

**SEETHA
V.
SHARVANANDA AND OTHERS**

COURT OF APPEAL

S.N. SILVA J.

C.A. 43/83 WITH H.C.A. 310/87

JUNE 7, 1988.

Habeas Corpus application — Right of Attorney-General to appear.

Under our law the Attorney-General is empowered to defend public officers in civil actions and to secure the acquittal of public officers in criminal prosecutions. The possibility that the proceedings may result in a public officer being prosecuted and punished cannot debar the Attorney-General from appearing for him.

Cases referred to :

- (1) *Attorney-General v. Independent Broadcasting Authority* [1973] 1 All ER 689
- (2) *Gouriet v. Union of Post Office Workers and others* [1977] 3 All ER 70
- (3) *Land Reform Commission v. Grand Central Ltd.* [1981] 2 Sri LR 147 (CA), SC Minutes of 16.9.1981 — Nos. 36/81 and 37/81 (SC)
- (4) *Vettivelu v. Wijeratne* 60 NLR 44

Application for an order regarding right of Attorney-General to appear for a public officer who is a respondent in a Habeas Corpus application.

H.L. de Silva P.C. with *Suriya Wickramasinghe, Sanath Jayatilleke, Lalitha Senarathne* and *Tilak Balasuriya* for the petitioner.

R. Arasakularatne S.S.C. for respondents.

Cur. adv. vult.

July 22, 1988

S. N. SILVA, J.

The Petitioner has filed this application for a ruling and, a direction, to be given by this Court to the Chief Magistrate, Colombo, that State Counsel on behalf of the Attorney General shall not appear and defend the 1st Respondent, A.E. Sharvananda (Officer-in-charge, Police Station, Kotahena), at the

inquiry being held by the Chief Magistrate in terms of the proviso to Article 141 of the Constitution: The application stems from an order made on 10-11-1987 by the Chief Magistrate overruling an objection taken by the Counsel for the Petitioner, to a Senior State Counsel appearing for the 1st Respondent at the said inquiry.

On 26-8-1983, the Petitioner filed an application No. H.C.A. 43/83 for a writ of Habeas Corpus in respect of her husband, named as the 2nd Respondent (the corpus). The 1st and 3rd Respondents, the O.I.C. and I.G.P. were parties to this application. The affidavit of the Petitioner filed in that application states inter alia that on 27-7-1983 at about 10 p.m. the 1st Respondent came with two other Police Officers, broke open the door of the house and dragged the corpus away to a jeep that was parked outside the house. The application was supported on 31-8-1983 and the Court issued notice on the 1st and 2nd Respondents and directed that the corpus be produced in Court. On 6-9-1983, State Attorney filed the proxy of the 1st and 3rd Respondents together with their affidavits. The 1st Respondent in his affidavit denied the allegations contained in the Petitioner's affidavit and stated that he was at another place at the time in question. When the case was mentioned before this Court on 7-9-1983 a Senior Attorney appeared for the Petitioner and a Senior State Counsel appeared for the 1st and 3rd Respondents. In view of the contents of the affidavits filed by the Respondents, Counsel for the Petitioner moved that the matter be referred for an inquiry and report to the Chief Magistrate Colombo. The Court, on this application, made a direction to the Chief Magistrate Colombo in terms of the proviso to Article 141 of the Constitution. It is to be noted that counsel for the Petitioner took no objection to the 1st and 3rd Respondents being represented by Senior State Counsel although, the allegation of the Petitioner and denial of the 1st Respondent were done in the form of affidavits by that stage.

The inquiry commenced before the Chief Magistrate on 4-10-1983. The Petitioner was represented by Counsel and the 1st and 3rd Respondents were represented by a Senior State Counsel. Thereafter the inquiry was held on 31 days during the

period 5-10-1983 to 3-4-1984. At the conclusion of the hearing of evidence, Counsel for the Petitioner and Senior State Counsel for the 1st and 3rd Respondents filed written submissions. It is to be noted that no objection was taken at any stage of the inquiry to the Senior State Counsel appearing for the 1st and 3rd Respondents.

The Chief Magistrate submitted his report to this Court on 27-11-1984. At the hearing before this Court and later before the Supreme Court, a Deputy Solicitor General appeared for the 1st and 3rd Respondents without any objection being taken by the President's Counsel who appeared for the Petitioner.

The Supreme Court by its order dated 26-8-1987 held " that the inquiry and the finding of the learned Magistrate are unsatisfactory for a number of reasons ". It is significant that the appearance of a Senior State Counsel for the 1st and 3rd Respondents is not noted by the Supreme Court, as being an unsatisfactory feature. The Supreme Court held that the issue in the case is considerably wider than what was envisaged by the Magistrate and made order as follows :

" We therefore quash the order of the Court of Appeal and the connected inquiry and findings of the learned Magistrate and direct that a full inquiry into the real issues in this case be held, namely, whether or not the 1st Respondent and or other police officers abducted the corpus. The Magistrate in his discretion would be entitled to record any evidence which he considers relevant and necessary to decide this issue apart from the material submitted by the parties.

We expect the Inspector General of Police to give all assistance to the Court to help the Magistrate to arrive at a finding in this matter. "

At the commencement of the new inquiry, on 10-11-1987, Counsel for the Petitioner, for the first time, objected to Senior State Counsel appearing for the 1st Respondent.

At the hearing of this application, Counsel for the Petitioner relied on the following grounds to support the objection to a State Counsel appearing for the 1st Respondent :

- (1) That in terms of the order of the Supreme Court, the I.G.P. has to give all assistance to the Court to help the Magistrate to arrive at a finding in this matter. It was submitted that a conflict of interests would arise in the Senior State Counsel appearing for the I.G.P. and the 1st Respondent. The role of the I.G.P. is to assist Court whereas the 1st Respondent has to defend himself in respect of the allegations made against him by the Petitioner.
- (2) That the Attorney General has to act in the public interest considering the extensive statutory power vested in him in the administration of justice especially in the area of criminal matters. Therefore, from a broader perspective, there is a conflict of duty in the Attorney-General representing the purely partisan interests of the 1st Respondent whose sole concern is to defend himself against the allegation made by the Petitioner.

As regards the first ground of objection, Senior State Counsel submitted that there is no conflict of interest between the I.G.P. and the 1st Respondent. The I.G.P. was cited as a Respondent by the Petitioner. In the prayer to the petition relief is sought against both Respondents. Further, the I.G.P. filed affidavit dated 6-9-1983 and also produced the affidavits of the Detective Superintendent of Police (Colombo North) and of the Assistant Superintendent of Police (Colombo North II) marked 3R1 and 3R2. On the basis of the material contained in these affidavits, the I.G.P. has specifically stated that he is satisfied that the corpus was not arrested or detained by any officer attached to Kotahena Police. Thus, it is seen that on the material placed before Court there is no conflict of interest between the 1st Respondent and the I.G.P. The order of the Supreme Court referred to above does not result in such a conflict. The I.G.P. is expected to assist the Court in the sense of complying with the directions given by the Magistrate and producing all documents and information necessary for a proper inquiry. The fact that a Senior State Counsel represents the I.G.P. and the 1st Respondent at the inquiry, cannot detract from the discharge of this duty by the I.G.P.

The 2nd ground of objection is based on a much broader perspective and relates to the role of the Attorney General in the administration of justice and the statutory power that is vested in him.

To support the proposition that the Attorney-General must act in the public interest, Counsel cited the judgment of the Court of Appeal in England, in the case of *Attorney-General v. Independent Broadcasting Authority* (1) Lord Denning made the following observation with regard to the role of the Attorney-General, (at p. 697).

“ It is settled in our constitutional law that in matters which concern the public at large the Attorney-General is the guardian of the public interest. Although he is a member of the government of the day, it is his duty to represent the public interest with complete objectivity and detachment. He must act independently of any external pressure from whatever quarter it may come. As the guardian of the public interest, the Attorney-General has a special duty in regard to the enforcement of the law. ”

Counsel also cited certain dicta of the House of Lords in the case of *Gouriet v. Union of Post Office Workers and others* (2). Both cases arose from the Attorney-General's refusal to institute relater actions. A relater action is a type of action which has existed from the earliest times in England and is one in which the Attorney-General on the relation of individuals, including local authorities or companies, brings an action to assert a public right. It is on this basis the Courts have observed that the Attorney-General is the guardian of the public interest. The relater proceeding which is deeply rooted in English common law does not form part of our law. Therefore, the observations made in the English decisions do not constitute a proper guide to the description of the role of the Attorney-General in Sri Lanka.

In support of the same ground, Counsel next relied on the judgments of this Court and of the Supreme Court in the case of *Land Reform Commission v. Grand Central Ltd.* (3). In that case the Attorney-General appeared in his private capacity as an Attorney-at-law, for the Land Reform Commission in an application for leave to appeal against an order of a District Court. Counsel for the Respondent raised a preliminary objection to the Attorney-General appearing in his private capacity. It was contended that in view of the status and functions of the

Attorney-General under our Constitution he has a right of audience in our Courts only in his official capacity. The Attorney-General claimed that in terms of section 41 (1) of the Judicature Act, No. 2 of 1978 and Article 14(1) (g) of the Constitution he had a right to appear as an Attorney-at-law for any party who has engaged his services. This Court and the Supreme Court held ; firstly, that every Court has an inherent power to regulate its procedure in the interests of justice and a fair and expeditious trial and in the exercise of that power may refuse the right of audience to any Attorney-at-law for good reason, secondly, that the holder of the office of Attorney-General should be heard by Court only in his official capacity and that the Attorney-General cannot serve both state and private litigant.

It is significant that no objection was raised in respect of a Deputy Solicitor General and a State Counsel who appeared in the same case for the same party as Attorneys-at-law. Therefore, the ratio of the *Grand Central* case is limited to the finding that the holder of the office of Attorney-General can appear for any party to a proceeding before Court only in his official capacity. In the proceeding that is pending before the Magistrate's Court, Senior State Counsel is appearing in his official capacity and is representing the 1st Respondent who is a public officer yet in service. Therefore, the ratio in the *Grand Central* case does not constitute an authority for the proposition that the Senior State Counsel should be denied a right of audience in this proceeding.

In Sri Lanka the Attorney-General is the Chief Law Officer of the State. He advises the Executive comprising inter alia of public officers. Section 463 of the Civil Procedure Code empowers the Attorney-General to undertake the defence of a public officer in a civil action. In such event the Attorney-General is substituted in place of the public officer, as defendant. In the case of *Vettivelu v. Wijeratne* (4), the Supreme Court held that without recourse to the procedure in section 463, the Attorney-General could nominate one of the officers to defend a public officer in a civil action. In such event, the State will satisfy the judgment if entered against such public officer. In criminal matters the position is different. The Attorney-General does not appear for the defence of any person charged with the commission of an offence. However, section 191 of the Code of Criminal Procedure Act No. 15 of 1979 recognises the right of the

Attorney-General to appear for the prosecution in a " private plaint " (complaint in terms of section 136 (1) (a)) filed against a public officer " in respect of a matter connected with or relating to the discharge of the official duties " of such public officer. In so appearing, the Attorney-General may offer no evidence and thereby secure the acquittal of the public officer who is accused. Thus it is seen that under our law the Attorney-General is empowered to defend public officers in civil actions and to secure the acquittal of public officers in criminal prosecutions. Whether such power should be exercised or not is a matter within the discretion of the Attorney-General. Counsel for the Petitioner has not cited any instance where the exercise of this discretion lying with the Attorney-General has been interfered with by a Court.

Further, in support of the second ground of objection, Counsel for the Petitioner submitted that the inquiry before the Magistrate could result in a finding against the 1st Respondent which could in turn lead to an investigation and/or prosecution of the 1st Respondent for the commission of offences against the corpus. He referred to the particular issue posed in the order of the Supreme Court : " whether or not the 1st Respondent and/or other police officers abducted the corpus. " If the answer to this issue is in the affirmative against the 1st Respondent, it would be a clear finding that the 1st Respondent has committed certain offences. He further submitted and rightly so, that the Attorney-General is vested with extensive power with regard to the investigation, prosecution and termination of prosecution, in criminal matters. Therefore, the appearance of a Senior State Counsel for the 1st Respondent would be in conflict with a proper discharge of the statutory functions of the Attorney-General and would result in an erosion of public confidence in the administration of justice.

Indeed, there is some merit in this submission. On the other hand, it is based on a speculative premise, that the inquiry may result in certain findings that may in turn lead to the exercise of statutory power by the Attorney-General. The affidavit filed by the Petitioner about five years ago clearly discloses the commission of certain offences by the 1st Respondent. The Petitioner has not

thought it fit to institute a prosecution against the 1st Respondent in terms of section 136 (1) (a) of the Code of Criminal Procedure Act in respect of these offences. Instead of which, the Court is now invited to deny the right of audience to a Senior State Counsel on the basis of a possible prosecution at some future date. This aspect of the matter and the fact that no objection was taken to the appearance of the Senior State Counsel during the past five years militate against the submission made by the Counsel for the Petitioner.

Senior State Counsel submitted that the inquiry before the Magistrate cannot result in the imposition of any punishment or liability against the 1st Respondent. As a matter of practice, in Writ applications, officers of the Attorney-General's Department represent the Executive (viz. Ministers, Public Officers) in this Court. The proviso to Article 35 (3) of the Constitution specifically provides that proceedings relating to the exercise of ministerial functions by the President shall be instituted against the Attorney-General. Thus, the Constitution itself has recognised and incorporated, to a certain extent this practice. The fact that serious allegations are made in such proceedings against members of the Executive which may or may not result in future criminal actions against such persons, cannot by itself debar the Attorney-General from representing them. If such proceedings disclose material implicating a member of the Executive with having committed any offence, at that stage, the Attorney-General should consider the material and exercise his statutory powers with customary objectivity and detachment. It is not necessary, for this Court to impose objectivity and detachment on the Attorney-General, in advance.

Accordingly, the Petitioner fails in this application. The application is refused. The Chief Magistrate is directed to proceed with the inquiry.

Application refused.