

FERNANDO

v.

ATTORNEY GENERAL AND ANOTHER

SUPREME COURT,
SAMARAKOON, C.J.,
WANASUNDERA, J.,
AND VICTOR PERERA, J.
S.C. APPLICATION NO. 2 OF 1983,
FEBRUARY 24 AND 25, 1983.

*Violation of Fundamental Rights - Articles 10, 11, 13
(1) (b) of the Constitution - Section 45 of the Referendum
Act No. 7 of 1981 - Section 77(1) and (3) of the Police
Ordinance.*

The petitioner, sought a declaration stating that the Respondents (the police) violated his fundamental rights of freedom of thought and conscience, subjected him to cruel, inhuman and degrading treatment and punishment, illegally

arrested him and did not inform him of the reason for such arrest and violated his fundamental right of freedom of speech. He further stated that at the time of his arrest he was attending a peaceful assembly and one day fast to protest against the detention of three Christian clergymen, a doctor, a University lecturer and his wife.

The Petitioner also stated that though they planned to go in procession to the premises of the Young Men's Hindu Association, on being warned by the Police they decided that the fast be staged at the church premises.

The respondents stated that the petitioner and others were members of an illegal procession on the Horowpatana Road and that when action was taken to disperse this procession violence erupted and, therefore, these people, including the petitioner were taken into custody and produced before the Magistrate.

The main questions were,

- 1 (a) whether there was a procession?
(b) if so was it on the road to Horowpatana?
(c) was this an illegal procession ?
- 2 Whether the police had rights and powers to act in the way they acted ?

HELD

(1) There was a procession which entered the Horowpatana Highway and proceeded some distance before it was blocked by a posse of policeman. Under Section 45 of the Referendum Act No.7 of 1981 and Section 77 (3) of the Police Ordinance, it was an illegal procession.

(2) The police had the power to act in the way

they did and it does not matter if they purported to do it in reference to the wrong provisions of law.

Application under Article 126 of the Constitution.

Cases referred to:

— (Vijaya Kumaranatunga vs. G.V.P. Samarasinghe - (1983)

V.S.a. Pullenayagam, with S.C. Chandra Hasan, S. Perinpanayagam, C.V. Vivekanandan, Miss. M. Kanapathipillai, Miss. D. Wijesundera, and Miss. N. Fernando for petitioner.

Upawansa Yapa, Senior State Counsel with C.R. de Silva, State Counsel for Attorney-General.

Cur.adv.vult.

March 16, 1983.

SAMARAKOON, C. J.,

The Petitioner Dr. S.N.Fernando complains that the 2nd, 3rd and 4th Respondents have violated his fundamental rights:

- (a) of freedom of thought and conscience, declared, recognised and guaranteed under Article 10 of the Constitution.
- (b) not to be subject to -
 - (i) degrading treatment,
 - (ii) cruel treatment, both declared, recognised and guaranteed under Article 11 of the Constitution;
- (c) (i) not to be arrested except according to procedure established by law, and
 - (ii) when arrested to be informed of the reasons for his arrest both declared, recognised and guaranteed under Article 13(1) of the Constitution;

- (d) of freedom of peaceful assembly, declared, recognised and guaranteed under Article 14 (1) of the Constitution.

The Petitioner is a Registered Medical Practitioner attached to the Base Hospital, Vavuniya since 1967. He is a citizen of Sri Lanka. The 2nd, 3rd and 4th Respondents are Police Officers attached to the Police Station, Vavuniya. At the relevant time the Army held three Christian Clergymen, a Doctor, a University Lecturer and his wife in detention in the Army Camp. They had been arrested under the provisions of the Prevention of Terrorism Act. Such detention led to protests from the public in places in the Northern Province. Vavuniya was one such place. The Petitioner states that on 15-12-82 at about 9.35 a.m. he arrived at the Rambaikulam St. Anthony's Church to join in a one day fast organised by the Sudhananda Young Men's Hindu Association of Vavuniya, the Gandiyan Organisation and other religious bodies to protest against the continued detention of the priests and the other detainees. Dr. Rajasunderam who was the Organising Secretary of the Gandiyan Society was the organiser of the fast. The arrangement was that the participants should gather at the said church at 9.00 a.m. and thereafter go in procession to the premises of the Young Men's Hindu Association to stage the fast. The Petitioner became aware that morning that Dr Rajasunderam had been summoned to the Police Station by the 2nd Respondent and had been informed that the proposed procession would not be permitted. Dr Rajasunderam discussed this with the others on his return to the Church premises and after discussion it was decided that the fast should be staged at the Church premises. The participants then squatted on the Church compound and the lawn facing the gate. The fast then commenced and devotional songs were being sung. The Petitioner was seated on the lawn. The Assistant Superintendent of Police, the Headquarters

Inspector and other armed police personnel were standing on the road and the fast went on peacefully. At about 10.45 a.m. the 2nd Respondent came to the Church in a jeep and got down at the entrance. Shortly thereafter, without any warning at all, the 3rd Respondent and other policemen "suddenly came into the Church compound, baton charging, assaulting, kicking and trampling the participants who were peacefully seated in the Church compound". He heard gun shots and tear gas shells landed in the compound. Women and children were assaulted and they took shelter inside the Church. The Petitioner says that he too went inside the Church. When he was standing by the altar the 3rd Respondent, on seeing him, came running towards him uttering abuse, assaulted him with a baton, dragged him to the road and put him into the police jeep. He was assaulted and abused by the 4th Respondent in the jeep and driven to the Police Station where also he was assaulted. Late in the evening he with eight others were produced before the Acting Magistrate and released on bail. This in short is the case of the Petitioner as narrated by him in the petition and affidavit. The Petitioner seeks a declaration that the 2nd to 4th Respondents -

- (a) violated his fundamental right of freedom of thought and conscience,
- (b) subjected him to cruel, inhuman and degrading treatment and punishment,
- (c) illegally arrested him and did not inform him of the reason for such arrest,
- (d) violated his fundamental right of freedom of speech.

The Respondents deny these allegations. They state that the Petitioner and others were members of an illegal procession on the Horowpatana Road and that when action was taken to disperse this procession violence erupted. The police were pelted

with stones. One policeman was injured and two jeeps damaged. Tear gas was thrown in the process and several people, including the Petitioner, were arrested and produced before the Magistrate.

Counsel for the Petitioner characterised this version of the Respondents' as completely false. He contended that the gathering inside the Church compound was a peaceful assembly and such assembly was attacked by the police for no rhyme or reason and without any right or power to do so.

The first question I have to decide is whether there was a procession and if so, was it on the road to Horawpatana? There is no doubt that the prime object of those who gathered in the Church compound was to go in procession along the highway to the Young Men's Hindu Association premises. This is admitted by the Petitioner and Dr. Rajasunderam. The Doctor was told this could not be permitted. In view of that ban the Doctor states the people squatted peacefully in the compound and began the fast. They state that no one squatted beyond the entrance to the Church. The Respondents state that at about 10.00 a.m. the procession entered the highway from the Church compound and it was blocked by the police. The people then squatted on the road. This is denied by the Petitioner and Dr. Rajasunderam. They would have us believe that all intentions to go in procession had been abandoned, the fast was in fact commenced at the Church premises and the participants were seated peacefully within the Church premises. No attempt whatsoever was made, they state, to get a procession moving. It is here that the statement of Rev. Alban Rajasingham, Parish Priest of St. Anthony's Church becomes relevant. It throws considerable light on the controversy and even Counsel for the Petitioner sought to rely on it to prove that those within the Church premises who were baton charged were members of a peaceful assembly. The relevant portion of this statement (3R3) reads as follows:-

"Today the managing Committee of the Hindu Youth Front of Vavuniya decided to have a procession and to proceed to the Hindu Society hall at Vavuniya to fast as a mark of protest against the arrest of the members of the clergy and others by security forces under the terrorist act. Permission was granted by the church to assemble in the church premises. Today at about 9.00 a.m. when I was at the church some people assembled inside the church premises and they were getting ready to leave the church premises in a procession. As far as I know Dr. Rajasunderam was the chief organiser for the fast and he too was present by that time H.Q.I. Vavuniya came and told Dr. Rajasunderam that S.P. wanted to speak to him. Dr. Rajasunderam accompanied H.Q.I. Vavuniya. Little later Dr. Rajasunderam came to the church. At the same time a reinforcement of Police Officers came there and stood on the road opposite the church. When the procession was about to leave the church premises. the Police warned the members in the procession not to get out to go in a procession. In spite of the Police warning the members in the procession tried to get out and when the Police Officers prevented them in going in a procession, most of the members in the procession sat on the ground. I went up to the church and sat on the stairs leading to the church."

It is clear that from 9.00 a.m. the assembled persons were making ready to leave the church in a procession. When the procession was about to leave the premises the police officers who were standing on the road opposite the Church warned them not to get out. In spite of the warning they tried to get out and the police blocked them. They then squatted on the ground. This gives the lie to the story of the Petitioner and his witnesses that no attempt

was made to get out of the Church premises and that, on the contrary, all intentions of going in procession had been abandoned on Dr. Rajasunderam's return from the Police Station. This statement of the priest compels me to reject the version of the Petitioner and his witnesses and to accept the version of the Police. I accept the Police version that the head of the procession entered the Horowpatana Highway and proceeded some distance before it was blocked by a posse of policemen. They then squatted on the highway and the Church compound and were so seated for about an hour till about 11.00 a.m. with no interference from the Police. At 11.00 a.m. they made another attempt to continue the procession despite warnings from the Headquarters Inspector. Then tear gas was used to disperse them. The processionists then pelted stones at the Police and caused injury to one policeman and damaged 2 jeeps parked on the highway. The Police then went into the Church premises and arrested the Petitioner and some others who they say were organisers. A report made by the Assistant Superintendent of Police (2R4) to the Superintendent of Police (2nd Respondent) on 16-12-82 and the entry made by the Superintendent of Police (2R2) in the Officers' Visit Book at 12.15 p.m. on 15-12-82 (the day of the incident) corroborate the version of the 3rd and 4th Respondents. When the Superintendent of Police visited the scene he found stones, placards and slippers strewn on the road and noticed the damage on the jeeps. I am unable to accept the version of the Petitioner and his witnesses and therefore reject them. Counsel for the Petitioner argued that in any event the Police had no right or power to enter the Church premises and arrest persons within such premises as those in the Church compound comprised a peaceful assembly. I cannot accept this. There is no doubt that they were all part of the procession, the head of the procession was on the highway and the rear of it was in the Church compound. They were part and

parcel of one procession. The tail cannot disown the head when it suits it.

Was this an illegal procession? Section 45(a) of the Referendum Act, No.7 of 1981 reads thus-

"45. No person -

(a) shall, at any time from the date of publication of the Proclamation in respect of a Referendum and ending on the day immediately following the date on which the result of the poll taken at such Referendum is declared, conduct, hold or take part in any procession, other than a procession on May 1 in the year, or any procession for religious or social purposes.

Every person who contravenes any of the preceding provisions of this section shall be guilty of an offence and shall, on conviction after summary trial before a Magistrate, be liable to a fine not exceeding one hundred rupees, or to imprisonment of either description for a term not exceeding one month, or to both such fine and imprisonment."

A Referendum had been declared and polling was to take place on 22-12-1982. The procession was therefore an illegal one.

Counsel however contended that this case must be judged solely on the basis that the Police acted on the basis of Emergency Regulations and that the persons arrested were charged for committing an offence under section 12(1) of the Emergency (Miscellaneous Provisions and Powers) Regulation Part 3 of 1982 published in Gazette No.219/21 of November 20, 1982. Admittedly those Regulations were not in force at the time and the charge was to that extent incorrect. But that does not mean that the procession was legal. It was illegal in terms

of section 45 of the Referendum Act, It was also illegal because no notice of it had been given to the Police in terms of section 77(1) of the Police Ordinance (Cap.53) and the organisers were thereby guilty of an offence (section 77(3)). These sections were quoted by the Assistant Superintendent of Police in his report to the Superintendent of Police (2R4) on 16-12-1982. The error is a *bona fide* one and does not by any means vitiate proceedings or by any stretch of imagination make the procession other than an illegal one. The Police had the power to act in the way they did and it does not matter if they purported to do it in reference to the wrong provisions of law. (Vijaya Kumaranatunga vs .G.V.P.Samarasinghe et al S.C 121/82 - Minutes of 3-2-1983).

There are the further allegations of violation of freedom of thought and conscience, of cruel, inhuman and degrading punishment. These were not substantiated and not pursued in the course of the argument. In regard to the allegation of failure to inform the Petitioner of the reason for his arrest Counsel pointed to the fact that the reason given was that of participation in a procession made illegal by an Emergency Regulation which was not in force at the time. The Petitioner was informed that he was part of an illegal procession and that is sufficient reason for the arrest. The Police do not have to quote chapter and verse from statutes and legal literature to justify the arrest. There is no obligation on the Police to quote the law applicable.

I dismiss the petition with costs.

WANASUNDERA, J. I agree.

VICTOR PERERA, J. I agree.

Application dismissed.