

Vivekanand Kumar Vs. State of Bihar

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Court : Patna

Decided On : May-09-1995

Judge : B.P. Singh, N. Pandey and Nagendra Rai, JJ.

Appeal No. : Criminal Writ Jurisdiction Case No. 594 of 1993

Appellant : Vivekanand Kumar

Respondent : State of Bihar

Advocate for Pet/Ap. : Mr. J.P. Shukla

Disposition : Petition Dismissed

Prior history : B.P. Singh, J. 1. The instant writ petition under Articles 226 and 227 of the Constitution of India has been filed by the petitioner, who is an accused in case pending before the Judicial Magistrate, Ist Class Patna, in G.R. No. 494 of 84/T.R. No. 1055 of 92 under Sections 341, 323, 324, 448 and 379 of the Indian Penal Code. He prays for quashing of the order dated 21.6.1993 passed by the Judicial Magistrate, Ist Class, Patna, in the aforesaid case, refusing to drop the criminal case pending a

Judgement :

B.P. Singh, J.

1. The instant writ petition under Articles 226 and 227 of the Constitution of India has been filed by the petitioner, who is an accused in case pending before the Judicial Magistrate, Ist Class Patna, in G.R. No. 494 of 84/T.R. No. 1055 of 92 under Sections 341, 323, 324, 448 and 379 of the Indian Penal Code. He prays for quashing of the order dated 21.6.1993 passed by the Judicial Magistrate, Ist Class, Patna, in the aforesaid case, refusing to drop the criminal case pending against the petitioner. In effect, the prayer of the petitioner is that the case pending against the petitioner should be directed to be withdrawn, in view of the policy decision of the Government, as contained in the letter No. 1791 dated 30th March, 1986, of the Secretary of the Department of Law addressed to all District Magistrate.

2. It appears that originally this application was filed under Section 482 of the Code of Criminal Procedure for quashing the order of the Magistrate rejecting the application for dropping the criminal proceeding, but the petitioner prayed for leave to convert the application into a criminal writ petition, and the same was allowed by this Court. When the matter came up before a Division Bench of this Court on 30th September, 1993, the Court was prima facie of the view that having regard to the well known distinction between withdrawal of cases under Section 321 of the Code of Criminal Procedure, and the quashing of prosecution under Section 482 of the Code of Criminal Procedure, it was not possible to quash the prosecution, in the light of the policy decision of the Government, but the Court asked for a report from the Judicial Magistrate, before whom the case was pending, about the present stage of the case, and the reasons for the delay. This was apparently with a view to pass an appropriate direction for the expeditious conclusion of the trial, which had been pending for a considerably long period.

3. On 15.10.1993 the Court considered the report received from the learned Magistrate, who reported that the application filed on behalf of the petitioner on 20th March, 1993 for dropping the case and discharging him, was rejected by order dated 21.6.1993. However, no progress was made thereafter, as the petitioner himself had filed a petition to stay the proceeding, so that he may move the High Court. Having regard to these facts, this Court was inclined to fix a fresh time schedule for the conclusion of the case, but counsel for the petitioner

submitted, that as was done by a Division Bench of this Court in Cr.W.J.C. No. 485 of 1990, a direction should be issued for withdrawal of the case, in view of the policy decision of the State Government. Counsel also referred to an order passed by a learned Single Judge of this Court in Cr.Misc. No. 5688 of 1985. These two orders have been annexed as Annexures 5 and 6 to the instant writ petition. The Court found that there was another order passed by a Division Bench of this Court in Cr.W.J.C. No. 600 of 1992, whereby the Court refused to quash the prosecution, but observed that the authorities should take steps for withdrawal of the case. The said order has been annexed as Annexure 7 to the instant writ petition. Having regard to these decisions, counsel for the petitioner submitted that the matter may be referred to a larger Bench, so that the point in issue may be authoritatively decided, and the difference of opinion between the two Division Benches of this Court may be resolved. That is how this matter has been placed before this Bench.

4. I may briefly recapitulate the facts, which constitute the factual back ground of this case. It appears that a civil dispute is pending before the court of Subordinate Judge, Patna, between the petitioner and one Smt. Sumitra Yadav, wife of Shri Ramashray Yadav, and an interim order had been passed in the aforesaid civil suit directing maintenance af status quo by the parties. According to the petitioner, the informant is the servant of the aforesaid Sri Ramashray Yadav. Despite the interim order passed by the Court, the informant and his master attempted to take forcible possession of the house by dispossessing the petitioner and his family members. Such frequent incidents were reported to the police by the father of the petitioner. Reference is made to the reports lodged with the police on 31.1.1984, 8.2.1984, 18.8.1984, 8.9.1984 and 14.9.1984. It, however, appears that the informant also lodged a report against the petitioner alleging offences under Sections 341, 323, 324, 448 and 379 of the Indian Penal Code, which was registered as Buddha Colony P.S. Case No. 139 dated 31.1.1984. The case of the petitioner is that the local police has been unduly helping the informant against the petitioner.

5. On 20th March, 1984, the police submitted a charge-sheet against the petitioner. The Chief Judicial Magistrate, Patna, took cognizance of the offences under Sections 341, 323, 324, 448 and 375 of the Indian Penal Code on

31.8.1984. The petitioner was granted anticipatory bail by this Court by order dated 12th July, 1984, whereafter the petitioner appeared before the Magistrate on 14.7.1986, and submitted bail bonds, which were accepted by the Court. The petitioner thereafter moved this Court for quashing of the order taking cognizance. By order dated 9.12.1986 the order of the Court below was stayed, and the record called for. However, ultimately the aforesaid application being Crl.Misc. No. 9427 of 1985 was dismissed by the Court.

6. On 20th February, 1993, the petitioner filed an application before the Judicial Magistrate for dropping of the criminal case in view of the State Government's policy decision as contained in the letter of the Law Secretary dated 30th March, 1986, as modified by letter dated 26.8.1986. Those letters are Annexures 2 and 3 to the instant writ petition. The learned Magistrate by his impugned order dated 21.6.1993 dismissed the application, and came to the conclusion that the petitioner was himself responsible for the delay in the conclusion of the trial. He, therefore, dismissed the application directed the petitioner to be present on 22nd June, 1993. for framing of charge, so that the matter may be disposed of expeditiously. The learned Magistrate also referred to the direction of this Court that the matter should be disposed of within six months.

It is in these circumstances that the petitioner initially filed an application under Section 482 of the Code of Criminal Procedure for quashing of the impugned order of the learned Magistrate; and thereafter sought permission to convert the same into an application under Articles 226 and 227 of the Constitution of India. Apparently, the petitioner wanted that the proceeding itself be quashed or dropped in the light of the Government's policy decision, and was not satisfied with any direction for expeditious disposal of the case. The petitioner obviously was not interested in pursuing his application under Section 482 of the Code of Criminal Procedure for quashing of the prosecution on the ground of delay, which necessarily involved an investigation into the causes for the delay with a view to ascertain whether the petitioner was not responsible for the delay in the disposal of the proceeding. The clear-cut stand of the petitioner is that in view of the policy decision of the State of Bihar, the Criminal Proceeding, pending against him must be dropped by the Court itself, even in the absence of an application by the Public

Prosecutor, and the petitioner be discharged.

7. This stand of the petitioner is opposed by the State on the ground that if the prosecution has to be withdrawn in the light of the policy decision of the Government in terms of the aforesaid decision, the procedure under Section 321 of the Code of Criminal Procedure has to be followed, and the Public Prosecutor incharge of the case must perform his statutory duty in the manner he is required to do in law; and the Court must also exercise its discretion under the section having regard to all relevant considerations. There can be no automatic withdrawal of the case by dropping of the case by the Court itself, in the absence of an application for withdrawal of the case by the Public Prosecutor incharge of the case. Such automatic termination of criminal prosecution is not envisaged by the Government's policy decision on which reliance is placed by the petitioner.

8. Mr. J.P. Shukla, counsel for the petitioner submitted that the policy decision of the Government, as contained in the letters of the Law Secretary, is binding upon all concerned and must be implemented. The aforesaid decision has attained the status of a law, since it has the approval of the Supreme Court of India and, therefore, in view of the said policy decision, the prosecution of the petitioner must be withdrawn. Secondly, he submitted, once it is held that the policy decision is a valid decision binding upon all concerned, there is no discretion left in the matter, and all prosecutions, which have remained pending for five years or more, and which relate to offences enumerated in the latter, must be automatically withdrawn. There is no scope for the operation of Section 321 of the Code of Criminal Procedure inasmuch as neither the Public Prosecutor nor the Court is required to consider the matter and to exercise the discretion that they may have. In substance, the argument is that the policy decision takes effect regardless of the provision of Section 321 of the Code of Criminal Procedure. Thirdly, it was submitted that where such a prosecution was not withdrawn, the Court must issue a writ dropping the prosecution. Lastly, it was urged that the petitioner's fundamental right of speedy trial was guaranteed. The policy decision only gave effect to that right. According to him, all prosecutions which have remained pending for five years or more must be quashed, otherwise it would infringe the fundamental right of a citizen to speedy trial, which is a component of the right to

life.

9. In view of the submissions urged on behalf of the petitioner. I shall first consider the letter of the Law Secretary addressed to all District Magistrates on 30th March, 1986, containing the Government decision, which is the sheet anchor of the petitioner's case. In the aforesaid letter (Annexure 2) the Law Secretary has informed all the District Magistrate that the State Government had taken a decision that criminal cases pending in the courts for five years or more in relation to offences which are not punishable with imprisonment for a term exceeding five years, and which do not involve any public policy, must be withdrawn. Paragraph No. 2 of the communication refers to various sections of the Indian Penal Code, and states that if the above two conditions are fulfilled, the cases under the aforesaid provisions of the Indian Penal Code may be withdrawn. It has further been emphasised that only such cases under the aforesaid provisions of the Indian Penal Code may be withdrawn, where the offence has not been committed in relation to the property of the Government or semi-Government organisation, or against an officer/employee of the Government or semi-Government organisation. Paragraph No. 4 of the letter specifies some other laws and states that having regard to the aforesaid two conditions, cases filed under the aforesaid laws also may be withdrawn. Paragraph No. 5 of the letter is most significant, and translated from vernacular, it is to the following effect:

it is, therefore, requested that the Public Prosecutors/Assistant Public Prosecutors incharge may be made aware of this decision of the Government and they be directed that in pending cases where cognizance has been taken by the courts in cases under the laws and the sections above mentioned, they should, after going through the concerned file, and on their own, take steps before the concerned courts for withdrawal of such cases under Section 321 of the Code of Criminal Procedure.

The aforesaid paragraph, therefore, clearly directs that before taking steps for withdrawal of the prosecution, the Public Prosecutor/Assistant Public Prosecutor incharge must go through the concerned files, and on their own (Swechha), must take necessary steps.

10. It will thus appear from Annexure 2 that the Government took a decision that those criminal cases which had remained pending for five years or more and which were in respect of offences not punishable with imprisonment for a period over five years, should be withdrawn. The offences under the Indian Penal Code as well as certain other specified laws were enumerated in the letter. This was subject to the condition that only those cases should be withdrawn; which did not involve an offence against Government or semi-Government property or an offence against Government or semi-Government officer/employee. Having specified the types of cases which may be withdrawn, paragraph No. 5 of the letter provided the procedure that must be followed for withdrawal of such cases. In clear terms it stated in paragraph No. 5 that the Public Prosecutors/Assistant Public Prosecutor incharge should be made aware of the Government's decision, and they should be directed to take appropriate steps for withdrawal of the cases after going through the concerned files, and on their own, under Section 321 of the Code of Criminal Procedure. The direction contained in the aforesaid letter does not suffer from anyx ambiguity, and in clear terms provides that the Public Prosecutor must take steps under Section 321 of the Code of Criminal Procedure. He must not only go through the concerned papers, but must, on his own, take necessary steps. This clearly means that he was required to exercise his discretion, as was vested in him under Section 321 of the Code of Criminal Procedure, and the direction was not in the nature of command to him for automatic withdrawal from the prosecution. Only a request was made to consider cases for withdrawal in the light of Government's decision, having regard to the provisions of Section 321 of the Code of Criminal Procedure. As is evident from letter (Annexure 3) dated 26-8-1986, the Government decision was subsequently modified in view of the observations of the Supreme Court in Kadra Paharia 's case.

11. Counsel submitted that Annexure 2, when it was issued, was a mere Government decision, but in view of the order of the Supreme Court in Kadra Paharia v. State of Bihar 1991 (2) PLJR 85 (SC), it attained the status of law. The argument proceeds on the basis that since the Supreme Court granted its approval by the said judgment to the decision of the State Government, and even suggested a modification, the decision of the Government, which was in the nature

of an executive instruction, attained the status of law declared by the Supreme Court under Article 141 of the Constitution of India. The submission is misconceived. In *Kadra Paharia's case* (supra), as it appears from the report, the Court was dealing with a situation created by the shortage of judicial officers resulting in long pendency of cases. In that connection the Court took notice of the affidavit of the Under Secretary, Department of Law, stating that the State Government by an order had created several posts of Additional District Judge, Subordinate Judges and Munsifs. The Court pointed out that these posts must be filled up immediately, and requested the High Court to recommend the names of the officers to be appointed as Additional District Judges and the State Government to appoint the persons whose names are so recommended by the High Court. In this connection it was also stated in the affidavit that the State Government had issued an order for withdrawal of those cases 'which do not warrant punishment for more than five years and which are pending in different courts for five years or more and which do not involve any public policy'. The Court observed that the words 'which do not involve any public policy' were rather vague. The Court, therefore, observed that the State Government should amend the order so as to provide that those cases which involved economic offences, or offences against women or children, may be excepted from the general order of withdrawal of such cases, instead of the general category denoted by the words 'which do not involve any public policy.' It further directed that cases covered by the Government order will be withdrawn within a period of six weeks.

12. From the above it would appear that the Supreme Court suggested an amendment to the Government order already issued, so as to clarify the category of cases which should be excepted from the general order of withdrawal of cases. It did not in any manner modify the procedure laid down in the said order for withdrawal of the cases, and further directed that the cases covered by the Government order shall be withdrawn within a period of six weeks. It is also not disputed that in the light of the order of the Supreme Court the decision as contained in letter dated 30th March, 1986, was modified by another letter dated 26th August, 1986 whereby the words 'which do not involve any public policy' were substituted by the words 'cases which involve economic offences or offences against women or children'.

13. I have no doubt that the order of the Supreme Court suggested an amendment to clarify what was meant by 'cases involving public policy', and it was made clear that such cases should mean cases which involved economic offences or offences against women or children. It did not seek to modify the Government decision in any other respect. Paragraph No. 5 of the decision which prescribed the procedure to be followed in such cases, making express reference to Section 321 of the Code of Criminal Procedure, was not modified. It would, therefore be difficult to contend that by reason of the order of the Supreme Court, the last paragraph of the Government decision should be deemed to have been obliterated. The direction of the Supreme Court that cases covered by the Government order will be withdrawn within a period of six weeks, no doubt provided the period within which the Government policy must be implemented. That direction, however, should be read consistently with the provision of Section 321 of the Code of Criminal Procedure, because it cannot be assumed that the Supreme Court directed that the prosecutions be withdrawn without following the procedure established by law, particularly when the decision of the Government, which was under consideration, expressly provided that the legal procedure as laid down in Section 321 of the Code of Criminal Procedure, must be followed.

14. The other limb of the argument, namely, that the Government decision acquired the status of law must be rejected, because no law was declared by the Supreme Court. All that was said was that the Government decision must be modified to make it more explicit, and should be implemented within a period of six weeks. No one has challenged the validity of the decision of the Government, nor it is contended that the order of the Supreme Court should not be obeyed in letter and spirit. The petitioner, however, urges that the order of the Supreme Court should be implemented by withdrawal of the prosecution without reference to the provision of Section 321 of the Code of Criminal Procedure, whereas the State contends that the withdrawal of the prosecution should be in accordance with the provision of Section 321 of the Code of Criminal Procedure. I have earlier noticed the Government decision, and the modification brought about in view of the observation of the Supreme Court. The decision of the Government, even as modified, in clear terms provided in paragraph No. 5 that the Public Prosecutor concerned must apply his mind to the facts of the case, and on his own take steps

under Section 321, Cr.P.C. for withdrawal from the prosecution, in cases covered by the aforesaid decision. In terms, therefore, the decision insisted on compliance with the provision of Section 321, Cr.P.C.

15. The next question is whether in law a prosecution can be withdrawn without observing the provision of Section 321 of the Code of Criminal Procedure, and whether the Government can command the Public Prosecutor incharge to withdraw from a prosecution without application of mind, as required under Section 321, Cr.P.C. To my mind, the question is not *res Integra* and is concluded by authoritative pronouncements of the Supreme Court. It is not necessary to refer the large number of authorities on the subject, because at least in two recent decisions the Supreme Court has succinctly stated that position in law.

16. In *Rajender Kumar Jain v. State* : 1980 CriLJ1084 , the Supreme Court considered a large number of decisions of the Supreme Court on the point, and thereafter stated the law, thus:

Thus, from the precedents of this Court; we gather:

(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 some-one 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 ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

We may add, it shall be 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. 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 the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of Section 321, Criminal Procedure Code. 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.

While considering the role of the Public Prosecutor and the Court in such matters, the Court observed:

Under the Code of Criminal Procedure it is the Public Prosecutor that has to withdraw from the prosecution and it is the Court that has to give its consent to such withdrawal. Rightly too, because the independence of the judiciary so requires it, as we have already mentioned. Now, the Public Prosecutor is an Officer of the Court. He sets the criminal law in motion in the Court: He conducts the prosecution in the Court for the people. So it is he that is entrusted with the task of initiating the proceeding for withdrawal from the prosecution. But, where such large and sensitive issues of public policy are involved, he must, if he is right minded seek advice and guidance from the policy-makers. His sources of

information and resources are of a very limited nature unlike those of the policy makers. If the policy-makers themselves move in the matter in the first instance, as indeed it is proper that they should where matters of momentous public policy are involved, and if they advise the Public Prosecutor to withdraw from the prosecution, it is not for the Court to say that the initiative came from the Government and therefore the Public Prosecutor cannot be said to have exercised a free mind. Nor can there be any quibbling over words. If ill-informed but well meaning bureaucrats choose to use expressions like 'the Public Prosecutor is directed' or 'the Public Prosecutor is instructed', the Court will not on that ground alone stultify the larger issue of public policy by refusing its consent on the ground that the Public Prosecutor did not act as a free agent when he sought withdrawal from the prosecution. What is at stake is not the language of the letter or the prestige of the Public, Prosecutor but a wider question of policy. The Court, in such a situation is to make an effort to elicit the reasons for withdrawal and satisfy itself, that the Public Prosecutor too was satisfied that he should withdraw from the prosecution for good and relevant reasons.

17. The same legal provision was reiterated in *Shiv Nandan Paswan v. State of Bihar* : 1983 CriLJ348 . After noticing the legal position as stated in *Rajender Kumar Jain's* case. Tulzapurkar, J. observed:

2. From the aforesaid enunciation of the legal position governing the proper exercise of the power contained in Section 321, three or four things become amply clear. In the first place, though it is an executive function of the Public Prosecutor for which statutory discretion is vested in him, the discretion is neither absolute nor unreviewable but is subject to the Court's supervisory function. In fact being an executive function it would be subject to a judicial review on certain limited grounds like any other executive action; the authority with whom the discretion is vested must genuinely address itself to the matter before it, must not act under the dictates of another body, must not do what it has been forbidden to do, must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously.... These several principles can conveniently be

grouped in two main categories; failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive (Vide deSmith's Judicial Review of Administrative Action, 4th Edition, pp. 285-286).

Though, Tulzapurkar, J. represents the minority view, on the question there was no difference of opinion between the Judges constituting the Bench. Having regard to the facts of this case, it is apt to notice the observations of the Supreme Court in the aforementioned case in similar circumstances. Repelling the submission that the letter written by the District Magistrate to the Public Prosecutor was a command to him, the Court observed:

Similarly, there is no substance in the contention that Shri Lalan Prasad Sinha had sought the withdrawal from the prosecution at the behest of the State Government. It is true that the State Government had taken its own decision to withdraw from the prosecution in the case against the respondent Nos. 2, 3 and 4 and it is also true that the said decision was communicated to Sri Lalan Prasad Sinha but if the two letters, one dated 25th February, 1981 from the Law Secretary to the District Magistrate and the other dated 26th March, 1981 from the Addl. Collector, incharge, Legal section to the special Public Prosecutor, incharge Vigilance cases, are carefully scrutinized it will be clear that the State Government merely suggested to Shri Lalan Prasad Sinha (which it was entitled to do) to withdraw from the prosecution but at the same time asked him to consider the matter on his own and after satisfying himself about it make the necessary application which he did on 17th June, 1981 and there is no material to doubt the recital that is found in the application that he had himself considered relevant materials connected with the case and had come to his own conclusion in that behalf. We are not impressed by the argument that the appointment of Shri Lalan Prasad Sinha was made only for applying for withdrawal and not for conducting the case. The appellant's contention, therefore, has to be rejected.

Baharul Islam, J. expressing the majority view stated the law to the same effect, though in different words. He observed:

The next question for examination is whether the permission was given by the Special Judge in violation of law as laid down by this Court in this regard. We have already referred to the decisions cited by the appellant. The law laid down by this Court in the series of decisions referred to above, inter alia, is: (1) that the withdrawal from the prosecution is an executive function of the Public Prosecutor and that the ultimate decision to withdraw from the prosecution is his; (2) that the Government may suggest to the Public Prosecutor that a particular case may not be proceeded with, but nobody can compel him to do so; (3) that not merely inadequacy of evidence, but other relevant grounds such as to further the broad ends of public justice, economic and political; public order and peace are valid grounds for withdrawal, The exercise of the power to accord or withdraw consent by the Court is discretionary. Of course, it was to exercise the discretion judicially. The exercise of the power of the Court is judicial to the extent that the Court, in according or refusing consent, has to see (i) whether the grounds of withdrawal are valid; and (ii) whether the application is bona fide or is collusive. It may be remembered that the order passed by the Court under Section 321 of the Code either according or refusing to accord consent, is not appealable. A mere perusal of the impugned order of the Special Judge shows that he has applied his mind to the facts of the case and also applied his mind to the law laid down by this Court in George Fernandes' case : 1980 CriLJ1084 that has summarised the entire law on the point, and correctly applied them to the facts of this case. It is, therefore, not correct to say that the decision of the Special Judge was contrary to the law laid down by this Court.

R.B. Misra, J. in his concurring judgment observed:

If the Public Prosecutor thought that the continuance of the prosecution in the circumstances would only end in an exercise in futility, he was fully justified in moving the application for withdrawal. The only question is whether he has applied his mind and he was not actuated by any extraneous consideration or improper motive. It was sought to be argued on behalf of the appellant that the Public Prosecutor has acted at the behest of the Government and he did not apply his own mind. Reference was made to the letter sent by the Government to the Public Prosecutor. The letter did indicate that the Government wants him not to proceed

with the case but the letter gave full freedom to the Public Prosecutor to apply his own mind and to come to his own conclusion. In view of the various authorities of this Court, consultation with the Government or high officer is not improper. But the Public Prosecutor has to apply his own mind to the facts and circumstances of the case before coming to the conclusion to withdraw from the prosecution. From the materials on the record I am satisfied that the Public Prosecutor has applied his own mind and came to his own conclusions.

18. It will thus be seen that the law is well-settled that even if the Government suggests to the Public Prosecutor withdrawal from the prosecution, the Public Prosecutor is not absolved of his duty to consider all relevant circumstances, and only after being satisfied that it is a proper case for withdrawal to make an application to the Court. Where the suggestion for withdrawal from prosecution is from the State Government, but the Public Prosecutor is also requested to consider the matter on his own, and only after satisfying himself about it, make the necessary application, and if the Public Prosecutor does consider all relevant materials and feels satisfied that withdrawal from prosecution is justified and makes an application to this effect under Section 321, it cannot be said that merely because the suggestion came from the Government, it was a command, which the Public Prosecutor was bound to obey. The Public Prosecutor exercises an executive function in the exercise of statutory discretion vested in him under Section 321 of the Code of Criminal Procedure. He cannot, surrender his discretion to someone else, and he cannot be compelled by anyone to exercise that discretion. The exercise of statutory discretion by the Public Prosecutor is subject to the provision of the Court granting or refusing consent to the withdrawal, having regard to relevant considerations including the broad ends of public justice, public order and peace. The Court before granting consent must satisfy itself that the discretion exercised by the Public Prosecutor is sound and on relevant considerations. It must be satisfied that the Public Prosecutor has not acted under compulsion of any other person or authority, and he has honestly exercised the discretion vested in him. The court has a special duty in this regard, it being the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

19. Having regard to the law well settled, it would be difficult to uphold the contention of the petitioner that the Government's decisions to Withdraw from the prosecution in certain category of cases had to be given effect; regardless of the provision of Section 321 of the Code of Criminal Procedure. One has to appreciate the true meaning and import of the Government's decision, as modified in view of the observation of the Supreme Court in Kadra Paharia's case. I have noticed earlier the contents of the letter of the Law Secretary written to all District Magistrates in connection with withdrawal from prosecution in the category of cases specified in the said letter. I have also earlier noticed the contents of paragraph No. 5 of the letter which is most crucial. It does not issue a command to any Public Prosecutor to withdraw from the prosecution in any case. It only requests the District Magistrate concerned to inform the Public Prosecutors and the Assistant Public Prosecutors Incharge about the Government's decision with a direction that in cases covered by the Government decision, they may go through the relevant files and thereafter on their own takes steps for withdrawal from prosecution under Section 321 of the Code of Criminal Procedure. There is express mention of the fact that the Public Prosecutors/Assistant Public Prosecutors concerned must be through the record and thereafter on their own make an application under Section 321, Cr.P.C. The fact that they are directed to do is not of much significance because of the words that follow. In fact, in Rajendra Kumar Jain's case (supra) the use of such inappropriate language was adversely commented upon by the Supreme Court, but in that case as well, as in the case of Sheo Nandan Paswan, letters written in somewhat similar language were not considered to be a command for the Government to the Public Prosecutor to withdraw from the prosecutions. In those cases it was held that the letters were in the nature of Government suggestion to the Public Prosecutors to withdraw from the prosecution, but not without complying with the requirements of Section 321, Cr.P.C. In the instant case, the requirement of going through the records, and of filing an application or his own, leaves no room for doubt that the Government decision did not envisage that the Public Prosecutors shall not act in accordance with the provision of Section 321 Cr.P.C. Obviously, therefore, they were required to exercise their executive function of withdrawing from prosecution after properly exercising the statutory discretion vested in them. This involved a consideration of

the facts of the case, as evidence from the records of the case, and application of independent mind, free of any compulsion, to take a decision whether the circumstances justified the withdrawal from the prosecution. Obviously, therefore, each case had to be considered on its own facts, and without doing violence to the language of the policy decision, it cannot be held that the withdrawal from-prosecution by the Public Prosecutor was a mere formality which he had to perform automatically, in the category of cases which were covered by the Government's decision. In my view, the Government decision itself emphasised the fact that the Public Prosecutor must exercise its executive function and statutory discretion on relevant consideration, and the Court was also required to exercise its supervisory function in the manner required by law. The prosecution could be withdrawn by the Public Prosecutors only in appropriate cases, and not in a routine manner. If this be a correct understanding of the policy decision of the Government, it is, perhaps, not necessary to consider the other submission, namely, that the prosecution could be withdrawn without reference to Section 321, Cr.P.C.

20. Learned Counsel submitted that if the Government is entitled to take a policy decision in these matters, its executive power is co-extensive with its legislative power and, therefore, it could by an executive decision provide for all that may be provided by law in exercise of legislative power. Learned Counsel is correct in his general submission, but the argument ignores the fact that the exercise of executive power cannot be in a manner contrary to the express provision of law enacted by the legislature. In the absence of a law enacted by the Legislature, the State may exercise its executive power to provide that which the Legislature may provide by Legislation. In the instant case, Section 321, Cr.P.C. lays down the manner in which a Public Prosecutor may withdraw from the prosecution. No executive instruction can be issued contrary to the provision of Section 321, Cr.P.C. If we read the Government's policy decision to mean that it absolves the Public Prosecutor of his responsibility to exercise his statutory discretion on relevant considerations and denudes the Court of its supervisory jurisdiction in such matters, then the Government decision must be held to be unconstitutional and void, and cannot be given effect, being clearly contrary to law enacted by Legislature. I have, therefore, no manner of doubt that the Government decision

itself envisaged the exercise of discretion by the Public Prosecutor and the exercise of supervisory jurisdiction by the Court in accordance with the provision of Section 321, Cr.P.C. There is, therefore, no escape from the conclusion that there can be no automatic withdrawal from prosecution and in each case the Public Prosecutor incharge is required to consider all aspects of the matter and apply for withdrawal from the prosecution only on relevant considerations. In an appropriate case it will be open to the Public Prosecutor not to apply for withdrawal from prosecution, and if called upon by the State, or even on his own, he may furnish his reasons to the District Magistrate concerned or the State. The submission of the petitioner, therefore, that in view of the Government's decision all prosecutions had necessarily to be withdrawn, and the withdrawal from prosecution was in the nature of a formality and automatic, must be rejected.

21. It was then contended on behalf of the petitioner that the Government's policy only sought to give effect to the fundamental right of the petitioner of speedy trial. The policy decision of the Government envisaged that no Criminal trial should remain pending for more than five years, and if the same remained pending, the same must be withdrawn. He submitted that as a matter of constitutional law, it must follow that all prosecutions pending for more than five years must be withdrawn immediately, without examining the reasons for the delay, because that is immaterial. Unfortunately for the petitioner, having regard to the binding precedents of the Supreme Court, the proposition so widely stated, cannot be accepted. The question came up for consideration before the Supreme Court in *Abdul Rehman Antulay v. R.S. Nayak* : 1992 CriLJ2717 . The submission was rejected in the following words:

But then speedy trial or other expressions conveying the said concept-are necessarily relative in nature. One may ask speedy means, how speedy? How long a delay is too long? We do not think it is possible to lay down any time schedules for conclusion of criminal proceedings. The nature of offence, the number of accused, the number of witnesses, the work-load in the particular Court, means of communication and several other circumstances have to be kept in mind. For example, take the very case in which Ranjan Dwivedi (petitioner in Writ Petition No. 268 of 1987) is the accused, 151 witnesses have been examined by

the prosecution over a period of five years. Examination of some of the witnesses runs into more than 100 typed pages each. The oral evidence adduced by the prosecution so far runs into, we are told, 4,000 pages. Even though, it was proposed to go on with the case five days of a week and week after week, it was not possible for various reasons viz., non-availability of the counsel, non-availability of accused, interlocutory proceedings and other systematic delays. A murder case may be a simple one concluded in a week while another case may involve a large number of witnesses, and may take several weeks. Some offences by their very nature e.g., conspiracy cases, cases of misappropriation, embezzlement, fraud, forgery, sedition, acquisition of disproportionate assets by public servants, cases of corruption against high public servants and high public officials take longer time for investigation and trial. Then again, the workload in each Court, district, region and State varies. This fact is too well-known to merit illustration at our hands. In many places, requisite number of courts are not available. In some places, frequent strikes by members of the Bar interferes with the work-schedules. In short, it is not possible in the very nature of things and present day circumstances to draw a time limit beyond which a criminal proceeding will not be allowed to go. Even in the U.S.A., the Supreme Court has refused to draw such a line. Except for the Patna Full Bench decision under appeal, no other decision of any High Court in this country taking such a view has been brought to our notice. Nor, to our knowledge, in United Kingdom. Wherever a complaint of infringement of right to speedy trial is made the Court has to consider all the circumstances of the case including those mentioned above and arrive at a decision whether in fact the proceedings have been pending for an unjustifiably long period. In many cases, the accused may himself have been responsible for the delay. In such cases, he cannot be allowed, to take advantage of his own wrong. In some cases, delays may occur for which neither the prosecution nor the accused can be blamed but the system itself. Such delays too cannot be treated as unjustifiable broadly speaking. Of course, if it is a minor offence not being an economic offence and the delay is too long, not caused by the accused, different considerations may arise. Each case must be left to be decided on its own facts having regard to the principles enunciated hereinafter. For all the above reasons, we are of the opinion that it is neither advisable nor feasible to draw or prescribe

an outer time limit for conclusion of all criminal proceedings, it is not necessary to do so for effectuating the right to speedy trial. We are also not satisfied that without such an outer limit, the right becomes illusory.

22. The broad proposition that all trials pending for five years or more should be automatically withdrawn or quashed cannot be accepted, since it has been held that it is neither advisable nor feasible to draw or prescribe an outer time limit for conclusion of all criminal proceedings. Moreover, this argument is not based on the policy decision of the Government. If the argument were to be accepted, all cases must be withdrawn if they have remained pending for five years or more, regardless of the nature of the offences committed. The Government decision, on the other hand, does not apply to cases where punishment of more than five years' imprisonment may be inflicted in the trial, having regard to the offence committed. Obviously, therefore, the Government decision envisaged the consideration of only such cases which related to minor offences of offences not punishable for a term over five years. After consideration of such cases by the Public Prosecutor, the Public Prosecutor was required to withdraw from the prosecution in appropriate cases, and not necessarily in all cases.

23. It is worth noticing that in the instant case this Court by its order dated 30th September, 1993, called for a report from the Judicial Magistrate, before whom the case was pending, about the present stage of the case, and the reasons for the delay, apparently with a view to pass appropriate orders for the expeditious conclusion of the trial. In fact, a report was also received from the Judicial Magistrate, but counsel for the petitioner insisted that the same order should be passed, as was passed by a Division Bench of this Court in Cr.W.J.C. No. 485 of 1990, namely, that a direction should be issued for withdrawal of the case in the light of the policy decision of the State Government. It is for this reason this Court could not issue directions for the expeditious disposal of the trial, because the petitioner was not satisfied with such an order, and insisted upon an order by the Court dropping the criminal prosecution.

24. The petitioner no doubt filed an application before the Judicial Magistrate concerned for dropping of the case and discharging him. The Judicial Magistrate

for obvious reasons could not allow the prayer in the absence of an application from the Public Prosecutor incharge of the case. There is no power vested in the Court to permit withdrawal of a prosecution at the behest of the accused himself, without there being an application of the Public Prosecutor for withdrawal from prosecution. The learned Magistrate, therefore, rightly dismissed that application. I am of the view that no fault can be found with the order of the learned Magistrate dismissing such an application by order dated 21.6.1993.

25. I shall now consider the two orders of this Court upon which reliance is placed by the petitioner, and a prayer is made that this writ petition may be disposed of in the same terms as was done in those two writ petitions. It is this insistence on the part of the petitioner that has necessitated the matter being placed before a larger Bench.

26. The first order on which reliance is placed was passed on 6.12.1991 in Cr.W.J.C. No. 485 of 1990, which has been annexed as Annexure 5 to the writ petition. For the sake of convenience, since the order is a short order, the same is being reproduced hereunder:

Heard the learned Counsel for the petitioner and the learned Counsel for the State.

The learned Counsel for the petitioner has submitted that the prosecution of the petitioner under Sections 447 and 323 of the Indian Penal Code is pending since 10.6.1983 and in view of the notification of the State Government to withdraw the cases over five years, this case has not been withdrawn, so the petitioner is suffering from the sort of prosecution for last about eight years.

The learned Counsel for the State Sri Lala Kailash Bihari Prasad has considered this aspect of the case and has candidly and fairly conceded that in view of the observation made in the case of *Kadra Paharia v. The State of Bihar* 1992 (1) PLJR 85, this case is liable to be quashed. He also says that in a number of cases including Criminal Misc. No. 2191 of 1986 such view had been taken.

Considering all the aspects, the prosecution of the petitioner in connection with G.R. Case No. 1287 of 1983/T.R. No. 151 of 1983 arising out of Bibhtipur P.S. Case No. 52 of 1983 for the offences under Sections 447 and 323 of the Indian Penal Code, is quashed.

It will be noticed that the petitioner in the aforesaid case had relied upon the notification of the State Government with regard to withdrawal of cases pending for over five years. Counsel appearing on behalf of the State conceded before the Court that in view of the observation made in Kadra Paharia's case, the prosecution was liable to be quashed. Accordingly, the criminal case against the petitioner was quashed. Apparently, therefore, the order was passed on a concession made by counsel for the State. I have earlier in this judgment considered the observations of the Supreme Court in Kadra Paharia's case. The Supreme Court had made certain observations with a view to making the Government decision more explicit and clear, and thereafter directed that the cases covered by the Government order shall be withdrawn within a period of six weeks. The Supreme Court did not intend, by the aforesaid direction, that the requirement of the Government order as also the requirement of law should be dispensed with. The Court only emphasised the urgency of the matter, and the direction must be understood as a direction to withdraw the prosecutions within the period stipulated in accordance with law, and not in derogation of the law. In my view, the concession made by counsel for the State was not justified.

27. The other order on which reliance is placed by counsel for the petitioner is Annexure-6 dated 8.8.1991 in Cr. Misc. No. 5688 of 1985. It may be noticed that the aforesaid application was one under Section 482, Cr.P.C. wherein quashing of the prosecution was prayed for on the ground of delay. The prosecution had remained pending for about eight years. It was in that context that reference was made to the Government's decision with regard to withdrawal from prosecution, and the Court came to the conclusion that the case was one which squarely covered by the aforesaid decision. However, the learned Single Judge observed that having regard to the fact of the case and the fact that the matter had remained pending for a considerably long period, the Public Prosecutor ought have taken steps for withdrawal from prosecution by filing a petition before the trial court for

withdrawal. His Lordship also observed that in cases covered by the aforesaid orders, if a petition for withdrawal from prosecution was filed, trial court should allow the same. His Lordship, however, thought that instead of giving opportunity to the Public Prosecutor for filing a petition for withdrawal, in the ends of justice the Court itself should quash the prosecution, as in regard to cases covered by Government decision, the withdrawal is generally a matter of course.

The Court, as is obvious, exercised its discretion under Section 482, Cr.P.C. and quashed the prosecution. It did not direct withdrawal of the prosecution, as the learned Judge himself observed that for withdrawal from prosecution filing of an application by the Public Prosecutor was necessary, which had not been done. The learned Judge, therefore, rightly quashed the prosecution on the ground of delay, which he was entitled to do in exercise of jurisdiction conferred by Section 482, Cr.P.C. The learned Judge, however, made certain observations which must be understood in the light of the decisions of the Supreme Court. These observations should not be understood to mean that the Court concerned is not required to exercise its supervisory jurisdiction under Section 321 of the Code of Criminal Procedure, and the Public Prosecutor is not to exercise his executive function and statutory duty without reference to relevant considerations.

28. On the other hand, an order of this Court, dated 23.11.1992 in Cr.W.J.C. No. 600/92 in similar circumstances, directed that the concerned authority should take steps for withdrawal of the case in accordance with the policy decision of the State Government, as modified by the judgment of the Apex Court in Kandra Paharia's case. I respectfully agree with the order passed in the above case by a Division Bench of this Court. If it is complained that in a case covered by the Government decision regarding withdrawal from prosecution, the authorities are not taking appropriate steps, this Court in exercise of its writ jurisdiction may direct the authorities to take such steps as they are bound to take in law.

29. In the result, I hold that the petitioner cannot claim that the prosecution pending against him should be quashed merely on the ground that it has been pending for over five years. In such a case the petitioner has to make out a case for quashing of the prosecution having regard to relevant circumstances, some of

which have been enumerated in A.R. Antulay's case (supra). No effort was made by the petitioner in the instant case to produce material before this Court to satisfy the Court that this was an appropriate case which deserves to be quashed on the ground of delay. In fact, when this Court moved in this direction and sought a report from the Judicial Magistrate concerned, counsel for the petitioner insisted that an order should be passed in the same terms as in Cr.W.J.C. No. 485/90 on the basis of the Government's policy decision, rather than on the ground of delay.

It is also not possible to grant the prayer for quashing of the order of the judicial Magistrate refusing to drop the proceeding, and to discharge the petitioner. The prayer for dropping of the proceed, and discharge of the petitioner was based on the Government's policy decision with regard to withdrawal from prosecution. In the absence of an application by the Public Prosecutor for withdrawal from prosecution, at the behest of the accused himself, the Court could not have exercised its jurisdiction under Section 321 of the Code of Criminal Procedure.

It is also not possible to accept the submission urged on behalf of the petitioner that having regard to the Government's policy there should be an automatic withdrawal from all prosecutions, regardless of the provision of Section 321 of the Code of Criminal Procedure. The Government's decision itself provides that the procedure under Section 321, Cr.P.C. must be followed. Consequently, the prayer that even in cases where the Public Prosecutors do not apply for withdrawal from the prosecution, yet the prosecution should be dropped and the accused discharged, must be rejected.

30. I am firmly of the view that in a case of this nature, if the Public Prosecutor does not act in accordance with the Government's policy decision, an aggrieved person may move the State or the District Magistrate, who must take appropriate steps in the matter. The Public Prosecutor may be requested to furnish reasons why it has not been possible for him to file an application for withdrawal from prosecution in a given case. It may be that in some cases, on account of the inadvertence of the office of the Public Prosecutor, steps may not have been taken. It is equally possible that in some cases the Public Prosecutor may have considered the records of the case and come to the conclusion that the case was

not an appropriate one for making an application for withdrawal from prosecution. This can be known only if the District Magistrate makes an inquiry from the Public Prosecutor incharge of the case, because it would not be proper for an accused directly to correspond with the Public Prosecutor.

31. In the result, this writ petition is dismissed, but it would be open to the petitioner to make a representation before the District Magistrate concerned, who in his turn, may request the Public Prosecutor incharge of the case to take necessary steps in accordance with the Government's decision, if not already taken. However, the dismissal of this writ petition will not preclude the petitioner from seeking quashing of the criminal prosecution on the ground of delay in accordance with law or on any other ground.

N. Pandey, J.

32. I agree

Nagendra Rai, J.

33. I agree.

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