JAYARATNE AND OTHERS
v.
CHANDRANANDA DE SILVA, SECRETARY, MINISTRY OF DEFENCE AND OTHERS

SUPREME COURT
FERNANDO, J.,
AMERASINGHE, J. AND
GUNASEKERA, J.
SC APPLICATIONS
NOS. 609, 583, 590, 591/96
NOS. 610, 611, 612, 628/96
NOS. 660, 661 AND 671/96
26TH AUGUST, 1998

Fundamental rights – Emergency regulations – Detention orders under regulation 17 (1) – Infringement of Articles 13 (1) and 13 (2) of the Constitution.

Eleven petitioners were arrested and detained by virtue of orders issued by the 1st respondent purporting to act under Emergency regulation 17 (1) on the basis that their detention was necessary to prevent them from acting in a manner prejudicial to public order. The 1st respondent stated in his affidavit that the detention orders were issued at the request of the Director CID and on the basis of material submitted to him alleging that there were threats directed at the Presidential Commission investigating the incidents at Batalanda; that there was information that the detainees (Police Officers) whose names transpired before the Commission were attempting to leave the Island; and that there was a possibility that they would inflict violence on the Commissioners themselves and witnesses who have testified before the Commission.

Held:

1. Communicating the purpose or object of the arrest does not satisfy the Constitutional requirement that the reasons for the arrest must be disclosed.

2. The material available to the 1st respondent was vague and was pure hearsay. He could not reasonably have formed an opinion adverse to the petitioners on such material. Consequently, he did not entertain, and could not have entertained, a genuine apprehension that the petitioners would act in a manner prejudicial to the national security or the maintenance of public order.

3. The "balance of convenience" is not a defence that can be advanced for upholding the arrest and preventive detention of the petitioners. A reasonable apprehension of past or future wrong doing is an essential prerequisite for the deprivation of personal liberty.

Per Fernando, J.

> "It is true that allegations of misconduct against Police Officers must be dealt with promptly and effectively . . . However, it is distressing and disturbing that the entire process of arrest and detention of the petitioners has been contrary to basic constitutional safeguards".

Cases referred to:

1. *Rodrigo v. De Silva* (1997) 3 Sri LR 265.
2. *Perera v. Rajaguru* (1997) 3 Sri LR 141.

APPLICATION for relief for infringement of fundamental rights.

Tilak Marapana, PC, with *Nalin Ladduwahetti* and *Jayantha Fernando* for the petitioners in 583/96, 590-591/96, 628/96, 660-661/96 and 671/96.

Upul Jayasuriya for the petitioners in 609-612/96.

S. Fernando SSC for the respondents in 583/96, 590/96 and 609-612/96.

S. Rajaratnam SC for the respondents in 591/96, 628/96 and 661/96.

P. D. Ratnayake, SC for the respondents in 660/96 and 671/96.

Cur. adv. vult.

September 21, 1998

FERNANDO, J.

These eleven applications were taken up for hearing together, as they involved the same questions of law and fact. Submissions were made in regard to application No. 609/96, and it was agreed that the decision in that application would apply to the other ten.

The petitioner is a Sergeant in the Police. By virtue of an undated order issued by the 1st respondent (the Secretary, Ministry of Defence), purporting to act under Emergency regulation 17 (1), the petitioner was arrested on 10.8.96, detained without being produced before a Magistrate, and released on 21.9.96 after the 1st respondent revoked that detention order on 19.9.96. In that order the 1st respondent failed to state his opinion as to the period for which he considered detention necessary.

It is not disputed that the failure to stipulate the period of detention rendered the 1st respondent's order invaild (see *Rodrigo v. de Silva,* [1997] 3 Sri LR 265, and *Perera v. Rajaguru,* [1997] 3 Sri LR 141); and that the stipulated place of detention was not an authorised place of detention under the Emergency regulations. As for the arrest itself, the petitioner stated that he had not been informed of the reasons for his arrest. In his affidavit, the arresting officer averred that he informed the petitioner that the 1st respondent had issued a detention order "on the basis that his detention would be required to prevent him from acting in a manner prejudicial to public order". For the reasons stated in *Rodrigo v. de Silva,* I hold that communicating the *purpose* or the *object* of the arrest does not satisfy the constitutional requirement that the *reasons* for the arrest must be disclosed.

Apart from those defects, Mr. Marapana, PC, strenuously contended that the 1st respondent's order was illegal because he had no material whatsoever on which he could possibly have formed the opinion that the arrest and detention of any of the petitioners were necessary to prevent them acting in a manner prejudicial to the national security or the maintenance of public order.

In his affidavit, the 1st respondent stated:

" . . . I received letter dated 9th August, 1996, from Director, CID, a certified copy of which is submitted to Your Lordships in a confidential cover, marked 1R1, requesting Detention Orders in terms of [Emergency] regulation 17 . . . in respect of those whose names appear in that letter.

I was also informed of *the various threats directed at the Presidential Commission* investigating the incidents at Batalanda and that there was information that police officers whose names transpired before the Commission were attempting to leave the

Island and that there is a *possibility that they could inflict violence on the Commissioners* themselves and witnesses who have testified before the Commission".

I having considered the material submitted to me including the contents of the letter [1R1] was of the view that the police officers whose names appear in the letter marked 1R1 may inflict violence on the Commission and the witnesses and that such acts would be prejudiced [*sic*] to National Security and also Public Order and that it would be necessary to detain them in order to prevent them from acting in a manner prejudiced [sic] to National Security and public order, issued Detention Order . . ." (emphasis added throughout).

The 1st respondent gave no reason why 1R1 should be withheld from the petitioners, nor did he make any reference to a letter (4R1) written by the 4th respondent, the Inspector-General of Police, and a file of documents (4R2), submitted to this Court by the 4th respondent in a confidential cover. The 4th respondent claimed that divulging the contents of 4R1 and 4R2 "at this stage" – presumably, at the time his affidavit was filed – "may adversely affect the investigations". It transpired at the hearing that even state counsel appearing for the respondents had not been furnished with these documents.

It is common ground that no investigations took place either before or after the arrest of the petitioners; that they were not even asked to make statements; and that those documents contain no allegation against any of the petitioners, by name, designation, description, or otherwise. Indeed, they make no specific allegation of wrongdoing against any named or identified person, except that the file of documents marked 4R2 contains references to anonymous threats against witnesses before the "Presidential Commission of Inquiry into the Disappearance of Persons, Unlawful Arrest of Persons, and the Operation of Places of Detention at the Batalanda Housing Scheme" (the Commission). Apart from certain inconsistencies between those documents and the affidavits filed on behalf of the Respondents, the substance of those documents has already been disclosed in the affidavits of the 1st and 4th respondents, and the director, CID, except that the names of the persons who say they received anonymous threats have not been disclosed.

Accordingly, we disclosed the contents of those documents to counsel for the petitioners, and furnished copies to state counsel. Although I will quote some relevant extracts from those documents, the documents themselves will not be made part of the record. The Registrar is directed to return them to the respondents after this judgment is delivered.

By 1R1 dated 9.8.96 the Director, CID, requested the 1st respondent to issue detention orders because:

> "On the evidence led before the Presidential Commission regarding crimes committed at Batalanda the following Police Officers [*sic*] *found to be responsible for committing various offences.*
>
> [Twelve names were then mentioned: the petitioners in these eleven cases and Douglas Peiris, SSP, who, according to the 4th respondent, was abroad.]
>
> Intelligence reports indicate that these officers *are conspiring to subvert the course of justice* and to act in a manner prejudicial to the national security. It is also reported that they *could* leave the country by illicit means *to avoid due process of law. Confidential information* indicates that these persons before leaving the country *could inflict violence on the Commissioners of the judicial forum* looking into these criminal acts and the witnesses who are and who have testified before the Commission".

In the affidavit which he filed in these proceedings the Director, CID, said:

> "I am aware of the various threats received by officers assisting the Presidential Commission investigating incidents that had taken place at Batalanda. I was also aware that *there was information* that police officers whose names had transpired during the course of the proceedings before the Commission and whose conduct could be the subject of investigation by the Commission were attempting to leave the Island and *that they may inflict acts of violence against the Commission* before leaving the Island.
>
> I also received from the 4th respondent the letter . . . [4R1] *directing me to investigate information regarding a possible threat of violence before the Commission.*

I was also aware of the information contained in the file [4R2).

In view of this information I was of the view that the police officers whose names transpired before the Commission and *whose conduct would possibly be investigated* by the Commission may inflict violence on the Commission and officers assisting the Commission and witnesses, and that detention of such officers would be necessary to prevent them from acting in a manner prejudicial to public order.

I therefore brought this information to the notice of the Secretary to the Ministry of Defence and requested . . . [detention orders]".

This affidavit shows that the confidential letter 1R1, by which the Director, CID, asked the 1st respondent to issue detention orders, contains wilful exaggerations, and even misstatements, as to the material he actually had. Thus, although 1R1 asserts that the petitioners had been "found responsible" for offences, his affidavit in this Court only mentions that their conduct "would possibly be investigated". Mr. Marapana submitted, without contradiction, that none of the petitioners had even been summoned by the Commission. In this Court, the Director, CID, did not repeat his allegation that he had "intelligence reports" of a "conspiracy" to subvert the course of justice, etc. Although he admits that (by 4R1 of 9.8.96) the 4th respondent had directed him to investigate "a possible threat of violence before the Commission", nevertheless it was without any investigation at all that he wrote the very same day to the 1st respondent claiming that he had "confidential information" of possible violence to the Commission.

The question which we have to decide is whether, when the 1st respondent made the impugned detention orders, he had material on which he could reasonably have formed the opinion that, *prima facie,* (*a*) on the evidence led before the Commission the petitioners had been "found responsible" for any offence and/or (*b*) that there were credible intelligence reports indicating that they were "conspiring to subvert the course of justice", and/or (*c*) that there was credible "information" that they had some connection with threats directed at the Commission or that they "could inflict violence on the Commissioners", or on the witnesses. In that event alone could he have formed the view that it was necessary that the eleven petitioners be taken into custody and detained, in order to prevent them from acting in

any manner prejudicial to the national security or to the maintenance of public order.

There is no doubt as to what material the 1st respondent had actually had before him. From his affidavit and the letter 1R1, it is very clear that the only material submitted to him was the letter 1R1. He does not say that he asked the Director, CID, or the 4th respondent, or anyone else, to submit any other material.

Apart from a vague general statement in his affidavit – that he "considered" the material submitted to him, including 1R1 – the 1st respondent does not say that he acted because the petitioners had been "found responsible" for any offence; or because they were engaged in a "conspiracy to subvert the course of justice" and/or "to act in a manner prejudicial to the national security". Although those two allegations appear in the letter 1R1 which the Director, CID, sent him - for which the respondents request "confidentiality" – it is significant that he was not prepared to repeat those allegations in the affidavit he filed in this Court. The 1st respondent could easily have asked the Director, CID, to submit "the evidence led before the Commission" and the "intelligence reports" which the Director, CID, had referred to, but failed to do so.

The only matter which the 1st respondent specifically mentioned in his affidavit was "information" about threats and the possibility of violence. Here, too, he did not call for supporting material from anyone.

The 1st respondent was under a duty to form an opinion himself, after considering the material available, and (where that was insufficient) after calling for additional material; he could not abdicate his responsibility to call for, peruse and assess the relevant material, by simply adopting the opinion of the Director, CID.

I hold that the 1st respondent did not actually form an independent opinion that the petitioners had been found responsible for any offence, or were engaged in any conspiracy, or were likely to resort to force or violence against the Commissioners or witnesses. Further, not only was the tenuous material available to him vague and lacking in particulars, but it was pure hearsay. He could not reasonably have formed an opinion adverse to the petitioners on such material.

Consequently, I also hold that he did not entertain, and could not have entertained, a genuine apprehension that the petitioners would act in a manner prejudicial to the national security or to the maintenance of public order.

Although it was conceded, on behalf of the respondents, that there was no material whatsoever implicating any of the petitioners – placed before the 1st respondent, or even before this Court – nevertheless it was submitted that the 4th respondent, the Head of the Police Force, had deposed that he had reports and information that the petitioners were attempting to disrupt the activities of the Commission, and to use force on witnesses and even on the Commissioners, and that was enough to justify the detention orders, even though that material was not disclosed to this Court. It was argued that there would have been a serious crisis if that information had proved to be true and the attempts had been successful, and that therefore the "balance of convenience" required the arrest and preventive detention of the petitioners.

That is an argument which has to be mentioned only to be rejected. A reasonable suspicion or apprehension of past or future wrongdoing is an essential prerequisite for the deprivation of personal liberty. Such deprivation can never be justified by resorting to an expedient "balance of convenience", which can be made to tilt towards the Executive on the purely speculative assumption that something untoward might happen, but without any reasonable basis for thinking that it would.

The 1st respondent's order can only be upheld if the material before him justified it. However, I will refer to the other material which the respondents have submitted in the course of these proceedings, because that amply confirms that neither before nor after the arrest did the Police have any material to justify the issue of detention orders; that even the motions of investigating any wrongdoing or threat to national security or public order had not been gone through; and that the 1st respondent had been misled into making the impugned orders by means of exaggerations and distortions of the vague allegations which the Police had.

The 4th respondent's letter 4R1 to the Director, CID, reads thus:

"During the evidence brought before the Presidential Commission regarding crimes committed at Batalanda, names of Police Officers *who were instrumental in carrying out directives of the main personalities responsible* for running the alleged torture chambers at Batalanda have come to light and have been reported to us by the Presidential Commission.

Intelligence and information is [*sic*] received that *such persons are conspiring to subvert the course of Justice* and to act in a manner prejudicial to the national security. It is also reported that that they could leave the country by illicit means to avoid due process.

Confidential information indicates that these persons before leaving the country *could inflict violence on the Commissioners* of the judicial forum looking into these criminal acts and the witnesses who have testified before the Commission.

We must not leave room for these elements to subvert the course of justice. Please take steps *to immediately conduct investigations* and take these persons into preventive custody. You should *report progress of investigations"*.

[He then set out the same twelve names listed in 1R1].

In his affidavit, the 4th respondent stated that the names of several police officers, including the petitioners', transpired *during the course of the proceedings before the Commission;* that it was reported to him that *interested persons were attempting to disrupt the activities of the Commission;* that the Secretary to the Commission had asked for police protection for witnesses, and senior officers assisting the Commission had informed him that they had received death threats; that *some* of the officers whose names had transpired before the Commission were attempting to leave the Island, and were attempting to subvert the course of justice, and it was feared that they may cause harm to the Commissioners; and that *persons who had reasons to fear the findings of the Commission* were attempting to disrupt its activities and may use force on witnesses and even on the Commissioners. He neither produced nor even referred to any supporting material, in the form of statements, reports or otherwise, other than the file 4R2.

The file 4R2 contains complaints and memoranda about anonymous threats to six witnesses and one Police Officer, but not one of those documents refers to any of the petitioners. The only document which mentions any of them by name is a letter dated 16.2.96 (nearly six months before the impugned detention orders were issued) written to the 4th respondent by the Acting Secretary to the Commission, on the instructions of the Chairman. It states that *the evidence led* before the Commission and *the other information disclosed in the course of investigations* includes evidence that nine named Police officers have committed offences or have been involved in their commission. Further, it was copied to two other state counsel, and that makes it difficult to understand why it was not disclosed to state counsel who appeared in these cases.

The file 4R2 gives rise to several awkward questions.

The nine names specified include the names of two Deputy Inspectors-General of Police and six of the petitioners. The names of the other five petitioners do not appear anywhere in 4R2, or in any other document produced by the respondents. There is no explanation as to how the 4th respondent, and thereafter the Director, CID, came to include those five names in 4R1 and 1R1. Further, inexplicably, the names of the two Deputy Inspectors-General of Police do not appear in 4R1 and 1R1. The petitioner in application 609/96 is one of the five who are not named in the letter dated 16.2.96.

Second, there is nothing in 4R2 which justifies the representation by the Director, CID, to the 1st respondent that the petitioners had been "found responsible" for offences. It is not clear from the letter dated 16.2.96 whether the names of any petitioners (and if so, which) transpired in *statements* made in the course of investigation, or in *evidence* led before the Commission: but it certainly does not suggest that any *findings* had been reached. There is no explanation from the 4th respondent as to how he concluded (from 4R2 or otherwise) that there were "main personalities responsible for running the alleged torture chambers" and that the petitioners "were instrumental in carrying out the directives" of those personalities. The 1st respondent acted without the benefit of studying the file 4R2, upon a serious distortion of the allegations it contained, aggravated by the addition of five extra names. Indeed, if, contrary to my view, 4R2 had been made available to the 1st respondent, that would make matters worse: the exaggerations and distortions in 1R1 would have been quite apparent to him.

Third, there is nothing in the file 4R2 which refers to any fear of force or violence to the Commissioners themselves. All that the letter dated 16.2.96 states is that it had been revealed that *some* of the named officers were still in service – at their former stations, or nearby, or close to Colombo, or elsewhere – and that *some* of them were yet holding positions in which they could exert pressure on Police and other witnesses, and obstruct the Commission's investigations. What was the confidential information which the Director, CID, had as to violence directed at the Commissioners? Which of the six named petitioners fell into that category? And what was the connection of the other five petitioners who were not named in 4R2?

Finally, it is relevant to mention that although the 4th respondent did not refer to any specific incident or information involving the petitioners, either in 4R1 or in his affidavit, yet in his affidavit he said this:

> "On [15.3.96] . . . state counsel leading evidence before the Commission had moved for an adjournment on the basis that there were two strangers inside [the] court house of whom he was suspicious due to their behaviour. Accordingly [their] identity had been checked, and it had been found that they were . . . security officers of Mr. Douglas Peiris against whom evidence had been led before the Commission. They, in fact, had no business before the Commission".

I express no opinion as to the right of those two persons to be present during the proceedings of the Commission; and as to the right of Douglas Peiris, if evidence had been led against him, to have someone present on his behalf to follow those proceedings. Leaving that aspect aside, the 4th respondent does not say whether that incident was even investigated, and what the alleged offence or misconduct was, and whether any action was taken by the Commission or the Police. And in any event the 4th respondent did not suggest any link between those two persons and the eleven petitioners. The fact that the 4th respondent chose to mention only that incident in his affidavit confirms that he knew of nothing more serious.

There can be no doubt that there was no material on which the 1st respondent could reasonably have formed the opinion that the eleven petitioners, or any of them, had been found responsible for offences, or that they were conspiring to subvert the course of justice, or to act in a manner prejudicial to national security or public order, or that they might inflict violence on the Commissioners or the

witnesses. If 1R1 was all that he had, he should have called for additional or supporting material, and the failure to do so was a serious lapse. On the other hand, if 4R2 had also been placed before him – which is doubtful – the 1st respondent himself should have realised that the material did not disclose any past misconduct, and did not justify any apprehension of future misconduct. As for the 4th respondent, he fails to explain why, for nearly six months after receiving the letter dated 16.2.96, he took no action – either to call for supporting material or to direct an investigation; and how and why, on 9.8.96, he was spurred into action, ordering the Director, CID, "to immediately investigate and take [the petitioners] into preventive custody". Likewise, the Director, CID, does not explain why, without any investigation, he asked the 1st respondent for detention orders. In all that haste, undated and indeterminate detention orders were issued, after mere allegations in the letter dated 16.2.96 had been represented to be evidence in 4R1, and had thereafter been transformed into findings in 1R1; and, what is even worse, allegations against six petitioners became findings against eleven, and the names of the two Deputy Inspectors-General of Police faded out of the picture. It is true that allegations of misconduct against Police Officers must be dealt with promptly and effectively, and that the 1st and 4th respondents and the Director, CID, purported to be acting in order to prevent the subversion of the course of justice before a Commission inquiring into unlawful arrests and unlawful places of detention. However, it is distressing and disturbing that the entire process of arrest and detention of the petitioners has been contrary to basic constitutional safeguards.

I therefore grant the petitioner a declaration that his fundamental rights under Articles 13 (1) and 13 (2) have been infringed by the 1st respondent upon the instigation of the 4th respondent. The detention order was illegal and void, and his arrest and detention for about forty days was wholly illegal, without any justification whatever, and I direct the state to pay him a sum of Rs. 50,000 as compensation, and Rs. 5,000 as costs. As agreed, the petitioners in the other ten applications will be entitled to the same relief. All these payments shall be made, and proof of payment submitted to the Registrar of this Court, on or before 30.10.98, failing which the Registrar is directed to list these applications for an order of Court in regard to enforcement.

AMERASINGHE, J. – I agree.

GUNASEKERA, J. – I agree.

Relief granted.