
(2007) 02 AHC CK 0165

Allahabad High Court

Case No: None

Sudesh, Subhash and
Sudheer

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Feb. 7, 2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 173, 228, 239, 240, 321#Penal Code, 1860 (IPC) â€” Section 323, 325, 504

Citation: (2007) 02 AHC CK 0165

Hon'ble Judges: Vinod Prasad, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Vinod Prasad, J.

The three siblings Sudesh, Subhash and Sudheer all sons of Sri Ram Ratan Chaudhary have prayed for quashing of

proceeding of Criminal Case No. 2249 of 2001, Crime No. 10/01 pending in the court of Chief Judicial Magistrate, J.P. Nagar, State v. Sudesh

and Ors., under Sections 325, 323 504 I.P.C., Police Station Amroha Nagar, District J.P. Nagar. The interim prayer is for stay of further

proceeding of the aforesaid case pendent lite.

2. The facts of the case as is culled out from the affidavit and annexures filed in support of this application are that a non-cognizable report was

lodged by Smt. Asha wife of Radhe Lal on 9.1.2001 at 4.45 P.M. at police station Amroha Nagar which was registered as NCR No. 10/01,

under Sections 323, 504 I.P.C. in respect of an incident of even date at about 4.00 P.M. The allegations levelled were that at the date and time of

incident all the accused persons, namely, Sudesh, Subhash, Sudheer and Ram Ratan who bore enmity with the informant, abused her filthily and on

protest being raised she was assaulted with lathi and danda. The collected neighbours saved the informant. Subsequent to the lodging of NCR the

informant Smt. Asha Devi, Goverdhan and Jugnoo the three injured in the incident got themselves medically examined and X-rayed. The X-ray

report established that fifth metacarpal bone of the left hand of Smt. Asha Devi was fractured. On the basis of the said X-ray report the aforesaid

NCR was converted into a report of cognizable offence and the investigation was carried on thereafter. After investigation the police submitted a

charge sheet under the aforesaid sections in the court on 29.1.2001 which was registered as case No. 2249 of 201 in the court of C.J.M., J.P.

Nagar, under Sections 323, 325, 504 I.P.C. From the record it transpires that withdrawal of the prosecution was ordered by the Government and

an application annexure No. 2 to the affidavit was filed for the said purpose vide letter dated 16.6.05 written by Special Secretary Government of

Uttar Pradesh addressed to the District Magistrate, Moradabad. The contents of the aforesaid letter shows that in pursuance of the letter written

by the District Magistrate dated 3.1.2005 the Government had decided to withdraw the aforesaid prosecution and hence the Governor U.P. gave

permission for filing an application for withdrawal of the prosecution. In pursuance of the said letter dated 16.6.2005 the Assistant Public

Prosecutor moved an application on 28.9.2005 mentioning therein that he has received the order for withdrawal of the prosecution and hence he

prayed that in pursuance of the Government order the Court should permit him to withdraw the prosecution exercising power u/s 321 Cr.P.C.

Along with the said application Assistant Public Prosecutor also appended the photocopy of the Government order as well as the order passed by

the District Magistrate. On the application of withdrawal filed by the State the injured informant Smt. Asha Devi filed an objection on 18.4.2006

and 5.5.2006. In her objection she had stated that she is a poor person belonging to Scheduled caste and her husband is a sweeper. She had

further stated that the accused persons are muscle men and on the date of the incident her devrani (Jugnoo) and her sons were badly assaulted

along with her. Because of the assault both had sustained lacerated wounds of their head regarding which the medical report and X-ray reports

were available on the record of the case. She further stated that there had been no compromise between her and the accused persons and in the

application for withdrawal by the State no reason was mentioned for recommending the withdrawal of the prosecution which was against the law

and natural justice. It was also mentioned that there was a cross case of the incident as well which was still pending. The said withdraw application

dated 28.9.2005 (Annexure No. 3) was rejected by the Chief Judicial Magistrate, J.P. Nagar on 10.5.2006 filed in the aforesaid case No. 2249

of 2001 State v. Sudesh and Ors., The said order dated 10.5.2006 was challenged in Criminal Revision No. 76 of 2006 before the Sessions

Judge, J.P. Nagar who vide his order dated 2.11.2006 also rejected the revision filed by the State. Both the above orders are under challenge in

this application and the proceeding is sought to be quashed.

3. I have heard Sri V.P. Gupta learned Counsel for the applicants at a great length and the learned A.G.A.

4. Learned Counsel for the applicants contended that since the State Government had decided for withdrawing the prosecution of Criminal Case

No. 2249 of 2001, under Sections 323, 325, 504 I.P.C., P.S. Amroha, District J.P. Nagar, therefore, the prosecution should be quashed. In

support of his contention learned Counsel for the applicants has relied upon a judgment of this Court reported in 2004 (49) ACC page 234 Ashraf

Ali v. State of U.P.

5. In view of the facts as has been stated above when I cogitate over the contentions raised by rival sides I find that the contentions raised by of the

learned Counsel for the applicants are unmerited and deserves to be rejected. In this case the prosecution side had sustained grievous as well as

simple injuries. The parties had not compromised the matter at all. The prosecution of the cross case arising out of the same incident was going on

which negates the factum of compromise. Withdrawal of prosecution of the present case which was a cross case under such fact was neither

desirable nor warranted as it would have amounted to shutting down the defence for the accused persons in the case in which the present victim

and injured persons were accused. This would have seriously prejudiced the right of the accused in the cross case who are informant and victim of

present case. Cross cases means that the incident did take place and the rival sides have got their different versions in respect of the manner of the

incident. In such a view the interest of justice demanded that both the sides must be given a fair and reasonable opportunity to substantiate their

version of incident during the trial. The case of none of the side should be thwarted and be nibbed into the bud at the very inception because it

would have not only prejudiced the right of the victim in the cross case but would have put them in a precarious situation. Since, through the cross

cases, the happening of the incident was admitted to both the sides there was no justification for the state Government to recommend withdrawal

of the prosecution.

6. Moreover, the prosecution can be withdrawn only for very cogent and legally sustainable reasons only in the public interest. The power u/s 321

Cr.P.C. has come up for consideration before the Apex Court in a number of cases some of which are referred to below.

Abdul Karim v. State of Karnataka AIR 2001 SC 116 : Sheonandan Paswan Vs. State of Bihar and Others, Subhash Chander Vs. State

(Chandigarh Administration) and Others,

7. In the aforesaid case *Abdul Karmi v. State of Karnataka* (supra) the Apex Court has held under;

The applications u/s 321 filed before the Designated Court at Chennai sought consent to the withdrawal from the TADA prosecution against

Venkatesan alias 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 was not set out. The order on the

applications was founded 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 alias Radio Venkatesan, who is involved in Cr. No. 50/93 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 alias Radio Venkatesan...."" The order, therefore, was not

passed after meeting the requirements of Section 321, and it is bad in law. AIR 2001 SC 116

8. In the case of *Sheo Nandan Paswan* (supra) the Apex Court has held as under:

29. The first qualification is that where a charge has been framed by the Court either u/s 228 or Section 240, Criminal P.C., 1973, it would not be

open to the Public Prosecutor to apply for withdrawal from the prosecution on the ground of insufficiency of evidence in support of the

prosecution. The reason is that u/s 228 a charge can be framed by the Court only if the Court is of opinion that there is ground for presuming that

the accused has committed an offence and so also u/s 240 the Court can frame a charge only if it is of opinion that there is ground for presuming

that the accused has committed an offence. The Court in both these cases applies its mind to the material consisting of the police report and the

documents sent with it u/s 173 and comes to a conclusion that a prima facie case has been made out against the accused and the charge should

therefore be framed. When the Court has come to this conclusion after full consideration and framed a charge, it is difficult to see how on the same

material the Court can be persuaded to hold that there is not sufficient evidence to sustain the prosecution. How can the Public Prosecutor be

permitted to make a volte face on the basis of the same material? That would be mockery of justice and it would shake the confidence of the Court

in the purity and integrity of the administration of justice. That is why this Court pointed out in Bansi Lal Vs. Chandan Lal and Others, that ""if the

material before the Additional Sessions Judge was considered sufficient to enable him to frame the charges against the respondents, it is not

possible to say (hat there was no evidence in support of the prosecution case."" So also in Balwant Singh and Others Vs. State of Bihar, this Court

reiterated that ""the State should not stultify the Court by first stating that there is a true case to be tried and then make voile face to the effect that

on a second investigation the case has been discovered to be false"". The Public Prosecutor in this last mentioned case sought to rely on a second

investigation for supporting the application for withdrawal but that was clearly and unequivocally not countenanced by this Court. Obviously, the

Public Prosecutor would be on much weaker ground when on the same material which was before the Court when it framed the charge, he

subsequently seeks to withdraw the prosecution on the ground that there is not sufficient, evidence to sustain the prosecution. It is, therefore, clear

that though the prosecution can be withdrawn at any stage, even after the framing of the charge, it would not be competent to the Public

Prosecutor, once the charge is framed, to apply for withdrawal of the prosecution on the ground that the same material which was before the Court

when it framed the charge is not sufficient to sustain the prosecution. Of course, if some material has subsequently come to light which throws

doubt on the veracity of the prosecution case the Public Prosecutor can certainly apply for withdrawal on the ground that the prosecution is not

well founded. It may also happen that in the meanwhile key witness may have died or some important evidence may have become unavailable or

some such thing may have happened ; in that event, the Public Prosecutor may legitimately feel that it will not be possible to sustain the prosecution

in the absence of such evidence and he may apply for withdrawal from the prosecution. But, on the same material without anything more, the

Public Prosecutor cannot apply for withdrawal from the prosecution after the charge is framed. To allow him to do so would impair the faith of the

people in the purity and integrity of the judicial process.

30. The second qualification which we must introduce relates to a situation where a charge-sheet has been filed but charge has not been framed in

a warrant case instituted on police report. Section 239, Criminal P.C., 1973, provides:

If upon considering the police report and the documents sent with it u/s 173 and making such examination, if any, of the accused as the Magistrate

thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the

accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

Now when a warrant case instituted on a police report comes before the Court, the Court is required to consider only the police report and the

documents sent along with it and the Court may make such examination, if any, of the accused as it thinks necessary and on the basis of such

material if the Court, after giving the prosecution and the accused an opportunity of being heard, considers the charge against the accused to be

groundless, the Court is bound to discharge the accused. What the Court, therefore, does while exercising its function u/s 239 is to consider the

police report and the document sent along with it as also any statement made by the accused if the Court chooses to examine him. And if the Court

finds that there is no prima facie case against the accused the Court discharges him. But that is precisely what the Court is called upon to do when

an application for withdrawal from the prosecution is made by the public prosecutor on the ground that there is insufficient or no evidence to

support the prosecution. There also the Court would have to consider the material placed before it on behalf of the prosecution for the purpose of

deciding whether the ground urged by the public prosecutor for withdrawal of the prosecution is justified or not and this material would be the

same as the material before the Court while discharging its function u/s 239. If the Court while considering an application for withdrawal on the

ground of insufficiency or absence of evidence to support the prosecution has to scrutinise the material for the purpose of deciding whether there is

in fact insufficient evidence or no evidence at all in support of the prosecution, the Court might as well engage itself in this exercise while

considering u/s 239 whether the accused shall be discharged or a charge shall be framed against him. It is an identical exercise which the Court will

be performing whether the Court acts u/s 239 or u/s 321. If that be so, we do not think that in a warrant case instituted on a police report the

public prosecutor should be entitled to make an application for withdrawal from the prosecution on the ground that there is insufficient or no

evidence in support of the prosecution. The Court will have to consider the same issue u/s 239 and it will most certainly further or advance the case

of public justice if the Court examines the issue u/s 239 and gives its reasons for discharging the accused after a judicial consideration of the

material before it, rather than allow the prosecution to be withdrawn by the Public Prosecutor. When the prosecution is allowed to be withdrawn

there is always an uneasy feeling in the public mind that the case has not been allowed to be agitated before the Court and the Court has not given

a judicial verdict. But, if on the other hand, the Court examines the material and discharges the accused u/s 239, it will always carry greater

conviction with the people because instead of the prosecution being withdrawn and taken out of the ken of judicial scrutiny the judicial verdict

based on assessment and evaluation of the material before the Court will always inspire greater confidence, Since the guiding consideration in all

these cases is the imperative of public justice and it is absolutely essential that justice must not only be done but also appear to be done. We would

hold that in a warrant case instituted on a police report - which the present case against Dr. Jagannath Misra and others admittedly is - it should not

be a legitimate ground for the public prosecutor to urge in support of the application for withdrawal that there is insufficient or no evidence in

support of the prosecution. The Court in such a case should be left to decide u/s 239 whether the accused should be discharged or a charge

should be framed against him.

9. In the case of Subhash Chander v. State (supra) the Apex Court has held as under:

4. When a crime is committed in this country, the assessment of guilt and the award of punishment or, alternatively the discharge or acquittal of the

accused are part of the criminal justice process administered by the Courts of the land. It is not the function of the executive to administer criminal

justice and in our system, judges are not fungible, as Justice Douglas in Chandler v. Judicial Council of the Tenth Circuit of the U.S. (1970) 398

US 74, asserted;

Judges are not fungible; they cover the constitutional spectrum; and a particular Judge's emphasis may make a world of difference when it comes

to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defence, and the like. Lawyers recognize this when they talk

about ""shopping"" for a Judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen

recognize this when they appraise the quality and image of the judiciary in their own community.

When a case is pending in a criminal court, its procedure and progress are governed by the Criminal Procedure Code or other relevant statute. To

intercept and recall an enquiry or trial in a court, save in the manner and to the extent provided for in the law, is itself a violation of the law.

Whatever needs to be done in accordance with the law. The function of administering justice, under our constitutional order, belongs to (those

entrusted with judicial power. One of the few exceptions to the uninterrupted flow of the court's process in Section 321, Cr. P. C. But even here it

is the Public Prosecutor, and not any executive authority, who is entrusted by the Code with the power to withdraw from a prosecution, and (that

also with the consent of the court. We repeat for emphasis. To interdict, intercept or jettison an enquiry or trial in a court, save in the manner and

to the extent provided for in the Code itself, is lawlessness. The even course of criminal justice cannot be thwarted by the Executive, however, high

the accused, however sure Government feels a case is false, however unpalatable the continuance of the prosecution to the powers that-be who

wish to scuttle court justice because of hubris, affection or other noble or ignoble consideration. Justicing, under our constitutional order, belongs to

the judges. Among the very few exceptions to this uninterrupted flow of the court process is Section 494, Cr. P. C. Even here, the Public

Prosecutor - not any executive authority-is entrusted by the Code with a limited power to withdraw from a prosecution, with the Court's consent

whereupon the case comes to a close. What the law has ignited, the law alone shall extinguish.

5. Although skeletal, the conditions for such withdrawal are implicit in the provision, besides the general principles which have been evolved

through precedents. Once a prosecution is launched, its relentless course cannot be halted except on sound considerations germane to public

justice. All public power is a public trust, and the Public Prosecutor cannot act save in discharge of that public trust, a public trust geared to public

justice. The consent of the court u/s 321 as a condition for withdrawal is imposed as a check on the exercise of that power. Consent will be given

only if public justice in the larger sense is promoted rather than subverted by such withdrawal. That is the essence of the nolle prosequi

jurisprudence.

6. We wish to stress, since impermissible influences occasionally infiltrate into this forbidden ground, that court justice is out of bounds for masters

and minions elsewhere. We do not truncate the amplitude of the public policy behind Section 494, Cr. P. C. but warn off tempting adulteration of

this policy, taking the public prosecutor for granted. Maybe, the executive, for plural concerns and diverse reasons, may rightfully desire a criminal

case to be scotched. The fact that broader considerations of public peace, larger considerations of public justice and even deeper considerations

of promotion of long-lasting security in a locality, of order in a disorderly situation or harmony in a faction milieu, or halting a false and vexatious

prosecution in a court, persuades the Executive, probono publico, sacrifice a pending case for a wider benefit, is not ruled out although the power

must be sparingly exercised and the statutory agency to be satisfied is the public prosecutor, not the District Magistrate or Minister. The

concurrence of the court is necessary. The subsequent discovery of a hoax behind the prosecution or false basis for the criminal proceeding as is

alleged in this case, may well be a relevant ground for withdrawal. For the court should not be misused to continue a case conclusively proved to

be a counterfeit. This statement of the law is not exhaustive but is enough for the present purpose and, indeed, is well-grounded on precedents.

7. The promotion of law and order is an aspect of public justice. Grounds of public policy may call for withdrawal of the prosecution. A

prosecution discovered to be false and vexations cannot be allowed to proceed. The grounds cover a large canvass. But the power must be

cautiously exercised, and the statutory agency to be satisfied is the Public Prosecutor in the first instance, not the District magistrate or other

executive authority. Finally, the consent of the court is imperative, the law was explained by this Court in M.N. Sankarayarayanan Nair Vs. P.V.

Balakrishnan and Others,

A reading of Section 494 would show that it is the Public Prosecutor who is in charge of the case that must ask for permission of the Court to

withdraw from the prosecution of any person either generally or in respect of one or more of the offences for which he is tried. This permission can

be sought by him at any stage either during the enquiry or after committal or even before the judgment is pronounced. The section does not,

however, indicate the reasons which should weigh with the Public Prosecutor to move the Court for permission not the grounds on which the Court

will grant or refuse permission. Though the section is in general terms and does not circumscribe the powers from the Public Prosecutor to seek

permission to withdraw from the prosecution the essential consideration which is implicit in the grant of the power is that it should be in the interest

of administration of justice which may be either that it will not be able to produce sufficient evidence to sustain the charge or that subsequent

information before prosecuting agency would falsify the prosecution evidence or any other similar circumstances which it is difficult to predicate as

they are dependent entirely on the facts and circumstances of each case. Nonetheless it is the duty of the court also to see in furtherance of justice

that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished

merely because the Government as a matter of general policy or expediency unconnected with its duty to prosecute offenders under the law,

directs the Public Prosecutor to withdraw from the prosecution and the Public Prosecutor merely does so at its behest.

The position was confirmed in *Bansi Lal Vs. Chandan Lal and Others*, and *Balwant Singh and Others Vs. State of Bihar*, The law is thus well-

settled and its application is all that calls for caution. In the special situation of this case, two principles must be hammered home. The decision to

withdraw must be of the Public Prosecutor, not of other authorities, even of those whose displeasure may affect his continuance in office. The court

is monitor, not servitor, and must check to see if the essentials of the law are not breached, without, of course, crippling or usurping the power of

the Public Prosecutor. The two matters which are significant are (a) whether the considerations are germane, and (b) whether the actual decision

was made or only obeyed by the Public Prosecutor.

8. In the setting of the present facts, the enquiry must be whether the considerations on which withdrawal was sought by the Assistant Public

Prosecutor were germane and pertinent, and whether the actual decision to withdraw was made by the Assistant Public Prosecutor or was the

result of blind compliance with executive authority. If it appears from the material before the Court that germane or relevant considerations did not

prompt the motion for withdrawal but it was the pressure of political influence, the Court will with-hold its consent.

9. The, functionary clothed by the Code with the power to withdraw from the prosecution is the Public Prosecutor. The Public Prosecutor is not

the executive, nor a flunkey of political power. Invested by the statute with a discretion to withdraw or not to withdraw, it is for him to apply an

independent mind and exercise his discretion. In doing so, he acts as a limb of the judicative process, not as an extension of the executive.

10. In view of such a law when I look into the withdrawal application filed by the Assistant Public Prosecutor as well as on the direction for

withdrawing the prosecution passed by the State it leaves no room for -doubt that the said direction was passed by the State Government without

any application of mind. The order passed by the State Government as well as application filed by the Assistant Public Prosecution are bereft of

any reasons as to why the prosecution was being withdrawn. Such an application without any reason is nothing but is a glaring example of arbitrary

exercise of power which cannot be sustained. Both the courts below took the aforesaid fact into consideration and have rightly rejected the prayer

for withdrawal of the prosecution. Further the victim had filed the objections against such a withdrawal. She has sustained grievous injury. The

interest of justice demand that she must be afforded a fair opportunity of substantiating her allegations. Without affording any opportunity to her,

withdrawal of the prosecution would have amounted to the grave injustice caused to her which cannot be permitted by the Courts.

11. In view of what I have stated above, I do not find any illegality into the two orders dated 10.5.2006 passed by C. J.M. J.P. Nagar in Case

No. 2249 of 2001, State v. Sudesh and Ors., under Sections 325, 323, 504 I.P.C and the order passed by the lower revisional court date

2.11.2006 in Criminal Revision No. 76 of 2006, State of U.P. Through District Magistrate v. Sudesh and Ors. passed by Sessions Judge, J.P.

Nagar.

12. This criminal miscellaneous application, therefore, is merit less and is hereby dismissed.