

(14) In view of the above, the instant writ petition is allowed and the impugned order dated 18th July, 2007 (Annexure P-3) is quashed. The order (Annexure P-4), whereby an amount of Rs. 3,41,059 has been deducted from the pension and gratuity of the petitioner is set aside, being illegal, and the respondents are directed to re-fix the pension of the petitioner and to pay the aforesaid amount to him within a period of three months from the date of receipt of a certified copy of this order.

R.N.R.

Before Augustine George Masih, J.

MAJOR SINGH—Petitioner

versus

STATE OF PUNJAB AND OTHERS—Respondents

Crl. R. No. 1005 of 2008

23rd November, 2009

Code of Criminal Procedure, 1973—S. 321—Trial Court granting permission u/s 321 to withdraw an accused from prosecution—Withdrawal from prosecution—An executive function of Public Prosecutor—Decision to withdraw from prosecution has to be of Public prosecutor alone and that too by applying his mind as a free agent, independent of any influence or external and extraneous considerations—No one should dictate terms to him nor should he be governed by guidelines given by any person or Authority—Order passed by trial Court cannot be sustained on ground that while considering application u/s 321 Cr. P.C. and granting permission to withdraw from case—Reasons assigned by Court are on merits and based on merely an enquiry report and supplementary challan presented in Court—Reasoning given by Court is totally contrary to public policy and law amounts to giving benefit to a person who is a fugitive from law as accused declared as proclaimed offender—Hence, application u/s 321 Cr. P.C. for withdrawal from prosecution cannot be said to be bona fide or having been moved with due application of mind or in the interest of justice which can be said to meet the ends of justice in any manner.

Held, that the application preferred under Section 321 Cr. P.C by the learned Additional Public Prosecutor deserves to be rejected. No doubt, withdrawal from prosecution is an executive function of the Public Prosecutor but the decision to withdraw from the prosecution has to be of the Public Prosecutor alone and that too by applying his mind as a free agent, independent of any influence or external and extraneous considerations. No one should dictate terms to him nor should he be governed by the guidelines given by any person or Authority. The discretion conferred in him cannot be surrendered by him to some one else.

(Para 13)

Further held, order dated 9th May, 2008 passed by the learned Additional Sessions Judge also cannot be sustained on the ground that while considering the application under Section 321 Cr. P.C. and granting permission to withdraw from the case *qua* Gurdeep Singh. The reasons assigned by the Court are on merits of the case and that too based on merely an enquiry report and supplementary challan presented in Court, which is sketchy and not conclusive especially in the light of the evidence of eye witnesses. He has been given benefit by the trial Court for the reason that he has not faced the trial as he has not appeared before the Court and is a proclaimed offender. The reasoning so given is totally contrary to the public policy and law. If this reasoning is accepted, it would amount to giving benefit to a person who is a fugitive from law as respondent No. 2 Gurdeep Singh has been declared as proclaimed offender. Hence, application under Section 321 Cr. P.C. moved by the learned Additional Public Prosecutor for withdrawal from the prosecution cannot be said to be *bona fide* or having been moved with due application of mind or in the interest of justice which can be said to meet the ends of justice in any manner. If such an application is allowed, it would rather tend to further the mischief which the law seeks to prevent and would be counter productive to the public order, peace and tranquility.

(Paras 17 & 18)

Navkiran Singh, Advocate, *for the petitioner*.

Amandeep Singh Rai, AAG, Punjab.

Charanjit Singh Bakhshi, Advocate *for the complainant*

AUGUSTINE GEORGE MASHI, J

(1) Challenge in the present revision petition is to the order passed by the learned Additional Sessions Judge, Tarn Taran, dated 9th May, 2008 *vide* which consent of the Court under Section 321 Cr. P.C. has been granted on an application moved under Section 321 Cr. P.C. for withdrawal from prosecution *qua* Gurdeep Singh-respondent No. 2.

(2) Counsel for the petitioner submits that respondent No. 2—Gurdeep Singh son of Mohan Singh is the main accused in FIR No. 113, dated 29th June, 2003 under Sections 302, 324, 449, 148 and 149 IPC read with Sections 25, 27, 54, 59 of the Arms Act, registered at Police Station, Patti, District Tarn Taran, at the instance of the petitioner. Respondent No. 2-Gurdeep Singh is the main accused as he is the person who killed Chanan Singh, son of Dalip Singh with the shots fired from .315 bore rifle and had escaped from the spot. He could not be arrested by the police and remained absconding, whereafter proclamation proceedings were initiated against him leading to his being declared as proclaimed offender. Challan was presented against all other accused and charge framed. The prosecution evidence was led wherein the witnesses had categorically deposed against respondent No. 2 and others *vide* their statements which have been appended as Annexures P-2 to P-6. Referring to those statements, counsel contends that a specific role has been attributed to respondent No. 2.

(3) He further contends that during the course of trial, Ranjit Kaur wife of Gursharan Singh, sister-in-law of respondent No. 2, filed a complaint before the Punjab State Human Rights Commission. An enquiry was ordered and on the basis of the report submitted by the Internal Vigilance Cell dated 14th December, 2004, respondent No. 2 had pressed hard for dropping the proceedings against him. He contends that respondent No. 2 is absconding from the process of law and has got himself declared innocent on the basis of an enquiry conducted on the instructions of the Punjab State Human Rights Commission. The Public Prosecutor on the basis of the said enquiry filed an application under Section 321 Cr.P.C. for withdrawal of prosecution against respondent No. 2 Gurdeep Singh as also against co-accused Sukhraj Kaur and Hardial Singh who also were, along with respondent No. 2. declared innocent in the enquiry conducted by the Internal Vigilance Cell. Counsel contends that the application under Section

321 Cr. P.C. by the Additional Public Prosecutor has not been moved with a *bona fide* intention but in order to help out Gurdeep Singh and the other two co-accused, namely, Sukhraj Kaur and Hardial Singh. The reasons mentioned in the application, moved by the Additional Public Prosecutor, amount to interference in the due process of law as the Additional Public Prosecutor has taken over the role of the Court while sieving through the evidence and relying upon the enquiry report submitted by the Internal Vigilance Cell after the presentation of challan and the charges having been framed against the co-accused. He, on this basis, submits that the application having been filed with a *mala fide* intention to shield the main accused against whom specific allegations have been levelled in the FIR and even statements of the prosecution witnesses clearly implicate him of the commission of the offence, which he is accused of, the application deserved to be dismissed. While challenging the order passed by the learned Additional District Judge, dated 9th May, 2008, he contends that the Court has proceeded to grant permission for withdrawal from the prosecution only against respondent No. 2—Gurdeep Singh whereas permission for withdrawal from prosecution *qua* Sukhraj Kaur and Hardial Singh stands declined. He submits that if the prosecution against the main accused—Gurdeep Singh is allowed to be withdrawn, the prosecution case would dash to the ground and the ends of justice would be defeated if the order impugned herein is not set aside.

(4) On the other hand, counsel for respondent No. 2 has vehemently argued that after the receipt of report of the Internal Vigilance Cell, the same was considered by the Public Prosecutor whereupon a supplementary challan was presented in Court. Making that the basis, the Public Prosecutor considered the case of the prosecution in the light of the findings recorded therein and vide letter No. 4-R-DA/L, dated 9th January, 2008 wrote to the District Magistrate, Tarn Taran that the Government of Punjab had accepted the recommendations of the District Magistrate, Tarn Taran, for withdrawal of the case against the three accused in the FIR, namely, Gurdeep Singh, Sukhraj Kaur and Hardial Singh. According to the counsel, the Public Prosecutor has applied its independent mind and had not only considered the evidence brought on record but had also taken an over all view of the matter, considering the factors which make the prosecution version doubtful and had mentioned the same in the application itself, which

would go a long way to prove that the Public Prosecutor had formed his independent opinion for withdrawal from the prosecution *qua* the above-mentioned three accused in the FIR. He submits that withdrawal from prosecution is an executive function of the Public Prosecutor and the same, therefore, is his discretion. The said discretion having been exercised in a justifiable manner and the learned trial Court having gone into the same and thereby allowing the application under Section 321 Cr. P.C., this Court should not, while exercising its revisional jurisdiction, interfere in such discretion. He relies upon the judgments of the Hon'ble Supreme Court in the case of **Mohd. Mumtaz versus Smt. Nandini Satpathy and others**, (1) **Sheo Nandan Paswan versus State of Bihar and others**, (2) **Ghanshyam versus State of M.P. and others**, (3) and a judgement of this Court in the case of **Karnail Singh versus State of Punjab and others**, (4).

(5) I have heard counsel for the parties and have gone through the records of the case with their able assistance.

(6) The allegations against respondent No. 2—Gurdeep Singh in the FIR are that on 29-6-2003, elections were being held in village Dhariwal. During polling, a dispute arose regarding the polling of votes at Booth No. 57, Gurmukh Singh, a polling agent of the complainant's side raised an objection at which Gursharan Singh started using abusive language, while Gurdeep Singh-respondent No. 2 and his wife Sukhraj Kaur started raising Lalkaras for not sparing Major Singh and others. At that time, Gurmeet Singh armed with a .315 bore rifle and others armed with Kirpan etc. came there. Gurmeet Singh handed over the .315 bore rifle to his brother Gurdeep Singh-Sarpanch-respondent No. 2. Gurmeet Singh gave a Kirpan blow with an intention to kill the complainant and the blow hit him on his left thigh. To save the complainant, some voters and supporters of the complainant, namely, Satnam Singh son of Surjit Singh, Hardev Singh and polling agent Gurmukh Singh came forward and injuries were given to all these persons with Kirpans by Harjit Singh, Gurvinder Singh and Gurdev Singh @ Hardev Singh etc. They raised noise which attracted the police officials on duty to

(1) AIR 1987 S.C. 863

(2) AIR 1987 S.C. 877

(3) 2006 (4) R.C.R. (Criminal) 653

(4) 1995 (3) R.C.R. (Criminal) 293

the spot. Chanan Singh son the Dalip Singh then came forward, when on exhortation of Gursharan Singh and Sukhraj Kaur, Gurdeep Singh-respondent No. 2 fired three shots from a .315 bore rifle which hit on different parts of the body of Chanan Singh who died at the spot. Gurdeep Singh, Sukhraj Kaur and some others ran away from the spot. All the other accused except Gurdeep Singh-respondent No. 2 were arrested and challan was presented against them. Charge was framed and the prosecution evidence stands closed. Statements of accused under Section 313 Cr.P.C. also stands recorded and two defence witnesses have been examined and thus defence evidence was in progress. As far as Gurdeep Singh is concerned, he could not be arrested and he absconded from law. Upon initiation of proceedings under Section 82 Cr.P.C. against him, he was declared as proclaimed offender.

(7) During the course of trial, Ranjit Kaur wife of Gursharan Singh, sister-in-law of respondent No. 2, submitted a representation before the Punjab State Human Rights Commission alleging therein that her relatives and other family members have, due to political vendetta, been harassed and falsely prosecuted in FIR No. 113, dated 29th June, 2003 under Sections 302 and 324 registered at Police Station, Patti, at the instance of the petitioner Major Singh, the complainant in the FIR. An enquiry was conducted on the directions issued by the Punjab State Human Rights Commission wherein respondent No. 2 Gurdeep Singh, his wife Sukhraj Kaur and Hardial Singh-accused were declared innocent, *vide* enquiry report dated 14th December, 2004 submitted by Shri Ajaib Singh Kalike, Superintendent of Police, Internal Vigilance Cell, which was forwarded to the Government. On consideration of the enquiry report, the Government of Punjab took the decision and conveyed the same to the Additional Director, General of Police, Internal Vigilance Cell-cum-Human Rights Commission, Punjab Chandigarh,—*vide* Memo No. 3/24/2005-2HR 523, dated 17th April, 2006 which reads as follows :—

“2. After careful consideration, following decisions have been taken by the Government :—

- (i) Proceedings against Gurdeep Singh, who has been exonerated by Shri Dinkar Gupta, I.G Intelligence in FIR No. 3, dated 7th January, 2003 be dropped.

- (ii) Proceedings against Gurdeep Singh, his wife and Hardial Singh who have been exonerated by SP IVC in FIR No. 113, dated 29th June, 2003 be dropped and after that supplementary challan be put up in the Court.
3. Immediate action be taken in this regard.
 4. This has the approval of the Hon'ble Chief Minister, Punjab.

(Sd.) . . .

(D.S. LAUNGIA),
Joint Secretary Home.
Dated 17th April, 2006."

(8) Thereafter a communication dated Memo No. 3/24/2005-4HR 1338, dated 22nd May, 2007 was sent to the Additional Director General of Police, Internal Vigilance Cell-cum-Human Rights Commission, Punjab, Chandigarh which reads as follows :—

- "2. Hon'ble Chief Minister Punjab has approved implementations of the decisions, which were conveyed to you *vide* I.D. No. 3. 24/06-2HR 573, dated 17th April, 2006 (Copy enclosed for ready reference).

(Sd.). . .,

Deputy Secretary Home".

(9) On the basis of this communication, a supplementary challan dated 29th January 2008 (Annexure R/2-5) under Section 173(8) Cr.P.C. was presented before the trial Court. The Public Prosecutor on consideration of the supplementary challan *vide* letter dated 4-R-DA/L, dated 9th January, 2008 wrote to the Deputy Commissioner, Tarn Taran wherein he stated that it was a fit case for seeking withdrawal of prosecution from the Court. The said communication was forwarded to the Department of Home Affairs and Justice, Government of Punjab. The Government of Punjab *vide* its Memo. No. 7/16/07-2 JUDL(1)/892, dated 3rd March, 2008 contaminated to the District Magistrate, Tarn Taran that the Government of Punjab has accepted the recommendation of the District Magistrate, Tarn Taran for

withdrawal of the case *qua* Gurdeep Singh and his wife Sukhraj Kaur and Hardial Singh-accused. This led to the filing of an application dated 31st March, 2008 under Section 321 Cr. P.C. by the Additional Public Prosecutor, Tarn Taran.

(10) There is no dispute with the proposition of law as has been laid down by the Hon'ble Supreme Court in the judgments referred to and relied upon by the counsel for respondent No. 2 i.e. in **Mohd. Mumtaz's case** (*supra*), **Sheo Nandan Paswan's case** (*supra*) **Ghanshyam's case** (*supra*).

(11) Section 321 of the Code of Criminal Procedure reads as follows:—

“321. Withdrawal from Prosecution.—The 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; 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 :

Provided that where such offence—

- (i) was against any law relating to a matter to which the executive power of the Union extends, or
- (ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or
- (iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court, shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.”

(12) The Hon'ble Supreme Court in the case of **Rajinder Kumar Jain versus State through Special Public Establishment and others**, (5) on consideration of provisions of Section 321 Cr. P.C. drew out the following conclusions, while referring to the earlier precedents :—

- “1. Under the Scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.
2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.
3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.
4. The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.
5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic, and we add, political purposes and Tammany Hall Enterprises.
6. The Public Prosecutor is an officer of the Court and responsible to the Court.

7. The Court performs a supervisory function in granting its consent to the withdrawal.
8. The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous consideration. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution."

(13) In view of the above, in an application under Section 321 Cr. P.C. preferred by the Public Prosecutor for withdrawal from prosecution, the test as laid down by the Hon'ble Supreme Court herein-above would be the touch-stone for getting the assent of the Court. While applying the above principles, I am of the view that the application preferred under Section 321 Cr. P.C. by the learned Additional Public Prosecutor deserves to be rejected. No doubt, withdrawal from prosecution is an executive function of the Public Prosecutor but the decision to withdraw from the prosecution has to be of the Public Prosecutor alone and that too by applying his mind as a free agent, independent of any influence or external and extraneous considerations. No one should dictate terms to him nor should he be governed by the guidelines given by any person or Authority. The discretion conferred in him cannot be surrendered by him to some one else.

(14) A perusal of the communications dated 17.4.2006 (Annexure R2/3) and 22nd May, 2007 (Annexure R2/4) although referred to the Additional Director General of Police, leaves no manner of doubt that the dictate was clear and specific leaving no scope to the Public Prosecutor to apply his independent mind or take a decision on his own. Reference of these letters also finds mention in the report submitted by the investigating Agency under Section 173(8) Cr. P.C. as also in the application under Section 321 Cr. P.C. meaning thereby that the learned Additional Public Prosecutor has not exercised its discretion as conferred upon him and in the required manner by the Statute. Therefore, the application moved without application of independent and uninfluenced mind does not fulfill the test on which consent to withdraw from the prosecution can be granted by the Court.

(15) That apart the Court performs a supervisory function in granting its consent to the withdrawal and owes a special duty to the Society to ensure that the system is free from all undue influences and the rule of law must prevail as it is the ultimate repository of legislative confidence in granting or withholding its consent.

(16) The allegations against respondent No. 2 Gurdeep Singh are serious as he is the main accused and as per the FIR he is the person who shot dead Chanan Singh with a .315 bore rifle in broad day light during polling. The statements of the prosecution witnesses are not being referred to here as it may prejudice the trial proceedings. Suffice it to say, withdrawal from the prosecution in the present case would not be in the interest of public justice.

(17) That apart, order dated 9th May, 2008 passed by the learned Additional Sessions Judge also cannot be sustained on the ground that while considering the application under Section 321 Cr. P.C. and granting permission to withdraw from the case qua Gurdeep Singh. The reasons assigned by the Court are on merits of the case and that too based on merely an enquiry report and supplementary challan presented in Court, which is sketchy and not conclusive especially in the light of the evidence of eye witnesses. He has been given benefit by the trial Court for the reason that he has not faced the trial as he has not appeared before the Court and is a proclaimed offender. The reasoning so given is totally contrary to the public policy and law. If this reasoning is accepted, it would amount to giving benefit to a person who is a fugitive from law as respondent No. 2 Gurdeep Singh has been declared as proclaimed offender.

(18) In view of the above, application under Section 321 Cr. P.C. moved by the learned Additional Public Prosecutor for withdrawal from the prosecution cannot be said to be *bona fide* or having been moved with due application of mind or in the interest of justice which can be said to meet the ends of justice in any manner. If such an application is allowed, it would rather tend to further the mischief which the law seeks to prevent and would be counter productive to the public order, peace and tranquility.

(19) The present revision petition is, thus, allowed. Application dated 31st March, 2008 moved by the Additional Public Prosecutor under Section 321 Cr. P.C. seeking permission of Court for withdrawal from the prosecution against Gurdeep Singh accused is hereby declined.