

Mohd. Mumtaz

Vs

Nandini Satpathy and Others (I)

Criminal Appeal No. 49 of 1983

(CJI P. N. Bhagwati, E. S. Venkataramiah, V. Khalid, G. L. Oza, S. Natarajan JJ)

20.12.1986

JUDGMENT

VENKATARAMIAH, J. -

1. I agree that this appeal has to be dismissed. I am of the view that the decision in State of Bihar v. Ram Naresh Pandey (1957 SCR 279 : AIR 1957 SC 389 : 1957 Cri LJ 567) interpreting Section 494 of the Code of Criminal Procedure, 1898 and the decision in Rajender Kumar Jain v. State ((1980) 3 SCR 982 : (1980) 3 SCC 435 : 1980 SCC (Cri) 757) 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. 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, 1973.

2. The appeal is, therefore, dismissed.

KHALID, J. –

I have just received (at 3.45 p.m. on December 19, 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 December 20, 1986, I do not have time to write a detailed judgment.

4. 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 (sic dismissed) the appeal quashing the charge framed against respondent 1 under Section 239 of the Code of Criminal Procedure. I regret to state that I cannot reconcile myself with this approach. 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.

5. This appeal along with Criminal Appeal No. 48 of 1983 (Mohd. Mumtaz v. Nandini Satpathy (II)) 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.

6. In a separate judgment to be pronounced by me in Criminal Appeal No. 241 of 1982 (Sheonandan Paswan v. State of Bihar, (1987) 1 SCC 288), 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.

7. I adopt the reasons given by me in Criminal Appeal No. 241 of 1982 (Sheonandan Paswan v. State of Bihar, (1987) 1 SCC 288), relying upon the decision reported in State of Bihar v. Ram Naresh Pandey (1957 SCR 279 : AIR 1957 SC 389 : 1957 Cri LJ 567) and in Rajender Kumar Jain v. State ((1980) 3 SCR 982 : (1980) 3 SCC 435 : 1980 SCC (Cri) 757) 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.

OZA, J. (on behalf of BHAGWATI, C.J. and himself) –

The present appeal by special leave is directed against the judgment of the High Court of Orissa dated May 14, 1981 in Criminal Revision No. 21 of 1981 arising out of an order dated September 20, 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 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.

9. The Vigilance Department submitted a charge-sheet against respondent 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 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 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 companies' advertisements for publication in the souvenirs. It is alleged that forgery was committed and Shri Ramanath Panda, respondent 2 was also alleged to have participated with respondent 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 respondents 1 and 2. Shri B. M. Patnaik the then Advocate General of Orissa was appointed as a Special Public Prosecutor to conduct the case. By order dated September 27, 1979, the Additional Chief Judicial Magistrate framed charges under Sections 406, 467, 471 and 120 of the IPC against respondent 1 and under Section 406 read with Section 34 of the IPC against respondent 2.

10. 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, 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.

11. Thereafter respondent 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 November 5, 1980, 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 November 6, 1980 the learned Advocate General Shri Gobind Das forwarded this letter of 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 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 :

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 and 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.

12. On 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 November 13, 1980 that the case be withdrawn. By letter dated November 15, 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 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 December 16, 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.

13. After consideration of the case, the Additional Chief Judicial Magistrate by order dated December 20, 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 revision petition in the High Court of Orissa challenging the order of the Additional Chief Judicial Magistrate permitting withdrawal of the case. But by an order dated May 14, 1981 the High Court dismissed the revision petition. Hence this appeal by special leave.

14. The FIR in this case was lodged by one Shyamsunder Mohapatra against respondents 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 alleged that respondent 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 2. It was alleged that neither advertisements were published nor the amounts returned to the companies. It is significant to note that Shri Shyamsunder Mohapatra was neither an office-bearer of the UPCC nor of the AICC. 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 1 was not the Chief Minister of the State. He had been suspended from the Congress Party for his anti-party activities when respondent 1 was the President of the UPCC 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 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.

15. 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 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 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 1.

16. 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 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 1. It is not the case of the prosecution that any of these amounts were handed over by any of the companies to respondent 1. The entrustment of these amounts, if at all, was to the Souvenir Committee of the All India Congress Committee and respondent 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 1 was totally groundless and we would therefore quash it.

17. We accordingly dismiss the appeal but instead of permitting the prosecution to be withdrawn under Section 321 we quash the charge framed against respondent 1 under Section 239 of the Code of Criminal Procedure, 1973.

NATARAJAN, J. –

This is a case where the Special Public Prosecutor (Vigilance) CD, Cuttack had filed a petition under Section 321 CrPC 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 CrPC a Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried.

19. 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. 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.

20. 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 *Rajender Kumar Jain v. State* ((1980) 3 SCR 982 : (1980) 3 SCC 435 : 1980 SCC (Cri) 757) which has followed the earlier decision of this Court in *State of Bihar v. Ram Naresh Pandey* (1957 SCR 279 : AIR 1957 SC 389 : 1957 Cri LJ 567). Before passing the order, the learned Magistrate has been fully alive to the responsibility of the court before it grants consent to an application made under Section 321 CrPC. The portion extracted below from the order of the learned Additional Chief Judicial Magistrate fully reveals this position :

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.

After making an objective assessment of the merits 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.

21. The order of the learned Additional Chief Judicial Magistrate was affirmed, after a careful scrutiny by a learned Judge of the Orissa High Court in Criminal Revision No. 21 of 1981 filed in the High Court. The learned Judge observed that the ratio laid down in *Rajender Kumar Jain v. State* ((1980) 3 SCR 982 : (1980) 3 SCC 435 : 1980 SCC (Cri) 757) "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."

22. 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* (1957 SCR 279 : AIR 1957 SC 389 : 1957 Cri LJ 567) reiterated in *Rajender Kumar Jain v. State* ((980) 3 SCR 982 : (1980) 3 SCC 435 : 1980 SCC (Cri) 757) 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.

23. 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.

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