ANSALIN FERNANDO
v.
SARATH PERERA, OFFICER-IN-CHARGE, POLICE STATION, CHILAW AND OTHERS

SUPREME COURT
FERNANDO, J.
AMERASINGHE, J. AND
KULATUNGA, J.
S.C. APPLICATION NO. 18/87
19 AND 30 MARCH 1990

Fundamental Rights – Arrest and detention – Torture – Articles 11, 13(1), 13(2), 13(4) of the Constitution – Emergency Regulations 18, 19 and 45.

Regulation 18 of the Emergency Regulations only empowers an arrest on account of an offence under Emergency Regulations. Murder as such is not such an offence. If (murder) is an offence in respect of which an arrest can only be made under Section 23 of the Code of Criminal Procedure Act, in which event the suspect has to be produced before a Magistrate in terms of Section 36 and within the period prescribed by section 37 of the Code. Where such arrest is claimed to have been made under Regulation 18(1) on a suspicion of the arrestee being concerned in committing an offence under Emergency Regulations, it would not be possible to defend the arrest even on the ground that it is referable to section 23 of the Code of Criminal Procedure Act. The arrest and the detention on that basis are violative of Article 13(1) of the Constitution.

Even if the arrest for murder was lawfully made in terms of Section 23 of the Code of Criminal Procedure Act and it became necessary on the basis of material disclosed during the investigation to detain the arrestee under Emergency Regulation 19(2), he was entitled to be informed of the reason for the deprivation of his personal liberty. Failure to do so would make the detention illegal.

Regulation 45 does not create an offence. Hence detention on an allegation of being concerned in committing an offence under Regulation 45 would be unlawful.

An arrest under Regulation 18(1) to be lawful has to be reasonable by application of the objective test; it should be effected on credible information.

An unlawful custody for 49 days, and detention for fifteen days without a semblance of authority for such detention and assaults and humiliations and pain (by being blindfolded and chained to a bench) inflicted during this period would

amount to degrading treatment or punishment and are violative of Article 11 of the Constitution.

Cases referred to:

1. *Nanayakkara v. Henry Perera* (1985) 1 Sri LR 375, 385, 388, 399.
2. *Wijewardena v. Zain and Others* S.C. Application No. 202/87 S.C. Minutes of 24.07.1989
3. *Joseph Perera v. Attorney-General* S.C. No. 107–109/86 S.C. Minutes of 25 May 1987
4. *Gunasekera v. De Fonseka* 75 NLR 246.
5. *Muttusamy v. Kannangara* 52 NLR 324
6. *Yapa v. Bandaranayake* (1988) 1 Sri LR 63

APPLICATION for infringement of fundamental rights.

Sanath Jayatilleke with *Jayantha Nandalal* for the petitioner.

C. R. de Silva, S.S.C. for 1 to 5 respondents.

Cur. adv. vult.

21st May, 1990.
KULATUNGA, J.

By her petition dated 18.02.87 the petitioner complains that her son the 6th respondent (a University student) was arrested at their house in Chilaw on 02.01.87 at about 3.30 p.m. by a police party who assaulted him with fists and took him away in a jeep without giving any reason for the arrest; that thereafter the 6th respondent was detained at the Bandaragama Police Station where he was subjected to assaults and other ill-treatment; that the 6th respondent was last seen on the evening of 04.02.87 after which she was informed that he had been transferred to the Kalutara Police Station; that although on 07.02.87 and 10.02.87 she visited the Kalutara Police Station she was not allowed by the H.Q.I. Kalutara Police to see the 6th respondent and the H.Q.I. even refused to talk to her.

The petitioner alleges that the detention and incarceration of the 6th respondent since 02.01.87 is illegal and violative of Articles 11,12, 13 and 14 of the Constitution. The petition is accompanied by an affidavit of one Raymond Fernando, an uncle of the 6th respondent, who had helped the petitioner in obtaining information

regarding the whereabouts of the 6th respondent and by visiting him whilst he was in police custody.

When the 6th respondent was taken away by the police, the petitioner believed that he had been taken to the Chilaw Police. Consequently, Raymond went to make inquiries at the Chilaw Police and was informed that the 6th respondent had been taken to the Bandaragama Police.

On the 3rd and 4th, Raymond Fernando visited the Bandaragama Police where he was informed that the Police team had not yet arrived with the 6th respondent. He had gone there again on the 5th when he saw the 6th respondent crying in pain having been assaulted on the knees and legs. He visited the 6th respondent next on 6th, 7th, 14th, 19th and 23rd but was not allowed to speak to him for more than 10 minutes on any day and a police officer was listening to the conversation throughout. The petitioner visited the detenu on 10th, 18th and 24th. On the 18th she had seen him chained to a bench with much pain. On her visit on the 31st she heard from another University student who was chained to a bench that the 6th respondent had been taken to the Criminal Investigation Department, but the police officers said that his whereabouts are not known.

On 04.02.87 the petitioner and Raymond Fernando went to the CID to be told that the 6th respondent had not been brought there. They were informed by the Police Headquarters that the 6th respondent was at the Bandaragama Police where they met him that evening. In the absence of a police officer he told them that he had been taken blindfolded to a lonely house where he was assaulted and kept for two days and bought back to the Kalutara Police Station; that he had been produced before the Magistrate Horana by the Kalutara Police that morning; and the Magistrate ordered him to be remanded for a further period of one month. In his affidavit dated 18.01.88 the 6th respondent states that on 04.02.87 he was produced before a lady Magistrate at her bungalow when she "remanded" him and two other detainees Rupasinghe and Jayasuriya for a further period and thereafter he was "remanded" at the Kalutara Police from 05.02.87 to 20.02.87.

The 1st respondent (O.I.C. Chilaw Police) states that the 6th respondent was not arrested by the Chilaw Police and further states that he is unaware of the arrest of the 6th respondent by the police. The 2nd respondent (O.I.C. Bandaragama Police) states that the 6th respondent was arrested by S.I. Manamperi on 05.01.87 and was produced at the Bandaragama Police Station on 06.01.87; that on "further investigations" there was evidence that the 6th respondent was concerned in committing offences under Emergency Regulations. He therefore obtained from Mr. Rajaguru, Deputy Inspector General of Police, a detention order under Emergency Regulations to detain the 6th respondent. The detention order 2R1 dated 07.01.87 authorises the detention of the 6th respondent and two others Asoka Rupasinghe and Bandula Jayasuriya for a period of 30 days from 06.01.87 at the Bandaragama Police Station under Regulation 19(2) of the Emergency Regulations. The order states that it had been reported that they had been arrested on 05.01.87 under Regulation 18(1) for an offence in contravention of Section 45 of the Emergency Regulations.

S.I. Manamperi in his affidavit (2R2) states that in January, '87 he was attached to the Horana Police; that he was detailed to investigate the murder of University student Daya Pathirana; that on information received he had reason to suspect that the 6th respondent was involved in that murder and it was necessary to arrest him for the purpose of investigation. He accordingly arrested him on 05.01.87 having explained the purpose for his arrest. He then proceeded to Medawachchiya and Badulla to check on other suspects and returned to the Bandaragama Police on 06.01.87 and produced the 6th respondent. He also recorded the 6th respondent's statement a certified copy of which is produced marked 'X'.

S.I. Manamperi claims that on the basis of the material that transpired during his investigations including the statement of the 6th respondent it became necessary to detain him under Emergency Regulations on the ground of a reasonable suspicion that he had been concerned in committing offences under Emergency Regulations and as such steps were taken to obtain a detention order from Mr. Rajaguru, Deputy Inspector General of Police.

It is clear from the affidavit of S.I.Manamperi that the 6th respondent had been arrested on a suspicion that he was involved with the murder of Daya Pathirana. The murder had been committed in mid December, 1986. No material has been placed before us as to what investigations were carried out during the two weeks preceding the arrest of the 6th respondent or what information led to his arrest. Even assuming the existence of credible information against him, the police had no power to have arrested the 6th respondent under Regulation 18(1) as stated in the detention order (2R1). That regulation only empowers an arrest on account of an offence under Emergency Regulations. Murder as such is not such an offence. It is an offence in respect of which an arrest can only be made under Section 23 of the Code of Criminal Procedure in which event the suspect has to be produced before a Magistrate in terms of Section 36 and within the period prescribed by Section 37 of the Code. As such, the impugned arrest is illegal for failure to effect it according to procedure prescribed by law and is therefore violative of Article 13(1) of the Constitution. In view of the affirmative stand taken by the 2nd respondent that the 6th respondent was arrested under Regulation 18(1) on a suspicion of being concerned in committing an offence under Emergency Regulations it would not be possible to defend the arrest even on the ground that it is referable to Section 23 of the Code of Criminal Procedure. Consequently, the impugned detention is also illegal and is violative of Article 13(2) of the Constitution.

It is then claimed that "on further investigations" there was evidence against the 6th respondent including his statement that he had been concerned in committing offences under Emergency Regulations and hence a detention order under Regulation 19(2) was obtained. The only material placed before us in regard to further investigations is the statement of the 6th respondent recorded on 14.01.87 which is subsequent to the date on which the detention order was made. No material obtained between the date of the 6th respondent's arrest and the date of the detention order has been produced. I shall, however, consider the validity of the detention order on the assumption that the material appearing in the 6th respondent's statement had transpired during the interrogation of the 6th respondent after his arrest and prior to the making of the detention order.

The 6th respondent states that he is a student of the Sri Jayewardenepura University. He is also the representative of that University on the Inter University Students Union. A meeting of the Union had been scheduled for 13.12.86 at the Kelaniya University which he attended but it could not be held due to poor attendance. He admits that it was not lawful to hold such meetings as student bodies had been proscribed. On 17.12.86 he read a newspaper report about the killing of a student of the Colombo University. He collected funds from students and put up a banner condoling the death. Thereafter he left for his home in Chilaw where he stayed until his arrest.

The statement of the 6th respondent discloses no offence under Emergency Regulations except perhaps the reference to his participation in the activities of a proscribed student organization. However, the police have not sought to justify the impugned detention on that ground. Even if he was lawfully arrested in the first instance for murder in terms of Section 23 of the Code of Criminal Procedure and it became necessary on the basis of material disclosed during investigations to detain him under Emergency Regulation 19(2) he was entitled to be informed of such reason for the deprivation of his personal liberty. The failure to so inform him is further ground for holding that the impugned detention is illegal.

The detention order itself has been made on the basis that the 6th respondent is concerned in committing an offence under Regulation 45 of the Emergency Regulations; but that regulation does not create an offence. It only makes provision to the effect that any attempt, abetment of or a conspiracy to commit an offence under any Emergency Regulation should be punished with the same punishment prescribed for such offence. However, no such specific offence has been alleged. In *Nanayakkara v. Henry Perera* [1] this Court expressed the opinion that it would be unlawful to detain a person for an unspecified and unknown purpose as this would be an infringement of Article 13(4). Colin-Thome, J. said (p. 388) –

> "Although Regulation 19(2) does not state that the order of the Inspector General of Police nominating a place of detention should state the reason for the detention we think that it is in the interest of natural justice that the reason should be

communicated to the detainee in the written order and that he should be supplied with a copy of the order".

As explained by Colin-Thome, J. (p. 389) the rationale of this requirement is that the arrest and detention are inextricably linked.

This view was followed in my judgment in *Wijewardena v. Zain and Others* [2]. Accordingly, I hold that the detention order 2R1 is illegal. I shall now proceed to consider the validity of the 6th respondent's detention from 05.02.87 until his release.

The 3rd respondent (O.I.C. Kalutara Police Station) admits the production of the 6th respondent before the Acting Magistrate, Horana, Mrs. Gunatilake on 04.02.87. He states that he did so in terms of Regulation 19 of the Emergency Regulations on instructions from the O.I.C. Counter Subversive Division. He disclaims, *inter alia,* any knowledge of the fact that the 6th respondent was thereafter detained at the Kalutara Police but fails to explain the whereabouts of the detenu after 04.02.87. It is not the position of the 3rd respondent that he was remanded to fiscal custody or that he was released. After carefully considering the evidence, I am satisfied that the 6th respondent was detained at the Kalutara Police from 05.02.87 to 20.02.87. No detention order covering that period has been produced; as such the continued detention of the 6th respondent during that period is also unlawful.

The total denial by the 1st – 5th respondents of almost every fact material to the case for the petitioner including date of the impugned arrest was countered with an affidavit dated 18.01.88 from the 6th respondent supported by other affidavits X1 – X7. The material, so furnished, if accepted, would corroborate the petitioner's version that the 6th respondent was arrested at about 3.30 p.m. on 02.01.87. The affidavits of Lionel Appuhamy who showed the 6th respondent's house to the police, Anthony Fernando, Principal of a school who had seen the 6th respondent being taken away by the police, Nicholas Fernando, Chairman, Gramodaya Mandalaya and Maxima Fernando Depot Manager, Regional Transport Board, Chilaw to whom the petitioner and the 6th respondent's uncle Raymond Fernando had spoken about the impugned arrest and Asoka Rupasinghe another University student who was arrested by the Bandaragama Police at

about 7.00 p.m. on the same day are particularly relevant. It is true that these are belated affidavits; but there is an explanation for the delay, namely that it was only after the respondents filed affidavits stating that the 6th respondent was arrested on 05.01.87 it became necessary for the petitioner to furnish further material to contradict that version.

Asoka Rupasinghe says that he was arrested when he was in the official quarters of his sister, a doctor attached to the Medawachchiya Government Hospital. The police party detained him and the 6th respondent at the Kekirawa Police Station on the night of 02.01.87. On the 3rd morning they were taken via Dambulla, Laggala and Mahiyangana to the Passara Police at which point the student Bandula Jayasuriya was brought into the jeep. They were then taken via Badulla and Bandarawela to the Haputale Police where they were detained at night. On the 4th they were taken via Balangoda and Ratnapura and reached Horana Police by about 2.30 p.m. where they were detained for the night; on the morning of the 5th they were brought to the Bandaragama Police by about 8.00 a.m. The police then took the 6th respondent, assaulting him, to the rear of the Police Station from which direction the witness heard the sound of cries.

On a careful consideration of the available evidence including the averments contained in the petition itself, I am satisfied that the 6th respondent was arrested on 02.01.87 and not on 05.01.87 as spoken to by S.I. Manamperi; this officer admits that after arresting the 6th respondent he visited Medawachchiya and Badulla to check other suspects wanted in the same case and returned to the Bandaragama Police on 06.01.87. He gives no further particulars of his investigations; nor has he produced any notes of investigations. His story does not have the ring of truth; it is unlikely that he could have carried out the entire investigations at Chilaw, Medawachchiya and Badulla and returned to Bandaragama with three suspects between the 5th and 6th. On the other hand, Asoka Rupasinghe and the 6th respondent have supplied the details of investigations covering 5 days from 02.01.87 to 06.01.87 which I accept. Even if the petitioner had not filed further affidavits, I accept the petitioner's version as to the arrest of the 6th respondent which appears to me to be intrinsically true.

Turning to the alleged violation of Article 11, the 6th respondent states that the police assaulted him and on 06.01.87; he was offered for interrogation by K. L. Dharmasiri, Vice President of the Independent Students' Union who visited the Bandaragama Police Station; that Dharmasiri humiliated him in the presence of the police and said "if you come out not a piece of yours would be spared". He also confirms the allegation in the petition that prior to his production before the Magistrate on 04.02.87 he had been taken blindfolded to a lonely house where he was subjected to assault and interrogation. He states that after such treatment he was taken to the Kalutara Police Station. Events thus averred to also have the ring of truth and can be relied upon by this Court. Whilst I shall not accept each and every allegation of assault/ill-treatment against the police unless it is supported by cogent evidence I do not consider it proper to reject such an allegation merely because the police deny it or because the aggrieved party cannot produce medical evidence of injuries. Whether any particular treatment is violative of Article 11 of the Constitution would depend on the facts of each case. The allegation can be established even in the absence of medically supported injuries.

The 6th respondent was arrested for alleged involvement in the murder of Daya Pathirana. As pointed out earlier, no evidence of his complicity in the alleged murder and no material warranting a suspicion that he is concerned in committing an offence under Emergency Regulations has been produced. An arrest under Regulation 18(1), to be lawful has to be reasonable by the application of the objective test; it should be effected on credible information. *Joseph Perera v. Attorney-General*[3]; *Gunasekera v. de Fonseka*[4] see also *Muttusamy v. Kannangara*[5] and *Yapa v. Bandaranayake*[6]. The arrest of the 6th respondent cannot satisfy this test; as such the arrest is illegal. If he was arrested for an offence under Emergency Regulations, he was not informed of such reason, in breach of his rights under Article 13(1) of the Constitution.

Having arrested the 6th respondent on speculation the police kept him in unlawful custody for 49 days as a subversive. He was at times chained to a beach causing severe pain. He was assaulted. He was submitted for interrogation by a hostile student unionist who

humiliated him. He was blindfolded and taken to a lonely house for interrogation. He was detained at the Kalutara Police Station from 05.02.87 to 20.02.87 without a semblance of authority for such detention. In my view deprivation of personal liberty, in such conditions is degrading treatment or punishment violative of Article 11 of the Constitution.

Accordingly, I determine that the arrest and detention of the 6th respondent are violative of his rights guaranteed by Articles 13(1), 13(2), 13(4) and 11 of the Constitution. There is no material to warrant the allegation that his rights under Articles 12 and 14 have been violated. On the question of relief, I have taken into consideration the fact that the 6th respondent had been illegally arrested and detained for 49 days and subjected to grave humiliation. The thought that the arrest made in the background of a killing which may have been politically motivated is irrelevant and should not stand in the way of granting just and equitable relief to the petitioner. I direct the State to pay the petitioner on behalf of the 6th respondent a sum of Rs. 25,000/- and costs which I fix at Rs. 2500/-.

FERNANDO J. – *I agree.*

AMERASINGHE, J. – *I agree.*

Relief granted.