SAMANTHILAKA
v.
ERNEST PERERA AND OTHERS

SUPREME COURT.
H. A. G. DE SILVA, J., AMERASINGHE, J. AND DHEERARATNE, J.
S. C. APPLICATION No. 65/88,
JUNE 11, 1990.

Fundamental Rights – Infringement of the fundamental right of freedom from arrest, except according to procedure established by law - Article 13(1) and (2) of the Constitution - Cruel, inhuman or degrading treatment or punishment - Article 11 of the Constitution -Burden of proof - Nature of the jurisdiction exercised in terms of Article 126 of the Constitution - Necessary parties - Failure to name respondents responsible for the infringement.

(1) The court will look for a high degree of probability in deciding which of the facts alleged have been established. But the court will not place an undue burden on a petitioner in his quest for access to justice. Financial constraints and the obstructions encountered in procuring material will be taken into account.

(2) In the exercise of its jurisdiction in terms of Article 126 of the Constitution, the Court is determining whether these rights of individuals which have been declared and guaranteed by the Constitution have been denied by a failure on the part of the State to discharge its complementary obligations. The State necessarily acts through its servants, agencies and institutions. But it is the liability of the State and not that of its servants, agents or institutions that is in issue. It is not a question of vicarious liability. It is the liability of the State itself. An investigation of the personal conduct of officials is not the function of the Court in the matter of an application for relief and redress under Article 126 of the Constitution.

(3) The person who has infringed or is likely to infringe a fundamental or language right is not a **necessary party** in the sense in which that phrase is used in connection with ordinary civil litigation. The failure to make a person who is alleged to have violated or is likely to violate a fundamental or language right a respondent is not a fatal defect. Indeed, such is the nature of the obligation under Rule 65 that the failure of a petitioner to personally, as distinguished from officially, identify the person violating his fundamental rights (and personally, therefore, being unable to name such person in his petition), or that he was mistaken (with the result that a wrong person is named as respondent) will not stand in the way of a petitioner's application for relief if the court is satisfied that a violation of a fundamental or language right had been occasioned by executive or administrative action.

(4) The fact that the second respondent had been wrongly added or that the three police officers named in the petition have not been named as respondents is of no consequence if infringement by executive or administrative action is established.

Cases referred to:

(1) *S. Wijeratne and Another v. N. Wijeratne (1971) 74 NLR 193.*
(2) *Saman v. Leeladasa and Another [1989] 1 Sri LR 1, 33, 39.*
(3) *Ganeshanathan v. Vivienne Goonewardene and Another [1984] 1 Sri LR 319, 330 331, 352.*

(4) *A. K Velmurugu v. The Attorney -General 1 FRD 426, 440.*
(5) *Vivienne Goonewardene v. Hector Perera and Others 2 FRD 426, 440.*
(6) *M. K. W. Alwis v. Quintus Raymond and Others .SC Application No. 145 of 1987 – S. C. Minutes of 21.7.1989.*
(7) *Subramaniam Ragunathan v. M. Thuraisingham, and the Attorney-General S. C. Application 158 of 1988 – S. C. Minutes of 23.8.1989.*
(8) *Mariadas Raj v. Attorney-General and Others [1982] FRD 397, 404, 406.*
(9) *Katunayakage Damesius Perera and Another v. R. Premadasa and Others (1979) 1 FRD 70, 72.*
(10) *Mrs. W. M. K. de Silva v. P. Senaratne [1989] 2 Sri LR 393.*

APPLICATION complaining of infringement of fundamental rights.

Sanath Jayatilake with *Jayantha Wewelwala* for petitioner.

Mervyn Samarakoon SSC for 1st and 4th respondents.

Lakshman Ranasinghe for 2nd and 3rd respondents.

Cur. adv. vult.

June 29, 1990.

AMERASINGHE, J.

This is an application under Article 126 of the Constitution in which Gamaralalage Samanthilake alleged that her rights under Articles 11, 12, 13, and 14 of the Constitution were violated by certain police officers. Leave to proceed with her petition was, however, limited by the Court to Articles 11, 13, (1) and 13 (2) of the Constitution.

The violations complained of by the petitioner concerned her fundamental right of freedom from arrest, except according to procedure established by law [Article 13 (1)]; her right to personal liberty and freedom from detention or custody, except after being produced before a judge of the nearest competent court, upon and in terms of an order of such judge made in accordance with procedure established by law [Article 13 (2)]; and the right to be free from torture and cruel, inhuman or degrading treatment or punishment. [Article 11].

Being serious allegations of misconduct on the part of an agent of the State - the Police - I looked with caution for a high degree of probability in deciding which of the facts alleged had been established. At the same time, I was anxious to ensure that, in her endeavour to have access to justice, an undue burden was not imposed upon the petitioner. She was a sixteen year old student, with limited financial resources belonging as

she did to a family whose members depended upon the collection of cashew nuts for their existence. Moreover, having been subject to vexation at the hands of the colleagues of those officers whom she might have called upon for further evidence in support of her application, she was more likely to have found obstruction rather than assistance in her search for additional material.

Upon a careful consideration of the affidavits and the helpful analysis of the evidence therein contained by learned Counsel for the applicant and the respondents; and upon an examination of the Medico-Legal Report submitted to this Court, the following facts have emerged:–

On January 26, 1988, on hearing that her brother, Senerath Shantha, had been taken into custody, after making inquiries at various police stations, she found him at the Gampaha Police Station with signs of physical abuse. On February 12, 1988, another brother of the petitioner, Sugath Kamalasiri, was arrested and detained at the Gampaha Police Station. When, after several unsuccessful attempts to see Sugath Kamalasiri, she and her mother did see him on February 14, 1988, the petitioner observed that his face and legs were swollen and that her brother was hardly able to speak. The petitioner and her mother were told by some police officers at the Police Station that this was the result of his not giving correct information. They were asked to advice him to disclose all the information he had. The applicant responded by stating that those who had laid violent hands on her brother should be prosecuted. On subsequent visits, she had been requested by the Police to persuade her brothers to disclose the information they supposed the brothers to have had. Senerath Shantha was then transferred to the Peliyagoda Police Station.

The Peliyagoda Police Station does not thereafter figure in the applicant's complaint and I am of the opinion that there are no grounds whatsoever for alleging that the second respondent, the Officer-in-Charge of the Peliyagoda Police Station, was guilty of any improper conduct towards the applicant.

The conduct of certain officers of the Gampaha Police Station, however, gives the petitioner sufficient cause for complaint.

On March 6, 1988, as stated by the Inspector-General of Police in his affidavit, a "Police Party" visited the home of the Petitioner. The Inspector-General of Police in his affidavit identifies and names two

Police Officers who were members of the "Police Party". One was a Police Constable (hereinafter referred to as the Police Constable) and a Sub-Inspector of Police who led the "Party". Both these officers were named and identified by the Petitioner. The Inspector-General of Police states that there was information that the Petitioner knew the movements of Sanjeeva, alias Jayadeva Kankanamalage Jayasuriya, who was wanted in connection with a case of murder and that the Police questioned her in this regard during the visit of the Police Party. The Inspector -General of Police in his affidavit admits that the Petitioner's brother, Senerath Shantha, had been arrested by the army in connection with the unlawful possession of firearms and while "he was running away after setting fire to a boutique which sells Lakehouse Newspapers." In the circumstances, the Petitioner's assertion that what she was questioned about was the alleged subversive activities of her brothers and their friends appears to be more probable than the averment that the investigation related to a murder. When she denied that they were concerned with any political activities, the Police officers examined her school books and departed after one of the Police Officers had placed a gun on her chest and threatened to kill her unless she spoke the truth.

On March 9, 1988, according to the affidavit of the Inspector-General of Police, "a Police party" had gone again to the petitioner's house. This, he says, was to question her with regard to Jayasuriya who, they believed, had been visiting the Petitioner. Although the respondents deny it, it appears from a consideration of the evidence in the affidavits submitted by the petitioner to be more probable that the Police Party took the petitioner to the Police Station in their vehicle on the occasion of their second visit. When the petitioner's mother had protested that she could not permit her young daughter to go alone, she was allowed to accompany her, but only until they had reached the Police Station, at which stage the mother was put out of the vehicle and left to hear her daughter wailing in the distance.

The petitioner who had been taken into the Police Station was interrogated about the alleged subversive activities of her brothers and their friends and she was repeatedly assaulted with clubs.

Counsel for the respondents submitted that although the petitioner had, in her affidavit, stated that she had been assaulted with *clubs*, this

was contradicted by her evidence contained in the Medico Legal Report where she had given a history of assault with an *iron rod* and a *broom stick*. I see no difficulty here, for any staff used as a weapon, including an iron rod or a broom stick, for the purposes of this case, could sufficiently and appropriately be described as a "club."

The Petitioner was then compelled to witness a brutal assault on her brother, Sugath Kamalasiri, after his hands and legs had been tied together and as he lay suspended from an iron bar supported by two tables. More interrogation and assaults on both the petitioner and her brother followed until the officers decided to leave, the Police Constable announcing as he retired that "the rest" was left for the morrow. The petitioner was then moved to a cell and asked to sleep on the floor. A female police officer who was placed in charge of the petitioner was ordered not to give her any food and to prevent her parents visiting her.

On March 10 the Police Constable and other officers, in keeping with the promise of the Police Constable, returned to interrogate the petitioner. The Police Constable slapped her and threatened her. When he tried to seduce her, she cried helplessly. Her parents had attempted to see her on that day, but were denied access to her. Instead of the comfort of seeing her parents, she was further interrogated and shown her brother, Sugath Kamalasiri, in pain, prostrate on the floor after he had been assaulted. The Police Constable had on that occasion pointed to her brother and said: "See what has happened to your brother. Tell the truth at least now." All the Petitioner could do, she says, was to weep "silently on seeing my brother in pain."

On March 11 the Police Constable took the Petitioner home and handed her over to her father.

On March 12, at the request of the Petitioner's mother, a neighbour, H.D. Kasthuriarachchi, took the Petitioner to the General Hospital, Colombo where the Petitioner was examined by several doctors. The Medico-Legal Report issued by the Assistant Judicial Medical Officer under caption "Short History Given by Patient" says: "Assault by Police in Police Station on 09.03.88 night with broom stick and iron rod."

The Assistant Judicial Medical Officer describes seven contusions on the arms, left scapula, lower back across the midline, buttocks and left thigh of the Petitioner.

The police officers had called at the Petitioner's residence on March 27 to take her for further questioning, but, it seems, without success. According to learned Counsel for the petitioner, she had by then, for reasons that are not difficult to understand, abandoned her usual home.

So much for the facts.

There was no dispute with regard to the law or its application to the facts of this case except with regard to one matter of some importance. Learned Senior State Counsel submitted that the failure of the Petitioner to add as respondents the Police Officers whom she had identified and named in her Petition and Affidavit, rendered her petition fatally defective, for those police officers were "necessary parties." In support of this view, the learned Senior State Counsel relied solely upon the decision of the Supreme Court in *S. Wijeratne and Another v. N. Wijeratne* (*1*). That decision was concerned with an appeal from a District Court in an action for the partition of a land. One of the defendants had not been made a party to the appeal and the Supreme Court upheld a preliminary objection to the hearing of the appeal on the ground that the failure to add a necessary party was a defect which required the Court to dismiss the appeal which, therefore, had not been properly constituted.

Respondents to an ordinary civil appeal are *adversarial* parties whose competing claims are determined by the Court and, understandably, in terms of section 756 of the Civil Procedure Code notice of appeal ought to be furnished to them.

Respondents to a petition for relief or redress in respect of the infringement or imminent infringement of a fundamental right or language right stand on a different footing. The Court is not, in such a matter, adjudicating upon the disputed rights and conflicting interests of the petitioner and respondents. It is, in such a matter, exercising its jurisdiction in terms of Article 126 of the Constitution to determine whether there is an infringement or imminent infringement by executive or *administrative action* of any fundamental right or language right declared and recognized by Chapter III or Chapter IV of the Constitution. The decisions of this Court make it abundantly clear that in the exercise of its jurisdiction in terms of Article 126 of the Constitution, the Court is determining whether those rights of individuals which have been declared and

guaranteed by the Constitution have been denied by a failure on the part of the *State* to discharge its complementary obligations. (*Saman v. Leeladasa and Another* (*2*)). The *State*, necessarily, acts through its servants, agencies and institutions: But it is the liability of the *State* and not that of its servants, agents or institutions that is in issue. It is not a question of vicarious liability. It is the liability of the State itself. (See *Saman's Case*, supra, especially at pp. 27-40).

Rule 65 (1) of the Court made under Article 136 of the Constitution (see *Gazette Extraordinary* of 8.11.78) provides that–

> "Where any person applies to the Supreme Court by a petition in writing for relief or redress in respect of the infringement or of an imminent infringement of any fundamental right or language right by executive or administrative action in terms of Article 126 (2) of the Constitution, he shall –
>
> (*a*) .....
>
> (*b*) name in his petition the Attorney -General and any person or persons who he alleges have infringed or are about to infringe his fundamental or language rights as the respondents.
>
> (*c*) .....
>
> (*d*) .....
>
> (*e*) .....
>
> (*f*) .....

One purpose of naming the officials concerned is to identify those who could help the Court in the exercise of its inquisitorial functions in clarifying disputed facts. Another is to facilitate proof that the act in question was an executive or administrative act. The given title or description of a state officer or other person could be so indicative as to reduce the petitioner's burden of adducing evidence to establish that the act in question was an executive or administrative action. For instance, to say that Mr.X the respondent was a Police Officer or The Secretary of a Ministry might provide a clue as to the capacity in which Mr. X acted. It

is in no way conclusive of the matter, for it may be established in the circumstances of a case that Mr. X, whatever his designation or title may have been, in doing the act complained of, was not, after all, exercising an executive or administrative action. It may have been a purely private act or one which was in no way connected with the performance of his official duties. There would then be no executive or administrative action and the State would, therefore, not be liable, (See *Saman v. Leeladasa and Another (2)).*

It has been said, that another purpose of Rule 65 is to give an officer named as a respondent, the opportunity of defending himself. (See per Ranasinghe, J. in *Ganeshanathan v. Vivienne Goonewardene and Three Others, (3)* . This is an opportunity primarily for defending his conduct with the object of exculpating the State and **incidentally** exonerating himself personally. However, an investigation of the personal conduct of officials is not, in my view, the function of this Court in the matter of an application for relief and redress under Article 126 of the Constitution. That is a matter to which the attention of the appropriate persons may, if the circumstances warrant, be directed by this Court for such action as it may deem to be necessary. This has been the practice of this Court in the past. (e.g. see *A.K. Velmurugu v. The Attorney-General and Another (4), Vivienne Goonewardene v. Hector Perera and Others (5), Cf. M.K.W.Alwis v. Quintus Raymond and Others (6) and Subramaniam Ragunathan v. M.Thuraisingham and The Attorney-General (7).* And so I propose to do in this case, confirming, with respect, the customary action of the Supreme Court in this regard. In so doing I am not condemning anyone but assisting the Government to become aware of violations so that, through appropriate measures, it could restore and ensure the respect for fundamental rights which it expects of its servants, agents and institutions . The measures, with deterrence and prevention in view, may include the punishment of transgressors, filling gaps in the laws or procedures and strengthening protecting institutions.

The person who has infringed or is likely to infringe a fundamental or language right is not a *necessary party* in the sense in which that phrase is used in connection with ordinary civil litigation. The failure to make a person who is alleged to have violated or is likely to violate a fundamental or language right a respondent in a petition for relief under Article 126 of the Constitution is not, in my view, a fatal defect. Indeed, such is the nature of the obligation under Rule 65 that the failure of a petitioner to

personally, as distinguished from officially, identify the person violating his fundamental rights, (and presumably, therefore, being unable to personally, name such person in his petition), or that he was mistaken (with the result that a wrong person is named as a respondent) will not stand in the way of a petitioner's application for relief if the Court is satisfied that a violation of a fundamental or language right had been occasioned by executive or administrative action. (See *Mariadas Raj v. Attorney-General and Others (8),*. at pp. 404, 405, per Sharvananda, J.at pp. 404, 405, *Ganeshanathan v.Vivienne Goonewardene and Three Others (3)* per Samarakoon, C.J. at pp. 330 -331.See also *Katunayakage Damesius Perera and Another v.R.Premadasa and Others (9), (1979)* Fundamental Rights Decisions 70 at p.72; Saman *v. Leeladasa and Another (2).*

In the case before us, the fact that the second Respondent has been wrongly added and the fact that the three police officers named by the Petitioner in her Petition have not been mentioned as Respondents are of no consequence with regard to the question of establishing executive or administrative action, since I am of the view that there is sufficient evidence to show that the infringement of the Petitioner's fundamental rights was caused by Police officers acting in the course of their duties under colour of office.

Nor was the State placed at any disadvantage by the Petitioner's failure to name as Respondents the Police officers she identified. The State could have submitted the affidavits of those persons if, as the learned Senior State Counsel suggested, their evidence was important.

Naturally, if their information was to be on the sparse lines of those of the second and third Respondents, such affidavits may have been advisedly omitted, adding as they would but little to the weight, and nothing at all to the quality of the evidence already adduced on behalf of the State. As for the opportunity for the officers who may have wished to have explained their personal conduct, they would. I hope. be given every opportunity to do so when their conduct, personally, rather than their conduct as agents of the State, is called in question in another place and at another time by other authorities. For the reasons stated in my judgment I make order as follows:-

(1) I hold that Gamaralalage Samanthilaka, the Petitioner in this case, was arrested by the Police and held in custody and

detained and deprived of her personal liberty by the Police without being produced before a Judge and otherwise than according to procedure established by law, and, consequently, that the said Petitioner is entitled to a declaration that the State has acted in violation of her rights under Article 13 (1) and (2) of the Constitution.

(2) I further hold that the said Gamaralalage Samanthilaka was subjected by the Police to such severe physical and mental pain as amounted in law (Cf. *Mrs W.M.K.de Silva v. P. Senaratne et al (10)* to cruel, inhuman and degrading treatment and punishment and, consequently, that the said Petitioner is entitled to a declaration that the State has acted in violation of her rights under Article 11 of the Constitution.

(3) The State shall be liable to pay a sum of Rs.25,000 to the Petitioner by way of compensation and Rs. 2,500 as costs.

(4) The Inspector-General of Police, who in paragraph 9 of his Affidavit has informed the Court that he has "given instructions to all the Police Stations concerning the manner in which a suspect taken into custody should be treated by the Police officers and if it transpires that these instructions have been violated that disciplinary action will be taken against them, and also if there is evidence against any officer steps will be taken to prosecute him in court", shall give effect to the said undertaking within three months of this Order.

(5) For the purpose of assisting the Inspector- General of Police to comply with the direction contained in paragraph (4) above, the Registrar of The Supreme Court shall forward to the Inspector-General of Police a certified copy of this judgment together with certified copies of the Petition and Affidavits filed in this case.

H.A.G. DE SILVA, J. - I agree.

R.N.M. DHEERARATNE, J.- I agree.

Application allowed.

Compensation ordered.