

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

**S.C. 107/86 - S.C. 108/86 - S.C. 109/86**

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

K. Joseph Perera alias Brutten Perera, Heddawatte, Chilaw

K.S. Lorens Perera alias Ruman Perera. 1/5, New Arc

Gardens, St. James Street, Chilaw.

Lionel Dias Wijegunasinghe of 669, High Level Road,

Nugegoda.

**Petitioners.**

Vs.

1. The Attorney General, Colombo – 12.

2. P.B. Balasuriya I.P. Police Station. Chilaw.

3. Henry Fernando I.P. Police Station, Chilaw.

4. Baskarasingham, Commissioner of Prisons,

Remand Prison, Negombo.

**Respondents.**

Before: Sharvananda, C.J. Wanasundara, J. Athukorala, J.

L.H. de Alwis, J. and Seneviratne, J.

Counsel: D.L. Abeykoon with R. Balendra, C.V. Vivekanandan and

N.N. Perera for petitioners in S.C. 107/86 and 109/86.

C.V. Vivekanandan with K.Packiyalingam, Miss K.

Ranjani Rajanathan and N.N. Perera for Petitioner in S.C.

108/86.

Upawansa Yapa D.S.G. with C.R. de Silva S.S.C. for

Attorney General instructed by Mrs. N. Nikapitiya

Senior State Attorney.

Argued on:16.03.87, 17.03.87, 18.03.87 and 19.03.87.

Decided on:25.05.87.

**JOSEPH PERERA ALIAS BRUTEN PERERA  
V.  
THE ATTORNEY GENERAL AND OTHERS**

**SUPREME COURT**

SHARVANANDA, C.J.

WANASUNDERA, J.

ATUKORALE, J.

L.H. DE ALWIS, J. AND

SENEVIRATNE J.

**S.C. 107/86, 108/86 AND 109/86**

16, 17, 18 AND 19 MARCH 1987.

*Fundamental rights – Regulation 28 of the Emergency (Miscellaneous) (Provisions and Powers) Regulation No. 6 of 1986 – **Illegal arrest and detention – Freedom of speech and expression – Constitution Articles 12(2), 13(1), 14(1)**—Power of President to make Emergency Regulations – The virus of Regulation 28 of the Emergency Regulations – Regulations 18, 19, 26(a), 26(d), and 33 of the Emergency Regulations – Burden of proof – Constitution Article 15(2) and (7) – Section 5 and 8 of the Public Security Ordinance and Articles 155(2) and 80(3) of the Constitution – Prior restraints – Pre-censorship.*

Three petitions 107 – 109/86 were consolidated and heard together. The petitioner in application No. 107/86, Joseph Perera *alias* Bruten Perera was a member of the Revolutionary Communist League and organizer of the 'Young Socialist' in Chilaw. The petitioner in application No. 108/86, Lorenz Perera *alias* Ruman Perera is a brother of Joseph Perera. The petitioner in application No. 109/86, Lionel Dias Wijegunasinghe was a one-time lecturer in History in the Colombo University. The Communist League organized a lecture to

be delivered by the petitioner in application No. 109/86 at the Luxmi Hall, Chilaw on 26th June 1986 at 3.30 p.m. on 'Popular Frontism and Free Education'. Two days prior to the meeting a leaflet XI accusing the U.N.P. Government supported by the Roman Catholic Bishop of Chilaw of getting enmeshed in a capitalist racist war with the result that there were no funds to spend on free education and calling on the witch-hunted teachers, progressive students and parents to attend the meeting to get together and establish their rights by imposing the fact that the accused parties are the enemies of the students and were trampling their rights, was distributed. The leaflet invoked the progressives to attend the meeting on 26 June and was issued in the name of 'Young Socialist of the Revolutionary Communist League' 'Kamkaru Mawatha'. A poster 'X' advertised the lecture.

**Before the commencement of the meeting at Luxmi Hall on 26 June 1986, a Police party led by the 2nd respondent arrived at the place of the meeting and dispensed the crowd and took into custody the three petitioners.** On the morning of the 26 June, 1992 the police had received two complaints from the Principal, St. Mary's College, Chilaw and the Vice Principal of Ananda College, Chilaw, to the effect that a meeting was organized and arranged to be held by some revolutionaries with a view to creating unrest among the students of the area. The Principal of St. Mary's College also informed that he had received a warning letter on 23 June, 1986 signed 'Ealam Tigers' threatening to blow up the school. The Principal connected this threat with the proposed meeting. The threatening letter was not produced, but the contents were taken down into the Information Book by the Police who recorded the complaints of the school authorities.

A detention order was served on the three petitioners on 27 June 1986, and they were held at the Chilaw Police Station until 15 July 1986. On this day the Magistrate ordered them to be remanded until 29 July 1986. The remand order was extended until 25 August 1986 but they were released on bail on 7 August 1986. Sergeant Major Abeysinghe claimed that it was he and not the 2nd respondent who arrested the petitioner. The respondents sought to justify the arrest and detention on the basis of powers vested in the police by Regulations 18 and 19 of the Emergency Regulations. The petitioners were alleged to have been connected or been concerned in the commission of offences under Regulations 26(a), 26(d) and 33 of the Emergencies Regulations. They were also said to have contravened Regulation 28 by distributing x and xi without the permission of the police.

**Held:**

- (1) Article 14 of the Constitution deals with those great and basic rights which are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country. Freedom of speech by Article 14(1)(a) goes to the heart of the natural rights of an organized freedom loving society to impart and acquire information. Of that freedom one may say that it is the matrix, the indispensable condition of nearly every other freedom. This freedom is not absolute. There is no such thing as absolute and unrestricted freedom of speech and expression wholly free from restraint, for, that would amount to uncontrolled license, which would lead to anarchy and disorder. Article 29(2) of the Universal Declaration of Human Rights sets forth the cases in which this freedom of expression may legitimately be restricted. On similar lines, there are provisions in our Constitution. Article 15(2) provides that the exercise and operation of the right of freedom of speech and expression shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or

incitement to an offence. Article 15(7) further provides that 'the exercise and operation of all the fundamental rights declared and recognized by Article 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interest of national security, public order and the protection of public health or morality or for the purpose of the due recognition and respect of the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society.

Section 5 of the Public Security Ordinance as amended by law No. 6 of 1978, enables the President to make Emergency Regulations. Section 8 of the Public Security Ordinance is a preclusive section providing that no Emergency Regulation and Order, Rule, or Direction made or given thereunder shall be called in question in any court. Article 155(2) of the Constitution empowers the President to make regulations overriding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution.

**Thus the President's legislative power of making Emergency Regulations is not unlimited. It is not competent for the President to restrict via Emergency Regulations, the exercise and operation of the fundamental rights of the citizen beyond what is warranted by Article 15(1) to (8) of the Constitution. The grounds of restriction specified in the limitation Article 15 are exhaustive and any other restriction is invalid.**

The regulations which the President is empowered to make owes its validity to the subjective satisfaction of the President that it is necessary in the interest of public security and public order. He is the sole judge of the necessity of such regulation and it is not competent for this court to inquire into the necessity for the regulations *bona fide* made by him. The regulation to be valid must satisfy the objective test that, it is in fact in the interest of national security, public, order etc. It is competent to the court to question the necessity of the Emergency Regulation and whether there is a proximate or rational *nexus* between the restriction imposed on a citizen's fundamental rights by Emergency Regulation and the object sought to be achieved by the regulation. The integrity of the prohibition referable to section 8 of the Public Security Ordinance is to the extent detracted. Further, regulations made under section 5 of the Public Security Ordinance do not attract the immunity from challenge provided by Article 80(3) of the Constitution. In a contest regarding the validity of a regulation, the President's evaluation of the situation that the regulation appeared to him to be necessary or expedient is not sufficient to tend validity to the regulation.

Freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. It includes one's idea through banners, posters, signs etc. It includes the freedom of discussion and dissemination of knowledge. It includes freedom of the press and propagation of ideas, this freedom is ensured by the freedom of circulation. The right of the people to hear is within the concept of freedom of speech. There must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of the government and expose its weaknesses. Debate on public issues should be uninhibited, robust and widely open and that may well include vehement, caustic and sometimes sharp attacks on government.

Such debate is not calculated and does not bring the government into hatred and concept.

It is only when the words written or spoken which have the tendency or objection of creating public disorder that the law steps in to prevent such activities in the interest of public security or public order.

Freedom of speech must yield to public order. In the interest of public order, the State can prohibit and punish the courses of loud noises in the street and public places by means of sound amplifying instruments, regulate the hours and places of public discussion, the use of public streets for the purpose of exercising freedom of speech, provide for the expulsion of hecklers from meetings and assemblies, punish utterances tending to incite an immediate breach of the peace or riot as distinguished from utterances causing mere public inconveniences, annoyance or unrest.

Regulation 28(1) applied to 'any posters, handbills or leaflets' and required the permission of the police whatever its character for valid distribution.

The general rule is that any form of previous restraint is regarded on the face of it as an abridgement of the freedom of expression and offends Article 14(1)(a) of the Constitution. Any system of prior restraint of expression comes to court to bring a heavy burden of showing justification for the enforcement of such a restraint.

Pre-censorship is under our law not necessarily unconstitutional and can be justified if brought within the ambit of Article 15. However, any system of pre-censorship which confers unguided and unfettered discretion upon an executive authority without narrow objective and definite standards to guide the official is unconstitutional.

Regulation 28 violates Article 12 of the Constitution. It is violative of the equality provision because, it would permit arbitrary and capricious exercise of power which is the antithesis of equality before the law.

The permission of the police mandated by regulation 28 is a form of prior restraint. It abridges the freedom of expression guaranteed by the Constitution. There is no rational or proximate *nexus* between the restriction imposed by regulation 28 and national security/public order. Hence the regulation is invalid and cannot form the basis of an offence in law.

**The burden rests on the respondents to justify the arrest and detention of the petitioners.**

**Held further:**

**(Sarvananda C.J. and Atukorale J. dissenting)**

**1.(a) There was no illegal arrest and the detention was illegal only from 15.7.1986 (and not from 26.6.1986).**

The powers of a police officer under the Emergency Regulations are in addition to and not in derogation of his powers under the ordinary law (regulation 54). In

deciding on the validity of the arrest the sole issue for the court is the knowledge and state of mind of the officer concerned at the time of the making of the arrest.

A state of emergency was in existence and prevailed in the country and it was the duty of the police and armed forces to be as alert and vigilant as possible to defend the State and the people from armed attack and subversion. It would not have been consistent with the vigilance expected of the police to ignore the complaint made by two responsible officers of two responsible institutions that persons were planning to take steps to blow up a school and also create unrest and disturbances among the students and have it directed against the government. The police team had promptly arrived at the scene of the offence and there saw a crowd of young persons and a meeting about to begin. Posters were affixed at the place. The petitioners were in possession of documents which on a cursory glance appeared to be subversive. Document 'XI' appeared to contain if not seditious statements, at least statements that can be regarded as tendentious. 'XI' was a ten paged tract that was in Sinhala. All this material required time to consider and legal opinion too could well have been considered necessary.

In deciding on the validity of the arrest, the sole issue for the court is the knowledge and state of mind of the officers concerned at the time of making the arrest.

***Per Wanasundare J.:***

“the principles and provisions relating to arrest are materially different from those applying to the determination of the guilt or innocence of the arrested person. One is at or near the starting point of a criminal proceeding while the other constitutes the termination of those proceedings and is made by the judge after hearing submissions of all parties. The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. On the other hand for an arrest, a mere reasonable suspicion or a reasonable complaint of the commission of an offence suffices. I should however add that the test is an objective one. I am of the view that the latter requirement was fulfilled in this case.”

(b) Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.

(c) This is not a case of the police riding roughshod over the right of citizens. The police action was *bona fide* and within the scope of their functions and the outcome has depended on a legal issue.

(d) No police officer can predict the trial outcome of case or/how a legal provision would be interpreted by the court. If they are placed in peril and heavy damages awarded in respect of their acts where prosecution was to fail, no police officer would be inclined to perform his functions and may henceforth decide to leave well alone not only doubtful cases, but practically all cases, thereby bringing the administration of justice to a standstill.

**(2) Though the initial arrest was legal, there is nothing in the document which will justify the conclusion that they would have brought the President or the government into hatred or contempt or incite feelings of any dissatisfaction.**

**They cannot be reasonably characterized as subversive literature. On completion of investigation into the complaint by 15.7.1985 no offence under the regulations could have been disclosed and detention after this date was illegal.**

**(3) Compensation in a sum of Rs. 10,000/- payable by the State would meet the ends of justice.**