

Withdrawal of Prosecution : An Analysis of Law and Safeguards

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The Word Prosecution owes its genesis to the Latin word *prōsecūtus*, meaning escorted or accompanied. In our criminal justice system, the public prosecution plays a key role in the dispensation of justice. Ensuring a larger public good is a principal consideration in the conduct of prosecution. The State certainly has a vested interest in the proper conduct of its prosecutions and in the process of furthering criminal justice, it is imperative that the guilty is convicted and the innocents are acquitted.

“Withdrawal of Prosecution” is certainly is a much talked about topic in the present times, necessitating a discussion and deliberation on the issue at hand, for a better understanding of the layman, the law students, the academicians, and certainly, the lawyers, on the power of the State Governments and the corresponding responsibilities of a public prosecutor to withdraw from prosecution of an offender.

The decision whether or not to prosecute an individual or entity is a crucial decision mandating that such decision must only be taken after a prosecutor has fully evaluated the evidence and circumstances, and taken care to answer two questions in particular:-

- i. Is the evidence sufficient to justify instituting or continuing proceedings?
- ii. If it indeed is, does the public interest require a prosecution to be pursued?

Openness and accountability, together with principled professionalism and independence, are the key objectives of a public prosecutor in the pursuit of justice.

Statutory / Legal Provision:

Keeping in mind the obligation of the State Government to secure public justice, we need to examine, evaluate and understand the provisions of Section 321 Cr.P.C. as amended in the State of U.P. The same reads as under:-

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 offence where such -

- (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.

STATE AMENDMENT

Uttar Pradesh:

In Section 321, after the words "in charge of a case may", insert the words "on the written permission of the State Government to that effect (which shall be filed in Court). [Vide Uttar Pradesh Act 18 of 1991, sec. 3 (w.e.f. 16-2-1991)]"

Section 321 of Cr.P.C. 1973, it is evident, deals with the power of Public Prosecutor/Assistant Public Prosecutor to withdraw case of which he is in-charge after obtaining **written permission** from the State Government and that permission is required to be filed in the Court. The power of withdrawal can be invoked by the Public Prosecutor/Assistant Public Prosecutor, in-charge of the case when same is made:-

- a. **in good faith,**
- b. **in the interest of public policy and justice and**
- c. **Not to thwart or stifle the process of law.**

At this juncture, it is important to note that Section 321 Cr.P.C. uses the phrase '**withdrawal from prosecution**' and not '**withdrawal of prosecution**' the effect being that when prosecution is instituted for **one or more offences against one or more persons**, the Public Prosecutor may at any time before the judgement, file an application to withdraw from Prosecution, i.e. withdrawal of one or more offences against one or all persons. If the phrase used was 'withdrawal of Prosecution' that would have necessarily meant the closure of case.

In this backdrop, we need to deliberate on the most important issue- relating to the powers of a democratically elected government, to order withdrawal of cases. We therefore need to understand the validity and propriety of such decisions, covering the following major parameters:-

1. Whether the power of withdrawal can be exercised by State Government under Section 321 of Code of Criminal Procedure in a **whimsical or arbitrary manner** or it is required to be exercised for the considerations, just, valid and judicially tenable?
2. Whether the decision taken by State Government for withdrawal of cases communicated to Public Prosecutor with direction to proceed ahead is **open to judicial review or not** in a writ jurisdiction under Article 226 of the Constitution of India?
3. Whether State Government be not required to make **scrutiny of various criminal cases pending in the Subordinate Courts** to find out if they deserve withdrawal in exercise of powers under Section 321 Cr.P.C. irrespective of fact that accused or

anyone else has approached the government for this purpose or not? "

It is an admitted legal position that any criminal offence is one against the society at large casting an onerous responsibility on the State, as the guardian and purveyor of human rights and protector of law to discharge its sacrosanct role responsibly and committedly, always accountable to the law-abiding citizenry for any lapse¹

There are situations which are relevantly in the comprehension of the Government and the Government is competent to decide the need for withdrawal and pass instructions to prosecutor. For instance, prosecutions may have arisen out of mass agitations, communal riots, regional disputes, industrial conflicts, student unrest etc. To restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the calm which may follow the storm, the Government may think it fit to withdraw cases since persistence to prosecute in the name of vindication of law may be utterly counterproductive.

A sensitive and responsive government is competent to decide whether it is baneful or beneficial to continue the prosecutions. In such cases, the initiative comes from the Government since large and sensitive issues of public policy are involved. In those type of situations, the Public Prosecutor with his limited resources and sources of information may not be in a position to take initiative. Once the court is satisfied it gives its consent for withdrawal.

Judicial Interpretations:

The Hon'ble Supreme Court, in the celebrated case of **Sheonandan Paswan versus State of Bihar**², has ruled that ultimate decision to withdraw from the prosecution should be of Public Prosecutor. Before an application is moved under Section 321, the Public Prosecutor has to apply his independent mind to the facts of the case without being subject to any outside influence. The government may make suggestion but cannot compel the Public Prosecutor. The Public Prosecutor may receive any instruction from the government but it is not necessary for him to abide by it. The Public Prosecutor has to apply his own independent mind before moving the application under Section 321 Cr.P.C. Public Prosecutor has a right to disagree with the government instruction and may refuse to move application for withdrawal of prosecution. The said judgment also laid down that while considering the

application moved by the Public Prosecutor, the court has to see that the application is made in good faith in the interest of public policy and justice and not to thwart or stifle the process of law or suffers from such improprieties or illegalities as to cause manifest injustice if consent is given by the court. The majority of Judges in the aforementioned case cited the following parameters for seeking withdrawal from prosecution:-

1. Lack of prospect of successful prosecution in the light of evidence,
2. Implication of persons as a result of political and personal vendetta,
3. Inexpediency of the prosecution for reasons of State and public policy, and
4. Adverse effects that the continuance of the prosecution will bring to the public interest in the light of the changed situation.

In the case of **State of Andhra Pradesh versus P. Anjaneyulu³, N. Natarajan versus B.K. Subba Rao⁴**, the aforesaid legal propositions have been reiterated.

It may also be relevant to point out that in another case of **State of Punjab versus Union of India⁵**, the Hon'ble Supreme Court ruled that it was the duty of the Court, while granting permission to the Public Prosecutor to withdraw from prosecution, to satisfy itself **that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. The administration of justice is the touch stone on which the question must be determined whether the prosecution should be allowed to withdraw.** Not only the material or paucity of evidence but broad ends of public justice including appropriate socio economic conditions may be ground to move withdrawal application.

In the case of **Abdul Karim versus State of Karnataka⁶**, Apex Court reiterated the principle emerging from Sheonandan Paswan (supra) and held that the Public Prosecutor may move application on the basis of the material provided by the State. It was further held that that an application under Section 321 Cr.P.C. could not be allowed **only** on the ground that the State Government had taken a decision for withdrawing the prosecution and such an order could only be passed after examining the facts and circumstances of the case. What the Court has to see is as to whether the application has been made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The Court, after considering

the facts of the case, is required to see whether the application suffers from such improprieties or illegalities as would cause manifest injustice, if consent was given.

In **Jasbir Singh versus Vipin Kumar Jaggi**⁷, the Hon'ble Supreme Court held that the provision contained in Section 321 Cr.P.C. is different than the power conferred by Section 307 of the Code. Unlike grant of pardon under Section 307, withdrawal from prosecution under Section 321 is unconditional though it requires express permission of the Central Government in specified cases.

In the case of **Rajender Kumar Vs. State through Special Police Establishment**⁸, the Supreme Court has held that “It shall be the duty of the Public Prosecutor to inform the grounds for withdrawal to the Court and it shall be the duty of the Court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The Court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its ‘Minister of Justice’. Both have a duty to protect the administration of Criminal justice against possible abuse or misuse by the Executive by resort to the provision of Section 321, Cr.P.C. The independence of the judiciary requires that once the case has travelled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case.”

Again, in the case of **S.K. Shukla versus State of U.P.**⁹, the Apex Court ruled that the Public Prosecutor cannot work like a post boy or act on the dictates of the State Govt. He has to act objectively as he is also an officer of the court. The court has to assess freely whether a case is made out for withdrawal of prosecution or not. It is always open for the court to reject the prayer.

In the case of **Mahmadhusen Abdulrahim Kalota Shaikh**¹⁰, the Hon'ble Supreme Court held that Section 321 Cr.P.C. is a **codified version of judicial review**. It ensures that the judiciary makes the final decision by approving or disapproving the decision of Public Prosecutor. In the matter concerning judiciary, the judiciary should have final say over the cases that have been placed before it. It goes without saying that the courts' decision to grant consent to an application for withdrawal is a judicial function. The final decision rests with the Judge.

In **Rahul Agarwal versus Rakesh Jain and another**¹¹, the Hon'ble Supreme Court considered when an application under Section 321 Cr.P.C. may be allowed. It was held by the Hon'ble Supreme Court that it may be permitted when valid reasons are made out for the same and it can be allowed only in the interest of justice. It shall be obligatory for the court to consider all relevant circumstances and find out whether the withdrawal of prosecution advances the cause of justice. Discretion under Section 321 should not be exercised to stifle the prosecution. **Withdrawal can be permitted if the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused or to bring out harmony between the parties.** In the facts of that case, their Lordships found that it was not proper for the High Court to have allowed the withdrawal application. While reiterating the settled proposition of law, it was held as under :-

"10. From these decisions as well as other decisions on the same question, the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal of prosecution. The discretion under Section 321 Code of Criminal Procedure is to be carefully exercised by the Court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the State for redressing their grievance. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished. Punishing the person who perpetrated the crime is an essential requirement for the maintenance of law and order and peace in the society. Therefore, the withdrawal of the prosecution shall be permitted only when valid reasons are made out for the same."

In **Ghanshyam versus State of M.P and others**¹², while reiterating the earlier view (supra) that the discretion to withdraw from prosecution vests in Public Prosecutor and none else, Apex Court held that the Public Prosecutor cannot surrender that discretion to anyone. He

may withdraw prosecution not merely on the basis of paucity of evidence but all other relevant factors as well in order to further the broad ends of justice, public order, peace and tranquility. Their Lordships of Apex Court declined to interfere with the order passed for withdrawal of case under Section 321 Cr.P.C. since the order was challenged after lapse of almost fifteen years.

Very recently, the Hon'ble Supreme Court in the case of **Bairam Murlidhar Vs. State of Andhra Pradesh**¹³, has taken a view that Public Prosecutor is duty bound to apply his mind to the material on record and form independent opinion that withdrawal would really subserve public interest at large and the order of Government in this regard is not binding upon Public Prosecutor. Public Prosecutor is obligated to disclose as to what material he has considered to come to the conclusion that withdrawal of prosecution would serve public interest. On application coming before the Court, the Court is required to see whether grant of consent would thwart or stifle the cause of law or cause manifest injustice. Judicial discretion is to be exercised carefully having regard to relevant facts, not to be exercised to stifle prosecution and not to be exercised mechanically. An order of the Government in this regard is not binding on the Public Prosecutor. A court while giving consent under S. 321 is required to exercise its judicial discretion, which is not to be exercised in a mechanical manner. Court must consider the material on record to see that the application had been filed in good faith and it is in interests of the public and justice.

Views to the similar effect have been expressed in the case of *M/s. VLS Finance Vs. S.P. Gupta*¹⁴

Gist of the Judicial Interpretations:

From the judgments that have been quoted above and the view point of the Hon'ble Supreme Court, it is clearly reflected that under the scheme of things provided for, that:-

- a. The Public Prosecutor/Assistant Public Prosecutor on his own can proceed to move an application for withdrawal of criminal case and for that has to take consent of the State Government.
- b. When the Public Prosecutor/Assistant Public Prosecutor, proceeds to move an application, he has to act objectively being an Officer of the Court and has to see and ensure that the move that is being mooted by him is in the interest of advancing cause

of justice.

- c. The Public Prosecutor will have to rise to the occasion and will have to act independently, courageously and not simply surrender his discretion.
- d. The authority conferred on Public Prosecutor to take independent decision is not negotiable and cannot be bartered away in favour of those who may be above him on the administrative side as the Public Prosecutor is obligated to be guided by law and spirit of Code of Criminal Procedure only and ensure that his opinion is not used otherwise.
- e. A duty has also been fastened on Court to check the abuse or misuse by the executive of the provisions of Section 321 of the Criminal Procedure Code. The Court is thus obligated to record a finding that the application moved by the Public Prosecutor is in the interest of justice and there is no abuse or misuse of the authority of Public Prosecutor or the Government.
- f. When a Court proceeds to allow an application for withdrawal its order must record a finding that the application has been moved in good faith to secure the interest of justice and not for advancing/promoting personal interest. The Court should deal with the matter with free, fair and independent exercise of mind in the interest of public policy/public good.
- g. The provisions of Section 321 Cr.P.C. exist on statute book with all checks and balances with defined role to be played by Public Prosecutor; the State and the Court. Prosecution of an alleged offender is primarily the responsibility of State which through investigating authorities file charge-sheet and initiates prosecution.
- h. The power to withdraw prosecution is, therefore, an exception to the general obligation of the State to discover, vindicate and establish truth before a Court of Law in furtherance of Criminal Justice System. Crimes being public wrong arising from breach and violation of public rights and duties, affecting the whole community, are not to be tolerated by the State.
- i. Concept of fair trial entails balancing the interest of the accused, the victim, society and the community with the help of the agencies of State.

Victim's Request for withdrawal of prosecution:

In a State prosecution, the victim cannot seek withdrawal from prosecution. This principle is in harmony with the general rule for public prosecutions. In our country, the public

prosecution of cognizable offences is not dependant on the consent of the victim for prosecution of offenders. The State has right to initiate prosecution irrespective of the willingness of the victim of crime. Any person can notify to police about the crime and the police is competent to investigate and the prosecutor is competent to pursue the prosecution. The reason underlying this principle is that notionally, it is the society and the State which are aggrieved of a crime, though the injury is to the person or property of an individual. Therefore, while the prosecutor is holding a case, it is theoretically impermissible to allow a private person, to seek for withdrawal. However, if the public prosecution is withdrawn by the Public Prosecutor against the wishes of the victim, the aggrieved victim can challenge the decision while the prosecutor's application is pending for consideration of the court or alternatively, can file a revision if the lower court allowed the prosecutor's application. Besides that, the aggrieved person can launch private prosecution against the accused after the court allowed the Public Prosecutor's withdrawal from prosecution

Power of Judicial Review:

It is a well-known principle of law that if the nature of the order is statutory and is an executive function, can same be subjected to judicial review. The content and scope of the power under Article 226 of the Constitution of India has fallen for scrutiny in the case of **State of West Bengal & others Vs. Committee for Protection of Democratic Rights¹⁵**, wherein the Hon'ble Supreme Court has ruled that no act of Parliament could exclude or curtail the power of Constitutional Courts. The power of judicial review is an integral part of the basic structure of Constitution. It was underlined that the same was essential to give pragmatic content to the objectives of Constitution embodied in Part III and other parts. In elaboration it was also held that Article 21 of the Constitution not only takes within its fold, the enforcement of the rights of accused but also the rights of the victim.

State and all its functionaries are duty bound to act fairly and reasonably in discharge of their official functions independently without external pressure. Powers conferred upon High Court under Article 226 are discretionary in nature which can be invoked for enforcement of any fundamental right or legal right.

The rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion as per the Apex Court in the case of **M.P. State Agro Industries Corporation Vs. Jahan Khan¹⁶**, and in appropriate case, in spite of

availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review in at least three contingencies namely:

- (I) where the writ petition seeks enforcement of any of fundamental rights
- (II) where there is failure of natural justice and
- (III) Where the orders or proceeding are totally without jurisdiction or the vires of the Act is challenged.

The Hon'ble Supreme Court in the case of **Radhey Shyam and another Vs. Chabi Nath and others**¹⁷ has taken note of the fact that language used in Article 32 and 226 of Constitution is very wide and the powers of the Supreme Court as well as the High Court in India extends to issuing or orders, writs or direction including writ in the nature of 'habeas corpus, mandamus, quo warranto, prohibition and certiorari,' as may be considered necessary, for enforcement of fundamental rights and in case of High Courts, for other purposes as well.

Opposition by third-party in case of improper withdrawal:

Any private individual can oppose the application for withdrawal from prosecution and it cannot be discounted on grounds of locus standi. In case of Sheo Nandan Paswan Vs. State of Bihar (supra) the Hon'ble Supreme Court has held that since a citizen can lodge an FIR or file a complaint and set machinery of Criminal law in motion, any member of society must have locus standi to oppose withdrawal. Particularly the offences of corruption and criminal breach of trust, being offences against society, any citizen, who is interested in cleanliness of administration, is entitled to oppose application for withdrawal of prosecution.

A Leading case on this point is the case of **V.S. Atchulthanandan v. R. Balakrishna Pillai**¹⁹ where the Hon'ble Supreme Court allowed the petition of a third party to annul the High Court's order permitting withdrawal of prosecution against the respondent. It was with the active support of the state government that the prosecution against the respondent, a former minister, was permitted to be withdrawn. The opposition leader challenged this order in the Supreme Court. The court accepted his plea and set aside the order.

Conclusion:

In the background of the provisions, that have been quoted above, and various judicial pronouncement, that have been noted above , the law on this point can be summarized as under:-

1. State Government is not at all free to exercise its authority under Section 321 Cr.P.C. in whimsical or arbitrary manner or for extraneous considerations apart from just and valid reasons.
2. The decision taken by the State Government for withdrawal of the case communicated to the Public Prosecutor is open to judicial review under Article 226 of the Constitution of India on the same parameters as are prescribed for invoking the authority of judicial review.
3. The State Government is free to act under the parameters provided for to make scrutiny of criminal cases pending in subordinate courts to find out as to whether they deserve withdrawal under Section 321 Cr.P.C. or not as it is in the realm of the policy decision, and call on the said score has to be taken by the State Government and same has to be based on the parameters required to be observed while moving an application for withdrawal of prosecution under Section 321 Cr.P.C.

Bibliography

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