

ASHIK
v
BANDULA AND OTHERS
(Noise Pollution Case)

SUPREME COURT
SARATH N. SILVA, C.J.
TILAKAWARDANE, J.
SOMAWANSA, J.
SC FR 38/2005
NOVEMBER 9, 2007

Constitution – Art 3 – Art 126 – 126(4) – Art 12(1) – Non issue of a loudspeaker permit – Police Ordinance Section 80 – Imposing of restrictions – Breach of fundamental rights? National Environment Act 47 of 1980 – Sections 23P – 23R – Amended by Act 56 of 1988 – Penal Code – Section 26 – Sound Pollution – Standards – Directions by the Supreme Court. – Public Nuisance.

The petitioners complained that, non issuing of loudspeaker permits under S80 Police Ordinance to the trustees of the Jumma Mosque Weligama and imposing restrictions on such use is in violation of their fundamental rights.

Held:

Per Sarath N. Silva C.J.

"A perceived convenience or advantage to some based on a religious practice cannot be the excuse for a public nuisance which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity."

- (1) People have been denied the equal protection of the law by the failure of the executive to establish by way of regulations an effective legal regime as mandated by S23P of the National Environmental Act 47 of 1980 (amended) to safeguard the public from harmful effects of noise pollution – No guidelines for the effective implementation of the applicable provisions of law so as to provide to the people equal protection of the law guaranteed by Art 12 (1) have been issued.

The Supreme Court having considered the matters before it, issued specific directions in terms of Art 126(4) of the Constitution.

APPLICATION under Art 126(1) of the Constitution.

Cases referred to:

1. *Marshall v Gunaratne Unnanse* – 1 NLR 179
2. *Church of God (full Gospel) in India v K.K.R.M.C. Welfare Association* – 1AR 2000 – SC – 2773.
3. *In Re Noise Pollution* – AIR 205 – SC 3136

Ikram Mohamed PC for the petitioners.

Ms. Indika Demuni de Silva – 2nd, 3rd, 4th respondents.

Ms. B.J. Tilakaratne, Deputy Solicitor General for Central Environmental Authority.

Uditha Egalahewa for 7th respondent.

March 9, 2007

SARATH N. SILVA, C.J.

The proceedings in this case commenced with an application 01
by the Trustees of the Kapuwatte Mohideen Jumma Mosque of
Weligama impleading the action of the 2nd respondent (ASP) in
not issuing a loudspeaker permit under section 81 of the Police
Ordinance to the extent permitted in previous years and in
imposing restrictions on such use, as being in breach of their
fundamental rights.

When the matter was supported on 25.2.2007 for leave to 10
proceed the Court noted that the application raises fundamental
issues with regard to sound pollution and the standards that should
be enforced by the Central Environmental Authority, and the
guarantee of the equal protection of the law (Article 12(1)) in this
regard.

Accordingly notice was issued on the Central Environmental
Authority which was later added as the 6th respondent.

The Environmental Foundation Limited being a non- 20
governmental organization that has consistently engaged in public
interest litigation to preserve and protect the environmental was
permitted to intervene in the case in view of the general concern
that emerges in this case requiring adequate legal safeguards to
protect the People from exposure to harmful effects of sound
pollution.

Mr. Senaka Weeraratne, Attorney-at-Law, sought to intervene representing the interests of persons affected by noise pollution. He was added as the 8th respondent.

In his affidavit dated 29.6.2007, he contradicted the claim of the petitioners for unrestricted use of loudspeakers in the call to prayer from the Mosque. He also contended *inter alia* that such unrestricted use makes:-

"Captive listeners of people of other religious faiths and violates the fundamental rights of the general public, such as the right to silence and the right to quiet enjoyment of property." 30

As a matter of personal experience, he contended in paragraph 4 of his affidavit that he is an aggrieved party as a result of similar conduct of a place of worship situated on the Marine Drive between Jaya Road and Nimal Road in a residential area in Colombo where

"the high pitched sound of a call to prayer is amplified five times a day beginning in the early hours of the morning, that is at 5.00 a.m. and ending at 8.15 p.m. and repeated daily and which conduct is causing unnecessary hardship and much disturbance, to residents in the neighbourhood the majority of whom belong to other religious faiths and which locality comprise in addition to residential dwellings, schools e.g. Holy Family Convent, private Accountancy Studies Institutions, Buddhist temples, Kovils, Churches....." 40

With the inclusion of the aforesaid parties, and considering the material presented and the submissions that were made the Court proceeded with the matter as being of public interest, to make a determination as to the effective guarantee of the fundamental right enshrined in Article 12(1) of the Constitution for the equal protection of the law in safeguarding the People from harmful effects of noise pollution. The impact of pollution is pervasive and its effect cannot be identified with the right of any particular person. The matter has to be viewed as being of general and public concern affecting the community as a whole. 50

The second respondent whose action has been impleaded in this case filed an affidavit supported with several other affidavits and documents. It appears that the particular dispute with regard to the action of the 2nd respondent, the ASP, being himself a Muslim, arose as a result of loudspeakers permits granted to three mosques situated in close proximity in the village of Kapuwatte in Weligama. 60

The dispute is between the Kapuwatte Mohideen Jumma Mosque and Jiffery Thakkiya Mosque on the one hand and the Jamiul Rahman Jumma Mosque on the other.

In paragraph 5 of the affidavit the 2nd respondent has stated that to the best of his knowledge from about April 2004 residents in the area where the three Mosques are located have complained of noise pollution due to the excessive use of the loudspeakers by the three mosques. 70

That, subsequently a dispute had arisen between the persons associated with the Mohideen Jumma Mosque and Jamiul Rahman Mosque with regard to the use of loudspeakers which resulted in the parties lodging complaints against each other at the Weligama Police Station. The Police conducted investigations into the incidents and being apprehensive of an imminent breach of peace filed a "B" Report bearing No. 2154/04 in the Magistrate Court of Matara citing persons associated with the said Mosques as parties. It appears that the proceedings are continuing. The allegation now appears to be that the 2nd respondent has given more favourable treatment to the Jamiul Rahman Mosque. 80

The 2nd respondent has produced marked "2R4A" to "2R4G" photocopies of some of the complaints and affidavits of persons, all of whom are Muslims that specifically state that noise pollution resulting from excessive noise emitted from loudspeakers of the Mosque, has caused severe health problems. Two of the deponents have coronary ailments and have produced medical evidence in support. The ASP has stated that it was in these circumstances that he reduced the use of loud speakers in the call for prayer to 3 minutes since in his view as a Muslim that period is adequate. The petitioners have not sought to contradict the material adduced by the 2nd respondent. 90

It is seen that complaint emerge from Muslims themselves as to the harmful effects of excessive emission of noise from loudspeakers in Mosques. Thus Mr. Weeraratne does not stand alone as a victim of such excessive noise.

Although there is no contest in the case as to the harmful effects of noise pollution the case has gone on for more than 2 years to enable suitable regulations to be made to be implemented by the Central Environmental Authority effectively. 100

Section 23P to section 23R of the National Environmental Act No. 47 of 1980 as amended provides for restrictions on noise pollution. The scheme of section 23P and 23R is that it would be an offence to emit noise in excess of the volume intensity and quality of the standards or limitations that are prescribed which thus becomes a prerequisite for the effectiveness of these provisions. Deputy Solicitor General submitted that the standards and limitations that have now been prescribed in relation to industrial noise cannot be used in respect of community noise (Vide, proceedings 28.3.05). 110

In the circumstances the parties agreed for adjournments to facilitate the formulation of Regulations.

Draft regulations have been tendered from time to time to Court.

The Environmental Foundation limited made a comprehensive written submission that the initial draft regulations would be unworkable and ineffective and that in contrast the existing legal regime as contained in; section 80 of the Police Ordinance regarding the grant of permits for the use of loudspeakers, amplifiers and the like; section 261 of the Penal Code with regard to the offence of public nuisance; the provisions of the Code of Criminal Procedure with regard to the abatement of any nuisance and the National Environmental (Noise Control) Regulations No. 1 of 1996; are adequate and that suitable directions could be issued by this Court in terms of Article 126(4) of the Constitution to assure the people equal protection of the applicable legal regime. 120

The Court noted that it is desirable to grant further time to formulate suitable Regulations and the added parties were 130

permitted to make representations to the relevant authority to improve the draft. Several postponements have been granted but there appears to be indecision, disputes, vacillation and on the whole a lack of collective will to take positive action. Deputy Solicitor General now submit that she has received instructions to move to add the Ministry of Religious Affairs as a party. This, in our view puts the matter back to square one. It has to be firmly borne in mind that Sri Lanka is a secular State. It terms of Article 3 of the Constitution, Sovereignty is in the People at common devoid of any divisions based on perceptions of race religion language and the like. Especially in the area of preserving the environment and the protection of public health, being of immediate concern in this case, there could be no exceptions to accommodate perceived religious propensities of one group or another. No religion advocates a practice that would cause harm to another or worse still a would cause pollution of the environment, a health hazard or a public nuisance being an annoyance to the public. 140

We have had in this country probably the oldest jurisprudential tradition of a secular approach in dealing with matters that constitute a public nuisance. I would refer to the Judgment of this Court handed down in the year 1895 in the case reported in *Marshall v Gunaratne Unnanse*⁽¹⁾. In that case the principal trustee of a Buddhist Vihare in Colombo was charged for creating noise in the night and disturbing the inhabitants of the neighbourhood. The report to Court was under the then applicable section 90 of the Police Ordinance. Considering the particular circumstances of the case Bonsor C.J., upholding the conviction stated as follows (at page 180): 150

"..... the idea must not be entertained that a noise, which is an annoyance to the neighbourhood, is protected if it is made in the course of a religious ceremony. 160

No religious body, whether Buddhist, or Protestant, or Catholic, is entitled to commit a public nuisance, and no license under section 90 of The Police Ordinance, 1865 will be a protection against proceedings under the Penal Code, though it may protect them from proceedings under the Police Ordinance."

It is to be noted that in terms of section 261 of the Penal Code a person is guilty of public nuisance who does any act or is guilty of an illegal omission, which causes *inter alia* any annoyance to the public or to the people in general who dwell or occupy any property in the vicinity. Section further states as follows: 170

"A public nuisance is not excused on the ground that it causes some convenience or advantage."

The proposition of Bonser, C.J., which could be cited as a classic statement of a secular approach in dealing with a public nuisance is referable to the final sentence of section 261 cited by me above. A perceived convenience or advantage to some based on a religious practice cannot be the excuse for a "public nuisance which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity". 180

Subsequent jurisprudential developments in other countries follows a similar trend of reasoning.

In the case of *Church of God (full gospel) in India v K.K.R.M.C. Welfare Association*⁽²⁾ at 2773 the Supreme Court of India posed the selfsame question as follows:

"Whether a particular community or sect of that community can claim rights to add to noise pollution on the ground of religion?" 190

Shah, J. in his Judgment at 2774 stated as follows in answer to that question

"Undisputedly no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice-amplifiers or beating of drums. In our view, in a civilized society in the name of religion activities which disturb old or infirm persons, students, or children having their sleep in the early hours or during day-time or other persons carrying on other activities cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without 200

there being any unnecessary disturbance by the neighbours. Similarly, old and infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick people afflicted with psychic disturbances as well as children upto 6 years of age are considered to be very sensitive to noise. Their rights are also required to be honoured."

210

It transpired in the course of the submissions that at times there is rivalry between respective religious groups. In this case the rivalry appears to be between different places of worship of one religious group. It is commonly known that when there is call to prayer in the early hours of the morning at about 5.00 a.m. on the other hand amplifiers and loudspeakers blare forth recorded chanting of "pirith". The proceedings in this case evoked much response of persons who are buffeted by the countervailing forces of such amplified noise.

It may be appropriate here to state *albeit* briefly some matters with regard to the chanting of "pirith" which dates back to the time of the Buddha. The chanting of "pirith" takes place only upon an invitation addressed three times to the Maha Sangha. Chanting follows with compassion to the devotees who address the three-fold invitation.

Much respected Piyadassi Thero in his work titled "The Buddhas Ancient Path" has stated as follows (at page 17) that benefit could be derived only, "*by listening intelligently and confidently to paritta sayings because of the power of concentration that comes into being through attending whole-heartedly to the truth of the sayings.*"

Thus there must necessarily be a close proximity between the person chanting and the person who is listening. Blaring forth the sacred suttas and disturbing the stillness of the environment, forcing it on ears of persons who do not invite such chant is the antithesis of the Buddha's teaching.

I would finally refer to the important case in India. In *Re. Noise Pollution*⁽³⁾ at 3136, especially because in that case the Supreme Court of India issued several directions in order to safeguard the people from the harmful effects of noise pollution. The motion of the

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interveniēt 6th respondent is that similar directions be issued pertinent to our legal context in terms of Article 126(4) of the Constitution.

The Chief Justice of India commences his judgment delving into the etymology of the term "Noise" itself and has noted that it is derived from the Latin "Nausea" defined as unwanted sound. He has cited a leading authority which describes unwanted sound as "a potential hazard to health and communication dumped into the environment without regard to the adverse effect it may have on unwilling ears and has continued to state that

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"noise is more than just a nuisance. It constitutes a real and present danger to people's health. Day and night, at home, at work, and at play, noise can produce serious physical and psychological stress. No one is immune to this stress. Though we seem to adjust, to noise by ignoring it, the ear, in fact, never closes and the body still responds – sometimes with extreme tension, as to a strange sound in the night."

Further, "that noise is a type of atmospheric pollution. It is shadowy public enemy whose menace has increased in the modern are of industrialisation and technological advancement." (at 3141 and 3142).

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The Supreme Court of India has firmly rejected the contention that there is a fundamental right to make noise associated with the freedom of speech and expression. The Chief Justice observed -

"Nobody can claim the fundamental right to create noise by amplifying sound of his speech with the help of loudspeakers. While one has a right to speech, and others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge in aural aggression." (at 3141)

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In an exhaustive survey, the Supreme Court of India has dealt with the developments in many other jurisdictions where comprehensive provisions have been made to safeguard people from the harmful effect of the public nuisance of noise pollution and finally the Court issued several directions (at 3164-3165) including

a direction that "no one shall beat a drum or tom tom or blow trumpet or beat or sound any instrument or use any sound amplifier at night (between 10.00p.m. and 6 a.m.) except in public emergencies".

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There is no dispute in this case that People have been denied the equal protection of the law by the failure of the executive to establish by way of regulations an effective legal regime as mandated by section 23P of the National Environmental Act No. 47 of 1980, as amended by Act No. 56 of 1988 to safeguard the public from the harmful effects of noise pollution. The facts also reveal that there are no guidelines for the effective implementation of the applicable provisions of law so as to provide to the people equal protection of the law guaranteed by Article 12(1) of the Constitution.

Accordingly, we consider it to be just and equitable in the circumstances of the case to make the following directions in terms of Article 126(4) of the Constitution:

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(i) That the emission of noise by the use of amplifiers, loudspeakers or other equipment or appliances which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity be considered a public nuisance in terms of section 261 of the Penal Code and that the Police should entertain complaints and take appropriate action for the abatement of such public nuisance;

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(ii) That all permits issued by the Police under section 80(1) of the Police Ordinance shall cease to be effective forthwith;

(iii) That no permits shall be issued in terms of section 80(1) of the Police Ordinance for the use of loudspeakers and other instruments for the amplification of noise as specified in that section covering the period 10 p.m. (night) to 6 a.m. (morning). Such permits may be issued for special religious functions and other special events only after ascertaining the views of persons who occupy land premises in the vicinity, a record of such matters to be maintained and the grant of any such permit shall be forthwith reported to the nearest Magistrate Court;

310

- (iv) That in respect of the hours from 6.00 a.m. to 10.00 p.m. permits may be issued for limited periods of time for specific purpose subject to the strict condition that the noise emitted from such amplifier or loudspeaker or equipment does not extend beyond the precincts of the particular premises.
- (v) Where a permit is issued in terms of section 80(1) as provided in direction (iii) and (iv) sufficient number of Police Officers should be designated and posted to the particular place of use to ensure that the conditions imposed are strictly complied with; 320
- (vi) That the Police will make special arrangements to entertain any complaint of a member of the public against any person guilty of an offence of public nuisance as provided in section 261 of the Penal Code or of using any loudspeaker, amplifier or other instrument as provided in section 80 of the Police Ordinance contrary to any of these directions and take immediate steps to investigate the matter and warn such person against a continuance of such conduct. If the conduct is continued after that warning to seize and detain the equipment as provided in section 80(4) of the Police Ordinance and to report the matter to the Registrar of this Court. 330

Copies of this Judgment to be sent to the Secretary, Ministry of Defence and the Inspector General of Police for immediate action to be taken in regard to – Directions stated above.

The Inspector General of Police to submit a report to Court as to the action taken on the judgment. 340

Mention case on 10.12.2007.

TILAKAWARDENA, J. – I agree.

SOMAWANSA, J. – I agree.

Direction issued under Article 126(4).

Ed. Note - The Supreme Court made order that till the Regulation is made the directions that have been issued and the circulars issued by the I.G.P. would continue to be in operation and enforced by the S.C.