What, then, is ”judicial discretion” in this bail context ? In the elegant words of Benjamin. Cardozo.

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ”the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains.

[The Nature of the Judicial Process-Yale University Press, (1921)].

Even so it is useful to notice the tart terms of Lord Camden that

”the discretion of a judge is the law of tyrants : it is always unknown, it is different in different men;” it is Casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which. human nature is liable…” (1 Bovu. Law Diet., Rawles” III Revision p. 885-quoted in Judicial Discretion–National College of the State Judiciary, Reno, Nevada p. 14).

Some jurists have regarded the term ”judicial discretion” as a misnomer. Nevertheless, the vesting of discretion is the unspoken but inescapable, silent command of our judicial system, and those who exercise it will remember that discretion, when applied to a court of justice, means sound discretion guided, by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular.

(Attributed to Lord Mansfield, Tingley
v. Bolby, 14 N.W. 145)

An appeal to a judge”s discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with, established principles of law.

Judicial Discretion, (ibid) p. 33]

Having grasped the core concept of judicial discretion and the constitutional perspective in which the court must operate public policy by a restraint on liberty, we have to proceed to see what are the relevant criteria for grant or refusal of bail in the case of a person who has either been convicted and has appealed or one whose conviction has been set aside but leave has been granted by this Court to appeal against the acquittal. What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said :

I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at

trial.

(R. v Rose-1898 18 Cox CC. 717; 67 LJQD 289 quoted in The Granting of Bail", Mod. Law Rev. Vol. 81, Jan. 1968 p. 40, 48).

This theme was developed by Lord Russel of Kiliowen C.J., when he charged the grand, jury at Salisbury Assizes, 1899 :

...it was the duty of magistrates to admit accused persons to bail, wherever practicable, unless there were strong grounds for supposing that such persons would not appear to take their trial. It was not the poorer classes who did not appear, for their circumstances were such as to tie them to the place where they carried on their work. They had not the golden wings with which to fly from justice.

(1899) 63 J.P. 193.

In Archbold it is stated that

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....

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... .

(Mod. Law Rev. ibid. p. 53-Archbold, Pleading Evidence and Practice in Criminal Cases, 36th edn., London, 1966 para 203)

Perhaps, this is an overly simplistic statement and we must remember the constitutional focus in Article 21 and 19 before following diffuse observations and practices in the English system. Even in England there is a growing awareness that the working of the bail system requires a second look from the point of view of correct legal criteria and sound principles, as has been pointed out by Dr. Bottomley. (The Granting of Bails : Principles and Practices : Mod. Law Rev. ibid, p. 40 to 54).

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