

**Vijay Kumar and ors. Vs. State**

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**Court :** Delhi

**Decided On :** Sep-11-2007

**Reported in :** 2007CriLJ4615

**Judge :** Pradeep Nandrajog, J.

**Acts :** Prevention of Food Adulteration Act - Sections 5(2) and 16(1); [Delhi Special Police Establishment Act, 1946](#); Indian Penal Code (IPC) - Sections 34, 109, 120B, 121A, 147, 148, 149, 186, 307, 324, 353, 420, 466, 467, 471 and 478; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 306, 306(4), 321, 361, 482 and 494; Explosive Act - Sections 4, 5 and 6

**Appeal No. :** Crl. M.C. No. 1265/2004

**Appellant :** Vijay Kumar and ors.

**Respondent :** State

**Advocate for Def. :** Anil Soni, Adv.

**Advocate for Pet/Ap. :** D.C.Mathur, Sr. Adv.,; Vishal Gosain and; Viresh B. Sawhney

**Judgement :**

**Pradeep Nandrajog, J.**

1. Vide above captioned 4 petitions under Section 482 of the Code of Criminal Procedure, 1973 a challenge is laid to the common order dated 30.1.2004 passed by the Additional Session Judge whereby revision petition filed by the public prosecutor against the order dated 3.11.2001 passed by the learned Metropolitan Magistrate refusing to grant permission to the prosecution to withdraw cases against petitioners was/were dismissed.

2. The facts giving rise to the present petitions are that four complaints were filed against accused persons on similar facts, inter alias stating as under:

A. That on 4.4.1994, Sanjeev Gupta, D.P. Singh and C.B. Bopora, inspectors of Prevention of Food Adulteration Department visited M/s. V.S. Dry Fruit at shop No. 494 A, Katra Ishwar Bhawan, Khari Baoli, Delhi for taking samples of food articles for analysis.

B. A mob gathered and petitioners did not allow the officials to take samples and along with some other persons abused, assaulted, obstructed and manhandled the officials and also prevented them from taking samples of the food articles for analysis.

C. That matter was reported to the local police and FIRs bearing No. 90/94, 91/94, 93/94, 94/94 were registered under Sections 186, 353, 34 of the Indian Penal Code read with Section 16(1)(c) of the Prevention of Food Adulteration Act.

3. Complaints remained pending since 1994 and till the year 2000 no meaningful progress was made. On 10.11.2000, an application was moved by the public prosecutor under Section 321 of Code of Criminal Procedure, 1973 seeking permission to withdraw the prosecution.

4. Vide order dated 3.11.2001, the said application was dismissed by the learned Metropolitan Magistrate.

5. Against the said order of the learned Metropolitan Magistrate, revision petitions were filed by the public prosecutor. Vide impugned order dated 30.1.2004, the learned Additional Session Judge dismissed the said revision petitions.

6. Aggrieved by the said dismissal of the revision petition, present petitions have been preferred by the petitioners.

7. The controversy in the present petitions revolve around Section 321 of the Code of Criminal Procedure, 1973 which is being reproduced hereinbelow:

321. Withdrawal from prosecution - The 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; and upon such withdrawal,-

(a) If it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

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

Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the [Delhi Special Police Establishment Act, 1946](#) ( 25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the prosecutor in charge of the case has not been appointed by the Central Government he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecution to produce before it the permission granted by the Central Government to withdraw from the prosecution.

8. Principles enunciated by the Supreme Court in relation to Section 321 of Code of Criminal Procedure 1973 may be culled out.

9. State of Bihar v. Ram Naresh Pandey : 1957 CriLJ567 . One Mahesh Desai was accused of committing murder. Murder was stated to be committed in course of a riot which resulted from difference between two rival trade union groups. An application under Section 494 of the Code of Criminal Procedure 1898 (corresponding to Section 321 of the Code of Criminal Procedure 1973) was filed by the public prosecutor seeking permission to withdraw from the prosecution. Withdrawal was sought on the ground that on the evidence available it would not be just and expedient to proceed with the prosecution of Mahesh Desai. Trial Court granted permission for withdrawal. In revision, the Session Judge also upheld the order of the Trial Court. In appeal, the High Court reversed the order of the Trial Court on the ground that 'there was exercise of no judicial discretion in the present case.' Supreme Court reversed the judgment of the High Court and affirmed the order of the Trial Court granting permission to the prosecution to withdraw from the prosecution of Mahesh Desai. It was inter alias observed as under:

(3) ...The function of the Court, therefore, 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 material gathered by the judicial method. Otherwise the apparently wide language of s. 494 would become considerably narrowed down in its application. 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.

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The judicial function, 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. M.N. Sankarayarayanan Nayar v. P.V. Balakrishnan : 1972 CriLJ301 . Accused persons were charged for offences under Section 467, 478, 420 read with Section 109 of Indian Penal Code. An application was moved by the public prosecutor seeking withdrawal from the prosecution of accused persons. Withdrawal was sought on following grounds:

- (i) No likelihood of case being successful.
- (ii) Interest of public policy.
- (iii) Subject matter of case decided in a civil suit.
- (iv) Delay in trial.
- (v) Securing evidence involves heavy expenses for State.
- (vi) Case is of civil nature.

Sessions Court granted permission to the prosecution as prayed for. Order of Session Court was upheld by the High Court as also Supreme Court. In para 5 of the judgment, Hon'ble Supreme Court observed as under:

(5) ...Though the Section is in general terms and does not circumscribe the powers of the Public Prosecutor to seek permission to withdraw from the prosecution the essential consideration which is implicit in the grant of the power is that it should be in the interest of administration of justice which may be either that it will not be able to produce sufficient evidence to sustain the charge or that subsequent information before prosecuting agency would falsify the prosecution evidence or any other similar circumstances which it is difficult to predicate as they are dependent entirely on the facts and circumstances of each case. Nonetheless it is the duty of the Court also to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished merely because the Government as a matter of general policy or expediency unconnected with its duty to prosecute offenders under the law, directs the public prosecutor to withdraw from the

prosecution and the Public Prosecutor merely does so at its behest....

11. State of Orissa v. Chandrika Mohapatra : 1977 CriLJ773 . 2 appeals were decided by a common judgment. In the first appeal withdrawal was sought on the ground that it would be inexpedient to proceed with the case and that there was meager evidence against the accused persons. Trial Court held that the first ground i.e. inexpedient to prosecute was not a sufficient ground to permit prosecution to withdraw from the prosecution. However, Trial Court agreed with the public prosecutor that there was insufficient evidence against the accused persons and thus granted permission for withdrawal. High Court set aside the order of the Trial Court. Reversing the order of the High Court and affirming the order of the Trial Court, in para 6, Supreme Court observed as under:

6. It will, therefore, be seen that it is not sufficient for the Public Prosecutor merely to say that it is not expedient to proceed with the prosecution. He has to make out some ground which would show that the prosecution is sought to be withdrawn because inter alias the prosecution may not be able to produce sufficient evidence to sustain the charge or that the prosecution does not appear to be well founded or that there are other circumstances which clearly show that the object of administration of justice would not be advanced or furthered by going on with the prosecution. The ultimate guiding consideration must always be the interest of administration of justice and that is the touchstone on which the question must be determined whether the prosecution should be allowed to be withdrawn.

12. Second case was result of a serious rivalry between two trade unions in an industrial unit. Accused persons were charged for offences under Sections 147, 148, 149, 307 and 324 of Indian Penal Code. Application for withdrawal from prosecution of accused persons was filed by the public prosecutor. Withdrawal was sought on the ground that since the date of occurrence of the unfortunate incident, there was industrial peace and harmony and that withdrawal would help maintain cordiality between rival trade unions. Sessions Court granted the permission sought for. Supreme Court upheld the order of the Session Court. In para 10 of the judgment, Supreme Court observed as under:

10. We have already discussed the principles which should govern cases of this kind where an application is made by the Public Prosecutor for grant of consent to the withdrawal of prosecution under Section 494 of the Criminal Procedure Code. We have pointed out that the paramount consideration in all these cases must be the interest of administration of justice. No hard and fast rule can be laid down nor can any categories of cases be defined in which consent should be granted or refused. It must ultimately depend on the facts and circumstances of each case in the light of what is necessary in order to promote the ends of justice, because the objective of every judicial process must be the attainment of justice. Now, in the present case, the application made by the Public Prosecutor clearly shows that the incident had arisen out of rivalry between two trade unions and since the date of the incident calm and peaceful atmosphere prevailed in the industrial undertaking. In these circumstances, the State felt that it would not be conducive to the interest of justice to continue the prosecution against the respondents, since the prosecution with the possibility of conviction of the respondents would rouse feelings of bitterness and antagonism and disturb the calm and peaceful atmosphere prevailing in the industrial undertaking. We cannot forget that ultimately every offence has a social or economic cause behind it and if the State feels that the elimination or eradication of the social or economic cause of the crime would be better served by not proceeding with the prosecution, the State should clearly be at liberty to withdraw from the prosecution. We are, therefore, of the view that in the present case the learned Sessions Judge was right in granting consent to the withdrawal of the prosecution and the High Court was in error in setting aside the order of the learned Sessions Judge.

13. *Rajender Kumar Jain v. State of Bihar* : 1980 CriLJ1084 . 25 accused were charged for offences under Section 121A, 120B Indian Penal Code read with Section 4, 5 and 6 of the Explosive Act. Application for withdrawal from prosecution was filed. Withdrawal was sought on the following grounds:

i) Two accused were granted pardon by the court and were examined as approver under Section 306 Sub section 4 Cr.P.C.

ii) That out of the 25 accused persons, two accused were declared proclaimed offenders by the court.

iii) That in public interest and changed circumstances, the Central Government has desired to withdraw from the prosecution of all the accused persons. Learned Metropolitan Magistrate granted permission for withdrawal. The Hon'ble Supreme Court affirmed the order of the learned Metropolitan Magistrate. It was inter alia observed as under:

13. 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 someone 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 enterprise.

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 considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

13-A. We may add it shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to appraise 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 361 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.

14. We have referred to the precedents of this Court where it has been said that paucity of evidence is not the only ground on which the Public Prosecutor may withdraw from the prosecution. In the past we have often known how expedient and necessary it is in the public interest for the Public Prosecutor to withdraw from prosecutions arising out of mass agitations, communal riots, regional disputes, industrial conflicts, student unrest etc. Wherever issues involve the emotions and there is a surcharge of violence in the atmosphere it has often been found necessary to withdraw from prosecutions in order to restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the calm which may follow the storm....

14. Sheonandan Paswan v. State of Bihar : 1983 CriLJ348 . Accused persons were charged for offences under Section 420, 466, 471, 109, 120B Indian Penal Code read with Section 5(2) of Prevention of Corruption Act withdrawal from prosecution was sought on following grounds:

- i) Lack of prospect of successful prosecution.
- ii) Implication of persons as a result of political and personal vendetta.

iii) Inexpediency of prosecution for reasons of State and Public Policy.

iv) Adverse affect that continuance of prosecution will bring on public interest in the light of changed situation.

Special Judge granted the permission sought for by the prosecution. Revision filed by the appellant was dismissed by the High Court. Majority judgment of the Supreme Court upheld the order of learned Special Judge. It was inter alia observed as under:

58. 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 has 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 that has summarised the entire law on the point, and correctly applied them to the facts of this case. It is thereforee not correct to say that the decision of the Special Judge was contrary to the law laid down by this Court.

84. ...The only guiding factor which should weigh with the public prosecutor while moving the application for withdrawal and the court according its permission for withdrawal is to see whether the interest of public justice is advanced and the application for withdrawal is not moved with oblique motive unconnected with the vindication of cause of public justice.

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87. The Court while according the consent to the withdrawal has only to see that the public Prosecutor has acted properly and has not been actuated by oblique or extraneous considerations. It is not the function of the Court to make a fresh appraisal of the evidence and come to its own conclusion on the question whether there is a triable issue to be investigated by the Court.

15. Sheonandan Paswan v. State of Bihar : 1987 CriLJ793 . Earlier decision of the Supreme Court in Sheonandan's case (supra) was examined by a Bench of 5 Judges. Majority judgment upheld the earlier decision. It was inter alias observed as under:

45. ...The judgment of a Public Prosecutor under Section 321 of the Criminal P.C., 1973 cannot be lightly interfered with unless the Court comes to the conclusion that he has not applied his mind or that his decision is not bona fide.

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67...When an application under Section 321, Cr. P.C, is made, it is not necessary for the Court to assess the evidence to discover whether the case would end in conviction or acquittal. To contend that the Court when it exercises its limited power of giving consent under Section 321 has to assess the evidence and find out whether the case would end in acquittal or conviction, would be to re-write Section 321, Cr. P.C. and would be to concede to the Court a power which the scheme of Section 321 does not contemplate. The acquittal or discharge order under Section 321 is not the same as the normal final orders in criminal cases. The conclusion will not be backed by a detailed discussion of the evidence in the case of acquittal or absence of prima facie case or ground lessness in the case of

discharge. All that the Court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The Court, after considering these facets of the case, will have to see whether the application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given. In this case, on a reading of the application for withdrawal, the order of consent and the other attendant circumstances, I have no hesitation to hold that the application for withdrawal and the order giving consent were proper and strictly within the confines of Section 321, Cr. P.C.

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70. ...The section 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. 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. The judicial function 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.

16. The gist of entire discussion is that power of court Section 321 of Code of Criminal Procedure 1973 is limited. The judgment of a Public Prosecutor under Section 321 of the Criminal P.C., 1973 cannot be lightly interfered with unless the Court comes to the conclusion that he has not applied his mind or that his decision is not bona fide.

17. As held in the decision reported as 1998 (i) AD Del 561, Govt. of NCT Delhi v. Preet Public Secondary School some of the grounds for withdrawal of the criminal cases as recognized by the Supreme Court can be enumerated as follows:

- i) Broader considerations of public peace.
- ii) Larger considerations of public justice.

- iii) Promotion of long lasting security in a locality.
- iv) Halting a false and vexalious prosecution.
- v) Considerations of public policy.
- vi) Purposes of law and order.
- vii) Advancing social harmony.
- viii) Inexpediency of prosecution for reasons of State.
- ix) Injustice to the accused in case the prosecution is continued.
- x) On other similar and cognate grounds.

18. The above list is illustrative and is not exhaustive of the grounds on which an application under Section 321 of the code can be made. It is not intended to limit the considerations on the basis of which the Public Prosecutor can move the application under the said provision.

19. In the light of aforenoted legal position, let me examine the grounds on basis of which withdrawal from prosecution of petitioners were sought in the instant case.

20. A perusal of application filed by the public prosecutor shows that withdrawal from prosecution is sought on the following grounds:

- i) That case is pending trial for more than 6 years.
- ii) That prosecution is weak on the point of identity of petitioners.
- iii) That to develop harmony between the market association and Prevention of Food Adulteration Department and also in public interest.
- iv) That no such obstruction was caused to the Prevention of Food Adulteration officials after the above incident.

21. It may be debatable whether reason No. 3 is relevant or germane for the decision taken by the public prosecutor, but other 3 reasons are relevant and

germane for the decision.

22. It has to be noted that the trial was pending for 6 years and no meaningful progress had been made at the trial. Afore-noted judgments of Supreme Court show that delay in trial has been recognised as a sufficient ground within the meaning of Section 321 of Code of Criminal Procedure Code, 1973.

23. Additionally, it is pertinent to note that petitioners were allegedly part of a mob and therefore it is quite probable that prosecution had been facing difficulty in bringing evidence to prove the identity of the petitioners.

24. Before concluding I may note that as of today thirteen years have passed since the date of commission of the alleged offence. For the past thirteen years, petitioners have been living under considerable mental stress and tension. Ultimate consideration under Section 321 of the Code of Criminal Procedure, 1973 is always the interests of administration of justice.

25. In view of law laid down by the Supreme Court and noting the reasons put forward by the public prosecutor, I set aside the order dated 3.11.2001 passed by the learned Metropolitan Magistrate and the order dated 30.1.2004 passed by the learned Sessions Judge. I allow the application filed by the public prosecutor to withdraw the complaints. Accordingly, the complaints shall stand dismissed as withdrawn.

26. No costs.

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