V.S. ACHUTHANANDAN

v.

R. BALAKRISHNA PILLAI AND ORS.

MAY 13, 1994

[J.S. VERMA, B.P. JEEVAN REDDY AND S.P. BHARUCHA, JJ.]

Code of Criminal Procedure, 1973 : Section 321—Public Prosecutor—Power to withdraw prosecution—Scope of—Non-application of mind by public prosecutor—Decision to withdraw prosecution not bona fide—Court's refusal to give consent to withdrawal of prosecution—Held justified.

Section 401—Revision against Court's order refusing consent to withdrawal of prosecution by public prosecutor—Nature and scope of High Court's power in such a matter—High Court not considering ground of withdrawal taken by public prosecutor—But considering grounds not urged by public prosecutor—Setting aside Court's order by High Court held not justified.

During the pendency of the trial against the respondents, for various offences punishable under the Indian Penal Code, 1860 and Section 5 of the Prevention of Corruption Act, 1947, the Public Prosecutor filed an application under Section 321 of the Code of Criminal Procedure, 1973 before the Special Judge for withdrawal of prosecution only against one accused on the ground that there was no material to substantiate the charge of conspiracy or for other offences against him. Relying on a decision of this Court reported in *Sheonandan Paswan* v. *State of Bihar*, [1987] 1 S.C.R. 702 the Special Judge observed that in such cases it was the duty of Court to see that the Public Prosecutor properly exercises his power under Section 321 and so it declined to give consent for withdrawal of prosecution holding that (i) having regard to the entire facts and circumstances of the case, the public prosecutor has not properly exercised the executive power vested in him under section 321 and has not applied his mind objectively, uninfluenced by extraneous considerations in securing the permission of the court to withdraw prosecution against one of the accused persons ; (ii) paucity of evidence cannot be taken as a ground to withdraw prosecution against one of the accused only.

In a revision filed by the State, the High Court placed reliance on

A material not forming part of the record and referred to some administrative files of the State Government for taking the view that the prosecution was the result of political vendetta; that the fear of prosecution has affected the morale of senior civil servants of the State which was required to be remedied. Accordingly the High Court allowed the revision and set aside the order of the Special Judge observing that the competent authority will consider whether the prosecution should be continued against any or all of the accused.

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In appeal to this Court, the legality of the High Court's order was assailed.

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Allowing the appeal and setting aside the High Court's order, this Court

HELD : 1. The impugned order of the High Court is not sustainable on merits. There was no ground available to the High Court to set aside D the well reasoned and justified order of the Special Judge rejecting the application of the Public Prosecutor and declining to give consent for withdrawal of prosecution. [103-C, 105-H]

2. The test applied by the Special Judge for deciding whether to grant E consent for withdrawal of the prosecution under Section 321 Cr. P.C. is correct. There is nothing in the impugned order which provides any legal basis for interfering with the order made by the Special Judge. Therefore, the order passed by the Special Judge declining to give consent for withdrawal of the prosecution is restored. [102-D, 106-B]

F *Sheo Nandan Paswan* v. *State of Bihar*, [1987] 1 S.C.R. 702, applied.

3. The High Court missed the true import of the scope of the matter before it and 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 G 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 prosecu- H tion has alone to be examined. [105-B, C]

4. All acts done and steps taken by the state Government or any other authority acting on, or pursuant to the observations made by the High Court in its order relating to withdrawal of prosecution against the other accused would automatically be rendered ineffective. [106-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 122 of 1994.

From the Judgment and Order date 3.2.93 of the Kerala High Court in Crl. R.P. No. 762 of 1992.

P.S. Poti and Ms. Malini Poduval for the Appellant.

Kapil Sibbal, E.M.S. Anam for the Respondent No. 1.

R.F. Nariman, E.M.S. Anam for the Respondent Nos. 2, 5, 7, 9 to 13.

K. Madhava Reddy and N. Sudhakaran for the Respondent No. 6

G. Ramaswamy and E.M.S. Anam for the Respondent Nos. 3, 4, 14 to 22.

Altaf Ahmad, Additional Solicitor General and M.T. George for the Respondent No. 23.

The Judgment of the Court was delivered by

VERMA, J. The challenge in this appeal by special leave is to the legality of the order dated 3rd February, 1993 passed by Chettur Sankaran Nair, J. of the Kerala High Court allowing Criminal Revision No. 762 of 1992 filed by the State of Kerala and setting aside the order dated 16th October, 1992 passed by the Special Judge, Idamalayar, in Criminal M.P. No. 79 of 1992 in C.C. 1 of 1991 declining to give consent to the Public Prosecutor to with draw the prosecution against the sixth accused - G. Gopalakrishnan Pillai, former Secretary, Irrigation and Power to the Government of Kerala.

The material facts may now be briefly stated. Idamalayar Dam as a part of the Idamalayar project was sanctioned by the planning Commission and huge expenditure in its construction was incurred upto March, 1985, However, in the trial run itself on 15.7.1985 a number of leaks were discovered in the tunnel exposing the inferior quality of construction work

A which was a matter of grave public concern giving rise to ventilation of that concern through the press and even in the State Legislative Assembly. There was public outcry for a judicial probe into the matter. Extensive repair at considerable cost had to be undertaken to remedy the defects. The Public Undertaking Committee of the State Legislature inspected the B site on 2.8. 1985 and submitted its report recommending a judicial probe. The State Government then appointed Justice K. Sukumaran, a sitting Judge of the Kerala High Court as the Commission of Inquiry to conduct the probe. The Commission of Inquiry recorded considerable evidence and submitted its report in June, 1988. The Commission found accused No. 1 - R. Balakrishna Pillai (from Minister for Electricity, Kerala), accused No. C 2 - G. Ganesa Pillai (former Chairman, Kerala State Electricity Board) and accused No. 6 - G. Gopalakrishna Pillai (former Secretary, Irrigation and Power) liable for positive acts of abuse of power. The Commission also came to the conclusion that the material placed before it disclosed the commission of certain offences punishable under Indian Penal Code as well D as under Section 5 of the Prevention of Corruption Act. The Commission after indicting the above persons recommended further steps for investigation into, and trial of these offences. The State Government accepted the recommendations of the Commission and constituted a special team headed by a Superintendent of Police for investigating into the crime after E obtaining sanction for prosecution from the Governor of Kerala. A report was filed on 14.12.1990 against the accused persons for offences punishable under various provisions of the Indian Penal Code and the Prevention of Corruption Act. This case is CC No. 1 of 1991 in the Court of Special Judge appointed for the trial of these accused.

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During the pendency of the trial before the Special Judge, an application for withdrawal of the prosecution only against accused No. 6 - G. Gopalakrishna Pillai was made by the Special Public Prosecutor on 24th August, 1992 under Section 321, Cr. P.C. which was registered as Crl. M.P. No. 79 of 1992 in CC No. 1 of 1991. The material portion of the application G is as under :

> "On going through the investigation papers minutely it will appear that successful prosecution of that accused (A6) cannot be launched, *for there are no materials to substantiate the charge of* H *conspiracy or for the other offences.*

In the circumstances I am of opinion that the trial against Shri Gopalkrishna Pillai will be unnecessary. The State also is of opinion that prosecution of A6 may not be sustainable. A

It is therefore requested that by virtue of provisions contained in Sec. 321 of the Crl. P.C. necessary consent may be granted to withdraw the prosecution against the 6th accused Shri Gopalkrishna Pillai and the said accused may be discharged." B

(Emphasis supplied)

It is clear that the only ground on which consent of the Court was sought by the Special Public Prosecutor to withdraw the prosecution against accused No. 6 - G. Gopalkrishna pillai was that "there are no materials to substantiate the charge of conspiracy or for the offences". In other words, the only ground was of total absence of any material evidence against accused No. 6. As earlier stated the learned Special Judge rejected this application and declined to give his consent by his order dated 16th October, 1992. C D

The learned Special Judge considered at length the only aforesaid ground on which consent for withdrawal of prosecution was sought, in paras 14 to 18 of his order, material portions of which read as under : E

"14. The general allegations against all the accused are stated at the beginning of this order. *The very foundation of the prosecution case is that the accused entered into a criminal conspiracy to award the disputed contracts involving heavy financial implications to the 4th accused and this conspiracy and abuse of power of the officials who include the 6th accused, enabled their con.conspirators to obtain an pecuniary advantage of Rs.2,39,64,253* in addition to the heavy financial loss caused to the Board. Now, the reason for withdrawal of the prosecution against the 6th accused as could be seen from the memo filed by the learned prosecutor, is paucity of evidence. But, one has to bear in mind that *criminal conspiracy being an offence committed in secrecy, direct evidence may not always be available,* Understandably, *the prosecution is therefore relying on certain circumstances,* which according to the prosecution, will speak for itself. The award of the contracts to the 4th accused at exorbitantly high rates (upto 188% over and above the PAC rate) F G H

is one such circumstance. Admittedly, the disputed contracts were awarded to the 4th accused on 19.11. 1982 by the Board consisting accused Nos. 6 to 11. It would appear that the issue relating to the award of the two disputed contracts was placed before the Board meeting held on 17.11.1982. According to the prosecution, the Board which met on 17.11.1982 postponed the meeting to such a nearer date with the ulterior motive of excluding all tenders other than the 4th accused. The 4th accused alone attended the Board meeting on 19.11.1982 and consequently the contracts were awarded to him. The impossibility of other tenderers to attend the meeting on 19.11.1982, the failure of the Board to issue proper notice to the tenderers to attend the meeting on 19.11.1982, the hastiness shown by the Board members in fixing such a nearer date are all high-lighted by the prosecution to substantiate the *malafides* of the members of the Board. *To prove its case in this regard, the prosecution finds support from the evidence of no less a person than the Chief Engineer of the Board at relevant time. (CW 9 in the charge sheet). Going by the charge-sheet, the accused Nos. 6 to 11 who attended the Board meeting on 17.11.1982 and 19.11.1982 are all similarly placed in sharing the criminal liability.* It is not brought to the notice of the court as to how the 6th accused alone could be treated differently. The learned prosecutor has no case that the move to withdraw the prosecution against the 6th accused is founded on any materials which came to light after the filing of the charge.

15. *The unusual manner in which the Board agreed to all the special conditions in the tenders resulting in heavy financial burden on the Board is another circumstance relied on by the prosecution to prove the conspiracy. The sanctioning of the special conditions misusing the official position of the 6th accused and others as public servants is sought to be proved by various documents, besides the oral evidence of a number of witnesses.* It is again not brought to my notice as to how the 6th accused stands on a different footing in regard to these material allegations. *Paucity of evidence cannot therefore be taken as a ground to withdraw the prosecution against one among them. At any rate, it cannot be said that there was a proper application of mind in seeking withdrawal of the prosecution against one among the officials.*

16. *The alleged attempts made by the 6th accused along with others to cause disappearance of evidence appears to be one of the most important circumstances, relied on by the prosecution to prove the involvement of 6th accused in the conspiracy.* Though the cracks in the concrete lining of the power tunnel were noticed even before the trial run, it is that the officials concerned tried to project everything as normal. *By his report dated 31.7.1985, the 6th accused as Power Secretary is alleged to have misled the Minister concerned, the Legislative Assembly and the public at large in regard to the cause of leakage in the power tunnel.* The Member Vigilance and Security, an I.P.S. Officer (CW 22) is reported to have pointed out the cracks in the tunnel, defective method of construction and unauthorised diversion of cement in his report dated 23.7.1985 and 1.8.1985. He recommended further enquiries on these aspects. *It is alleged that the 6th accused did all what is possible to suppress the reports by the Member Vigilance and Security and tried to legitimate everything. One another important allegation against the 6th accused is that he even tried to scuttle the judicial enquiry ordered by the Government. In the face of these serious allegations against the 6th accused, I am not persuaded to hold that the learned prosecutor applied his mind as a free agent uninfluenced by irrelevant and extraneous considerations.* No doubt, it is too premature to say whether or not the materials collected by the prosecution are sufficient to prove the involvement of this accused in the alleged conspiracy. Whether the circumstances relied on by the prosecution are incompatible with the innocence of the accused is also a matter for the court to decide. Before assessment of the prosecution evidence, one cannot jump into the conclusion that one of the 6th accused is an exercise in futility.

17. Of course, finding support from the observations of the Supreme Court in *Sheo Nandan Paswan's* case, A.I.R. (1987) S.C. 877, the learned Public Prosecutor argued with vehemence that the judgment of a Public Prosecutor under Section 321 Cr. P.C. cannot be lightly interfered with. But the settled decision of law, which I have already discussed, makes clear that the court has a duty to oversee whether the Public Prosecutor has properly exercised his power under Section 321 Cr.P.C. Having regard to the entire facts and circumstances of this case, it is not possible to hold

A that the Public Prosecutor has properly exercised his discretion or that there are justifiable or convincing reasons to deflect from the normal course of justice.

B 18. *Thus on a careful and anxious consideration of the materials available before court. I do not think that the learned Public Prosecutor has properly exercised the executive power vested on him under Section 321 Cr. P.C. or that he has applied his mind objectively uninfluenced by extraneous considerations in seeking the permission of the Court to withdraw the 6th accused from prosecution.* I, therefore, decline to give consent to withdraw the prosecution C against the 6th accused. The result is that the petition is dismissed."

(Emphasis supplied)

There cannot be any doubt that the test applied by the learned D Special Judge for deciding whether to grant consent for withdrawal of the prosecution under Section 321. Cr. P.C. was correct and his reading of the decisions of this Court for that purpose was also correct. Rejection of the application of the Special Public Prosecutor and refusal to give consent for withdrawal of the prosecution was on the view taken that the learned Special Public Prosecutor had not applied his mind to the material in E support of the prosecution as a free agent uninfluenced by irrelevant and extraneous considerations. In short the conclusion reached by the learned Special Judge was that the decision of the Special Public Prosecutor to invoke Section 321 Cr. P.C. was not a *bona fide* decision reached on proper application of mind to the material relied on by the prosecution to support F the charge against accused No. 6 - G. Gopalakrishna Pillai. According to the decisions of this Court including *Sheo Nandan Paswan* v. *State of Bihar* [1987] 1 SCR 702, on which reliance was placed by the learned Special Judge, this was the correct test and a ground available to the learned Special Judge to decline consent for withdrawal of the prosecution under Section 321, Cr. P.C.

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This being so, the only question for consideration is: Whether it was legally permissible for the High Court and it was justified in setting aside the order of the learned Special Judge declining to give consent for withdrawal of prosecution against accused No. 6 - G. Gopalakrishna Pillai, H in the facts and circumstances of the present case ?

The High Court has set aside the aforesaid order of the Special Judge in a revision filed by the State of Kerala represented by the Superintendent of Police. No grievance against the order of the Special Judge was made by the Special Public Prosecutor whose application under Section 321, CR. P.C. had been rejected by the Special Judge. It has been urged on behalf of the appellant that such a revision did not lie at the instance of the State Government when the Special Public Prosecutor chose not to assail the order of the Special Judge declining to give consent for withdrawal of the prosecution. However, we consider it unnecessary in the present case to go into this question since we have formed the opinion that the impugned order of the High Court is not sustainable on merits.

The learned Additional Solicitor General who appeared on behalf of the State of Kerala, in all fairness, made on attempt to dispute the position that the High Court's order does not at all deal with the only ground on which the application was made by the Special Public Prosecutor and which was found non-existent by the learned Special Judge in his order chal nged before the High Court in revision. It does appear that without considering the only ground material for the present case the High Court embarked upon a roving inquiry in an extraneous field filed totally ignoring the fact that if the ground urged for withdrawal of the persecution was non-existent and there was *prima facie* material, if believed, to support the prosecution then the motive for launching the prosecution by itself may be of no avail. Curiously enough the High Court has placed reliance on material not forming part of the record and referred to some administrative files of the State Government for taking the view that the prosecution was the result of political vendetta. The High Court has also taken the view that the fear of prosecution has affected the morale of senior civil servants of the State which was required to be remedied overlooking the fact that withdrawal of prosecution on charges of corruption would promote corruption in public life. The High Court also took the view that the Leader of the Opposition in the State Assembly, who had appeared to oppose the withdrawal of prosecution, had no *locus standi* in the matter. We need not go into the question of locus because no learned counsel appearing before us disputed that the appellant who is an acknowledged public figure of the State has sufficient locus in this matter.

The High Court also referred to the same decisions of this Court but

A has apparently missed the true import thereof to reach the conclusion that it was justified in setting aside the order of the Special Judge refusing consent for withdrawal of prosecution in the present case. Some relevant portions of the High Court's order containing the reasons for making that order are as under :

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> "When the State has confessed political vendetta, there is no need to make a further enquiry into the reason. The public prosecutor is well within his rights, in withdrawing from a prosecution, launched for political reasons, and motivated by vendetta."

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> "The files produced before me indicate that the Administrative Department decided to launch a prosecution."

> "Another ground stated for withdrawal is that fear of prosecution has affected the morale of senior civil servants, and that the situation has to be remedied. They hesitate to take decisions for

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> fear of reprisals, says the State Prosecutor."

> "*I am not unaware, that the petition filed before the Court below was cryptic. But, when grounds are pleaded in this Court, they must be considered*, more so, when the Court below viewed the whole matter, in the wrong perspective".

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> "As far as withdrawal is concerned it is for the Government to extent it concerns it, and for the Public Prosecutor to the extent it concerns him, to consider whether the prosecution against the Minister, the officials and any other person should be withdrawn,

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> having regard to the state of affairs revealed from ground No. 21."

> "(a) *State is the only Authority* (other than the Court giving consent) *for purposes of Section 321.*"

> "For the foregoing reasons, the Criminal Revision Petition is al-

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> lowed and the order of the court below is set aside."

(Emphasis supplied)

The High Court went further to give an extraordinary direction in respect of other accused for whom no proposal to withdraw the prosecu-

H tion was either made or required consideration. It further said :

"The competent authority will consider whether, for the reasons stated in Grounds 3, 6 and 21 of the Revision Petition, the prosecution should be continued against any or all of the accused." A

The above are the only material portions of the order of the High Court which would indicate that the High Court missed the true import of the scope of the matter before it. 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. It is on account of this palpable error and due to the lack of proper perception of the nature and scope of the High Court's power in such a matter that the High Court not only set aside the well reasoned and justified order of the learned Special Judge but also proceeded to add that the "competent authority will consider whether ..... the prosecution should be continued against any or all of the accused." We are informed that encouraged by this further, needless and unwarranted observation of the High Court, steps are being taken by the State Government for withdrawal of the prosecution against other accused persons also. It is sufficient to observe that all consequential steps taken pursuant to any such observations in the impugned order of the High Court also fall automatically on the setting aside of the High Court's order. B C D E F

It was urged on behalf of the appellant that the un-usual zeal exhibited by the State Government in filing the revision and producing its administrative files to support withdrawal of prosecution was for political reasons. It is not necessary for us to deal with this aspect even though the manner of filing the revision and supporting it was indeed extraordinary. However, the learned Additional Solicitor General presented the case before us in keeping with the highest traditions of a Government counsel and that is a redeeming feature. G

As indicated earlier, there was no ground available to the High Court to set aside the well reasoned and justified order of the learned Special H

A Judge rejecting the application of the Special Public Prosecutor and declining to give consent for withdrawal of prosecution. We may also add that there is nothing in the impugned order of the High Court which provides any legal basis for interfering with the aforesaid order made by that learned Special Judge. The High Court's order must obviously be set aside.

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For the aforesaid reasons, the appeal is allowed. The impugned order dated 3rd April, 1993 of the High Court is set aside resulting in restoration of the order dated 16th October, 1992 passed by the learned Special Judge declining to give consent for withdrawal of the prosecution. It is also made clear that all acts done and steps taken by the State Government or any other authority acting on, or pursuant to the observations made by the High Court in para 21 of its order relating to withdrawal of prosecution against the other accused would automatically be rendered ineffective.

C

T.N.A. Appeal allowed.