

WITHDRAWAL FROM PROSECUTION **(Section 321 of the Cr.P.C.)**

Ashutosh Kumar Misra*

In criminology, an offence done by a person is never against any particular individual but against the whole society (state). Therefore in the criminal matters, the state itself is a party. The prosecution of criminal cases is conducted by the Public Prosecutor. Section 321 of the Criminal Procedure Code enables the Public Prosecutor or the Assistant Public Prosecutor to 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. For doing so, consent of the Court is necessary.

Section 321, Cr.P.C. corresponds to section 494 of the Old Code except that a proviso has been newly added. The proviso lays down that consent of the Central Government should be obtained before a Public Prosecutor moves the Court for the withdrawal from prosecution, whenever the offence relates to a matter to which the executive power of the Union extends or was investigated by the Special Police Establishment or involves misappropriation, destruction or damage to Central Government property or is committed by a Central Government Servant.

The object of Section 321, Cr.P.C. appears to reserve power with the executive Government to withdraw any criminal case on longer grounds of public policy such as inexpediency of prosecutions for reasons of State, broader public interest like maintenance of law and order, maintenance of public peace and harmony, changed social, economic and political situation.

It is important to observe that Section 321 Cr.P.C. uses the phrase 'withdrawal from prosecution' and not 'withdrawal of prosecution' the effect being that when prosecution 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.

* Civil Judge (Sr. Div.), Dehradun

Scope, applicability and grounds:

Section 321 of the Code gives a general executive discretion to the Public Prosecutor or the Assistant Public Prosecutor to withdraw from the prosecution, subject to the consent of the Court. The consent, if granted, has to be followed up by discharge or acquittal of the accused as the case may be. If withdrawal is made before a charge had been framed, the accused shall be discharged in respect of such offence or offences and if such withdrawal is made after a charge has been framed, or when under the Code no charge is required, the accused shall be acquitted in respect of such offence. But this Section gives no indication as to the grounds on which the Public Prosecutor may move the application or the consideration on which the Court is to grant its consent. In granting consent the Court must exercise judicial discretion. In the case *Sheo Nandan Paswan Vs. State of Bihar and others (1983) 1 SCC 438* the Supreme Court opined that Section 321 of the code enables the Public Prosecutor to withdraw from the prosecution with the consent of the Court. Before on application made U/S 321 Cr.P.C. the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any outside influence and secondly that the Court, before which the case is pending can not give its consent to withdraw without itself applying mind to the fact of the case.

The Supreme Court also opined that the Public Prosecutor can not act like a post box or act on the dictate of the State Government. He has to act objectively as he is also an officer of the Court. At the same time Court is also free to assess whether the prima facie case is made or not. The Court if satisfied can also reject the prayer. But it can not be said that a public prosecutor's action will be illegal, if he receives any communication or instruction from the Government. On the contrary the Public Prosecutor can not file an application for withdrawal from prosecution on his own without instruction from the Government. The majority of Judges in this case cited four grounds 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 *Subhash Chandra Vs. Chandigarh Administration (1980) 2SCC 155* it was held that the Public Prosecutor who alone is entitled to pray for withdrawal, is to act not as a part of executive but as a judicial limb and in praying for withdrawal he is to exercise his independent discretion even if it incurs the displeasure of his master affecting continuance of his office.

Permission for withdrawal from prosecution cannot be granted mechanically. Withdrawal must be for proper administration of justice and only in Public Interest. It has been held by the Apex Court in the case of *Abdul Karim and others vs. State of Karnataka (2000) 8 SCC 710*, 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 whether 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. The Court, after considering the facts of the case, has to see whether the application suffers from such improprieties or illegalities as would cause manifest injustice, if consent was given.

In the case of *Rajender Kumar Vs. State through Special Police Establishment, (1980) 3SCC 435* 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."

Duty of Government:

Before instructing the Public Prosecutor for withdrawal from the Prosecution, State Government should also consider the matter carefully and the file in which consideration is made should contain reasons. When a matter is for benefit of society there is no scope of its being confidential. If this procedure is followed chances of favouritism or extraneous political considerations would be curbed to a great extent.

Who can withdraw prosecution:

Section 321, Cr.P.C. enables the Public Prosecutor or the Assistant Public Prosecutor in charge of a case to withdraw from the prosecution with the consent of the Court. After State amendment of the State of Uttar Pradesh written permission of the State Government to that effect is necessary for the Public Prosecutor or the Assistant Public Prosecutor as the case may be, before an application for withdrawal is made in the State of Uttar Pradesh and Uttarakhand. It is also necessary that the permission of the State Government shall be filed in the Court.

When the case was being conducted by a Special Public Prosecutor and subsequently another Special Public Prosecutor was appointed to conduct the case without cancelling the engagement of the earlier appointed Special Public Prosecutor, in the case of *Sheo Nandan Paswan*, it was held that the latter Special Public Prosecutor could apply for withdrawal from prosecution. But a Public Prosecutor has no power to withdraw a case institution on private complaint.

Stage of withdrawal

Application for withdrawal from prosecution may be made at any time before the judgment is pronounced. So the Public Prosecutor may file an application for withdrawal from prosecution at any time ranging between the Court taking Cognizance of the case till such time the Court actually pronounces the judgment. In *Rajendra Jain Vs. State (1980)3 SCC 434* the Supreme Court has held that notwithstanding the fact that offence is exclusively triable by the Court of Session, the Court of Committing Magistrate is competent to give consent to the Public Prosecutor to withdraw from the prosecution.

If a person has been convicted by trial Court and case is pending before Appellate Court, then at this stage the Public Prosecutor can not move an application before Appellate Court for withdrawal from prosecution because under Sec 321 Cr.P.C. 'Court' means Trial Court, not Appellate Court and also prosecution is made before a trial Court. So, the Public Prosecutor can not move an application for withdrawal from the prosecution before an Appellate Court.

Recording of reasons

Section 321, Cr.P.C. does not make it necessary for the Court to record reasons before consent is given. However, it does not mean that consent of the Court is a matter of course. When the Public Prosecutor makes the application for withdrawal after taking into consideration all the materials before him the Court exercises its judicial discretion by considering such materials and on such consideration either gives consent or declines consent. For justice, it is necessary that the Court should record reasons about his satisfaction with the view of the Public Prosecutor but a detailed order is not required.

Third-Party can oppose 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 (1987) 1 SCC 288*, the 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.

Conclusion

Section 321 of the Criminal Procedure Code enables to the Public Prosecutor to withdraw from prosecution with the consent of the Court. All that is necessary to satisfy the Section is to see that the Public Prosecutor acts in good faith and that the Court is satisfied that the exercise of discretion by the Public Prosecutor is proper. The judgement of the

Public Prosecutor under the section cannot be lightly interfered with unless the Court comes to the conclusion that the Public Prosecutor has not applied his mind or that his decision is not in the interest of public policy. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting its consent to withdrawal from the prosecution.
