

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application under Article
17 read with Article 126 of the constitution

1. Ven. Walahahangunawewa
Dhammarathana Thero
Rajamaha Viharaya
Mihintale.
2. Ven. Mihintale Seelarathane
Rajamaha Viharaya
Mihintale.

Petitioners

Vs.

SC FR No. 313/09

1. Sanjeewa Mahanama
Officer-in-Charge
Police Station
Mihintale.
2. Chandana Weerathna Waduge
Kandy Road, Mihintale.
3. Inspector General of Police
Police Head Quarters
Colombo 01.
4. Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondents

Before : Marsoof, P.C, J.
Ekanayake, J. &
Dep, P.C. J.

Counsel : J.C. Weliamuna with Pulasthi Hewamanne for Petitioners
Lakmali Karunanayake, SSC for AG.

Argued on : 09.11.2011

Written Submissions

Tendered on : 30.11.2011 -Petitioners

Decided on : 03-07-2013

Priyasath Dep, PC, J

The Petitioners in this application alleged that their fundamental rights guaranteed under Articles 12(1), 13(1) and 13(2) of the Constitution were violated by the Respondents. This Court granted leave to proceed under article 13 (1) of the Constitution.

The 1st Respondent is the Officer in Charge of the Police Station, Mihintale. The 2nd Respondent is the person who made a complaint to the Police against the Petitioners. The 3rd Respondent is the Inspector General of Police and the 4th Respondent is the Attorney General.

The 1st Petitioner is the Viharadhikari of the Mihintale Rajamaha Viharaya. He had been a bhikku for a long period of time prior to his appointment as Viharadhikari. The 2nd Petitioner is a samanera bhikku and at the time of the incident was 19 years of age and has been a samanera bhikku for the past 8 years.

The Petitioners state that on 12.03.2009 at about 4.00 p.m. approximately 100 pilgrims from Cambodia visited the temple to follow religious observances. The 1st Petitioner was in the main office with the person who is in charge of finances and three others who were engaged in issuing tickets to the Cambodian pilgrims. The 2nd Petitioner was at that time sweeping the temple grounds at the Ambathala Maluwa (Mango Tree Terrace) which is approximately 75- 100 meters away from the main office. At that time several guides who accompanied the pilgrims were waiting near the Meda Maduwa (Middle Hall) till the pilgrims complete their religious observances. The 2nd Petitioner had observed the 2nd Respondent Chandana Weerarathna Waduge and Susantha Kapilaratne meddling with the bags of the pilgrims who were engaged in religious observances. The 2nd Petitioner approached them and questioned them as to what they were doing. These two persons abused him and pushed him aside and he fell on the ground. Then the 2nd Respondent pulled out a spray can and tried to spray some substance on his face which he believed to be a toxic substance. The 2nd Petitioner used the eckle broom and struck a blow to defend him. Then the 2nd Respondent and the other person quickly descended from the Meda Maluwa abusing him and thereafter left the temple premises. The 2nd Petitioner had gone in search of the 1st Petitioner and met him at the main office and narrated the incident.

The following day that is on 13.03.2009 a Police officer came to the temple and informed the 1st Petitioner that there was a complaint against the 1st and the 2nd Petitioners made by the 2nd Respondent who was hospitalized and requested them to appear at the Police Station to make a statement. The 1st Petitioner informed the police officer that he was not involved in the incident but he will send the 2nd Petitioner to make a statement. The police officers then left the premises. On 14.03. 2009 two police officers came to the temple and met the 1st Petitioner and requested the Petitioner to

accompany them to the police station to get a statement recorded. The 1st Petitioner informed the police officers that he was not a party to the alleged incident. At that time the 2nd Petitioner was not at the temple premises. Thereafter the police officer contacted some senior officer over the phone and obtained instructions. At about 9.00 a.m. about 15 police officers came in a police truck and entered the Meda Maluwa. The police officers were armed. The sub-inspector in-charge wanted the 1st Petitioner to come to the Police Station. The 1st Petitioner had informed the Sub-Inspector that he is willing to make a statement to the police without going to the Police Station. He had informed the police officer that he had previously made a statement to the Magistrate in MC Anuradapura 2357/8 implicating senior police officers and certain politicians in relation to the attack and destruction of the house and property belonging to Dr. Raja Johnpulle and due to that fact some police officers are ill-disposed towards him.

The 1st Petitioner states that due to the insistence of the police officer he was able to contact the 2nd Petitioner who was in the premises and decided to send the 2nd Petitioner to the Police Station. At about 12.00 noon the 2nd Petitioner accompanied by an Attorney-at-Law went to the Police station to make a statement. At about 12.30 the Attorney-at-Law informed him that the 1st Respondent the officer in-charge of the police station had told him that the 1st and the 2nd Petitioners are required to be present at the police station only for the purpose of recording their statements. They could leave after the recording of the statements. Thereafter the 1st Petitioner went to the police station and entered the office of the 1st Respondent where both the 2nd Petitioner and the Attorney-at-Law were present. To his utter surprise 1st Respondent ordered an officer in plain clothes to arrest and detain them. The Attorney-at-Law then inquired from the 1st Respondent as to why they were arrested to which the 1st Respondent did not respond and detained the Petitioners. The Attorney-at-Law had inquired from the 1st Respondent whether police bail could be given. However this was refused

After the arrest, statements were recorded from 1st and 2nd Petitioners. The 2nd Petitioner's statement revealed that the 1st Petitioner was not involved in the incident and he acted on his own to defend himself to prevent the 2nd Respondent's possible attack on him by using a spray can which he believed it to contain toxic substance. If his version is correct the 2nd Petitioner had acted in defence of his person and thereby no offence was committed by him.

The 1st Petitioner in his statement had stated that he has no knowledge of the incident as he was at the main office at the time of the alleged incident. The Petitioners state that at about 2.30 p.m. they were taken to the Acting Magistrate's residence by two police officers. The Petitioners were produced before the Acting Magistrate and they were remanded till 18.03.2009(Wednesday) as the police objected to granting of bail. The Petitioners state that they verily believe that they were arrested on a Saturday and produced before an Acting Magistrate to get them remanded till 18.03.2009 which is the day the cases from Mihintale Police Station are taken up in the Magistrate Court of Anuradhapura. However, consequent to a motion filed on their behalf the case was called on 16.03.2009 (Monday) before the Permanent Magistrate who granted bail after hearing the submissions made by parties. Witness Kapilaratne who was with the 2nd Respondent at the time of the incident submitted an affidavit to the court affirming that the 1st Petitioner was not involved in the incident and that the police have incorrectly recorded

in his statement that the 1st Petitioner was also involved. He submitted that though he signed the statement it was not read over to him by the police. The Petitioners alleged that their fundamental rights guaranteed under Article 12, 13(1) and 13(2) were violated.

The 1st Respondent, the officer in charge of the Mihintale Police Station filed objections and along with the objections had annexed the IB extracts and the initial B reports filed in this case. Other Respondents did not file objections. Although the 2nd Respondent was hospitalized the medical reports were not tendered along with the objections. The fact that the 2nd Respondent was hospitalized was a fact that influenced the Acting Magistrate to remand the Petitioners. The medical reports are relevant for the determination of this case. An adverse inference could be drawn against the Respondents due to their failure to produce the medical reports

The 1st Respondent in his objections affirmed that the 2nd Respondent in his statement has stated that the 2nd Petitioner attacked him with a club as a result he fell on the ground and the 1st Petitioner kicked him on the abdomen. The 2nd Respondent was admitted to the Mihintale hospital. He justified the arrest and detention of the Petitioners.

The 1st Petitioner filed a counter affidavit controverting the version given by the 1st Respondent. He reiterated that the 2nd Respondent was never subject to an attack as alleged and there is no medical evidence whatsoever to suggest that there were any injuries due to the purported attack. He further stated that consequent to a complaint made by him to the Human Rights Commission an inquiry was held and the Commission found that the 1st Respondent is guilty of violating the fundamental rights of the 1st Petitioner guaranteed under article 12(1) and 13 (1) of the Constitution. The 1st Respondent was ordered to pay Rs 10,000/= to the 1st Petitioner as compensation. Report of the Human Rights Commission was produced as P8.

The question that arises is whether arrest and detention of the Petitioners are in accordance with the procedure established by law. In other words whether it was in accordance with provisions of the Code of Criminal Procedure Act No. 15 of 1979. The Petitioners alleged that the arrest and detention was made arbitrarily, mala-fide and for collateral purpose. As this arrest and detention was made without a warrant it is necessary to examine section 32(1) of the Code of Criminal Procedure Act which empowers a police officer to arrest a person without a warrant. Relevant section of the Criminal Procedure Code reads thus :

“32(1) Any peace officer may without an order from a Magistrate and without a warrant arrest any person –

- (a) who in his presence commit any breach of the peace

This sub section permits a peace officer to arrest a person without a complaint or receiving of information. This is due to the reason that the police officer had seen the commission of the offence and he has first hand information regarding the commission of the offence. This is the only section that permits a peace officer to arrest a person

without a complaint or receipt of information. This subsection is not relevant to this application.

The relevant subsection of section 32(1) which is applicable to this application reads as follows:

“Who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;”

In order to arrest a person under this subsection there should be a reasonable complaint, credible information or a reasonable suspicion. Mere fact of receiving a complaint or information does not permit a peace officer to arrest a person. Police Officer upon receipt of a complaint or information is required to commence investigations and ascertain whether the complaint is a reasonable complaint, the information is credible or the suspicion is reasonable before proceeding to arrest a person.

In *Muttusamy vs Kannangara* (1951) 52NLR 324 it was held that ‘ A peace officer is not entitled to arrest a person on suspicion under 32 (1) (b) of the Criminal Procedure Code, except on grounds which justify the entertainment of a reasonable suspicion’.

In *Corea Vs The Queen* (55NLR457) it was held that “the arrest must be made upon reasonable ground of suspicion.. There must be circumstances objectively regarded- the subjective satisfaction of the officer making the arrest is not enough.....”

This principle equally applies to complaints and information. The fact that a complaint was made is not itself a ground to arrest a person. Anyone can falsely implicate another person. Peace officer should be satisfied that it is a reasonable complaint.

In this case the Police commenced investigations consequent to a complaint made on 12-3-2009 by Chandana Waduge a site guide in Mihintale area. The question is whether it is a reasonable complaint or not. He implicated both Petitioners. Thereafter on 14-3-2009 the Petitioners appears at the police station and made statements. The 1st Petitioner denied that he was involved in the incident and that he was elsewhere. (a plea of an alibi)The 2nd Petitioner stated that he acted in self defence and has given the names of several persons who were present at the time of the incident. If he had acted in self defence, there is no offence committed by him. According to section 89 of the Penal Code ‘Nothing is an offence which is done in the exercise of the right of private defence’. In the light of the statements made by the Petitioners serious doubts will be cast on the complaint made by the 2nd Respondent. In the circumstances further investigations are required to verify the version given by 2nd Respondent. The Police have to ascertain the credibility of the complaint and the information received before rushing to arrest and produce the Petitioners in court. On the contrary police produced the Petitioners before the Acting Magistrate and moved for the remand of the Petitioners. The report filed by the police stated that the Petitioners had committed offences under section 314 and 316 of the Penal Code. In the report it was stated that the complainant was hospitalized without

informing the nature of injuries. Complainant was admitted to the hospital on the 12th and the Petitioners were produced on the 14th. Police had sufficient time to find out the condition of the 2nd Respondent. It may be that the Complainant was feigning illness or got himself admitted to make matters worse for the petitioners.

The next question that arises is as to why the 1st respondent did not consider granting police bail. The alleged offences are bailable offences and included in the category of cases that should be referred to the Mediation Board. Further the 1st Respondent should have considered the fact that the Petitioners are not persons of criminal disposition and there are no grounds to believe that they will abscond or there is a likelihood of committing further offences or interfere with the witnesses.

It appears that the virtual complainant (2nd Respondent) is a person of criminal disposition. He is a suspect in the arson case. 1st Petitioner had implicated him in that case. Due to this reason he has a motive to falsely implicate the 1st Petitioner. The Officer in Charge (1st Respondent) should have considered these facts before effecting the arrest.

The Acting Magistrate and the 1st Respondent had disregarded the provisions of the Bail Act No 30 of 1997. Section 2 of the Bail Act states that ‘Subject to the exceptions as herein after provided for in this Act, the guiding principle in the implementation of the provisions of this act shall be that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception.’

Granting of bail is the guiding principle of the Bail Act. If this principle is followed it could avoid incarceration of suspects pending trial unless the gravity of the offence or the other circumstances warrants the remanding of suspects. This will reduce the congestion in remand prisons. It is the intention of the legislature to minimize the pre-trial detention of suspects.

Section 6 of the Bail Act states that a police officer inquiring into a bailable offence shall not be required to forward the suspect under its custody but instead release the person on a written undertaking and order the suspect to appear before the magistrate on a given date. Only exception been the public reaction to the offence under investigation likely to give rise to a breach of the peace. This section is meant to prevent unnecessary hardships faced by the persons suspected or accused of committing trivial offences and also to save time and expense involved in producing suspects before the nearest magistrate.

It appears from the facts of this case and from the sequence of events the motive of the 1st Respondent is to arrest and produced Petitioners before the Magistrate and get them remanded. This is apparent from the application made to the Magistrate. In the report filed on 14-3-2009 when producing the Petitioners the 1st Respondent moved the Acting Magistrate to remand the Petitioners till 18-3-2009 and also to direct the prison Authorities to produce the suspects on that date. OIC had virtually dictated the order and the Acting Magistrate had allowed the application. The Acting Magistrate had failed to exercise his discretion in a judicial manner. He had failed to give reasons for refusal of bail under section 16 of the Bail Act.

It is regrettable to mention that though the Bail Act was passed in 1997, the police as a rule continue to produce suspects in the Magistrate Court in bailable offences and move for the remand of the suspects and there are numerous instances where Magistrates without considering the facts and circumstances of the cases had remanded the suspects contrary to the guiding principle of the Bail Act.

The crucial issue in this case is whether it is lawful for the 1st Respondent to arrest the Petitioner without conducting further investigations and verifying their version. The conduct of the 1st Respondent and the sequence of events establish that instead of objectively deciding whether the complaint was a reasonable complaint or not, the 1st Respondent arrested and produced the Petitioners in court and got them remanded. It is apparent that the remanding of the suspects was the main object of the 1st Respondent.

In *Corea vs. The Queen* (supra), the suspect in that case changed his mind to accompany the police to the police station. This annoyed the inspector who ordered the suspect to be arrested in order to “teach him a lesson”. It was held that the arrest or attempted arrest in the particular circumstances was illegal.

In *Muttusamy vs Kannangara* (supra), Gratiaen J said “I have pointed out, that the actions of police officers who seek to search private homes or to arrest private citizens without a warrant should be jealously scrutinized by their senior officers and above all by the courts”.

I hold that the arrest and detention of the Petitioners in these particular circumstances is a violation of their fundamental rights guaranteed under Article 13 (1) of the Constitution.

The Human Rights Commission also inquired into the complaint made by the 1st Petitioner and found the 1st Respondent guilty of violating the fundamental rights of the 1st Petitioner and the 1st Respondent was ordered to pay Rs 10,000/= as compensation.

I order the 1st Respondent to pay Rs 25,000/= each to the Petitioners as compensation.

Judge of the Supreme Court

Justice Saleem Marsoof, P.C. J.

I agree

Judge of the Supreme Court

Justice Chandra Ekanayake, J.

I agree

Judge of the Supreme Court