ALLAHABAD HIGH COURT

Emperor

Vs

H.L. Hutchinson

(Mukerji, J.)

23.04.1931

JUDGMENT

Mukerji, J.

1. These are two applications made by two of the accused per-sons in what is known as the Meerut. Conspiracy Case in which a large number of persons has been charged with the commission of an offence under Section 121-A, I. P.C. namely a conspiracy to deprive the King-Emperor of His sovereignty of British India. The maximum sentence laid down in the section is transportation for life.

2. The two applicants were allowed to appear in person to argue their applications as they were not represented by counsel in the Court below or in this Court. In issuing the orders for the appearance of the applicants we took care to say that the permission to appear was not to be treated as a precedent for all accused persons in all oases.

3. A short history of the proceedings in Court against the applicants is as follows.

4. The applicant Mr. Nimbkar and several others were arrested on 20th March 1929 and have since been in custody as under-trial prisoner's. The applicant Mr. Hutchinson was arrested about three months later on 14th June 1929, and has been since in custody for nearly two years. The proceedings before the Magistrate started on 12th June 1929 and the order for commitment to the Court of Session was passed on 14th January 1930. In the Sessions Court the trial is still pending. About the middle of March 1931 the examination of the prosecution witnesses was finished and the statements of the accused persons were begun to be taken. So far, in the course of a month the statements of only six accused persons have been taken down.

5. There are about 30 accused persons and the number of defence witnesses cited is about 300. Mr. Nimbkar told us that he did not cite any witnesses and proposed to apply for his witnesses to be summoned after he has been let out on bail if such an order be made in his favor.

6. The prosecution examined nearly 300 witnesses. It can be taken without much argument that the examination of the defence witnesses will not take such long time as the prosecution witnesses have taken. But the Court will be addressed at length on behalf of the accused persons, some of whom are represented by counsel. This will take some time bearing in mind the fact that there are nearly 300 prosecution witnesses, and nearly 2,600 exhibits which having been printed occupy 7500 printed foolscap pages. Besides this printed material there are books and news-papers and other materials on which arguments will be based for the accused persons. As the defence proposes to produce witnesses and to otherwise produce evidence, the Crown will have a right of reply and this will take considerable time. Then the learned Judge will naturally take a good deal of time to write out his judgment. In this view, the trial is very likely to last throughout this whole year.

7. Having stated the nature of the case and the history of its trial I will proceed to consider the powers of the High Court in ordering the bail in respect of an accused person.

8. The High Court's power is conferred on it by Section 498, Criminal P.C. and is entirely unfettered by any conditions. It has been argued on behalf of the prosecution by Mr. Kemp, the learned Counsel who has been especially appointed to conduct the prosecution at Meerut that the High Court's power, though not limited in language, is to be exercised having regard to the provisions of Section 497, Criminal P.C. The learned Counsel cited two oases from the Calcutta High Court and one decided by the Rangoon High Court. While the Calcutta cases do support his contention, the Pull Bench decision of the Rangoon High Court does not entirely support him.

9. Speaking for myself, I think it very unwise to make an attempt to lay down any particular rules for the guidance of the High Court, having regard to the fact that the legislature itself left the discretion of the Court entirely unfettered. The reason for this action on the part of the legislature is not far to seek. The High Court might be safely trusted in this matter and it goes without saying that it would act in the best interests of justice whether it decides in favour of the prosecution or the defence. The variety of cases that may arise from time to time cannot be safely classified and it will be dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes.

10. This being my reading of the law, I proceed to see whether this is a case in which the applicants ought to be let out on bail.

11. On general principles and on principles on which Sections 496 and 497 (as amended in 1923) are framed the grant of a bail should be the rule and refusal of bail should be the exception. In the cases of a bailable offence, the law expressly says that if the accused person applies for bail he shall be released (Section 496). Section 497 applies to cases of nonbailable offences and there it is said that the accused person shall be released on bail except where there appears to be a

reasonable ground for believing that ha has been guilty of a very heinous offence, viz, one which may be punished by either death or by transportation for life: Section 497 (1). Again it is laid down that, where at any stage of the investigation or trial, there are not reasonable grounds for believing that the accused person has committed a nonbailable offence, but there are sufficient grounds for further enquiry into his guilt, the accused shall be released on bail: Section 497 (2).

12. The principle to be deduced from Sections 496 and 497, Criminal P.C., therefore is that grant of bail is the rule and refusal is the exception. That this must be so is not at all difficult to see. An accused person is presumed under the law to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to freedom and every opportunity to look after his own case. It goes without saying that an accused person, if he enjoys freedom, will be in a much better position to look after his case and to properly defend himself than if he ware in custody. One of the complaints made by the applicants, in this case is that their letters sent from custody have been opened and inspected and censored and therefore they were not in a position to conduct their defence with the aid of such friends as may be outside the prison. As I have said, it is obvious that a presumably innocent person should have his freedom to enable him to establish his innocence.

13. This being the rule there may, of course, be exceptions. I will not attempt to lay down any oases of. exceptions, because these oases before us are not exceptions and I do not want to say anything which will "be only in the nature of an obiter dictum.

14. The accused persons in this case are charged, as I have said, with conspiring to deprive His Majesty of his sovereignty of British India. But it was conceded on behalf of the prosecution by Mr. Kemp, the learned Counsel, that the accused persons before us have not been charged with having done any overt illegal act in pursuance of the alleged conspiracy. All that therefore they have done is to hold meetings, study the principles of communism and probably also to make an attempt to disseminate those teachings, which are said to be dangerous to society and dangerous to the sovereignty of His Majesty. In view of this admission on behalf of the prosecution, it is clear that if there was any offence committed by the applicants, in the shape of a conspiracy of a serious nature, the conspiracy has been almost nipped in the bud by the police. In the circumstances, the case is not one in which the accused persons will probably be sentenced to transportation for life. Although the maximum sentence is laid down as transportation for life, the case itself is of a much milder character, so far as I have been able to see from the presentation of it on either side.

15. It has not been suggested that the applicants before us are dangerous criminals, who if they are at liberty, would in any way, intimidate or cause hurt to the prosecution witnesses or that they would tamper with them. The prosecution evidence has been closed and yet the end of the trial is not in sight.

16. The learned Judge who has been hearing this case stated in this order refusing bail to the applicants, that he was not in a position to say definitely that there appeared (on the evidence before him) reasonable grounds for believing that the applicants had really been guilty of the offence, alleged to have been committed by them. He said this because, as already indicated, the evidence is so voluminous and relates to so many accused persons that it will not be probably possible for him to pronounce a definite opinion till he has heard the whole case and until he has heard the counsel on either side and the accused persons who have no counsel. Having regard to all the circumstances of the case, I consider that these are pre-eminently the cases in which bail should be granted. It is a pity that the applicants' applications before the Magistrate's Court and the Court of the learned Sessions Judge were not granted. The applicants ought to have been set free earlier.

17. I would therefore let out the applicants under certain conditions to be found in the order of the Court on bail to be furnished to the satisfaction of the District Magistrate, such bail being adequate but not excessive.

Boys, J.

18. This is an application for bail made by H. L. Hutchinson in what is known as "the Meerut Conspirancy Case."

19. The applicant was arrested in June 1929 and the magisterial enquiry against . him and a number of other persons proceeded into a charge framed under Section 121-A, I. P.C. The charge reads that:You the accused generally in and between the years 1925 and 1929 within and without British India agreed and conspired with one another and with Amir Haidar Khan, the absconding accused, and the persons and bodies mentioned in the list attached (appendix) and other persons known or unknown and not before the Court, to deprive the King-Emperor of the sovereignty of British India and thereby committed an offence punishable under Section 121-A, I. P.C., and within the cognizance of the Court of Session.

20. The applicant together with the other accused was committed for trial upon this charge on 14th January 1930. The trial in the Court of Session is still proceeding practically de die in diem since that date.

21. The prosecution has recently been closed, six of the accused statements have been taken and the statement of the seventh is in progress. In all there are about thirty accused. The applicant applied to the Special Sessions Judge presiding at the trial for bail. On his application being rejected by the order of the Sessions Judge dated 27th January 1931 the applicant has now applied to this Court.

22. The applicant also prayed that he might be allowed to argue his application in person.

23. The materials before this Court being insufficient for the decision of the applications, the prosecution was directed by one of the members of the present Bench to inform this Court by an affidavit briefly setting forth the nature of the case for the Crown against the applicant. That affidavit was in due course sent to this Court, the applicant having been given an opportunity of answering it.

24. The applicant sent a further prayer to this Court asking that he might be allowed to argue his application in parson. He in fact claimed this as of right. No accused person has any right under the law to be allowed to argue in person an application for bail, but 'it appeared desirable in the special circumstances of the present "case that such permission should be given, and the applicant has therefore had an opportunity of presenting his application in person. It is only fair and just for me to say that he did not abuse the privilege given to him, but addressed to us a reasoned and proper argument appropriately and temperately expressed. In reply Mr. Kemp, the Special Public Prosecutor, in charge of the case, was heard.

25. The section of the Code of Criminal Procedure under which we are empowered to act is Section 498, the material portion of which reads as follows:The High Court or Court of Session may in any case, * * direct that any person be admitted to bail.

26. It is manifest that the discretion given to this Court, and also to the Court of Session, is unrestricted in any way by the terms of the statute. Two things follow from this, firstly that the discretion is one which must be judiciously exercised, and secondly that the Court has power if it does grant bail to grant it on such conditions as the circumstances of the case and the public interest may require.

27. It has been strenuously urged on both sides, from different points of view, that the discretion given by Section 498 is limited: by, or must in practice be limited by the conditions to be found in Section 497, and there is some support to be found for the suggestion in reported decisions. I can find no warrant for the proposition thus baldly stated. The legislature has given the High Court and the Court of Session discretion unfettered by any limitation other than that which controls all discretionary powers vested in a Judge, viz. that the discretion must be exercised judiciously. The question whether there are or are not reasonable grounds for believing that the accused has been guilty of the offence charged Section 497 (1) and (2) is no doubt one matter appropriate for consideration by the High Court or the Court of Session; but it is a consideration which would only approach being conclusive in the absence of the other considerations which may or may not be present in a particular case. There is only this much ground for attaching special weight to this consideration that it is in certain circumstances the only one to which the Magistrate is entitled to give weight, and to this extent the legislature has indicated its view of its importance.

28. In my view one further caution is necessary in regard to the application of Section 497. We have been addressed by the applicant and also by the Special Public Prosecutor on the assumption that Section 497, Sub-section (1) is applicable to the case, and on this basis it has been contended that by Act 18 of 1923 the legislature, by striking out the words "the offence with which he is accused" and substituting the words "an offence punishable with death or transportation for life," has intended to relax somewhat the restriction formerly placed on the powers of a Magistrate and therefore as it has been contended, the suggested restriction put by the Courts on the discretion to be exercised by the High Court or the Court of Session is similarly relaxed.

29. Section 497(1) would however appear to have no application to an application for bail, such as the present, even if it had been made before a Magistrate. Sub-section (1) reads:When any person accused of any non-bail-able offence is arrested or detained without warrant by an officer in charge of a police station, or appears, or is brought before a Court.

30. All these phrases, "is arrested," "detained without warrant by an officer in charge of a police station" and "appears or is brought before a Court" suggest the stage of the case when an accused person is first brought before a Court or his arrest or detention is first brought to the notice of the Court and there is little or no information before the Court upon which it can act. The appropriate provision applicable where the investigation or enquiry or the trial has been proceeding is Sub-section (2), Section 497. The importance of the distinction lies in the fact that the relaxation of the restriction on the powers of the Magistrate under Section 497 (1) effected by Act 18 of 1923 does not find place in Section 497 "(2).

31. I will not however discuss further the distinction between the, two subsections of Section 497 because, as I have said, I am of opinion that in any event the discretion of this Court or of the Court of 'Session is not limited to the consideration set out in Section 497, but that that consideration is only material to be considered along with all the circumstances of the 'case.

32. A large number of oases have bean quoted to us by the applicant and four by the Special Public Prosecutor. I do not consider 'it necessary to deal with them in detail, but I merely state my conclusions.

33. As to the object of keeping an accused person in detention during the trial, it has been stated that the object is not punishment, that to keep an accused person under arrest with the object of punishing him on the assumption that he is guilty even if eventually he is acquitted is improper. This is most manifest. The only legitimate purposes to be served by keeping person under trial in detention are to prevent repetition of the offence with which he is charged where there is apparently danger of such repetition and to secure his attendance at the trial. The first of those purposes clearly to some extent involves an assumption of the accused's guilt, but the very trial itself is based on a prima facie assumption of the accused's guilt and it is impossible to hold that

in some circumstances it is not a proper ground to be considered. The main purpose however is manifestly to secure the attendance of the accused.

34. The matters for consideration in this particular case to which I have given my best attention may be enumerated as follows:

(a) Whether on the facts set out in the affidavit filed on behalf of the Crown and in the replies written and oral of the applicant there is or is not reasonable ground for believing that the applicant has committed the offence with which he is charged.

35. The applicant has contended 'that he is being prosecuted only because he holds certain opinions. It is a contention which, on the materials set out in the affidavit for the Crown, prima facie has no force in it; whether it be established eventually or not, the suggestion for the Crown is that he is promulgating his opinions and endeavouring to persuade others to those opinions with a view to a resort to violence sooner or later to enforce those opinions. It is not desirable, in view of the fact that it will be for the Sessions Judge to pronounce judgment on the merits of the evidence, for me to say anything further, but it is necessary to say this much to make it clear that in passing the order at which I shall arrive I in no way lose sight of the gravity of the charge or of the nature of the evidence.

(b) The nature and gravity of the charge.
(c) The severity or degree of the punishment which might follow in the particular circumstances in case of a conviction.
(d) The danger of the applicant absconding if he is released on bail;
(e) the character, means and standing of the applicant.
(f) The danger of the alleged offence being continued or repeated, assuming that the accused is guilty of having committed that offence in the past. In view of the particular circumstances of the case and the nature of the evidence as to the particular conspiracy I do not consider there is serious danger of this.
(g) The danger of witnesses being tampered with. In the present case the prosecution is closed.
(h) Opportunity to the applicant to prepare his defence;
(i) The fact that the applicant has already been some 22 months in jail, and that the trial is not likely to conclude for a further several months at least. I am of opinion that the accused should, on all these considerations weighed together and given their proper weight, be released on bail. This cannot of course be taken to suggest for a moment that I am prejudging the case against the applicant. His guilt or innocence is matter for future determination by the trial Judge. In a matter like the present, whether release on bail be refused or allowed, there can be no ground for the suggestion that the case is being prejudged. The only case in which such an assumption could possibly be justified is where the applicant has satisfied the Court that on the evidence hitherto produced there is no possible case against him. Such is not the case here.

36. I am of opinion that the applicant should be released on bail to the satisfaction of the District Magistrate, who, in determining the amount of personal bail and the amounts in which he will demand sureties, will bear in mind no doubt the fact that the object must be really and only to secure the attendance of the accused in Court at Meerut on all days during which the trial proceeds. The release on bail will be subject to the conditions set out in the order of the Court.

ORDER

37. We direct that the applicant Mr. H. It. Hutchinson be admitted to bail to the satisfaction of the District Magistrate who will, of course, see that the bail is adequate but not excessive.

38. Before the applicants are admitted to bail, they must give an undertaking in writing to the District Magistrate that they will not take part in any public demonstration or agitation of any description and that they will not make any public speeches or contribute anything . to the public press during the time they are out on bail.

39. The applicants have put in the forefront of their applications the suggestion that they need to be released on bail in order that, amongst other steps necessary for their defence, they must be at liberty to search for witnesses. We must not be understood to have approved by our order granting bail that they are entitled to any adjournment for such a purpose at this stage.