

JAYAKODY  
v.  
KARUNANAYAKE, OFFICER-IN-CHARGE,  
POLICE STATION, POLGAHAWELA AND  
ATTORNEY-GENERAL

SUPREME COURT.  
AMERASINGHE, J.  
KULATUNGA, J. AND  
DHEERARATNE, J.  
S.C. APPLICATION NO. 91/91.  
JUNE 03 AND OCTOBER 9, 1992.

*Fundamental Rights – Arrest without warrant for alleged transport of voters at Local Authorities Elections of 1991 – Local Authorities Elections Ordinance ss. 81, 81A, 81B and 81C – Constitution, Articles 12, 13(1) and 14(1) (c).*

The transport of voters at Local Authorities Elections is an offence under s. 81C of the Local Authorities Elections Ordinance but it is not a cognizable offence. Hence arrest without a warrant is not valid and constitutes an infringement under Article 13(1) of the Constitution.

Where a person puts on the mantle of a *de facto* leader of a Group at the elections and is acknowledged as such there is no infringement under Article 12 and 14(1) (c) of the Constitution. Being a strong supporter of a Group alone will not entitle a person to exercise the same rights and privileges as enjoyed by the *de jure* leader of a recognised group at the election.

**APPLICATION** for infringement of fundamental rights.

*Lalith Athulathmudali P.C. with Ranjan Gooneratne, Dr. Ranjith Fernando, Mahendra Amerasekera, Anil de Silva, Ranjani Morawaka, T. M. S. Nanayakkara, Nalin Dissanayake, Kalinga Indatissa* for petitioner.

*Upawansa Yapa, Additional Solicitor-General* with *B. Aluwihare S.C.* for respondent.

*Cur. adv. vult.*

November 18, 1992.

**KULATUNGA, J.**

The petitioner was the United National Party Member of Parliament for Polgahawela until December 1988. He was not nominated by the U.N.P. to contest the General Elections held in 1989. Consequently, he moved away from the U.N.P. and during the Local Authorities

Elections in 1991 he worked against the U.N.P. At the election of members to the Polgahawela Pradeshiya Sabha, he supported the Independent Group which was led by one Tennakoon. Although the petitioner was neither the leader nor a candidate contesting as a member of that group, he claimed and was acknowledged during the election campaign, to be the 'de facto' leader thereof. One of the posters published on behalf of the Independent Group refers to the petitioner as the 'Lion of the North-West region'.

The petitioner complains that the 1st respondent, the Officer-in-Charge of the Polgahawela Police Station obstructed the election campaign of the Independent Group from the nomination day, until the conclusion of the election whilst the U. N. P., S. L. F. P. and B. J. P. members including Members of Parliament were allowed to campaign freely and tour the electorate on the day of the poll. The petitioner himself was arrested without a warrant on the polling day for alleged transport of voters (which is a non-cognizable offence), and was remanded to Fiscal Custody where he remained until the conclusion of the election. He alleges that by reason of such treatment his rights under Articles 12(1), 12(2), 13(1) and 14(1) (c) of the Constitution have been infringed.

The petitioner states that on 26.03.91 two persons who were prospective candidates of the Independent Group were arrested for a motor traffic offence and were detained at the Polgahawela Police Station with the result that they were precluded from signing the group nomination paper; that for eight years he had been residing at the Lihiniya Rest House, Polgahawela with the Resthouse-Keeper who is a relation of his when on 24.04.91 the Assistant Superintendent of Police Maho (who he says is ill-disposed towards him) visited the Polgahawela Police Station and ordered that all his belongings be removed from the Resthouse Keeper's residence within 6 hours; that on the same day the 1st respondent obstructed him when he was on his way to an election meeting; and that on 29.04.91 he made a complaint (P3) at the Police Headquarters regarding the said acts of harassment directed against the election campaign of the Independent Group.

The petitioner also produced marked P4 a copy of a statement made to the police on 01.05.91 by one Seneviratne, a candidate of the Independent Group who alleges that on 24.04.91 the A.S.P.,

Maho disrupted one of his election meetings which was attended by the petitioner; and that the next day the Officer-in-Charge of the Potuhera Police Station met him and suggested that he ceases to function as a member of the Independent Group.

On the day of the poll (11.05.91), the petitioner gave his car to Tennakoon, the Leader of the Independent Group and toured the electorate with him, meeting polling agents, counting agents and making arrangements to safeguard the interests of the Independent Group at the count. At about 1.30 p.m. they met Buddhadasa, one of their supporters and went to his house (which is a place close to the Mawatta Junior School Polling Station). At that stage the 1st respondent accompanied by three other police officers arrived and arrested the petitioner and Tennakoon without informing them of the reason for their arrest and removed them to the Police Station. Tennakoon was released at about 3.00 p.m. but the petitioner was kept in police custody. On 12.05.91 police officers informed him that the allegation against him was that he had transported voters. He was, thereafter produced before the Magistrate who, on the application of the police, remanded him until 16.05.91.

The petitioner denies the alleged transport of voters (which is an offence under s. 81C of the Local Authorities Elections Ordinance) and contends that in any event it is not a cognizable offence and hence he could not have been lawfully arrested without a warrant.

The 1st respondent states that prior to the Local Authorities Elections which were held in 1991 after the lapse of several years, Police Stations throughout the country had been directed to be vigilant in view of possible attempts to disrupt the peaceful conduct of the poll; that on the night of 26.05.91, the police arrested two persons who were found inside a railway carriage parked at the Polgahawela Railway Station; that the same night three persons who were riding a motor-cycle were arrested as they could not produce identity cards and the motor-cycle had no proper registration number. According to the petitioner, two of them namely, Premaratne and Illangakoon were prospective Independent Group candidates and by being detained at the Police Station on 27.03.91 they were precluded from signing the group nomination paper. They requested the police to release them to enable them to attend to that matter; but the police did not release them. The 1st respondent, however, denies that they

had informed him of the fact that they were prospective candidates for the Pradeshiya Sabha Elections. He states that they were released after recording their statements (1R4 and 1R5), on 27.05.91.

In justification of the petitioner's arrest, the 1st respondent states that he received information that the petitioner was transporting voters and canvassing votes; that when he visited the scene, he observed the petitioner committing those acts in the proximity of the Mawatta Junior School Polling Station, using vehicle No. 50 Sri 9797 which was being driven by a driver; that the said acts constituted offences under Sections 81, 81A and 81B of the Local Authorities Elections Ordinance; and that he arrested the petitioner and the driver, having informed them of the allegation against them after which he took them to the Police Station along with the said vehicle. The 1st respondent denies the allegation that he arrested Tennakoon. In support of his version the 1st respondent has produced marked 1R6, 1R7 and 1R8 - I. B. Extracts of the notes of investigations in the case. These include the statements of three voters (Arumugam, Chandrasiri and Jayaratne Banda) who state that the petitioner called them to vote and provided transport by vehicle. According to the entries made by the police, the information that the petitioner was transporting voters had been given to the 1st respondent by a radio message transmitted by the Chief Security Officer for Mr. Rekawa, Member of Parliament; and at the time of his arrest, the petitioner had shouted threats against Mr. Rekawa.

I shall first consider the validity of the petitioner's arrest. In this respect, it is very clear that Sections 81 and 81B relied upon by the 1st respondent have no application to the facts before us. Under s. 81, the use of undue influence at an election is an offence. Under s. 81B the display of handbills, posters etc. on the day of the poll is an offence. There are no such allegations against the petitioner. S. 81A penalises a variety of acts including canvassing for votes and soliciting the vote of any voter. The learned Additional Solicitor-General submitted that according to the statements of the three voters, the petitioner had, besides transporting them, canvassed for votes or solicited their votes in favour of the Independent Group and thereby committed an offence under s. 81A (3) which offence is declared cognizable by subsection 6 of the said section; and that the petitioner's arrest was, therefore, lawful.

The petitioner denies the alleged transport of voters (which is an offence under s. 81C) and states that on the available facts he could not have been arrested for offences under s. 81, 81A or 81B. It is his position that he was arrested at Buddhadasa's house. Learned President's Counsel for the petitioner submitted that even assuming the commission of an offence under s. 81C, the petitioner could not have been arrested without a warrant for such offence; that apart from a prosecution, the only step which the police are empowered to take thereunder is to seize the vehicle used in committing the offence and to detain it until the conclusion of the election. Upon the conviction of a person for an offence under s. 81C, a Court may also make order declaring the vehicle forfeit to the State. Counsel submitted that—

- (a) as per the 1st respondent's notes, he arrested the petitioner for transporting voters after informing the petitioner of such reason for the arrest;
- (b) that the 'B' report made to Court on 12.05.91 (and all subsequent reports) confirm that the impugned arrest had been made for alleged transportation of voters; the said report further states that the petitioner is thereby guilty of an offence under s. 81C;
- (c) that the present claim of the 1st respondent that he arrested the petitioner for offences under sections 81, 81A and 81B is an afterthought when he realised that the petitioner could not have been lawfully arrested without a warrant for an offence under s. 81C or under the relevant provisions of the Code of Criminal Procedure.

In support of his position that he was arrested at the house of Buddhadasa, the petitioner has produced affidavits from Buddhadasa (P5), Atapattu (P6), Tennakoon (P8) and Karunaratne (P12). Tennakoon was the Leader of the Independent Group and the others referred to were loyal supporters of that group. All of them were faithful followers of the petitioner who was their '*de facto*' leader. As such, they are not impartial witnesses. Hence, in the absence of corroboration from an independent source, I am unable to accept their version as to the place of the petitioner's arrest. On a balance of

evidence, I accept the 1st respondent's version that he was arrested whilst transporting voters. The three voters concerned have made statements to the police stating that at the time of the petitioner's arrest he was transporting them to the polling booth in a vehicle. The petitioner has failed to adduce any reason as to why the said voters should have falsely implicated him in an offence. I, therefore, reject the petitioner's version.

However, I accept the submission of the learned Counsel for the petitioner that on the basis of the available evidence the 1st respondent's claim that he arrested the petitioner for offences under Sections 81, 81A and 81B is not true and that on the basis of his own entries and the report to Court, the 1st respondent had purported to arrest the petitioner without a warrant for an offence under s. 80C (which is not a cognizable offence); and that the said arrest was unlawful. If as the 1st respondent now claims the petitioner was arrested for a different offence, then, as per the notes of investigations, the 1st respondent failed to inform the petitioner of the reason for such arrest, in which event also, the impugned arrest would be unlawful. (on account of such failure). I, therefore, hold that the petitioner's rights under Article 13(1) of the Constitution have been infringed.

Next, I consider the alleged violations of Articles 12(1) and (2) and 14(1) (c) of the Constitution. The petitioner's complaint in respect of the said Articles arises in consequence of alleged obstruction by the 1st respondent of the election campaign of the Independent Group. In considering this complaint, the following matters are relevant:

- (a) The petitioner was neither the Leader nor a candidate of the Independent Group. His legal status was that of a strong supporter of the said group. He was also responsible for its formation and he gave it such support as made it appear that he was its virtual leader.
- (b) The petitioner appears to believe that by reason of his '*de facto*' leadership of the Independent Group, he was entitled to the same rights enjoyed by its '*de jure*' leader. However, the correct position is that his rights are no more than those enjoyed by any ordinary supporter of the group.

- (c) Neither the Leader of the Independent Group (Tennakoon) nor any other member of that group has invoked the jurisdiction of this Court in consequence of alleged acts directed against the group. Tennakoon has only filed an affidavit regarding the arrest of the petitioner.
- (d) The two persons said to be prospective candidates of the Independent Group and who were arrested by the police on 26.03.91 have not filed any affidavits to rebut the allegation that they were found without identity cards and riding a motor cycle without a proper registration number. There is also no admissible evidence that they informed the police of the fact that they were prospective candidates of the Independent Group.
- (e) Independent Group candidate Seneviratne who in his statement to the police (P4) makes allegations against the police has not filed an affidavit. Neither the A.S.P. Maho nor the H.Q.I. Potuhera who are said to have obstructed his election campaign has been added as a party to these proceedings to enable this Court to make a fair determination in the matter.
- (f) On the basis of my findings, a *prima facie* case of an offence under s. 80C of the Ordinance has been made out against the petitioner. Even though he was not arrested for the offence of soliciting the votes, a *prima facie* case of such an offence (under s. 80A) has been made out on the basis of the statements of the three voters who are said to have been travelling in the petitioner's vehicle.

It seems to me that the petitioner was not similarly circumstanced as M.P.'s belonging to the U.N.P. or the S.L.F.P. who were campaigning at the election except to the extent that each of them was a supporter of a recognised political party or an Independent Group; but the petitioner has exceeded his limit by purporting to put on the mantle of the Leader of the Independent Group, in particular on the day of the poll and seeking to exercise the same rights and privileges as enjoyed by the '*de jure*' Leader of the Group. In the circumstances, I hold that the alleged infringements of the petitioner's rights under Articles 12 and 14(1) (c) have not been established.

For the foregoing reasons, I grant the petitioner a declaration that his rights under Article 13(1) have been infringed. In determining the compensation payable to him, I have taken into consideration the fact that in my view the 1st respondent did not intend to ride rough shod over the law when he arrested the petitioner on 11.05.91. The 1st respondent made a mistake in making an unlawful arrest. In all the circumstances, I consider it just and equitable to award the petitioner compensation in a sum of Rs. 3000/- (Rupees Three Thousand) together with Rs. 500/- (Rupees Five Hundred) as costs. I direct the state to pay the said sum to the petitioner.

**AMERASINGHE, J.** – I agree.

**DHEERARATNE, J.** – I agree.

*Relief granted.*

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