

ABDUL RAZAK AND ANOTHER
v.
DHARMADASA, CHIEF INSPECTOR OF POLICE,
KATUGASTOTA AND OTHERS

SUPREME COURT

G. P. S. DE SILVA, CJ.,

P. R. P. PERERA, J. AND

BANDARANAYAKE, J.

S.C. APPLICATION NO. 877/96 (FR)

DECEMBER 17, 1998

Fundamental rights – Unlawful arrest and detention – Articles 13 (1) and 13 (2) of the Constitution.

The 1st petitioner and his son the 2nd petitioner were reputed businessmen in Kandy. The 3rd respondent was an Attorney-at-law. On 10.11.1996 at about 7 pm the petitioners were returning home and were driving along a narrow road close to the lane where their residence was situated. At that point of time the 3rd respondent was driving a car along the same road but in the opposite direction. Next an argument occurred between the 3rd respondent and the petitioners when the vehicles driven by the 3rd respondent and the 1st petitioner found it difficult to pass each other. After the argument the 3rd respondent drove away threatening that he would complain to the police and have the 1st petitioner remanded. On 11.11.1996 the 1st respondent Chief Inspector visited the petitioners at their business office and arrested them on a complaint made by the 3rd respondent and took them to the Katugastota Police station. The 1st respondent informed the petitioners that the 2nd respondent had given him specific instructions to arrest the petitioners and produce them at the Police station. According to the 3rd respondent's complaint to the Police, at about 7 pm on 10.11.1996 the 1st petitioner had abused him and the 2nd petitioner had attempted to seize the 3rd respondent by his shirt collar. On that complaint the 1st respondent produced the petitioners before the Magistrate on a "B" report alleging that the petitioners had committed offences under sections 332, 480 and 484 of the Penal Code, whereupon the Magistrate committed the petitioners to remand custody.

Held:

The "B" report presented to the court did not justify the allegation of an offence under section 332 of the Penal Code which was the only cognizable offence referred to therein. The other two offences are non-cognizable offences for which

an arrest without a warrant cannot be made. Hence the arrest and detention of the petitioners were wrongful and the 1st and 2nd respondents had infringed the rights of the petitioners guaranteed by Articles 13 (1) and 13 (2) of the Constitution.

Per Perera, J.

"Having regard to the facts and circumstances of this case, there is very little doubt in my mind that the 1st and 2nd respondents arrested the petitioners at the instigation of the 3rd respondent . . . I would have had no hesitation in awarding substantial compensation personally against the 3rd respondent, but for the fact that the petitioners have specifically stated that they claim no relief from him."

Case referred to:

Faiz v. Attorney-General and Others – (1995) 1 Sri LR 372.

APPLICATION for relief for infringement of fundamental rights.

Faiz Musthapha, PC with Sanjeewa Jayawardena for petitioners.

Rienzie Arsekularatne, DSG with Harsha Fernando, SC for State.

Dr. J. De Costa with Upali Kirindigoda for the 3rd respondent.

Cur. adv. vult.

February 23, 1999.

PERERA, J.

In the present petition to this court, the petitioners complain that the 1st and 2nd respondents have acted in violation of their Fundamental Rights guaranteed by Articles 13 (1) and 13 (2) of the Constitution. The petitioners have, in the circumstances, sought a declaration to this effect from this court with the prayer that the 1st and 2nd respondents be ordered to pay compensation in a sum of Rs. 1 million to the said petitioners.

The facts relating to this complaint of the 1st and 2nd petitioners are as follows:-

The 1st petitioner is a reputed businessman and is the owner of several commercial establishments in and around Kandy. He is the Chairman and Managing Director of Bobby Industries (Pvt) Ltd., a manufacturing concern specialising in Jossticks and other related products, and is also the Chairman and Managing Director of Monara Match Co., (Pvt) Ltd.

The 2nd petitioner is the son of the 1st petitioner who is presently preparing for the Chartered Institute of Management Accountants Stage 1 examination. He is also a Director of both the aforesaid companies referred to above.

According to the petitioners they were arrested by the 1st respondent on the 11th of November, 1996, in pursuance of a false complaint made by the 3rd respondent. This arrest was effected without a warrant and without explaining to them the reason for such arrest.

The 1st respondent is the Chief Inspector of the Katugastota Police station and the 2nd respondent is the OIC of the same station.

According to the petitioners around 7.00 pm on the 10th of November, 1996, the 1st and 2nd petitioners were returning from Kandy to their residence at 1st lane, Mavilmada, Kandy. The 2nd petitioner was driving the van bearing registration No. 61-5801 followed by the 1st petitioner who was driving the car bearing registration No. 19-9065. The petitioners proceeded in their aforesaid respective vehicles along the road which connects the Mavilmada road and the intersection of the 2nd and 1st lanes. The said road is a steep and narrow one and as such two vehicles could not pass abreast of each other. As the petitioners approached the said intersection, they observed a car driven by the 3rd respondent approaching them at an excessive speed from the direction of the 2nd lane. As the 3rd respondent failed to dip the headlights of his car in accordance with established driving rules, the petitioners who were driving up the hill were blinded by the glare emanating from the light of the said headlights and they were, therefore, compelled to stop their vehicles.

The 2nd petitioner who had stopped at the aforesaid intersection thereafter drove past the 3rd respondent in the direction of the 2nd lane. The car driven by the 3rd respondent passed the intersection and entered the aforesaid road at a high speed without dipping its headlights. As it was not possible for the 1st petitioner's car and the 3rd respondent's car to pass each other, the 3rd respondent had driven up alongside the 1st petitioner's car and asked him to reverse the van up to Mavilmada road. The 1st petitioner had explained to the 3rd respondent that the Mavilmada road was about 200 yds away and requested him to reverse his car on to the intersection which was only a few yds behind him. Thereupon, the 3rd respondent had abused the 1st petitioner in foul language and stated that the 3rd respondent was an Attorney-at-law and that he would complain to the Police and have the 1st petitioner remanded.

By this time, the 2nd petitioner had arrived on the spot and advised the 3rd respondent that there was no necessity for such abuse over a trivial matter. The 3rd respondent had continued to abuse both petitioners and had threatened to have both of them remanded. Thereupon, the 1st petitioner had driven his car along the ditch on to the road with the assistance of the 2nd petitioner and proceeded to their residence.

The petitioners state further that on the following day – ie on 11. 11. 1996 at or about 8.30 am the 1st respondent had visited the petitioners in the office at Bobby Industries (Pvt) Ltd., and requested them to accompany him to the Katugastota Police station. When the petitioners inquired from the 1st respondent as to why they were requested to accompany him to the Police station, the 1st respondent had informed them that he had to record statements from both petitioners on a complaint that had been made against them by the 3rd respondent. The petitioners had then requested the 1st respondent to record their statements at the office. This request had been turned down by the 1st respondent who had informed them that the 2nd respondent had given him specific instructions to arrest the petitioners and to bring them to the Katugastota Police station.

Accordingly, the petitioners had arrived at the Katugastota Police station around 11.00 am that morning and met the 1st respondent, who had then read out a complaint made by the 3rd respondent. The 3rd respondent in this complaint had stated that the petitioners had abused him and that the 2nd petitioner had attempted to seize the 3rd respondent by his shirt collar at around 7.00 pm on the previous night at the aforesaid intersection.

The petitioners then denied the aforesaid allegations and made their statements relating to this incident. (Copies of the statements made by the 1st and 2nd petitioners are annexed to the petition marked P2 and P3).

Thereafter, according to the petitioners, the 1st respondent showed them a document and informed them that the said document had already been prepared to produce them before the Magistrate, Kandy. The petitioners had protested stating that they had not committed any offence and had requested the 1st respondent to release them forthwith. The 1st respondent had refused to do so and had informed the petitioners that they were "under arrest". On the same day, at around 1.30 pm – ie 11. 11. 1996, the petitioners were produced before the Additional Magistrate, Kandy, by the 1st respondent on the basis of the aforesaid document which had been previously shown to them. The petitioners later discovered that this document was a 'B' report bearing number B/42292/96 (P4).

According to the said 'B' report, the petitioners had committed offences punishable under sections 332, 480 and 484 of the Penal Code. The petitioners state that although there were several lawyers present in court at the time the petitioners were produced, no lawyer was willing to appear on their behalf.

The 1st respondent had having filed this report moved that the petitioners be released on bail. However, several lawyers who appeared for the 3rd respondent had strenuously objected to bail being granted. Thereupon the Additional Magistrate committed the petitioners to remand custody and directed that the case be called in open court on 19. 11. 1996. Thereafter, this case was called before the Magistrate

on the 12th of November, 1996, on a motion filed on behalf of the petitioners and the Magistrate released the petitioners on cash bail in a sum of Rs. 5,000 each with two sureties who were ordered to deposit a sum of Rs. 10,000 each. In addition, the said Magistrate directed the petitioners to report to the Katugastota Police station on every Sunday till the conclusion of the trial. (A true copy of the said 'B' report and the journal entries of the said case have been produced marked P4. The Order of the Additional Magistrate dated 11. 11. 1996 committing the petitioners to remand custody has been produced marked P4A and the order of the Magistrate releasing the petitioners on bail dated 12. 11. 1996 is marked produced P4B).

Mr. Musthapha, PC invited the attention of this court to the 'B' Report which, *inter alia*, states that of the two vehicles which had come up the road, the 1st vehicle had driven past the virtual complainant and that the virtual complainant had also at a later stage driven away from the scene of the alleged incident. Specific attention of this court was also invited to the fact that there is no mention whatsoever in the 'B' report filed in court that the 3rd respondent had been prevented from proceeding in any direction. Hence, counsel contended that there was no justification whatsoever to allege the commission of the offence of wrongful restraint (section 332 of the Penal Code) in the aforesaid 'B' report.

It was also submitted that the other offences alleged in the said 'B' report, namely, offences under sections 480 and 484 of the Penal Code are non-cognizable offences for which a Peace Officer shall not arrest without a warrant. (vide 1st schedule of the Criminal Procedure Code Act, No. 15 of 1979 read with the definition of "non-cognizable offences" in section 2 of that Act).

These offences are bailable offences, and as such, the petitioners were entitled to be released on bail in terms of the provisions of section 116 (1) of the Code of Criminal Procedure Act, No. 15 of 1979.

It was counsel's submission that the 1st respondent had no warrant from a competent court to arrest either of the petitioners on 11. 11. 96. The arrest of the petitioners was, therefore, not in

accordance with the procedure established by law and as such the 1st respondent has acted in violation of their fundamental rights guaranteed by the provisions of Article 13 (1) of the Constitution.

The petitioners state that they were arrested by the 1st respondent at the instance and instigation of the 3rd respondent.

It was also submitted on behalf of the petitioners that neither the 1st respondent nor the 2nd respondent requested the petitioners to furnish security with a view to releasing them (vide section 116 (1) of the Criminal Procedure Code). Hence, the consequential detention of the petitioner for the purpose of producing them before the Additional Magistrate was illegal and unlawful and was in violation of Articles 13 (1) and 13 (2) of the Constitution.

The petitioners have also averred that when the above case filed against them by the respondents was called in court on the 19th of November, 1996, the Katugastota Police had informed the Magistrate that they would not be filing a plaint against the said petitioners and the learned Magistrate then referred this matter to the Mediation Board for settlement.

Having regard to the facts set out in the affidavits filed by the petitioners and the submissions of President's Counsel, I have carefully examined the affidavits filed by the respondents and the written submissions filed on their behalf. The 1st respondent in his affidavit states that in this case he has merely performed his statutory duties as a Police Officer on a complaint (1R1) made by the 3rd respondent in accordance with the relevant provisions of the Criminal Procedure Code Act.

On a complaint made by the 3rd respondent to the Katugastota Police on the 10th of November, 1996, he had deputed a subordinate officer to proceed to the scene of the alleged offence and having recorded the statements of the wife of the 3rd respondent and the two petitioners, had the petitioners arrested and produced in the Magistrate's Court, Kandy.

The petitioners were produced in court by the 1st respondent upon a 'B' report (P4) alleging that they had committed offences under sections 332, 480 and 484 of the Penal Code (vide P4 & 1R6) and stating that further investigations were proceeding. The 1st respondent moved that the petitioners be released on bail upon such terms as the court deems fit.

Counsel for the State in the written submissions filed on behalf of the 1st and 2nd respondents has submitted that the direction of the 1st respondent requiring the petitioners to attend the Police Station was a lawful order, which a Police officer investigating a cognizable offence was empowered to make in terms of section 109 of the Code of Criminal Procedure Act. He also contended that the arrest of the petitioners was lawfully effected under the provisions of section 32 (1) (b) of the aforesaid Act. This section counsel submitted, empowered any Peace officer to arrest without a warrant any person who has been concerned in any cognizable offence, 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.

In this case, it was State counsel's contention, that the 'B' report – P4, disclosed the commission of the offence of wrongful restraint (section 332) which is a cognizable offence. Hence there was sufficient material for the respondent if he gave credence to the complaint of the 3rd respondent to act upon the basis that a cognizable offence had been committed. In the aforesaid circumstances, State counsel submitted that the arrest of the two petitioners by the respondents was a lawful arrest effected according to the procedure established by law. The detention in the Police station thereafter up to the time the petitioners were produced before the Magistrate was hence lawful. It was State counsel's submission that the petitioners have failed to establish that their fundamental rights guaranteed by Articles 13 (1) and 13 (2) of the Constitution have been violated by the 1st and 2nd respondents.

I am in entire agreement with this submission of State counsel on behalf of the respondents that if there was any material which

disclosed that the petitioners had committed an offence under section 332 of the Penal Code which is a cognizable offence, the conduct of the respondents could in no way be faulted for the reason that they have acted under the provisions of section 32 (1) (b) of the Code of Criminal Procedure Act.

In the said circumstances, it was indeed necessary for this court to ascertain upon a perusal of the 'B' report marked P4, whether on the basis of the facts set out in that report the petitioners had either jointly or severally committed an offence under section 332 of the Penal Code. With this objective in view, I have given my careful consideration to the contents of P4, which is based upon the material which was available to the Police at the time this report was filed. The 'B' report (P4) bears the heading, "Intimidation and attempted assault". According to the 'B' report (P4), the petitioners are alleged to have threatened and abused the 3rd respondent and attempted to pull him out of his car in order to assault him. The 3rd respondent had at this stage with some degree of difficulty, closed the door of his motor car and had driven away.

It is nowhere alleged in the 'B' report – P4, that the petitioners had prevented the 3rd respondent from proceeding in any direction. In other words, it does not disclose the commission of an offence under section 332 of the Penal Code, which is the only cognizable offence referred to in the 'B' report. The other two offences punishable under sections 480 and 484 of the Penal Code are non-cognizable offences for which a Peace officer shall not arrest without a warrant. (vide first schedule read with the interpretation of "non-cognizable" in section 2 of the Code of Criminal Procedure Act, No. 15 of 1979).

Section 332 of the Penal Code sets out the punishment of the offence of wrongful restraint. The offence of wrongful restraint is defined in section 330 of the same Code:

"Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has the right to proceed is said "wrongfully to restrain that person."

It is implicit in the analysis of the word, "obstruction" in the aforesaid section that the complainant should have been dissuaded from proceeding on his way because of fear induced in his mind of impending unlawful harm – (vide offences under the Penal Code, second edition at page 155, G. L. Peiris). On an examination of the document P4, it is clear that there is no material from which one could draw the inference that an offence punishable under section 332 of the Penal Code had been committed or even an allegation to that effect.

Having regard to the facts set out above, I am of the opinion that the 1st and 2nd respondents by arresting the petitioners without a warrant in this case, where there was no credible information that a cognizable offence had been committed, had acted in violation of the law. It is in my view reasonable to conclude on the material placed before this court that the respondents have deliberately stated in the 'B' report that an offence under section 332 of the Penal Code had been committed for the purpose of justifying the arrest of the petitioners without a warrant. If this type of conduct on the part of Police officers is condoned by this court, the very salutary provisions relating to arrests contained in the Code of Criminal Procedure Act would be rendered nugatory. Indeed it was these irresponsible acts on the part of the 1st and 2nd respondents that ultimately culminated in the incarceration of the petitioners in the Kandy Remand Prison without any justification whatsoever. Such conduct on the part of Police officers must indeed be strongly condemned.

In the above circumstances, I hold that the arrest and the detention of the petitioners at the Police station by the respondents up to the time the petitioners were produced before the Magistrate by the 1st and 2nd respondents constituted wrongful arrest and wrongful detention and that such arrest and detention was therefore not in accordance with the procedure established by law.

Having regard to the facts and circumstances of this case, there is very little doubt in my mind that the 1st and 2nd respondents arrested the petitioners at the instigation of the 3rd respondent. This court in Faiz's case held that a person who induced or instigated the unlawful arrest or detention of a person would himself be liable for

the violation of such person's fundamental rights guaranteed by Article 13 of the Constitution. (see *Faiz v. AG & Others*⁽¹⁾).

In the present case, I would have had no hesitation in awarding substantial compensation personally against the 3rd respondent, but for the fact that the petitioners have specifically stated that they claim no relief from him.

Having regard to the facts of this case, I hold that the 1st and 2nd respondents have acted in violation of the fundamental rights of the petitioners guaranteed by Articles 13 (1) and 13 (2) of the Constitution.

I accordingly direct the 1st respondent to pay –

- (a) Compensation in a sum of Rs. 15,000 to the 1st petitioner,
- (b) Compensation in a sum of Rs. 15,000 to the 2nd petitioner.

The 2nd respondent is directed to pay –

- (a) Compensation in a sum of Rs. 15,000 to the 1st petitioner,
- (b) Compensation in a sum of Rs. 15,000 to the 2nd petitioner.

Both the 1st and 2nd respondents are ordered to pay a sum of Rs. 2,500 as costs to the two petitioners. The 1st and 2nd respondents are ordered to pay the compensation and costs to the two petitioners within three months of the date of this judgment.

I also direct the State to pay the petitioners a sum of Rs. 50,000 as compensation.

The petitioners would accordingly receive a total sum of Rs. 112,500 as compensation and costs.

G. P. S. DE SILVA, CJ. – I agree.

BANDARANAYAKE, J. – I agree.

Relief granted.