

WIJENAYAKE AND OTHERS
v.
AMERASENA AND OTHERS

SUPREME COURT
DHEERARATNE, J.
PERERA, J.
BANDARANAYAKE, J.
SC (FR) 290/98
01ST SEPTEMBER, 1999

Fundamental Rights - Constitution, Articles 11, 13(1), 13(2) - Search of premises - Conflicting medico legal Reports - Offences under the Brothels Ordinance - Acquitted in the Magistrate's Court - Observations of Magistrate in acquitting accused.

The Petitioners allege that a Police party entered the "Guesthouse" and caused a search to be made. The Petitioners also allege that they were brutally assaulted.

The Petitioners were also charged under the Brothels Ordinance, in the Magistrate's Court, and all the Petitioners were acquitted after trial.

Held :

(1) The three Medico Legal Reports issued by Government Medical Officer only show abrasions or no injuries.

(2) The Medico Legal Report of the 1st Petitioner issued by the J. M. O. Matara, show injuries; the Medical Certificate issued to the 2nd and 3rd Petitioners also show injuries.

Per Perera, J.

"The Medical Officer who examined the 1st Petitioner when he was produced before him by the 1st Respondent very shortly after this incident has failed to observe the several injuries which were noted by the J. M. O. three days later. The only inference which could reasonably be drawn is that the Medical Officer who issued the Medico Legal Report on the very same day after an examination of the 1st Petitioner has endeavoured to assist the Police in the unlawful exercise."

(2) In the Magistrate's Court case the Magistrate had observed that the Respondents have not produced a single woman who was indulging in

the unlawful activity before Court. The reason given by the Magistrate in acquitting the accused appear to be a telling indictment on the Police Officers who conducted the raid.

(3) There was no justification whatsoever for this exercise on the part of the Respondents who unlawfully interfered with the lives of ordinary peace loving and law abiding citizens.

(4) The conduct of the Respondents in inflicting serious injuries on the Petitioners and the treatment meted out to them in the presence of onlookers in the neighbourhood, undoubtedly amounts to cruel, inhuman and degrading treatment.

APPLICATION under Article 126 of the Constitution.

Barana Gayan Perera with Ms Prabha Perera for Petitioners.

D. Akurugoda with Ms Kumudu Nanayakkara for the 1-8 Respondents Allan David, S. C. for 10th and 11th Respondents.

November 29, 1999.

PERERA, J.

Leave to proceed in this case has been granted by this Court for the alleged infringement of the fundamental rights of the Petitioner protected by Articles 11, 13(1) and 13(2) of the Constitution.

The 1st Petitioner states that he was running a Guesthouse at No 7, Demoni Road, Weligama from 1987 under the name of "Dilkini Guesthouse." The aforesaid business was duly registered under the provisions of the Business Registration Act No 1 of 1990 (P1).

The gravamen of the Petitioners complaint is that a Police party led by the 1st Respondent having entered the premises of the Dilkini Guesthouse on the 31st of October, 1997 without a search warrant had searched the premises, despite the strenuous objections of the Petitioners. According to the 2nd Petitioner on that date, the 1st Respondent who led the Police team had pushed her to a side when she informed him that

she was unable to permit the Police Officers to search the Guesthouse. The 2nd Petitioner had fallen as a result of the act of the 1st Respondent and the 1st Respondent had stated, "We can do anything," and had gone into the Guesthouse and carried out a search. The 1st Petitioner had then made a request of the 1st Respondent to issue a letter stating that they had searched the Guesthouse and the Respondents who had been annoyed by this request had replied, "We shall not give you any letters. We are prepared to go even to Jaffna. . . . We shall not permit you to carry on these activities. We shall destroy all these." No detection whatsoever had been made on this date at the aforesaid premises.

Thereafter, according to the Petitioners on 4th November, 1997 once again, the 1st to the 7th Respondents had come to the Dilkini Guesthouse in a jeep around 12.30 p. m. The 1st and 2nd Respondents were in uniform, but the other Respondents were in civvies. The 1st Respondent had entered the Guesthouse and had informed the 2nd Petitioner that he had come there to search the Guesthouse that day, armed with a search warrant, to which, the 2nd Petitioner had replied as follows - "Today, you have acted in the correct manner." Then the 1st and 2nd Respondents had entered the Guesthouse and searched the entire house. At that stage, the 2nd Petitioner had also gone inside the Guesthouse and as the 2nd Petitioner was passing through the corridor, the 2nd Respondent, a woman Police Constable in uniform had jumped at her and said, "Where is your mouth today? How did you speak to our Sub-Inspector on the last occasion?" and had slapped the 2nd Petitioner on the face. The 2nd Petitioner had then raised cries asking them not to assault her. At the same time, the 1st Respondent and the other two men who were clad in civvies had come up to her and had assaulted her brutally, kicked her and dragged her out.

The 2nd Petitioner was dragged up to the jeep, while the 2nd Respondent had whipped the 2nd Petitioner with her leather belt. At this stage, while the 2nd Petitioner was being dragged

up to the jeep, her son, the 3rd Petitioner had rushed there and had begged of them not to assault his mother, the 2nd Petitioner. Two persons who were seated at the Reception Desk had attempted to save the 2nd Petitioner from this brutal attack, but they were chased out by the Respondents. Affidavits from these two witnesses setting out these facts are attached marked P5 and P6. The Respondents had then jointly put the 2nd and 3rd Petitioners into the Police jeep.

At this stage, the 1st Petitioner who was in his house which is situated in the same premises as the Guesthouse had heard this commotion and had attempted to inform the Assistant Superintendent of Police, Weligama whose office was situated at the rear of the Petitioner's house to seek his assistance. But two people in civvies, whom they later came to know were Police Officers had held him and assaulted him. Then the 1st Petitioner had run into his house to telephone the ASP, but found that his telephone lines had been disconnected. The 1st Petitioner states that while he was in this predicament, the 1st Respondent together with two other Police Officers who were in civvies arrested him and forcibly dragged him inside the house for the purpose of searching the premises. After carrying out the search of the premises, the 1st Respondent and the two other Police Officers aforesaid had dragged him into the jeep while continuing to assault him - he was at that stage bleeding from his mouth. These facts set out in the Petition are corroborated by two other independent witnesses whose affidavits have been filed marked 97 and P8.

The Petitioners were then taken to the Matara Police Station in the Respondents' jeep and in the course of this journey they were subjected to assault and abuse at the hands of the 1st, 2nd and 5th Respondents.

Shortly after the Petitioners were taken to the Matara Police Station, they were taken before a Medical Officer at the Matara Hospital. The Petitioners were threatened with dire consequences if they divulged to the Doctor that they were assaulted by the Respondents.

After the Medical Examination of the Petitioners, they were taken back to the Matara Police Station and detained there overnight. On the next day the statements of the Petitioners were recorded. The Petitioners allege that they were not given an opportunity of reading the statements before they signed them. Thereafter the Petitioners were produced before the Matara Magistrate. The learned Magistrate released the 3rd Petitioner on bail in a sum of Rs. 2,500/- and remanded the 1st and 2nd Petitioners until the 7th of November, 1997 on which day they were also enlarged on bail in M C Matara case No 1663/92.

Upon his release, the 1st Petitioner had to seek admission to the Matara Hospital for treatment for the injuries sustained by him resulting from the Police assault. This is amply borne out by the contents of the Medico-Legal Reports issued by the JMO Matara dated 9.11.1997 and the certified copy of the Bed Head ticket relating to the 1st Petitioner which were forwarded upon a direction given by this Court. (vide x)

It is indeed very significant that the 1st Petitioner on the same day, that is on the 31st of October 1997, very shortly after the search of the premises which took place around 2.45 p. m. had complained about this unlawful search at the Weligama Police Station around 3.15 p. m. (vide P4) It is in this background that one has to consider the conduct of the Respondents who came to these premises once again on the 4th November 1997. The conversation that ensued between the Petitioners and the Respondents on the 31st of October 1997 (which has been reproduced earlier) is very clearly indicative of the fact that the Respondents were irked by the conduct of the Petitioners on that occasion and that their objective on the 4th of November 1997 was more to embarrass and harass the Petitioners for what occurred on the 31st of October, 1997 than to effect a genuine detection.

I do not propose to reiterate the conversation (between the Respondents and the Petitioners on that occasion) which

clearly demonstrates the motivation of the Respondents, and having regard to the contents of P4 which is a prompt complaint made by the 1st Petitioner to the Weligama Police Station, I have no hesitation in accepting the version narrated by the Petitioners that the 1st Respondent had conducted an unlawful search on the said premises on 31.10.1997.

The 1st to 7th Respondents (herein after referred to as the Respondents) in the affidavits filed by them state that they had received information to the effect that the premises in question was a house of ill-fame. Thereafter from 31.10.1997 to 3.11.1997, they had done a surveillance of these premises to check the accuracy of the information received by them. In support of this statement, the Respondents have produced a certified copy of the notes made by the 1st Respondent in Divisional Vice Minor Offences marked 1R1. He has also produced certain entries marked 1R1A, 1R2 and 1R4.

Thereafter on the 4th of November, 1997 they had proceeded to the Dilkini Resthouse having obtained a search warrant from the learned Magistrate of Matara. The Respondents have produced a certified copy of the search warrant marked 1R5 and the reports regarding the execution marked 1R5A, 1R6 and 1R7. The Petitioners had obstructed the Respondents in the execution of their duties under the search warrant and had assaulted WPC Chandra Ranasinghe (the 2nd Respondent). The Respondents had therefore to use minimum force to execute the search warrant and to bring the Petitioners under control as they had turned out to be violent. The 2nd Respondent had suffered and sustained injuries in the course of this transaction. The Respondents had thereafter explained the charge to the Petitioners and had taken them into custody according to the procedure prescribed by law - vide 5R1. The Respondents have also produced a Medico-Legal Report relating to the injury sustained by the 2nd Respondent marked 2R2 which is described as an abrasion, (a mere scratch). According to the Respondents, the allegations made against them by the Petitioners are of a malicious nature.

In this connection, I have examined the notes made by the Respondents which have been produced marked 1R1, 1R1A and 1R2 dated 31.10.1997, 1R3 dated 1.11.1997, 1R4 dated 3.11.1997, 1R6, 1R7 and 1R7A dated 4.11.1997.

On a perusal of these notes, I am, though reluctantly, compelled, to make the observation that the contents of these notes are most unconvincing, artificial, and if I may say so, self-serving. Hence I could place very little reliance on these documents. It is indeed significant that although the Respondents vehemently deny having entered the aforesaid Guesthouse on 31.10.1997, the original notes made by the Respondents marked 1R1, 1R1A and 1R2 are dated 31.10.1997. This is the date on which the Petitioners complained that an unlawful search of the premises was done by the Respondents.

The Respondents also state that they had produced the Petitioners before the Magistrate at the earliest possible opportunity within the time prescribed by law, and that the Petitioners did not make any complaint to the Magistrate of any harassment by the Respondents.

The Respondents have also invited the attention of this Court to the fact that the Respondents had produced the 3 Petitioners before a Government Medical Officer at around 3.30 p. m. on the 4th of November, 1997 very shortly after the arrest. They have produced the Medico-Legal Examination forms relating to the Petitioners marked 1R9, 1R10 and 1R11. 1R10 relates to the 1st Petitioner and the only injuries indicated therein are described as an abrasion. The Medico-Legal report relating to the 2nd Petitioner marked 1R9 indicates that she had sustained no injuries, while in the Medico-Legal report relating to the 3rd Petitioner marked 1R11 the injuries are described as an abrasion. These were the documents that the Respondents relied upon to establish the fact that they had merely used reasonable force in bringing the Petitioners under control when they obstructed the lawful exercise of their duties.

At the request of the Petitioners' Counsel, this Court called for a Medical-Legal report from the JMO, Matara relating to the injuries he observed on the 1st Petitioner who was admitted to the Matara hospital on 8.11.97 to obtain treatment for the injuries he had sustained in the course of this incident up to the time of his discharge from hospital on 10.11.97. The Petitioner was prevented from procuring proper treatment for his injuries as he had been remanded by the Matara Magistrate on the application of the 1st Respondent on 5.11.97 and was released on bail only on 7.11.97.

According to the JMO, the 1st Petitioner had given a history of injuries sustained as a result of an assault by 8 Police Officers with hands on 4.11.97 at 12.00 noon at the Dilkini Guesthouse. According to the Medico-Legal report marked 'x', the 1st Petitioner had sustained the following injuries :-

1. 1/2" lacerated wound on the lower lip,
2. 1" x 1" contusion on the chin,
3. 3" superficial abrasion on the back of the chest (left side),
4. 2" superficial abrasions on the right forearm, and
5. 2" x 1" contusion on the right leg.

According to the JMO, these injuries could have been caused with a blunt weapon. However, the Medical Officer who examined the 1st Petitioner when he was produced before him by the 1st Respondent on the 4th of November 1997 very shortly after this incident has failed to observe the several injuries which were noted by the JMO three days later. This is a question which indeed perplexes me. The only inference which could reasonably be drawn in these circumstances is that the Medical Officer who issued the document 1R10 on the very same day after an examination of the 1st Petitioner has endeavoured to assist the Police in this unlawful exercise.

This same observation has to be made in regard to the Medico-Legal report relating to the 2nd Petitioner. The 2nd Petitioner has produced a Medical Certificate dated 9.11.97 from a General Practitioner in Tangalle. According to P10, the 2nd Petitioner suffered from,

- (a) ear-ache,
- (b) discharge from the left ear,
- (c) severe headache,
- (d) chest pain,
- (e) abrasions of knee joints, and
- (f) contusion of the legs.

Here again, the same Medical Officer who examined her shortly after the incident had not observed any of these injuries and in point of fact states in his report that she had no injuries.

In regard to the 3rd Petitioner, the Respondents had produced the Medico-Legal report marked 1R11 which indicated that he had sustained an abrasion and no more. The 3rd Petitioner has also produced marked P11, a Medical Certificate dated 5.11.97 from a General Practitioner in Tangalle, wherein the following injuries have been set out :-

- (a) intractable headache,
- (b) vomiting,
- (c) generalised aches and pains,
- (d) abrasions of hands, and
- (e) several contusions of chest.

The Doctor goes on to state that the patient is advised to be kept under observation and institutional treatment if the vomiting continues.

Having regard to the following documents, namely the JMO's report of the 1st Petitioner marked 'x', and the Medical Certificates relating to the 2nd and 3rd Petitioners marked P10 and P11, I have no hesitation whatsoever in rejecting the documents produced by the Respondents marked 1R9, and 1R11 relating to the injuries sustained by the three Petitioners.

The Petitioners have also produced marked P24, a certified copy of the proceedings in M C Matara Case No 29139. On a perusal of P24, it would appear that the 3 Petitioners were charged on the following counts : -

1. that on 4th November, 1997 the 1st and 3rd accused (2nd & 3rd Petitioners) had committed an offence under section 2(a) of the Brothels Ordinance,
2. that in the course of the same transaction, the 2nd accused (1st Petitioner) had permitted the 1st accused (2nd Petitioner) to use the said premises as a brothel, an offence punishable under section 2 of the Brothels Ordinance,
3. that the 2nd accused (1st Petitioner) aided and abetted the 1st accused (2nd Petitioner) to carry on a brothel in the aforesaid premises, an offence punishable under section 2 of the Brothels Ordinance.
4. that the 1, 2 and 3 accused (the Petitioners in this present application), obstructed the Respondents in executing a Search Warrant issued by the Magistrate. an offence punishable under section 183 read with section 32 of the Penal Code.
5. at the same time, in the course of the same transaction, obstructed the Police officers in the performance of their duties by assaulting them with hands and causing injuries, an offence punishable under section 323 read with section 32 of the Penal Code, and

6. that the 3 accused were guilty of having committed the offence of criminal intimidation of the Respondents, an offence punishable under section 344 read with section 32 of the Penal Code.

This matter was taken up for trial by the learned Magistrate of Matara on the 26th of February, 1999. At the conclusion of the 1st Respondent's evidence, the learned Magistrate acquitted the accused observing that, having regard to the nature of the evidence given by the 1st Respondent in examination-in-chief, he did not wish to proceed with this case any further. Commenting on the evidence of the 1st Respondent, the Magistrate observes thus :-

"The testimony given by the 1st Respondent in his capacity as a responsible Police officer is *prima facie* unacceptable. It is the evidence of this witness that he was assisted in this detection by 3 male Police officers and 2 women Police officers and a decoy. The only person who had objected to the search of the premises was the 1st accused (2nd Petitioner). At this stage, the 1st Respondent who was inside the Guesthouse had observed 3 women whom he suspected to be prostitutes, together with 2 men who were seen running out of the rear door. The main objective of the Respondent was to detect the unlawful activities of the brothel. If so, it was the prime duty of the 1st Respondent to have arrested the women who were in that Guesthouse indulging in prostitution. The main objective of a person conducting a detection of such a place would be to arrest the women who were indulging in this activity and the person who was running this institution, with a view to producing them before a court. But it is the evidence of this witness that neither he nor the other officers who assisted him in this detection, made any effort to apprehend the prostitutes who were escaping from these premises. This evidence in my view is *prima facie* unacceptable.

The Respondents have not produced a single woman who was indulging in this unlawful activity before this Court."

In my view, the reasons given by the Magistrate in acquitting the accused appears to be a telling indictment on the 1st Respondent and the other Police officers who assisted him in this raid and proceeded thereafter to arrest and detain the three Petitioners until the next day at the Matara Police Station.

Upon a consideration of the observations made by the Magistrate in acquitting these Petitioners, it is amply clear that it was, the testimony of the 1st Respondent, at the trial that the only person who obstructed the search of the aforesaid premises was the 2nd Petitioner. If that be so, what was the justification for inflicting the numerous injuries they inflicted upon the 1st, and 3rd Petitioners?

The Magistrate having disbelieved and rejected the evidence of the 1st Respondent at the trial has acquitted the Petitioners on all the charges including the charge of obstructing the Respondents on the 4th of November, 1997.

I am of the view that in the circumstances of this case there was absolutely no justification for the arrest of the 3 Petitioners by the Respondents on 4. 11.97. There was also no justification for the Respondents to have taken the Petitioners to the Police Station on that day, to have detained them until the next day at the Police Station, and to have produced them before the Magistrate from whom they sought an order for the remand of the 1st and 3rd Petitioners until the 7th of November, 1997.

Having regard to the totality of the circumstances of this case, I much prefer to accept the version given by the Petitioners relating to their arrest and detention and the circumstances in which they sustained their injuries at the hands of the Respondents. This view I have expressed finds ample support in the reasons given by the learned Magistrate acquitting the Petitioners in M C Matara Case No. 29139 produced marked P24 extracts of which have been reproduced in this Judgement

elsewhere. This type of highhandedness on the part of Police officers whose primary duty it is to uphold and maintain the law, must be condemned without any reservation.

I hold that the 1st to 7th Respondents in this case have acted in violation of the fundamental rights of all 3 Petitioners protected by Articles 13(1) and 13(2) of the Constitution.

There is also sufficient material adduced by the Petitioners to establish that in the course of the arrest, the Respondents have inflicted several injuries on the Petitioners, dragged them out of their house and humiliated them without any justification by taking them to the Police Station, producing them before the Magistrate and having two of the Petitioners remanded and one Petitioner released on bail. There was in my view, no justification whatsoever for this exercise on the part of the Respondents who have unlawfully interfered with the lives of ordinary peace loving and law abiding citizens.

The conduct of the Respondents in this case in inflicting serious injuries on the Petitioners and the treatment meted out to them in the presence of onlookers in the neighbourhood, indoubtedly, amounts in my view, to cruel, inhuman and degrading treatment which is prohibited by Article 11 of the Constitution. I, therefore, hold that the 1st to 7th Respondents acted in violation of the fundamental rights of the Petitioners protected by Article 11 of the Constitution as well.

Counsel for the Respondents raised a preliminary objection to the maintainability of the present application on the ground that the application was out of time. I hold that there is no substance in this objection as the Petitioners have made a complaint to the Human Rights Commission of Sri Lanka on 21.11.97. The Human Rights Commission has by its letter to the 1st Petitioner dated 29.04.98 (P9) instructed the Petitioner to file a Fundamental Rights Application in the Supreme Court within 30 days of the date of the aforesaid letter (vide P9) in terms in Section 15(3) of the Human Rights Commission Act

No. 21 of 1996. The Petitioners have filed the present petition within the specified period.

I order the 1st Respondent to personally pay a sum of Rs. 20,000/- to each of the Petitioners.

I further order the 2nd to the 7th Respondents to personally pay a sum of Rs. 5,000/- to each of the three Petitioners.

The State will pay the Petitioners Rs. 25,000/- as compensation and costs.

The three Petitioners will therefore be entitled to a sum of Rs. 150,000/- from the 1st to the 7th Respondents as compensation and a sum of Rs. 25,000/- from the State as compensation and costs making a total of Rs. 175,000/-.

The Respondents are directed to pay this sum to the Petitioners within three months from today.

DHEERARATNE, J. - I agree.

BANDARANAYAKE, J. - I agree.

Application allowed.