A SHEO NANDAN PASWAN

v.

STATE OF BIHAR & ORS.

DECEMBER 20, 1986

B [P.N. BHAGWATI C.J., E.S. VENKATARAMIAH, V. KHALID, G.L. OZA AND S. NATARAJAN; JJ.]

Review of judgments or orders by the Supreme Court—Constitution of India, 1950, Article 137 read with Rule 1 of order XL of the Supreme Court Rules, 1966—Nature of the power of Review by the
C *Supreme Court—Whether the Supreme Court could interfere with the granting consent orders for "Nolles Prosequi" against the accused, when the orders of the Special Judge, of the High Court in Revision, and of the majority of the Judges of the Supreme Court in an appeal by special leave, were in favour of the accused.*

D *Review order is to the effect "the review petition should be admitted and the appeal should be reheard immediately after the decision of Nandini Satpathi's case Crl. Appeals 48 and 49 referred to a Constitution Bench"—Meaning and consequence of the order admitting the Review Petition—Whether the judgment sought to be reviewed was set aside or not.*

E *Code of Criminal Procedure, 1973, section 321—Withdrawal from the Prosecution—Scope and construction of the provisions of the section as to the power of the Public Prosecutor to withdraw and the power to grant consent to such withdrawal by the Magistrate—Whether on the face of the record, there was any error apparent—Whether the principle of administrative law be invoked for construing the*
F *section.*

Locus standi of a complainant in a criminal proceedings to file a revision before the High Court and an appeal by special leave before the Supreme Court under Article 136 of the Constitution, against an order
G *granting consent to withdraw the criminal case.*

"Discharge" of an accused, consequent to the consent passed by the Magistrate under section 321 and "Discharge" of an accused made under section 227 or 239 of the Code of Criminal Procedure.

H **Under Article 137 of the Constitution of India The Supreme Court shall have power to review any judgment pronounced or order**

made by it, subject to the provisions of any law made by Parliament or any rules made under Article 145. The Supreme Court, in exercise of the powers conferred by Article 145 of the Constitution and all other powers enabling it and with the approval of the President made the "Supreme Court Rules 1966". Under Rule 1 of Order XL thereof, the "Court may review its judgment or order but no application for review will be entertained ..... in a criminal proceeding except on the ground of an error apparent on the face of the record."

Patna Urban Cooperative Banks was registered in May 1970 and it commenced its banking business with Nawal Kishore Sinha as its Chairman, K.P. Gupta as its Honorary Secretary, M.A. Hydary as Manager and A.K. Singh as loan clerk. Dr. Jagannath Misra who was then a Member of the Legislative Council was closely associated with Nawal Kishore Sinha and helped the Cooperative Bank and Nawal Kishore Sinha in diverse ways in connection with the affairs of the Bank and assisted in mobilisation of the resources for the Bank. There were some irregularities in the affairs of the Bank. The then Chief Minister Shri Abdul Ghafoor ordered the prosecution of the officers and staff of the Bank including its Honorary Secretary Shri K.P. Gupta, Manager, M.A. Haidary and the loan clerk. However, this was not done. On 11.4.1975 Shri Abdul Ghafoor was replaced by Dr. Jagannath Misra as Chief Minister. On May 16, 1975 he passed an order that only stern action should be taken for realisation of loans since on the perusal of the file it appeared there was no allegation of defalcation against the Chairman and members of the Board. This date is alleged to have been later changed to May 14, 1975 by a fresh order. As per the revised order directions for restoration of normalcy and holding of Annual General Meeting "of the bank was made. On 15.4.1976 the Reserve Bank cancelled the banking licence issued to the Bank and a liquidator was appointed. Consequent to the report of the Estimates Committee and the debate in the Assembly, Dr. Jagannath Misra directed, on 4.8.76 the prosecution against those involved in the defalcation. Thus 23 criminal cases were filed against the office bearers and loanees but Nawal Kishore Sinha was excluded from being arraigned as an accused. In June 1977 there was a change of Ministry at the Centre. In June 1977 the Government headed by Dr. Jagannath Misra was replaced by the Government headed by Sri Karpoori Thakur.

As a sequel to the memorandums submitted by the Patna Secretariat Non-gazetted Employees' Association to the new Chief Minister on 9.7.1977 requesting him to enquire into allegations against Dr. Jagannath Misra, after a detailed procedure and obtaining requisite

A sanction of the Governor, a criminal case was instituted by the vigilance Department against Dr. Jagannath Misra and others.

The charge sheet filed by the State of Bihar against the respondents on 19th February, 1979, was for offences under sections 420/466/471/109/120-B of Indian Penal Code and under Sections 5(1) (a), 5(a) B (b) & 5(1) (d) read with Section 5(2) of the Prevention of Corruption Act, 1947. The charge against Dr. Jagannath Misra was that he, who at all material times, was either a Minister or the Chief Minister of Bihar abusing his position as a Public servant, in conspiracy with the other accused, sought to interfere with the criminal prosecution and surcharge proceedings against Nawal Kishore Sinha and others with a C view to obtain to himself and to the other respondents pecuniary advantage to the detriment of Patna Urban Cooperative Bank. The Chief Judicial Magistrate took cognizance of the case on 29.7.1979.

There was a change of ministry in Bihar in June 1980 and the second respondent became the Chief Minister again. A policy decision D was taken on 10.6.1980, that criminal cases launched out of political vendetta and cases relating to political agitation be withdrawn. On 24.2.1981 the Government appointed Shri L.P. Sinha as a Special Public prosecutor. On 25.2.1981, the secretary to the Government of Bihar wrote a letter to the District Magistrate informing him of the policy decision taken by the Government to withdraw from prosecution E of two vigilance cases including the case with which the Court is concerned. He was requested to take steps for the withdrawal of the case. On 17th June, 1981, Shri Sinha made an application under s.321 of the Cr.P.C. to the Special Judge seeking permission to withdraw from the prosecution of respondent Nos. 2, 3 and 4 on four grounds; (a) Lack of prospect of successful prosecution in the light of the evidence, (b) Implif cation of the persons as a result of political and personal vendetta; (c) Inexpediency of the prosecution for the reasons of the State and public policy and (d) Adverse effects that the continuance of the prosecution will bring on public interest in the light of the changed situation. The learned Special Judge gave consent sought, by his order dated 20th June, 1981. The appellant, thereupon, filed a criminal Revision Appli- G cation No. 874/81 against the order permitting withdrawal of the prosecution. The said application was dismissed *in limine* by the High Court by an order dated 14.9.1981. The appellant therefore preferred Crl. Appeal No. 241/82 by special leave to this Court. In two well reasoned concurring judgments, Baharul Islam J and R.B. Misra J. dismissed the appeal by their judgments dated December 16, 1982 and H by an equally reasoned judgment, Tulzapurkar J. dissented from the

main judgement and allowed the appeal. (See Sheonandan Paswan v. State of Bihar & Ors.,[(1983) 2 SCR 61] Baharul Islam J. demited office on 13.1.1983. An application was filed on 17.1.1983 to review the judgment under Article 137 of the Constitution read with Order XI of the Supreme Court Rules. On 22.8.1983, the matter was heard in open court by a Bench consisting of Tulzapurkar J., A.N. Sen J. and R.B. Misra J, and A.N. Sen J. passed an order admitting the Review Petition without disclosing any reason therefor and directed the rehearing of the petition immediately after the decision in *Mohd. Mumtaz* v. *Smt. Nandini Satpathy* [1983] 4 SCC 104, which was referred already to a Constitutional Bench of five Judges. Hence the rehearing of the case to review the two concurrent judgments.

Dismissing the appeal, in accordance with the opinion of the majority, the Court, (Per Venkataramiah J.) (Majority view)

Held: 1.1 Merely because a court discharges or acquits an accused arraigned before it, the court cannot be considered to have compromised with the crime. True, corruption, particularly at high places should be put down with a heavy hand. But, the passion to do so should not overtake reason. The Court always acts on the material before it and if it finds that the material is not sufficient to connect the accused with the crime, it has to discharge or acquit him, as the case may be, notwithstanding the fact that the crime complained of is a grave one. Similarly if the case has been withdrawn by the Public Prosecutor for good reason with the consent of the Court, Supreme Court should be slow to interfere with the order of withdrawal. In either case, where the Special Judge had rejected the application for withdrawal and the High Court had affirmed that order, and where the special judge had permitted the withdrawal but the High Court had reversed that order, the Supreme Court may not have interfered with the orders of the High Court under Article 136 of the Constitution. But this is a case where the Special Judge had permitted the withdrawal of the prosecution, and the said order of withdrawal has been affirmed by the High Court as well as by the majority judgment pronounced by Supreme Court earlier. Interference by the Supreme Court on review must only be on strong and compelling reasons. [766D-H]

1.2 When the earlier decisions of the Supreme Court are allowed to remain in tact, there is no justification to reverse the majority judgments of Baharul Islam and R.B. Misra JJ., reported in [1983] 2 SCR 61 by which the appeal had already been dismissed. The reversal of the earlier judgment of Supreme Court by the process of Review strikes at

A **the finality of judgments of Supreme Court and would amount to the abuse of the power of review vested in Supreme Court, particularly in a criminal case. This case which was admitted solely on the ground that Nandini Satpathy's case had been subsequently referred to a larger Bench to review the earlier decision cannot be converted into an appeal against the earlier decision of Supreme Court. [774A-C]**

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R.K. Jain etc. **v.** *State through Special Police Establishment and Ors. etc.*, **[1980] 3 SCR 982 and** *State of Bihar* **v.** *Ram Naresh Pandey*, **[1957] SCR 279, referred to.**

2.1 Section 321 of the Code of Criminal Procedure cannot be
C **construed in the light of the principles of Administrative law. The legal position expounded by the Supreme Court in** *R.K. Jain's* **case and in** *Ram Naresh Pandey's,* **case is correct. If any change in the law is needed it is for Parliament to make necessary amendments to section 321 of the Code of the Criminal Procedure, 1973, which has remained so despite the judgment of the Supreme Court in Pandey's case**
D **rendered in 1957. [773D-E]**

2.2 The judgment of a Public Prosecutor under section 321 of the Code of Criminal Procedure, 1973 cannot be lightly interfered with unless the Court comes to the conclusion that he has not applied his mind or that his decision is not bona fide. A person may have been
E **accused of several other misdeeds, he may have been an anthema to a section of the public media or he may be an unreliable politician. But these circumstances should not enter into the decision of the Court while dealing with a criminal charge against him which must be based only on relevant material. [773B-C]**

F **2.3 In the circumstances of this case, it cannot be said that the Public Prosecutor had not applied his mind to the case or had conducted himself in an improper way. If in the light of the material before him the Public Prosecutor has taken the view that there was no prospect of securing a conviction of the accused it cannot be said that his view is an unreasonable one. The Public Prosecutor is not a Persecutor. He is the**
G **representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the land, the two fold aim of which is that guilt shall not escape or**
H **innocence suffer. He may prosecute with earnest and vigour indeed, he**

should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate one to bring about a just one. [772E-H]

Berger v. *United States*, 295 US 78, quoted with approval.

2.4 Further the questions involved in this case are: whether Dr. Jagannath Misra has been a privy to the misdeeds committed in the Patna Urban Co-operative Bank; whether he and his co-accused should be prosecuted for the offences of conspiracy, bribery etc., and whether the Public Prosecutor had grievously erred in applying for the withdrawal of the case. All the other Judges who have dealt with the case on merits from the Special Judge onwards, except Tulzapurkar J. have opined that the permission was properly given for withdrawal. In the circumstances, it is difficult to take a different view. [770G-H; 771A-B]

The three circumstances put up against the accused in this case are (i) that Jiwanand Jha had credited Rs. 10,000 and Rs. 3000 on 27.12.1973 and on 1.4.1974 respectively in the Savings Bank account of Dr. Jagannath Misra; (ii) that there was ante-dating of the order passed by Dr. Jagannath Misra on 14.5.1975; and (iii) that there was a second confessional statement of Hydary which supported the prosecution. As regards the two items of bribe, it has not been shown by any extract of bank account that the said two sums came from the Patna Urban Co-operative Bank. If that was so there would have been entries in the Bank accounts. Mere crediting of the two sums, without any other reliable evidence, in a bank account by a political ally or a friend does not by itself show that the sums were either bribe amounts or any official favour had been shown. This fact by itself is not conclusive about the guilt of the accused. The passing of the two orders one on 15.6.1975 on the note sheet and the other on buff paper which is dated 14.5.1975 cannot be faulted on account of the explanation that it was the practice in the Bihar Secretariat that whenever an order is changed it is done by writing the later order on a buff-sheet and pasting it on the earlier order. It is not also shown by the prosecution that any action had been taken pursuant to the order dated 16.5.1975 by any of the departmental authorities. If any action had been taken it would have been a matter of record readily available for production. No such record is produced before Supreme Court. Hence it is a mere surmise to say that any such action was sought to be nullified, particularly when there was no acceptable evidence at all on the communication of the order dated 16.5.1975 to any departmental authorities. [769F-G; 770D-G]

A **Per Khalid J. (on behalf of himself and on behalf of S. Natarajan J.)**

1.1 Admitting a review petition is not the same thing as setting aside the order sought to be reviewed. Order 47, Rule 1 C.P.C. deals with review in civil matters. Article 137 of the Constitution is a special B **power with the Supreme Court to review any judgment pronounced or order made by it. An order passed in a criminal case can be reviewed and set aside only if there are errors apparent on the record. In this case, one of the Judges who was a party to the order to review (R.B. Misra J) had earlier dismissed the appeal with convicting reasons. If the judgment was set aside by the order passed in the review petition, the** C **learned Judge would definitely have given his own reasons for doing so by a separate order. This has not been done. All that the order says is that the review petition had been admitted. The direction to re-hear the appeal, therefore can only be to ascertain reasons to see whether the judgment need be set aside.** [776C-G]

D **2.1 There is no error apparent on the face of the record in the judgment reported as** *Sheonandan Paswan* **v.** *State of Bihar & Ors.*, **[1983] 2 SCR 61.** [776G-H]

2.2 All the three judges who gave the earlier judgment in this case have correctly declined to accept the plea that Shri Sinha was not a competent Public Prosecutor since Datt's appointment has not been E **cancelled.** [780B-C]

3.1 Section 321 needs three requisite to make an order under it valid; (1) The application should be filed by a public prosecutor or Assistant Public Prosecutor who is competent to make an application for withdrawal; (2) he must be in charge of the case; (3) the application F **should get the consent of the court before which the case is pending. All the three requisites are satisfied here.** [780D-E]

3.2 In the absence of any allegation of mala fide against the public prosecutor or of bias against the Special Judge the Public Prosecutor should normally be credited with fairness in exercise of his power under G **s.321. Equally, in the absence of a challenge in the revision petition before the High Court to the order of the Special Judge giving consent, it has to be assumed that he has perused the relevant records before passing the consent order.** [781C-E]

3.3 Section 321 gives the public prosecutor the power for with- H **drawal of any case at any stage before judgment is pronounced. This**

pre-supposes the fact that the entire evidence may have been adduced in the case, before the application is made. When an application under s.321 Cr. P.C. is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. To contend that the court when it exercises its limited power of giving consent under s.321 has to assess the evidence and find out whether the case would end in acquittal or conviction, would be to re-write s.321 Cr.P.C. and would be to concede to the court a power which the scheme of s.321 does not contemplate. [781F-H]

3.4 The acquittal or discharge order under s.321 are not the same as the normal final orders in criminal cases. The conclusion will not be backed by a detailed discussion of the evidence in the case of acquittal or absence of prima facie case or groundlessness in the case of discharge. All that 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 these facets of the case, will have to see whether the application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given. On a reading of the application for withdrawal, the order of consent and the other attendant circumstances, it must be held that the application for withdrawal and the order giving consent were proper and strictly within the confines of section 321 Cr.P.C. [781H; 782A-C]

3.5 While construing s.321, it is necessary to bear in mind the wide phraseology used in it, the scheme behind it and its field of operation. True, it does not give any guideline regarding the grounds on which an application for withdrawal can be made. But since it was enacted with a specific purpose, it would be doing violence to its language and contents by importing into the section words which are not there or by restricting its operation by fetters in the form of conditions and provisos. [782C-D]

3.6 While conferring powers upon the Subordinate courts under s.321 of the Code, the Legislature had only intended that the court should perform a supervisory function and not an adjudicatory function in the legal sense of the term. Section 321 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 initiative is that of the Public Prosecutor and what the court has to do only to give its consent and not to determine any matter judicially. The Judicial function implicit in the

A exercise of the judicial discretion for granting the consent would normally mean that the court has 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. [484A-B; C-D]

B 3.7 The courts' function is to give consent. It is not obligatory on the part of the court to record reasons before consent is given. However, consent of the court is not 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 C either gives consent or declines consent. If on a reading of the order giving consent a higher court is satisfied that such consent was given on an overall consideration of the materials available, the order giving consent has necessarily to be upheld. [484D-G]

D 3.8 The order under section 321 is not appealable but only revisable under section 397 of the Code of Criminal Procedure. While considering the legality, propriety or the correctness of a finding or a conclusion, normally, the revising court does not dwell at length into the facts and evidence of the case. The Court, in revision, considers the materials only to satisfy itself about the correctness, legality and propriety of the findings, sentence or order and refrains from substituting E an order passed under s.397 appeal comes to the Supreme Court by special leave under Article 136 of the Constitution of India. [789B-C]

It has been the declared policy of the Supreme Court not to embark upon a roving enquiry into the facts and evidence of cases like this or even an order against discharge. The Supreme Court will not F allow itself to be converted into a court of facts and evidence. The Supreme Court seldom goes into evidence and facts. That is as it should be. Any departure from this salutary self imposed restraint is not a healthy practice. As an apex Court, any observation on merits or on facts and evidence of a case which has to go back to the courts below will seriously prejudice the party affected and it should be the policy of the G court not to tread upon this prohibited ground and invite unsavory but justifiable criticism. Supreme Court cannot assess the evidence to find out whether there is a case for acquittal or conviction and cannot convert itself into a trial court. Nor can this court order a retrial and examination of hundred witnesses to find out whether the case would end in acquittal or conviction. [789D-G]

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3.9 Section 321 Crl. P.C. is virtually a step by way of composition of he offence by the State. The State is the master of the litigation in criminal cases. By the exercise of functions under s.321 the accountability of the concerned person or persons does not disappear. A private complaint can still be filed if a party is aggrieved by the withdrawal of the prosecution but running the possible risk of a suit of malicious prosecution if the complaint is bereft of any basis. [789G-H; 790A]

3.10 When the Magistrate states in his order that he has considered the materials, it is not proper for the court not to accept that statement. The proper thing to do is to hold that Magistrate gave consent on objective consideration of the relevant aspects of the case. It would be acting against the mandate s.321 to find fault with the Magistrate in such cases, unless the order discloses that the Magistrate has failed to consider whether the application is made in good faith, in the interest of public policy and justice and not to thwart or strifle the process of law. The application for withdrawal by the Public Prosecutor has been made in good faith after careful consideration of the materials placed before him and the order of consent given by the Magistrate was also after the consideration of various datails as indicated above. It would be improper for the Court, keeping in view the scheme of s.321, to embark upon a detailed inquiry into the facts and evidence of the case or to direct re-trial fro that would be destructive of the object and intent of the section. [792C-E; 793B-D]

State of Bihar v. *Ram Naresh Pandey*, [1957] SCR 279; *M.N. Sankaranarayanan Nair* v. *P.V. Balakrishnan & Ors.*, [1972]2 SCR 599; *Bansi Lal* v. *Chandan Lal*, AIR 1976 AC 370; *State of Orissa* v. *Chandrika Mohapatra & Ors.*, [1977] 1 SCR 335; *Balwant Singh* v. *State of Bihar*, [1978] 1 SCR 604; *Subhash Chander* v. *State*, [1980] 2 SCR 44 and *Rajendra kumar Jain v. State*, [1980] 3 SCR 982, referred to.

4.1 In this case the Supreme Court is called upon only to consider the ambit and scope of s.321 Crl. P.C. and not the truth or otherwise of the allegations against the respondent No. 2. The appellant is admittedly a political rival of respondent No.2. There is no love lost between them. It is at the instance of such a highly interested person that the Court is called upon to direct re-trial of the case, setting aside the consent given by the Special Judge. The second respondent is a leader of a political party. He was a rival to the Chief Minister who followed him after the 1977 at the time of institution of the case. In 1977, when the second respondent was the Chief Minister, a warrant of arrest was issued

A against Shri Karpoori Thakur for his arrest and detention. It has been suggested that Shri Thakur had grudge against the second respondent. Viewed against this background, and on the unsatisfactory factual details of the case, accepting the appeal and ordering retrial would not advance either the interests of justice or public interest. [796B-E]

B 4.2 There were two confessional statements of Haidari in this case one on 4.11.1976 and another on 24.1.1978. In the former he did not implicate respondent No.2 but he did it in the next one. The second statement at best is the confessional statement of a co-accused which normally will not inspire confidence, in any court. It is also a statement of an accomplice turned approver and hence of a very little evidentiary C value. When Supreme Court exercises its jurisdiction while considering an order giving consent on an application under s.321, consistent with the declared policy of the court not to embark upon evidence, request for an order for retrial on this legally weak and infirm evidence should be rejected. [795A-E]

D 4.3 As to the accusation of forgery, taking the entire evidence against the appellant it cannot be held that he has committed forgery under s.463 or an offence under s.466. Even though there is overwriting or pasting or interpolation or change of digits, there is no evidence at all to show that this paper went out of the Chief Minister's office or that any one was unduly favoured or that any one secured E undue advantage by use of such overwriting. [796A-B]

Per Bhagwati (on behalf of himself and G.L. Oza J.) (Minority view). (Per contra)

1.1 The Review Bench did exercise the power of review and set F aside the order made by the Original Bench. When the Review Bench used the expression "I ..... admit the Review" and directed rehearing of the appeal, it must by necessary implication be held to have allowed the Review Petition and set aside the order of the Original Bench. The true meaning and effect of the order of the Review Bench cannot be allowed to be obfuscated by a slight ineptness of the language G used by the Review Bench. The substance of the order must always be looked in to its apparent form. [737F-H]

1.2 There can be no doubt that the Review Bench was not legally bound to give reasons for the order made by it. The apex Court being the final court against which there is no further appeal, it is not under H any legal compulsion to give reasons for an order made by it. But

merely because there may be no legal compulsion on the apex court to give reasons. It does not follow that the apex court may dispose of cases without giving any reasons at all. It would be eminently just and desirable on the part of the apex court to give reasons for the orders made by it. But when the apex court disposes of a Review Petition by allowing it and setting aside the order sought to be reviewed on the ground of an error apparent on the face of record, it would be desirable for the apex court not to give reasons for allowing the Review Petition. Where the apex court holds that there is an error apparent on the face of the record and the order sought to be reviewed must therefore be set aside and the case must be reheard, it would considerably prejudice the losing party if the apex court were to give reasons for taking this view. If the Review Bench of the Court were required to give reasons, the Review Bench would have to discuss the case fully and elaborately and expose what according to it constitutes an error in the reasoning of the Original Bench and this would inevitably result in pre-judgment of the case and prejudice is rehearing. A reasoned order allowing a Review Petition and setting aside the order sought to be reviewed would, even before the rehearing of the case, dictate te direction of the rehearing and such direction, whether of binding or of persuasive value, would conceivably in most cases adversely affect the losing party at the rehearing of the case. Therefore, the Review Bench, in the present case, could not be faulted for not giving reasons for allowing the Review Petition and directing rehearing of the appeal. [738B-G]

2. It is now well settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment to the offender in the interest of the society. It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book. *Locus standi* of the complainant is a concept foreign to criminal jurisprudence. Now if any citizen can lodge a first information report or file a complaint and set the machinery of the criminal law in motion and his *locus standi* to do so cannot be questioned, a citizen who finds that a prosecution for an offence against the society is being wrongly withdrawn can oppose such withdrawal cannot oppose such withdrawal. If he can be a complainant or initiator of criminal prosecution, he should equally be entitled to oppose prosecution which has already been initiated at his instance. If the offence for which a prosecution is being launched is an offence against the society and not merely an individual wrong, any member of the society must have *locus* to initiate a prosecution as also to resist

A withdrawal of such prosecution, if initiated. Here in the present case, the offences charged against Dr. Jagannath Misra and others are offences of corruption, criminal breach of trust etc. and therefore any person who is interested in cleanliness of public administration and public morality would be entitled to file a complaint; eqaully he would be entitled to oppose the withdrawal of such prosecution, if it is already B instituted. [739C-H; 740A]

R.S. Nayak v. *A.R. Antulay,* [1984] 2 SCR 500, referred to 3.1.

It is undoubtedly true that the effect of withdrawal of the prosecution against Dr. Jagannath Misra was that he stood discharged in respect C the offences for which he was sought to be prosecuted but it was not an order of discharge which was challanged by Sheonandan Paswan in the revision application filed by him before the High Court but it was an order granting consent for withdrawal of the prosecution that was assailed by him. [740E-G]

D 3.2 The analogy of an order of discharge made under section 227 or section 239 of the Code of Criminal Procedure is not apposite because there the Sessions Judge or the Magistrate, as the case may be, considers the entire material before him and then comes to the conclusion that there is not sufficient ground or proceeding against the accused or that the charge against the accused is groundless. But, here, E when the Magistrate makes an order granting consent to withdrawal of the prosecution under s.321, it is a totally different judicial exercise which he performs and it would not therefore be right to say that if the High Court sets aside the order of the Magistrate granting consent to withdrawal from the prosecutor, the High Court would be really setting aside an order of discharge made by the Magistrate. What the High F Court would be doing would be no more than holding that the withdrawal from the prosecution should proceed against the accused and ultimately if there is not sufficient evidence or the charges are groundless, the accused may still be discharged. Even the order of discharge can be discharged by the High Court in revision if the High Court is satisfied that the order passed by the Magistrate is incorrect, illegal or G improper or that the proceedings resulting in the order of discharge suffer from any irregularity. [740F-H; 741A-C]

3.3 The revisional power exercised by the High Court under s.397 is couched in words of widest amplitude and in exercise of this power can satisfy itself as to the correctness, legality propriety of any order passed by the Magistrate or as to the regularity of any proceed- H ings of such Magistrate. When the Supreme Court is hearing an appeal

against an order made by the High Court in the exercise of its revisional power under s.397 it is the same revisional power which the Supreme Court would be exercising and the Supreme Court, therefore, certainly can interfere with the order made by the Magistrate and confirmed by the High Court if it is satisfied that the order is incorrect, illegal or improper. In fact, in a case like the present where the question is of purity and public administration at a time when moral and ethical values are fast deteriorating and there seems to be a crises of character in public life, the Supreme Court should regard as its bounden duty-a duty owed by it to the society-to examine carefully whenever it is alleged that a prosecution for an offence of corruption or criminal breach of trust by a person holding high public office has been wrongly withdrawn and it should not matter at all as to how many judges in the High Court or the lower court have been party to the granting of such consent for withdrawal. The mathematics of numbers cannot, therfore, be invoked for the purpose of persuading the court not to exercise its discretion under Article 136 of the Constitution. [741C-H]

4.1 It is a well-established proposition of law that a criminal prosecution, if otherwise justifiable and based upon adequate evidence does not become vitiated on account of mala fides or political vendetta of the first informant or the complainant. [742D-E]

State of Punjab v. *Gurdial Singh*, [1980] 1 SCR 1076, referred to.

4.2 The fact that the prosecution against Dr. Jagannath Misra was initiated by the successor Government of Karpoori Thakur after the former went out of power, by itself cannot support the inference that the initiation of the posecution was actuated by political vendetta or *mala fides* because it is quite possible that there might be material justifying the initiation of prosecution against Dr. Jagannath Misra and the successor Government might have legitimately felt that there was a case for initiation of prosecution and that is why the prosecution might have been initiated. Therefore, the prosecution cannot be said to be vitiated on that account. [742G-H; 743A]

Krishna Ballabha Sahay and Ors. v. *Commission of Enquiry*, [1969] 1 SCR 387 and *P.V. Jagannatha Rao* v. *State of Orissa*, [1968] 3 SCR 789, referred to.

5.1 There is no provision of law which requires that no prosecution should be launched against a former Chief Minister or a person holding high political office under the earlier regime without first set-

A ting up a Commission of Enquiry for enquiring into his conduct. It cannot be said that if a prosecution is initiated without an inquiry being held by a Commission of Enquiry set up for that purpose, the prosecution would be bad or that on that ground alone the prosecution could be allowed to be withdrawn. [743G-H; 744A]

B 5.2 In view of the tardy and slow moving criminal process in India causing inordinate delay and availability of adequate protection under different existing laws to the accused, it would be perfectly legitimate for the successor government to initiate a prosecution of a former Chief Minister or a person who has held high political office under the earlier regime without first having an enquiry made by a Commission of C Enquiry, provided of course, the investigation is fair and objective and there is sufficient material to initiate such prosecution. [744A-D]

6. No unfettered or unrestricted power is conferred on the Public Prosecutor/Assistant Public Prosecutor under section 321 of the Code to apply for withdrawal from the Prosecution, but the said power must be D a controlled or guided power or else it will fall foul of Article 14 of the Constitution. Section 321 is more or less similar to the powers of the police under s.173 of the Code of Criminal Procedure. [746F-H]

The police has no absolute or unfettered discretion whether to prosecute an accused or not to prosecute him. In fact, in the constitu- E tional scheme, conferment of such absolute and uncanalised discretion would be violative of the equality clause of the Constitution. The Magistrate is therefore given the power to structure and control the discretion of the police. The discretion of the police to prosecute is thus "combined and confined" and, subject to appeal or revision, and the Magistrate is made the final arbiter on this question. The Legislature has in its F wisdom taken the view it would be safer not to vest absolute discretion to prosecute in the police which is an Executive arm of the government but to subject it to the control of the judicial organ of the State. The same scheme has been followed by the Lesiglature while conferring power on the Public Prosecutor to withdraw from the prosecution. This power can be exercised only with the consent of the court so that the G court can ensure that the power is not abused or misused or exercised in an arbitrary or fanciful manner. Once the charge-sheet is filed and the prosecution is initiated, it is not left to the sweet-will of the State or the Public Prosecutor to withdraw from the prosecution. Once the prosecution is launched, its relentless course cannot be halted except on sound considerations germane to public justice. The Public Prosecutor H cannot therefore withdraw from the prosecution unless the Court

before which the prosecution is pending gives its consent for such withdrawal. This is a provision calculated to ensure non-arbitrariness on the part of the Public Prosecutor and compliance with the equality clause of the Constitution. [748D-H]

H.S. Bains v. *State*, AIR 1980 SC 1883; *Subhash Chander* v. *State & Ors.*, [1980] 2 SCR 44; *M.N. Sankaranarayanan Nair* v. *P.N. Balakrishnan & Ors.*, [1972] 2 SCR 599; and *State of Orissa* v. *C. Mohapatra*, [1977] 1 SCR 385, referred to.

7.1 The position in law in regard to the degree of autonomy enjoyed by the Public Prosecutor vis-a-vis the government in filling an application for withdrawal of the prosecution is rather confused. Now there can be no doubt that prosecution of an offender who is alleged to have committed an offence is primarily the responsibility of the Executive. It is the Executive which is vested with the power to file a charge-sheet and initiate a prosecution. This power is conferred on the Executive with a view to protecting the society against offenders who disturb the peace and tranquility of the society by committing offences. Of course it is left to the court to decide whether to take cognizance of the offences set out in the charge-sheet but the filing of the charge-sheet and initiation of the prosecution is solely within the responsibility of the Executive. It is the State through the investigating authorities which files a charge-sheet and initiate the prosecution and the Public Prosecutor is essentially counsel for the State for conducting the prosecution on behalf of the State. The Public Prosecutor is an officer of the court, as indeed every advocate practising before the court is, and he owes an obligation to the court to be fair and just: he must not introduce any person interest in the prosecution nor must he be anxious to secure conviction at any cost. He must present the case on behalf of the prosecution fairly and objectively. He is bound to assist the court with his fairly considered view and the fair exercise of his intention. But at the same time he conducts the prosecution on behalf of the Central Government or the State Government, as the case may be, and he is an advocate acting on behalf on the Central Government or the State Government which has launched the prosecution. There is nothing wrong if the government takes a decision to withdraw from the prosecution and communicate such direction to the Public Prosecutor. The Public Prosecutor, would, *inter alia*, consider the grounds on which the government has taken the decision to withdraw from the prosecution and if he is satisfied that those grounds are legitimate, he may file an application for withdrawal from the prosecution. If on the other hand he takes the view that the grounds which have been given by the government are not

A legitimate he has two options available to him. He may inform the government that in his opinion, the grounds which have weighed with the government are not valid and that he should be relieved from the case and if this request of his is not granted he may tender his resignation or else, he may make an application for withdrawal from the prosecution as directed by the government and at the hearing of the application he may offer his considered view to the court that the application is not sustainable on grounds set out by him and leave it to the court to reject the application. There is nothing wrong in the Public Prosecutor being advised or directed by the government to file an application for withdrawal from the prosecution and the application for withdrawal made by him pursuant to such direction or advice is not necessarily vitiated. The Public Prosecutor can of course come to his own independent decision that the prosecution should be withdrawn but ordinarily if he is wise and sensible person he will not apply for withdrawal without consulting the government because it is the government which has launched the prosecution and is prosecuting the accused. Theoretically of course, he can make an application for withdrawal from the prosecution without consulting the government and he cannot be accused of any illegality for doing so and the court may give its consent for such withdrawal but in that event the Public Prosecutor would render the risk of incurring the displeasure of the Government which has appointed him. If the Public Prosecutor seeks the permission of the government for withdrawal from the prosecution and the government grants such permission to him and on the basis of such permission he applies for withdrawal the application cannot be said to be vitiated. The proviso to s.321 in fact contemplates in so many terms that in certain categories of offences the Public Prosecutor appointed by the State Government cannot move the court for its consent to withdraw from the prosecution without the permission of the Central Government. There is no danger of abuse or misuse of power by the Government inherent in this process because there are two principal safeguards against any such abuse or misuse of power by the government: one is that an application must be based on grounds which advance public justice and the other is that there can be no withdrawal without the consent of the Court. [755C-H; 756A-H; 757A-F]

State of Bihar v. *Ram Naresh Pandey*, [1957] SCR 279; *Balwant Singh* v. *State of Bihar*, [1978] 1 SCR 604; *M.N. Sankaranarayanan Nair* v. *P.V. Balakrishnan & Ors.*, [1972] 2 SCR 599; *State of Orissa*, v. *C. Mohapatra*, [1977] 1 SCR 335 and *R.K. Jain* v. *State*, [1980] 3 SCR 982, referred to.

7.2 The Public Prosecutor cannot maintain an application for

withdrawal from the prosecution on the ground that the government does not want to produce evidence and proceed with the prosecution against the accused or that the government considers that it is not expedient to proceed with the prosecution. The Public Prosecutor has to make out some ground which would advance or further the cause of public justice. If the Public Prosecutor is able to show that he may not be able to produce sufficient evidence to sustain the charge, an application for withdrawal from the prosecution may be legitimately made by him. [758H; 759A-B]

7.3 However, where a charge has been framed by the court either under s.228 or s.240 of the Code of Criminal Procedure, 1973 it would not be open to the Public Prosecutor to apply for withdrawal from the prosecution on the ground of insufficiency of evidence in support of the prosecution. The reason is that in both these cases the Court applies its mind to the material consisting of the police report and the documents sent with it under s.173 and comes to a conclusion that a prima facie case has been made out against the accused and the charge should therefore be framed. When the court has come to this conclusion after full consideration and framed a charge, the court cannot be persuaded on the same material to hold that there is not sufficient evidence to sustain the prosecution. The Public Prosecutor cannot be permitted to make a *volte face* on the basis of the same material. To do so would be mockery of justice and it would shake the confidence of the court in the purity and integrity of the administration of justice. It is, therefore, clear that though the prosecution can be withdrawn at any stage, even after the framing of the charge, it would not be competent to the Public Prosecutor once the charge is framed, to apply for withdrawal of the prosecution on the ground that the same material which was before the court when it framed the charge is not sufficient to sustain the prosecution. Of course, if some material has subsequently come to light which throws doubt on the veracity of the prosecution case the Public Prosecutor can certainly apply for withdrawal on the ground that the prosecution is not well-founded. It may also happen in the meanwhile a key witness may have died or some important evidence may have become unavailable or some such thing may have happened in that event, the Public Prosecutor may legitimately feel that it will not be possible to sustain the prosecution in the absence of such evidence and he may apply for withdrawal from the prosecution. But on the same material without anything more, the Public Prosecutor cannot apply for withdrawal from the prosecution after the charge is framed. To allow him to do so would impair the faith of the people in the purity and integrity of the judicial process. [759C-H; 760A-E]

Bansi Lal v. *Chandi Lal*, AIR 1976 SC 370, referred to.

7.4 Further while exercising its function under s.239 is to consider the police report and the document sent along with it as also any statement made by the accused if the court chooses to examine him. And if the court finds that there is no prima facie case against the accused the court discharges him. But that is precisely what the court is called upon to do when an application for withdrawal from the prosecution is made by the public prosecutor on the ground that there is insufficient or no evidence to support the prosecution. There also the court would have to consider the material placed before it on behalf of the prosecution for the purpose of deciding whether the ground urged by the public prosecutor for withdrawal of the prosecution is justified or not and this material would be the same as the material before the court while discharging its function under s.239. If the court while considering an application for withdrawal on the ground of insufficiency or absence of evidence to support the prosecution has to scrutinise the material for the purpose of deciding whether there is in fact insufficient evidence or no evidence at all in support of the prosecution, the court might as well engage itself in this exercise while considering under s.239 whether the accused shall be discharged or a charge shall be framed against him. It is an identical exercise which the court will be performing whether the court acts under s.239 or under s.321. If that be so, in a warrant case instituted on a police report the public prosecutor should not be entitled to make an application for withdrawal from the prosecution on the ground that there is insufficient or no evidence in support of the prosecution. The court will have consider the same issue under s.239 and it will most certainly further or advance the case of public justice if the court examines the issue under s.239 and gives its reasons for discharging the accused after a judicial consideration of the material before it, rather than allow the prosecution to be withdrawn by the Public Prosecutor. When the prosecution is allowed to be withdrawn there is always an uneasy feeling in the public mind that the case has not been allowed to be agitated before the court and the court has not given a judicial verdict. But if on the other hand, the court examines the material and discharges the accused under s.239 it will always carry greater conviction with the people because instead of the prosecution being withdrawn and taken out of the ken of judicial scrutiny the judicial verdict based on assessment and evaluation of the material before the court will always inspire greater confidence. Since the guiding consideration in all these cases is the imperative of public justice and it is absolutely essential that justice must not only be done but also appear to be done. Hence in a warrant case instituted on a police report—which the

present case against Dr. Jagannath Misra and others admittedly is—it should not be a legitimate ground for the public prosecutor to urge in support of the application for withdrawal that there is insufficient or no evidence in support of the prosecution. The court in such a case should be left to decide under s.239 whether the accused should be discharged or a charge should be framed against him. [761A-H; 762A-B]

7.5 Ultimately every offence has a social or economic cause behind it and if the State feels that the elimination or eradication of the social or economic cause of the crime would be better served by not proceeding with the prosecution, the State should clearly be at liberty to withdraw from the prosecution. Though in this area no hard and fast rule can be laid down nor can any categories of cases be defined in which an application for withdrawal of the prosecution could legitimately be made. It must ultimately depend on the facts and circumstances of each case in the light of what is necessary in order to promote the ends of justice. [762C-D; H; 763A-B]

7.6 The Court, while considering whether to grant consent or not, must not accept the *ipse dixit* of the public prosecutor and content itself by merely examining whether the public prosecutor has applied an independent mind but the court must satisfy itself not only that the grounds are germane or relevant to advancement of public justice but also whether the grounds in fact are satisfactorily established. The ultimate test which must be applied by the court in order to determine the validity of the grounds in a particular case is that the requirement of public justice outweighs the legal justice of that case so that withdrawal from the prosecution could be permitted in the larger interest of public justice. The imperative of public justice provides the only relevant consideration for determining whether consent should be granted or not. It is not possible to provide an exclusive definition of what may be regarded as falling within the imperative of public justice in a strait-jacket formula. Every case must depend on its peculiar facts and circumstances because there may be a myriad situation where this question may have to be considered by the Court. [763G-H; 764A-D]

8. Applying these principles to the facts of the present case, it is clear, that the court of the Chief Judicial Magistrate Patna as also the High Court were clearly in error in granting consent to the withdrawal from the prosecution against Dr. Jagannath Misra and others. There are two very strong and cogent reasons why consent to the withdrawal of the prosecution must be refused. In the first place, the learned Chief Judicial Magistrate could have considered under s.239 whether the

material placed before him was sufficient to make out a prima facie case against Dr. Jagannath Misra and the other accused so that if the learned Chief Judicial Magistrate came to the conclusion on the basis of such material that the charge against Dr. Jagannath Misra and the other accused was groundless, he would be bound to discharge them for reasons to be recorded by him in writing. There is no reason why in these circumstances the public prosecutor should be allowed to withdraw from the prosecution under s.321. The same exercise could be performed by the learned Chief Judicial Magistrate by acting under s.239. Moreover, in the present case, the decision to withdraw from the prosecution was taken by the Cabinet at a meeting held on 24th February 1981 and this meeting was presided over by Dr. Jagannath Misra himself. It may be that Shri Lallan Prasad Sinha did not implicitly obey the decision of the Cabinet and applied his independent mind to the question whether the prosecution should be withdrawn or not but even so, it would seriously undermine the confidence of the people in the administration of justice if a decision to withdraw the prosecution against him is taken by the accused himself and pursuant to this decision the Special Public Prosecutor who was appointed by the State Government of which the accused is Chief Minister, applies for withdrawal from the prosecution. It is an elementary principle that justice must not only done but must also appear to be done. It would be subversive of all principles of justice that the accused should take a decision to withdraw the prosecution against himself and then the Special Public Prosecutor appointed in effect and substance by him makes an application for withdrawal from the prosecution. [764E-H; 765A-E]

8.2 It is no doubt true that if there is not sufficient evidence to sustain the prosecution against Dr. Jagannath Misra and the other accused, it would be subjecting them to harassment and inconvenience to require them to appear and argue before the Court for the purpose of securing an order of discharge under s.239, but even so it would be desirable in the interest of public justice that high political personages, accused of offences should face the judicial process and get discharged, rather than seem to manoeuvre the judicial system and thus endanger the legitimacy of the political as well as the judicial process. It is possible that in a particular case personal harassment or inconvenience may be caused by non withdrawal of the prosecution, if the accused is really innocent and is ultimatley liable to be discharged, but such harassment or inconvenience must be considered as an inevitable cost of public life, which the repositories of public power should have no hesitation to pay, as justice must not only be done but must also appear to be done. [765E-H; 766A]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 241 of 1982. A

From the Judgment and Order dated 14.9.81 of the Patna High Court in Crl. Revision No. 874/81.

Dr. L.M. Singhvi, S.K. Sinha, S.K. Verma, A.M. Singhvi, S. Singh, C. Mukhopadhya and R. Tyagi for the Appellants. B

Dr. Y.S. Chitale, F.S. Nariman, S.N. Kacker, Rajinder Singh, D. Goburdhan, D. Chandrachud, L.R. Singh, Gopal Singh, M.P. Jha, R.K. Jain, Ranjit Kumar and B.P. Singh for the Respondents.

C

The following Judgments were delivered:

BHAGWATI, CJ. This case has had a chequered history and it is necessary to state the facts in some detail in order to appreciate the questions which arise for determination before us. The principal actor in the drama in this case is Dr. Jagannath Misra, one time Chief D Minister of the State of Bihar. The main controversy around which all questions revolve is whether the prosecution launched against Dr. Jagannath Misra at a time when he was not in power has been rightly allowed to be withdrawn by the Chief Judicial Magistrate or whether such withdrawal is invalid and must be set aside so that the prosecution can continue against Dr. Jagannath Misra. E

The fact-situation out of which this case arises relates to the affairs of a cooperative Bank called the 'Patna Urban Cooperative Bank' (hereinafter referred to as the 'Cooperative Bank'). The Cooperative Bank was registered in May 1970 and it commenced its banking business with Nawal Kishore Sinha as its Chairman, K.P. F Gupta as its Honorary Secretary, M.A. Hyderi as its Manager and A.K. Singh as a loan clerk. It was not seriously disputed that most of the members of the Cooperative Bank were closely associated with Nawal Kishore Sinha. The object of the Cooperative Bank was to help people financially to set up small industries and businesses and to assist people in ordinary circumstances to carry on their vocation or busi- G ness. There was a sub-Committee formed, called "Loan Sub Committee", consisting of Nawal Kishore Sinha, K.P. Gupta and one Purnendu Narain, an Advocate, to attend to the work of sanctioning and granting of loans. The Chairman, i.e., Nawal Kishore Sinha, was, according to the bye-laws, the ultimate deciding authority in regard to all the functions of the Cooperative Bank and the Honorary Secre- H

A tary i.e. K.P. Gupta along with the Chairman had to exercise supervisory control over all the activities of the Cooperative Bank, while the Manager, i.e. M. A. Hyderi, was concerned only with its day-to-day working. Dr. Jagannath Misra who was then a Member of the Legislative Council was closely associated with Nawal Kishore Sinha and he helped the Cooperative Bank and Nawal Kishore Sinha
B in diverse ways in connection with the affairs of the Cooperative Bank and also assisted in mobilisation of resources for the Cooperative Bank. Sometime in 1974 separate audits into the functioning of the Cooperative Bank were carried out by the Reserve Bank of India as well as the Cooperative Department of the State of Bihar for the years 1972-73 and 1973-74 and as a result of these audits, there came to light
C a large number of irregularities such as non-maintenance of cash books in a proper manner and grant of overdraft facilities without current account as also illegal practices and acts of defalcation and malversation of funds of the Cooperative Bank. The audit reports disclosed that huge amounts running into lakhs of rupees had been squandered away by giving loans to non-members, giving loans even without applica-
D tions, agreements or promissory notes, giving loans without hypothecation or security, giving short-term loans instead of releasing cash from sale proceeds of hypothecated goods, giving loans to the same persons in different names and giving loans to fictitious persons and non-existing firms or industries. There were instances where loans had been granted on the security of Gandhi Maidan and Patna Railway
E Station. The audit team of the Reserve Bank in its Report came to the conclusion that Nawal Kishore Sinha and others were responsible for 'bad loans' to the tune of Rs. 12 lakhs and misappropriation and embezzlement of funds to the extent of Rs.25 lakhs.

On the basis of these audit reports, the Registrar Cooperative
F Societies, at the instance of the Reserve Bank, made an order on 10th July 1974 superseding the management of the Cooperative Bank, removing Naval Kishore Sinha and other Directors on the Board from their office as Chairman and Directors and appointing an officer of the Cooperative Department as Special Officer to look-after the affairs of the Cooperative Bank. The Registrar, Cooperative Societies followed
G up this action by putting up a note dated 4th November 1974 to the Secretary, Cooperation pointing out that, according to the audit reports, prima facie charges of defalcations, embezzlement of funds, conspiracy etc. were made out against the officials of the Cooperative Bank and legal action should be taken against them after taking the opinion of the Public Prosecutor. The Secretary, Cooperation by his
H note dated 7th November 1974 sought the opinion of the Law Depart-

ment in regard to the action to be taken as suggested in the note of the Registrar, Cooperative Societies. The Law Department recorded its opinion in the relevant file on 18th November 1974 that a prima facie case of conspiracy and criminal breach of trust was made out against the loanees and the office bearers of the Cooperative Bank. On the basis of this opinion, a draft complaint was prepared on 16th December 1974 by the Asstt. Public Prosecutor, Patna for being filed in the court of the Chief Judicial Magistrate, Patna and on the same day, an office noting was made on the file suggesting that the advice of the Law Department on the draft complaint be obtained. This course of action was approved by the Secretary, Cooperation and the Minister for Cooperation also approved of it on 1st January 1975 and it also received the approval of the then Chief Minister, Shri Abdul Ghafoor on 2nd January 1975. The file was then sent back to the Law Department and the Law Department again reiterated its earlier advice for launching the prosecution and on the file being received back on 17th January 1975, the Secretary Cooperation, endorsed the file on 21st January 1975 to the Additional Public Prosecutor, Shri Girish Narain Sinha, for necessary action, that is, to file the prosecution. Thus, by 21st January 1975 a firm decision was taken to launch a criminal prosecution against the loanees and the members of the Board of Directors of the Cooperative Bank including the Chairman Naval Kishore Sinha and a complaint in that behalf duly approved by the Law Department and signed by Shri Jagdish Narain Verma, District Cooperative Officer, Patna on 25th January 1975 was ready with the Addl. Public Prosecutor, for being filed in the court of the Chief Judicial Magistrate. But before the Additional Public prosecutor could file the complaint, Dr. Jagannath Misra who was then Minister incharge of Agriculture and Irrigation wrote a buff-sheet note dated 24th January 1975 asking the Secretary Cooperation to send the concerned file along with the audit reports to him before instituting the criminal case. It may be pointed out that under the Notification dated 30th April 1974 issued under Article 166(3) of the Constitution read with Rule 5 of the Rules of Executive Business of the State of Bihar, the then Chief Minister Shri Abdul Ghafoor, was holding *inter alia* the portfolio of Law but, according to the affidavit of Shri Neelanand Singh dated 19th October 1982 filed on behalf of respondent No. 1 in this Court, Shri Abdul Ghafoor had, with a view to lessen his heavy burden, requested Dr. Jagannath Misra to look after the work of the Law Department. Since Dr. Jagannath Misra asked for the concerned file, Shri Abdul Ghafoor, on a reference made to him directed on 27th January 1975 that the file may be sent to Dr. Jagannath Misra. The Secretary, Cooperation accordingly recalled the comp-

A B C D E F G H

laint and other papers from the Additional Public Prosecutor on 28th January 1975. The file was then placed before R.K. Srivastava, Minister of Cooperation and he made an endorsement on the file on 31st January 1975 pointing out various instances of criminal conspiracy criminal breach of trust and misappropriation of public funds which had come to light against the Directors of the Cooperative Bank and sent the file to Dr. Jagannath Misra route to the Chief Minister since they wanted to see the file before the complaint was actually lodged. It does not appear from the record as to when the file was actually sent to Dr. Jagannath Misra but in any event the file was in the hands of Dr. Jagannath Misra on 24th February 1975. The file remained with Dr. Jagannath Misra for over two and a half months and no endorsement was made by him on that file until the middle of May 1975 with the result that prosecution could not be filed against Naval Kishore Sinha and the other Directors. Meanwhile on 11th April 1975, Shri Abdul Ghafoor was thrown out and in his place Dr. Jagannath Misra became Chief Minister. Dr. Jagannath Misra made an Order in his own hand in Hindi in the file on 16th May 1975 regarding the action to be taken against Nawal Kishore Sinha and others and the English translation of this Order ran as follows:

> "Much time has passed. On perusal of the File it appears that there is no allegation of defalcation against the Chairman and the Members of the Board of the Bank. Stern action should be taken for realisation of loans from the loanees and if there are difficulties in realisation from the loanees surcharge proceedings should be initiated against the Board of Directors. The normal condition be resorted in the Bank after calling the Annual General Meeting and holding the election.
>
> Sd/-
> May 16, 1975 Jagannath Misra

In the margin opposite to this Order, the seal containing the despatch entry originally showed May 16, 1975 as the date on which the file was despatched from the Chief Minister's secretariat to the Cooperative Department after Dr. Jagannath Misra had made the Order. It is obvious from the first part of the Order that Dr. Jagannath Misra did not want any criminal prosecution to be launched against Nawal Kishore Sinha and the other Members of the Board of the Cooperative Bank and that is why he observed that there was no allegation of defalcation against the Chairman and the Members of the

Board though that was not correct. The object of making this observation clearly was to pre-empt the filing of any criminal prosecution against Nawal Kishore Sinha and the other members of the Board. The second part of the Order provided that if there was any difficulty in realisation of the loans from the loanees, surcharge proceedings should be initiated against the Chairman and other members of the Board and since the loans advanced by the Cooperative Bank were mostly in fictitious names and in any event it was impossible to recover them. It was clear that, on the basis of this part of the Order, surcharge proceedings would have to be adopted against the Chairman and other Directors of the Cooperative Bank. Now, according to the despatch entry as originally made, the file containing this Order must have left the office of Dr. Jagannath Misra on 16th May 1975, though the case of Dr. Jagannath Misra is that it never left his offifce. If the file left the office of Dr. Jagannath Misra on 16th May 1975, it does not appear from the record as to when it came back, because there is no endorsement or seal showing inward receipt of the file by the Secretariat of Dr. Jagannath Misra. But whether the file remained in the office of Dr. Jagannath Misra as claimed by him or it left the office on 16th May 1975 and subsequently came back to the office, it is indisputable that Dr. Jagannath Misra passed another Order in his own hand on a piece of paper in Hindi under his signature and had it pasted over the earlier order dated 16th May 1975 so as to efface the same completely and this subsequent Order was ante-dated to 14th May 1975. The date of despatch namely, 16th May 1975 in the despatch entry appearing in the margin was also altered to 14th May 1975 by over-writing. The English translation of this second Order addressed to the Minister, Cooperation was in the following terms:

> "Please issue order for restoring the normal condition in the Bank after holding Annual General Meeting".
>
> Sd/-
> May 14, 1975 Jagannath Misra"

The explanation given on behalf of Dr. Jagannath Misra was that, as Chief Minister, he had authority and power to revise or review his earlier order and that it is the usual practice prevailing at the Patna Secretariat that whenever any order passed earlier is sought to be revised or reviewed by the same officer or Minister, it is done by pasting it over by a piece of paper containing the revised order. But even with this explanation, the admitted position that emerges is that the first Order dated 16th May 1975 made by Dr. Jagannath Misra in his own

A handwriting in the file was obliterated by the second Order made by him subsequent to 16th May 1975 but ante-dated to 14th May 1975 and the date '16th May 1975' in the despatch entry was also changed to 14th May 1975 by overwriting. The effect of this action on the part of Dr. Jagannath Misra was that even the direction to adopt surcharge proceedings against the Chairman and Board of Directors in default of B realisation of the loans from the loanees, was wiped out and the only direction which remained was that norman condition in the Cooperative Bank should be restored by calling the Annual General Meeting and holding the election. Thus, not only no approval was given by Dr. Jagannath Misra to the filing of the prosecution against the Chairman and members of the Board of Directors but no directon was given even C in regard to the adoption of surcharge proceedings against them. There can be no doubt that Dr. Jagannath Misra as Chief Minister had the authority and power to revise the earlier Order dated 16th May 1975 and he could have easily done so, but instead, he ante-dated the second Order to 14th May 1975 and pasted it over the earlier Order dated to 16th May 1975 so as to efface it altogether and also altered D the date of the despatch entry to 14th May 1975. The contention was that this was deliberately done by Dr. Jagannath Misra with the fraudulent intent to override the effect of the earlier Order dated 16th May 1975 and protect Nawal Kishore Sinha from civil liability arising from initiation of surcharge proceedings. This contention was disputed on behalf of Dr. Jagannath Misra and it was said that this was an E innocent act in accordance with the practice of the Patna secretariat and the ante-dating was not mala fide but simply a result of bona fide error. This is a matter which would have to be gone into by the Court if the withdrawal of the prosecution is set aside and the prosecution is directed to be continued against Dr. Jagannath Misra.

F So far as the filing of the prosecution against Nawal Kish re Sinha and the other members of the Board of Directors was concerned, it appears that the Cooperative Department wanted to go ahead with it and the Minister, Cooperation accordingly put up a Note dated 28th June 1975 and sought directions from Dr. Jagannath Misra as to what should be the next course of action in the matter of filing of G the complaint. Dr. Jagannath Misra in response to this query passed the following Order in the file on 30th June 1975: "Discussion has been held. There is no need to file the prosecution." This clearly shows that Dr. Jagannath Misra did not want any prosecution to be filed against Nawal Kishore Sinha and others and wanted to protect Nawal Kishore Sinha against any such criminal prosecution. It appears H that in July 1975 there were questions and call attention motions in the

Bihar Legislative Assembly and in the course of the proceedings, the propriety of not filing prosecution against Nawal Kishore Sinha and others connected with the affairs of the Cooperative Bank, despite the advice of the Law Department, was discussed and the Speaker referred the matter to the Estimates Committee of the House. The next event which happened in chronological sequence was that the annual general meeting of the Cooperative Bank was held and the associates of Nawal Kishore Sinha were elected in November, 1975, the management of the Cooperative Bank was handed over to the elected directors. But, on 15th April, 1976 the Reserve Bank of India cancelled the banking licence of the Cooperative Bank and on 19th April, 1976 the Cooperative Bank was ordered to be liquidated and T. Nand Kumar, an IAS officer, was appointed liquidator of the Cooperative Bank.

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The Estimates Committee to which the matter had been referred by the Speaker submitted its report in June, 1976 recommending prosecution of Nawal Kishore Sinha and others and this led to a debate in the Bihar Legislative Assembly in July 1976, the upshot of which was that the Government was forced to agree to launch prosecution against the culprits. Dr. Jagannath Misra accordingly passed an order on 4th August 1976 directing launching of prosecution against those involved in the sordid affairs of the Cooperative Bank but even there, he directed that the prosecution be launched against some of the office bearers and loanees including K.P. Gupta, M.A. Hyderi and A.K. Singh but not against Nawal Kishore Sinha. Thus, 23 criminal cases were filed against these office bearers and loanees but Nawal Kishore Sinha was excluded from being arraigned as an accused in these cases. This order made by Dr. Jagannath Misra affords the clearest indication that, even with all the furore which had arisen on account of non-prosecution of Nawal Kishore Sinha and others. Dr. Jagannath Misra persisted in his attempt to shield Nawal Kishore Sinha from prosecution. T. Nand Kumar, liquidator of the Cooperative Bank however addressed a communication to the Registrar Cooperative Societies suggesting that besides the other office bearers, Nawal Kishore Sinha also deserved to be prosecuted for the offences of embezzlement, forgery, cheating etc. but the matter was kept pending for the report of the Superintendent of the Police (Cooperative Vigilance Cell). The Superintendent of Police (Cooperative Vigilance Cell) after collecting the necessary evidence got it examined by the Deputy Secretary, Law, and on the basis of the opinion given by the Law Department that a criminal case was fully made out against Nawal Kishore Sinha. He proposed on the file on 8th October, 1976 that a

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A fresh criminal case as per draft first information report, should be filed against Nawal Kishore Sinha and he should also be made co-accused in the previously instituted cases. This proposal was approved by the Deputy Inspector General (CID) and it was submitted to the Commissioner of Cooperative Department for obtaining the approval of the Chief Minister, that is, Dr. Jagannath Misra. Since Dr. Jagannath B Misra had earlier made an order restricting the filing of criminal cases against some of the office bearers and loanees and excluded Nawal Kishore Sinha from the prosecution, the Superintendent of Police in charge of cooperative vigilance cell categorically stated in his note that the draft first information report against Nawal Kishore Sinha had been vetted by the Deputy Secretary, Intelligence CID, as well as by C Inspector General of Police. The Commissioner of Cooperative Department after examining the entire material carefully and obtaining clarifications on certain points put up a lengthy note on 15th January, 1977, to the Minister Cooperation in which he specifically placed the proposal of the Superintendent of Police (Cooperative Vigilance Cell) for launching first information report against Nawal D Kishore Sinha for his approval and also suggested that the Hon'ble Minister may obtain the approval of the Chief Minister. The Minister Cooperation in his turn endorsed the file on 20th January, 1977 to the Chief Minister for approval. The file was received in the secretariat of the Chief Minister on 30th March, 1977 and Dr. Jagannath Misra as Chief Minister instead of clearly and specifically approving the pro- E posal or even indicating his mind either way, merely marked the file to 'I.G. of Police' on 9th April, 1977. It is difficult to understand this endorsement made by Dr. Jagannath Misra because the draft first information report had already been vetted and approved by the Inspector General of Police and there was no point in referring the matter back to the Inspector General of Police. If Dr. Jagannath Misra was F merely approving the action proposed to be taken he would have either made an endorsement of approval or put his signatures or initials without saying anything more but instead he marked the file to 'I.G. of Police'. There is considerable force in the submission made on bahalf of the appellant that the object of making this endorsement was merely to put off the matter. Soon thereafter however on 30th April, G 1977 the Government of Dr. Jagannath Misra went out of power and President's Rule was imposed in the State of Bihar. The file containing the proposal for prosecution of Nawal Kishore Sinha then went to the Advisor (Cooperation) under the President's Rule and he approved the proposal on 15th May, 1977 and the then Governor, Shri Jagannath Kaushal, gave his approval to the proposal on 16th May, 1977 H with the result that a criminal case ultimately came to be filed against

Nawal Kishore Sinha on 30th May, 1977. It is obvious from this narration of facts that Dr. Jagannath Misra, whilst he was in power, made determined effort to protect Nawal Kishore Sinha against any criminal prosecution even though the filing of criminal prosecution was advised by the Reserve Bank of India and the Cooperative Department, proposed by the investigating authorities, recommended by the Estimates Committee and strongly supported by the Law Department. But ultimately a criminal prosecution was launched against Nawal kishore Sinha after Dr. Jagannath Misra went out of power.

Sometime in May, 1977 as a result of fresh elections to the State Legislature, a new Government came to power in the State of Bihar and at the instance of Shri Karpoori Thakur who became the Chief Minister in the new Government, an inquiry was directed into the allegations regarding irregularities in the affairs of the Cooperative Bank. The inquiry was entrusted to the then Secretary Shri D.N. Sahay. Meanwhile a Commission of Inquiry had already been instituted by the State Government and Shri D.N. Sahay therefore addressed a communication dated 1st September, 1977 to the Special Secretary in regard to the charge relating to the affairs of the Cooperative Bank and he pointed out that since an inquiry had already been instituted, it may not be desirable to proceed with a vigilance inquiry. Shri Karpoori Thakur however directed that the vigilance inquiry might continue as the materials collected as a result of the vigilance inquiry could be made use of by the Commission of Inquiry. The vigilance inquiry was thereafter entrusted to Shri D.P. Ojha who was posted as Superintendent of Police, Vigilance, by Shri Karpoori Thakur and all the cases relating to the affairs of the Cooperative Bank were transferred to the vigilance department. M.A. Hyderi who was already an accused in the previously instituted cases was rearrested in connection with those cases and in the course of the fresh investigation started by the vigilance department, M.A. Hyderi made a second confessional statement on 24th January, 1978 which implicated Dr. Jagannath Misra which sought to support the case that Dr. Jagannath Misra had been helping Nawal Kishore Sinha by abusing his office and for making illegal gains for himself. It may be noted that M.A. Hyderi had earlier made a confessional statement on 3/4th November, 1976 in which he had not implicated Dr. Jagannath Misra but in the second confessional statement recorded on 24th January, 1978 he clearly and unequivocally implicated Dr. Jagannath Misra. On 28th January, 1978 A.K. Singh also made a confessional statement supporting the confessional statement of M.A. Hyderi. Immediately after recording these confessional statements Shri D.P. Ojha submitted his inquiry report

recon mending institution of criminal cases against Dr. Jagannath Misra and others. This recommendation was supported by the Deputy Inspector General of Police (Vigilance) as also by the Inspector General of Police (Vigilance). The file was then referred to the Advocate General, Shri K.D. Chatterjee, and the recommendation to institute prosecution against Dr. Jagannath Misra and others was approved by the Advocate General who opined that there was sufficient material for the prosecution of Dr. Jagannath Misra and others. The file was then placed before the Chief Minister, Karpoori Thakur, on 31st January, 1978 and it was approved by him on the same day and a direction was given to investigate the case against Dr. Jagannath Misra and others and to institute prosecution against them. The police in the vigilance department thereafter filed Vigilance P.S. Case No. 9(2)78 and carried out further investigation and ultimately as a result of such investigation, two charge sheets were filed against Dr. Jagannath Misra and others on 21st February, 1979.

One, A.K. Datta, a senior advocate of the Patna High Court was appointed Special Public Prosecutor by the State Government on 26th February, 1979 to conduct these two vigilance cases against Dr. Jagannath Misra and others and on 21st November, 1979, the Chief Judicial Magistrate-cum-Special Judge, Patna took cognizance of these two cases. But before these two cases could proceed further there was a change of Government in the State of Bihar and Dr. Jagannath Misra once again became the Chief Minister in June, 1980. Dr. Jagannath Misra after coming back to power constituted a Cabinet sub-Committee on 15th September, 1980 to consider the expediency of the withdrawal of the prosecution and on 20th February, 1981 the Cabinet sub-Committee recommended that the cases against Dr. Jagannath Misra and others should be withdrawn. This recommendation of the Cabinet sub-Committee was placed before the Cabinet presided over by Dr. Jagannath Misra and it was approved by the Cabinet on 24th February, 1981. On the same day on which the recommendation of the Cabinet sub-Committee was approved, a decision was taken that the two cases against Dr. Jagannath Misra and others should be withdrawn and the State Government cancelled the panel of lawyers which had been constituted by the previous Government for conducting cases pertaining to the vigilance department and in its place constituted a new panel consisting of four lawyers including one Lallan Prasad Sinha. The Secretary to the Government of Bihar thereafter addressed a letter dated 25th February, 1981 to the District Magistrate which was in the following terms:-

"Government of Bihar
Law (Justice) Department

From: Shri Ambika Prasad Sinha
Secretary to Government,
Bihar, Patna

To: The District Magistrate
Patna.

Patna, Dated 25th Feb. 1981.

Subject:
In connection with the withdrawal of Vigilance P.S. Case No. 9(2)78 and P.S. case No. 53(8)78.

Sir,

I am directed to say that the State Government have decided to withdraw from prosecution the above mentioned two criminal cases on the ground of inexpediency of prosecution for reasons of State and public policy.

You are, therefore, requested to direct the public prosecutor to pray the Court after himself considering for the withdrawal of the above mentioned two cases for the above reasons under section 321 of the Code of Criminal Procedure.

Please acknowledge receipt of the letter and also initimate this department about the result of the action taken.

Yours faithfully,
sd. Illegible
Secretary to Govt. Patna.

Memo No. MW 26/81, 1056 J.
Patna, dated 25th February, 1981

Copy forwarded to Vigilance Department for information."

A Shri Lallan Prasad Sinha thereupon filed an application in the Court of the Chief Judicial Magistrate on 16th June, 1981 praying for permission to withdraw from the prosecution of Dr. Jagannath Misra and others under Vigilance P.C. Case No. 9(2)78. There were four grounds stated in the application for permission to withdraw from the prosecution and they may be stated as follows in the language of the B application itself:-

(1) Lack of prospect of successful prosecution in the light of evidence,

(2) the implication of the persons as a result of political and personal vendetta,

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(3) inexpediency of the prosecution for the reasons of the State and public policy, and

(4) the adverse effects that the continuation of the prosecution will bring on public interest in the light of the changed situation.

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The application after setting out these grounds proceeded to elaborate them in the following words:-

".....That I have therefore gone through the case diary and the relevant materials connected with the case and E have come to the conclusion that in the circumstances prevailing at the time of institution of the case and the investigation thereof, it appears that the case was instituted on the ground of political vendetta and only to defame the fair image of Dr. J.N. Mishra, who was then the leader of the opposition and one of the acknowledged leaders of the F Congress party in the country. The prosecution was not launched in order to advance the interest of public justice. I crave leave to place materials in support of the above submission and conclusion at the time of moving this petition.

That it is in public interest that the prosecutor which G has no reasonable chance of success and has been launched as a result of political vendetta unconnected with the advancement of the cause of public justice should not proceed further. More so, as the same is directed against the head of the Executive in whom not only the electorate have H put their faith and confidence but who has been elected

leader of the majority party in the legislature, both events have taken place after the institution of the case ....."

The application for withdrawal was opposed by Sheonandan Paswan, a member of the Bihar Legislative Assembly and its Deputy Speaker at the material time. The *locus standi* of Sheonandan Paswan to object to the application for withdrawal was challenged by Shri Lallan Prasad Sinha and this challange was upheld by the learned Chief Judicial Magistrate and it was held that Sheonandan Paswan had no *locus standi* to oppose the application for withdrawal. The learned Chief Judicial Magistrate then considered the application for withdrawal on merits and passed an order dated 28th June, 1981 in which, after reciting the rival contentions urged before him, held that "it is a fit case in which prayer of the learned Special Public Prosecutor to withdraw should be allowed and it is therefore allowed" and Dr. Jagannath Misra and other accused persons were ordered to be discharged. It will thus be seen that no reasons at all were given by the learned Chief Judicial Magistrate in his order for giving his consent to the withdrawal of the prosecution against Dr. Jagannath Misra and others. It does not appear from the order as to which ground or grounds appealed to the learned Chief Judicial Magistrate for giving his consent to the withdrawal.

Sheonandan Paswan thereupon filed Criminal Revision Application No. 874 of 1981 against the order of the learned Chief Judicial Magistrate permitting withdrawal of the prosecution but this application was dismissed *in limine* by the High Court by an order dated 14th September 1981. The High Court observed that the learned Chief Judicial Magistrate having considered the grounds urged by Lallan Prasad Sinha for withdrawal of the prosecution "was satisfied that permission should be accorded to the special public prosecutor to withdraw the prosecution" and there was, therefore, no illegality in the Order passed by the learned Chief Judicial Magistrate. The High Court did not even consider for itself whether the grounds on which withdrawal of the prosecution was sought were justified or not. The High Court seem to proceed on the basis that if the learned Chief Judicial Magistrate was satisfied that permission should be accorded for withdrawal of the prosecution, that was enough and it was not necessary for the High Court to examine the validity of the grounds urged for such withdrawal. This view taken by the High Court was, as we shall presently point out, wholly erroneous.

Since the High Court rejected the Revision Application in

limine, Sheo Nandan Paswan filed the present appeal after obtaining special leave from this Court. The appeal was heard by a Bench of three Judges consisting of Tulzapurkar, Baharul Islam and R.B. Misra, JJ. There was a difference of opinion amongst the Judges in regard to the decision of the appeal. Tulzapurkar, J. took the view that a prima facie case was clearly made out against Dr. Jagannath Misra and others and the ground urged on behalf of the State Government that there was not sufficient evidence which could lead to the conviction of Dr. Jagannath Misra and others, was not well founded. The learned Judge took this view on a detailed consideration of the material which was on record and held that the withdrawal of the prosecution was not justified either on merits or in law and being illegal had to be quashed. Baharul Islam and R.B. Misra, JJ., on the other hand, took the view that the entire investigation was vitiated and no person could be convicted on the basis of evidence procured as a result of such investigation and the withdrawal of the prosecution was, therefore, justified. Having regard to the majority judgment of Baharul Islam and R.B. Misra, JJ., the appeal was dismissed.

Sheo Nandan Paswan thereupon filed a Review application before this Court. But on the date when the Review application was filed, Baharul Islam, J. had already resigned his office as a Judge of this Court. Now, under the Rules of this Court the Review application had to be heard by the same Bench but since Baharul Islam, J. had ceased to be a Judge, A.N. Sen, J. was asked to join Tulzapurkar and R.B. Misra, JJ. and thus the Bench consisting of Tulzapurkar, A.N. Sen and R.B. Misra, JJ. heard the Review application. The judgment of the Review Bench was delivered by A.N. Sen, J on 22nd August 1983 and after setting out the rival arguments the learned Judge observed:

> "Applying the well-settled principles governing a review petition and giving my very anxious and careful consideration to the facts and circumstances of this case, I have come to the conclusion that the review petition should be admitted and the appeal should be re-heard. I have deliberately refrained from stating my reasons and the various grounds which have led me to this conclusion. Any decision of the facts and circumstances which, to my mind, constitute errors apparent on the face of the record and my reasons for the finding that these facts and circumstances constitue errors apparent on the face of the record resulting in the success of the review petition, may have the possibility of

prejudicing the appeal which as a result of my decision has to be re-heard." A

and in the result the learned Judge passed an order admitting the review petition and directing re-hearing of the appeal. But since prior to the date of this judgment the case of *Mohd. Mumtaz* v. *Smt. Nandini Satpathy*, [1983] 4 SCC 104 had already been referred to a Bench of five Judges, the learned Judge directed that the present appeal should be re-heard immediately after Nandini Satpathy's case. That is how the present appeal has now come before this Bench of five Judges. B

There was one contention of a preliminary nature advanced by Mr. Nariman on behalf of Dr.Jagannath Misra and that contention was that on a proper reading of the order on the Review Petition made by A.N. Sen, J. it was clear that the Review Bench did not exercise the power of review and set aside the order made by the Original Bench. The argument was that the order made by the Original Bench stood unquashed and unreserved and it was therefore not competent to the Constitution Bench to rehear the appeal on merits as if the order of the Original Bench did not exist. It was also urged by Mr. Nariman on behalf of Dr. Jagannath Misra that the order made by the Review Bench was not legal and valid since it was a non-speaking order which did not contain any reasons why the order of the Original Bench should be reviewed. This contention was of course not stongly pressed by Mr. Nariman but in any event we do not think that it has any substance. It is undoubtedly true that the order of the Review Bench did not in so many terms set aside the order of the Original Bench and used a rather unhappy expression, namely, "I ..... admit the Review Petition". But it is clear that when the Review Bench used the expression "I ..... admit the Review Petition" it plainly unequivocally meant that it was allowing the Review Petition and setting aside the order of the Original Bench, otherwise it is difficult to understand how it could possibly "direct the rehearing of the appeal". The appeal could be reheard only if the Review Petition was allowed and the order of the Original Bench was set aside and therefore obviously when the Review Bench directed rehearing of the appeal, it must by necessary implication be held to have allowed the Review Petition and set aside the Order of the Original Bench. We cannot allow the true meaning and effect of the order of the Review Bench to be obfuscated by a slight ineptness of the language used by the Review Bench. We must look at the substance of the Order rather than its apparent form. We must therefore proceed on the basis that the Order of the Original Bench C D E F G H

A was set aside and rehearing of the appeal directed by the Review Bench.

We must concede that no reasons appear to have been given by the Review Bench for allowing the Review petition and directing rehearing of the appeal. The question is: does this introduce any in-
B firmity in the Order of the Review Bench. There can be no doubt that the Review Bench was not legally bound to give reasons for the Order made by it. The apex court being the final court against which there is no further appeal, it is not under any legal compulsion to give reasons for an order made by it. It is not uncommon to find the Supreme Court of the United States allowing a writ of certiorari without giving any
C reasons. But merely because there may be no legal compulsion on the apex court to give reasons, it does not follow that the apex court may dispose of cases without giving any reasons at all. It would be eminently just and desirable on the part of the apex court to give reasons for the orders made by it. But when the apex court disposes of a Review Petition by allowing it and setting aside the order sought to be
D reviewed on the ground of an error apparent on the face of record, it would be desirable for the apex court not to give reasons for allowing the Review Petition. Where the apex court holds that there is an error apparent on the face of the record and the order sought to be reviewed must therefore be set aside and the case must be reheard, it would considerably prejudice the losing party if the apex court were to give
E reasons for taking this view. If the Review Bench of the apex court were required to give reasons, the Review Bench would have to discuss the case fully and elaborately and expose what according to it constitutes an error in the reasoning of the Original Bench and this would inevitably result in pre-judgment of the case and prejudice its rehearing. A reasoned order allowing a Review Petition and setting
F aside the order sought to be reviewed would, even before the rehearing of the case, dictate the direction of the rehearing and such direction, whether of binding or of persuasive value, would conceivably in most cases adversely affect the losing party at the rehearing of the case. We are therefore of the view that the Review Bench in the present case could not be faulted for not giving reasons for allowing
G the Review Petition and directing rehearing of the appeal. It is significant to note that all the three Judges of the Review Bench were unanimous in taking the view that "any decision of the facts and circumstances which ..... constitute errors apparent on the face of record and my ..... reasons for the finding that these facts and circumstances constitute errors apparent on the face of record resulting in the suc-
H cess of the Review Petition, may have the possibility of prejudicing the

appeal which as a result of my decision has to be reheard". This contention of Mr. Nariman must therefore be rejected. A

The learned counsel on behalf of Dr. Jagannath Misra also raised another contention of a preliminary nature with a view to displacing the *locus standi* of Sheonandan Paswan to prefer the present appeal. It was urged that when Shri Lallan Prasad Sinha applied for permission to withdraw the prosecution against Dr. Jagannath Misra and others, Sheonandan Paswan had no locus to oppose the withdrawal since it was a matter entirely between the Public Prosecutor and the Chief Judicial Magistrate and no other person had a right to intervene and oppose the withdrawal, and since Sheonandan Paswan had no standing to oppose the withdrawal, he was not entitled to prefer an appeal against the order of the learned Chief Judicial Magistrate and the High Court granting permission for withdrawal. We do not think there is any force in this contention. It is now settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment to the offender in the interest of the society. It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book. It is for this reason that in *R.S. Nayak* v. *A.R. Antulay*, [1984] 2 SCC 500 this Court pointed out that "punishment of the offender in the interests of the society being one of the objects behind penal statute enacted for larger goods of society, the right to initiate proceedings cannot be whittled down, circumscribed of fettered by putting it into a *strait jacket* formula of *locus standi*". This Court observed that *locus standi* of the complainant is a concept foreign to criminal jurisprudence. Now if any citizen can lodge a first information report or file a complaint and set the machinery of the criminal law in motion and his *locus standi* to do so cannot be questioned, we do not see why a citizen who finds that a prosecution for an offence against the society is being wrongly withdrawn, cannot oppose such withdrawal. If he can be a complainant or initiator of criminal prosecution, he should equally be entitled to oppose withdrawal of the criminal prosecution which has already been initiated at his instance. If the offence for which a prosecution is being launched is an offence against the society and not merely an individual wrong, any member of the society must have locus to initiate a prosecution as also to resist withdrawal of such prosecution, if initiated. Here in the present case, the offences charged against Dr. Jagannath Misra and others are offences of corruption, criminal breach of trust etc. and therefore any person who is interested in cleanliness of public B C D E F G H

A administration and public morality would be entitled to file a complaint, as held by this Court in *R.S. Nayak* v. *A.R. Antulay* (supra) and equally he would be entitled to oppose the withdrawal of such prosecution if it is already instituted. We must therefore reject the contention urged on behalf of Dr. Jagannath Misra that Sheonandan Paswan had no *locus standi* to oppose the withdrawal of the prosecution. If he was B entitled to oppose the withdrawal of the prosecution, it must follow a fortiori that on the turning down of his opposition by the learned Chief Judicial Magistrate he was entitled to prefer a revision application to the High Court and on the High Court rejecting his revision application he had standing to prefer an appeal to this Court. We must therefore reject this contention of the learned counsel appearing on behalf of Dr. Jagannath Misra.

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There was also one other contention urged on behalf of Dr. Jagannath Misra with a view to bunking an inquiry by this Court into the merits of the appeal. It was argued on behalf of Dr. Jagannath Misra that this was not a fit case in which the Court should interfere in D the exercise of its extraordinary jurisdiction under Article 136 of the Constitution since the permission granted by the learned Chief Judicial Magistrate for withdrawal of the prosecution had resulted in discharge of Dr. Jagannath Misra in respect of the offences for which he was charge-sheeted and this order of discharge was upheld by the High Court in revision and finally by two out of three Judges of this Court E and it would be unfair and unjust to reverse the order of discharge and direct a retrial of Dr. Jagannath Misra. We have considered this argument but it does not appeal to us. We fail to see any logic behind it. It is undoubtedly true that the effect of the withdrawal of the prosecution against Dr. Jagannath Misra was that he stood discharged in respect of the offences for which he was sought to be prosecuted but it was not an F order of discharge which was challenged by Sheonandan Paswan in the revision application filed by him before the High Court but it was an order granting consent for withdrawal of the prosecution that that assailed by him. The analogy of an order of discharge made under section 227 or section 239 of the Code of Criminal Procedure is not apposite because there the Sessions Judge or the Magistrate, as the case may be, G considers the entire material before him and then comes to the conclusion that there is not sufficient ground for proceeding against the accused or that the charge against the accused is groundless. But here when the Magistrate makes an order granting consent to withdrawal of the prosecution under section 321, it is a totally different judicial exercise which he performs and it would not therefore be right to say that if H the High Court sets aside the order of the Magistrate granting consent

to withdrawal from the prosecution, the High Court would be really setting aside an order of discharge made by the Magistrate. What the High Court would be doing would be no more than holding that the withdrawal from the prosecution was incorrect or improper and that the prosecution should proceed against the accused and ultimately if there is not sufficient evidence or the charges are groundless, the accused may still be discharged. Moreover it may be pointed out that even an order of discharge made by the Magistrate can be set aside by the High Court in revision if the High Court is satisfied that the order passed by the Magistrate is incorrect, illegal or improper or that the proceedings resulting in the order of discharge suffer from any irregularity. The revisional power exercised by the High Court under section 397 is couched in words of widest amplitude and in exercise of this power can satisfy itself as to the correctness, legality or propriety or any order passed by the Magistrate or as to the regularity of any proceedings of such Magistrate. When this Court is hearing an appeal against an order made by the High Court in the exercise of its revisional power under section 397 it is the same revisional power which this Court would be exercising and this Court therefore certainly can interfere with the order made by the Magistrate and confirmed by the High Court if it is satisfied that the order is incorrect, illegal or improper. In fact, in a case like the present where the question is of purity of public administration at a time when moral and ethical values are fast deteriorating and there seems to be a crisis of character in public life, this Court should regard as its bounden duty—a duty owed by it to the society—to examine carefully whenever it is alleged that a prosecution for an offence of corruption or criminal breach of trust by a person holding high public office has been wrongly withdrawn and it should not matter at all as to how many Judges in the High Court or the lower court have been party to the granting of such consent for withdrawal. Here in the present case, it is no doubt true that the order granting consent for withdrawal of the prosecution was made by the learned Chief Judicial Magistrate and it was upheld by the High Court and two out of three Judges of the bench of this Court which initially heard the appeal agreed with the view taken by the High Court but we cannot overlook the fact that according to the Review Bench which also consisted of three Judges, there was an error apparent on the face of the record in the judgment of the earlier Bench. The mathematics of numbers cannot therefore be invoked for the purpose of persuading this Court not to exercise its discretion under Article 136 of the Constitution.

A B C D E F G

It was then contended on behalf of Dr. Jagannath Misra that H

A Sheonandan Paswan was Minister in the cabinet of Karpoori Thakur and continued to be a member of the political party opposed to Dr. Jagannath Misra and he was therefore actuated by political motivation in opposing the withdrawal of prosecution against Dr. Jagannath Misra and in prefering a revision application to the High Court and an appeal to this Court. This contention is also without substance and B does not command itself to us. We may concede for the purpose of argument that Sheonandan Paswan opposed the withdrawal of the prosecution against Dr. Jagannath Misra because he had a political score to settle with Dr. Jagannath Misra and he was motivated by a political vendetta. But that is no reason why this Court should sustain an order made by the learned Cheif Judicial Magistrate granting con- C sent for withdrawal of the prosecution if otherwise the order appears to be improper and unjustified. The question is even if no one had opposed the withdrawal of the prosecution, would the learned Chief Judicial Magistrate and the High Court have been justified in granting consent to the withdrawal of the prosecution and that would depend essentially on the facts and particulars of the case placed before the D Court. The political motivation or vendetta of Sheonandan Paswan could not posssibly be a valid ground for granting consent for withdrawal of the prosecution if otherwise on the facts and circumstances of the case it was improper and invalid. It is a well-established proposition of law that a criminal prosecution, if otherwise justifiable and based upon adequate evidence does not become vitiated on account of E *mala fides* or political vendetta of the first informant or the complainant. It was rightly observed by Krishna Iyer, J. in *State of Punjab* v. *Gurdial Singh*, [1980] 1 SCR 1076. "If the use of power is for the fulfilment of a legitimate object, the actuation or catalisation by malice is not legiciable." The same principle must obviously apply where a person is opposing withdrawal of prosecution against an accused. His F political motivation or vendetta cannot justify grant of consent for withdrawal if otherwise it is not legitimate or justified.

It is undoubtedly true that the prosecution against Dr. Jagannath Misra was initiated by the successor Government of Karpoori Thakur after Dr. Jagannath Misra went out of power. But that by itself G cannot support the inference that the initiation of the prosecution was actuated by political vendetta or mala fides because it is quite possible that there might be material justifying the initiation of prosecution against Dr. Jagannath Misra and the successor Government might have legitimately felt that there was a case for initiation of prosecution and that is why the prosecution might have been initiated. There H would be nothing wrong on the part of the successor Government in

doing so and the prosecution cannot be said to be vitiated on that account. This is precisely what Hidayatullah, J. speaking for the Constitution Bench pointed out in *Krishna Ballabha Sahay and others* v. *Commission of Enquiry,* [1969] 1 SCR 387:-

> "The contention that the power cannot be exercised by the succeding ministry has been answered already by this Court in two Cases. The earlier of the two has been referred to by the High Court already. The more recent case is *Shri P.V. Jagannath Rao & Ors.* v. *State of Orissa,* [1968] 3 SCR 789. It hardly needs any authority to state that the inquiry will be ordered not by the Minister against himself but by some one else. When a Minister goes out of office, its successor may consider any glaring charges and may, if justified, order an inquiry. Otherwise, each Ministry will become a law unto itself and the corrupt conduct of its Ministers will remain beyond scrutiny."

These observations afford a complete answer to the contention urged on behalf of Dr. Jagannath Misra that this Court should not interfere with the withdrawal of the prosecution because the successor Government of Karpoori Thakur or Sheonandan Paswan was actuated by political motivation or vendetta.

The learned counsel on behalf-of Dr. Jagannah Misra also contended that the prosecution should not have been initiated against Dr. Jagannath Misra without a prior inquiry made through a Commission of Enquiry set up for that purpose. The argument was that both prudence and propriety requires the setting up of a Commission of Enquiry prior to initiation of the prosecution because an inquiry made through the Commission of Enquiry would act as a filter for politically motivated or mala fide prosecution. This argument is also, in our opinion, without any force and cannot be sustained. It is undoubtedly true that in the past there have been cases where a successor Government has set up a Commission of Enquiry to enquire into the conduct of former Chief Minister and other persons connected with the administration during the regime of the former Chief Minister but that does not mean that no prosecution should be launched against a former Chief Minister or a person holding high political office under the earlier regime without first setting up a Commission of Enquiry for enquiring into his conduct. There is no provision of law which requires such a course of action to be adopted and it cannot be said that if a prosecution is initiated without an inquiry being held by a Commis-

A sion of Enquiry set up for that purpose, the prosecution would be bad or that on that ground alone the prosecution could be allowed to be withdrawn. The criminal process in India is quite tardy and slow moving and as it is, it takes considerable time for a prosecution to ultimately come to an end and if a requirement were super-imposed that no prosecution shall be launched against a person holding high B political office under an earlier regime without first setting up a Commission of Enquiry and the Commission coming to a *prima facie* conclusion that such person has committed acts which would constitute offences, the entire criminal process would be reduced to a mockery because the Commission of Enquiry itself might go on for years and after the inquiry is concluded the prosecution will start where the C entire evidence will have to be led again and it would be subject to cross-examination followed by lengthy arguments. It would, in our opinion, be perfectly legitimate for the successor Government to initiate a prosecution of a former Chief Minister or a person who has held high political office under the earlier regime without first having an inquiry made by a Commission of Enquiry, provided, of course, the D investigation is fair and objective and there is sufficient material to initiate such prosecution. There are, under the existing law, sufficient safeguards for the purpose of ensuring that no public servant is harassed by false and vexatious prosecution or charges of corruption because no such prosecution can be initiated without sanction under section 6 of the prevention of Corruption Act or section 197 of the E Code of Criminal Procedure, 1973. These safeguards cannot be said to be inadequate even if they do not afford adequate protection in any particular case, the Magistrate is always there to protect an innocent accused because if in the opinion of the Magistrate, there is not sufficient evidence and the charge against the accused appears to be groundless, the Magistrate may straightaway discharge the accused F without taking any evidence. It would become very difficult—almost impossible—to bring, to use the words of Krishna Iyer, J. "the higher inhabitants of Indian public and political decks" within the net of the criminal law if an additional requirement is imposed that there should first be an inquiry by the Commission of Enquiry before any prosecution can be launched against them. This contention urged on behalf of G Dr. Jagannath Misra must also, therefore, fail.

That takes us to the merits of the question debated before us, namely, whether the learned Chief Judicial Magistrate and the High Court were right in granting consent for withdrawal of the prosecution against Dr. Jagannath Misra and others. The application for with- H drawal was made by Shri Lallan Prasad Sinha and consent for such

withdrawal was given by the learned Chief Judicial Magistrate under section 321 of the Code of Criminal Procedure, 1973 and consequently, it is this section which falls for construction and application in the present case. The question is whether the application for withdrawal made by Shri Lallan Prasad Sinha was within the scope of his power under section 321 and whether the consent given by the Chief Judicial Magistrate for such withdrawal was within the terms of that section. 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,—
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> (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;
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> (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—
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> (i) was against any law relating to a matter to which the executive power of the Union extends, or
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> (ii) was investigated by the Delhi Special Police Establishment under the Delhi 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,

A 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
B granted by the Central Government to withdraw from the prosecution."

This section corresponds to section 494 of the old Criminal Procedure Code, 1898 and it incorporates certain changes which have relevance in that they threw some light on the true interpretation of the section. It may be noted that there are two limbs of section 321. The first is that
C any Public Prosecutor or Assistant Public prosecutor incharge of a case may withdraw from the prosecution of any person but this power to withdraw from the prosecution is not an unfettered or unrestricted power because it can be exercised only "with the consent of the Court". If the Court does not give its consent to the withdrawal of the
D prosecution, the Public Prosecutor or the Assistant Public Prosecutor cannot withdraw it. But the question is as to what are the grounds on which the Public Prosecutor or Assistant Public Prosecutor can apply for withdrawal from the prosecution and also similarly what are the considerations which must weigh with the Court in granting or refusing consent for the withdrawal of the prosecution. There have been a
E number of decisions of this Court bearing on both these issues but it must be conceded straightaway that these decisions do not disclose any uniform approach. The Court has in some decisions taken very narrow view while in some others it has adopted a broader view. The Court has swung from narrow grounds to broad ones in different decisions from time to time. We shall consider some of these decisions a little
F later.

Now one thing is certain that no unfettered or unrestricted power is conferred on the Public Prosecutor—when we refer to Public Prosecutor, we also include Assistant Public Prosecutor—to apply for withdrawal from the prosecution. It is obvious that the power conferG red on the Public Prosecutor to withdraw from the prosecution must be a controlled or guided power or else it will fall foul of Article 14 of the Constitution. It is necessary in this context to refer to certain other provisions of the Code of Criminal Procedure, 1973 which, though not directly relevant, throw some light on the determination of the question as to what is the extent of the power of the Public Prosecutor to
H withdraw from the prosecution and how it is controlled and regulated.

When a First Information Report relating to the commission of a cognizable offence is lodged in a Police Station under section 154 or an order is made by a Magistrate directing the police to investigate a non-cognizable case under section 155, the police is bound to investigate the offence alleged to have been committed. The powers of the police in regard to investigation and the procedure to be followed by them in such investigation are set out in sections 157 to 172. Section 173 sub-section (1) casts an obligation on the police to complete the investigation without unnecessary delay and sub-section (2) of section 173 then proceeds to state that as soon as the investigation is completed, the officer-incharge of the Police Station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the prescribed form stating the various particulars mentioned in that sub-section. Section 190 confers power on the Magistrate to take cognizance of an offence and there are three different ways in which cognizance of an offence may be taken by a Magistrate. This section states that cognizance of an offence may be taken— (a) upon receiving a complaint of facts which constitute such an office (b) upon a police report of such facts and (c) upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed. We may concentrate our attention on clause (b) since the section read with that clause clearly goes to show that even in the matter of initiating a prosecution, the police has no unfettered discretion. It is now well-settled as a result of several decisions of this Court, of which we may mention only one, namely, *H.S. Bains* v. *State*; AIR 1980 SC 1883, that even if the report submitted by the police to the Magistrate under section 173 states that in the opinion of the police no offence appears to have been committed and no prosecution may therefore be initiated, the Magistrate can still form an opinion on the facts set out in the report that they constitute an offence and he can take cognizance of the offence and issue process against the accused. The Magistrate may also find, after considering the report, that the investigation is unsatisfactory or incomplete or there is scope for further investigation and in that event, the Magistrate may decline to accept the report and direct the police to make further investigation and then decide whether or not to take cognizance of the offence after considering the report submitted by the police as a result of such further investigation. It will thus be seen that the police has no absolute or unfettered discretion whether to prosecute an accused or not to prosecute him. In fact, in our constitutional scheme, conferment of such absolute and uncanalised discretion would be violative of the equality clause of the Constitution. The Magistrate is therefore given the power to structure and control the discretion of the

police. If the Magistrate finds from the report made by the police either on initial investigation or on further investigation directed by the Magistrate, that *prima facie* an offence appears to have been committed, the Magistrate is empowered to take cognizance of the offence notwithstanding the contrary opinion of the police and equally if the Magistrate forms an opinion that on the facts set out in the report no offence *prima facie* appears to have been committed though the police might have come to a contrary conclusion, the Magistrate can decline to take cognizance of the offence. The discretion of the police to prosecute is thus 'cabined and confined' and, subject to appeal or revision, and the Magistrate is made the final arbiter on this question. The Legislature has in its wisdom taken the view that it would be safer not to vest absolute discretion to prosecute in the police which is an Executive arm of the Government but to subject it to the control of the judicial organ of the State.

The same scheme has been followed by the Legislature while conferring power on the Public Prosecutor to withdraw from the prosecution. This power can be exercised only with the consent of the Court so that the Court can ensure that the power is not abused or misused or exercised in an arbitrary or fanciful manner. Once the charge-sheet is filed and the prosecution is initiated, it is not left to the sweet-will of the State or the Public Prosecutor to withdraw from the prosecution. The Court is entrusted with control over the prosecution and as pointed out by Krishna Iyer, J. in *Subhash Chander* v. *State and others*; [1980] 2 SCR 44. "The even course of criminal justice cannot be thwarted by the Executive however high the accused, however sure the Government feels a case is false, however unpalatable the continuance of the prosecution to the powers-that-be who wish to scuttle court justice because of hubris, affection or other noble or ignoble consideration." Once the prosecution is launched, its relentless course cannot be halted except on sound considerations germane to public justice. And again, to quote the words of Krishna Iyer, J. in the same case, "the Court is monitor, not servitor, and must check to see if the essentials of the law are not breached, without, of course, crippling or usurping the power of the public prosecutor." The Public Prosecutor cannot therefore withdraw from the prosecution unless the Court before which the prosecution is pending gives its consent for such withdrawal. This is a provision calculated to ensure non-arbitrariness on the part of the Public Prosecutor and compliance with the equality clause of the Constitution.

It is also necessary to point out that the law has fashioned

another safeguard against arbitrary exercise of power by the Public Prosecutor in withdrawing from the prosecution and this safeguard is that the Public Prosecutor can apply for withdrawal only on the basis of certain legitimate grounds which are germane or relevant to public justice. It is significant to note that the entire development of administrative law is characterised by a consistent series of decisions controlling and structuring the discretion conferred on the State and its officers. The Law always frowns on uncanalised and unfettered discretion conferred on any instrumentality of the State and it is the glory of administrative law that such discretion has been through judicial decisions structured and regulated. This Court has therefore, despite fluctuating opinions delivered in different cases, laid down the broad principle and consistently acted upon it, namely, that the power to apply for withdrawal from the prosecution can be exercised only in furtherance of justice. It was pointed out by this Court in *M.N. Sankaranarayanan Nair* v. *P.V. Balakrishnan and others,* [1972] 2 SCR 599, "the essential consideration which is implicit in the grant of the power is that it should be in the interest of administration of justice." So also, one of us, (Bhagwati, J. as he then was) said in *State of Orissa* v. *C. Mohapatra,* [1977] 1 SCR 385 "the ultimate guiding consideration must always be the interest of administration of Justice." That is the broad principle under which the Public prosecutor must bring his case in order to be able to justify his application for withdrawal from the prosecution. What are the different grounds which may possibly come within this principle is a matter which we shall presently discuss but whatever be the grounds on which the application is made it can be sustained only if those grounds are relatable to furtherance of public justice.

There was one major question debated before us in regard to the position of the Public Prosecutor in relation to an application for withdrawal from the prosecution and the issue was as to what is the degree of autonomy conferred on the Public Prosecutor vis-a-vis the Government whilst filing an application for withdrawal. This issue can be operationalised into three different questions: (1) Does section 321 permit a Public Prosecutor to withdraw from a case without seeking the opinion of the Government (2) whether section 321 empowers a Public Prosecutor to refuse to withdraw from the prosecution despite the advice of the Government to withdraw and (3) where a public prosecutor withdraws from the prosecution on the advice and direction of the Government, does he act contrary to the requirement of section 321? These questions have presented a lot of difficulty and unfortunately as mentioned earlier the decisions of this Court have not been

A consistent in the answer to be given to these questions. We shall refer to a few of these decisions. In *State of Bihar* v. *Ram Naresh Pandey*; [1957] SCR 279 which is the first important case dealing with the interpretation and application of section 321, this Court while deliberating on the role of a Public Prosecutor said:-

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> ". . . . . it is right to remember that the Public Prosecutor (though an executive officer as stated by the Privy Council in *Bawa Faqir Singh* v. *The Kind Emperor*, [1938] L.R. 65 I.A. 388, 395) is, in a larger sense , also an officer of the Court and that he is bound to assist the Court with his fairly-considered view and the Court is entitled to have the
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> C benifit of the fair exercise of his function. It has also to be appreciated that in this country the scheme of the administration of criminal justice is that the primary responsibility of prosecuting serious offences (which are classified as cognizable offences) is on the executive authorities. Once information of the commission of any such offence reaches
>
> D the constituted authorities, the investigation including collection of the requisite evidence, and the prosecution for the offence with reference to such evidence, are the functions of the executive. But the Magistrate also has his allotted functions in course of these stages." . . . . . In all these matters he exercises discretionary functions in
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> E respect of which the initiative is that of the executive but the responsibility is his."

These observations seem to suggest that the prosecution for an offence is the function of the Executive and that the Public Prosecutor is really an Executive Officer who is conducting the prosecution on behalf of

F the State. So also in *M.N. Sankarayaraya Nair* v. *P.V. Balakrishnan and others* (supra) we find that there is a paragraph which seems to implidely accept governmental directive in the matter of withdrawal from the prosecution as legitimate and that paragraph reads as follows:-

G

> "The appellant's Advocate later during the course of the argument conceded that there is no force in the first of his contentions namely that the Public Prosecutor cannot either be asked by the State Government to consider the filing of a petition under section 494 nor would it be proper for him if he was of the opinion that the prosecution ought
>
> H not to proceed to get the consent of the Government to the

> filing of a petition under that section for obtaining permission of the Court to withdraw from the prosecution." A

This Court also seemed to accept in *State of Orissa* v. *C. Mohapatra* (supra) that the policy decision for withdrawal from the prosecution can be made by the State though the application for withdrawal would be made by the Public Prosecutor. This is what the Court said in that B case:

> "We cannot forget that ultimately every offence has Social or economic cause behind it and if the *State* feels that elimination or eradication of the social or economic cause behind it would be better served by not proceeding with the C prosecution the *State* should be at liberty to withdraw." (italics are ours)

This position seems to obtain until 1978 so far as the decided cases are concerned.

D

But in 1978 the trend changed when in *Balwant Singh* v. *State of Bihar*; [1978] 1 SCR 604 the view that found favour was that the Public Prosecutor is the primary authority to decide on the question of withdrawal from the prosecution. This Court speaking through Krishna Iyer, J. observed in this case:-

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> "The Statutory responsibility for deciding upon withdrawal squarely vests on the public prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side. The Criminal Procedure Code is the only matter of the public prosecutor and he has to guide himself with reference to Criminal F Procedure Code only ..... Here, the Public Prosecutor is ordered to move for withdrawal. This is not proper for a District Magistrate to do. Indeed, it is not proper to have the public prosecutor ordered about. It is entirely within the discretion of the public prosecutor. It may be open to the District Magistrate to bring to the notice of the Public G Prosecutor and suggest to him to consider whether the prosecution should be withdrawn or not. He cannot command where he can only command."

This decision for the first time made the Public Prosecutor autonomous of the Executive in so far as withdrawal from the prosecution is H

A concerned and held that the Public Prosecutor must apply his own mind and come to his own decision whether to apply for withdrawal or not, irrespective of the opinion or advice of the Executive.

The same view was reiterated by Krishna Iyer J., speaking on behalf of the Court, in *Subhash Chander* v. *State and others* (supra)
B where the learned Judge said:-

> "The functionary clothed by the Code with the power to withdraw from the prosecution is the Public Prosecutor. The Public Prosecutor is not the executive, nor a flunk of political power. Invested by the Statute with a discretion to
C withdraw or not to withdraw, it is for him to apply an independent mind and exercise his discretion. In doing so, he acts as a limb of the judicative process, not as an extension of the executive."

The learned Judge strongly depricated the action of the District Magis-
D trate in directing the Public Prosecutor to withdraw the prosecution in the case before him and observed in words admitting of no doubt:-

> "The jurisprudence of genuflexion is alien to our system and the law expects every repository of power to do his duty by the Constitution and the law, regardless of com-
E mands, directives, threats and temptations. The Code is the master for the criminal process. Any authority who coerces or orders or pressurises a functionary like a public prosecutor, in the exclusive province of his discretion violates the rule of law and any public prosecutor who bends before such command betrays the authority of his office.
F May be, Government or the District Magistrate will consider that a prosecution or class of prosecutions deserves to be withdrawn on grounds of policy or reasons of public interest relevant to law and justice in their larger connotation and request the public prosecutor to consider whether the case or cases may not be withdrawn. There-
G upon, the Prosecutor will give due weight to the material placed, the policy behind the recommendation and the responsible position of Government, which in the last analysis, has to maintain public order and promote public justice. But the decision to withdraw must be his."

H This case also, like the earlier one in *Balwant Singh* v. *State of Bihar*

(supra), introduced the concept of independent application of mind by the Public Prosecutor on the question of withdrawal from the prosecution and insisted that the Executive cannot direct or pressurise the Public Prosecutor to withdraw from the prosecution and the Public Prosecutor must come to his own decision without bending before the command of the Executive. Once this component of independent application of mind on the part of the Public Prosecutor was introduced the Court while considering whether consent for such withdrawal should be granted or not was required to deliberate not only on the legitimacy of the grounds urged in support of the withdrawal but also whether the Public Prosecutor had applied his mind in the matter.

But then again there was a slight shift in this position in the latest decision in *R.K. Jain* v. *State*, [1980] 3 SCR 982. The Court in this case adopted a more middle of the road approach and after pointing out what the Court conceived to be the correct position in law in the following words:-

> "Whilst at one point it said that it shall be the duty of the Public Prosecutor to inform 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 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 provisions of s.321 Cr. PC." (emphasis is ours)

The Court recognised that the Government has a role in the administration of criminal justice and observed:

> "An elected Government, sensitive and responsive to the feelings and emotions of the people, will be amply justified if for purposes of creating an atmosphere of goodwill or for the purpose of not disturbing the calm which has descended it decides not to prosecute the offenders involved or not to proceed further with prosecutions already launched. *In such matters who but the Government can and should decide in the first instance whether it should be baneful or beneficial to launch or continue prosecutions.* If the Government decides that it would be in the interest to withdraw from

A prosecutions, how is the Government to go about to task?" (emphasis is ours).

and proceeded to add that the Public Prosecutor may act on the advice of the Government in applying for withdrawal of the prosecution "where large and sensitive issues of public policy are involved." Chin-
B nappa Reddy, J. speaking on behalf of the Court elaborated this view in the following words:-

> "Where large and sensitive issues of public policy are involved he must if he is right minded the Public Prosecutor seek advice and guidance from the policy-makers. His sources of information and resources are of a very limited
C nature unlike those of the policy-makers. If the policy-makers themselves move in the matter in the first instance as indeed it is proper that they should where matters of momentous public policy are involved *and if they advice the Public Prosecutor to withdraw from the prosecution,* it is
D not for the Court to say that *the initiative came from the Government* and therefore the Public Prosecutor cannot be said to have exercised a free mind." (Emphasis is ours)

The majority Judges however took a different view in the present appeal when it was heard by the earlier Bench. Baharul Islam, J.
E stated the view of the majority in the following terms:-

> "Unlike the Judge, the Public Prosecutor is not an absolutely independent officer. He is an appointee of the Government, Central or State (see sections 24 and 25, CrPC), appointed for conducting in court any prosecution
F 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. A Public Prosecutor cannot act without instructions of the Government; a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his
G client, namely, the Government ... 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 receives such instructions, he cannot be said to act under extraneous influence. On the contrary, the Public
H Prosecutor cannot file an application for withdrawal of a

> case on his own without instruction from the Government ..... In our opinion, the object of Section 321, Cr. P.C. appears to be to reserve power to the Executive Government to withdraw any criminal case on larger 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, social, economic and political; changed social and political situation; avoidance of destabilization of a stable government and the like. And such powers have been, in our opinion, rightly reserved for the Government, for, who but the Government is in the know of such conditions and situations prevailing in a State or in the country? The Court is not in a position to know such situations."

It will thus be seen that the position in law in regard to the degree of autonomy enjoyed by the Public Prosecutor vis-a-vis the Government in filing an application for withdrawal of the prosecution is rather confused and it would be desirable to approach the question on first principle.

Now there can be no doubt that prosecution of an offender who is alleged to have committed an offence is primarily the responsibility of the Executive. It is the executive which is vested with the power to file a charge-sheet and initiate a prosecution. This power is conferred on the Executive with a view to protecting the society against offenders who disturb the peace and tranquillity of the society by committing offences. Of course it is left to the Court to decide whether to take cognizance of the offences set out in the charge-sheet but the filing of the charge-sheet and initiation of the prosecution is solely within the responsibility of the Executive. When the prosecution is initiated by filing a charge-sheet the Public Prosecutor comes into the picture. Of course, even before the charge-sheet is filed, the investigating authorities may seek the advice of the Public Prosecutor in regard to the prosecution of the accused but it is not obligatory on the investigating authorities to do so. The Public Prosecutor comes on the scene as soon as the charge-sheet is filed and he appears and argues the case on behalf of the prosecution. It is the State through the investigating authorities which files a charge-sheet and initiate the prosecution and the Public Prosecutor is essentially counsel for the State for conducting the prosecution on behalf of the State. The expression "Public Prosecutor" is defined in section clause (u) to mean " any person appointed under section 24 and includes any person acting under the

A directions of a Public Prosecutor." Section 24 provides for the appointment of a Public Prosecutor: sub-section (1) of section 24 states that "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 B other proceeding *on behalf of the Central Government or State Government, as the case may be*". (Emphasis is ours). Sub-section(3) of section 24 enacts that for every District, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district and under sub-section(7) of that section a person is eligible for being appointed as a Public Pro- C secutor or an Additional Public Prosecutor only if he has been in practice as an advocate for not less than 7 years. Thus the Public Prosecutor appointed by the State Government conducts the prosecution on behalf of the State Government and the Public Prosecutor appointed by the Central Government does so on behalf of the Central Government. It is undoubtedly true that the Public Prosecutor is an D officer of the Court, as indeed every advocate practising before the Court is, and he owes an obligation to the Court to be fair and just: he must not introduce any personal interest in the prosecution nor must he be anxious to secure conviction at any cost. He must present the case on behalf of the prosecution fairly and objectively and as pointed out by this Court in *State of Bihar* v. *Ram Naresh Pandey* (supra) he is E bound to assist the court with his fairly considered view and the fair exercise of his judgment. But at the same time it must be noted that he conducts the prosecution on behalf of the Central Government or the State Government, as the case may be, and he is an advocate acting on behalf of the Central Government or the State Government which has launched the prosecution. We are therefore of the view that there is F nothing wrong if the Government takes a decision to withdraw from the prosecution and communicate such direction to the Public Prosecutor. The Public Prosecutor would *inter alia* consider the grounds on which the Government has taken the decision to withdraw from the prosecution and if he is satisfied that these grounds are legitimate, he may file an application for withdrawal from the prosecution. If on the G other hand he takes the view that the grounds which have been given by the Government are not legitimate he has two options available to him. He may inform the Government that in his opinion, the grounds which have weighed with the Government are not valid and that he should be relieved from the case and if this request of his is not granted, he may tender his resignation. Or else, he may make an H application for withdrawal from the prosecution as directed by the

Government and at the hearing of the application he may offer his considered view to the court that the application is not sustainable on the grounds set out by him and leave it to the court to reject the application. We do not think there is anything wrong in the Public Prosecutor being advised or directed by the Government to file an application for withdrawal from the prosecution and the application for withdrawal made by him pursuant to such direction or advice is not necessarily vitiated. The Public Prosecutor can of course come to his own independent decision that the prosecution should be withdrawn but ordinarily if he is wise and sensible person he will not apply for withdrawal without consulting the Government because it is the Government which has launched the prosecution and is prosecuting the accused. The critically, of course, he can make an application for withdrawal from the prosecution without consulting the Government and he cannot be accused of any illegality for doing so and the court may give its consent for such withdrawal but in that event the Public Prosecutor would render the risk of incurring the displeasure of the Government which has appointed him. If the Public Prosecutor seeks the permission of the Government for withdrawal from the prosecution and the Government grants such permission to him and on the basis of such permission he applies for withdrawal the application cannot be said to be vitiated. The proviso to section 321 in fact contemplates in so many terms that in certain categories of offences the Public Prosecutor appointed by the State Government cannot move the Court for its consent to withdraw from the prosecution without the permission of the Central Government. There is no danger of abuse or misuse of power by the Government inherent in this process because there are two principal safeguards against any such abuse or misuse of power by the Government: one is that the application must be based on grounds which advance public justice and the other is that there can be no withdrawal without the consent of the court.

Now let us consider the question as to what are the grounds on which the Public Prosecutor can apply for withdrawal from the prosecution. These grounds have been variously stated in the decisions of this Court but the basic principle under lying all these grounds is that the withdrawal can be sought only for furthering the cause of public justice. If we may repeat what we have said before, the paramount consideration must always be the interest of administration of justice. That is the touch-stone on which the question must be determined whether an application for withdrawal of the prosecution can be sustained. This Court tried to formulate several instances where the cause of public justice would be served better by withdrawal from the pro-

A secution. It was observed by this Court in *M.N. Sankaravaraya* v. *P.V. Balakrishnan* (supra) that an application for withdrawal from the prosecution may be made on the ground that "it will not be possible to produce sufficient evidence to sustain the charge or that subsequent information before prosecuting agency would falsify the prosecution evidence or in any other similar circumstances which it is difficult to B predicate as they are dependent entirely on the facts and circumstances of each case". This Court also pointed out in *State of Orissa* v. *C. Mohapatra* (supra) that "it is not sufficient for the Public Prosecutor merely to say that it is not expedient to proceed with the prosecution. He has to make out some ground which would show that the prosecution is sought to be withdrawn because *inter alia* the prosecu- C tion may not be able to produce sufficient evidence to sustain the charge or that the prosecution does not appear to be well-founded or that there are circumstances which clearly show that the object of administration of justice would not be advanced or furthered by going on with the prosecution." It was also emphasised by this Court in *Subhash Chander* v. *State* (supra) that "justice cannot be allowed to be D scuttled by the Public Prosecutor or the State because of hubris affection or other noble or ignoble considerations." This Court also observed in *R.K. Jain* v. *State* (supra):

> "In the past we have often known how expedient and necessary it is in the public interest for the public Prose- E cutor to withdraw from prosecutions arising out of mass agitiations, communal riots, regional disputes, industrial conflicts, student unrest etc. Wherever issues involve the emotions and there is a surcharge of violence in the atmosphere it has often been found necessary to withdraw from prosecutions in order to restore peace, to free the F atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to persist with prosecutions where emotive issues are involved in the name of vindicating the law even be utterly counter productive. An elected Government, sensitive and responsive to the feelings and emotions of the people, will be amply justified if G for the purpose of creating an atmosphere of goodwill or for the purpose of not disturbing a calm which has descended it decides not to prosecute the offenders involved or not to proceed further with prosecutions already launched."

It will thus be seen that the Public Prosecutor cannot maintain an H application for withdrawal from the prosecution on the ground that the

Government does not want to produce evidence and proceed with the prosecution against the accused or that the Government considers that it is not expedient to proceed with the prosecution. The Public Prosecutor has to make out some ground which would advance or further the cause of public justice. If the Public Prosecutor is able to show that he may not be able to produce sufficient evidence to sustain the charge, an application for withdrawal from the prosecution may be legitimately made by him. But there are two clarifications which we would like to introduce where the prosecution is sought to be withdrawan on this ground.

The first qualification is that where a charge has been framed by the Court either under section 228 or section 240 of the Code of Criminal Procedure, 1973, it would not be open to the Public Prosecutor to apply for withdrawal from the prosecution on the ground of insufficiency of evidence in support of the prosecution. The reason is that under section 228 a charge can be framed by the Court only if the court is of opinion that there is ground for presuming that the accused has committed an offence and so also under Section 240 the Court can frame a charge only if it is of opinion that there is ground for presuming that the accused has committed an offence. The Court in both these cases applies its mind to the material consisting of the police report and the documents sent with it under section 173 and comes to a conclusion that a *prima facie* case has been made out against the accused and the charge should therefore be framed. When the Court has come to this conclusion after full consideration and framed a charge, it is difficult to see how on the same material the Court can be persuaded to hold that there is not sufficient evidence to sustain the prosecution. How can the Public Prosecutor be permitted to make a *volte face* on the basis of the same material? That would be mockery of justice and it would shake the confidence of the people in the purity and intergrity of the administration of justice. That is why this Court pointed out in *Bansi Lal* v. *Chandi Lal*, AIR [1976] SC 370 that, "if the material before the Additional Sessions Judge was considered sufficient to enable him to frame the charges against the respondents, it is not possible to say that there was no evidence in support of the prosecution case." So also in *Balwant Singh* v. *State* (supra) this Court reiterated that "the State should not stultify the Court by first stating that there is a true case to be tried and then make *volte face* to the effect that on a second investigation the case has been discovered to be false." The Public Prosecutor in this last mentioned case sought to rely on a second investigation for supporting the application for withdrawal but that was clearly and unequivocally not countenanced by this

A Court. Obviously, the Public Prosecutor would be on much weaker ground when on the same material which was before the Court when it framed the charge, he subsequently seeks to withdraw the prosecution on the ground that there is not sufficient evidence to sustain the prosecution. It is, therefore, clear that though the prosecution can be withdrawn at any stage, even after the framing of the charge, it would B not be competent to the Public Prosecutor, once the charge is framed, to apply for withdrawal of the prosecution on the ground that the same material which was before the Court when it framed the charge is not sufficient to sustain the prosecution. Of course, if some material has subsequently come to light which throws doubt on the veracity of the prosecution case the Public Prosecutor can certainly apply for withdrawal on the ground that the prosecution is not well-founded. It may C also happen that in the meanwhile a key witness may have died or some important evidence may have become unavailable or some such thing may have happened; in that event, the Public Prosecutor may legitimately feel that it will not be possible to sustain the prosecution in the absence of such evidence and he may apply for withdrawal from D the prosecution. But, on the same material without anything more, the Public Prosecutor cannot apply for withdrawal from the prosecution after the charge is framed. To allow him to do so would impair the faith of the people in the purity and integrity of the judicial process.

The second qualification which we must introduce relates to a E situation where a charge-sheet has been filed but charge has not been framed in a warrant case instituted on police report. Section 239 of the Code of Criminal Porcedure, 1973 provides:-

> "If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

G Now when a warrant case instituted on a police report comes before the Court, the Court is required to consider only the police report and the documents sent alongwith it and the Court may make such examination, if any, of the accused as it thinks necessary and on the basis of such material if the Court, after giving the prosecution and the accused an opportunity of being heard, considers the charge against the H accused to be groundless, the Court is bound to discharge the accused.

What the Court, therefore, does while exercising its function under section 239 is to consider the police report and the document sent along with it as also any statement made by the accused if the court chooses to examine him. And if the court finds that there is no *prima facie* case against the accused the court discharges him. But that is precisely what the court is called upon to do when an application for withdrawal from the prosecution is made by the public prosecutor on the ground that there is insufficient or no evidence to support the prosecution. There also the court would have to consider the material placed before it on behalf of the prosecution for the purpose of deciding whether the ground urged by the public prosecutor for withdrawal of the prosecution is justified or not and this material would be the same as the material before the court while discharging its function under section 239. If the court while considering an application for withdrawal on the ground of insufficiency or absence of evidence to support the prosecution has to scrutinise the material for the purpose of deciding whether there is in fact insufficient evidence or no evidence at all in support of the prosecution, the court might as well engage itself in this exercise while considering under section 239 whether the accused shall be discharged or a charge shall be framed against him. It is an identical exercise which the Court will be performing whether the court acts under section 239 or under section 321. If that be so, we do not think that in a warrant case instituted on a police report the public prosecutor should be entitled to make an application for withdrawal from the prosecution on the ground that there is insufficient or no evidence in support of the prosecution. The court will have to consider the same issue under section 239 and it will most certainly further or advance the case of public justice if the court examines the issue under section 239 and gives its reasons for discharging the accused after a judicial consideration of the material before it, rather than allow the prosecution to be withdrawn by the Public Prosecutor. When the prosecution is allowed to be withdrawn there is always an uneasy feeling in the public mind that the case has not been allowed to be agitated before the court and the court has not given a judicial verdict. But, if on the other hand, the court examines the material and discharges the accused under section 239, it will always carry greater conviction with the people because instead of the prosecution being withdrawn and taken out of the ken of judicial scrutiny the judicial verdict based on assessment and evaluation of the material before the court will always inspire greater confidence. Since the guiding consideration in all these cases is the imperative of public justice and it is absolutely essential that justice must not only be done but also appear to be done. We would hold that in a warrant case instituted on a police report—which

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A the present case against Dr. Jagannath Misra and others admittedly is—it should not be a legitimate ground for the public prosecutor to urge in support of the application for withdrawal that there is insufficient or no evidence in support of the prosecution. The court in such a case should be left to decide under section 239 whether the accused should be discharged or a charge should be framed against him.

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We may also reiterate what was pointed out by this Court in *State of Orissa* v. *C. Mohapatra (supra)* that in a given case it may not be "conducive to the interest of justice to continue the prosecution .... since the prosecution with the possibility of conviction" may rouse feelings of bitterness and antagonism and disturb the calm and peace-
C ful atmosphere which has been restored. We cannot forget that ultimately every offence has a social or economic cause behind it and if the State feels that the elimination or eradication of the social or economic cause of the crime would be better served by not proceeding with the prosecution, the State should clearly be at liberty to withdraw from the prosecution. This was the ground on which this court in *State of Orissa*
D v. *C. Mohapatra* (supra) allowed withdrawal of the prosecution in a case where the incident resulting in the commission of the offence had arisen out of rivalry between two trade unions but since the date of the incident calm and peaceful atmosphere prevailed in the industrial undertaking. There may be broader considerations of public peace, larger considerations of public justice and even deeper considerations
E of promotion of long lasting security in a locality, of order in a disorderly situation or harmony in a factious milieu which may legitimately persuade the State to "sacrifice a pending case for a wider benefit". The imperative of public justice may in such cases transcend and overflow the legal justice of a particular litigation. We are wholly in agreement with what this Court in *Balwant Singh* v. *State of Bihar*
F (supra): "... communal feuds which may have been amicably settled should not re-erupt on account of one or two prosecutions pending. Labour disputes which, might have given rise to criminal cases, when settled, might probably be another instance where the interests of public justice in the broader connotation may perhaps warrant withdrawal from the prosecution." We also express our approval of the
G observations made by this Court in *R.K. Jain* v. *State* (supra) which we have reproduced above:

These are broadly the considerations which can be brought under the rubric of public justice so as to justify an application for withdrawal from prosecution. But, of course, we must make it clear that in this
H area no hard and fast rule can be laid down nor can any categories of

cases be defined in which an application for withdrawal of the prosecution could legitimately be made. It must ultimately depend on the facts and circumstances of each case in the light of what is necessary in order to promote the ends of justice.

When the application for consent to the withdrawal from the prosecution comes for consideration, the Court has to decide whether to grant such consent or not. The function which the court exercises in arriving at this decision, as pointed out by this Court in *State of Bihar* v. *Ram Naresh*, is a judicial function. The Court has to exercise its judicial discretion with reference to such material as is then available to it and in exercise of this discretion the court has to satisfy itself that the executive function of the public prosecutor has not been improperly exercised and that the grounds urged in support of the application for withdrawal are legitimate grounds in furtherance of public justice. The discretion has not to be exercised by the court mechanically and the consent applied for has not to be granted as a matter of formality or for the mere asking. The Court has to consider the material placed before it and satisfy itself that the grant of consent would serve the interest of justice. That is why this Court in *State of Bihar* v. *Ram Naresh* (supra) examined the entire material which was available to it for the purpose of coming to the conclusion that there was no evidence worth the name on the basis of which the prosecution could be sustained against the accused Mahesh Desai. This court pointed out that consent is not to be lightly given on the application of public prosecutor "without a careful and proper scrutiny of the grounds on which the application for consent is made." It was emphasised by this Court that in these matters the public prosecutor exercises discretionary functions in respect of which the initiative is that of the executive but the responsibility is that of the court. This court again reiterated in *M.N. Sankarayaraynanan Nair* v. *P.V. Balakrishnan & Ors.* (supra) that the court must satisfy itself that the executive function of the public prosecutor has not been improperly exercised and that it is not an attempt to interfere with the normal course of justice and added that the court may give its permission only if it is satisfied on the materials placed before it that the grant of consent subserves the administration of justice. The same view has been taken in all the subsequent cases and it must now be regarded as well settled that the court while considering whether to grant consent or not must not accept the *ipse dixit* of the public prosecutor and content itself by merely examining whether the public prosecutor has applied an independent mind but the court must satisfy itself not only that the grounds are germane or relevant to advancement of public justice but also

A whether the grounds in fact are satisfactorily established. The ultimate test which must be applied by the court in order to determine the validity of the grounds in a particular case is that the requirement of public justice outweighs the legal justice of that case so that withdrawal from the prosecution could be permitted in the larger interest of public justice. The same considerations which we have discussed B while determining what are the legitimate grounds on which an application may be made by the public prosecutor for withdrawal from the prosecution must also apply in guiding the court as to whether consent for withdrawal of the prosecution should be granted or not. We may again emphasise that the imperative of public justice provides the only relevant consideration for determining whether consent should be granC ted or not. It is not possible to provide an exclusive definition of what may be regarded as falling within the imperative of public justice nor is it possible to place the concept of public justice in a strait-jacket formula. Every case must depend on its peculiar facts and circumstances because there may be a myriad situation where this question may have to be considered by this court. The paramount consideration D must be the requirement of public justice and some of the grounds which would bring the case within the fabric of public justice have already been discussed by us in the preceding paragraphs and we need not repeat them. The same grounds may be regarded as germane and relevant to the requirement of public justice and if they exist, the court would be justified in granting consent to withdrawal from the proE secution.

If we apply these principles to the facts of the present case, it is clear that the court of the Chief Judicial Magistrate, Patna as also the High Court were clearly in error in granting consent to the withdrawal from the prosecution against Dr. Jagannath Misra and others. We do F not propose to go into the question whether the material available to the court could be regarded as sufficient for sustaining the prosecution of Dr. Jagannath Misra and others because if we consider this question and make any observations in regard to the sufficiency of the material, such observations may tend to prejudice Dr. Jagannath Misra and the other accused. Of course, if there were no other reasons which would G persuade the court not to grant consent to the withdrawal of the prosecution, we would have had to go into the question whether the material produced before the court was sufficient *prima facie* to sustain the prosecution. But, there are two very strong and cogent reasons why consent to the withdrawal of the prosecution must be refused. In the first place, the learned Chief Judicial Magistrate could have conH sidered under section 239 whether the material placed before him was

sufficient to make out a prima facie case agaisnt Dr. Jagannath Misra and the other accused so that if the learned Chief Judicial Magistrate came to the conclusion on the basis of such material that the charge against Dr. Jagannath Misra and the other accused was groundless, he would be bound to discharge them for reasons to be recorded by him in writing. There is no reason why in these circumstances the public prosecutor should be allowed to withdraw from the prosecution under section 321. The same exercise could be performed by the learned Chief Judicial Magistrate by acting under section 239. Moreover, in the present case, the decision to withdraw from the prosecution was taken by the Cabinet at a meeting held on 24th February 1981 and this meeting was presided over by Dr. Jagannath Misra himself. It may be that Shri Lallan Prasad Sinha did not implicitly obey the decision of the Cabinet and applied his independent mind to the question whether the prosecution should be withdrawn or not but even so, it would seriously undermine the confidence of the people in the administration of justice if a decision to withdraw the prosecution against him is taken by the accused himself and pursuant to this decision the Special Public Prosecutor who is appointed by the State Government of which the accused is the Chief Minister, applied for withdrawal from the prosecution. It is an elementary principle that justice must not only be done but must also appear to be done. It would be subversive of all principles of justice that the accused should take a decision to withdraw the prosecution against himself and then the Special Public Prosecutor appointed in effect and substance by him makes an application for withdrawal from the prosecution. We are of the view that these two considerations are so strong and cogent that consent to withdraw from the prosecution should not have been granted in the present case.

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It is no doubt true that if there is not sufficient evidence to sustain the prosecution against Dr. Jagannath Misra and the other accused, it would be subjecting them to harassment and inconvenience to require them to appear and argue before the Court for the purpose of securing an Order of discharge under section 239, but even so we think it would be desirable in the interest of public justice that high political personages, accused of offences should face the judicial process and get discharged, rather than seem to manoeuvre the judicial system and thus endanger the legitimacy of the political as well as the judicial process. It is possible that in a particular case personal harassment or inconvenience may be caused by non withdrawal of the prosecution, if the accused is really innocent and is ultimately liable to be discharged, but such harassment or inconvenience must be considered as an inevitable cost of public life, which the repositories of public power should have no hesitation to pay, as justice must not only be

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done but must also appear to be done.

We accordingly allow the appeal, set aside the Order made by the Chief Judicial Magistrate and confirmed by the High Court and direct that the prosecution may proceed against Dr. Jagannath Misra and the other accused in accordance with law.

VENKATARAMIAH, J. I have gone through the judgments of Bhagwati, C.J. and Khalid, J. which are pronounced today. I have also gone through the orders of the Special Judge who permitted the withdrawal of the prosecution, the judgment of the High Court affirming it, the three judgments pronounced by Tulzapurkar, J., Bahrul Islam, J. and R.B. Misra, J. by which this Court by majority affirmed the order permitting withdrawal of the criminal case in question and also of A.N. Sen, J. who passed the orders admitting the review petition. The facts of the case are set out in the judgments referred to above and it is unnecessary to repeat them here. I have given my anxious consideration to the case since it relates to the purity of public life.

At the outset it should be stated that merely because a court discharges or acquits an accused arraigned before it, the Court cannot be considered to have compromised with the crime. Corruption, particularly at high places should be put down with a heavy hand. But our passion to do so should not overtake reason. The Court always acts on the material before it and if it finds that the material is not sufficient to connect the accused with the crime, it has to discharge or aquit him, as the case may be, notwithstanding the fact that the crime complained of is a grave one. Similarly if the case has been withdrawn by the Public Prosecutor for good reason with the consent of the Court, this Court should be slow to interfere with the order of withdrawal. In this case if the Special Judge had rejected the application for withdrawal and the High Court had affirmed that Order, this Court may not have interfered with that order under Article 136 of the Constitution of India. Even if the Special Judge had permitted the withdrawal but the High Court had reversed that order, this Court may not have interfered with the orders of the High Court. But this is a case where the Special Judge had permitted the withdrawal of the prosecution, and the said order of withdrawal has been affirmed by the High Court as well as by the majority judgment pronounced by this Court earlier. The question is whether this Court on review should interfere with the order permitting the withdrawal of the case. Are there any strong and compelling reasons which require interference with the order permitting withdrawal? This is the question which has arisen before us now.

Since the orders of the Special Judge, of the High Court and of Bahrul Islam, J. and R.B. Misra, J. are in favour of the accused, I shall not refer to them. I shall refer only to the judgment of Tulzapurkar, J. (*See Sheonandan Paswan* versus *State of Bihar and others)*; [1983] 2 S.C.R. 61, who has held against the accused to decide whether there are sufficient incriminating circumstances which compel this Court to set aside the order permitting withdrawal of the prosecution. In his judgment at pages 101 to 103 Tulzapurkar, J. summarises the case against Dr. Jagannath Misra thus:

> "It will appear clear from the above discussion that the documentary evidence mentioned above, the genuineness of which cannot be doubted, clearly makes out a *prima facie* case against Respondent No. 2 sufficient to put him on trial for the offence of criminal misconduct under s. 5(1) (d) read with s. 5(2) of the Prevention of Corruption Act, 1947. Similar is the position with regard to the incidental offence of forgery under s.466, I.P.C. said to have been committed by him, for, ante-dating of the second order by him is not disputed; and it is on record that in regard to such ante-dating no explanation was offered by him during the investigation when he was questioned about it in the presence of his lawyers and there has been no explanation of any kind in any of the counter-affidavits filed before us. But during the course of arguments his counsel offered the explanation that could only be ascribed as a bona fide mistake or slip (vide written arguments filed on 14.10.1982) but such explanation does not bear scrutiny, having regard to the admitted fact that after the ante-dated order was pasted over the first order the despatch date appearing in the margin was required to be and has been altered to 14.5.1975 by over-writing is required to be done there cannot any bona fide mistake or slip. The ante-dating in the circumstances would be with oblique intent to nullify any possible action that could have or might have been taken pursuant to the first order as stated earlier, that being the most natural consequence flowing from it which must in law be presumed to have intended. It would, of course, be open to him to rebut the same at the trial but at the moment there is no material on record—by way of rebuttal. In the circumstances it is impossible to accept the paucity of evidence or lack of prospect of successful prosecution as a valid ground for withdrawal from the prosecution. On the

aforesaid undisputed documentary evidence no two views are possible in the absence of any rebuttal material, which, of course, the respondent No.2 will have the opportunity to place before the Court at the trial. What is more the so-called unfair or over-zealous investigators were miles away when the aforesaid evidence came into existence.

As far as Respondent No. 3 (Nawal Kishore Sinha) and Respondent No.4 (Jiwanand Jha) are concerned it cannot be forgotten that they have been arraigned alongwith Respondent No. 2 on a charge of criminal conspiracy in pursuance whereof the several offences are said to have been committed by all of them. Further it is obvious that the principal beneficiary of the offence of criminal misconduct said to have been committed by Respondent No. 2 under s. 5(1) (d) read with s. 5(2) of Perevention of Corruption Act, 1947 has been Respondent No.3 and so far as Respondent No.4 is concerned it cannot be said that there is no material on record suggesting his complicity. Admittedly, he has been very close to Respondent No. 2 for several years and attending to his affairs-private and party affairs and the allegation against him in the F.I.R is that he was concerned with the deposit of two amounts of Rs. 10,000 and Rs.3,000 on 27.12.1973 and 1.4.1974 in the Savings Bank Account of Respondent No. 2 with the Central Bank of India, Patna Dak Bungalow Branch, which sums, says the prosecution, represented some of the bribe amounts said to have been received by respondent No. 2 and the tangible documentary evidence in proof of the two deposits having been made in Respondent No. 2's account consists of two pay-in slips of the concerned branch of Central Bank of India. Whether the two amounts came from the funds of the Patna Urban Co-operative Bank or not and whether they were really paid as bribe amounts or not would be aspects that will have to be considered at the trial. However, as pointed out earlier the offence under s.5(1) (d) would even otherwise be complete if pecuniary advantage (by way of scuttling the civil liability of surcharge) was conferred on Nawal Kishore Sinha and others. If Respondent No. 2 has to face the trial then in a case where conspiracy has been charged no withdrawal can be permitted against Respondent No. 3 and Respondent No. 4. In arriving at the conclusion that paucity of evidence

is not a valid ground for withdrawal from the prosecution in regard to Respondents Nos. 2, 3 and 4. I have deliberately excluded from consideration the debatable evidence like confessional statements of the approvers etc. (credibility and effect whereof would be for the trial court to decide) said to have been collected by the allegedly over-zealous investigating officers after Respondent No.2 went out of power in 1977."

The three circumstances put up against the accused in this case are (i) that Jiwanand Jha had credited Rs. 10,000 and Rs.3000 on 27.12.1973 and on 1.4.1974 respectively in the Savings Bank account of Dr. Jagannath Misra, (ii) that there was ante-dating of the order passed by Dr. Jagannath Misra on 16.5.1975 and it had been shown as having been passed on 14.5.1975, and (iii) that there was a confessional statement of Hydari which supported the prosecution. Tulzapurkar, J. himself has found it not safe to act on the confessional statement. He observes "I have deliberately excluded from consideration the debatable evidence like confessional statement of approvers (credibility and effect wehereof would be for the trial court to decide) said to have been collected by the allegedly over-zealous investigating officers after Respondent No. 2 went out of power in 1977". The two other circumstances on which Tulzapurkar, J. has acted are (i) the crediting of Rs. 10,000 and Rs.3,000 on 27.12.1973 and 1.4.1974 respectively in the Savings Bank Account of Dr. Jagannath Misra by Jiwanand Jha and (ii) the ante-dating of the orders dated 16.5.1975.

As regards the first of these two circumstances Tulzapurkar, J. Observes: "Admittedly, he (Jiwanand Jha) has been very close to Respondent No. 2 (Dr. Jagannath Misra) for several years and attending to his affairs-private and party affairs and the allegation against him in the F.I.R. is that he was concerned with the deposit of two amounts of Rs. 10,000 and Rs.3,000 on 27.12.1973 and on 1.4.1974 respectively in the Savings Bank Account of Respondent No. 2 with the Central Bank of India, Patna Dak Bungalow Branch, which sums, says the prosecution represented some of the bribe amounts said to have been received by Respondent No.2 and the tangible documentary evidence of the two deposits having been made in Respondent No. 2's account consists of two pay-in-slips of the concerned Branch of Central Bank of India. Whether the two amounts came from the funds of the Patna Urban Co-operative Bank or not and whether they were really paid as bribe amounts or not would be aspects that will have to be considered at the trial". On this observation, it has to be stated, that it

A has not been shown by any extract of bank account that the said two sums came from the Patna Urban Co-operative Bank. If that was so there would have been entries in the Bank accounts. Mere crediting of two sums, without any other reliable evidence, in a bank account by a politically or a friend does not by itself show that the sums were either bribe amounts or any official favour had been shown. This fact B by itself is not conclusive about the guilt of the accused.

As regards the ante-dating of the order dated 16.5.1975 it may be noticed that Tulzapurkar, J. himself observes in the course of his order "It is true that a mere ante-dating a document or an order would not amount to an offence of forgery but if the document or the order is C ante-dated with the obligue motive or fraudulent intent indicated above (without the same actually materialising) it will be a forgery."

The passing of the two orders one on 16.5.1975 on the note sheet and the other on buff paper which is dated 14.5.1975 is not in dispute. It is explained that it was the practice in the Bihar Secretratiat that D whenever an order is changed it is done by writing the later order on a buff-sheet and pasting it on the earlier order. We were shown another file of the Bihar Government where similar pasting had been done. Tulzapurkar, J. observes that "the second order which was ante-dated with the obvious fradulent intent of nullifying or rendering any action that could have been or in fact might have been taken (even if not E actually taken) pursuant to the first order after the file had left the Chief Minister's Secretariat on 16.5.1975, that being the most material consequence flowing from the act of ante-dating the second order". It is not shown by the prosecution that any action had been taken pursuant to the order dated 16.5.1975 by any of the departmental authorities. If any action had been taken it would have been a matter F of record readily available for production. No such record is produced before the Court. Hence it is a mere surmise to say that any such action was sought to be nullified, particularly when there was no acceptable evidence at all on the communication of the order dated 16.5.1975 to any departmental authorities. I also adopt the reasons given by Bahrul Islam. J. and R.B. Misra, J. in support of my judgment.

G

In fact about 23 criminal cases have been launched against Naval Kishore Sinha and others for the offences alleged to have been committed by them. They remain unaffected. The questions involved in this case are whether Dr. Jagannath Misra has been a privy to the misdeeds committed in the Patna Urban Co-operative Bank, whether H he and his co-accused should be prosecuted for the offences of conspi-

racy, bribery etc., and whether the Public Prosecutor had grievously erred in applying for the withdrawal of the case. All the other Judges who have dealt with the case on merits from the Special Judge onwards, except Tulzapurkar, J., have opined that the permission was properly given for withdrawal. In the circumstances, it is difficult to take a different view in this case.

I respectfully agree with the legal position flowing from section 321 of the Code of Criminal Procedure as explained by Krishna Iyer and Chinnappa Reddy, JJ. in respect of cases relating to Bansi Lal and Fernandes in *R.K. Jain etc.*, v. *State through Special Police Establishment and Ors., etc. etc.*, [1980] 3 S.C.R. 982. In that case Chinnappa Reddy, J. has summarised the true legal position thus:

> "1. Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.
>
> 2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.
>
> 3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.
>
> 4. The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.
>
> 5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, political purposes Sans Tammany Hall enterprise.
>
> 6. The Public Prosecutor is an officer of the Court and responsible to the Court.
>
> 7. The Court performs a supervisory function in granting its consent to the withdrawal.

A 8. The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of
B legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

We may add it shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to appraise itself of the reasons which prompt the
C 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 provisions of s.321
D Criminal Procedure Code. 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."

In the circumstances of this case I find it difficult to say that the
E Public Prosecutor had not applied his mind to the case or had conducted himself in an improper way. If in the light of the material before him the Public Prosecutor has taken the view that there was no prospect of securing a conviction of the accused it cannot be said that his view is an unreasonable one. We should bear in mind the nature ot the role of a Public Porsecutor. He is not a persecutor. He is the
F representative not of an ordinary party to a controversy, but of sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the land the two fold aim of which is that guilt shall not escape or
G innocence suffer. He may prosecute with earnest and vigour indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike fould ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate one to bring about a just one. (See *Berger* v. *United States),* 295 U.S. 78. It is a privilege of an accused that he
H should be prosecuted by a Public Prosecutor in all cases involving

heinous charges whenever the State undertakes prosecution. The judgment of a Public Prosecutor under section 321 of the Code of Criminal Procedure, 1973 cannot be lightly interfered with unless the Court comes to the conclusion that he has not applied his mind or that his decision is not bona fide.

A person may have been accused of several other misdeeds, he may have been an anathema to a section of the public media or he may be an unreliable politician. But these circumstances should not enter into the decision of the Court while dealing with a criminal charge against him which must be based only on relevant material.

Judged by the well-settled principles laid down by this Court in *State of Bihar* v. *Ram Naresh Pandey;* [1957] S.C.R. 279 and *R.K. Jain's* case (supra), it is seen that the averments in the application are similiar to the avernments in the application made for withdrawal in the case relating to Fernandes which are to be found in *R.K. Jain's* case (supra). I feel that no case has been made out in this case for interference. I am also of the opinion that there is no need to differ from the legal position expaunded in the above two decisions. If any change in the law is needed, it is for Parliament to make necessary amendment to section 321 of the Code of Criminal Procedure, 1973. It is significant that section 321 of the Code of Criminal Procedure, 1973 is allowed to remain in the same form in 1973 even though in 1957 this Court had construed section 494 of the former Criminal Procedure Code as laid down in *Ram Naresh Pandey's* case (supra). I, however, find it difficult to construe section 321 of the Code of Criminal Procedure, 1973 in the light of the principles of administrative law.

Before leaving this case I may refer to another circumstance which is rather distrubing. The Review Petition was filed before this Court after the retirement of Bahrul Islam, J. Allegations of bias were made against him apparently to get the petition admitted. But later on they were withdrawn before the Court hearing the Review Petition pronounced its order. But again in the course of the hearing before this Bench an attempt was made to repeat the allegation of bias against the learned Judge. But on objection being taken by the Court, it was promptly withdrawn. This conduct on the part of the appellant deserves to be deprecated.

The Review Petition was admitted after the appeal had been dismissed only because Nandini Satpathy's case had been subsequently reffered to a larger Bench to review the earlier decisions. When the

A earlier decisions are allowed to remain intact, there is no justification to reverse the decision of this Court by which the appeal had already been dismissed. There is no warrant for this extra-ordinary procedure to be adopted in this case. The reversal of the earlier judgment of this Court by this process strikes at the finality of judgments of this Court and would amount to the abuse of the power of review vested in this B Court, particularly in a criminal case. It may be noted that no other court in the country has been given the power of review in criminal cases. I am of the view that the majority judgement of Bahrul Islam and R.B. Misra, JJ. should remain undisturbed. This case cannot be converted into an appeal against the earlier decision of this Court.

C Having considered all aspects of the case, I agree with the decision of Khalid, J. and dismiss the appeal filed against the judgment of the High court.

KHALID, J. I regret I cannot persuade myself to agree with the Judgment now pronounced by the learned Chief Justice, the last portion of which was received by me on 18.12.1986. It is unfortunate that a discussion could not be held about this case by the Judges who heard this case, after it was reserved for Judgment in September, 1986. It was by a sheer accident that this apeal came before a Constitution Bench. Criminal Appeal Nos. 48 & 49 of 1983 were orginally directed to be posted before a Constitution Bench and this Appeal was also directed E to be heard by a Constitution Bench because the same points were involved. Judgments are being pronounced today in those appeals dismissing them. I have agreed with the conclusion but not with the reasoning. Due to paucity of time I have written only a short Judgment there. This appeal has been pending for a long time. I am, therefore, pronouncing a Judgment of my own hurriedly prepared so that this F matter can be given quietus.

2. This appeal had an unpleasant history. I am grieved at the turn of events in this case. Even so, it is necessary to have the utmost restraint in dealing with the said turn of events, because what is involved here, is the credibility of this Court as the Highest Court of the G land. In two well reasoned concurring Judgments, Beharul Islam, J. and R.B. Misra, J. dismissed the appeal by their Judgments dated December 16, 1982 and by an equally reasoned Judgment, Tulzapurkar, J. dissented from the main Judgment and allowed the appeal. These Judgments are reported in 1983 (2) SCR 61. One of the Judges (Baharul Islam,J) demited office on 13.1.1983. An application was H filed on 17.1.1983, to review the judgment. This application can only

be to review the concurring judgments. On 27.1.1983, an application to raise additional grounds, specifically, based on bias was filed. The review application was considered in chambers on 13.4.1983. Notice was issued, returnable on 19.4.1983. In July, 1983, the matter was again considered in chambers when allegation of bias was given up. In August, 1983, the matter was heard in open Court by Tulzapurkar, J., A.N. Sen, J. and R.B. Misra, J. On August 22, 1983, the order worded as follows (reported in 1983(4) SCC 104) was by A.N. Sen, J.

> "I, therefore, admit the review petition and direct the re-hearing of the appeal."

The learned Judge who gave this order justified his conclusion with the following observation:

> "In view of the limited scope of the present proceeding I do not consider it necessary to deal at length with the various submissions made by the learned counsel appearing on behalf of the parties. In the view that I have taken after a very anxious and careful consideration of the facts and circumstances of this case I am further of the opinion that it will not be proper for me in this proceedings to express any views on the same. Applying the well-settled principles governing a review petition and giving my very anxious and careful consideration to the facts and circumstances of this case, I have come to the conclusion that the review petition should be admitted and the appeal should be re-heard. I have deliberately refrained from stating my reasons and the various grounds which have led me to this conclusion. Any decision of the facts and circumstances which, to my mind, constitute errors apprarent on the face of the record and my reasons for the finding that these facts and circumstances constitute errors apparent on the face of the record resulting in the success of the review petition, may have the possibility of prejudicing the appeal which as a result of my decision has to be re-heard."

In paragraph 15, the learned Judge directed as follows:

> "Accordingly, I further direct that the appeal be re-heard immediately after the decision of Nandani Satpathy case."

The other Judges agreed with this.

A 3. Thus the Bench that heard the review petition did not disclose in the order, the reasons why re-hearing of the appeal was ordered nor did it outline in the order, what constituted errors apparent on the face of the record to justify the order passed. By this order, the Bench did not set aside the earlier judgment. All that was done was to admit the review petition and to direct re-hearing of the appeal. The one ques-
B tion seriously debated at the bar is whether the Judgment sought to be reviewed was set aside or not. It was forcefully contended that the earlier judgment was not set aside and was still at large. This was met with the plea that if it was not set aside, what is it that the Court now hears? I will examine this contention presently.

C 4. One incontrovertible fact is that the earlier was not in terms set aside. Admitting a review petition is not the same thing as setting aside the order, sought to be reviewed.

Order 47 Rule 1 C.P.C. deals with review in civil matters. Article 137 of the Constitution is a special power with the Supreme Court to
D review any judgment pronounced or order made by it. An order passed in a criminal case can be reviewed and set aside only if there are errors apparent on the record. In this case, we are left only to guess what reasons or grounds persuaded the Judge to pass this order, for, the learned Judge has deliberately refrained from stating his reasons and 'various grounds' in the order.

E

That the Judgment was not set aside can be concluded from one important fact. One of the Judges who was a party to this order (R.B. Misra, J) had earlier dismissed the appeal with convincing reasons. If the Judgment was set aside by the order passed in the review petition, the learned Judge would definitely have given his own reasons for
F doing so by a separate order. This has not been done. All that the order says is that the review petition had been admitted. The direction to re-hear the appeal, therefore, can only be to ascertain reasons to see whether the Judgment need be set aside. In my view, with great respect, it would be highly unfair to the learned Judge (R.B. Misra, J.) to contend that his earlier Judgment was set aside.

G

It is left to us now, the unpleasant task to unravel this mystery and to divine the mind of man. I must confess my failure in this task. After hearing the lengthy arguments, I have not been able to find any error apparent on the face of the record in the earlier Judgment. The direction contained in the second order was to re-hear the appeal.
H That wish has been set aside by the reviewing order nor any error

discernable on the face of the record shown, in my considered view, the original order has to stand, which means that the appeal has to be dismissed affirming it. This is the short manner in which this appeal can be dismissed and I do so. However, I do not propose to rest content with this manner of disposal of the appeal.

5. This matter was heard at length. The stand taken by the appellant is that the earlier Judgment has been set aside. Therefore, it is only fair that the facts of the case and the questions of law bearing on them are also considered since the matter has been placed before a bench of five Judges.

6. The appeals referred to this Bench do not raise any questions of constitutional law. There are decisions rendered by Benches of three Judges and two Judges of this Court wherein the scope of Section 321 of Criminal Procedure Code (Section 494 of Old Criminal Procedure Code) has been discussed at length. Two criminal appeals 48 and 49 of 1983 were referred to a Constitution Bench, originally. The Bench that referred these appeals did not doubt the correctness of such earlier Judgments. The reference order reads as follows:

> "Special leave granted in both the matters. In view of certain decisions referred to at the time of the hearing of the petitions with differing interpretations, it appears that in order to clarify the legal issues connected with power of withdrawal of criminal cases and put them beyond pale of controversy, it is better the matter be placed befoe Hon'ble the Chief Justice to place the matter before a larger Bench of five Judges."

It is this order of reference and the direction by the Bench that heard the review petition, to re-hear this appeal immediately after the decision in Nandani Satpathy's case, criminal appeal Nos.48 and 49 of 1983, that has brought this case also before this Bench. This is the accidental coincidence about which reference was made by me in the opening paragraph of this Judgment.

7. It is not necessary to deal at length with the facts leading to this appeal. The background facts have been given in detail in the Judgment sought to be reviewed. I do not, therefore, think it necessary to encumber this Judgment with all the facts. I shall refer only to the bare facts necessary for the purpose of this Judgment.

A 8. The appellant and respondent No. 2 belonged to the rival political parties. The appellant is a member of the Bihar Legislative Assembly. Respodent No. 2 was the Chief Minister of Bihar. Respondent No. 4 was a close associated of Respondent No. 2. Respondent No. 3 started the Patna Urban Co-operative Bank and became its Chairman. He and respondent No. 2 were close friends. There were B some irregularities in the affairs of the bank. Proceedings were taken to prosecute those connected with the bank for the irregularities. The then Chief Minister (Respondent No. 2) ordered the prosecution of the office bearers and staff of the bank including its Honorary Secretary Shri K.P. Gupta, Manager M.A. Haidari and the loan clerk.

C Consequent upon a mid term poll to the Lok Sabha in March, 1977, there was a change of Ministry at the Centre. In April, 1977, the Patna Secretariat Non-Gazetted Employees Association submitted a representation against the second respondent to the Prime Minister and the Home Minister of the Union Government. In June, the Government, headed by the second respondent, was replaced by the D Government headed by Shri Karpoori Thakur. The Employees' Association submitted a copy of their representation to the new Chief Minister on July 9, 1977, requesting him to enquire into the allegations against the second respondent. After a detailed procedure and obtaining requisite sanction from the Governor, a criminal case was instituted by the vigilance against the second respondent and others. E On 19.2.1979, a charge-sheet was filed.

9. The charge-sheet filed by the State of Bihar against the respondents on 19th February, 1979, was for offences under Sections 420/466/471/109/120-B of I.P.C. and under Sections 5(1)(a), 5(a)(b) & 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, F 1947. The charge against the second respondent was that he, who at all material times, was either a Minister or the Chief Minister of Bihar abusing his position as a public servant, in conspiracy with the other accused, sought to interfere with the criminal prosecution and surcharge proceedings against Nawal Kishore Sinha and others with a view to obtain to himself and to the other respondents pecuniary G advantage to the detriment of Patna Urban Cooperative Bank. The Cheif Judicial Magistrate took cognizance of the case on 29.7.1979.

10. There was a change of ministry in Bihar in June, 1980 and the second respondent became the Chief Minister again. A policy decision was taken on 10.6.1980, that criminal cases launched out of H political vendetta and cases relating to political agitation be with-

drawn. On 24.2.1981, the Government appointed Shri L.P. Sinha as a Special Public Prosecutor. On 25.2.1981, the secretary to the Government of Bihar wrote a letter to the District Magistrate informing him of the policy decision taken by the Government to withdraw from prosecution of two vigilance cases including the case with which we are concerned. He was requested to take steps for the withdrawal of the case. On 17th June, 1981, Shri Sinha made an application under Section 321 of the Cr.P.C. to the Special Judge seeking permission to withdraw from the prosecution of respondent Nos. 2, 3 & 4, on four grounds; (a) Lack of prospect of successful prosecution in the light of the evidence, (b) Implication of the persons as a result of political and personal vendetta, (c) Inexpediency of the prosecution for the reasons of the State and public policy and (d) Adverse effects that the continuance of the prosecution will bring on public interest in the light of the changed situation. The learned Special Judge gave consent sought, by his order dated 20th June, 1981. A criminal revision was filed before the High Court against this order. This was dismissed on 14th September, 1981 and this dismissal has given rise to this appeal.

11. The application for withdrawal and their order granting consent are assailed on the following grounds:

(1) The withdrawal was unjustified on merits.

(2) It was against the principles settled by this Court in various decisions governing the exercise of power under Section 321 Cr.P.C.

(3) Neither the public prosecutor nor the Special Judge applied their mind in the application for withdrawal and in the order giving consent.

(4) Shri L.P. Sinha was not competent to apply for withdrawal since Shri A.K.Datta's appointment to conduct the case under Section 24(8) of the Cr.P.C. had not been cancelled.

(5) In the circumstances of the case Shri Sinha did not function independently but was influenced and guided by the State Government decision in the matter and the withdrawal was vitiated for this reason.

12. I will dispose of question No. 4 first. It is not necessary to

A consider in detail the question whether Shri Sinha was competent to make the application for withdrawal. The contention is that Shri Sinha's appointment is bad since the earlier appointment of Shri Datta had not been set aside. This case was pressed before the three Judges who heard the appeal first and is repeated before us also. All the three Judges who gave the Judgement in the case of *Sheonandan Paswan* v. B *State of Bihar & Ors.*, [1983] 2 SCR 61, have declined to accept the plea that Shri Sinha was not a competent public prosecutor since Shri Datt's appointment had not been cancelled. I adopt the reasons given in the judgment and reject the plea repeated before us.

13. The real question that has to be answered in this case is C whether the executive function of the public prosecutor in applying for, and the supervisory functions of the Court in granting consent to, the withdrawal have been properly performed or not. The four remaining points enumerated above virtually revolve around this question.

D 14. Section 321 needs three requisites to make an order under it valid; (1) The application should be filed by a public prosecutor or Assistant public prosecutor who is competent to make an application for withdrawal, (2) He must be in charge of the case, (3) The application should get the consent of the Court before which the case is pending.

E

I find that all the three requisites are satisfied here. The question is whether the functions by the public prosecutor and the Court were properly performed. At no stage was a case put forward by any one that the application made by the public prosecutor was either mala fide or that it was not in good faith. There is no allegation of bias against F the Special Judge. The application filed by the public prosecutor discloses the fact that he had gone through the case diary and the relevant materials connected with the case and that he came to the conclusion that in the circumstances prevailing at the time of institution of the case and investigation thereof, the case was instituted on the ground of political vendetta and only to defame the fair image of J.N. Misra. G This statement of the public prosecutor has not been challenged as borne out of any unwholesome motive. It has not been made out or suggested that the public prosecutor was motivated by improper considerations. The only contention raised is that the reasons are not sufficient or relevant.

H 15. The public prosecutor should normally be credited with fair-

ness in exercise of his power under Section 321, when there is no attack against him of having acted in an improper manner. He had before him the State Government's communication of the policy taken by it. He had before him the case diary statements and other materials. He perused them before filing the application. Thus his part under Section 321 in this case has been performed strictly in conformity with this Section. The question that remains then is whether the grounds urged by him in support of withdrawal were sufficient in law. The application clearly shows that Sh. Sinha applied his mind to the facts of the case. One would normally not expect a more detailed statement in an application for withdrawal than the one contained in the application in question, when one keeps in view the scope of Section 321 and the wide language it uses. The plea that there was lack of application of mind by the public prosecutor has only to be rejected in this case.

16. The Chief Judicial Magistrate was acting as the Special Judge. In his order giving consent he has expressly stated that he perused the relevant records of the case before granting consent. This statement was not challenged in the revision petition before the High Court. It has, therefore, to be assumed that the Magistrate perused the relevant records before passing the order. We must give due credence to this statement by the Magistrate. There is no other allegation against the Special Judge. Thus the function of the Special Judge was also performed in conformity with the Section. The matter was taken in revision before the High Court. The High Court dismissed the revision and while doing so exercised its power properly because the materials before the Court would justify only an order of dismissal and not an order ordering retrial.

17. Section 321 gives the public prosecutor, the power for withdrawal of any case to any stage before judgment is pronounced. This pre-supposes the fact that the entire evidence may have been adduced in the case, before the application is made. When an application under Section 321 Cr.P.C. is made, it is not necessary for the Court to assess the evidence to discover whether the case would end in conviction or acquittal. To contend that the Court when it exercises its limited power of giving consent under Section 321 has to assess the evidence and find out whether the case would end in acquittal or conviction, would be to re-write Section 321 Cr.P.C. and would be to concede to the Court a power which the scheme of Section 321 does not contemplate. The acquittal or discharge order under Section 321 are not the same as the normal final orders in criminal cases. The conclusion will not be backed by a detailed discussion of the evidence in the case of

A acquittal or absence of prima facie case or groundlessnesss in the case of discharge. All that 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 these facts of the case, will have to see whether the application suffers from such impropreties or illegalities as to cause manifest injustice if B consent is given. In this case, on a reading of the application for withdrawal, the order of consent and the other atttendant circumstances, I have no hesitation to hold that the application for withdrawal and the order giving consent were proper and strictly within the confines of Section 321 Cr.P.C.

C 18. While construing Section 321, it is necessary to bear in mind the wide phraseology used in it, the scheme behind it and its field of operation. True, it does not give any guideline regarding the grounds on which an application for withdrawal can be made. But in applying it, we have to bear in mind that it was enacted with a specific purpose and it would be doing violence to its language and contents by impor- D ting into the section words which are not there or by restricting its operation by fetters in the form of conditions and provisos. Its predecessor Section 494 had been on the statute book from the inception of the Criminal Procedure Code. When the code was amended in 1973, this Section was re-numbered and the only change brought in this section is to add the words "in charge of the case" while referring to E the Public Prosecutor or Assistant Public Prosecutor.

19. 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 Section 333 F 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 G and therefore the discretion given to them by section 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 orginal criminal trials in the High Court, has still a bearing, H while considering the scope of Section 321 corresponding to Section

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, Section 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 under Section 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 Section 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 Section 494 of the old Code and Section 333 respectively. It would, therefore, be just and reasonable to hold that while conferring powers upon the subordinate courts under Section 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

A 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 B 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".

20. The Section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations C on which the Court is to grant its consent. The initiative is that of the Public Prosecutor and what the Court has to do is only to give its consent and not to determine any matter judicially. The judicial function implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the Public Prosecutor has not been impro- D perly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.

21. The Court's function is to give consent. This section does not obligate the Court to record reasons before consent is given. However, I should not be taken to hold that consent of the Court is a matter of E 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. The section should not be construed to mean that the Court has to give a detailed reasoned order when it gives consent. If on a reading of the F order giving consent, a higher Court is satisfied that such consent was given on an overall consideration of the materials available, the order giving consent has necessarily to be upheld.

22. It would be useful to compare the scope of the Court's power under Section 321 with some other sections of the Code. There are G some provisos in the Code which relate to the manner in which Courts have to exercise their jurisdiction in pending cases when applications are made for their withdrawal or when the Court finds that there is no ground to proceed with the cases. Sections 203, 227, 245, 257 and 258 are some such sections. Section 203 of Criminal Procedure Code empowers a Magistrate to dismiss a complaint at the initial stage itself if H he is of opinion that there is no sufficient ground for proceeding. But,

before doing so, the Magistrate is called upon to briefly record his reasons for so doing. The Section reads as follows:

> "*203. Dismissal of complaint.*
>
> If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the enquiry or investigation (if any) under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismisss the complaint, and in every such case he shall briefly record his reasons for so doing."

Section 245(1) deals with the power of the Magistrate in discharging an accused when no case has been made out against him. However, the Section imposes an obligation on the Magistrate to record his reasons before discharging the accused, Section 245(1) reads as follows:

> "If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him."

This section gives the Magistrate, in cases where he considers that the accused should be discharged, a power to discharge him but the power is fettered by an obligation to record his reasons for doing so. If reasons are not recorded in an order of discharge that would be violative of the mandate of the Section.

Section 245(2) enables the Magistrate to discharge an accused "at any previous stage" of the case also if he considers that the charge against an accused is groundless. Sub-section (1) deals with a stage when all evidences referred to in Section 244 is taken. Section 244 deals with evidence in any warrant case instituted otherwise than on a police report. It is when all such evidence has been taken that the Magistrate can discharge the accused under Section 245(1), while Section 245(2) deals with the case in which the evidence referred to in Section 244 has not been taken. Here again the order of discharge by Magistrate has to be supported with reasons for discharge. Section 245(2) reads as follows:

A "Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

B An order of discharge under either of the two sub-sections can be sustained only if the Magistrate has recorded his reasons for discharge.

Section 257 in chapter 20, deals with trial of summons cases by a Magistrate and provides for the withdrawal of complaints. It reads as follows:

C "257. Withdrawal of Complaint—If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint against the accused, or if there be more than one accused, against all or any of them, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused against when the complaint is so withdrawn."

D

The wording of this section is also significantly different from Section 321. When a complainant wants to withdraw his complaint against the accused, the Magistrate can permit him to withdraw the same and acquit the accused against whom the complaint is so withdraw, only when he satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint. In other words, the complainant cannot withdraw his complaint as he pleases nor can the Magistrate permit him to do so unless the Magistrate satisfies himself that there are sufficient grounds to withdraw the complaint. This section thus contemplates an order disclosing sufficient grounds to satisfy the Magistrate to accord permission to withdraw the complaint. The power conferred on a Magistrate under this Section is in order to ensure that a complainant does not abuse the process of law by filing a false or vexatious complaint against another and withdrawing the complaint after adequatly embarrassing or harassing the accused so as to escape the consequences of a complaint or suit for malacious prosecution by the accused in the complaint.

E

F

G

Section 258 Cr.P.C. in the same chapter deals with the power of Magistrate to stop proceedings in certain cases which can also be usefully read.

H

> "258. Power to stop proceedings in certain cases-In any summons case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceeding is made after the evidence of the principal witness has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge."

This section deals with the stopping of proceedings at any stage without pronouncing any judgment and acquitting or discharging the accused as the case may be, but the section mandates the Magistrate to record his reasons for doing so. The Magistrate, cannot stop proceedings under this section without recording his reasons. Even in a Sessions case the Sessions Court cannot exercise its powers of discharge under Section 227 without recording reasons therefore. Section 227 is in the following terms:-

> "If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

It is thus clear that the scheme of the above Sections differ from Section 321.

The scope of Section 321 can be tested from another angle and that with reference to Section 320 which deals with "compounding of offences". Both these Sections occur in Chapter 24 under the heading "General Provisions as to Enquiries and Trials". Section 320(1) pertains to compounding of offences, in the table, which are not of a serious nature while Section 320(2) pertains to offences of a slightly serious in nature but not constituting grave crimes. The offences in the table under Section 320(1) may be compounded by the persons mentioned in the third column of the table without the permission of the Court and those given in the Table-II, under Section 320(2) can be compounded only with the permission of the Court. Under Subsection 4(a), when a person who would otherwise be competent to compound an offence under Section 320, is under the age of 18 years

A or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the Court, compound such offence. Sub-section 4(b) provides that when a person who would otherwise be competent to compound an offence under this Section is dead, the legal representative, as defined in the Code of Civil Procedure, of such person may, with the consent of the Court, compound such offence.

B

These two sub-sections use the expression "with the permission of the Court" and "with the consent of the Court" which are more or less ejusden generis. On a fair reading of the above-mentioned Sub-sections it can be safely presumed that the Sections confer only a supervisory power on the Court in the matter of compounding of C offences. in the manner indicated therein, with this safeguard that the accused does not by unfair or deceitful means, secure a composition of the offence. Viewed thus I don't think that a plea can be successfully put forward that granting permission or giving consent under Sub-section 4(a) or 4(b) for compounding of an offence, the Court is en-joined to make a serious detailed evaluation of the evidence or assess-D ment of the case to be satisfied that the case would result in acquittal or conviction. It is necessary to bear in mind that an application for compounding of an offence can be made at any stage. Since Section 321 finds a place in this chapter immediately after Section 320, one will be justified in saying that it should take its colour from the imme-diately preceding Section and in holding that this Section, which is a E kindred to Section 320, contemplates consent by the Court only in a supervisory manner and not essentially in an adjudicatory manner, the grant of consent not depending upon a detailed assessment of the weight or volume of evidence to see the degree of success at the end of the trial. All that is necessary for the Court to see is to ensure that the application for withdrawal has been properly made, after independent F consideration, by the public prosecutor and in furtherance of public interest.

I referred to these sections only by way of illustration to emphasis the distinction between section 321 and other sections of the Code dealing with orders withdrawing criminal cases or discharging or G stopping proceedings. My purpose in referring to the above sections is only to show that Section 321, in view of the wide language it uses, enables the public prosecutor to withdraw from the prosecution any accused, the discretion exercisable under which is fettered only by a consent from Court on a consideration of the materials before it and that at any stage of the case. The Section does not insists upon a H reasoned order by the Magistrate while giving consent. All that is

necessary to satisfy the section is to see that the public prosecutor acts in good faith and that the Magistrate is satisfied that the exercise of discretion by the public prosecutor is proper.

23. There is no appeal provided by the Act against an order giving consent under Section 321. But the order is revisable under Section 397 of the Criminal Procedure Code. Section 397 gives the High Court or the Sessions Judge jurisdiction to consider the correctness, legality or propriety of any finding, sentence or order and as to the regularity of the proceedings of any inferior Court. While considering the legality, propriety or the correctness of a finding or a conclusion, normally, the revising Court does not dwell at length into the facts and evidence of the case. The Court in revision considers the materials only to satisfy itself about the correctness, legality and propriety of the findings, sentence or order and refrains from substituting its own conclusion on an elaborate consideration of evidence.

An order passed under Section 321 comes to this Court by special leave, under Article 136 of the Constitution of India. The appeal before us came thus. It has been the declared policy of this Court not to embark upon a roving enquiry into the facts and evidence of cases like this or even an order against discharge. This Court will not allow itself to be converted into a Court of facts and evidence. This Court seldom goes into evidence and facts. That is as it should be. Any departure from this salutary self imposed restraint is not a healthy practice and does not commend itself to me. It is necessary for this Court to remember that as an apex Court, any observation on merits or on facts and evidence of a case which has to go back to the Courts below will seriously prejudice the party affected and it should be the policy of this Court not to tread upon this prohibited ground and invite unsavory but justifiable criticism. Is this Court to assess the evidence to find out whether there is a case for acquittal or conviction and convert itself into a trial Court? Or is this Court to order a retrial and examination of hundred witnesses to find out whether the case would end in acquittal or conviction? Either of these conclusions in the case is outside the scope of Section 321. This can be done only if we rewrite Section 321.

24. Section 321 Cr.P.C. is virtually a step by way of composition of the offence by the State. The State is the master of the litigation in criminal cases. It is useful to remember that by the exercise of functions under Section 321, the accountability of the concerned person or persons does not disappear. A private complaint can still be filed if a party is aggrieved by the withdrawal of the prosecution but running the

possible risk of a suit of malicious prosecution if the complaint is bereft of any basis.

25. Since Section 321 does not give any guideline regarding the grounds on which a withdrawal application can be made, such guidelines have to be ascertained with reference to decided cases under this section as well as its predecessor Section 494. I do not propose to consider all the authorities cited before me for the reason that this Court had occasion to consider the question in all its aspects in some of its decisions. Suffice it to say that in the Judgments rendered by various High Courts, public policy, interests of the administration, inexpediency to proceed with the prosecution for reasons of State and paucity of evidence were considered good grounds for withdrawal in many cases and not good grounds for withdrawal in certain other cases depending upon the peculiar facts and circumstances of the cases in those decisions. AIR 1932. Cal. 699 (Giribala Dasi v. Mader Gazi), AIR 1943 Sind 161 (Emperor v. Sital Das), AIR 1936 Cal. 356 (Marihar Sinha v. Emperor), AIR 1949 Patna 233 (The King v. Moule Bux and Ors.) AIR 1952 Raj. 42 and 1933 Privy Council 266 are some of the cases which were brought to our notice.

Ram Naresh Pandey's case reported in 1957 SCR 279 is a land mark case which has laid down the law on the point with precision and certainty. In this decision the functions of the Court and the Public Prosecutor have been correctly outlined. While discussing the role of the Court, this Court observed:

> "His discretion in such matters has necessarily to be exercised with reference, to such material as is by then available and it is not a prima facie judicial determination of any specific issue. The Magistrate's functions in these matters are not only supplementary, at a higher level, to those of the executive but are intended to prevent abuse. Section 494 requiring the consent of the Court for withdrawal by the public prosecutor is more in line with this scheme, than with the provisions of the Code relating to inquiries and trials by Court. It cannot be taken to place on the Court the responsibility for a prima facie determination of the triable issue. For instance the discharge that results therefrom need not always conform to the standard of "no prima facie case" under Sections 209(1) and 253(1) or of 'groundlessness' under Sections 209(2) and 253(2). This is not to say that a consent is to be lightly given on the application of the

> public prosecutor, without a careful and proper scrutiny of the grounds on which the application for consent is made." A

This decision was approved by this Court in *M.N. Sankaranarayanan Nair* v. *P.V. Balakrishnan & Ors.*, [1972] 2 SCR 599 as is seen at page 606:

> " ..... In the State of Bihar v. Ram Naresh Pandey (1957 SCR 279) it was pointed out by this Court that though the Section does not give any indication as to the ground on which the Public Presecutor may make an application on the consideration of which the Court is to grant its consent, it must none-the-less satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised and that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes ....." B C

26. I will now briefly refer to some other cases cited to understand how Courts considered the scope of Section 321 depending upon the facts of each case. D

In the case of *Bansi Lal* v. *Chandan Lal*, AIR 1976 SC 370 this Court followed its earlier decision reported in [1972] 2 SCR 599 which in turn followed [1957] SCR 279 and declined consent when withdrawal was sought on the ground that the prosecution did not want to produce evidence and continue the criminal matter against the accused. The Sessions Judge gave his consent as it appeared to him "futile to refuse permission to the State to withdraw prosecution". This consent was set aside because reluctance to produce evidence was held to be not sufficient ground for withdrawal. E

In *State of Orissa* v. *Chandrika Mohapatra & Ors.*, [1977] 1 SCR 335 the application for withdrawal was made on two grounds: (i) that it was considered inexpedient to proceed with the case; (ii) that the evidence collected during investigation was meagre and no useful purpose would be served by proceedings with the case against the accused. The Magistrate gave consent holding that compelling the State to go on with the prosecution would involve unnecessary expenditure and waste of public time. This Court upheld the consent and held that meagre evidence was a legitimate ground for withdrawal. The following observation at page 338 is useful for our purpose on an important aspect. In that case, as in this case, the Magistrate had clearly stated in his order that he was giving consent after going through the materials placed before him. This is how the Court summed up its finding: F G H

A "It is difficult for us to understand how the High Court could possibly observe in its order that the Magistrate had not perused the case diary when in terms the learned Magistrate has stated in his order that he had read the case diary and it was after reading it that he was of the opinion that the averment of the prosecution that the evidence was B not sufficient was not ill-founded. Then again it is difficult to comprehend how the High Court could possibly say that the learned Magistrate accorded consent to the withdrawal of the prosecution on the ground that it was inexpedient to proceed with the case, when, in so many terms, the learned Magistrate rejected that ground and granted consent only on the second ground based on inadequacy of evidence .." C

When the Magistrate states in his order that he has considered the materials, it is not proper for this Court not to accept that statement. The proper thing to do is to hold that the Magistrate gave consent on objective consideration of the relevant aspects of the case. It would be D acting against the mandate of Section 321 to find fault with the Magistrate in such cases, unless the order discloses that the Magistrate has failed to consider whether the application is made in good faith, in the interest of public policy and justice and not to thwart or strifle the process of law.

E In *Balwant Singh* v. *State of Bihar,* [1978] 1 SCR 604 this Court felt unhappy when the public prosecutor and the Magistrate had surrendered their discretion, but still declined to grant leave under Article 136 and the withdrawal stood confirmed.

In *Subhash Chander v. State,* [1980] 2 SCR 44, this Court upheld F the consent given for withdrawal since a fresh investigation had revealed that the case was framed by the concerned Police Officers with ulterior motives. This Court observed that two relevant matters to be considered about the consent are: (1) whether the considerations are germane and (2) whether actual decision was taken by the public prosecutor or he only obeyed the orders dictated to him by others.

G

In *Rajendra Kumar Jain* v. *State,* [1980] 3 SCR 982, this Court had to deal with two sets of cases—one relating to the Baroda Dynamite case and the other the Bhiwani Temple Demolition case. In that case, this Court summarised eight propositions which are given in the judgment rendered by Tulzapurkar, J. in *Sheonandan Paswan* v. *State* H *of Bihar & Ors.*, This Court observed that paucity of evidence is not

the only ground on which the Public Prosecutor may withdraw from the prosecution, though that is a traditional ground for withdrawal. Political purposes and political vendetta afford sufficient ground for withdrawal.

27. All the above decisions have followed the reasoning of *Ram Naresh Pandey's* case and the principles settled in that decision were not doubted.

It is in the light of these decisions that the case on hand has to be considered. I find that the application for withdrawal by the Public Prosecutor has been made in good faith after careful consideration of the materials placed before him and the order of consent given by the Magistrate was also after due consideration of various details, as indicated above. It would be improper for this Court, keeping in view the scheme of Section 321, to embark upon a detailed enquiry into the facts and evidence of the case or to direct re-trial for that would be destructive of the object and intent of the Section.

Now, I propose to quickly rush through the facts of the case to make the discussion complete.

28. When the matter was first heard by this Court, the documents produced were profusely referred to by counsel on both sides. This consisted of also affidavits filed by both sides. Baharul Islam, J, after discussing the questions of law examined the factual aspect also. Referring to Shri Venugopalan's arguments (the appellants' counsel then), on facts, the learned Judge observed as follows:

> "The learned Counsel fairly concedes that he does not take much reliance or oral evidence but takes strong reliance on two pieces of documentary evidence, namely alleged creation of forged documents by Dr. Mishra and the confessional statement of Haidari implicating Dr. Mishra."

On this concession, the learned Judge proceeded to consider the factual details pressed by the Counsel, but cautioned himself saying that consideration of the factual details should not be treated as a precedent because, according to him, the appellant should not be permited to raise them for the first time in an appeal by special leave under Article 136 of the Constitution. This is how the learned Judge spoke.

> "Before proceeding further, it is pertinent to mention that

A in his application before the Special Judge, the appellant did not find fault with any of the grounds of withdrawal in the application filed by the Public Prosecutor under Section 321. His only contention was that an attempt was being made by the Public Prosecutor to scuttle the case and that the Court should apply its independent mind before B according consent to the withdrawal and that he should be heard in the matter. He made no mention of any forgery by antedating or by pasting of any earlier order and thereby making any attempt at shielding of any culprit. He thus, prevented the Special Judge and the High Court from giving any finding on alleged forgery on the allegations of C pasting and ante-dating and thereby depriving us also from the benefits of such findings of the Courts below. This question of fact has now been sought to be brought to the notice of this Court during the course of argument by learned counsel of the appellant in this appeal. A question of fact that needs investigation cannot be allowed to be D raised for the first time in an appeal by Special Leave under Article 136 of the Constitution."

I respectfully agree with this approach.

29. We have a few documents on which reliance has been placed E by counsel on both sides in furtherance of their submission. Prior to March, 1977, there were only three important documents relating to the mis-deeds in Patna Urban Co-operative Bank:

(a) Report of the Reserve Bank of India;

F (b) Audit report of the Special Divisional Co-operative Audit Officer; and

(c) The report of the Estimates Committee of the Bihar Legislative Assembly.

In none of the three reports has the second respondent been named G either as a conspirator in any offence or as an offender in relation to the affairs of the bank. These three documents, therefore, will not help the appellant to press a case against the second respondent before a Criminal Court. The accusation against the second respondent was that he was trying to shield N.K. Sinha. But it is useful to remember that 17 criminal cases had been filed against him and they are still H pending.

Thus a one important piece of evidence that is pressed into service against the second respondent is the confessional statement of Haidari. There were two cases against Haidari, the case on hand and another case. In this case he was granted pardon. He turned an approver and became a prosecution witness. He has been prosecuted in several other cases on the basis of orders passed by respondent No. 2 on 4-8.1976. His first confessional statement was on 4-11-1976. Then he did not implicate respondent No. 2. He was re-arrested on 22-1-1978. He made a second confessional statement on 24-1-1978. This time he implicated the second respondent for the first time for the alleged offence said to have been committed in the years 1973-75. What is the evidentiary value of these confessional statements implicating the second respondent. The second statement at best is the confessional statement of a co-accused which normally will not inspire confidence, in any Court. It is also a statement of an accomplice turned approver and hence of a very little evidentiary value. The question for consideration is whether a retrial should be ordered on this legally weak and infirm evidence, when this Court execises its jurisdiction while considering an order giving consent on an application under Section 321 of Criminal Procedure Code. I have no hesitation to reject such a request consistent with the declared policy of this Court not to embark upon evidence.

The second piece of evidence relates to the alleged forgery. The gravamen of the charge is that the second respondent as Chief Minister passed an order on 16-5-1975, in Hindi and wrote another order putting the date as 14-5-1975 and got it pasted over the earlier order. The allegation is that he changed the original Hindi digit 'six' into 'four'. This is not denied by the second respondent. The case put forward is that by the above act of ante-dating by over-writing, the second respondent committed forgery and also an offence under Section 5(1)(d) of the Prevention of Corruption Act. I do not propose to deal with this part of the case in detail for the simple reason that there is no shred of evidence in this case, that this file ever left the office of the Chief Minister nor that any one had secured any benefit by this over-writing. When Shri Rajendra Singh, one of the learned counsel asserted that the file had not left the Chief Minister's office, that assertion was not met by any one on the appellant's side. There is no evidence as to when the date was changed and as to whether this change of date had extended any benefit on the third respondent, N.K. Sinha. That being so, this factual aspect also need not detain me. On these materials, one

A fails to understand how an offence under Section 466 could be made out. Taking the entire evidence against the appellant it cannot be held that he has committed forgery under Section 463 or an offence under Section 466. Even though there is over-writing or pasting or interpolation or change of digits, there is no evidence at all to show that this B paper went out of the Chief Minister's office or that any one was unduly favoured or that any one secured undue advantage by use of such over-writing.

The appellant is admittedly a political rival of respondent No. 2. There is no love lost between them. It is at the instance of such a highly interested person that this Court is called upon to direct retrial of the C case, setting aside the consent given by the Special Judge. The second respondent is a leader of a political party. He was a rival to the Chief Minister who followed him after the 1977 at the time of institution of the case. In 1977, when the second respondent was the Chief Minister, a warrant of arrest was issued against Shri Karpoori Thakur for his D arrest and detention. It has been suggested that Shri Thakur had grudge against the second respondent. Viewed against this background, in my view, it would not advance either the interests of justice or public interest, on the unsatisfactory factual details of the case, to accept the appeal and direct retrial.

E 33. I have deliberately refrained from considering the factual details of the case because the details are available in the three Judgment rendered by the three Judges of this Court reported in [1983] 2 SCR 61. I have approached the whole case in a purely detached manner with reference to the facts of the case and the question of law involved. In this case this Court is called upon only to consider the F ambit and scope of Section 321 Cr.P.C. and not the truth or otherwise of the allegations against the second respondent. Therefore, when we uphold the order of the High Court and that of the Special Judge, we have only upheld the propriety of the orders tested against the scope of Section 321 Cr.P.C. The number of true cases that get crucified at the altar of the doctrine of benefit of doubt is legion. Since the scope of G this appeal does not and cannot extend to the consideration of the merits of the case in depth, I have advisedly not embarked upon such an enquiry. I firmly believe that this Court while deciding cases should consider only the legal issues involved and not the individuals involved.

H On a careful consideration of the facts and circumstances of the

case, I hold that this appeal has to fail and has to be dismissed. Accordingly, I dismiss the appeal. A

V. Khalid J.

ORDER S. Natarajan J. B

In accordance with the opinion of the majority the appeal shall stand dismissed.

S.R. Appeal dismissed.

C