

SARANAPALA
v.
SOLANGA ARACHCHI, SENIOR SUPERINTENDENT OF
POLICE AND OTHERS

SUPREME COURT
AMERASINGHE, J.,
WIJETUNGA, J. AND
GUNAWARDANA, J.
S.C. APPLICATION NO. 470/96 (FR)
JUNE 18, 1997

Fundamental Rights – Freedom of speech, expression and peaceful assembly – Right to equality – May Day processions and meetings – Articles 12 (1), 12 (2), 14 (1) (a) and 14 (1) (b) of the Constitution – Permitted restriction of rights – National security and public order – Article 15 (7) of the Constitution – Section 77 (3) of the Police Ordinance.

On 25. 4. 1996 Deputy Inspector-General of Police (Colombo Range) the 4th respondent approved the application of the Navalanka Sama Samaja Party (NSSP) for a May Day procession and a meeting. However, on 29.4.1996, the 4th respondent informed the Secretary of the NSSP in writing that due to security reasons processions within the city of Colombo had been prohibited and that therefore the permission granted earlier stood revoked. An attempt by some supporters of the NSSP on the May Day to proceed in procession to their meeting place was stopped by the Police. Consequently, the NSSP could only hold a meeting. The matter before the Court was whether the restrictions on the NSSP were permitted by s. 77 (3) of the Police Ordinance in the interest of public order or by emergency regulations made by the President prohibiting all processions for a period of 24 hours from 30th April, 1996, in the interest of national security.

Held:

1. Article 15 (7) of the Constitution permits restrictions on the rights declared and recognized by Article 14. Such restrictions must be (i) prescribed by Law (including regulations made under the law relating to public security) and (ii) in the interest of national security, public order, etc. Thus, section 77 (3) of the Police Ordinance empowers the Police to prohibit a procession

in the interest of public order. This power is subject to the Constitution; and measures taken to further the maintenance of public order must be unrelated to the suppression of free expression and the incidental restriction on the exercise of free expression must be no greater than is essential to the furtherance of public order.

2. The evidence before the Court did not show a security threat at May Day processions as claimed by the respondents. On the other hand other political parties including the Lanka Sama Samaja Party (LSSP) had been permitted, not only to hold meetings in public places but also to march on the streets on that day. Hence, the concern of the Police in prohibiting the NSSP procession was not the furtherance of the interest of national security or public order but the suppression of free expression by the petitioner and other members of the NSSP. In the circumstances the prohibition of the holding of a procession by the NSSP was a transgression of the petitioner's rights under Articles 14 (1) (a) and 14 (1) (b) of the Constitution.
3. In permitting other political parties to conduct processions, the respondents failed to act even-handedly in applying the provisions of section 77 (3) of the Police Ordinance and the emergency regulations and thereby violated the petitioner's fundamental rights declared by Articles 12 (1) and 12 (2) of the Constitution.

Cases referred to:

1. *Hague v. CIO* 307 US 496, 515-516, 59 S. Ct. 954, 964, 83L. Ed 1423 (1939).
2. *United States v. O'Brien* 391 US 367, 88 S. Ct. 1673, 20 L. Ed 2d 672 (1968).
3. *Cox v. State of New Hampshire* 312 US 569, 61 Ct. 762, 85L Ed 1049.
4. *Kovacs v. Cooper*, 336, US 77, 69 S. Ct. 448, 93L ED 513.
5. *Poulos v. State of New Hampshire* 345, US 395, 73 S. Ct. 760, 97L Ed 1105.
6. *Adderly v. State of Florida* 385 US 39, 97 S. Ct. 242, 171 Ed 2d 149.
7. *Cox v. Louisiana* 379 U. S. 536, 555, 85 S. Ct. 453, 464 13L, Ed 2d 471.
8. *Walker v. City of Birmingham* 388, US 307, 87 S. Ct. 1824, 18L, Ed 2d 1210 (1967).
9. *Shuttlesworth v. City of Birmingham* 394 US 147, 89 S. Ct. 935 22l Ed. 2d 162 (1969).
10. *Goonewardena v. Perera* (1983) 1 Sri LR 305, 317-318.
11. *Joseph Perera v. The Attorney-General* (1992) 1 Sri LR 199, 214, 218.

APPLICATION for relief for infringement of fundamental rights.

D. W. Abeykoon, PC with *Nimal Ranawaka* and *Chandrika Morawaka* for the petitioner.

Nihal Jayasinghe, Deputy Solicitor-General with *N. Pulle*, SC for the respondents.

Cur. adv. vult.

July 17, 1997.

AMERASINGHE, J.

On 21.06.1996, the Court granted the petitioner leave to proceed on the basis of the alleged infringements of Article, 12 (1), 12 (2), 14 (1) (a) and 14 (1) (b) of the Constitution.

The petitioner is the General Secretary of the Government United Federation of Labour and a Politburo member of the Nava Sama Samaja Party. On 15 February, 1996, the Secretary of the Nava Sama Samaja Party (NSSP) applied to the Police with regard to the holding of the 1996 May Day celebrations. On the 25th of April, 1996, the fourth respondent, who was the Deputy Inspector-General of Police (Colombo Range), respondent to the application of the Secretary of the NSSP giving the approved assembly point, the route for the procession and the meeting place :

"Assembly Point – In front of Hope House, Slave Island.

Route – Union Place – Dawson Street – Park Road – Baybrooke Street – Dharmapala Mawatha – Turn right at colour lights to Sir James Peiris Mawatha.

Meeting Place – De Mel Park."

However, in his letter dated 29th April, 1996, the fourth respondent wrote to the Secretary of the NSSP stating that, due to security reasons, processions within the city of Colombo had been prohibited and that therefore the permission granted earlier stood revoked.

Notwithstanding the revocation, on May Day, 1996, some supporters of NSSP set off at about 1.15 pm from an assembly point in front of Hope House, Slave Island, and proceeded along Union Place to Dawson Street where they were stopped by the Police. The first respondent, Senior Superintendent, Solanga Arachchi, after consulting the fourth respondent – Deputy Inspector-General of Police Dissanayake – on his radio transmitter, permitted the leader of the NSSP, Dr. Wickramabahu Karunaratne, and three other persons (not including the petitioner) to proceed along the route approved earlier, accompanied by the first respondent. Dr. Karunaratne and the other accompanying persons eventually reached De Mel Park at about 2 p.m. and proceeded to hold a public meeting of the NSSP.

In his written submissions, learned counsel for the respondents supported the assertion in the affidavit of the first respondent that "there is no fundamental right to use a public highway for a demonstration". Accordingly, the Police seem to have assumed that section 77 (3) of the Police Ordinance gives the Police unlimited power to prohibit the taking out of processions or to impose conditions upon the holding of processions. Section 77 (3) states : "Notwithstanding anything in any other law, an officer of police of a rank not below the grade of Assistant Superintendent, if he considers it expedient so to do in the interests of the preservation of public order, may give directions (whether orally or in writing) prohibiting the taking out of any procession, or imposing upon the person or persons organizing or taking part in the procession such conditions as appear to him to be necessary, including conditions prohibiting or restricting the display of flags, banners or emblems".

There appears to be a misunderstanding : The Constitution is the supreme law and the powers conferred by section 77 (3) of the Police Ordinance are subject to the provisions of the Constitution. Article 14 (1) (a) of the Constitution declares that every citizen is entitled to the freedom of speech and expression including publication. Article 14 (1) (b) declares that every citizen is entitled to the freedom of peaceful assembly. The petitioner complains that his fundamental rights guaranteed by Articles 14 (1) (a) and (b) had been violated by the refusal of the police to allow him and the members of his political party to march on the streets on May Day. While I do not accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea, I do, however, accept the fact that marching, parading and picketing on the streets and holding meetings in parks and other public places may constitute methods of expression entitled to the protection of the freedoms declared and recognized in Articles 14 (1) (a) and (b) of the Constitution. Streets and parks and public places are held in trust for the use of the public and have been customarily used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets, parks and public places is a part of the privileges, immunities, rights and liberties of citizens : See *Hague v. CIO*⁽¹⁾. In Sri Lanka it is customary for mass meetings known as 'May Day rallies, to be held on the 1st day of the month of May each year in parks and other public places : These meetings are usually preceded by persons belonging to or supporting trade unions or political groups assembling at various pre-arranged points and marching along the streets on the way to their meetings. Such activities are protected by Articles 14 (1) (a) and (b) of the Constitution.

The complaint before us relates to denial of the use of public streets to conduct such a May Day procession. It is a matter of common knowledge that when there is such a procession there is a communication of ideas by slogan-shouting marchers bearing flags, banners, emblems and so on. There is speech as well as other forms of expression when such a procession takes place.

When "pure speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element could, in my view, justify incidental limitations on the exercise and operation of the fundamental rights declared and recognized by Articles 14 (1) (a) and (b). To characterize the quality of governmental interest that must appear, Courts have employed a variety of descriptive terms : 'compelling'; 'substantial'; 'subordinating'; 'paramount'; 'cogent'; 'strong'. Admittedly, the terms are not exact. However, as Chief Justice Warren, delivering the opinion of the Court, said in *United States v. O'Brien*⁽²⁾ : "Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment Freedoms is no greater than is essential to the furtherance of that interest".

The constitutional power of the government to impose restrictions on the exercise and operation of the rights declared and recognized by Article 14 of the Constitution is conferred by Article 15 (7) of the Constitution. Article 15 (7) limits the manner and the circumstances in which restrictions may be imposed : A restriction must (1) be prescribed by law (including regulations made under the law for the time being relating to public security); and (2) such restrictions must be "in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or meeting the just requirements of the general welfare of a democratic society". Article 15 (7) makes it clear that the right to speech or other methods of expression is not absolute, but relative, and must be exercised in subordination to laws that may impose restrictions permitted by Article 15 (7) of the Constitution for the sake of achieving certain ends. The privilege of a citizen to use the streets, parks and public places for communication of views on public questions may be regulated by the government in certain circumstances.

In the matter before us, the restriction on the NSSP procession was imposed by law, namely (1) section 77 (3) of the Police Ordinance – which permitted the fourth respondent in the interests of public order to prohibit the taking out of a procession; and (2) the Emergency Regulation made by the President under section 5 of the Public Security Ordinance prohibiting all processions for a period of twenty-four hours from midnight on the 30th of April, 1996. The restrictions were said to be in the interests of national security and public order and were, therefore, *ex facie*, constitutionally within the power of the government to impose.

Did the restriction on the NSSP procession further an important or substantial interest of the government? In general, it must be recognized that a government has a strong interest in regulating the use of streets and other public places : *Cox v. State of New Hampshire*⁽³⁾; *Kovacs v. Cooper*⁽⁴⁾; *Poulos v. State of New Hampshire*⁽⁵⁾; *Adderly v. State of Florida*⁽⁶⁾. Governmental authorities have the duty and responsibility to keep their streets open and available for movement and they must exercise a great deal of control in the interest of traffic regulation and public safety : *Cox v. Louisiana*⁽⁷⁾. When protests take the form of mass demonstrations, parades, or picketing on public streets and pavements, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern: *Walker v. City of Birmingham*⁽⁸⁾. When the matter of public safety is complicated by other exceptional facts, such as acts of terrorism, government interest in intervention must necessarily be increased in a commensurable manner. I hold that, *ex facie*, the prohibition on the NSSP procession did further an important or substantial interest of government.

However, government interest must be unrelated to the suppression of free expression : The right of free speech and expression cannot be abridged or denied in the *guise* of regulation for the pretended purpose of furthering legitimate government interests : Cf. *Hague v. CIO (supra)*. In *Shuttlesworth v. City of Birmingham*⁽⁹⁾; a statute gave

the City Commission absolute power to refuse a parade permit whenever they thought "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused". The United States Supreme Court emphasized the need to strictly and narrowly construe the powers conferred on public authorities to restrict the use of public places, such as streets and parks, which have been customarily used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Justice Stewart, who delivered the opinion of the Court, said : "Although the Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold upon broad criteria unrelated to proper regulation of public places. Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare', 'decency' or 'morals' of the community." The Court said that in the matter before it, it was "evident that the ordinance was administered so as in the words of Chief Justice Hughes, 'to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought . . . immemorially associated with resort to public places' ".

There is no doubt in terms of section 77 (3) of the Police Ordinance an officer of Police of a rank not below the grade of Assistant Superintendent – the officer in the matter before us was a Deputy Inspector-General – if he considers it expedient to do so in the interests of the preservation of public order, may give directions prohibiting the taking out of any procession or impose upon the person organizing or taking part in the procesion such conditions as appear to him necessary : *Goonewardena v. Perera*⁽¹⁰⁾. Undoubtedly it is within the constitutional power of the government to preserve public order; and measures taken to further the maintenance of public order could be

justified even if they incidentally limit the freedoms guaranteed by Articles 14 (1) (a) and (b) of the Constitution. Such measures, however, must be unrelated to the suppression of free expression, and the incidental restriction on the exercise of the free expression must be no greater than is essential to the furtherance of the interest in maintaining public order. In other words, section 77 (3) of the Police Ordinance, does not, in my view, empower Police officers to 'roam at will' in giving directions prohibiting the taking out of any procession or imposing conditions on persons taking part in a procession.

The position of the respondents is that the National Intelligence Bureau had information of a "possibility of Northern Terrorists striking Colombo in the guise of participating in demonstrations to be held on the 1st of May, 1996". In the circumstances, acting under the provisions of section 77 (3) of the Police Ordinance, the NSSP was informed by the fourth respondent – a Deputy Inspector-General of Police – that the earlier decision granting permission to hold a 'procession' had been revoked for security reasons. The fourth respondent in his affidavit states that "the withdrawal of permission granted to the Nava Sama Samaja Party to take out a procession, was consequent to the information I received in regard to the security threat apprehended at such processions".

According to Mr. M. R. Latiff, Assistant Superintendent of Police, he was "In charge of the Northern Terrorism desk of the National Intelligence Bureau collecting intelligence pertaining to Northern Terrorism which has spread to other parts of the country". It was Mr. Latiff's views that were supposed to have guided the respondents. There was no other evidence on the matter submitted by the respondents. Mr. Latiff in his affidavit states as follows :

8. I state that I received intelligence reports of probable terrorist attacks in the city of Colombo on May Day.
9. I state that I was further informed that the said terrorist attacks were to be launched at places where there would be minimum

security in order to disrupt normalcy and the security in Colombo. I state that it is almost impossible to enforce a strict security arrangement at a demonstration.

10. I state that I accordingly informed the Director of the National Intelligence Bureau about the aforesaid information received by me.
11. I state that I am aware that the said information received by me was accordingly communicated to the DIG Colombo the 4th respondent in SC Application No. 470/96 [the matter before this Court] in order that necessary precautions would be taken to avoid the security threat to the city."

Although the fourth respondent, supported by the first respondent, states that the procession of the NSSP was prohibited because there was information with regard to "the security threat apprehended at *such processions*", (the emphasis is mine) there is nothing in Mr. Latiff's affidavit to show that there was such a security threat : If the information supplied by Mr. Latiff was the basis for action, namely, that "terrorist attacks were to be launched at places where there would be minimum security . . . it is almost impossible to enforce a strict security arrangement at a demonstration", it is difficult to understand why public meetings, including a meeting of the NSSP at De Mel Park and a joint meeting of the LSSP and the People's Alliance, were permitted in the city of Colombo. I have no hesitation in rejecting the respondents' explanation that the NSSP procession was prohibited for security reasons. In my view the prohibition of the NSSP procession was for the purpose of the suppression of the free expression by members of that party.

The petitioner in fact adduced evidence by way of photographs published in newspapers and an affidavit from a reporter for "Yukthiya" supporting his allegation that members of other political parties, including the Lanka Sama Samaja Party (LSSP), had been permitted, not only to hold meetings in public places, but also to march on the streets on that day. The respondents do not state that other political parties had also been informed that their processions had been cancelled under the terms of section 77 (3) of the Police Ordinance.

The fact that the members of the LSSP had gathered together at their assembly point is evidence of the fact that they had not been informed that their procession had been cancelled. In fact, the position of the respondents is that the other processions were prohibited by an Emergency Regulation made on the 30th of April, 1996, banning all processions throughout the country for twenty-four hours commencing at midnight on the 30th of April, 1996. The NSSP procession had been prohibited by the fourth respondent's letter dated the 29th of April. Why were steps not taken to prohibit the processions of other political parties if security considerations prompted the prohibition of the NSSP procession?

Mr. Henry Perera, Senior Superintendent of Police, in his affidavit stated that the members of the LSSP had assembled at Campbell Park in order to proceed in procession to their meeting place at the Town Hall. He informed the leaders of the LSSP that "in terms of the Emergency Regulations in force at the time, all public processions had been now prohibited and accordingly produced a copy of the Emergency Regulations to the said leaders of the Lanka Sama Samaja Party". When the leaders of the LSSP informed him that they wished to proceed to the Town Hall for their meeting, he informed them that "they would have to do so in scattered groups and not a procession". The leaders and their followers, he says, having "co-operated" with him, proceeded "in scattered groups" and held their "joint meeting at the Town Hall with the People's Alliance . . ."

What was a "scattered group"? The photographs show a large number of persons following a banner held aloft with the words "Lanka Sama Samaja Party". It looks like any ordinary May Day procession. "Scattered groups" obviously did not mean that some went one way and the others went some other way. They all followed the same route. Assuming that, as learned counsel for the respondents endeavored to explain, the Lanka Sama Samaja Party members followed each other on the same route but in groups, as directed by the Police, were they then not marching along in orderly succession when they were walking behind each other in groups specified either by the Police or by the leaders of the political party? Surely, that is the way in which "procession" is ordinarily understood? And so, how does the

Police differentiate between the NSSP and the LSSP except for political reasons? The respondents admit that in the case of the NSSP only Dr. Karunaratne and three others were allowed to proceed from their assembly point to their place of meeting. If the members of the LSSP were allowed to proceed in "scattered groups" of the sort depicted in the photographs, why were the members of the NSSP differently treated? The concern of the Police in prohibiting the NSSP procession was, in my view, not the furtherance of the government interest in national security or public order, but the suppression of free expression by the petitioner and other members of his political party.

In the circumstances, I am of the view that the prohibition of the holding of a procession by the NSSP by the invocation of the powers conferred by section 77 (3) of the Police Ordinance, thereby preventing the petitioner from marching with members of his political party on May Day was a transgression of his fundamental rights of freedom of speech and expression declared and recognized by Article 14 (1) of the Constitution. The prohibition was not for the purpose of maintaining public order but for the suppression of free expression by the members of the NSSP, including the petitioner. Section 77 (3) of the Police Ordinance and the Emergency Regulation dated the 30th of April, 1996, were used by the Police to deny the petitioner the right of peaceful assembly declared and recognized by Article 14 (1) (b) of the Constitution and the opportunities for communication traditionally associated in Sri Lanka with resort to the streets by political parties on May Day, thereby denying him the right to freedom of speech and expression declared and recognized by Article 14 (1) (a) of the Constitution. By permitting members of other political parties to march while denying or seriously abridging the petitioner's right to march, the respondents failed to act even handedly in applying the provisions of section 77 (3) of the Police Ordinance and the Emergency Regulations and thereby violated the petitioner's fundamental right to equality before the law and equal protection of the law declared by Article 12 (1) of the Constitution, and the petitioner's fundamental right declared and recognized by Article 12 (2) not to be discriminated against on the ground of political opinion :

Acting under the powers conferred by section 5 of the Public Security Ordinance, the President on 30 April, 1996, by notification in the *Gazette* prohibited all public processions in every region of the country during a period of twenty-four hours from midnight on 30th April, 1996. Mr. Abeykoon submitted that restrictions on the exercise and operation of fundamental rights, if they are to be regarded as permissible, legitimate and valid, must be based on one or more of the grounds set out in Article 15 of the Constitution and must be strictly referable to it : The burden of proving that a restriction was in the interests of national security or public order lies on the respondents : Per Sharvananda, CJ. in *Joseph Perera v. The Attorney-Genera*⁽¹¹⁾. Mr. Abeykoon submitted that the respondents had failed to discharge the burden of showing that the total ban on all processions of every kind, including funeral and religious processions, throughout the country was required for the purposes of national security or public order. I am in agreement with the principle that incidental restrictions of free speech and expression must be no greater than is necessary for the furtherance of a government interest as prescribed by Article 15 (7) of the Constitution. However, in the view of the conclusions I have come to on the application of the Emergency Regulation on the assumption that it was valid, it is not necessary for me to consider whether the regulation should have been more narrowly drawn and was invalid on account of being over-broad.

For the reasons set out in my judgment, I declare that the State violated the fundamental rights of the petitioner declared by Articles 12 (1), 12 (2), 14 (1) (a) and 14 (1) (b) of the Constitution.

The State shall pay the petitioner a sum of Rs. 15,000 as costs.

WIJETUNGA, J. – I agree.

GUNAWARDANA, J. – I agree.

Relief granted.