CALCUTTA HIGH COURT

Nagendra Nath Chakrabarthi

Vs

King-Emperor

(Mookerje , J.)

01.10.1923

JUDGMENT

Mookerjee, J.

1. This rule, which was granted by Suhrawardy and Chotzner, JJ., on the 29th August, 1923, calls upon the District Magistrate of Alipore to show cause why the petitioner Nagendranath Chakrabarti should not be let out on bail. As the rule has been opposed on behalf of the Grown, the facts material for the determination of the question must be narrated in detail.

2. The petitioner, who was arrested on the 5th August, 1.923, by Inspector Hernchandra Lahiri of the Calcutta Police, asserts that ho is a motor mechanic and driver and holds certificates of good character from various gentlemen, Indian and European, who have employed him during the last ten years. He further alleges that at the time of his arrest his house was thoroughly searched but nothing suspicions or incriminating was found. The petitioner, after his arrest on the 5th August, is said to have been produced on the 16th August before a Deputy Commissioner of Police to whom he applied for bail; but the application was refused. On the 18th August an application for bail was then made on his behalf to the Chief Presidency Magistrate, but he was informed that his proper remedy was by Habeas Corpus. On the 20th August, the petitioner was produced for the first time before the Police Magistrate at Sealdah, to whom he applied for bail. The Magistrate thereupon recorded the following order: Thirty-two accused sent up, charged under Sections 400 and 401, Indian Penal Code. They are remanded to hajat till 4-9-23. Confession and search lists and diary should be produced to show that; there is justification for detaining them in custody, if no chalan is submitted on that date.

3. This order was made on the basis of a letter which was addressed by the Inspector of Police, Detective Department, to the Police Magistrate, Sealdah, and was forwarded by the Deputy Commissioner of Police, C.I.D. The letter was in the following terms:

I beg to produce before Your Honour the following accused who are concerned in several cases of dacoities, murders for gain, drugging, robberies, house-breaking with thefts and thefts, committed in the suburbs and town of Calcutta, as also the surrounding districts and other places. I beg further to mention that one of the gang members has made a confessing statement before Magistrate implicating these men as well as others and that the Local Government have been pleased to appoint a Special Magistrate to verify the confession. In the circumstances, I pray that the accused be remanded pending judicial verification and investigation with a view to their prosecution under Sections 400 and 401, Indian Penal Code.

4. Then follow the names of the persons produced; the list includes the name of the petitioner who is described as "Nagendranath Chakrabarti alias Nagen, d river, son of Rsiklal Chakrabarti.

5. On the 25th August, an application for hail was made on behalf of the petitioner to the District and Sessions Judge of the 24 Parganas. The application was dismissed by the following order: This is an application or bail. It appears that the accused was arrested by the Calcutta police and produced after several days before the Magistrate at Sealdah who has remanded the accused to custody for a for night. It is argued that only Section 344, Criminal Procedure Code, is applicable; that refers to the stage of the trial. The cases still under investigation. The Magistrate does not seem to be without jurisdiction in ordering detention of the accused from the date on which he was produced before him. I do not think that I should interfere at the stage. It has under Section 400 or 401. Indian Penal Code, is contemplated against the accused and many others the Magistrate has taken time to look round and has called for the confessions and diaries to be put up before him on the next date fixed. Apparently a gang case of some kind is contemplated. The accused was placed before the Magistrate only five days ago. There has not been sufficient time given to the Magistrate to consider the case against the accused. The application is therefore premature. The application is dismissed.

6. An application was thereupon made to this Court and the present rule was granted.

7. On the 4th September the petitioner was produced for the second time before the Police Magistrate of Sealdah, who recorded the following order: Confession of one Pramatha Nath Das implicating these accused shown and some search : list also shown. They disclose materials for remanding the accused to custody for another fortnight. For 18-9-23. Accused as before.

8. On the 18th September, the petitioner was produced for the third time before the Police Magistrate of Sealdah who recorded the following order: Examined one witness Mr. Morshed, Deputy Magistrate, Alipur, who is verifying the confession of the prisoner Pramatha Nath Das. He says he will take another fortnight to complete the verification. He also held a test

identification in the Alipur Jail. On 4-9-23 the confessing prisoner identified 29 prisoners in this case. He found the confessing prisoner Pramatha confounded and nervous and held a second test identification on 13-9-23. On this day 6 more prisoners including Hari Das Kanshari whose bail application was fixed for hearing to-day, were identified. Mr. Morshed believes that the second day's identification was quite as good and honest as that of the first day. One prisoner Bhusan Chandra Sarkar was not identified on either date. The Police report that there is no other sufficient evidence against him. So he is released from custody. In view of the evidence of Mr. Morshed, the bail applications of all the accused including that of Hari Kanshari are rejected. Considering the evidence obtained and the evidence of Mr. Morshed that he will require another fortnight to finish the verification and the fact that further evidence is likely to be obtained by a remand, all the accused (except Bhusan Chandra Sirkai" ordered to be released from custody) are remanded to custody till 2-10-23.

9. Besides these materials, the confession of Pramatha Nath Das has been placed before us. This is a lengthy document covering seventy-five closely written pages, written on several days between the 8th June and 16th June, that is, some weeks before the petitioner was arrested on the 5th August. Mr. Mookerjee has contended before us that, on the materials thus accessible, an order for release of the petitioner on bail should be made. Before we deal with the question, we may refer to the relevant provisions of the Criminal Procedure Code.

10. Section 61 provides that no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of Magistrate under Section 167 exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. The period for which a Magistrate can authorise the detention of the accused person in police custody is fifteen days on the whole, as prescribed by Section 167 which is in the following terms:

(1) Whenever it appears that any investigation under this Chapter cannot be completed within the period of twenty-four hours fixed by Section 61 and there are grounds for believing that the accusation or information is will-founded, the officer in charge of the police station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time forward the accused (if any) to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days on the whole.

If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

11. The next important provision is contained in Section 344 which authorises a remand after a Magistrate has taken cognisance and is in the following terms:

(1) If, from the absence of a witness, or any reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate. Explanation : If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand this is reasonable cause for a remand.

12. We have not been informed as to what happened to the petitioner between the 5th August and the 16th August and whether there was or was not strict compliance with the provisions of Section 61. It is also not clear that the scheme of the Code with regard to remands was kept in view. The power of remand under Section 167 is given to detain prisoners in custody while the Police make the investigation and, in a proper case, to commence the inquiry. But the custody mentioned in Section 344 is quite different and is intended for under-trial prisoners. Section 167 gives the Magistrate discretion (recording his reasons) to remand, from time to time, but limits the period for the exercise of the discretion to fifteen days in all. Section 170, Criminal Procedure Code, authorises the police officer, if there is evidence or reasonable ground for suspicion, to forward the accused to a Magistrate empowered to take cognizance of an offence on police report. Then, under Section 344, an application might be made for cause shown as specified there to the proper Magistrate to postpone the commencement of the enquiry and remand the prisoner. The intention of the Legislature, having regard to Sections 61 and 167 and to the requirements of justice generally, is that an accused person should be brought before a Magistrate competent to try, or commit with as little delay as possible *: Ponnusami v. Queen*[1] *Queen-Empress v. Engadu*[2] *Narendra Lal Khan v. Emperor*[3] *Ahmad Ali v. Emperor*[4] It is, however, fairly clear that the

proceedings have not been regular in a vital respect. Mr. Mookerjee raised the question whether the Police Magistrate at Sealdah had taken cognizance of the case in accordance with law, and, if so, on what date. The Magistrate has stated that he took cognizance of the case against the accused under Section 190(6), Criminal Procedure Code, on the 20th August on the police report submitted on that date, which, in his opinion, contained sufficient materials to enable him to take cognizance. This view is clearly untenable. On the 20th August, Act XVIII of 1923 had not yet come into operation. Consequently, Section 190 as it stood on that date authorises the Magistrate to take cognizance of an offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts ;

(c) upon information received from any person, other than a police officer, or upon his own knowledge or suspicion that such offence has been committed.

13. The Magistrate states that he took cognizance under Clause {b), that is, upon a police report, of facts which constitute such offence. There was, however, no police report on that date. The expression "police report" has been interpreted in this Court to mean a police report within the meaning of Section 170: *see Abdullah v. Emperor* [5]*Lee v. Adhikenj*[6] *Harihar v. King-Emperor*[7] *Sukumar V. Mofizuddin*[8] Reference may also be made, to the decision of the Full Bench of the Bombay High Court, *in King-Emperor v. Sada*[9] *which followed Reg. v. Jafar*[10] *Sarfaraz Khan v. King-Emperor*[11] *Ramlal v. Emperor*[12] The Deputy Legal Eemembrancer realised this difficulty and contended that the Police Magistrate may be deemed to have taken cognizance, if not on the 20th August as he states, then on a later date, namely, the 4th or 18th September, This contention is manifestly untenable. When a Magistrate takes cognizance of an offence under Section 190, he performs a judicial act : Emperor v. Sourindra [1910] 37 Cal. 412; and it would be contrary to sound principle to hold by a fiction that he exercised this judicial function on an occasion when the question was not even present in his mind. But, it is important to point out that even if such an imaginary assumption could be made it would be of no avail. Section 45 of the Code of Criminal Procedure Amendment Act, 1923 (Act XVIII of 1923), no doubt came into operation on the 1st September, 1923. Section 45 of the amending statute modified Clause (b) of Section 190 so as to authorise a Magistrate to take cognizance of an offence "upon a report in writing of such facts (that is, of facts which constitute the offence) made by any police officer." It would be observed that the expression "police report" which had been interpreted in a technical sense has been replaced by the non-technical expression "report made by any police officer. But this is of no assistance to the Crown. The report must state facts which constitute the offence. This is a requisite of fundamental importance : Pulin Behary Das v. King-Emperor [1912] 15 C.L.J. 517.

In this case, it is plain that there was no compliance with this requirement of Section 190(b) either on the 4th September or on the 18th September. No facts were stated which if proved would constitute offences under Sections 400 and 401, Indian Penal Code, and assertions that offences under those sections had been committed could not be regarded as compliance with the letter or the spirit of the law. The substance of the matter, consequently, is that the petitioner was arrested on the 5th August and has been in custody for nearly two months. The provisions of the law have not been strictly followed and though assertions have been made, the concrete facts which constitute the alleged offences have not yet been specifically stated before a Magistrate in conformity with law. We have the additional circumstance that the confession of Pramatha Nath Das was recorded some weeks before the accused was arrested. These facts must be borne in mind in the application of the principles which regulate the consideration of applications for bail.

14. It is indisputable that bail is not to be withheld merely as a punishment. The requirements as to bail are to secure the attendance of the accused at the trial : R v. Rose [1898] 18 Cox. C.C. 717. The proper test to be applied in the solution of the question, whether bail should be granted or refused, is whether it is probable that the party will appear to take his trial: Re Robinson [1859] 23 L.J.Q.B. 286, R. v. Scaifa [1841] 9 D.P.C. 553. The test is applied by reference to the following considerations:

(a) The nature of the accusation : R. v. Barronet [1853] 1 El. & Bl. 1; R. v. Butler [1881] 14 Cox. C.C. 530.

(b) The nature of the evidence in support of the accusation: Re Robinson (1859) 23 L.J.Q.B. 286; R. v. Butler [1881] 14 Cox. C.C. 530; R. v. McCormic [1864] 17 Ir. C.L.R. 411.

(c) The severity of the punishment which conviction will entail: Re Robinson [1859] 23 L.J.Q.B. 286; and this explains the reluctance of Courts to grant bail on charges of murder : Re Barthelemy [1852] 1 El. & Bl. 8; R. v. Andrews [1844] 2 D. & L. 10. In this connection we may recall that in England, bail in treason or felony is discretionary in the High Court or Courts having jurisdiction to try the offence: R. v. Mc Cartie [1859] 11 Ir. C.L.R. 188; R. v. Platt [1777] 1 Leach 157; on the other hand, bail in misdemeanour is said to be of right at common law : R. v. Spilsbury [1898] 2 Q.B. 615; R. v. Badgar [1843] 4 Q.B. 468; Re Frost [1888] 4 J.L.R. 757; see also R. v. Crowe [1829] 4 C. & P. 251; R. v. Beardmore [1836] 7 C. & P. 497; R. v. Osborne [1837] 7 C. & P. 799; King v. Fortier [1902] 13 Quebec K.B. 251. This distinction is reflected in sections 496 and 497 of the Criminal Procedure Code which treat respectively of the grant of bail in cases of what are described in the phraseology of the Indian Legislature as bailable and non-bailable offences.

15. The substance of the matter is that the discretionary power of the Court to admit to bail is not arbitrary, but is judicial, Manikam v. Queen [1882] 6 Mad. 63, and is governed by established principles. The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal enquiry is, whether a recognizance would effect that end. In seeking an answer to this enquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and in some instances, the character, means and standing of the accused: see R. v. Bennett [1907] 49 L.T. 387; R. v. Atkins [1907] 49 L.T. 421; R. v. Manniny [1888] 5 T.L.R. 139; R. v. Wood [1845] 9 Ir. L.R. 71; R. v. Gallagher [1855] 7 W.C.L. 19; R. v. Stewart [1900] 4 Canada Cr. Cas. 131.

16. Section 497 of the Criminal Procedure Code leaves ample room for exercise of discretion on these lines, and we are in agreement with the view expressed by Mitra, J., in Re Johur Midi [1906] 10 C.W.N. 1093; and Jamini Mullick v. Emperor [1908] 36 Cal. 174. We may also recall that Section 497 has been materially altered by Section 136 of Act XVIII of 1923 which substitutes the words "an offence punishable with death or transportation for life" for the words "the offence of which he is accused", This cannot but be regarded as the result of a liberalizing influence on the policy of the legislature, and the discretion of the Courts will henceforth be less fettered than before. In the case before us, the offences attributed to the petitioner are those mentioned in Sections 400 and 401, Indian Penal Code. The maximum sentence under the former section is transportation for life; under the latter section, rigorous imprisonment for seven years. This Court has not been placed in possession of facts which might enable it to entertain reasonable grounds for believing that the petitioner has been guilty of the offences of which he is accused.

17. Upon a consideration of all the circumstances of the case, we are of opinion that the Rule should be made absolute. We direct that the petitioner be released on bail to the satisfaction of the District Magistrate. We fix the amount at Rs. 6,000 with three sureties for Rs. 2,000 each.

Cases Referred.

1[1882] 6 Mad. 69
2[1887] 11 Mad. 98
3[1908] 36 Cal. 166
4[1914] 1 N.L.R. 168
5[1913] 40 Cal. 854
6[1909] 37 Cal. 49
7[1918] 23. C.W.N. 479
8A.I.R. [1921] Cal. 561
9[1901] 26 Bom. 150
10[1871] 8 V.H.C.R. 113 (Cr.)
11[1913] 11 AL.J. 331
12[1919] 1 P.L.T. 73