Babu Singh and Others

Vs

State of U. P.

Criminal Miscellaneous Petition No. 191 of 1978

(V. R. Krishna Iyer, D. A. Desai JJ)

31.01.978

ORDER

KRISHNA IYER, J. -

1. The petitioners have moved for bail setting out special grounds in support of the prayer. The state opposes on various grounds which we will presently set out. One of us sitting as a Chamber Judge (Gudikanti Narasimhulu v. Public Prosecutor, (1978) 1 SCC 240 : 1978 SCC (Cri) 115) had considered this question at some length and since the principles set out therein commend themselves to us, we are proceeding on the same lines and are inclined to reach the same conclusion.

2. Briefly we will state the facts pertinent to the present petition and prayer and proceed thereafter to ratiocinate on the relevant criteria in considering the interlocutory relief of bail. Right at the beginning, we must mention that, at an earlier stage, their application for bail was rejected by this Court on September 7, 1977. But an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. While we surely must set store by this circumstance, we cannot accede to the faint plea that we are barred from second consideration at a later stage. An interim direction is not a conclusive adjudication, and updated reconsideration is not over-turning an earlier negation. In this view, we entertain the application and evaluate the merits pro and con.

3. Shri R. K. Jain has brought to our notice certain significant factors which frown upon continuance of incarceration and favour provisional, perhaps conditional, enlargement of the applicants.

4. All the petitioners were charged with an offence of murder under Section 302 IPC but all of them were acquitted by the Sessions Court as early as November 4, 1972. The state successfully appealed against the acquittal and the High Court, reversing the findings of the Sessions Court, held all the petitioners guilty and sentenced them all to life imprisonment. This judgement was pronounced on May 20, 1977, after an unfortunately tragic sojourn of five years for an appeal in a murder case. Our justice system, even in grave cases, suffers from slow motion syndrome which is lethal to "fair trial", whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings. This is by the way, although it is important that judicial business management by engineering, not tinkering, so as to produce efficient expedition, is an urgent, high-priority item on the agenda of Court reform, to be radically undertaken none too soon.

5. Back to the necessary facts. On the High Court upsetting the acquittal, the petitioners have come up to this Court exercising their statutory right of appeal. The present petition, as earlier stated, is the second one for bail, the first hang been rejected about six months ago. The petitioners 1 to 5 have suffered sentence in some measure, having been imprisoned for about twenty months. The sixth petitioner had been on bail in the Sessions Court and all the petitioners had been free during the pendency of the appeal.

6. Certain other pregnant particulars deserve special mention. All the petitioners 1 to 5 are the entire male members of a family, the one point mentioned by Shri Jain is that all of them are in jail. Their defence in this Court may, therefor, be jeopardised. Another factor, equally meaningful, is that there is nothing indicted before us to show that during the long five years, when the petitioners had been out of prison, pending appeal, there had been any conduct on their part suggestive of disturbing the peace of the locality, threatening anyone in the village or otherwise thwarting the life of the community or the course of justice. Nay more. When the High Court entertained the appeal, the State did not press for their custody for apprehended abscondence or menace to peace and justice. It must be noticed that the episode of murder itself is attributed as the outcome of faction fight or feud between the two clans in the village, not an unusual phenomenon in rural India riven by rivalry of castes, sects and gens. This is, of course, a survival of primitive tribalism, as it were, but cannot be wished away unless sociological therapeutics were applied. The pharmacopoeia of the Penal Code is no sufficient curative. Nevertheless, we have to remember the reality of the village feud and consequent proness to flare-ups and recrudescence of criminal conflicts.

7. Against this backdrop of social and individual facts we must consider the motion for bail. The correct legal approach has been clouded in the past by focus on the ferocity of the crime to the neglect of the real purposes of bail or jail and indifferent to many other sensitive and sensible circumstances which deserve judicial notice. The whole issue, going by decisional material and legal literature, has been relegated to a twilight zone of the criminal justice system. Courts have often acted intuitively or reacted traditionally, so much so the fate of applicants for bail at the High Court level and in the Supreme Court, has largely hinged on the hunch of the bench as an expression of 'judicial discretions'. A scientific treatment is the desideratum.

8. 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 the liberty, justice, public safety and burden on the public treasury, all of which insist that a developed jurisprudence of bail is integral to socially sensitized judicial process. As Chamber Judge in this summit Court I had 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 refuses, 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 glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive or 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.

9. The doctrine of police power, constitutionally validates punitive process for the maintenance of public order, security of the State, national integrity and interest of 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.

10. What, then, is 'judicial discretion' in this bail context ? In the elegant words of Benjamin Cardozo (The Nature of 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 Dist., Rawles' III Revision p. 685 - quoted in Judicial Discretion - National College of the State Judiciary, Reno, Nevada p. 14) the discretion of a judge is the law of tyrants : it is always unknown, it is 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 ....

11. 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, Tinglay v. Dolby, 14 NW 146)

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, (ibid) p. 33)

12. Having grasped the core concept of judicial discretion and the constitutional perspective in which the Court must operate public policy by a restraint on the 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 against 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 LJ QB 289 - quoted : in 'The Granting of Bail', Mod. Law Rev., Vol. 81, Jan. 1968, pp. 40, 48)

I observe that in this case bail was refused for the prisoner. It cannot be to 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 ((1899) 63 JP 193, Mod. Law Rev., p. 49 ibid):

> ... it was 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 with which to fly from justice.

In Archbold it is stated that (Mod. Law Rev. ibid. p. 53 - Archbold, Pleading Evidence and Practice in Criminal Cases, Thirty-sixth Edn., London, 1966, para 203)

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 focus in Articles 21 and 19 before following diffuse observations and practices in the English system. Even in England there is a growing 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 Practices : Mod. Law Rev., ibid., p. 40 to 54)

13. 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 severe sentence, if such be plausible into 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 tea stage of judgment, should 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., p. 50-51).

I do not think that an accused party is detained 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 willful 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.

14. 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.

15. 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 Devbrin, The Criminal Prosecution in England (London) 1960, p. 75 - Mod. Law Rev., ibid., p. 54)

16. Thus the legal principle and practice validate the Court considering the likelihood of the applicant interfering with witness 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 criminollogical history that a thoughtless bail order has enabled the bailee 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.

17. 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 considerations 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.

18. 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 Manhattan 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 cruelty an expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible.

19. A few other weighty factors deserve reference. All deprivation of liberty is validated by social defense and individual correction along an anticriminal direction. Public justice is central to the whole scheme of bail law. 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.

20. 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. Again, the ground

for denial or 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 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 exaggeration of prospective misconduct of the accuse, if enlarged, must be soberly sized up lest danger of excess 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.

21. 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 liberty, a consummation vigilantly to be vetoed. So, a circumstance of some consequence, when considering a motion for bail, is the period in prison already spent and the prospect of tea appeal being delayed for hearing, having regard to the suffocating crowd of dockets pressing before the few Benches.

22. 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 interluded of parole are part of the compassionate constitutionalism of our system.

23. The basic 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.

24. Ye another factor which heavily tips the scales of justice in favour or release pendente lite is the thought best expressed by Justice Bhagwati, speaking for the Court in Kashmira Singh v. The State of Punjab ((1977) 4 SCC 291, 292 : 1977 SCC (Cri) 559, 560 : AIR 1977 SC 2147, 2148):

> The appellant contends in this application that pending the hearing of the appeal he should be released on bail. Now, the practice in this Court as also in many of the High Court has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment

> was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal to such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to retain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified ? Would it be just at all for the Courts to tell a person : "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefor, until we hear your appeal, you must retain in jail, even though you may be innocent" ? What confidence would such administration of justice inspire in the mind of the public ? It may quite conceivable happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal ? Would it not be an affront to his sense of justice ? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it ? It is, therefore, absolutely essential that the practice which this court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence.

25. Having regard to this constellation of considerations, carefully view in the jurisprudential setting above silhouetted, we are of the view that, subject to certain safeguards, the petitioners are eligible to be enlarged on bail.

26. The endemic pathology of factious scrimmage and bloodshed should be pre-empted by suitable safeguards, even if we are inclined to bail out the petitioners. So, we direct that the petitioners be released on their own recognisances in a sum of Rs. 5000 each, with one surety for each in a like sum, subject to two conditions, viz., firstly, that the petitioners shall not enter Bharaiyam village which is alleged to be the hot-bed of clan clashes according to the prosecution and secondly, the petitioners shall report at the Tandiawan Police Station (District Hardoi) once every week. We direct the Sub-Inspector of police station concerned to see that both the conditions are observed. In the event of breach of either condition, the prosecution will be at liberty to move this Court for cancellation of the bail hereby granted.

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