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(1980) 03 CAL CK 0004

Calcutta High Court

Case No: None

Sk. Abdur Karim

APPELLANT

Vs

The State and Others

RESPONDENT

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**Date of Decision:** March 21, 1980

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 321, 333, 435
- Explosives Act, 1884 - Section 6
- Penal Code, 1860 (IPC) - Section 109, 302, 307, 323, 34

**Citation:** (1981) CriLJ 219

**Hon'ble Judges:** Jyotirmoyee Nag, J

**Bench:** Single Bench

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**Judgement**

@JUDGMENTTAG-ORDER

Jyotirmoyee Nag, J.

This Rule is directed against an order being Order No. 23 dated June 25, 1979, passed by the learned Additional Sessions Judge, Second Court, Murshidabad in Sessions Case No. 170 of 1977. The accused opp. parties were charged u/s 307 read with Section 34 of the Indian Penal Code and one of the accused was charged u/s 323 of the Indian Penal Code separately. There was also a charge u/s 6(3) of the Indian Explosives Act against all the accused persons. As the offences are sessions triable the accused persons were committed to the court of session by the learned Magistrate. After the charges were framed in the Sessions Court an application was made by the learned Public Prosecutor u/s 321 of the Code of Criminal Procedure for permission to withdraw the case against the accused persons. The application made by the learned Public Prosecutor in charge of the case was to the following effect. "That, being instructed by my client and satisfied with the grounds of withdrawal, the Public Prosecutor Murshidabad puts in the petition seeking Your Honour's consent to the withdrawal from the prosecution in the above case with

regard to all offences against the accused persons on the following amongst other grounds: For that in the interest of administration of justice the consent be given. For that the continuation of the case may not serve the administration of justice inasmuch as the social normalcy may not be furthered thereby. For that in the changed political situation the change of minds of the accused persons involved is desired."

Upon this application being made the learned Sessions Judge passed the impugned order. The considerations that weighed with the learned Judge are firstly that in the interest of administration of justice it was necessary that the permission be given to withdraw the case against the accused persons. The learned Judge looked into the medical report and was satisfied that although the charges were under the Explosive Substances Act and also u/s 307, of the Indian Penal Code, none of the injuries that were sustained by the victim, were very serious injuries, in fact they were simple in nature and could be caused by some hard and blunt substance. It was also submitted on behalf of the Public Prosecutor that the incident originated over a dispute in connection with land and that in order to bring about normal relationship between the parties and restore normalcy in the locality it was necessary that the case should be withdrawn against the accused persons. The learned Judge also found that it was a fit case where permission should be granted. Accordingly he acquitted the accused persons upon granting permission u/s 321 of the Code of Criminal Procedure.

2. This order of acquittal is challenged by Mrs. Mukti Moitra. Mrs. Moitra has submitted that in view of the various decisions of this Court as well as of the Supreme Court the permission to withdraw the case has been given on a misconception of the law. Firstly, she has argued, that the Public Prosecutor had stated in his application that it was his client who had instructed him to withdraw the case. Who his client is, does not appear from the petition or what the clients' instructions are have not been stated in the petition. The Public Prosecutor however considered the materials before him and was of the view that in the interest of administration of justice it was necessary that the case may be withdrawn for which permission was sought for by him. He was also guided by other public considerations for instance the question of restoring the normal relationship between the parties in the locality.

3. Mrs. Moitra has submitted that one of the grounds for withdrawal is that due to changed political situation a change of mind is desired. This means that there is a political reason for withdrawal of the case and that should not weigh either with the Public Prosecutor or with the Court for granting permission. Though that is a ground stated in the application by the Public Prosecutor but in the order passed by the learned Sessions Judge, that was not a consideration for granting permission to withdraw the case. As submitted by Mr. Abdus Sattar on behalf of the accused opp. parties what has to be looked into is whether the Public Prosecutor was influenced

by any superior executive authority in praying for permission for withdrawing the case and also when the Court is granting permission whether the court is influenced by any consideration other than the interest of administration of justice. The learned Sessions Judge considered all the points that were necessary for giving permission for withdrawal of the case, the main consideration being the interest of administration of justice; accordingly permission was rightly be given by the learned Judge. No doubt he considered what was the nature of the case, the nature of the injuries and the evidence as it appeared from the records. That certainly would be considerations in granting permission u/s 321 of the Code of Criminal Procedure.

4. Mrs. Mukti Moitra has cited several cases in support of her contention that the learned Sessions Judge was not oblivious of the principles relating to withdrawal of cases as laid down by the decisions of this Court and the Supreme Court, The cases cited by her are report- ted in 1966 Cri LJ 700, equivalent to [Thakur Ram Vs. The State of Bihar](#), . In reply to a question put by this Court as to whether the complainant has locus standi to move against an order permitting withdrawal of the case by the learned Magistrate or the Judge. Mrs. Moitra has submitted that the Supreme Court had deprecated the practice of private party who has no locus standi to move the court against any order of discharge or acquittal particularly when the case has proceeded on the basis of a Police report. It has been held in that case ( [Thakur Ram Vs. The State of Bihar](#), ) "that no doubt the terms of Section 435 are very wide, so a private party can take up the matter suo motu. The criminal law is not however, to be used as an instrument of wreak private vengeance by an aggrieved party against the person who, according to that party, had caused injury to it. Barring a few exceptions, in criminal matters the party who is treated as the aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all steps necessary for bringing the person who has acted against the social interests of the community to book". However, it is argued by Mrs. Moitra that that is no authority for saying that the private party can under no circumstances move against an order of acquittal for permission being given u/s 321 of the Code of Criminal Procedure. She has pointed out that in many cases that have gone up to the Supreme Court they have been entertained upon application from private parties (complainant) against orders passed u/s 321 of the Code of Criminal Procedure. She could not however point out to any direct authority on this point except one case of this Court being an unreported case Criminal Revn. Case No. 688 of 1978. In that case after an order of acquittal was passed upon permission being given u/s 321 of the Code of Criminal Procedure a person who was only a witness in the case moved the High Court challenging the order made by the learned Magistrate u/s 321 of the Code of Criminal Procedure; it was commented by their Lordships of the Division Bench presided over by P.C. Borooah, J. that the person who moved the application being a mere witness, cannot file a case against an order u/s 321 of the Code of Criminal Procedure.

5. The next case to support that the complainant can challenge an order u/s 321 of the Code of Criminal Procedure is that reported in [The State of Bihar Vs. Ram Naresh Pandey](#). In this case which went to the Supreme Court, permission to withdraw the case against one of the appellants was given by the learned Magistrate before commitment. The accused was charged under Sections 302 and 109 of the Indian Penal Code. The ground stated by the Public Prosecutor in his application for permission to withdraw was that on the evidence available it would not be just and expedient to proceed with the prosecution of Sri Mahesh Desai (accused) and that therefore it was necessary to withdraw the case against Shri Mahesh Desai only. It was argued by the Public Prosecutor before the learned Magistrate that the evidence regarding the complicity of the accused was meagre, that there was only a single item of evidence of a dubious nature against him which was not likely to establish a prima facie case. The learned Magistrate granted permission and discharged the accused. The order was upheld by the learned Sessions Judge, on an application filed by the first informant and by the widow of the murdered person. The persons pursued the matter further and applied to the High Court in revision. The High Court held that permission or consent should not have been given in such a case. Accordingly, that order was set aside, Mrs. Moitra has pointed out that ultimately the State went up against the order passed by the High Court but up to the stage of High Court a private party was pursuing the matter against the withdrawal of the case. But as I have already commented, the question was not directly decided as to whether the private party has a locus standi to move in the matter when according to the Criminal Procedure Code the matter is between the Public Prosecutor and the Magistrate or the Judge concerned. It has been held in this case [The State of Bihar Vs. Ram Naresh Pandey](#), that Section 439 of Cri P.C. (old) 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. "There can be no doubt however, that the resultant order on the granting of consent being an order of discharge or acquittal would attract the applicability of the correction by the High Court u/s 435, 436, 439 or 417 of the Code of Criminal Procedure (old). The function of the Court in granting its consent may well be taken to be a judicial function. It follows that in granting the consent the Court must exercise a judicial discretion. But it does not follow that the discretion is to be exercised only with reference to the material gathered by the judicial method. Otherwise the apparently wide language of Section 494 of the Code of Criminal Procedure (old) would become considerably narrowed down in its application. The initiative is of the Public Prosecutor and what the Court has to do is only to give consent and not to determine any matter judicially". Accordingly, it was held that "where an application for withdrawal u/s 494 of the Code of Criminal Procedure is made on ground of insufficiency or meagerness of reliable evidence that is available, it is not an improper exercise of discretion for the court to grant consent before evidence is taken, if it was reasonably satisfied, otherwise, that the evidence, if actually taken, is not likely to result in conviction."

6. The next case cited by Mrs. Moitra is reported in [State of Punjab Vs. Surjit Singh and Another](#), . In this case the question arose for decision before their Lordships of the Supreme Court in relation to an application u/s 494 of the Code of Criminal Procedure (old) as to who can file an application u/s 494 of the Code and it has been held that it is only the Public Prosecutor, who is in charge of a particular case and is actually conducting the prosecution that can file an application under that section, seeking permission to withdraw from the prosecution. If a Public Prosecutor is not in charge of a particular case and is not conducting the prosecution he will not be entitled to ask for withdrawal from prosecution, u/s 494 of the Code of Criminal Procedure, if it is found that the prosecution is being conducted by the complainant, and the prosecuting Deputy Superintendent of Police, Bhatinda, was nowhere in the picture, when he filed the application u/s 494 of the Code. In such a case the Public Prosecutor is not entitled to file an application for withdrawal". To deal with the case reported in [M.N. Sankarayarayanan Nair Vs. P.V. Balakrishnan and Others](#), , the same principle as is quoted above, has been reiterated in this case, in respect of the scope of Section 494 of the Code of Criminal Procedure. It may be that the Public Prosecutor can be asked by the State Government to consider the filing of a petition for obtaining permission of the Court to withdraw from the prosecution. He can if he is of opinion that the prosecution ought not to proceed get the consent of the Government to file such a petition. The power contained in Section 494 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. It is in pari materia with Section 333 of the Code. The section does not, however, disclose the reasons which should weigh with the Public Prosecutor to move the Court nor the grounds on which the Court will grant or refuse permission. But it is the duty of Court to see that in furtherance of justice the permission is given and 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.

7. One other case to which reference has been made by Mrs. Moitra is reported at [Balwant Singh and Others Vs. State of Bihar](#), . In this case judgment was delivered by Mr. Justice Krishna Iyer, J. His Lordship has pointed out that 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 interest of public justice being the paramount consideration they may transcend and overflow the legal justice of the particular litigation. The Criminal Procedure Code is the only master of the public prosecutor and he has to guide himself with reference to Criminal Procedure Code only. So guided, the 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.

Where in an ordinary criminal case, the public prosecutor is ordered by the District Magistrate to move for withdrawal and the public prosecutor obeys and not acts, and no public policy bearing on the administration of justice is involved, the Court will refuse to accord permission. It may be open to the District Judge to bring to the notice of the public prosecutor materials and suggest to him to consider whether the prosecution should be withdrawn or not. He cannot command where he can only commend. The court has to be vigilant when a case has been pending before it and not succumb to executive suggestion made in the form of application for withdrawal.

The case reported in (1978) 82 CWN 578 may now be referred to. The judgment was delivered by Mr. Justice Sudhamay Basu, J. in *Chintamoni Mondal v. State of West Bengal*. It has been pointed out by his Lordship that whatever conduces to the justice are germane to the issue and whatever is extraneous to the same is irrelevant. The initiative has to come from the public prosecutor who will exercise his mind independently without being actuated by dictates of the executive authority and the Magistrate who has a very wide discretion in the matter will be guided solely by considerations of administration of justice. In considering the materials germane to the withdrawal the Magistrate can look into the case diary and other material available including statements made u/s 161 of the Criminal Procedure Code.

8. Having considered all the cases referred to by Mrs. Moitra and Mr. Abdus Sattar the order of the learned Sessions Judge is to be examined to see whether permission was rightly given for withdrawal. The learned Sessions Judge undoubtedly had the principles laid down in the decisions of the Supreme Court that it is the administration of justice that should weigh with him in granting permission to withdraw the case. Therefore, it cannot be said that the learned Sessions Judge granted permission improperly upon extraneous matters. I accordingly uphold the order passed by the learned Sessions Judge, In this connection I may point out that though there is no direct authority on the point, I am of the view that a private party has no locus standi to move against an order of acquittal passed by the learned Judge upon an application being made u/s 321 Cri P. Code to him by the Public Prosecutor in a case which he was conducting. The language of Section 321 of the Code makes it quite clear that the matter is between the Public Prosecutor and the Magistrate or the Judge concerned and a private party has no right to interfere in such matters. "Any 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" (Section 321 Cri P.C.). The Public Prosecutor being "the custodian of public justice" he is the only

person who can make an application for withdrawal and, if withdrawal is granted by the court in the interest of administration of justice, no private party can come up against that order of withdrawal.

9. In the result the Rule is discharged.