5) In the circumstances of the case Shri Sinha did not function independently but was influenced and guided by the State Government decision in the matter and the withdrawal was vitiated for this reason.

13. In the latter part of the judgment the Apex Court has observed in paragraphs : 63, 64, 65, 66..., 67, and 68.

63. The real question that has to be answered in this case is whether the executive function of the Public Prosecutor in applying for, and the supervisory functions of the Court in granting consent to, the withdrawal have been properly performed or not. The four remaining points enumerated above virtually revolve

around this question. 64. Section 321 needs three requisites to make an order under it valid : (1) the application should be filed by a Public Prosecutor or Assistant Public Prosecutor who is competent to make an application for withdrawal, (2) he must be in-charge of the case, (3) the application should get the consent of the Court before which the case is pending.

I find that all the three requisites are satisfied here. The question is whether the functions by the Public Prosecutor and the Court were properly performed. At no stage was a case put forward by any one that the application made by a Public Prosecutor was either mala fide or that it was not in good faith. There is no allegation of bias against the special judge. The application filed by the Public Prosecutor discloses the fact that he had gone through the case diary and the relevant materials connected with the case and that he came to the conclusion that in the circumstances prevailing at the time of institution of the case and investigation thereof the case was instituted on the ground of political vendetta and only to defame the fair image of J.N. Mishra. This statement of the Public Prosecutor has not been challenged as borne out of any unwholesome motive. It has not been made out or suggested that the Public Prosecutor was motivated by improper considerations. The only contention raised is that the reasons are not sufficient or relevant.

65. The Public Prosecutor should normally be credited with fairness in exercise of his power u/s 321, when there is no attack against him of having acted in an improper manner. He had before him the State Government's communication of the policy taken by it. He had before him the case diary statements and other materials. He perused them before filing the application. Thus his part u/s 321 in this case has been performed strictly in conformity with this section. The question that remains then is whether the grounds urged by him in support of withdrawal were sufficient in law. The application clearly shows that Sh. Sinha applied his mind to the facts of the case. One would normally not expect a more detailed statement in an application for withdrawal than the one contained in the application in question, when one keeps in view the scope of Section 321 and the wide language it uses. The plea that there was lack of application of mind by the Public Prosecutor has only to be rejected in this case.

66. The Chief Judicial Magistrate was acting as the Special Judge. In his order giving consent he has expressly stated that he perused the relevant records of the case before granting consent. This statement was not challenged in the revision petition before the High Court. It has, therefore, to be assumed that the Magistrate perused the relevant records before passing the order. We must give due credence to this statement by the Magistrate. There is no other allegation against the Special Judge. Thus the function of the Special Judge was also performed in conformity with the section. The matter was taken in revision before the High Court. The High Court dismissed the revision and while doing so exercised its power properly because the materials before the Court would justify only an order of dismissal and not the order ordering re-trial.

67. Section 321 gives the Public Prosecutor, the power for withdrawal of any case at any stage before judgment is pronounced. This presupposes the fact that the entire evidence may have been adduced in the case, before the application is made. When an application u/s 321, Criminal Procedure Code is made, it is not necessary for the Court to assess the evidence to discover whether the case would end in conviction or acquittal. 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, Criminal Procedure Code and would be to concede to the Court a power which the scheme of Section 321 does not contemplate. The acquittal or discharge order u/s 321 is not the same as the normal final orders in criminal cases. The conclusion will not be backed by a detailed discussion of the evidence in the case of acquittal or absence of prima facie case or groundlessness in the case of discharge. All that the Court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The Court, after considering these facets of the case, will have to see whether the application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given. In this case, on a reading of the application for withdrawal, the order of consent and the other attendant circumstances, I have no hesitation to hold that the application for withdrawal and the order giving consent were proper and strictly within the confines of Section 321, Criminal Procedure Code

68. While construing Section 321, it is necessary to bear in mind the wide phraseology used in it, the scheme behind it and its field of operation. True, it does not give any guideline regarding the grounds on which an application for withdrawal can be made. But in applying it, we have to bear in mind that it was enacted with a specific purpose and it would be doing violence to its language and contents by importing into the section words which are not there or by restricting its operation by fetters in the form of conditions and provisos. Its predecessor Section 494 had been on the statute book from the inception of the Criminal Procedure Code. When the Code was amended in 1973, this section was re-numbered and the only change brought in this section is to add the words "in-charge of the case" while referring to the Public Prosecutor or assistant Public Prosecutor.

In further paragraph, it has been observed;

69. ...This section enables the Public Prosecutor, in-charge of the case to withdraw from the prosecution of any person at any time before the judgment is pronounced, but this application for withdrawal has to get the consent of the Court and if the Court gives consent for such withdrawal the accused will be discharged if no charge has been framed or acquitted if charge has been framed and where no such charge is required to be framed. It clothes the Public Prosecutor to withdraw from the prosecution of any person, accused of an offence both when no evidence is taken or even if entire evidence has been

taken. The outer limit for the exercise of this power is "at any time before the judgment is pronounced."

70. The section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations on which the Court is to grant its consent. The initiative is that of the Public Prosecutor and what the Court has to do is only to give its consent and not to determine any matter judicially. The judicial function implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.

71. The Court's function is to give consent. This section does not obligate the Court to record reasons before consent is given. However, I should not be taken to hold that consent of the Court is a matter of course. When the Public Prosecutor makes the application for withdrawal after taking into consideration all the materials before him, the Court exercises its judicial discretion by considering such materials and on such consideration, either gives consent or declines consent. The section should not be construed to mean that the Court has to give a detailed reasoned order when it gives consent. If on a reading of the order giving consent, a higher Court is satisfied that such consent was given on an overall consideration of the materials available, the order giving consent has necessarily to be upheld.

14. In 2000(4) Crimes 203 (SC), Abdul Karim etc. etc. v. State of Karnataka and Ors. etc. the Apex Court has observed in paragraphs 17, 18, 19 and 21 thus:

17. The law as it stands today in relation to applications u/s 321 is laid down by the majority judgment delivered by Khalid, J., in the Constitution Bench decision of this Court in Sheonandan Paswan v. State of Bihar and Ors. It is held therein that when an application u/s 321 is made, it is not necessary for the Court to assess the evidence to discover whether the case would end in conviction or acquittal. What the Court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The Court, after considering the facts of the case, has to see whether the application suffers from such improprieties or illegalities as would cause manifest injustice if consent was given. When the Public Prosecutor makes an application for withdrawal after taking into consideration all the material before him, the Court must exercise its judicial discretion by considering such material and, on such consideration, must either give consent or decline consent. The section should not be construed to mean that the Court has to give a detailed reasoned order when it gives consent. If, on a reading of the order giving consent, a higher Court is satisfied that such consent was given on an overall consideration of the material available, the order giving consent has necessarily to be upheld. Section 321 contemplates consent by the Court in a supervisory and not an adjudicatory manner. What the Court must ensure is that

the application for withdrawal has been properly made, after independent consideration by the Public Prosecutor and in furtherance of public interest. Section 321 enables the Public Prosecutor to withdraw from the prosecution of any accused. The discretion exercisable u/s 321 is fettered only by a consent from the Court on a consideration of the material before it. What is necessary to satisfy the section is to see that the Public Prosecutor has acted in good faith and the exercise of discretion by him is proper.

18. The law, therefore, is that though the Government may have ordered, directed or asked a Public Prosecutor to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that the public interest will be served by his withdrawal from the prosecution. In turn, the Court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently, thereto that the Public Prosecutor, acting in good faith, is of the opinion that his withdrawal from the prosecution is in the public interest, and that such withdrawal will not stifle or thwart the process of laws or cause manifest injustice.

19. It must follow that the application u/s 321 must aver that the Public Prosecutor is, in good faith, satisfied on consideration of all relevant material that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice. The material that the Public Prosecutor has considered must be set out, briefly but concisely, in the application or in an affidavit annexed to the application, or in a given case, placed before the Court, with its permission, in a sealed envelope. The Court has to give an informed consent, it must be satisfied that this material can reasonably lead to the conclusion that the withdrawal of the Public Prosecutor from the prosecution will serve the public interest; but it is not for the Court to weigh the material. The Court must be satisfied that the Public Prosecutor has considered the material and, in good faith, reached the conclusion that his withdrawal from the prosecution will serve the public interest. The Court must also consider whether the grant of consent may thwart or stifle the course of law or result in manifest injustice. If, upon such consideration, the Court accords consent, it must make such order on the application as will indicate to a higher Court that it has done all that the law requires to do before granting consent.

21. The applications u/s 321 filed before the Designated Court at Chennai sought consent to withdrawal from the T.A.D.A. prosecution against Venkatesan " Radio Venkatesan after "perusal of records" by the Special Public Prosecutor, and they submitted that "under the new change of circumstances and also in the public interest the permission was sought." What the record was that the Special Public Prosecutor had perused was not set out nor was it annexed nor a summary thereof recited. What the changed circumstances were not set out. The order on the applications was found only upon the relevant Government Order, thus:

So far as this case is concerned the Government have passed order to withdraw the TADA case alone as against the accused Venkatesan " Radio Venkatesan,

who is involved in Cri. No. 60/93 and Cr. No. 346/93. As this application has been filed by the learned Special Public Prosecutor on the basis of the Government order referred above. Permission is granted to withdraw the TADA case against the accused Venkatesan " Radio Venkatesan....The order, therefore, was not passed after meeting the requirement, and it is bad in law.

15. In AIR 2002 SC 1192, Ayyub etc. v. State of U.P. it has been observed by the Apex Court thus:

10. In the instant case, the learned Designated Judge rejected the application for withdrawal from prosecution indicating that the State Government had not given any reason for withdrawal from prosecution and that mere use of the expression "Janhit" was not sufficient for according consent in mechanical manner. The learned Judge was also of the view that it cannot be said that ends of public interest and administration of justice be served by the withdrawal from prosecution. The learned Judge was of the view that material records might have been placed before the Government while taking a decision in the matter.

11. We do not find any merit in the reasons given by the Designated Judge. There are stringent provisions in the TADA Act and in the Government Order, it is stated that the Government after proper discussion on the facts of the case and the evidence/reports/letters available on the record decided to waive the TADA sections in the cases recorded in the enclosed list. When the Order itself states that all records were perused and considered, we do not think that the learned Designated Judge was justified in rejecting the application. It cannot be said that the Senior Prosecuting Officer had filed the application without consideration of the relevant facts. It cannot also be said that application was filed with any mala fide intention to save some of the culprits from the clutches of law. The request was made only to withdraw from prosecution as against the offences punishable under the TADA Act. Charges in respect of other offences punishable under Indian Penal Code remained and the accused had to face trial for that. Government must have thought that the stringent and harsh provisions of TADA Act were not necessary to deal with such situations.

12. We are of the view that the learned Designated Judge should have accepted the application for withdrawal from prosecution as against the offences charges against the appellants under the TADA Act. Therefore, we allow that application and the appellants shall stand acquitted u/s 321(b) of Criminal Procedure Code of all the the charges framed against them under the TADA Act.

16. In State of Maharashtra Vs. Mohd. Yusuf Noormohammed and others, the Division Bench of this Court has observed - In our judgment, the interest of public at large and of the Society is of far more importance than the interest of the individual and such interest or right of an individual to continue prosecution must give way to the larger interest of the society.

17. Bearing above law in mind, one has to see the contents of the application preferred by the learned Public Prosecutor for withdrawing the prosecution. He

has specifically mentioned in paragraphs 2, 3, 4 and 5 of the application thus:

2. I have gone through the record of charge-sheet in this trial. On consideration of all the related facts and circumstances of the case and after independent application of my mind to the facts of the case, I have decided to withdraw from prosecution in the abovesaid case. In my opinion, it is necessary to withdraw from the prosecution of the accused in the interest of public and complainant and accused are residing at Rohinkhed in above circumstances making law and order in the village. From the record it clearly seems that the conviction is far cry in this trial. If the consent is granted to withdraw from prosecution of the accused then socio-personal problems may be solved.

3. It is the cardinal principle of law that opportunity should be given to a person to improve the life and object of the punishment is also the same. Considering their change of nature, and considering the cardinal principle as stated above a chance should be given to the accused persons for uplifting their moral in the society.

4. There will be no harm to the society at large, if the withdrawal be granted from the prosecution to the State. Therefore, the prosecution is applying for grant of consent of this Hon"ble Court for withdrawal from prosecution.

5. It is further submitted that already the Government of Maharashtra has instructed to withdraw from the prosecution in this matter. Hence I am filing this application for grant of consent to withdraw from prosecution. There is no bar in Criminal Procedure Code.

18. It is evident that all the material aspects which are necessary to be satisfied before moving the application for grant of consent for withdrawal of prosecution, as laid down by Apex Court in the aforesaid authorities have been satisfied. The learned Trial Judge has observed that there is political power in moving this application however, there appears to be nothing of this sort proved or apparent from record of the case. I have already pointed out that the complainant has not appeared in the matter to work out his contentions and objections. Merely because the learned P.P. has received direction from State Government for making an application for withdrawal that fact by itself will not give it colour of political object sans reliable material to that effect on records and objections.

19. It is true that the offences alleged are some what serious because, it is alleged that accused persons had committed mischief by using weapons and by setting fire to the buildings and the household as well as agricultural material of the complainant. However, fact remains that there as many as 22 accused in the present case, the offence is of 1997 and after due compliance of the legal necessities and requirements, learned Public Prosecutor has applied for grant of consent or withdrawal of the prosecution.

20. When having considered every aspect Public Prosecutor is of the opinion that conviction is far cry in the present case, withdrawal of the prosecution would be

justified.

21. In my opinion therefore, the order of the learned Trial Judge seems to be incorrect, improper and unjust. It is no doubt that it is a duty of the Court to see that the permission is not sought on the ground extraneous to the interest of justice or offences should not go unpunished merely because government as a matter of policy justifies to direct the withdrawal of the prosecution.

22. Here it is not seen that there is substantiated case and, there could be conviction if the accused is prosecuted. Applicant-State itself state that conviction is not possible. The complainant does not appear and say that he would be prejudiced if the matter is allowed to be withdrawn and there is sufficient evidence warranting conviction of all or any of the accused. All these circumstances taken together in the light of above legal background, extracted above would show that the Court had no option but to grant consent for withdrawal of the prosecution.

23. In this view of the matter therefore, the order passed by the learned Trial Judge is found to be incorrect, improper and unjust at law. Therefore, impugned order passed by the 2nd Ad-hoc Additional Sessions Judge, Buldana in Sessions Trial No. 37/1998 dated 22-1-2004 is set aside and the said application is allowed. The consent for withdrawal of the prosecution is hereby accorded. Inform the lower Court for passing further orders consequential to above.