

KERALA HIGH COURT

Accountant General (Admn.) Office

Vs

State of Kerala

Criminal Revn. Petns. Nos. 201 to 206, 210, 213, 217, 229, 230, 237, 240, 249, 252 and 284 of
1969

(P.T. Raman Nayar C.J., P. Govindan Nair and V.P. Gopalan Nambiyar, JJ.)

06.08.1969

JUDGMENT

P.T. Raman Nayar C.J.,

1. In August 1968, various unions of employees of the Central Government gave notice of a one-day strike on the 19th September to press some demands of theirs, a token strike as it is called, being in token or earnest of what they could and would do if the demand was not met. The Central Government, it would appear, chose to meet the threat rather than the demand. On the 13th September, the President promulgated the Essential Services Maintenance Ordinance, 1968, section 3 whereof empowered the Central Government to prohibit strikes in any essential service as defined in section 2, and sections 4, 5 and 6 whereof provided for penalties for persons participating in any such prohibited strike as well as for persons instigating and financing such strikes. On the same day the Central Government issued an order under section 3 of the Ordinance, in effect prohibiting strikes in any service in connection with the affairs of the Union, although some services, like the postal, telegraph or telephone service, were specifically mentioned. This notwithstanding, the threatened strike did take place it is claimed that it was a signal success in this stage as elsewhere in the country. As a result, numerous complaints (information, in the language of the Criminal Procedure Code; but we are using the words, "complaint" and "complainant" in the popular sense, not in the sense in which, "complaint" is defined in section 4 (h) of the Code) were made to the police throughout the State by various officers of the Central Government departments concerned, of offences under the Ordinance and under other laws. These were investigated, and, in due course, a large number of charge-sheets were filed by the police before the magistrates having jurisdiction against the strikers for offences under section 4 or 5 or both of the Ordinance, some of them also for offences under other laws, such as Sections 143, 147, 294, 323, 341, 353, 448 and 506 of the Indian Penal Code and Section 25 of the Indian Telegraph Act. On the 24th December, the State Government decided to withdraw cases not involving serious personal violence or destruction of property and it directed the Inspector-General of Police to "take immediate action for the withdrawal of the cases accordingly through the Public Prosecutors concerned." Accordingly towards the end of January or early in February 1969, applications were made to the several Courts by the Public

Prosecutors concerned (namely, the Assistant Public Prosecutors in charge of the cases) under Section 494 of the Criminal Procedure Code for the necessary consent. In most of the cases the applications were allowed despite opposition by the complainants who appeared by counsel; and the accused persons were acquitted. The complainants have come up in revision against the grant of the consent and the consequent acquittal. We are here dealing with sixteen such cases, CrI. R. P. Nos. 201 to 206 being in respect of employees of the Accountant General's Office, Trivandrum, and the rest, of employees of the Posts and Telegraphs department.

2. Section 494, Criminal Procedure Code, runs as follows: Any public prosecutor, may with the consent of the Court, in cases tried by jury before the return of the verdict, end in other cases 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; and, upon such withdrawal,-

- (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;
- (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences."

As pointed out by the Supreme Court in *State of Bihar v. Ram Naresh Pandey*¹, two things are clear from a plain reading of the section. The first is that the power to withdraw is conferred on the Public Prosecutor and on no one else; and, although this is an executive power, it is a power which he must exercise in the light of his own judgment and not at the dictation of some other authority, however high. That being so, the discussion at the bar as to whether the executive power in respect of this matter is vested in the State by reason of, "administration of justice" being in the State List, and, "Criminal Procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution", being in the Concurrent List, or whether it is vested in the Union by reason of, "Union Public Services" being in the Union List seems to be largely beside the point. So also whether, even if the power falls within the executive power of the Union, Article 256 (subject to any direction given thereunder by the Central Government none has, in fact, been given) and Article 258 (2) (in the light of the decisions in *Emperor v. Sibnath Banerji*², and *Anant Baburao v. State*³, would not confer executive power on the State. For, there can be no question of the executive power, either of the Union or of the State, being exercised contrary to law; and when, as we have seen, the law confers the power of withdrawal on the Public Prosecutor, that means that that power must be exercised by the Public Prosecutor and by no one else.

3. The second thing that is clear from a plain reading of the section is that the power or withdrawal conferred on the Public Prosecutor is not an absolute power. He can withdraw from the prosecution only with the consent of the Court and this curb is placed on his power in order to ensure that the power is not abused, in other words, is

¹ AIR 1957 SC 389

³ AIR 1967 Bom 109

² AIR 1945 PC 156

not exercised for improper reasons or to serve improper ends.

4. The questions that arise before us then are: First, was the power in these cases in fact exercised

by the Public Prosecutor in the light of his own judgment; and, secondly, was the grant of consent by the Courts proper, in other words, was the application for withdrawal made on proper grounds and was there material placed before the Court to substantiate those grounds. If either question is answered in the negative, these petitions, it seems to us, must be allowed.

5. The order made by the State Government on the 24th December, 1968 runs thus:

"Consistent with the policy of Government in relation to mass agitation and strike, it has been decided to withdraw with the leave of the court the cases registered in connection with the Central Government Employees strike on the 19th September, 1968 except those involving serious personal violence or destruction of property. It is ordered accordingly.

The Inspector-General of Police will take immediate action for the withdrawal of the cases accordingly through the Public Prosecutors concerned." This order, it seems to us, shows scant respect for the law and is in disregard of the duty and the responsibility of the State Government to enforce the law. It must be remembered that the Public Prosecutors in these cases are not independent members of the legal profession but full time Government servants working under the immediate control and direction of the District Collectors, themselves subordinates of the Government. In all the applications for withdrawal, this order of the Government was mentioned as a ground for withdrawal-to many of them a copy of the order was appended-and we are sure that, in the circumstances, every one of the Public Prosecutors must have felt himself bound by the order to withdraw from the prosecution irrespective of his own views in the matter, the only matter left for his decision being whether the case involved "serious personal violence or destruction of property", whatever might be meant by the qualification, "serious".

6. The State Government does not appear to have appreciated that there can be no question of executive policy in a region covered by the law. The only valid policy, if policy it can be called and therefore the only relevant policy, is the policy of the law. The law must be enforced whatever be the views the executive might entertain. The policy, such as it is, disclosed by the State Government's order is clearly opposed to the law. The law, namely, the Essential Services Maintenance Ordinance, 1968, makes certain acts, whether they do or do not involve personal violence or destruction of property, punishable. Its very purpose is to prevent strikes in essential services by prohibiting them on threat of penalty. That a strike is the result of mass agitation is obviously an aggravating rather than an extenuating factor, for, in such a case, the greater would be the harm which the law seeks to prevent. Mass agitation is not a cover for all sins; on the contrary, it often makes the sin more harmful; and to say that it is the policy of the Government in relation to mass agitation and strikes that, for no other reason than that the offences were committed in the course of a mass agitation or a strike, offenders against the law should not be proceeded against - and that is what the withdrawal of the cases against them amounts to-except in cases involving serious personal violence or destruction of property, is nothing but a defiance of the law. It is little use exclaiming (apparently with reference to material that has not been placed before us) that the Central Government was also guilty of like defiance when, it is said, it directed that important public men or leaders of political parties should not be arrested for offences against the Ordinance notwithstanding that the Ordinance, by section 7 thereof, makes such offences cognizable.

7. What would you make of a policy which, for example, directed that persons committing the

offences of rioting and simple hurt should not be proceeded against merely because the offenders are large in number and have mass support and a continuing motive, as if these were factors bringing the case within some exception of the Indian Penal Code instead of being, as they really are, aggravating factors because both the harm actually caused and the chances of repetition are greater? Would you not say that it is an unlawful policy lending encouragement to the commission of further offences? And would you not be apprehensive that, given the values informing such a policy, if it is simple hurt that is condoned today, it might well be grievous hurt tomorrow, and, who knows what the day after.

8. The State Government's order, it is clear, discloses no legitimate ground for the withdrawal of the cases. The applications for withdrawal made in these cases, though made by different persons, are in substance the same. We shall set out in full the application in Cr. R. P. No. 205 of 1969, which it is agreed, makes out the best case, if case there be, for a withdrawal:

"1. Application made by the Assistant Public Prosecutor, Grade I, Trivandrum, under section 494 of the Criminal Procedure Code for consent of the court to withdraw from the prosecution of the above case.

2. I am in charge of the prosecution of the accused in the above case.

3. The accused, 39 in number, have been charge-sheeted by the Central Crime Police under section 5 of the E. S. M. Ordinance, 1968.

4. The allegation in the charge-sheet is that on 19-9-1968 at 10 a.m. the accused assembled in front of the main gate of the Accountant General's Office and obstructed the loyal officers who came for work. The accused also struck work and instigated and incited the other workers to strike work as a part of their agitation against the Central Government.

5. The strike was organized and resorted to by large section of Central Government employees for the purpose of getting their service conditions improved in terms of a charter of demand placed before the Central Government by various unions of the Central Government employees.

6. Due to lapse of time and change of attitude of the Central Government on the one hand and the employees on the other during the interval understanding and good-will have been considerably restored and the situation has become more or less normal. The Central Government also have expressed its view to consider the position of its employees favorably.

7. It appears that the restoration of peace and good feelings between the employees and the Central Government will be promoted by the withdrawal of the case not involving serious personal violence or destruction of property.

8. The Government of Kerala also has considered the matter and have expressed their view that cases arising in connection with the strike on 19-9-1968, except those involving serious personal violence or destruction of property be withdrawn.

9. A reading of the charge will convince that the accused have not committed any offence (on the

date of occurrence) involving any destruction of property or any personal violence against C. Ws. 1 and 2. Now they have called off their strike. For the existence of much more peaceful atmosphere and friendship between the employees in the office the withdrawal from the prosecution of this case at this stage seems to be necessary.

10. I have examined all the aspects in particular the facts of this case and being the person in charge of the prosecution of this case I am of the view that considering all the circumstances in particular the absence of any features which may render withdrawal of the case objectionable in law, interest of justice require that this case be withdrawn.

11. To the best of my knowledge there is no material on record in the case or any other grounds which stand in the way of the court in according permission to withdraw from the prosecution of the above case.

12. for the reasons stated above, it is humbly prayed that the court may be pleased to grant permission to me to withdraw from the prosecution of the above case.

9. It is difficult to formulate a general principle for determining the grounds on which a Public Prosecutor may legitimately seek withdrawal, or, looked at from another angle, the grounds on which the Court can properly grant or withhold its consent. The only general test we can think of, namely, that consent should be withheld if the withdrawal would tend to further the mischief the law seeks to prevent and that it should be granted if it is likely to have the opposite effect, is too general to be of much use in practice. But, as in most such matters, there might be no great difficulty in reaching a decision on the facts of a particular case there is none here. The court gives its consent in the exercise of its judicial discretion and before granting consent, it must be satisfied that the grounds stated for the withdrawal are proper grounds, grounds which, if true, would make the withdrawal a furtherance of, rather than an hindrance to, the object of the law. Further, that there is material to substantiate the grounds alleged, though not necessarily material gathered by the judicial method.

10. One of the well-established grounds on which a withdrawal can properly be based is that there is no evidence in the case which would warrant a conviction. In such a case it would certainly not further the object of the law to harass the accused and waste the time of the court, the witness, the prosecution and the defence by going on with the case. But in none of the cases we are here considering is the withdrawal based on such a ground.

11. We shall now proceed to consider the grounds, such as they are, stated in the application which we have set out in full. Paragraphs 1 to 4 of the application only contain statements of fact and have no bearing on the question of withdrawal excepting that the application is made by the Public Prosecutor in charge of the case. Paragraph 5 is probably not intended as a ground for withdrawal even if it echoes the State Government's order of the 24th December 1968. However that might be, the very object of the law being to prohibit and punish strikes "organised and resorted to by large sections of Central Government employees for the purpose of getting their service conditions unproved in terms of a charter of demand placed before the Central Government by various unions of the Central Government employees", that can scarcely be a ground on which a withdrawal can be sought. The grounds stated in paragraphs 6 and 7 of the application would no doubt be relevant and proper grounds were they well-founded. But it seems to us that there is no material placed in respect of these grounds beyond the bare assertion of the

Public Prosecutor; on the other hand, such material as there is, is against this assertion. Lapse of time there has no doubt been; but the change of attitude on both sides and the restoration of good-will and normalcy alleged in paragraph 6 are not matters for the Public Prosecutor's subjective satisfaction. If true, concrete facts substantiating the allegation should have been forthcoming: yet none are stated. And if the Central Government had expressed any views in the matter, one would have expected the orders or communications expressing those views to be placed before the Court. No such thing was done and no attempt whatsoever was made to show how "the restoration of peace and good feelings between the employees and the Central Government will be promoted by the withdrawal of the case not involving serious personal violence or destruction of property". The very fact that not merely did the Central Government not think fit to withdraw the order it had made on the 13th September 1968 under section 3 of the Ordinance, but that, on the 28th December, Parliament thought it necessary to replace the Ordinance by an Act, the Essential Services Maintenance Act, 1968, and, by section 9 (2) thereof, to continue the order as if it were an order made under the Act, is ample indication that there could have been no such change in the situation as to warrant the non-prosecution of persons who had committed offences under the Ordinance. So also the circumstance that officers of the Central Government, namely, the complainants in these cases, appeared before the Court and opposed the withdrawal of the prosecutions.

12. We may in this connection mention that it is pointed out that in none of the objections filed by these complainants is it stated that they were opposing the applications for withdrawal under instructions from the Central Government; and it is said that if the statements made by the Public Prosecutor as to the attitude of the Central Government and as to the relations between the Central Government and its employees were unfounded, one would have expected the Central Government itself to oppose the applications and to have come up in revision to this Court. It would no doubt have been better if the Central Government had done so-that the Central Government as such is not a party to the proceedings in the courts below is no impediment, for, in a matter of such public importance the High Court can be expected to exercise its powers of revision suo motu if there is sufficient ground for the exercise, and the locus standi of the person bringing the matter to the notice of the High Court would, in that case, be of no consequence-and, possibly, the criticism that the Central Government has adopted an equivocal attitude is justified. But we are quite unable to agree that this leads to the inference that the opposition by the complainant is due to some private spite, or alternatively, that the Central Government, chary of stepping into the arena itself, is fighting some ulterior battle of its own making a cat's paw of its subordinates. In any case, what we have to consider is whether there is any material at all to substantiate the grounds stated. That, as we have seen, there is not.

13. The ground stated in paragraph 8 which, it seems to us, is the ground that compelled the applications for withdrawal is, as we have seen, not a legitimate ground.

14. Coming to paragraph 9, the persons referred to as C. Ws. 1 and 2 therein are the complainants in the case. They made the complaints as officers of the Central Government and not to vindicate any personal grievance of theirs and that they suffered no personal injury seem to us altogether irrelevant. Nor was there any calling off of the strike. It was avowedly a one-day strike and it took its full course.

15. The remaining paragraphs only state the conclusions reached by the Public Prosecutor and

pray for consent to withdraw from the prosecution.

16. It is clear from what we have stated that both the questions that we have posed in paragraph 4 above must be answered in the negative.

17. We might perhaps state that our attention has been drawn to some decisions which say that considerations of State policy are relevant on the question of grant of consent under Sec 494 of the Code. Apparently, the purpose is to show that the State Government's order of the 24th December, 1968 is an order based on policy considerations. We have already shown that the policy set out therein being a policy opposed to the law cannot be taken into consideration. It only remains to add that the word, "State" as used in those decisions is not to be confused with, "State Government". It is used in the sense of the sovereign power; and the State policy referred to is the policy of that limb of the sovereign power whose duties and responsibilities are affected by the mischief to prevent which the law has created the offence. In relation to the offences under the Indian Penal Code it might well be that the limb is the State Government; but in relation to the offences under the Essential Services Maintenance Ordinance and the Indian Telegraph Act, there can be no doubt that the limb is the Central Government.

18. We might mention that the locus standi of the petitioners to move us in revision has been questioned. As we have already indicated, this is not of any consequence, for, this is a matter in which we would have felt bound to act irrespective of the locus standi of the petitioners.

19. In the result we allow these petitions, set aside the orders of consent made by the courts below and the acquittals consequent thereto. We direct that the accused persons concerned be retried by the District Magistrates having jurisdiction or by such other Magistrate of competent jurisdiction other than the Magistrate who heard the case in the first instance, as the District Magistrate might
Petitions allowed.