BECHU AND ANOTHER

v.

REGINAM

[SUPREME COURT, 1962 (MacDuff C.J.), 5th, 19th October]

Appellate Jurisdiction

Criminal law—bail—matters to be considered in granting or refusing—Criminal Procedure Code (Cap. 9) s.109(3)—Arms and Ammunition Ordinance 1961.

Criminal law—practice and procedure—bail—refusal by magistrate—application to Supreme Court—desirability of affidavit by prosecution—material required to support allegation defendant likely to interfere with witnesses—Criminal Procedure Code (Cap. 9) s.109(3).

In considering whether to grant or refuse bail, in addition to applying the test of whether it is probable that the defendant will appear to take his trial, a court may take into consideration the likelihood of the offence being repeated before trial and (in Fiji) any likelihood that the defendant may interfere with prosecution witnesses.

Observations on the desirability as a matter of practice of an affidavit being filed by the prosecution on an application to the Supreme Court for bail after refusal by a magistrate. Observations on the material required to be put before the court when it is alleged that the defendant may interfere with witnesses.

Cases referred to: *Phillips v. R.* (1947) 32 Cr. App. R. 47; 111 J.P. 333: *Re Whitehouse* [1951] 1 K.B. 673; [1951] 1 All E.R. 353: *Krishna Chandra Jagati v. King Emperor* (1927) I.L.R. 6 Pat 802: *Re Robinson* (1854) 23 L.J.Q.B. 286; 2 W.R. 424: *Mohammed Alibhai v. R.* 1 T.L.R. (R) 138: *R. v. Scaife* (1841) 10 L.J.M.C. 144.

Application to Supreme Court for bail under section 109(3) of the Criminal Procedure Code.

S. M. Koya for the applicants.

B. A. Palmer for the respondent.

MACDUFF C.J.: [19th October, 1962]—

This was an application by Bechu s/o Udit and Hari Krishna s/o Bechu asking that they be admitted to bail pending the hearing of certain charges against them. The two accused were charged before the Magistrate, First Class, at Ba, on the 1st day of October, 1962, on three counts of offences under the Arms and Ammunition Ordinance (No. 39 of 1961), two of which carried a maximum penalty of five years' imprisonment and the third one of two years' imprisonment. The two accused pleaded not guilty to all counts and the

trial was adjourned to the 10th October, 1962, for hearing, whereupon Counsel for the accused applied that they be released on bail pending the hearing. This was refused by the learned Magistrate, his reasons being given in these words:

> "The offences as charged are of a serious nature—particularly so in this Division. Accept the allegation having regard to the type of offences that these accused might attempt to interfere with witnesses."

Application was then made to this Court under Section 109(3) of the Criminal Procedure Code.

Counsel for the accused relied before this Court, as he did in the Court below, on the statements in *Archbold on Criminal Pleading, Evidence and Practice,* 34th Edition, at paragraph 203 where the learned authors say:

> "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. *Re Robinson,* 23 L.J.Q.B. 286; *R. v. Scaife,* 10 L.J.M.C. 144.

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."

He submitted that this was the only test as to whether bail should be granted or refused an accused person, that the prosecution were satisfied that the two accused would appear to stand trial and therefore they were entitled as of right to bail subject to their being able to provide satisfactory and independent sureties for their appearance. This argument sounds attractive but, in my view, there are other considerations which may affect the discretion of a court in granting or refusing bail. I refused to grant bail to the two accused on the present summons and it seems desirable that I should make clear what I consider to be certain of the considerations which may properly be taken into account by a court considering whether or not an accused person should be granted bail. For that reason I said that I would give my reasons in full, which I now proceed to do.

In the first place while a Court has, subject to statutory restriction, a discretion in granting bail such discretion must be exercised judicially and in the light of the paramount principle that an accused person is presumed to be innocent until he has been found guilty. For that reason he should not be deprived of his liberty merely because he is accused of a crime if he can satisfy the test that in all the circumstances he will appear to stand his trial on that accusation. To that extent I accept the statement from Archbold as setting out the law correctly.

There are, however, other considerations which may be taken into account. An example of one may be found in the remarks of the Court of Criminal Appeal in *Phillips v. R.* 32 Cr. App. R. 47, when that Court expressed the view that it was undesirable that bail be granted in cases of housebreaking where there is a likelihood of the offence being repeated pending trial. Again it is not usual to grant bail where the prisoner has a bad criminal record—*Re Whitehouse* [1951] 1 K.B. 673.

In the present case the main ground on which the prosecution oppose the granting of bail is the likelihood of the accused interfering with prosecution witnesses. I have been unable to find, in the time at my disposal, any English authority to the effect that bail has been refused on this ground, but I have a recollection that this was the ground on which bail was refused in a series of cases arising out of gang attacks in the West End of London some three years ago. Wort J. in the Indian case of *Krishna Chandra Jagati v. King Emperor* (1927) 1.L.R. 6 Pat. 802 discussed the decision in *In re Robinson* (supra), on which the statement quoted from Archbold is based in these terms:

> "I wish to say only this. The case of in re Robinson decided by Lord Coleridge cannot be regarded as an authority in England and certainly not in India for the proposition that an alleged tampering with the prosecution witnesses is not any ground for refusing bail. First, Lord Coleridge merely said that he would not regard that argument which is not the same thing as saying that that argument may never be regarded in any case. Secondly, the English Courts have an untrammelled discretion in refusing or granting bail and owing to the criminal procedure in England it is almost impossible to get an authoritative decision on the question of what grounds there should be in a case where bail is to be granted or refused. For these reasons, as I have already stated, the case of In re Robinson cannot be looked upon as an authority for the proposition urged in this case and, in my view, having regard to the state of the law in England, it would be impossible for any part to get a decision from a divisional Court of the King's Bench Division laying down dogmatically and exhaustively the limits or grounds upon which an application for bail should be treated."

In the same case Mullick Actg. C.J., said:

> "It was said (In re Robinson (supra)) that the character or behaviour of the accused is irrelevant; but other authorities are of a contrary opinion, and in India I think any allegation that the accused is tampering or attempting to tamper with witnesses and thereby obstructing the course of justice would, in my opinion, be a very cogent ground for refusing bail."

It would seem that the ratio decidendi of this case was that the principles laid down in *In re Robinson* (supra) were suitable and proper for English conditions but needed modification in the light of Indian conditions. That is, with respect, a very sound reason and one which I think is equally applicable to this country.

This reasoning was applied in the High Court of Tanganyika in *Mohammed Alibhai v. R.* 1 T. L. R. (R) 138 where it was held:

> "(1) That though the English rules governing the grant or refusal of bail are worthy of respect and full consideration they are not binding or immutable as far as Tanganyika courts are concerned, and their modification and the taking into account of additional considerations is right and proper, in view of the wide discretion given by section 121 Criminal Procedure Code.
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> (2) That a definite allegation on reasonable grounds that the accused if released on bail is likely to tamper or attempt to tamper with or improperly influence Crown witnesses, thus interfering with the due course of justice, is proper material for consideration in deciding whether to grant bail.
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> (3) That where a further application for bail is made to the High Court, after it has been refused in the lower Court, there should normally, as a matter of practice and convenience be an affidavit in support of the application and an affidavit in reply by the police officer who opposed bail in the lower Court, or other competent person, showing the facts on which the Crown relies in opposing the application."

That decision, to my knowledge, has been followed in the other Territories in East Africa and, in my view, should be followed in this Colony.

I should comment on two matters which arise out of these decisions. The first is the desirability as a matter of practice of the prosecution filing an affidavit in reply by the police officer who opposed bail in the lower Court. In the present case to have given the prosecution time to comply with this requirement would in any case have required such time as to render this present application abortive. For that reason I was compelled to rely on the statements made to the learned Magistrate in the lower Court .

The second matter is the question as to what is required to satisfy a Court on this particular ground of objection to the granting of bail. It is a matter for the Court itself as to the weight to be attached to an allegation of this nature. Such observations as I make must, therefore, be of a general nature. Obviously a police officer cannot be expected to prove as a fact that an accused person is likely to interfere with witnesses and the administration of justice. The weight to be attached to his statement must depend on a number of factors, the experience and integrity of the police officer concerned, his knowledge of the district, of the accused person and the persons with whom he is known to consort, the implication of this type of offence with other and more serious offences in the district and of an accused being suspected of being involved therein. These factors are not intended to be exhaustive but indicate the weight to be given to the statement or evidence of a police officer in opposing bail. It is for that reason that I held in refusing bail on the present application that: "The statement that there was a real danger of an accused, if granted bail, interfering with witnesses, made by an experienced

police officer, familiar with his district, is entitled to be given great weight. The learned Magistrate, who was also familiar with his district and with the serious implications of this type of offence, accepted that allegation as well founded. I would be wrong in overriding his decision and allowing bail." A

Application refused.