(1969) 11 SC CK 0018

Supreme Court of India

Case No: Criminal Appeal 12 of 1969

M.N. Sankaranarayanan Nair		APPELLANT
	Vs	
P.V. Balakrishnan and Others		RESPONDENT

Date of Decision: Nov. 26, 1969

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 173, 173(4), 207A, 240, 333
- Essential Services Maintenance Ordinance, 1968 - Section 4, 5
- Penal Code, 1860 (IPC) - Section 109, 120A, 193, 420, 467

Citation: (1974) LW(Cri) 128

Hon'ble Judges: Palekar, J; Jaganmohan Reddy, J

Bench: Division Bench

Advocate: A. Sreedharan Nambiar, for the Appellant; Lily Thomas and A.G. Padissery, for the Respondent

Final Decision: Allowed

Judgement

Jaganmohan Reddy, J.
Respondent 1 and Respondent 2 were committed on 15th June 1965 by the Second Class Magistrate, Cannanore to stand trial before the Assistant Sessions Judge, Tellichery the former for offences u/s 467, 478 and 420 read with Section 109 of the I.P.C. while the latter u/s 467 read with 109, 471 and 420. While the case was pending before the Assistant Sessions Judge, the Public Prosecutor of Tellicherry filed a Memo on 30th November 1967 u/s 494 of the Code of Criminal Procedure, for permission to withdraw from the prosecution which permission was accorded by the Assistant Sessions Judge on 2nd December 1967. The Appellant who was the Managing Partner of Shree Narayana Transport Company, Calicut filed a Criminal Miscellaneous Petition en 19th February 1968 in the High Court of Kerala against the order of the Assistant Sessions Judge according permission to the Public Prosecutor for withdrawing from the

prosecution. The High Court held that the Public Prosecutor was justified when he applied for the withdrawal of the case and accordingly dismissed the petition against which the appeal comes up before us by Special leave.

2. The 1st Respondent was the agent of Shree Narayana Transport Company of one of its Branches namely at Baliapattom and in that capacity it was one of his duties to accept goods from the public for transporting them by lorry service of the Company and issue Way Bills. These Way Bills contained an undertaking that in the event of any of the Banks discounting them and if goods are lost or damaged during transport, the Transport Company will be responsible to the Bank. It is alleged that the 1st Respondent issued nine Way Bills on different dates in favour of the 2nd Respondent, as if the goods were received but in fact no such goods were accepted for transport nor were any such goods despatched. These Way Bills were duly discounted by the second Respondent the consignor, who draw about Rs. 84,000 against them from his Bank. This fraud was detected on a check made by the General Manager of Shree Narayana Transport Co., Kozhikode and it appears that the 1st accused (1st Respondent) executed an agreement in favour of the Transport Company undertaking to make good the loss suffered by it, after which he was suspended on 10th April 1963. On the same day a complaint was filed before Baliapattom Police and a case was accordingly registered against both Accused 1 and Accused 2. After investigation the Sub Inspector of Police, Baliapattom filed a chargesheet. The Magistrate on the material disclosed in the report u/s 173 committed the accused to stand trial before the Assistant Sessions Court on 13th June 1965 against which a Revision was filed in the High Court of Kerala on 9th July 1965. It was contended before the High Court that the committal was illegal as no evidence had been adduced in the case, as such it would be premature at that stage to say whether and and if so, what offence could be disclosed. The High Court dismissed this Revision Petition on 20th October 1966 holding that the procedure adopted in the committal proceedings instituted on a police report is prescribed in Section 207-A of the Code of Criminal Procedure under which the Magistrate had the power to commit even without recording the evidence of witnesses. The High Court drew support for this conclusion from a decision of this Court in 279564 where if was held that though normally in a criminal trial, the Court can proceed on documents which are duly proved, or by the rules of evidence made admissible without formal proof the Legislature had under the amended code in Section 207-A prescribed a special procedure for commitment of the accused. The record under the said provision consists of the oral evidence recorded under Sub-section (4) of Section 173, and it would be difficult to regard only these documents which are duly proved for which are admissible without proof as "evidence" within the meaning of Clause (6) and not the rest. On this view it was observed that there was no legal impediment in the Magistrate using the case diary for the purpose of deciding whether there was a case for committal and accordingly dismissed the revision petition. After this Revision was disposed of the Assistant Sessions Judge to whom the case stood committed ordered the splitting up the charges into 8 cases against which the second Respondent filed a Revision In the High Court u/s 561-A Code of Criminal Procedure where it was contended that all the 8

charges should have been consolidated into one case as otherwise there would be 8 distinct offences leading to multiplicity of trials. The High Court by its judgment d. 30th October 1967, following a decision of this Court in 279304 , said that the order of the Magistrate splitting up the charge into 8 cases was proper and while it does not call for any interference, it left it open for the prosecution as provided u/s 240 Code of Criminal Procedure to withdraw the other charges if one of the trials should and in a conviction.

3. After this petition was dismissed the Respondents seem to have moved the State Government to withdraw the prosecution and accordingly, as would appear from the Memo., filed by the Public Prosecutor on 30th November 1967, the Government passed on order G.O. Rt. No. 1589-67 Home (B) d. 22nd November 1967 directing the withdrawal of the case with the sanction of the Court, in the interest of public policy as also because there was no likelihood of the case being pursued to a successful issue. It was stated in the Memo filed by the Public Prosecutor that the alleged offences charged against the accused arose out of a contract agreed to between the accused and the de facto complainant viz., the General Manager, Shree Narayana Transport; that the subject matter of the case bad been decided by the Subordinate Judges Court, Calicut in a Civil suit; that the case was registered as early as 1963 and the trial has not yet begun; that the witnesses from far off places such as Bombay and Calcutta are cited and the securing of their evidence would involve heavy expenses for the State and that the case is one of Civil nature.

4. It is contended before us that u/s 494 Code of Criminal Procedure it is the Public Prosecutor and the Public Prosecutor alone who should make up his mind to withdraw from title prosecution without any reference to the State Government, that is was the State Government which directed the Public Prosecutor to seek permission as such the Public Prosecutor has not adverted his mind nor did he exercise his independent judgment in deciding whether the case is one in which permission of the Court to withdraw from the prosecution ought to have been asked for. In any case it is submitted on the grounds disclosed in the Memo filed by the Public Prosecutor that no permission ought to have been given as even prior to the filing of the said Memo, the High Court had said that there was a prima facie for the trial to go and therefore the present order directing the Public Prosecutor to withdraw from the prosecution is manifestly contrary to the views earlier expressed by it.

5. The Appellant''s Advocate later during the course of the argument conceded that there is no force in the first of his contentions namely that the Public Prosecutor cannot either be asked by the State Govt., to consider the filing of a petition wider Section 494 nor would it be proper for him if he was of the opinion that the prosecution ought not to proceed to get the consent of the Government to the filing of a petition under that Section for obtaining permission of the Court to withdraw from the prosecution. Section 494 which empowers the Public Prosecutor with the consent of the Court to withdraw from the prosecution is as follows:

Any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases 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

(b) If it is made after a charge has been framed, or when under this Code no charge is required, be shall be acquitted in respect of such offence or offences.

6. The power contained in the Section gives a general executive direction to withdraw from the prosecution subject to the consent of the Court which may be determined on many possible grounds and is therefore wide and uncontrolled by any other provision in the Code nor is it in pari-meteria with Section 333 which enables the Advocate General at any stage in a Trial by the High Court and before the return of the verdict to inform the Court if he thinks fit on behalf of the Government, that he will not further prosecute the Defendant upon the charge and on such information being given the case against the accused comes to an end. This power of entering a nolle prosecui u/s 333 Code of Criminal Procedure is not dependent upon any permission of the Court. 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 nor the grounds on which the Court will grant or refuse permission. Though the Section is in general terms and does not circumscribe the powers of 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 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. A large number of cases have been referred to but it is unnecessary to consider them except for a few as typifying the approach in cases where permission to withdraw from the prosecution was sought on grounds extraneous to and not germane to the maintenance and enforcement of the law and which permission though given by the Trial Court was quashed by the High Court.

7. A special Bench of the Calcutta High Court in 18200 was considering the validity of the permission granted by the Magistrate to the Govt. Pleader to withdraw from the prosecution in a case where the accused were charged with offences under Sections 193, 467, 477, 109 and 120-A of the Penal Code. The prosecution had been started and after some evidence had been recorded, the record of the case was called for by the Government which having kept it for six months returned it to the Govt. Pleader who filed a petition for withdrawal from the prosecution u/s 494 Code of Criminal Procedure on certain grounds which were not substantial namely that the original complainant had withdrawn from the prosecution; that on an independent examination of the records of the Provisional Govt. considered that the evidence was insufficient to warrant further proceeding with the case; and that the Provincial Government would not in view of the uncertainty of a successful prosecution be justified in incurring heavy expenses in the fees, the travelling allowances of the handwriting expert and in lawyers'' expenses. The Magistrate though considering that these grounds are not sufficient for not committing the accused persons but on the other hand was of the view that there was ample substantial evidence to show that serious offences were actually committed, nonetheless granted permission to the Govt. Pleader to withdraw from the prosecution. It was held by the High Court that the consent of the Trying Magistrate for the discharge had not been properly given and therefore quashed the proceedings. It also appeared that some of the accused in the case were related to one of the Ministers found proved by the High Court and the action of the Govt. in calling for the record of the case from the Magistrate while it was still proceeding and retaining it for six months was quite illegal and utterly improper. A Full Bench of the Patna High Court in 899082 lso held that there was no justification whatever for the view that the Prime Minister or any other Minister or executive officer has the power to usurp the functions of the Court or to take the case out of the seisin of the Magistrate before whom it is pending for trial and that where the Trying Magistrate makes no attempt to exercise his discretion at all and permits the withdrawal of the prosecution merely in consequences of the order of the Government the High Court will interfere. At the same time it was observed that the High Court would be reluctant to direct the prosecution of persons against whom Govt. does not desire to proceed, unless there is evidence which require judicial consideration. The permission granted by the Magistrate in that case was held to be wrong, so also was the action of the Govt., in a case which is subjudice irrespective of the question whether the prosecution is likely to end in conviction as interfering with the even and ordinary course of justice, by usurping the function of the Court and taking it out of its seisin.

8. In a recent case the Full Bench of the Kerala High Court in 547394 was considering the application for withdrawal filed by the Public Prosecutor under the directions of the Govt. to withdrawal from the prosecution against the strikers for offences under Sections 4 & 5 of the Essential Services Maintenance Ordinance, 1968, and other laws such as the Penal Code and Telegraph Act mentioning as a ground the withdrawal order of the State Government which stated that consistent with the Policy of the Government in relation to mass agitation and strike it has been decided to withdraw with the leave of the Court, the

cases registered in connection with the Central Government Employees strike on the 19th September, 1968 except those involving serious personal violence or destruction of property. It was held that the policy set out therein being a policy opposed to the law could not be taken into the Consideration. Apart from the order being in disregard of the duty and the responsibility of the State Government to enforce the law, the Full Bench said there could be no question of the executive policy in a region covered by the law. In that view it quashed the permission granted by the Trial Court. In the 282542 it was pointed out by this Court that though the Section does not give any indication as to the ground on which the Public Prosecutor may make an application on the consideration of which the Court is to grant its consent, it must nonetheless satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised and that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.

9. It appears to us that the wide and general powers which are conferred u/s 494 on the Public Prosecutor to withdraw from the prosecution though they are subject to the permission of the Court have to be exercised by him in relation to the facts and circumstances of that case in furtherence of rather than as a hindrance to the object of the law and justified on the material in the case which substantiate the grounds alleged, not necessarily from those gathered by the judicial method but on other materials which may not be strictly on legal or admissible evidence. The Court also while considering the request to grant permission under the said section should not do so as a necessary formality--the grant of it for the mere asking. It may do so only if it is satisfied on the materials placed before it that the grant of it sub serves the administration of justice and that permission was not being sought covertly with an ulterior purpose unconnected with the vindication of the law which the executive organs are in duty bound to further and maintain.

10. What then are the circumstances in which the permission has been sought in this case and the considerations that weighed with the courts in granting that permission. The Public Prosecutor as we have seen thought that the matter was of a civil nature that the subject matter of the case before the Magistrate had been decided in a Civil suit, the witnesses are from far off places and their evidence will incur huge expenses for the State, that the case was registered as early as 1963 and the trial has not yet begun. It is clear that prima facts none of these grounds or even the cumulative effect of all these grounds would justify the withdrawal from the prosecution. It may be that the acts of the Respondent may make them both liable under the Civil law as well as under the Criminal law but it does not justify either the seeking of permission to withdraw from the prosecution or granting of it unless the matter before the Criminal Court is of a purely civil nature. The accused in this case have been charged with offences of cheating of the forgery of valuable securities with the intention that the documents forged shall be used for the purpose of cheating, and/or also for using them as genuine which they know or have reason to believe to be forged documents. The case of the Respondents was that all this was done with the knowledge of the complainant with a view to further the practice

prevailing to popularise the transport business. It appears that after the complaint was filed and the police took cognizance of the offence and investigated it but before the charge sheet was filed the Public Prosecutor seems to have expressed the view on 8th June 1963 that a successful prosecution may not be possible u/s 467 and 420 because the matter for which the Respondents were sought to be charged related to a practice which seems to have prevailed in that Transport Company and in other Companies as well and in the light of that practice mens rea may not be established but this opinion did not prevail as he was directed to file the charge sheet and accordingly the case proceeded.

11. A perusal of the committal order will make this conclusion of ours clear. Before the Magistrate the learned Advocate had contended that there was a normal practice that the Company used to issue way bills without obtaining the goods from the party for the sake of popularising the Company and that in the circumstances Respondent 1 while issuing the way bill had no intention to cause damage or to cheat. The Magistrate negatived this contention and said that he was not able to believe that the Company will resort to these practices for the sake of such popularity and that it was the way bills that were issued in Accused 2''s name and it was Accused 2 who obtained the money from the Bank. Therefore there was prima facie evidence to show that goods were not produced at the time of issuing way bills by Respondent 1 to Respondent 2 and that Respondent 2 was well aware if it when he drew the money on the way bills from the Bank for the goods he had never produced for booking. Knowing that these receipts were forged ones Respondent 2 had got them discounted. It also appears from the committal order that the prosecution had produced a letter alleged to have been written by Respondent 2 to Respondent 1 requesting him to issue the way bills, a reading of the Magistrate said shows that it was a letter written with the intention of obtaining them. In this view he thought that there was a prima facie case against the accused and accordingly he framed the charges.

12. The High Court ignoring the view taken by it in its previous two revisions referred to earlier that there was prima facie case and that there was no illegality in the prosecution, though that the Public Prosecutor was right when he applied to the court for sanction to withdraw the prosecution on the ground that it might not result in a conviction to which it further added that there was a long delay of five years and that the witnesses were not in the locality and have to be brought to Court from different places. Though it thought that this latter reason may not justify the abandonment of the prosecution but nevertheless it said that in view of the practice prevailing in this Transport Company as well as in other Transport Companies the chances of successful prosecution were remote. It further thought that the question of expenses would also become relevant. We think that these grounds are flimsy and do not justify the granting of permission to withdraw from the prosecution. In the first place there is nothing to indicate what that practice was how it was resorted to and what elements were deficient to constitute the offences for which the Respondents were entitled to be charged and in the second place nothing had happened

since the committal order except that the several revisions filed by Respondent 1 and Respondent 2 had delayed the trial which delay by itself cannot be made a ground for according permission. On the other consideration which weighed with the High Court that a prosecution would involve a huge expenditure there is no material to show what amount would be involved if the case was prosecuted nor how many witnesses would be required to be called from Calcutta and Bombay On the other hand the case appears to be mostly hinged on the issue of the Way Bills to Respondent 2 by Respondent 1 without receipt of goods from Respondent 2 which the Respondents say was due to the practice followed by the complainant to popularise its transport business. The execution of the Way Bills by Respondent 1, their issue by him without receipt of the goods and the obtaining of money by the second Respondent from the Bank by discounting them with it are some of the elements and except perhaps for the non-receipt of the goods by the people to whom they were-alleged to have been booked, are all dependent on local witnesses. In any case the expenditure involved is not the sole criterion for granting permission.

13. In the view we have taken, this appeal is allowed, the permission granted by the Trial Court and confirmed by the High Court in Revision is set aside and we direct that the trial do proceed in accordance with law.