State (Delhi Administration)

Vs

Sanjay Gandhi

Criminal Appeal No. 188 of 1978

(CJI Y. V. Chandrachud, Syed M. Fazal Ali, P. N. Shinghal JJ)

05.05.1978

JUDGMENT

CHANDRACHUD, C.J. -

1. The respondent is arraigned as accused No. 2 in a prosecution instituted by the Central Bureau of Investigation in the court of the learned Chief Metropolitan Magistrate, Delhi. Omitting details which are not necessary for the present purpose, the case of the prosecution is as follow :

2. One Shri Amrit Nahata had produced a film called 'Kissa Kursi Ka', which portrayed the story of the political doings of the respondent and his mother, Smt. Indira Gandhi, the former Prime Minister of India. The Board of Censors declined to grant a certificate for exhibition of the film whereupon, Shri Nahata filed a writ petition in this Court for a Writ of Mandamus. On October 29, 1975, a direction was given by the Court that the film be screened on November 17 to enable the Judges to see whether the censorship certificate was refused rightly. In order to prevent this Court from exercising its constitutional jurisdiction and with a view to preventing the film from being publicly exhibited, the respondent and his co-accused Shri Vidya Charan Shukla, who was then the Minister for information and Broadcasting, entered into a conspiracy to take possession of the film and to destroy it. In pursuance of that conspiracy, 13 steel trunks containing 150 spools of the film were brought under special escort from Bombay to Delhi at the behest of Shri Shukla. The consignment reached the New Delhi Railway Station on November 10, 1975. The spools were then loaded in two tempo vehicles belonging to the respondent or to his company, M/s. Maruti Ltd., Gurgaon, of which respondent was the Managing Director. The vehicles, which were driven by Ram Chander and Charan Singh were taken to Gurgaon at the premises of Maruti Limited where, under instructions given by the respondent, the spools were destroyed by setting fire to them some time prior to November 24, 1975. A positive print of the film was lying in the Auditorium of the Ministry at Mahadev Road, New Delhi, which was taken charge of by one Ghose, a Deputy Secretary in the Ministry of Information and Broadcasting. He loaded it in Shri Shukla's staff car whereupon Shri Shukla himself delivered the print at No. 1, Safdarjang Road, where the respondent and his mother used to live at the relevant time. The Supreme Court was informed that it was not possible to screen the film for evaluation by the Judges. And the writ petition filed by Shri Nahata came to an abrupt end upon an affidavit being filed on March 22, 1976, by Ghose that the spools of the film had got mixed up with some other films received by the Government in connection with the International Film Festival.

3. After the emergency was lifted and the present Janata Government came into power, a certain information was received in consequence of which a raid was effected on the Gurgaon premises of the Maruti Limited. The raid yielded incriminating material to show that the 13 boxes which had

been received from Bombay at the New Delhi Railway Station contained the spools of the film 'Kissa Kursi Ka' which were burnt and destroyed in the factory premises. R. B. Khedkar, a Security Officer of the Maruti Limited and his assistant, Kanwar Singh Yadav, who was the Security Supervisor of the company, were arrested on the very day of the raid. Yadav made a statement on the following day stating how the film was burnt in the premises of the factory. Yadav's confessional statement was recorded by the Chief Metropolitan Magistrate on June 3 and Khedkar's on June 4. They were granted pardon under Section 306 of the Code of Criminal Procedure on July 14, 1977. During the course of investigation, various statement were recorded by the police including those of the two drivers of that tempo vehicles, Ram Chander and Charan Singh, a watchman Om Prakash and several employees of the Store Department of the company.

4. After completion of the investigation, a charge-sheet was filed by the C.B.I. in the court of the Chief Metropolitan Magistrate citing 138 witnesses for proving charges under Section 120B read with Sections 409, 435 and 201 of the Penal Code as also for substantive offences under the last mentioned three sections of the Penal Code.

5. In certain proceedings for contempt and perjury which were filed in this Court against Shri Shukla, it was directed by the Court on January 2, 1978, that the Chief Metropolitan Magistrate shall commence the hearing of the case of February 15 and that the Sessions Court will commence the trial on March 20, 1978, and shall proceed with the hearing from day to day. By an order dated February 14, the Court extended the time limit by four days in each case.

6. The committal proceedings commenced in the court of the learned Chief Metropolitan Magistrate, Delhi, on February 20, 1978. Khedkar who was examined on that day supported the prosecution fully except that he admitted in his cross-examination that he had written two inland letters, which may tend to throw a cloud on his evidence. On February 21, the second approver Yadav was examined by the prosecution. He resiled both from the statement which he made to the police under Section 161 of the Code of Criminal Procedure as well as from his judicial confession. The recording of Yadav's evidence was over on the 22nd.

7. On February 27, 1978, an application was filed by the Delhi Administration, in the High Court of Delhi for cancellation of the respondent's bail. That application having been dismissed by a learned single Judge on April 11, 1978, the Administration has filed this appeal by special leave.

8. Before the High Court, the following submissions were made on behalf of the appellant :

> (1) That the respondent was charged with offences amongst which is the offence under Section 409 of the Penal Code which is punishable with imprisonment for life. The respondent, having been accused of a non-bailable offence, it was wrong in the first instance to enlarge him on bail.
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> (2) Initially, the investigation was started in respect of the conspiracy and theft of the film from the custody of the Government. The respondent had obtained an order of anticipatory bail from the Delhi High Court in respect of those offences. It transpired during the course of investigation that a far more serious offence under Section 120B read with Section 409 of the Penal Code was committed by the respondent and the co-accused. Even though prior to July 14, 1977, on which date the charge-sheet was filed, the State was in possession of information showing that the respondent was trying to tamper with the witnesses, the State did not apply for cancellation of the

anticipatory bail nor did it ask the Magistrate to issue a non-bailable warrant because the very witnesses who were attempted to be tampered with had complained to the police that the respondent was trying to win them over. In the larger interest of justice, the State did not adopt a vindictive attitude towards the respondent by asking that he should be taken into custody.

(3) It was the plain duty of the High Court to enforce the provisions of Section 437 of the Code of Criminal Procedure when it was brought to its notice that the respondent, being charged with an offence under Section 409 which is punishable with life imprisonment was illegally on bail, particularly when he had misused his liberty. The obligation of the court to enforce the provisions of Section 437 of the Code of Criminal Procedure does not depend upon whether the State has acted with vigilance and promptitude.

(4) The burden which rests on the State in an application for cancellation of bail is of a limited nature. All that is necessary for the State to show, in support of its plea that bail be cancelled, is that there is a reasonable apprehension that by tampering with witnesses, the accused is interfering with the course of justice. It is neither necessary to prove the fact of tampering with mathematical certainty nor indeed beyond a reasonable doubt. The test to be adopted in such matters is one of 'reasonable apprehension'.

(5) On February 13 and 14, 1978, approver Yadav, first first through Khedkar and then by an application written and signed by himself, complained to the C.B.I. Officers that the respondent was trying to tamper with his evidence through Ram Chander, the driver of the tempo. Within a week thereafter, that is on February 21, 1978, Yadav turned hostile by going back upon the statement which he had made before the police under Section 161 of the Code of Criminal Procedure and on his confessional statement recorded by the Magistrate on the basis of which he had secured pardon a few days earlier. This incident by itself was sufficient to justify the State's plea that there was a reasonable apprehension in the mind of the prosecution that the respondent was tampering with their witnesses.

(6) The fact that the respondent has contacted Yadav on February 17 and was seen in Yadav's company on that date was supported by the evidence of Ganpat Singh, a Postal Peon, Digambar Das, an employee of the Maruti Limited and Satpal Singh, a constable of the Haryana Armed Police. There was no justification for disbelieving the affidavits of these three persons.

(7) As far back as July 1977, the respondent had attempted to tamper with two witnesses, Charan Singh and A. K. Dangwal. Both of these witnesses had given written applications to the police complaining of attempts made by the respondent to win them over. The entries made by the police in the General Diary corroborated the complaints made by these witnesses. The two complaints, though not acted upon promptly by the police by asking for the cancellation of respondent's bail, render it highly probable that during the later stages of the trial, several witnesses turned hostile on account of the pressure and influence which the respondent exercised on them.

(8) It was through Ram Chander that approver Yadav was approached and tampered with. On February 21, 1978, Ram Chander was sitting in the court though his presence was not necessary and indeed, he entered the court-room along with a group of respondent's partisans for whom the respondent had obtained the Magistrate's permission by seeing him in his chamber.

9. These very contentions have been repeated before us by Shri Ram Jethmalani who also relied upon some additional data in support of the application for cancellation of the respondent's bail. The new material on which counsel relies has come into existence after the High Court delivered its judgment on April 11 and in the very nature of things, the High Court has had no opportunity to consider its weight and relevance on the question in issue.

10. Shri A. N. Mulla who appears on behalf of the respondent controverted each and every allegation made by the appellant. He contends that the prosecution has been launched out of political vendetta, that ordinary offences triable by a Magistrate have been magnified beyond all proportion, that pardon was tendered to the so-called approvers though no charge could have been levelled against them, for the sole purpose of attracting the application of Section 306(5) of the Criminal Procedure Code so as to drag the accused to the Sessions Court, that the police with their unlimited resources have left no stone unturned in order somehow to implicate the accused and that evidence in regard to tampering of witnesses is manufactured with a view to explaining away the tell-take circumstance that the key witnesses, including one of the approvers, have refused to support the prosecution. The prosecution, according to counsel, ventured into sensation-mongering by building the superstructure of a Sessions trial on a slippery foundation and having been disillusioned by the performance of its star witnesses, it has resorted to the expedient of asking for cancellation of the respondent's bail in order to give prop to a failing case based on trumped-up charges. Strong objection was taken by the learned counsel to the attempt made by the appellant to cite new and additional material before us. This, according to him is impermissible in an appeal filed by leave under Article 136 of the Constitution, since the only question that is open to us to consider is whether, on the material before it, the High court is right in coming to the conclusion to which it did.

11. We are not disposed to allow the State to rely on any new material which was not available to the High Court. True, that the additional data came into existence after the High Court gave its judgment but it would be unfair to the respondent to make use of that material without giving him an adequate opportunity to meet it. That will entail a fairly long adjournment which may frustrate the very object of the proceedings initiated by the State. Besides, though in appropriate cases the court has the power to take additional evidence, that power has to be exercised sparingly, particularly in appeals brought under Article 136 of the Constitution. The High Court, while dismissing the State's application for cancellation of bail, has reserved to it the liberty to approach it "if, at any time in future, the respondent abuses his liberty". The new developments could, if the prosecution is so advised, be brought to the High Court's attention for obtaining suitable relief. We cannot spend our time in scanning affidavits and sifting material for the first time for ourselves, for determining whether the new material can justify cancellation of bail. We propose, therefore, to limit ourselves to the facts and incidents which were before the High Court and on which it has pronounced.

12. We ought not to forget, while dealing with the rival contentions, that the trial is still pending in the Sessions Court and any observation made by us in this incidental proceeding may unwittingly influence the course of trial. We will take care to see that nothing is said on the merits of the matter,

no comment made on the veracity of witnesses and no subtle guidance offered to unravel why the witnesses have turned hostile. These matters, at this moment, are within the exclusive domain of the Sessions Court and we cannot, by employing an artifice, withdraw the decision of these questions to ourselves. It is the privilege of the Sessions Court, not of the Supreme Court, to try the accused. We must therefore make it clear that nothing said by us in our judgment shall influence the decision of the case and the Sessions Judge is free to assess and evaluate the evidence, unhampered by any observations we may have happened to make.

13. Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. The fact that prosecution witnesses have turned hostile cannot by itself justify the inference that the accused has won them over. A brother, a sister or a parent who has seen the commission of crime, may resile in the Court from a statement recorded during the course of investigation. That happens instinctively, out of natural love and affection, not out of persuasion by the accused. The witness has a stake in the innocence of the accused and tries therefore to save him from the guilt. Likewise, an employee may, out of a sense of gratitude, oblige the employer by uttering an untruth without pressure or persuasion. In other words, the objective fact that witnesses have turned hostile must be shown to bear a causal connection with the subjective involvement therein of the respondent. Without such proof, a bail once granted cannot be cancelled on the off chance or on the supposition that witnesses have been won over by the accused. Inconsistent testimony can no more be ascribed by itself to the influence of the accused than consistent testimony, by itself, can be ascribed to the pressure of the prosecution. Therefore, Mr. Mulla is right that one has to countenance a reasonable possibility that the employees of Maruti like the approver Yadav might have, of their own volition, attempted to protect the respondent from involvement in criminal charges. Their willingness now to oblige the respondent would depend upon how much the respondent has obliged them in the past. It is therefore necessary for the prosecution to show some act or conduct on the part of the respondent from which a reasonable inference may arise that the witnesses have gone back on their statements as a result of an intervention by or on behalf of the respondent.

14. Before we go to the facts of the case, it is necessary to consider what precisely is the nature of the burden which rests on the prosecution in an application for cancellation of bail. Is it necessary for the prosecution to prove by a mathematical certainty or even beyond a reasonable doubt that the witnesses have turned hostile because they are won over by the accused ? We think not. The issue of cancellation of bail can only arise in criminal cases, but that does not mean that every incidental matter in a criminal case must be proved beyond a reasonable doubt like the guilt of the accused. Whether an accused is absconding and therefore his property can be attached under Section 83 of the Criminal Procedure Code, whether a search of person or premises was taken as required by the provisions of Section 100 of the Code, whether a confession is recorded in strict accordance with the requirements of Section 164 of the Code and whether a fact was discovered in consequence of information received from an accused as required by Section 27 of the Evidence Act are all matters which fall preculiarly within the ordinary sweep of criminal trials. But though the guilt of the accused in cases which involve the assessment of these facts has to be established beyond a reasonable doubt, these various facts are not required to be proved by the same rigorous standard. Indeed, proof of facts by preponderance of probabilities as in a civil case is not foreign to criminal jurisprudence because, in cases where the statute raises a presumption of guilt as, for example, the Prevention of Corruption Act, the accused is entitled to rebut that presumption by proving his

defence by a balance of probabilities. He does not have to establish his case beyond a reasonable doubt. The same standard of proof as in a civil case applies to proof of incidental issues involved in a criminal trial like the cancellation of bail of an accused. The prosecution, therefore, can establish its case in an application for cancellation of bail by showing on a preponderance of probabilities that the accused has attempted to tamper or has tampered with its witnesses. Proving by the test of balance of probabilities that the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice is all that is necessary for the prosecution to do in order to succeed in an application for cancellation of bail.

15. Our task therefore is to determine whether, by the application of the test of probabilities, the prosecution has succeeded in proving its case that the respondent has tampered with its witnesses and that there is a reasonable apprehension that he will continue to indulge in that course of conduct if he is allowed to remain at large. Normally, the High Court's findings are treated by this Court as binding on such issues but, regretfully, we have to depart from that rule since the High Court has rejected incontrovertible evidence on hypertechnical considerations. If two views of the evidence were reasonably possible and the High Court had taken one view, we would have been disinclined to interfere therewith in this appeal under Article 136 of the Constitution. But the evidence points in one direction only, leaving no manner of doubt that the respondent has misused the facility afforded to him by the High Court by granting anticipatory bail to him.

16. The sequence of events is too striking to fail to catch the watchful eye. But, we will not enter too minutely into the several incidents on which the appellant relies to prove its case. We will confine ourselves to some of the outstanding instances and show how the prosecution is justified in its apprehension.

17. Kanwar Singh Yadav was working at the relevant time as a Security Supervisor under R. B. Khedkar who was the Security Officer of Maruti Ltd. Both of them were arrested on the very day of the raid, that is, on May 25, 1977. On the 26th, the police recorded Yadav's statement and on the 28th, he made a petition to the Chief Metropolitan Magistrate, expressing his willingness to confess. The confessional statement was recorded on June 3 and Yadav was granted pardon on July 14, under Section 306 of the Code of Criminal Procedure. Khedkar made a confession on June 4 and was granted pardon on July 14, 1977. The C.B.I. filed the charge-sheet on July 14 itself.

18. The committal proceedings were fixed by this Court by an order dated January 2, 1978 to begin peremptorily on February 15, 1978. The respondent obtained a modification of that order, by virtue of which the proceedings began on February 20.

19. One day before the proceedings were originally scheduled to begin, that is on February 14, the two approvers Yadav and Khedkar appeared at the C.B.I. office and filed written complaints dated the 13th that the respondent was making repeated attempts to call Yadav to meet him by sending the car with Ram Chander, the driver of the respondent. One of these complaints is signed by Yadav and the other by Khedkar. Yadav turned hostile when he was examined on February 21 before the Committing Magistrate. He went back on his police statement, resiled from his confession and risked his pardon. But he admitted in his cross-examination to the Public Prosecutor that he had given the complaint to the C.B.I. He explained it away by offering a series of excuses but we will only characterise that attempt as lame and unconvincing. A deeper probe into the matter and its critical analysis is likely to exceed the legitimate bounds of this proceeding and therefore we will stop with the observation that there is more than satisfactory proof of the respondent having attempted to suborn Yadav. Whether Yadav succumbed to the persuasion is not for us to say. The

Sessions Judge shall have to decide that question uninfluenced by anything appearing herein. We are concerned with the respondent's conduct, not with Yadav's reaction or his motives. Khedkar stuck to the complaint.

20. That is in regard to the event of February 14. On the 17th, Yadav and the respondent were seen together, the former leaving the Maruti factory with the respondent in his car. This is supported by the affidavits of Sat Pal Singh, a constable of the Haryana Armed Constabulary who was on duty at the Factory, Ganpat Singh, a Postal Peon and Digambar Das, an Assistant Despatch Clerk in Maruti. It is undisputed that the respondent had gone for official work to the factory on the 17th. The High Court objects the incident firstly because it is not mentioned in the petition for cancellation of the respondent's bail. The affidavit of Ved Prakash, Inspector of Police, C.B.I., shows that information of the incident was received on the 24th whereas the petition was drafted on February 22. That apart, we cannot understand the High Court to say that the affidavits of the three witnesses could not be accepted because the verification clause of the affidavits was "most defective" as it could not be said "what part of the affidavits is true to the knowledge of the deponent and what part thereof is true to the belief of the deponent". This reason has been cited by the learned Judge for rejecting many an incident but then it was open to him to ask for better particulars of verification. The witnesses claim to have seen with their own eyes that Yadav drove away with the respondent. The incident consisted of one single event and there was no possibility of the witnesses' knowledge being mixed up with their belief. We find it impossible to endorse this part of the High Court's reasoning and are inclined to the view that the respondent ultimately succeeded in establishing contact with Yadav. Whether the respondent succeeded in achieving his ultimate object is beyond us to say except that Yadav turned hostile in the Committing Magistrate's court on February 21.

21. The High Court has also rejected the affidavit of Sarup Singh that on February 28, 1978, while he was doing duty as an armed constable at the factory, he saw the respondent coming to the factory and heard him assuring Yadav that he need not worry. The verification clause of the affidavit was again thought to be "defective'. We are unable to agree with this part of the learned Judge's judgment for reasons already indicated.

22. We are also unable to agree with the High Court that the complaint filed by Charan Singh on July 12 in regard to the incident of July 5, 1977 and the complaint filed by A. K. Dangwal on July 9 in regard to the incident of July 7, 1977 are "irrelevant" since the prosecution did not even oppose the grant of bail to the respondent after the charge-sheet was filed on July 14, 1977. It is true that it is not possible to accept Shri Jethmalani's explanation of the inactivity on the part of the prosecution even after receiving the two complaints showing that the respondent was trying to tamper with the witnesses. Concessions of benevolence cannot readily be made in favour of the prosecution. But it cannot be overlooked that Charan Singh did turn hostile, though that happened after the High Court gave its judgment on April 11. The respondent knows that the witness turned hostile and significantly, though the witness refused to support the prosecution, he made an important admission that he had submitted a written application or complaint to Inspector Ved Prakash on July 12, 1977 and that "whatever is mentioned in that application is correct". That application, which is really a complaint, contains the most flagrant allegation of attempted tempering with the witness by the respondent, through his driver Chattar Singh. Reference to this incident is not in the nature of additional evidence properly so called because the witness was examined in the Sessions Court in the presence of the respondent and his advocates. They know what the witness stated in his open evidence and what explanation he gave for making the complaint on July 12, 1977. The Sessions Court will no doubt assess its value but for our limited purpose, the episode is difficult to dismiss as irrelevant.

23. Even excluding the last incident in regard to Charan Singh which is really first in point of time and though it is corroborated by an entry in the General Diary, we are of the opinion that (i) Yadav's complaint of February 14, (ii) Khedkar's complaint of even date, (iii) Yadav's admission in his evidence that he did make the written complaint in spite of the fact that he had turned hostile, (iv) the affidavits of Sat Pal Singh, Ganpat Singh and Digambar Das in regard to the incident of the 17th and (v) the affidavit of Sarup Singh regarding the incident of February 28, furnish satisfactory proof that the respondent has abused his liberty by attempting to suborn the prosecution witnesses. He has therefore forfeited his right to remain free.

24. Section 439(2) of the Code of Criminal Procedure confers jurisdiction on the High Court to Court of Session to direct that any person who has been released on bail under Chapter XXXIII be arrested and committed to custody. The power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection. But the power, though of an extraordinary nature, is meant to be exercised in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the course of justice by tampering with witnesses. Refusal to exercise that wholesome power in such cases, few though they may be, will reduce it to a dead letter and will suffer the courts to be silent spectators to the subversion of the judicial process. We might as well wind up the courts and bolt their doors against all than permit a few to ensure that justice shall not be done.

25. The power to cancel bail was exercised by the Bombay High Court in Madhukar Purshottam Mondkar v. Talab Haji Hussain (60 Bom LR 465 : AIR 1958 Bom 406) where the accused was charged with a bailable offence. The test adopted by that court was whether the material placed before the court was "such as to lead to the conclusion that there is a strong prima facie case that if the accused were to be allowed to be at large he would tamper with the prosecution witnesses and impede the course of justice". An appeal preferred by the accused against the judgment of the Bombay High Court was dismissed by this Court. In Gurcharan Singh v. State (Delhi Administration) (1978 Cri LJ 129, 137 : (1978) 1 SCC 118, 128-129 (para 28) : 1978 SCC (Cri) 41, 52 (para 28)), while confirming the order of the High Court cancelling the bail of the accused, this Court observed that the only question which the court had to consider at that stage was whether "there was prima facie case made out, as alleged, on the statements of the witnesses and on other materials", that "there was a likelihood of the appellants tampering with the prosecution witnesses". It is by the application of this test that we have come to the conclusion that the respondent's bail ought to be cancelled.

26. But avoidance of undue hardship or harassment is the quintessence of judicial process. Justice, at all times and in all situations, has to be tempered by mercy, even as against persons who attempt to tamper with its processes. The apprehension of the prosecution is that 'Maruti witnesses' are likely to be won over. The instances discussed by us are also confined to the attempted tampering of Maruti witnesses like Yadav and Charan Singh, though we have excluded Charan Singh's complaint from our consideration. Since the appellant's counsel has assured us that the prosecution will examine the Maruti witnesses immediately and that their evidence will occupy no more than a month, it will be enough to limit the cancellation of respondent's bail to that period. We hope and trust that no unfair advantage will be taken of our order by stalling the proceedings or by asking for a stay on some pretext or the other. If that is done, the arms of law shall be long enough. Out of abundant caution, we reserve liberty to the State to apply to the High Court, if necessary, but only if strictly necessary. We are hopeful that the State too will take our order in its true spirit.

27. In the result, we allow the appeal partly, set aside the judgment of the High Court dated April

11, cancel the respondent's bail for a period of one month from today and direct that he be taken into custody. Respondent will, in the normal course, be entitled to be released on fresh bail on the expiry of the aforesaid period. The learned Sessions Judge will be at liberty to fix the amount and conditions of bail. The order of anticipatory bail will stand modified to the extent indicated herein.

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