MALALGODA
v
ATTORNEY-GENERAL AND ANOTHER

SUPREME COURT
SHARVANANDA, J., COLIN-THOME, J., AND SOZA, J.
S.C. APPLICATION NO. 95/82
NOVEMBER 10 AND 12, 1982.

Fundamental Rights – Constitution, Articles 14 and 15(2) – Freedom of speech – Freedom of publication – Restriction on freedom of publication of defamatory material.

The applicant, a writer and poet of 40 years standing and author of several books caused to be published on 17.9.1982 an anthology of poems under the title Nuthana Devadaththa. This anthology was full of diatribes defamatory of not only the President and the Prime Minister but also of members of the public.

On or about 24th September 1982 the Police seized all the publications.

The applicant contended that as a result of this seizure his fundamental right of freedom of speech was violated though it was guaranteed in the Constitution.

Held –

(1) The fundamental right to freedom of speech is subject to such restrictions as the law may impose under the heads mentioned in Article 15(2) of the Constitution.

(2) Freedom of publication means that the applicant may publish whatever will not expose him to a prosecution or a civil action for defamation. The freedom of publication does not include the licence to defame and vilify others.

Cases referred to:

(1) *Cohen v. California 29 U.S. Supreme Court Decisions Lawyer's Ed. – Annotated 2nd Ed. 248*

(2) *Schenck v. United States (1919) 249 U.S. 47, 52*

(3) *Terminiello v. Chicago (1949) 337 U.S. 1, 36, 37*

(4) *Bowman v. Secular Society Ltd., (1917) A.C. 406, 466, 467*

(5) *Babulal Parate v. Maharashtra (1961) A.I.R. SC 884*

(6) *Jang Bahadur v. Principal, Mohindra College (1951) A.I.R. Pep 59*

(7) *Akistan Apena of Iporo v. Akinwande Thomas (1950) A.C. 227, 234*

(8) *Smith v. London Transport Executive (1951) A.C. 555*

APPLICATION alleging infringement of fundamental rights.

V.S.A. Pullenayagam with *Desmond Fernando* and *Miss. D. Wijesundera*, for applicant.

Sunil de Silva, Addl. S.G. with *Suri Ratnapala S.S.C.* for respondents.

Cur.adv.vult.

December 2, 1982

SOZA, J.

The applicant in this case invokes the jurisdiction vested in this Court by Article 126 of the Constitution to hear and determine a question relating to the alleged infringement by the Police of his fundamental right of freedom of speech and expression including publication guaranteed to him by Article 14(1)*(a)* of the Constitution.

The applicant claims he is a writer and poet of over 40 years' standing and the author of several works of literature. He has been the Secretary of the All Ceylon Sinhala Poets Union for the last twenty-five years. On 17th September 1982 he caused to be published an anthology of his poems under the title "Nuthana Devadaththa" a copy of which marked A he has annexed to his application. He has named the Attorney-General as the first respondent and the Inspector General of Police as the 2nd respondent to his application. A perusal of the book A shows that the text has been printed at the Piliyandala Kaviya Printing Press and the cover at the Veyangoda Press. The book carries a foreword written by one Srilal Kodikara Gunapala Senasinghe and is dedicated to Rev. Henpitagedera Gnanaseeha. For the purpose of sale the applicant distributed six hundred copies of this anthology to Messrs. Godage Brothers of Maradana Road, Colombo 11 and four hundred copies to McCallum Book Depot. On or about 24th September 1982 police officers of the Criminal Investigation Department had seized the only two remaining

copies from the Veyangoda Press. On the next day the applicant was interrogated at the fifth floor of Police Headquarters and a lengthy statement by him was recorded. In the meantime the Police led by Inspector Mohan Jayasuriya seized and removed the copies that were with the booksellers and even the copy presented to the writer of the foreword. The applicant requested the return of the books but Inspector Mohan Jayasuriya refused. The applicant then requested the Inspector-General of Police the 2nd respondent to return the books but he too neither returned the books nor gave any reason for failing to return them. The applicant further states that the 2nd respondent has acted in this manner with the intention of interfering with the free and impartial conduct of the Presidential elections and to further the candidature of Mr. J.R. Jayewardene at the Presidential Elections thus contravening Article 93 of the Constitution. The petitioner complains that the action of the 2nd respondent and his subordinates constitutes a violation of his fundamental right to freedom of speech and expression including publication guaranteed to him by Article 14 (1)*(a)* of the Constitution.

The publication Nuthana Devadaththa is replete with scurrilous diatribes defamatory of the President and the Prime Minister and several other public men. Even the winners of the Presidential literary awards have not been spared the barbs of vitriolic invective.

At the hearing before us it is important to observe it was not sought to dispute that the publication is defamatory. The main contention of the applicant however is that the right to think as you will, write as you think and publish what you write is a fundamental freedom guaranteed by the Constitution and cannot be abridged by restraints upon publication. The argument follows to some distance the famous Blackstonian expostition in regard to the freedom of the press:

> "The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity." *Bl. Comm.* IV pp 151, 152.

Blackstone however drew the line where legitimate suppression begins chronologically at the time of publication. But the argument put forward by learned Counsel for the applicant goes even further. The book cannot be seized even after publication though the offence of defamation, if it has been committed, can be punished. To seize and impound the literature which a citizen prints and publishes would be to muzzle the basic freedom of speech and expression including publication entrenched in the Constitution. The publication cannot be barred but if the publication is defamatory the law will take its course and punish the offence.

Learned Counsel for the applicant sought to derive support for his proposition from the American case of *Cohen v California* (1). In this case the defendant Cohen was seen wearing a jacket imprinted with the words "F-k the draft," in the corridor of the Los Angeles County Courthouse. This was Cohen's way of condemning the Selective Service System in the context of the Vietnam war. He was convicted by a California municipal court for disturbing the peace by offensive conduct. The California Court of Appeal affirmed the conviction and rejected defendant's contention that the conviction violated his federal constitutional right to free speech. The California Supreme Court declined review. By a majority decision the United States Supreme Court reversed the conviction.

Justice Harlan who delivered the majority opinion held that one of the prerogatives of the American citizen is the right to criticize public men and measures and that meant not only informed and responsible criticism but the freedom even to speak foolishly and without moderation. The State had no right to cleanse public debate to the point where it would not offend the susceptibilities of the genteel. Although the particular vulgar expression used by the defendant was more distasteful than others of its genre yet it is often true that one man's vulgarity is another man's lyric. So long as there was no exhibition of an intent to incite disobedience to or disruption of the draft, Cohen could not be punished for asserting the inutility or immorality of the draft on his jacket. The State was free to ban the use of "fighting words" inherently likely to provoke violent reaction. But though the four-letter word displayed by Cohen in relation to the draft was not uncommonly employed in a personally provocative fashion, in this instance it was not clearly directed to the person of the hearer. No one who saw Cohen was violently aroused.

But a close examination of the facts of this case shows that when Cohen entered the courtroom itself he removed his jacket and stood with it folded over his arm. The State could not consistently with the Constitution make the simple public display of the single four-letter expletive a criminal offence. Justice Harlan, it is worth mentioning, added the caution that the Constitution did not give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses. And it must be borne in mind in considering this and other decisions that the Constitutional provisions in regard to freedom of speech in America are couched in terms very different from ours. Hence the American decisions afford very limited guidance to us.

It would not be inapposite to examine the American provisions in view of the reliance on *Cohen's* case. The American Constitutional provisions in regard to freedom of speech are found mainly in the First Amendment to the Constitution of the United States of America. The first Amendment was in a package of ten Amendments passed in 1791 and commonly referred to as the Bill of Rights. The First Amendment reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Blackstone's statement of the law is thought by many to have influenced the First Amendment. This Amendment enacts an absolute prohibition. It sets out no restrictions. It was left to the Courts to evolve them. It became evident that if freedom of speech meant liberty to calumniate others, liberty to subvert law and order, liberty to undermine the very foundations of the State, then these very freedoms could become a means to encompass their own destruction. The line had to be drawn somewhere. Holmes J., earlier an exponent of Blackstone's view, drew it in the case of *Schenck v United States* (2) in a famous pronouncement:

> "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic ..... The question in every case is whether the words used are used in such circumstances and are of such a nature as to

> create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

The "clear and present danger" test formulated by Holmes, J. was accepted by many American Judges but Jackson, J. felt this limiting test did not go far enough. In a notable dissent in the case of *Terminiello v Chicago* (3) he pointed out that:

> "Invocation of constitutional liberties as part of the strategy for overthrowing them presents a dilemma to a free people which may not be soluble by constitutional logic alone,"
>
> and "no liberty is made more secure by holding that its abuses are inseparable from its enjoyment."

He then went on to conclude as follows:

> "This court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinnaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."

Later constitution makers profited from the American experience. In many modern Constitutions like the Indian and Sri Lankan Constitutions, fundamental rights are entrenched but with appropriate restrictions. In the Indian Constitution one whole Part comprising Articles 12 to 35 is devoted to Fundamental Rights. Article 19(1)*(a)* of the Indian Constitution provides inter alia "that all citizens shall have the right to freedom of speech and expression." Sub-Article (2) of Article 19 as restrospectively amended by the Constitution

(First Amendment) Act 1951 provides as follows:

> "Nothing in sub-clause *(a)* of clause (1) shall affect the operation of any existing law, or prevent the State from making any law in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

It will be seen that the Indian constitutional provisions in regard to freedom of speech are subject to such reasonable restrictions as the law may have imposed or may impose under the sub-heads spelt out in Article 19(2). The limiting provision of "reasonable restrictions" was probably inspired by Lord Sumner's celebrated dictum in the House of Lords decision in *Bowman v Secular Society Ltd* (4) where the question was whether the propagation of anti-Christian doctrines constituted the offence of blasphemy:

> "The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before ..... The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact. I desire to say nothing that would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that, experience having proved dangers once thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion, as known to the law, which prevents us from varying their application to the particular circumstances of our time in accordance with that experience."

Seervai in his *Commentary on the Constitutional Law of India* 2nd Ed (1975) 1261 pp. 347, 348, has, on the question of freedom of speech and expression, emphasised the distinction between the Indian and the American Constitutions. Pre-censorship and preventive action were constitutionally permissible in India but not in America. The 'clear and present danger' test of Holmes, J. was rejected by the Supreme Court of India in the case of *Babulal Parate v Maharashtra* (5). The test was already provided in the Indian Constitution – the reasonableness of the restriction. In fact the Indian Courts have even broadened the scope of the heads of restrictions to freedom of speech adumbrated in the Constitution. Seervai (ibid) p 353 refers to the case of *Jang Bahadur v Principal, Mohindra College* (6) where Teja Singh, C.J. held that apart from the qualifications contained in clauses (2) to (6) of Article 19, there was the further qualification that the rights conferred by Article 19(1) must not violate the rights of others. In that case, the petitioner had written a highly defamatory circular defaming among others, the respondent, who was the Principal of the College in which the petitioner was studying. The respondent rusticated the petitioner, who contended that such rustication violated the freedom of speech guaranteed to him under Article 19(1)*(a)*. In rejecting the contention the court said that the rights conferred by Article 19(1) were subject to the qualification that they did not violate the rights of others. Article 19(1)*(a)* did not entitle the petitioner to defame the respondent and the action taken by the respondent was in the interest of discipline and did not violate Article 19(1)*(a)*.

Our Constitutional provisions in regard to freedom of speech are similar to but not quite the same as the Indian provisions. In Sri Lanka freedom of speech whether it be the spoken, the written or the printed word is guaranteed by Articles 14(1)*(a)* and 15(2) of the Constitution appearing in Chapter III on the subject of Fundamental Rights. Article 14(1)*(a)* declares that "every citizen is entitled to the freedom of speech and expression including publication." Article 15(2) however stipulates that "the exercise and operation of the fundamental right declared and recognized by Article 14(1)*(a)* shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence."

It will be seen that the limitations to the right of freedom of speech are in Sri Lanka prescribed in more absolute terms than in

India. In Sri Lanka the *operation and exercise* of the right to freedom of speech are made *subject to* restrictions of law not qualified by any test of reasonableness. Neither the validity nor the reasonableness of the law imposing restrictions is open to question unlike in America or India. This is not to say of course that the Court should not be reasonable in applying the law imposing restrictions. Freedom of speech in Sri Lanka therefore is *subject to* such restrictions as the law may impose under the heads mentioned in Article 15(2). What is the significance of the words "subject to"?

The phrase "subject to" as used in legislation came up for interpretation in the Privy Council case of *Akistan Apena of Iporo v. Akinwande Thomas* (7). Lord Simonds delivering the judgment of the Board expressed the view that the words " 'subject to' are equivalent to 'without prejudice to.' " In the case of *Smith v London Transport Executive* (8) the House of Lords had to consider the meaning of the expression "subject to" as it appeared in the Transport Act 1947. By section 1 of this Act the British Transport Commission was set up. Section 2 spelt out the powers conferred on the Commission "subject to the provisions of this Act." Lord Simonds in his speech from the Woolsack explained that these words enact that the powers given are subject to restrictions or limitations found elsewhere in the Act and went on to say at p. 569:

> "The words 'subject to the provisions of this Act' ..... are naturally words of restriction. They assume an authority immediately given and give a warning that elsewhere a limitation upon that authority will be found."

In the same case (p.577) Lord MacDermott in his speech said that the expression "subject to" "is commonly used to avoid conflict between one part of an enactment and another."

The language of Article 15(2) of our Constitution makes it clear that the fundamental right of freedom of speech can only be exercised subject to the limitation that there can be no transgression of the restrictions prescribed in Article 15(2). So far as concerns the case before us freedom of publication means that the applicant may publish whatever will not expose him to a prosecution or a civil action for defamation. In exercising his fundamental right of freedom of publication he cannot shake off the contraints imposed by law. The freedom of publication does not include the licence to defame and vilify others.

There is therefore no merit in the complaint that the applicant's fundamental rights have been infringed by the seizure of his book Nuthana Devadaththa by the Police. The application is accordingly dismissed with costs.

SHARVANANDA, J. – I agree.

COLIN-THOMÉ, J. – I agree.

Application dismissed