

ANURA BANDARANAIKE
v.
W. B. RAJAGURU, INSPECTOR-GENERAL OF
POLICE AND OTHERS

SUPREME COURT
DHEERARATNE, J.,
WADUGODAPITIYA, J. AND
BANDARANAYAKE, J.
S.C. APPLICATION NO. 239/97
DECEMBER 8, 1998.

Fundamental rights – Entering a house to arrest a person – Powers of a police officer – Sections 24 and 25 of the Code of Criminal Procedure Act – Section 125 of the Evidence Ordinance – Article 12 (1) of the Constitution.

On 12. 02. 1997 at about 2.15 am the 2nd respondent Deputy Inspector-General of Police, Criminal Investigation and the 3rd respondent Deputy Director, Criminal Investigation entered the petitioner's residence without a warrant or the petitioner's permission purporting to act under sections 24 and 25 of the Code of Criminal Procedure Act on the basis that they had "reason to believe" that a murder suspect – one Punchi Nilame had entered the premises. Those respondents stated that they acted on the instructions of the 1st respondent Inspector-General of Police who had told the 1st respondent that a private informant whom he (the 1st respondent) had known personally for 15 years and had given reliable information on many previous instances told him that he (the said informant) had observed Punchi Nilame entering the petitioner's residence at about 9 pm on 11. 02. 1997. The informant was then produced before the 2nd respondent who after questioning him directed the 3rd respondent to question him further. The 3rd respondent has made a note that he questioned the informant who stated that he observed the suspect entering the petitioner's residence from the rear side entrance.

The informant refused to disclose his identity; and no IB extracts were produced to show whether the informant had been questioned *inter alia*, regarding the circumstances of his presence near the petitioner's residence which was situated in a high security zone, guarded by security personnel. The credibility of the information had not been checked. The police searched the petitioner's residence but did not find Punchi Nilame. No other house in the vicinity was searched.

Held:

1. The 1st respondent failed to satisfy court that he received any reliable information from an informant. The 2nd and 3rd respondents failed to satisfy court that they had "reason to believe" that the suspect had entered the premises of the petitioner.
2. Section 125 of the Evidence Ordinance which *inter alia* provides that a police officer shall not be compelled to say whence he got the information of any offence has no application where a violation of a fundamental right is alleged. The respondent cannot under the cover of section 125 proclaim that he had "reason to believe" the information on which they acted. It is the duty of the court to scrutinize the material placed before the court and determine whether in fact the informant referred to existed.

APPLICATION for relief for infringement of fundamental rights.

Faiz Musthapha, PC with Ananda Kasturiarachchi, Sanjeewa Jayawardena, Nalin Dissanayake, Ms. Faisza Markar and Thushani Machado for the petitioner.

Palitha Fernando, DSG, with Buvaneka Aluvihare, SSC for the respondent.

Cur. adv. vult.

February 19, 1999.

JUDGMENT OF THE COURT

The petitioner has a unique and a distinguished parentage; his late father was one time Prime Minister of this country and his mother, besides being the present Prime Minister, has been Prime Minister several times earlier. The petitioner is their only son. Her Excellency the President of Sri Lanka, is his sister. In his own right, the petitioner has been a Member of Parliament for about 20 years; he was at one time the Leader of the Opposition and a Minister of State. The background of the petitioner is mentioned here, not to accord him any special privilege before the law, but to demonstrate how the fundamental rights of even a person of such standing are liable to be violated by errant executive and administrative action. The liberty of one citizen is no less and no more important than that of any other.

The incident which will be narrated later, which gave rise to the petitioner's complaint of the violation of his fundamental rights, is connected with the assassination of the late Nalanda Ellawala (Ellawala), a youthful Member of Parliament at Ratnapura about 4 pm on 11. 02. 1997. The petitioner stated that he is a near relative and a close associate of the Ellawala family and knew young Ellawala intimately from Ellawala's infancy. The petitioner states that he was greatly shocked and deeply grief-stricken at the news of the assassination which he received about 6 pm on that day. One of the suspects in the assassination of Ellawala is Susantha Punchi Nilame (Punchi Nilame), a Member of Parliament. At the time of the assassination, both the petitioner and Punchi Nilame, as Members of Parliament in the opposition, represented the same political party, namely, the United National Party.

The petitioner's Colombo residence, where the incident complained of occurred, is situated adjoining the residence of his mother the Prime Minister and both those premises abut Rosmead Place. Along the Kynsey Roadside boundary of the petitioner's premises, there is a by-lane which comes to a dead end immediately passing the petitioner's premises. From this by-lane there is a side entrance to the petitioner's residence. Access could be had to the petitioner's mother's residence, from the petitioner's own residence, through a connecting door situated at the rear of his residence. The petitioner, as a Member of Parliament, is provided with security personnel, who are attached to the Government Ministerial Security Division. A high security zone screens the residences of the petitioner and his mother. No outsider could gain access to any one of those two premises, either from the direction of Wijerama-Rosmead Place intersection, or from the direction of Kynsey Road, without obtaining clearance from the security personnel posted along Rosmead Place, at the two ends of the security zone (sketch P4). The two check-points are manned by members of the elite Special Task Force, the Army and the Police.

On 11. 02. 1997, the petitioner left from his residence at Horagolla, to the Gampaha Kachcheri, in order to submit the nomination papers of candidates contesting several local bodies in the Gampaha District, from the United National Party. He returned to his residence in Colombo around 1.30 pm. About 11 pm he retired to bed; his bedroom was situated on the upper floor of his residence. The only persons in the petitioner's residence, besides himself, were, his Chief Security

Officer, Hewage Torrington Swarnathilake (Swaranthilake) of the Ministerial Security Division and several domestic servants. In the early hours of 12. 02. 1997, about 2.15 am when the petitioner was asleep, he was suddenly awakened by Swarnathilake, who informed him that two persons, later identified as 2nd and 3rd respondents, had demanded and gained forcible entrance to his residence and were insisting upon making a search of every room (affadavit P5). The petitioner immediately got out of his bedroom in order to descend the stairs. To his surprise, he encountered the 2nd and 3rd respondents already ascending the staircase despite the vehement protests of Swarnathilake. The petitioner states that he was considerably frightened by the rude intrusion of 2nd and 3rd respondents and he apprehended harm to his person and/or property. The petitioner promptly asked the two intruders, who were wearing civilian clothes, who they were, and why they had come to his residence at that hour. The two respondents then identified themselves and told the petitioner that they had been ordered by the 1st respondent to search the petitioner's residence for Punchi Nilame, who they said was the prime suspect in the assassination of Ellawala. The petitioner vehemently protested against the unlawful and forced intrusion into his residence. He also felt utterly humiliated because the search suggested that he was a person capable of harbouring a man wanted in connection with a heinous crime. However, after a thorough search of the bedrooms of the petitioner's residence, which lasted about 20 minutes, respondents left, finding no Punchi Nilame anywhere. Strangely no other house in the vicinity was searched.

The petitioner stated that he subsequently came to know that the 2nd and 3rd respondents had arrived at his residence with a posse of policemen in several police vehicles, which had created the impression to the neighbours that a large scale raid was being conducted on the petitioner's residence. The petitioner also stated that the 4th respondent had forced his servants through threats and intimidation to open the front door of his residence, through which the 2nd and 3rd respondents gained entrance.

The petitioner contended that by the acts of the 1st to 4th respondents, his fundamental rights guaranteed under Articles 12 (1) of the Constitution were violated.

The 2nd and 3rd respondents admitted the search of the premises of the petitioner. The position of the 1st respondent is that on the day of the killing of Ellawala, around 11.20 pm, a person known to him personally, who has been a private informant for a period of over 15 years contacted him over the telephone at his official residence. According to the 1st respondent, the informant had furnished him with accurate and reliable information on many previous instances during his career as a police officer. The informant had told him that he saw Punchi Nilame enter the residence of the petitioner at Rosmead Place, through the side entrance, around 9.00 pm and that the petitioner was harbouring him. Since the 1st respondent considered this information to be reliable, he immediately contacted the Deputy Inspector-General in charge of the Criminal Investigation Department (CID), who is the 2nd respondent, and 2R passed on the information received by him. He told him that the informant was long-standing private informant who had given him accurate information on many previous instances. The 1st respondent had instructed the 2nd respondent to consider the information given by him and take necessary action. He also instructed the 2nd respondent to be at his office so that he could make arrangements for the informant to meet the 2nd respondent in his office. The 1st respondent instructed the informant to proceed to Police Headquarters and meet the 2nd respondent. The 1st respondent submitted that he had sufficient reason to believe that the petitioner was harbouring Punchi Nilame.

The 2nd respondent averred that on 11. 02. 1997, around 11.30 pm he was contacted by the 1st respondent who informed him that a long-standing private informant, who had furnished him with reliable information in the past had informed him that he had seen Punchi Nilame enter the residence of the petitioner at Rosmead Place around 9.00 pm. The 1st respondent informed him that he would get the informant to meet him at his office and directed him to report to his office immediately. He then contacted the 3rd respondent around 11.35 pm and instructed him to report at his office. Around 12.10 am on 12. 02. 1997, a person said to be the informant was produced before him by Sub Inspector Chandrasena, who was the duty officer (2R1). The 2nd respondent questioned the informant who did not disclose his name. The 2nd respondent formed the opinion that there was reason to believe him and instructed the 3rd respondent to question the informant further. The 2nd respondent was of the opinion that the information given by the informant should be kept confidential as far

as possible, lest the suspect comes to know and attempts to escape being arrested.

The position of the 3rd respondent is that he questioned the informant in detail and that he considered the information to be credible. He was of the view that immediate action should be taken. As there was no time to obtain a warrant lest the suspect should escape, he decided to act in terms of sections 24 and 25 of the Code of Criminal Procedure Act and to search the residence of the petitioner with a view to arresting Punchi Nilame, who was suspected of having committed the offence of murder. He informed the 2nd respondent of his intention and instructed the 4th respondent to report to him to assist in the investigation. The 4th respondent denied that he had intimidated or threatened the servants of the petitioners in order to facilitate access of the 2nd and 3rd respondents to the petitioner's residence.

The respondents relied on the relevant provisions of section 125 of the Evidence Ordinance which states that –

"No Magistrate or police officer shall be compelled to say whence he got the information as to the commission of any offence, . . ."

Accordingly, it was submitted that the respondents cannot be compelled to disclose the identity of the informant. Further it was submitted that under sections 24 and 25 of the Code of Criminal Procedure Act, if there was "reason to believe" that a person to be arrested has entered into any place, a search could be carried out by a person who had the authority to arrest.

In spite of this provision, it is not infrequently that this court has been taken into confidence and confidential and/or privileged material placed before the Judges (off the record) for them to satisfy themselves as to the relevant matters which have resulted in the executives or administrative decisions which were in question. No such attempt at such disclosure was made in this case. At the hearing of this application, the question as to the existence or non-existence of this

so-called informant loomed so large, that we questioned the learned DSG whether he made any attempt to verify for himself the existence and identity of this person. He confessed that he was neither informed by the respondent police officers nor did he venture to ask them for the so-called informant's identity. When it comes to a question of violation of fundamental rights, it would be highly dangerous from the view-point of the liberty of the citizen, for us to permit officials to conveniently hedge behind section 125 of the Evidence Ordinance and proclaim that they had "reason to believe" that matters on material particulars provided by persons whose identity cannot be disclosed, must be taken as true. In these circumstances it is our bounden duty to scrutinise the material placed before us by the State most diligently, to find out the truth as to the existence or non-existence of such an informant in the first place.

The 1st, 2nd and 3rd respondents in their affidavits, state that since the petitioner is a senior member of the United National Party and since the suspect is also a member of the same party, they had reason to believe that the petitioner was harbouring him with the intention of protecting a fellow Member of Parliament of his own party from being arrested.

It is common ground that the petitioner's residence is situated in a high security area where 24-hour surveillance is carried out. The 1st, 2nd and 3rd respondents say that they had spoken to the informant but according to their affidavits only the 1st respondent was aware of the identity of the informant. Except the document marked 3R1, there are no IB extracts attached to the affidavits of the respondents. 3R1 is a document prepared by the 3rd respondent which states that -

"... I questioned the informant in detail but he was not prepared to disclose his identity but he stated that he has been a long-standing private informant of Inspector-General of Police, Mr. W. B. Rajaguru and he has passed him valuable information which was found to be true and correct. The informant stated that he personally saw the suspect entering into the house of MP for UNP Mr. Anura Bandaranaiake at about 2100 hrs. through the rear

side entrance and that Mr. Anura Bandaranaike was harbouring suspect Susantha Punchinilame, who is wanted in a case of double murder. He further stated that for a successful arrest of S. Punchinilame, prompt action should be taken without affording the person to be arrested an opportunity of escape. I believe the information to be credible. There is no time to obtain a warrant"

This is a self-serving document. It is the burden of the respondents to prove that the search was lawful. Although the respondents submitted that they were of the belief that the information was reliable, no satisfactory evidence was placed before us to indicate the basis of their conclusion. Although the 1st respondent stated that the informant had for the past 15 years furnished him with accurate and reliable information and although this statement was repeated parrot-like by 2nd and 3rd respondents, no details of these items of accurate and reliable information have been provided to us so as to enable us to verify the truth of this statement. According to 3RI, the informant stated that "he personally saw the suspect entering into the house of MP for UNP, Mr. Anura Bandaranaike at about 2100 hrs". The 1st and 3rd respondents have averred that they questioned the informant in detail. We have not been provided with any details on what he was questioned upon; nor the answers given by him. What is in our possession is their bare statements to effect that the informant was questioned in detail. There are no contemporaneous notes available as to what these details are. There is nothing to indicate that the 1st, the 2nd or the 3rd respondents questioned him as to where he was when he said he saw the suspect entering the petitioner's premises from "the rear side entrance". Was he questioned how far away he was from the rear side entrance of the petitioner's residence when he saw the suspect? What was state of the illumination available for recognising the suspect that night? How did the suspect get near the rear side entrance of the petitioner's residence? Did he walk or come in a vehicle? Was he alone or in the company of another? Most importantly, was the informant asked how he entered the high security zone to see what he says he saw? What did the informant mean when he said "and Anura Bandaranaike was harbouring him"? There is nothing to indicate that the informant was questioned on these lines.

These are questions any normal person with average intelligence would have asked an informant in order to satisfy himself as to whether the informant was speaking the truth or not. We are starved of those details and there is nothing to indicate that the respondents had any of those details themselves.

The 1st respondent has failed to satisfy us that he received any reliable information from an informant who has been supplying him such information for 15 years previously. The 2nd and 3rd respondents have failed to satisfy us that they had "reason to believe" that the suspect has entered the premises of the petitioner. In these circumstances it is more likely that the informant was non-existent and that the search was conducted in the petitioner's residence with some other undisclosed purpose in mind.

We find that the 4th respondent has only played a minor role in this incident in the company of his superiors. We hold that the 1st to 3rd respondents have violated petitioner's fundamental right to equal protection of the law guaranteed under Article 12 (1) of the Constitution. We direct each of the 1st, 2nd and 3rd respondents to personally pay to the petitioner a sum of Rs. 40,000 as compensation and Rs. 10,000 as costs; and the State to pay the petitioner a sum of Rs. 200,000 as compensation. The petitioner will be entitled in all to a sum of Rs. 350,000. This amount should be paid within one month from today.

DHEERARATNE, J.

WADUGODAPITIYA, J.

SHIRANI BANDARANAYAKE, J.

Relief granted.