ABEYRATNE BANDA

v.

GAJANAYAKE, DIRECTOR, CRIMINAL INVESTIGATION DEPARTMENT AND OTHERS

SUPREME COURT
FERNANDO, J.,
GUNASEKERA, J. AND
WIGNESWARAN, J.
SC (FR) NO. 653/2000
JUNE 11, 2002

Fundamental Rights – Arrest under regulation 18 and detention under regulation 19 (2), Emergency Regulations – Lack of reasonable suspicion for arrest – Articles 13 (1) and 13 (2) of the Constitution.

The petitioner was a captain in the Sri Lanka Army. He was in charge of the Bindunuwewa Rehabilitation Camp where persons undergoing rehabilitation were detained. Rehabilitation orders were made by the Minister in terms of Emergency Regulations or the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979. There was a Police post attached to the camp manned by a few Police officers. There were 45 inmates at the camp undergoing rehabilitation.

On 19. 10. 2000 the detainees protested violently against their detention. One of the three Police constables on duty became excited and fired his gun into the air, another ran to the village seeking help. As a result, the inmates became more violent though the petitioner pleaded with them to be calm. Consequently, 80 Policemen from the Bandarawela Police and an Army platoon from Diyatalawa were brought. Having made the inmates calm the Army left leaving the Police in charge of the camp.

The next day about 2,000 villagers armed with clubs, axes, swords and firearms marched to the camp. Outsiders gathering near the camp shouted slogans against inmates and the petitioner that he was helping the LTTE. Despite the petitioner's request to the Police to take action and his pleas to the invaders, they entered the camp and brutally killed 24 inmates and set fire to the place with the bodies.

The 1st respondent (Director, CID), the 2nd respondent (Inspector of Police) and the 3rd respondent (SP, CID) arrived at the Bandarawela Police where the petitioner had gone. The 1st respondent questioned him and the 2nd respondent arrested him (under ER 18) on charges that he had on 26. 10. 2000 acted in such a manner as to create difficulties between the Sinhala and Tamil communities in contravention of ER 24 (1) (*a*), (*b*) (*d*) and (*e*) and ER 26 (*d*) and (*e*). Thereafter, the petitioner was kept on detention on two detention orders issued by the 4th respondent (DIG, CID) for 90 days from 26. 10. 2000. He was discharged on 06. 06. 2001 by Court without a prosecution.

Held:

(1) There was no material whatsoever for a reasonable suspicion that the petitioner was concerned in the offence of creating communal disharmony. On the other hand, the petitioner had endeavoured to establish calm at the camp and was without power to give orders to the Police to maintain order.

(2) The Emergency Regulations invoked in support of the arrest contained offences which were very different from the alleged offences urged for justifying the arrest.

(3) In the circumstances the petitioner's arrest under regulation 18 as well as his detention under regulation 19 (2) were unlawful and violative of the petitioner's fundamental rights under Articles 13 (1) and 13 (2) of the Constitution.

Cases referred to:

1. *Sirisena v. Perera* – (1991) 2 Sri LR 97, 107.
2. *Padmanathan v. Paranagama* – (1999) 2 Sri LR 225, 238.

APPLICATION for relief for infringement of fundamental rights.

Chula Bandara for petitioner.

Shavindra Fernando, Senior State Counsel for respondent.

Cur. adv. vult.

August 02, 2002

FERNANDO, J.

The petitioner claimed that his fundamental rights under Articles 13 (1) and (2) had been infringed by reason of his arrest on 26. 10. 2000 and his detention thereafter, until 19. 01. 2001 when he was produced before a Magistrate and remanded. He was later released on bail on 21. 03. 2001.

The facts are not seriously in dispute.

The petitioner joined the Sri Lanka Cadet Corps on 08. 11. 1990 as a Lieutenant, and was later promoted as Captain. He was mobilized and attached to the Ministry of Rehabilitation in 1991. Since 1993 he was working at the Rehabilitation Camp, Bindunuwewa (the Camp), under the Commissioner-General of Rehabilitation. Later he was put in charge of that camp. He was functioning as a civil officer, and was never in uniform and did not carry a firearm. At the relevant time, officers attached to the Bandarawela Police were stationed at a Police Post, within the camp, which admittedly was responsible for maintaining security at the camp.

Mr. Fernando, SSC, on behalf of the respondents, informed us that the 45 inmates of the camp were persons undergoing rehabilitation under and in terms of the Emergency Regulations (ER's). ER 20A (1) authorized the Minister of Defence, or the Secretary, to make a "Rehabilitation Order", in respect of any person detained under ER 17 or 19, or under section 9 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (PTA), "in the interest of the welfare of such person" making him "subject to rehabilitation for such period as is specified in the Order"; no maximum period was prescribed; and release was only upon revocation of the Rehabilitation Order. Upon the making of such a Rehabilitation Order, the relevant order under ER 17 or 19, or section 9 of the PTA, was deemed to have been

revoked. Thus, a person who could no longer lawfully be detained under the ER's or the PTA could nevertheless be further deprived of personal liberty by means of an executive order otherwise than on any consideration of national security. Further, ER 20C provided that the Secretary, Defence, *shall* order rehabilitation, for a period not exceeding twelve months in the first instance, of a person who "surrenders" voluntarily to the Police or the Army "in connection with" offences under various laws (including the PTA and ER's) or even "through fear of terrorist activities". Thus, even a victim of criminal terrorist activities was liable to mandatory deprivation of personal liberty for an initial period of twelve months even if not required by any consideration of national security. Further, ER 20C (7) restricted a surrendee's family visits to once a fortnight, and that too only with permission. It is necessary to stress that both ER 20A and ER 20C did not exclude persons against whom there was no credible information or reasonable suspicion of having committed an offence. Mr. Bandara, on behalf of the petitioner, contended that others, too, had been sent to the camp, but there is no evidence of that.

The petitioner was on leave from 19. 10. 2000, and reported for work on the 24th evening. Some of the inmates demanded that they be allowed to leave the camp no sooner they finished a three-month period of rehabilitation. Despite the petitioner's promise to look into the matter the next day, the inmates started a protest which turned violent. They seized the only telephone in the camp. The three constables who were on duty had become over-excited, and one fired his gun in the air, while the other two had run into the village seeking help. Hearing the gunshots, the inmates ran towards the Police Post and tried to grab the firearm from the remaining constable. The petitioner intervened and pleaded for calm.

Help came around 7.00 p.m. in the form of about 70 constables from Bandarawela – the respondents say it was less – and an Army platoon from Diyatalawa. The Headquarters Inspector of the Bandarawela Police and the army officers spoke to the inmates, and

managed to calm them. The Police then asked the Army to leave, while the Police stayed on, overnight, to maintain security at the camp. The respondents stated that there were two teams of Police Officers, each in charge of an Inspector.

The next morning the petitioner was informed that posters with slogans against him and the inmates had been posted on the walls in the Bandarawela and Bindunuwewa towns, and along the roads leading to the camp. (Later, in the afternoon, he saw some of the posters, which had slogans such as "milk for them, mud for us", and "The Chief feeds milk to the Tigers".) By 7.30 a.m. outsiders started gathering near the camp. They were shouting slogans against the inmates and the petitioner – that he was helping the LTTE. Admittedly, at that time there were over 60 Police Officers at the camp, most of them armed with automatic weapons. (The respondents stated that reinforcements had been brought from seven Police Stations.) The petitioner informed the Police of the situation and asked them to take "appropriate action". By 8.15 a.m. the mob had swelled to about 2,000, mostly armed with clubs, swords and axes (and some with firearms), and began to march towards the camp. The petitioner pleaded with the Police to prevent the advance of the mob. He and his assistant even went up to the main gate and shouted at the crowd to disperse as there was no trouble inside the camp.

The Police did nothing, and the mob then moved into the camp. Within 15 minutes they attacked and killed about 24 inmates in the most gruesome manner, threw their bodies into the dormitories, and set them on fire. When the petitioner pleaded with the crowd he too was threatened with death. However, four children, within the age group of 12 to 15 years, were spared.

Shortly thereafter Army personnel arrived from Diyatalawa, and the crowd dispersed. The Army and the Police did not take anyone into custody. Steps were taken thereafter to collect and identify the bodies, hold inquests, etc.

On the 26th morning the petitioner went to the Bandarawela Police Station, where SSP Seneviratne recorded his statement, and gave him permission to leave. That averment was specifically admitted by the 3rd respondent. As he was about to leave, the 1st, 2nd and 3rd respondents (respectively, the Director CID, Inspector CID, and SP CID) arrived, and the 1st respondent asked him whether he was the officer in charge of the camp, and questioned him about the incident. Thereafter, the petitioner and his assistant were asked to get into a CID vehicle and were taken to Colombo, to the 4th floor of the CID, and a further statement was recorded. At the conclusion of the hearing we asked Mr. Fernando to furnish copies of all statements made by the petitioner to the Police. Later, Mr. Fernando informed me that according to the instructions received from the CID, the petitioner had made only two statements to the Police, both recorded by the CID – one recorded on 26. 10. 2000 at 11.00 a.m. at Bandarawela, and the other recorded on 03. 01. 2001 at the CID office. The failure to produce the petitioner's statement to SSP Seneviratne is inexcusable, because not only was it admitted in the 3rd respondent's affidavit, but the statement recorded on the 26th by the CID commences with a reference to the petitioner's statement to SSP Seneviratne.

On behalf of the respondents only the 3rd respondent filed an affidavit. He stated that the petitioner was arrested by the 2nd respondent at Bandarawela at 4.00 p.m. on 26. 10. 2000. According to the latter's notes of arrest, the charges were that he had acted and behaved in such a manner as to create disaffection between the Sinhala and Tamil communities, and had thereby contravened ER 24 (1) (*a*), (*b*) and (*e*) and ER 26 (*a*) and (*c*). He was not handed over to the Bandarawela Police, but sent to Colombo. The 4th respondent (the DIG, CID) issued "AN ORDER FOR PLACE OF DETENTION UNDER ER 19 (2) PUBLISHED IN GAZETTE NO. 1130/8 DATED 03. 05. 2000 AND NO. 1132/14 DATED 16. 05. 2000" which purported to authorize the officer-in-charge, CID, to detain the petitioner for 30 days with effect from 26. 10. 2000 at the CID office. That order alleged that he had committed, or was reasonably suspected of, offences under

ER 24 (1) (*a*), (*b*), (*d*) and (*e*) and ER 26 (*d*) and (*e*). That order was extended for another 60 days on the same basis on 25. 11. 2000. The petitioner was then remanded to Fiscal custody on 19. 01. 2001, and released on bail on 21. 03. 2001. The material on the basis of which the 2nd respondent arrested him, and the 4th respondent issued orders for his detention, has not been disclosed to the Court. It must, therefore, be assumed that there was none besides the petitioner's own statement.

I must refer in this connection to the averments in the 3rd respondent's affidavit. He said:

> "The petitioner, and other police officers present, who were sufficiently armed and equipped, *failed and neglected* to prevent, *the moderately armed villagers* from entering the said camp. Even while the detainees were being attacked, the petitioner and other officers had taken *little or no steps* to disperse the said mob and bring the situation under control."
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> ". . . the situation at or about the time of this incident was unprecedented and in my opinion had all the markings of turning into a *communal backlash*, especially due to all detainees being ethnic Tamils whereas all the assailants were from the majority Sinhala community. There was the perceived danger of communal violence erupting in the neighbouring areas had the situation not been brought under control immediately."
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> "Therefore, *to facilitate investigations*, it was decided to act in terms of powers under the Emergency Regulations in force . . . the petitioner was taken into custody and detained in terms of the said regulations."
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> "At the conclusion of the investigations . . . it transpired that there was *insufficient evidence* to institute criminal proceedings against the petitioner . . . [who] was discharged on 6th June 2001." [*emphasis added*]

ARREST

The offences created by ER 24 (1) may be summarized thus:

(*a*) destruction/damage to property;
(*b*) causing death/injury with explosives, etc;
(*c*) theft from vacant/damaged premises;
(*d*) removal of goods from such premises and offences under sections 427 – 446, Penal Code;
(*e*) membership of an unlawful assembly the object of which is to commit an offence under (*a*) to (*d*) above.

ER 26 creates further offences;

(*a*) bringing the President/Government into hatred, contempt, etc;
(*b*) bringing the Constitution/administration of justice into hatred, contempt, etc;
(*c*) inciting, otherwise than by lawful means, the alteration of any matter by law established;
(*d*) creating disaffection, etc., among the inhabitants of Sri Lanka or any section thereof;
(*e*) promoting hatred, etc., between different sections, etc., of the inhabitants of Sri Lanka.

There was, and still is, no material whatsoever objectively justifying a suspicion that the petitioner had caused disaffection between the Sinhala and Tamil communities, or had committed, or was reasonably suspected of, any of the five offences specified in the 2nd respondent's notes of arrest. In the absence of an affidavit from the arresting officer, I further hold that he did not even subjectively suspect the petitioner of any such offences.The arrest was illegal on both counts, and was not *bona fide*. The arrest notes reveal that the 1st respondent ordered the arrest, and the 3rd respondent's affidavit shows that he was a party to the arrest and made every endeavour to justify it.

In attempting to justify that arrest, Mr. Fernando first submitted, in effect, (1) that the acts prohibited by the ERs include illegal omissions, (2) that the inaction of the Police officers present that morning constituted illegal omissions, (3) that the petitioner knew of those illegal omissions, and (4) that the petitioner as the officer-in-charge of the camp was responsible for the illegal omissions, or culpable inaction, of those Police officers. I can readily accept the first three propositions, but not the fourth unless two conditions were fulfilled. *If* the petitioner had lawful authority over the Police officers present, in regard to the security of the camp and the safety of the inmates, and *if* by the exercise of that authority (by giving appropriate orders to restrain the mob) he could have prevented the aforesaid illegal omissions, then I would agree that the petitioner's failure to exercise his authority amounted to culpable inaction, which would make him also liable for the misconduct of his subordinates – at least on the basis of abetment under section 100 of the Penal Code. However, neither of those conditions was satisfied. The available evidence overwhelmingly indicates that the petitioner's responsibility was confined to the administration of the camp, and did not extend to the security of the camp or the safety of its inmates (which fell within the sole purview of the Bandarawela Police through their Police Post within the camp). He had no power to give orders to the Police, and cannot be held liable for the failure to exercise an authority which he did not have. Despite his lack of authority over the Police, he nevertheless asked them, and pleaded with them, to restrain the mob. What is more, despite being unarmed, and at some risk to himself, he even went up to the mob and asked them to disperse and, later, to spare the inmates. In his statement to the CID at Bandarawela – whether it was true or not is another matter – the fact is that he claimed that on the 24th night he had, by telephone, informed the Commissioner-General of Rehabilitation and others of the situation. There is no evidence that the CID made any effort to verify those matters before deciding to arrest him or even thereafter. It can fairly be said that from the time he returned from leave on the 24th evening the petitioner did whatever he could reasonably have done to maintain

peace and order in the camp and kept his superiors informed, and the respondents have not produced a shred of evidence to the contrary. To say that the petitioner had taken "little or no steps" to disperse the mob was a cruel falsehood.

Had the petitioner been a Police officer having authority over the others present, the position would have been entirely different. As it is, the petitioner was in no better position to restrain the mob than any casual civilian visitor who happened to be in the camp that morning. He could do nothing more than appealing and pleading.

Mr. Fernando advanced other arguments in an endeavour to justify the arrest. A grave situation had arisen. All the inmates were Tamil, and the assailants were Sinhala. The CID anticipated a possible communal backlash – presumably from sections of the Tamil community. The situation had to be brought under control quickly. It was also necessary to arrest all those in authority, and to investigate and ascertain who were responsible.

These contentions are unacceptable for several reasons. Having arrested the petitioner for the very specific reasons set out in the 2nd respondent's notes of arrest, the respondents cannot now urge different reasons. If there is no credible information or reasonable suspicion that a person has committed an offence, he cannot be arrested for the purpose of investigation, fishing for evidence against him. Third, in his statement, when questioned at Bandarawela, the petitioner's position was made clear, and the respondents have produced no material to the contrary. Finally, the respondents have not produced any material suggesting that the Tamil community might have considered the petitioner as responsible for the massacre. On the contrary, the evidence shows that there was a perception among those who had put up posters and shouted slogans that the petitioner was *too helpful* to the Tamil inmates. His arrest was more likely to displease the Tamil community; and to encourage the perpetrators.

DETENTION

ER 18 (1) (*Gazette* No. 1130/8 of 03. 05. 2000) authorizes a Police officer to arrest a person who has committed, or is reasonably suspected of having committed an offence under the ER's, and ER 18 (2) requires that any person detained under ER 18 (1) be handed over to the nearest Police station within twenty-four hours. ER 19 (1) provides that sections 36, 37 and 38 of the Code of Criminal Procedure shall not apply to such a person, but that he "shall be produced before any Magistrate within a reasonable time, having regard to the circumstances of the case, and in any event not later than thirty days after such arrest". ER 19 (1) further provides that such production shall not affect detention under 19 (2). ER 19 (2) provided:

> "Any person detained in pursuance of [ER 18] in a place authorized by the IGP may be so detained for a period not exceeding ninety days reckoned from the date of arrest . . . and shall at the end of that period be released . . ."

However, by *Gazette* No. 1132/14 (of 16. 05. 2000) another provision was substituted:

> "Any person arrested and detained in pursuance of [ER 18] may, for the purpose of investigating the offence in relation to which such person was arrested, be kept in detention upon an order made by a police officer not below the rank of [DIG] . . . for a period of ninety days reckoned from the date of arrest. Such person shall, at the end of the period of detention, be released unless . . ."

It appears that the CID had failed to follow the procedure prescribed by the ER's by failing to hand over the petitioner to the Bandarawela Police. Further, ER 19 (1) prescribes a mandatory upper limit, and not an approved minimum; and it is arguable that since the petitioner was being held in Colombo, insulated from whatever disturbances there might have been in Bandarawela, there were no circumstances

which justified the delay in producing him before a Magistrate in Colombo. However, those matters were not raised at the hearing, and I refrain from making any finding thereon.

ER 18 and ER 19 (1) do not authorize the making of Detention Orders. The later version of ER 19 (2) authorized a DIG to make a detention order, and it is difficult to understand why the 4th respondent captioned his order as an "ORDER FOR A PLACE OF DETENTION".

For several reasons, the 4th respondent's order was not warranted by ER 19 (2). First, the power conferred by ER 19 (2) extended only to "any person detained *in pursuance of* ER 18". That does not include a person detained in *pretended* or *purported* pursuance of ER 18, or in abuse of that provision, but only one lawfully and properly detained *under* that provision (see *Sirisena v. Perera,*[1] *Padmanathan v. Paranagama*[2]). Since, for the reasons I have stated above, the petitioner had not been lawfully arrested and detained under ER 18, ER 19 (2) did not apply to him. Second, the only material available to the 4th respondent was the petitioner's statement, and that did not incriminate him in any way. It is difficult to understand how the 4th respondent included charges under ER 24 (1) (*d*) and ER 26 (*d*) and (*e*) which were not mentioned in the 2nd respondent's notes of arrest. What is more, serious charges of bringing the President and the government into hatred, contempt, etc., referred to in the notes of arrest at 4.00 p.m. in the afternoon were unceremoniously dropped by nightfall. Third, ER 19 (2) authorized detention for the purpose of *investigating* offences, and not just any offences, but the *offences for which he had been arrested.* It is clear that the petitioner was not detained for the purpose of investigation; no attempt had been made to verify the truth of the matters stated in his statement to the CID; the statement which he had admittedly made to SSP Seneviratne on 26. 10. 2000 was not available with the CID even after the oral hearing was concluded; and no further statement was recorded until January, 2001. It is clear that his detention was for some other reason. Fourth, when the second detention order was made it was plain that there

was no reason to detain him further, and any further detention was an unmitigated abuse of power. Finally, the 4th respondent's failure to submit an affidavit explaining the basis on which he acted shows that he did not honestly believe that there was any justification for the petitioner's detention or that he simply acted under dictation. Having failed or neglected to arrest the real culprits, the petitioner was made a convenient scapegoat, and kept out of circulation until public attention was directed elsewhere.

ORDER

I grant the petitioner a declaration that his fundamental right under Article 13 (1) was infringed by the 1st, 2nd and 3rd respondents, and that his fundamental right under Article 13 (2) was infringed by the 4th respondent. Having regard to all the circumstances, I award the petitioner a sum of Rs. 120,000 as compensation for the infringement of Article 13 (2) of which one-half shall be paid by the State and the other half by the 4th respondent personally; a sum of Rs. 30,000 as compensation for the infringement of Article 13 (1) which shall be paid by the 1st, 2nd and 3rd respondents personally in equal shares; and a sum of Rs. 20,000 as costs payable by the State. These payments shall be made on or before 30. 09. 2002. The Registrar is directed to forward copies of this judgment and the pleadings and documents produced in this case to the Public Service Commission to consider disciplinary action against those responsible for the arrest and detention of the petitioner.

GUNASEKERA, J. – I agree.

WIGNESWARAN, J. – I agree

Relief granted.