

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL. M.C. No. 1764/2011**

Date of Decision : 11.05.2012

STATE OF NCT OF DELHI

.....Petitioner

Through: Mr. Hiren Rawal, ASG with
Mr. Pawan Sharma,
Sanding Counsel &
Mr. Harsh Prabhakar, Adv.

Versus

ABU SALEM ABDUL QAYOOM ANSARI

..... Respondent

Through: Mr. M.S. Khan, Adv.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This is a petition filed under Section 482 Cr.P.C. for setting aside the order dated 28.8.2009 passed by Ms. Pinki, the Designated Court MCOCA/POTA/TADA (hereinafter referred to as 'Designated Court'), dismissing the application of the petitioner under Section 321 of the Cr.P.C. seeking withdrawal of charges under Sections 3(2) and 3(4) of Maharashtra Control of Organised Crime Act (hereinafter referred to as MCOCA) read with Section 120-B of the IPC. It has also been prayed that a consequential order quashing the framing of the charges by the Designated Court be also passed. It may be pertinent to mention here that by the impugned order, the

Designated Court had rejected the request of the petitioner seeking withdrawal of charges against the respondent/accused in respect of the aforesaid offences.

2. Briefly stated, the facts of the case are that, on 4.4.2002, a case under Section 506 of the IPC was registered at PS:Greater Kailash, New Delhi by the Special Cell of Police at the instance of one Ashok, who stated that he had received threats on telephone. After the registration of the FIR No.88/2002 under Section 387/506/507/201/120-B IPC, the investigations of the case were handed over to the Special Cell, Delhi Police. In pursuance to the investigations, two persons, namely, Pawan Mittal and Sajjan Soni were arrested on 6.5.2002 and subsequent thereto, Mohd. Ashraf @ Babloo, Mazid Khan @ Raju Bhai and Chanchal Mehta were also arrested. During the course of the investigation, as there were allegations of extortion against the respondent/accused, Sections 3(2) and 3(4) of the MCOCA and Section 120-B IPC were added. On 31.7.2002, a Chargesheet under Sections 387/506/507/201/120-B of the IPC read with Sections 3(2) and 3(4) of MCOCA was filed before the Designated Court. The respondent/accused herein, Abu Salem Abdul Qayoom Ansari was shown to be an absconder in the Chargesheet. The

Designated Court took cognizance of the aforesaid offences on 1.8.2002 against the aforesaid five accused persons and proceeded ahead with the Trial. Presently, the said case is stated to be at the stage of arguments.

3. On 18.9.2002, the respondent, Abu Salem Abdul Qayoom Ansari was detained at Lisbon in Portugal, as he was found in possession of false identity/travel documents. There was an existing Interpol Notice and a Red Corner Notice was issued against him by the Interpol on the request of the Government of India in 1993 for his involvement in Bombay Bomb Blast case. The extradition proceedings against the respondent/accused were initiated on the basis of the requests of the Investigating Agencies. Necessary request in this regard was made by the Government of India in respect of nine cases, to the Government of Portugal, including the present one. Though, initially a request for deportation of the accused/respondent was made, but the said request was not favourably considered and it was requested by the Ministry of External Affairs, Government of Portugal, on 4.10.2002, to present a formal request for extradition which must fulfill the requirements of Portuguese law. It may also be pertinent to mention here since there was no Extradition Treaty between

the two countries, by virtue of Section 21 of the Extradition Act, 1962 (hereinafter referred to as the 'Act'), a Notification, extending the applicability of the Act to the Republic of Portuguese was issued by the Government of India on 13.12.2002. On 17.12.2002, the Hon'ble Deputy Prime Minister of India had written a letter to the then Hon'ble Minister of Foreign Affairs of Portuguese, giving assurance that in case the respondent/accused is extradited by the Government of Portugal for his trial to India, then he would not be visited by death penalty or imprisonment for a term beyond 25 years. On 28.3.2003, the Ministry of External Affairs, Government of Portugal, on the solemn assurance of the Government of India coming from the highest quarters, decided to grant his extradition in respect of 8 cases, and that too only in respect of specific offences mentioned in the Extradition Order. It may be pertinent to mention here that at the time when a request for extradition of the respondent/accused was made to the Government of Portugal, giving the details of 9 cases, including the case in hand, the various sections in respect of which the involvement of the respondent/accused was found, were specifically mentioned therein. Meaning thereby that in respect of FIR

No.88/2002 registered by PS:Greater Kailash, New Delhi not only the offence under Sections 387/506/507/120-B IPC was mentioned, but also a mention was made of Sections 3(2) and 3(4) of MCOCA. The Government of Portugal granted the extradition with the specific condition, as has been stated hereinabove, with the solemn assurance that the respondent/accused would not be visited with the punishment of death or imprisonment for a term of more than 25 years vide order dated 28.3.2003. Obviously, this meant that he could not be tried for the offences under Sections 3(2) and 3(4) of MCOCA and Section 120-B of the IPC because these offences carried punishment, which was prohibited in the Extradition Order.

4. On 27.1.2005, the respondent/accused, not being satisfied with the Order of Extradition passed by the High Court at Lisbon, challenged the said order before the Supreme Court of Justice, Portugal. The said appeal of the respondent/accused was rejected on 27.1.2005. It may also be pertinent to mention here that despite the specific request of the Government of the India to the Government of Portugal to extradite the respondent/accused under the provisions of MCOCA and Section 120-B of the IPC also, the said request

was not acceded to and the respondent/accused was permitted to be tried, after extradition, only for the offences under Section 506/507/387 IPC.

5. The respondent/accused was brought to India on 11.11.2005 by the Mumbai Police. He was produced before a Delhi Court on 22.5.2007 in respect of FIR No.39/2002 registered by PS: Special Cell, Delhi and the Production Warrants in the case in hand were also issued. On 1.6.2007, a formal arrest of the respondent/accused in respect of the present FIR No.88/2002 was shown.
6. On 16.8.2007, sanction under Section 23(2) of MCOCA was granted by the competent authority to prosecute the respondent/accused. On 20.8.2007, a Supplementary Chargesheet against the respondent/accused was filed before the Designated Court in the present case. After filing of the Chargesheet itself, the Government of NCT of Delhi considered the case of the respondent and it took a decision that as the respondent/accused was extradited by a sovereign foreign country on solemn assurance of the Government of India from the highest quarters to the effect that he would not be tried and visited with a punishment of death or imprisonment of more than 25 years, therefore, he could not

be tried for the offence under Sections 3(2) and 3(4) of MCOCA and Section 120-B of the IPC, as both these offences were not in line with the conditions imposed in the Extradition Order. Accordingly, the Government was of the view that it is a fit case wherein an application under Section 321 Cr.P.C. should be filed, seeking permission of the Designated Court to withdraw the prosecution of the respondent/accused for the said offences.

7. On 26.2.2008, the Government of NCT of Delhi forwarded a proposal in this regard to the Director of Prosecution, so that the concerned Special Public Prosecutor could examine the matter and take appropriate action independently seeking withdrawal of the prosecution of the respondent/accused for the said offences after due application of his mind.
8. The Special Public Prosecutor, after considering the entire gamut of the facts and the background in the light of Extradition Order, took an independent and informed decision after subjective satisfaction that it was a fit case where an application seeking permission of the Designated Court for the withdrawal of the offences under Sections 3(2) and 3(4) of the MCOCA and Section 120-B IPC should be filed. It may be pertinent to mention here that this application was filed when

the charges against the respondent/accused were yet to be framed. This application u/S 321 Cr.P.C. seeking withdrawal of prosecution for the aforesaid offences was filed in Court on 27.2.2008 and the arguments were heard by the Designated Court. After hearing the arguments, the Designated Court passed a detailed order on 28.8.2009, rejecting the application of the Special Public Prosecutor by observing that the application seeking permission of the withdrawal was not bonafide. It was held that the said decision was not taken independently by the Special Public Prosecutor and that the withdrawal was not in the larger public interest. It is this finding of the Designated Court, which has been challenged in the present petition.

9. It may also be pertinent to mention here that in the meantime new developments had taken place in respect of not only this case, but some of the other cases also in which the respondent/accused was facing the trial. So far as the present case is concerned, the Designated Court framed the charges against the respondent/accused not only in respect of offences under Sections 387/506/507/201/120-B IPC, but also the offences for which the prosecution was sought to be withdrawn, i.e. Sections 3(2) and 3(4) of MCOCA.

10. On 10.9.2010, Crl.A.990/2006 filed by the respondent before the Hon'ble Supreme Court along with Crl.A.1142-43/2007 and WP(Crl.) 171/2006 came to be decided. By the said proceedings, the respondent/accused, who was the petitioner /appellant in the appeals before the Hon'ble Supreme Court, had canvassed that he could be tried by a Designated Court (of Mumbai) only in respect of offences for which the Extradition Decree was passed and no other. The aforesaid petition mainly related to the cases registered in Mumbai. The Hon'ble Supreme Court of India held that the respondent/accused could be tried for the offences for which his extradition was permitted. In addition to this, he could also be tried for a lesser offence made-out from the same facts which were considered for his extradition. Therefore, it was held that the charges under the provisions of MCOCA and Section 120-B IPC are liable to be quashed and were accordingly set aside on the ground of principles of speciality also. The present petition was filed on 25.5.2011, assailing the order dated 28.8.2009 passed by the Designated Court.
11. I have heard Mr. Hiren Rawal, the learned ASG appearing for the petitioner and also the learned counsel for the respondent. As a matter of fact, the learned counsel for the

respondent did not contest the matter at all, so far as the submissions which are made by the learned ASG are concerned. In fact, he has contended that he has separately filed the petitions bearing Crl. Rev. Pet. Nos.591/2009 and 654/2010, assailing this very order regarding the non-grant of permissions to the petitioner seeking withdrawal of the charges against the respondent/accused under Sections 3(2) and 3(4) of the MCOCA and Section 120-B of the IPC.

12. The learned ASG has made three broad submissions before this Court for setting aside the order passed by the Designated Court. The first contention of the learned ASG is that the reasoning for rejection of the application of the petitioner by the Designated Court is totally erroneous and it has misdirected itself in observing that merely because at the time of the grant of extradition of the respondent/accused to India, the Portuguese Authorities were aware that the proceedings pending against him are under Section 3(2) and 3(4) of the MCOCA and 120-B of the IPC, which made punishable the commission of an organized crime, therefore, it could be said that they had tacitly given permission to try the respondent/accused for an offence of organized crime in

which he was indulging in to obtain large sums of money by administering threats of extortion.

13. The second reason which is given by the Designated Court for the rejection of the permission under Section 321 Cr.P.C. is that the Government of India had given solemn assurance to the sovereign government of Portugal that the respondent would not be sentenced to death or imprisonment for more than 25 years and if that be so, Section 34C of the Extradition Act, 1962 provides that if an offence is punishable with death, then the UOI has the power to commute the said sentence of death into life imprisonment. Extending the said reasoning further, the Designated Court had observed that the President of India and the Governors of the States hold identical powers of remission under Articles 72 and 161 of the Constitution of India and by virtue of these three provisions, the respondent/accused, even if he is permitted to be tried for offences under Sections 3(2) and 3(4) of MCOCA and Section 120-B of the IPC, it can be ensured that the assurance, which has been given by the Government of India to the Portuguese Government, can be honoured.
14. The third reasoning, which has been given by the Designated Court, is to the effect that the application seeking withdrawal

of the charges by the Prosecutor is not bonafide and the power of the Court to grant the consent is only supervisory, but, while exercising that power, it must be shown by the Prosecutor that he has independently applied his mind, which, it seems, the Designated Court found to be lacking.

15. It has been contended by Mr. Rawal, the learned ASG that on all the three counts the reasoning given by the Designated Court for rejection of the application of the petitioner under Section 321 Cr.P.C. was erroneous and bereft of any merit. In this regard, the learned ASG has contended that the first principle which was violated was the principle of speciality which is enshrined in Section 21 of the Extradition Act:-

"21. Accused or convicted person surrendered or returned by foreign State not to be tried for certain offences.— Whenever any person accused or convicted of an offence, which, if committed in India would be an extradition offence, is surrendered or returned by a foreign State, such person shall not until he has been restored or has had an opportunity of returning to that State, be tried in India for an offence other than—

(a) the extradition offence in relation to which he was surrendered or returned; or

(b) any lesser offence disclosed by the facts provided for the purposes of securing his surrender or return

other than an offence in relation to which an order for his surrender or return could not be lawfully made; or
(c) the offence in respect of which the foreign State has given its consent.” (Emphasis supplied)

16. It has been further contended by Mr. Rawal, the learned ASG that a perusal of the aforesaid Section would show that once a person is extradited by the extraditing State to the recipient State, he could be tried only for such offences for which his custody was surrendered or, at best, he could be tried for offences which are lesser offences disclosed on the basis of same facts. It has been contended by Mr. Rawal, the learned ASG that, admittedly in the instant case, the extradition of the petitioner was sought in respect of nine cases, out of which extradition was given only in eight cases, out of which one was the case in hand. No doubt, the offence under Section 3(2) and 3(4) MCOCA and Section 120-B IPC was mentioned in respect of FIR No.88/2002, in addition to other offences, that is, putting person in fear of death or grievous hurt, in order to commit extortion (Section 387 IPC), punishment for criminal intimidation (Section 506 IPC), criminal intimidation by an anonymous communication (Section 507 IPC) and causing disappearance of evidence of offence, or giving false

information to screen offender (Section 201 IPC), but the Government of Portugal had given permission to extradite the respondent/accused only for the purpose of facing the trial in respect of latter offences other than the offence of conspiracy, under Section 120-B IPC and under Section 3(2) and 3(4) of MCOCA. Therefore, he could not be tried for these offences. It has also been contended that apart from the principle of speciality, if the petitioner is permitted to be prosecuted and tried for an offence for which he was not extradited, it will result in not adhering to the solemn assurances given by the highest quarters of the Government of India to the Government of Portugal and, therefore, it will not be in keeping with the international norms of observing the commitments which had been assured by the Government of India.

17. It has further been contended that in the instant case, the application for seeking withdrawal of the prosecution against the respondent/accused was filed in the year 2008, much before the charges against the respondent/accused were framed. It is stated that the application was not only filed by the Special Public Prosecutor after due application of his mind and in the larger public interest but also in the interest of

maintenance of international relations and thus it became a political decision. It has been further contended that as the matter was pending before the Apex Court involving the same question which was raised by the respondent/accused himself by Crl. Appl. No.990/2006 and Crl. Appl. Nos.1142-43/2007 and WP(Crl.) No.171/2006 before the Apex Court in a matter arising from the Bombay Courts, the petitioner was awaiting the decision of the said cases and the moment said judgment was received, this application was filed.

18. The learned ASG, Mr. Rawal, has also drawn the attention of the Court to the observations made by the Apex Court in the judgment of Abu Salem Abdul Qayoom Ansari -vs- State of Maharashtra & Anr. in Crl. Appeal Nos.990/2006 & 1142-43/2007 and WP(Crl.) 171/2006, wherein the Apex Court had also upheld the contention of the respondent/accused that he could not be tried by the Designated Court at Mumbai in respect of those offences for which no extradition was granted. The necessary observations made by the Apex Court are as under:-

- 10) The contention of the appellant that he is being tried for the offences for which he has not been specifically extradited, has been rejected by way of the impugned order on the ground that the extradition has been granted for the offences of higher degree and the additional offences for which he is being tried are

subsumed/included in the said higher degree of offences and the trial would be permissible by virtue of clause (b) of Section 21 of the Extradition Act, 1962. As pointed out earlier, apart from the appeals against the order of the Designated Court, the appellant has also preferred a writ petition seeking to invoke the extraordinary writ jurisdiction of this Court on the ground that the trial for the offences for which he has specifically not been extradited is violative of the fundamental rights enshrined under Article 21 of the Constitution of India which guarantees a fair trial with due process of law.

- 11) The term 'extradition' denotes the process whereby under a concluded treaty one State surrenders to any other State at its request, a person accused or convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent to try the alleged offender. Though extradition is granted in implementation of the international commitment of the State, the procedure to be followed by the courts in deciding, whether extradition should be granted and on what terms, is determined by the municipal law of the land. Extradition is founded on the broad principle that it is in the interest of civilised communities that criminals should not go unpunished and on that account it is recognised as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice.

19. I have carefully considered the submissions made by the learned ASG and also have gone through the impugned order.
20. Before dealing with the issue, it would be worthwhile to see the scope of the power of judicial review which the Court is to exercise with regard to Section 321 of the Cr.P.C. Section 321 of the Cr.P.C. has been the subject-matter of judicial

pronouncements by the Apex Court in a number of decisions. By now, the Apex Court has laid down a number of guiding factors which the Court has to consider while granting permission under Section 321 Cr.P.C. for withdrawal of the prosecution. In *M.N. Sankarannaraya Nair -vs- P.V. Balakrishnan*, AIR 1972 SC 496, it was observed as under:-

“5. The Public Prosecutor may withdraw from the prosecution. 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”.

Further, it was observed that the Court has to apply its mind to ensure that withdrawal is not for extraneous purposes.

21. In case titled *Rajender Kumar -vs- State*, AIR 1980 SC 1510, the Court, after examining various judgments, had summed up the considerations as under:-

- “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”.

It was further observed as under:-

“13-A. We may add it shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The Court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of Section 361 Criminal Procedure Code. The independence of the judiciary requires that once the case has travelled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case”.

22. In *Sheo Nandan Paswan -vs- State of Bihar*, AIR 1987 SC 877, it was observed as under:-

“70. The section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations on which the Court is to grant its consent. The initiative is that of the Public Prosecutor and what the Court has to do is only to give its consent and not to determine any matter

judicially. The judicial function implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.

71. The Court's function is to give consent. This section does not obligate the Court to record reasons before consent is given. However, I should not be taken to hold that consent of the Court is a matter of course. When the Public Prosecutor makes the application for withdrawal after taking into consideration all the materials before him, the Court exercises its judicial discretion by considering such materials and on such consideration, either gives consent or declines consent. The section should not be construed to mean that the Court has to give a detailed reasoned order when it gives consent. If on a reading of the order giving consent, a higher Court is satisfied that such consent was given on an overall consideration of the materials available, the order giving consent has necessarily to be upheld.
72. It would be useful to compare the scope of the Court's power under Section 321 with some other sections of the Code. There are some provisions in the Code which relate to the manner in which Courts have to exercise their jurisdiction in pending cases when applications are made for their withdrawal or when the Court finds that there is no ground to proceed with the cases. Sections 203, 227, 245, 257 and 258 are some such sections. Section 203 of Criminal P.C. empowers a Magistrate to dismiss a complaint at the initial Stage itself if he is of opinion that there is no sufficient ground for proceeding. But, before doing so, the Magistrate is called upon to briefly record his reasons for so doing. The Section reads as follows:

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The section does not insist upon a reasoned order by the Magistrate while giving consent. All that is necessary to satisfy the section is to see that the Public Prosecutor acts in good faith and that the

Magistrate is satisfied that the exercise of discretion by the Public Prosecutor is proper”.

23. *In case titled Abdul Karim etc. -vs- State of Karnataka & Ors. etc.*, AIR 2001 SC 116, it was observed as under:-

“18. The law as it stands today in relation to applications under Section 321 is laid down by the majority judgment delivered by Khalid, J. in the Constitution Bench decision of this Court in Sheonandan Paswan v. State of Bihar and Ors. 1987CriLJ793. It is held therein that when an application under Section 321 is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. What the court had to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The court, after considering the facts of the case, has to see whether the application suffers from such improprieties or illegalities as would cause manifest injustice if consent was given. When the Public Prosecutor makes an application for withdrawal after taking into consideration all the material before him, the court must exercise its judicial discretion by considering such material and, on such consideration, must either give consent or decline consent. The section should not be construed to mean that the court has to give a detailed reasoned order when it gives consent. If, on a reading of the order giving consent, a higher court is satisfied that such consent was given on an over all consideration of the material available, the order giving consent has necessarily to be upheld. Section 321 contemplates consent by the court in a supervisory and not an adjudicatory manner. What the court must ensure is that the application for withdrawal has been properly made, after independent consideration by the Public Prosecutor and in furtherance of public interest. Section 321 enables the Public Prosecutor to withdraw from the prosecution of any accused. The discretion exercisable under Section 321 is fettered only by a consent from the court on a consideration of the material before it. What is

necessary to satisfy the section is to see that the Public Prosecutor has acted in good faith and the exercise of discretion by him is proper.

19. The law, therefore, is that though the Government may have ordered, directed or asked a Public Prosecutor to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that the public interest will be served by his withdrawal from the prosecution. In turn, the court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently thereto, that the Public Prosecutor, acting in good faith, is of the opinion that his withdrawal from the prosecution is in the public interest, and that such withdrawal will not stifle or thwart the process of law or cause manifest injustice.
20. It must follow that the application under Section 321 must aver that the Public Prosecutor is, in good faith, satisfied, on consideration of all relevant material, that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice. The material that the Public Prosecutor has considered must be set out, briefly but concisely, in the application or in an affidavit annexed to the application or, in a given case, placed before the court, with its permission, in a sealed envelope. The court has to give an informed consent. It must be satisfied that this material can reasonably lead to the conclusion that the withdrawal of the Public Prosecutor from the prosecution will serve the public interest; but it is not for the court to weigh the material. The court must be satisfied that the Public Prosecutor has considered the material and, in good faith, reached the conclusion that his withdrawal from the prosecution will serve the public interest. The court must also consider whether the grant of consent may thwart or stifle the course of law or result in manifest injustice. If, upon such consideration, the court accords consent, it must make such order on the application as will indicate to a higher court that it has done all that the law requires it to do before granting consent.

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42. The satisfaction for moving an application under Section 321 Cr.P.C. has to be of the Public Prosecutor which in the nature of the case in hand has to be based on the material provided by the State. The nature of the power to be exercised by the Court while deciding application under Section 321 is delineated by the decision of this Court in Sheonandan Paswas v. State of Bihar and Ors. : 1987CriLJ793. This decision holds that grant of consent by the court is not a matter of course and when such an application is filed by the Public Prosecutor after taking into consideration the material before him, the court exercises its judicial discretion by considering such material and on such consideration either gives consent or declines consent. It also lays down that the court has to see that the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law or suffers from such improprieties or illegalities as to cause manifest injustice if consent is given”.

24. In *S.K. Shukla & Ors. -vs- State of U.P. & Ors.*, AIR 2006 SC 413 relied upon in Sheonandan Paswan’s case (supra). It was held that the settled law laid down by the Supreme Court has been that the withdrawal from the prosecution is an executive function of the Public Prosecutor and the ultimate decision to withdraw from the prosecution is his. Before an application is made under Section 321, the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any outside influence. The Government may suggest to the Public Prosecutor that a particular case may not be proceeded with, but nobody can compel him to do so. However, Section

321 of the Code does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. If the Public Prosecutor received such instructions, he cannot be said to act on extraneous influence. On the contrary, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government, since a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government. Unlike the Judge, the Public Prosecutor is not an absolutely independent officer. He is appointed by the government for conducting in court any prosecution or other proceedings on behalf of the Government concerned. The relationship between the Public Prosecutor and the Government is same as that of a counsel and his client. If the Government gives instructions to a Public Prosecutor to withdraw from the prosecution of a case, the latter, after applying his mind to the facts of the case may either agree with the instructions and file an application stating grounds of withdrawal or disagree therewith having found a good case for prosecution and refuse to file the withdrawal application. In the latter event

the Public Prosecutor will have to return the brief and perhaps to resign, for, it is the Government, not the Public Prosecutor, who is in the know of larger interest of the State. The Public Prosecutor cannot act like a post box or act on the dictate of the State Governments. He has to act objectively as he is also an officer of the Court. At the same time court is also not bound by that. The courts are also free to assess whether the prima face case is made or not. The court, if satisfied, can also reject the prayer”.

25. A perusal of the aforesaid authorities would clearly show that the power of seeking withdrawal of the prosecution is essentially an executive function and the Special Public Prosecutor, unlike a Judge, is supposed to receive a request seeking withdrawal of the prosecution from the Executive. It is after the receipt of such request from the Executive that the Special Public Prosecutor is required to apply his mind and then decide as to whether the case is fit to be withdrawn from the prosecution or not and the reasons for seeking withdrawal of the prosecution could be social, economic or even political, as has been approved by the Courts. In some of the judgments, the Apex Court has observed that the withdrawal of the prosecution must be bonafide for a public purpose and

in the interest of justice and further while undertaking such an exercise, the Special Public Prosecutor is not required to shift the evidence, which has been gathered by the prosecution as sought to be produced or is produced before the Court.

26. Keeping these parameters in view, in the instant case, let us now examine as to whether the Special Public Prosecutor had applied his mind bonafide for the withdrawal of the prosecution against the respondent/accused. It is not in dispute that at the time when the extradition of the respondent/accused was granted by the Government of Portugal, the permission was granted to try the respondent/accused for the specified offences. These offences did not include the offence under Section 3(2) and 3(4) of MCOCA and Section 120-B of the IPC which is an offence of conspiracy to do an illegal act, which, in the instant case, was extortion and criminal intimidation of a person. The Designated Court has drawn an inference and observed that these offences were mentioned along with the FIR. The Court had also dealt with the definition of 'organised crime', as given under the MCOCA and then concluded that as these offences were mentioned in the letter of request of the Government of India seeking extradition, therefore, they

being heinous crimes, it is tacitly deemed that the Government of Portugal had the knowledge that he would be tried for such an offence. Alternatively, the Designated Court has observed that even if such permission is assumed to have not been given by the Government of Portugal, even then the Government of India can keep its assurance of not visiting the respondent/accused with a penalty of death or the penalty of imprisonment of more than 25 years by exercising executive power of remission under Articles 72 and 161 of the Constitution of India. In addition to these, the Government could also, by invoking Section 34C of the Extradition Act, 1962, commute the death sentence into sentence of life imprisonment. With utmost respect, although the learned Designated Court has correctly reproduced the case law in the impugned order, however, there has been an erroneous application of the same. The reasoning, which has been given by the Designated Court for denying the permission, is also totally erroneous. The question, which was involved in the application, was as to whether seeking the withdrawal of prosecution under Section 3(2) and 3(4) of MCOCA and Section 120-B of the IPC was bonafide and secondly whether it was in the larger public interest or was it a political decision

which was taken by the Government of India in the larger public interest, as it had given an assurance to the Government of Portugal that in case the respondent/accused is extradited by the Government of Portugal for his trial to India, then he would not be visited by death penalty or imprisonment for a term beyond 25 years. The question which the Designated Court was to consider was whether the learned Prosecutor had applied his mind to the request seeking withdrawal of these charges or not. This was not done. On the contrary, it erroneously embarked on the inquiry as to whether there could be deemed consent of the extraditing State for prosecution of the accused for offences for which the extradition was not specifically permitted. This, in my view, was totally beyond the scope of the Designated Court.

27. There is no denial of the fact that in the comity of nations in the world, our country commands a lot of respect and it is not only because of its rapid development which has taken place in the field of science and technology, but also for its principled stand which has been taken by the Government of India right after the independence. This stand of the Government of India, by not aligning with any of the group of

super powers, by adopting the concept of *Panchsheel* and by adopting a neutral attitude on the world issues before various international foras and sending for peace keeping mission to different countries have all added and enhanced the prestige of the country and, therefore, if any assurance is given by the sovereign Government of India of the day that is taken very seriously in the countries of the world. Similarly, if the sovereign Government of India at a given point of time has given a solemn assurance to a Foreign State to extradite a criminal who was desperately wanted by our country for trial then we ought to have honoured that commitment. This was a political decision. In the instant case, none other than the then Deputy Prime Minister of India, Mr. L.K. Advani, had given solemn assurance to the sovereign Government of Portugal that in case the respondent/accused is extradited to India, he will be punished in accordance with the Extradition Order. Moreover, despite the fact that there was no Extradition Treaty between the two countries and by the fiction of law, the extradition was obtained by extending the provisions of the Extradition Act, 1962, therefore, the Court should have permitted that assurance to be adhered to and implemented. Otherwise, in case the prosecution is not

permitted to be withdrawn in terms of the assurance given by the Government of India not only the stand of our Government in the international arena would have been falsified, but in future also the foreign countries will be loath to take our assurance seriously. There are the political implications which the country would have to face in the long run in case we do not adhere to the assurance which has been given to a sovereign government. The Designated Court has failed to appreciate this concern of the Government of India in making a request to the Special Public Prosecutor to seek withdrawal only because of this reason and which has been bonafidely approved by the Special Public Prosecutor. The Court's power was only supervisory in this regard. Therefore, this reasoning, which has been given by the Designated Court, is totally erroneous and deserves to be set aside.

28. The other aspect of the matter is that the Government of Portugal having learnt about the trial of the respondent for an offence other than the one for which he was extradited, followed the principle of speciality. In this regard, reference can be made to Section 21(2) of the Extradition Act, 1962. The Government of Portugal, because of the violation of the principle of speciality, had already approached its judicial

forums and obtained an order from the High Court of Portugal against the Government of India for repatriation of the respondent/accused back to Portugal. No doubt, against the said order of repatriation and revocation of the Order of Extradition, the Government of India has preferred an appeal and presently, the said appeal is pending before the superior appellate court for adjudication, but in case the order of the Designated Court is not set aside, i.e., the prosecution of the respondent/accused is not permitted to be withdrawn in respect of offences of MCOCA and the criminal conspiracy, they would fatally affect the interest of the Government of India, inasmuch as it will be under an obligation to repatriate the respondent/accused to the sovereign Government of Portugal, because of which the petitioner will not be able to face the trial for any of the offences for which he is facing trial, namely for offences u/S 387/506/507/201 IPC. So a decision has to be taken by this Court obviously for offences for which extradition is granted or no trial at all for any offence whatsoever.

29. Therefore, for the above-mentioned reasons, I feel that the order, which has been passed by the Designated Court, is totally erroneous, bereft of any rationality and is not in

consonance with the law laid down by the Apex Court. The Apex Court also in Abu Salem's case (supra) only has observed that he could be prosecuted only for offences for which he was extradited by the Bombay Courts. Accordingly, the impugned order is set aside and the petitioner is permitted to withdraw the prosecution of the respondent/accused for offences under Sections 3(2) and 3(4) of MCOCA and Section 120-B of IPC. I have been informed that the Designated Court has already framed the charges against the respondent/accused for the aforesaid offences vide order dated 1.5.2010. Since the petitioner is permitted to withdraw the prosecution of the respondent/accused for the aforesaid offences, as a necessary consequence of the same, the order dated 1.5.2010, directing framing of charges for the offences under MCOCA as well as the criminal conspiracy are also set aside.

V.K. SHALI, J.

May 11, 2012
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