

JIFFRY
v.
NIMALASIRI AND FIVE OTHERS

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
ANANDACOOMARSWAMY, J. AND
SHIRANI BANDARANAYAKE, J.
S.C. NO.507/95
DECEMBER 16, 1996.

Constitution – Article 13(1) – Arrest – whether proper procedure has been followed – Section 23(1), and 32(1)b of the Code of Criminal Procedure Act.

The petitioner has alleged that his arrest was not according to the provisions of the Code of Criminal Procedure Act (Code) nor under any other law and thereby his arrest was not according to the procedure established by law. It was contended that –

- (a) he was taken into custody without a warrant;
- (b) he was not informed of the reason for his arrest;

Held:

(1) The plaint submitted that the petitioner is to be charged for (i) Criminal Trespass (ii) Criminal Intimidation. Under the Code a person who is suspected of Criminal Intimidation shall not be arrested without a warrant. However a person who is suspected of Criminal Trespass may be arrested without a warrant. Therefore when the Police took him into custody without a warrant they had acted lawfully and with authority on reasonable grounds.

(2) The respondents stated that the petitioner was informed of the reasons for the arrest. The petitioner too has made a complaint to the Kohuwela Police on 8.8.95, in that complaint, he explained the incident which took place on 24.07.1995. The events that took place on 24.07.1995, have led the petitioner to a position where he would have known that sometimes or other the Police would contact him. The affidavit of the 2nd respondent explains that the compliant against the petitioner relates to Assault and Criminal Trespass.

The only evidence to the contrary is the affidavit by the petitioners wife which was affirmed to after a lapse of 7 months.

On a scrutiny of the entirety of the material, it would appear that the case resolves itself to one of "word against word", the burden of proof lies clearly on the petitioner.

APPLICATION under article 126 of the Constitution.

Cases referred to:

1. *Sirisena and Others v. Earnest Perera* – 1991 – 2 SLR 97 at 108
2. *Channa Peiris and Others v. Attorney-General and Others* – 1994 – 1 SLR 2
3. *Piyasiri and Others v. Nimal Fernando, A.S.P. and Others* 1988 – 1 – SLR 173 at 183.

G. Jayakumar for the petitioner

Suhada Gamlath S.S.C., for respondents.

Cur adv vult.

January 24, 1997.

SHIRANI A. BANDARANAYAKE, J.

The petitioner, who is a businessman, alleges that he was taken by the 2nd respondent around 10.30 p.m. on the 9th August, 1995 to the Kohuwela Police Station in a Police Jeep. At the Kohuwela Police Station, the petitioner was informed by the 2nd respondent that the Pettah Police wanted him arrested and the 1st respondent had directed the 2nd respondent to keep the petitioner inside the cell at the Kohuwela Police Station. On the 10th August, 1995 around 10.30 a.m., the 3rd respondent, a police officer attached to the Pettah Police Station, took charge of the petitioner from the Kohuwela Police Station. While he was inside the cell at the Pettah Police Station, the 4th respondent appeared before him around 10.30 p.m. on the 10th August, 1995 and told him that he should give a written undertaking that he will not create trouble to a person by the name of Sahabdeen. A bail bond was signed and he was released on the 10th August, around 10.30 p.m..

The petitioner alleges that his arrest was not according to the provisions of the Code of Criminal Procedure Act nor any other law and thereby his arrest was not according to the procedure established by law. He claims that 1st to the 5th respondents have infringed his rights under Article 13(1) of the Constitution.

The main contention advanced on behalf of the petitioner is that respondents did not arrest him according to the procedure laid down by law. Accordingly, it is submitted that –

- (a) he was taken into custody without, a warrant;
- (b) he was not informed of the reasons for his arrest.

Section 23(1) of the Code of Criminal Procedure Act states that –

"In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested"

It was submitted that the police officers who arrested the petitioner had no warrant for his arrest. It is important to consider the events that took place prior to the arrest of the petitioner as it seems that the arrest was one incident in a sequence of events, in which the petitioner was involved.

On the 24th July, 1995 a person named, Mustapha Mohamed Sahabdeen, made a complaint (4R1) at the Pettah Police Station. He had stated that the petitioner had come to his office situated at no. 213, Main Street, Colombo 11 around noon on 24th July and threatened him that if he does not pay his money that he would either kill him or abduct him. Sahabdeen had also stated that he has not got petitioner's address with him but he would furnish it later. Sahabdeen made a request to the Police to have an inquiry in regard to this dispute in order to settle it.

On the 9th August, 1995 around 2.30 p.m. the O.I.C., Pettah had sent a radio message (1R1) to the Kohuwela Police that the petitioner is needed at the Pettah Police Station as he is a suspect in an allegation of Criminal Trespass and Criminal Intimidation. On the same day at 10.42 p.m. a message (1R2) was sent to the Pettah Police Station by O.I.C. Kohuwela requesting them to send an officer to take charge of the petitioner who has been arrested.

The question for decision is whether in these circumstances the proper procedure laid down by law has been followed in respect of the arrest of the petitioner. In this regard, a basic allegation put forward by the petitioner against the respondents is that the petitioner was arrested without a warrant. The plaint submitted to the Magistrate's Court, Colombo on the 23rd August, 1995 which is produced as 4R3 states that the petitioner is to be charged for -

- (a) Criminal Trespass; and
- (b) Criminal Intimidation.

According to Section 32(1) (b) of the Code of Criminal Procedure Act -

"Any peace officer may without an order from a Magistrate and without a warrant arrest any person - who has been concerned in any cognizable offense or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned".

Furthermore, under the Code of Criminal Procedure Act a person who is suspected of Criminal Intimidation shall not be arrested without a warrant. However, a person who is suspected of Criminal Trespass may be arrested without a warrant. A complaint was made against the petitioner, and the petitioner was charged both for Criminal Trespass and Criminal Intimidation. Therefore, when the police took him into custody without a warrant, they had acted lawfully and with authority on reasonable grounds.

The second allegation by the petitioner is that he was not informed of the reason for his arrest. The petitioner contends that thereby his fundamental rights guaranteed and protected by Article 13(1) of the Constitution have been infringed. Article 13(1) states that -

"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest"

In order to support his argument, the petitioner has relied on *Sirisena and Others v. Earnest Perera* ¹, where it was stated (by Fernando J.)

"Article 13(1) thus contains a prohibition on deprivation of liberty – no person shall be arrested. However, there is an exception, that such deprivation of liberty may be effected "according to the procedure established by law", (and this is certainly more restrictive than the phrase "except in accordance with the law") Further, even if a person is arrested in accordance with the procedure established by law, he must nevertheless be informed of the reason for his arrest."

The petitioner also relied on *Channa Peiris and Others v. Attorney-General and Others*⁽²⁾, where it was stated, (by Amerasinghe J.)

"The right to be deprived of personal liberty except according to a procedure established by law is enshrined in Article 13(1) of the Constitution. Article 13(1) prohibits not only the taking into custody but also the keeping of persons in a state of arrest by imprisonment or other physical restraint except according to procedure established by law."

The petitioner too has made a complaint (P1) to the Kohuwela Police on the 8th of August, 1995. In that complaint he explained the incident which took place on the 24th of July, 1995. The petitioner has said that an unknown person had come to his house on the 8th and had threatened his wife and due to the fear created in the petitioner's mind he decided to make this complaint.

The arrest of the petitioner by the Kohuwela Police should be considered in this background. The petitioner was aware of the dispute between Sahabdeen and himself. He also knew that he too had made a complaint at the Kohuwela Police Station. The important question is whether the police had informed the petitioner the reason for his arrest. The 2nd respondent in his affidavit has stated that when he took the petitioner into custody he explained the purpose of the

visit and informed him of the complaint against him. (Assault and Criminal Trespass). This is also recorded in the Information Book (2R1) maintained at the Kohuwela Police Station. On the other hand, the petitioner's wife in her affidavit (P3) stated that the 2nd respondent did not inform the petitioner the nature of the charge or the allegation on which the petitioner was arrested on the 9th August, 1995. However, it should be noted that the petitioner's wife has submitted her affidavit only on the 19th May, 1996, after a lapse of 7 months from the date of the arrest.

The Counsel for the petitioner, in his written submissions attempted to gain support from *Piyasiri and Others v. Nimal Fernando. A.S.P. and Others*⁽³⁾. While agreeing with the view that "custody does not today, necessarily import the meaning of confinement but has been extended to mean lack of freedom of movement brought about not only by detention but also by threatened coercion, the existence of which can be inferred from the surrounding circumstances", it should be noted that the facts and circumstances of that case are quite different from the present case. In Piyasiri's case, the arrest of the petitioner was highly speculative and was for the purpose of ascertaining whether any of them could be suspected of having committed an offence of bribery.

The case for the respondents is that the petitioner was informed of the reasons for the arrest. The events that took place on the 24th July, 1995, have led the petitioner to a position where he would have known that some time or other the police would contact him. The affidavit of the 2nd respondent explains that the complaint against the petitioner relates to Assault and Criminal Trespass. The 2nd respondent avers that he explained the charges to the petitioner. The only evidence (apart from that of the petitioner) to the contrary, is the affidavit by the petitioner's wife which was affirmed to after a lapse of 7 months which leaves us in doubt as to the veracity of it.

On a scrutiny of the entirety of the material placed before us, it would appear that the case resolves itself to one of "word against word". The burden of proof lies clearly on the petitioner. In this view of

the matter, I hold that the petitioner has failed to establish the infringement of Article 13(1) of the Constitution. The application fails and is accordingly dismissed but, in all the circumstances, without costs.

G. P. S. DE SILVA, C. J. – I agree.

ANANDACOOMARASWAMY J. – I agree.

Application dismissed.
