

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CRIMINAL APPLICATION NO. 8049 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE NIRAL R. MEHTA

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

KAMLESHKUMAR C. DAVE
 Versus
 STATE OF GUJARAT

Appearance:
 MR MITESH AMIN, PUBLIC PROSECUTOR for the Respondent(s) No. 1

CORAM: HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 09/11/2022

ORAL JUDGMENT

- By way of this Special Criminal Application under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973, the petitioner who has been appointed as Special Public Prosecutor, District Devbhoomi Dwarka, prays as under.

“(A) This Hon’ble Court be pleased to admit and allow this application;

(B) This Hon'ble Court be pleased to grant leave for withdrawal from prosecution of Criminal Case No.696 of 2008 pending before court of Ld. Chief Judicial Magistrate, Khambhaliya, Dist. Devbhumi Dwarka, as provided under Section 321 of Cr.P.C.;

(C) During the pendency and final disposal of the application, this Hon'ble Court be pleased to stay the further proceedings of Criminal Case No.696 of 2008 pending before Court of Ld. Chief Judicial Magistrate, Khambhaliya, Dist. Devbhumi Dwarka;

(D) This Hon'ble Court be pleased to grant such other and further relief/s and/or order as deemed fit in the facts and circumstances of the case and in the interest of justice."

- 2.** Brief facts of the case can be summarized as under.
 - 2.1** On 21st December, 2007 a mob of 200-300 persons gathered outside the gate of Essar company at Khambhaliya Taluka for public agitation for the resolution of issues affecting public at large and local agriculturists. However, during the said agitation, the mob had started stone pelting on the buses of the company and as a result thereof, employees travelling in the buses had received injuries and even damage was caused to the buses. Police officers who were deployed there to maintain public peace and safety have also received stone injuries.
 - 2.2** In view of aforesaid incident, Police Sub Inspector Shri Nakum lodged a F.I.R. being C.R. No.165 of 2007 for the offences punishable under Sections 143, 147, 148, 149, 341, 332, 324, 427, 506 of the Indian Penal Code read

with Section 135(1) of the Bombay Police Act against 46 persons. Pertinently, out of the said 46 accused persons, one accused viz. Dharmendrasinh alias Hakubha Jadeja is now the sitting MLA elected from Jamkhambhalia constituency.

- 2.3** In furtherance of the aforesaid F.I.R., the investigating agency had investigated the entire offence and filed chargesheet against all the accused persons in the competent court and thereupon, Criminal Case No.696 of 2008 came to be registered in the court of learned Chief Judicial Magistrate, Khambhalia, District Devbhoomi Dwarka.
- 2.4** The then learned Assistant Public Prosecutor who was in charge of the said criminal case, submitted an application Exh.197 dated 06th October, 2020 under Section 321 of the Code of Criminal Procedure, 1973 for withdrawal from prosecution against all the 46 accused persons before the court of learned Chief Judicial Magistrate, Khambhalia. However, learned Chief Judicial Magistrate vide his detailed order dated 14th October, 2020 rejected the said application.
- 2.5** Feeling aggrieved and dissatisfied with the aforesaid order, the State of Gujarat through learned District Government Pleader, as well as sitting MLA viz. Dharmendrasinh alias Hakubha Jadeja, preferred Criminal Revision Application Nos.13 of 2020 and 14 of 2020 respectively before the Sessions Court. Learned

Sessions Judge, Devbhoomi Dwarka, after having considered materials on record, was pleased to reject the Revision Applications by common order dated 05th December, 2020.

- 2.6** At this stage, it would be relevant to note that the order passed by learned Sessions Judge, Devbhoomi Dwarka dated 05th December, 2020 was never challenged before any higher forum and thereby the said order attained its finality.
- 2.7** In the interregnum period and during the pandemic period, one co-accused Surendrasinh Jadeja filed an application at Exh.227 requesting, *inter alia*, for examining remaining witnesses after the period of lockdown. However, the said application came to be rejected by the learned Magistrate. Thus, being aggrieved by the aforesaid order, Special Criminal Application No.7296 of 2020 came to be filed before this Court wherein the coordinate Bench of this Court vide order dated 26th November, 2020 stayed the trial in connection with Criminal Case No.696 of 2008.
- 2.8** It appears that thereafter the present petitioner came to be appointed as Special Public Prosecutor for the District Devbhoomi Dwarka for conducting cases against MPs and MLAs. After having taken charge and receipt of papers from the then learned APP, the petitioner submitted an application Exh.341 before the learned trial court under the provisions of Section 321 of the

Code seeking, *inter alia*, withdrawal from prosecution under the pretext of public interest and in furtherance of justice. The said application is pending for adjudication.

- 2.9** However, the petitioner learnt that in view of order dated 10th August, 2021 passed by the Apex Court in Writ Petition (C) No.699 of 2016 wherein it has been observed that no prosecution against sitting or former MP or MLA shall be withdrawn without the leave of the concerned High Court.
- 3.** Under the aforesaid premises and during the pendency of application Exh.341, the present petition has been filed by the petitioner in his capacity of Special Public Prosecutor seeking permission of this Court for withdrawing prosecution as per the provisions of Section 321 of the Code.
- 4.** I have heard learned Public Prosecutor Mr.Mitesh Amin on behalf of the petitioner.
- 5.** Mr.Amin, learned Public Prosecutor, submitted that public agitation was in the public interest and for the purpose of protection of interest of the local agriculturists and thereby withdrawal of such prosecution is in the larger public interest. Mr.Amin further submitted that the entire agitation was for the public cause and the accused persons have no personal interest. Therefore, permission for withdrawal from prosecution may be granted.

- 5.1** Mr.Amin submitted that as per the F.I.R., mob was of 200-300 persons, however only 46 persons have been named and arrested in connection with the crime and chargesheet is filed against them only. He further submitted that even considering the investigation papers, role played by the accused persons is not clear and thus, permission for withdrawal of prosecution may be granted in such circumstances. Mr.Amin, by and large, submitted that the case of the prosecution requires to be withdrawn as the cause or incident was wholly for the public interest and not for any personal gain.
- 5.2** By making above submissions, learned Public Prosecutor has prayed this Court to grant leave for withdrawal from prosecution of Criminal Case No.696 of 2008 pending in the court of learned Chief Judicial Magistrate, Khambhalia, District Devbhoomi Dwarka.
- 6.** I have heard learned Public Prosecutor and have gone through the materials produced on record in detail. No other and/or further submissions have been canvassed by learned Public Prosecutor for the petitioner except what are stated hereinabove.
- 7.** Having considered the submissions advanced by Mr.Amin for the petitioner as well as having gone through the materials produced on record, the question that falls for consideration of this Court is whether, in the facts of the present case, leave for withdrawal from

prosecution of Criminal Case No.696 of 2008 pending before the court of learned Chief Judicial Magistrate, Khambhalia under the provisions of Section 321 of the Code can be granted?

8. So as to decide the aforesaid question, it would be apt to refer to and rely upon provisions of Section 321 of the Code, which can be extracted 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 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.”

9. It would also be profitable to refer to and rely upon the latest pronouncement of the Apex Court in the case of **State of Kerala v. K. Ajith in Criminal Appeal NO.697 of 2021** whereby entire law on the provisions of Section 321 came to be discussed and settled after referring to series of judgments as under.

“23. The principles which emerge from the decisions of this Court on the withdrawal of a prosecution under Section 321 of the CrPC can now be formulated:

- (i) Section 321 entrusts the decision to withdraw from a prosecution to the public prosecutor but the consent of the court is required for a withdrawal of the prosecution;*
- (ii) The public prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice;*
- (iii) The public prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution;*
- (iv) While the mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the public prosecutor was satisfied that the withdrawal of the prosecution*

is necessary for good and relevant reasons;

(v) *In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature. Before deciding whether to grant its consent the court must be satisfied that:*

(a) The 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;

(b) 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;

(c) The application does not suffer from such improprieties or illegalities as would cause manifest injustice if consent were to be given;

(d) The grant of consent sub-serves the administration of justice; and

(e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law which the public prosecutor is duty bound to maintain;

(vi) *While determining whether the withdrawal of the prosecution subserves the administration of justice, the court would be justified in scrutinizing the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated; and*

(vii) *In a situation where both the trial judge and the revisional court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would exercise caution before disturbing*

concurrent findings. The Court may in exercise of the well-settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent.”

- 10.** Yet in another decision of the Apex Court in the case of **Bairam Muralidhar v. State of Andhra Pradesh [(2014) 10 SCC 380]**, it held as under.

“18. The central question is whether the public prosecutor has really applied his mind to all the relevant materials on record and satisfied himself that the withdrawal from the prosecution would subserve the cause of public interest or not. Be it stated, it is the obligation of the public prosecutor to state what material he has considered. It has to be set out in brief. The Court as has been held in Abdul Karim’s case, is required to give an informed consent. It is obligatory on the part of the Court to satisfy itself that from the material it can reasonably be held that the withdrawal of the prosecution would serve the public interest. It is not within the domain of the Court to weigh the material. However, it is necessary on the part of the Court to see whether the grant of consent would thwart or stifle the course of law or cause manifest injustice. A Court while giving consent under Section 321 of the Code is required to exercise its judicial discretion, and judicial discretion, as settled in law, is not to be exercised in a mechanical manner. The Court cannot give such consent on a mere asking. It is expected of the Court to consider the material on record to see that the application had been filed in good faith and it is in the interest of public interest and justice. Another aspect the Court is obliged to see whether such withdrawal would advance the cause of justice. It requires exercise of careful and concerned discretion because certain crimes are against the State and the society as a collective demands justice to be done. That maintains the law and order situation in the society. The public prosecutor cannot act like the

post office on behalf of the State Government. He is required to act in good faith, peruse the materials on record and form an independent opinion that the withdrawal of the case would really subserve the public interest at large. An order of the Government on the public prosecutor in this regard is not binding. He cannot remain oblivious to his lawful obligations under the Code. He is required to constantly remember his duty to the Court as well as his duty to the collective.”

- 11.** It would also be apt to refer to and rely upon the judgment of the Apex Court in the case of **S.K. Shukla v. State of U.P. [(2006) 1 SCC 314]** wherein the Apex Court has cast greater responsibility on the shoulder of Public Prosecutor while filing an application under Section 321 of the Code and has held, thus, as under.

“32. *This petition is filed against the order passed by the State Government dated 29.8.2003 whereby public prosecutor was directed to withdraw the POTA cases against the accused persons. An application was moved by public prosecutor for withdrawal of these cases before Special Judge, though no order was passed permitting withdrawal of these cases. However, in view of our finding in SLP (Crl) 5609 of 2004, we cannot affirm the order of the State Government for withdrawal of these cases and consequential application made by the public prosecutor for withdrawal of these cases. The order passed by the Government dated 29.8.2003 as well as application moved by the special public prosecutor before the Special Judge, Kanpur Nagar cannot be sustained and accordingly the order passed by the State Government and the application moved by the special public prosecutor before the Special Judge at Kanpur, both are rejected. In this connection our attention was invited to 1983(1) SCC 438, 1980(3) SCC 435, 1996(2) SCC 610, 2002(3) SCC 510. In these cases it has been laid down that the public prosecutor has to shoulder a greater responsibility for withdrawal of the cases under Section 321 Cr.P.C. In Sheonandan Paswan*

vs. State of Bihar and others 1983 (1) SCC 438, it was held:

“The settled law laid down by the Supreme Court has been that the withdrawal from the prosecution is an executive function of the Public Prosecutor and the ultimate decision to withdraw from the prosecution is his. Before an application is made under Section 321, the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any outside influence. The Government may suggest to the Public Prosecutor that a particular case may not be proceeded with, but nobody can compel him to do so.

However, Section 321 of the Code does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. If the Public Prosecutor received such instructions, he cannot be said to act extraneous influence. On the contrary, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government, since a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government. Unlike the Judge, the Public Prosecutor is not an absolutely independent officer. He is appointed by the government for conducting in court any prosecution or other proceedings on behalf of the Government concerned. So there is the relationship of counsel and client between the Public Prosecutor and the Government.

If the Government gives instructions to a Public Prosecutor to withdraw from the prosecution of a case, the latter after applying his mind to the facts of the case may either agree with instructions and file a petition stating grounds of withdrawal or disagree therewith having found a good case for prosecution and refuse to file the

withdrawal petition. In the latter event the Public Prosecutor will have to return the brief and perhaps to resign, for, it is the Government, not the Public Prosecutor, who is in the know of larger interest of the State".

The Public Prosecutor cannot act like a post box or act on the dictate of the State Governments. He has to act objectively as he is also an officer of the Court. At the same time court is also not bound by that. The courts are also free to assess whether the prima face case is made or not. The court, if satisfied, can also reject the prayer. However in the present case we have examined the matter and found that there is a prima facie case to proceed against the accused persons under Section 4(b) of the Act and other provisions of the Explosive or Arms Act, therefore, the sanction granted by the Government and application moved by public prosecutor for withdrawal of the cases cannot be sustained. Hence writ petition Nos.132-134 of 2004 is accordingly allowed and the order of the State Government dated 29.8.2003 withdrawing the cases against the accused persons is quashed, likewise direction to the public prosecutor for withdrawing the cases from the Court."

- 12.** Keeping in mind the aforesaid exposition of law laid down by the Apex Court, few admitted facts requires to be noted as under.
- (i)** At the time when the offence was committed, one of the co-accused viz. original accused No.41 - Dharmendrasinh alias Hakubha Merubha Jadeja was a Member of District Panchayat, Vadinar and now a sitting MLA from Jamkhambhalia constituency.
- (ii)** Pursuant to the policy of the State Government, an opinion was called for from the then learned Assistant

Public Prosecutor Shri S.P. Vasava for withdrawal of the case. Pursuant thereto, learned APP has in no uncertain terms opined that the said case is not worth withdrawing. Thereafter, it appears that learned District Government Pleader as well as Additional District Magistrate, Devbhoomi Dwarka, vide their letters dated 26th August, 2020 and 20th August, 2020 respectively, directed learned APP Shri Vasava to file an application for withdrawal of prosecution under Section 321 of the Code. Pursuant thereto, an application Exh.197 was filed on 06th October, 2020 by the then learned APP despite he was of the opinion that the present case is not worth withdrawing.

- (iii)** The said application Exh.197 came to be rejected by learned Chief Judicial Magistrate, Khambhalia vide order dated 14th October, 2020 keeping in mind the seriousness of the offence as well as in absence of independent application of mind by learned APP.
- (iv)** Revisions preferred by the State Government as well as Dharmendrasinh alias Hakubha Merubha Jadeja being Criminal Revision Application Nos.13 of 2020 and 14 of 2020 came to be rejected by learned Sessions Judge, Devbhoomi Dwarka vide common order dated 05th December, 2020.
- (v)** The aforesaid orders passed by learned Chief Judicial Magistrate as confirmed by learned Sessions Judge has now attained its finality in absence of any further

challenge made either by the State Government or by Dharmendrasinh alias Hakubha Merubha Jadeja (MLA).

- (vi)** Fresh application at Exh.341 dated 03rd July, 2021 came to be filed by the present petitioner under the provisions of Section 321 of the Code after he has taken over charge of the Criminal Case No.696 of 2008 as in capacity of Special Public Prosecutor for withdrawal of the Criminal Case. The said application is pending before the concerned learned Magistrate.
- 13.** What emerges from the aforesaid admitted facts is that earlier application Exh.197 under Section 321 of the Code was filed by the then learned APP against his own negative opinion with regard to withdrawal of prosecution on the insistence of the higher authorities. The said application, therefore, rightly said to have been made without any independent application of mind but under the pressure of higher authorities. Pertinently, one of the accused is a sitting MLA and thereby there are all reasons to believe that at his instance, pressure was made on the then learned APP despite his negative opinion. The said belief can be fortified from the fact that even with the change of learned APP, again, the same application under the provisions of Section 321 came to be moved. Thus, this Court firmly believes that anyhow and at any cost, the State Government is trying to save his sitting MLA under the provisions of Section 321 of the Code under the pretext of larger public interest.

- 13.1** If application Exh.341 is perused, learned Special Public Prosecutor has not formed a particular opinion as to how and in what manner broad ends of public justice would be met. Learned APP in his application Exh.341 has nowhere stated that how the withdrawal from prosecution would sub-serve the public interest. This Court could not find as to how withdrawal of criminal case would advance the cause of justice. Considering application Exh.341 as well as keeping in mind the past orders of learned Chief Judicial Magistrate and learned Sessions Judge, it appears to this Court that application Exh.341 is not filed with *bona fide* intention, but is filed only with a view to see that sitting MLA shall escape from liability to undergo rigors of trial.
- 13.2** It is really shocking that once having rejected the application for withdrawal by learned Chief Judicial Magistrate as confirmed by learned Sessions Judge, though the said orders have attained finality, without there being any challenge to those orders, again newly appointed learned Special Public Prosecutor ventured to file an application Exh.341, which suggest that the said learned Special Public Prosecutor is nothing but a sheer “puppet” in the hands of the State Government who has not kept his obligation towards the Court as envisaged in Cr.P.C. in mind and only with a view to please the superior authority, made such an application. In my view, newly appointed concerned learned Special Public Prosecutor, before filing application Exh.341, should

have opined whether such second application could have been maintainable? The said application, in my view, is certainly not maintainable. If such an application allowed to be maintained, then in that event, every now and then upon rejection of withdrawal of prosecution by the courts, learned APP would be changed and the said changed learned APP would make a fresh application for withdrawal of prosecution, which cannot be permitted to be allowed. The cause of filing application under Section 321 of the Code does not arise with the change of the Public Prosecutor. But for the fact that accused is a political leader, application for withdrawal is submitted without demonstrating how public interest would be met which is the foremost requirement. If the accused would not have been the political leader, such an application for withdrawal of prosecution would not have been filed.

- 14.** Considering the facts of the present case, the allegations against the accused persons are very serious in nature. Merely because the accused now being a sitting MLA, there cannot be any differential treatment to be extended to him. The accused cannot be allowed, on the basis of his subsequently acquired status of MLA, to claim distinguishable privilege than that of normal citizen. As it appears from the allegations, under the pretext of agitation, rioting took place and caused damage to the property of M/s.Essar company as well as employees from the police department those who have been injured. While giving permission to withdraw the

prosecution, in my view, those who suffered, have also stake in the proceedings and thereby that aspect also requires to be considered by the Court while granting leave for withdrawal of prosecution. In the instant case, victims are M/s.Essar Company as well as employees of the State police. Those victims cannot be ignored at the discretion of learned Public Prosecutor who appears to be acting only on the direction of the higher authorities. The application moved by the newly appointed learned Special Public Prosecutor, in my view, is not with an independent mind, but is made only with a view to please the higher authorities. In Section 321 of the Code, wide discretion is given to learned APP/Spl.PP. Therefore, when absolute discretion is given, the same discretion has to be exercised with utmost care and circumspection. Such discretionary powers cannot be exercised or expected to be exercised by learned APP to please higher authorities. Learned APP/Spl.PP, under the provisions of Section 321 of the Code, owes statutory duties/obligation. Learned APP is the assistant of the Court in the first place, therefore, he owes his obligation towards the Court and thereby same obligation has to be discharged with paramount care and caution. When one learned APP had already given negative opinion for withdrawal of prosecution, however, upon pressure of the higher authorities even the application was moved and when such application is rejected by the learned trial court as well as by the revisionist court, in that event, particularly when such orders have attained

finality, with the change of Public Prosecutor again an application seeking withdrawal of prosecution is nothing but an abuse of law at the discretion of the learned Public Prosecutor.

15. In view of the aforesaid discussion, if the law laid down by the Apex Court in the case of **K. Ajith (supra)** is considered, the Apex Court has laid down the duties of the Public Prosecutor as well as the concerned Court. Thus, keeping in mind the said duties and more particularly as stated in para-23(v)(a) to 23(v)(e), I find that Special Public Prosecutor appears to have exercised his discretion improperly. I say so because first of all, Public Prosecutor cannot make fresh application of withdrawal merely because he has replaced earlier learned APP. Secondly, having known the fact that earlier withdrawal of prosecution has been rejected by the learned Chief Judicial Magistrate as well as learned Sessions Court and when the said orders attained finality, learned Special Public Prosecutor should have applied his legal mind for filing fresh application for the same cause. Thus, it established beyond any doubt that Special Public Prosecutor has acted on the instructions of government only and thereby rendered himself as merely a "postman". The said application appears to have been filed not in a good faith, in the interest of public policy and justice. Rather, it appears to have been filed purely with a political interest and therefore, the same is nothing but an attempt to thwart and stifle the

process of law. Additionally, the said application itself suffers from patent manifest illegality as if such application is objectively considered, then in that case, no prudent court officer would opine to file such an application when earlier application for the same purpose and object has been duly rejected by the learned Sessions Court and the same has attained its finality. This Court has not found any material which shows that withdrawal of prosecution would serve public purpose.

- 16.** In view of the aforesaid discussion, in my considered opinion, learned APP appears to have exercised discretionary power improperly and would nothing but an attempt to interfere with normal course of justice for illegitimate reasons. Thus, this Court cannot be a mute spectator and should not grant permission merely upon asking.
- 17.** In view of the aforesaid discussion, I answer the question in affirmative "No".
- 18.** Resultantly, the present petition is bereft of any merits and is hereby dismissed summarily with no order as to costs.

(NIRAL R. MEHTA,J)

ANUP