WIJERATNE
v.
VIJITHA PERERA, SUB-INSPECTOR OF POLICE, POLONNARUWA AND OTHERS

SUPREME COURT
FERNANDO, J.,
GOONEWARDENA, J. AND
WADUGODAPITIYA, J.
SC APPLICATION NO. 379/93
JANUARY 10, 1994

Fundamental Rights – Peaceful picketing for advancement of workers' conditions – Leaflets in aid of agitation – Seizure of leaflets – Arrest and detention of petitioner – Constitution, Articles 13 (1) and 13 (2) and Article 14 (1) (a), (b) and (c).

The petitioner, a casual worker since 1984 working within the Cultural Triangle was the secretary of a branch of the trade union of workers employed in the Alahena Pirivena Project. The petitioner took a leading part in arranging a non-violent picketing campaign for the lunch interval on 06. 08. 1993 to agitate for a better salary and conditions of service. He received from the parent union posters for display at the picketing.

On the evening of 04. 08. 1993 the 1st respondent Sub-Inspector of Police acting on the direction of the 2nd respondent officer-in-charge of the police station searched the petitioner's house without a search warrant or the petitioner's consent and seized all the posters. According to a belated affidavit by the president of a rival trade union, the petitioner's union was getting ready to disrupt the project site by inciting the workers which was an attempt to topple the government. This information was alleged to have been given to the 2nd respondent.

After the search and seizure of leaflets, the 1st respondent directed the petitioner to go to the police station where he was detained until his release on the noon of the next day with a threat against the proposed display of posters.

Held :

(1) The 2nd respondent had not received any information from the informant regarding the alleged disruptive event.

(2) The petitioner was not given any reason for the search of his house and the house was searched without the petitioner's consent or lawful authority.

(3) The posters were unlawfully seized and detained in police custody and they contained nothing subversive, criminal or otherwise objectionable. The 1st and 2nd respondents thereby infringed the petitioner's rights under Article 14 (1) (*a*), (*b*) and (*c*) of the Constitution.

(4) The petitioner was unjustifiably arrested and detained by the 1st respondent with the approval and acquiescence of the 2nd respondent. (Goonewardena, J. dissenting on Article 13 (2)).

(5) The 1st and the 2nd respondents infringed the petitioner's right under Articles 13 (1) and 13 (2) of the Constitution.

Per Fernando, J.

> "Dissent, or disagreement manifested by conduct or action, is a cornerstone of the Constitution . . . Democracy requires that not merely that dissent be tolerated, but it be encouraged and the obligation of the Executive is expressly recognized by Article 4 (*d*), which therefore requires that the police not merely refrain from suppressing lawful dissent but also that they "respect, secure and advance", the right to dissent."

Cases referred to :

1. *West Virginia State Board of Education v. Barnette* – (1943) 319 US 624, 641.
2. *Amaratunga v. Sirimal* – (1993) 1 Sri LR 264.
3. *Bandara v. Premachandra* – (1994) 1 Sri LR 331.
4. *Faiz v. The Attorney-General and Others* – (1995) 1 Sri LR 372.

APPLICATION for relief for infringement of fundamental rights.

A. A. de Silva for petitioner.

D. P. Kumarasinghe, Deputy Solicitor-General for respondents.

Cur. adv. vult.

March 02, 1994

FERNANDO, J.

The petitioner alleges that the 1st and 2nd respondents (a Sub-Inspector of Police, and the Headquarters Inspector, respectively, of the Polonnaruwa Police) had violated his fundamental rights, by arrest and detention contrary to Article 13, and by the unlawful restriction of his freedoms of speech and expression, peaceful assembly, and association, contrary to Article 14 (1) (*a*), (*b*) and (*c*).

The petitioner says that he is a person of good character, a Justice of the Peace, and the President of the Gramodaya Mandalaya, and has never been involved in any illegal or violent act. At the relevant time, he was among about 2,500 workers employed on a casual basis on six projects, within the Cultural Triangle, under the Central Cultural Fund established by Act, No. 57 of 1980. About 300 of these workers, including the petitioner, were employed in the Alahena Pirivena Project. The majority of the workers were members of a registered trade union, and the petitioner was the secretary of the branch union at the Alahena Project. The casual workers received a daily wage of Rs. 78 of which half was paid in food stamps.

In 1993 a salary increase of 30% and a special living allowance of Rs. 600 per month was given to all public sector employees, including employees of the Central Cultural Fund, but not to the casual workers even though they had been employed for some years. Quite naturally, the parent trade union made representations to the management and several discussions were held with the Director-General of the Fund. These were fruitless. The parent union took a decison to draw the attention of the public to the plight of the workers by displaying at all Project sites printed posters containing their demands; "Increase Salaries", "Grant Permanency of Employ-

ment", and "Abolish the System of Contract Employment". This was to be a peaceful, non-violent, picketing campaign at the worksite; no strike was intended and, indeed, to avoid any disruption of work the protest was scheduled for the lunch interval on 06. 08. 1993; the authorities of all six Projects were informed. About 300 posters printed in Colombo were sent by the parent union to the petitioner.

In their affidavits both respondents state that the 2nd respondent had received information that some employees were planning "to create disturbances under the guise of a picketing campaign"; they make no mention of violence, strikes or overthrowing the Government. The 2nd respondent does not reply to or deny these averments, while the 1st respondent pleads ignorance (apart from admitting the poster and its contents). Had they made any investigation into the incident in question, either contemporaneously or later, I would have expected some positive assertion as to most of these matters. They have produced, however, an entry from the Daily Information Book, made at 19:35 of 04. 08. 1993, to the effect that the 1st respondent as directed by the 2nd respondent, was proceeding with four other officers, with weapons, to search the houses of two individuals (not identified in anyway), in view of the "information" (not particularized) received by the 2nd respondent. The name of the alleged informant and his information was disclosed only in an affidavit obtained (four weeks after leave to proceed was granted) for the purpose of this application. The alleged informant was the president of a rival trade union, which had also made representations regarding terms and conditions of employment; he alleges that on or about 01. 08. 1993, the petitioner requested the support of this union for a picketing campaign planned for 06. 08. 1993, indicating that this campaign would commence with the display of posters and might develop into a strike; he thereupon expressed his disapproval. Later he received information (source unspecified) that the petitioner's union was getting

ready to cause disruption at the Project site by inciting the workers and the public, and had obtained posters for this purpose. Being of the view that this was a course of action which might provoke an attempt to topple the Government, he caused information to be conveyed to the 2nd respondent. No reason has been suggested for the failure to record a statement from this informant on 04. 08. 1993 or thereafter. Had information of this nature actually been received by the 2nd respondent on 04. 08. 1993, it is most unlikely that he would have failed to cause a proper record to be made; I hold that the 2nd respondent had not received such information from this informant.

It is common ground that an armed police led by the 1st respondent came to the petitioner's residence at about 9.00 p.m. on 04. 08. 1993 and wanted to search his house. When he asked the 1st respondent whether there was a search warrant, he was asked to shut up; in addition to a general denial; the 1st respondent merely states that he explained to the petitioner "the reason why he wanted to search [the] house". What that "reason" was, is not set out either in the affidavit or in the petitioner's statement recorded later that night. The respondents do not claim to have had a search warrant or to have obtained the petitioner's consent. I hold that the petitioner was not given any reason for the search, that his consent was not obtained, and that his legitimate query as to whether there was lawful authority for the search was rudely brushed aside.

The learned Deputy Solicitor-General was unable to cite any legal provision which authorised or justified this forcible search of the petitioner's house.

The petitioner says that the Police found the 300 posters; the 1st respondent says, 175 printed and 20 handwritten posters. Admittedly, however, all the posters found were seized and taken

away. There could have been no doubt that the twenty odd words on the posters related only to the workers' demands, and just one minute would have sufficed to convince anyone that they contained nothing subversive, criminal or otherwise objectionable. While not denying that the posters were taken away despite the petitioner's protests, the 1st respondent claims that he directed the petitioner to come to the Police Station the following day, and to meet the 2nd respondent and remove the posters. This assertion is consistent only with his having known all along that there was no reason to deprive the petitioner of the posters. The learned Deputy Solicitor-General was forced to concede that the removal of the posters was quite unjustified, and that even if the 1st respondent had entertained any doubt, he could have taken just one to show his superiors. The petitioner further alleges that the 1st respondent threatened that if any such poster was displayed as planned, the petitioner and the workers responsible would be remanded for 14 days; that he was arrested and detained at the Police Station till 12 noon the next day; and that at the time of release the 2nd respondent made similar threats. The respondents deny arrest, detention and threats. They claim that the petitioner came to the Police Station, met the 1st respondent, and "was produced before the 2nd respondent"; that the 2nd respondent "warned the petitioner not to create any disturbances and that he could carry on a picketing campaign peacefully", and asked him to remove the posters, but that the petitioner did not. Although the 1st respondent says that he recorded the petitioner's statement at 21:15 on 04. 08. 1993 and although he made an entry at 23:00 when he handed over the seized posters to another officer, he made no reference to this "direction" to the petitioner to remove the posters the next day. Nor, apparently, was any entry made when the petitioner allegedly refused to take the posters when the 2nd respondent asked him to do so. On 09. 08. 1993, the parent union complained to the IGP (with copies to the DIG, NCP, and SP, Polonnaruwa) giving the

petitioner's version, in particular that threats were made, that the posters were still in Police custody, and that all this was done in order to disrupt the picketing campaign; and requested an inquiry. There was no reply, denying the petitioner's version; and the respondents did not in their affidavits, give any explanation regarding the serious allegations in that complaint.

I, therefore, hold that the posters were unlawfully seized and retained in police custody, against the petitioner's wishes. This suggests that the respondents intended to hinder the petitioner's planned protest. Having regard to the high-handed manner in which the petitioner's residence was searched, and his property unlawfully seized, in order to obstruct that protest, it is probable that the respondents did threaten the petitioner with remand if he went ahead with his protest.

In consequence of all this, the petitioner says, he and other members of the union, through fear, decided not to hold the picketing campaign scheduled for lunch time on 06. 08. 1993 or to prepare or display any posters or placards.

Article 14

The facts disclose a grave and pre-meditated violation of the fundamental rights of a citizen, and it matters little whether he is a humble casual worker, raising a not-uncommon plea for a salary increase to meet escalating living costs, or a person of standing and responsibility in the community, as a Justice of the Peace, the President of the Gramodaya Mandalaya, or an office-bearer of a trade union branch. According to his statement, as recorded by the 1st respondent, he commenced casual employment as far back as 1984 as a trainee; the issue of the inadequacy of salary was raised ever since 1988 with the Central Cultural Fund, and also with a Member of Parliament for the area, the Prime Minister, and the President.

In that background, what other option did the petitioner have? Did he have any other means of redress? Was it not appropriate to resort to collective or trade union action? Or did the Constitution require him to suffer in silence? The Constitution, and in particular Articles 10, 12, and 14 recognise the fundamental right of every Sri Lankan to *be* different; to *think* differently; and to have and to *express* different opinions – not merely a right to disagree privately in silence, but to communicate disagreement openly, by word, conduct and action, by peaceful and lawful means. Dissent, or disagreement manifested by conduct or action, is a cornerstone of the Constitution. It is a right enjoyed by Members who speak and vote as they wish in Parliament; by "Judges, who must decide controversies according to their considered opinion; and by every citizen at election time when he casts his vote for the candidate of his choice. Democracy requires not merely that dissent be tolerated, but that it be encouraged; and this obligation of the Executive is expressly recognized by Article 4 (*d*), which therefore requires that the police not only refrain from suppressing lawful dissent, but also that they 'respect, secure and advance" the right to dissent. As Justice Jackson ominously observed in *West Virginia State Board of Education v. Barnette*[1] :

> "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the first amendment was designed to avoid these ends by avoiding these beginnings."

The planned protest was clearly not a hasty, strident, over-reaction to trifling or transient grievance, but a patient, subdued and dignified plea to the conscience of the community for a living wage. In *Amaratunga v. Sirimal,*[2] I upheld the right to dissent, and expressed the hope :

> " . . . that the Inspector-General of Police will of his own volition issue appropriate directions and instructions to all officers-in-charge of Police Stations, that criticism of the Government, and of political parties and policies, is, *per se,* a permissible exercise of the freedom of speech and expression under Article 14 (1) (*a*)."

It is regrettable that five months later, the respondents chose to obstruct a much more restrained exercise by the petitioner of his fundamental rights. His freedom of speech and expression was violated by the seizure of his posters, and by threats to have him remanded if he proceeded with the picketing campaign or displayed posters; this effectively deterred the lunch-time protest; by preventing the non-violent demonstration, his freedom of peaceful assembly was infringed; and since that protest and assembly was a legitimate activity of a lawful association, of which he was a member (*Bandara v. Premachandra*[3]) his freedom of association was also impaired. These were not errors of judgment occurring during a sudden emergency, or when dealing with armed violence directed at the foundations of democracy. On the contrary, the respondents had time for deliberation and were faced with a proper exercise of democratic dissent. Not only should they have realised that the seizure and retention of the posters was unlawful, but they should have returned them, with an unqualified apology, and an unequivocal acknowledgement of the petitioner's right to go ahead with his demonstration. Instead, they decided to invade the petitioner's residence at night on the most tenuous material – consisting, at best, of a vague rumour communicated by a trade union rival; they caused an armed police party rudely to violate the privacy of his home, arrogantly dismissing his lawful challenge to search, and arbitrarily to seize his property without any semblance of right; and then threatened that any further attempt to exercise his fundamental rights would be suppressed by procuring what would have been an improper judicial order of remand. A prompt complaint to the IGP requesting an inquiry, was of no avail.

I hold that the petitioner's fundamental rights under Articles 14 (1) (*a*), (*b*) and (*c*) have been infringed by the 1st and 2nd respondents.

Article 13

The material available to the 1st respondent did not justify the arrest of the petitioner. The 1st respondent denies any such arrest. However, not only is the petitioner's allegation that he was arrested supported by an affidavit sworn by his father, but in the letter dated 09. 08. 1993 sent by the parent union to the IGP this allegation of unlawful arrest was specifically made, and neither denied nor explained. Taking into consideration the absence of a reply or an explanation, as well as the conduct of the respondents in attempting to obstruct the planned protest, I hold that it is more probable that the 1st respondent did arrest and detain the petitioner, with the 2nd respondent's approval or acquiescence, in furtherance of their intention to prevent that protest. The petitioner's fundamental rights under Article 13 (1) and (2) were therefore infringed.

As compensation for infringement of his fundamental rights, I direct the payment of a sum of Rs. 70,000 to the petitioner as follows :

(*a*) Rs. 50,000 to be paid by the State,
(*b*) Rs. 10,000 to be paid by the 1st respondent, and
(*c*) Rs. 10,000 to be paid by the 2nd respondent.

I direct the Inspector-General of Police –

(*a*) to issue, after consulting the Attorney-General, precise and detailed instructions to all officers-in-charge of Police Stations as to their duties in terms of Article 4 (*d*) of the Constitution, to respect, secure and advance the exercise

of the fundamental rights guaranteed by Articles 13 (1) and (2) and Articles 14 (1) (*a*), (*b*) and (*c*), and thereafter to forward to the Registrar of this court a copy of such instructions; and

(*b*) to refrain from promoting the 1st and 2nd respondents for a period of one year from the date of this judgment.

WADUGODAPITIYA, J. – I agree.

January 10, 1994

GOONEWARDENA, J.

In my judgment in the case of *Mohamed Faiz v. The Attorney-General and Six Others*,[4] I had occasion to hold that an illegal arrest violative of Article 13 (1) of the Constitution is not necessarily accompanied by the consequence that there is a violation of Article 13 (2) as well, and that a violation of that Article can occur only when there has been a failure to transfer an arrested person from non-judicial custody to judicial custody within the time period prescribed by law. It is not necessary to repeat here the reasons I set out in that judgment and I see no reason now to take a different view.

Upon the petitioner's own showing in this application he had not been kept in police custody for a period in excess of twenty-four hours. In these circumstances the petitioner has failed to establish that there has been a violation of Article 13 (2) of the Constitution.

In this application I would limit myself and while desisting from giving directions to the Inspector-General of Police, agree with Fernando, J., only to the extent of holding that there has been an infringement of the petitioner's rights guaranteed to him under Articles 13 (1) and 14 (1) (*a*), (*b*) and (*c*) of the Constitution and would accordingly order compensation as he has ordered. I see no order in the judgment of Fernando, J. as respects costs and I myself would make no such order.

Relief granted.