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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(CRL) 542/2010 & CRL.M.A. 4699/2010

VIKAS TANWAR

..... Petitioner

Through: Mr. Ajit Nair, Advocate.

versus

GOVT OF NCT OF DELHI & ORS

..... Respondents

Through: Mr. Saleem ahmed, ASC for State with
Ms. Charu Dalal, Advocate.

Insp. M. Haroon, PS Kirti Nagar, Delhi.

Mr. Jagdeep Kr. Sharma, Advocate for
respondents No.3 to 9.

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Date of Decision : 30th August, 2012

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J : (ORAL)

1. Present petition has been filed under Articles 226 and 227 of the Constitution of India for quashing the letter No. F14/15/2009/HG/496 dated 01st February, 2010 issued by Deputy Secretary Home(G) regarding approval for withdrawal of prosecution

under Section 321 Cr.P.C. of proceedings titled as “State vs. Ram Sharan & Ors.” arising from FIR No. 376/2007 registered with police station Kirti Nagar, Delhi under Sections 323/448/452/506/34 IPC as well as the order dated 20th March, 2010 passed by the Court of Ms. Shelly Arora, Metropolitan Magistrate, Delhi.

2. The brief facts of the present case are that upon an application filed by the Public Prosecutor under Section 321 Cr.P.C., the Metropolitan Magistrate allowed the prosecution to withdraw FIR No. 376/2007. The relevant portion of the application filed under Section 321 Cr.P.C. is reproduced hereinbelow:

“1. That the aforesaid case is pending before the Hon’ble Court for adjudication and listed for framing of charge of NDOH.

2. That the government of NCT of Delhi was recommended for withdrawal from prosecution of the aforesaid case.

3. That in the interest of the public and society no purpose will be served to further proceed with the case and hence state government want to withdraw the case from prosecution.

It is, therefore, prayed that in view of the above fact and circumstances a permission may kindly be given to the prosecution to withdraw the case, in the interest of justice.”

(emphasis supplied)

3. The admitted position is that the aforesaid application was filed on the basis of a letter dated 01st February, 2010 issued to the Director of Prosecution by the Home(G) Department, Government of NCT of Delhi. The relevant portion of the aforesaid letter is reproduced hereinbelow:-

“Sub: Regarding approval for withdrawal of prosecution under section 321 of the Cr.P.C.

Sir,

The Government of NCT of Delhi has recommended the withdrawal of the following case from prosecution:-

S.No.	Name of the Accused	FIR No.	Police Station	Sections of law under which case registered
1	Ram Saran & Ors.	376/2007	Kirti Nagar	448/452/506/34 IPC

In view of the above, I am directed to say that in exercise of powers conferred under section 321 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974) read with the Government of India, Ministry of Home Affairs Notification No. U-11011/2/74/-UTL(I) dated 20.03.1974 regarding the withdrawal of prosecution proceedings, the Lt. Governor of Delhi, being satisfied that it is in public

interest to do so, has decided, after keeping the provisions contained in proviso to Section 321 of the Code of Criminal Procedure, 1973 in view, that the Public Prosecutor in the above case may permitted to move the appropriate courts of law for granting their consent to the withdrawal of the prosecution in above case.

It is, therefore, requested that the A.P.P. concerned may please be asked to move the application in the court of competent jurisdiction for withdrawal of these aforesaid case and intimate the position to this Government.”

(emphasis supplied)

4. Learned counsel for petitioner submits that the Metropolitan Magistrate overlooked the fact that the Public Prosecutor had acted only on instructions and that too as a post office of the respondent No.2 in filing the application for withdrawal. He submits that under Section 321 Cr.P.C., the prosecution could be withdrawn only by the Public Prosecutor and that too after he had applied his own mind.

5. On the other hand, learned counsel for respondents No.3 to 9 submits that in the present case, after a detailed inquiry, the State Government had come to the conclusion that the police officials had abused their powers and foisted a false case upon his clients.

According to him, the State Government to secure the ends of justice, had taken a decision to withdraw the aforesaid case. He further points out that all the erring police officials had even been departmentally prosecuted.

6. Having heard the parties, this Court is of the view that the impugned order passed by the Metropolitan Magistrate is untenable in law.

7. In the opinion of this Court, Section 321 Cr.P.C. confers exclusive discretion upon the Public Prosecutor to withdraw the prosecution. He cannot surrender that discretion to anyone else.

Section 321 Cr.P.C. reads as under:-

“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.”

8. The Supreme Court in ***Rajender Kumar Jain vs. State through Special Police Establishment and Others, 1980 (3) SCC 435*** has held as under:-

“14. Thus, from the precedents of this Court, we gather:

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 Sans Tammany Hall enterprise.*

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 considerations. 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.*

9. Moreover, this Court in ***State vs. Ibotombi Sapam W.P.(Crl.)***

1712/2005 decided on 27th May, 2009 has held as under:-

“17. From the above decisions, it is clear that under Section 321 Cr.P.C., the public prosecutor performs an executive function when he decides to withdraw from the prosecution. The court, before whom an application for withdrawing from the prosecution is made by the public prosecutor, performs a supervisory function in granting consent. It is also clear that the Government may suggest to the public prosecutor that he may withdraw from the prosecution, but cannot compel him to do so.”

(emphasis supplied)

10. Keeping in view the aforesaid mandate of law as well as the withdrawal application filed by the Public Prosecutor, this Court is of the view that in the present case, the Public Prosecutor has not applied his mind independently to the facts of the present case.

11. Consequently, the impugned order as well as the application filed by the Public Prosecutor under Section 321 Cr.P.C. are set aside. However, the Public Prosecutor is directed to independently consider the aforesaid letter written by the Delhi government dated 01st February, 2010 as a recommendation and not as a binding direction.

It is clarified that the Public Prosecutor shall have the option either to reject or to accept the suggestion given by the Delhi Government.

12. The Public Prosecutor is directed to take a decision within three months.

13. With the aforesaid directions, present petition and pending application stand disposed of.

MANMOHAN, J

AUGUST 30, 2012

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