

DHANAPALA FERNANDO

v.

**ATTANAYAKA, OFFICER-IN-CHARGE,
KANDANA POLICE STATION AND OTHERS**

SUPREME COURT
FERNANDO, J.
ISMAIL, J. AND
WIGNESWARAN, J.
SC NO. 330/2002 (FR)
22nd JANUARY, 2002

Fundamental Rights – Search of a licenced restaurant and arrest of its guests and Manager – Power of arrest and search by police - Sections 32 and 33 of the Code of Criminal Procedure Act – Sections 65 and 68 of the Police Ordinance – Articles 12 (1) and 14 (1) (g) of the Constitution.

The plaintiff and his sister owned a partnership business called Jayasiri Restaurant and Inn ("the Inn") at Kandana registered under the Business Names Statute of the Western Provincial Council and licensed by the Ja-Ela Urban Council. The business consisted of a restaurant, a reception hall for weddings and parties and an inn with guest rooms.

On the orders of the 1st respondent, the 2nd respondent Sub Inspector of Police who was armed with a revolver raided the Inn on 3.6.2002, 9.6.2002, 13.6.2002 and 16.6.2002 and searched it apparently at gun point and hence without the consent of the Manager of the Inn.

On 3. 6. 2002, the 2nd respondent questioned three couples who were occupying rooms. They disclosed their names and addresses. They were not asked to show their identity cards. One of the couples was married, another had intended to get married; and third couple married but not to each other. As per IB extracts, the Manager had told the police that a licence had been obtained for the business but he was not told to produce the licence. The Manager himself was arrested allegedly for failing to establish the identity of the couples. The 2nd respondent told the Manager that the business cannot be operated without a licence from the Tourist Board. The Manager and couples were taken to the Kandana Police Station and released the same day after questioning.

The subsequent raids by the 2nd respondent were to re-check whether the Inn was functional. During these visits the 2nd respondent once told the Manager to close up the business if a licence from the Tourist Board had not been obtained and the 2nd respondent threatened to assault the Manager if rooms were let.

On 27.6.2002 when the restraining order against the police instructions to close up the business came up for renewal the State Counsel submitted to court that in view of the licence obtained from the local authority the police had no power to prohibit the petitioner from operating his licence.

However, the State Counsel argued that the impugned arrests and search could be defended in terms of sections 32 and 33 of the Code of Criminal Procedure Act, and sections 65 and 68 of the Police Ordinance.

Held :

Per Fernando, J.

1. "...The respondents tried to justify the arrests upon numerous grounds - that the three couples were reasonably suspected of an offence, cognizably or otherwise and / or of underworld or of criminal activities; that they were taking precautions to conceal their presence; that there was a need to investigate their possible involvement in such offences or activities, that they were found in a place reasonably suspected of being a resort of loose and disorderly characters; that the police had reason to believe that the names and addresses given by them were false and needed verification; and that they had given contradictory reasons for their presence at the Inn. The respondents have totally failed to establish any factual basis whatsoever for any of these allegations. That the arrest had really nothing to do with such matters and was an arbitrary and high handed infringement of liberty and invasion of privacy is manifest.
2. Whilst there was evidence of rising crime in the area, the search was unlawful because the respondents had no reasonable suspicion but only a vague general suspicion that criminals from outside lodge in guest

houses in order to commit crimes and then leave the area. Further, the search was effected not with the consent of the Manager but by forcing him to submit to the search by the 2nd respondent showing his weapon.

3. The petitioner's fundamental rights under Articles 12(1)(g) have been infringed by the 1st and 2nd respondents for which the State and the said respondents were liable.

APPLICATION for relief for infringement of fundamental rights.

Case referred to :

(1) *Bandaranayake v Rajaguru* - (1999) Sri LR 104

D. Premaratne, PC. with *Hemantha Situge* for petitioner.

Rajiv Goonatilleke, State Counsel for 1st to 4th respondents.

Cur.adv.vult

March 19, 2003

FERNANDO, J.

The Petitioner and his sister are the partners of a business called "Jayasiri Restaurant and Inn" ("the Inn") registered in terms of the Business Names Statute of the Western Province, and licensed by the Ja-ela Urban Council. The business is carried on in premises at Kandana, and consists of a restaurant, a large reception hall given on hire for weddings and parties and an Inn with rooms given out to guests. The Petitioner alleges that the 1st and 2nd Respondents (the Officer-in-Charge and a Sub-Inspector, respectively, of the Kandana Police) infringed his fundamental rights (s) under Article 12(1) by conducting three illegal searches of the premises on and after 3.6.2002 and (b) under Article 14(1)(g) by compelling the closure of his business from 3.6.2003.

It is not disputed that (as shown by the Information Book ("IB") extracts) at 10.45 a.m. on 3.6.2002 on the 1st Respondent's orders, the 2nd Respondent left the Kandana Police station, armed with his gun, together with a party of Police officers in a private

vehicle, ostensibly to investigate information received regarding an underworld gang. At 11.00 a.m. they came to the Inn and searched it. While the Petitioner claimed that the 2nd Respondent forcibly searched the premises after showing the Manager of the Inn a revolver, the 2nd Respondent denied that allegation and claimed that the search was with the Manager' consent. Thereafter the 2nd Respondent got the Manager to open up the rooms of the Inn, and took into custody three couples, who were occupying three rooms, on the ground (as averred in his affidavit) that they were "unable to satisfactorily establish their identity," as well as the Manager as he too was unable to establish their identity. The "Visitors Book" of the Inn was also taken. According to the 1st Respondent's affidavit it had not been duly maintained after 28.4.2002 and was retained as a production. That Book was not produced but only a photocopy of the "last entered page" which contained an entry for 24.5.2002. Although that Book was not returned, nevertheless (according to the 2nd Respondent) the 1st Respondent had warned the Manager to maintain that Book. It was not pleaded that any shortcoming in the maintenance of that Book was one of the reasons for the arrest. After further questioning at the Kandana Police station, the three couples and the Manager were released at about 2.15 p.m. One of the matters elicited in the course of the Manager's statement was that licences had been obtained for the business, but his statement does not refer to any request to produce those licences.

The Petitioner claimed that the 2nd Respondent had told the Manager that the business cannot be operated without a licence from the Tourist Board, and had ordered its closure – all of which the Respondents denied.

At 6.30 p.m. on 9.6.2002, on the 1st Respondent's orders, the 2nd Respondent left the station, armed, with a Police party to investigate information that a suspect couple had obtained accommodation in an (unspecified) guest-house. According to the IB extracts, the Police party visited the Inn, questioned the Manager, searched the Inn but found neither guests nor suspicious activity, and returned at 7.05 p.m. without having attended to any other duties.

The Petitioner claimed (but the Respondents denied) that at 10.00 a.m. on 13.6.2002 the 2nd Respondent had again come to

the Inn and had asked the Manager to come to the station at 5.00 p.m., at which time the 1st Respondent had told him to close the business, threatening to assault him if rooms were let.

According to the IB extracts, at 3.00 p.m. on 16.6.2002, on the 1st Respondent's orders, the 2nd Respondent left the station, armed, with a Police party to investigate information that underworld gangs were meeting in guest-houses in the area to organize themselves. At 3.15 p.m. they came to the Inn and found all five rooms empty, and recorded a brief routine statement from the Manager – among the matters elicited in that statement was that the approval of the Tourist Board had not been obtained for the Inn. At 3.35 p.m. they visited another guest-house where they arrested four couples and the Manager, and returned to the station at 4.00 p.m.

I must note at this point that although the 2nd Respondent claimed that all three searches were with the Manager's consent, the relevant IB extracts did not record any such consent.

The Petitioner made a complaint at Police Headquarters on 18.6.2002. Having referred to the Police searches and arrests, he stated that the 1st Respondent had ordered the closure of the Inn; that the Police had told the Manager to get Tourist Board approval; and that the threats and harassment by the Police were making it impossible to carry on his business, and were affecting bookings which he had already obtained. He asked for an inquiry and that he be allowed to carry on his business. An inquiry was held by an Assistant Superintendent of Police. Although the Inspector-General of Police was the 3rd Respondent in this case, we were not informed of the result of that inquiry.

This application was filed on 19.6.2002, and leave to proceed was granted on 25.6.2002. The Petitioner had pleaded that he had bookings for 25th, 26th and 27th June and despite the lack of notice to Respondents in view of the urgency, an interim order was made, permitting the Petitioner to carry on business, and directing 1st to 3rd Respondents not to interfere with the running of his business. That order was operative until 28.6.2002, and the question of renewal was to be considered on 27.6.2002. The journal entry of 27.6.2002 reads thus:

“Learned State Counsel submits to Court that the licence to operate to petitioner has been granted by the Ja-ela Pradeshiya Sabha, and in the circumstances the Police have no legal rights to prohibit the petitioner from operating or (to cancel) his licence”.

In his affidavit the 1st Respondent implied that it was only after this application had been filed that he became aware that the Inn was licensed. He complained that no such licence had been produced to the Police – perhaps forgetting that the Petitioner and the Manager had not been asked to do so. He went on to set out the background to the searches and arrests. There had been a rise in armed robberies and crimes in the area. A number of crimes had been committed in places close to guest-houses and it was suspected that criminals from outside lodge at guest-houses, commit crimes, and leave the area. He had therefore ordered patrols and searches, including checks on guest-houses, to ascertain if any suspicious or underworld characters had taken lodging there. Other guest-houses besides the Petitioner's had been searched.

Based on those averments, learned State Counsel contended in his written submissions that it was not “unreasonable for the Police to take in persons for questioning to ascertain their identity when their identity could not be established, (a) because the Manager was unaware of the identity of the persons occupying rooms, (b) because the persons found there could not establish their identity, (c) because on initial questioning the couples had contradictory explanations for their presence”. In the background of high crime in the area, the circumstances “warranted the Police to consider them to be either concealing their identity or of *loose character*”. He argued further that often offenders are found by chance, when they are unable to establish their identity or to explain their presence at some place, and asserted that if the police were to be censured for requiring a person to attend the Police station to establish his/her identity, it would greatly thwart the ability of law enforcement agencies in a civil society to deter persons of *loose character* and detect offenders and criminals... it is often said that it is the badge of secrecy that is the badge of a criminal. In any event the persons taken to the Police station had not complained of unlawful arrest and detention and had not even given supporting

affidavits. Learned State Counsel relied on sections 32 and 33 of the Code of Criminal Procedure Act and sections 65 and 68 of the Police Ordinance.

Learned State Counsel further submitted, correctly, that the Petitioner had made no allegation of malice or ill-will against the Respondents, and that the allegation that they had acted under pressure from his business rivals was wholly unsubstantiated. He referred to IB extracts showing that other guest-houses had been raided and suspects taken for questioning. He contended that the Petitioner had failed to prove that the 1st and 2nd Respondents had ordered the closure of the Inn, apart from the allegation made at Police Headquarters, and that since evidence in fundamental rights applications is by affidavit, there being no opportunity for cross-examination, when it is word against word, neither party can be believed or disbelieved. Finally, he urged that in any event the petitioner had failed to quantify his loss with evidence of occupancy rates or past profits.

Before dealing with those submissions, it is necessary to ascertain more precisely the circumstances in which the three couples were arrested, taken to the Police station, and questioned, as appearing from the IB extracts relied on by the Respondents. The 2nd Respondent had made his notes at 11.50 a.m. on 3.6.2002 at the Inn itself, and these showed that all six did give their names and addresses. Although there is nothing to suggest that they were asked a single question regarding their identity or residence, and no record of any reason to doubt the information given, he nevertheless noted that since they had not produced any identity cards or documents to establish their identity he was arresting them in order to ascertain their identity and to investigate further whether they were involved in any offences.

The 2nd Respondent's "In" entry made at 1.00 p.m. gave the names and addresses of all "suspects", which thus confirms that they had already given their names and addresses at the Inn itself; and no reason for disbelief was recorded. The "suspects" were then detained, while awaiting the 1st Respondent's instructions. Their statements were recorded – and no mention was made of identity cards, or the lack of them. While the Respondents claim that the three couples were released after ascertaining their identity and

that they were not engaged in underworld activities, they did not explain how the brief statements recorded could possibly have satisfied them on those two points.

The statements recorded show that the "suspects" were all adults, who fell into three categories. One couple was married while the second was intending to get married. The other two persons were married but not to each other. The first couple explained that, having no place to stay while their house was nearing completion, they had been lodging at the Inn for about 20 days. Both of them were recorded as saying that, they had not informed the Police that they were staying at the Inn - for which the wife went on to beg pardon from the police! She also stated that she was pregnant. Instead of even a formal expression of regret by the Police, the statements of that couple included an assurance that they had nothing to say against the Police! They were not asked anything about their identity cards, or why they did not have them, or about underworld or criminal activities.

Arrest

Learned State Counsel submitted that sections 32 and 33 of the Code of Criminal Procedure Act authorize the arrest of a person suspected of committing a cognizable offence, or found taking precautions to conceal his presence under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence. Any such person can be taken to a Police station for questioning to ascertain his name and address.

That submission does not help in the circumstances of this case. Under section 32(1)(b) a mere suspicion is not enough. A reasonable suspicion or credible information is required. Likewise section 32(1)(h) applies only where there is "reason to believe" that a person is taking precautions with a view to committing a cognizable offence. There was no such suspicion, information or reason justifying the arrest of the three couples and the Manager. Section 33 applies to a person accused of a non-cognizable offence in the presence of a Police officer who either refuses to give a Police officer his name and residence or gives a name or residence which such officer has "reason to believe" to be false: such a person may be arrested for the purpose of ascertaining his name or residence. The IB extracts show that when questioned at the Inn all six "sus-

pects” gave their names and addresses, and the Respondents have not established that they had “reason to believe” that any of these were false.

Learned State Counsel also relied on section 65 of the Police Ordinance, which, he contended, authorized the “arrest of persons without warrant for the ascertainment of names and addresses.” Section 65 provides:

“Every person taken into custody by any police officer without a warrant (except persons detained for the mere purpose of ascertaining their name and residence) shall forthwith be delivered into the custody of the officer-in-charge of a station in order that such person may be secured until he can be brought before a Magistrate...”

That is not a provision which confers a *power* of arrest without warrant, but merely prescribes the *procedure* for dealing with persons after being taken into custody. The parenthetical clause merely serves to exclude from that procedure the persons therein described, but creates neither any new offence nor a new power of arrest. That clause would therefore apply to persons arrested under section 33 of the Code of Criminal Procedure Act, but does not in any way widen the ambit of that section.

Finally, learned State Counsel claimed that section 68 of the Police Ordinance enables “the police to enter a place without warrant on suspicion *inter alia* of it having a person of *loose character*.” In so far as is relevant to this case, section 68 empowers a Police officer without warrant:

“... to enter and inspect all drinking shops, gaming houses and other resorts of loose and disorderly characters, all premises of persons suspected of receiving stolen property, any locality, vessel, boat, or conveyance in any part whereof he shall have just cause to believe that crime has been or is about to be committed... and then and there to take all necessary measures for the effectual prevention of crime...”

Learned State Counsel's submission appears to be that “persons of *loose character*” include couples having extra marital or pre-marital relations, and that upon “suspicion” that there were

such couples at the Inn, the Respondents were entitled to enter and search the Inn and arrest any such couples because they could not establish their identity to the satisfaction of the Police and/or because they gave contradictory explanations for their presence at the Inn. Such an interpretation would give the Police unacceptably wide powers to enter a great many establishments and make numerous arrests. However, such conduct is not criminal, although it may constitute a matrimonial offence or (in some circumstances) misconduct attracting disciplinary action under the Establishments Code. It does not justify search and arrest by the Police. Further, even if "*loose character*" can be given the wide meaning suggested by learned State Counsel, section 68 only applies if the place in question is a *resort* of persons of "*loose and disorderly character*": and the only power which the police have is to take measures for the prevention and detection of crime, and nothing else. The Respondents had, and have no evidence or information that the Inn was such a place.

To sum up, the Respondents tried to justify the arrests upon numerous grounds - that the three couples were reasonably suspected of an offence: cognizable or otherwise, and/or of underworld or criminal activities; that they were taking precautions to conceal their presence; that there was a need to investigate their possible involvement in such offences or activities; that they were found in a place reasonably suspected of being a resort of loose and disorderly characters; that the Police had reason to believe that the names or addresses given by them were false and needed verification; and that they had given contradictory reasons for their presence at the Inn. The Respondents have totally failed to establish any factual basis whatsoever for any of these allegations. That the arrests had really nothing to do with such matters and was an arbitrary and high-handed infringement of liberty and invasion of privacy is manifest. Thus it was that a pregnant wife was forced, as the price of avoiding further detention, humiliation and inconvenience, to beg pardon from the Police for failing to inform them that she and her husband were lodging in a licensed guest-house. The arrest of the other two couples was equally wrongful, although the circumstances of aggravation were less.

Learned State Counsel seized upon the fact that the Manager and the couples did not petition this Court in respect of their arrest. Clearly, the Petitioner was not entitled to complain of those arrests, as such. But if those arrests, directly or indirectly, impaired his own fundamental rights, as for instance his right to carry on a lawful business, he was certainly entitled to complain: The successful running of a guest-house requires a Manager, staff, and, of course, guests. If the wrongful acts of a Police officer in relation to Manager, staff and/or guests, prevents or deters them from discharging their duties or from patronizing the guest-house, and thereby impedes the successful running of the guest-house, the proprietor is entitled to complain of the infringement of his own rights. I hold that the Petitioner is entitled to complain that the unlawful arrest of his Manager and customers impaired his own fundamental right under Article 14(1)(g).

Search

The Respondent's contention was that, having regard to the deteriorating crime situation, the Petitioner's Inn was searched to ascertain whether suspicious or underworld character were lodging there; that other guest-houses were similarly searched; that the Police had no malice against the Petitioner; and that the searches were with consent.

As for the other guest-houses most of the IB extracts produced referred to arrests of couples, and no instance was cited of any other guest-house being searched three or four times within a fortnight. It is true that the Petitioner has not proved malice.

However, while the Respondents have produced evidence of rising crime rates, they merely pleaded a vague general suspicion that criminals from outside lodge in guest-houses in order to commit crimes, and then leave the area. The Respondents not only failed to adduce any material whatsoever which gave them reason to believe, in general, that criminals did lodge in guest-houses, but they also failed to establish that they had any reason to believe in particular, that they were lodging at the Inn.

In *Bandaranaike v Rajaguru* ⁽¹⁾ the petitioner's house was searched allegedly upon information (of which some particulars were disclosed) received by the Inspector-General of Police from a

long-standing and reliable informant. Nevertheless, after scrutinizing the material relied on, this Court held that the respondent had failed to discharge his burden of satisfying the Court that he had received reliable information, and that he had "reason to believe" that the search was justified; and further that it was more likely that the Respondent had acted "with some undisclosed purpose in mind." The present case is even more starved of evidence justifying the repeated searches of the Inn.

The fact that the Manager and the three couples were not questioned about underworld or criminal activities confirms that the search on 3.6.2002 was not connected with such activities.

As for consent, the 2nd Respondent's notes at 11.50 a.m. at the Inn, his "In" entry at 1.00 p.m. and the Manager's statement at 1.30 p.m. did not record that the search was with consent. It is very probable that the 2nd Respondent did draw attention to his weapon and left the Manager with no option but to agree to a search. Even the IB extracts relating to the subsequent searches do not mention consent.

I hold that the searches of the Petitioner's premises were arbitrary, without valid reasons, and without consent, and were therefore in violation of his fundamental right under Article 12(1).

Closure of Business

The evidence establishes that the Petitioner's business was in fact closed from 3.6.2002 until interim relief was obtained on 25.6.2002. Indeed, the IB extracts of 9.6.2002 and 16.6.2002 recorded that all the rooms of the Inn were empty.

The natural and probable consequence of the arrests of the Manager and all six guests on 3.6.2002, their detention at the Police station, and the subsequent searches would have been to impair the carrying on of the Petitioner's business, in violation of Article 14(1) (g).

The available evidence further shows that the Respondents were disputing the Petitioner's right to carry on business, as indicated by the questions asked about licences and Tourist Board approvals, and not investigating criminal and underworld activities. The Petitioner's complaint to Police Headquarters on 18.6.2002 was the natural consequence of the Respondent's

orders to close his business; and so also the retention of the "Visitors" Book "as a production" although there was no charge in contemplation.

The Respondents' submission that this was a matter of word against word and that therefore neither party can be believed or disbelieved is not tenable. Although affidavit evidence cannot be tested by cross-examination, it can certainly be tested by reference to omissions, contradictions, inconsistencies, intrinsic improbability, etc. I have no hesitation in holding the Petitioner's version to be much more probable than the Respondents' which is subject to the numerous infirmities which I have already pointed out.

I hold that the 1st and 2nd Respondents, directly and indirectly, and without lawful justification, compelled the closure of the Petitioner's business from 3rd to 25th June 2002, in violation of his fundamental right under Article 14(1)(g).

Loss and Damage

While it is true that the Petitioner has not given details of the loss and damage suffered by him, there is evidence that he had mortgaged the premises for Rs. 250,000 which he was liable to repay in monthly instalments of Rs. 8,000, that he had eight employees, and that rooms were let at Rs. 350 per day. I consider it likely that he would have incurred a pecuniary loss of at least Rs. 50,000 until he was able to re-establish himself.

Order

I grant the Petitioner a declaration that his fundamental rights under Articles 12(1) and 14(1)(g) have been infringed by the 1st and 2nd Respondents, and award him a sum of Rs. 100,000 as compensation payable by the State, and a sum of Rs. 30,000 as costs payable in equal shares by the 1st and 2nd Respondents personally. These payments shall be made on or before 31.5.2003.

ISMAIL, J. - I agree.

WIGNESWARAN, J. - I agree.

Relief granted.