

MARIADAS RAJ
v.
ATTORNEY-GENERAL AND ANOTHER

SUPREME COURT

SHARVANANDA, J., RANASINGHE, J. and RODRIGO, J.

S. C. APPLICATION NO. 130 OF 1982.

7TH FEBRUARY, 1983.

Alleged violation of Articles 11 and 13(1 J) - Mistake as to identity of police officer who infringed right - Nature of proceedings under Article 12(b) - what constitutes Executive or Administrative Acts.

Petitioner was a citizen of India who had come to Sri Lanka on 10.11.82 on a Visa obtained from the Deputy High Commissioner for Sri Lanka in Madras. The petitioner alleged that on 13.11.82, while he was sleeping in a house in Chilaw he was woken from his sleep, brutally assaulted and arrested by the 2nd Respondent who was a police officer. Petitioner complained that he was subject to cruel, inhuman treatment and punishment and was arrested not according to procedure established by law, nor was he informed of the reason for his arrest. (Articles 11 and 13(11) respectively). The 2nd respondent filed an affidavit in which it was stated that the arrest was not by the 2nd respondent but by another police officer.

Held

It is not of much consequence whether the violation of Petitioner's fundamental rights was caused by X or Y, in the exercise of the coercive powers with which the State has clothed them. The relevant question is — has the alleged infringement of the right been caused by "executive or administrative action"; if the answer is in the affirmative, then the State is liable.

The protection afforded by Article 126 is against infringement of fundamental rights by the State, acting by some public authority endowed by it with the necessary coercive powers. This is not vicarious liability - it is the liability of the State itself. The relief granted is principally against the State, although the delinquent official may also be directed to make amends and/or suffer punishment.

Cases referred to—

Muthusamy v. Kannangara - (1951) 52 NLR 524.

Christie v. Leachinsky — 1947 AC 573.

Corea v. The Queen ~ 55 NLR 457.

McNabb v. USA - 1943, 318 US 332, 87 L Ed. 819.

Velmuruguv. Attorney -General & another —
S.C. Application 74/81.

Maharaja v. Attorney-General of Trinidad — 1978 —
2AER670.

Thornhill v. Attorney - General - 1981 AC p.61 at 73.

Iowa Dadesmonies National Bank v. Bonnet (1931) —
284 US 323

Ratnasara Thero v. Udugatnpola Superintendent of Police et al
SC Application No. 125/82 SC.M. 8.2.83.

V. S. A. Pullendyagam with S. C. Chandrahasan, Miss. N. Kanapathipillai and Miss. D. Wijesundera for Petitioner.

Priyantha Perera, Deputy Solicitor General with Nimal Amara-tunga, State Counsel* for 1st Respondent.

S. D. P. Valentine with C. Kadiramanpulle for 2nd Respondent.

February, 14, 1983.

SHARVANANDA, J.

The petitioner in this case is a foreigner. He is a citizen of India holding an Indian Passport bearing No. K. 9880409. He has come to Sri Lanka on 10.11.1982 on a Sri Lankan visa No.67904/82 issued at the Office of the Deputy High Commissioner for Sri Lanka in Madras on 02.11.1982.

By his petition under Article 126 of the Constitution the petitioner complains, that while he was staying with one Anthony Rodrigo at Chilaw, he was woken up from his sleep at about 1 a.m. On 13th November, 1982 by the 2nd respondent, Nihal Karunaratne, an Inspector of Police, Chilaw and was brutally assaulted and was arrested and taken to the Chilaw Police Station in spite of his pleading that he was a mere visitor to the house of Anthony Rodrigo, having come from India two days ago. Peti-

tioner states that when he was arrested he was not informed of the cause or ground for his arrest. By his petition the petitioner complains that on 13th November, 1982, he,

- (a) was subjected to cruel inhuman treatment and punishment in violation of Article 11 of the Constitution, and
- (b) was arrested not according to procedure established by law, nor was informed of the reason for his arrest, in violation of Article 13(1) of the Constitution.

The petitioner was produced before the Acting Magistrate at about 7.30 or 8.30 p.m. on 13.11.1982 and on the orders of the Magistrate he was remanded. He was ultimately discharged from detention only on 03.12.1982. Articles 11 and 13 (1) apply to all persons; not only to citizens.

By his affidavit the 2nd respondent has stated that he had nothing to do with the arrest and assault of the petitioner. He produced an affidavit from one Dhammika Godagama, Sub-Inspector of Police, Chilaw dated 30.01.1983, in support of his defence. According to the latter's affidavit it would appear that it was Sub Inspector of Police Dhammika Godagama who arrested the petitioner in the early hours of 13.11.1982 and not the 2nd respondent. In his affidavit Sub Inspector of Police Godagama has stated that he arrested the petitioner because he suspected the petitioner to be an illegal immigrant.

In view of these affidavits it would appear that the petitioner had made a mistake in identifying the 2nd respondent as the Police Officer who arrested him and assaulted him on 13.11.1982. The case against the 2nd respondent was therefore not pressed by Counsel for the petitioner. Counsel however submitted that the case of the petitioner was that the Police Officer, whoever it might be, who arrested him did not comply with the mandatory requirements of the law which obligated the officer arresting a person to inform him the reason for his arrest. Since Sub Inspector of Police Dhammika Godagama has owned that it was he who arrested the petitioner on 13.11.1982 and not the 2nd respondent, the failure to communicate the reasons for his arrest was ascribable to Godagama. The infringement by executive or administrative action of the fundamental right guaranteed by Article 13(1) of the Constitution to be informed of the reasons

for his arrest thus consisted in Dhammika Godagama, the Police Officer, not informing the petitioner of the reasons for his arrest on 13.11.1982. Counsel very relevantly pointed out that in his affidavit Dhammika Godagama had not refuted the petitioner's averments in his affidavit that the officer who arrested him did not inform him the cause or grounds for his arrest, and that in the circumstances the allegation of infringement of the petitioner's constitutional right of freedom from arbitrary arrest guaranteed to him by Article 13(1) of the Constitution has been established. In this connection the 'B' report made by the Officer-in-charge of the Chilaw Police Station dated 13.11.1982, under Chapter III of the Criminal Procedure Code provides relevant material supporting the petitioner's allegation. It is stated in the report that in the course of a search of the house of Anthony Rodrigo "we questioned a person who was sleeping in front of the said house and found that he has come from India and that he has no visa to remain here, that he was a person called Mariyadasa Raj of Tamil Nadu territory and as such we took him into custody and produced to the Police. I state that further investigations in connection with this person are being carried on and move that he be remanded till 23.11.1982 and until the investigations are over." It is quite clear that the petitioner was taken into custody by the Police Officer because he was suspected to be an alleged immigrant and that he had no valid visa. The petitioner in his affidavit has stated that he had pleaded with the Police Officer who arrested him that he was a mere visitor to the house, having come from India two days ago and that he had stated that he could show his passport and air ticket. But the said Police Officer had turned a deaf ear to his pleas. Had Sub Inspector Godagama duly informed the petitioner the reasons for his arrest as mandated by the law, the suspicion which was the warrant for the exercise of his Police powers of arrest and detention would have been dispelled, and there would have been no justification for the arbitrary arrest and detention of the petitioner. Had Sub Inspector of Police, Godagama complied with the law and informed the petitioner of the reasons for his arrest, namely that he suspected the petitioner to be an illegal immigrant, it is inconceivable that the petitioner who had with him his Indian Passport would have failed to show his passport, which at page 17 had the visa endorsed on it authorising the entry into Ceylon of the petitioner within one month of the date of issue, namely 02.11.1982 and stay in Ceylon for one month from the date of his entry namely 10.11.1982. In view of this visa there would have been no foundation for Sub Inspector Godagama's suspicion that he was an illegal immigrant. These

circumstances tend to mitigate against the acceptance of any denial by Godagama, of the petitioner's version that he was not informed of the reasons for his arrest. The allegation of the petitioner that when he was arrested he was not made aware of the reasons for his arrest by the Police Officer who arrested him has, in my view, been established.

Article 13(1) provides that - "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reasons for his arrest."

Section 23(1) of the Code of Criminal Procedure Act No. 15 of 1979, provides that—

"in making an arrest, the person making the same . . . shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested."

The corresponding provision of the Criminal Procedure Code, which was repealed by the Code of Criminal Procedure Act of 1979, namely, Section 23(1) of the Code does not specifically provide for the person arrested to be informed of the nature of the charge or allegation upon which he is arrested. Even though there was no such express provision in the Criminal Procedure Code, Gratien, J., in *Muthusamy v. Kannangara* (1951) 52 NLR "page 524, held that "whenever a Police Officer arrests a person on suspicion without a warrant 'common justice and common sense' require that he should inform the suspect of the nature of the charge upon which he is arrested." He relied on the judgment of the House of Lords in *Christie v. Leachinsky*, 1947 AC 573 as authority for the principle and expressly desired that the following general propositions enunciated by Lord Chancellor Simon should be borne in mind by all Police Officers in this country :

- " 1. If a Police Officer arrests without a warrant, upon reasonable suspicion, he must, in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or give a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized.
2. If a citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment."

In *Corea v. The Queen*, 55 NLR 457 -Gratiaen J., with whom Fernando, A. J. agreed, re-affirmed at page 462 his conviction

"that in this country (as in England) a Police Officer who arrests private citizens with or without the authority of a warrant is equally obliged to notify the arrested person of the reason for' interfering with his personal freedom. A recognition of this fundamental rule . . . is demonstrably implicit in the scheme of our Code."

Against this background the present Code of Criminal Procedure Act chose specifically to make express provision that the person to be arrested should be informed of the nature of the charge or allegation upon which he is arrested. The concern of the framers of Constitution for this elementary principle was manifested when they caused it to be incorporated in the Constitution and made a justiciable fundamental right; Article 13(1) of the Constitution, unequivocally and in no uncertain terms provides that the person arrested shall be informed of the reasons for his arrest. The law is solicitous for the freedom of the individual and has therefore enacted that the person who is arrested is entitled to know the reasons for his arrest and has elevated this right into a fundamental right with the attendant sanctions for its breach.

In *Leachinsky* case 1947 AC page 573 Lord Simonds observed at page 591:

"Putting first things first. I would say that it is the right of every citizen to be free from arrest unless there is in some other person, whether a constable or not, the right to arrest him. And I would say next that it is a corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful. How can these rights be reconciled with the proposition that he may be arrested without knowing why he is" arrested? . . . Blind, unquestioning obedience is the law of tyrants and of slaves; it does not yet flourish on English soil."

Professor Glanville L. Williams in his article "Requisites of a valid arrest" in 1954 Criminal Law Review page 6 and page 16 criticises the reason given by Lord Simonds as "somewhat legalistic," because few people know the law of arrest in such a way that they can decide on the spot whether the arrest to which they are

being subjected to is legal. In his opinion the true reason is a different one, e.g., the reason given by Viscount Simon L.C., in the same case at page 588 in the following words:

"If the charge or suspicion of which the man is arrested is then and there made known to him, he has the opportunity of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken with the result that further inquiries may save him from the consequences of false accusation."

One more reason is that it acts as a safeguard against despotism and over-zeal, as remarked by Prof. Glenville L. Williams *{supra}* page 17 —

"The rule has the effect of preventing the Police from arresting, on vague general suspicion not knowing the precise crime suspected but hoping to obtain evidence of the commission of some crime for which they have power to arrest."

In *McNabb v. USA* - 1943, 318 US, 332, 87 L Ed. 819 Frankfurter, J., observed at page 343 —

"Experience has therefore counselled that safeguards must be provided against the dangers of the over-zealous as well as the despotic Legislation such as this, requiring that the Police must with reasonable promptness show legal cause for detaining arrested persons constitutes an important safeguard."

There is thus good reason and sense for the person arrested to be entitled to know why he is being arrested and what is the crime he is suspected to have committed.

The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 has, as reasonably to be expected, given this human right the status and sanction of a fundamental right. On being arrested, a person must be informed of the reason for his arrest, the very nature of the right indicates that if he is not informed, his detention after the arrest is illegal. The omission to so notify cannot be regarded as a mere irregularity. According to Viscount Simon in *Leachinsky's case* — —

"the matter is a matter of substance and turns on the elementary proposition that in this country a person is, *prima facie* entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed" (page 567).

Article 13(1) embodies a rule which has always been regarded as vital and fundamental for safeguarding the personal liberty in all legal systems where the Rule of Law prevails. The International Covenant on Civil and Political Rights (1966) also provides "anyone who is arrested shall be informed, at the time of arrest of the reasons for his arrest and shall be promptly informed of any charges against him" (Article 9(2)). The purpose of this rule is to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the mind of the arresting official and disabuse his mind of the suspicion which actuated the arrest.

The Deputy Solicitor General submitted that the petition should fail for the reason that Godagama, Sub Inspector of Police, who was the person who arrested the petitioner has not been made a respondent to these proceedings, and that the grant of the application would involve a finding adverse to the said officer. This submission is based on a misapprehension as to the nature of the present proceedings. What the petitioner is complaining of is an infringement of his fundamental right by "executive or administrative action," that the State has through the instrumentality of an over-zealous or despotic official committed the transgression of his constitutional right. The protection afforded by Article 126 is against infringement of fundamental rights by the State, acting by some public authority endowed by it with the necessary coercive powers. The relief granted is principally against the State, although the delinquent official may also be directed to make amends and/or suffer punishment.

In this connection, it is apposite that I should reiterate what I stated in my judgment in *Velmurugu v. Attorney General and another* (SC Application No.74/81 - SC Min. 9th November, 1981)—

"It is to be noted that the claim for redress under Article 126 for what has been done by the executive officers of the State is a claim against the State for what has been

done in the exercise of the executive powers of the State. This is not vicarious liability; it is a liability of the State itself; it is not a liability in tort at all; it is a liability in the public law of the State — *Vide Maharaja v. Attorney-General of Trinidad* - (1978 2 AER 670 at 679 PC)."

On this analysis it is not of much consequence whether the violation of petitioner's fundamental right was caused by Inspector of Police, Nihal Karunaratne (2nd respondent) or Sub Inspector of Police, Godagama, in the exercise of the coercive powers with which the State has clothed them. The relevant question is, has the impugned infringement of petitionees fundamental rights been caused by "executive or administrative action", if the answer is in the affirmative then the State is liable.

The Deputy Solicitor General then contended that in any event the action of the Police Officer concerned does not constitute "executive or administrative action" such as would give to the petitioner the right to apply for relief under Article 126 on the ground of contravention of his constitutional rights. In my view this contention is not well founded. Sub Inspector of Police, Godagama, is a repository of State Power, charged with law-enforcement duties. In the performance of his police duties he represents the executive arm of the State and his action is to be deemed the action of the State. As was stated by the Privy Council in *Thornhill v. Attorney-General* — (1981 AC page 61 at page 73).

"It is beyond question, however, that a Police Officer in carrying out his duties in relation to the maintenance of order, the detection and apprehension of offenders and bringing them before a judicial authority, is acting as a public officer carrying out an essential executive function of any sovereign State — the maintenance of law and order, or to use the expression originally used in England "Preserving the Kings Peace." It is also beyond questioning that in performing these functions, Police Officers are endowed with coercive powers by the common law, even apart from any statute. Contraventions by the Police of any of the human rights or fundamental freedoms of the individual that are recognised by Chapter I of the Constitution thus fall squarely within what has since been held by the Judicial Committee in *Maharaja v. Attorney-General of Trinidad* - 1979 AC 385, 396, to be the ambit

of the protection afforded by section 6 *viz.* contravention "by the State or by some other public authority endowed by law with coercive powers."

It was in the exercise of the police powers vested in him that Sub Inspector Godagama, in the discharge of what he conceived to be his duty, arrested the petitioner. He acted thus in the name and for the State. His action bears the stamp of State action even though he failed to observe the forms and rules of law. He has used the State power to commit the contravention which the Constitution prohibits. The commission of the wrong has been rendered possible by the State power of which he was a repository, and hence his action is that of the State. As stated by Brandeis, J., in *Iowa Dadesmonies National Bank v. Bonnet* (1931) — 284 US 323 -

"Acts done by virtue of a public position under State government in the name and for the State ... are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to the express command of the State Law. Where a State official acting under the colour of State authority invades, in the course of his duties, a private right secured by the federal constitution, that right is violated even if the State Officer not only exceeded his authority, but disregarded the special command of the State Law."

In this context it is relevant to bear in mind that Article 4(d) of the Constitution mandates all organs of government not to restrict or deny the fundamental rights declared by the Constitution but to secure and advance them.

What is "executive or administrative action" and its ambit have been discussed by me more fully in my judgment in the *Velmurugu* case (*supra*). It is to be noted that in *Ratnasara Thero v. Udugampola Superintendent of Police, et, el* SC Application No. 125/82 - SC Min. 8.2.83, the wrongful seizure by the Gampaha Police of petitioner's 20,000 pamphlets which he intended to publish, was held by a Divisional Bench of this Court to constitute an infringement of the petitioner's fundamental right under Article 14(1) (a) of the Constitution and the petitioner's application under Article 126 was allowed. This decision is explicable only on the basis that the unlawful action of the Superintendent

of Police* in causing the seizure of the petitioner's pamphlets in the exercise of his powers, though an individual action of a police officer, was regarded by the Court to be constituting "executive or administrative action.'" It is to be noted that the State did not contest the position that the police officer's action constituted "executive or administrative action'."

On the application of the above criterion of "executive or administrative action " the State cannot disown responsibility for the misfeasance or misconduct of Sub Inspector of Police, Godagama; it is answerable for the wrong way that the officer has chosen to exercise the powers with which the State have invested him.

I agree with the relevant submission of the Counsel for the petitioner and I hold that the petitioner has established the allegation that his fundamental right assured to him by Article 13 (1) of the Constitution has been infringed by "executive or administrative action." Accordingly, I make the declaration that the arrest of the petitioner on the 13.11.1982 by Sub Inspector of Police, Godagama, was not according to procedure established by law and that the petitioner was not informed of the reasons for which he was arrested, in contravention of Article 13(1) of the Constitution.

The material on record does not justify the grant of a declaration that the petitioner was subject to cruel and inhuman treatment and punishment in violation of Article 11 of the Constitution. Counsel for the petitioner too did not press this allegation.

As stated earlier the petitioner could have been spared the trauma of arrest and detention, had Sub Inspector of Police, Godagama only told him the ground for his arrest, namely suspicion on his part that the petitioner was an illegal immigrant; the petitioner could and would have satisfied Sub Inspector that he was not an illegal immigrant, that he had lawfully entered and was staying in Sri Lanka, by the exhibition to him of his Indian passport, which bore the endorsement of the relevant visa permitting his entry and stay. For the default of Sub Inspector of Police, Godagama, the State is, in the circumstance, liable to pay a fair compensation. Officers who feel called upon to arrest other persons (whether they are citizens or not) and deprive them of freedom in the discharge of what they conceive to be their duty, ought strictly and scrupulously, observe the forms and rules of

law and have due regard for their constitutional or fundamental rights.

I allow the application of the petitioner against the 1st respondent in respect of his complaint of violation of Article 13(1) and grant the declaration that the arrest of the petitioner on 13th November, 1982, was in violation of Article 13(1) of the Constitution and direct the State to pay Rs. 5000/- as compensation to the petitioner. I also made order that the 1st respondent pay the petitioner the costs of this application. Since Sub Inspector, Godagama has not been a party to these proceedings, I do not make any order against him though strongly I disapprove his flouting the law and exercising his powers despotically.

As the petitioner has mistakenly made Inspector Nihal Karunaratne, the 2nd respondent, instead of Sub Inspector, Godagama, I dismiss the application against him and direct the petitioner to pay him Rs. 150/- as costs of this application.

RANASINGHE, J. - I agree.)

RODRIGO, J. - I agree.

Application allowed with costs.