

P L D 1977 Supreme Court 451

Present : Anwarul Haq and Muhammad Haleem, JJ

MIR HASSAN-Appellant

versus

TARIQ SAEED AND 2 others-Respondents

Criminal Appeal No. K-3 of 1977, decided on 4th February 1977.

(On appeal from the judgment and order of the High Court of Sind & Baluchistan made on 25-10-1976 in Cr. Revision No. 99 of 1976).

(a) Criminal Procedure Code (V of 1898)--

- S. 494-Withdrawal from prosecution-Section 494 very widely worded and not indicative of any principle or guideline for grant or refusal of consent of Court-Order of acquittal or discharge passed under section consequent upon withdrawal of Public Prosecutor from prosecution with consent of Court-A judicial order liable to revision by High Court when direction improperly or arbitrarily exercised by Court.

The King v. Parmarand A I R 1949 Pat. 222 ; The King v. Mould Buz A I R 1949 Pat. 233 ; Rajni Kanti Shaha v. Idrees Thaukar -I L R 48 Cal. 1105 ; State of Bihar v. Ram Naresh Pandey P L D 1957 S C (Ind.) 361 Awaz Gul v. Habib Khan P L D 1959 Pesh. 186 and State v. Ensab Ali 1969 P Cr. L J 320 ref.

(b) Criminal Procedure Code (V of 1898)-

--- S. 494-Withdrawal from prosecution-Exercise of discretion to give or refuse permission to withdraw from prosecution-Need not be deferred till trial Court records all available evidence-Discretion in such regard, held, exerciseable on basis of available material, even though evidence not judicially recorded.

(c) Criminal Procedure Code (V of 1898)-

--- S. 494-Withdrawal from prosecution-Matters to be determined for purpose of giving consent. What the Court has to determine in such a case, for the purpose of giving consent, is whether the general executive discretion given by law to the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for reasons not related to the public interest.

(d) Criminal Procedure Code (V of 1898)--

S. 494-Withdrawal from prosecution-Possible grounds for withdrawal and function of Court in such regard.

The application for withdrawal can be made on many possible grounds which may include the inexpediency of prosecution on grounds of public policy or in the interest of public peace, or the undesirability of permitting the prosecution to continue where there is insufficient or meagre evidence to justify a conviction The discretionary power having been vested in the public prosecutor by the statute, the Court acts, so to say, in a supervisory capacity, to see that the power is not abused in any manner or exercised arbitrarily and contrary to the public interest so as to amount to an interference with the ordinary course of justice. The Court must, therefore, satisfy itself that there do exist on the record grounds to sustain the reasons advanced by the public prosecutor for his withdrawal from the prosecution. It is clear that this supervisory function of the Court can be exercised only on a consideration of all the facts and circumstances of the case available to the Court, and not in disregard of any material factor or circumstance having a bearing on the issue. At the same time, it is also clear that in undertaking this exercise the Court cannot embark upon the kind of detailed analysis of the evidence which can

appropriately be undertaken only at the conclusion of a judicial trial. Any such attempt would amount to throttling the prosecution or interfering with the ordinary course of justice.

(e) Criminal Procedure Code (V of 1898)-

-- S. 494-Withdrawal from prosecution-Application for withdrawal from prosecution not made on any ground of public policy or public peace and interest but merely on grounds directly related to detailed appreciation of evidence-Application, held, in facts and circumstances of case tantamounted to an attempt to throttle prosecution and to interfere with ordinary course of justice-Real question involved being whether prosecution witnesses were mostly of credit and whether circumstances existed for benefit of respondents, such question, held, could only be determined by a proper trial and such function of trial Court could not be allowed to be pre-empted at a preliminary stage by making application for withdrawal from prosecution.

The application for withdrawal from prosecution has not been made in this case on any ground of public policy or public peace and interest, but merely on grounds which are directly related to the detailed appreciation of evidence, namely, that the only role assigned to accused respondent is one of instigation, while no overt act has been alleged against other accused respondent that the incident having occurred owing to enmity between the parties, it was not shown whether accused respondents were in any manner connected with the two opposing factions, that the number of the jeep in which the assailants are said to have arrived at the spot showed that the vehicle was not a jeep but a Toyota Car, that there was political rivalry between that two respondents and the appellant that respectable witnesses in the locality have supported the alibi of the two respondents, and that one person had categorically stated that the two respondents were not members of the unlawful assembly which had assaulted the deceased. Counsel for the appellant, submitted that this is precisely the kind of exercise which is not to be undertaken for the purpose of deciding whether consent to the withdrawal application should be accorded or not on the ground that there was insufficient or meagre evidence to sustain the prosecution. It was submitted that in this case the first information report was lodged promptly within fifteen minutes of the occurrence, that the two respondents were positively named as being among the assailants, and that the leading role of instigators was assigned to second respondent. It was also pointed out that during the investigation of the case seven eye-witnesses had supported the prosecution version, and accordingly this was eminently a case in which it should have been left to the trial Court to decide whether the prosecution evidence was worthy of credit or not.

Held : In the facts and circumstances of the case the application made by the Public Prosecutor for his withdraws' from the prosecution of the two respondents did amount to an attempt to throttle the prosecution and to interfere with the ordinary course of justice. This is not at all a case where there is no evidence against these respondents such as could sustain a conviction. The real question in the case is whether the prosecution witnesses are worthy of credit and whether there are circumstances the benefit of which should go to respondents. These are questions which can only be determined by a proper trial and this function of the trial Court cannot be permitted to be pre-empted at a preliminary stage by an application of the kind made in this case by the Public Prosecutor.

Abdul Wahab Khan for Appellant.

M. Hayat Junejo, Senior Advocate and M. I. Memon, Advocate-on. Record for Respondents Nos. 1 and 2.

A. X. Lakho, Addl. Advocate-General (Sind) for the State.

Date of hearing : 1st February 1977.