

**SUMANADASA AND 205 OTHERS
VS.
ATTORNEY GENERAL**

SUPREME COURT.
S. N. SILVA, C. J.
JAYASINGHE. J.
TILAKAWARDENA. J.
SC SPL 1-199-200-206.
JUNE 19, 2006.

Fundamental Rights - Articles 4 (d), 13 (1), 13(2), 16(1), 15(7) 118(b), 136(1) (d), 140, 170- Application by remandees - Immigration and Emigration Act - Section 45, Section 47- Non Bailable - Criminal Procedure Code No. 15 of 1979- Section 23 (1), Section 114, Section 115, Section 116, Section 404 - Continuous detention without any recourse to a remedy - Violation of Article 13(2) ? Accused Suspect - difference?.

Complaints (205) were addressed to the Supreme Court by persons held in custody upon orders of committal to remand by Magistrates in respect of offences punishable in terms of Section 45 of the Immigration and Emigration Act. As the offence being non bailable the applications filed in the Court of Appeal under Section 404 have also been dismissed. They alleged an

infringement of their fundamental rights guaranteed by Article 13(2) resulting from continuous detention in custody without any recourse to a remedy under any procedure established by law.

HELD:

- (i) In terms of Article 118(b) the Supreme Court is vested with jurisdiction for the "Protection of fundamental rights" The word protection is wider than "enforcement" . It is incumbent on the Supreme Court to make such orders as are necessary to ensure that the fundamental rights guaranteed by the Constitution are adequately protected and safeguarded.
- (2) Fundamental rights form part of the sovereignty of the people and Article 4 (d) being a basic provision on which the structure of the Constitution is founded requires that fundamental rights be respected, secured and advanced by all organs of government and shall not be abridged, restricted or denied in the manner and to the extent provided.
- (3) Any abridgment, restriction or denial has to be based only on specific provisions of the Constitution itself, and Article 16(1) does not amount to a specific restricting of the fundamental rights guaranteed by Article 13(2). The permitted restrictions are contained in Article 15(7) and the provisions of Section 47(1) of the Immigration and Emigration Act could never be construed as restricting fundamental rights guaranteed by Article 13(2).
- (4) There is no law as defined in Article 170 with regard to grant and issue of writs. However, from the promulgation of the Constitution and even writs have been previously granted on the basis of the common law principles as evidenced by Judgments of the Superior Courts. Provisions of Article 13 (2) shall be similarly given effect to and the continued detention of persons accused of offences under Section 45 should be adjudicated upon according to the procedure applicable to non-bailable offences. S 403 of the Code of Criminal Procedure and Case Law.

Per Sarath Silva, C. J.

"It has to be noted that the Divisional Bench in *A. G. vs. Sumathapala* has not made any findings as to the content and ambit of the fundamental right guaranteed by Article 13(2) and the observation of the Divisional Bench - that if there is a conflict between the specific provisions of section 47(1) of the Immigration and Emigration Act and individual liberty it is for the legislature to make necessary amendments has to be considered as "Obita Dicta" "

Application under Article 126 of the Constitution.

Cases referred to :

- (1) *Attorney General vs. Sumathipala* - 2006- 2 Sri LR 126 (SC)DB (distinguished)
- (2) *Attorney General Vs. Nilanthy* — 1997 2 Sri LR 203
- (3) *Tunnaya alias Gunapala vs. O. I. C. Galewela* -1993 - 1 Sri LR
- (4) *Attorney General Vs. Punchi Banda* - 1986 -1 Sri LR 40.

Nuwan Peiris with *Pradeepa Nilmini* and *Champika Nilantha* for petitioners.
Yasantha Kodagoda DSG with *Ms. Harshika de Silva SC* for respondent

Cur. adv .vult.

June 19, 2006

SARATH SILVA. C. J.

Proceedings in these cases commenced on the basis of complaints addressed to this Court by persons held in custody, upon orders of committal to remand made by Magistrates in respect of offences punishable in terms of Section 45 of the Immigrants and Emigrants Act. They allege an infringement of their fundamental rights guaranteed

by Article 13(2) of the Constitution resulting from continuous detention in custody without any recourse to a remedy under any procedure established by law.

The case of the Petitioners is that in view of the provisions of Section 47(1) of the said Act, as interpreted by a Divisional Bench of this Court in the case of *Attorney General vs. Sumathipala*⁽¹⁾ - no Court has jurisdiction to release them on bail and they have to necessarily languish in remand indefinitely pending the conclusion of the cases against them.

Since the persons are in prison and in view of the fact that there are 207 such complaints of continued incarceration without any remedy the Court decided to entertain these complaints in terms of Rule 44(7)(b) of the Supreme Court Rules 1990 and granted leave to proceed, in respect of the alleged infringement of the fundamental rights of the Petitioners guaranteed by Article 13(2) of the Constitution. In the order granting leave to proceed, the Court has noted that the complainants did not have means to prosecute their complaints in the manner provided for in a regular application and that they continue to suffer substantial prejudice by reason of the alleged infringement being deprived of their liberty without a remedy before any Court.

Since the matter in issue is the same, Court made a further order that the Petitions will be considered together and the State may present a motion to each case as there are no disputed questions of fact, to obviate the need to file affidavits and formal pleadings. The contents of the motions that may be filed have been specified in the order dated 29.05.2006.

The Petitioners have been arrested in connection with offences under Section 45 of the Immigrants and Emigrants Act. They have been denied bail in terms of Section 47(1) of the said Act, as amended., The relevant provisions of the section are as follows :

“Notwithstanding anything in any other law

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- (a) every offence under paragraph (a) of sub-section (1) of section 45 ;
 - (b) every offence under sub-section (2) of Section 45 so far in as it relates to paragraph (a) of sub-section (1) of that section ;
 - (c)
 - (d)
 - (e)

shall be non - bailable and no person accused of such an offence shall in any circumstances be admitted to bail.”

In view of the provision that the offence shall be non -bailable and that a person accused of such offence shall not in any circumstances be admitted to bail, Magistrates have committed the Petitioners to remand custody.

It was submitted by Counsel appearing for the Petitioners that they have filed applications for bail in the Court of Appeal, in terms of section 404 of the Code of Criminal Procedure Act No.15 of 1979. The basis of these applications have been that although there is a bar to their release by the magistrate, in view of the provisions of the second part of section 404 of the Code, the Court of Appeal may direct that the persons be released on bail.

The Divisional Bench of this Court in the case of *Attorney General vs Sumathipala (supra)* referred to above held inter alia as follows :

“It is thus clearly evident that the effect of Section 47(1) of the Immigrants and Emigrants Act is that no person accused of such an offence shall be admitted to bail. The restriction thus devolves on an accused, who would have to be incarcerated without a remedy until the conclusion of the trial. Compared with the provisions of the fundamental rights enshrined in our Constitution, it is an arguable point this position leads to an injustice as even a suspect would be deprived of his liberty irrespective of the fact that in

terms of the provisions contained in the Chapter on fundamental rights of the Constitution, the basic rights of the individual must be safeguarded.

However, it is to be noted that although the liberty and freedom of an individual is thus restricted in terms of the provisions of section 47(1) of the Immigrants and Emigrants Act, that injustice cannot be cured by this Court as it is for the legislature, viz ; the Parliament to makè necessary amendments if there is a conflict between the specific provisions and individual liberty.”

The resulting position as noted in the judgment of the Divisional Bench is that the Petitioners have to continue in custody until the conclusion of the proceedings against them although reference has been made to the fundamental rights of persons who have to be incarcerated without a remedy, it has to be noted that the Divisional Bench has not made any findings as to the content and ambit of the fundamental right guaranteed by Article 13(2) of the Constitution. Indeed such a matter was not directly in issue in the case presented to the Divisional Bench.

The observation of the Divisional Bench that if there is a conflict between the specific provisions of Section 47(1) of the Immigrants and Emigrants Act and individual liberty it is for the legislature to make the necessary amendments, has to be considered as *obiter dicta* since the two questions on which special leave to appeal had been granted and the matter set down for hearing before the Divisional Bench relate only to the interpretation of section 404 of the Code of Criminal Procedure Act and Section 47(1) of the Immigrants and Emigrants Act.

In this background we have to address the present complaints of the infringement of Article 13(2) of the Constitution. This provision reads as follows.:

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

The provision guarantees to every person held in custody, detained or otherwise deprived of personal liberty, two specific rights; they are :

- (i) the right to be brought up before the judge of the nearest competent court according to the procedure established by law and ;
- (ii) the right not to be further held in custody, detained or deprived. personal liberty except upon and in terms of an order of such judge made in accordance with the procedure established by law.

The procedure established by law in respect of the right referred to above in (i) above is contained in Sections 115 and 116 of the Code of Criminal Procedure Act. It is not in dispute that this procedure has been complied with and that the Petitioners have been produced before the judge of the nearest competent court.

The alleged infringement is in respect of the second right as contained in (ii) above, namely the absence of a procedure established by law in accordance with which the persons would be further held in custody, detained or deprived of personal liberty. The stipulation that there be a procedure established by law necessarily envisages that such procedure would contain provisions for an adjudication of the matter of continued detention by the judge before whom the person is produced or by a court having jurisdiction in the matter.

The findings of the Divisional Bench referred to above is that the restriction in section 47(1) "devolves on an accused, who would have to be incarcerated without remedy until the conclusion of the trial". In the result the person held in custody is denied a procedure established by law in terms of which his continued detention would be adjudicated upon.

Deputy Solicitor General submitted that the restriction contained in Section 47(1) is only in respect of a person accused of any offence punishable under Section 45 and that a person who has been produced in court and remanded and against whom no charges have been framed will not come within this restriction. He submitted that such a person would be only a suspect and the Magistrate would have jurisdiction to consider the release of such persons on bail in terms of Section 403 of the Code of Criminal Procedure Act, on the basis that he is produced in respect of a non-bailable offence. This has certainly not been the case of the State previously since all persons have been routinely remanded by the Magistrate on the basis that there is a bar on their release on bail in terms of Section 47(1). It is on that premise that applications had been made to the Court of Appeal in terms of Section 404 of the Code. Counsel appearing for the Petitioners who filed applications in the Court of Appeal submitted that their applications have been dismissed by the Court of Appeal on the strength of the judgment of the Divisional Bench. If the contention of the Deputy Solicitor General had been presented to the Magistrate this situation would not have arisen. It is clear from the routine orders made by Magistrates remanding these persons that it has been done on the basis that the bar in Section 47(1) applies from the time a person is produced before the judge. In any event since the submissions have been made with regard to the meaning of the term "accused" as appearing in Section 47(1), it is incumbent to consider this matter further.

It is to be noted at the outset that the Divisional Bench in its judgment has not made any distinction between a person "accused of" or "Suspected of" having committed an offence in terms of section 45.

The Deputy Solicitor General submitted that since the word "accused" is imprinted in bold letters in the judgment it should be considered that the terms would not extend to a person who is suspected of having committed an offence. Such an inference cannot be drawn by the mere fact that the word appears in bold type. In fact in a later sentence of the passage cited above the judgment of the Divisional Bench states that "even a suspect would be deprived of his liberty".

We have pointed out to Deputy Solicitor General in the course of submissions that the Code of Criminal Procedure Act uses the words "accused" and "suspect", interchangeably. In Section 114 of the Code which refers to a situation where it is found that there is not sufficient evidence or reasonable suspicion to justify producing the person arrested in court and such person is released on a bond by the Police, he is referred to as the "accused". Thus a person is described as an "accused" well before a plaint is filed.

In Section 115(1) which covers situations where the person is produced in court the reference is to a "suspect". On the other hand the provisions in section 402 with regard to the release of a person brought before the court the reference is to an "accused". Similarly in Section 403 the reference is to an "accused".

It is in this context that in the case of *Attorney General vs Nilanthi*⁽²⁾ at page 203, the Court of Appeal upheld the submission of the Deputy Solicitor General who appeared in that case that the words "charged with" or "accused of" as contained in Section 10 of the Offensive Weapons Act should necessarily be given a meaning which is akin to "suspected of."

Deputy Solicitor General persisted in his submission and placed reliance on the judgment of this Court in *Tunnaya alias Gunapala vs OIC, Galewela*⁽³⁾

It is to be noted that the findings in that case relate to what constitutes commencement of proceedings in terms of the Code of Criminal Procedure Act. The Court departed from previous dicta in *Attorney*

General vs Punchi Banda⁽⁴⁾ at 40, that the production of a suspect in terms of Section 116(1) of the Code amounts to an institution of proceedings in terms of section 136(1)(d). The observations made in that judgment had been considered in the case of *Attorney General vs Nilanthi* (supra) and the Court held that they are inapplicable to consider the meaning of phrases "charged with" and "accused of". We are in entire agreement with that finding.

In terms of Article 13(1) of the Constitution every person arrested has to be informed of the reasons for his arrest.\

Section 23(1) of the Code of Criminal Procedure Act require that the person arrested be informed of the nature of the charge or allegation upon which he is arrested. Thus, a person is accused of having committed an offence at the very point of his arrest. He is produced before the Magistrate as a person accused of having committed an offence. Throughout the proceedings in the Magistrates court or any other court before which proceedings are continued such person is referred to as an accused in view of the accusation on which the criminal justice process commences against him.

The term "suspicion" or "suspect" derives from the material on which such accusation is made. This suspicion transforms to a charge after a plaint or indictment is filed. After a trial it transforms into a conviction or ends by way of an acquittal, as the case may be.

Therefore we see no merit in the submission of the Deputy Solicitor General that section 47(1) applies only after plaint has been filed against the person. The Petitioners have been in custody throughout on the basis that there is a bar to their release on bail in terms of Section 47(1).

The next matter to be considered is the alleged infringement of the fundamental right guaranteed by Article 13(2) due to the absence of a procedure established by law, in terms of which the continued detention could be adjudicated upon.

Deputy Solicitor General submitted that Section 47(1) as interpreted by the Divisional Bench which denied to the Petitioners a procedure upon which their continued detention could be adjudicated upon, is existing law since the amendment was in 1961 and should be held as being valid and operative in terms of Article 16(1) of the Constitution as existing law. Article 16(1) relied upon by the Deputy Solicitor General reads as follows :

"All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter."

In this regard it has to be noted that this Court is not required to pronounce upon the validity of Section 47(1) which has been interpreted as noted above by the Divisional Bench. The Court has to consider the ambit of the fundamental right guaranteed by Article 13(2) and the relief, if any, to be granted to the Petitioners in the absence of a procedure established by law to adjudicate on their continued detention.

In this context we note that in terms of Article 118(b) of the Constitution this Court is vested with jurisdiction " for the protection of fundamental rights". The word "Protection" is wider than the word "enforcement". It is incumbent on this Court to make such orders as are necessary to ensure that the fundamental rights guaranteed by the Constitution are adequately protected and safeguarded. Fundamental rights forms part of the sovereignty of the People and Article 4(d) of the Constitution being a basic provision on which the structure of our Constitution is founded, requires that fundamental rights be "respected, secured and advanced by all organs of government and shall not be abridged, restricted or denied save in the manner and to the extent hereinafter provided.

Hence the rights guaranteed to the Petitioners in terms of Article 13(2) should be secured and advanced by this Court and not be abridged, restricted or denied. Any such abridgment, restriction or denial has to be based only on specific provisions of the Constitution itself.

Article 16(1) relied on by the Deputy Solicitor General does not amount to a specific restriction of the fundamental rights guaranteed by Article 13(2) of the Constitution. The permitted restrictions are contained in Article 15(7) of the Constitution and the provisions of Section 47(1) of the Immigrants and Emigrants Act could never be construed as restricting the fundamental right guaranteed by Article 13(2) of the Constitution.

The next matter to be considered is the relief to be granted by this Court, in the absence of a procedure established by law in terms of which continued detention of a person could be adjudicated upon.

In this context we have to note that Article 140 of the Constitution which empowers the Court of Appeal to issue writs has a similar provision which states that such writs shall be issued "according to law".

There is no law as defined in Article 170 of the Constitution with regard to the grant and issue of these writs. However, from the promulgation of the Constitution and even previously, writs have been granted on the basis of the common law principles as evolved by the judgments of the Superior Courts. We are of the view that the provisions of Article 13(2) should be similarly given effect to and the continued detention of persons accused of offences under the relevant provisions of Section 45 of the Immigrants and Emigrants Act should be adjudicated upon according to the procedure applicable to non-bailable offences.

In this context the Deputy Solicitor General submitted that the principles of law evolved in terms of section 403 of the Code of Criminal Procedure Act should be taken into account in considering the continued detention of these persons.

We are inclined to agree with the submission and hold that the continued detention of the persons who are produced with having committed offences in terms of section 45 of the Immigrants and Emigrants Act should be considered on the basis of the provisions of Section 403 of the Code of Criminal Procedure Act and the applicable case law.

We have had to deal with these complaints as a matter of urgency, in view of the continuing flow of complaints from persons who are in custody without an adjudication by any Court of law as to the basis of their detention. It was submitted that about 10 days ago a female suspect in the Negombo prison being one of the Petitioners who was held in a crowded cell died, since there was no response to urgent appeals for medical assistance when she fell ill in the night.

Continued detention of such large numbers necessarily resulting in over crowding in prisons, without proper adjudication of the basis of their detention negates the very essence of the fundamental right guaranteed by Article 13(2) of the Constitution.

We accordingly hold that the fundamental rights of the Petitioners guaranteed by Article 13(2) of the Constitution have been infringed by executive or administrative action, since the Petitioners have been detained in custody merely upon their being produced in court and incarcerated without a remedy until the conclusion of their trials. On the basis of the findings stated above the respective Magistrate Courts are directed to decide on the continued detention of these persons in accordance with the procedure applicable to persons accused of non-bailable offences. Registrar is directed to send copies of the judgment to the Magistrates Court of Negombo, Chief Magistrates Court, Colombo, Magistrate Court of Fort, Colombo and Kalutara.

Applications are allowed. No costs.

JAYASINGHE J., — *I agree.*

TILALAKAWARDENA J., — *I agree*

Application allowed.

Fundamental rights of the petitioners have been infringed. The Magistrate's courts are directed to decide on the continued detention in accordance with the procedure applicable to non-bailable offences.