

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

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

Omaththa Mudalige Don Gamini
262, Panchawatta, Himbutana,
Angoda.

Petitioner

SC/FR 81/2011

Vs

1. Nishantha Silva
Inspector of Police,
Special Unit,
Criminal Investigation Department,
Colombo 01.
2. Police Sergeant Mendis 14209
Special Unit,
Criminal Investigation Department,
Colombo 01.
3. M.A.S. Ranjith Munasinghe
Inspector of Police,
Officer-in-Charge,
Special Unit,
Criminal Investigation Department,
Colombo 01.
4. G.S. Abeysekara
Assistant Superintendent of Police,
Special Unit,
Criminal Investigation Department,
Colombo 01.
5. Inspector General of Police
Police Head Quarters,
Colombo 01.
6. Hon. Attorney General

Attorney General's Department,
Colombo 12.

Respondents

Before : Sisira J de Abrew J
Anil Gooneratne J
K T Chitrasiri J

Counsel : Shyamal A Collure with AP Jayaweera for the Petitioner
Anoopa de Silva SSC for all the Respondents

Argued on : 26.4.2016

Decided on : 22.9.2016

Sisira J De Abrew J.

The Petitioner, by this petition, inter alia, seeks a declaration that his fundamental rights guaranteed under Article 11, 12(1), 12(2), 13(1) 13(2) and 14(1) (g) of the Constitution have been violated by the 1st to 5th Respondents. This Court by its order dated 3.6.2011, granted leave to proceed for alleged violation of Article 12 (1) of the Constitution. The Petitioner, in his petition and counter affidavit state the following facts.

On 26.1.2011 around 5.45 p.m. the 1st and the 2nd Respondents came to his shop at Keyzer Street Colombo and showed him an open warrant issued on one OM Don Gamini and took him to the Criminal Investigation Department (CID) Colombo. The 1st Respondent thereafter showed him a petition sent to His Excellency the President and to the Inspector General of Police (IGP) and informed him that there are allegations against him (the Petitioner) regarding a double murder alleged to have been committed in 1982 and an incident relating to threatening three people with a pistol. Although the Petitioner denied all the

allegations, he was handcuffed and taken to his residence at Himbutana in a jeep by four Police Officers including the 1st and the 2nd Respondents. They searched the Petitioner's house but could not recover any illegal items. Thereafter the Petitioner was taken to the CID and his statement was recorded. The recording of the statement came to an end around 5.30 a.m. on the following day (27.1.2011). The Petitioner was thereafter kept in a cell. On 27.1.2011 around 3.30 p.m. the Petitioner was produced before the Chief Magistrate under Case No.5051/1/2011 alleging that he had committed an offence punishable under Section 483 of the Penal Code read with Section 44(b) Firearms (Amendment) Act No. 22 of 1996. The Petitioner was remanded till 1.2.2011. On 8.2.2011 he was produced at an identification parade but he was not identified by the witnesses. While the above case was pending in the Magistrate's Court, Police filed another case bearing No.4245/2/2014 against the Petitioner. The charge in the said case was that he being armed with a pistol intimidated one Dharmadasa Silva. The charge states that it is an offence punishable under Section 486 of the Penal Code. This case was referred to Mediation Board for settlement and at the inquiry Dharmadasa Silva stated that he did not make such a complaint and that such an incident did not take place. When the report of the Mediation Board was submitted to the learned Magistrate, he discharged the Petitioner. In the other case too (B 5051/1/2011) the Petitioner was discharged by the learned Magistrate.

The 1st Respondent, in his affidavit filed in this court, admits that he with his team of Police Officers arrested the Petitioner on 26.1.2011 for illegal use of firearms and for the alleged offence of criminal intimidation (vide paragraph 6(c) of his affidavit). He in his affidavit states the following facts.

The Inspector General of Police (IGP) forwarded to the CID an anonymous petition received by him on 3.9.2009 for investigation. A copy of the petition has been marked as 1R1. The said petition contained information that a person by the

name of OMD Gamini residing at Mullariyawa was terrorizing the area whilst engaging in various illegal activities. The 1st Respondent was a member of the investigating team. On information gathered in the course of the investigation, he and the police team, on 26.1.2011, arrived at the Petitioner's shop at Keyzer Street Colombo and arrested the Petitioner for the alleged offence of illegal use of firearms and for the alleged offence of criminal intimidation. Prior to the arrest, the 1st Respondent had received a copy of the warrant issued by the Magistrate Nugegoda in case No. 42359 against one and OM Don Gamini and he showed the copy of the warrant to the Petitioner. This is the summary of the 1st Respondent story. The other respondents have not filed affidavits.

The Petitioner states that at the time of his arrest there were no cases filed against him. He further states, in his counter affidavit, that no one has made any complaint against him. At this stage it is relevant to note what the complainant had stated at the Mediation Board inquiry. The complainant, Dharmadasa Silva, stated that he did not make a complaint of this nature. It has to be noted here that the learned Magistrate discharged the Petitioner from both the cases filed against him.

I now advert to the contents of the affidavits filed by both parties. The 1st Respondent tries to justify the arrest of the Petitioner on the strength of the warrant issued by the Magistrate Nugegoda in case No. 42359. Although the 1st Respondent, in his affidavit, states that the said warrant has been issued against OM Don Gamini, I can't accept the said position in view of P7 which is a certified copy of case No. MC Nugegoda 42359. According to P7 the name of the accused is Meemadamudalige Don Gamini and not OMD Gamini. Thus the 1st Respondent and his police team could not have arrested the petitioner on the strength of the warrant issued in MC Nugegoda 42359. Further the 1st Respondent tries to justify the arrest of the Petitioner on the information gathered in the course of the investigation that he conducted on the petition sent to the IGP marked as 1R1. This

was an anonymous petition. If he gathered information in the course of the said investigation, where is the statement made by the aggrieved party? He has failed to produce in this court any statement made against the Petitioner by the aggrieved party. Where is his investigation report submitted to the IGP or Director CID? He has not produced any of these documents to this court. On what grounds does the 1st Respondent justify the arrest of the Petitioner? In my view the respondents have not shown any ground to justify the arrest of the Petitioner. As I pointed out earlier, the other Respondents have not filed any affidavits in this court. Having considered all the above matters, I hold that there were no reasons for the 1st and the 2nd Respondents to arrest the Petitioner. For the above reasons, I hold that the arrest of the Petitioner by the 1st and the 2nd Respondents is illegal. If the arrest is illegal then the detention of the Petitioner at the CID under the hands of the 1st and 2nd Respondents also becomes illegal. For the above reasons, I hold that 1st and the 2nd Respondents have violated the fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution.

The allegation levelled against the 3rd Respondent is that he signed the B report in case No. B 5051/1/11 describing the Petitioner as an underworld character. The 3rd Respondent is the Officer-in-Charge of the Special Unit in the CID. When the report, containing matters relating to the investigation, is brought to his notice by the other Police Officers of his team, he, as the OIC of the unit, has to sign it placing trust on his officers. The above facts in my opinion are not sufficient to hold that the 3rd Respondent has violated the fundamental rights of the Petitioner. There are no allegations leveled against the 4th and 5th Respondents.

Earlier I have held that the 1st and the 2nd Respondents have violated fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution.

The next question that must be considered is that whether the 1st and the 2nd Respondents are personally liable to pay compensation to the Petitioner. It appears from the facts of this case that the 1st and the 2nd Respondents have not taken any personal revenge from the Petitioner. They were conducting investigations on the petition marked 1R1 forwarded by the IGP.

When I consider all the above matters, I hold the view that it is not justifiable for me to hold that the 1st and the 2nd Respondents should pay compensation from their personal funds. They have arrested the Petitioner in the course of their duties. Having considered the aforementioned matters, I hold that compensation should be paid from the State funds. I make order that the State should pay Rs.300,000/- to the Petitioner as compensation. I direct the IGP (the 5th Respondent) to take steps to pay the said amount from the funds of the Police Department.

Judge of the Supreme Court.

Anil Gooneratne J
I agree.

Judge of the Supreme Court.

K.T.CHITRASIRI, J

I had the opportunity of reading the draft judgment of Sisira De Abrew J. wherein His Lordship has found that the fundamental rights of the petitioner guaranteed under Article 12(1) of the Constitution had been violated by the actions of the two Police Officers namely the 1st and the 2nd respondents to this

application. At the same time, he has also come to the conclusion that the 3rd respondent who was the Officer in Charge of the Special Unit in the Criminal Investigation Department could not be made liable for the reason that he had placed trust on his subordinates namely the 1st and the 2nd respondents when he signed the reports filed in court containing matters relating to the investigation carried out in respect of the allegations made against the petitioner.

Admittedly, the 1st and the 2nd respondents were the officers who were instrumental in physically arresting the petitioner. According to the 1st respondent, the reason for the arrest of the petitioner had been a result of an investigation conducted by the officers in the Special Unit of the CID, pursuant to a direction given by the Inspector General of Police. The said direction of the IGP was made consequent upon a petition received by him where allegations have been made against a person named O.M.D.Gamini. In the aforesaid petition, it is also alleged that the said O.M.D.Gamini had been associating with illegal use of firearms and explosives and that he had close connection to the underworld. It was an anonymous and undated petition. It was marked as 1R1 and was filed with the affidavit of the 1st respondent. Upon receiving the said petition, the IGP has made an endorsement on it on the 5th September 2009 directing the Deputy Inspector General of Police of the CID to conduct an inquiry over the matters contained therein. Therefore, it is clear that the arrest of the petitioner was a result of the aforesaid anonymous petition received by the IGP. [vide paragraph 6 of the affidavit 24.08.2012 of the 1st respondent]

In the aforesaid petition, consequent to which the investigation was commenced also alleges that the petitioner had killed two persons. No evidence whatsoever had been found in connection with such an offence. However, the Police also have investigated as to a warrant, alleged to have been issued on the petitioner in the case bearing No.42359 filed in the Magistrate's Court of Nugegoda though such an allegation had not been made in the said anonymous petition. The virtual complainant namely Dharmadasa de Silva in that case 42359 has said that he never made a complaint against the petitioner. Indeed, it was later revealed that the said warrant that was made use of to arrest the petitioner was not a warrant issued against the petitioner.

The affidavit of the 1st respondent reveals that the petitioner was arrested for having firearms without obtaining permission from the authorities and for committing the offence of criminal intimidation. [vide paragraphs 6 (c) and 7 of the 1st respondent's affidavit] The 1st respondent in his affidavit has admitted that the police have failed to recover any firearm or explosive from the custody of the petitioner though they have searched even his residence in Himbutana. Therefore, it is seen that the police have failed to find any evidence against the petitioner in relation to the matters contained in the petition marked 1R1, upon which the investigation against the petitioner had commenced. Accordingly, I agree with the decision of His Lordship Justice Sisira J.de.Abreu that the 1st and the 2nd respondents have violated the fundamental rights of the petitioner, guaranteed by Article 12(1) of the Constitution.

Having agreed with the decision of De Abrew J, I wish to add my views over the liability of the 3rd respondent namely, M.A.S.Ranjith Muasinghe. Petitioner in his petition filed in this Court has complained that his rights enshrined in Article 12(1) of the Constitution have been violated by the 3rd respondent as well. He was the Officer-in-Charge of the Special Unit of the Criminal Investigation Department who gave instructions to his subordinates to conduct investigations into the matters contained in the petition 1R1. Also, he was the person who reported facts to courts having studied the progress of the investigation carried out against the petitioner. The question that comes to my mind then is whether it is correct to decide that the 3rd respondent, he being the Officer in Charge of the Special Unit of the CID whose duty is to supervise and direct the investigations in this instance, was not involved personally or whether he had any hand in the process that led to incarcerate the petitioner.

At this stage, it is necessary to note that when the Police are called upon to investigate an alleged crime, the person who directs or command the investigation shall first ascertain whether a crime had, in fact, been committed. If so, then he shall proceed to investigate the case in order to discover any reasonable material which points to the identity of the offender and to find out other material which tends to corroborate or contradict the matters complained of. Finally, all that is required of a Police officer is to investigate an offence, in order to ascertain the true facts relevant to the case irrespective of whether these facts are in favour or against the suspect.

The Police should remember that they exercise their powers only in order to safeguard the rights of those very same members of the public whom they seek to arrest, interrogate and detain. A Police officer, whilst displaying initiative, skill and finesse, should not make the investigation of crime, a personal crusade. He must investigate with an open mind and be always ready to change any theories he may have regarding the manner in which the crime was committed or the identity of the offender, on the basis of fresh material which of course has to be carefully verified.

The issue in this instance is whether there was sufficient material to arrest and then to produce the petitioner in courts with a report that had been prepared and signed by the 3rd respondent. Accordingly, the question arises as to whether there was sufficient material or not, for the Police to genuinely think or at least to suspect that the petitioner has committed an offence known to the law. Therefore, I must mention that it will not be a bar for the Police to arrest a suspect and produce him in courts according to law, if reasonable suspicion exists in the minds of the investigator as to committing of an offence. "Suspicion" in the mind of the investigator had been discussed in several authorities including that of the following.

In **Withanachchi Vs Herath [1988 (ii) CALR 170 at 181] Seneviratne J** held that;

In the sphere of criminal law there are varying degrees of proof that is sufficient in law in the circumstances... "beyond reasonable doubt", "has reason to believe", "is probable" and "has reason to suspect". In

this instance the Court has to consider the degree of proof “has reasonable ground for suspecting”. In these degrees of proof “suspicion” seems to be the lowest degree of proof required by law in certain instances. Section 32(1) of the Code of Criminal Procedure Act No.15 of 1979 lays down as follows;

- (a) Any peace officer may...without a warrant arrest any person.*
- (b) Reasonable suspicion exists of having been so concerned in any cognizable offence.*

In Weerawansa Vs The Attorney General and others [SC Application 730/96 SC Minutes dated 06.06.200] Fernando J has held as follows:

“A reasonable suspicion may be based either upon matters within the officer’s knowledge or upon creditable information furnished to him, or a combination of both sources. He may inform himself either by personal investigation or by adopting information supplied to him or by doing both. A suspicion does not become “reasonable” merely because the source of the information is creditworthy.”

In the case of **Udaya Prabath Gammanpila Vs M.D.C.P. Gunathillake and 7 others [2016 BLR Vol.XXII at page 121] Sripavan C J** held thus:

“The question therefore arises whether investigators had sufficient material giving reasonable suspicion to the 1st and the 7th respondents to cause the arrest of the petitioner.”

Having dealt with the manner that should be adopted when arresting a person by the Police, I will now turn to consider whether it is possible for the 3rd respondent to suspect reasonably that the petitioner may have committed an

offence when he prepared the report in order to produce the petitioner in court. In this instance, the person who directed the 1st and the 2nd respondents to investigate on the matters contained in the document marked 1R1 is the 3rd respondent. He gave such instructions pursuant to an order made by the IGP upon receiving the aforesaid anonymous petition marked 1R1 in the year 2009 i e two years before the arrest of the petitioner. 3rd respondent is the officer who signed the “B” Report dated 27th January 2011 by which the petitioner was produced for the first time in Court. Under those circumstances, the 3rd respondent should have been satisfied as to the correctness of the matters in the report that he prepared and tendered to court.

In that “B” Report filed in Court, 3rd respondent has stated that the police have recorded a statement from one Selliah Krishnan as well. In that statement of Krishnan, he supposed to have stated that he was intimidated by the petitioner having a pistol in his hand. In that “B” report, it further states that another statement by Mohamed Usuff was also been recorded. He supposed to have stated that he saw the petitioner shooting at the air with a pistol in hand.

The aforesaid Selliah Krishnan, when he was directed to identify the petitioner at an identification parade held by the learned Magistrate, has stated that he cannot remember even going to the Criminal Investigation Department to make a complaint. Also, nothing is revealed to show that any further steps had been taken against the aforesaid Krishnan for giving false statement to the police though he had treated as an adverse witness at subsequent proceedings in court.

In the “B” Report subsequently filed on 01.02.2011, the 3rd respondent has stated that Asurumunige Dharmadasa Silva alias Sunil also had made a complaint stating that the petitioner has made an attempt to shoot him. No criminal proceedings had been commenced against the petitioner on that complaint even though it is a serious allegation. Those circumstances suggest that no such incident had taken place.

Accordingly, it is seen that the 3rd respondent has not verified the facts in the “B” report signed by him before it was submitted to courts or in other words he may have submitted falsehood to the Magistrate. Being the Officer-in-Charge of the Division, it is the duty of the 3rd respondent to direct his subordinates to investigate the matters referred to in the petition marked 1R1 in a sensible and fair manner. More importantly, nothing is stated in that “B” report to show that there existed material for them to suspect that the petitioner had committed a crime referred to in the petition 1R1.

All the “B” Reports filed in the Magistrate’s Court had been signed by the 3rd respondent himself. Then he must take the responsibility of informing Court as to the correctness of the allegations made against the petitioner without being a mere rubber stamp as to what his subordinates have reported. By looking at those reports, it seems that the 3rd respondent being the Officer-in-Charge of the police station had gone on a voyage of discovery of material in order to justify the arrest of the petitioner or it may have been to satisfy his superiors.

Moreover, the 3rd respondent has not denied the allegations made against him in the petition filed in this Court. He has not even filed an affidavit in this

case even though serious allegations had been made against him in that petition. Such inaction of the petitioner would deem to result in accepting those allegations made against him since such circumstances would be considered as unchallenged. Therefore, failure to file an affidavit by the 3rd respondent which he could have easily done would also show that he has no explanation to the allegations made against him by the petitioner.

In the circumstances, it is my opinion that the 3rd respondent M.A.S.Ranjith too is responsible for the violation of the Fundamental Rights of the petitioner guaranteed under Article 12(1) of the Constitution. However, I do not wish to make an order as to any payment of compensation by him since Sisira De Abrew J has adequately dealt with on the question of payment of compensation.

JUDGE OF THE SUPREME COURT