

PIYASIRI & OTHERS
v.
NIMAL FERNANDO, A.S.P. & OTHERS

SUPREME COURT.

ATUKORALE, J., L. H. DE ALWIS, J., AND H. A. G. DE SILVA, J.,

S.C. APPLICATIONS Nos. 221-234/86.

AUGUST 28, 1987; NOVEMBER 20, 1987 AND DECEMBER 1, 1987.

Fundamental Rights—Constitution, Article 13(1)—Freedom from arbitrary arrest—Right to be informed of reason for arrest.

A complaint alleging that customs officers working at the airport were soliciting and accepting bribes and refraining from imposing duty that was in fact due, was received and on the orders of the Bribery Commissioner an investigation was commenced by the 1st respondent who was attached to the Bribery Commissioner's department. He received information that bribes collected by the officers were divided amongst them before they left the airport after duty. Due to strict security measures within the airport it had not been possible to detect any officers in the act of accepting bribes. It had been decided therefore to search the officers when they were leaving the airport after duty.

Accordingly, when the fourteen petitioners were returning after work they were stopped near the Seeduwa Police Station, questioned, and asked to go to the Seeduwa Police Station. They did so, in their own cars, followed by the 1st respondent and other Police Officers. At the Police Station they were searched and moneys in their possession were taken charge of by the 1st respondent. They were then ordered to

proceed to the Bribery Commissioner's department. They did so in their own cars. The 1st respondent accompanied them. At the department their statements were recorded and they were released on giving a written undertaking to appear in the Magistrate's Court the following morning.

The petitioners alleged that their fundamental rights under Article 13(1) of the Constitution had been violated.

The 1st respondent denied that he had arrested the petitioners.

Held—

- (i) There was in fact an arrest of the petitioners by the 1st respondent. Custody does not necessarily import the meaning of confinement but has been extended to mean lack of freedom of movement brought about not only by detention but also by threatened coercion, the existence of which can be inferred from the surrounding circumstances.
- (ii) The arrest of the petitioners was highly speculative and was for the purpose of ascertaining whether any of them could be detected to have committed an offence of bribery. No Police Officer has the right to arrest a person on a vague and general suspicion, not knowing the precise crime suspected but hoping to obtain evidence of the commission of some crime by searching the petitioners after arresting them. The Law does not sanction such a course of action.
- (iii) It is a condition of lawful arrest that the party arrested should know on what charge or in suspicion of what crime he is arrested. The 1st respondent could not have informed the petitioners the charge on which they were being arrested for the reason that there was no credible information available to him that the petitioners had committed an offence of bribery.
- (iv) The arrests were therefore in violation of Article 13(1) of the Constitution.

Cases referred to:

- (1) *Muthuweeran Namasivayam v. H. G. Gunawardene et al*—S.C. 166/86 (S.C. Minutes of 24.09.87)
- (2) *Christie v. Leachinsky* [1947] A.C. 573
- (3) *Muttusamy v. Kannangara* (1951) 52 N.L.R. 324
- (4) *Mariadas Raj v. A. G.* Vol. 2 *Fundamental Rights Cases*, pg. 397
- (5) *Corea v. Queen* (1954) 55 N.L.R. 457

APPLICATION under Article 126 of the Constitution.

Dr. Colvin R. de Silva with D. S. Wijesinghe, Mrs. Manouri Muttetuwegama, Tivanka Wickremasinghe, M. Jayampathy, Dinal Phillip and Miss Chamantha Weerakoon for the Petitioners in Applications Nos. 221/86 to 227/86 & 233/86 to 234/86.

D. S. Wijesinghe for the Petitioners in Applications No. 228/86 to 231/86.

Jayampathy Wickremaratne for the Petitioner in Application No. 232/86.

Sarath Silva, Deputy Solicitor General with K. C. Kamalasinghe, Senior State Counsel and K. Indrathissa, State Counsel for the Respondents.

Cur. adv. vult.

March 17, 1988.

H. A. G. DE SILVA, J.

The petitioners in these applications allege that the 1st respondent has violated their fundamental rights guaranteed by Article 13(1) of the Constitution and pray, that the 1st, 2nd and 3rd respondents be directed to return to them the moneys taken from them and that each of them be granted compensation in a sum of Rs. 500,000/- for wrongful arrest, loss of employment, humiliation and pain of mind suffered by them.

The petitioners are Assistant Charges Officers attached to the Customs Department and whose functions include inter alia, the examination of the inward/outward passengers and their baggages and the levying of import and export Customs duties.

On 24th November 1986 the petitioners who work on a roster basis were on duty at the Katunayake International Airport from 9.00 a.m. till the same time the next day. After their turn of duty, the petitioners left for Colombo, some in their own cars while others travelled in the cars of their colleagues who had similarly completed their turn of duty. When passing Seeduwa, and near the Seeduwa Police Station, the vehicles in which they were travelling were stopped by a Police Officer in uniform. Shortly afterwards a person in civilian clothes, who is the 1st respondent came towards their cars and questioned their inmates as to whether they had any foreign currency with them. When questioned about his identity, the 1st respondent had stated that he was an Assistant Superintendent of Police attached to the C.I.D. No identification card or document of authority was shown to them.

The 1st respondent wanted to search the vehicles in which they were travelling as well as their brief cases and questioned them whether they had any Whisky. When they denied they were asked to stay there for a while. The petitioners noticed that there were a number of other Police Officers in uniform in the vicinity and they too were engaged in stopping the vehicles carrying the Customs Officers

from the Katunayake International Airport to Colombo.

Shortly thereafter the 1st respondent ordered the petitioners to proceed to the Seeduwa Police Station and they did so followed by the 1st respondent and other Police Officers in uniform.

At the Seeduwa Police Station they were searched and the moneys in their possession were taken charge of by the 1st respondent. No acknowledgement was given in respect of the moneys taken from them but they were ordered to proceed directly to the office of the Bribery Commissioner in Colombo. They proceeded to the Bribery Commissioner's Department in the cars in which they were travelling accompanied by the 1st respondent. At the Bribery Commissioner's Department the petitioners were not informed of any allegation made against them by any person nor were they questioned in regard to any offence they were alleged to have committed but statements were recorded with regard to the moneys that they had in their possession. During the period during which they were in the Bribery Commissioner's Department which was till about 10.00 p.m. that day they were kept under the continuous control and orders of the Police whom they had no alternative but to obey and even their friends and relations who sought to contact them were not allowed to do so. At 10.00 p.m. they were permitted to leave only after they had given a written undertaking to appear in the Magistrate's Court, Colombo, the following morning.

The petitioners allege that the happenings on 24th November 1986 was sequel to an incident that took place on or about 7th November of that year wherein there was a fight between two Customs Officers and some police officers of the Bribery Commissioner's Department including the 1st respondent and consequent to this fight relations between the two sets of officers were strained.

The 1st respondent on the other hand avers that on 11th November 1986 a person submitted a written complaint to the Principal Collector of Customs alleging inter alia that Customs Officers at the Katunayake International Airport were in the habit of soliciting and accepting bribes and refraining from imposing Customs duty on passengers even when they were due. The Principal Collector of Customs had endorsed on the said complaint a minute to the Bribery Commissioner "to look into the aspects of bribery alleged against the officers", and directed the

complainant with the document to the Bribery Commissioner. The Bribery Commissioner instructed him to record the complaint and to investigate into the allegations of bribery made against the Customs Officers functioning at the Katunayake International Airport. He recorded the statement of the complainant and on 12.11.1986 obtained a search warrant valid for one month for the purpose of carrying out necessary investigations, but in view of the strict security arrangements within the Airport premises he found that it was not possible to detect any Customs Officers in the act of accepting bribes in connection with their work. Thereafter he received additional information that the Customs Officers at the Airport were in the habit of collecting bribes through the minor employees of their Department and also through touts to pass baggage of passengers without the payment of duty or with the payment of duty less than the amount legally due and that the bribes so collected were divided amongst the Customs Officers before they left the Airport after their turn of duty. He reported this fact to the Bribery Commissioner and suggested that the Customs Officers be searched on 25th November 1986 when they were leaving the Airport after duty. The Bribery Department approved this course of action.

On 25th November 1986, he left Colombo with a party of police officers attached to the Bribery Commissioner's Department. Two of them were in uniform while the others, including the 1st Respondent were in civilian clothes. He instructed one of the officers to note the numbers of the cars of the Customs Officers that were parked in a separate area and to stay near the turn off to the Airport from the main Colombo-Negombo road and to signal to him when the cars passed. He instructed two other officers in uniform to stand a distance apart and to signal the cars to stop. He then went up to the cars and informed the occupants thereof that he was investigating allegations of bribery against Customs Officers at the Airport and wanted each officer to give his name and state the amount of local and foreign currency and the description of the goods that they had with them. S. A. D. Somapala, the Petitioner in (S.C.228/86) stated that he had about Rs. 10,000; K. Hettiarachchi (S.C. 229/86) Rs. 5,000; P. H. Ratnaseela (S.C. 234/86) Rs. 3,000; N. B. S. Gunasekera (S.C.233/86) some money but did not know even the approximate amount; R. P. Hewagama (S.C. 230/86) approximate amount of money not known; W. D. Piyadasa (S.C.226/86) Rs. 300; P. S. Senaratne (S.C. 224/86) Rs. 1,000; M. D. Piyasoma (S.C. 225/86)

Rs. 2,000; P. R. Atukorale (S.C.232/86) approximate amount of money not known; J. A. D. Aloysius Perera (S.C. 231/86) approximate amount of money not known; W. Ponnampereuma (S.C. 222/86) Rs. 2,000; one W. A. Dharmadasa, Rs. 2,000; W. A. R. K. N. de Silva (S.C. 227/86) Rs. 2,000; B. A. Piyasiri (S.C. 221/86) Rs. 2,000; B. J. S. Bopearachchi (S.C. 223/86) Rs. 2,000. He then requested the Customs Officers to go to Seeduwa Police Station and there search each of the said officers, their brief cases and the cars in which they had been travelling. He found that S. A. D. Somapala who stated that he had about Rs. 10,000 had in his possession Rs. 19,520; K. Hettiarachchi (Rs. 5,000) had Rs. 9,688; P. H. Ratnaseela (Rs. 3,000) had Rs. 4,330; N. B. S. Karunasekera (approximate amount unknown) had Rs. 4,286; R. P. Hewagama (approximate amount unknown) had Rs. 4,830; W. D. Piyadasa (Rs. 300) Rs. 850; S. Somaratne (Rs. 1,000) had Rs. 6,000, 4 bottles of whisky, 1 silk saree and an imported doll about 2 ft. in height; N. D. Piyasena (Rs. 2,000) had Rs. 4,550; P. D. Athukorale (approximate amount unknown) had Rs. 2,170, 2 bottles of Whisky marked Sri Lanka Duty Free and a pair of ladies shoes; J. A. D. Aloysius Perera (approximate amount unknown had Rs. 8,105 and two flower vases; W. Ponnapperuma (Rs. 2,000) had Rs. 1,750; W. A. Dharmadasa (Rs. 2,000) had Rs. 4,300, Singapore \$ 335, U.S. \$ 21, 2 sarees and a packet containing earrings; B. A. Piyasiri (Rs. 1,000) had Rs. 1,564; B. J. S. Bopearachchi (Rs. 2,000) had Rs. 2,140; in addition N. B. S. Karunasekera had 3 Inward Baggage Declarations made by passengers; P. R. Athukorale 2 Inward Baggage Declarations. These declarations, tendered by passengers, constituted a part of the official documentation and had to be kept in the Customs Office and these two officers were unable to give a satisfactory reason for their possession of these official documents. Since the 1st Respondent was not satisfied with the explanations given by each of the Petitioners to account for their possession of large sums of local and foreign currency, imported articles and baggage declaration forms, he informed them that it was necessary to question them further and to record their statements and therefore requested them to proceed to the Bribery Commissioner's Department at Colombo in their respective cars.

At the Bribery Commissioner's Department, he questioned each of the Petitioners and recorded their statements and they were permitted to leave with a request that they present themselves in the

Magistrate's Court on 26th November 1986. With regard to the incident on 7th November 1986 the 1st Respondent states that it took place when two Customs Officers who were under the influence of liquor obstructed certain Police Officers attached to the Bribery Commissioner's Department.

At the hearing of these applications it was agreed to consolidate all the applications, and submissions were made by Counsel on behalf of the Petitioners in all these applications.

Article 13(1) of the Constitution which is alleged to have been infringed in these cases states that "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

It is the submission of the Petitioners that from the time they were signalled to halt at Seeduwa on the Colombo-Negombo road at about 9.00 a.m. on 25th November 1986 and at least till 10.00 p.m. that night when they were released from the Bribery Commissioner's Department, they were under arrest. In fact they go so far as to say that even their being permitted to leave the Bribery Commissioner's Department did not amount to a release from arrest as they were allowed to do so only on their giving a written undertaking to be present in the Magistrate's Court of Colombo, the next morning. The 1st Respondent on the other hand maintains that there was no arrest, formal or otherwise and that the Petitioners were at no time confined or incarcerated and that their movements were restricted, only for the limited purpose of searching them and recording their statements and that immediately after the statements were recorded they were permitted to leave with a request that they be present in the Magistrate's Court on the next day.

The questions to be decided is (1) was there an arrest of the petitioners by the 1st respondent, (2) if there was such an arrest was it according to procedure established by law and (3) were the Petitioners, if arrested, informed of the reason for their arrest?

Section 23(1) of the Code of Criminal Procedure Act No. 15 of 1979 states how an arrest is made. It says,

"In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there

be a submission to the custody by word or action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested”.

The explanation to that sub-section states that—

“Keeping a person in confinement or restraint without formally arresting him or under the colourable pretension that an arrest has not been made when to all intents and purposes such person is in custody shall be deemed to be an arrest of such person.”

The only warrant that has been obtained by the 1st respondent is P3 a search warrant to search the Customs area, the restroom of the Customs Officers, the Public Health Office and the office and restroom of the Immigration and Emigration officers, all situated at the Katunayake International Airport. Therefore if the 1st respondent was effecting an arrest of the petitioners, he was doing so without a warrant, which he was entitled to do as offences under Part II of the Bribery Act have been made cognizable offences by Section 30 thereof, if all other legal requirements had been satisfied.

Dr. Glanville Williams in his article on *“Requisites of a valid arrest”* (1954) Criminal Law Review 6 at page 8 et seq. states—

“An imprisonment or deprivation of liberty, is a necessary element in an arrest; but this does not mean that there need be an actual confinement. If the officer indicates an intention to make an arrest, as for example, by touching the suspect on the shoulder, or by showing him a warrant of arrest, or in any other way by making him understand that an arrest is intended, and if the suspect then submits to the direction of the officer, there is an arrest. The consequence is that an arrest may be made by mere words and the other submits”

“If an officer merely makes a request to the suspect, giving him to understand that he is at liberty to come or refuse, there is no imprisonment and no arrest. If however the impression is conveyed that there is no such option, and that the suspect is compelled to come, it is an arrest”

“ obviously it is not every imprisonment or detention that constitutes an arrest. To be an arrest, there must be an intention to subject the person arrested to the criminal process—to bring him within the machinery of the criminal law; and this intention

must be known to the person arrested. Arrest is a step in law enforcement, so that the arrester must intend to bring the accused into what is sometimes called 'the custody of the law'.

In the unreported case of *Muthuweeran Namasivayam v. H. G. Gunawardene et al* (1) the petitioner alleged that while he was travelling in a C.T.B. bus on the day in question, on his way to Nawalapitiya, he was arrested by the 3rd respondent; he was not informed the reason for his arrest etc. The 3rd respondent denied having arrested the petitioner on that day. He stated that he was investigating into a case of robbery of a gun from Rosella Farm. He had reason to believe that the petitioner was acquainted with the fact and circumstance relating to the said robbery and requested the petitioner to accompany him to the Ginigathhena Police for questioning. At the Police Station he was questioned in connection with this case and was released immediately after his statement was recorded. Subsequently the 3rd respondent had received information that the petitioner was involved in acts which constituted offences under the Emergency Regulations and then he arrested the petitioner at the Watawala Railway Station, after having explained the charge against him, and took the petitioner to the Hatton Police Station where his statement was recorded. Sharvananda, C.J. in his judgment with which I concurred at page 8 states—"In my view when the 3rd respondent required the petitioner to accompany him to the Police Station and took him to the Police Station, the petitioner was in law arrested by the 3rd respondent. The petitioner was prevented by the action of the 3rd respondent from proceeding with his journey in the bus. The petitioner was deprived of his liberty to go where he pleased. It was not necessary, that there should have been any actual use of force; threat of force used to procure the petitioner's submission was sufficient. The petitioner did not go to the Police Station voluntarily".

If one applies the principles gleaned from the above authorities it will be seen that what transpired in the instant case would amount to an arrest of the petitioners by the 1st respondent at Seeduwa. It is the position of the 1st respondent himself, that as he found it difficult to detect any offences of bribery at the Airport due to security restrictions, he intended to accost the petitioners on their way to Colombo. It is for that reason that the numbers of the Customs Officers cars were noted and he posted two officers to signal to him, when the cars passed them, while the 1st respondent stationed

himself close to the Seeduwa Police Station with some Police Officers in uniform on either side of the road signalling the cars carrying the Customs Officers to halt. After going up to the cars and questioning the occupants thereof of the approximate amount of money they had and whether they had whisky, foreign currency and any imported items, he asked them to proceed to the Seduwa Police Station in order that they be searched. After the search at the Seeduwa Police Station they were directed to go in their own vehicles to the Bribery Commissioner's Department in Colombo. The 1st respondent too travelled to Colombo. At this stage it is significant to note that in the report to court P1-P1A made under Section 115 of the Code of Criminal Procedure Act the O.I.C. of the Police attached to the Bribery Department has stated that since the A.S.P. had suspicions about the manner in which the petitioner had come by the money and the other articles found on them, they were brought "අනෙහි විට" to the Bribery Commissioner's Department situated in Colombo.

At the Bribery Commissioner's Department their statements were recorded and at about 10 p.m. that day they were permitted to leave on their giving a written undertaking to present themselves the following day in the Magistrate's Court.

Learned Counsel for the respondents submitted that nowhere in the report to court P1-P1A has it been mentioned that any of the petitioners were taken into custody or treated as a suspect, but it is quite clear from what transpired that day that the 1st respondent thought that the large sums of money found on the petitioners along with imported items of goods, had not been adequately explained by them and hence he suspected them to have been concerned in committing offences under the Bribery Act. Otherwise his actions in directing them to go to the Bribery Department in Colombo, recording their statements and getting a written undertaking to be present the next day at the Magistrate's Court, are unexplainable. Section 115 of the Code of Criminal Procedure Act itself envisages in cases where the investigations cannot be completed within a period of time a report of the case to be made to the Magistrate and at the same time the Police Officer is expected to forward the suspect to such Magistrate and the Magistrate is under sub-section 2 thereof empowered to detain the suspect for 15 days or discharge him or require him to execute a bond to appear if and when so required, and in the instant case that is what the Magistrate has done, i.e., released them on bail to appear if and when so required.

After the petitioners were signalled to stop by the Police Officers near the Seeduwa Police Station, they were, till they appeared in the Magistrate's Court the next day under the coercive directions of the 1st respondent. Surrounded by Police Officers, some of whom were in uniform, it would have been foolhardy to say the least, for any of the petitioners to have attempted to exercise their right to the freedom of movement. Custody does not today, necessarily import the meaning of confinement but has been extended to mean lack of freedom of movement brought about not only by detention but also by threatened coercion, the existence of which can be inferred from the surrounding circumstances.

The next question to be decided is whether the arrests have been made according to procedures established by law. Inherent in this question is whether the arrest of the Petitioners was lawful.

Section 30 of the Bribery Act makes offences enumerated in Part II of the Act cognizable offences for the purpose of the application of the provisions of the Criminal Procedure Code Act. Section 32 (1) (b) thereof states that—

Any peace officer may without an order from a Magistrate and without warrant arrest any person... who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned."

Implicit in this power given to a peace officer by Section 32(1) (b) is that the person arrested must be a person concerned in any cognizable offence or against whom a complaint has been made or credible information has been received etc. of his having been so concerned. In the instant case, could one say that all these conditions were satisfied? According to the 18th Respondent himself any belief or suspicion he had, was as a result of the complaint made by a person to the P.C.C. who in turn referred it to the Bribery Commissioner for investigation. The complaint as such was not against any named officer but against all Customs Officers working at the Airport. The 18th Respondent therefore could not have had any suspicion or credible information of the commission of a bribery offence by any one or all of the Petitioners. It was a general allegation of bribery and as such under Section 32(1) (b) of the Code of Criminal Procedure Act,

not one of the Petitioners could have been arrested unless all or any of them were actually seen committing such an offence or there was definite information that any of all the Petitioners were concerned in the commission of such offences. The arrest of the Petitioners in my view was highly speculative and was for the purpose of ascertaining whether any of them could be detected to have committed a bribery offence. No Police Officer has the right to arrest a person 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 the power to arrest. Even if such evidence comes to light the arrest will be illegal because there will have been no proper communication of the reason for the arrest to the accused at the time of the arrest.

Learned Counsel for the Respondent attempted to justify the action of the 18th Respondent on the basis that what the 18th Respondent was doing was investigating allegations of bribery on the order of the Bribery Commissioner, as he was empowered to do, under Section 3 of the Bribery Act but this section presupposes that there are allegations of bribery against definite individuals and not allegations of a nebulous nature. In the result I am of the view that the arrest of the Petitioners by the 18th Respondent was not lawful.

The last matter that arises for consideration is whether as contemplated in Article 13 the Petitioners were informed of the reason for their arrest. It was the 18th Respondent's position that when he got the vehicles in which the Petitioners were travelling stopped, he went up to the cars and informed the Petitioners that he was investigating allegations of bribery made against Customs Officers working at the Airport. It was the position of the Respondent's Counsel that no information need have been given to the Petitioners as at no time did the 18th Respondent intend arresting the Petitioners.

This provision of our Constitution reiterates what has been the law on this subject from the time of *Christie v. Leachinsky* (2) where the House of Lords held affirming the judgment of the Court of Appeal "that (apart from special circumstances, which did not exist in this case), an arrest without warrant can be justified only if it is an arrest on a charge made known to the person arrested and the pleas of justification failed.

It is a condition of lawful arrest that the party arrested should know on what charge or on suspicion of what crime he is arrested. Therefore, just as a private person arresting on suspicion must acquaint the party with the cause of his arrest, so must a policeman arresting without warrant on suspicion state at the time (unless the person is already acquainted with it), on what charge the arrest is being made or at least inform him of the facts which are said to constitute a crime on his part. Even if circumstances exist which may excuse this, it is still his duty to give the information."

The reason why it is incumbent on the police officer arresting to inform the person arrested of the nature of the charge against him is that the latter 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. It is therefore axiomatic that before one deprives a person of his liberty for whatever the period may be, it must be done in due course and process of law.

The need to inform the person arrested of the charge which he is suspected of having committed has been emphasised over and over again. *Muttusamy v. Kannangara* (3); *Mariadas Raj v. A. G.* (4), *Corea v. Queen* (5) all reiterate this principle.

In the instant case the 1st Respondent could not possibly have informed the Petitioners, the charge on which they were being arrested for the reason that here was no credible information available to him that the Petitioners had committed any offence of bribery. What the 1st Respondent sought to do was to arrest them on vague and general suspicion, not knowing the precise crime that they are alleged to have committed but hoping to obtain evidence of the commission of some offence of bribery by searching them after their arrest. This the 1st Respondent has no sanction in law to do. I am therefore of the view that these applications should be allowed as 1st Respondent has violated the fundamental rights guaranteed to the Petitioners under Article 13(1) of the Constitution. In the circumstances of this case, I am also of the view that the ends of justice would be met if compensation in a sum of Rs. 500 is awarded to each of the Petitioners and direct the State to make the payments accordingly. There will be no costs. The moneys and articles taken charge of from the petitioners could await the results of any proceedings, in the

Magistrate's Court or in a departmental inquiry, that may be taken. If no such proceedings are taken, the Petitioners would be entitled to have such moneys returned to them.

ATUKORALE, J. – I agree.

L. H. DE. ALWIS, J. – I agree.

Application allowed.
