

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

In the matter of an Application under Article 126 of the Constitution.

SC Application No. 661/95

Ms. Vinitha Mulkanthi Hulangamuwa, 32, Jason Flats,
Sri Saranangara Road, Dehiwala

Petitioner

Vs

1. Weerasinghe, Officer in Charge, Police Station,
Kohuwala.
2. Karunaratne, Sub Inspector, Police Station,
Kohiwala
3. Dehideniya, Sub Inspector, Police Station,
Kohiwala
4. Ananada, Sub Inspector, Police Station, Kohiwala
5. W.D. Rajaguru, Inspector General of Police, Police
Headquarters Colombo 1
6. The Attorney General, Attorney General's
Department, Colombo 12

Respondents

BEFORE: Fernando J., Dheeraratne J. and Wijetunga J.

COUNSEL: K. Thirangama with H. Hassan K. Jayalath and H. Ratnayake for
petitioner

Kolitha Dharmawardena DSG for the respondents

ARGUED ON: 23rd May 1996

DECIDED ON: 22nd July 1996

Fernando J.

The petitioner complains that she was arrested by the 3rd respondent, a Sub Inspector attached to the Kohuwala Police and detained at that Police Station in violation of her fundamental rights under Article 13(1) and (2) and that not only

was there no justification for her arrest but she was told that she was being arrested to teach her a lesson for making complaints against the police. She was taken to the police station and her statement was recorded after she had been kept waiting for an hour. She was brought to the Magistrate's Court of Gangodawila and on the way she was shown a warrant and told that she was charged with criminal misappropriation of a refrigerator worth Rs. 30,000/-. She was kept in the remand cell and later released on bail by the Magistrate. The respondents claim that she was arrested upon a warrant issued by that Magistrate's Court and detained in consequence thereof. Their case is that upon a complaint by one Sriyani Liyanage, on 6.10.95 a plaint was filed on 14.11.95 in that Magistrate's Court that **the Court ordered summons for 11.12.95 that summons was issued but not served that a motion dated 24.11.95 was filed by the 4th respondent a Sergeant attached to Kohuwala Police seeking the issue of a warrant on the ground that the petitioner was preparing to go abroad, that on the same day the Court ordered that the petitioner's passport be impounded and issued a warrant for her arrest, that when the petitioner was arrested by the 3rd respondent on 27.11.95 she was shown the warrant and that her statement was recorded thereafter at the Kohuwala Police 'in keeping with the usual practice' after which she was produced before the Magistrate the same day and released on bail.**

Although the respondents' sole justification for the arrest was the warrant, they did not produce the original or a copy. The learned Deputy Solicitor General tentatively suggested that they might have had some difficulty in getting a certified copy from the Magistrate's Court to which the warrant should have been returned after its execution. **Not only is the difficulty to believe but it did not seem at all likely**, because the respondents had obtained a certified copy of the motion dated 24.11.95. Although it appeared to us that the burden lay on the respondents to prove by producing the warrant or a certified copy, that it was upon a valid warrant that they had arrested the petitioner, nevertheless when reserving judgment we called for the record from the Magistrate's Court. We then found that the warrant was in the record and that there was no journal entry recording its return to the Court. There was also a letter dated 29.2.96 from the 1st respondent the Officer in Charge asking for a certified copy of the motion dated 24.11.95 but strangely, not asking for a copy of the warrant, **giving rise to a question whether he already knew that the warrant was not there.**

THE ISSUE

The question whether the petitioner's arrest and detention was in violation of Article 13 (1) and (2) involves two distinct questions:

1. Was the petitioner arrested for the reason and in the manner stated by her?

2. Even if the petitioner had been arrested upon a warrant which had been shown to her at the time of arrest, should this Court decline to presume that the arrest was upon a warrant *ex facie* valid and regular and in accordance with the procedure established by law, because –
 - (i) Neither the warrant nor a certified copy was produced.
 - (ii) There were irregularities in regard to the issue of the warrant?

THE WARRANT OF ARREST

I will assume that the petitioner was shown the warrant at the time of arrest.

(a) The contents of the warrant

The journal entry of 27.11.95 records that the petitioner was arrested on a warrant and released on bail and that the Court had called for the warrant.

Subsequent journal entries do not show that it was returned. After judgment was reserved the 1st respondent was called upon to forward the warrant but his reply was that it had been returned on 27.11.95 when the petitioner was produced.

This is contrary to the journal entries. What is more, the warrant was an essential component of the respondents' case and if the police had actually returned the warrant to the Court, the 1st respondent would have asked for a certified copy of the warrant at the time he asked for the less important document, the motion dated 24.11.95.

There is no doubt that a warrant was in fact issued and the petitioner admits that a warrant was shown to her, but **a citizen is not liable to be arrested upon a warrant and is entitled to resist arrest unless the warrant is *ex facie* regular. Thus it must be signed by the Judge, must sufficiently particularize the offence charged and must contain necessary endorsements as to bail and so on.** Should the court apply the presumption as to the regularity of an official act and hold that the warrant was *ex facie* regular? Not only am I reluctant to apply the presumption where the liberty of the citizen is involved but the circumstances in which the warrant was issued militate against it.

(b) The issue of the warrant

Upon plaint, being filed on 14.11.95 the Court directed the issue of summons despite the 4th respondent's submission that the petitioner was attempting to abscond. That summons though issued to the police for service, was not served, when the 1st respondent was asked, after judgment was reserved, to produce the summons, the reply was that it had been returned in open Court on 11.12.95. But there is no journal entry for that day and that it would seem that the case was not

called in open court and no steps were taken that day and the summons is not in the record.

Although the first complaint made against the petitioner on 6.10.95 alleged an offence committed between 23.9.95 and 6.10.95 the plaint alleged offences committed on 12th May 1995. Had a warrant been sought in the first instant section 139(1) (b) of the Code of Criminal Procedure Act required the Magistrate to record evidence on oath. **The procedure adopted by the police resulted in this valuable safeguard being by-passed because on 24.11.95 the warrant was issued on a mere motion which was no substitute for sworn evidence and which contained no particulars whatsoever suggesting that the petitioner was then preparing to leave the country and this was done although no attempt had been made to serve summons.** Even if that warrant was referable to section 63(1)(a) under which perhaps sworn evidence is not essential yet the Magistrate was required to have reason to believe that the accused had absconded and that conclusion must be judicially reached upon relevant and acceptable material. **In any event, whatever the applicable provision the Magistrate must record his opinion and his reasons. That was not done.**

Further, even now we do not know on what material the police wanted a warrant. The petitioner had left Sri Lanka on 4.11.95 and returned on 12.11.95. On 14.11.95 he had already told the Magistrate that the petitioner was attempting to abscond but the basis of that statement was not disclosed in his affidavit the Magistrate did not set on it. The 4th respondent then filed the motion of 24.11.95 without any personal knowledge of the acts. He claims that that motion was filed on information and instructions given by the 1st respondent. The 1st respondent says that after the plaint was filed he 'received information from a trusted informant that the petitioner was planning to go abroad to join her husband in order to avoid facing trial and this information was confirmed by subsequent inquiries made (him) from an acquaintance of the petitioner' and that he recorded all this in his pocket note book 'since the parties who gave the information were known to the petitioner and they (were) reluctant to make statements'. Even assuming that he might have had good reason to withhold the name of and to refrain from recording a statement from, the 'trusted informant' he had no excuse in regard to the 'acquaintance' who was questioned in the course of an investigation into an offence and whose statement should have been recorded. **For the reasons which I set out later, orders prejudicial to the liberty of the citizen cannot at least generally be procured on secret information. The information should have been disclosed to the Magistrate when asking for a warrant and to the Court when seeking to justify the arrest. No attempt**

was made to tender the pocket note book for perusal, even confidentially by the Court only.

(c) The Execution of the Warrant

The only legitimate purpose of a warrant was to bring the person arrested before the Magistrate Court (see section 54 and Form No. 4 in the Schedule).

The respondents admit that the petitioner was not taken directly to the Magistrate's Court but to the Kohuwala Police where she was detained for almost an hour and that after her statement was recorded, she was taken to the Magistrate's Court. The information book extracts show that the petitioner was brought to the police station and kept there on the 1st respondent's instructions. It was submitted that the usual practice is to bring an arrested person to the police station and record his statement before he is produced in Court. **Whatever the 'usual practice' Article 13(2) imperatively requires that every person who is deprived of personal liberty, 'be brought before the Judge of the nearest competent Court according to procedure established by law'. The 'procedure established by law' does not permit other procedures and practices which result in delay in production in Court, and thus prolong the deprivation of personal liberty.**

(d) The Impounding of the Passport

The same day that the warrant was issued, the Registrar of the Magistrate's Court wrote to the Controller of Immigration and Emigration that the Magistrate had ordered that the petitioner's passport be impounded. That letter was not copied to the petitioner. It is disturbing that a passport was impounded in that way – on the most nebulous material, without notice, even subsequently to enable the petitioner to ask for a variation of the order. **In any event, it was unnecessary to arrest the petitioner and to impound her passport as well, in order to prevent her leaving the country; one or the other was quite enough.**

(e) Finding

In the circumstances, I hold that even if a warrant of arrest had been shown to the petitioner at the time of arrest it has not been proved to be *ex facie* valid and regular, on the contrary, it had been irregularly issued. The petitioner was therefore arrested contrary to the procedure established by law and she was not promptly produced before the Magistrate's Court in accordance with the procedure established by law.

MOTIVE FOR ARREST

The learned Deputy Solicitor General contends that the respondents had sufficient grounds to arrest the petitioner without a warrant because he says the statements recorded from various persons justified a reasonable suspicion that the petitioner had committed the offence of criminal misappropriation or more probably criminal breach of trust and the fact that instead, they asked for a warrant establishes their good faith.

I have no hesitation in rejecting this contention. Although the police filed a 'B' report, dated 13.11.95 a plaint dated 14.11.95 and an amended plaint dated 11.12.95 no mention was made of criminal breach of trust. Further, a warrant was sought not because of any belief or suspicion that the petitioner had committed an offence in respect of the refrigerator but **upon a representation that she might abscond and for that there was no foundation. It is therefore likely that they thought that an arrest without a warrant might be unjustified and so tried to take cover behind a Court order, obtained in the circumstances, which I have already mentioned.**

JUSTIFICATION FOR ARREST WITHOUT WARRANT

The petitioner's husband was working in London. She lived with their three children at Jason Flats, Sri Saranankara Road, Dehiwala and owned a house at Pamankada which had been rented one Zarook. Subsequently Zarook left the premises on 24.9.95 delivering vacant possession to her, and according to her leaving behind no goods of any kind. **Therefore, several people came to her Dehiwala residence making claims that Zarook had either borrowed money from them or sold various items of property to be collected later from the promises.**

Sriyani Liyanage's first complaint was that she had paid Rs 30,000/- and bought a refrigerator from Zarook which she had left at the promises because she had to arrange for its transport to Matara, and that Zarook, who was going abroad, had given her a letter informing the landlady also to the effect that she could take the refrigerator whenever she wanted it. **She did not mention the date of this transaction gave no description of the refrigerator and made no reference either to a receipt for the payment or the reason for the lack of one.** She complained that she had met the petitioner shown her the documents but that on various pretends the petitioner had refused to give her the refrigerator. She named Pushpamala de Silva and Swarna Sahabandu as her witnesses.

In her second statement made on 13.10.95 Sriyani Liyanage gave more particulars. She gave details of the refrigerator **but said contradicting her first complaint that she paid an advance of Rs. 7,000/- she explained that she did not ask for a receipt because of their longstanding friendship.** For the first time she claimed that Zarook had given her the petitioner's telephone number and that on 29.9.95 and 1.10.95 she had telephoned the petitioner about removing the refrigerator. **The letter which Zarook**

gave her as well as the piece of paper on which he wrote the petitioner's address and telephone number have not been produced. She made no claim that she paid the balance Rs. 23,000/- required to complete the transaction. She also said again contradicting her first complaint, that she came directly to the police without going to meet the petitioner.

The two witnesses whom she had named claimed that they saw her pay Zarook Rs. 30,000/-. Further although Sriyani Liyanage had mentioned only one visit on 23.9.95 one witness referred to another visit on 24.9.95 while the other witness referred to two visits on 22nd and 23rd October. No statement was obtained from Zarook and it was only much later that statements of some of his relatives were obtained to the effect that the refrigerator was in the premises when Zarook handed them over to the petitioner. Another matter which the respondents did not disclose and which came to light only when this Court called for the Magistrate's Court record, was that on 13.11.95 the first respondent had filed a report in respect of the investigation that made no reference to any witnesses or statement; it alleged that Sriyani Liyanage had paid Rs. 30,000/- and purchased a refrigerator from Zarook 'residing at 32, Jason Flats, Saranankara Road' and that the refrigerator had been left at those premises. The plaint filed the next day referred to offences committed on 12th May 1995. **The only witness listed were Zarook (from whom no statement had been obtained) the 2nd respondent Sriyani Liyanage and one of the witnesses named by her, Zarook's relations were not mentioned. The report and the plaint referred to offences under section 386 and 396 made no mention of criminal breach of trust.**

The petitioner says that she came to the police station on 6.10.95 in response to a police message the 1st respondent called her to his room and abused her asking her to return to Sriyani Liyanage a refrigerator which according to Sriyani Liyanage's complaint, Zarook had left in the premises that he did not accept her explanation that Zarook had left nothing behind, that he threatened to prosecute her unless she returned the refrigerator and that thereafter she was produced before the 2nd respondent who recorded her statement. She says that on 7.10.95 she complained to SSP Navaratnaraja that she had been abused by the 1st and 2nd respondents and that Navaratnaraja telephoned the 1st respondent and asked him not to harass her, saying that if Zarook had sold the refrigerator to Sriyani Liyanage, Sriyani Liyanage should get it from him and that if the 1st respondent was unable to handle the case he should refer it to his SSP, Navaratnaraja, says the petitioner even thereafter she received several telephone calls messages to come to the Kohuwala Police, **even on 20.10.95 when there was an all-day curfew on account of the attack on the Kolonnawa oil tanks.** On 21.10.95 she wrote to Navaratnaraja complaining about this harassments but to no avail. On 1.11.95 and 2.11.95 she received more messages. On 2.11.95 she made a

complaint which Navaratnaraja recorded; a copy was sent to the 1st respondent and was recorded in the Kohuwala Information Book on 7.11.95. The 1st and 2nd respondents deny such harassment and claim that it was only once that the petitioner was asked to come to the station but that she did not respond. **They do not specifically deal with her complaints to Navaratnaraja nor have they produced an affidavit from him.** It is therefore likely that the petitioner did complain thrice to Navaratnaraja, **I hold it was because she complained to SSP Navaratnaraja that the 3rd respondent on the instructions of the 1st respondent arrested her in the circumstances described by her and then detained her at the police station. There was no justification for arresting her without a warrant.**

CONCLUSION

I hold that whether arrested with or without a warrant the petitioner's fundamental rights under Article 13(1) and (2) were infringed by the 1st and 3rd respondents by reason of her arrest and subsequent detention of the Kohuwala Police Station and award her compensation and costs in a sum of Rs 20,000/- payable by the State.

The Magistrate Court of Gangodawila is directed to review the order impounding the petitioner's passport after giving her an opportunity of being heard.

Judge of Supreme Court

Deeraratne J.

I agree

Judge of Supreme Court

Wijetunga J.

I agree

Judge of Supreme Court