

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

In the matter of an application made under Article 17 read with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**SC FR Case No:34/2017
SC FR Case No:125/2017**

Kanagarathnam Selvaharan
No.425/5, Himbutana Lane
Angoda.

Petitioner

Vs.

01. Idippully Mudiyanselage Ranjith
Kumarasinghe
Officer- Unit 03
Frauds Investigation Bureau
No.532/7, Elvitigala Mawatha
Colombo 08.

Presently
BMICH Police Station,
Colombo 07.

02. Herath Mudiyanselage Rohana Susil
Kumara
PC-5811
Officer- Unit 03
Frauds Investigation Bureau
No.532/7, Elvitigala Mawatha
Colombo 08.

03. Pilapitiya Karunathilake Wijesundera
Ratnayake Mudiyanselage Bandara
Pilapitiya
Chief Inspector
Officer in Charge

Unit 03
Frauds Investigation Bureau
No.532/7, Elvitigala Mawatha
Colombo 08.

04. Uditha Perera
Superintendent of Police
Director
Frauds Investigation Bureau
No.532/7, Elvitigala Mawatha
Colombo 08.
05. Pujith Jayasundera
Inspector General of Police,
Police Headquarters,
Colombo 01.
06. Hon. Attorney General
Attorney General's Department,
Hulftsdorp
Colombo 12.

Respondents

Before	:	Jayantha Jayasuriya, PC, CJ Kumudini Wickremasinghe, J Achala Wengappuli, J
Counsel	:	Chandana Liyanapatabendy, PC with Vijaya Gamage, Ershan Ariaratnam & Janaka Arunashantha instructed by H.Chandrakumar de Silva for the Petitioner in both matters.
		Sajith Bandara, SC for the Respondents
Written submissions	:	05.12.2022 by the Respondents
Argued on	:	16.11.2023
Decided on	:	22.05.2024

Jayantha Jayasuriya, PC. CJ

The petitioner, Kanagarathnam Selvaharan who is a shareholding Director of a private limited company invoked the jurisdiction of this Court on the premise that the Fundamental Rights guaranteed under Articles 11, 12 and 13 of the Constitution were infringed due to the conduct of first to the fourth respondents, who were attached to the Colombo Fraud Bureau, of Sri Lanka Police. The petitioner claims that his arrest by the officers of the Colombo Fraud Bureau was illegal and unlawful. He further claims that the complaint made against him fails to disclose any criminal conduct and hence the respondents acted arbitrarily. Furthermore, he claims that the initial arrest followed with his detention at the police station until he was produced before the magistrate amounts to a violation of Article 11 of the Constitution.

The petitioner has filed two applications before this Court. The initial petition that was filed on 20th January 2017 (SC FR 34/17) impugns the arrest and detention until he was produced before the Magistrate. By the subsequent application that was filed on 28th March 2017 (SC FR 125/17) the petitioner impugns the filing of further reports in the Magistrate's Court and framing charges in the Magistrate's Court. He prays *inter alia* an order or a direction to quash the charges and criminal proceedings pending in the Magistrates Court. These two applications have been amalgamated and considered together when leave to proceed was granted and all parties agreed that both these matters should continue to be amalgamated and all issues be addressed together in a single judgment.

Respondents deny the petitioner's claim. They submit that the petitioner was arrested for alleged commission of offences of cheating and criminal misappropriation. It is their contention that the arrest of the petitioner was due to a complaint that was duly received. They contend that the arrest was carried out after recording statements from relevant witnesses and examination of all material that was gathered in the course of the investigation.

It is common ground that the company of which the petitioner is a shareholding director engaged in the business of exporting fresh fish and vegetables to countries such as Switzerland, France, Canada, United Kingdom and United States of America via air freight. The petitioner has obtained services of a private limited company that was involved in freight forwarding for the export of the relevant consignments. One such consignment had not reached the destination on time as there was a flight delay due to an unexpected intervening factor (riots in one of the transit cities). The Consignee had refused to accept the consignment as it contained perishable items. However, the freight forwarding company has invoiced the exporter company and the petitioner had refused to honour the payment due to the freight forwarding company on the basis that the delay in reaching the destination caused loss to them. This questionable consignment was dispatched on 15th July 2016 and was due to reach the consignee on the following day namely on 16th July 2016.

The affidavit filed in this court by the second respondent who was attached to the Unit-e of the Fraud Investigation Bureau reveals that the investigation that led to the arrest of the petitioner was initiated on a complaint made by a Deputy Director of the relevant freight forwarding company. According to the said complaint the Petitioner's company has defaulted several payments due to the complainant company, totaling approximately to rupees three million. The complaint was therefore lodged on the basis that the failure to honour due payments amounts to cheating and criminal misappropriation. On the receipt of this complaint on 24th November 2016, several statements had been recorded and documentary material had been gathered. On 12th December 2016 facts had been reported to the relevant magistrate's court on the basis that offences under sections 403, 389 and 386 are revealed. Further time was sought to record additional statements and thereafter to arrest and produce the suspect.

The learned State Counsel who represented the respondents submitted that the respondent investigators have acted within the parameters of law in carrying out the

arrest as per Chapter XI of the Criminal Procedure Code. It was submitted that a complaint was recorded, facts had been reported to court by way of a B report, the name of the suspect had been included in the body of the said report and time had been sought to arrest and produce the suspect as he did not make an attempt to make the due payment. Thus, there is no violation of Article 13. Facts fail to establish that the respondents acted either arbitrarily or unlawfully. Furthermore, it was contended that at no stage did the petitioner take any steps to repay the amounts due for a series of consignments that were dispatched subsequent to the consignment that failed to reach the destination on time. The petitioner has continued to obtain services of the freight forwarding company despite the unforeseen event and failed to honour the invoices pertaining to these consignments which had no bearing to the questionable consignment. It is in this context it was submitted that the alleged undisputed conduct raises a reasonable suspicion on the commission of offences as described in the initial report filed by the respondents in the Magistrate's Court.

Section 32 (1)(b) of the Code of Criminal Procedure Act No 15 of 1979 as amended (hereinafter referred to as the "code") reads:

"Any peace officer may without an order from a Magistrate and without a warrant arrest any person..... 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 having been so concerned..."

Sections 36 and 37 of the code sets out the manner in which a peace officer should deal with a person who is arrested without a warrant. A person so arrested subject to provisions relating to bail should be produced before a Magistrate without unnecessary delay. Such a person should not be held in custody for a longer period than reasonable and such custody should not exceed twenty-four hours.

Articles 13(1) and 13(2) of the Constitution recognizes respectively that “*no person shall be arrested except according to the procedure established by law.....*” and “*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....*”

According to the respondents, the petitioner has obtained the services of the complainant company for freight forwarding for seven consignments even after the consignment that was not delivered on time. However, thereafter having obtained such services refused to make payments for more than four months. At no stage during this period the petitioner had indicated that payments for subsequent consignments will be made after settling the issue on the delayed consignment. The complainant company was made to believe that no defaults or a refusal would take place for such successful consignments. According to the code, offences of criminal misappropriation, criminal breach of trust and cheating are cognizable offences, where an arrest could take place without a warrant.

It is trite law that a peace officer should not arrest a person even for a cognizable offence on suspicion founded on mere conjecture or vague surmise. To effect an arrest of a person for a cognizable offence without a warrant, there should be tangible evidence that is sufficient to establish the reasonableness and credibility of the charge, information or suspicion. The information on which the arrest is based must be credible by the application of the objective test. There should be reasonable grounds for suspecting that the person in question is concerned, in or to be committing or to have committed the offence. The mere fact that a complaint was made is not itself a ground to arrest a person. **[Gamlath v Neville Silva and Others – (1991) 2 SLR 267; Channa Peiris and others v Attorney-General and others – (1994) 1 SLR 1; Seneviratne v Rajakaruna and Others - (2003) 1 SLR 410; Dhammarathana Thero and another v OIC Police Station Mihinthale et al – SC FR 313/09, SC**

minutes of 03.07.2013; **Lakshman de Silva and another v OIC Police Station Kiribathgoda et al**, SC FR 09/2011 - SC minutes of 03.03.2017].

It is also pertinent to observe that this Court held that,

“the provisions relating to arrest are materially different to those applying to the determination of the guilt or innocence of the arrested person. One is at or near the starting point of criminal proceedings while the other constitutes the termination of proceedings and is made by the judge after the hearing of submissions from all parties. The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. What the officer making the arrest needs to have are reasonable grounds for suspecting the persons to be concerned in or to be committing or to have committed the offence” [**Channa Peiris** (supra at 45)].

One of the main arguments on behalf of the petitioner was the fact that the learned magistrate granted bail when the petitioner was produced in court while observing “that the transaction concerned is primarily commercial in nature” and subsequently on 12th September 2017 discharged the petitioner on a preliminary objection raised on his behalf should be considered in favour of the petitioner in determining that the fundamental rights of the petitioners were violated due to the arrest of the petitioner.

However, it is pertinent to observe that the material placed before this court by way of affidavits and other documents including the reports filed in the Magistrate’s Court in my view fail to establish that the respondents either acted arbitrarily or outside the procedure established by law in arresting the petitioner. The guilt or innocence of the petitioner has to be determined after considering all evidence presented at a trial and the burden on the prosecution is to prove charges beyond a reasonable doubt. However, presence or absence of evidence to establish guilt beyond reasonable doubt

is not the threshold criteria that should be adopted in determining the lawfulness or otherwise of an arrest. Mere appearance of a transaction which is commercial in nature *per se* is insufficient to establish that there were no reasonable grounds to suspect the commission of an offence. As discussed hereinbefore there is material to demonstrate that the company of which the petitioner is a director engaged the complainant company for freight forwarding even after the incident where the delay of delivery of the consignment caused a loss to the petitioner. At no stage until November, the petitioner disputed the payments due to be paid to the complainant company relating to subsequent consignments. In my view, the second respondent had acted within the procedure established by law and exercised lawful authority when he formed the opinion that the petitioner deceived the complainant company when obtaining services and made them to believe that payments will be made in due course and defrauded with the subsequent refusal to honour the invoices. Hence forming a reasonable suspicion that the petitioner has committed the offence of cheating cannot be faulted. Hence I am of the view that the arrest and subsequent initiation of criminal proceedings against the petitioner are lawful acts that had been performed in accordance with law.

Therefore, I am of the view that the petitioner has failed to prove that the rights guaranteed under Articles 12 and 13 of the Constitution had been violated.

The Petitioners contention that his rights guaranteed under Article 11 has been violated is based on the premise that he was treated like a “common criminal” along with the others during the time of arrest and at the time of him being produced before the Magistrate’s Court. In this regard it is pertinent to observe that a high degree of certainty is required if the Court is to hold a violation of Article 11. The fact that the petitioner was treated like a common criminal fails to establish that his rights under Article 11 were violated. To the contrary, it is pertinent to note that no person who is suspected of committing a crime could claim preferential treatment based on his status

in the society or the nature of the offence he is alleged to have committed. Persons accused of offences involving physical violence as well as persons accused of offences that does not involve physical violence are liable to be treated in accordance with law and such process would not amount to torture, cruel, inhumane or degrading treatment falling within the ambit of Article 11 of the Constitution. As I have already concluded that the arrest of the petitioner does not amount to a violation of Article 12 or 13 and the petitioner has also failed to establish that such arrest and subsequent steps initiated in accordance with the procedure established by law resulted in the violation of rights guaranteed to him under Article 11, the petitioner has failed to establish the violation of his rights.

Based on these findings, I am of the view that there is no merit in these applications and hence both petitions are dismissed. Court makes no order on costs.

Chief Justice

Kumudini Wicremasinghe, J.
I agree

Judge of the Supreme Court

Achala Wengappuli, J.
I agree

Judge of the Supreme Court

