

Vidya Amin.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION No. 5358 OF 2018

Union of India	...	Petitioner
VS.		
Bhavesh Jayantilal Shah & Ors.	...	Respondents

Mrs. Anuradha Mane, Advocate for the petitioner.
 Mr. Taraq Sayed, Advocate for respondent no. 1.
 Mr. Aabad Ponda a/w. Mr. Ayaz Khan, Yogesh Rohira, Dr. Sujay Kantawala, Advocate for respondent no. 2.
 Mr. A.R. Patil, APP for the respondent no. 3/State.

CORAM	:	Mrs.MRIDULA BHATKAR, J.
RESERVED ON	:	8th February, 2019
PRONOUNCED ON	:	4th March, 2019

JUDGMENT :

Rule. Rule made returnable forthwith. By consent, the Writ Petition is heard finally and disposed of at the stage of admission.

2. The Union of India through Intelligence Officer, Directorate of Revenue Intelligence has filed this Writ Petition under Article 226 r/w. 227 of Constitution of India wherein the order dated 29th October, 2018 releasing the respondents/original accused nos. 1 and 2 under section 169 of Cr. P.C. is challenged.

3. On 27th June, 2018 Directorate of Revenue Intelligence had

recovered 20 kgs. of white powder purported to be methaqualone. Thereafter in search, 10 kgs. of white powder purporting to be methaqualone and tablets of Tramadol from godown were recovered. The Directorate of Revenue Intelligence investigated the matter and submitted File No. DRI/MZU/INT-91 of 2018. The prosecution was initiated against the accused for the offence punishable under section 8C r/w. 22(C) of NDPS Act, 1985 and under sections 28, 29, 23(C) r/w. 8c of NDPS Act. The accused were produced before the Special Judge, NDPS on 20th October, 2018 and at that time, negative CA report was received by the Investigating agency and therefore, the Special Prosecutor moved an Application under section 169 of Cr. P.C that investigating agency has decided not to prosecute the accused but to release them and therefore, the Judge forthwith released them under section 169 of Cr. P.C. In absence of the consent given by the Investigating officer, the Application under section 169 of Cr. P.C. submitted by the prosecutor was illegal and wrong and so the order passed by the learned Judge. Hence, this Writ Petition is filed challenging the said order.

4. Learned Prosecutor has submitted that the investigating

agency never gave consent to move an Application for release of the accused because the huge quantity of tablet Tramadol, i.e., nearly 2 to 2.44 lakhs tablets of various brands were recovered and seized from respondent No. 1. Further, the investigation revealed that respondents were not having proper valid licence to possess or manufacture these tablets. She submitted that the learned Special Prosecutor without considering the fact that test report confirming the positive for Tramadol NDPS substance, inadvertently filed the closure application on that day under section 169 of Cr. P.C. and to move such Application, consultation of complainant-Investigation officer Mr. Manoj Choudhary was required. She has submitted that Investigating Officer Manoj Choudhary has specifically refused to give consent for filing Application under section 169 of Cr. P.C.

5. Per contra, the learned counsel for the respondents supported the order passed by the learned trial Court Judge mainly on the ground that CA report was negative in respect of contrabands seized by the police. He further submitted that the Application in fact was made under section 321 of Cr. P.C. which gives power to the Prosecutor to withdraw the accused from

prosecution. In support of his submissions, he relied on the following decisions:

- (i) Constitutional Bench judgment of Supreme Court in the case of **Nagendra Nath Bora & Anr. vs. The Commissioner of Hills Division and Appeals, Assam & Ors.**, reported in **1958 SCR 1240** on the point of restrictions of powers of the High Court to invoke the writ of certiorari when there is no error of law.
- (ii) The learned counsel further submitted that though in the Application, section is wrongly quoted as 169 instead of 321 of Cr. P.C., the order passed therein cannot be illegal only for the mistake of quoting wrong section. On this point, he relied on the judgment of Supreme Court in the case of **T. Nagappa vs. Y.R. Muralidhar**, reported in **(2008) 5 SCC 633**.
- (iii) Judgment of Supreme Court in the case of **Subhash Chander vs. State (Chandigarh Administration) & Ors**, reported in **(1980) 2 SCC 155**.
- (iv) Judgment of Supreme Court in the case of **Vijaykumar Baldev Mishra alias Sharma vs. State of**

Maharashtra, reported in **(2007) 12 SCC 687** on the point of scope of section 321 of Cr.P.C. especially about the use of term “with permission of the Court” and “with the consent of the Court”

6. The issue raised in this Application is whether the Application made under section 169 of Cr. P.C. can be treated as Application made under section 321 of Cr. P.C. Hence, both the sections are reproduced for the purpose of the comparison.

“169. Release of accused when evidence deficient. If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.”

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."

7. Though the implication seemingly appears to be the same,

the legislative intent of the two sections is not so, therefore, both the Sections cannot be substituted for each other. Let me advert to the comparison of these two sections on the background of the ratio relied by the learned counsel for the petitioner.

8. In the the case of **T. Nagappa** (*supra*), it is held that if the Court has requisite jurisdiction to pass an order, then non-mentioning or wrong mentioning of provision of law would not be of any relevance.

9. In the case of **Subhash Chandra** (*supra*), the Supreme Court has relied on the case of **M.N. Shankaranarayanan Nair vs. P.V. Balakrishna** on section 494 reported in **AIR 1972 SC 496**. At that time, old section 494 was subsequently made Section 321 of Cr. P.C. The Supreme Court discussed the scope of Section 494 as a public policy and made it clear that with the permission of the Court, the withdrawal of the prosecution of accused can take place at the stage of enquiry or after committal or even before the judgment is pronounced.

10. In the case of **Vijaykumar Baldev Mishra** (*supra*) on the point of scope of section 321 of Cr.P.C. especially about the use of term “with the permission of the Court” and “with the consent of the Court” and also discussed that Section 321 finds the place in the Chapter immediately after Section 320, one will be justified in saying that it should take its colour from the immediately preceding section and in holding that section. In the said case, the Supreme Court has relied on the case of **Sheonandan Paswan vs. State of Bihar**, reported in **(1987) 1 SCC 288**. However, in the case of **Sheonandan Paswan**, the Supreme Court held that “all that is necessary for the Court to see is to ensure that the Application for withdrawal has been properly made, after independent consideration, by the Public Prosecutor and in furtherance of public interest. Thus, the Public Prosecutor is supposed to give independent thought about the detention or withdrawal of the accused person from the prosecution.

11. In the present case, it is unambiguous that the Application is made under section 169 of Cr. P.C. The section itself is quoted by the prosecutor and it is mentioned that since the evidence against the accused is inadequate to adjudge their prosecution, it is

respectively prayed that they be released from custody. In Section 169 of Cr. P.C. the discretion to make such Application is left to officer in-charge of the police station and he may release the accused on his executing a bond with or without surety and may direct to appear if and when so required.

12. Under section 321(a) if before charge such withdrawal is made, then the accused shall be discharged in respect of the offence. Under section 321(b) if it is made after the charge, then it shall be acquittal. Under section 169 of Cr. P.C. accused is released. Thus, the terms used are to be understood with appropriate meaning, they do not carry same connotations so the effect.

13. While comparing two sections, i.e., Sections 169 and 321 of Cr.P.C., it is necessary to take into account one more section, i.e., Section 319 of Cr. P.C. Under section 319 of Cr. P.C., the Court if on perusal of the evidence on record forms an opinion that the person who was released earlier under section 169, if he appears to be guilty of the offence , then the Court under the said section can proceed against him. Under section 321 of Cr. P.C. the prosecutor incharge of the case is given discretion to move the

Application to the Court to withdraw from prosecution of any person, however, such withdrawal is conditional, i.e., with the consent of the Court. Under section 169 of Cr. P.C. no consent of the Court is contemplated and therefore, further prosecution of such released person under section 169 of Cr. P.C. is possible under section 319 of Cr. P.C. However, if there is a withdrawal from prosecution of any person with the consent of the Court under section 321 of Cr. P.C. on application moved by the prosecutor, then such person again cannot be brought back under section 319 of Cr. P.C.

14. The learned counsel Mr. Ponda has submitted that Section 169 is included in Chapter XII about the powers of the police to investigate the matter. Section 321 is included in Chapter XXIV in the Chapter of General Provisions as to enquiries and trials. On the basis of the inclusion of Section under the relevant heads, he formulated his argument that Section 321 can be invoked by the Prosecutor even at any time before the judgment is pronounced and since the accused is brought before the Court, the enquiry begins and therefore, stage of remand is a stage of enquiry when this Application for withdrawal from the prosecution can be made

by the prosecutor.

15. This argument is not convincing. The provisions under section 321 cannot be used by Public Prosecutor during ongoing investigation. Under section 169 discretion is given to the officer in-charge of the police because investigating machinery is collecting the evidence and if at all the evidence is not sufficient and the person is made accused initially either on suspicion or on false allegation, the Investigating officer has power to move such Application before the Court during the period of investigation and thereafter. Under Section 321 when the investigation is not complete but during the enquiry, if prosecution forms the opinion that there is no evidence to proceed against the accused then it will be premature on the part of the prosecutor to move such application. The investigating agency may come across some evidence at later stage and may file the chargesheet thereafter. The arguments of Mr. Ponda further cannot be accepted also in view of Section 321(a) & (b) wherein the stage of moving the Application and the result of which if allowed is mentioned.

16. On the point of powers of this Court under Article 227 of the Constitution of India, Mr. Ponda has submitted that this Court has

limited jurisdiction and the Court cannot enjoy the powers of the Appellate Court especially in dealing with the facts of the matter.

17. In the case of **Nagendra Nath Bora & Anr.** (*supra*), the constitutional Bench has held that if the error of law is apparent on the face of record, then the statutory powers can be exercised but not each and every error of law and fact can be corrected by superior Court. It also held that it is essential that error should be something more than a mere error of law, that it must be one which is manifest on the face of record. The principles laid down in **Nagendra Nath Bora** are binding on the Court, however, in the present case, the error of law is gross and obvious deviation from the use of powers and the procedure under section 169 of Cr.P.C. by the prosecutor.

18. In the present case, the order passed by the learned Magistrate is based on misconception of law and exfacie illegal considering the scope of sections 169 and 321 of Cr.P.C. Sections 169 and 321 of Cr.P.C. cannot be substituted for each other. They can be invoked in different circumstances and the Court's power after invocation of these two sections are not the same and therefore, it is a fit case to be entertained under writ jurisdiction.

19. On the background of this discussion, the Application made by the prosecutor in the present case is to be looked into. As held earlier, it is the Application under section 169 of Cr. P.C. The learned Judge has also treated the Application under section 169 and therefore, he did not mention a word about giving consent for withdrawal of the accused from the prosecution. Therefore, it is not a mentioning of mere wrong section but it is the application specifically under section 169 of Cr. P.C. Later the Investigating officer has filed the affidavit and has stated that he did not want to release the accused and therefore, he did not want to move such application under section 169 of Cr. P.C. The roznama discloses that Investigating officer was not present when this application was moved by the prosecutor. The learned Judge has accepted the Application as it is made by the learned Prosecutor. Under such circumstances, the Application moved by the Prosecutor under section 169 is illegal and so the order passed therein, it should go.

20. It is submitted at bar that the learned Prosecutor Mr. Saldanha was asked to return all the files of D.R.I. after this incident. Therefore, it is necessary to place on record the reason for which the learned Prosecutor moved Application under section

169 of Cr. P.C. otherwise it will be unfair to the learned Prosecutor, who has efficiently worked as a Prosecutor for the petitioner for many years. In the course of argument, it was mentioned that the Government has taken out notification dated 13th July, 2018 by which the Government gave opportunity to the manufacturers or stockists to dispose of the Scheduled drug of Tramadol within stipulated period. The respondents/accused were benefitted by the notification and hence with this reason, the learned Prosecutor moved the Application. A counter argument was advanced about the existence of valid licence with the respondents. However, under such circumstances, it appears that the learned Prosecutor has moved this Application bonafide, having different interpretation of the notification. Thus, I am of the view, the following order is required to be passed:

- (i) The order is set aside;
- (ii) The prosecution is given two weeks time from the date of this order to file complaint. Delay is condoned.
- (iii) The status of the respondents is restored as accused in the said case;
- (iv) The respondents/accused are already out of the prison and therefore, in all fairness, I am of the view that no

coercive action is to be taken against them for a period of one month from the date of the filing of the complaint;

(v) The respondents/accused shall move an application for bail before the learned Special Court and the learned Special Court to decide that Application of bail on merits in accordance with law.

(MRIDULA BHATKAR, J.)