

FULL BENCH (CRIMINAL).

Before Sir Guy Ruddle, Kt., K.C., Chief Justice, Mr. Justice Maugham, and Mr. Justice Doyle.

1927

Feb. 21.

KING-EMPEROR

71.

NGA SAN HTWA AND OTHERS.*

Bail—Criminal Procedure Code (V of 1888), section 497—"Death or transportation for life" to be interpreted disjunctively—Discretion of Magistrate in cases not punishable with death or transportation for life how to be exercised—Power of the High Court to grant bail, and the practice of the Court.

Held, that the phrase "with death or transportation for life" appearing in section 497 of the Criminal Procedure Code must be read disjunctively as if it ran "with death or with transportation for life."

Held, further, that the amended section 497 does not limit the power of Magistrates in granting bail in case of non-bailable offences except in cases punishable with transportation for life or with death.

Held, also, that the High Court has an absolute discretion in granting bail in any case but that though the discretion is absolute, the High Court must exercise it judicially, and since the legislature has chosen to entrust the initial stage of dealing with questions of bail to Magistrates and while giving Magistrates an unfettered discretion of granting of bail in all cases except two classes, *i.e.*, cases punishable with death and cases punishable with transportation for life, the High Court ought not to grant bail in such cases except for exceptional and very special reasons.

Per RUTLEDGE, C.J.—"But I concur with the following concluding observations of my brother Doyle in *Mohammed Ensoof's* case at page 542. 'They (*i.e.*, Magistrates) are bound, when weighing the probability of the prisoner appearing for trial, to consider the nature of the offence charged, the character of the evidence against the prisoner and the punishment which in the event of conviction is likely to be inflicted on the prisoner. Again, while mere vague allegations that the prisoner, if released, will tutor witnesses should not be taken into account, the Magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses or where there are reasonable grounds for believing that he will use his liberty to suborn evidence.'

Bondville v. King-Emperor, 2 Ran. 546; *Ensoof and one v. King-Emperor*, 3 Ran. 538—*referred to and overruled in part.*

This is a criminal reference made by Mr. Justice Doyle under Rule 13, Chapter XI, of the High Court

* Criminal Reference No. 9 of 1927 arising out of Criminal Revision No. 47A of 1927.

Rule and Orders. The facts of the case appear from the order of reference reported below :—

“ In Criminal Regular Trials Nos. 162, 163 and 164 of 1926 of the Township Court of Kungyangôn, the Township Magistrate had allowed bail to the accused. The District Superintendent of Police addressed a letter to the District Magistrate, Hanthawaddy, protesting against the release on bail of cattle thieves by the Township Magistrate of Kungyangôn. The District Magistrate, Hanthawaddy, in his Criminal Miscellaneous Trial No. 90 of 1926, has pointed out that the law as regards bail in non-bailable offences is contained in section 497, Code of Criminal Procedure, and that in this connection he should follow the ruling in *H. M. Boudville v. King-Emperor* (1), which he explained as meaning that persons accused of non-bailable offences shall be detained in custody, except where there are, in the opinion of the Magistrate dealing with the case, no reasonable grounds for believing that the accused has or have committed the offence charged against him or them. He, therefore, ordered the Township Magistrate, Kungyangôn, to reconsider his orders allowing bail to the accused. The Township Magistrate, Kungyangôn, on application by the Court Prosecutor, remanded the accused to custody.

“ In *H. M. Boudville v. King-Emperor*, Mr. Justice Duckworth remarked : ‘ As however, the Legislature has placed the initial stage of dealing with crimes with Magistrates, and having, in effect, enacted that persons accused of non-bailable offences shall be detained in custody, except when there are, in the opinion of the Magistrate dealing with the case, no reasonable grounds for believing that the accused has committed the offence charged against him, a High Court is bound to follow the general law as a rule * * * .’

1927
 KING-
 EMPEROR
 v.
 NGA SAN
 HTWA AND
 OTHERS.

(1) (1924) 2 Ran. 5-6.

1927
 KING-
 EMPEROR
 v.
 NGA SAN
 HTWA AND
 OTHERS.

"In *Mohammed Eusoof and one v. King-Emperor* (2), I held that in the case of all offences other than those punishable with death or transportation for life, a Magistrate has discretion to enlarge an accused on bail, even where he believes that the accused may be guilty. I, at the same time, laid down certain general rules which should guide the discretion of the Magistrate in enlarging an accused on bail. In that judgment I interpreted the phrase 'death or transportation for life' as referring only to offences which were punishable with death, or, as a minor alternative, with transportation for life, and held that the Magistrate was not precluded from granting bail in cases where an accused was charged with offences punishable with transportation for life but not in the alternative with capital punishment. My view at that time was based on the phraseology of the Indian Penal Code and on the intention of the Legislature which drafted the new section, since the phrase, as used in the Indian Penal Code appeared to have a specially narrow interpretation. I have since, however, studied the phraseology of the Criminal Procedure Code itself, to which my attention was not at that term drawn, and have come to the conclusion that the term 'death or transportation for life' is elsewhere used so loosely in the Criminal Procedure Code that, whatever may have been the intention of the Legislature, the phrase as it stands, must include offences punishable with transportation for life only, as well as offences punishable with death or transportation for life. This view is based on the phraseology of sections 30, 31 and 34 of the Criminal Procedure Code.

"In section 30 District Magistrates and Magistrates of the first class may be empowered to try all offences not punishable with death; section 31 (3) states that an Assistant Sessions Judge may pass any sentence

authorized by law, 'except a sentence of *death* or of *transportation* for a term exceeding seven years or of *imprisonment* for a term exceeding seven years'; section 34 states that the Court of a Magistrate, specially empowered under section 30, may pass any sentence authorized by law, 'except a sentence of *death* or of *transportation* for a term exceeding seven years or *imprisonment* for a term exceeding seven years.'

"It will be seen from a comparison of sections 31 and 34 of the Criminal Procedure Code that, although it is clearly intended that Assistant Sessions Judges and specially empowered Magistrates shall have exactly the same powers as regards passing sentence, there is a slight variation in the phraseology, the 'of' being omitted before the word 'imprisonment' in section 34, on what grounds, other than looseness of drafting, it is not clear. This in itself would dispose of my contention that in the Criminal Procedure Code the phrase 'death or transportation for life' is a single inseparable definition; furthermore, if my former interpretation were to be accepted, District Magistrates and Magistrates of the first class would be permitted to try all offences except that of murder by a life convict under section 303 of the Indian Penal Code—the only offence under the Indian Penal Code for which the punishment of death only is provided.

"While, on the one hand, the ruling in *Mohammed Eusoof and one v. King-Emperor*, was erroneous to the extent that it held that Magistrates might give bail in the case of offences punishable with transportation for life, the ruling in *H. M. Boudville v. King-Emperor*, does not appear to be in accordance with section 497 of the Criminal Procedure Code as amended. Mr. Justice Duckworth seems to have had in his mind section 497 of the old Criminal Procedure Code, which prohibited a Magistrate, where he considered that there

1927

KING-
EMPEROR
v.
NGA SAN
HTWA AND
OTHERS

1927

KING-
EMPEROR
v.
NGA SAN
HTWA AND
OTHERS.

were reasonable grounds for believing in the guilt of the accused, from releasing him on bail in the case of a non-bailable offence, but the modification introduced in 1923 into section 497 explicitly extended the discretion of the Magistrates to all offences, except those punishable with death or transportation for life. To hold that by implication a Magistrate's discretion is further fettered would appear to be an incorrect exposition of the law on the subject.

“As the rulings above quoted are contradictory, and as both of them appear to be erroneous, I refer, under section 12, Chapter XI, High Court Rules and Orders, for the decision of a Bench the following question :—

To what extent is the discretion of a Court to release an accused on bail fettered by the provisions of section 497 of the Criminal Procedure Code ?”

The reference came up for hearing before a Full Bench of this Court consisting of Rutledge, C.J., Maung Ba and Doyle, JJ., with

Eggar, Government Advocate—for the Crown.

E Maung (1)—for the Respondents.

RUTLEDGE, C.J.—This is a reference by Mr. Justice Doyle of the following question :—

“To what extent is the discretion of a Court to release an accused on bail fettered by the provisions of section 497 of the Criminal Procedure Code ?”

The learned Judge refers to two reported decisions of this Court : *Boudville v. King-Emperor* (1) and *Mohammed Eusoof and one v. King-Emperor* (2), which are conflicting and neither in his opinion is correct. As all questions regarding bail are of practical importance the question has been referred to this Full Bench for decision.

(1) (1924) 2 Ran. 546.

(2) (1925) 3 Ran. 538.

I agree with the learned referring Judge that the decision in *Mohammed Eusoof's* case is erroneous in so far as it held that the phrase "death or transportation for life" was a single inseparable phrase and that a Magistrate had a discretion to admit on bail a person charged with an offence punishable with transportation for life. For the reasons given in the order of reference the phrase must be read disjunctively as if it ran "punishable with death or punishable with transportation for life."

With regard to the decision in *Boudville's* case, while I agree that the learned Judge exercised his discretion properly in that case, certain of his *dicta* are not happily worded. I do not think that the amended section 497 limits the powers of Magistrates in granting bail in case of non-bailable offences except in cases punishable with transportation for life or with death.

The learned Judge goes on to say: "But a High Court is not limited within the bounds of that section (497). It has absolute discretion in the matter." This of course is quite accurate. That absolute discretion is given by section 498. In the subsequent passage the learned Judge states: "a High Court is bound to follow the general law as a rule." The word "bound" is not happy and would seem to negative the absolute discretion given by section 498. The more accurate method of stating the principle seems to be this. Though the discretion is absolute the High Court must exercise it judicially, and since the Legislature has chosen to entrust the initial stage of dealing with questions of bail to Magistrates and while giving Magistrates an unfettered discretion of granting of bail in all cases except two classes, *i.e.*, cases punishable with death and cases punishable with transportation for life, the High Court ought not

1927

KING-
EMPEROR

v.

NGA SAN
HTWA AND
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C.J.

1927

KING-
EMPEROR
v.
NGA SAN
HTWA AND
OTHERS.
RUTLEDGE,
C.J.

to grant bail in such cases except for exceptional and very special reasons.

We have been asked to indicate for the guidance of Magistrates the lines on which they should exercise their discretion. Strictly speaking this does not arise on the reference before us. But I concur with the following concluding observations of my brother Doyle in *Mohammed Eusoof's* case (2) at page 542: "They (*i.e.*, Magistrates) are bound, when weighing the probability of the prisoner appearing for trial, to consider the nature of the offence charged, the character of the evidence against the prisoner and the punishment which in the event of conviction is likely to be inflicted on the prisoner. Again, while mere vague allegations that the prisoner, if released, will tutor witnesses, should not be taken into account, the Magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses or where there are reasonable grounds for believing that he will use his liberty to suborn evidence."

DOYLE, J.—I concur.

MAUNG BA, J.—I concur with the Hon'ble the Chief Justice. The amendment has as a matter of fact enlarged the powers of Magistrates in granting bail in non-bailable cases. Formerly they had no discretion but must refuse bail in all non-bailable cases when there were reasonable grounds for believing that accused persons had been guilty. The Legislature found that law too stringent and in order to render it less stringent introduced the amendment and thereby restricted its applicability only to non-bailable offences punishable either with death or with transportation for life.