

MOHD. MUMTAZ
v.
NANDINI SATPATHY AND ORS.

DECEMBER 20, 1986

[P.N. BHAGWATI CJI, E.S. VENKATARAMIAH,
V. KHALID, G.L. OZA AND S.NATARAJAN, JJ.]

*Criminal Procedure Code, 1973: ss.321 & 329—Nolle prosequi—
Withdrawal from prosecution—Right of public prosecutor—Charge
framed against accused—Withdrawal whether legal.*

Section 321 Criminal Procedure Code, 1973 empowers a Public
Prosecutor incharge of a case to withdraw with the consent of the court
from the prosecution of any person in respect of any one or more of the
offences for which he is tried, at any time before the judgment is
pronounced.

Respondent No. 1 Ex-Chief Minister of Orissa, was alleged to
have misappropriated a huge sum, said to have been collected by
District Congress Committees from various companies for publication of
their advertisements in party's souvenirs before the 1971 General Elec-
tions. A case was registered by the Vigilance Department against her
and a charge-sheet submitted. The Addl. Chief Judicial Magistrate
framed charges under ss.406,467,471 and 120 of the IPC.

After the 1980 General Election, the State Government took a
policy decision to withdraw cases against political leaders who were
subjected to victimisation. The Special Public Prosecutor on being
satisfied that the charge of criminal breach of trust would fail against
respondent No. 1 filed a petition under s.321 Cr.P.C. and sought the
permission of the court in public interest for withdrawal of the case,
when the case was posted for consideration of charge.

After making an objective assessment of the merits of the applica-
tion and being satisfied that the withdrawal of the prosecution would in
no way affect any public interest or improve any public confidence the
Addl. Chief Judicial Magistrate granted consent to withdraw from the
prosecution. The appellant's revision petition having been dismissed by
the High Court he appealed by special leave to this Court.

Dismissing the appeal the Court,

HELD: *Per Oza, J. (Bhagwati C.J.I. and Oza, J.)*

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1. Once a charge has been framed against the accused on the basis that there was ground for presuming that he had committed the offence charged against him, the Public Prosecutor cannot make an application for withdrawal from the prosecution and the Magistrate cannot give his consent to such withdrawal on the ground that there was insufficient or no evidence to sustain the prosecution. [698H-699B]

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2. The charge of criminal breach of trust framed against respondent No. 1, however, was totally groundless. There was nothing on record to indicate that the entrustment of funds to her was for the specific purpose of being utilised only for the purpose of publication of advertisements in the souvenirs. It was not the case of the prosecution that any of these amounts were handed over by any of the companies to her. The entrustment of these amounts, if at all, was to the souvenir committee of the All India Congress Committee and respondent No. 1 could not be charged for utilising any of these amounts for the purpose other than that for which it was entrusted to her. The charge against her, therefore, could not be sustained. [699E-G]

Instead of permitting the prosecution to be withdrawn under s.321 the charge framed against respondent No. 1 is quashed under s.239 of the Code of Criminal Procedure, 1973. [699H-700A]

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Per Venkataramiah, J.

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1.1. Consent can be given under s.321 of the Code of Criminal Procedure, 1973 for withdrawal from the prosecution of a case at any time before the judgment is pronounced. The framing of the charge cannot be an impediment to give consent to such withdrawal.

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1.2. In the instant case, the Public Prosecutor had applied his mind to the case before applying for withdrawal and the Chief Judicial Magistrate had not committed any error in giving his consent to such withdrawal. The order was, therefore, fully justified.

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2. The decision in *State of Bihar v. Ram Naresh Pandey*, [1957] SCR 279, interpreting s.494 of the Code of Criminal Procedure, 1898 and the decision in *R. K. Jain v. State through Special Police Establishment & Ors.*, [1980] 3 SCR 982, interpreting s.321 of the Code of Criminal Procedure, 1973 do not call for any reconsideration. [694C-E]

Per Khalid, J.

1. Order of withdrawal passed by the Additional Chief Judicial Magistrate is upheld. [695D]

2. Consent can be given under s.321 of the Code of Criminal Procedure for withdrawal from the prosecution of a case, not only when the charge is not framed but even after the charge is framed and at any time before the judgment. [694H-695A]

3. Section 239 of the Code of Criminal Procedure 1973 is not attracted to the facts of the case for the propriety of the charge framed was not at issue. [695B, C]

Sheo Nandan Paswan v. State of Bihar, Criminal Appeal No. 241 of 1983 decided on 20th December 1986, applied.

State of Bihar v. Ram Naresh Pandey, [1957] SCR 279 and *R.K. Jain v. State*, [1980] 3 SCR 982, referred to.

Per Natarajan, J.

1. The consent given by the Additional Chief Judicial Magistrate to the Special Public Prosecutor for withdrawal of the prosecution suffers from no error of law, patent or latent. [701G]

2. There is no material in the case to show that the Special Public Prosecutor was influenced by any improper motives for filing the application for withdrawal of the prosecution or that he had acted against his will at the behest of anyone else. The Additional Chief Judicial Magistrate had bestowed judicial consideration over the matter and had thereafter passed a reasoned order. Not only he but also the High Court had found after a careful scrutiny of relevant factors and circumstances, that the application for withdrawal of the prosecution made by the Special Public Prosecutor fully satisfied the tests laid down by the Supreme Court inasmuch as the Public Prosecutor had not exercised his executive function improperly and also had not attempted to interfere with the normal course of justice for illegitimate reasons or purposes. [700D-E, 701E-F]

State of Bihar v. Ram Naresh Pandey, [1957] SCR 279 and *R.K. Jain v. State*, [1980] 3 SCR 982, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.49 of 1983.

A From the Judgment and Order dated May 14, 1981 of the Orissa High Court in Crl. R. No. 21 of 1981.

V.J. Francis for the Appellant.

B Anil B. Divan, D.P. Singh, G.S. Chatterjee, R.K. Mehta, Salaman Khurshid, L.R. Singh and Vinoo Bhagat for the Respondents.

The Judgment of the Court was delivered by

C **VENKATARAMIAH, J:** I agree that this appeal has to be dismissed. I am of the view that the decision in *The State of Bihar v. Ram Naresh Pandey*, [1957] SCR 279 interpreting section 494 of the Code of Criminal Procedure, 1898 and the decision in *R.K. Jain etc. v. State through Special Police Establishment and Others*, [1980] 3 SCR 982 interpreting section 321 of the Code of Criminal Procedure, 1973 do not call for any reconsideration. I am in full agreement with the views expressed in these decisions. I am satisfied that the Public
D Prosecutor had applied his mind to the case before applying for withdrawal and the Chief Judicial Magistrate has not committed any error in giving his consent to such withdrawal. Such consent can be given at any time before the judgment is pronounced. The framing of the charge cannot be an impediment to give consent to such withdrawal as it is evident from section 321(b) of the Code of Criminal Procedure,
E 1973.

The appeal is, therefore, dismissed.

F **KHALID, J:** I have just received (at 3.45 p.m. on 19th December, 1986) a draft Judgment by Oza. J. in the above case. I agree with the conclusion that the appeal has to be dismissed, but not, with respect, with the reasoning contained in the Judgment. Since the case is listed for Judgment on 20th December, 1986, I do not have time to write a detailed Judgment.

G The question to be decided in this appeal is the scope of Section 321 of Criminal Procedure Code. Oza, J. has set aside the permission granted by the Court to withdraw the prosecution under Section 321, Criminal Procedure Code, but allowed the appeal quashing the charge framed against respondent No. 1 under Section 239 of the Code of Criminal Procedure. I regret to state that I cannot re-concile myself with this approach. A cursory glance at Section 321 will satisfy anyone
H that consent can be given for withdrawal from the prosecution of a case,

not only when the charge is not framed, but even after the charge is framed and at any time before the Judgment. A

This appeal along with Criminal Appeal No. 48 of 1983 were directed to be posted before a Constitution Bench to consider the scope of Section 321, Criminal Procedure Code. That being so, I do not think it proper to abandon that pursuit and take refuge under Section 239 of Criminal Procedure Code. B

In a separate Judgment to be pronounced by me in Criminal Appeal No. 241 of 1983, I have outlined the scope of Section 321 of Criminal Procedure Code. What is to be decided in this case is whether the order passed by the Magistrate under Section 321, Criminal Procedure Code, is proper or not. We are not called upon to consider the propriety of the charge framed and then examine the evidence and see whether the accused should be discharged or the charge framed should be upheld. C

I adopt the reasons given by me in Criminal Appeal No. 241 of 1983, relying upon the decision reported in [1957] SCR 279 (State of Bihar v. Ram Naresh Pandey) and in [1980] 3 SCR 982 (R.K. Jain v. State) and uphold the order of withdrawal passed by the Additional Chief Judicial Magistrate, Bhubaneswar, and upheld by the High Court in revision, and dismiss the appeal. D

OZA, J.: [For himself and on behalf of Bhagwati CJ.] The present appeal by special leave is directed against the judgment of the High Court of Orissa dated 14th May 1981 in Criminal Revision No. 21 of 1981 arising out of an order dated 20th September, 1980 passed by Additional Chief Judicial Magistrate, Bhubaneswar allowing an application filed by the Special Public Prosecutor wherein he prayed for withdrawal from the prosecution of the Vigilance Case No. 33 of 1977 against Respondent No. 1. By the impugned judgment, the High Court dismissed Criminal Revision filed by the appellant-petitioner and confirmed the order passed by Additional Chief Judicial Magistrate. E

The Vigilance Department submitted a charge-sheet against respondent No. 1 on the allegation that All India Congress Party some time before the General Election of the Parliament in the year 1971 set out a programme to raise funds for publication of Souvenir on behalf of the said party by each of the District Congress Committees under different provincial Congress Committees to educate people about the policy and programme of the Congress Party and the achievements in F G H

A the context of 1971 Elections. It was alleged that the Souvenir Committee was formed and huge amount was collected from different companies at Delhi and Bombay for publication of advertisements in the Souvenirs. It is further alleged that Smt. Nandini Satpathy respondent No. 1 misappropriated a sum of Rs.1,02,200 out of this amount collected from the companies and did not take steps for asking the
B Companies' advertisements for publication in the Souvenirs. It is alleged that forgery was committed and Shri Ramanath Panda, respondent No. 2 was also alleged to have participated with respondent No. 1 in misappropriation of the aforesaid amount. On the information of Shri Shyamsunder Mohapatra, Ex-Member of Parliament, a case was registered by the Vigilance Department and ultimately a charge-sheet was submitted against respondent Nos. 1 and 2. Shri B.M. Patnaik the
C then Advocate General of Orissa was appointed as a Special Public Prosecutor to conduct the case. By order dated 27.9.1979, the Additional Chief Judicial Magistrate framed charges under Sections 406, 467, 471 and 120 of the I.P.C. against respondent No. 1 and under Section 406 read with Section 34 of the I.P.C. against respondent
D No. 2.

After the General Elections of May/June, 1980, Shri Patnaik resigned from the office of Advocate General and also informed the State Government that he was not inclined to continue as Special Public Prosecutor in the case against Smt. Nandini Satpathy. In fact,
E though the case had been fixed on a number of dates between July and November, 1980 Shri Patnaik did not appear in the case on any one of these dates.

Thereafter respondent No. 4 who had been appointed as Special Public Prosecutor to conduct the cases of the Vigilance Department under Section 24(6) of the Code of Criminal Procedure was instructed by the Government in the Vigilance Department to take charge of this case. On 5.11.80, Shri P.K. Mohanty, Advocate sent a letter to the then Advocate General Shri Gobind Das requesting him for withdrawal of this case and by letter dated 6.11.1980 the learned Advocate General Shri Gobind Das forwarded this letter of
F Shri P.K. Mohanty, Advocate to the Chief Secretary who endorsed the letter to Inspector General (Vigilance) asking him for his comments. I.G. of Police (Vigilance) suggested that it would be proper to obtain the views of the Law Department, and after receipt of the comments of
G I.G. of Police (Vigilance) the Chief Secretary referred the matter to the Law Department for advice and the Legal Remembrancer after considering the legal position regarding the withdrawal of the prosecution observed as under:
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"As it sometimes happens, Political leaders are subjected to victimisation. Resort is had to law courts to harass political rivals. In view of the law laid down by the Supreme Court Government may take a policy decision to curb such political victimisation through law Courts and direct withdrawal irrespective of the question whether or not there is sufficient evidence in support of the prosecution.

The instant case is one instituted against Smt. Nandini Satpathy, Ex-Chief Minister of Orissa. It is possible for Government to take notice of the intense political rivalry between Smt. Nandini Satpathy, on the one hand and the erstwhile leaders of Janta Party on the other hand that motive behind institution of such cases was political victimisation rather than vindication of the law. Government may suggest withdrawal of such cases to the concerned Public Prosecutor."

On the receipt of this opinion from the law Department, the file was endorsed by the Chief Secretary to the Law Minister and the Law Minister endorsed the file to the Chief Minister. After considering the matter from all angles, the Chief Minister passed an order dated 13.11.1980 that the case be withdrawn. By letter dated 15.11.1980, the I.G. (Vigilance) communicated the decision of the Government to withdraw the prosecution to the Special Public Prosecutor Shri Dibakar Bhuyan and requested him to take necessary action in the matter. After respondent No. 4 was put in charge of the case, he examined the case diary and the connected papers and on being satisfied that the charge of criminal breach of trust would fail against Smt. Nandini Satpathy, he filed an application under Section 321 of the Code of Criminal Procedure for withdrawal from the prosecution on having found that the charged amounts in this case are contributions to Souvenir Committee of the All India Congress Committee and that none of the members of the Central Souvenir Committee has complained of any dishonest use or fraud or injury or wrongful loss to the Committee or AICC for such non-utilisation of the funds and that the offences charged would ultimately depend upon the proof of dishonest intention or fraud or wrongful loss to the Central Souvenir Committee or to the AICC. On 16.12.1980 the Special Public Prosecutor made an application for additional ground to be added in the application for withdrawal and the additional ground alleged was that in public interest and in the changed circumstances, the State Government desired to withdraw from the prosecution.

- A After consideration of the case, the Additional Chief Judicial Magistrate by order dated 20th December, 1980 recorded his consent and permitted the Special Public Prosecutor to withdraw from the prosecution. Thereafter one Mohd. Mumtaz, the present appellant who was not a party to these proceedings filed a revision petition in the High Court of Orissa challenging the order of the Additional Chief
- B Judicial Magistrate permitting withdrawal of the case. But by an order dated 14.5.81 the High Court dismissed the revision petition. Hence this appeal by special leave.

- C The F.I.R. in this case was lodged by one Shyamsunder Mohapatra against respondents Nos. 1 and 2 alleging that in January and February 1971 certain companies had issued 49 cheques in the names of Presidents of the District Congress Committees of Orissa totalling Rs. 1,08,200 for advertisements to be published in Souvenirs to be brought out in each district by the respective District Congress Committee. These cheques were deposited in the account of Chairman, Souvenir Committee in Canara Bank, Bhubaneswar. It is
- D alleged that respondent No. 1 misappropriated the amount by drawing in favour of self-bearer 9 cheques aggregating to Rs. 95,000 and two bearer cheques aggregating to Rs. 32,854 in the name of respondent No. 2. It was alleged that neither advertisements were published nor the amounts returned to the companies. It is significant to note that
- E Shri Shyamsunder Mohapatra was neither an office-bearer of the U.P.C.C. nor of the A.I.C.C. Admittedly he was neither a member of the Central Souvenir Committee to which the money was entrusted for transmission to the State or the District Congress Committee nor was he in any manner connected with any of the companies which paid the money for publication of the advertisements. Shri Shyamsunder Mohapatra lodged the complaint when respondent No. 1 was not the
- F Chief Minister of the State. He had been suspended from the Congress Party for his anti-party activities when respondent No. 1 was the President of the U.P.C.C. and the Chief Minister of Orissa. It is significant that these monies were paid by various companies in the name of All India Souvenir Committee and there is no material to indicate how the All India Souvenir Committee transferred these cheques to the respective
- G State Congress Committees or the District Congress Committees. There is no complaint also from any one of the companies that the monies paid by them were not utilised for the purpose for which they were given or were utilised for a different purpose without their consent.

- H Now it is difficult to appreciate how the learned Special Public

Prosecutor could make an application for withdrawal from the prosecution and the learned Chief Judicial Magistrate gave his consent to such withdrawal on the ground that there is no evidence to sustain the prosecution when a charge was already framed against respondent No. 1 on the basis that in the opinion of the learned Chief Judicial Magistrate who framed the charge there was ground for presuming that respondent No. 1 had committed the offences charged against her. There can therefore be no doubt that the withdrawal from the prosecution could not be permitted on the ground that there was insufficient or no evidence to sustain the prosecution. But since entire record is before us and the matter has been argued at great length on the basis of the material on record we propose to consider whether the charge was rightly framed and if we take the view that on the basis of the material on record no charge could be framed we must quash the charge against respondent No. 1.

It is clear from the material on record that various companies all over India gave monies by way of cheques to the Souvenir Committee of the All India Congress Committee. We will assume for the purpose of argument that these amounts were given by the companies for the purpose of publication of advertisements in the souvenir which were entitled to be brought out by each District Congress Committee, but there is no material on record at all to show that when these amounts were distributed by the All India Congress Committee to the respective provincial Congress Committees and by the provincial Congress Committees in their turn to the respective District Congress Committees, the entrustment of these amounts by the All India Congress Committee was expressed to be for the specific purpose of publication of advertisements in the souvenirs. When there is nothing to indicate that the entrustment of these amounts to respondent No. 1 was for the specific purpose of being utilised only for the purpose of publication of advertisements in the souvenirs, it is difficult to see how any charge of criminal breach of trust can be sustained against respondent No. 1. It is not the case of the prosecution that any of these amounts were handed over by any of the companies to respondent No. 1. The entrustment of these amounts, if at all, was to the Souvenir Committee of the All India Congress Committee and respondent No. 1 could not therefore possibly be charged for utilising any of these amounts for a purpose other than that for which it was entrusted to her. We are therefore of the view that the charge framed against respondent No. 1 was totally groundless and we would therefore quash it.

We accordingly dismiss the appeal but instead of permitting the

- A prosecution to be withdrawn under Section 321 we quash the charge framed against respondent No. 1 under Section 239 of the Code of Criminal Procedure, 1973.

- B NATARAJAN, J: This is a case where the Special Public Prosecutor (Vig.) C.D. Cuttack had filed a petition under Section 321 Cr.P.C. and sought the permission of the Court for withdrawal of the case against the first respondent when the case was posted for consideration of charge. Under Section 321 Cr.P.C. a Public Prosecutor or Assistant Public Prosecutor incharge 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.

- C In this case the Special Public Prosecutor had set out in paras 5 and 6 of his application the relevant materials which had prevailed upon him to seek withdrawal of prosecution of the case, after obtaining the consent of the Court, to subserve the interests of justice better.
- D There is no material in the case to show that the Special Public Prosecutor was influenced by any improper motives for filing the application for withdrawal of the prosecution or that he had acted against his will at the behest of any one else.

- E The learned Additional Chief Judicial Magistrate has bestowed judicial consideration over the matter and has thereafter passed a reasoned order. While giving his consent for the withdrawal of the prosecution the learned Magistrate has borne in mind the principles laid down by this Court in *R. K. Jain v. State*, [1980] 3 SCR 982 which has followed the earlier decision of this Court in *State of Bihar v. Ram Naresh Pandey*, [1957] SCR 279. Before passing the order, the learned
- F Magistrate has been fully alive to the responsibility of the Court before it grants consent to an application made under Section 321 Cr.P.C. The portion extracted below from the order of the learned Additional Chief Judicial Magistrate fully reveals this position:—

- G “While mentioning the facts in the petition, I have already indicated the reasons for which the prosecutor does not want to prosecute. Now the Court has to consider whether consent should be given or not. The discretion as to whether consent should be given to withdraw is with the court but it should be exercised judiciously and on correct legal principles. It is not to be given as a matter of course nor the court shall surrender its own independence of judgment.”
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After making an objective assessment of the merit of the application, the learned Additional Chief Judicial Magistrate held that the withdrawal of the prosecution "would in no way affect any public interest or improve any public confidence" and concluded as follows:-

"Considering all these circumstances if the public prosecutor most judiciously thought it proper to withdraw from the case in my opinion, the court should be not a stumbling block by disallowing its consent. I feel it just and proper to allow the petition".

The order of the learned Additional Chief Judicial Magistrate was affirmed, after a careful scrutiny by a learned Judge of the Orissā High Court in Crl. Rev. No. 21 of 1981 filed in the High Court. The learned Judge observed that the ratio laid down in *R.K. Jain v. State* (supra) "would not justify entertaining this application when a public prosecutor in his application had indicated that the evidence already collected did not support the prosecution and there was no prospect of a conviction and the appropriate authority had taken the view that the prosecution in the broad ends of justice need not continue".

It may be thus seen that not only the learned Magistrate but also the High Court has found, after a careful scrutiny of relevant factors and circumstances, that the application for withdrawal of the prosecution made by the Special Public Prosecutor fully satisfied the tests laid down by this Court in *State of Bihar v. Ram Naresh Pandey* (supra) reiterated in *R.K. Jain v. State* (supra) for its being allowed viz. that the executive function of the public prosecutor in applying for withdrawal of the prosecution has not been improperly exercised and that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.

The appellant has failed to establish in this appeal that the consent given by the learned Additional Chief Judicial Magistrate to the Special Public Prosecutor for withdrawal of the prosecution suffers from any error of law, patent or latent. Consequently, the appeal fails and has, therefore, to be dismissed.

P.S.S.

Appeal dismissed.