

MALLAWARACHCHI
v.
SENEVIRATNE, OFFICER-IN-CHARGE, POLICE STATION,
KOLLUPITIYA AND OTHERS

SUPREME COURT
M. D. H. FERNANDO, J.
KULATUNGA, J. AND
DHEERARATNE, J.
S.C. APPLICATION NO. 212/88
24 AUGUST, 1989

Fundamental Rights – Illegal arrest – Right to freedom of speech and protection from arbitrary arrest – Constitution, Articles 13(1) and (2) – Necessity to give reason for arrest to arrestee at time of arrest – Is every defamatory statement prohibited? – Right to claim return of posters.

Held:

It is obligatory to give to the person arrested the reason for his arrest at the moment of arrest or where it is, in the circumstances excused, at the first reasonable opportunity. This is to enable the person arrested to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority at the earliest possible opportunity and thus regain his freedom.

A person arrested is not bound to submit and may resist arrest, if he is not duly informed of the reason for his arrest.

The right of a person to be informed of the reason for his arrest is now elevated to a fundamental right.

Every statement which is *per se* defamatory does not cease to be in the exercise of the freedom of speech.

A true statement, made in the public interest or in the protection of a lawful interest, would be clearly in the exercise of freedom of speech although *ex facie* defamatory. Such statements may be made by way of criticism of those holding or seeking public office, particularly where relevant to such office.

The police are not called upon before acting to have anything like a *prima facie* case for conviction. The wider discretion vested in the police is logical and it is necessary for the performances of the functions of the police and for the maintenance of the law and order in the country. This does not mean however that subsequent detention except for a reasonable period to scrutinise the material can be excused.

Where the person arrested for pasting posters was released within a reasonable period and the court held he had been informed of the reason for his arrest, there was no violation under Articles 13(1) and (2).

Since the petitioner was reasonably suspected of a contravention of the Emergency Regulations, the seizure and retention in Police custody of the posters, was a preventive measure lawfully taken for the preservation of public order. The failure to return the posters may have been a violation of his proprietary rights, but not of his fundamental rights.

Where the statement exceeds permissible limits, the object of the statement was not identified, the statements are *per se* defamatory and the poster does not set out any facts on which the statements are justified and there was no pleading seeking to prove that the statement was true or constituted free comment, the fundamental right of freedom of speech and expression was not infringed.

Cases referred to:

1. *Joseph Perera v. Attorney-General S.C.* Applications Nos. 107 – 109 /86 S.C. Minutes of 25.05.87.
2. *Gunaratne v. Cyril Herat and Others* – S.C. Application No. 96/87 – S.C. Minutes of 3.3.1989.
3. *Wijesuriya v. Abeyratne and Others* – S.C. Application No. 99/87 – S.C. Minutes of 3.3.1989.
4. *Christie v. Leachinsky* (1947) A.C. 573.
5. *Muttusamy v. Kannangara* 52 NLR 324, 331.
6. *Corea v. The Queen* 55 NLR 457.
7. *Gunasekera v. De Fonseka* 75 NLR 246, 250.
8. *Dumbell v. Roberts* (1944) 1 All E.R. 326, 329.
9. *Schenk v. U.S.* – 249 U.S. 47, 52.
10. *Malalgoda v. Attorney-General* 2 FRD 283.
11. *R. v. Commissioner of Police, ex parte Blackburn* (1968) 2 QB 150.
- D. W. Abeykoon with Nimal Punchihewa, Miss M. K. S. Marapitiya and Lal Chandratilleke* for petitioner.
- Mervyn Samarakoon, S.S.C. with S. K. Gamlath, S.C.* for respondents.

28th September, 1989.

KULATUNGA, J.

The petitioner and one Chandradasa *alias* Yaparatne were detected on the morning of 23.10.88 by a police party on mobile patrol pasting posters near the Liberty Cinema, Kollupitiya, the contents of which were –

“ම්‍රා ගොරෝන්, දිනුවෙක් රට විකුණුයි
– මාස්ක්යුලාදී කරුණ පෙරමුණ”

A direct translation of these words into English may be as follows:-

“This is a rogue
If he wins he will sell the country
– Marxist Youth Front”

The word ‘ගොරෝක’ can also have other defamatory connotations such as “thief” or “fraudulent person”. “Selling the country” has the connotation of “betrayal of the nation”.

Mr. Abeykoon, learned Counsel for the petitioner did not seriously contest that the contents of the said poster are capable of such defamatory connotations. However, he argued that the petitioner is the Secretary of a political group established in 1973 called the Marxist Youth Front and states that the impugned poster was put up by the front in reply to an earlier political poster “මේ තුළදු මොකටද කරන්නතා?” and that the words “මේ ගොරෝක” were used in a political sense of deceiving the people to get votes by promising what cannot be fulfilled and by “දිනුවෙක් රට විකුණුයි” was meant taking massive loans from imperialist countries, becoming dependent on them and allowing foreigners to control our country. The impugned poster was thus a political reply to a political poster, and therefore not defamatory.

The petitioner admits being arrested by Police officers attached to the Kollupitiya Police Station when he was getting the impugned posters pasted by Chandradasa *alias* Yaparatne and being produced before the 1st respondent (the Officer-in-Charge of the

Police Station) along with sixty of the said posters at the Kollupitiya Police Station where his statement was recorded. He was detained at the Police Station overnight and released, the next day.

The petitioner complains that except being asked whether they had got Police permission to paste the posters to which he replied that such permission was not necessary, he was not informed of the reason for his arrest, that he was not produced before a Magistrate nor was there a Detention Order in respect of him. He alleges that the arrest is violative of Article 13(1) and his detention is violative of Articles 13(2) and 13(4) of the Constitution. He also alleges that his detention for getting the said posters pasted and the failure to return the posters taken from him infringe on his right to the freedom of speech and expression guaranteed by Article 14(1)(a) of the Constitution. He seeks declarations and damages accordingly.

The petitioner states that he was arrested at about 9.30 a.m. on 23.10.88 and was released at 12.45 p.m. on 24.10.88. However, the 1st respondent – who is supported by Police Constable 12153 Gamini who actually effected the arrest – states that the petitioner along with Yaparatne were arrested around 10.30 a.m. on 23.10.88 and that they were released at 9.00 a.m. on 24.10.88.

The case for the 1st respondent is that this was a period of civil unrest caused by acts of terrorism by certain groups and in pursuance of subversive activities numerous posters were displayed in the city of Colombo particularly on the eve of the nomination for the Presidential Election scheduled for 19.12.88; that they carried legends, words or signs or visible representations which were, *inter alia*, likely to excite or incite violence or feelings of disaffection or commission of offences prescribed by Regulations 26, 28 and 33 of the Emergency Regulations; that in view of this situation he kept the Kollupitiya Police area under surveillance with a view to apprehend any person found pasting posters and for this purpose a specially assigned police party was instructed to patrol the area. It was pursuant to these instructions that PC Gamini on mobile patrol arrested the petitioner and Yaparatne on the morning of 23.10.88 in the exercise of powers under Regulation 18(1) of the Emergency

Regulations, that the petitioner and Yaparatne were so arrested and detained at the Police Station on a reasonable suspicion that they were concerned in or to be committing offences under Regulations 26, 28 and 33 of the Emergency Regulations; that they were kept in Police custody in good faith pending investigations as to whether there was any subversive link with their acts; and that they were released without any delay when it was confirmed that they were not wanted in connection with any subversive activity.

In his further affidavit dated 06.06.89 the petitioner states that they had not violated any Emergency Regulation and alleges that the regulation mentioned by the 1st respondent is an afterthought to justify their arrest. The learned Counsel for the petitioner submitted that the petitioner had in fact been arrested under the old regulation 28(1) of the Emergency Regulations which required the permission of the Police to affix posters which regulation had been declared *ultra vires* the Public Security Ordinance in *Joseph Perera v. The Attorney-General*⁽¹⁾ and hence the arrest of the petitioner is illegal.

Subsequent to the ruling of this Court, Regulation 28(1) was replaced by a new Regulation 28 which is as follows:-

"no person shall affix in any place visible to the public or distribute among the public any posters, handbills or leaflets, the contents of which are prejudicial to public security, public order or the maintenance of supplies and services essential to the life of the community".

This regulation which was in force on 23.10.88 does not require the permission of the Inspector General of Police for affixing posters which was a requirement under the former Regulation 28(1). If, therefore, the arrest of the petitioner was based on the said Regulation 28(1), such arrest would be illegal.

In support of his submission, learned Counsel for the petitioner cited the decision in *Gunaratne v. Cyril Herat and Others*⁽²⁾ – *Wijesuriya v. Abeyratne and Others*.⁽³⁾ In that case, this Court found that the 'B' report on which the petitioner Wijesuriya was produced before the Magistrate and the Detention Order under Regulation

19(2) of the Emergency Regulations both referred to the commission of an offence under Regulation 28(1) which had been struck down by this Court; that the Police had no reasonable ground for suspecting the petitioners to be concerned in committing an offence under Regulation 68(3), which was also relied upon by the Police in filing their affidavit in this Court; and that the posters which had been seized could hardly have been characterised as subversive literature. In the circumstances, the arrest and detention of the petitioners were held to be unlawful and in violation of Articles 13(1), 13(2), 13(4) and 14(1)(a) of the Constitution.

The facts of the case before us are different. No doubt PC Gamini who effected the arrest admits having asked the petitioner whether the petitioner had the authority of the IGP for pasting posters. However, according to this officer this is not all that occurred. He states that his Officer-in-Charge the 2nd respondent had given several Police officers attached to the Kollupitiya Police including himself specific instructions to patrol the Kollupitiya Police area and to be on the alert for any subversive activity and to arrest any person committing any offence under Emergency Regulations; that whilst he was on mobile patrol, he received a motor rola message that certain persons were pasting posters near the Liberty Cinema; that when he visited the scene he saw the petitioner and Yaparatne pasting posters on a wall and questioned them with regard to the posters.

It is the position of PC Gamini that he reasonably suspected the petitioner and Yaparatne to be concerned in or to be committing offences under Emergency Regulations and informed them "about the nature of the available charges against them".

In his affidavit, PC Gamini states that he believed in good faith that the petitioner and Yaparatne were committing offences under Regulations 26, 28 and 32 of the Emergency Regulations. The reference to specific regulations appears to reflect the opinion of the Police formed after the arrest. It does not appear to be a claim to have informed the petitioner and Yaparatne that they had committed offences under any particular regulation; nor is there any legal requirement to formulate any charge at the time of arrest.

While the fact that the petitioner was questioned about the lack of Police permission does tend to support the contention that he was arrested for this reason, the other established facts indicate that the reason for the arrest, made known to the petitioner, related to the nature and contents of the poster. PC Gamini had received instructions to be watchful for subversive activity in contravention of Emergency Regulations; at the Police Station the petitioner was questioned, primarily and at some length, about the illegality of the poster, and only incidentally about the lack of Police permission; his statement has been produced marked X2. At the same time messages were sent to other sections of the Police in order to check whether the petitioner was wanted in connection with subversive activity.

On the basis of the established facts, it is intrinsically more probable that PC Gamini did convey to the petitioner his belief that the poster contravened the Emergency Regulations. Whilst the I.G.P.'s permission would not have converted an illegal poster into a lawful one, a constable might well ask that question out of an abundance of caution, because the fact of such permission would influence his judgment, even to the extent of refraining from arrest.

Article 13(1) of the Constitution reads:

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

Commenting on the corresponding provisions of Article 9(1) of the U.N. Covenant on Civil and Political Rights which prohibits the deprivation of a person of his liberty except according to the procedure established by law, Theodor Meron, Human Rights in International Law p. 138 states –

"The purpose of this provision is to require States to spell out in legislation the grounds on which an individual may be deprived of his liberty and the procedure to be used. With the freedom of action of the executive branch of Government thus restricted, Rector Dinstein observes 'not every policeman (or other state functionary) is entitled to decide at his discretion, and his own responsibility, who can be arrested, why and how'".

The duty to give the reason for an arrest is in Article 9(2) of the Covenant which reads –

"Anyone who is arrested shall be informed, at the time of arrest, of the reason for his arrest and shall be promptly informed of the charges against him".

The European Convention on Human Rights Article 5(2) is as follows:-

"Everyone who is arrested shall be informed promptly, in a language which he understands, of the reason for his arrest and of any charge against him".

Article 22(1) of the Indian Constitution enacts –

"No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds of such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice".

This right is not available to certain categories of persons referred to in Article 22(3).

The right of an arrested person to be informed of the ground of his arrest was originally part of the Common Law of England. The applicable principles have been discussed in the much quoted decision of the House of Lords in *Christie v. Leachinsky*.⁽⁴⁾ Extracts from the judgments in that case appear in several of our decisions which if read out of context may not help in the application of the relevant principles to the facts of the case before us. I shall therefore make the following summary of propositions from the judgments in *Christie's* case which I think would assist us –

- (1) A policeman arresting without warrant upon reasonable suspicion must, in ordinary circumstances inform the person arrested of the true ground of arrest.
- (2) If the citizen is not so informed but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.

- (3) The requirement that he should be so informed does not mean that technical or precise language need be used.
(Lord Chancellor Simon)
- (4) The subject is entitled to know why he is deprived of his freedom if only, in order that he may, without a moment's delay, take such steps as may enable him to regain it. If a man is to be deprived of his freedom he is entitled to know the reason why in order that he may know whether he is or is not bound to submit to the arrest.
- (5) It is not an essential condition of arrest that the constable should at the time of arrest formulate any charge which may ultimately be found in the indictment. The arrested man is entitled to know what is the act for which he is arrested or the facts which are said to constitute the crime on his part.
(Lord Simonds)
- (6) A person who is arrested should be given the reason for his arrest at the moment of arrest, or where it is, in the circumstances excused, at the first reasonable opportunity.
- (7) The law does not encourage the subject to resist the authority of one whom he knows to be an officer of the law. The right to resist is always limited by the duty to submit to arrest by an officer of the law even though the reason for the arrest is not at once stated.
(Lord de Parcq).

It is clear from the judgments in *Christie's* case that subject to the reservations set out therein a person arrested is not bound to submit and may resist arrest, if he is not duly informed of the reason for his arrest.

In *Muttusamy v. Kannangara*⁽⁶⁾ Gratiaen, J. said.—

“... the law in Ceylon coincides with the English Law on this fundamental matter affecting the right of private citizens”.

This ruling is re-affirmed in *Corea v. The Queen*⁽⁶⁾

The right of a person to be informed of the reason for his arrest is now elevated to a fundamental right. As observed by H. N. G. Fernando, CJ in *Gunasekera v. de Fonseka* –⁽⁷⁾

"It is only if a person is informed of the ground of his arrest, or (in other words) of the offence of which he is suspected, that he will have an opportunity to rebut the suspicion or to show that there is some mistake as to identity".

Shukla – Constitution of India – Seventh Edition p. 127-128 – observes that this requirement is "meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority ..."

I am of the view that the obligation to inform a person arrested of the reason for his arrest under the several systems referred to above, however worded, is much the same; that rights are defined in, substantially similar terms; the obligation is to give the reason at the moment of arrest or where it is, in the circumstances excused, at the first reasonable opportunity. In the instant case, the obligation has been complied with at the moment of arrest and at the Police Station shortly after the petitioner was taken there.

Applying the relevant legal principles to the facts of this case, I am satisfied that the petitioner has been informed of the reason for his arrest as required by Article 13(1) of the Constitution and provided with the opportunity of adducing explanations in his favour to the 1st respondent. It was indeed in consequence of the provision of these facilities that he was able to obtain his release expeditiously. Accordingly, the fact that the petitioner was asked whether he had the permission of the I.G.P. to affix posters would be irrelevant for testing the validity of his arrest; I hold that the 1st respondent is not guilty of a contravention of Article 13(1) of the Constitution.

It is then submitted that in any event the arrest of the petitioner is illegal in that there was no reasonable ground for suspecting him to be concerned in or to be committing an offence under Emergency Regulations; and that his detention in Police custody is violative of Article 13(2) and (4) of the Constitution.

They were arrested in the act of affixing the impugned posters which according to the petitioner is a reply to an earlier poster. The earlier poster is innocuous whilst the reply is offensive and scurrilous. In his statement to the Police (X2) the petitioner states that the said poster is in connection with the Presidential Election. Presumably, it is directed against one of the contenders to the Office of President. Although the Police asked him to identify the person against whom the poster is directed, the petitioner was not prepared to identify the person beyond stating that it is in reply to an earlier poster; even in his petition he has not identified such person. This shows that the petitioner was acting *mala fide* and was not engaged in making political comments against the person concerned as claimed by him.

The petitioner's poster, viewed in isolation months later, does not appear to be subversive. But in the circumstances then prevailing, and in the light of instructions given to him, PC Gamini could reasonably have suspected on 23.10.88 that the poster was part of a subversive campaign – a suspicion strengthened by reference to selling or betraying the country, and the petitioner's failure to identify the person against whom it was directed. I am of the view that PC Gamini did have reasonable grounds for suspecting that the poster was part of a subversive campaign, prejudicial to public order, in contravention of Regulations 28 and 33.

In *Joseph Perera v. The Attorney-General (supra)* Wanasundera, J. considering the validity of an arrest under Regulation 18(1) of the Emergency Regulations said –

"The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. On the other hand, for an arrest a mere reasonable suspicion or reasonable complaint of the commission of an offence suffices. I would, however add that the test is an objective one".

Wanasundera, J. quoted Scot, LJ in *Dumbell v. Roberts*⁽⁶⁾ –

"The police are not called upon before acting to have anything like a *prima facie* case for conviction".

and proceeded to express the following opinion.

"This wider discretion vested in the police is logical and is necessary for the proper performance of the functions of the police and for the maintenance of the law and order in the country.

But this does not mean that the subsequent detention (except for a reasonable period to scrutinise the material) can be excused".

I hold that the arrest and the initial detention of the petitioner are lawful. The petitioner had been lawfully arrested and detained under Regulation 18(1) of the Emergency Regulations. Regulation 19(1) permits his production before a Magistrate "within a reasonable time, having regard to the circumstances of each case, and in any event, not later than thirty days after such arrest". His detention in Police custody during such extended period would be lawful even if no detention order had been obtained. Such an order is required and may be obtained under Regulation 19(2) only where it is sought to detain such person at a place authorised by the Inspector General of Police in which event he may be so detained for a period not exceeding ninety days from the date of his arrest. The petitioner was detained for about 24 hours – or at most 27 hours according to his affidavit – which was not excessive in the circumstances. His detention does not constitute a punishment. On the other hand, the 1st respondent has acted *bona fide* in making expeditious inquiry and releasing the petitioner so soon as he was satisfied that there was no subversive link with his acts. The 1st respondent has also properly exercised his discretion in not prosecuting the petitioner; and accordingly, he is not guilty of any infringement of Article 13(2) or 13(4) of the Constitution.

I shall now consider the alleged infringement of the petitioner's rights under Article 14(1)(a) of the Constitution. I owe what follows, as well as some of the conclusions, reached in this judgment, to elucidations by my brother Fernando, J. and his careful analysis of the facts, which I have adopted.

Since the petitioner was reasonably suspected of a contravention of the Emergency Regulations, the seizure and retention in Police

custody of these posters was a preventive measure lawfully taken for the preservation of public order.

When it was ascertained that the petitioner had no subversive connections and that the posters were not part of the prevailing subversive campaign, the detention of the petitioner and the retention of the posters ceased to be justifiable, for similar reasons. We have not been referred to any general right of retention of defamatory material.

Just as any further detention of the petitioner would have been violative of Article 13(2), the petitioner contends that the retention of the posters was in violation of Article 14(1)(a). The failure to return the petitioner's property, when it ceased to be regarded as contrary to the Emergency Regulations, may have been a violation of his proprietary rights, but was not necessarily a violation of his fundamental rights. It is crucial to his claim, that his rights under Article 14(1)(a) have been violated, to establish that the poster constituted a legitimate exercise of his freedom of speech.

Freedom of speech, by its very nature, is not absolute. Apart from the restrictions authorised by Articles 15(2) and 15(7) "the law's stringent protection of free speech would not protect a man in falsely shouting 'fire' in a Theatre and causing panic" (*Schenk v. U.S.*⁽⁹⁾ per Holmes, J.). It is unnecessary to consider in this case whether "restrictions as may be prescribed by law ... in relation to defamation" include Common Law restrictions. Whilst agreeing that "the freedom of publication does not include the licence to defame and vilify others" *Malalgoda v. Attorney-General*.⁽¹⁰⁾ I do not think that every statement which is *per se* defamatory ceases to be in the exercise of the freedom of speech.

A true statement, made in the public interest or in the protection of a lawful interest, would be clearly in the exercise of the freedom of speech although *ex facie* defamatory. Such statements may be made by way of criticism of those holding or seeking public office, particularly where relevant to such office. In *R. v. Commissioner of Police, ex parte Blackburn*⁽¹¹⁾ it was observed (in relation to contempt of Court) that the freedom of speech entitles every man to make fair

comment; even outspoken comment, on matters of public interest, and that this right is not exceeded by reason of some error, or bad taste.

Here, however, the statement exceeds permissible limits. The object of the statement has not been identified; the statements are *per se* defamatory, and the poster does not set out any facts on which those statements are justified; it is not even pleaded, nor sought to be proved, that the statement was true or constituted fair comment. No facts are set out, in the poster or even in the petition, to show that the statements bore a different meaning to their plain and defamatory sense. It cannot be regarded as a legitimate exercise of freedom of speech. The 1st respondent is accordingly not guilty of a violation of the petitioner's rights under Article 14(1)(a) of the Constitution.

The 2nd respondent was the Assistant Superintendent of Police for the area under whose supervision the 1st respondent functioned during the relevant period. He is not guilty of any violation of the fundamental rights of the petitioner.

For the above reasons, I dismiss the application of the petitioner with costs.

M. D. H. FERNANDO, J. – I agree.

DHEERARATNE, J. – I agree.

Application dismissed.