
(1992) 11 OHC CK 0009
In the Orissa High Court
Case No : Criminal Revision No. 277 of 1991

State of Orissa

APPELLANT

Vs

Bijoyaranjan Singh Bariha and Others

RESPONDENT

Date of Decision : 20-11-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 321

Citation : (1993) CriLJ 437 : (1993) 1 OLR 416

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : Sisir Das, for the Appellant; N.S. Misra, (for opp. party No. 9), for the Respondent

Final Decision : Dismissed

Judgement

A. Pasayat, J.—A motion was made for withdrawal of a criminal proceeding which was pending before the learned Subdivisional Judicial Magistrate, Padampur in terms of Section 321 of the Code of Criminal Procedure, 1973 (in short, the "Code"). The learned SDJM accepted the prayer. The informant assailed correctness of the order of the learned SDJM before the learned Sessions Judge, Sambalpur. The prayer for interference was accepted, and the order directing withdrawal of the prosecution and acquittal of the accused persons was set aside. The matter was sent back to the learned SDJM for disposal in accordance with law. The State has assailed correctness of the order of the learned Sessions Judge on the ground that the relevant legal and factual aspects were not kept in view by the learned Sessions Judge.

2. it is necessary to recapitulate the background facts in short.

One Gountia Kumar Sahu, opp. party No. 9 in this application, lodged a first information report alleging commission of offences punishable Under Sections 147/294/506/323/149 of the Indian Penal Code, 1860 (in short "IPC") by opp. party Nos. 1 to 8 herein. Accusations were that they being members of an

unlawful assembly, they threatened to kill him and abused him in obscene language. They assaulted him on his back and other parts of the body, and forced one Niranjan Sahu, a betel shop owner, to close his shop, Sri Gopal Chandra Sahu as the Assistant Public Prosecutor, Padampur was in charge of the case. Shri S. N. Dora, Associate Public Prosecutor was not in charge of the case. He filed a petition on 25-8-1990 in the Court of the SDJM u/s 321 of the Code seeking permission for withdrawal from prosecution on the ground that in the interest of public justice and to maintain public peace and social order in the society and to secure good relationship between the parties concerned, the Government of Orissa through Home Department had decided to withdraw the case from prosecution against the accused persons. It was also indicated that the Government after a careful consideration had decided to withdraw the case since the alleged offences were felt to have been committed by accused persons under the circumstances and in course of a political agitation like Hartal, Gherao, and had directed him as per their wireless message for withdrawal. The prayer was accepted and the informant moved the learned Sessions Judge for interference and the impugned order has been passed.

The learned Sessions Judge set aside the order primarily on the ground that there was no application of judicial mind and no reason was indicated for permitting withdrawal. The application was filed by the Associate Public Prosecutor, who was not in charge of the case. Since he had filed the application for withdrawal, the Court should not have mechanically accepted the prayer for withdrawal without considering the ground for withdrawal. The grounds indicated in the petition for withdrawal were not considered to be valid grounds for withdrawal of the case.

3. The learned counsel for State has submitted that the Associate Public Prosecutor who had filed the application had authority to do so, and the grounds indicated were valid grounds for withdrawal. The impugned order was characterised as indefensible. The learned counsel for opp. party No. 9 supported the order.

4. At this juncture a reference to Section 321 of the Code so far as it is relevant is necessary. The same reads as follows :

"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 ;

(d) 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 :

xx xx xx"

Two main features of Section 321 are (i) initiation by the Public Prosecutor or Assistant Public Prosecutor in charge of a case ; and (,ii) consent of the Court. A factual dispute has been raised that Shri S. N. Dora who had filed the application was neither the Public Prosecutor nor the Assistant Public Prosecutor in charge of the case. Admittedly Shri S. N. Dora was the Associate Public Prosecutor. Shri Gopal Chandra Sahu, Assistant Public Prosecutor attached to the Court of SDJM, Padampur, was in charge of the case. Two applications were filed-One on 25-5-1990 and the other on 20-9-1990. The second petition has filed by Shri S. N. Dora and interestingly there is an endorsement by the A.P.P. Shri Sahu, "Seen". Obviously, therefore, the Assistant Public Prosecutor in charge of the case had not made the motion for withdrawal. A petition was filed by Shri S. N. Dora on 19-9-1990 wherein also similar endorsement had been made by the A. P. P. The prayer in the said petition was to the effect that the case may be fixed to 20-9-1990 for hearing or withdrawal petition filed by prosecution and that he (Shri Dora) wanted to go through the case papers again to have a discussion with the concerned Assistant Public Prosecutor attached to the Court since he had been entrusted with that Court recently and for his further preparation in the matter. The prayer was to put up the case records that day and for permission to the Associate Public Prosecutor to verify the records. It is, therefore, clear that he was not in charge of the case. A factual finding has been recorded by the learned Sessions Judge that the Associate Public Prosecutor who filed the application for withdrawal was not in charge, In the absence of any material to the contrary, I concur with the view of the learned Sessions Judge that the Associate Public Prosecutor was not authorised to make the prayer for withdrawal. As observed by the Apex Court in State of Punjab Vs. Surjit Singh and Another, the Public Prosecutor who is in charge of a particular case and is actually conducting the case can file the application for withdrawal seeking permission to withdraw from prosecution.

5. Additionally the other question that needs adjudication is whether the ground on which the withdrawal was sought for was germane. As observed by the Apex Court in State of Orissa Vs. Chandrika Mohapatra and Others, it is not sufficient for the Public Prosecutor merely to say that it is not expedient to proceed with the prosecution. He has to make out some ground which would show that the prosecution is sought to be withdrawn because inter alia the prosecution may not be able to produce sufficient evidence to sustain the charge or that the prosecution well founded or that there are other circumstances which clearly show that the object administration of justice would not be advanced or furthered by going on with the prosecution. By ultimate guiding, consideration must always be the interest of administration of justice and that is the touch-stone on which the question must be determined whether the Prosecution should be allowed to be withdrawn. In Rajender Kumar Jain and Others Vs. State Through Special Police Establishment and Others, the Apex Court has observed that an elected Government, sensitive and response to the feelings and emotions

of the people, will be amply justified if for the purpose of creating an atmosphere of goodwill or for the purpose of not disturbing a Cam which has descended it decides not to prosecute the offers involved or not to proceed further with prosecution already launched. The Court in such a situation is to make an effort to elicit the reason. for withdrawal and satisfy itself, that the Public Prosecutor too was satisfied that he should withdraw from the prosecution for good and relevant reasons The power of Public Prosecutor to withdraw from prosecution is wide but should not be used as a rubber stamp. This Court in *Balabhadra Das and Anr. v. State of Orissa and Ors.* (1991)IV OCR 263 went to the extent of saying that the concerned file should be made available to the Public Prosecutor and the Court to examine if it would be beneficial to the society. The grounds indicated were that the accused persons had committed the offences "in course of agitation, Hartal and Gherao". The accusations certainly are not to that effect. Withdrawal from 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 the he may withdraw from the prosecution but nobody can compel him to do so. Though Section 321 does not lay bar to restrain the Public Prosecutor from tiling the application for withdrawal, he must apply his mind to see whether withdrawal is called for. The Court is no to re-appreciate the grounds which led the Public Prosecutor to reques withdrawal from the prosecution, but has to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in the regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution. (See *R.K.Jain's case* (supra)). A bare psrusal of the order passed by the learned SDJM shows that he was oblivious of the requirement of law He merely stated that the petitions dated 25-8-1990 and 20 9-1990 tiled by the Associate Public Prosacutor and APP were put up and heard. The petitions were allowed and the accused persons were acquitted. The order shows complete non-application of mind. He also committed error of record by holding that the petitions were filed by APP. In reality it was not so done. It was filed by the Associate Public Prosecutor. The APP had merely endorsed "Seen" as indicated above.

6. The Court may grant permission to withdraw only if it is satisfied on the materials placed before it show that the grant of it would subserve the administration of justice, and that permission was not being sought covertly with an ulterior purpose unconnected with the vindication of law which the executive organs are in duty bound to further and maintain (See *M.N. Sankarayarayanan Nair Vs. P.V. Balakrishnan and Others*, . The sole consideration for the Public Prosecutor when he decides to withdraw from a prosecution is the larger factor of the administration of justice-not political favours nor party pressures nor like concerns. Of course, the interests of public justice being the paramount consideration they ma " transcend and over-flow the legal justice of the

particular litigation. The statutory responsibility for deciding upon withdrawal squarely vests on the Public Prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side consideration which must weigh with him is, whether the broader cause of public justice will be advanced or retarded by the withdrawal or continuance of the prosecution. Public justice may be a much wider conception than the justice in a particular case.

As observed by the Apex Court in *Sheo Nandan Paswan v. State of Bihar and Ors.* : AIR 1937 SC 877 Section 321 providing for withdrawal from prosecution 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. 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. The Court's function is to give consent. The Court is not obligated to record reasons before consent is given. However, it does not mean 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. All that is necessary to satisfy the section is to see that the Public Prosecutor acts in good faith and the Court should be satisfied that the exercise of discretion by the Public Prosecutor is proper.

7. The true legal position following from Section 321 is as follows :

- (1) Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.
- (2) The withdrawal from the prosecution is an executive function of the Public Prosecutor.
- (3) 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.
- (4) The Government may suggest to the Public prosecutor that he may withdraw from the prosecution but none can compel him to do so.
- (5) 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 justice will certainly include appropriate social, economic and political purposes
cass Tammany Hall enterprise.

(6) The Public Prosecutor is an officer of the Court and responsible to the Courts.

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

(8) The Court's duty is not to re-appreciate 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.

(9) It shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to apprise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution.

8. The Court has a responsibility and to take in the 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. 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 consent of the Court is not 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 over all consideration of the materials available, the order giving consent has necessarily to be upheld. Unfortunately this is not the case at hand. The wireless message purportedly on the basis of which the Associate Public Prosecutor purported to act referred to 13 C3ses and the case with which this application is rooted was one of them. The instruction for withdrawal was given on the ground that the cases related to "political agitations etc.". While making the motion for withdrawal the question whether the genesis of the dispute was political agitation needed a look. Mere description that the dispute was in the nature of political agitation like Hartal, Gherao is not sufficient. It is apparent that the nature and essence of the accusations were neither kept in mind nor considered. The accusations clearly show there was no Hartal, Gherao etc. That also made the motion vulnerable, in addition to the same having been made by an unauthorised counsel.

9. The discretion of the Court in such matters is necessarily to be exercised with reference to such materials as is by then available and it is not a prima facie

judicial determination of the 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 321 which corresponds to Section 494 of the old Code 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 a prima facie determination of the triable issue. The consent is not 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. The decision on the point was illuminatingly stated in *Bihta Co-operative Development Cane Marketing Union Ltd., and Another Vs. The Bank of Bihar and Others*, .

10. The revisional Court has come to a definite finding that the grounds indicated were not germane and not factually supportable. The grounds indicated by the Associate Public Prosecutor were not factually correct. He had no jurisdiction to make the motion and there was absolute non-application of mind by the learned SDJM, The revisional order is in order and needs no interference.

The revision application accordingly, fails and is dismissed.