VICTOR IVON
v.
SARATH N. SILVA, ATTORNEY-GENERAL AND ANOTHER

SUPREME COURT
FERNANDO, J.,
WADUGODAPITIYA, J. AND
BANDARANAYAKE, J.
S.C. APPLICATION NO. 89/98
MARCH 11TH AND 19TH 1998.

Fundamental Rights – Prosecution of persons for defamation – Penal Code – Sections 479 and 480 – Code of Criminal Procedure Act – Sections 135 (1) (f) 135 (6) and 393 (7) – Indictment in the High Court – Attorney-General's discretion – Articles 12 (1) and 14 (1) (g) of the Constitution.

The petitioner complained that the Attorney-General and/or his officers had indiscriminately, arbitrarily and for collateral purposes without proper assessment of the facts indicted the petitioner in High Courts with several offences of criminal defamation in breach of the petitioner's rights guaranteed by Article 12 (1) and 14 (1) (*g*) of the Constitution.

Per Fernando, J.

> "It is clear that the Attorney-General has a statutory discretion, which involves several aspects. He has to decide whether to give or refuse sanction; and whether to exclude a summary trial, and in that event, whether to order non-summary proceedings or to file an indictment. The exercise of that discretion is neither legislative nor judicial action but constitutes "executive or administrative action".

Held:

1. The Attorney-General's power to file (or not file) an indictment for criminal defamation is a discretionary power, which is neither absolute nor unfettered. Where such a power or discretion is exercised in violation of a fundamental right, it can be reviewed in proceedings under Article 126.

2. The pendency of proceedings in another court will not bar the exercise of the constitutional jurisdiction of the Supreme Court. However, that would be a circumstance which would make the court act with greater caution and circumspection.

3. The petitioner had failed to establish a prima facie case for review.

APPLICATION for relief for infringement of fundamental rights.

R. K. W. Goonasekera with *Suranjith Hewamanne, J. C. Weliamuna, P. K. T. Perera* and *Ms Kishali Pinto Jayawardena* for the petitioner.

K. C. Kamalasabayson, P.C, A.S.G with *U. Egalahewa,* S.C and *Harsha Fernando,* S.C for the respondents.

Cur. adv. vult.

April 3, 1998.

FERNANDO, J.

We have to consider whether to grant leave to proceed with this application, which alleges infringements by the Attorney-General of Articles 12 (1), 14 (1) (*a*) and 14 (1) (*g*) of the Constitution, giving rise to questions which are as complex as they are important.

The petitioner is the Editor of the "Ravaya", a Sinhala weekly newspaper which enjoys a substantial circulation as well as a reputation for exposing misconduct and corruption. He complains about two indictments, served on him in January, 1998, for criminal defamation of a former Minister of Fisheries (in the "Ravaya" of 13.2.94), and of the present Inspector-General of Police (in the 'Ravaya" of 19.1.97). His petition refers to four previous indictments. One was in 1993: there, after an appeal to this Court, the proceedings came to an abrupt end in 1996 on account of a defect in the proceedings, which was not attributable to the prosecution. The second was in 1994: initially proceedings had been instituted in the Magistrate's court; an objection was taken that sanction had not been given; he was discharged, but thereafter an indictment was filed in the High Court; and that was later withdrawn. (In the meantime, the victim had filed three civil cases which were dismissed for default of appearance.) Another was filed in 1996, and that too was withdrawn in 1997. The fourth was filed in 1997, and the proceedings in the High Court are still pending.

As there was some uncertainty as to the factual averments, and as the issues were more than ordinarily difficult, on 11.3.98 we asked Mr. Kamalasabayson to file a statement clarifying the position as to all six indictments. That was done. Among the matters disclosed was that the Attorney-General had declined to institute or sanction

proceedings for criminal defamation against the petitioner, upon complaints by nine other persons.

The petition also referred to several other incidents as well as "Ravaya" articles critical of the Attorney-General and officers of his Department from which the inference of bias was sought to be drawn.

The petitioner stated his grievance in this way:

> ". . . the Hon. Attorney-General and/or his officers have indiscriminately, arbitrarily and for collateral purposes without proper assessment of the facts as required in law for criminal defamation prosecution and without regard to the constitutional guarantees given to journalists have indicted the petitioner in High Courts as aforesaid and therefore the petitioner's fundamental rights guaranteed to him under Article 12 (1) have been violated . . . [D]ue to the aforesaid actions . . . the petitioner's right to freedom of speech and expression including publication has been violated contrary to Article 14 (1) (*a*) . . . and . . . his right to freedom to engage in his lawful profession has been effectively violated contrary to Article 14 (1) (*g*) of the Constitution."

I must add that the indictments, incidents and articles referred to by the petitioner go back to 1992, and thus cover the periods of office of the present Attorney-General as well as his two immediate predecessors in office.

Criminal defamation is defined in section 479 of the Penal Code, and is punishable under section 480. It is an offence triable summarily by the Magistrate's Court, and by the High Court as well. By virtue of section 135 (1) (*f*) of the Code of Criminal Procedure Act, no prosecution for criminal defamation can be instituted either by the victim or by any other person (including a "peace officer") except with the sanction of the Attorney-General. However section 393 (7) permits the Attorney-General directly to file an indictment in the High Court, and to direct that non-summary proceedings be held "having regard to the nature of the offence or any other circumstances", in which event section 135 (1) (*f*) will cease to apply (section 135 (6)).

It is clear that the Attorney-General has a statutory discretion, which involves several aspects. He has to decide whether to give or refuse

sanction; and whether to exclude a summary trial, and, in that event, whether to order non-summary proceedings or to file an indictment. The exercise of that discretion is neither legislative nor judicial action, but constitutes "executive or administrative action".

The important question in this case is whether the Attorney-General's discretion in regard to the institution of criminal proceedings is absolute, unfettered and unreviewable, in which event leave to proceed must be refused without further ado.

The question is not simply whether a decision to file an indictment can be reviewed; it is a larger question, whether a decision to grant sanction to prosecute, or to file an indictment, or **the refusal to do so**, can be reviewed. Whichever way that question is answered, it may have implications in regard to decisions by public officers to institute (or refrain from instituting), criminal proceedings.

Mr. Kamalasabayson, P.C, submitted that whether or not the Attorney-General's discretion can be reviewed, it was properly exercised in relation to the two impugned indictments served in January, 1998, and that leave to proceed should be refused on that ground. Mr. Goonesekera contended that even if, in general, that discretion might not be reviewable, it was reviewable in regard to indictments for criminal defamation, issued in violation of the fundamental right to freedom of speech.

I do not think it is possible to look at the two indictments, on the basis of either of the above submissions, without first considering the nature, scope and purpose of that discretion. It is only then that we can determine whether that discretion was properly exercised, as Mr. Kamalasabayson says it was, or whether, as Mr. Goonesekera contends, *prima facie,* it infringed the petitioner's rights.

A primary consideration is that the constitutional jurisdiction of this Court to grant relief for infringements of fundamental rights by executive or administrative action must necessarily apply to the exercise of any power or discretion conferred on a public officer by an Act of Parliament, in the absence of a constitutionally valid derogation from that jurisdiction.

In order to determine the nature of the discretion to file an indictment, and whether it is reviewable, and if so, in what circumstances and to what extent, it is useful first to examine the discretion to grant sanction: because it is difficult to see on what principle the Attorney-General could conclude that a prosecution was not warranted and therefore refuse to grant sanction, but nevertheless file an indictment. Let me begin with an extreme hypothetical case. If a person complains that he was criminally defamed at a public meeting, at which he was not present, and the only witness he has, as to the actual words spoken, is a person who is quite hard of hearing, could sanction be granted, without any further investigation, and without the statement of the accused having been recorded? A decision to prosecute in such circumstances would be, *prima facie,* arbitrary and capricious, and so would the grant of sanction. If the accused were to seek judicial review, relying on Article 12 (1), and submitted a certified copy of Court proceedings conclusively establishing that at the time of the alleged defamation he was giving evidence in a Court one hundred miles away, should this Court say that his only remedy was to place that evidence before the Magistrate's Court; obtain an aquittal; and then recover damages for malicious prosecution? That would be to condone the use of the executive power of the State to pervert the criminal justice system into an instrument of harassment, instead of a shield for the protection of the citizen.

Let me turn to another extreme example, where there is sufficient evidence of guilt. Suppose that during an election campaign rival politicians were persistently defaming each other, and that the Attorney-General consistently refused sanction despite adequate evidence of guilt – referring all the complainants to their remedies under the civil law and the election laws. I think that would be proper. Suppose, however, that he made exceptions in regard to all cases in which the alleged wrongdoer belonged to one particular political party. Could it be said that the accused in those cases cannot complain that the grant of sanction infringed Article 12 (2), simply because there was sufficient evidence against them to justify a prosecution? In other words, where a decision has to be taken whether or not to grant sanction to prosecute the members of one class of alleged offenders, similarly circumstanced in every respect, save political affiliation, could that decision turn solely on their political persuasion? It might conceivably be argued that alleged offenders against whom there is evidence can hardly be heard to complain that other offenders

are not being prosecuted. But let me look at the problem from the point of view of those defamed. Could it possibly be said that complainants who belonged to that political party were not entitled to complain that the refusal of sanction to them was in violation of Article 12 (2), in a situation in which complainants from rival political parties were granted sanction? Such examples can be multiplied. If all persons complaining of criminal defamation by articles published in a rival newspaper were denied sanction despite ample evidence, but sanction was regularly granted for prosecutions against the "Ravaya" even on tenuous evidence, would there not be an infringement of Article 12 (1)?

It seems to me that the undoubted discretion regarding sanction is subject to obvious limits: where the evidence was plainly insufficient, where there was no investigation, where the decision was based on constitutionally impermissible factors, and so on.

Let me now turn to the discretion to file an indictment. Section 393 (7) does not contemplate that in every case where sanction is granted, an indictment should be filed. There must be something more in "the nature of the offence or any other circumstances of the case", and that becomes clear when one compares the different consequences which result from an indictment. Where sanction is granted to the victim to prosecute, it is he who must meet the expenses of the case – retaining lawyers, making investigations, finding witnesses and ensuring their attendance. And if his prosecution is unsuccessful, it is he who runs the risk of an action for damages for malicious prosecution. Where a peace officer institutes proceedings in the Magistrate's Court, or the Attorney-General files an indictment, the victim of the alleged defamation is relieved of all those burdens, expenses and risks.

The victim of defamation may completely clear his name by means of a civil action for damages, which has the advantage of a lower burden of proof. But the criminal law allows him a penal remedy, if he gets sanction, and that may perhaps be more satisfying to him than monetary compensation for the wrong done to him. But why should the State undertake the burdens, the expenses, and the risks, of vindicating his reputation? Is the power to do that – whether by means of a prosecution by a peace officer or by indictment – intended to be used purely to confer a benefit on the victim, or only where

it would serve the public interest? It seems to me that, in order to justify that burden being shifted to the State, there must be some distinct public interest and benefit, as, for instance, where the alleged defamatory statement is likely to disrupt racial or religious harmony, or to prejudice Sri Lanka's international relations, or to erode public confidence in the maintenance of law and order or in the administration of justice.

It is enough, for the purposes of this case, to say that the Attorney-General's power to file (or not to file) an indictment for criminal defamation is a discretionary power, which is neither absolute nor unfettered. It is similar to other powers vested by law in public functionaries. They are held in trust for the public, to be exercised for the purposes for which they have been conferred, and not otherwise. Where such a power or discretion is exercised in violation of a fundamental right, it can be reviewed in proceedings under Article 126.

Does the fact that the High Court has jurisdiction in respect of the indictments filed affect the jurisdiction of this Court under Article 126? Upon the filing of an indictment it is the High Court alone which has the jurisdiction to try the accused on that indictment; it has also the power to consider whether that indictment complies with legal requirements, as to form, etc., but it has no authority whatever to review the antecedent process leading up to the executive act of issuing the indictment, and particularly whether it was issued in violation of the fundamental rights of the accused. That is a distinct jurisdiction, solely and exclusively vested in this Court under Article 126. The exercise of that jurisdiction will not adversely affect the jurisdiction of the High Court. Thus, in analogous situations, this Court can properly determine whether the arrest and detention of a person was contrary to Article 13, although a trial is pending in the High Court: a finding by this Court that the arrest was lawful (or unlawful) in no way inhibits a subsequent verdict by the High Court that the accused was not guilty (or guilty), because the issues relating to the constitutionality of an arrest are different to those relating to guilt. And, conversely, a verdict by the High Court that the accused is guilty (or not guilty) will not be inconsistent with a subsequent decision by this Court that his arrest was nevertheless unlawful (or lawful). Likewise a finding by this Court that the decision to file an indictment for criminal defamation was in violation of, say, Article 12 (2) or Article 14 (1) (*a*), does not preclude the High Court from reaching a verdict of

guilty – unless this Court finds that the violation was so serious as to require the quashing of the indictment. That, however, is both proper and inevitable: this Court is superior to the High Court, and what is more its constitutional jurisdiction under Article 126 takes precedence over the statutory jurisdiction of the High Court.

While the pendency of proceedings in another Court do not bar the exercise of the constitutional jurisdiction of this Court, that would be a circumstance which would make this Court act with greater caution and circumspection.

The next question is whether the petitioner has established a *prima facie* case for review.

Mr. Goonesekera made a submission which suggests that a journalist or a newspaper should be considered differently to other people. He submitted that in exposing misconduct and corruption through the "Ravaya" the petitioner was performing a service to the public. Mr. Kamalasabayson did not question that. But Mr. Goonesekera went further. He claimed that it was not always possible for a newspaper, under the pressure of deadlines, to ensure accuracy; that mistakes were sometimes made; but if mistakes did occur, the policy of the "Ravaya" was to publish corrections and in support he referred to a notice published in the "Ravaya" inviting corrections and responses. Laudable though that policy is, I do not think that a newspaper enjoys any greater privilege of speech, expression and publication, or immunity from prosecution, than the ordinary citizen. The freedom of the press is not a distinct fundamental right, but is part of the freedom of speech and expression, including publication, which Article 14 (1) (*a*) has entrenched for everyone alike. It surely does allow the pen of the journalist to be used as a mighty sword to rip open the facades which hide misconduct and corruption, but it is a two-edged weapon which he must wield with care not to wound the innocent while exposing the guilty. As Shakespeare put it:

"O! it is excellent
To have a giant's strength,
But it is tyrannous,
To use it like a giant."
(Measure for Measure, II, ii, 107)

I cannot accept the submission that the Attorney-General's decision to indict a newspaper editor must be scrutinized with any greater strictness than a similar decision to indict any other citizen.

Mr. Kamalasabayson handed to us on a confidential basis, for perusal only by us – without objection from Mr. Goonesekera – the reports submitted to the Attorney-General by the two State Counsel who dealt with the two files.

In regard to the indictment alleging defamation of the Inspector-General of Police, the petitioner claimed that it had been filed even though the Inspector-General of Police himself had made no complaint. Mr. Kamalasabayson produced the complaint made on 20.1.97 by the Inspector-General of Police – the day after the offending publication – denying the truth of the allegations against him. The petitioner says that he was not aware that such a complaint had been made, and that it was not listed in the indictment. However, the undisputed fact is that such a complaint had been made.

The impugned article alleged that the Inspector-General of Police had abused his authority by interfering with the investigations into a case of sexual abuse of children. State counsel recommended an indictment because the Inspector-General of Police, the suspects, and the investigating officer made statements denying such interference, while the petitioner had not provided any material to substantiate his allegations. It is undoubtedly in the public interest to ensure that in all respects the conduct of the Inspector-General of Police is at all times above suspicion. State counsel observed that the article affects public confidence in the law enforcement process. I hold that the Attorney-General could properly have taken the view that this was more than a matter of vindicating the reputation of an individual, and warranted an indictment.

The petitioner's other complaint is that the Attorney-General decided to indict him in 1996 (in respect of the "Ravaya" article of 13.2.94 about the former Minister of Fisheries) despite two reports, dated 30.9.94 and 27.1.95, which, he says, establishes the truth of the article. Mr. Kamalasabayson submitted that those reports had not been sent to the Attorney-General, and that the petitioner himself made no reference to them either in the statement he made on 24.2.95 or later. (He also said that he has now called for them, and that they

will be given due consideration.) However, although a perusal of that statement shows that the petitioner did say that official inquiries were then proceeding in respect of corruption and irregularities in that Ministry, the report made by State counsel does not indicate that any investigations had been made about those inquiries.

A citizen is entitled to a proper investigation – one which is fair, competent, timely and appropriate – of a criminal complaint, whether it be by him or against him. The criminal law exists for the protection of his rights – of person, property and reputation – and lack of a due investigation will deprive him of the protection of the law. But the alleged lack of a proper investigation, which resulted in those reports not being available to the Attorney-General was a lapse on the part of those whose duty it was to investigate, and not on the part of the Attorney-General. Those responsible for the investigation have not been made parties, and the petitioner's case has not been presented on the basis of a defective investigation.

The impugned article contained a general allegation that the Ministry had become the personal business of the Minister. It went on to make three specific allegations: that a dredger worth millions had been sold for Rs. 400,000 to a company owned by the Minister's son, that a circuit bungalow had been sold to the son, and that a Ministry vehicle had also been given to him. The Minister and his son had denied all these. State counsel ought to have asked for clarification whether official inquiries were in fact pending about those matters – particularly, because two years had elapsed between the publication and the indictment. If there had been such inquiries, they might have revealed evidence which had a bearing on the truth of the allegations. But despite that lapse all that we have now are the two reports relevant to the first allegation. Even if I were to assume in the petitioner's favour that the first allegation is true, yet we do not have any material at all suggesting that the other two are also true. At least in regard to those two allegations, it cannot be said that prosecution was unjustified. State counsel expressed the view that the allegations affected not only the individual but the Ministry and the conduct of its affairs: there was thus an element of public interest.

The net result is that the defects in the investigation have not been duly challenged. It does not appear, *prima facie,* that the lapse on the part of State counsel in not calling for further material has caused any prejudice whatsoever in regard to two of the three allegations.

Errors and omissions do occur, and by themselves are not proof that the impugned decision was arbitrary, capricious, perverse or unreasonable, or intended to interfere with the petitioner's freedom of speech.

I do not regard the fact that four previous indictments had been filed against the petitioner as continuous harassment, particularly because three of the four were withdrawn, or not proceeded with, and of these, two withdrawals were in circumstances which do not suggest any impropriety on the part of the prosecution; and, moreover, during the same period the Attorney-General declined to take action on nine other complaints.

For the above reasons, leave to proceed is refused. We are indebted to Counsel for their assistance in this matter.

WADUGODAPITIYA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Leave to proceed refused.