

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Order Reserved on : 10.07.2017

Order Passed on : 25.07.2017

CR.R No. 840 of 2016

Rakesh Jaiswal, S/o. R. P. Jaiswal, Aged About 51 Years, R/o. Rajasva Colony, Sarkanda, Bilaspur, District- Bilaspur, Chhattisgarh.

---- Petitioner

Versus

1. State Of Chhattisgarh, Through : Police Station- Kota, District- Bilaspur, Chhattisgarh.
2. Jaikumar @ Ajay Yadav (Since Deceased), S/o. Lalji Yadav, Aged About 26 Years, R/o Firangi Para, Kota, District- Bilaspur Chhattisgarh.
3. Mangal @ Babudas Manikpuri, Aged About 49 Years, R/o. Purani Basti, Kota, District- Bilaspur Chhattisgarh.

---- Respondents

CR.R. No. 956 Of 2016

Rakesh Jaiswal, S/o. Shri R.P. Jaiswal, Aged About 51 Years, R/o. Rajasva Colony, Sarkanda, Bilaspur, District Bilaspur, Chhattisgarh.

---- Petitioner

Vs

State Of Chhattisgarh, Through : Police Station -Kota, District- Bilaspur, Chhattisgarh.

---- Respondent

And

CR.R. No. 1053 Of 2016

State of Chhattisgarh, Through : Its District Magistrate, Bilaspur, District -Bilaspur, Chhattisgarh.

---- Petitioner

Vs

1. Jai Kumar Yadav @ Ajay Yadav (Since Deceased), S/o. Lalji Yadav Aged About 26 Years, R/o. Firangi Para, Kota, Police Station Kota, District - Bilaspur, Chhattisgarh.
2. Mangal, S/o. Babu Das Manikpuri, Aged About 49 Years, R/o. Purani Basti, Kota, Police Station -Kota, District -Bilaspur, Chhattisgarh.
3. Rakesh Jaiswal, S/o. R.P. Jaiswal, Aged About 38 Years, R/o. Rajaswa Colony, Sarkanda, District -Bilaspur, Chhattisgarh.

---- Respondents

For Petitioner : Mr. Kishore Bhaduri with Mr. Dharmesh
Shrivastava and Mr. Pawan Kesharwani,
Advocates

For Respondent/State : Mr. Ashish Shukla, Govt. Advocate

For Respondent No.3 : Mr. Govind Dewangan, Advocate

For Objector – Manish Dadsena: Mr. T.K. Jha, Advocate

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV ORDER

25/07/2017

1. Cr.R. No.840/2016 and Cr.R. No.1053/2016 are petitions under Section 397 of Cr.P.C. challenging the order dated 30.08.2016, passed by the 9th Additional Sessions Judge, Bilaspur by which the application under Section 321 of Cr.P.C. for withdrawal of the prosecution against petitioner/accused - Rakesh Jaiswal by the State was dismissed.
2. Criminal Revision No.956/2016 has been filed by the petitioner – Rakesh Jaiswal, challenging the order dated 27.09.2016, passed by the 9th Additional Sessions Judge, Bilaspur, whereby the charges under Section 302/34, 120-B, 201 of Indian Penal Code has been framed against the petitioner – Rakesh Jaiswal.
3. It is submitted by the counsel for the petitioner that petitioner has been charge-sheeted and prosecuted in Crime No.152/2001, registered at Police Station – Kota, District – Bilaspur for the offence punishable under Section 302 read with Section 394, 201 of Indian Penal Code without their being any evidence against him.

4. On the basis of opinion given by the prosecutor, an application under Section 321 of Cr.P.C. was moved by respondent No.1 for withdrawal of prosecution, which has been rejected by the impugned order dated 30.08.2016.
5. It is submitted by counsel for the petitioner in Cr.R. No.840/2016 and Cr.R. No.956/2016 that deceased- Jawahar Dadsena started from Lormi to reach his place of residence at Bilaspur on 19th May, 2001 on motor cycle bearing registration No. M.P.-26-KC-2937. He did not reach Bilaspur and a missing report was lodged in Police Station – Kota. On 23rd May, 2001, a decomposed body was found near Jogipur in the field, which was identified by one Latel Ram as that of deceased on the basis of the articles found with dead body. Autopsy could not reveal the mode or cause of death because decomposition of body was in advanced stage, being found late about 7 to 8 days from the date of incident. Statement of as many as 20 witnesses were recorded under Section 161 of Cr.P.C. by police. On reading of statement, it is very clear that there is totally no evidence against the petitioner even by way of suspicion, but motor cycle of the deceased could not be found. It is submitted by counsel for the petitioner that Section 321 of Cr.P.C. provides that case shall be withdrawn by the prosecution with the consent of the Court. It is the duty of the learned Judge of trial Court to grant or refuse consent judiciously on the basis of material present on record. The Court below has mechanically passed the order of rejection, hence prayed that present revision petitions may be allowed with grant of permission to withdraw the criminal case

against the petitioner. In the alternative it is prayed that impugned order framing charge against the petitioner may be set-aside.

6. Counsel for the petitioner – Rakesh Jaiswal places reliance on the judgment passed by the Hon'ble Supreme Court in case of **The State of Bihar Vs. Ram Naresh Pandey, reported in AIR 1957 SC 389, Rajender Kumar Jain Vs. State Through Special Police Establishment and Ors. reported in (1980) 3 Supreme Court Cases 435, Sheonandan Paswan Vs. State of Bihar and Others reported in (1987) 1 Supreme Court Cases 288, Vijay Kumar Baldev Mishra @ Sharma Vs. State of Maharastra reported in AIR 2008 Supreme Court 961**. The counsel further placed his reliance in the judgment dated 02.07.2015, passed by the Coordinate Bench of this Court in **Cr.M.P. No.849/2013, Dr. Shakrajeet Nayak & Ors. Vs. State of Chhattisgarh and other connected matters**. The counsel has also relied on the case law reported in **2016 (3) C.G.L.J. Ramesh Kumar Sharma Vs. State of C.G. & Ors.**, wherein the same principles has been reiterated. Reliance has also been placed in the judgment passed by the Hon'ble Supreme Court in case of **Baliram Murlidhar Vs. State of Andhra Pradesh, reported in (2014) 10 Supreme Court Cases 380**.
7. Counsel for the State has submitted arguments, which are not opposed to the submission made by the petitioner – Rakesh Jaiswal in Cr.R. No.840/2016 and Cr.R. No.956/2016 and in support of the criminal revision 1053/2016, in which prayer has been made for setting-aside the impugned order.

8. Counsel for the respondents No.2 and 3 have not made any submission for or against the petitions under consideration.
9. Counsel for the objector replying to Cr.R. No.840/2016 and has raised objection to the petition and submitted that petitioner and two other accused persons have been prosecuted and charged for offence of commission of murder of deceased -Jawahar Dadsena. From the initiation of the criminal prosecution, petitioner has been active to disrupt the proceedings by filing various petitions, thus, hampering the proceeding of trial. It is submitted that it is only the public prosecutor, who has the authority to bring application under Section 321 of Cr.P.C., and petitioner has no locus-standi to challenge the order passed on this application under Section 321 of Cr.P.C.
10. The trial Court has relied on the judgment of ***Abdul Karim Vs. State of Karnataka and others, reported in AIR 2001 Supreme Court 116***, in which it has been held that before granting consent, Court has to ensure that Public Prosecutor has applied his mind independently and acted in good faith and opined that withdrawal of the case is in public interest.
11. In the present case, the application for withdrawal of prosecution has been for withdrawal of prosecution against only one accused the petitioner – Rakesh Jaiswal, on the ground that prosecution has failed to collect sufficient evidence against the petitioner – Rakesh Jaiswal.
12. Section 321 of Cr.P.C. provides that 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. This provision does not categorises offence, for which the trial is pending, which means Public Prosecutor has authority to seek withdrawal of prosecution of any person for any of the offence against him. Further, this provision does not put a bar as to seeking withdrawal of prosecution for one of the accused person amongst the accused persons arrayed in the charge-sheet.

13. In the application under Section 321 of Cr.P.C., it was stated by the Prosecutor that no cogent evidence is available against the petitioner/accused - Rakesh Jaiswal to connect him with the murder of the deceased. Statement on memorandum given by the co-accused persons are not admissible in evidence and the statement of other witnesses of prosecution are also not sufficient for prosecution of the petitioner – Rakesh Jaiswal.
14. The Court below has held that, while opposing the bail petition on behalf of the State, the stand was taken that there is sufficient material in evidence to show involvement of the petitioner in the commission of crime. Thereafter, the charge is filed against him. Later on the prosecution has made u-turn by moving the application for withdrawal of prosecution on the ground of insufficiency of prosecution evidence, which shows that prosecutor has made no application of mind while bringing the application for withdrawal of the prosecution.

15. Petitioner – Rakesh Jaiswal earlier had filed a petition U/s. 482 of Cr.P.C., before this Court, which was registered as Misc. Criminal Case No. 1900/2002 for quashment of FIR No.152/2001, which was decided on 02.12.2013, in which it was held that material collected on behalf of the prosecution is sufficient to show the involvement of the petitioner in crime in question and the submission of the State counsel is also recorded in the order, the petition was opposed on this basis that, the prosecution has collected sufficient material to show involvement of the petitioner in commission of crime in question stating that statement of Shanti Bai and Smt. Leela Bai recorded under Section 161 of Cr.P.C. are sufficient in this respect. With these observations, the petition U/s. 482 of Cr.P.C. was dismissed.
16. The order of this Court in M.Cr.C. No.1900/2002, passed on the petition U/s. 482 of Cr.P.C. is the order of Coordinate Bench, which has considered and given opinion regarding the same ground, which is taken by the petitioner in this petition that evidence against the petitioner in the case is insufficient for him to be prosecuted. It is settled in case of ***Tribhuwan Das Purshottamdas Thakur Vs. Ratilal Motilal Patel & Others, reported in AIR 1968 SC 372***, in which it was held by the Hon'ble Supreme Court that Single Judge of the High Court is ordinarily bound to accept as correct the judgments of Courts of coordinate jurisdiction and of Division Benches and of the Full Benches of the same Court. It has been further reiterated by the Supreme Court in case of ***Sant Lal Gupta & Others Vs. Modern Coroperative Goup Housing Society***

Limited and others, reported in **(2010) 13 SCC 336** that earlier decision of Coordinate Bench is binding upon in later Coordinate Bench deciding the same or similar issue. Hence for these reasons, the issue regarding sufficiency of evidence for prosecution of petitioner, which has been decided by the Coordinate Bench in the earlier judgment has a binding effect, which can not be recalled in the Criminal Revision No.840/2016 and Criminal Revision No.1053/2016, as these petitions are also on the based on the same footing. For these reasons and for the reasons of judicial propriety, the same issue can not be reviewed or recalled. Hence in the result, both the petitions Criminal Revision No.840/2016 and Criminal Revision No.1053/2016 are dismissed.

17. Criminal Revision No.956/2016 is directed against the order of trial Court dated 27.09.2016 of framing charges against him under Section 302/34, 302/120-B and 201/120-B of Indian Penal Code.
18. This is the question raised on different footing i.e. at the stage of commencement of trial, wherein, the question involved is whether a prima-facie case is made out against the accused for trial of offence that are mentioned in the charge-sheet against him on the basis of which, the charges are framed. The question of sufficiency of evidence considered earlier had been at the stage of investigation in which the Coordinate Bench in M.Cr.C. No.1900/2002 by order dated 02.12.2013 has recorded statement of the State that prosecution has collected sufficient material to show involvement of the petitioner in commission of crime in question and the same issue was raised again while considering the application of State

under Section 321 of Cr.P.C. and that being the order of the Coordinate Bench, the petition challenging the order passed by the trial Court on application under Section 321 of Cr.P.C. has been dismissed. Though orders passed have not expressed any opinion regarding the prima-facie case against the petitioner in the prosecution case against him. Hence this is a question which can be considered separately without being bound by the orders passed in M.Cr.C. No.1900/2002 and the orders passed in Cr.R. No.840/2016 and Cr.R. No.1053/2016.

19. Charges have been framed against the petitioner after filing of the charge sheet on 27.09.2016, which means that no further investigation is pending. Hence at this stage, before framing of charge, it has to be seen whether prima-facie case is made out against the petitioner/accused or not. On perusing the material on record, the certified copies of documents of the case, it is evident that FIR dated 31.05.2001 was recorded against unknown person.
20. On perusal of documents in support of charge-sheet, it appears that no statement of the petitioner was recorded on memorandum under Section 27 of the Evidence Act and no seizure of articles has been made from the possession of the petitioner/accused.
21. In the statement under Section 161 of Cr.P.C., Birjuram has stated that on 19.05.2001, petitioner along with his family departed for Amarkantak and returned on 20.05.2001. Other witnesses Prakash, Vishnu and Sukhnandan have given similar statements. Witness Premchand Mishra has stated about some shirt which the co-accused Ajay Yadav used to wear which is not connected with this

petitioner. Witness Bihari Sahu is the person, who is the driver of the vehicle M.P.-26E-7271, which was hired by the petitioner on 18.05.2001 and had been to visit dam site at Amarkantak. Witness Mintu @ Manish Diksena has stated without referring to any date about petitioner going to Amarkantak and others places and coming back. Anshu, Dwarika Kashyap, Anjani Kela have also given similar statements.

22. Raju @ Raj Kumar Dansena have given statement about departure of the deceased on the date of incident who did not return and later on he came to know of his death. Shyam Bihari Bajpai is the witness, who was the owner of the vehicle that was hired by the petitioner on the date of incident. Statement of Latel Das, Mahagu Lal also does not disclose anything against petitioner.
23. Witness Shanti Bai has stated that deceased Jawahar Dansena came to visit the petitioner, who was offered tea by the petitioner. There is no statement as to the date of this visit and neither anything else about the deceased or about the incident of his death.
24. Witness Leela is the wife of the deceased, who has given statement that on 19.05.2001 her husband departed from his place of residence to visit the petitioner. On the same day she received a phone call at 9.00 pm in the night from the petitioner, who said that he was waiting for the deceased for the whole day, but he has not come, on which she informed him that her husband had departed from home to visit him in the morning. She has also stated that in the morning of 19.05.2001 her brother – Ramesh Jaiswal talked with her husband asking to come to Ratanpur for consulting about

horoscope. There is nothing to suggest that Ramesh Jaiswal and Rakesh Jaiswal are same persons. Thereafter, her brother- Ramesh called at 11.00 am and informed that her husband had not reached Ratanpur and later he called at 9.00 pm in the night asking whether the deceased had arrived or not. Thereafter, she came to know about the death of her husband. This is the only statement given which indicates that deceased intended to visit the petitioner on the date of incident apart from that there is no other statement against petitioner.

25. Manish Dadsena is the objector in Cr.R. No.840/2016 and also a witness in this case. He has made statement under Section 161 of Cr.P.C. and stated that his father, the deceased informed that he is going to Ratanpur from there he will go to Bilaspur on the date of incident on 19.05.2001, whose dead body was found later on. He was informed by Raju, Ghansu Kesharwani, Punnam, Ashish and Golu that they visited to the petitioner at about 10-11 am and knocked but the door was not opened, hence witness had doubt as to why he did not open the door. Another witness Ashish is also son of the deceased, who has also not stated anything against the petitioner.
26. After closely scrutinizing the evidence of all the witnesses recorded under Section 161 of Cr.P.C., it is apparently clear that nothing has been stated by any of the witnesses regarding involvement of the petitioner in causing death of deceased - Jawahar Dadsena by conspiracy or by any overt or covert act. Deceased intended to visit petitioner on the date of incident and statement of one witness

Shanti Bai that deceased came to visit the petitioner in afternoon on the date of incident by itself is not sufficient to involve him in the case. Statement of co-accused person in their memorandum U/s. 27 of Evidence Act, can not be taken up as confession U/s. 30 of the Evidence Act, which may be considered by the Court against a co-accused person because that has to be specifically a confession permissible under law, i.e. a confession recorded u/s. 164 of Cr.P.C. and that is not the case here. Hence after perusal of all the material on record and considering the submission of the State as well as that there is no evidence against the petitioner for prosecution, for which the withdrawal of prosecution was sought from the trial Court, hence this revision petition appears to have substance and deserves to be allowed.

27. In view of the forgoing discussions and observations made, this revision petition No.956/2016 is allowed. The impugned order of the trial Court dated 27.09.2016 framing of charge against the petitioner is set-aside and petitioner is discharged from the prosecution case.
28. Accordingly, all the petitions stands disposed off.

Sd/-
(Rajendra Chandra Singh Samant)
Judge