

**DAYANANDA  
V.  
WEERASINGHE AND OTHERS**

SUPREME COURT  
RATWATTE J., COLIN THOME J., AND RODRIGO J.  
S.C. APPLICATION NO. 97/1982  
DECEMBER 13, 1982

*Fundamental Rights — Application under Article 126 of the Constitution —  
Order for remand made in the exercise of judicial discretion.*

The Petitioner filed application under Article 126 of the Constitution, alleging violation of his fundamental rights under Article 13(2) of the Constitution on the ground that, based on false reports made by the 1st and 2nd Respondents the Magistrate had made orders for his remand.

**Held —**

Orders made by a judicial officer in the exercise of his judicial discretion do not come within the purview of the special jurisdiction of the Supreme Court under Article 126 of the Constitution, even though such orders may be the result of a wrongful exercise of the judge's judicial discretion.

**Cases Referred to :**

1. S. C. Application No. 54/82, S. C. Minutes of 6.9.1982.
2. S. C. Application No. 35/79, S. C. Minutes of 17.9.1979.

**APPLICATION** under Article 126 of the Constitution.

*Jayampathy Wickremaratne* for Petitioner.

*Priyantha Perera D. S. G.* with *N. G. Ameratunga* S. C. for Respondents.

*Cur. adv. vult*

January 20, 1983.

**RATWATTE, J.**

At the conclusion of the arguments in this case on 13.12.1982, we made order dismissing the Petitioner's application without costs and indicated that we would deliver our reasons later. We now give our reasons.

The Petitioner filed this application on 14.12.1982 under Article 126 of the Constitution alleging that the fundamental rights guaranteed to him by Article 13(2) of the Constitution have been infringed by executive or administrative action.

Article 13(2) reads as follows :

“Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.”

The 1st Respondent is the Officer in Charge of the Hunnasgiriya Police Station, the 2nd Respondent is a Sergeant attached to the same Police Station and the 3rd Respondent is the Attorney General. The Petitioner prays for a declaration that the 1st and 2nd Respondents have infringed the fundamental rights guaranteed to him by Article 13(2) of the Constitution.

The Petitioner states that he is the owner of a hotel in Hunnasgiriya. On 04.09.1982 whilst he was in his hotel the 1st and 2nd Respondents and some other Police officers came to the hotel at about 9 p.m and requested the Petitioner to accompany them to the Police Station. According to the Petitioner no reasons were given by the 1st or 2nd Respondents or by any of the other Police officers for the Petitioner's arrest, although the Petitioner demanded to know why he was being arrested. The Petitioner was taken to the Police Station and put in the cell. The 2nd Respondent is said to have abused and threatened the Petitioner. On the following day the 1st Respondent questioned the Petitioner and recorded his statement. The 1st Respondent had asked the Petitioner whether he was involved in the activities of the Janatha Vimukthi Peramuna and whether he had been involved in the insurgency of 1971. The Petitioner had denied both allegations. On the same day, that is on 05.09.1982, the Petitioner was produced

before the Acting Magistrate of Teldeniya in case No.139/82 and the Acting Magistrate had remanded the Petitioner till 15.09.1982. In the report filed by the 1st Respondent on 05.09.1982 in terms of Section 115(1) of the Code Criminal Procedure Act. No.15 Of 1979 as amended by Act. No. 52 of 1980, the 1st Respondent states *inter alia* that on receiving reliable information on 03.09.1982 that there were likely to be incidents dangerous to the State and to security organisations, he conducted investigations. In the course of investigations the 1st Respondent had arrested the petitioner as one of the suspects. The 1st Respondent has further stated in the report that investigations were proceeding and had asked that the Petitioner be remanded till 15.09.1982. On a motion filed by an Attorney-at-law on behalf of the Petitioner the case had been called on 08.09.1982 before the Magistrate. On that date as the 2nd Respondent had informed Court that the investigation were incomplete, order had again be made to remand the Petitioner till 15.09.1982. On 15.09.1982 the 1st Respondent filed a further report stating that the investigation were still proceeding and asked for a further date to file his report after completion of inquiry. When the case was called on that date in open court application had been made on behalf of the Petitioner for bail. The 2nd respondent had objected to bail as investigations were incomplete and also because the allegations against the Petitioner was that he was involved in incidents which were a threat to the security of the State. The 2nd Respondent had further stated that the Police intended consulting the Attorney-General regarding the case. The Magistrate had thereupon remanded the Petitioner till 22.09.1982. The 2nd Respondent in his affidavit had admitted the Petitioner's averments regarding what transpired in Court on 15.09.1982.

On 22.09.1982 the Petitioner was produced in the Magistrate's Court and the 1st Respondent filed a further report stating that he had been unable to complete investigations and that the investigations were proceeding. On that date too an application for bail was made on behalf of the Petitioner. The 2nd Respondent had objected and the Magistrate had made order

remanding Petitioner till 06.10.1982. On 06.10.1982 the 1st Respondent filed a further report stating that he has made further investigations regarding the information received by him on 03.09.1982 and that on the evidence he has so far recorded it appeared that the Petitioner and three others had been hiding near the Police Station. The 1st Respondent moved for a date to arrest two other suspects and asked that the Petitioner be further remanded. An application for bail had been objected to by the 2nd Respondent and the Petitioner had been further remanded by the Magistrate till 13.10.1982 and on that date he had been further remanded till 27.10.1982. The Petitioner states in his Petition that he filed an application in the Court of Appeal in terms of Section 404 of the Code of Criminal Procedure Act asking that the Petitioner be enlarged on bail.

The Petitioner has attached to his application marked P1 the proceedings in the Magistrate's Court containing the reports of the 1st Respondent dated 05.09.82, 15.09.1982 and 22.09.1982 and the Journal Entries of 05.09.1982, 08.09.1982, 15.09.82 and 22.09.1982. He has also attached marked P2 the 1st Respondent's report dated 06.10.1982 and the Journal Entry of that date.

The Petitioner in his petition and affidavit alleges that the 1st Respondent has deprived the Petitioner of his personal liberty by making the reports referred to above maliciously to the Magistrate and that these reports had caused the Petitioner to be kept in remand unjustly. The Petitioner further states that the 2nd Respondent had aided and abetted the 1st Respondent in these activities. The Petitioner goes on to state that he verily believes that the three reports filed by the 1st Respondent are false. The Petitioner states in paragraph 26 of his petition that the 1st and 2nd Respondents "bear ill will and malice" and proceeds to give the numbers of three cases filed by the Police against three employees in the Petitioner's hotel for offences under the Excise Ordinance. In paragraph 27 the Petitioner states that the 1st and 2nd Respondents are angry with him for accompanying two persons from Hunnasgiriya to see the Superintendent of Police, Kandy to lodge a complaint against the 1st Respondent.

The 1st and 2nd Respondents filed separate affidavits denying the allegations made against them by the Petitioner. As regards paragraph 26 of the petition, they both state that the three cases were filed upon the successful detection of unauthorised sales of arrack. As regards paragraph 27 of the Petition both respondents state that they were unaware of any complaint made to the S.P. against the 1st Respondent and of the alleged role played by the Petitioner in that regard.

When this matter was taken up for argument on 13.12.1982 which was the last day of the two months period within which this Court had to finally dispose of this Petition as required by Article 126(5) of the Constitution, several affidavits were filed on behalf of the Petitioner in support of the allegations against the 1st and 2nd Respondents contained in paragraph 27 of the petition. As the Respondents had no opportunity of meeting the averments in these new affidavits, we indicated that we will not be taking these affidavits into consideration.

At the commencement of the arguments in this case the Deputy Solicitor General raised a preliminary objection. It was admitted that on the application made by the Petitioner to the Court of Appeal for bail, that Court had made order on 26.11.1982 directing that the Petitioner be released on bail in a sum of Rs. 2,500/- and that the Petitioner had in fact been released on bail on 06.12.1982. The learned D.S.G. argued that as the Petitioner has now been released on bail there was in fact no basis for the Petitioner to pursue this application. In support of his submission the D.S.G. cited the judgment of this Court in S.C. Application No.35/79<sup>(1)</sup> which was also an application filed under Article 126 of the Constitution. The Petitioner in that case was a labourer in a state Corporation which was the 1st Respondent in the application. He alleged in his petition that there had been an infringement of the Fundamental Rights guaranteed to him by Article 12(2) which states that no citizen shall be discriminated against on the ground among others, of political opinion. The Petitioner's allegation was that certain employees of the Corporation who belonged to a Trade Union which supported the United National Party had been promoted solely due to their political opinions. It transpired that after this

Court had issued notice of that application to the Respondents and after notice had been served, the 6th Respondent to that application, who was the Minister in Charge of that particular Corporation, had directed that all the promotions complained of by the Petitioner as solely due to political opinion, be cancelled. The direction of the Minister had been implemented. At the hearing in that application the 1st Respondent's Counsel had taken a preliminary objection that as the foundation for the Petitioner's claim for relief no longer existed, the pursuit of the application of the Petitioner was futile. This Court upheld the preliminary objection and rejected the petition. I do not think that judgment applies to the facts of the instant case. In the instant application the Petitioner grievance is that he had been kept in unlawful detention due to the malicious acts of the 1st and 2nd Respondents and he was prayed for a declaration that the 1st and 2nd Respondents have infringed the Fundamental rights guaranteed to the Petitioner in Article 13(2) of the Constitution. I am therefore of the view that there is no substance in the preliminary objection raised by the D.S.G.. I shall accordingly proceed to the Petitioner's application.

As stated earlier the Petitioner is claiming a declaration from this Court against the 1st and 2nd Respondents. Learned Counsel for the Petitioner conceded quite rightly in our view, that a judicial order does not come within the purview of Article 126 of the Constitution. The Petitioner's case is that the remand orders made by the learned Magistrate were due to the false and malicious reports filed by the 1st Respondent who was aided and abetted by the 2nd Respondent who in addition made false statement to the Magistrate in open Court. It was contended on behalf of the Petitioner that these actions of the 1st and 2nd Respondents resulted in the Petitioner being deprived of his personal liberty. Learned Counsel for the Petitioner stated that he is unable to rely on the arrest of the Petitioner on 04.09.1982 and the remand order made on 05.09.1982 as this petition was filed only on 14.10.1982. Article 126(2) requires a person who alleges that fundamental rights have been infringed, to apply to the Supreme Court for relief within one month of the alleged infringement. The petitioner is relying on the reports filed by the 1st Respondent and the oral submissions made by the 2nd

Respondent in the Magistrate's Court on 15.09.1982, 22.09.1982 and 06.10.1982 and on the remand orders made on those days. It was submitted on behalf of the Petitioner that though the further orders of remand were made by the Magistrate, they were the inevitable consequences of the acts of the 1st and 2nd Respondents. It was further contended that when the 1st Respondent alleged, in his report that he had received information that the Petitioner was involved in acts which endangered the security of the state, the 1st Respondent sought to make the Magistrate believe that the Petitioner came within the 1st schedule to the Criminal Procedure (Special Provisions) Law No. 15 of 1978 as amended though the 1st and 2nd Respondents did not directly state so. Mr Wickremaratne for the Petitioner argued that the words "by executive and administrative action" in Article 126(2) also means "in consequence of executive or administrative acts". It was finally submitted that on account of the aforesaid acts of the 1st and 2nd Respondents the orders made by the Magistrate were not "in accordance with procedure established by law".

The question that arises for consideration is whether though the remand orders were made by a judicial officer, the Petitioner is entitled to relief on the ground, as alleged by him, that the remand orders were made as a result of the wrongful acts of the 1st and 2nd Respondents. This question is now covered by authority. In S. C. Application No. 54/82<sup>(2)</sup> a similar question arose for decision. The Petitioner in that case alleged that among the fundamental rights infringed was the fundamental right declared by Article 13(2). It was held in that case that there had been a "violation of the fundamental rights guaranteed by Article 13(2) of the Constitution, but this violation has been more the consequence of the wrongful exercise of judicial discretion as a result of a misleading Police report". In view of this, this Court went on to state that it was unable to grant the Petitioner the relief prayed for by him. In my view this judgment is directly in point. I do not think it is necessary to consider the allegations of the Petitioner that the 1st and 2nd Respondents were actuated by malice and ill will towards him. The fact remains that the remand orders were made by the Magistrate in the exercise of his judicial discretion. Even if such orders were made on false or misleading reports it does not help the

Petitioner in this case because orders made by a Judge in the exercise of his judicial discretion do not come within the purview of the special jurisdiction of the Supreme Court under Article 126 of the Constitution, even though such orders may be the result of a wrongful exercise of the Judge's judicial discretion. In such an event an aggrieved person's remedy is to invoke the appellate or revisionary powers of the Appellate Courts. For these reasons we are unable to hold that the petitioner is entitled to any relief on this application.

Before I conclude I think it is pertinent to make some comments on the procedure that has been followed in this case. The first report filed by the 1st Respondent was, as the report itself states, filed in terms of Section 115(1) of the Code of Criminal Procedure. Section 115(1) requires the Police to file along with the report a summary of the statements, if any, made by each of the witnesses examined in the course of the investigation. It is apparent from P1 that no such summary had been filed. It may be that by 05.09.1982 on which date the report was filed the Police had no sufficient time to record any statements of witnesses. The information received by the Police appeared to relate to an offence falling under Chapter VI of the Penal Code which deals with "offences against the State." All the offences under that chapter are cognizable offences and in terms of Section 109(5) of the Code, it was the duty of the officer-in charge of the Police Station to commence an investigation for the discovery and arrest of the offender. The 1st Respondent had as required by Section 115(1) forwarded the suspect to the Magistrate within 24 hours of the arrest. In terms of Section 115(2) the Magistrate if he decides to make an order of detention had to record his reasons. The acting Magistrate before whom the Petitioner was produced on 05.09.1982 has not recorded any reasons when he remanded the Petitioner. According to the Journal Entries of the 8th, 9th, 15th and 22nd September and the 6th October, the Magistrate who made the remand orders has also not recorded any reasons apart from merely stating that "the investigations are not complete." The reports filed by the 1st Respondent on the 15th and 22nd September and on the 6th October are woefully inadequate. Even along with these reports a summary of statements made by



witnesses have not been filed. By that time the Police must surely have recorded some statements. From the documents filed before us we do not know whether fuller reports were filed after 06.10.1982. The Petitioner was released on bail only on 06.12.1982. which means that he has been deprived of his personal liberty for a period of three months. It may be as stated by me earlier that the Magistrate thought that the petitioner came within either the 1st schedule or the 2nd schedule to the Criminal Procedure (Special Provisions) Law No. 15 of 1978. The Magistrate should have recorded his reasons for ordering the remand of the Petitioner. It must be remembered that when a person is remanded he is deprived of his personal liberty during the duration of the remand period and a person who is remanded is entitled to know the reasons why he is so remanded. Magistrates should be more vigilant and comply with the requirements of the law when making remand orders and not act as mere rubber stamps.

The Registrar is directed to forward a copy of this order to the Inspector General of Police for necessary action.

**COLIN THOME, J.** — I agree.

**RODRIGO, J.** — I agree.

*Application refused.*