

RATNAYAKE AND ANOTHER
vs
MEDIWAKA, DEPUTY INSPECTOR GENERAL OF POLICE, KANDY
AND OTHERS

SUPREME COURT,
BANDARANAYAKE, J,
JAYASINGHE, J. AND,
UDALAGAMA, J,
S. C (FR) 231/2003
3RD JUNE, 2004

Fundamental Rights- Search of hotel on search warrant - Investigation by police consequent to petition dated 03.04.2003 alleging offences being committed at hotel - Instructions of Assistant Superintendent of Police to Kandy Police to investigate and if necessary search on court order - Articles 11, 12(1) and 14(1) (g) of the Constitution.

The petitioners were owners of Hotel "Sunray" Kandy and complained to the Police and the court that on 10.04.2003 they had invited about 30 persons to celebrate an award which their son had received from Trinity College. While they were awaiting the arrival of guests, some of whom had arrived, about 30 persons dressed in camouflage uniform arrived with T-56 rifles and entered the hotel and searched it. The 2nd and 3rd respondents who were police officers attached to the Kandy Police were there. They showed a search warrant.

The 2nd respondent Sub Inspector Kandy Police averred that the raid was carried out on the instructions of the Assistant Superintendent of Police to investigate a petition dated 03.04.2003 alleging that the hotel was used as a brothel and that a woman used to sell heroin to school children. The Assistant Superintendent also instructed, *inter alia*, to inquire whether illegal activities were being done with the connivance of Kandy Police or any officer. The 2nd respondent was instructed to investigate if necessary, after obtaining a search warrant and to make a report to court. The search did not disclose any offence and the police party left representing that the matter was settled.

The petitioners also alleged that the search warrant was wrongly issued under section 9(2) of the Code of Criminal Procedure Act when it should have been issued under the Brothels Ordinance. In fact the 1st petitioner had a previous conviction in a related offence several years ago ; and one Nadeera had been arrested with a small quantity of heroin and fined Rs. 6,000 on 09.04.2003 on pleading guilty. The raid conducted on 10.04.2003 was made

after reporting the matter to the Magistrate and obtaining a search warrant, on reasonable suspicion based on credible information and preliminary investigation.

In fact the raiding party had only 17 officers, 5 only were in civilian clothes. 12 others including the 3rd respondent (Inspector of Police) were in uniform

The petitioners relied on the decision in *Anura Bandaranaike v the IGP* which was different as regards the instructions for the impugned search.

The petitioners alleged that they were humiliated by the fact that as a result of the raid their guests left without waiting for lunch.

Held :

1. In the case of *Anura Bandaranaike* there was no credible evidence for the search. In the instant case there was credible information on the basis of which the Magistrate issued a search warrant, which was a judicial act.
2. There were discrepancies between the two complaints made by the 1st petitioner to the police and shortcomings in an affidavit signed by a guest of the petitioners.
3. The fact that the search warrant was issued under a wrong section did not vitiate it.
4. The freedom of the individual has to be reconciled with the interest of the society at large.
5. There was no violation of fundamental rights in the circumstances of the case.

Cases referred to :

1. *Anura Bandaranaike v the IGP* (1999)1 Sri LR 104
2. *Fernando v Parwathi Radan* (1908) 1 Weerakoon's Report 15
3. *L. C. H. Peiris v The Commissioner of Inland Revenue* (1963) 65 NLR 457
4. *Chick Fashions (West Wales) Ltd. v Jones* 1968 (2)QB 299

APPLICATION for relief for infringement of fundamental rights

D. S. Wijesinghe, PC, with Sanjeewa Jayawardena for petitioners.
Parinda Ranasinghe (Jr), State Counsel, for respondents.

Cur.adv. vult.

February 24, 2005

SHIRANI A. BANDARANAYAKE J.

The 1st and 2nd petitioners, being the husband and wife respectively, were the partners of Hotel Sunray, situated at No. 117/8, Anagarika Dharmapala Mawatha, Kandy. They alleged that their fundamental rights guaranteed in terms of Articles 11, 12(1) and 14(1)g of the Constitution were infringed by the actions of the 1st to 5th respondents for which this Court granted leave to proceed in respect of the violation of the aforementioned Articles of the Constitution. Consequent to the conclusion of the oral arguments, learned President's Counsel for the petitioners submitted by way of further written submissions that the petitioners' substantive complaint is against the 1st, 2nd, 3rd and/or 5th respondents only.

The petitioners' version

Hotel Sunray is a multi-storied building situated at a central location in Kandy. The hotel consists of 21 rooms and 2 reception halls which are used for weddings and other functions and the petitioners with their three children resided in the penthouse of the building.

On 10.04.2003, the petitioners' 2nd son, who was a member of the Trinity College Cricket Team, had received the prestigious 'Trinity Lion' at a special assembly held at the college. In view of this occasion, the petitioners had invited around 30 of their son's friends and their parents for lunch at the petitioners' hotel at the conclusion of the ceremony. Around 1.00 p.m. on that day whilst the 1st petitioner was entertaining their guests, around 30 persons dressed in camouflage uniform and carrying T-56 rifles had entered the hotel together with 6 other persons who were in civilian clothes. Some of the said soldiers came inside the hotel, whilst several others were in the garden and on the roofs of the adjoining houses with their weapons aimed at the said hotel, creating a scenario resembling a serious military operation.

Everyone who were present at that time, including the invitees for lunch as well as the guests in the hotel were amazed and filled with extreme alarm, fear and apprehension at this armed intrusion. There was so much confusion, that many of the petitioners' guests were screaming in fear.

Some of the armed officers had also gone into the petitioners' residence and had entered the petitioners' bedroom with weapons, whilst the 2nd petitioner was dressing in order to come down to attend to her guests who had already arrived. When some of the armed officers attempted to run towards the reception counter of the hotel, the 1st petitioner has attempted to intercept them in order to inquire as to the purpose of their visit. When the said officers were not responding, the 1st petitioner had placed his arm across the door and at that time one officer had aimed his rifle at the 1st petitioner's neck, whilst two others pushed him inside. At that stage, the 1st petitioner had identified the 2nd and the 3rd respondents as officers who are attached to the Kandy Police Station. When he had inquired from the said officers as to why they had made this intrusion, the 1st petitioner was informed that it was to search the petitioner's hotel and on inquiry they had stated that they possess a search warrant for this purpose. The 1st petitioner had seen the name 'Sunray Inn Guest House' in the warrant and had immediately informed that his establishment was Sunray Hotel and not Sunray Inn Guest House. Nevertheless, notwithstanding the 1st petitioner's persistent protests around 20 armed personnel who had entered the hotel proceeded to search all the rooms and other areas of the hotel upon instructions issued by the 2nd respondent.

The 1st petitioner had submitted that he was shocked to hear one of the members of the armed officers remarking in Sinhala that there was some suspicion that there was a brothel being run in the said hotel. The 1st petitioner had then produced the relevant business registration, Tourist Board approval, and the guest register to the 2nd respondent which he had refused to read.

By this time there was a crowd of about 30 to 40 persons including neighbours and persons in the area congregated in the vicinity of the hotel.

A little while later the 2nd respondent produced a document for the 1st petitioner to sign. Although he did not want to do so, on the insistence of the 2nd petitioner and his second son, he placed his signature on the said documents without being able to read through its contents. The 2nd respondent had stated that there will be no problems as everything is now settled and that he had just carried out the DIG's order. Thereafter the 2nd respondent had left the hotel with the other officers.

Although the petitioners were not informed that they were to come to the Police Station, the 1st petitioner decided to proceed to the Police Station in order to lodge a complaint. At that stage, the 2nd petitioner, who was severely disturbed by the events that took place, fainted and suffered a fall. The effect of the fall was exacerbated by the fact that she had undergone a womb operation a few months ago. By that time the petitioners' guests who had arrived at the hotel had left without waiting for lunch, causing much pain of mind to the petitioners.

On the day following the incident, viz. on 11.04.2003, the 1st petitioner, tried to make a complaint at the Kandy Police Station, but the officers on duty at that time refused to entertain the said complaint, Accordingly the 1st petitioner had addressed a letter to the 5th respondent with copies to Her Excellency the President, the Hon. Minister of Internal Affairs and the 1st respondent referring to the incident and requesting the 5th respondent to inquire into the matter and to take appropriate action. Later on 01.05.2003, the 1st petitioner made a written complaint to the Police Headquarters on the incident which took place on 10.04.2003.

The respondents' version

The 2nd respondent, who was the sub-inspector of police, Kandy, submitted that the raid of Sunray Hotel took place subsequent to a petition dated 03.04.2003 sent by an inhabitant of Talwatta, alleging that the said premises were being used to provide prostitutes and that some armed personnel were also in the habit of frequenting the said premises in search of them (2R9). Upon the receipt of the said petition the Assistant Superintendent of Police, (Crimes and Operations) forwarded the same to the 2nd respondent for investigations with written instructions outlining the matters to be investigated. These instructions included the following :

“උ. සො. ප. මද්දුම බණ්ඩා,
ස්ථානාධිපති,
දිසා දුෂණ මර්ධන ඒකකය

1. මෙම පෙත්සමේ සඳහන් කරුණු සම්බන්ධව පසු විමර්ශනය කරන්න.
2. එහි සඳහන් දුෂිත කටයුතු වලට මහනුවර පොලීස් ස්ථානයේ කුමන හෝ නොනිර්මිත නිලධාරීන්ගේ සහය ලැබෙන්නේද යන්න සොයා බලන්න.

3. පෙර වැරදි සම්බන්ධව සොයා බලන්න
4. දඬල ස්ථානය අවට පදිංචි විස්ථාස කටයුතු පදිංචිකරුවන්ගෙන් තොරතුරු ලබා ගන්න.
5. පෙත්සමේ සඳහන් පරිදි ගණකා ව්‍යාපාරයක් පැවැත්වෙන බවට විස්ථාස කිරීමට ප්‍රමාණවත් කරුණු ඉතාධරණය වුවහොත් ගරු අධිකරණයට වාර්තා කොට සොයා බලනු වරෙන්තුවක් ලබා ගැනීමට කටයුතු කරන්න.
6. පානාල කල්ලි සමඟ සම්බන්ධකම් පවත්වන ආයතනවලට හෝ වෙනත් ජාතික ගැටපෙත බවට තොරතුරු ඇත්දැයි පරීක්ෂා කරන්න. එවැනි තත්ත්වයකට මුහුණ පෑමට සිදුවී නම් ප්‍රමාණවත් ආරක්ෂාවක් ඇතිව සොයා බලනු මෙහෙයුමක් දියත් කර ප්‍රතිපල වර්තා කරන්න. අධිකරණයටද කරුණු වාර්තා කරන්න."

The 2nd respondent submitted that he had kept the premises in question under observation for several days and he was convinced that the matters set out in the said petition warranted a complete investigation. The 2nd respondent has submitted the certified extracts of the covert operations carried out by him with other officers on 06.04.2003, 07.04.2003, 08.04.2003 and 09.04.2003 (2R10, a, b and c). The 2nd respondent further submitted that the inquiries he had made within the Department of Police had revealed that the 1st petitioner had a previous conviction in a related offence several years ago. In view of the aforementioned circumstances, the learned Magistrate was moved for a search warrant and the 2nd respondent contended that the said raid on the petitioners' premises was carefully planned on reasonable suspicion based on credible information and preliminary investigations. It was submitted that the raid was never carried out for any collateral purpose and never intended to subject the petitioners or member of their family to any kind of distress or humiliation.

The question of violation of petitioners' fundamental rights

The petitioners submitted that despite the incident that took place on 10.04.2003, the petitioners were never requested to present themselves at the Police Station nor were any statements recorded from them and no further action has been taken on the matter. The petitioners further submitted that they have a reasonable apprehension that the search operation which was carried out on 10.04.2003 was for a pre-determined, malicious and collateral purpose at the instance of the 1st respondent in order to bring the petitioners and their business establishment into disrepute.

The petitioners prayed from this court for :

- (a) a declaration that the petitioners' fundamental right to freedom from cruel, inhuman or degrading treatment as guaranteed to them in terms of Article 11 of the Constitution ;
- (b) a declaration that the petitioners' fundamental right to equality and equal protection of the law in terms of Article 12(1) of the Constitution ; and
- (c) a declaration that the fundamental right to freedom to engage in a lawful occupation, profession, trade, business or enterprise as guaranteed to them by Article 14(1) of the Constitution.

All three aforementioned alleged infringements were based on the entering and surrounding of the petitioners' premises by respondents on 10.04.2003. The petitioners allege that the search that was carried out and the manner in which it took place, referring to the number of officers that were brought in, clearly indicates that it was a malicious move to bring disrepute to the petitioners' establishment. Since the petitioners have made these accusations against the respondents on the basis of unequal treatment, now I would turn to examine the said allegations to ascertain whether there has been a violation of Article 12(1) of the Constitution, since that is the main infringement the petitioners have claimed in their petition.

The search carried out by the respondents

As stated earlier, the respondents rely on the anonymous letter received by the Police in early April 2003. The contention of the Counsel for the petitioners is that the respondents cannot rely on an alleged anonymous informant and in support of this contention they have relied on the decision of *Anura Bandaranaike v The IGP*⁽¹⁾. In that case, the court had held that the 1st respondent failed to satisfy court that he received any reliable information from an informant and that the 2nd and 3rd respondents had failed to satisfy court that they had 'reason to believe' that the suspect had entered the premises of the petitioner. However, the decision taken in *Anura Bandaranaike's case (supra)* could be distinguished from this case as the material before this court with regard to the present matter is altogether different. In *Anura Bandaranaike's case* there was no material produced before court referring to any such written document regarding a complaint and the respondents were not in a position even to divulge the details of the information given to the respondents and therefore the

respondents failed to satisfy the court that reliable information was received by the respondents. In the instant case the 2nd respondent has produced the anonymous letter received by them (2R9). The letter provides information on two aspects ; firstly, it speaks about prostitution carried out in Buwelikada, Talwatte areas and especially in Hotel Sunray which establishment belongs to the 1st petitioner. The letter also refers to men armed with weapons and guns who frequent this hotel. There is also reference to school girls being provided as prostitutes by the petitioners. Furthermore a request is made to the Police to take steps to stop all these shameless activities of the petitioners. The writer has also alleged that the petitioner has patronage of the Police. Secondly, the letter refers to a woman who sells heroin to school children near Dharmaraja College. Therefore, the facts in the instant application are different to that in the case of *Anura Bandaranaike v The IGP (supra)* and as such no reliance could be placed on the said decision.

It is to be borne in mind that the respondents had not merely acted on the receipt of this letter. Immediately after the letter was received, the Assistant Superintendent of Police had directed the 2nd respondent to inquire into the matter, to look into any previous incidents and to obtain a search warrant, if it is required. As pointed out by the learned State Counsel for the respondents, a reference number (CR/00/08/04/04/03) was given to the said letter and the date for reporting to the superior officers has been noted down as 01.05.2003.

The surveillance notes of the Police Officers contain detailed accounts as to their observations and considering the observations of several Police Officers contained in 2R10, it is clear that a reasonable suspicion had arisen in the minds of the investigators that a search of the premises was warranted.

Moreover, the respondents had also taken the precaution to obtain a search warrant for the purpose of carrying out a search on the premises in question. Learned State Counsel for the respondents correctly submitted that the impugned search warrant (2R1) was issued by the learned Magistrate of Kandy on 09.04.2003, based on the information provided by the Police. More importantly it is to be borne in mind that the issuing of a search warrant is purely a judicial act, which cannot be examined in proceedings pertaining to an infringement of a fundamental right of a petitioner. It was brought to our notice that although the search warrant

was issued under section 9(2) of the Criminal Procedure Code, the correct provision of law for the Magistrate to issue such warrant would have been under the Brothels Ordinance. In *Fernando v Parawathi Radan* ⁽²⁾ a search warrant directing the search for toddy in premises where it was alleged to be sold, failed to aver the quantity of toddy to be searched was in excess of one gallon - an essential element, if the act was to be treated as an offence. The court held that irrespective of the error the warrant was valid and that the officer endeavouring to execute it was acting in discharge of the functions entrusted to him by the court, Furthermore, in *L. C. H. Peiris v The Commissioner of Inland Revenue* ⁽³⁾ it was held that the mere citing of the wrong provision of law does not vitiate the act performed thereunder.

The petitioners' main grievance was based on the fact that his hotel was raided at a time he was celebrating his 2nd son's achievement of obtaining the coveted Trinity Lion by a large contingent of officers in camouflage uniform. By the said action, the petitioners complained that their fundamental rights enshrined in Article 12(1) of the Constitution were infringed by the respondents.

Article 12(1) of the Constitution states that,

“All persons are equal before the law and are entitled to the equal protection of the law.”

The petitioners' allegations against the respondents are chiefly based on the fact that an armed contingent entered the petitioners' premises on 10.04.2003. As observed earlier, the respondents on the receipt of the anonymous letter had commenced an investigation on the complaint made, took steps to keep premises under surveillance and after establishing that there was a cause to search the premises made an application to the learned Magistrate for a search warrant. The respondents visited the petitioners' premises only thereafter. In such circumstances, would it be possible to state that the respondents had infringed the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution? Furthermore, the anonymous letter included a second matter concerning drugs being sold in the vicinity. Learned State Counsel submitted that the respondents had inquired into this complaint and a successful raid was carried out in which a suspect by the name Nadeera Suriyanpala was arrested with a small quantity of heroin for which he was fined Rs. 6,000 on 09.04.2003 upon pleading guilty. This raid was also carried out by the 2nd respondent.

In the light of the foregoing it would now be necessary to consider the crediworthiness of the position taken up by the petitioners.

Firstly, the petitioners claim that at the time the respondents 'charged into' their hotel, they were to start the reception to celebrate their son's achievement. In the petition it is clearly stated and the affidavit affirmed that, the 2nd petitioner at that time was 'getting ready' to come down in order to welcome their guests, In fact the allegation is that at the time the 2nd petitioner was preparing herself in her room, Police Officer had come into her room without any permission or notice, However, there are several affidavits filed by the petitioners' guests along with the petitioners' counter affidavit, which aver the following :

"At or about 1 p. m. **whilst the party was in progress**, to my utter surprise and astonishment, suddenly and without any prior warning whatsoever, approximately 25-30 persons clad in camouflage uniform and carrying T-56 rifles entered the premises at which the hotel is located, together with approximately 6 other persons who were in civilian clothes, and one police officer in police uniform."

Thus its is apparent that at the time of the arrival of the respondents with others, '**the party was in progress**'. At a time when the party was in progress could it be possible for the hostess to be still inside her room getting dressed up for the occasion ? Furthermore, there are several other affidavits, the petitioners had filed along with the petition (X1 to X12). Almost all the affidavits are identical in substance and the language that has been used. More importantly the affidavit marked X6 is purported to have been sworn by one Buddhika Sembapperuma of Trinity College, who was a friend of the petitioners' son. According to the affidavit he was invited for the luncheon party along with his parents. This affidavit has been seriously challenged by the said Buddhika Sembapperuma's father by his affidavit dated 26.03.2003 (2R19) in which he alleges that neither his wife, their son nor he had participated at a luncheon orgainzed by the petitioners at their restaurant on 10.04.2003. He has categorically stated that none of them were invited for the said function on 10.04.2003.

It is to be also borne in mind that there are serious contradictions pertaining to the petitioners' allegation against some of the respondents. In his petition the petitioners have alleged that "they have a reasonable apprehension and that they verily believe that the said forced entering and search operation was carried out for a pre-determined malicious and

collateral purpose at the instances of the 1st respondent, in a manner which action was designed to bring the petitioners' and their business establishment into disrepute". (paragraph 50 of the petition dated 09.05.2003). However, on 11.04.2003, immediately after the alleged incident, the 1st petitioner made a written complaint to several persons including the 1st respondent calling for an impartial inquiry. In that there were no allegations againsts the 1st respondent. Three weeks after the 1st written complaint, the 1st petitioner lodged a further complaint at the Police Head Quarters against the Kandy Police. This included the complaint against the 1st respondent and a persual of this second document indicates that there were several discrepancies between these two documents which raise doubts as to the credibility of the petitioners' version. Moreover, although the petitioners are alleging mala fide on the part of the 1st respondent, no material has been produced to substantiate such allegations. With regard to the number of Police Officers who entered the restaurant, the respondents' version is that only four officers actually entered the building, although the police party had consisted 17 officers including 2nd respondent and 3rd respondent. Out of the aforesaid contingent of 17 officers 5 had been clad in civilian clothes and 12 officers including the 3rd respondent were in police uniform. Only 9 officers were carrying arms and none of them had been clad in camouflage uniform. Except for the affidavits tendered by the friend of the petitioners who attended the function on 10.04.2003, there is no other material before us to indicate that we could accept the version given by the petitioners. Considering the inaccuracies of some of the affidavits as well as the discrepancies of the petitioners' own documents referred to above, on a balance of probability, I am inclined to accept the version given by the respondents as to what took place on 10.04.2003.

Considering the contents of the allegation made by the petitioners, it is to be clearly borne in mind that their basic complaint is founded on the raid on their restaurant by the respondents. The respondents on their part had not acted on a mere suspicion. Moreover, although the petitioners complained that the respondents have obtained certain statements and affidavits against the petitioners by several people in the vicinity, under duress, there is other material supported by several documents placed before this court to indicate that the respondents had not acted blindly or in order to satisfy an interested third party.

If the respondents had acted on a mere suspicion, it could have been an arguable situation that the action on the part of the respondents is

arbitrary and therefore a violation of the petitioners' fundamental rights. But, where there are several other measures taken by the respondents to ascertain whether the complaint or information is worthy of further investigation by searching the premises and for that purpose when they have obtained a search warrant, the action of the respondents has reached judicial sanctity and has moved beyond the point of being an arbitrary act. In such circumstances could it be an act of infringement of petitioners' fundamental rights? I do not think so, for an act to be arbitrary and violative of fundamental rights, the decision has to be one without a rational basis or a foundation. Equal protection, enshrined in terms of Article 12(1), means the right to equal treatment in similar circumstances which would include the situations where liabilities are imposed by law. Such protection guarantees safeguards from discriminatory actions by the executive. It is to be borne in mind that an act of discrimination cannot be presumed and it is essential that such action is clearly shown, unless it is apparent on the material available. Even if there is discrimination and thereby unequal treatment, such inequality *per se* will not violate the provisions of Article 12(1), as for the inequality to offend the principle of equality it is mandatory that there should be an act or acts which are unreasonable and arbitrary. In the instant case there were justifiable reasons for the respondents to take necessary steps to obtain information which they have carried out, in my view, according to the procedure laid down by law.

There is one final matter, to which I wish to address my mind before I part from this judgment, Search warrants are an important tool with regard to the day to day duties and functions of a Police Officer and several statutes enable Magistrates to issue search warrants for all kinds of offences. In Lord Denning's words, 'search warrants are a necessary tool in the war against crime'. Having that in mind it would be necessary to stress upon the fact that there should be a great regard for the integrity, freedom and privacy of a person which are jealously guarded from unnecessary interferences. Similarly, it is to be borne in mind that it is in the larger interest of the society that steps should be taken to find out wrongdoers and suppress crime. In fact in *Chic Fashions (West Wales) Ltd. v. Jones* ⁽⁴⁾ Lord Denning M. R. referring to a search of a premises on a search warrant stated that,

"We have to consider, on the one hand, the freedom of the individual. The security of his home is not to be broken except for the most compelling reason. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime. In

these present times, with the ever-increasing wickedness there is about, honest citizens must help the police and not hinder them in their efforts to track down criminals”

Having said that, it is also to be borne in mind that the police officers also should act strictly according to the procedure laid down by law with due adherence to the basic fundamental rights guaranteed in terms of the Constitutional provisions. Accordingly, it is not only necessary but also essential to maintain a careful balance between the rights of individuals and the duties carried out by the officers. The lawfulness of the officers' conduct will have to be judged at the time of the alleged act which had taken place, and has to be considered on a case by case basis.

On a consideration of the totality of the circumstances in the instant application and for the aforementioned reasons I hold that the petitioners have not been successful in establishing that there was a violation of their fundamental rights guaranteed in terms of Articles 11, 12(1) and 14 (1)g of the Constitution.

This application is accordingly dismissed, but in all the circumstances of this case there will be no costs.

JAYASINGHE, J. - I agree

UDALAGAMA, J. - I agree
Application dismissed.
