

SUBBASH CHANDRA FERNANDO
v.
KAPILARATNE, OFFICER-IN-CHARGE, POLICE STATION,
GAMPAHA AND OTHERS

SUPREME COURT,
BANDARANAYAKE, J.,
M. D. H. FERNANDO, J. AND
KULATUNGA, J.

S.C. APPLICATION NO. 1/91
02 AUGUST, 1991, AND 11 AND 26 SEPTEMBER, 1991

Fundamental Rights – Violation of fundamental rights under Articles 11, 13(1) and (2) – Excessive detention – Test to be applied to an order of preventive detention.

Held:

- (1) Detention for an excessive period and the circumstance that it was no longer necessary to keep the detainee in detention to prevent him from acting in any manner prejudicial to the national security or the maintenance of public order will make the detention illegal.
- (2) The Secretary is competent to make an order for preventive detention but this should be on the basis of his subjective satisfaction as to the existence of reasonable probability of the likelihood of the detainee acting in a manner similar to his past acts and preventing him by detention from doing so. It may or may not relate to an offence. Yet when such an order is challenged, the mere production of the order may not be adequate. The court is competent to review the order applying the test of reasonableness in the wide sense.

Cases referred to:

1. *Breen v. Amalgamated Engineering Union* (1971) QB175.
2. *Hirdaramani v. Ratnavale* 75 NLR 67.
3. *Wickremabandu v. Cyril Herath* SC Application No. 27/88 SC Minutes of 06.04.90.

APPLICATION for infringement of fundamental rights.

P. D. Gomes for petitioner.

A. R. N. Fernando, S.S.C. with *Vijitha Malalgoda, S.C.* for respondents.

Cur adv vult.

10th December, 1991.

KULATUNGA, J.

The petitioner is a Medical Practitioner with a MBBS degree from the University of Ceylon. He was arrested on 19.07.89 on a complaint that he had assaulted Dr. Gunatilaka, Surgeon, Base Hospital, Gampaha and obstructed the carrying on of the service at the hospital in breach of Regulation 46(2)(a)(i) of the Emergency Regulations. Thereafter he was detained at the Welikada Prison on an order dated 20.07.89 under Regulation 19(2) (1R5). He remained in such detention until 27.09.89 when a preventive detention order (8R1) was made in terms of which it was directed that he be detained at the New Magazine Prison, Welikada where he has been kept in continuous detention up to date.

The complaint against the petitioner was that he had assaulted Dr. Gunatilaka twice on 19.07.89 first at the path lab, a private medical establishment, and thereafter at the Base Hospital, Gampaha. Although he was arrested for such conduct under Emergency Regulations, criminal proceedings were instituted on 12.04.90 in M.C. Gampaha case No. 98646 under the normal law. He was charged on two counts with voluntarily causing hurt to Dr. Gunatilaka punishable under s.314 of the Penal Code. On 01.10.90 the petitioner admitted the commission of offences but without a formal plea of guilt and was ordered to pay Rs. 500/- as State costs (*Vide* CP5).

The petitioner states that in consequence of representations made by him on 26.07.90 and 02.08.90 to the Advisory Committee established by Regulation 17 of the Emergency Regulations, the Committee recommended his release from custody but this was not acted upon. He alleges that he has been detained under Emergency Regulations and kept in continuous detention despite the termination of the criminal proceedings against him because he happens to be the brother-in-law of Rohana Wijeweera the late acknowledged leader of the Janatha Vimukthi Peramuna, a political party that was proscribed; that whilst he was in detention a Mercedes Benz motor car belonging to him was removed by the 4th respondent (Senior Superintendent of Police); that the petitioner's private residence was set on fire and his private nursing home extensively damaged at the

instigation of the police; and that he himself has been subjected to numerous assaults by prison officials.

This Court granted the petitioner leave to proceed for alleged violations of the petitioner's rights under Articles 11, 13(1) and (2) of the Constitution. The petitioner's version of the incident which led to his arrest is that when he met Dr. Gunatilaka and questioned as to why Dr. Gunatilaka had failed, though requested, to attend on a patient who was gravely ill and needed urgent attention and was lying at the petitioner's private nursing home, Dr. Gunatilaka was rude and assaulted him; whereupon he visited the Police Station to make a complaint when he was arrested without being informed of the reason for such arrest in breach of Article 13(1) of the Constitution. However, it is clear from the notes of investigation (1R1) and the petitioner's statement to the police (1R2) that the police had informed him of the charge against him; and as such there has been no violation of Article 13(1).

As regards the detention order under Regulation 17(1), the affidavit of the 1st respondent, Headquarters Inspector, Gampaha during the relevant period, shows that the fact that the petitioner was the brother-in-law of Rohana Wijeweera is a circumstance which has weighed with the authorities. The affidavit in support of the detention has been filed by the 20th respondent, General Cyril Ranatunga, Secretary, Defence, with a supporting affidavit 20R1 from L. M. Jayawardena, Senior Superintendent of Police. The 20th respondent says that it was his predecessor in office General Attygalle who made the order 8R1 on an application made by the Inspector General of Police after considering the material including the material contained in 20R1. He adds that the said order has been periodically reviewed by his predecessor in office and himself.

The material urged against the petitioner in 20R1 is –

- (a) threatening the publisher of "Janadina" newspaper;
- (b) organising an anti-government demonstration violating Emergency Regulations;
- (c) conducting lectures in support of the JVP;

- (d) his vehicle has been used for JVP activities;
- (e) inciting people to support JVP organizations;
- (f) threatening prison staff whilst in detention with reprisals by the JVP; and
- (g) assaulting doctors at the Gampaha Hospital and the Dental Institute Colombo.

Mr. Gomes, learned Counsel for the petitioner challenged the correctness or the relevancy of these grounds.

As regards the material disclosed at (a) above, Mr. Gomes submits that the truth as is borne out by the document CP4 is that the "Janadina" had in February 1989 published a derogatory statement about the petitioner; that the petitioner met the editor and questioned him about it and thereafter complained to the Press Council successfully and obtained a direction on the editor to publish a correction; that the demonstration referred to at (b) above occurred on 29th July 1987 when the petitioner was proceeding to his private nursing home and met a crowd on the road. It was during curfew hours. The crowd was demonstrating against the signing of the Indo-Sri Lanka Peace Accord. He was arrested and detained until the emergency was lifted when he was released; his prosecution under Emergency Regulations on account of that incident ended with his acquittal on 31.01.91 in case No. 4066/89 by the High Court of Colombo; in S.C. Application No. 7/89 SCM 03.05.91 he was awarded compensation in a sum of Rs. 25,000/- for the infringement of his rights under Article 11 of the Constitution during his said detention; that the petitioner denies the allegations at (c), (d) and (e) above; that the threat to prison staff referred to at (f) above is an incident which occurred in the prison during the petitioner's detention; and that the alleged assault on a doctor at the Dental Institute in Colombo referred to at (g) above also relates to an incident during his detention.

Mr. Gomes submits that the petitioner was not indicted under Emergency Regulations for the assault which occasioned his arrest

presumably because the evidence did not warrant such indictment; that there is no justification for his detention after the termination of his prosecution before the Magistrate; that the decision of the Secretary in making the order of detention is vitiated in that it is affected by irrelevant considerations and the Secretary never had the opinion he claims to have had in making the said order. Mr. Gomes cites *Breen v. Amalgamated Engineering Union* ⁽¹⁾ and *Hirdaramani v. Ratnavale* ⁽²⁾ in support. Mr. A. R. N. Fernando, learned Senior State Counsel submits that even if the assault on Dr. Gunatilaka by itself may not be adequate for making the impugned order, it is justified in the background of the petitioner's conduct; that the Secretary has also taken into consideration the petitioner's recent conduct in prison which is unsatisfactory in continuing his detention; and that unless his conduct in prison improves he cannot be released.

Whilst there is some substance in the criticism levelled against the material urged in support of the detention order, it must be kept in mind that it is an order for preventive detention which the Secretary is competent to make on the basis of his subjective satisfaction as to the existence of "a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing so ... It may or may not relate to an offence". Shukla – The Constitution of India 7th ed. p.134. Yet when such an order is challenged the mere production of the order may not be adequate and this Court is competent to review the order applying "the test of reasonableness, in the wide sense" as was held in the Divisional Bench decision in *Wickremabandu v. Cyril Herath* ⁽³⁾. Applying that test to the facts of this case, I am unable to hold that the initial detention of the petitioner is vitiated on the ground of irrelevant considerations. It is also not possible to conclude that the Secretary never had the opinion he claims to have had in making the order. I therefore hold that the order 8R1 was validly made and the petitioner's rights under Article 13(2) have not been thereby infringed. However, the Court has to consider whether the prolonged detention of the petitioner under that order can be defended; but before I consider that question I shall consider the alleged infringement of the petitioner's rights under Article 11.

The petitioner alleges that on 21.09.90 after he came before this Court in S.C. Application 7/89 referred to above certain officials

assaulted him; the 7th respondent, jailor and the 8th respondent, Superintendent of Prisons dealt two blows on his face; that on 23.09.90 the 9th and the 10th respondents, prison guards, assaulted him with wooden poles; that on 20.11.90 the 18th respondent, jailor, assaulted him; that on 01.12.90 the 7th respondent, jailor and ten others assaulted him in ward No. 41 of the General Hospital, Colombo in the course of which they broke his spectacles; and the J.M.O. who examined him on 03.12.90 found injuries on his body; and that on 10.12.90 the 15th and the 16th respondents, overseers of the Prison Hospital, assaulted him with hands and wooden poles; and he was again referred to the J.M.O. who examined him.

Medical reports submitted by the Assistant Judicial Medical Officer and the Deputy Judicial Medical Officer, Colombo in compliance with directions given by this Court tend to support the allegations of assault made by the petitioner whilst the affidavits of the prison officials who are respondents including medical officers attached to the Prison Hospital show that there had been a progressive deterioration in the relations between the petitioner and prison officials; and that certain incidents had occurred between them in the course of which it is probable that some force was used on the petitioner. However, the respondents do not admit having used force on him. I shall now discuss this evidence.

The Asst. J.M.O. had examined the petitioner on 24.10.90. He gave a history of assault by the 7th and the 8th respondents on 21.09.90 and by the 9th and the 10th respondents with poles and hands on 23.09.90. He complained of pain and tenderness over the left side of chest. Dr. Vasantha Perera consultant orthopaedic surgeon diagnosed the pain as being due to soft tissue injury. The Deputy J.M.O. Colombo had examined the petitioner on 03.12.90. The petitioner told him that on 01.12.90 the 17th respondent and ten others assaulted him with clubs and kicked him on the lower abdomen when he was in ward No. 41 of the General Hospital Colombo. The petitioner complained of chest pain and difficulty in passing urine. He also complained that the assailants had damaged his spectacles and dentures.

The Deputy J.M.O. found on him –

1. Contusions of the upper and lower lids of the right eyelid. This could have been caused when his spectacles were damaged.
2. An abrasion of the inner aspect of the right wrist area. This could have been caused by the handcuffs.

The Deputy J.M.O. next examined the petitioner on 12.12.90 when the petitioner gave a history of assault by the 15th and the 16th respondents on 10.12.90. The petitioner complained of pain in the chest and lower abdomen and difficulty in passing urine. There were no external injuries.

The petitioner filed this application on 02.01.91. According to another report by the Asst. J.M.O. who had examined the petitioner on 19.01.91, the petitioner complained that on 05.01.91 he had been assaulted by the 15th respondent and another jailor with hands and feet on his head, arms and abdomen; further that he had been assaulted on 19.01.91 by male nurse Mahinda on the head and shoulder with a wooden pole and hands; he was also kicked on the abdomen. The Asst. J.M.O. observed tenderness of the left shoulder with limitation of movement of the joint. He also had tenderness of the right lower abdomen. He was shown to the consultant orthopaedic surgeon who prescribed treatment. The patient was seen again on 06.02.91 and 23.02.91 when he showed improvement.

The 7th and 8th respondents deny the alleged assault. They say that on 21.09.90 when the petitioner was taken to the High Court he requested that he be taken without handcuffs. When this was not acceded to he became abusive and made allegations against prison staff. The 9th, 10th, 15th and 18th respondents deny the alleged assaults. The 16th respondent has not entered an appearance. The 17th respondent says that on 01.12.90 at the General Hospital, Colombo the petitioner attempted to snatch a gun from a police officer, hit the 17th respondent and climbed a bed and became abusive to prison staff. This respondent too denies having assaulted the petitioner.

The 6th respondent, the Commissioner of Prisons says that there were complaints about the petitioner's unruly behaviour, the

underlying cause of all complaints being the petitioner's objection to being handcuffed when taken to Court. The 13th respondent Dr. Rani Fernando, the Medical Officer Prisons says that the petitioner being a doctor demanded others to prescribe him medicines, food and other facilities of his choice; when these demands were not met he became abusive and refused treatment; once he threatened her that by not acceding to his demands she would have to face consequences at the hands of the J.V.P. The 14th respondent Dr. Perimpanayagam, Senior Medical Officer Prisons describes the petitioner's behaviour as unruly, irrational, abusive and violent; he says that the petitioner once assaulted a male nurse who had to be warded at the General Hospital in consequence; that Professor Sheriff recommended a psychiatrist's opinion but the petitioner refused to be examined at the psychiatric clinic.

Upon a consideration of the evidence it is my finding that the petitioner's complaints of assault are not fabrications but only a one-sided version of incidents with the prison staff in the course of which considerable force appears to have been used on him. The use of such force is perhaps unfortunate; but I cannot in all the circumstances hold that the petitioner has been thereby subjected to torture or cruel, inhuman or degrading treatment. As such the alleged violation of Article 11 has not been established.

As indicated earlier in this judgment I shall now consider the question of the excessiveness of the detention. Can the petitioner be now regarded as being a threat to national security or public order? I am of the view that prolonged incarceration extending over a period of two years has affected the petitioner physically and mentally; further Professor Sheriff has recommended a psychiatrist's opinion on him. The petitioner's private residence has been burnt and destroyed; his private nursing home has been damaged, even though there is no evidence that the police were responsible for it. His car has been seized by the police. No order of requisition has been produced as authority for such seizure. If the vehicle was seized for being used in connection with subversive activity as alleged, no charge has been framed against anybody. During the hearing before us, learned Senior State Counsel undertook to release the vehicle. A report made to this Court by the agents for the vehicle shows that it is presently unusable.

It is also relevant to note that at the time of the filing of this application the aforesaid Advisory Committee had recommended the release of the petitioner. The Secretary, Defence is however not bound by such recommendation. By 12.06.91 this application was ready for argument when Senior State Counsel undertook to explore the possibility of the petitioner's release from custody. No adjustment could be effected; instead a submission was made that the petitioner cannot be released unless his conduct in prison improves. This is not a valid ground for extending the petitioner's detention. He is not a convicted prisoner in respect of whom punishments including imprisonment can be imposed for offences against prison discipline as may be competent under Sections 79 and 80 of the Prisons Ordinance (Cap. 54).

The petitioner also informed us that his incarceration has prevented him from seeking to migrate to the United Kingdom where his family is and where he is eligible to practise his profession and for which he has facilities. Mr. Gomes, his Counsel is not prepared to concede that the petitioner is in need of psychiatric treatment. In all the circumstances, it cannot be said that it is now necessary to keep him in detention to prevent him from acting in any manner prejudicial to the national security or the maintenance of public order. I hold that the detention order 8R1 is vitiated for excessiveness and the same is invalid after 02.01.91 i.e. the date of this application and accordingly grant a declaration that the petitioner's detention after that date is violative of his rights under Article 13(2) of the Constitution. I direct the 6th and the 20th respondents to release him from custody. I also direct the State to pay him compensation in a sum of Rs. 9000/- (Rupees Nine Thousand) together with costs in a sum of Rs. 1500/- (Rupees One Thousand Five Hundred).

BANDARANAYAKE, J. – *I agree.*

M. D. H. FERNANDO, J. – *I agree.*

Relief granted for excessive detention.