

Razack and ors. Vs. State of Kerala

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Court : Kerala

Decided On : Sep-06-2000

Reported in : 2001CriLJ275

Judge : K.A. Mohamed Shafi, J.

Acts : Indian Penal Code (IPC) - Sections 143, 147, 148, 149, 324, 326, 332 and 333; Code of Criminal Procedure (CrPC) , 1974 - Sections 203, 227, 245, 257, 258, 321 and 494; P.D.P.P. Act - Sections 3(2)

Appeal No. : Cri. R.P. No. 604 of 2000

Appellant : Razack and ors.

Respondent : State of Kerala

Advocate for Def. : P.P.C.M. Suresh Babu, Adv.

Advocate for Pet/Ap. : K. Harilal, Adv.

Disposition : Petition allowed

Judgement :

ORDER

K.A. Mohamed Shafi, J.

1. This revision petition is filed by the accused in S.C.No. 83/94 on the file of the Asst. Sessions Court, Thiruvalla challenging the order dated 18-3-2000 passed by the Court in Cri.M.P. No. 246/99.

2. The petitioners are standing trial before the Asst. Sessions Court Thiruvalla for the offences punishable under Sections 143, 147, 148, 324, 326, 332 and 333 r/w 149 of I.P.C. and Section 3(2)(c) of the P.D.P.P. Act as per the charge-sheet laid by the C. I. of Police, Adoor in Crime No. 204/92 of Pandalam Police Station. The allegation is that the accused persons who belonged to the I.S.S. in protest against the assault of their leader Madani by the members of the R.S.S., formed themselves into an unlawful assembly armed with deadly weapons and in prosecution of their common object to cause grievous hurt and to prevent the police officers from discharging their official duty as public servants on 7-8-1992 at about 10.30 a.m. stopped K.S.R.T.C. buses bearing registration Nos. KLX 5970, KL-15/874 and KLX 6104 and when the police tried to prevent the accused from causing mischief, they attacked the police officers, inflicted grievous injuries upon them including fractures and caused damages to the buses.

3. While the case was pending trial before the Asst. Sessions Court, Thiruvalla, the Addl. G.P. and Addl. P.P. in charge of the prosecution of the case filed Cri. M.P.No. 246/99 seeking to withdraw the prosecution against the accused under Section 321 of the Cr.P.C. The Asst. Sessions Judge by the impugned order dated 18-3-2000 dismissed the application. Hence the above revision is preferred by the accused before this Court.

4. Heard counsel for the petitioners and the Public Prosecutor.

5. In the petition filed under Section 321 of the Cr. P.C., the Addl. G. P. &Addl.; P. P. in charge of the case has stated that the prosecution case is that the accused on 7-8-1992 at about 10.30 a.m. formed themselves into an unlawful assembly armed with deadly weapons and in furtherance of the common object of their unlawful assembly, obstructed public servants from their duty and caused injury to them and mischief to public property, that the incident had happened due to the long standing family as well as political enmity between the parties, that CWs. 3 to 7 are Trade Union Leaders and the accused are local leaders of rival political

groups, that the issue has been amicably settled by the initiative of mediators, that if the trial is continued there is every possibility to change the present harmony between the parties and to the locality and that to ensure peace and communal harmony in the locality and promoting goodwill between the police and public and between political parties and also in the interest of justice the withdrawal of the above case from the prosecution is inevitable. The learned Asst. Sessions Judge issued notice to CWs. 1 to 7, the injured in the case in the above petition and after their appearance before the Court, examined CW1 as PW1 who stated that there is damage to public property in this case and he has objection in allowing the petition seeking withdrawal of the prosecution against the accused. Hence the learned Asst. Sessions Judge dismissed the petition holding that there is damage to public property in this case and the injured has objection in allowing the petition in the interest of administration of justice.

6. The counsel for the petitioners vehemently submitted that the very approach made by the learned Asst. Sessions Judge and the finding arrived at by him in this case are absolutely erroneous and illegal and beyond the scope of the enquiry contemplated in a petition filed under Section 321 of the Cr. P.C. seeking permission to withdraw from the prosecution.

7. Section 321 of the Cr. P.C. reads as follows :

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

:XXXX XXXX XXXX XXXX

8. In the decision in *State of Bihar v. Ram Naresh Panday*, AIR 1957 SC 389 : (1957 Cri LJ 567) the Supreme Court has considered the rights of the Public Prosecutor in preferring application to withdraw from prosecution and has observed as follows (at page 571 of Cri LJ):

His discretion in such matters has necessarily to be exercised with reference to such material as is by then available and it is not a *prima facie* judicial determination of any specific issue. The Magistrate's functions in these matters are not only supplementary, at a higher level, to those of the executive but are intended to prevent abuse. Section 494 requiring the consent of the Court for withdrawal by the Public Prosecutor is more in line with this relating to inquiries and trials by Court.

9. In the decision in *Bansi Lal v. Chandan Lal*, AIR 1976 SC 370 : (1976 Cri LJ 328) the Supreme Court has observed as follows (at page 330 of Cri LJ) :

This Court in *M. N. Sankaranarayanan Nair v. P.V. Balakrishnan*, (1972) 2 SCR 599 : AIR 1972 SC 496 : (1972 Cri LJ 301) explaining the well-established legal position as to the scope and ambit of the powers granted by Section 494 has observed that though the section 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.... It is added that the request to grant permission under Section 494 should not be accepted 'as a necessary formality', 'for the mere asking', but the Court must be satisfied 'on the materials placed before it' that the grant of permission would serve the administration of justice and that 'permission was not being sought covertly with an ulterior purpose unconnected with the vindication of the law which the executive organs are in duty bound to further and maintain'.

10. In the decision reported in *Rajender Kumar v. State*, AIR 1980 SC 1510 : (1980 Cri LJ 1084) the Supreme Court has observed as follows (at page 1090-1091 of Cri LJ):

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 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 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 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.

11. In the decision in *Sheo Nandan Paswan v. State of Bihar*, AIR 1987 SC 877 : (1987 Cri LJ 793) the Supreme court has observed as follows (at page 831-832 of Cri LJ) :

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.

71. The Court's function is to give consent. This section does not obligate the Court to record reasons before consent is given. However, I should not be taken to hold that consent of the Court is a matter of course. When the Public Prosecutor makes the application for withdrawal after taking into consideration all the materials before him, the Court exercises its judicial discretion by considering such materials and on such consideration, either gives consent or declines consent. The section should not be construed to mean that the Court has to give a detailed reasoned order when it gives consent. If on a reading of the order giving consent, a higher Court is satisfied that such consent was given on an overall consideration of the materials available, the order giving consent has necessarily to be upheld.

72. It would be useful to compare the scope of the Court's power under Section 321 with some other sections of the Code. There are some provisions in the Code which relate to the manner in which Courts have to exercise their jurisdiction in pending cases when applications are made for their withdrawal or when the Court finds that there is no ground to proceed with the cases. Sections 203, 227, 245,

257 and 258 are some such sections. Section 203 of Criminal P.C. empowers a Magistrate to dismiss a complaint at the initial stage itself if he is of opinion that there is no sufficient ground for proceeding. But, before doing so, the Magistrate is called upon to briefly record his reasons for so doing. The section reads as follows :

xxxx xxxx xxxx xxxxThe Section does not insist upon a reasoned order by the Magistrate while giving consent. All that is necessary to satisfy the section is to see that the public prosecutor acts in good faith and that the Magistrate is satisfied that the exercise of discretion by the public prosecutor is proper.

12. In the decision in *State of Kerala v. Balakrishna Pillai*, 1993 (1) KLT 473 a single Judge of this Court has observed as follows :

7. The Public Prosecutor exercises a power in the nature of a prerogative. In Criminal Law, the State and its instrumentalities enjoy prerogatives, akin to crown prerogatives in England. The power exercised by the Public Prosecutor under Section 321 of the Code of Criminal Procedure is in the nature of such a prerogative. The State may advise him in this regard, but he must exercise his mind independently, and he ought not to act under dictation. If he acts honestly, his act cannot be questioned. The limited role of the Court is only supervisory, and not adjudicatory or appellate in character.

13. In the decision in *V.S. Achuthanandan v. R. Balakrishna Pillai*, 1994 (2) Crimes 990: (AIR 1995 SC 436) the Supreme Court has observed as follows (at page 440 of AIR) :

The High Court went into grounds which were not even urged by the Special Public Prosecutor in his application made under Section 321, Cr. P.C., or otherwise before the learned Special Judge. It delved into administrative files of the State which did not form part of the record of the case and accepted anything which was suggested on behalf of the State Government overlooking the fact that for the purpose of Section 321, Cr. P.C. it is the opinion of the Public Prosecutor alone which is material and the ground on which he seeks permission of the Court for withdrawal of the prosecution has alone to be examined.

14. In the decision in Appukuttan Pillai v. State of Kerala, 1999 (1) KLJ 337 : (1999 Cri LJ 965) a single Judge of this Court has held that if the Court is satisfied that the Public Prosecutor has acted in good faith and has exercised his discretion in filing the application for withdrawal under Section 321 of the Cr. P.C. after taking all the materials before the Court, the Court can grant permission to withdraw from prosecution.

15. I have already adverted to the grounds mentioned by the Public Prosecutor under which he filed the above application for withdrawal from prosecution. It is clear from the averments made in the petition that the grounds upon which the prosecution has to be withdrawn, are that in order to further the broad ends of public justice, public order and peace, that the dispute between the rival political groups settled amicably by the initiative of the mediators and that if the trial is continued there is every possibility to change the present harmony between the parties and at the locality. Therefore, in order to ensure peace and communal harmony in the locality and promoting goodwill between the police and public and political parties and also in the interest of justice he sought permission for withdrawal from the prosecution. Therefore, it is clear that the Public Prosecutor after applying his mind and on cogent and genuine reasons moved the Asst. Sessions Court for permission for withdrawal from the prosecution. Therefore, the learned Asst. Sessions Judge was in absolute error in declining the permission sought for by the learned Addl. Public Prosecutor on the ground that the injured has objection in allowing the petition and there is loss to public property.

16. It is also pertinent to note that the Asst. Sessions Judge has committed illegality in issuing notice to CWs. 1 to 7 in the case. Under the provisions of Section 321 of the Cr. P.C. when the Public Prosecutor applies for withdrawal from prosecution, the complainant or the charge witnesses has not locus standi in the exercise of the discretion by the Public Prosecutor to withdraw from prosecution.

17. In the decision of Saramma Peter v. State of Kerala, 1991 (1) KLT 881 : (1991 Cri LJ 3211) a single Judge of this Court has observed as follows (at page 3213 of Cri LJ)

12. There can be no doubt that only the Public Prosecutor or the Assistant Public Prosecutor in charge of the case and none else, with the consent of the Court, could apply for withdrawal from prosecution. He is not expected to act according to the instructions of the complainant but is the sole Judge. The complainant does not come into the picture and indeed has no locus standi in the matter of exercise of discretion by the Assistant Public Prosecutor.

18. In the decision in Joy Joseph v. Gopinathan, 1999 (1) KLT SN Case No. 37 at page 35 a single Judge of this Court has held that for moving the application for withdrawal under Section 321 of Cr. P.C., the Public Prosecutor or Assistant Public Prosecutor is the sole Judge and a third party cannot interfere, particularly, the de facto complainant in the matter and if aggrieved, the de facto complainant can resort to appropriate remedies available to him under law.

19. I am in respectful agreement with the dictum laid down by the single Judge of this Court as stated above. Therefore, the Asst. Sessions Judge has committed a grave error in issuing notice to CWs. 1 to 7, examining CW1 and relying upon his contentions to dismiss the application filed by the Addl. Public Prosecutor seeking permission for withdrawal from prosecution.

20. In view of what is stated above, the order passed by the learned Asst. Sessions Judge dismissing Cri. M.P.No. 246/99 filed by the Addl. G.P. and Addl. P.P. seeking permission for withdrawal from prosecution in this case is absolutely illegal and unsustainable and hence the same is liable to be set aside. Hence the Cri. R. P. is allowed. The impugned order is set aside. Cri. M.P. No. 246/99 in S.C. 83/94 is allowed. Permission to withdraw from prosecution is granted and the accused-petitioners herein are acquitted. The bonds executed by them are cancelled.