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SUBHASH CHANDER

v.

STATE (CHANDIGARH ADMN.) & ORS.

November 15, 1979

[V. R. KRISHNA IYER AND R. S. PATHAK, JJ.]

B

Criminal Procedure Code, Sections 321, 494—*Scope of.*

The petitioner alleged that his house had been burgled and that many valuables were lost. The police recovered the property. Eventually, charges were also framed by the trial court against two other persons who were said to be collaborators.

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During the pendency of the criminal case, the Asstt. Public Prosecutor applied for withdrawal from prosecution under section 321, Cr. P.C. on the ground that on fresh investigation by a senior officer the alleged search and seizure were discovered to be a frame-up by the concerned police officer in order to pressurise the accused to withdraw a certain civil litigation. The court required a fuller application, the Assistant Public Prosecutor made a fresh and more detailed petition for withdrawal which was eventually granted by the trial

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court, despite the petitioner's remonstrance that the withhrawal wa· prompted by political influence wielded by the jeweller leading to instructions from high quarters to the Assistant Public Prosecutor to withdraw from the case concerning that accused. It was alleged that the Assistant Public Prosecutor did not apply an independent mind in carrying out the said instructions. The trial court nevertheless accepted the request of the Assistant Public Prosecutor and directed acquittal of the jeweller, while continuing the case against the remaining two

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accused. The order was unsuccessfully assailed in revision before the High Court by the petitioner.

By special leave to appeal under Article 136 of the Constitution, it was argued on behalf of the petitioner that (i) a case which pends in court cannot be subject to a second police investigation without the judge even knowing about it, (ii) political considerations of the Executive vitiate the motion for

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withdrawal of pending proceeding, and (iii) the District Magistrate's order to withdraw from a case communicated to the Public Prosecutor and carried out by him, is compliance with section 494.

Dismissing the petition,

HELD : When a crime is committed, the assessment of guilt and the award of punishment or, alternatively, the discharge or acquittal of the accused are

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part of the criminal justice process administered by the courts of the land. It is not the function of the executive to administer criminal justice and in our system, judges are not fungible. [47 A]

When a case is pending in a criminal court, its procedure and progress are governed bv the Criminal Procedure Code or other relevant statute. To intercept and recall an enquiry or trial in a court, save in the manner and to the extent provided for in the law, is itself a violation of the law. Whatever needs

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to be done must be done in accordance with the law. The function of administering justice, under our constitutional order, belongs to those entrusted with judicial power. One of the few exceptions to the uninterrupted flow of the

court's process is section 321, Cr. P.C. But even here it is the Public Prosecutor and not any executive authority, who is entrusted by the Code with the power to withdraw from a prosecution, and that also with the consent of the court. To interdict, intercept or jettison an enquiry or trial in a court, save in the manner and to the extent provided for in the Code itself, is lawlessness. The even course of criminal justice cannot be thwarted by the executive, however high the accused, however sure Government feels a case is false, however, unpalatable the continuance of the prosecution to the powers-that-be who wish to scuttle court justice because of hubris, affection or other noble or ignoble consideration. Among the very few exception to this uninterrupted flow of the court process is section 494, Cr. P.C. Even here, the Public Prosecutor is entrusted by the Code with a limited power to withdraw from a prosecution with the court's consent whereupon the case comes to a close. What the law has ignited, the law alone shall extinguish. [47 D-H, 48 A]

The promotion of law and order is an aspect of public justice. Grounds of public policy may call for withdrawal of a prosecution. A prosecution discovered to be false and vexatious cannot be allowed to proceed. But the power must be cautiously exercised, and the statutory agency to be satisfied is the Public Prosecutor in the first instance, not the District Magistrate or other executive authority. Finally, the consent of the court is imperative. [48 G-H]

There was no evidence to support the allegation of political influence. At the same time, the District Magistrate acted illegally in directing the Assistant Public Prosecutor to withdraw. It has been alleged that the second investigation of the case on the executive side, which led to the discovery that the earlier investigation was motivated, was vitiated by the omission to question the first informant. That was a matter for the Assistant Public Prosecutor to consider when deciding whether or not to withdraw from the prosecution. It is abundantly clear that the Assistant Public Prosecutor made an independent decision on the material before him and did not act in blind compliance with the instructions of the District Magistrate. [50 F-H, 51 A]

The rule of law warns off the executive authorities from the justicing process in the matter of withdrawal of cases. Since the courts were satisfied that the Public Prosecutor did not yield to the directive of the District Magistrate but made an independent study of informing himself of the materials placed before the court and then sought permission to withdraw from the prosecution, this court declined to reverse the order of the courts below. [51 F-H]

M. N. Sankaranarayana Nair v. *P. V. Bala Krishna & Ors.* AIR 1972 SC 496 : *Bansi Lal* v. *Chandan Lal,* AIR 1976 SC 370 : *Balwant Singh & Ors.* v. *Bihar,* AIR 1977 SC 2265, affirmed.

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Criminal) No. 2076 of 1978.

From the Judgment and Order dated 17-3-1978 of the Punjab and Haryana High Court in Criminal Revision No. 181/77)

R. L. Kohli, S. K. Sabharwal and *Subhash Chander* for the Petitioner.

A *R. N. Sachthey* for Respondent No. 1.

Prem Malhotra for Respondent No. 2.

The Order of the Court was delivered by

KRISHNA IYER, J.—What constrains us to explain at some length our reasons for rejection of leave to appeal in this case is the desideratum that every executive challenge to justice-in-action is a call to the court to strengthen public confidence by infusing functional freshness into the relevant law sufficient to overpower the apprehended evil.

The house of the petitioner is said to have been burgled and he alleges that he lost many valuables. The police, on information being laid, searched and recovered the property. Eventually, charges were framed by the trial court against one Hussan Lal, a jeweller, and one Madan Lal, an alleged collaborator (respondents Nos. 2 and 3 in this petition) under s. 411 I P.C. and one Ashok Kumar under s. 380, I.P.C. During the pendency of the criminal case, the Assistant Public Prosecutor applied for withdrawal from prosecution under s. 321, Cr.P.C. on the ground that on fresh investigation by a senior officer the alleged search and seizure were discovered to be a frame-up by the concerned police officer in order to pressurise the accused Hussan Lal to withdraw a certain civil litigation. On the court requiring a fuller application the Assistant Public Prosecutor made a fresh and more detailed petition for withdrawal which was eventually granted by the trial court, despite the petitioner's remonstrance that the withdrawal was prompted by the political influence wielded by Hussan Lal leading to instructions from high quarters to the Assistant Public Prosecutor to withdraw from the case concerning that accused. It was alleged that in carrying out the instructions the Assistant Public Prosecutor did not apply an independent mind. The court nevertheless accepted the request of the Assistant Public Prosecutor and directed acquittal of Hussan Lal, while continuing the case against the remaining two accused. The order was unsuccessfully assailed in revision before the High Court by the petitioner. Undaunted by that dismissal, he has moved this court under Art. 136 of the Constitution. In view of the startling disclosures on either side we have listened at some length to the oral submissions in supplementation of the affidavits in the record.

The three focal points of arguments are whether (i) a case which pends in court can be subject to a second police investigation without the judge even knowing about it, (ii) political considerations of the Executive vitiate the motion for withdrawal of pending proceeding, and (iii) the District Magistrate's order to withdraw from a case communicated to the Public Prosecutor and carried out by him, is compliance with s. 494.

When a crime is committed in this country, the assessment of guilt and the award of punishment or, alternatively, the discharge or acquittal of the accused are part of the criminal justice process administered by the courts of the land. It is not the function of the executive to administer criminal justice and in our system, judges are not fungible, as Justice Dougles in *Chandler*,(1) asserted :

> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community."

When a case is pending in a criminal court, its procedure and progress are governed by the Criminal Procedure Code or other relevant statute. To intercept and recall an enquiry or trial in a court, save in the manner and to the extent provided for in the law, is itself a violation of the law. Whatever needs to be done must be done in accordance with the law. The function of administering justice, under our constitutional order, belongs to those entrusted with judicial power. One of the few exceptions to the uninterrupted flow of the court's process is s. 321, Cr. P.C. But even here it is the Public Prosecutor, and not any executive authority, who is entrusted by the Code with the power to withdraw from a prosecution, and that also with the consent of the court. We repeat for emphasis. To interdict, intercept or jettison an enquiry or trial in a court, save in the manner and to the extent provided for in the Code itself, is lawlessness. The even course of criminal justice cannot be thwarted by the Executive, however high the accused, however sure Government feels a case is false, however unpalatable the continuance of the prosecution to the powers-that-be who wish to scuttle court justice because of hubris, affection or other noble or ignoble consideration. Justicing, under our constitutional order, belongs to the judges. Among the very few exceptions to this uninterrupted flow of the court process is s. 494, Cr.P.C. Even here, the Public Prosecutor—not any executive authority—is entrusted by the Code with a limited power to withdraw from a prosecution, with the

(1) *Chandler* v. *Judicial Council of the Tenth Circuit of the U.S.* 398 U.S. 74, 1970.

A court's consent whereupon the case comes to a close. What the law has ignited, the law alone shall extinguish.

Although skeletal, the conditions for such withdrawal are implicit in the provision, besides the general principles which have been evolved through precedents. Once a prosecution is launched, its relentless B course cannot be halted except on sound considerations germane to public justice. All public power is a public trust, and the Public Prosecutor cannot act save in discharge of that public trust, a public trust geared to public justice. The consent of the court under s. 321 as a condition for withdrawal is imposed as a check on the exercise of that power. Consent will be given only if public justice in the C larger sense is promoted rather than subverted by such withdrawal. That is the essence of the *nolle prosequi* jurisprudence.

We wish to stress, since impermissible influences occasionally infiltrate into this forbidden ground, that court justice is out of bounds D for masters and minions elsewhere. We do not truncate the amplitude of the public policy behind s. 494 Cr.P.C. but warn off tempting adulteration of this policy, taking the public prosecutor for granted. Maybe, the executive, for plural concerns and diverse reasons, may rightfully desire a criminal case to be scotched. The fact that broader considerations of public peace, larger considerations of public justice and even E deeper considerations of promotion of long-lasting security in a locality, of order in a disorderly situation or harmony in a factious milieu, or halting a false and vexatious prosecution in a court, persuades the Executive, *pro bono publico,* sacrifice a pending case for a wider benefit, is not ruled out although the power must be sparingly exercised and the statutory agency to be satisfied is the public prosecutor, F not the District Magistrate or Minister. The concurrence of the court is necessary. The subsequent discovery of a hoax behind the prosecution or false basis for the criminal proceeding as is alleged in this case, may well be a relevant ground for withdrawal. For the court should not be misused to continue a case conclusively proved to be a counterfeit. This statement of the law is not exhaustive but is enough G for the present purpose and, indeed, is well-grounded on precedents.

The promotion of law and order is an aspect of public justice. Grounds of public policy may call for withdrawal of the prosecution. A prosecution discovered to be false and vexatious cannot be allowed to proceed. The grounds cover a large canvas. But the power must H be cautiously exercised, and the statutory agency to be satisfied is the Public Prosecutor in the first instance, not the District Magistrate or other executive authority. Finally, the consent of the court is impera-

tive. The law was explained by this Court in *M. N. Sankaranarayana Nair* v. *P. V. Bala Krishna & Ors.*(1) A

> "A reading of Sec. 494 would show that it is the public prosecutor who is in-charge of the case that must ask for permission of the Court to withdraw from the prosecution of any person either generally or in respect of one or more of the offences for which he is tried. This permission can be sought by him at any stage either during the enquiry or after committal or even before the judgment is pronounced. The section does not, however, indicate the reasons which should weigh with the Public Prosecutor to move the Court for permission nor the grounds on which the Court will grant or refuse permission. Though the Section is in general terms and does not circumscribe the powers of the Public Prosecutor to seek permission to withdraw from the prosecution the essential consideration which is implicit in the grant of the power is that it should be in the interest of administration of justice which may be either that it will not be able to produce sufficient information before prosecuting agency would falsify the prosecution evidence or any other similar circumstances which it is difficult to predicate as they are dependent entirely on the facts and circumstances of each case. Nonetheless it is the duty of the Court also to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished merely because the Government as a matter of general policy or expediency unconnected with its duty to prosecute offenders under the law directs the Public Prosecutor to withdraw from the prosecution and the Public Prosecutor merely does so at its behest."

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The position was confirmed in *Bansi Lal* v. *Chandan Lal*(2) and *Balwant Singh & Ors.* v. *Bihar*(3). The law is thus well settled and its application is all that calls for caution. In the special situation of this case, two principles must be hammered home. The decision to withdraw must be of the Public Prosecutor, not of other authorities, even of those whose displeasure may affect his continuance in office. G

(1) A.I.R. 1972 S.C. 496.

(2) A.I.R. 1976 S.C. 370.

(3) A.I.R. 1977 S.C. 2265.

A The court is monitor, not servitor, and must check to see if the essentials of the law are not breached, without, of course, crippling or usurping the power of the public prosecutor. The two matters which are significant are (a) whether the considerations are germane, and (b) whether the actual decision was made or only obeyed by the Public Prosecutor.

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In the setting of the present facts, the enquiry must be whether the considerations on which withdrawal was sought by the Assistant Public Prosecutor were germane and pertinent, and whether the actual decision to withdraw was made by the Assistant Public Prosecutor or was the result of blind compliance with executive authority. If it C appears from the material before the Court that germane or relevant considerations did not prompt the motion for withdrawal but it was the pressure of political influence, the Court will withhold its consent.

The functionary clothed by the Code with the power to withdraw from the prosecution is the Public Prosecutor. The Public Prosecutor D is not the executive, nor a flunkey of political power. Invested by the statute with a discretion to withdraw or not to withdraw, it is for him to apply an independent mind and exercise his discretion. In doing so, he acts as a limb of the judicative process, not as an extension of the executive.

E In the present case, it appears that when the court commenced proceedings, the accused Hussan Lal complained to higher police officers that the concerned Assistant Sub-Inspector had initiated the case merely for the purpose of putting pressure on him to compromise a suit against a close relative. The allegations were enquired into by a senior officer and the District Magistrate, on the basis of the material F coming to light, directed disciplinary action against the Assistant Sub-Inspector and instructed the Assistant Public Prosecutor to withdraw from the case against Hussan Lal. We find no evidence to support the allegations of political influence. At the same time, it is necessary to point out that the District Magistrate acted illegally in directing the Assistant Public Prosecutor to withdraw. It has been alleged that the G second investigation of the case on the executive side, which led to the discovery that the earlier investigation was motivated, was vitiated by the omission to question the first informant. That was a matter for the Assistant Public Prosecutor to consider when deciding whether or not to withdraw from the prosecution.

H On the principal question arising in this case, the record shows that the Public Prosecutor applied his mind to the disclosures emerging from the second enquiry, and he found that "even the recovery wit-

nesses Sarvashri Mato Ram and Phool Singh did not support that they had witnessed the recovery or any disclosure statement was made in their presence by Madan Lal accused." He found that Phool Singh at the relevant time was bed-ridden and had since expired. He also discovered that Mato Ram had stated that nothing had happened in his presence but his signatures were obtained by the Investigating Officer. It is abundantly clear that the Assistant Public Prosecutor made an independent decision on the material before him and did not act in blind compliance with the instructions of the District Magistrate.

We cannot dispose of this petition without drawing attention to the very disturbing presence of the District Magistrate in the withdrawal proceedings. The jurisprudence of genuflexion is alien to our system and the law expects every repository of power to do his duty by the Constitution and the laws, regardless of commands, directives, threats and temptations. The Code is the master for the criminal process. Any authority who coerces or orders or pressurises a functionary like a public prosecutor, in the exclusive province of his discretion violates the rule of law and any public prosecutor who bends before such command betrays the authority of his office. May be, Government or the District Magistrate will consider that a prosecution or class of prosecutions deserves to be withdrawn on grounds of policy or reasons of public interest relevant to law and justice in their larger connotation and request the public prosecutor to consider whether the case or cases may not be withdrawn. Thereupon, the Prosecutor will give due weight to the material placed, the policy behind the recommendation and the responsbile position of Government which, in the last analysis, has to maintain public order and promote public justice. But the decision to withdraw must be *his*.

The District Magistrate who is an Executive Officer is not the Public Prosecutor and cannot dictate to him either. Maybe, the officer had not apprised himself of the autonomous position of the Public Prosecutor or of the impropriety of his intrusion into the Public Prosecutor's discretion by making an order of withdrawal. Similar mistakes are becoming commoner at various levels and that is why we have had to make the position of law perfectly clear. We emphasise that the rule of law warns off the executive authorities from the justicing process in the matter of withdrawal of cases. Since we are satisfied that the Public Prosecutor did not yield to the directive of the District Magistrate but made an independent study of informing himself of the materials placed before the court and then sought permission to withdraw from the prosecution, we decline to reverse the order passed by the courts below.

A The trial court was satisfied that the Assistant Public Prosecutor had not exercised the power of withdrawal for any illegitimate purpose and the High Court endorsed that conclusion. We are not disposed to interfere with the order of the High Court.

One obvious grievance of the petitioner deserves to be remedied. B He is interested in getting back his stolen goods. The accused claims no property in the goods. In the event of the complainant identifying them as his property, the trial court will consider passing appropriate orders for their return to him. Surely, criminal justice has many dimensions beyond conviction and sentence, acquittal and innocence. The victim is not to be forgotten but must be restored to the extent possible.

C The petition is rejected.

N.K.A. *Petition dismissed.*