

AMARATUNGA v. SIRIMAL AND OTHERS (JANA GHOSHA CASE)

SUPREME COURT.

FERNANDO J.,

DHEERARATNE J. AND

RAMANATHAN J.

S.C. APPLICATION NO. 468/92

09 FEBRUARY, 1993.

Fundamental Rights Article 14 (1)(a) of the Constitution Right of freedom of speech and expression Criticism of the Government.

Several political parties including the Sri Lanka Freedom Party decided to show their disapproval of the policies and actions of the Government on a range of issues. It was decided to harmonize their protests, nationwide by means of a 15 minute noisy cacophony of protests (Jana Ghosha) : ringing of bells, tooting of motor vehicle horns, beating of drums, banging of saucepans, so that there might resound throughout the nation, a deafening din of disapproval. The petitioner, a member of the S.L.F.P. and a member of the Pradeshiya Sabha of Horana was one such participant at Ingiriya.

The petitioner voiced his protest by beating a drum. When he did not heed the police order to stop beating the drum, he was assaulted and his drum broken with a rice pounder. The crowd of protesters shouted slogans against the Government and formed a cordon across the road. Tear gas and a baton charge were used to disperse the crowd.

Held:

1. The Police did not have reason to apprehend a breach of the peace. The action by the Police was simply because anti Government slogans were being shouted.
2. The petitioner's fundamental right of speech and expression was violated.

Per Fernando, J.

" The right to support or to criticize Governments and political parties, policies and programmes is fundamental to the democratic way of life, and the freedom of speech and expression is one which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions ".

3. Criticism of the Government, and of political parties and policies, is *per se*, a permissible exercise of the freedom of speech and expression under Article 14 (1)(a).

Cases referred to:

1. *Carey v. Brown* (1980) 447 U.S. 455.
2. *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92, 95 96.

3. *Tinker v. Des Moines* (1969) 393 U.S. 503.
4. *United States v. O' Brien* (1968) 391 U.S. 367, 377.
5. *Strombero v. California* (1931) 283 U.S. 359.
6. *Cohen v. California* (1971) 403 U.S. 15, 26.
7. *Ekanayake v. A. G.* S.C. Application No. 25/91 S.C. Minutes of 18.12.91.
8. *Whitney v. California* (1927) 274 U.S. 357.
9. *De Jonge v. Oregon* (1937) 299 U.S. 353.

APPLICATION for infringement of fundamental rights.

R. K. W. Goonesekera with *L. C. M. Swarnadhipathi* and *J. C. Weliamuna* for petitioner.

Mohan Pieris S. S. C. for the respondents.

Cur. adv. vult.

MARCH 08, 1993.

FERNANDO. J.

Several political parties, including the Sri Lanka Freedom Party (S. L. F. P.), decided to show their disapproval of the policies and actions of the Government on a range of issues the unbearable increase in the cost of living, the privatization of public enterprises and the consequent retrenchment, wasteful expenditure on political extravaganzas, corruption, the suppression of discussion on certain matters of public interest, escalating abductions and killings, and the North East War. It was decided to harmonise their protests, nationwide, by means of a 15 minute " Jana Ghosha " on 1.7.92. Wide publicity was given, and prospective participants were asked to orchestrate their efforts in a noisy cacophony of protest the ringing of temple and church bells, the tooting of motor vehicle horns, the beating of drums, the banging of saucepans, and the like so that there might resound, throughout the nation, a deafening din of disapproval. The petitioner, a member of the S.L.F.P. and a member of the Pradeshiya Sabha of Horana, was one such participant at Ingiriya. Alleging that the 1st and 2nd respondent's (two police constables attached to the Ingiriya Police) had destroyed and silenced his drum, and inflicted injuries on him, the petitioner filed this application for the infringement of his fundamental right under Article 14 (1) (a).

The petitioner's case is that while he was beating his drum near the bus stand, at about 12.35 p.m., the 1st and 2nd respondents threatened him, and compelled him to give up his drum to the 1st respondent, who threw it on the ground, and struck it with a rice pounder. The petitioner persevered in his protest, proceeding to beat the remains of his drum near the Ingiriya super market; the 1st respondent again wielded the rice pounder, causing extensive damage to the drum. Undaunted, the petitioner continued to manifest his protest by clapping his hands; the 2nd respondent ordered him to stop and, upon his failure to obey, assaulted him. There is no doubt that the petitioner did receive some non grievous injuries that day. He claims therefore that the 1st and 2nd respondents forcibly prevented him from manifesting his protest, thus infringing his fundamental right under Article 14 (1)(a).

Learned Counsel for the petitioner submitted that the petitioner's drumming and clapping was a solo effort, distinct from the orchestrated performance in the vicinity. However, the petitioner's affidavit shows that he had been fully aware of the plans for the protest at Ingiriya, in which he had come to play his part; he started at the bus stand, and later went near the Super Market. The supporting affidavit from an eyewitness, Nandasena (another drummer), also indicates that both of them were acting in concert with all the other protesters. Thus the question whether the petitioner's fundamental right was violated has to be considered in the context of the entire demonstration at Ingiriya that day.

The 1st respondent claims that he was not at the scene. He relies on entries ("1R1") in the relevant register to the effect that he left the Ingiriya Police Station at 8.50 a.m. for the Magistrate's Court, Horana, in order to hand over some productions; having handed the productions to a clerk, and having obtained an acknowledgement, he returned to the Station at 2.37 p.m. Therefore, he asks us to infer, he could not have been at the site of the protest. It is difficult to believe that the 1st respondent took nearly six hours to return to the Police Station after going to Horana merely to hand over some productions to the productions clerk; he does not explain why this errand took so long. He had quite enough time to get to the Ingiriya junction by 12 noon, and to return with the other police officers after the Jana Ghosha. The two entries produced by the 2nd respondent ("2R1") show that S. I. Priyadarshana and the 2nd respondent returned at about the same time, i. e. shortly before 3.00 p.m. Both the petitioner and Nandasena have named the 1st respondent and described his part in the incident in detail; the petitioner is a person from the area, and it is not unlikely that he knew the 1st respondent by sight. Undoubtedly the petitioner had been involved in an incident which resulted in injury to him; he had no particular reason to implicate the 1st respondent falsely. If he wished to accuse some one falsely, he could as easily have named one of the many other police officers who had been at the spot. What is more, the petitioner also named another police constable, Pelpola, as having been there, but did not name him as a respondent as he had not participated in the incidents complained of; this is not an invention, because 2R1 shows that Pelpola was one of the officers who went to the scene of the protest. The 2nd respondent has averred that the 1st respondent was not at the spot, but he was an interested party, and it was to his advantage to deny the incidents; Pelpola had no such motive, but he has not sworn an affidavit. It is therefore probable that the 1st respondent was at the Ingiriya junction that day.

The 2nd respondent's description of the events, as recorded in his notes made at 3.05 p.m. that day, can be summarised thus:

The police party was near the Ingiriya Bo tree on riot control duty. At 12.40 p.m., a crowd of about 1,000 protesters came from the direction of the Ingiriya Super Market and the Ratnapura road, and attempted to pass in front of the police party, shouting slogans against the Government, lighting crackers, and beating drums. They were shouting "riot ("ler,s .ijz") "chase Abaya out ", " overthrow (the Government) ". Although told several times to disperse, the protesters, scolding the police, started their procession. Thereafter, they formed a cordon across the road, by holding hands and attempted to block the road; the protesters again started to pass them, when on the instructions of S.I. Priyadarshana two tear gas canisters were used on the protesters. Those who were affected by the tear gas ran away wiping their eyes. Afterwards the protesters again came, shouting, towards

the police. Thereafter, on the instructions of S. I. Priyadarshana, using the minimum amount of force, the police baton charged, whereupon the protesters dispersed.

His affidavit is to the same effect, the words "ler,s .ijz" being rendered as " that the people ought to riot against the Government ", but with some significant differences:

- (i) that the crowd was " behaving *violently* ",
- (ii) that " as the procession *became unruly*, (S. I. Priyadarshana) warned the marchers not to proceed but to disperse peacefully ";
- (iii) that after the use of the tear gas, " the protesters resumed their march and some of them *threw missiles* at the police, notwithstanding the warnings to stop their *violent conduct*" .

The affidavit thus brings in an element of violence, which is conspicuously absent in the contemporaneous record.

The respondents have not produced any affidavit from the Officer in charge of the police squad, S.I. Priyadarshana. His notes made at 3.00 p.m. that day describe the incident in much the same way as the 2nd respondent; they do not mention any violence or missiles; but they do say that notwithstanding the warnings, the protesters attempted to continue their procession, " *shouting slogans against the Government* ", whereupon the police formed a cordon.

On the material furnished by the respondents, it would appear that the noisy, slogan shouting, processionists were warned repeatedly to disperse; when they failed to disperse, tear gas was fired ; then they were baton charged; and admittedly, four persons, including the petitioner, sustained injuries. It is necessary to determine therefore, why the police attempted to stop the demonstration. The respondents position is that S.I. Priyadarshana had acted in terms of section 78 (1) of the Police Ordinance:

" Officers of police not below the grade of Sub Inspector may, as occasion requires, direct the conduct of all assemblies and processions in any public place, prescribe the routes by which and the times at which such processions may pass, and direct all crowds of twelve or more persons to disperse when they have reason to apprehend any breach of the peace. "

The question that arises therefore is whether he had " reason to apprehend any breach of the peace."

According to the 2nd respondent, one of the slogans shouted was an incitement to riot. Learned Counsel for the petitioner submitted that in a demonstration of this nature, even if an incitement to riot was intended, it is most unlikely that the words "ler,s .ijz" would have been used. However, that consideration does not rule out the possibility that those words were in fact uttered at some stage. At the same time the only evidence that these words were used, is the 2nd respondent's affidavit (there being no affidavit from S. I. Priyadarshana); and I hesitate to accept that affidavit in view of the significant additions not appearing in his contemporaneous notes. However even assuming in favour of the respondents, that some such words had previously been

used, it is clear that at the time when S. I. Priyadarshana decided to stop the protest, and procession (if indeed there was one), what induced him to act was that the protesters were "shouting slogans against the Government "; and according to the 2nd respondent, because they were scolding the Police. It was not because of any incitement to riot or violence. If at that point of time protesters were actually inciting people to riot, or any form of violence, it is unthinkable that both S. I. Priyadarshana and the 2nd respondent would have failed to mention that fact in their notes.

I therefore hold that S. I. Priyadarshana did not, objectively, have " reason to apprehend any breach of the peace ", and did not, subjectively, think that a breach of the peace was likely, at the time the police party decided to stop the protest, or at any time thereafter (when the Police used tear gas and when they baton charged). I am satisfied that he acted simply because anti Government slogans were being shouted.

There is ample authority that " speech and expression " extend to forms of expression other than oral or verbal placards, picketing, the wearing of black armbands, the burning of draft cards, the display of any flag, badge, banner or device, the wearing of a jacket bearing a statement, etc (cf. *Carey v. Brown* ⁽¹⁾, *Police Department of Chicago v. Mosley* ⁽²⁾, *Tinker v. Des Moines* ⁽³⁾, *United States v. O' Brien* ⁽⁴⁾, *Stromberg v. California* ⁽⁵⁾, *Cohen v. California* ⁽⁶⁾. Learned Senior State Counsel concedes that drumming, clapping and other sounds, however unmusical or discordant, can, in the context of the Jana Ghosha, be regarded as "speech and expression".

Learned Counsel for the petitioner submitted that the petitioner's protest was disrupted simply because it was against the Government, and that criticism, in any form, of the Government, was well within Article 14 (1) (a); and although learned Senior State Counsel agreed that this was so, he insisted on reminding me of my observations in *Ekanayake v A.B.* ⁽⁷⁾ which I have no hesitation in reiterating:

" The Constitution demands the protection of the right to think as you will, and to speak as you think (*Whitney v California*, ⁽⁸⁾ subject to limitations which are inherent, as well as restrictions imposed by law under Article 15. Subject to that, the expression of views, which may be unpopular, obnoxious, distasteful or wrong, is nevertheless within the ambit of freedom of speech and expression, provided of course there is no advocacy of, or incitement to, violence or other illegal conduct. "

I am therefore of the view that the fundamental right of the petitioner under Article 14 (1)(a) has been violated. The right to support or to criticise Governments and political parties, policies and programmes, is fundamental to the democratic way of life, and the freedom of speech and expression is one "which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions " (*De Jonge v. Oregon* ⁽⁹⁾). This is not a borderline case, or a sudden emergency in which a quick decision had to be taken. Prior publicity had been given to the planned protest, and the police had information about it; I cannot accept the 2nd respondent's statement that information had been received of a plan to incite the people into committing acts of violence and to cause a riot, because the respondents have not produced any record of that information, and have not

disclosed the nature and source thereof. If in fact a riot or violence had been anticipated, the police would have known that they had to act when there was incitement to riot or violence, or actual violence. However the 2nd respondent acted when slogans were shouted against the Government; not that he understood those slogans as an incitement to riot or violence; and not that there was a need to prevent any such breach of the peace or obstruction as is referred to in section 78 (1) of the Police Ordinance. It was thus a grave, deliberate and unprovoked violation of the petitioner's freedom of speech and expression, and I am of the view that the petitioner should be awarded compensation in a sum of Rs.50,000. Stifling the peaceful expression of legitimate dissent today can only result, inexorably, in the catastrophic explosion of violence some other day. Hence the obligation cast upon this Court by Article 4 (d) of the Constitution, to respect, secure and advance fundamental rights, would amply justify the exercise of our power (under Article 126 (4) to give directions to the police to ensure that they will respect the citizen's fundamental right of speech and expression, and will not suppress peaceful protest. We trust, however, that the Inspector General of Police will of his own volition issue appropriate directions and instructions to all Officers in charge of Police Stations, that criticism of the Government, and of political parties and policies, is, per se, a permissible exercise of the freedom of speech and expression under Article 14 (1)(a).

I hold that the fundamental right of the petitioner under Article 14 (1)(a) has been infringed, and award him compensation in the sum of Rs.50,000 payable by the State.

DHEERARATNE, J. I agree.

RAMANATHAN, J. I agree.

Relief ordered.