

**NANDASENA
VS
CHANDRADASA, O. I. C., POLICE STATION,
HINIDUMA AND OTHERS**

SUPREME COURT
BANDARANAYAKE, J.
WEERASURIYA, J. AND
UDALAGAMA, J
SC (SPL) APPLICATION No. 12/2004
17TH JUNE AND 15TH SEPTEMBER, 2005

Fundamental Rights-Articles 11, and 13(1) of the Constitution-Alleged unlawful arrest and torture-Insufficiency of evidence on torture-Arrest for a breach of the peace.

The petitioner complained that the 1st respondent OIC came near his boutique in a jeep; and after summoning him assaulted him on his face. He was then taken to the police station by other police officers. He complained of infringement of Articles 11 and 13(1) of the Constitution. He alleged that a part of his boutique had been demolished.

It was proved that on information received by the 1st respondent over the telephone, from a Pradeshiya Sabha Member that the petitioner was making an unauthorized construction encroaching on the public road and that a crowd

had gathered creating unrest and a possible breach of the peace, the 1st respondent visited the scene. He found an atmosphere of unrest there. The evidence of the 1st respondent was supported by the Pradeshiya Sabha Member and another witness by their affidavits.

The petitioner's version which was supplement by his petition and a belated statement made to a Grama Niladhari was contradictory. He had no injuries to establish the alleged assault.

The 1st respondent's version was that he reached the scene on information received over the telephone and saw the unlawful construction which the petitioner refused to remove. There was unrest in the crowd that had gathered there. In the context, the 1st respondent arrested the petitioner to prevent a breach of the peace.

There was no medical evidence showing any injury to the petitioner.

Article 13(1) requires arrest according to procedure established by law ; and the person arrested should be informed of the reason for the arrest.

Article 11 provides that no person should be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

HELD:

1. The petitioner must discharge his burden regarding alleged infringement of Article 11 with a high degree of certainty. In the instant case, the evidence falls short of the required standard.
2. Under section 32 of the Code of Criminal Procedure Act, No. 15 of 1979, an arrest without a warrant is competent where, *inter-alia*, a person commits a breach of the peace, in the presence of the arresting officer. In the instant case, the evidence established the commission of a breach of the peace.
3. In the circumstances, there was no infringement of Articles 13(1) or 11 of the Constitution.

Cases referred to :

1. *Mc. Nabb vs. U. S.* (1943) 318 US 332
2. *Channa Peiris vs. Attorney-General and Others* (1994) 1 Sri LR 1

APPLICATION for relief for infringement of fundamental rights.

Kapila Gamini Jayasinghe for petitioner.

D. Akurugoda for 1st respondent.

K. A. P. Ranasinghe, State Counsel for 2nd and 3rd respondents

Cur.adv.vult

14th October, 2005

SHIRANI BANDARANAYAKE, J.

The petitioner, who was 54 years of age at the time of the incident, is a small scale trader, carrying on his business at Thawalama, a village situated in the Galle District. He alleged that on 02.09.2003 around 10.00 o'clock in the morning, the 1st respondent, who was the Officer-in Charge of the Police Station at Hiniduma, arrived near his boutique in his jeep and after summoning the petitioner near the jeep assaulted him on his face. Thereafter the 1st respondent, along with some other police officers had taken the petitioner to the Police Station. Prior to that, part of his boutique had been demolished by the aforementioned group of police officers. The petitioner further submitted that he was produced before the Magistrate's Court of Baddegama on 03.09.2003 and was released on bail.

The petitioner therefore complained that the 1st respondent had violated his fundamental rights guaranteed in terms of Articles 11, 12(1), 12(2), 13(1) and 14(1)(g) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Articles 11 and 13(1) of the Constitution.

The petitioner's allegations were against the 1st respondent that he was arrested on 02.09.2003 without any basis and that he was assaulted at the time he was so arrested on 02.09.2003. In support of his complaint against the 1st respondent, the petitioner had produced an affidavit from one Jinadasa Vithanage from Thawalama, Galle and a copy of the complaint made by the petitioner to the Grama Niladhari of Thawalama.

Of the allegations made against the 1st respondent, let me first consider the alleged violation of Article 13(1) of the Constitution. Article 13(1) of the Constitution, which relates to freedom from arbitrary arrest, reads as follows :-

"No person shall be arrested except according to procedure established by law. Any person arrested, shall be informed of the reason for his arrest."

According to 1st respondent, around 9.00 a.m. on 02.09.2003, he had received a telephone message (1R7) informing him that a person was erecting a structure encroaching the road and thereby causing an obstruction to the public at Halvitigala-Aswalandeniya junction. On the information received he had decided to visit the place in question and on his arrival at the said junction he had seen that a person was erecting a shed encroaching several feet of the Aswalandeniya road. The 1st respondent had also observed that at that time a crowd had gathered and the two parties were about to clash. At that instance the 1st respondent had dispersed the said crowd and had warned the petitioner to remove the unauthorised construction, which was being erected by him encroaching the road. The petitioner, according to the 1st respondent, had refused to remove the said unauthorised construction and continued with his work irrespective of the warning given by the 1st respondent. Accordingly after explaining to the petitioner that he was causing a public nuisance which may lead to an imminent breach of the peace, the 1st respondent had taken the petitioner into custody. In support of his contention the 1st respondent had produced an affidavit from a Member of the Pradeshiya Sabha of Thawalama, namely, one Waidyaratne Attanayake Herath Mudiyanseelage Sumathipala, who had been an eye witness to the aforesaid incident. According to him around 8.00 a.m. on 02.09.2003 a group of villagers had informed him that the petitioner had started to construct a temporary shed obstructing the junction near Aswalandeniya Road. According to his version if this construction was allowed to remain that would have obstructed the roadway and would have prevented any vehicle using the road. At the time the said Sumathipala had approached the Aswalandeniya junction (1R2), villagers had assembled near the junction and were becoming restless..

The 1st respondent had also filed a further affidavit from one Gardi Hewawasam Dodangodage Sujeewa Lakmal who was carrying on a business of collecting and transporting tea leaves from Dammala, in Hiniduma area. According to him around 7.00 a.m., when he was passing Aswalandeniya in his truck, he had seen the petitioner constructing a temporary shed obstructing the main road. Sometime later, a Member of the Pradeshiya Sabha, had arrived at the scene and had warned the petitioner not to carry out the construction, but to no avail. Later the 1st respondent had arrived and had warned the petitioner, but as the petitioner continued with his construction, the 1st respondent arrested him after dispersing the crowd that had gathered near the junction (1R6).

On a consideration of the afore mentioned affidavits it is apparent that the 1st respondent had arrived at the scene in question on the information he had received by way of a telephone message, that had been given as had been found out later, by the Member of the Pradeshiya Sabha. It is also clear that the 1st respondent had arrested the petitioner as it had clearly appeared to him that the petitioner was causing a public nuisance.

Section 32 of the Code of Criminal Procedure Act, No. 15 of 1979 describes the instances where peace officers could arrest persons without a warrant. According to Section 32 (1) (b)

“Any peace officer may without an order from a Magistrate and without a warrant arrest any person -

- (a) who in his presence commits any breach of the peace ;
- (b) 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”.

It is common ground that the petitioner was arrested by the 1st respondent. The contention of the 1st respondent is that the petitioner was arrested as he was causing a public nuisance. In such circumstances could such an arrest be a violation of the petitioner’s fundamental rights guaranteed in terms of Article 13(1) of the Constitution ? In terms of Article 13(1), as stated earlier, the arrest should be ‘according to procedure established by law’. The importance of observing the ‘correct and proper procedure’ was correctly evaluated by Justice Frankfurter in *Mc. Nabb vs. U.S.*⁽¹⁾ where he had stated that ‘the history of liberty has largely been the history of observance of procedural safeguards’. The purpose of following the correct procedure is therefore to safeguard the liberty as well as maintain law and order and thereby to mete out justice and fairplay.

Considering the circumstances of this matter, it is clear that the 1st respondent had arrested the petitioner as he was instrumental in causing a public nuisance leading to a breach of the peace. The police had taken necessary steps against the petitioner and criminal proceedings were

instituted against him. On an examination of the totality of the evidence, I am inclined to accept the version given by the 1st respondent.

In such a situation the arrest of the petitioner cannot be regarded as an illegal arrest and therefore the petitioner's claim with regard to Article 13(1) of the Constitution should fail.

The petitioner has complained that the 1st respondent had assaulted him on 02.09.2003 and thereby he has alleged that the 1st respondent had violated his fundamental rights guaranteed in terms of Article 11 of the Constitution. Article 11 of the Constitution refers to freedom from torture and states as follows :-

“No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

According to the complaint made by the petitioner, the 1st respondent had assaulted him on his face at the time the latter had arrived near his boutique. Except for his petition and affidavit where he refers to the said assault, it is to be borne in mind that the petitioner has not produced any medical evidence to substantiate his allegations against the 1st respondent.

Learned Counsel for the petitioner submitted that the petitioner had not received any medical treatment with regard to the aforementioned assault and that it was the reason for the non-production of any medical certificates. Accordingly it is clear that there were no injuries due to the alleged assault. Learned Counsel for the petitioner drew our attention to the affidavit given by Jinadasa Vithanage (P3) and the complaint made by the petitioner to Grama Niladhari on 23.09.2003 (P3A) as supporting documents to substantiate his allegations against the 1st respondent. In the affidavit given by the said Jinadasa Vithanage (P3) it is averred that the 1st respondent had summoned the petitioner near the jeep and thereafter had assaulted the petitioner on his face. Paragraph 3 of the said affidavit refers to the said incident in the following terms :

“ඒ අනුව වෙදගේ තන්දසේන යන අය හිනිඳුම් පොලීස් ප්ලාන්කට්පතිතුමා අහියාට ගිය විට ඔහු වෙදගේ තන්දසේනගේ කම්පයෙන් අල්ලා “භම්මුලට” පහර කීපයක් ගසා..... (emphasis added)”.

However, in the complaint made to the Grama Niladhari at Thawalama (P3A) what is stated is as follows :-

“එහි සිටි ස්ථානාධිපතිතුමා මගේ බෙල්ලේ අල්ලා කණට දෙන තුනක් ගසා (emphasis added)”.

On an examination of these two documents it appears that the petitioner’s version given in his petition and affidavit is different to the version stated in the two documents filed by him to substantiate his position.

When there is an allegation based on violation of fundamental rights guaranteed in terms of Article 11 of the Constitution, it would be necessary for the petitioner to prove his position by way of medical evidence and/or by way of affidavits and for such purpose it would be essential for the petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden. Discussing this position, Amerasinghe, J. in *Channa Peiris and other vs Attorney General and others* ⁽²⁾ had clearly stated that,

“Having regard to the nature and gravity of the issue a high degree of certainty is required before the balance of probability might be said to tilt in favour of the petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment”.

Considering the non-availability of any medical evidence with regard to the alleged assault, it would be necessary to examine carefully the supporting documents produced by the petitioner to substantiate his allegations against the 1st respondent.

The petitioner attempted to substantiate his allegations against the 1st respondent on the basis of the complaint made by him to the Grama Niladhari of Thawalama and relying on an affidavit he had filed along with his petition of one Jinadasa Vithanage. The first document, being the complaint made to the Grama Niladhari of Thawalama (P3A), indicates that the petitioner had made the said complaint on 23.09.2003. Accordingly the petitioner had decided to make a statement to the Grama Niladhari only after 3 weeks from the date of the said incident. The affidavit of Jinadasa Vithanage (P3) on the other hand is dated 22.03.2004, which is over 6 months from the date of the incident.

Learned Counsel for the 1st respondent contended that the said Jinadasa Vithanage, who is the author of the affidavit dated 22.03.2004, is a close relative of the petitioner and is the owner of the boutique adjoining the petitioner's grocery store at Thawalama. Therefore it is not possible to place any reliance on the aforesaid affidavit not only that being the single affidavit filed by the petitioner to substantiate his position, but also, as referred to earlier, the contents of this affidavit differ from what was stated by the petitioner in his petition and affidavit.

In the event where there has been no evidence of physical harm and the only document produced by the petitioner being a statement by him that the 1st respondent had assaulted him on his face which statement had not been supported by any independent evidence by way of affidavits or by medical evidence, I am of the view that the petitioner has not been able to satisfy this Court that his fundamental rights guaranteed in terms of Article 11 were infringed by the 1st respondent.

Considering all the circumstances referred to above it is apparent that the 1st respondent has not violated the fundamental rights of the petitioner guaranteed in terms of Articles 11 and 13(1) of the Constitution.

I accordingly hold that the petitioner has not been successful in establishing that his fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution have been violated by the actions of the 1st respondent. This application is accordingly dismissed, but in all the circumstances of this case without costs.

WEERASURIYA, J.—I agree.

UDALAGAMA, J.—I agree.

Application dismissed