

(2008) 09 P&amp;H CK 0192

**High Court Of Punjab And Haryana At Chandigarh****Case No:** Criminal Miscellaneous No. M 2720 of 2008

Swaranjit Kaur Bajwa

APPELLANT

Vs

State of Punjab

RESPONDENT

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**Date of Decision:** Sept. 1, 2008**Acts Referred:**

- Arms Act, 1959 - Section 25, 27
- Criminal Procedure Code, 1973 (CrPC) - Section 321
- Penal Code, 1860 (IPC) - Section 142, 148, 149, 323, 34

**Citation:** (2008) 4 RCR(Criminal) 792**Hon'ble Judges:** Ranjit Singh, J**Bench:** Single Bench**Advocate:** M.K. Dogra, for the Appellant; A.S. Brar, DAG, Punjab, for the Respondent

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**Judgement**

Ranjit Singh, J.

Petitioner, a widow of Army Officer, who died in accident, is facing the onslaught of near relatives of her husband. Result is that she is saddled with criminal charges. This move is aimed at depriving her of legal right in the joint property left by her husband. The Courts apparently have been insensitive to the plight of this widow. Though it would be satisfying to notice that the State did act to rectify the situation arising out of action by the police to register a case against lady, by moving an application for withdrawal of prosecution u/s 321 Cr.P.C. The Court of Magistrate and Additional Sessions Judge, Fast Track, Gurdaspur, have dismissed this application filed by the State. The petitioner has now impugned the said orders by filing two Criminal Misc. Petition Nos. M 2720 of 2008 and 55144 of 2007 as two separate FIRs were registered against the petitioner and prayer of the State for withdrawal from prosecution has been declined in both these cases. Both these petitions are being disposed of by this common order.

2. Trouble for the petitioner started when her husband died in road accident on 15.4.1997. The petitioner, who was travelling with her late husband at the time of accident also suffered multiple injuries, for which she remained bed ridden for a considerable period. The complainants, who are closely related to her late husband, instead of helping her out, had acted to take benefit of her sorrow and are continuously harassing her on one pretext or the other. The aim is to deprive her of the share in the property left by her husband. The issue in dispute seems to be a Kothi, which the late husband of the petitioner appears to have made his abode after his retirement. Concededly, he had a share in this house and had accordingly occupied the same.

3. The son of the complainant earlier filed a Civil Suit No. 94 of 1998 in the Courts at Gurdaspur by pleading that the said house has come to his share in partition. He had accordingly moved an application under Order 39 Rules 1 and 2 CPC, seeking interim direction for staying his dispossession, which statedly was under threat from the petitioner, who was impleaded as defendant in the said suit. In response to the said application, the petitioner pointed out before the Court that she alongwith her husband was residing in this Kothi since 1996 and the plaintiff in the suit had taken forcible possession of the Kothi on 7.9.1998, when the petitioner had gone to Ludhiana in connection with her treatment for the injuries that she suffered in the accident. The petitioner had proved on record the telephone bill, ration card, gas connection and the residential certificate to show her possession over the Kothi. The Civil Court, on the basis of material placed before it, came to the conclusion that Kothi in dispute was joint between the parties and the petitioner (defendant in the suit) was in possession of the same as co-sharer. The partition as alleged by the plaintiff in the suit was not believed as it was not reflected in the revenue record and hence possession of the petitioner in the Kothi was held to be that of a co-sharer and the prayer for interim direction, as sought, was declined.

4. It appears that having remained unsuccessful in their attempt to dislodge the petitioner through civil suit, the complainant resorted to filing criminal complaints against her. The complainant lodged an FIR on 16.6.2000 under Sections 452, 427, 342/506 IPC and 25/27/54/59 of the Arms Act. It is alleged against the petitioner that she had demolished the wall of the house for making forcible entry. The reading of the allegations made in the FIR would on the face of it show the falsity and absurdity of the allegations made against the lady. She was stated to be armed with a revolver and had started demolishing the wall. She was accused of breaking doors of bed rooms. So much so, it is alleged that she broke open the door with Gainti, which she was holding at the time alongwith the revolver. A lady is alleged to be having a revolver in a hand and a Gainti in another to break open the door. Would it not sound absurd and unbelievable on the face of it ?.

5. It seems that high level enquiry was marked perhaps at the instance of the petitioner and the allegations were found to be false and supplementary challan

under Sections 427 and 506 IPC was presented on 22.4.2004. The prosecution ultimately decided to file an application for withdrawing from the criminal proceedings. Sanction in this regard was issued by the District Magistrate on 8.11.2004 and ultimately, Additional Public Prosecutor, Gurdaspur, moved application u/s 321 Cr.P.C. for withdrawal from the case in the Court of J.M.I.C., Gurdaspur. This application, however, was dismissed. Grievance made by the petitioner that the Court has not properly appreciated the legal issues involved would sound genuine. Section 452 is stated to have been attracted in this case against the petitioner, which would not be so as the petitioner has earlier been held to be joint owner and in possession of the Kothi by the Civil Court as referred to above. Feeling aggrieved against this order, the petitioner filed a revision against the same before the Additional Sessions Judge, Gurdaspur, which was also dismissed on 24.10.2007. The petitioner has now filed Criminal Misc. No. M 15544 of 2007 for quashing of the impugned orders.

6. Criminal Misc. No. M 2720 of 2008 is filed by the petitioner to impugn the order passed pursuant to the registration of a case against her vide FIR No. 158 dated 23.8.2001, under Sections 323, 452, 427, 142, 148, 149 IPC. This FIR was also registered in the background that the complainant could not succeed in civil litigation filed against the petitioner and the complainant is alleged to have resorted to lodging this criminal proceedings against the petitioner. The allegation in the present FIR is that the petitioner had demolished the floor of the house of the complainant by making forcible entry. In this case also, supplementary challan was filed u/s 323/34 IPC on 2.6.2005 after enquiry, when the investigations were directed to be conducted by high level officers. In this case also, the prosecution decided to withdraw from the criminal proceedings pending against the petitioner and had moved an application u/s 321 Cr.P.C. on 9.11.2004. This application was again dismissed by JMIC, Gurdaspur, on 16.3.2006 against which the petitioner filed a revision before the Sessions Judge, Gurdaspur. The said revision was also dismissed on 24.10.2007 and accordingly Criminal Petition No. M 2720 of 2008 was filed to challenge the said orders.

7. The common question of law would arise in both the petitions and this relates to the power of the Public Prosecutor to move an application u/s 321 Cr.P.C to withdraw from the prosecution of any person and the discretion of the Court to allow such withdrawal on the grounds raised before the Court. Section 321 Cr.P.C. leaves a discretion with the Public Prosecutor/Assistant Public Prosecutor, Incharge of the case, to 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. Undoubtedly, the permission to withdraw from the prosecution is subject to the consent of the Court where the same is pending. The copies of the applications moved by the Assistant Public Prosecutor to withdraw from the prosecution in these cases are on record, as Annexure P-2 with the respective petitions. The Public Prosecutor sought permission to withdraw from the prosecution on the ground that offences alleged against the

accused are non-cognizable under which the supplementary challan after enquiry has been filed in the Court. It is on this ground pleaded that prosecution against the accused, in the public and administrative interest, be permitted to withdraw from prosecution. Identical grounds are pleaded in the application filed by the Assistant Public Prosecutor in both the applications.

8. Judicial Magistrate Ist Class declined to grant the permission on the ground that offence against the accused stood disclosed and at no stretch of imagination it can be said that there is no material available on the file to pursue the matter against the accused. The Court further observed that simply on the whims and fancies, the prosecutor cannot be allowed to withdraw from prosecution. After referring to few of the judgments, the Court finally held that the application of the prosecution did not contain sufficient material to show that it will be in the interest of public at large and in the interest of administration of justice that prosecution should be permitted to withdraw. The order passed by the Magistrate in both the cases are identically worded. The Revisional Court, however, while dismissing the revision observed that provisions of Section 321 Cr.P.C. are to be invoked where it would advance cause of justice and the case is likely to end in acquittal and the continuation of the case is an attempt to cause harassment to the accused only or the withdrawal from the prosecution is likely to bury hatchet within the parties and to bring harmony between them. The Court then noticed that withdrawal from the prosecution in this case was sought on the ground that the offences against the accused are non-cognizable. The Court then observed that the charges have been framed against the petitioner under various Sections which included cognizable offences. Finding the application to be vague and that offence u/s 452 IPC to be cognizable, the prayer to withdraw from the prosecution was declined. As already noticed, both the orders passed in the respective petitions are now under challenge before this Court.

9. Section 321 Cr.P.C. is an enabling provision and vests in the Public Prosecutor the discretion to apply to the court for its consent to withdraw from the prosecution of any person. Reference may be made in this regard to the case of [The State of Bihar Vs. Ram Naresh Pandey](#), Public Prosecutor is entrusted with the discretion to withdraw from the prosecution with the consent of the court. In [Rajender Kumar Jain and Others Vs. State Through Special Police Establishment and Others](#), Hon"ble Supreme Court held that 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 Hon"ble Supreme Court further observed that the court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its "Minister of Justice". Both have a duty to protect administration of criminal justice against possible abuse or misuse by the executive by resort to the provisions of Section 321 Cr.P.C. The Hon"ble Supreme Court further cautioned the courts by saying that when moved for permission for withdrawal from prosecution, they must be vigilant and inform themselves fully before granting the consent. After referring to number

of previous decisions, the Hon"ble Supreme Court in the case of Rajender Kumar (supra) summarised the position of law 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 public justice will certainly include appropriate social, economic and, we add, political purposes sans Tammany Hall enterprises.
6. The Public Prosecutor is an officer of the Court and responsible to the Court.
7. The Court performs a supervisory function in granting its consent to the withdrawal.
8. 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."

The principles as laid down by the Hon"ble Supreme Court were re-affirmed in [Sheonandan Paswan Vs. State of Bihar and Others](#), . Even a Constitutional Bench of Hon"ble Supreme Court by majority held that the principles regarding withdrawal of cases by the Public Prosecutor, which have been settled by the earlier decision of the Supreme Court in Ram Naresh Pandey's and Rajender Kumar Jain's cases (supra) should not be disturbed. Even from the plain reading of the Section, two things are clear, namely, (i) the power to withdraw is conferred on a Public Prosecutor and no one else. Though this is an executive power, it is a power which he must exercise in the light of his own judgment and not at the dictates of some authority, however high and (ii) the power of withdrawal conferred on a Public Prosecutor is not an absolute power. He can withdraw from the prosecution only with the consent of the court. It may need a mention that Section does not authorise the withdrawal of a case. It merely authorises the Public Prosecutor to withdraw from the prosecution, and that too only with the consent of the court. The court is

not bound to give its consent. The initiative to withdraw a prosecution is that of a Public Prosecutor and the court is merely required to give its consent. Apparently, the condition regarding the consent of the court is to place an embargo on the power of the Public Prosecutor with a view to prevent any abuse.

10. Having considered the roles and duties of Public Prosecutor and the court, one may have to make reference to the grounds on which such permission for withdrawing from the prosecution can be generally sought. The section itself gives no indication as to the grounds on which the Public Prosecutor may make the application. Section also does not contain any consideration on which the court is to grant its consent. The Public Prosecutor of course has to exercise his power in relation to the facts and circumstances of the case in furtherance of, rather than as a hindrance to, the object of law. He has also to justify his action on the material in the case which substantiate the grounds alleged, which may not necessarily be gathered by judicial methods and may be based on other materials which may not be strictly legal or admissible evidence. The legislature has not defined the circumstances under which a withdrawal is permissible. The courts have observed that it would not be a right to attempt to lay down any hard and fast rule circumscribing the limits within which the withdrawal may be made. It has also been laid down that it is always desirable, though not mandatory, that the reasons which prompt the Public Prosecutor to request the court to grant consent for withdrawal be disclosed. It has also been held that if reasons are not stated in the application for withdrawal by the Public Prosecutor, the Magistrate is entitled to ask the Public Prosecutor to give reasons. These then would be the parameters, which would govern the exercise of power u/s 321 Cr.P.C.

11. The reasons for which the Public Prosecutor sought permission to withdraw from the prosecution in this case were disclosed in the application, which have been referred to above. Though not disclosed in that manner but apparently Public Prosecutor was wanting to withdraw from the prosecution considering the fact that no cognizable offence was made out against the petitioner. If he had been bit better in expressing himself, the Public Prosecutor perhaps was wanting to urge that the petitioner is a lady and the allegations against her apparently are made in a manner which will make them look absurd or unbelievable. The FIRs though were lodged against the petitioner under various sections, but investigation only disclose offences under Sections 323/34 IPC and 427/506 IPC in the second FIR. A reference has been made to portion of the allegations made against the petitioner in the FIR. A lady is alleged to have carried Gainti in one hand and revolver in other to break open the door. Such allegation against a lady of an advanced age would on the face of it not only sound improbable but puerile. Obviously, such allegations were not found made out after enquiry and that is how the challan was only presented under the sections as noted above. The Public Prosecutor made out the ground to seek permission to withdraw from prosecution in exercise of his discretion available to him under law. Undoubtedly, the Public Prosecutor possess wide powers in this

regard. He can withdraw from case on a broad ends of public justice which would include social, economic and political purpose. It is to be noticed that the Court's duty is not to appreciate the grounds which have prompted the public prosecutor to seek withdrawal but only to consider and see that he has applied his mind as free agent, uninfluenced by irrelevant and extraneous considerations. Apparently, the courts in this case have mis-informed themselves to appreciate the grounds pleaded by public prosecutor instead of finding if there was any irrelevant or extraneous consideration weighed by him while seeking withdrawal from prosecution. The Courts were to perform supervisory functions in this regard and not to appreciate the validity of the ground. There is nothing on record to show that the action on the part of public prosecutor was not taken as free agent or that his action was actuated by any irrelevant or extraneous considerations. The court seems to have fell in error in appreciating the grounds pleaded by the public prosecutor which would be beyond the purview of the legal position fully settled. While declining the permission, the Magistrate has noticed that the offence against the accused stood disclosed. It is further observed by the Magistrate that application of the Public Prosecutor did not contain sufficient material to show that it would be in the interest of public at large or in the interest of administration of justice that the prosecution should be permitted to be withdrawn. These are not the valid grounds to decline the permission sought. Thus, it is clear that the Magistrate has not applied his mind validly to the legal considerations which were to be kept in view. Similarly, the Revisional Court has also not kept these legal parameters in mind while passing the impugned orders. At the cost of repetition, it may be stated that courts are to only see if there is any extraneous consideration taken by public prosecutor and not to appreciate the validity of the grounds. Courts have rather taken upon themselves to specify the grounds on which permission could be granted as if these are the only grounds available. Public Prosecutor is entitled to substantiate his stand which may have not been on the basis of strictly legal or admissible evidence. A widow of an army officer is seen saddled with criminal liability by her relations for dispute regarding property. Public prosecutor may have thought it fit to withdraw from this prosecution due to these or some other such considerations. Thus, valid consideration in the light of law noted above was not taken into consideration by the courts below. The impugned orders, as such, cannot be sustained and are set aside. The case would go back to the Magistrate for re-deciding the application filed by the Public Prosecutor in the light of law as discussed above. The court would be at liberty to ask the Public Prosecutor to furnish further details in support of his grounds, if so required.

The present petitions are accordingly disposed of in the above terms.