Gudikanti Narasimhulu and Others

Vs

Public Prosecutor, High Court of Andhra Pradesh

Criminal Misc. Petition No. 1443 of 1977

(V. R. Krishna Iyer JJ)

06.12.1977

ORDER

1. "Bail of jail ?" - at the pre-trail or post-conviction stage - belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Article 21 are the life of that human right.

2. The doctrine of police power, constitutionally validates punitive processes for the maintenance of public order, security of the State, national integrity and the interest of the public generally. Even so, having regard to the solemn issue involved, deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious considerations relevant to the welfare objectives of society, specified in the Constitution.

3. What, then, is 'judicial discretion' in this bail context ? In the elegant words of Benjamin Cardozo (The Nature of the Judicial Process - Yale University Press (1921)) :

> The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'. Wide enough in all conscience is the field of discretion that remains.

Even so it is useful to notice the tart terms of Lord Camden that (1 Bovu. Law Dict., Rawles' III Revision p. 885 - quoted in Judicial Discretion - National College of the State Judiciary, Rano,

Nevada p. 14)

the discretion of a Judge is the law of tyrants : it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable ....

4. Some jurists have regarded the term 'judicial discretion' as a misnomer. Nevertheless, the vesting of discretion is the unspoken but inescapable, silent command of our judicial system, and those who exercise it will remember that (Attributed to Lord Mansfield, Tingley v. Dalby, 14 NW 145)

discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular.

An appeal to a Judge's discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with, established principles of law. (Judicial discretion, (idib.) p. 33)

5. Having grasped the core concept of judicial discretion and the constitutional perspective in which the Court must operate public policy by a restraint on liberty, we have to proceed to see what are the relevant criteria for grant or refusal of bail in the case of a person who has either been convicted and has appealed or one whose conviction has been set aside but leave has been granted by this Court to appeal agaist the acquittal. What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said (R. v. Rose, (1898) 18 Cox CC 717 : 67 J.J QB 289 - quoted in 'The Granting of Bail', Modern Law Rev., Vol. 81, Jan. 1968, pp. 40-48)

I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial.

This theme was developed by Lord Russel of Killowen, C.J., when he charged the grand jury at Salisbury Assizes, 1899 :

> ... it was the duty of magistrates to admit accused persons to bail, wherever practicable, unless there were strong grounds for supposing that such persons would not appear to take their trial. It was not the poorer classes who did not appear, for their circumstances were such as to tie them to the place where they carried on their work. They had not the golden wings which to fly from justice.

In Archbold it is stated that

The proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial ...

The test should be applied by reference to the following considerations :

> (1) The nature of the accusation ...
>
> (2) The nature of the evidence in support of the accusation ....

(3) The severity of the punishment which conviction will entail ....

(4) Whether the sureties are independent, or indemnified by the accused person ...

Perhaps, this is an overly simplistic statement and we must remember the constitutional facus in Articles 21 and 19 before following diffuse observations and practices in the English system. Even in England there is a graowing awareness that the working of the bail system requires a second look from the point of view of correct legal criteria and sound principles, as has been pointed out by Dr. Bottomley. (The Granting of Bail, Principles and Practice, Mod. Law Rev. ibid. pp. 40 to 54)

6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the Court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a serve sentence, if such be plausible in the case. As Erle, J. indicated, when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the Court may reasonably presume, some evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged (Mod. Law Rev. p. 50 ibid., 1852 I E & B 1). Lord Campbell, C.J. concurred in this approach in that case and Coleridge, J. set down the order of priorities as follows : (Mod. Law Rev. ibid., pp. 50-51)

I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial ... It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to a determination on that point three elements will generally be found the most important : the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted.

In the present case, the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the charge, and the punishment of the offence is, by law, death.

7. It is thus obvious that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

8. Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being. (Patrick Devlin : The Criminal Prosecution in England, (London) 1960, p. 75 - Mod. Law Rev. ibid., p. 54)

9. Thus the legal principles and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record - particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological

history that a thoughtless bail order has enabled the bailes to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance.

10. The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the consideration I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice - to the individual involved and society affected.

11. We must weigh the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. In the United States, which has a constitutional perspective close to ours, the function of bail is limited, 'community roots' of the applicant are stressed and, after the Vera Foundation's Manhattam Bail Project, monetary suretyship is losing ground. The considerable public expense in keeping in custody where no danger of disappearance or disturbance can arise, is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our sub-jails, that the unrewarding curelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible.

12. A few other weighty factors deserve reference. All deprivation of liberty is validated by social defence and individual correction along and anti-criminal direction. Public justice is central to the whole scheme of bail low. Fleeing justice must be forbidden but punitive harshness should be minimised. Restorative devices to redeem the man, even through community service, meditative drill, study classes or other resources should be innovated, and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offences while on judicially sanctioned 'free enterprise', should be provided against. No seeker of justice shall play confidence tricks on the Court or community. Thus, conditions may be hung around bail orders, not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our Constitution.

13. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends ? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Agian, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding - if that be so - of innocence has been recorded by one Court. It may not be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, if enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio-geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a

complacent refusal.

14. Realism is a component of humanism which is the heart of the legal system. We come across cases where parties have already suffered 3, 4 and in one case (the other day it was unearthed) over 10 years in prison. These persons may perhaps be acquitted - difficult to guess. If they are, the injustice of innocence long in rigorous incarceration inflicted by the protraction of curial processes, is an irrevocable injury. And, taking a pragmatic view, while life imprisonment may, in law, last a whole life, in practice it hardly survives ten years, thanks to rules of remission. Thus, at the worst, the prisoner may have to serve some more years, and, at the best, law is vicariously guilty of dilatory deprivation of citizen's leberty, a consummation vigilantly to be vetoed. So, a circumstance of some consequence, when cosidering a motion for bail, is the period in prison already spent and the prospect of the appeal being delayed for hearing, having regard to the suffocating crowd of dockets pressing before the few Benches.

15. It is not out of place to mention that if the State takes up a flexible attitude it may be possible to permit long spells of parole, under controlled conditions, so that fear that the full freedom if bailed out, might be abused, may be eliminated by this experimental measure, punctuated by reversion to prison. Unremitting insulation in the harsh and hardened company of prisoners leads to many unmentionable vices that humanizing interludes of parole are part of the compassionate constitutionalism of our system.

16. The basics being thus illuminated, we have to apply them to the tangled knot of specifics projected by each case. The delicate light of the law favours release unless countered by the negative criteria necessitating that course. The corrective instinct of the law plays upon release orders by strapping on to them protective and curative conditions. Heavy bail from poor men is obviously wrong. Poverty is society's malady and sympathy, not sternness, is the judicial response.

17. In this jurisprudential setting, I take up each case. Detailed ratiocination is not called for, since I have indicated the broad approach. And, for a bail order - once awareness of matters of relevance is assured - the briefer the better, and prolixity may be fraught with unwitting injury. The focus is on personal freedom, barricaded or banned when it turns a menace to the fair administration of justice which is the foundation of a free society.

KRISHNA IYER, J.

The reason which I have set out at great length which in my view bear upon the grant or refusal of bail warrant enlargement of the petitioners in the facts of the present case. It is a fact that they have been acquitted along with others in the trial Court although that acquittal has been set aside in the High Court. Further, there is no suggestion possible that during the time they were on bail - and they were free during the pendency of the trial and when the appeal was pending in the High Court - that they abused the trust reposed by the Court allowing them to be a large. Moreover, four of the fellow accused have been already enlarged on bail by this Court and an attempt at cancellation thereof rebuffed.

19. The petitioners have suffered imprisonment around a year and a reasonable prediction of the time of the hearing of the appeal may take us to a few years ahead. Which means that incarceration during that period may possibly prove an irrevocable injury if the appeal ends in their favour. The Magistrate's report the conduct of the petitioners while in sub-jail is not uncomplimentary.

20. Counsel for the respondent-State rightly stresses that the village is factious and that the petitioners are activists in one faction. The potentiality of community peace being disturbed should therefore be obviated by proper safeguards. It is significant that the State itself has released the petitioners on parole and there is nothing to suggest that while on such spell of freedom anything injurious to public interest or public peace or public justice has been committed.

21. The cumulative result of these considerations persuades me to direct the petitioners to be enlarged on bail, namely, their own bond to appear to receive sentence in the event of an adverse verdict from this Court. However they will be put on conditions which Counsel for the petitioners accepts. The petitioners will keep out of the village Gonegondla except for one day in a week. They will be allowed to enter the village on that day only after reporting to the police at the Gonegondla police station. They shall leave the village the next day and they will report to the police when they are departing from the village. This will help the police to have a vigilant eye on the petitioners and prevent them from doing mischief inside the village and incidentally will help the petitioners carry on their agricultural operations by once-a-weak supervision.

22. It is commendable, if the petitioner choose to report daily before any therapeutic centre for psychic reformation, such as a transcendental meditation centre. This is left to their option but may eventually prove to their good. The petition is disposed of accordingly.

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