

SENASINGHE
v.
KARUNATILLEKE, SENIOR SUPERINTENDENT
OF POLICE,
NUGEGODA AND OTHERS

SUPREME COURT
FERNANDO, J.
GUNASEKERA, J. AND
WIGNESWARAN, J.
SC NO. 431/2001 (FR)
3rd DECEMBER, 2002 AND 6th JANUARY, 2003

Fundamental Rights – Protest march against prorogation of Parliament – Referendum on Constitutional proposal – Articles 70 and 86 of the Constitution – Police action to disperse the procession – Section 45 of the Referendum Act – Violation of the right to freedom of movement of the petitioner – Excessive shooting of rubber bullets – Arrest of petitioner – Articles 14(1)(h), 11 and 13(1) of the Constitution – Jurisdiction of the court to review validity of the Referendum.

By a Proclamation dated 10.7.2001 under Article 70 of the Constitution the President prorogued Parliament until 7.9.2001. By another Proclamation of the same date acting under Article 86 of the Constitution read with section 2 of the Referendum Act she directed the Commissioner of Elections to hold a Referendum of the people on the need of a "New Constitution." According to media information a group of opposition parties decided to hold a protest rally at Maradana. Permission for the march was refused by the then Inspector General of Police Laki Kodituwakku (now deceased) under section 45 of the Referendum Act. One such march was to commence at the Nugegoda junction and to proceed on the High Level Road to Maradana.

The evidence does not establish that the petitioner was a participant in the march. He was an attorney-at-law who had been on his way to Wijerama South of Nugegoda to obtain second hand spare parts. Due to the gathering of protesters at the Nugegoda junction he could not proceed. So he parked his car near the "Park' N Shop" North of the Nugegoda junction where he bought a packet of potato chips. Then he proceeded southward towards the Nugegoda junction in search of a restaurant for refreshments.

The police acted solely under section 45 of the Referendum Act which prohibited processions during the Referendum period and not for want of notice of the march under section 77 of the Police Ordinance. Nor did they act under section 78 of the Ordinance which empowered the police to maintain public order or to prevent a breach of the peace or obstruction of the streets. The procession marched along the High Level Road notwithstanding an oral prohibition by the 1st respondent Senior Superintendent of Police.

At that stage the police fired tear gas which struck the petitioner. When he wanted to return to his car police officers ordered him to go towards the Nugegoda junction where there were protestors. At that stage there were pedestrians on both sides of the road as proved by a photograph. The petitioner identified himself as an attorney-at-law but on the orders of the 1st respondent the police officers shot at his face with rubber bullets. He was arrested and released due to his injuries for which he was hospitalized for two weeks. He had pellets in his head, arms and spinal area and other injuries above his feet which were caused by the shooting which was carried out contrary to the relevant Police Rules.

Held :

1. The proposed Referendum was invalid as the question submitted to the People was incapable of an intelligible and meaningful answer. Hence section 45 of the Referendum Act under which the police acted had no application. The court has the jurisdiction to review the legal aspects of the Referendum, particularly as the Parliament which could question the political aspects of the Referendum had been prorogued.

2. By preventing the petitioner from returning to his car, the 1st respondent infringed his right to freedom of movement under Article 14(1)(h) of the Constitution. By ordering his subordinates to fire at the petitioner and to injure him the 1st respondent infringed the petitioner's rights under Article 11 of the Constitution; and by ordering his arrest the 1st respondent infringed Article 13(1) of the Constitution.

Per Fernando, J.

"As I observed ten years ago "stifling the peaceful expression of legitimate dissent today, can only result, inexorably, in the catastrophic explosion of violence some other day..... Democracy requires not merely that dissent be tolerated, but that it be encouraged and the obligations of the Executive is expressly recognized by Article 4(d), so that the police too must respect, secure and advance the right to dissent....."

APPLICATION for relief for infringement of fundamental rights

Cases referred to:

1. *Wickramabandu v Herath* - (1990) 2 Sri LR 348,358
2. *Premachandra v Jayawickrama* - (1994) 2 Sri Lr 90,107-111
3. *State of Rajasthan v Union of India* - AIR 1977 SC 1361,1413
4. *Dinesh Chandra v Charan Singh* AIR - 1980 DELHI 114
5. *Adegbebro v Akintola* - (1963) 3 ALL ER 544
6. *Ramupillai v Festus Perera* - (1991) SRI LR 11
7. *Perera et al v Pathirana* - SC 453/97 SCM 30.1.2003
8. *Karunatileke v Dissanayake* - (1999) 1 Sri LR 157
9. *Amaratunga v Sirimal* - (1993) 1 Sri LR 264,271
10. *Wijeratne v Perera* - SC 379/93 SCM 2.3.94
11. *West Virginia State Board of Education v Barnette* - (1943) 319 US 624,641

Ikram Mohamed P.C. with *S.Jayawardena, F. Cassim* and *A.M. Faiz* for petitioner

Manohara de Silva for 1st respondent

P. Ranasinghe, State Counsel for 3rd and 4th respondents.

March 17, 2003

FERNANDO, J.

The Petitioner, an attorney-at-law, alleges that on 19.7.2001 between 10.30 a.m. and 10.50 a.m. his fundamental rights under Articles 11, 13(1) and 14 (1)(h) were infringed by the 1st Respondent, the Senior Superintendent of Police (“SSP”) Nugegoda, and other Police officers carrying out his orders in relation to a protest march.

On 10.7.2001, by Proclamation (Gazette 1192/14 of 10.7.2001) under Article 70 of the Constitution the President prorogued Parliament until 7.9.2001. Simultaneously, by another Proclamation (Gazette 1192/16 of 10.7.2001) under Article 86 of the Constitution; read with section 2 of of the Referendum Act, No. 7 of 1981, the President directed the Commissioner of Elections to conduct a Referendum on 21.8.2001, specifying “the proposal to be put to the People at such Referendum” (which I will refer to as the “Referendum Proposal”) as:

“Is a new constitution as a matter of national importance and necessity needed for the country?”

Article 86 provides:

“The President may, subject to the provisions of Article 85, submit to the People by Referendum any matter which in the opinion of the President is of national importance”

Article 87(2) required Parliament to provide by law, *inter alia*, for the matters relating to the procedure for the submission of Bills and of matters of national importance to the People by Referendum. Parliament enacted the Referendum Act, which provides:

2. (1) A Referendum in terms of Chapter XIII of the Constitution shall be conducted by the Commissioner of Elections..... where the President has, by Proclamation published in the Gazette, directed such Commissioner to conduct a Referendum.

- (2) A Proclamation issued under subsection (1) shall -
- (a) specify the proposal to be put to the people at the Referendum in the form of a question which shall be answered by a “Yes” or a “No”

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... is declared, conduct, hold or take part in any procession other than a procession on May 1....”

UNDISPUTED FACTS

Some Opposition parties and groups, under the name “Alliance for the Protection of Democracy”, had organized six protest marches for 19.7.2001 for the purpose – according to the Petitioner – of protesting against the prorogation of Parliament and of calling upon the Government to reconvene Parliament and to uphold and preserve democracy. In his affidavit the 1st Respondent claimed that the proposed march was not for a peaceful purpose and “was being organized mainly against the holding of the Referendum”. However, he himself produced a “*Lankadipa*” newspaper report, dated 19.7.2001, according to which UNP Deputy Leader Gamini Athukorale had informed the Police of the proposed march under the theme “*Reconvene Parliament*” and had requested Police protection, but had been told that permission had been refused by the 3rd Respondent, the then Inspector-General of Police (now deceased), under section 45 of the Referendum Act. No other reason was mentioned. The six marches were to terminate at Maradana junction, where a protest rally was to be held, after which there was to be a mammoth march to the President’s House. One such march was due to start from the Nugegoda junction and to proceed on the High Level Road to Maradana.

A large number of people had gathered at the southern end of the Nugegoda junction by about 9.45 a.m. The 1st Respondent stated that he had been informed by the Superintendent of Police (“SP”) Nugegoda, that the latter’s request to the people to disperse

had not been obeyed, and that he had ordered the SP that "no force whatsoever should be used, but to pursue his powers of persuasion to stall the people from proceeding until he arrived." He arrived at the Nugegoda junction at about 10.20 a.m. and assessed the situation. At 10.29 a.m. he went up to the protesters and spoke to Members of Parliament Ravi Karunanayake and Gamini Athukorale, "who were leading the mob and requested them to advise their supporters... to refrain from proceeding in view of the order made by the IGP *in view of section 45*". Neither then nor later was any other reason given for ordering the protesters to disperse. However, the two Parliamentarians insisted that they would proceed with the march as planned. No proceedings were instituted against those two leaders of the "mob" for any offence under section 45.

A Police officer had been given the task of videotaping the activities of both the Police and the protesters. The 1st Respondent produced the videotape and several still photographs from the videotape. Together with Counsel we viewed the videotape and it was then discovered that immediately after some photographs taken at 10.48 a.m. there appeared photographs taken at 10.50 a.m. – so that all photographs taken at 10.49 a.m. (and perhaps a few taken even before and after) were missing. The Police officer who had videotaped the march stated in his affidavit that he had viewed the videotape before presenting it to Court. However, in their affidavits, neither he nor the 1st Respondent offered any explanation as to the missing minute in the videotape.

While there is some dispute as to what exactly happened between 10.30 a.m. and 10.50 a.m. photographs taken at 10.50 a.m. showed that the Petitioner had received some injury. It is not disputed that shortly before 10.50 a.m. the 1st Respondent had ordered the SP Nugegoda, who was in charge of the Police party, to order his subordinates to fire rubber bullets at the crowd, in consequence of which the petitioner suffered injuries on the back of his head, on the back of one arm and near his spine. He was hospitalized, first at Asiri Hospital in Colombo and then at the General Hospital, Kandy, and underwent three surgical operations – to extract three pellets, from the head, the arm and the spinal area. He was under treatment for a period of two weeks thereafter.

Supporting medical reports and X-rays proved that these were not superficial injuries. Not only did he suffer pain, dizziness and loss of memory but he was also unable to engage in his profession.

The Petitioner produced, without objection, what was described as Police Departmental Orders applicable to the "Dispersal of crowds and unlawful assemblies and the use of firearms on rioters", which provide as follows:

"Rules to be observed by the Police when compelled to use firearms.....

2 . (iii) If the officer-in-command should be of opinion that a slight effort would suffice, he will give the word of command to fire only to two specified men. If a greater effort should be required, he will give the word of command to the whole squad, or to as many of the squad as may be necessary to fire. He will direct the firing party *to fire low* i.e., below the knees of the persons on whom they are ordered to fire.

(iv) Care is to be taken *not to fire upon persons separated from the crowd*.....

Civil Force

When an armed party is brought on to the scene.... *as little force must be used and as little injury caused* as is consistent with dispersing the assembly and arresting and detaining the offenders.....

4. To ensure that all Police officers are thoroughly cognizant of their powers in using firearms they are required to learn by heart.... (the following precis of their powers)....

'If I see a mob committing or attempting to commit any of the following crimes -

- (a) Murder or grievous hurt
- (b) Robbery
- (c) Burning or damaging by means of explosives.....
- (d) Breaking into houses, shops by night
- (e) (attacking?) houses, shops....in such a way as may

cause death of or grievous hurt to any inmate,.... and if there is no other way to stop the mob -

I am entitled to FIRE UPON THE MOB TO PROTECT THE PERSONS AND PROPERTY IN DANGER....'

Note - Whenever Police are compelled to use fire arms, a careful note is to be made, when firing ceases, by the senior Police officer present of the number of rounds actually fired.. *The number of rounds fired must be recorded...*

Amount of force that may be used.

- (a) Fire should be opened only when such action is *absolutely necessary to prevent the commission of the crimes mentioned above* and it is clear that the mob intends to persist in its action....
- (b) You may be so placed that an order to fire may involve risk to innocent bystanders. *If peoples' lives are in danger* however, and you cannot otherwise save them, *you are entitled to take the risk of injuring these bystanders.*
- (c) No more force must be used than is reasonable in the particular circumstances of each case...."(emphasis added)

THE PETITIONER'S VERSION

According to the Petitioner, after a consultation with a client, he left Hulftsdorp at 9.30 a.m. with a friend for Wijerama, Nugegoda (which is south of the Nugegoda junction) in order to purchase some second-hand spare parts. On his way he parked his car at the "Park 'N Shop" supermarket (north of Nugegoda junction) where he purchased a packet of potato chips. The machine-printed receipt recorded the time of purchase as 10.17 a.m. Then, finding that he could not proceed in his vehicle due to the gathering of protesters at the Nugegoda junction, the Petitioner left his car at the supermarket and with his friend walked towards the junction in search of a restaurant for refreshments. People were freely moving around and there were Police officers on both sides of the road, who were not restricting the free movement of people. This is con-

firmed by a photograph taken at 10.23 a.m. which shows the Petitioner at the northern part of the Nugegoda junction, close to a group of Police officers but nowhere near the protesters.

Although the 1st Respondent claimed that the Petitioner was a willing participant in the protest, and not a mere bystander, it is clear that up to 10.23 a.m. he had no connection with the protesters.

The Petitioner claimed that the Police suddenly and arbitrarily fired tear gas at random without any previous warning, towards the protesters at the junction who were about 150 meters away. Several bystanders, including the Petitioner and his friend, were caught in-between and had to take shelter from the tear gas for about 15 minutes. The tear gas affected the Petitioner's eyes, and caused him breathing difficulties, and he was thrown into a state of confusion and shock. He decided to get back to his car at the supermarket. However, a group of Police officers ordered him to turn back and go towards the Nugegoda junction. The Petitioner explained that he and his friend were not part of the protesters and were merely bystanders who wished to return to their car. At this point the 1st Respondent came up. The Petitioner then produced his lawyer's identity card and explained the reason for his presence at the scene. Despite that explanation, the 1st Respondent threatened and abused the Petitioner; and ordered him to run towards the protesters. No details were given of the threats and abuse except that the 1st Respondent barked out the words "get out". Upon seeing the Petitioner being accosted by the 1st Respondent, two attorneys-at-law came up from among the protesters, and inquired as to what was taking place. The Petitioner again explained to the 1st Respondent and the two attorneys that he was only trying to get back to his car. However, the 1st Respondent continued to threaten the Petitioner and ordered him to run towards the protesters. (This is supported by a newspaper photograph, produced by the Petitioner, which showed the Petitioner and several Police Officers, including the 1st Respondent whose outstretched arm was pointing towards the junction.) When the Petitioner refused to turn back the 1st Respondent asked him, "*thamuseeta bullet oneda?*" ("Do you want bullets?") The Petitioner then suggested that the 1st Respondent accompany him to his car. Disregarding that request the 1st Respondent ordered his subor-

dinates to open fire on the Petitioner. Those officers, however, were hesitant but when the 1st Respondent repeated his order they fired at the ground close to the Petitioner. The Petitioner pleaded with the 1st Respondent not to open fire but to take him into custody if necessary. The 1st Respondent then screamed at his subordinates ordering them to shoot the Petitioner in the face. When the Police officers aimed their guns at him, in fear the Petitioner turned and went towards the protesters as ordered. Nevertheless, he says, he was shot at a range of about 10 meters. One of the other attorneys-at-law too sustained bullet injuries.

The Petitioner was outraged, but despite being in pain and bleeding, he approached the 1st Respondent and asked why he had given orders to shoot. (This is supported by a newspaper photograph produced by the Petitioner as well as a videophotograph taken at 10.50 a.m., both of which showed the Petitioner with his hand pressed to the back of his head.) The 1st Respondent then asked the Petitioner, "*Kewa madida, thawa bullet bassandada?*" ("Haven't you had enough, do you want more bullets?") The Petitioner persisted in questioning the 1st Respondent who then ordered his arrest. (This is supported by another newspaper photograph which showed a Police officer holding the Petitioner by his tie). He was then handed over to another group of Police officers, who did not detain him any further. Video-photographs taken at 10.50 a.m. showed the petitioner (holding the back of his head) and one other civilian in close proximity to the Police officers, with no sign of any other civilians in the vicinity.

THE 1ST RESPONDENT'S VERSION

The 1st Respondent stated that the 3rd Respondent had a meeting on 17.7.2001 with Deputy Inspector-Generals and SSP's in charge in Divisions in Colombo. At that meeting the 3rd Respondent directed those officers not to permit protest marches in view of section 45 of the Referendum Act. That was the sole reason, and it was not pleaded or contended that those directions were given under section 77(3) of the Police Ordinance "in the interests of the preservation of public order". The 2nd Respondent, DIG Western Province, was discharged prior to the hearing.

On 19.7.2001, immediately after speaking to the two Members of Parliament, the 1st Respondent ordered that barricades be placed across the High Level Road, at a point about 150 meters north of the Nugegoda junction, in order to prevent the protesters from proceeding to Colombo. Nevertheless the protesters commenced their march at about 10.30 a.m., brushing aside the Police officers and disregarding repeated appeals to disperse "as they were committing an offence under section 45". A video-photograph at 10.32 a.m. shows the protesters calmly walking from the junction towards Colombo with no sign of unruliness or violence. The 1st Respondent claimed that the Petitioner appeared in that photograph, proving that he was an active and willing participant in the protest, but the Petitioner denied that he was the person depicted in the photographs, and we are unable to hold on a balance of probability that the 1st Respondent was correct.

At about 10.34 a.m., despite repeated warnings, the protesters grappled with the Police, pushed down the barricades, and attacked the Police with missiles. As the crowd was violent and as there was a breach of the peace, the 1st Respondent ordered firing of tear gas, in consequence of which the crowd dispersed and went back towards the Nugegoda junction. The 1st Respondent contended that there was a footpath, by the side of the High Level Road, along which the Petitioner could have got back to his own car without confronting the Police.

The 1st Respondent stated that "rubber bullets were fired from a position about 70 meters (away) only when the mobs were attacking the police and were advancing towards them with missiles". He did not claim that the kind of injury or damage referred to in the Departmental Orders has occurred or was anticipated, nor that he had ordered firing below the knees. He also did not give any further clarification as to how the Petitioner was injured, nor any particulars as to the weapons and ammunition issued to the Police officers and the number of rounds actually fired, but he did produce some internal correspondence in which the opinion had been expressed that rubber bullets *could* be fatal at under 30 meters. He stated that he could not recall the Petitioner being injured, but could remember giving instructions to the Police officers to take a person who was injured to hospital; that he did not order that the Petitioner

be arrested; and that he only wanted to help the Petitioner by ordering the Police officers to take him to hospital, but the Petitioner's friends volunteered to do so.

CONTENTIONS

Learned Counsel for the Petitioner contended that the protest march was lawful and peaceful; that the Petitioner was not a participant in that protest but only a bystander; that by preventing him from returning to his car the 1st Respondent and other Police officers had infringed his freedom of movement under Article 14(1)(h); that by shooting at and wounding him in the back, while separated from the protesters, they had subjected him to cruel, inhuman and degrading treatment in violation of Article 11; and that his subsequent arrest on the 1st Respondent's order was an infringement of Article 13(1).

Learned Counsel for the 1st Respondent submitted that the protest march was not peaceful and was unlawful by virtue of section 45 of the Referendum Act; that the Petitioner was a willing participant; that he could have left the place and returned to his car, but chose to remain; that despite police warnings to the protesters to disperse they pushed down the barricades; that when the crowd was advancing and throwing missiles, the 1st Respondent was compelled to order his subordinates to shoot with rubber bullets at a distance of over 50 meters; that the Petitioner "only suffered slight injuries"; and that the Police did not arrest him.

In the course of the oral hearing it was pointed out to learned Counsel for the 1st Respondent and to learned State Counsel that the prohibition on processions imposed by section 45 seemed to apply only if a Referendum - i.e. a *valid* Referendum, and not merely a *purported* Referendum - had been duly called under section 2, but not otherwise; and that, arguably, the Referendum Proposal was outside the scope of section 2, because the question submitted was not capable of being answered, unambiguously, "Yes" or "No". On those issues, the 1st Respondent's position was stated thus in written submissions filed after judgment was reserved:

“.....whilst the President could have framed the question differently it cannot be said that the question presently formulated is not legal. These questions are political questions beyond the jurisdiction of the court. In any event the 1st Respondent....in the position (in which he was placed) on the morning of 19.7.2001 could not have reasonably (been) expected to scrutinize the legality or the propriety of the President’s question. The 1st Respondent was well entitled to presume that all official acts are regularly performed. The 1st Respondent acted *bona fide* and therefore did not act in violation of the Petitioner’s fundamental rights.”

If the protest march was unlawful, the Police were entitled to use reasonable force to disperse the crowd, and the issues in this case would then have centred on whether they had used *excessive* force. If, however, the march was lawful, peaceful and orderly, the issues would have been whether they were entitled to use any force at all, and whether they were entitled to take any risk at all injuring bystanders. It is therefore necessary to decide whether the march was unlawful.

It was not the 1st Respondent’s position that the march was unlawful by reason of any failure to give notice under section 77 of the Police Ordinance, or that it became necessary to disperse the marchers because of directions given in the interests of public order or to prevent an apprehended breach of the peace or obstruction of the streets (cf sections 77(3) and 78 of the Police Ordinance).

THE REFERENDUM

It is therefore necessary to examine several issues in regard to the validity of the Proclamation and the Referendum Proposal.

1. Did the prohibition on processions imposed by section 45 of the Referendum Act apply only where there had been a valid Proclamation under section 2?
2. Does this Court lack jurisdiction to determine whether the Proclamation was valid and/or whether the Referendum Proposal had been duly formulated, because those were “political questions”?

3. If this Court does have jurisdiction, was the Proclamation invalid because the proposal for submission to the People by Referendum was not a question satisfying the requirements of section 2?
 4. Even if the Proclamation was invalid for that reason, did the 1st Respondent act *bona fide* and in the reasonable belief that the Proclamation was valid and that section 45 was applicable to the protest march, and was therefore not liable for any violation of the Petitioner's fundamental right?
1. Articles 14(1)(a) and 14(1)(b) recognize the freedom of citizens peacefully to express their views and to assemble. They protect the right of citizens to go in procession and to hold rallies, in order to manifest their protests against acts and decisions, including those of the Government. Section 45 of the Referendum Act constitutes a restriction on those rights. Article 15 permits "restrictions" on fundamental rights, but does not contemplate or authorize *unreasonable* restrictions (*Wickremabandu v Herath*,⁽¹⁾). Section 45 is thus an exercise by Parliament of the power to impose reasonable restrictions. Accordingly, if there is some ambiguity as to the scope of the restriction imposed by Parliament in section 45, that interpretation should be preferred which would make such restriction reasonable, rather than that which would make it unreasonable. In any event, as a matter of general principle, restrictions on the rights of citizens must be narrowly construed rather than broadly; and references by Parliament to Proclamations, Referenda and other official acts, must be assumed to include only lawful and valid acts. Finally, the fundamental rights are one manifestation of the sovereignty of the People, and the acts of all three organs of Government must, as far as reasonably possible, be interpreted so as to advance rather than to derogate from the fundamental rights, and the Judiciary, as part of the State, is committed to achieving "the full realization of the fundamental rights and freedoms of all persons" (of Articles 4(d) and 27(2)(a)).

For all those reasons, I hold that the prohibition in section 45 only applies where there has been a valid Proclamation in respect of a valid Referendum Proposal.

2. The argument that this Court lacks jurisdiction to determine questions relating to the exercise of executive powers simply

because they are “political questions” was firmly rejected in *Premachandra v Jayawickrama* (2). That decision dealt with the power of Provincial Governors (under Article 154F) to appoint Chief Ministers. In dealing with that argument, I cited the observations of Bhagwati, J, (as he then was), in *State of Rajasthan v Union of India* (3).

“....So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed, it would be its constitutional obligation to do so.... No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution.... It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the Rule of Law....”

Reference was also made to the fact that the Courts did not decline to review even the appointment and removal of the Prime Minister, in India (in *Dinesh Chandra v Charan Singh*,⁽⁴⁾ and in Nigeria (in *Adegbenro v Akintola*,⁽⁵⁾).

It is now firmly established that all powers and discretions conferred upon public authorities and functionaries are held upon trust for the public, to be used reasonably, in good faith, and upon lawful and relevant grounds of public interest; that they are not unfettered, absolute or unreviewable; and that the legality and propriety of their exercise must be judged by reference to the purposes for which they were conferred.

In accordance with those principles, this Court has reviewed the acts of the entire Cabinet of Ministers inclusive of the President (*Ramupillai v Festus Perera*,⁽⁶⁾; *Perera et al. v Pathirana*,⁽⁷⁾ SC 453/97 SCM 30.1.2003), and of the President (*Wickremabandu v Herath*; *Karunatileke v Dissanayake*,⁽⁸⁾) despite Article 35 which only provides a shield of *personal* immunity from proceedings *in courts and tribunals*, leaving the impugned acts themselves open to judicial review.

There is another aspect of the “political questions” argument. The exercise of many powers, Constitutional and statutory, would have both legal and political aspects. While it is appropriate that the Judiciary should review only the legal aspects, the question arises whether the political aspects are reviewable at all, except by the People themselves at the next election. It appears to me that in that respect the role of Parliament – as the elected representatives of the People – has been recognized in Articles 42 and 43, which essentially ensure the responsibility of the Executive to Parliament for the due exercise of all powers, Constitutional and statutory. Article 35 has no application to proceedings in *Parliament* under Articles 42 and 43. Hence the “political questions” argument is only correct to this extent: questions of legality are for the Judiciary alone to determine, and political questions are left for the People and their elected representatives.

It must also be remembered that in this case when the Referendum was called for on 10.7.2001, Parliament was simultaneously prorogued until 7.9.2001 – more than a fortnight *after* the scheduled date of the Referendum. Consequently, Parliament was denied the opportunity of exercising whatever powers it has under Article 42. In that background, declining jurisdiction on the basis of the “political questions” argument would have served to place the Proclamation beyond review, thus undermining the Rule of Law.

I therefore hold that this Court does have jurisdiction to consider whether the Proclamation and the Referendum Proposal were in conformity with the Constitution and the Referendum Act.

3. I have now to consider the validity of the Referendum Proposal as set out in the impugned Proclamation. Section 2(2)(a) requires that a Proclamation “shall specify the proposal to be put to the People at the Referendum in the form of a question which shall be answered by a ‘Yes’ or a ‘No’...”

A Referendum is an electoral process that is little different to any nation-wide election, in respect of the enormous expenditure of public funds and the disruption of day-to-day life involved – including danger to life and limb, and damage to property. It cannot lightly be assumed that Parliament intended that process to be used except in a manner which would yield an intelligible, meaningful and useful result.

Article 3 defines the sovereignty of the People as including the powers of government; and Article 4(a) defines one component of sovereignty to be the legislative power, which shall be exercised by Parliament and by the People at a Referendum. A Referendum is, *prima facie*, an exercise of legislative power, and a Referendum under Article 85 is clearly a part of the legislative process. However, Article 86 is in wider terms, and a Referendum under that Article does not appear to be necessarily a part of the legislative process, although it may be a prelude to legislation. But even a Referendum under that Article would be a costly exercise in futility unless it yields a meaningful result, conveying the opinion of the People with a sufficient degree of clarity and precision as to constitute a mandate for future governmental action.

In my opinion, section 2(2)(a) permits submission for Referendum only of questions the answer to which - whether "Yes" or "No" - would convey clear, intelligible and meaningful information on issues relevant to future governmental action.

The impugned proposal must now be scrutinized. The answer "No" would have been somewhat ambiguous, and could accurately have been given by three different groups of persons: those who thought that a new Constitution, though needed, was not of national importance and necessity, as other matters were more urgent and important; those who thought a *new* Constitution was not needed, but that the existing one needed amendment; and those who thought neither a new Constitution nor amendments were needed.

The answer "Yes" would have been even more ambiguous, and could have been given by several different groups of persons, agreed only upon the need for a new Constitution, but holding wholly divergent views as to what that Constitution should provide. Thus those in favour of a new *unitary* Constitution as well as those in favour of new *federal* Constitution would vote "Yes", and a majority "Yes" vote would therefore fail to reveal what number of voters favoured each alternative. Furthermore, there would have been even more confusion on that issue, because some voters who preferred a unitary Constitution could also have accurately have voted "No". Hence on the issue - "*unitary*" or "*federal*"? - the result would have been inconclusive and ambiguous. There would have been

similar divergent views on other issues: such as, *Presidential Executive*, or *Parliamentary Executive*? Elections according to Proportional Representation, or the old *Constituency System*, or some other system? Thus a "Yes" vote would have lumped together, for example, those who desired a Federal system with a Parliamentary Executive elected on the Constituency system, as well as their most vigorous opponents who favoured a Unitary system with a Presidential Executive and elections by Proportional Representation. There are other important aspects of a new Constitution: the sharing of governmental powers, judicial review of legislation and executive action, fundamental rights and their enforcement, appointments to high posts, etc. The purpose of a Referendum is to obtain the verdict of the People, and a series of questions should (and could) have been so formulated that a majority "Yes" vote would have clearly disclosed at least the main features which the majority of the electorate agreed should be incorporated in the new Constitution; and so that a "No" vote would have disclosed without ambiguity why a new Constitution was not desired.

I hold that the impugned proposal did not satisfy the requirements of section 2(2)(a) of the Referendum Act, and the Proclamation was therefore invalid, and section 45 did not apply to the protest march.

If, and to the extent that, that march and the intended rally were a peaceful protest against the Referendum and prorogation of Parliament, and a plea for the reconvening of Parliament and the restoration of democracy, they were a legitimate exercise of the freedoms of speech and expression, and of peaceful assembly, under Articles 14(1)(a) and (b). Although section 45 was not operative, yet those freedoms were subject to inherent and intrinsic limitations, in that they should not have been exercised on public streets and pavements so as to deny or infringe the rights of other users of such streets and pavements. There is no evidence of any such infringement or interference, and whatever inconvenience was caused could probably have been avoided if the Police had allowed the march to proceed, and regulated and controlled its conduct using the powers conferred by sections 77 and 78 of the Police Ordinance, as indeed they do in regard to the many proces-

sions, peraheras, marches and walks which are a part of the Sri Lankan scene.

4. If the 1st Respondent had acted *bona fide* that would have been a mitigatory factor which, however, would not exempt him from liability.

FINDINGS OF FACT

The evidence establishes that the protesters had assembled peacefully in preparation for a lawful protest march at Nugegoda junction; that the Police on the instructions of the 1st Respondent had unlawfully prevented them from proceeding on their march, probably resulting in some obstruction to the streets; that when they commenced their march at 10.30 a.m. the Police had unlawfully attempted to stop them, using tear gas as well; that the protesters were thereby pushed back south of the Nugegoda junction; that the Police acted on the sole ground that section 45 was applicable, and not on account of any actual or apprehended breach of the peace, or obstruction of the streets, or to prevent the commission of any of the offences specified in the Police Departmental Orders; that the protesters then resorted to throwing sticks and stones at the Police; that the Petitioner was not a participant in the protest march; that the 1st Respondent prevented the Petitioner from leaving the scene and proceeding towards his car, and peremptorily directed him to go towards the protesters; that the Petitioner was probably unaware of any footpath by the side of the High Level Road and/or that this led to the supermarket, and after a heated argument turned and went towards the protesters as ordered; that nevertheless the 1st Respondent callously ordered his subordinates to open fire, but without directing them to fire low; that the Petitioner received injuries from behind, whilst he was moving away from the Police officers; that such injuries were inflicted when the Petitioner was about 10 meters away from the Police officers, and so far separated from the protesters that such firing was not related to any genuine attempt to disperse the protesters, or to prevent any specified offence, and was without due regard to the risk of injury to bystanders; that alternatively, even assuming as claimed by the 1st Respondent that the Petitioner was then over 50 meters away from the Police, he was not advancing towards the

Police, and such firing was unrelated to any attempt to disperse the protesters; that such firing was in all material respects contrary to the clear provisions of the Police Departmental Orders, and, in the circumstances, not capable of being excused or mitigated by any *bona fide* belief that the protest was unlawful; that thereafter the Petitioner was arrested on the 1st Respondent's orders, but released almost immediately; and that the Petitioner suffered serious injuries requiring surgery and hospitalization, and consequential loss and damage.

Even if I were to assume *both* that the protest march was unlawful, *and* that the Petitioner was a willing participant, yet in the circumstances the use of firearms (especially directed above the knees) was unjustified, unreasonable, excessive and in violation of the Departmental Orders (which re-iterated the applicable legal provisions).

ORDER

I hold that by preventing the Petitioner from returning to his car, the 1st Respondent infringed his freedom of movement under Article 14(1)(h); that by causing his subordinates to open fire on, and to injure, the Petitioner, the 1st Respondent subjected him to cruel and inhuman treatment in violation of Article 11; and that by ordering the Petitioner's arrest, the 1st Respondent infringed his fundamental right under Article 13(1).

As for compensation, the infringement of Article 11 was particularly grave and reprehensible because the 1st Respondent not only acted with high-handed disregard for the Departmental Orders but displayed a callous indifference to human suffering, while suppressing a democratic protest. As I observed ten years ago, "stifling the peaceful expression of legitimate dissent today can only result, inexorably, in the catastrophic explosion of violence some other day" (*Amaratunga v Sirimal*,⁽⁹⁾). Democracy requires not merely that dissent be tolerated, but that it be encouraged, and that obligation of the Executive is expressly recognized by Article 4(d), so that the Police too must respect, secure and advance the right to dissent (*Wijeratne v Perera*,⁽¹⁰⁾) for as cautioned in *West Virginia State Board of Education v Barnette*,⁽¹¹⁾, "those who begin coer-

cive elimination of dissent soon find themselves exterminating dissenters”.

I therefore award the Petitioner compensation in a sum of Rs 200,000 for the infringement of Article 11 and in a sum of Rs 10,000 for the infringement of Articles 13(1) and 14(1)(h), together with costs in a sum of Rs 25,000, payable on or before 31.5.2003. While the infringements were the consequence of improper governmental decision for which the 1st Respondent was not responsible, he nevertheless acted in bad faith, and in excess and abuse of his powers. I therefore order the 1st Respondent personally to pay a sum of Rs 20,000, and the State to pay the balance. I also direct the Registrar to forward a copy of this judgment to the National Police Commission.

GUNASEKERA, J. - I agree.

WIGNESWARAN, J. - I agree.

Relief granted.