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MOHD. MUMTAZ

v.

NANDINI SATPATHY AND ORS.

DECEMBER 20, 1986

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

Criminal Procedure Code, 1973—Section 321—Withdrawal from prosecution—Public Prosecutor—Right of—Conditions under which withdrawal is permissible—Competency of Court to permit withdrawal.

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Prosecution was launched against Respondent No. 1 under s.5(1)(d) read with s.5(2) of the Prevention of Corruption Act, 1947 for having assets disproportionate to her known sources of income.

D The Special Public Prosecutor filed application for withdrawal of the prosecution against Respondent No. 1. The Additional Special Judge allowed the application. The High Court dismissed the revision petition and confirmed the order permitting withdrawal of the case.

Dismissing the Appeal to this Court,

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HELD: Per Venkataramiah, J.

The Public 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. [683D-E]

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The State of Bihar v. Ram Naresh Pandey, [1957] S.C.R. 279 and R.K. Jain etc. v. State through Special Police Establishment and others, [1980] 3 SCR 982, Relied upon.

Per Khalid, J.

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1. What is to be decided in this case is whether the order passed by the Magistrate under s.321, Criminal Procedure Code, is proper or not. The Court is 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. [684D-E]

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2. 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. [684B-C] A

The State of Bihar v. Ram Naresh Pandey, [1957] SCR 279 and R. K. Jain etc. v. State through Special Police Establishment and others, [1980] 3 SCR 982, Relied upon.

Per Oza, J.

1. Ordinarily when the exercise of considering the material on record for the purpose of determining whether there is sufficient material to sustain the prosecution can be performed by the Court under s.239 of the Code of Criminal Procedure 1973, the Court should not allow the prosecution to be withdrawn under s.321. [688C-E] B

2. In the present case, there is no point in setting aside the withdrawal and sending the case back to the Special Judge because there is no material at all to show that there is a *prima facie* case and the charges appear to be groundless. Respondent No. 1 would, therefore, be entitled to be discharged under s.239. It is, therefore, not necessary or expedient to interfere with the order made by the Special Judge and confirmed by the High Court. [688E-F] C

3. When the charge-sheet was filed, the Income Tax Department re-opened the assessment, examined the whole matter afresh and passed final orders during the pendency of the case in this Court explaining all the items of assets said to have been unaccounted and suppressed as also entires pertaining to the house construction and other assets, which show that there is nothing to indicate that Respondent No. 1 was possessed of assets disproportionate to her means. [688A-B] D

4. The application moved by the Special Public Prosecutor for withdrawal from the prosecution was, therefore, clearly *bona fide* and in furtherance of public justice and it was clearly a false and vexatious criminal prosecution launched against respondent No. 1. The Special Judge also on these facts took the view that no useful purpose would be served by continuance of the prosecution and accordingly permitted the withdrawal which was upheld by the High Court in revision. [688B] E

5. The first allegation relates to payments made to Dharitri and Navjat Printers. Dharitri is a newspaper which receives advertisements. There is nothing to show that the payment received by Dharitri for advertisement had anything to do with respondent No. 1. [687B-C] F

A 6. The second allegation relates to valuation of assets and the construction of the house and the third relates to the monies received by the U.P.C.C. which are alleged to have been paid by respondent No. 1. Lastly there are similar items of monies paid to the sons and found in the possession of her husband. It was on the basis of these allegations that the Income Tax Department re-opened the assessments, conducted detailed enquiries and ultimately passed a final order accepting her returns as correct and rejecting the allegations that she had suppressed any income from undisclosed sources. [687C-E]

C 7. The application for withdrawal was made by the Special Public Prosecutor in 1980 when respondent No. 1 had nothing to do with the party in power as she was in opposition party after the elections held in 1980. This is a strong circumstance which indicates that the application for withdrawal was made in furtherance of public justice. [687E-G]

D 8. In the light of the facts on record and the order passed by the Income Tax Officer explaining all the items of assets alleged to be unaccounted and suppressed, the charges against respondent No. 1 appear to be groundless. [688C]

Per Natarajan, J.

E 1. Section 321 makes it clear that an application for withdrawal of a case can be made by a Public Prosecutor or Assistant Public Prosecutor who is incharge of the case concerned, at any time before the judgment is pronounced. The application for withdrawal of prosecution may be made at any time ranging between the Court taking cognizance of the case till such time the Court actually pronounces judgment. Even where reliable evidence has been adduced to prove the charges, the Public Prosecutor can seek the consent of the Court to withdraw the prosecution. The section does not, therefore, lay down that an application for withdrawal of the prosecution should necessarily be made at the earliest stages of the case or only if the evidence is of a weak and infirm nature. [689E-G]

G 2. The Special Public Prosecutor had set out the reasons which justified filing of an application under s.321 of the Code for the withdrawal of the prosecution, and the Magistrate has considered the matter judicially, before giving his consent. [689G-H]

H *The State of Bihar v. Ram Naresh Pandey [1957] SCR 279 and R.K. Jain etc. v. State through Special Police Establishment and others, [1980] 3 SCR 982, relied upon.*

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal A
No. 48 of 1983.

From the Judgment and Order dated 14.5.1981 of the Orissa
High Court in Crl. R. No. 22 of 1981.

V.J. Francis for the Appellant. B

F.S. Nariman, Anil B. Divan, L.R. Singh, R.K. Mehta, G.S.
Chatterjee 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] S.C.R. 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 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. D

The appeal is, therefore, dismissed. E

KHALID, J. I have just received (at 7.40 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. F

The question to be decided in this appeal is the scope of Section 321 of Criminal Procedure Code, and I do not agree with the following observation of Oza, J. since there is no question of setting aside of the order passed by the learned Additional Special Judge, Bhubaneswar; G

“.....But in the present case, there is no point in setting aside the withdrawal and sending the case back to the learned Special Judge because after considering the entire material on record in detail we are of the view that there is H

A no material at all on the basis of which it could be said that there is a *prima facie* case against respondent No. 1 and the charges against respondent No. 1 appear to be groundless and respondent No. 1 would, therefore, in any event be entitled to be discharged under Section 239"

B A cursory glance at Section 321 will satisfy anyone 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.

C This appeal along with Criminal Appeal No. 49 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.

D 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.

E I adopt the reasons given by me in Criminal Appeal No. 241 of 1983, relying upon the decisions 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 F Special Judge, Bhubaneswar, and upheld by the High Court in revision, and dismiss the appeal.

G OZA, J. The present appeal by special leave is directed against the judgment and order of the High Court of Orissa dated 14th May 1981 in Criminal Revision No. 22 of 1981 arising out of an order dated 20th December, 1980 of the Additional Special Judge, Bhubaneswar allowing an application filed by the Special Public Prosecutor praying for withdrawal from prosecution in Case No. 13 of 1979 against respondent No. 1. By the impugned judgment the Hon'ble High Court dismissed the revision petition filed by the appellant and confirmed the order passed by the learned Additional Special Judge permitting withdrawal of the case by the Special Public Prosecutor. The Vigilance

Department of the State submitted a charge-sheet against respondent No. 1 on the allegation that she had no assets prior to her election as a member of the Rajya Sabha in the year 1962. Subsequently she was re-elected and became a Union Deputy Minister from January 1966 to June 1970 and a Union State Minister from June 1970 to June 1972. She became the Chief Minister of Orissa from 15.6.72 to 28.2.73 and again from 6.3.74 to 26.12.76. Even before becoming the Chief Minister of Orissa she had no assets save and except a thatched roof house at Pithapur, Cuttack and a bank balance of Rs. 18,000. It was alleged that during her incumbency as Chief Minister, the bank balance increased as well as her other assets swelled-up and it was alleged that in 1977 her net assets were to the tune of Rs. 7,54,735,85 p. which were disproportionate to her known sources of income.

In 1977 the respondent No. 1 left the Congress Party and joined the Congress for Democracy. In the parliamentary elections in 1977, the Congress was defeated and Janata Party came to power and also in the Assembly elections which followed, the Congress lost and the Janata Party came to power in the State. It appears that although the Congress for Democracy which respondent No. 1 had joined, merged with the Janata Party, still many leaders of the Janata Party had a grudge against her as during her regime as Chief Minister when emergency was clamped, a number of leaders who were prominent in the Janata Party were put behind bars and ultimately for having assets disproportionate to her known sources of income, a prosecution was launched against her under Section 5(1)(d) read with Sec. 5(2) of the Prevention of Corruption Act.

One of the allegations on the basis of which the charge-sheet was filed was that on 15.7.74, respondent No. 1 passed an order in favour of M/s Ferro Alloys Corporation. This order was passed by her in her official capacity and it is alleged that because of this order M/s Ferro Alloys made a huge profit of about Rs. 4 crores and on 3.10.75 and 7.10.75 cheques in the aggregate sum of Rs. 48,000 were given by M/s Ferro Alloys Corporation to Dharitri a newspaper for an advertisement which was published in the newspaper. It was therefore alleged that respondent No. 1 obtained Rs. 48,000 from M/s Ferro Alloys Corporation.

The second allegation against respondent No. 1 was that on 14.6.76 the Prime Minister requested respondent No. 1 to indicate the approximate value of her recently completed house at Bhubaneswar and no reply to this query is found on the record of the Prime Minister.

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- A The construction of the house started in September 1974 and ended on 29th February, 1976. The investment in the construction of the house is said to be Rs.3,32,000 and odd whereas according to respondent No. 1 she had spent an amount of Rs.2,68,000 and the difference of Rs.64,000 according to the allegation of the prosecution was the amount acquired by respondent No. 1 by illegal and corrupt means as
- B Chief Minister. It was alleged that the whole sum of Rs.3,27,614 is surreptitious and not disclosed in income-tax return for the financial years 1974-75 and 1975-76. It is also alleged that Navjat Printers which is owned by Samajbadi Society received a sum of Rs.3,94,540 between 6.3.74 and 29.2.76 in respect of orders placed by U.P.C.C. The allegation is that U.P.C.C. between 6.3.74 and 29.2.76, paid only Rs.60,964 and as regards the balance of Rs.3,33,576 it must have been acquired by respondent No. 1 herself and paid to Navjat Printers.

- C It was alleged that Shri Natchiketa Satpathy, son of respondent No. 1 purchased a flat at Kailash Apartments, New Delhi and for this purpose respondent No. 1 paid Rs.50,000 to her son in three instalments. Similarly it was alleged that on 15.3.75 respondent No. 1 paid Rs.15,000 to her other son Tathagat Satpathy and managed to get invested a sum of Rs.33,000 in different names fictitiously in M/s Rosambi Private Limited. An amount of Rs.15,000 is said to have been a payment by cheque.
- E It was alleged that in the house of her husband, cash was contained in two bags which was to the tune of Rs.51,766. One of the bags there had a visiting card of the First Secretary of the USSR Embassy. This cash was discovered after respondent No. 1 ceased to be Chief Minister. The search was made on 8th July 1977 when respondent No. 1 had already ceased to be Chief Minister nearly nine months before that date. It was alleged that the cash must be deemed to have been of the ownership of respondent No. 1 and that it must have been acquired by her during the period when she was the Chief Minister.

- G It appears that when charge-sheet was filed against respondent No. 1, the Income Tax Department also issued notice for re-opening of her assessments and examined the whole matter afresh and during the period that this case has been pending here, final orders have been passed by the Income Tax Department which explain in detail all the items of assets which according to the prosecution were disproportionate to the legitimate means of respondent No. 1. This matter came up before us along with another case from Bihar where we heard arguments at length on the question of withdrawal from the prosecution
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and its legal implications, but so far as the present case is concerned, in view of the facts as they emerge, we do not find it necessary to go into all these questions. The allegations can be broadly classified into three heads:

The first head relates to payments made to Dharitri and Navjat Printers or Samajbadi Society. These are clearly distinct institutions which could not be said to belong to respondent No. 1. It is not disputed that Dharitri is a newspaper which receives advertisements and payment for advertisement made to Dharitri could not possibly be co-related to respondent No. 1 or regarded as receipt of respondent No. 1. There is nothing at all to show that the payment received by Dharitri for advertisement (which in fact was published in Dharitri) had anything to do with respondent No. 1.

The second head of allegations relates to valuation of assets and the construction of the house and the third category to the monies received by the U.P.C.C. which are alleged to have been paid by respondent No. 1. Lastly there are similar items of monies paid to the sons and found in the possession of her husband. So far as these allegations are concerned, it may be pointed out that it was on the basis of these allegations that the Income Tax Department re-opened the assessments after giving notice and conducted detailed enquiries and ultimately passed a final order accepting her returns as correct and rejecting the allegations that she had suppressed any income from undisclosed sources.

It is also significant that the application for withdrawal was made by the Special Public Prosecutor in 1980 when respondent No. 1 had nothing to do with the party in power, as after the elections held in 1980, Congress-I came back to power in Orissa and J.B. Patnaik became the Chief Minister. Respondent No. 1 contested the Assembly election as a candidate of Congress (Urs) Party and was elected, defeating her Congress-I opponent Shri Profulla Bhanja and she was a member of Congress (Urs) (Opposition) during that period. This is to our mind a strong circumstance which indicates that the application for withdrawal was made in furtherance of public justice and distinguished the case of respondent No. 1 from that of Dr. Jagannath Misra in the Bihar case which is being disposed of by another judgment today.

The Income Tax Officer examined in detail each one of the items of assets said to have been unaccounted and suppressed and the order passed by the Income Tax Officer which has been placed on record

- A clearly explains all the items as also entries pertaining to the house construction and other assets and shows that there is nothing to indicate the respondent No. 1 was possessed of assets disproportionate to his means. The application moved by the Special Public Prosecutor for withdrawal from the prosecution was therefore clearly bona fide and in furtherance of public justice and it was clearly a false and vexatious
- B criminal prosecution which had been launched against respondent No. 1 which was sought to be halted. The learned Special Judge also on these facts took the view that no useful purpose would be served by continuance of the prosecution and he accordingly permitted the withdrawal. The High Court too maintained the order of the learned Special Judge. We agree that in the light of the facts on record and the order passed by the Income Tax Officer which explains all the items of assets alleged to be unaccounted and suppressed, the charges against respondent No. 1 appear to be groundless. It is true that ordinarily when the exercise of considering the material on record for the purpose of determining whether there is sufficient material to sustain the prosecution can be performed by the Court under Section 239 of
- D the Code of Criminal Procedure 1973 the Court should not allow the prosecution to be withdrawn under Section 321 as held by us in the Judgment in Dr. Jagannath Misra's case, which has been delivered today. But in the present case there is no point in setting aside the withdrawal and sending the case back to the learned Special Judge because after considering the entire material on record in detail we are
- E of the view that there is no material at all on the basis of which it could be said that there is a *prima facie* case against respondent No. 1 and the charges against respondent No. 1 appear to be groundless and respondent No. 1 would therefore in any event be entitled to be discharged under Section 239. We do not therefore think it necessary or expedient to interfere with the order made by the learned Special
- F Judge and confirmed by the High Court.

The appeal will therefore stand dismissed.

- G **NATARAJAN, J.** In the withdrawal petition filed on 15.11.80 and the supplementary withdrawal petition filed on 16.12.80 the Special Public Prosecutor (Vig.) C.D., Cuttack has set out the factors which have prevailed with him to seek the consent on the Court to withdraw the prosecution launched in V.C.R. Case No. 33 of 1977 against the accused therein, viz. Smt. Nandini Satpathy & Anr.

- H The Additional Chief Judicial Magistrate has passed a detailed and considered order on 20.12.80 wherein he has fully discussed the

matter and thereafter given consent to the withdrawal of the prosecution. The conclusion of the learned Magistrate is contained in para 12 which reads as follows:—

“Taking the facts and circumstances of the case into consideration. I am of the view that the ends of public justice be met if the consent be given for withdrawal of the case.”

The order of the learned Magistrate has been critically assessed by a learned Judge of the Orissa High Court in Crl. Rev. No. 21 and 22 of 1981 filed before the High Court. The learned Judge upheld the order of the Magistrate and has summed up the High Court's view as under:—

“The observations of the Supreme Court (in *R.K. Jain v. State*—AIR 1980 Supreme Court 1510—1980 Volume 3 SCR 982) 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 there was no prospect of a conviction and the appropriate authority in the broad ends of justice need not continue.”

Section 321 makes it clear that an application for withdrawal of a case can be made by a Public Prosecutor or Assistant Public Prosecutor who is incharge of the case concerned, at any time before the judgment is pronounced. In other words, it means that the application for withdrawal of prosecution may be made at any time ranging between the court taking cognizance of the case till such time the court actually pronounced judgment. Consequently, it follows that even where reliable evidence has been adduced to prove the charges, the Public Prosecutor can seek the consent of the Court to withdraw the prosecution. The Section does not, therefore, lay down that an application for withdrawal of the prosecution should necessarily be made at the earliest stages of the case or only if the evidence is of a weak and infirm nature.

In his application a Special Public Prosecutor had set out the reasons which justified his filing an application under Section 321 of the Code to seek the consent of the Court for the withdrawal of the prosecution. The learned Magistrate has considered the matter judicially in the light of the decision of this Court in *R.K. Jain v. State*, [1980] 3 SCR 982 which has followed the earlier decision in *State of*

A *Bihar v. Ram Naresh Pandey*, [1957] SCR 279. The order of the learned Magistrate has been approved and affirmed by the High Court.

There are no materials in the appeal to persuade me to hold that the order passed by the Additional Chief Judicial Magistrate or the High Court suffers from any error of law, patent or latent. In that view the appeal has to be dismissed.

A.P.J.

Appeal dismissed.