

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

In the matter of an Application  
under and in terms of Article 126 of  
the Constitution of Sri Lanka

SC/FR/768/2009

1. Sisira Kumara Wahalathanthri  
Puhulyay  
Ambalantota.
2. Dannister Gunasekara  
No. 153/01/B,  
Weerakatiya Road,  
Aluthgoda, Tangalle.

**PETITIONERS**

Vs.

1. Jayantha Wickramaratne  
Inspector General of Police  
Police Headquarters,  
Colombo 01.
2. Kalinga Silva  
Headquarter Inspector  
Tangalle Police Station,  
Tangalle.
3. S. J. B. Suwaris  
Inspector of Police  
Police Station  
Tangalle.

4. Hon. Attorney General  
Attorney General's Department  
Colombo 12.

**RESPONDENTS**

**BEFORE:** Wanasundara P.C., J.  
Jayawardena P.C., J &  
Gooneratne J.

**COUNSEL:** J.C. Weliamuna with Pulasthi Hewamanne for the petitioners  
  
Varunika Hettige S.S.C. for Respondents

**WRITTEN SUBMISSIONS FILED ON:**

23.03.2012 (by the Petitioners)  
15.07.2013 (by the Respondents)

**ARGUED ON:** 11.08.2015

**DECIDED ON:** 05.11.2015

**GOONERATNE J.**

The two Petitioners are members of the Janatha Vimukthi Peramuna which is a recognized political party. The 1<sup>st</sup> Petitioner was the group leader of the

Hambantota District JVP candidate for the Southern Provincial Council Elections 2009. The Petitioners filed this Fundamental Rights Application alleging that the Respondents had violated their fundamental rights guaranteed under Article 12(1), 12(2) and 14(1) (a) of the Constitution. As regards the 2<sup>nd</sup> Petitioner as per sub para (c) of the prayer to the Petition, Respondents have allegedly violated the fundamental rights of the 2<sup>nd</sup> Petitioner guaranteed under Article 13(1) & 13(2) of the Constitution. Respondents are police officers, marked as 1<sup>st</sup> and 2<sup>nd</sup> Respondents the Inspector General of Police and the Hon. Attorney General, named as 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The Southern Provincial Council was dissolved on 03.08.2009 (P1) and the Commissioner of Elections then called for nominations to hold elections for the said Provincial Council. (P2). Thereafter the JVP tendered nominations for the District of Hambantota and among others was the 1<sup>st</sup> Petitioner as a candidate for the above Provincial Council Elections (P3). In para 6 of the petition it is pleaded that the 1<sup>st</sup> Petitioner took steps to establish a branch office in the manner described in the said paragraph.

The substantial complaint of the Petitioners are more particularly contained in paragraphs 7 – 11 of the petition and the corresponding paragraphs of the affidavit of the 2<sup>nd</sup> Petitioner. It is stated that a group of supporters of the United Peoples' Freedom Alliance attacked and set fire to the above

branch/elections office of the JVP on 18.09.2009. 2<sup>nd</sup> Petitioner lodged a complaint at the Tangalle Police Station about the above incident. It is the position of the Petitioners that the police have not taken action to investigate the said complaint. Police according to the Petitioners were inactive and acting under the dictation of higher political authorities, as can be seen by the complaint bearing No. EIB 96/62. Police inactions are further demonstrated and supported by document P5 pertaining to other complaints made by the JVP pertaining to serious acts of violence which have not been investigated. Petitioners aver in their petition that they were disappointed over the inaction of the police as described in para 9 of the petition and thereby were prevented in engaging in peaceful political propaganda in connection with the above election. The 2<sup>nd</sup> Petitioner as a mark of protest displayed a banner over the burnt out election office which reads “uy Prd rdPmlal wdKavqfjS m%Pd;ka;%jdoh fuSlo?

Petitioners plead that on 24.09.2009 around 7.30 a.m the 2<sup>nd</sup> Petitioner was accompanying his wife to the bus stand on the other side of the road. Three police jeeps rushed towards him and stopped in front of him, and about 15 Police Constables were in the police jeep and several of them who were

armed, forcibly took the 2<sup>nd</sup> Petitioner into custody. The officer who made the arrest is described as “Maha Kalu Sinhalaya” (Petitioner reserves the right to add him). 2<sup>nd</sup> Petitioner was not informed of the reason for his arrest. Police Officer also removed the banner that was displayed and took it to the police station.

Petitioners aver in their pleadings that, at the Tangalle Police Station, police had inquired from the 2<sup>nd</sup> Petitioner as to who displayed the banner and the 2<sup>nd</sup> Petitioner admitted that he displayed the banner as a protest to undemocratic practices of the Rajapakse regime. Police officers replied by saying that the 2<sup>nd</sup> Petitioner and the JVP cannot criticize the President or call his government, “uy Prd rdPmlal wdKavqfjS m%Pd;ka;%jdoh fuSlo?”. It was the position of the police that these type of banners cannot be displayed and police have instructions to remove such banners. Petitioner also state that the police had not informed the reason for arrest, nor had stated about a complaint being lodged against displaying of the banner. On the same day at about 2.00 p.m (24.09.2009) the 2<sup>nd</sup> Petitioner was produced before the Magistrate, Tangalle and remanded as the police objected to bail. However on 30.09.2009 the 2<sup>nd</sup> Petitioner had been released on bail. (P6)

The position of the Petitioner was that the destruction of the elections office and the arrest of the 2<sup>nd</sup> petitioner resulted in the propaganda activities of the party being adversely affected. Police connived with the perpetrators to curtail political activities of the JVP, i.e being inactive in investigating the arson attack. The grounds of violation of fundamental rights are dealt in paragraph 14 of the Petitioner's Petition.

I have noted the contents of the affidavit filed in these proceedings by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. It is stated that a complaint was made by the 2<sup>nd</sup> Petitioner on 19.09.2009 at about 1.05 a.m to the Tangalle Police, as to setting fire to a pandol erected by the Janatha Vimukthi Peramuna. 3<sup>rd</sup> Respondent avers that the aforesaid complaint was bereft of any reference to the supporters of United People's Freedom Alliance attacking and setting fire to an Election office of the JVP. Nor did such complaint identify any alleged attackers and support this position with documents 3R1. In order to meet the position of police inaction, the 3<sup>rd</sup> Respondent aver that within 20 minutes of recording the statement of the complainant a police party left the station to investigate (3R2).

The 3<sup>rd</sup> Respondent in para 6 IV of his affidavit disclose the role of the police as follows:

- (a) Though an application to establish an election office was granted by the 2<sup>nd</sup> Respondent there was no election office of the said Janatha Vimukthi Peramuna (JVP) at the said location which was about 3 k.m from Tangalle – Weeraketiya Road.
- (b) At the said location there was a pandol depicting JVP election propaganda material erected about 30 meters from a partly built house which did not even have an electricity supply.
- (c) The said pandal was erected on the road reservation and was gutted by fire.
- (d) That neither the complainant nor anyone else recognized the identity of the persons who carried out the said attack, explaining as follows: -

- “(i) on the next day I did further investigations but no evidence was revealed as to who was responsible for this attack.
- (ii) Photographs of the said scene was taken by PS 22492 Gamage and submitted to the Police Station which were properly documented under production record (PR) 155/9.
- (iii) I then informed the facts of this case to the Magistrate of Tangalle under case No. BR 605/09”

The material placed before this court by the Respondents tend to demonstrate that the police were not inactive as regards the complaints made by the JVP, and had taken whatever possible action on such complaints. The affidavit of the 3<sup>rd</sup> Respondent attempt to show that the police did not act under the

direction of the ruling party. The 3<sup>rd</sup> Respondent also aver that on 24.09.2009 he was on special duty regarding the arrival of the then President of the country and he had received information about a display of the banner which display words which could bring disaffection to the Government, which would promote ill will and hostility among the people. The 3<sup>rd</sup> Respondent also had mentioned that the banner in question was displayed over the burnt banner of the JVP at No. 153/13, Aluthgoda Tangalle which is the same place he visited on 19.09.2009 as in para 6 of his affidavit.

The main question to be considered in a case of this nature is to decide the scope of the fundamental rights alleged to have been violated as pleaded by the Petitioners. This is no doubt a very crucial function of this court as the rights guaranteed by the constitution permits the legislator to impose restrictions i.e in the larger interest of the community, to mainly to maintain peace and harmony within the country. On the other hand freedom of speech has to ensure a free flow of ideas political or not, to maintain democracy and to ensure that people are provided with information for which the people are entitled, to be informed. Does the words used in the banner, amounts to committing of an offence under Section 120 of the Penal Code? Or is it common



usage of words within the scope and ambit of political criticism? At the hearing of this application the learned counsel for the Petitioners indicated to this court that he would not urge the issue of police inaction, in the manner pleaded.

In answer to paragraph 13 of the Petitioner's affidavit with annexure P6, ('B' report) the 3<sup>rd</sup> Respondent in his affidavit (at paragraph 9) states about the display of the banner as one which could bring disaffection to the Government and which could promote feelings of ill will and hostility among the people. It is also stated that on 24.09.2009 he was on special duty regarding the arrival of His Excellency the President in Tangalle. Pleadings of the 3<sup>rd</sup> Respondent on this point disclose that allegedly the banner violated the relevant laws and could easily bring discontent and disaffection among people. The banner was removed by the police and 2<sup>nd</sup> Petitioner's statement recorded and police took steps to produce the 2<sup>nd</sup> Petitioner before the Magistrate who remanded the 2<sup>nd</sup> Petitioner, but two days later was released on bail. As regards the position of informing the 2<sup>nd</sup> Petitioner, the reason for his arrest which must be conveyed to any suspect is not specifically dealt and stated by the 3<sup>rd</sup> and 2<sup>nd</sup> Respondents in their affidavits. It is no excuse or answer to merely plead that the words in the banner violated the relevant laws of the country. The constitutional requirement as per Article 13(1) is unambiguous as the suspect has to be informed the reason

for his arrest, and in a case of this nature it is incumbent upon the police Respondents to specifically plead that the 2<sup>nd</sup> Petitioner was informed, the reason for his arrest, and not expect court to surmise such compliance as required by law or gather such material from police notes. Even the written submissions filed on behalf of the Respondents (para 3 (iii) pg. 4) is silent on this point. Admission of a banner being displayed by the 2<sup>nd</sup> Petitioner is another matter which may be a plus point to the Petitioners as the 2<sup>nd</sup> Petitioners had not made any attempt to hide the truth. Perhaps the 2<sup>nd</sup> Petitioner believed that his acts or actions concerning the display of the banner is a legitimate right which he should pursue, in the context and background of the case where a pandol erected by the JVP was burnt.

A material fact contained in a document (3R8) when it is not pleaded in the petition and affidavit, would amount to a lapse on the part of the Respondents even if the document is filed with the petition and affidavit. Police notes and notes from the Information Book provides information but it cannot be full proof or conclusive.

I have had the advantage of perusing a variety of authorities. There is an important matter to be kept in mind in a case of this nature where the Apex Court of the country is called upon to decide such a case. Any Government or an

agency of the Government should be open to uninhibited public criticism. Curtailing such criticism or an attempt to resist such expression of persons or criticism would place an undesirable fetter of freedom of expression. The position may be different if a person by his speech or writing persuade others to violate existing law or overthrow by force or other unlawful means the existing Government but all other utterances or publication against the Government must be considered absolutely privileged.

Every citizen has a right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantages for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely. *City of Chicago Vs. Tribune Co* (1923) 139 NE 86; *Derbyshire County Council V. times Newspapers Ltd.* (1993) AC 534.

The two main issues to be considered is whether the words exhibited in the banner fall within the meaning of Section 120 of the Penal Code and also violate Section 74(1) of the Provincial Councils Elections Act No 02 of 1988 (as amended), and if not whether as a result of the 2<sup>nd</sup> Petitioner being arrested and

produced before a Magistrate infringes upon the fundamental rights of the Petitioners.

I have considered the views expressed by both parties in each other's written submissions. I am inclined to hold the view that initially the background facts need to be examined for the display of the banner which ultimately led to the arrest of the 2<sup>nd</sup> Petitioner. An election office of the JVP was established. A complaint was received by the police about a fire to a pandol erected by the JVP in or around the elections office. Though the persons who set fire to the pandol were unknown, an allegation was to the effect that supporters of the United People's Alliance attacked and set fire to the pandol. A Complaint was made to the respective police but the culprits were not apprehended. In response to the above incident as a mark of protest the JVP and more particularly the 2<sup>nd</sup> Petitioner displayed a banner over the burnt pandol with the words "uy Prd rdPmlal wdKavqfjS m%Pd;ka;%jdoh fuSlo?".

The above would be the background facts, and the resulting position of the burnt pandol, of the JVP. This no doubt was the spontaneous reaction by a party who suffered some damages or injury and from that (JVP) point of view is something to be taken very seriously. Even the general public may condone such acts of setting fire, especially during a period of elections in the country.

The question posed in the banner is about democracy of the Government of the day Is this democracy? m%Pd;ka;%jdoh fuSlo?. Connected to the incident of setting fire a question is posed. This does not, or posing such a question cannot be a basis to impute any wrong/offence, on the person responsible for exhibiting of those words. What had been objectionable to the police and the Respondents is the reference made to government and the particular government regime. i.e Rajapakse Government or Rajapakse regime, or more particularly to the words “uy Prd”. The adjective and the adjectival phrase used before Rajapakse Government is uy Prd. This means big and dirty. Or immensely dirty. I am firmly of the view that such comment or remarks contained in the banner makes no reference to an individual as the then President, but to the government of the day. I do agree with the learned counsel for the Petitioner that universally in political parlance calling a government dirty is quite common and a way of criticizing a government.

I also agree that its quite common to refer to a government and or a its regime by name of the Head of the State or Government. Reference made to like ‘Obama Government’ or “Obama Regime or Administration” is not a bad practice but a reference made universally.

I reject the submissions made on behalf of the Respondents that use of the words 'uy Prd' serves to mean a person reeking in filth or is filthy and unparliamentary. How the words displayed in the banner came to light need to be understood based on the background facts and circumstances that led to such display, which facts are considered above in this judgment. One cannot forget the fact that the people in the area or the general public became aware of the background facts, prior to such a display of the banner, since a JVP pandol was burnt. It is regrettable that the Respondents attempt to give an unacceptable extended meaning to the words displayed on the banner without understanding same in the context it was published. It is also unfortunate that for reasons best known to the Respondent the 2<sup>nd</sup> Petitioner was arrested and taken into custody and thus deprived and curtailed him of a right guaranteed under the Constitution. The guarantee extended by the Constitution to safeguard the personal liberty of the citizens is paramount.

*In Channa Peiris and others Vs. A.G and Others (Ratawesi Peramuna Case) – Digest Sri Lanka Law Reports Vol. (1) 1994 pgs. 2/3*

the Ratawesi Peramuna was an anti-government organization. However as a matter of law, merely vehement, caustic and unpleasantly sharp attacks on the government, the President, Ministers, elected representative or public officers are not per se unlawful

*Per Amerasinghe, J.*

(a) “The right not to be deprived of personal liberty except according to a procedure established by law is enshrined in Article 13(1) of the Constitution, Article 13(1) prohibits not only the taking into custody but also the keeping of persons in a state of arrest by imprisonment or other physical restraint except according to procedure established by law.”

(b) “Legitimate agitation cannot be assimilated with incitement to overthrow the government by unlawful means. What the third respondent is supposed to have heard, even according to the fabricated notes he has preferred, was a criticism, of the system of Government, the need to safeguard democracy, and proposals for reform.”

(c) “The call to ‘topple’ the President or the Government did not mean that the change was to be brought about by violent means. It was a call to bring down persons in power by removing the base of public support on which they were elevated.

If the throwing down was to be accomplished by democratic means, the fact that the tumble may have had shocking or traumatic effects on those who might fall is of no relevance. It is the means and not the circumstances that have to be considered.

The obvious purpose of Regulation 23(a) is to protect the existing government not from change by peaceable, orderly, constitutional and therefore by lawful means, but from change by violence, revolution and terrorism, by means of criminal force or show of criminal force.

*Lingens Vs. Austria, 8 July 1986, No. 9815/82, EHRR 407.*

“The limits of acceptable criticism are .... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance”

(at paragraph 42)

*Amaratunga Vs. Sirimal and Others (Jana Ghosha Case) 1993 1 SLR 264,*

“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” (pg. 271)

*Joseph Perera alias Bruten Perera Vs. The Attorney General and Others 1992 1 SLR 199*

is yet another significant case where a citizen’s right to criticize the government has been recognized in this country. In this case, *Sharvananda CJ held* that the constitutionally guaranteed freedom of speech and expression includes the expression of one’s ideas through banners, posters, signs etc. (vide: pg. 223 of). Moreover, his Lordship went on to state as follows:

“.... There must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. Government must be prevented from assuming the guardianship of the public mind. Truth can be sifted out from falsehood only if the Government is vigorously and constantly cross-examined. (at page 224).

The Respondents thought it fit to charge the 2<sup>nd</sup> Petitioner in the Magistrate Court under Section 120 of the Penal Code and Section 74(1) of the Provincial Council’s Elections Law .



Section 20 reads thus:

Whoever by words, either spoken or intended to be read, or by signs; or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the President or to the Government of the Republic, or excites or attempts to excite hatred to or contempt of the administration of justice, or excites or attempts to excite the People of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or attempts to raise discontent or disaffection amongst the People of Sri Lanka, or to promote feelings of ill-will and hostility between different classes of such People, shall be punished with simple imprisonment for a term which may extend to two years.

It is a section which requires exciting or attempts to excite feelings of disaffection to the Government. It is an offence against the State embodied under Chapter VI of the Penal Code. A prosecution under Chapter VI of the Penal Code requires the sanction and authority of the Hon. Attorney General (Section 127). In the absence of such authority no prosecution could be launched. The material provided to this court does not indicate any such authority of Attorney General.

Section 120 must be read with its explanation which reads as follows:

*Explanation* – It is not an offence under this section by intending to show that the President or the Government of the Republic have been misled or mistaken in measures or to point out errors or defects in the Government or any part of it, or in the administration of justice, with a view to the reformation of such alleged errors or defects, or to excite the People of Sri Lanka to attempt to procure by lawful means the alteration of any matter by law established, or to point out in order to

their removal matters which are producing or have a tendency to produce feelings of hatred or ill-will between different classes of the People of Sri Lanka.

The Penal effect of this section read along with the explanation need to be understood, that pointing out errors or mistakes of the Government cannot form the basis of an offence.

The Constitutional guaranteed freedom of speech and expression would not be negated by Section 120 of the Penal Code. Provision of Section 120 of the Penal code and its explanation contained therein guarantee freedom of expression and speech, and the explanation to the section no doubt fortify this position in great measure. Whatever comments and strongly used words against the government which does not excite feelings and cause public disorder by acts of violence cannot be a basis to prosecute a person under Section 120 of the Penal Code. I am of the view and I hold that the words displayed in the banner are not words strongly used to cause harm. Underline meaning of the words conveyed in the banner is to pose a question as regards 'democracy' and its need to be upheld, in the given circumstances and its context. There is no material presented to this court of any evidence of violence, by the 2<sup>nd</sup> petitioner who was a suspect in the Magistrate's Court, to be charged, without lawful justification and authority. I also hold that the words displayed in the banner does not constitute

an offence under Section 120 of the Penal Code, and there is absolutely no basis to arrest the 2<sup>nd</sup> Petitioner. To cause any annoyance or embarrassment to a Head of State or the Government will not form the basis of a prosecution under Section 120 of the Penal Code. Essence of Section 120 is whether the words in question incite the People to commit acts of violence and disorder and not whether the words are defamatory or not.

In a very recent case, where I had the benefit to be associated and share the bench with my brothers Justice Dep and Justice Sisirra de Abrew. (S.C 63/2009), considered a similar matter. In the said case the allegation was pasting of posters by the JVP which was against the Government. Hon. Justice Dep who delivered the judgment with whom I agreed, considered all the background facts. The following excerpts from the said judgment immensely fortified my views as regards the application of Section 120 of the Penal Code.

..... "This case emphasize the fact that what is relevant is the state of mind of the arresting officer at the time of arrest.

The Petitioners were originally produced under S. 118 of the Penal Code. The learned Magistrate had pointed out that this section was repealed by the Penal Code

(Amendment) Act, No. 12 of 2002. Then the Police had relied on Section 120 of the Penal Code. Section 120 refers to exciting or attempt to excite feelings of disaffection to the President or Government of the Republic, which is similar to the offence referred to

as “Sedition” under Common Law. This position taken up by the police was apparent from the B reports filed by them marked as P5 & P6. The Section 120 of the Penal Code should be read with the explanation given to it.

..... At this stage it is appropriate to consider the interpretation given by the Indian Supreme Court on the corresponding section of the Indian Penal Code.

In the case of Kedar Nath Singh V the State of Bihar 1962 AIR 955 1962 SCR Supl (2) 769, the Supreme Court of India held that “a citizen has a right to say or write whatever he likes about the government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder” (pages 805 0 807)

Therefore intention to incite people to violence or create public disorder are essential constituent element of sedition.”

Information (‘B’ Report) filed in the Magistrate’s Court also reveal that the 2<sup>nd</sup> petitioner has allegedly violated Section 74(1) of the Provincial Councils Elections Act. Section 74(1) reads thus.

Section 74(1) begins with the following introductory paragraph:

“During the period commencing from the first day of the nomination period at an election and ending on the day following the day on which a poll is taken at such election, no person shall for the purpose of promoting such election display

(a) in any premises, whether public or private, any flag or banner except in or on any vehicle that is used for the conveyance of a candidate at such election; or .....

The main ingredient to be established as required by the said section would be words displayed in a banner for the purpose of promoting such election.

The use and the purpose of the banner in question, is in no way connected to election promotional material for the Provincial Council Election. Prohibition under Section 74(1) is the display of election related matters pertaining to the Provincial Council Election.

The banner conveys a meaning about Democracy of the Government of the day. To be more precise, it states whether it is a democratic way of the Government, as the banner in question stood over the burnt pandol erected by the JVP. Merely being critical of the Government and its democracy would not constitute an offence under Section 120 of the Penal Code and Section 74(1) of the Provincial Councils Elections Act. What is conveyed in the banner has nothing to do with any election. To be critical of former President's Government or for that reason of any Government is a right that should be enjoyed by any person in a country committed to preserve democracy, and to protect the basic principles and true nature, scope and extent of fundamental rights guaranteed by our Constitution. Petitioners being members of a recognized political party could oppose the Government and its policies. The arrest of the 2<sup>nd</sup> Petitioner is arbitrary and cannot be discriminated because of his or his party's political

opinion. There is nothing improper, illegal or mischievous contained in the banner, to excite the public or disturb national/public security.

Therefore I hold that the Respondents have violated Article 12(1), 12(2), 13(1) and 14(1)(a) of the Constitution. Respondents were motivated by extraneous factors such as 2<sup>nd</sup> Petitioner being a supporter of a political party which opposes the Government, and its policies, and the banner in question was critical of the Government of the then President of the country who was to travel on the road (para 9(ii) of the 3<sup>rd</sup> Respondent's affidavit). 2<sup>nd</sup> and 3<sup>rd</sup> Respondents alone cannot be held Responsible for the above violations. As the State is liable I order the Inspector General of Police to pay Rs. 20,000/- to the 2<sup>nd</sup> Petitioner on behalf of the State.

Application allowed.

JUDGE OF THE SUPREME COURT

Wanasundara P.C., J.

I agree

JUDGE OF THE SUPREME COURT

Jayawardena P.C., J.

I agree.

JUDGE OF THE SUPREME COURT