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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Case No. S.C (F/R) 405/ 2018

Ganeshan Samson Roy,

No. 84. /90,

Nawala Road,

Colombo 05

PETITIONER

Vs.

1. M.M. Janaka Marasinghe

Police Inspector

Officer in Charge

Special Investigation Unit 11

Criminal Investigation Department

Colombo 01

2. A.S Sudasinghe

Sub Inspector of Police

Investigation Officer

Criminal Investigation Department

Colombo 01

3. H.G.C.P. Priyadharshana (87254)

Police Constable
Investigating Officer
Criminal Investigation Department
Colombo 01

4. Shani Abeysekera
Senior Superintendent of Police
Director
Criminal Investigations Division
Colombo 01

5. Pujith Jayasundara
Inspector General of Police
Police Headquarters
Colombo 01

5A. C.D. Wickremaratne
Inspector General of Police
Police Headquarters
Colombo 01

6.M.M Saveen Chathuranga Gunaratne

No.259/14, Pamunuwa Gardens
Pamunuwila
Gonawila

7. Officer in Charge

Remand Prison, Mahara

8. The Honourable Attorney General
Attorney General's Department
Hulftsdorp
Colombo 12
RESPONDENTS

BEFORE: B.P Aluwihare, PC, J.
A.H.M.D. Nawaz, J.
Mahinda Samayawardhena, J.

COUNSEL: Senany Dayarathne with Eshanthi Mendis for the Petitioner
Induni Punchihewa, SC for the 01st to 03rd, 05A and 8th Respondents
Migara Kodithuwakku instructed by Ruskshan Aravinda Gamage for the 06th Respondent

ARGUED ON: 10.02.2023.

WRITTEN SUBMISSIONS: Petitioner on 03.09.2019
01st, 03rd, 05A and 8th Respondents on 17.06.2020

DECIDED ON: 20.09.2023

Aluwihare, PC, J.

The Petitioner, an employee of George Steuart (Pvt) Limited, complained that his Fundamental Rights enshrined in Articles 11, 12(1), 13(1) and 13(2) of the Constitution were violated by the Respondents. The 6th Respondent is a private party, and the Petitioner alleges that the 6th Respondent lodged a false complaint against him with the Criminal Investigation Department, which the Petitioner claims, led to his arrest. On 01.02.2019, this Court granted Leave to Proceed for the alleged violations of the Fundamental Rights of the Petitioner under Articles 12(1), 13(1) and 13(2) of the Constitution.

The Factual Background

According to the Petitioner, he had been acquainted with a certain Rehana Marian Sebastian [Hereinafter referred to as Rehana] for a long time. Sometime later, Rehana introduced the Petitioner to her sister, presently, his wife, Stephanie Sylvia Sebastian. The Petitioner's relationship with the 6th Respondent resulted from his acquaintance with Rehana. The Petitioner states that the 6th Respondent and Rehana had entered into a loan agreement for a sum of Rupee Fifty-Three Million whereby Rehana had agreed to pay back the principal with an interest of 12% per annum, to the 6th Respondent. The Petitioner's position was that he was totally oblivious to this transaction between the 6th Respondent and Rehana, at the time the incident central to the present application took place. At some point Rehana had approached the Petitioner, stating that she was receiving money from a friend, namely the 6th Respondent and had requested the Petitioner to facilitate the said transaction by permitting that money to be credited to his bank account and provided a letter (Marked P 13) which states that she was to receive money from a friend as a loan on interest and that she does not have a bank account with the Sampath Bank PLC. This request, that is to allow her friend to deposit the said money to the Petitioner's account, appears to have been made purely for their convenience. The Petitioner had agreed because of his close relationship with Rehana and this conduct on the part of

the Petitioner does not appear to be unusual given the fact that Rehana was his sister -in- law to be.

Sometime after this request was made, a sum of Rupees seven million Rupees 7,000, 000 /- was deposited to the Petitioner's account in several tranches, which the Petitioner had withdrawn and handed over to Rehana. Rehana's position was that she repaid the amount borrowed, with interest, however, the 6th Respondent had threatened her, which had prompted her to write to the Officer-in-Charge of Keselwatte Police on 02.05.2018. Her sister, Stephanie also had made statements at the Narahenpita Police and Keselwatte Police on 04.05.2018 and 18.05.2018 respectively, stating that her sister Rehana had repaid all the monies borrowed and had submitted documents and bank slips to the police as proof of the repayment.

On 07.05.2018 the 6th Respondent had visited the Petitioner's house in his absence, and had intimated to his father that he had deposited the money to the bank account of the Petitioner and that he will be compelled to complain to the Criminal Investigation Department if the Petitioner fails to repay him. The 6th Respondent also provided his mobile phone number to the father with instructions for the Petitioner to phone the 6th Respondent. The Petitioner as requested had phoned him on the very day itself. The Petitioner's position was that, as he felt the conduct of the 6th Respondent was dubious, therefore, he took precautions to record the conversation he had with the 6th Respondent.

The Petitioner had, along with the petition, filed a transcript of this conversation. Throughout the conversation the Petitioner denies knowledge of any transaction between the 6th Respondent and Rehana. Moreover, the 6th Respondent provided several unrelated and convoluted reasons for depositing the money to the Petitioner's account and had threatened to have a complaint lodged at the FCID. Importantly, throughout the conversation, there is no mention whatsoever by the 6th Respondent regarding any agreement or an arrangement between the Petitioner, Rehana and himself to import two BMW vehicles for his use. The significance of this omission will be apparent later. The very next day i.e., 08.05. 2018, the Petitioner had lodged

a complaint against the 6th Respondent at the Narahenpita police, alleging criminal intimidation.

On 01.06.2018 the 6th Respondent had lodged a complaint with the Criminal Investigation Department [Hereinafter the CID] complaining that the Petitioner and Rehana defrauded the 6th Respondent of seven million rupees [Rs.7.0 million] by agreeing to import two BMW vehicles on behalf the 6th Respondent. He further claimed that the Petitioner and Rehana are avoiding the 6th Respondent. No documentation is available before this Court as proof of the existence of this purported Agreement or any communications between the Petitioner and the 6th Respondent to indicate such an arrangement or agreement was negotiated between the parties. The only documents produced by the 6th Respondent are the bank slips indicating that seven million Rupees were deposited into the account of the Petitioner in several transactions. The Petitioner, however, has not denied the receipt of the money but has explained that the money was received to facilitate the transaction between the 6th Respondent and Rehana, which was referred to earlier. It is also important to note that, as referred to earlier, nowhere during the phone conversation on 07.05.2018, between the 6th Respondent and the Petitioner, the 6th Respondent refers to any agreement to import vehicles, although several unrelated accusations had been made by the 6th Respondent against the Petitioner. Thus, the basis of the complaint to the CID, which was made three weeks after the telephone conversation, appears to be an entirely new accusation made by the 6th Respondent.

The objections filed by the Respondent CID officers, do not give details of the investigations and/or steps taken by the CID in pursuance of the 6th Respondent's complaint. What is more shocking is that, after the complaint was made against the Petitioner, no attempt appears to have been made by the CID officers to notice the Petitioner of the complaint made against him nor had independently verified the truth of the allegation. Instead, the 2nd Respondent claims that the Petitioner was absconding. In the B Report dated 19.09.2018 (which is more than four and a half months after the complaint) filed by the CID officers marked "2R 1" it is stated that

there is reliable information that the Petitioner was attempting to travel abroad to evade justice and on that basis a travel ban under Section 51C (1) of the Immigrants and Emigrants Act (as amended) was sought from the Learned Magistrate of the Wattala and it was issued on the same day. No document was produced as proof of any notice being issued to the Petitioner. The Petitioner on the other hand had produced taxi bills as evidence of his travels he made from his residential area as proof that he was very much in the area where he lived and had made no attempt to abscond.

Oblivious to all these events, the Petitioner had planned to travel overseas to China and Malaysia on holiday in November 2018, which was five months after the initial complaint. On arrival at the Bandaranaike International Airport on 15.11.2018 to board a flight scheduled to depart, he was informed at the Immigration Counter that he was charged with an offence, and a travel ban is in operation. The Petitioner states that this was the first time he was informed of any allegation or charge against him by the authorities. According to the Petitioner, he was arrested by a CID officer. The arrest notes marked "2R 3" indicate that the Petitioner was arrested at 23:20 hours. According to the Petitioner, despite making several inquiries to ascertain information about the offence he had allegedly committed, the only information divulged was that it was related to the financial fraud of seven million Rupees.

Some officers of the CID had arrived from Colombo and had taken over the custody of the Petitioner. Once in Colombo, he was informed that he had misappropriated and/or defrauded money at the behest of one Rehana. The Petitioner was further informed that he was arrested on a complaint made by one Maheepala Saveen Chathuranga Gunaratne, (the 6th Respondent), for defrauding or misappropriating seven million Rupees. The said complaint alleges that the Petitioner committed criminal breach of trust by obtaining 7 million rupees on a promise to import two BMW vehicles on behalf of the 6th Respondent and that the Petitioner was introduced to the 6th Respondent by Rehana.

Subsequently, the Petitioner was produced by the 2nd Respondent before the Learned Acting Magistrate of the Wattala on 16.11.2018 who refused to enlarge him on bail, as the CID officers informed the court, that further time is required to conduct investigations. The Petitioner had been remanded until 19.11.2018 and on 19.11.2018, it was submitted that a statement had not yet been taken from the Petitioner and the Petitioner was further remanded till 23.11.2018, on which date Bail was finally granted, after having been incarcerated for 8 days.

Petitioner filed the present petition on 13.12.2018 seeking relief and during the pendency of this matter, the Hon. Attorney General on 23.07.2019 had forwarded an indictment in terms of Section 400 of the Penal Code against the Petitioner.

I shall now consider the alleged violations of the Fundamental rights of the Petitioner.

Alleged Violation of Article 13(2) of the Constitution

Article 13 (2) provides that; "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law" As held in ***Farook v Raymond and Others*** **[1996] 1 Sri L.R 217**,

"the object of Article 13(2) of the Constitution is to afford a person who has been deprived of his personal liberty by executive action, to have the benefit of placing his case before a neutral person - a judge - so that a judicial mind may be applied to the circumstances and an impartial determination made in accordance with the applicable law. The provision is designed to eliminate arbitrariness in depriving a person of his liberty, and this extends to the exclusion of arbitrariness on the part of a judge who orders that a person brought before him be further held in custody, detained or deprived of personal liberty. If in depriving a person of his liberty a

judge does not act according to procedure established by law, there is a contravention of the guarantee enshrined in Article 13(2) of the Constitution."

The procedure established by law in which a detainee is to be produced before a judge is contained in Section 36 and 37 of the Code of Criminal Procedure Act No. 15 of 1979. Sections 36 and 37 reads as follows;

"A peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail take or send the person arrested before a Magistrate having jurisdiction in the case"

"Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate"

It is apparent from the above Sections that a detainee should be produced within 24 hours before a Magistrate having jurisdiction in the case. Petitioner states that there was a deliberate attempt to delay in producing the Petitioner before a Magistrate. The arrest notes marked "2R 3" indicate that the Petitioner was arrested on 15.11.2018 at approximately 23:30 at the Airport. The Petitioner disputes the time of the arrest as 22:30, however, given that the Petitioner's flight was scheduled to depart at 00:25 hours on 16.11.2018, it is highly likely that the arrest took place between 22:30 and 23:30.

According to the Petitioner, he was produced before the Magistrate on 16.11.2018 approximately at 23:30 hours. If there was a deliberate attempt to delay the production of the Petitioner, it is highly likely that he would have been produced much later. The Petitioner was arrested on the 15.11.2018 and was produced before the Magistrate on 16.11.2018, according to the B Report marked "2R 4". Therefore, it appears that he had been produced before the magistrate within 24 hours. Hence, I hold that the Petitioner has failed to establish that the Respondents had violated his fundamental rights enshrined in Article 13(2).

Alleged Violation of Article 13(1) of the Constitution

The personal liberties of a person are protected from arbitrary arrest by Article 13(1) of the Constitution. Article 13(1) provides that "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest." The procedure established by law for arresting a person without a Warrant is set out in Chapter IV B (Sections 32-43) of the Code of Criminal Procedure.

According to the 2nd Respondent's affidavit, it is stated [paragraph 6(c)] that "the Petitioner could not be found in his usual place of abode when the police visited his residence in order to record a statement". Thereafter, the facts were reported to the Learned Magistrate in the Magistrate Court of Wattala by way of a B report dated 19.09.2018 marked "2R 1" and a travel ban was sought and was issued by the Learned Magistrate on the same day. Subsequently, the Petitioner was arrested on 15.11.2018 at the Airport. Therefore, it is apparent that the Petitioner was arrested without a warrant.

The Respondents justify the arrest by resorting to Section 32(1)(b) of the Code of Criminal Procedure Code. Section 32(1)(b) provides that;

"(1) Any peace officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who in his presence commits any breach of the peace;

(b) 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;"

Even to make an arrest under Section 32(1)(b) of the Code of Criminal Procedure, reasonable suspicion must exist of the suspect having been concerned with a

cognizable offence in the mind of the police officer effecting the arrest. The test is objective, and an arrest made purely on subjective grounds or on a general or vague suspicion would be arbitrary. What would amount to a reasonable suspicion? The requirement is limited and is not equated with prima facie proof of the commission of the offence. As stated, however, by His Lordship Justice Amarasinghe in ***Channa Pieris and Others v. Attorney General and Others*** **[1994] 1 Sri L.R 1 at p. 46**

"A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or upon a combination of both sources."

Police officers cannot mechanically make an arrest upon a mere complaint received, without forming the opinion that the allegation is credible. Thus, a police officer is required to make necessary investigations, unless the facts are obvious, to verify whether the complaint is credible or whether the information provided is reliable. An arrest upon a general or vague suspicion would lead to significantly abridging the personal liberties guaranteed to a person by the Constitution. Therefore, an element of prudence is required from police officers before making an arrest to verify the allegation. This requirement, in my view, applies with greater force in 'white collar' crimes. The reason being, it needs to be ascertained whether the impugned transaction is purely a commercial transaction which had gone wrong or whether the suspect had the intent to defraud.

As held in ***Gamlath v Neville Silva and Others*** **[1991] 2 Sri L.R 267;**

"A suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the Police Officer's own knowledge or on statements made by other persons in a way which justify him giving them credit."

Moreover, the principle laid by Lord Devlin in ***Shaaban Bin Hussien v Chong Fook Kam*** **[1969] 3 All ER 1626 at 1630** is relevant to the instant case. As a general rule, an arrest should not be made until the investigation is complete. Still, the legislature allows police officers to affect an arrest before the completion of the investigation in

certain circumstances; this is to avoid the investigation process being hampered and in order to maintain the law and order in the country. But to give the power to arrest on a reasonable suspicion does not mean that it should always be or even ordinarily be exercised. It means that there is executive discretion. In the exercise of such discretion, many factors must be considered. Besides the *strength of the case*, the possibility of escape, obstruction of the investigation, prevention of further crimes, and the threat of the accused to the public are some of the factors a police officer may consider. Thus, it appears the 'strength of the case' is a critical factor in making an arrest. In the words of Lord Devlin;

"It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar."

When one considers the material that was available at the point of arrest, it cannot be said that the Respondents had a reasonable suspicion that the Petitioner committed an offence. The Respondents purely acted on the complaint made by the 6th Respondent, which is evident by the B report dated 19.09.2018 marked "2R 1". There is no material before this court indicating that the CID officers had conducted any investigations to verify the allegation and only had bank receipts provided by the 6th Respondent as evidence, which merely indicated that money was deposited into the Petitioner's account. It is clear that the officers of the CID had acted on the complaint without making any attempt to verify the complaint independently or attempting to verify whether the complaint of the 6th Respondent was creditworthy.

At best, the CID officers could have suspected a commercial transaction existed between the 6th Respondent and the Petitioner to import vehicles, and there is

nothing illegal in engaging in a commercial transaction of that nature. On an objective assessment, investigating officers would require additional credible information to form the opinion of a reasonable suspicion of a commission of an offence. Evidence nor any material to form such a suspicion was placed before this Court.

Moreover, the Court cannot accept that the CID officers had reasons to believe that the Petitioner was evading justice. The Petitioner was in the country for a period of more than five months from the initial date of the complaint, and even after a travel ban was sought, the Petitioner was in the country for nearly two months. It was pointed out that, if the Petitioner wished to evade justice, he could easily have made an attempt to travel to a country with a visa-on-arrival concession was available, instead of making arrangements to travel to China and Malaysia, two countries that require prior visa approval. Every person is entitled to enjoy the freedom of movement within and without the country, a fundamental right guaranteed under Article 14(1) (h) of the Constitution, and as delineated by Article 4(d) of the Constitution, it is the duty of the State and its agencies, not to act in a manner to abridge, restrict or deny such right. This Constitutional duty cast must be respected and adhered to by all persons concerned without an exception. In this backdrop, when seeking a judicial order preventing a person travelling overseas, such an order can only be sought in situations where the officer concerned is possessed of credible information that the suspect is likely to flee the country and not otherwise.

Necessity to Inform the Reason for the Arrest of the Petitioner

Article 13(1) requires a person to be informed of the reason for the arrest. Justice Sharvananda states the purpose of this requirement in his treatise, "Fundamental Rights in Sri Lanka" on page 141 as;

"Meant to afford the earliest opportunity to him to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority and to disabuse the latter's mind of the suspicion which triggered the arrest and also for

the arrested person to know exactly what allegation or accusation against him is so that he can consult his attorney-at-law and be advised by him."

Further, Section 23(1) of the Code of Criminal Procedure requires that the person making an arrest to inform the person to be arrested of the nature of the charge or allegation upon which he is arrested. This requirement aims to ensure that the person arrested is afforded the opportunity to challenge the arrest at the earliest opportunity. A particular form is not required for the notification, nor does it require a complete detailed description of the charges against the suspect. The requirement is for the arrested person to be told in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest at the earliest reasonable opportunity. Justice Sharvananda in his treatise (supra), on page 141 in this regard, went on to state that;

"*All the material facts and particulars which form the foundation of the arrest must be furnished to the arrested person because they are the reasons or grounds for his arrest to enable the arrested person to understand why he has been arrested.*"

"*Further, it is important that the communication of the reasons should be in a language that the arrestee understands. The adequacy of the reasons for arrest require that they are: (a) such as to prima facie warrant arrest and (b) based upon information which is considered reliable*"

The Petitioner contends that at the time of the arrest, the CID officer that arrested him at the Airport merely informed him that he was arrested on a charge that was related to the financial fraud of seven million rupees. Meanwhile, the arrest note marked "2R 3" produced by the 2nd Respondent states that;

"මෙම ගුවන් මගියාට අපරාධ පරීක්ෂණ දෙපාතර්මේන්තුවේ විශේෂ විමශර්ණ අංශ 11 මගින් සිදු කරනු ලබන විමශර්නයකට අදලව වත්තල ම/ඵ බී 1505/18 අදලව ලබාගෙන ඇති ගුවන් තහනම් නියොග ප්‍රකාරව කරුණු පහද දී පැය 2320ට නො 84/90, නාවල පාර, නාරාහෙන්පිට ලිපිනයේ පදිංචි ගණේෂන් රොයි සම්සන් යන අය අත්ඩංගුවට ගන්නා ලදි."

It is pertinent to observe that even the arrest note produced does not state the substance of the allegation or charge against the Petitioner and only provides a vague statement that the reasons for the arrest were given. Informing that the Petitioner was arrested on a complaint related to the financial fraud of seven million Rupees is not sufficient for the Petitioner to understand the legal and factual grounds for his arrest. The requirement is to ensure that the arrested person is aware of the reasons relied on to deprive his liberty. In the present case, the information divulged was insufficient in our view for the Petitioner to appreciate the allegation or accusation against him.

On the other hand, even if the CID officer that arrested the Petitioner stated the allegation or charge against him, the allegation must be one that is be based on information well founded. Section 32(1)(b) of the Code of Criminal Procedure provides for the arrest of a person concerned with a cognizable offence without a warrant if there is a reasonable complaint, credible information or reasonable suspicion against such person. Therefore, a person cannot be arrested on a vague allegation. It must be based on information well-founded, and only if the allegation or charge against a person is well-founded can the accused be produced before a Magistrate as per Section 114 of the Code of Criminal Procedure Code. Otherwise, the accused has to be released on an execution of a bond.

Parroting a vague allegation to the Petitioner cannot excuse the Respondent's liability under Article 13(1) of the Constitution. If the allegation was vague, then there were no reasons for the arrest. If there were no reasons for the arrest to begin with, then there was no charge or allegation to inform the Petitioner. The right to arrest and the duty to submit are correlative. A person having lawful authority to deprive the liberty of another person must know the reasons for the arrest, otherwise, it will constitute false imprisonment. As held in ***Christie and Another v Leachinsky*** **[1947] 1 All ER 567 at 579**

"*The omission to tell a person who is arrested at, or within a reasonable time of, the arrest with what offence he is charged cannot be regarded as a mere irregularity.*

Arrest and imprisonment, without a warrant, on a charge which does not justify arrest, are unlawful and, therefore, constitute false imprisonment, whether the person making the arrest is a policeman or a private individual"

The Court held further at page 580 that;

"*I find it impossible to suppose that the law will hold the arrest good if it subsequently appears that the officer had in his own mind an unexpressed suspicion that a felony had been committed.*"

Similarly, the arresting officers could not have arrested the Petitioner if the allegation was not well founded. Consequently, the arrest was defective from the inception. Hence, even if reasons are given by the arresting officer, such reasons were also defective. Therefore, I declare that the Petitioner's rights under Article 13(1) are infringed.

Alleged Violation of Article 12(1) of the Constitution

Article 12(1) of the Constitution guarantees that "All persons are equal before the law and are entitled to the equal protection of the law". The essence of Article 12(1) is to ensure that a person is protected from arbitrary, capricious, irrational, unreasonable, discriminatory, or vexatious, executive or administrative actions. Delivering the judgement in the case of ***Rajapaksha v Rathnayake and Ten Others*** **Sri L.R 1 [2016] 119 at p. 130,** His Lordship Justice Sisira de Abrew stated that;

"When the 1st Respondent arrested the petitioner without any reasons and fabricated a false charge against him, can it be said that he got equal protection of law and that the 1st Respondent applied the principle that 'all persons are equal before the law' to the petitioner? This question has to be answered and is answered in the negative. It is now proved that the petitioner was arrested and detained in the police station without any reasons and the charge framed against him was a fabricated charge. Thus, the principle that 'all persons are equal before the law and are entitled to the equal protection of the law' has not been applied to the petitioner by the 1st Respondent."

It is explicit that the power of arrest cannot be exercised arbitrarily. It would deny the equal protection of the law to the Petitioner. In the present case, the arrest was made, merely on the complaint without any verification of the allegation made. Moreover, the Respondents had ample opportunity to check the veracity of the allegation since the arrest was made after five months from the initial complaint. The 6th Respondent had provided the telephone number of the Petitioner to the CID when the initial complaint was made. In the objections filed on behalf of the 1st to the 8th Respondents, which are 'sparse' to say the least, it is averred that the 'Petitioner could not be found in his usual place of abode when the police visited his residence'. The objections do not disclose the date and time they visited the residence of the Petitioner and how many such attempts were made. If he was not at his residence, did they leave the contact number of the investigating officer with any inmate of his residence, requesting the Petitioner to contact the CID? What prevented them from acting under Section 109(6) of the Criminal Procedure Code, a provision which all law enforcement agencies regularly resort to, in order to compel persons to attend the office of the law enforcement agency, in the instant case the CID. What prevented CID officers, from calling the Petitioner on his telephone as the number was available to the CID? If any of these steps were taken, in all probability they would have secured the presence of the Petitioner and would have provided the CID officers with an opportunity to question and verify the complaint and the Petitioner could have directed the CID officers to the police complaints made to the Keselwatte Police and Narahenpita Police Station on numerous instances, thereby allowing him the opportunity to purge any suspicion.

The credibility of the 6th Respondent's version is also suspect and appears to be low. It is unlikely for a person to import high-end luxury vehicles without entering into some agreement, which provides for the particulars of the transaction, before parting with money. It is common knowledge that unlike any other merchandise, when placing an order for a vehicle the specifications of the vehicle matters. The engine configuration, the options the buyer would want the vehicle to be equipped with, the colour and the list goes on. In addition, the mode of liability, method of

payment are all factors that any reasonable party will consider before entering into a similar transaction, therefore, parties are bound to leave behind a paper trail. Whether such a 'high end' vehicle can be imported for a sum of Rs.7.0 million is also questionable. In the complaint of the Petitioner, he does not disclose the cost it would incur to import each vehicle.

According to the 'complaint' made by the 6th Respondent to the CID, he states that somewhere in 2017, at the residence of Rehana, he had met both Rehana and the Petitioner regarding the importation of two BMW vehicles, which the petitioner had denied. The arrangement, according to the 6th Respondent, was for Rehana to import a BMW X5 and the Petitioner to import a BMW 318i. Accordingly, he had credited Rs. 23.4 million to Rehana and Rs. 7.0 million to the Petitioner in July and August 2017, expecting the vehicles to arrive in December 2017. The vehicles, however, had not arrived according to the 6th Respondent. Going by the version of the 6th Respondent, it was a joint arrangement of both Rehana and the Petitioner to source the two vehicles. Strangely, the 6th Respondent had lodged a complaint only against Rehana leaving out the Petitioner and subsequently followed it up by lodging a separate complaint against the Petitioner. The complaint against the Petitioner had been made on the 1st June 2018, however the date of the complaint against Rehana is not available to the court.

In spite of the fact that the vehicles had not arrived even by December as alleged, the 6th Respondent had given a loan of Rupees fifty-three million [RS.53.0 million] to Rehana in December 2017, at 12% interest payable in three months. The loan agreement, a notarially attested document has been produced marked "P12".

According to the Petitioner, the 6th Respondent had visited his house at a time when he was not at home and had instilled fear in his father to the effect that he would get the Petitioner remanded for 3 months as he has lodged a complaint with the CID. The 6th Respondent also had said that he credited Rs.7.0 million to the petitioner's account and had left his telephone number with his father.

The Petitioner states that, as he has had no previous interactions with the 6th Respondent, he phoned him up straight away and took the precaution to record the conversation. The transcript of the conversation has been produced marked "P19". It is clear from the transcript that there is no mention whatsoever regarding an arrangement for importation of vehicles. In the course of the telephone conversation, the 6th Respondent clearly says that he credited to the Petitioner's account as requested by Rehana as she required money to place an order to import ointments. It is also clear from the transcript that this was the first conversation between the Petitioner and the 6th Respondent and that they had not known to each other before.

From the above, along with other material produced by the respective parties to this application, it is clear that the version of the 6th Respondent is bereft of any credence, and his complaint appears to be a concocted one.

After the telephone conversation, as referred to earlier, the Petitioner had lodged a complaint against the 6th Respondent at the Narahenpita police on the very next day, i.e. on 08.05.2018, alleging criminal intimidation. The Respondents, however, in particular the 1st to the 3rd Respondents, had not considered any of these material facts and merely acted on the word and on the Bank slips provided by the 6th Respondent. I wish to reiterate that, especially in cases where financial fraud is alleged, it is incumbent on the investigating agency to ascertain whether it is purely a transaction commercial in nature or whether a criminal element is present. As far as this incident, was concerned, this aspect was an essential part of the investigation, which the CID officers had to carry out before proceeding to place the Petitioner in custody. In the circumstances I hold that the arrest of the Petitioner is arbitrary, irrational, and unreasonable and had deprived the Petitioner the equal protection of the law guaranteed to him under the Constitution. Thus, I declare that the 1st to the 3rd Respondents had infringed the Petitioner's fundamental right under Article 12(1) of the Constitution.

<u>Liability of the 6th Respondent</u>

The 6th Respondent was absent and unrepresented when this application was supported for leave to proceed, nor was he represented when this matter was taken up for argument, although notice was issued to him, on no less than four occasions. After the arguments were concluded, however, in the interest of justice, the Court took the additional step of issuing notice on the 6th Respondent for the fifth time, through the Officer-in-Charge of the Sapugaskanda Police Station. On 23.03.2023 he was represented by Counsel and sought permission to file objections on behalf of the 6th Respondent, which was permitted.

As per the statement of objections filed by the 6th Respondent, he states as per paragraph 5(f) and 5(g) that;

"*That the petitioner although has taken money never took steps to import one BMW 318i car as agreed and just passed time making various excuses and thereafter never answered the phone. The said Rehana who also had taken 23 million from the 6th Respondent did not take steps to import BMW 5 car as agreed and ceased all contacts with the 6th Respondent*"

That thereafter the 6th Respondent made separate complaints against the said Rehana and the Petitioner at the CID. The 6th Respondent handed over the original deposit slips to the CID during the investigation regarding the said complains and the Petitioner has also admitted that he received money"

The complaint made by the 6th Respondent against the Petitioner is certainly false. This can be gleaned from the background facts. During the phone conversation between the Petitioner and the 6th Respondent on 07.05.2018 as said earlier, there is no mention of any agreement to import vehicles, by the 6th Respondent. Parties are likely to negotiate in depth any commercial arrangement, but no evidence was forthcoming from the 6th Respondent as proof of such an agreement. Hence, considering the material that is available at this point of time, the inference that can be drawn is that the complaint made by the 6th Respondent is false and bereft of any truth.

The entire process that culminated in the arrest of the Petitioner was instigated by the 6th Respondent and consequently resulted in the breach of the Petitioner's fundamental rights. I am of the opinion that this is a fit matter to apply the principle laid down in the case of ***Faiz v Attorney General and Others*** **Sri L.R 1 [1995] 372.** In the case of **Faiz** [supra], his Lordship Justice Mark Fernando stated;

"Article 126 speaks of an infringement by executive or administrative action; it does not impose a further requirement this action must be by an executive officer. It follows at the act of a private individual would render him liable, if in the circumstances that act is "executive or administrative". The act of a private individual would be executive if such act is done with the authority of the executive such authority; ***transforms an otherwise purely private act into executive or administrative action****; Such authority may be express, or implied from prior or concurrent acts manifesting approval, instigation, connivance, acquiescence, participation and the like (including inaction in circumstances where there is a duty to act); and from subsequent acts which manifest ratification or adoption. While I use concepts and terminology of the law relating to agency, and vicarious liability in delict, in my view responsibility under Article 126 would extend to all situations in which the nexus between the individual and the executive makes it equitable to attribute such responsibility. The executive, and the executive officers from whom such authority flows would all be responsible for the infringement.* ***Conversely, when an infringement by an executive officer, by executive or administrative action, is directly and effectively the consequence of the act of a private individual (whether by reason of instigation, connivance, participation or otherwise) such individual is also responsible for the executive or administrative action and the infringement caused thereby****. In any event this Court would have power under Article 126(4) to make orders and directions against such an individual in order to afford relief to the victim."* [emphasis added]

As we have concluded that the arrest of the Petitioner was arbitrary and unreasonable and that the arrest was a direct consequence of the instigation on the

part the 6th Respondent by making a complaint which was false, the 6th Respondent cannot avoid liability. In the process of protecting the Fundamental Rights of the citizenry, the Court cannot condone private parties instigating the executive to use its powers to achieve their ulterior motives unreasonably and/or in an arbitrary manner. Permitting such conduct would lead to a breakdown of the Rule of Law and erode public confidence, as such, infractions should be frowned upon by this Court.

The Decision to Indict the Petitioner.

When this matter was taken up, on 12.11.2011, the Court inquired from the learned State Counsel whether the transcript of the telephone conversation dated 07.05.2018, between the Petitioner and the 6th Respondent was considered before forwarding the indictment. Requested by the Court, the learned State Counsel produced the file pertaining to the Petitioner containing the decision to forward the indictment against him. Upon perusal of the said file by the Court, it was observed that;

1. The material relating to the telephone conversation between the Petitioner and the 6th Respondent had not been considered by the Learned State Counsel before deciding to forward the indictment.

2. Other than the bare statement stating that the Complainant had deposited a sum of Rupees Seven Million in the Bank Account of the Petitioner no other material whatsoever had been considered by the Learned State Counsel to establish the requisite ingredients, in particular the requisite mental element of the offence of cheating

3. Further, the Learned State Counsel had paid scant regard as to whether the facts relating to this case makes out an offence of cheating and whether the material is sufficient to establish the offence.

Neither a declaration nor any relief was sought in relation to the indictment against the Petitioner. The Court, however, cannot ignore the scant regard the Learned State

Counsel had paid when forwarding the indictment. I am reminded of the dicta of his Lordship Justice Sansoni in the case of *The Attorney General vs. Sivapragasam et al*, 60 NLR 468 at p. 471,

"*The prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor feel pride or satisfaction in the mere fact of success .... His attitude should be so objective that he is, so far as is humanly possible, indifferent to the result*"

Similar views were echoed by His Lordship Justice Mark Fernando in the case of *Victor Ivon vs. Sarath N. Silva, Attorney General and Others* [1998]1 Sri. L.R. 340 at p. 344. The Attorney General has a statutory discretion and the decision to file an indictment; however, this discretion is subject to certain limitations. Any executive discretion should be exercised on constitutionally permissible factors. If a suspect is indicted by the Attorney General when the evidence was plainly insufficient, it would be prima facie arbitrary or capricious. In the words of His Lordship Justice Mark Fernando;

"*If a person complains that he was criminally defamed at a public meeting, at which he was not present, and the only witness he has, as to the actual words spoken, is a person who is quite hard of hearing, could sanction be granted, without any further investigation, and without the statement of the accused having been recorded? A decision to prosecute in such circumstances would be, prima facie, arbitrary and capricious, and so would the grant of sanction.*"

No doubt, the Attorney General enjoys unfettered discretion in almost all aspects of criminal processes; institution of criminal proceedings, conduct of prosecutions as well as discontinuing of proceedings and is not obliged to explain why a particular decision was taken either to indict or not to indict an individual. Prosecutorial discretion is an essential element of our criminal justice system and is also critical to the fair and efficient administration of criminal justice. However, the right to a fair

administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed at the altar of expediency.

The decision to prosecute is a serious step that affects suspects, victims, witnesses and the public at large and must be undertaken with the utmost care. Many common law jurisdictions apply a two- stage test in deciding whether or not to initiate a prosecution; that is evidential sufficiency and the public interest. In assessing the sufficiency of evidence, the prosecutor should consider, the admissibility, the reliability and the credibility of the material. The evidence of the defence and any argument which might be put forth should be weighed before asking whether it is more likely than not a court would convict the accused. There must be a rigorous examination of the case to ensure that indictments are not made prematurely. Before indictments are filed, the Attorney General should consider if there are reasonable grounds to suspect that the person to be indicted has committed the offence, or if further evidence can be obtained to provide a realistic prospect of conviction, or if the seriousness or the circumstances of the case justifies the making of an immediate decision to file indictments or if it is in the public interest to file indictments against the suspect.

In the instant case, the indicting State Counsel had only to consider the statement made by the Petitioner along with the transcript of the telephone conversation to assess the truthfulness of the complaint, which unfortunately had not happened.

The complaint itself is fraught with improbabilities. The version of the Petitioner, the telephone conversation, and the fact that the 6th Respondent had given Rs.53.0 million to Rehana in December, which was five months after the purported vehicle transaction as alleged [by the 6th Respondent] that both the Petitioner and Rehana were jointly involved, negates any criminal intent on the part of the Petitioner.

It is regrettable neither the indicting State Counsel nor the officer who supervised and sanctioned the indictment, had failed in their duty to consider the facts objectively before taking the decision to indict the Petitioner.

The two decisions [**Sivapragasam and Victor Ivan**] referred to above and the jurisprudence of this court has spelt out that the discretion vested in the Attorney General, as a public prosecutor, is constitutionally protected and this discretion had been reviewed by this court, thus the jurisprudence permits this court to consider any challenge to the exercise of the prosecutorial discretion statutorily vested with the Attorney General.

Although the discretion of the Attorney General regarding forwarding of indictments is reviewable, the circumstances in which the Court will intervene are rare. Prosecutorial powers are entrusted to identified officers and no other authority can exercise them or make judgments; it is not within the Courts' constitutional function to assess the merits of the polycentric character of official decision-making in such matters. The Court will only intervene when the decision is prima facie, arbitrary, capricious, or unlawful.

Needless to state that the mental trauma one must undergo in facing criminal charges and for that matter an incitement before the High Court would be considerable. The impact of it would be greater if the person charged was of some social standing.

Conclusions

We are of the opinion that the Petitioner has been successful in establishing that his Fundamental Rights enshrined in Article 12(1), and 13(2) of the Constitution had been violated by the Respondents and the court proceeds to make a declaration to that effect.

When one considers the chain of events, it would be reasonable to draw the conclusion that the 6th Respondent had made a false complaint, as far as the matters impugned in these proceedings and had taken advantage of the mechanism of the criminal justice system to achieve his dubious objectives.

I agree with the view expressed by Justice Mark Fernando in the case ***Faiz v. The Attorney General*** [supra] when his Lordship said; *"….. when an infringement by*

an executive officer, by executive or administrative action, is directly and effectively the consequence of the act of a private individual (whether by reason of instigation, connivance, participation or otherwise) such individual is also responsible for the executive or administrative action and the infringement caused thereby. In any event this Court would have power under Article 126(4) to make orders and directions against such an individual in order to afford relief to the victim" [at page 383].

As stated earlier, the facts amply demonstrate that the whole process that triggered the action of the 1st to the 3rd Respondents which led to the infringement of the Petitioner's fundamental rights was instigated by the 6th Respondent.

Accordingly, this Court declares that the 1st 2nd and 3rd Respondents had violated the fundamental rights of the Petitioner under Articles 12(1) and 13(2) of the Constitution. The violations aforesaid was either induced or instigated by the 6th Respondent, who therefore is also responsible for the violations.

His Lordship Justice Kulatunga in the case ***Shaul Hameed and Another v Ranasing***he **1990 1 SLR 104**, observed; [at page 119]

"*This Court has the power to make an appropriate order even against a respondent who has no executive status where such respondent is proved to be guilty of impropriety or connivance with the executive in the wrongful acts violative of fundamental rights or even otherwise, where in the interest of justice it becomes necessary to deprive a respondent of the advantages to be derived from executive acts violative of fundamental rights e. g. an order for the payment of damages or for the restoration of property to the petitioner. Article 126 (4) provides that The Supreme Court shall have the power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) and (3) or this Article.....". The power of this Court to grant relief is thus very wide. Such power has been expressly conferred to make the remedy under Article 126 (2) meaningful.*"

I agree with the observation made by Justice Kulatunga referred to above and I am of the view that the Petitioner should be entitled to compensation for the violations aforesaid.

I am also of the opinion that we are bestowed with great latitude in terms of granting relief under Article 126 of the Constitution and when this Court orders compensation for the violation of a Fundamental Right it is awarded by way of acknowledgement of regret and a *solatium* for the hurt caused by the violation. As held by His Lordship Justice Amarasinghe in ***Saman v Leeladasa*** **Sri L.R 1 [1989] 1 at p. 42**;

"When, in an appropriate case, compensation is awarded for the violation of a Fundamental Right, it is, I think, by way of an acknowledgement of regret and a solatium for the hurt caused by the violation of a fundamental right and not as a punishment for duty disregarded or authority abused."

I am also of the view that the 6th Respondent, being a private party, should also be ordered to pay compensation. The 6th Respondent's actions had led to considerable disruption of the Petitioner's life; his plans to embark on a holiday came to an abrupt halt and had to suffer incarceration in remand custody followed by an indictment on a charge of cheating. All these events, no doubt, would have impacted adversely on his life and possibly would have tarnished his reputation as well. This Court would be failing in its bounden duty if we were to ignore the grievance caused to the Petitioner or condone the conduct of the 6th Respondent.

I must also add that although His Lordship Justice Amarasinghe opined in ***Saman v Leeladasa*** **[supra]** that deterrence should not be considered as a relevant element in the assessment of compensation, those opinions were limited to State liability, as the depths of the State coffers is vast, and the burden of large awards will inevitably pass to the taxpayer. But in my opinion deterrence is a relevant element when the Fundamental Rights violation is a result of instigation by a private party. Private parties should be deterred from instigating the executive to use its powers to achieve their ulterior motives unreasonably and/or in an arbitrary manner.

In this regard I am guided by the judgement of ***Dumbell v Roberts*** **[1944] 1 All ER at pg. 330**, where it was held that no person should be arrested by the police except on grounds which in the particular circumstances of the arrest justify the entertainment of a reasonable suspicion. And that, English Law has recognized that is in the public interest that sufficient damages should be awarded in instances of false imprisonment in order to give reality to the protection afforded by the law. The court went on to observe that;

"The more high-handed and less reasonable the detention is, the larger may be the damages; *and, conversely, the more nearly reasonable the defendant may have acted and the nearer he may have got to justification on reasonable grounds for the suspicion on which he arrested, the smaller will be the proper assessment. The whole of the facts will, of course, be taken into account on the new trial in order to arrive at a proper figure."*

Although the judgement was concerned with appeal from an action for false imprisonment, I believe the instance case is one that is apt to apply the principle enunciated in ***Dumbell v Roberts*** [supra], as the spectrum of unlawful arrests and false imprisonments are wide, and the compensations should reflect the events and bereavements of the Petitioner.

However, I am inclined to include a word of caution. The quantum of compensation reflected by the final Order of this Court should not be construed as the rule. It is very much the exception, especially when making an order regarding payment of compensation against a private party as oppose to the state and it should be done only upon carefully weighing the facts and circumstances of each case. The Court is mindful not to unleash a pandora's box. Hence, the compensation granted by the Court is reflected by the circumstances of this case.

Taking into account the facts and circumstance that led to the violation of the Petitioners' fundamental rights, this Court makes order as follows;

1. 1st Respondent is directed to pay a sum of Rs. 75,000.00 as compensation to the Petitioner.

2. Each of the 2nd and 3rd Respondents are directed to pay a sum of Rs, 25,000/- as compensation to the petitioner.

3. The 6th Respondent is directed to pay a sum of Rupees three million [Rs.3.0 million] to the Petitioner as compensation.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ J.

I agree

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA J

I agree

JUDGE OF THE SUPREME COURT