

**State Vs. Mahmood Butt and ors.**

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**Court :** Allahabad

**Decided On :** Sep-26-1972

**Reported in :** 1973CriLJ881

**Judge :** P.N. Bakshi, J.

**Appellant :** State

**Respondent :** Mahmood Butt and ors.

**Judgement :**

ORDER

**P.N. Bakshi, J.**

1. This is a revision filed by Sri B. N. Katju, the Public Prosecutor against the order of the I Civil and Sessions Judge. Allahabad dated 13.3.1972 rejecting his application for withdrawal of criminal case No. 449 of 1970. State v. Sri Mahmood Butt I.A.S. Administrator and 26 other employees of the Nagar Mabapalika, Allahabad. It appears that on 12.10.1970 Sri G.C. Ohaturvedi, I.A.S. District Magistrate, Allahabad had taken cognizance of an offence punishable under Sections 147, 148, 149, 302 read with Section 301, I.P.C. 307 and 395 I.P.C. against the accused referred to above. After taking cognizance, the District Magistrate transferred this case to the file of the Additional District Magistrate (Judicial) Allahabad for disposal according to law. The accused Sri M. Butt filed a revision against the order of the District Magistrate taking cognizance of the case

which was referred by the I Additional Civil and Sessions Judge, Allahabad on 2.2.1972 to this Court for setting aside the said order and for a direction that the prosecution of Sri M. Butt should be started only after compliance of the provisions of Section 197, Cr.P.C. That criminal reference is No. 440 of 1972. On February 20, 1971 Sri Rishi Ram, Public Prosecutor applied in case No. 449 of 1970 under Section 494, Cr.P.C. praying for the permission of the court to accord its consent for the withdrawal of the prosecution of Sri M. Butt and the other 26 co-accused for the offences mentioned above. One Sri Ramadhar Fender filed objections against the application of the Public Prosecutor which had been ordered by the Magistrate to be amalgamated with this case. It, appears that subsequently, the State Government appointed Sri. B.N. Katju as Public Prosecutor and he put in his appearance to support the application for withdrawal filed by Sri. Rishi Ram, On 23.10.1971 he moved an application for adding some fresh grounds to the application for withdrawal of the case. Sri Ramadhar Pandey who objected to the withdrawal was represented by Sri P.C. Chaturvedi. Advocate before the court of the Additional District Magistrate (J) Allahabad. Sri B.N. Katju raised a preliminary objection that Sri Ramadhar had no locus stand to oppose the withdrawal application as he was a stranger to the proceedings. This objection of the Public Prosecutor was upheld by the Additional District Magistrate (Judicial) on 17.11.1971 but he permitted Sri P.C. Chaturvedi, Advocate to argue the law points amicus curiae to assist the court in the correct appreciation of the complicated questions of law involved therein. The Additional District Magistrate by his order dated 1.12.1971 rejected the application of the Public Prosecutor for withdrawal of the case against the aforesaid accused persons. Aggrieved thereby Sri B.N. Katju filed a revision before the I Civil and Sessions Judge Allahabad which was dismissed by him on 30.3.1972. Thereafter Sri B.N. Katju filed criminal revision No. 690 of 1972 before this Court. As common questions of law and facts were involved, this revision was directed by this Court to be lasted along with Criminal Reference No. 449 of 1972 referred to above. Both the criminal revision and the criminal reference have been heard by me together. I have given the details of the case in the connected criminal reference No. 440 of 1972. It is therefore, not necessary for me to repeat those facts in this criminal revision. The facts for the purpose of this case may therefore be taken from the connected criminal reference

No. 440 of 1972 which has also been decided by me today.

2. The first point which has been very hotly contested in this revision is the right of Sri P.C. Chaturvedi Advocate to address this Court. It is contended by Sri B.N. Katju. Public Prosecutor, that Sri P.C. Chaturvedi. Advocate does not represent any of the parties in this re-vision. It is also submitted that he is not even counsel for any of the parties in the connected reference; as such he has no right to be heard by this Court.

3. Sri P.C. Chaturvedi on the other hand contended that he was counsel for Sri R.A. Pandey who had objected to the withdrawal of the case and he was entitled to be heard in this Court. I p not inclined to accept the submission made by Sri P.C. Chaturvedi for the simple reason that Sri R.A. Pandey had-no locus stands to oppose the withdrawal application filed by the public prosecutor. I have however, permitted Sot Chaturvedi to address the Court Amicus Curiae.

4. The first submission made by Sri P.C. Chaturvedi was that Section 494 Cr.P.C. is volatile of Article 14 of the Constitution of India. He relies for his submission on a decision reported by their Lordships of the Supreme Court in Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar AIR 1968 SC 538. Shri B. N. Katju. Public Prosecutor raised an objection that Sri P.C. Chaturvedi who was appearing as Amicus Curiae is not authorized to question the constitutionality of Section 494, Cr.P.C. He relies for this submission on a decision of the Supreme Court reported in : [1950]1SCR869 . Charanjit Lal v. Union of India, In this case their Lordships of the Supreme Court held that:

No one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law.

5. I have also been referred to Corpus Juris Secundum Vol. 3 wherein this view has also been endorsed that an Amicus Curiae cannot attack the constitutionality of a statute. It has been held in State v. City of Albuquerque, 249 P. 242, 31 N.M. 576 that the constitutionality of a statute may not be attacked by one whose rights are not affected by the opinion of the statute, an amicus curiae has no right to question the constitutionality of an Act. It has also been laid dose in State v. Martin

230 N.W. 540, 210 Iowa 207 that the court will not adjudicate on ground of invalidity urged by an Amicus Guise but not presented by the parties.

6. In view of the above decisions, I am inclined to accept the submission made by the Public Prosecutor Sri B.N. Katju that Sri P.C. Chaturvedi having been permitted by this Court to act as Amicus curiae is not entitled to question the validity or constitutionality of Section 494, Cr.P.C.

7. Now I shall deal briefly with the points arising out in this revision.

8. A number of submissions have been made by learned Counsel on the issues arising on the merits of the case. On the one hand it is contended that Sri M. Butt and the Nagar Mahapalika party had acted in the due discharge of their duties or at least in the purported discharge of their duties in realizing the boat tax and in seizing the boats of the boatmen who had been operating on the river Ganges without a license. It is submitted that even if they exceeded that right while discharging their duties, their action was not culpable. On the other hand the contention is that Sri M. Butt and the Mahanagar Palika party exceeded their jurisdiction in seizing boats moored in the cantonment area outside the limits of the city of Allahabad and are thus liable to prosecution.

9. I have heard Sri B.N. Katju, Public Prosecutor at length on the factual aspects of the respective cases for the parties but in view of the opinion that I have taken in the connected criminal reference, it is not proper for me to consider the force of these contentions. I have held in the connected criminal reference that the order passed by Shri G.G. Chaturvedi District Magistrate dated 12.10.1970 taking cognizance of the offence in question under Section 190(1)(c) Cr.P.C. is an illegal order. I have also held that the evidence recorded by Shri R.R. Shah City Magistrate, Allahabad in the enquiry held by him is wholly without jurisdiction. I have further directed the District Magistrate, Allahabad to send the memorandum filed by Sri Jaipal Singh Keshav on 31.7.1969, which outlined the version of the boatmen, for investigation by the Police under Section 156(3) Cr.P.C. In view of my above findings there is yet no legally permissible material before the court on the basis of which a decision can be taken on questions of fact and the correlated questions of law which may arise therein, Sri B.N. Katju. Public Prosecutor has

placed reliance on a case reported in : 1957 CriLJ567 , State of Bihar v. Ram Naresh and has submitted on its basis that this Court should at this stage consider the question of withdrawal on the basis of the investigation so far conducted by the police in case No. 148 of 1969 which is being investigated by the Daraganj police on the report lodged by Sri J. N, Pandey Licensing Officer, Nagar Mahapalika. Reliance has been placed on the following observations of their Lordships of the Supreme Court in : 1957 CriLJ567 (Supra).

In understanding and applying the section, two main features thereof 'have to be kept in mind. The initiative is that of the Public Prosecutor and what the court has to do is only to give its consent and not to determine any matter judicially. Section gives a general executive discretion to the Public Prosecutor to withdraw from the prosecution subject to the consent of the court, which may be determined on many possible grounds.

The Judicial functions, therefore, implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.

10. One of the questions for consideration by their Lordships of the Supreme Court in the case reported in : 1957 CriLJ567 (Supra) was with regard to the stage of the proceedings at which the Public Prosecutor may be permitted to withdraw the case under Section 494, Cr.P.C. In that case, the application for withdrawal was filed by the Public Prosecutor before the Magistrate in the committal stage and before any evidence was actually taken. It was urged therein by the Public Prosecutor that on the evidence available it would not be just and expedient to proceed with the prosecution of one Sri Mahesh Desai and that therefore, it was necessary to withdraw the case against him. The view of the Chief Justice of the Patna High Court which was set aside by their Lordships of the Supreme Court was that the Magistrate should record the evidence and then consider whether it established a prima facie case against Sri Mahesh Desai and no withdrawal should be permitted before that stage. Their Lordships of the Supreme Court rejected the view of the

Chief Justice of the Patna High Court to the effect that it would be improper for the court to consent to withdrawal before recording the evidence and taking it into consideration. Their Lordships of the Supreme Court in this connection however, observed as follows:

We are not to be understood, however, as implying that such evidence as may already have been recorded by the time the application is made is not to be looked into and considered in such cases, in order to determine the impropriety of the withdrawal as amounting to abuse or an improper interference with the normal course of justice.

11. Relying upon the observation of the Supreme Court Sri B.N. Katju Public Prosecutor submitted that the statements that have been recorded by the Police during the course of their investigation on the basis of the report filed by Sri J.N. Pandey in criminal case No. 148 of 1969 should be looked into for deciding the propriety or otherwise of the application filed by him. Ordinarily I may have been inclined to accept his submission but in the circumstances of this case referred to hereafter. I shall not be justified in accepting this contention.

12. I have already mentioned above that on 30-7-1969 Sri J.P. Singh Keshay filed a representation to the District Magistrate, Allahabad in which he gave the counter version of the occurrence. It was alleged in the representation that Sri M. Butt accompanied by a large number of persons armed with lathes, spears, phrases. gun and pistols arrived at the Ganges Ghat and started attacking the boatmen, with lathes and fire arms in order to realize tax. The boatmen informed Sri M. Butt that this tax was illegal and should not be levied upon them. They also pointed out that they were not plying their boats in the Corporation area. Sri M. Butt did not listen to this objection, and fired his pistol. An order was given by him to the other members of the Nagar Mahapalika to fire and assault the boatmen. It is further alleged that about ten boats along with other articles were taken away by the Nagar Mahapalika party. These are very serious allegations embodied in the representation. In the connected reference, I have already directed the District Magistrate to refer this counter report to the Police for investigation under Section 156(3) Cr.P.C. The position therefore, is that these allegations which have been

made against Sri M. Butt and the Nagar Mahapalika party are yet to be investigated by the police. If I allow the Public Prosecutor to withdraw the prosecution it would amount to an order of discharge which is bound to have an effect upon the fairness of the investigation into the counter version. It may also result in throttling a fair and unbiased investigation. In my view, therefore, it will be improper for me to consent to the withdrawal application filed by B.N. Katju, Public Prosecutor.

13. Investigation that has so far been conducted by the police is only with respect to the allegations which have been made by Sri J.N. Pandey. Licensing Officer of the Nagar Mahapalika, Allahabad. That is the just one side of the picture. The statements so far recorded by the police would obviously not assist in disclosing facts with respect to the counter version of the occurrence. Even that investigation is still pending. The Public Prosecutor has himself referred to the letter of Sri R.P. Goel. Senior Superintendent of Police to the effect that 'The investigation could not be completed because the Magisterial enquiry was in progress.' If this Court was possessed of the result of the investigation wholly or partially conducted by the police on the version given by Sri J.N. Pandey, as also the investigation conducted with regard to the counter version given by Sri Jaipal Singh Keshav. I Would have been inclined to look into the merits of the respective versions, in order to determine the propriety of the prayer of withdrawal made by the Public Prosecutor. But in the absence of any investigation of the counter report, to my mind, it will amount to an abuse of the process of the court if consent to withdrawal is given at this stage.

14. In the case of the Supreme Court reported in AIR 1967 SC 389 (supra) their Lordships also considered the question if. the insufficiency or meager-ness of the evidence could be taken into consideration by the court, in deciding whether it was a proper exercise of discretion, to grant consent to withdrawal of the case, before the actual evidence had been taken in the committal stage. Their Lordships expressed the view that the insufficiency or meagerness of evidence that was available could be considered by the court, but in discharging this duty 'it cannot be taken to place on the court the responsibility for a prima facie determination of a trouble issue.' For instance the discharge that results there from need not always

conform to the standard of no prima facie case under Sections 209(1) and 253(1), Cr.P.C. or of 'groundlessness' under Section 209(2) and Section 253(2) Cr.P.C. But at the same time it was observed that:

This is not to say that a consent is to be lightly given on the application of the Public Prosecutor without a careful and proper scrutiny of the grounds on which the application for consent is made.

15. In the light of this observation we may now scrutinize the grounds of withdrawal under Section 494, Cr.P.C.

16. A perusal of the application filed by Sri Rishi Ram, Public Prosecutor on 20.2.1971 indicates that the withdrawal was sought on three grounds:

17. The first ground embodied in paragraphs. 17 and 18 of the application is as follows:

That in the meantime, the U. P. Government entrusted an administrative enquiry to Sri B.B. Lal, the then Chief Secretary, U.P. Government. Sri B.B. Lal came to Allahabad on several dates and after recording several statements of all the parties he gave a report On 25.11.1969 that no administrative action was needed in this case.

2. The second ground has been given in paragraphs 32 and 33 of the aforesaid application to the following effect-

that there is no adequate or reliable evidence on which a conviction is possible of the accused persons and on the evidence available it will not be expedient to proceed with the prosecution of the accused persons. That the prosecution would involve harassment to all; the accused persons. It would be in the interest of justice that they may not be unnecessarily harassed.3. The next ground is given in paragraph 34 of the application which runs thus:

The District Magistrate should obtain necessary sanction under Section 197 Cr.P.C. from the Government concerned before taking any action against Sri M. Butt and others.4. That last ground is given in the paragraph 35 of this application-

That having regard to the facts and circumstances of the case, the Governor has been pleased to order in public interest, that leave be sought from the court, for withdrawal of the prosecution of Sri. M. Butt and others in the case under Sections 147, 148, 149, 307, 395 read with Sections 301 and 302, I.P.C. pending in the court of the Additional District Magistrate (Judicial) Allahabad.

18. In my opinion the mere holding of an administrative enquiry by the Chief Secretary of the U.P. Government; is not a sufficient ground to subvert the normal course of justice. Departmental action in the case of an officer of Government is something within its exclusive jurisdiction. Courts of law are not concerned with the departmental or administrative enquiries and the result of such enquiries. I, therefore do not consider this a sufficient ground for according my sanction to the withdrawal application.

19. On the question regarding the adequacy or reliability of evidence on which a conviction is possible, I have already directed in the connected reference that the revision filed on behalf of the boatmen by Sri J.P. Singh Keshav against Sri M. Butt and 26 others shall be sent for investigation to the Police under Section 156(3) Cr.P.C. Unless the offence is investigated, and we have before us the statement of the witnesses, recorded during the investigation, or such other material, which may be available during the course of investigation, it is not possible for us to go into the question of meagerness or otherwise of evidence. There is no evidence yet, reliability of evidence does not therefore, arise at present. In my opinion, therefore, it would not be a proper exercise of my judicial discretion if I permit the withdrawal of the case on this ground alleged by the prosecutor.

20. The objection that as sanction under Section 197, Cr.P.C. has not been obtained by the District Magistrate, the case against Sri Butt and others should be allowed to be withdrawn, is a matter which can only be considered after the facts have been brought to light, either by police investigation, or during the course of the trial. It is premature at this stage to consider this question and to accord, sanction on this ground. As I have already mentioned, it would be for the investigating agency to obtain requisite sanction, if such sanction is deemed

necessary, during the investigation of the case. It is always open to the public prosecutor to raise the objection at the appropriate stage as indicated by me above. In my opinion, this is not a sufficient ground for giving my consent to the withdrawal.

21. The last ground urged, that the withdrawal of the case would be in the public interest is an argument which does not appeal to me at all. It is not shown in what manner public interest would be affected, by a continuance or discontinuance of the criminal prosecution of the offenders. To my mind, public interest demands that the scales of justice should be evenly balanced for the high and the low, and the procedure prescribed by law should be rigidly observed. In my opinion, it would be an improper interference with the normal course of justice, and obviously against public kite rest, if permission for withdrawal at this stage is given to the. Public Prosecutor.

22. Sri B.N. Katju. Public Prosecutor who appeared subsequently in support of the application for withdrawal applied on 3.10.1971 for adding a fresh ground, That additional ground ran as follows:

Because the order of Shri G.C. Chaturvedi, District Magistrate. Allahabad dated 31.7.1967 directing the City Magistrate Allahabad to hold an enquiry into the incident and submit his report to him and the magisterial enquiry held by Sri Agrawal, City Magistrate Allahabad Sri R.R. Shah City Magistrate Allahabad and Sri G.C. Chaturvedi, District, Magistrate, Allahabad and the report of Sri Shah dated 12.6.1970, and the order passed by Sri. G.C. Chaturvedi, District Magistrate. Allahabad dated 12-10-1970 were improper, illegal and without jurisdiction, as they were in violation of Section 190(1) Cr.P.C. and Chapter 18 Cr.P.C.

23. With regard to this additional ground, taken by Sri Katju, I have already accepted his submission and have held in the connected reference that the entire enquiry conducted by City Magistrate Sri R.R. Shah as also the order of Sri G.C. Chaturvedi. District Magistrate dated 12.10.1970 taking cognizance of the offence, are improper, illegal and without jurisdiction. On this ground I have directed the District Magistrate, Allahabad to send the counter report of Sri Jaipal Keshav

dated 31.7.1969 for investigation by the Police under Section 156(3) Cr.P.C. In this view of the matter, it would not be in the fair name of justice to gag the enquiry by consenting to the withdrawal of the case against Sri M. Butt and 26 others at this stage.

24. For all the above reasons. I do not think it would be a proper exercise of judicial discretion to permit the withdrawal of the case at this stage as pleaded by the learned Public Prosecutor, Justice must not only be done but must appear to be done. Law must take its course, and the procedure prescribed by law must be equally observed for all citizens of the State.

25. I. therefore, reject this revision filed by Sri B.N. Katju Public Prosecutor,

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