



Weerawansa v. Attorney General, et al.

[2000] 1 LRC 407; (2000) 3 CHRLD 211

Country: Sri Lanka

Region: Asia

Year: 2000

Court: Supreme Court

Health Topics: Prisons

Human Rights: Right to due process/fair trial, Right to liberty and security of person

Facts

W, an Assistant Superintendent of Customs, was arrested on 30 April 1996 by the Criminal Investigation Department (CID) acting on the second respondent's (DIG Sumanasekera) instructions on suspicion of aiding and abetting the smuggling of illegal weapons. They purported to act under s 6(1) of the Prevention of Terrorism (Temporary Provisions) Act, No 48 of 1979 (PTA). W was then detained under s 7(1) PTA until 2 May 1996.

Section 7(1) authorized the detention of a person arrested under s 6(1) for a period not exceeding 72 hours when, unless a s 9 detention order was made, the detainee must be produced before a magistrate. From 2nd May until 1st August 1996 W was detained under a s.9 detention order, which permitted the Minister to authorize the detention of a person who she believes or suspects of being connected with or concerned in any unlawful activity, within the terms of the PTA, for no more than three months. On 1st August this detention was extended for another three months by a second order despite the fact that W was in poor health and making repeated visits to medical clinics. On the 2nd October W was taken into hospital and on the same day transferred into the custody of Customs and detained until 31 December 1996 under a Magistrates' remand order despite being never seen by the latter.

W complained that these actions infringed his constitutional rights: firstly, under Art 13(1), which provided that a person must be arrested according to a procedure established by law and told the reasons for the arrest; and secondly, under Art 13(2), which provided that a person deprived of liberty must be brought before the judge of the nearest competent court according to lawful procedure and must not be further deprived of his liberty except upon and in terms of the order of such judge made in accordance with a lawful procedure. The PTA was enacted with a two-thirds majority of the legislature, and accordingly, in terms of Art 84 of the Constitution, became law despite any inconsistency with the constitutional provisions.

[Adapted from INTERIGHTS summary, with permission]

Decision and Reasoning

In upholding W's claim, the Supreme Court held that:

The evidence that led to W's arrest did not give rise to a reasonable suspicion that he was connected with or concerned in any 'unlawful activity' as defined in the PTA. Therefore, as the arrest did not comply with s 6(1), it was not in accordance with a procedure established by law and therefore infringed W's fundamental rights under Art 13(1).

The exception to Art 13(1) provided by s 7(1) - 72 hours detention without production before a Magistrate - only applied where the stipulated pre-condition of a valid and proper arrest in accordance with s 6(1) existed. Therefore, as the arrest under s 6(1) was not valid the second respondent and CID officers did not have the right to detain W under s 7(1) and, consequently, infringed Art 13(2).

A section 9(1) detention order required not just that the Minister should have a subjective belief that the accused was connected with or concerned in any 'unlawful activity', but that there were objective reasons for her so doing. If these were met then the order and detention would be lawful even if the preceding arrest and detention were invalid. However, in the present case the Minister did not exercise her statutory discretion independently. Instead she merely adopted the second respondent's conclusions, which were, in any event, willfully false, perverse and unreasonable. Thus, the detention under the first Ministerial order was unlawful and breached Art 13(2).

Further, by failing to consider whether there was in fact any reason to continue to deprive W of his liberty the

order to extend his detention for another three months also breached Art 13(2).

Detention orders, including extensions, whether under the PTA or other emergency regulations should not be made mechanically (Rodrigo v de Silva [1997] 3 Sri LA 265, 299 applied). In particular the failure to bring the poor health of W - relevant to both the place and period of any future detention - to the attention of the Minister meant that she was unable to make an informed decision when issuing the second order.

Further whilst s 9(1) removes the second safeguard provided by Art 13(2) - the need for a judicial order authorizing further detention - it does not remove the first, namely that a person deprived of liberty must be brought before a judicial officer. Such production is more than a mere formality, but is internationally recognized as an essential component of human rights protection which must be strictly complied with by the executive (Edirisuriya v Navaratnam [1985] 1 Sri LR 100 applied). In particular the failure to produce the detainee subsequent to the making of an executive detention order, as here during W's period of detention from May to October 1996, infringes Art 13(2).

The transfer to and detention by Customs by the fourth respondent (the Deputy Director of Customs) occurred in the absence of any reasonable suspicion that W had committed an offence under the Customs Ordinance or of W being informed of the reasons for his detention. Nor was the Human Rights Commission informed contrary to s.28 of the Human Rights Commission of Sri Lanka Act, No 21 of 1996. Both these omissions infringed W's rights under Art 13(1).

The failure of the eighth respondent (the Magistrate) to visit or communicate with W whilst he was in hospital before issuing a remand order on the 3rd October 1996 and several subsequent orders meant that he omitted to satisfy the two essential tests of Art 13(2). Firstly, that the suspect must be taken to where the nearest competent judge is, or that judge must go to where the suspect is, and secondly, that the suspect must have an opportunity to communicate with the judge. With regard to a hospitalized detainee it was insufficient to rely on a medical report from the police that it would be hazardous to move him since the magistrate or his delegate should visit him (dicta of Wimalaratne J in *Kumarasinghe v AG* (1982) SC 54/82 SCM disapproved). Consequently the eighth respondent lacked the jurisdiction to make the remand order and extensions with the result that the subsequent period of detention until W's release on bail on 31st December 1996 breached Art 13(2).

However, under Art 126 of the Constitution W would only be entitled to relief in the foregoing common law proceedings if the Magistrate's remand orders constituted executive or administrative action. It cannot be assumed that the impugned remand orders were intrinsically judicial in character. However, in this case the failure to bring W before the Magistrate resulted in a patent lack of jurisdiction which the latter omitted to address. In these circumstances, the remand orders were not judicial acts carried out in the exercise of judicial power and, accordingly it was the executive who had custody of W from the 3rd October 1996 until his release. In these circumstances the State and not the eighth respondent was liable for the violation of Art 13(2).

W was awarded Rs 300,000 as compensation. Rs 200,000 to be paid by the state, Rs 75,000 by the 2nd Respondent and Rs 25,000 by the 4th Respondent.

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Decision Excerpts