

**Aboobacker Vs. State of Kerala**

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**SooperKanoon Citation :** [sooperkanoon.com/729913](http://sooperkanoon.com/729913)

**Court :** Kerala

**Decided On :** Dec-04-2002

**Reported in :** 2003(1)ALT(Cri)151; 2003(1)KLT42

**Judge :** R. Rajendra Babu, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 321

**Appeal No. :** Crl. R.P. Nos. 1309 and 1517 of 2002

**Appellant :** Aboobacker

**Respondent :** State of Kerala

**Advocate for Def. :** Abdul Rasheed, Public Prosecutor,; Babu S. Nair and; Smi

**Advocate for Pet/Ap. :** K.P. Mujeeb, Adv.

**Disposition :** Petition dismissed

**Judgement :**

ORDER

**R. Rajendra Babu, J.**

1. The important question that came up for consideration was whether the Public Prosecutor who was not in charge of the case was competent to file a request for withdrawal from the prosecution under Section 321 Cr.P.C.

2. Out of the eleven accused arrayed in C.C. No. 22/95 pending before the Additional Sessions Court (Fast Track-I), Manjeri, nine were; facing the trial for offences under Sections 143, 147, 148, 341, 323, 326 and 307 read with Section 149 IPC. Two of the accused were not available for trial and the case against them was spiked. Twelve witnesses were examined as PWs. 1 to 12 and the case stood posted for questioning the accused under Section 313 Cr.P.C. At that stage the Public Prosecutor who was not in charge of the case filed a request for withdrawal from the prosecution. The court below rejected the above request saying that it was a belated one. The nine accused who were facing the trial filed CrI.R.P. No. 1309/2002 and the State filed CrI.R.P. No.1517/2002 challenging the above order.

3. Heard the learned counsel for the revision petitioners in CrI.R.P. 1309/02 viz., the accused, one of the de facto complainant (the injured who was impleaded as per order in CrI.M.P. 7595/02) and also the learned Public Prosecutor.

4. The learned Public Prosecutor argued that the Government as per Order No. 79984/L3/96 Home (L) Department dated 19.9.2001 had informed the Public Prosecutor that they had no objection in withdrawing the prosecution against the accused with leave of the court and on receipt of the above intimation, the Public Prosecutor, after going through the records and after satisfying himself that it was necessary to withdraw from the prosecution on public interest and in good faith submitted the request on 8.10.2002 before the Court below praying for leave to withdraw from the prosecution. It was further submitted that the above request was turned down solely on the ground that it was a belated one and the approach made by the court below in rejecting the request was wrong and hence the above order was liable to be set aside. The learned counsel appearing for the de facto complainant submitted that the Public Prosecutor who was not in charge of the case was incompetent to file such a request for withdrawal from prosecution and the court below ought have rejected the request on that ground. In fact, the ground stated by the court below for rejecting the request of the Public Prosecutor to withdraw from prosecution was unsustainable as Section 321 of the Code of Criminal Procedure (for short to be referred as 'Code' hereafter) would permit to withdraw the case at any stage of the case before the judgment was pronounced. Hence, the ground mentioned in the order that the request of the Public

Prosecutor was a belated one was not a sufficient ground for refusing the withdrawal from prosecution. Yet the question whether the Public Prosecutor who was not in charge of the case, can file a request under Section 321 of the Code has to be considered.

5. Section 321 Cr.P.C. reads:

'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.....'.

The above section would clearly state that the right to seek leave of the court to withdraw from the prosecution was on the Public Prosecutor or the Additional Public Prosecutor 'in charge of the case'. This Court obtained the report from the concerned Sessions Judge before whom the case was tried and the Sessions Judge reported that the case was conducted by the Additional Public Prosecutor Sri. Josy Jacob and the request under Section 321 Cr.P.C. was filed by the Public Prosecutor Sri. V. Abdurahiman. Thus, it has clear that the request had been made by the Public Prosecutor who was not in charge of the case or who was not conducting the case. The learned counsel for the de facto complainant further submitted that in Section 494 of the old Code corresponding to Section 321 of the new Code, the words 'in charge of the case' was not there, but in the present Section 321, the above words were incorporated in view of the decision of the Supreme Court in State of Punjab v. Surjit Singh (AIR 1967 SC 1214). It would be relevant to refer to Section 494 of the old Code which reads:

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

Though the words 'in charge of the case' were not there in Section 494 of the old Code, the Supreme Court, while considering the above provision, held:

'The reasonable interpretation to be placed upon Section 494, in our opinion, is that it is only the Public Prosecutor, who is in charge of a particular case and is actually conducting the prosecution, that can file an application under that section, seeking permission to withdraw from the prosecution. If a Public Prosecutor is not in charge of a particular case and is not conducting the prosecution, he will not be entitled to ask for withdrawal from prosecution, under Section 494 of the Code'.

The Supreme Court further held that the Public Prosecutor who can file a request under Section 494 must be the Public Prosecutor, who is in charge of the particular case in which the request is made and Section 494 must refer only to the Public Prosecutor who was in charge of the particular case. The Supreme Court further observed that if any Public Prosecutor, who had nothing to do with the particular case, was entitled to submit a request under Section 494 of the Code, the result would be very anomalous. The Legislature incorporated the above words 'in charge of the case' in Section 321 Cr.P.C with the specific purpose of limiting the right only on the Public Prosecutor or the Additional Public Prosecutor who was in charge of the case to file a request for withdrawal from prosecution. When the statute had limited the right to seek permission for withdrawal from prosecution with the leave of the court only on the Public Prosecutor or the Additional Public Prosecutor in charge of the case or who was conducting the case, no other Public Prosecutor was entitled to file a request before the court for withdrawal from prosecution. In fact, by introducing the words 'in charge of the case' in Section 321, the Legislature intended to impose a prohibition on all other Public Prosecutors who were not in charge of the case from making requests or applications under Section 321 to withdraw from prosecution. In the present case, though the case was conducted by one Public Prosecutor, the request was made by another Public Prosecutor who was not in charge of the case or who was not conducting the case and hence, he was incompetent to file a request for withdrawal from prosecution. The right to request for withdrawal from prosecution was only with the Public Prosecutor in charge of the case and in the present case the Public Prosecutor who filed the request was not in charge of the

case and he was not competent to file the request to withdraw from prosecution. The court below should have rejected the request on that ground, that it was filed by an incompetent person. The order passed by the court below rejecting the request has to be maintained on the above ground, though a different one.

6. The learned counsel for the de facto complainant advanced another argument that even on merits the request made by the Public Prosecutor cannot be maintained. It was submitted that the request was made only because the Government had informed the Public Prosecutor that they have no objection for withdrawal from prosecution and the Public Prosecutor had not applied his mind as to whether it was necessary to withdraw from prosecution for serving any public interest. The request made by the Public Prosecutor for withdrawal from prosecution reads:

'I have perused the case diary and other relevant records of this case. The incident had taken place as early as 19.12.1992. No untoward incident had taken place in connection with the above matter subsequently. I am of the opinion that if the case is further proceeded with that may affect the peaceful atmosphere prevailing in the locality and therefore it would be better to withdraw the above case from prosecution. I have applied my mind and I am convinced that natural justice will not be furthered in prosecuting this case.

In the above circumstances, it is most humbly prayed that this Hon'ble Court may be pleased to give consent to the State to withdraw from the prosecution against all accused in the above case'.

The main ground urged in the above request was that if the case was further proceeded with that might affect the peaceful atmosphere prevailing in the locality. The details of such an inference that further prosecution of the case would affect the peaceful atmosphere prevailing in the locality was not at all furnished. On going through the grounds mentioned in the request, I do not think that the Public Prosecutor had properly applied his mind before making such a request and it is not possible to accept the above ground. If the above ground mentioned in the request is accepted, any case pending before any court can be withdrawn making such an allegation. The Public Prosecutor can request for withdrawing from

prosecution if it would serve public interest. The learned counsel for the de facto complainant placed reliance on a decision of the Supreme Court in Abdul Karim etc. etc. v. State of Karnataka and Ors. etc. etc. (JT 2000 (Suppl. 2) 363) wherein the Supreme Court while considering Section 321 Cr.P.C. held:

'The Court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently thereto, that the Public Prosecutor, acting in good faith, is of the opinion that his withdrawal from the prosecution is in the public interest. The court must be satisfied that the Public Prosecutor has considered the material and, in good faith, reached the conclusion that his withdrawal from the prosecution will serve the public interest. The court must also consider whether the grant of consent may thwart or stifle the course of law or result in manifest injustice.'

In Sheo Nandan Paswan v. State of Bihar, AIR 1987 SC 877, the Supreme Court held:

'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'.

If the request made by the Public Prosecutor is considered in the light of the above decisions of the Supreme Court, I do not think that the above request can be granted. No circumstances had been elicited in the request to show that the Public Prosecutor had filed the request in good faith and it was made to serve any public interest. On the other hand, the ground urged in the request that further prosecution of the case might affect the peaceful atmosphere prevailing in the locality, would reveal that the withdrawal from prosecution would stifle and thwart the course of law and would result in injustice. No legal and acceptable ground had been mentioned in the request for withdrawing from prosecution. On that ground also the request of the Public Prosecutor cannot be allowed.

7. The learned counsel for the revision petitioners in CrI.R.P. 1309/2002 submitted that the de facto complainant was not entitled to be impleaded or to be heard. Reliance was placed on two decisions of this Court in Joy Joseph v. Gopinathan, 1999(1) KLT SN 37, and Razack v. State of Kerala, 2000 (3) KLT 686. In the above two decisions, the learned Single Judges of this Court held that when the Public Prosecutor applies for withdrawal from prosecution, the de facto complainant or the charge witness, has no locus standi to challenge in the exercise of the discretion by the Public Prosecutor to withdraw from prosecution. I respectfully disagree with the above view taken by the learned Single Judges. The Supreme Court in JK International v. State, Government of NCT of Delhi and Ors., JT 2001 (3) SC 130, while considering the locus standi of a private party to be impleaded in criminal proceedings, held:

'An aggrieved private person is not altogether to be eclipsed from the scenario when the criminal court takes cognizance of the offences based on thereport submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them'.

It was further held that if such a person appears before court, it is the duty of the court to hear him. In Abdul Karim's case (supra) in fact the Supreme Court heard the father of one of the victims in respect of the matter under Section 321 Cr.P.C. Sri. Abdul Karim who approached the Supreme Court was none other than the father of a victim at the hands of the accused whose cases were sought to be withdrawn and the Supreme Court accepted his contentions also. Thus, an aggrieved person was heard by the Supreme Court while considering the application for withdrawal from prosecution under Section 321 Cr.P.C. Hence, the argument advanced by the learned counsel for the revision petitioners that the de facto complainant, who is a stranger, is not entitled to be heard cannot be accepted. When once the de facto complainant enters appearance and seeks permission for himself of being heard, the court cannot deny the same and he has to be heard. Hence, the impleading of the de facto complainant in the present proceedings was proper and he was entitled to be heard. Thus, the order of the court below has to be sustained on the grounds not discussed in the order.

In the result, both these revision petitions are dismissed.

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