

V. Krishnasamy and Etc. Vs. S.K. Monoharan and Others

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Court : Chennai

Decided On : Jun-14-1996

Reported in : 1997CriLJ654

Judge : M. Karpagavinayagam, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 147, 148, 323, 324, 325, 394, 397, 427, 448, 458 and 506; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 321

Appeal No. : Crl. R.C. Nos. 116 of 1992 and 465 of 1993

Appellant : V. Krishnasamy and Etc.

Respondent : S.K. Monoharan and Others

Advocate for Def. : Mr. Balaji, Govt. Adv.

Advocate for Pet/Ap. : Mr. Sivaraman, Adv. for ;N. Damodaran

Judgement :

ORDER

1. These revisions are directed against the orders dated 23-1-1992, passed in C.M.P. Nos. 122 and 123 of 1992, on the file of Judicial Magistrate, Udumalpet, permitting the Asst. Public Prosecutor, to withdraw the cases in C.C. Nos. 121 and 119 of 1990, respectively, and acquitting the respondents/accused.

2. The facts in Crl.R.C. No. 116 of 1992, are as follows :-

The petitioner, V. Krishnasamy of Chellappampalayam village is doing coconut business in the said village. On 26-8-1987, when he was sleeping inside his shop bearing Door No. 3/124, along with one Selvaraj and Thangavel, at about 11.30 p.m. the respondents 1 to 39/accused broke open the shop, trespassed and attacked the petitioner and others by means of dangerous weapons, following which a case was registered on 27-8-1987, in Cr. No. 259 of 1987 for offences under Sections 147, 148, 448, 427, 324, 323 and 397 I.P.C. After the investigation was over, on 7-6-1988, the 40th respondent/police filed a charge sheet in C.C. No. 121 of 1990, for offences under Sections 147, 148, 458, 323, 324, 325 and 394 I.P.C.

3. In the meantime some of the respondents/accused filed a petition for quashing the proceedings before this Court and obtained a stay. Ultimately the same was dismissed on 8-7-1991.

4. The facts in Crl.R.C. No. 465 of 1993, are as follows :-

The petitioner Karuppasamy Gounder of Challappampalayam village, on the assurance of the 1st respondent that he would make arrangement to lay water pipe-line in the village, gave some funds to him along with other villagers. But contrary to his promise, the 1st respondent did not lay any pipe in the house of the petitioner. When the inaction was questioned by the petitioner and others, misunderstanding between them arose. While so, on 26-8-1987, when the petitioner was sleeping with his family members in his house, at about 12.00 midnight; the 1st respondent along with other accused person trespassed into his house and caused damage to his properties.

5. On 27-8-1997, a complaint was lodged to the police made a case was registered in Cr. No. 260 of 1987, under Sections 147, 427, and 506(1) C.P.C. At this juncture, some other accused filed a petition for quashing the proceedings before this court and obtained a stay. However, the petition was dismissed on 8-7-1991.

6. In both these cases, though the victims are different, the accused persons are same. When these cases were about to be taken up for trial by the Magistrate, learned Asst. Public Prosecutor filed a memo on 21-1-1992, in both the cases in C.M.P. Nos. 122 and 123 of 1992, as per the instructions of the Superintendent of Police, Coimbatore Rural in his proceeding dated 6-1-1992, requesting the Court, to permit him to withdraw both the cases.

7. On 23-1-1992, learned Judicial Magistrate, Udumalpet, passed orders, only on the basis of the memo referred to above, permitting to withdraw the cases, under Section 321 Cr.P.C. and acquitting the respondents/accused. These orders are being challenged in these two revisions before this Court, by the victims/first informants.

8. Mr. Sivaraman, learned counsel representing Mr. Damodaran, appearing for the revision petitioners in both the revisions, took me through the memos filed by the Asst. Public Prosecutor, before the trial Court and the orders passed by learned Judl. Magistrate and strenuously contended that the learned Judl. Magistrate has committed a serious illegality in passing the above orders, without any application of judicial mind, as contemplated under Section 321 Cr.P.C. He further contended that in the memos filed by the Asst.P.P. he has not given any reasons, and as such, the memos do not reflect any application of mind on his part, independent of the instruction given by the Superintendent of Police, in his proceedings dated 6-1-1992, and that the learned Magistrate also has not given any reason whatsoever, for giving such a direction or consent for withdrawal.

9. I heard Mr. Balaji learned Government advocate, representing the State/40th respondent. Though notices were served upon the other respondents they have not appeared either in person or through counsel.

10. The orders impugned in these revisions are the classic example of how orders are not to be passed in an application under Section 321 Cr.P.C., for withdrawal. S. 321 Cr.P.C., contemplates :-

that the Public Prosecutor in charge of a case may, with the consent of the Court withdraw, from the prosecution of any person and consequently obtaining of such

a consent the accused can be acquitted by the order of the Court.

So, this section provides two important and fundamental requirements. One is the right of the Public Prosecutor to request for the consent of the Court for withdrawal from the prosecution on his being satisfied about the reasons for the same, independent of the instructions given by the executive authorities. The second thing is that the Magistrate has also to consider the various circumstances, before giving such consent for withdrawal, independent of the orders of the executive authorities and the opinion expressed by the Asst. Public Prosecutor in charge of the case, in his application filed under Section 321, Cr.P.C.

11. But, in the instant case, a reading of the orders and the memos filed by the Asst. Public Prosecutor would clearly show that there was lack of application of mind on the part of both the Asst. Public Prosecutor and the learned Judicial Magistrate. So, the orders passed by the learned Judicial Magistrate is quite illegal, which has caused flagrant miscarriage of justice.

12. This Court as well the Apex Court in several judgments has held that the Public Prosecutors, Asst. Public Prosecutors are not mere instruments of the Police, State, and they have been entrusted with some duties to go through the records and come to his/their own conclusion before filing an application under S. 321 Cr.P.C. In this case, the Asstt. Public Prosecutor has given up his right and he was ready to become a tool under the hands of the Superintendent of Police, by merely filing a memo for withdrawal of the case, following the proceedings, of the Superintendent of Police. It is quite unfortunate to see, that the A.P.P., has not done his statutory duties enjoined upon him. In the same way, the learned Judicial Magistrate also has passed orders, permitting the prosecutor to withdraw from the prosecution, without understanding the scope and object of Section 321 Cr.P.C. by which the learned Magistrate has to consider independently, whether the case is fit for giving consent for withdrawal. As such, the learned Magistrate has also not done his judicial duty. Thus, both the learned Judicial Magistrate and the Asstt. Public Prosecutor have meekly and obediently complied with the 'Orders of the Superintendent of Police', in his proceedings dated 6-1-1992, which is quite unfortunate.

13. It is the Public Prosecutor, who is entrusted by the Cr.P.C., with the power to withdraw from a prosecution and not any executive authority, that too only with the consent of the Court. The consent of the Court under Section 321, Cr.P.C. as a condition for withdrawal is imposed as a check on the exercise of that power. Consent will be given only if public justice in the larger sense is promoted rather than subverted by such withdrawal. These discretionary powers for requesting withdrawal is invested with the Public Prosecutor by the Statute and it is for him to apply, an independent mind and exercise of the discretion. In doing so, he acts as a limb of the judicative process, not as an extension of the executive. In other words, the decision to withdraw must be of the Public Prosecutor not of other authorities even of those where displeasure may affect his continuance in office. When a case is pending in a criminal Court, its procedure and progress are governed by the Criminal Justice cannot be thwarted by the Executive, however high the accused, however, sure Government feels a case is false, however, unpalatable the continuance of the prosecution to the powers that be who wish to scuttle Court Justice because of hubris, affection or other noble or ignoble consideration.

14. Permission to withdraw from the prosecution should not be granted 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. Where the trial is about to be commenced especially when there is no material before the Court, justifying the trial against the accused, the Magistrate cannot pass an order granting permission, without any reason either mentioned in the Memo or in the order. The essential consideration, which is implicit in the exercise of the grant of the power invested with the Public Prosecutor and the Court is that, it should be in the interest of administration of Justice.

15. Though withdrawal from prosecution is an executive function of the Public Prosecutor for which statutory discretion is vested in him, the discretion is neither absolute nor unreviewable but it is subject to the Court's supervisory function. As per Section 321 Cr.P.C. the withdrawal could be permitted only when there is a consent of the Court. Such being the case, before an application is made under Section 321, Cr.P.C., the Public Prosecutor should apply his mind to the facts of

the case independently, without being subject to any outside influence. At the same time, it cannot be said that a Public Prosecutor's action will be illegal, if he receives any communication or instruction from the Government regarding withdrawal. Unlike the Judge or Magistrate, the Public Prosecutor is not an absolutely independent officer. He is an appointee of the Government. So there is the relationship of counsel and client between the Public Prosecutor and the Government. In other words, the Public Prosecutor cannot act without instructions of the Government and he cannot conduct a case absolutely on his own, or contrary to the instruction of his client. Section 321 does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. If the Public Prosecutor receives such instructions, he cannot be said to act under extraneous influence. He has to apply his mind independently and take a decision as to whether he could file an application under Section 321, Cr.P.C. for withdrawal or not. Then alone, he could approach the Court for consent for withdrawal. The function of the Court in according its consent to withdrawal, is however, a judicial function. It, therefore, becomes necessary for the Court, before whom the application for withdrawal is filed by the Public Prosecutor to apply its mind so that the appellate Court may examine and be satisfied that the Court has not accorded its consent as a matter of course but has applied its mind to the grounds taken in the application for withdrawal by Public Prosecutor.

16. This Court and the Apex Court, on various occasions held that while interpreting Section 321, Cr.P.C. that the sole consideration for the Public Prosecutor, when he decides to withdraw from the prosecution is the larger factor of the administration of Justice - not political favours nor party pressures nor like concerns. The interests of public justice being the paramount consideration that may transcend and overflow the legal justice of the particular litigation.

17. Of course, Section 321, Cr.P.C. providing for withdrawal from prosecution 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. 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. 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.

18. In the light of the above discussion, I am of the view that the first informants/victims in these cases aggrieved over the illegality committed by the learned Magistrate, while passing the impugned orders have approached this Court with genuine grievance.

19. In *State of Orissa v. Chandrika Mohapatra*, : 1977 CriLJ773 , the Supreme Court has observed as follows :- (para 6)

'It is not sufficient for the Public Prosecutor merely to say that it is not expedient to proceed with the Prosecutor. He has to make out some ground which would show that the prosecutor is sought to be withdrawn because inter alia the prosecution may not be able to produce sufficient evidence to sustain the charge or that the prosecution does 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 there is the touch-stone on which the question must be determined whether the prosecution should be allowed to be withdrawn The paramount consideration in all these cases must be the interest of administration of justice.'

These principles have been laid down in the following decisions also :-

i. *Bansi Lal v. Chandan Lal*, : 1976 CriLJ328 .

ii. Balwant Singh v. State of Bihar, : 1977 CriLJ1935 .

iii. Subhash Chander v. The State (Chandigarh ADMN), : 1980 CriLJ324 .

iv. Sheonandan Paswan v. State of Bihar, : 1983 CriLJ348 .

v. Sheo Nandan Paswan v. State of Bihar, : 1987 CriLJ793 .

20. In view of the foregoing discussions, I am of the considered view that the orders passed by the learned Judicial Magistrate, Udumalpat dt. 23-1-1992, in C.M.P. Nos. 122 and 123 of 1992 are not proper and the same are illegal and liable to be set aside. Accordingly the orders of the learned Judicial Magistrate, Udumalpat are set aside and he is directed to take up the cases and proceed on with the trial after serving summons to the accused. The learned Magistrate is further directed to dispose of the cases as expeditiously as possible by giving due opportunity to both the parties.

21. With these observations, both the revisions are allowed.

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