

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Revision No.616 of 1980

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Bishambhar Prasad Singh, son of Late Sheonandan Prasad Singh, resident of village Maranchi, Police Station Hathidah, District Patna Informant....

... .. Petitioner/s

Versus

1. The State of Bihar
2. Binod Kumar Sharma, son of Late Rameshwar Prasad Sharma, resident of village Shankarwar Tola, Mokameh Police Station Mokameh, District Patna
3. Bhaskar Bhushan Shukla, son of Aditya Narain Shukla, resident of village Alinagar, Police Station Surajgarha, District Monghyr, at present resident of village Maranchi, P.S. Hathidah, District Patna.
4. Pashupati Singh, son of Late Ram Swaroop Singh, resident of village Maranchi, Police Station Hathidah, District Patna

... .. Opposite Parties

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Appearance :

For the Petitioner/s : Sri Anil Singh, Amicus Curiae

For the Opposite Parties : Sri Lalit Kishore, Advocate General

Sri S.D. Yadav, A.A.G. IX

Sri Prabhu Narayan Sharma, A.C. to A.G.

Ms. Prachi Pallavi, A.C. to A.G.

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
and
HONOURABLE MR. JUSTICE SUDHIR SINGH
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 11-01-2019

1. Whether under Section 321 of the Code of Criminal Procedure, 1973, (hereinafter referred to as “New Code”) the Public Prosecutor is solely authorized to file a petition for withdrawal from prosecution even in a case which is being prosecuted by the Additional Public Prosecutor, in charge of a



case? This is the moot question to be answered in the present Revision petition.

2. The present Criminal Revision petition under Section 397 and 401 of New Code was filed against an order dated 03.06.1980 passed by learned IVth Additional Sessions Judge, Patna in Sessions Trial No. 72 of 1974. By the said order the learned court below allowed the petition filed by the Public Prosecutor, Patna seeking permission of the Court to withdraw from prosecution and secondly allowing withdrawal petition acquitted all the accused persons of the case whereas after filing of the petition for withdrawal from prosecution, the Additional Public Prosecutor who was conducting the case had filed an objection petition to withdrawal petition filed by the Public Prosecutor. Similarly the informant of the case had also filed an objection petition against the prayer for withdrawal from prosecution in respect of the accused persons.

3. The present case has got a chequered history. Long back on 21.09.1970 the informant, who is petitioner in the present Revision petition, gave fardbyan before the Officer Incharge of Mokamah Police Station disclosing therein that in the preceding night at 11.00 P.M. he had slept in a room of his Dalan and beside him one Tirpit Singh also slept. The uncle of the informant



namely- Rajendra Singh (deceased) had slept on a cot at the Verandah whom they could see from a window fitted in the room. On 21.09.1970 at about 1.00 or 1.30 A.M. the uncle of the informant cried "Ramashis Kahar Jan Marlack" upon which the informant put the electric bulb on and saw that five accused persons were assaulting his uncle Rajendra Singh on the Verandah with Bhala and Fasuli and then the victim fled towards South at the Dalan of Suresh Babu but he fell down and accused persons again injured him with Fasuli and Bhala. The informant claimed to identify Ramashis Kahar, Ram Badan Tanti and Sadhu Sharan Das and two others by face. Out of them one was identified as Binod Kumar Sharma (Opposite Party No. 2) and other as Surendra Prasad who were apprehended by the villagers along with Ramashis Kahar and Sadhu Sharan Das in and around the vicinity of the place of occurrence. The informant at the time of occurrence had also seen some other accused persons standing below the said Verandah and on his hulla villagers rushed there and apprehended some of them and saw the occurrence. The motive of the occurrence was that accused Ramashis Kahar of village- Maranchi was a leader of Communist Party and other accused persons were his party men. The deceased - Rajendra Singh used to protest against their illegal activities including their prevalent 'land grab



movement' through Farmers Committee and this protest annoyed the accused persons resulting in his brutal murder.

4. During investigation accusation was found true and charge sheet was submitted against the accused persons. Thereafter the learned Subdivisional Magistrate, Barh took cognizance of offences under Sections 302/34 of the I.P.C. vide order dated - 18.12.1971. After cognizance the case record was transferred to the file of Shri G.D. Mishra, Munsif Magistrate Ist Class, Barh for committal proceeding under Chapter XVIII of the Code of Criminal Procedure, 1898. Finally on 17.04.1974 learned Judicial Magistrate 1st Class, Barh considering the fact that the offence was exclusively triable by the court of Sessions committed the case to the court of Sessions. From record it appears that before framing of charge one of the accused escaped from jail on 07.07.1971 and remained absconder for several years and finally in the year 1978 his attendance could be secured and thereafter on 21.06.1978 charges were framed under Sections 302/34 of the I.P.C. against opposite party no. 2 to 4 and trial commenced and by 28.08.1978 about ten (10) prosecution witnesses including the informant were examined. It is further evident that one Sri Ram Khelawan Singh was appointed as Additional Public Prosecutor to conduct the trial on behalf of the State and he was conducting the



trial on behalf of the prosecution. Though evidences were going on and till 28.08.1978 altogether ten prosecution witnesses were already examined during which the case was being prosecuted by Sri Ram Khelawan Singh, learned Additional Public Prosecutor, on 28.08.1978 Sri Ram Dayal Prasad, learned Public Prosecutor, Patna filed an application under Section 321 of the Code of Criminal Procedure, 1973 to withdraw prosecution in Sessions Trial No. 72 of 1974 i.e. the present trial. The said petition was filed in the court of Shri Shrideo Mishra, learned Additional Sessions Judge VII, Patna on the plea that Government had decided to withdraw the said case on account of inexpediency of prosecution for reason of State and public policy and secondly there was direction of the District Magistrate, Patna to the said effect. After filing of the said petition by the Public Prosecutor, this petitioner / informant filed its rejoinder petition challenging the withdrawal from prosecution taking the plea that in the said trial several prosecution witnesses had already been examined and it was not in the interest of justice to accord permission. The Public Prosecutor had filed petition for withdrawal from prosecution. After hearing the parties and considering the fact that such withdrawal petition was an attempt to interfere with the normal course of justice and also the fact that accused persons



were facing trial for offence under Sections 302/34 of the I.P.C. the learned Additional Sessions Judge VII, Patna Shri Shrideo Mishra by a detailed and speaking order rejected the withdrawal petition vide its order dated 19.09.1978. The copy of that Order has already been brought on record as Annexure -11 to the present Revision petition. Against the order dated 19.09.1978 opposite party no. 2 preferred a Revision petition vide Cr. Revision No. 995 of 1978 before this Court which was finally dismissed by a Division Bench of this Court on 04.03.1980. However while dismissing the petition it was observed that **“the application filed was not an application filed by the Public Prosecutor in exercise of his independent judgment. The Public Prosecutor, or the Additional Public Prosecutor incharge of the case, will be at liberty to file an application under Section 321 of the Code for consent to withdraw from the prosecution, if the learned Public Prosecutor or the Additional Public Prosecutor, as the case may be, in exercise of his independent judgment is convinced that interests of public justice demand that the State should withdraw from the prosecution”**. Subsequently on 05.04.1980 after dismissal of Criminal Revision No. 995 of 1978 and in view of the observation of Division Bench of this Court Shri Ram Dayal Prasad, learned Public Prosecutor, Patna filed a



fresh petition under Section 321 of the Code of Criminal Procedure in the court of Sri L.P.N. Shah Deo, learned IVth Additional Sessions Judge, Patna before whom the case record was pending. A typed copy of petition dated 05.04.1980 filed by Public Prosecutor, Patna has been brought on record as Annexure-12 to the present petition. This Court prefers to quote the petition filed by Sri Ram Dayal Prasad, learned Public Prosecutor in Sessions Trial No. 72 of 1974 as follows:-

“In the court of Addl. Sessions Judge IV at Patna.
S. Tr. No. 72 of 1974
State Vs. Ram Asis Kahar and Others ... Accused
The humble petition on behalf of the Public
Prosecutor u/s 321 Cr.P.C.

Most respectfully sheweth:-

1. That in the above case Naxalites are involved and the occurrence arose out of the cult of violence in which the Naxalites believed.

2. That later the leaders of the different sections of the Naxalites publicly disclaimed the path of violence and expressed their faith in parliamentary democracy.

3. That, therefore to give them the opportunity to mend their ways the Govt. at the central and the State level adopted a policy of withdrawing all cases against the Naxalites including murder cases in which they have remained in jail for five years or more as a result of which large number of cases against the Naxalites were withdrawn.

4. That the State Govt. also took a decision to withdraw Mokameh P.S. Case No. 22 (9) 70 now pending before your honour and the decision was communicated to P.P. by the District Magistrate, Patna.

5. That a petition for withdrawal had been filed earlier but it was not allowed against which a criminal revision was filed in the Hon'ble High Court and the Hon'ble High Court by its judgment dated 4.3.80 in Criminal Revision No. 995 of 1978 has observed that the Public Prosecutor in exercise of this independent judgment if convinced that the State should withdraw from the prosecution may file a fresh application for withdrawal of Mokameh P.S. Case No. 22 (9) 70.



6. That petitioner has applied his mind to the facts of the case and considered all matters independently and is satisfied in the larger interest of justice and on account of in expediency of prosecution for reasons of State and public policy that the abovementioned case should be withdrawn.

It is, therefore, prayed that your honour be pleased to accord consent for the withdrawal of the case;

And for this the petitioner shall ever pray.

Sd. Ram Dayal Pd. P.P. 5.4.80.

Dt. 5.4.80”

5. Immediately after coming to know about filing of such petition Sri Ram Khelawan Singh, learned Additional Public Prosecutor who was in charge of the case and conducting the trial filed a petition on 05.04.1980 itself raising objection that the said withdrawal petition was not in the interest of public policy and public justice and it may not be allowed to be withdrawn. It was categorically stated in the said petition that the said trial was transferred to Sri Ram Khelawan Singh, learned Additional Public Prosecutor and he was the in charge of the case and he was conducting the said case. The said petition filed by Shri Ram Khelawan Singh, learned Additional Public Prosecutor has been brought on record as Annexure- 13. It would be profitable to quote the petition filed by Incharge Additional Public Prosecutor Sri Ram Khelawan Singh, as follows:-

“In the court of Addl. S.J. IV Patna.

S. Tr. No. 72/74

State Vs. Ram Asis Kahar and others.

The humble petition on behalf of the State
through Ram Khelawan Sinha, A.P.P.

Most respectfully sheweth:-



1. That today it transpired that the Public Prosecutor of Patna has filed fresh withdrawal petition for withdrawing the above Sessions Trial.

2. That the above trial was transferred to Sri Ram Khelawan Sinha Addl. P.P. Patna by the then Public Prosecutor and since then Sri Ram Khelawan Sinha Addl. P.P. is incharge of the above case and he has been conducting the above case.

3. That the above case is still with this Addl. P.P.

4. That the above case is not fit for withdrawal as it is not in the interest of public policy and public justice to withdraw the above case and hence the above case should not be allowed to be withdrawn in the interest of public policy and public justice.

It is, therefore, prayed that your honour may be pleased to consider the withdrawal petition filed by the Public Prosecutor Patna and not petition has been filed by the Addl. P.P. incharge of the case and pass proper order and for this the petitioner shall ever pray.

Sd. Ram Khelawan Sinha Addl. P.P.
5.4.80”

6. Against the withdrawal petition on 12.04.1980 the informant, who is petitioner before this Court, had also filed an objection petition with a prayer to reject the withdrawal petition dated 05.04.1980 filed by Sri Ram Dayal Prasad, learned Public Prosecutor. The copy of the said petition has been brought on record as Annexure- 14 to the present Revision petition and same is quoted hereinbelow:-

“In the court of the Addl. Sessions Judge IV, Patna
S. Tr. No. 72 of 1974
State Vs. Binod Kumar Sharma and others ... Accused
The humble petition on behalf of the
informant Bishambhar Pd. Singh;
Most respectfully sheweth:-



1. That the Public Prosecutor Sri Ram Dayal Pd. Advocate who had never conducted the prosecution on behalf of the State in the instant case.

2. That from very beginning of the instant case Sri Ram Khelawan Sinha Addl. P.P. had worked and conducted the case till and on behalf of the State. He is in full know of the facts and the circumstance of the case. Sri Ram Khelawan Sinha, became the Public Prosecutor for this case. After the case was transferred to him and he took charge of the case, he had never filed any withdrawal petition rather he has been against the withdrawal of the case.

3. That this matter was raised before the then VIIth. Addl. Sessions Judge, Sri Srideo Mishra who was trying the case and he had been pleased to reject the withdrawal of the case and refused permission for withdrawal of the case by Sri Ram Dayal Prasad, Public Prosecutor. The order passed by the then learned VIIth Addl. Sessions Judge Sri Srideo Mishra is a detailed order and contains all the aspect of the case.

4. That the accused went to the Hon'ble High Court where it was heard before Hon'ble Mr. Justice N.P. Singh and Hon'ble Mr. Justice S. Narain. Their Lordships after hearing the parties and considering the entire facts, circumstances and law dismissed Cr. Revision No. 995 of 1978 vide judgment dated 4.3.1980 and observed in para 2 of the judgment. "In my opinion, however, no cause for interfering with the impugned order has been made out. The application for withdrawal from the prosecution filed by the learned Public Prosecutor must fail on another ground.

5. That the Public Prosecutor has not assigned any reason based on careful consideration of entire facts and circumstances of the case nor he has given adequate proper reasons for withdrawal of the case which might have shown that he had applied his independent mind rather he has suppressed the true facts and has filed this petition to help the accused.

6. That no new point or ground has been raised by the Public Prosecutor. The accused persons are not Naxalites nor there is any evidence on the record that they are Naxalites. The Govt. has also never treated this case as a Naxalite case when there was Special Cell in the Govt. for Naxalite case.

7. That Sri Ram Dayal Prasad P.P. in any view of the matter is not a competent person to file the impugned petition for permission for withdrawal of the case and the above case is still being conducted by Sri Ram Khelawan Pd. Sinha, Addl. P.P. Patna who has also objected to the impugned petition for consent to withdrawal filed by Sri Ram Dayal today.

8. That all the points of this petition had been raised in earlier petition as well.

9. That petition filed by the Public Prosecutor is without jurisdiction and fit to be rejected.

10. That before the Hon'ble High Court the State Govt. did not support the stand taken by the Public



Prosecutor rather the learned standing counsel appearing on behalf of the State support the petitioner's version.

11. That no counter affidavit was filed by the State Govt. or the Public Prosecutor Sri Ram Dayal Pd. before the Hon'ble High Court in Cr. Rev. No. 995 of 1978.

It is, therefore, prayed that the petition dated 5.4.80 filed by Sri Ram Dayal Pd. P.P. Patna may kindly be rejected;

And for this the petitioner shall ever pray.
12.4.80."

7. After hearing learned counsel for the parties, learned IVth Additional Sessions Judge, Patna by the impugned order i.e. the order dated: 03.06.1980 accorded permission for withdrawal from prosecution of all the accused persons and allowed the petition filed under Section 321 of the Code of Criminal Procedure by the Public Prosecutor which has been assailed in the present Revision petition filed under Section 397 and 401 of the Code of Criminal Procedure, 1973. The Revision petition was admitted for hearing on 15.07.1980 by a Single Bench of this Court and notice was directed to be issued to private opposite party no. 2 to 4. Office note suggests that private opposite party no. 2 to 4 had already appeared through their counsel. On 27.04.1981 at the time of hearing a Single Bench of this Court was of the opinion that the matter requires to be heard by a Division Bench considering the submission of both the parties. On behalf of the informant-petitioner it was submitted that Section 321 of the New Code should be read to mean "Public Prosecutor-in-charge of a case" whereas on behalf of private opposite parties it was argued that the



word “incharge of a case” only controls ‘Assistant Public Prosecutor’ and it was emphasized that the word ‘the’ as a suffix to the word ‘Public Prosecutor’ indicates that it is only Public Prosecutor himself who can withdraw a Sessions trial and not an Additional Public Prosecutor appointed under Section 2 (u) read with Section 24. The Single Bench observed that: **“the main question for determination is whether the Public Prosecutor has an over-riding right to withdraw from prosecution of a trial pending in the court of Sessions though he may not be incharge of the same. Several Supreme Court decisions have also been decided relating to the Old Code the Section of which was not similar to the one of the present Code and a case known as Bombay Dynamite case under the New Code in which it was held that a P.P. incharge could withdraw from prosecution. The question is not only in interest however, considerable public importance.”** Accordingly the Single Bench referred the matter to Division Bench. Subsequently the present Revision petition was heard by a Division Bench and on 10.04.1990 a Division Bench of this Court referred the matter to larger Bench observing as follows: **“the matter is of considerable importance and in view of the judgment as laid down in a case of Shiv Nandan Paswan V. State of Bihar (A.I.R. 1983 (SC)**



194), we think it desirable that the case be referred to a larger Bench. In our opinion, the withdrawal from the prosecution of any person is an executive function of the Public Prosecutor and the ultimate function to withdraw the prosecution is his, but since some doubt has been expressed as to whether the Public Prosecutor includes the Assistant Public Prosecutor or Additional Public Prosecutor in charge of the case, in our opinion, it is a matter of great importance. For the reasons stated above, we feel that the matter should be decided by a larger Bench.” Accordingly the matter has been placed before us for answering the question which has been incorporated in paragraph no. 1 of this judgment.

8. After Full Bench was constituted by Hon'ble the Chief Justice the present petition was notified in the Daily Cause List in advance and finally on 06.12.2018 the matter was listed under the heading “For Hearing” on which date on the ground of personal difficulty of learned Advocate General time was sought for. On that date on repeated call none had appeared on behalf of the petitioner and as such the Court requested Sri Anil Singh, learned counsel to assist the Court as Amicus Curiae and he agreed to render his services. The hearing was deferred to 13.12.2018 on which date we heard Sri Anil Singh, learned Amicus Curiae, Sri



Lalit Kishore, learned Advocate General and also Sri S.D. Yadav, learned Additional Advocate General No. IX, however despite entering appearance on none of the aforesaid two dates anyone appeared on behalf of private opposite parties and finally judgment was reserved on 13.12.2018.

9. Sri Anil Singh, learned Amicus Curiae submitted that Section 321 of the New Code is very much clear on the point that Public Prosecutor conducting a case or trial, is only entitled to file any petition in accordance with law for withdrawal from prosecution before the court. He submits that in the Old Code under Section 494 the word 'only Public Prosecutor' was mentioned who was competent to file petition however in the Old Code an issue was raised as to whether Public Prosecutor conducting the trial was competent to file petition for withdrawal or the Public Prosecutor. This question was answered by a Constitution Bench of the Hon'ble Supreme Court in a case reported in **AIR 1967 Supreme Court 1214 State of Punjab v. Surjit Singh and another**. He submits that Hon'ble Supreme Court's Constitution Bench in Surjit Singh Case (Supra) has already held that Public Prosecutor conducting the trial in a case is only entitled to file petition under Section 494 of the Cr.P.C. According to Sri Anil Singh since there was some ambiguity in



Section 494 of the Old Code the Parliament thought it proper to clarify the same and as such on this issue Forty – First Report of the Law Commission Of India was considered. The Law Commission Of India’s Forty – First Report dated September, 1969 makes it clear that conducting Public Prosecutor would be entitled to move for withdrawal from prosecution for obtaining consent of the court. He has specifically referred to Chapter XXXVIII of the 41st Report of the Law Commission Of India particularly Clause 38.5 to 38.7. It would be profitable to quote the same, which is as follows:-

“38.5 Section 494 seems to authorize any Public Prosecutor to withdraw from the prosecution with the consent of the Court. The Supreme Court has held that the reasonable interpretation to be placed on this section is that it is only the Public Prosecutor who is in charge of a particular case and is actually conducting the prosecution that can file an application under this section seeking permission to withdraw from the prosecution. If a Public Prosecutor is not in charge of a particular case and is not conducting the prosecution, he will not be entitled to ask for withdrawal from prosecution of that case under Section 494. If any Public Prosecutor who has nothing to do with a particular case is held entitled to file an application under Section 494, the result will be anomalous. The contrary view viz., that the section gives an unqualified right to any person who, in law, is a “Public Prosecutor” to file an application for withdrawal from prosecution was, it appears, strongly urged in the case supported by a few decisions of High Courts. That view was negated by the Supreme Court.

38.6. We have elsewhere referred to a conflict of interests that may possible arise between the Central Government and the State Government in the matter of remitting or commuting sentences. A similar conflict of interests can arise under section 494 in respect of withdrawal of prosecutions. A



State Public Prosecutor appointed by the State Government can, if he is in charge of the case, withdraw from the prosecution, though the Central Government may be much concerned in the prosecution of the offenders. This could happen where the offence relates to a matter to which the executive power of the Union extends, or was investigated by the Delhi Special Police Establishment, or involved the misappropriation of destruction of, or damage to, Central Government property, or was committed by a Central Government servant in the course of his official duty. We are of the view that in such cases it is desirable that the consent of the Central Government should be obtained before the Public Prosecutor seeks permission of the Court to withdraw from the prosecution. We recommend the insertion of a proviso to that effect in section 494.

38.7. Section 494 may accordingly be revised to read as follows:-

“494.(1) 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, 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 withdraw from the prosecution without



the previous permission of the Central Government.”

10. He submits that in view of the recommendation of the Law Commission Of India the Code Of Criminal Procedure was newly enacted as Cr.P.C., 1973 and Section 494 of the Old Code was substituted by Section 321 of the Cr.P.C., 1973. According to Sri Singh in view of enactment now there is no ambiguity. Section 321 of the Cr.P.C. itself makes it clear that Public Prosecutor who is in charge of a case is only competent to move the court for its consent for withdrawal from prosecution of any person in respect of any offence and as such according to Sri Anil Singh, learned Additional Sessions Judge IV, Patna has incorrectly entertained the petition filed by the Public Prosecutor, Patna who was not in charge of the case ignoring the objection raised by Additional Public Prosecutor who was in charge of the case and prosecuting the case on behalf of the State.

11. Sri Lalit Kishore, learned Advocate General has not disputed the proposition that Public Prosecutor in charge of a case in accordance with law can file a petition for obtaining consent of the court for withdrawal from prosecution of an accused, however he tried to persuade the Court that Public Prosecutor appointed under Section 24 of the New Code is the overall in charge of prosecution in a Sessions Court and he is overall in charge of all



the cases and in that capacity he can withdraw a case from an Additional Public Prosecutor. In support of his submission he has placed reliance on a judgment of Division Bench of Calcutta High Court in a case reported in **1986 CRI. L.J. 1163 The Superintendent and Remembrancer of Legal Affairs, West Bengal v. Monahar Sarkar**. He has referred to paragraph no. 4 of the said judgment. Learned Advocate General in sum and substance has argued that Public Prosecutor appointed under Section 24 of the Cr.P.C. is overall in charge of prosecution in a Sessions Court and as such he can withdraw a case from an Additional Public Prosecutor and in that view of the matter he can also file an application before the court for withdrawal from prosecution.

12. Sri S.D. Yadav, learned Additional Advocate General No. IX has also supported the submission of learned Advocate General however he too has accepted that for filing petition for withdrawal from prosecution under Section 321 of the New Code Public Prosecutor in charge of a case whether he is an Additional Public Prosecutor is competent.

13. Before answering the question which has been referred to this Bench it would be necessary to incorporate both the



provisions i.e. provision relating to withdrawal from prosecution in the Old Code as well as New Code, which are as follows:-

Code of Criminal Procedure, 1898 Section 494

“494. Effect of withdrawal from prosecution. – Any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other case 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.”

Code of Criminal Procedure, 1973 Section 321

“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.”

14. The primary difference in between Section 494 of the Old Code and Section 321 of the New Code is that in the Old Code there was no mentioning of Assistant Public Prosecutor rather only ‘Any Public Prosecutor’ was incorporated for withdrawal from prosecution however in the New Code additionally Assistant Public Prosecutor has been incorporated. Even after inclusion of the word ‘Assistant Public Prosecutor’ the meaning of Public Prosecutor may not be considered to be changed in the New Code from the Old Code. So far present case is concerned in which reference is regarding the authority of Public Prosecutor or Additional Public Prosecutor in respect of withdrawal from prosecution is concerned, it would be necessary to take notice of the provision relating to appointment of Public Prosecutor in the New Code. Section 2 (u) read with Section 24 of the New Code deals with Public Prosecutor and as such it would



be beneficial to quote Section 24 of the New Code as well as the definition of Public Prosecutor in Section 2(u) of the New Code.

“Section 2(u) “Public Prosecutor” means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor;”

“24. Public Prosecutors.- (1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub section (4)

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:



Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purpose of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.”

15. As per definition of Public Prosecutor, Public Prosecutor means a person appointed under Section 24 of the New Code. Sub-section (3) of Section 24 of the New Code makes no difference in between Public Prosecutor and Additional Public Prosecutor for the district. Accordingly if either Section 2(u) or Section 24 of the New Code makes no difference in between Public Prosecutor or Additional Public Prosecutor certainly in a case which is being conducted by Public Prosecutor or Additional



Public Prosecutor the conducting Public Prosecutor or conducting Additional Public Prosecutor would be solely entitled to move an application under Section 321 of the Cr.P.C. in accordance with law. Of- course for approaching the court for withdrawal from prosecution, as settled, the Public Prosecutor or Additional Public Prosecutor is required to examine the matter and with the approval of the concerned Government he can approach the court by way of filing petition for obtaining consent / permission of the court for withdrawal from prosecution of an accused person / accused persons from any offence or all offences, as the case may be. Since in the present proceeding this Court is required to answer as to who would be the competent Prosecutor to withdraw from prosecution, we are not discussing other aspects. The Old Code was substituted by the New Code in the year 1973. The New Code has been enacted in consonance with the Forty-First Report of the Law Commission Of India of September, 1969 which has already been quoted hereinabove. The recommendation of the Law Commission of India which was acted upon by the Parliament clarifies that if a Public Prosecutor is not in charge of a particular case and is not conducting the prosecution, he will not be entitled to ask for withdrawal from prosecution of that case. It further makes it clear that if any Public Prosecutor who has nothing to do



with a particular case is held entitled to file an application for withdrawal from prosecution, the result will be anomalous. The recommendation of the Forty – First Report of the Law Commission of India was virtually incorporated in Section 321 of the New Code save and except minor deviations from the Report. In the New Code under Section 321 entire portion of the recommendation i.e. from the word **“The Public Prosecutor **** he shall not,”** has been incorporated and only a few words i.e. **“withdraw from the prosecution without the previous permission of the Central Government”** was substituted with **“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.”** The words which were substituted from the Report of the Law Commission Of India in Column 38.7 as has been quoted hereinabove were only in relation to offence or offences which was/were against any law relating to a matter to which the executive power of the Union extends, or the case was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act 1946, or involves the



misappropriation or destruction of, or damage to, any property belonging to the Central Government, or 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. In such situation as per Section 321 of the New Code before according consent by the court the concerned court has been imposed with the onus to direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution otherwise the 41st Report of the Law Commission Of India as incorporated in Column 38.7 has entirely been incorporated in Section 321 of the Cr.P.C. Now in the New Code under Section 321 of the Cr.P.C. after the word Public Prosecutor, Assistant Public Prosecutor has been incorporated. Assistant Public Prosecutor has been incorporated with a view that in a case which is being prosecuted by Assistant Public Prosecutor appointed under Section 25 of the New Code for conducting prosecution in the courts of Magistrates the word 'Assistant Public Prosecutor' has been added in the New Code. Regarding the authority of the Public Prosecutor in a case of withdrawal from prosecution Constitution Bench of the Hon'ble Supreme Court in Surjit Singh Case (Supra) has already held that only in charge Public Prosecutor is authorized to move for withdrawal from



prosecution. It would be appropriate to quote paragraph no. 30 and 31 of Surjit Singh Case (Supra), which is as follows:-

“(30) In our opinion, the Public Prosecutor, who can file an application under S. 494 of the Code, must be the Public Prosecutor who is already in charge of the particular case in which that application is filed. We are not inclined to accept the contention of the learned counsel for the appellant that the expression ‘the Public Prosecutor’ in S. 494 is to be understood as referring to any person who is a Public Prosecutor, whether he is a Public Prosecutor appointed generally, under S. 492(1) or for the purpose of a particular case, as contemplated under S. 492(2) of the Code. Section 492 only deals with the appointment of Public Prosecutors by the Government or by the District Magistrate, in circumstances mentioned therein and S. 493 specifically refers to the Public Prosecutor who is in charge of the case which is under enquiry, trial or appeal, when appearing and pleading before such Court. Section 493 only dispenses with the Public Prosecutor having to file any written authority. That section also makes it clear that if any private person is instructing a pleader to prosecute any person ‘in any such case’- which must have reference to the case of which the Public Prosecutor is incharge – nevertheless, the Public Prosecutor shall conduct the prosecution and the pleader is to act under his directions. Section 494 also, in our opinion, must refer only to the Public Prosecutor who is in charge of the particular case in which he makes a request to withdraw from the prosecution. Some of these aspects have been already adverted to by us earlier. If any Public Prosecutor, who had nothing to do with a particular case, is held entitled to file an application under S. 494, in our opinion, the result will be very anomalous. For instance, if there are two Public Prosecutors appointed for a particular Court, and one of the Public Prosecutor is conducting the prosecution in a particular case, and desires to go on with the proceedings, it will be open to the other Public Prosecutor to ask for withdrawal from the prosecution. Similarly, a



Public Prosecutor appointed for case A, before a particular Court, can, by virtue of his being a Public Prosecutor, file an application in case B, with which he has nothing to do, and ask for permission of the Court to withdraw from the prosecution.

(31) The reasonable interpretation to be placed upon S. 494, in our opinion, is that it is only the Public Prosecutor, who is in charge of a particular case and is actually conducting the prosecution, that can file an application under that section, seeking permission to withdraw from the prosecution. If a Public Prosecutor is not in charge of a particular case and is not conducting the prosecution, he will not be entitled to ask for withdrawal from prosecution, under S. 494 of the Code.”

16. The Division Bench before referring the matter to larger Bench had taken notice of a judgment of the Hon'ble Supreme Court in a case reported in **AIR 1983 SUPREME COURT 194 Sheonandan Paswan v. State of Bihar and others.** However, after going through the judgment in Sheonandan Paswan Case [**AIR 1983 SUPREME COURT 194**] it is evident that in the said case on the date of filing of petition under Section 321 of the Cr.P.C. Public Prosecutor who had filed the petition, was in charge of the case and conducting the trial before the court below whereas in the present case the trial was being conducted before the court of Sessions by Sri Ram Khelawan Singh, learned Additional Public Prosecutor who had filed objection petition to the petition filed by Sri Ram Dayal Prasad, learned Public Prosecutor, Patna and as such there is no need to deal with



Sheonandan Paswan Case [AIR 1983 SUPREME COURT 194] in detail. However, in this context it would be necessary to refer paragraph no. 52 of Sheonandan Paswan Case [AIR 1983 SUPREME COURT 194] which is as follows:-

“52. The next question is whether Shri L.P. Sinha was in charge of the case as required by Sec. 321 of the Code. Shri L.P. Sinha was entrusted with, and put in charge of, the case is question, namely, Vigilance Case No. 9 (2) 78, vide Letter No. 1829 dated 25th February, 1981. The relevant portion of the letter read:

“Letter No. 1829

**Bihar Government,
Cabinet (Vigilance) Department.**

From

Shri Shiwajee Sinha,

Special Secretary to Government

To

**Shri Lallan Prasad Sinha, Advocate,
Sharda Sadan, Sendpur, Nala Road, Patna
Patna, dated 25th February, 1981**

**Subject: Panel of Advocates for –
cases pertaining to Vigilance Dept.**

Sir,

You have also been appointed as Panel Lawyer relating to the above subject vide letter No. 1943 dated 24-2-1981 of the Law Department. In may cases, charge – sheets have been submitted in the Court of Chief Judicial Magistrate – cum-Special Judge. Out of these cases the following cases are allotted to you to work for the prosecution:

- 1. Vigilance P.S. Case No. 9 (2) 78
2 to 5.....**

Please take necessary action for the prosecution in the cases on being acquainted with the present position from the court.

**Yours faithfully,
Sd/- Shivaji Sinha
25-2-1981**



**Special Secretary to Government.”
(Emphasis added)**

Shri L.P. Sinha had been appointed a Government counsel on 24-2-1981 to conduct vigilance cases as stated above. The application for withdrawal was made by him on 17-6-1981 – more than four months later. After having been appointed Public Prosecutor, and having been put in charge of the Vigilance P.S. Case No. 9 (2) 78 , he appeared in the case on seven dates, namely, 6-4-1981, 21-4-1981, 27-4-1981, 26-5-1981, 3-6-1981, 19-6-1981 and 20-6-1981. It has been stated in the affidavit filed by the Secretary, Law Department of the State of Bihar that the order disclosed that “ no one else appeared for the prosecution” except Shri L.P. Sinha. There is nothing on record to show whether in fact Shri A.K. Datta did at all accept the appointment as a Public Prosecutor. The record does not show that he took any steps at all in the case. Shri L.P. Sinha could not have appeared on seven different dates during the course of 3 ½ months and taken steps in its had he (A.K. Datta) been in charge of the case. The learned Special Judge also has found as a fact in his judgment that the application under Section 321 of the Code was made “ by Shri Lallan Prasad Sinha, Special Public Prosecutor, in charge of this case” (Emphasis added). There is, therefore, absolutely no doubt that at the relevant time Shri L.P. Sinha was in charge of the case, and not Shri A.K. Datta, as submitted by the appellant. Shri L.P. Sinha was both de jure and de facto Public Prosecutor in the case.

It was factually wrong that Shri L.P. Sinha was appointed only to withdraw the case, as submitted by appellant’s counsel. Even if he were, there was nothing illegal in it (also see AIR 1931 Cal 607). If Shri L.P. Sinha fulfilled the two conditions as required by Sec. 321 of the Code, namely, that (i) he was a Public Prosecutor and (ii) was in charge of the case, he was



competent to apply for withdrawal of the case, even if he were appointed for that purpose only.”

This proposition has further been clarified by the Constitution Bench of the Hon'ble Apex court in respect of the same appellant i.e. Sheo Nandan Paswan reported in **AIR 1987 SUPREME COURT 877** and paragraph no. 69 of the said judgment which is quoted hereinbelow clarified the position.

“69.The old Code contained a section which enabled the Advocate General to inform the High Court before which a case is pending at any stage before the return of the verdict that he will not further prosecute the defendant upon the charge. This was S. 333, Cr.P.C. The discretion of the Advocate General under this Section was absolute. It was not subject to any control. When the Advocate General informs the High Court that he does not propose to proceed with the prosecution, the Court has no alternative but to stay all proceedings and to act in accordance with that section. That section has now been deleted from the Code. Public Prosecutors are lesser mortals and therefore the discretion given to them by S. 321 is less plenary and is made subject to one limitation and that is the consent of the Court before which the prosecution is pending.

Section 333, which was deleted consequent on the discontinuance of original criminal trials in the High Court, has still a bearing, while considering the scope of S. 321 corresponding to S. 494 of the earlier Code and a comparative study of the



two sections and their scope will be appropriate. Both the sections pertain to withdrawal of prosecutions though at different level. A harmonious view should, in my view, prevail in the reading of the two sections. Section 333 does not give any discretion or choice to the High Court when a motion is made under it. Such being the case, S. 321 must also be construed as conferring powers within circumscribed limits to the Court to refuse to grant permission to the public prosecutor to withdraw the prosecution. If such a harmonious view is not taken it would then lead to the anomalous position that while S. 333, a High Court has to yield helplessly to the representation of the Advocate General and stop the proceedings and discharge or acquit the accused, the subordinate courts when moved under S. 321, Cr.P.C. would have a power to refuse to give consent for withdrawal of the prosecution if it is of opinion that the case did not suffer from paucity of evidence. The legislature would not have intended to confer greater powers on the subordinate courts than on the High Court in the exercise of powers under S. 494 of the old Code and S. 333 respectively. It would, therefore, be just and reasonable to hold that while conferring powers upon the subordinate courts under S. 494 to give consent to a public prosecutor withdrawing the prosecution, the legislature had only intended that the courts should perform a supervisory function and not an adjudicatory function in the legal sense of the term.

Section 321 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.”

(Proviso omitted)

This Section enables the Public Prosecutor, in charge of the case to withdraw from the prosecution of any person at any time before the judgment is pronounced, but this application for withdrawal has to get the consent of the Court and if the Court gives consent for such withdrawal the accused will be discharged if no charge has been framed or acquitted if charge has been framed or where no such charge is required to be framed. It clothes the public prosecutor to withdraw from the prosecution of any person, accused of an offence both when no evidence is taken or even if entire evidence has been taken. The outer limit for the exercise of this power is “at any time before the judgment is pronounced.”

The same view has recently been taken by the Hon’ble Apex Court in (2014) 10 Supreme Court Cases 380 BAIRAM MURALIDHAR *Versus* STATE OF ANDHRA PRADESH.



17. So far reliance placed by learned Advocate General on Monahar Sarkar Case (Supra) is concerned, on going through paragraph no. 4 of the said judgment it is evident that though the Calcutta High Court had noticed the submission in respect of the authority of the Public Prosecutor the same was not addressed by it since there was no occasion for such discussion in the said case. Moreover on going through paragraph no. 4 of the aforesaid judgment it appears that argument was advanced regarding the jurisdiction of Public Prosecutor and Assistant Public Prosecutor and as such we do not find any relevance of the said case while adjudicating the present matter.

18. The view which has been expressed by the Constitution Bench of the Hon'ble Supreme Court till date has not been altered by a larger Bench of the Hon'ble Supreme Court and as such the said law is having its binding effect. In view of discussion in the Forty – First Report of the Law Commission of India in Column 38.5 to 38.7 and law laid down by the Hon'ble Supreme Court in Surjit Singh Case (Supra) there is no reason to record any different finding than to record that Public Prosecutor in charge of a case is only entitled to move a court for its permission for withdrawal from prosecution of an accused from an offence or any offences.



19. Accordingly the term of reference is answered that- in a case pending before the court of Sessions the Public Prosecutor in charge of a case, whether he is an Additional Public Prosecutor is only entitled to approach the court for withdrawal from prosecution. In view of the proposition that Public Prosecutor in charge of a case is only entitled to file a petition for withdrawal from prosecution under Section 321 of the New Code, the order impugned i.e. order dated 03.06.1980 passed by Shri L.P.N. Shah Deo, learned Additional Sessions Judge IV, Patna in Sessions Trial No. 72 of 1974 arising out of Mokamah P.S. Case No. 22 (9) 70 may not be termed as valid order since before the court below petition under Section 321 of the New Code was filed by a Public Prosecutor who was not in charge nor conducting the case before the court below. The case was being conducted by Sri Ram Khelawan Singh, learned Additional Public Prosecutor whereas petition under Section 321 was filed by Shri Ram Dayal Prasad, learned Public Prosecutor, Patna. Till the date of passing of the impugned order Shri Ram Khelawan Singh, learned Additional Public Prosecutor was in charge of the case and as such learned trial judge was not required to take notice of the petition filed by the Public Prosecutor, Patna who was not in charge of the case.



20. Of-course this Court was only required to answer the reference, but considering the fact that present Criminal Revision was filed in the year 1980 it would not be appropriate to remit back the matter to learned Single Judge for deciding the case. Accordingly, it is desirable to interfere with the impugned order and as such the order dated 03.06.1980 passed by Sri L.P.N. Shah Deo, learned 4th Additional Sessions Judge, Patna in Sessions Trial No. 72 of 1974 arising out of Mokamah P.S. Case No. 22 (9) 70 is hereby set aside. The Revision petition is allowed.

(Rakesh Kumar, J)

Aditya Kumar Trivedi, J: **I agree.**

(Aditya Kumar Trivedi, J)

Sudhir Singh, J: **I agree.**

(Sudhir Singh, J)

praful/-

AFR/NAFR	AFR
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