

WIMAL VIDYAMANI
v.
LT. COL. JAYATILLEKE AND OTHERS

SUPREME COURT.
FERNANDO J.,
KULATUNGA J. AND
WADUGODAPITIYA J.
S.C. APPLICATION NO. 852/91 SPL
JUNE 16, 1992.

Fundamental Rights – Illegal detention – Torture – Articles 13 (1), 27, 11 of the Constitution.

The petitioner who was the Mill Security Officer at the Embilipitiya Mill of the National Paper Corporation was arrested and detained by the Police under emergency regulations for being allegedly concerned in a subversive J.V.P attack on the Paper Mill. Thereafter, he was transferred to the Pelawatte Detention Camp and detained under a Preventive Detention Order. The petitioner had an exemplary record of service and had won the confidence of his employer. There was no material to warrant the suspicion that the petitioner had J.V.P. links or was concerned in the subversive attack on the Paper Mill. An allegation that he was absent from his place of work during the attack was contradicted.

The Judicial Medical Officer found 16 injuries on the petitioner. It was not alleged that the petitioner had these injuries at the time of his arrest. Even in the absence of a clear medical opinion, as to the cause of these injuries, these injuries could be understood as having being caused by the use of blunt force during an assault by police officers whilst the petitioner was in police custody.

Held :

(1) The validity of arrest under Regulation 18 (1) has to be determined by the application of the objective test upon adequate material placed before Court. The validity of an Order under Regulation 17 (1) is determined by the application of the test of reasonability, in the wide sense. The Secretary making such order may, in particular circumstances, become obliged to place before Court relevant grounds to justify his claim that he was of the opinion that it was necessary to order detention in the interest of national security or the maintenance of public order.

(2) The petitioner's arrest and detention were unlawful, there was proof of torture and these were infringements of his fundamental rights.

Cases referred to :

1. *Wickremabandu v. Herat* and others [1990] 2 Sri L.R. 348.
2. *Nanayakkara v. Henry Perera* [1985] 2 Sri L.R. 375, 385.
3. *Hirdaramani v. Ratnavale* 75 NLR 67.
4. *Sanasasiritissa Thero v. P. A. de Silva* [1989] 2 Sri L.R. 356, 380 – 381.
5. *Amal Sudath Silva v. Kodituwakku* [1987] 2 Sri L.R. 119.
6. *Geekiyanaage Premalal Silva v. Rodrigo* S.C. Appeal No. 24/89 S.C. Mins. of 05.09.90.
7. *Jayaratne v. Tennakoon* S.C. No. 18/89 and 10/89 S.C. Mins. of 04.07.91.
8. *Gamlath v. Neville Silva* S.C. Application No. 78/90 Mins. of 27.09.91.

APPLICATION for relief for infringement of fundamental rights.

L.C.M. Swarnadhipathi for petitioner.

1st respondent absent and unrepresented.

Shavindra Fernando, S.C. for the 2nd and 3rd respondents.

Cur. adv. vult.

June 22, 1992.

KULATUNGA, J.

By his letter dated 18.3.91 addressed to His Lordship the Chief Justice the petitioner who had, at the relevant time, been a member of the Security Service at the Embilipitiya Mill of the National Paper Corporation complained that he was in illegal detention at the Pelawatta Detention Camp having been unlawfully arrested by the Embilipitiya Police on 19.10.90. He also complained that until his transfer to the said camp on 17.11.90, he was unlawfully detained at the Embilipitiya

Police Station during which period the police officers there subjected him to various acts of torture. His affidavit was filed on 31.07.91 wherein he sought relief for alleged infringement of his rights under Articles 11, 13 (1) and (2) of the Constitution. On 04.09.91, he filed an amended affidavit in which he stated *inter alia*, that on 10.08.91, he had been transferred to Ratnavali Rehabilitation Camp, Anuradhapura. The petitioner was then granted leave to proceed ; at the same time, this Court directed the Judicial Medical Officer Anuradhapura to examine the petitioner for any injuries he had sustained and to make a report to this Court. Pursuant to the said direction, the J.M.O. examined the petitioner on 26.09.91 and forwarded his report dated 10.10.91.

The petitioner joined the National Paper Corporation in 1980 as a Security Officer. He was promoted to the post of Executive Security Officer in 1983 and to the post of Mill Security Officer in 1985. The evidence adduced before us shows that he has, as an employee of the Corporation, maintained an exemplary record of service. This is supported by documentary evidence which I summarise as follows:

1. 29.06.84 : commendation by the Corporation for assistance given in detecting a gambling den conducted by certain employees of the Corporation and in apprehending the offenders. (P5)

2. 07.09.84 : commendation by the Head Quarters Inspector Embilipitiya Police Station for assistance rendered in the recovery of a water pump belonging to the Corporation, which had been stolen. (P6)

3. 19.09.84 : appreciation by the Mahaweli Authority of his service in giving the officers of the Authority a demonstration in fire fighting. (P3)

4. 13.11.84 : commendation by the HQI Embilipitiya Police station for assistance rendered in the recovery of stolen tractor spare parts worth Rs. 20,000 belonging to the Corporation. (P7)

5. 12.12.84 : commendation by the Corporation for his " devoted, dedicated and loyal service " to the Corporation in conducting a basic course of training for its security staff, including on the subjects of fire-fighting and self defence. (P2)

6. 26.06.86 : certificate of specialised training in security duties (armed and unarmed) provided by the Ministry of Security for Industrial and Commercial Establishments which states that the petitioner had obtained the 1st place in the course. (P1)

7. 15.01.89 : appreciation by the Commanding Officer of the Army Training Centre Embilipitiya for a lecture given to the new recruits on the subject of fire-fighting. (P4)

8. 13.02.89 : payment of a reward of Rs. 259 to the petitioner by the Corporation for assisting in the recovery of a stock of paper which had been stolen from the Corporation. (P8)

We then have the petitioner's report (P9) dated 17.09.90 addressed to the Chairman of the Corporation regarding subversive attacks on the Embilipitiya Paper Mill in October and November 1989 and the action taken in that regard. On 9.10.89 subversives attacked the Mill and damaged 20 vehicles and assaulted the employees. The Army COD H.Q (Embilipitiya) and the Embilipitiya Police were informed ; but they visited the Mill only in the morning of the next day. Thereafter, the petitioner visited the Embilipitiya Police Station from time to time with a view to adopting security measures but he was informed that Police Officers were unable to intervene without a directive from the Ministry of Defence. On 21.10.89 the petitioner liaised with Army Head Quarters Embilipitiya and arranged for assistance to be given against further subversive attacks on a signal being by the blowing of the siren. On 11.11.89 subversives attacked the Mill again, damaged its property and set fire to the Mill. Mr. Gunasena Kuruppu managed to blow the siren, whereupon the army arrived and the subversives fled. They were thereby able to save the paper machine. Mr. Kuruppu was assaulted by the subversives on that occasion and was consequently hospitalised for 3 days. The General Manager of the Corporation has, by a writing dated 06.05.92 (P13) confirmed the facts relating to the two subversive attacks referred to in P9 and further confirmed that the petitioner was present at the station during the said attacks and duly attended to his duties by extinguishing the fire and salvaging the property of the Corporation.

It is common ground that on 15.11.89 a police post was established inside the Mill premises to tighten the security there. The petitioner states that on 29.05.90 he was arrested by Sgt. Bandara of the

Embilipitiya Police who was illdisposed towards him ; he was not informed of the reason for his arrest ; and he was detained at the Embilipitiya Police Station until 31.05.90. Shortly before he was released, a Police Officer recorded a statement from him about subversive activities at the Mill premises. On 04.06.90 the General Manager of the Corporation called for a report from the Assistant Superintendent of Police Embilipitiya regarding the said arrest. However, no report was received, despite a reminder on 1.10.90 (P14a). The petitioner alleges that in the meantime Sgt. Ariyadasa and other police officers were stealing the property belonging to the Corporation. On 05.06.90 the petitioner made a report (P10) to the Chief Security Officer detailing the alleged acts of theft. In that report, the petitioner states that property including stocks of paper were being removed by the police without gate passes claiming that the Management had permitted such removal.

On 12.09.90 the General Manager of the Corporation addressed a letter (P11) to the Superintendent of Police Ratnapura giving a detailed account of alleged acts of misconduct by Police Officers attached to the police post at the Mill (between 22.08.90 and 11.09.90) including the unauthorised removal of empty barrels, bleaching powder, paper and exercise books, misuse of Corporation vehicles, assaulting a security guard and taking two employees into custody. The General Manager also arranged for the Chief Security Officer of the Corporation (who was accompanied by the petitioner) to discuss the matter with the S.P. The petitioner states that after discussions, all the Police Officers attached to the Police post at the Mill were transferred out ; that thereafter, on 19.10.90 when he was on duty, Police Officers from the Embilipitiya Police Station arrested him ; that at the Police Station Sgt. Wimalasiri and other police officers assaulted him ; that as a result he sustained many injuries including a permanent disability of the middle finger of his right hand ; that whilst so assaulting him they questioned him about the damage caused to the Mill by the subversives ; and that he was detained at the Embilipitiya Police Station until 17.11.90 on which date he was transferred to the Pelawatte Detention Camp where he remained until his transfer to Ratnavali Rehabilitation Camp, Anuradhapura, on 10.08.91.

The petitioner denies that he engaged in any unlawful activity or was in any way associated with subversive activity at the Mill and asserts that he duly carried out his duties as a Security Officer and

assisted in safeguarding the Mill against such activity. He alleges that the motive for his illegal arrest, detention and torture was the fact that the Police Officers concerned were displeased with the action taken by him for safeguarding the property of the Corporation and its employees which led to a complaint being made to the SP against various acts of misconduct by Police Officers. On behalf of the respondent, affidavits have been filed by the Secretary to the Minister of State for Defence, ASP Amaradasa Fernando, Sub Inspector of Police Upali Minipura of the Counter Subversive Unit Embilipitiya and Sergeant Wimalasiri Goonewardena. It is the case for the respondents that the petitioner had links with the Janata Vimukti Peramuna and was involved in the subversive attacks at the Mill. ASP Amaradasa Fernando states that the petitioner's involvement with the subversives was confirmed by the fact that he was absent from his place of work during both attacks and was absent for two months thereafter ; that the petitioner was arrested on 30.05.90 and was released the next day after recording his statement ; that after the establishment of the police post at the Mill, the petitioner was kept under observation and being displeased with such vigilance, he made complaints against police officers ; and that on receipt of further information, the petitioner was re-arrested on 19.10.90 and detained pending investigations.

As authority for the petitioner's detention, the respondents have produced two detention orders namely, an order dated 20.10.90 under Regulation 19 (2) of the Emergency Regulations for a period of 90 days (Z1) and an order dated 16.01.90 under Regulation 17 (1) for the period thereafter (Z2). The petitioner was released on 31.10.91, during the pendency of these proceedings. The Secretary to the Ministry of State for Defence states that in the meantime he reviewed periodically the available material against the petitioner as to the necessity for his continued detention.

It is well settled that the validity of arrest under Regulation 18 (1) has to be determined by the application of the objective test upon adequate material placed before this Court. The validity of an order under Regulation 17 (1) is determined by the application of the test of reasonability, in the wide sense ; and the Secretary making such order may, in particular circumstances, become obliged to place before this Court relevant grounds to justify his claim that

he was of the opinion that it was necessary to detain the petitioner in the interest of national security or the maintenance of public order. *Wickremabandu v. Cyril Herat* ⁽¹⁾. In the instant case, there is no material to warrant the suspicion that the petitioner had JVP links or that he was concerned in the subversive attacks at the Mill. The allegation that he was absent from his place of work during the said attacks is contradicted by documentary evidence and particularly by the statement of the General Manager of the Corporation (P13) in which the General Manager also contradicts the allegation that the petitioner absented himself from his place of work for two months after the subversive attacks. The General Manager states that the petitioner was absent for one month and 14 days on approved leave. In the circumstances, the petitioner's arrest under Regulation 18 (1) was unlawful and the consequent detention order Z1 was also unlawful. Further no material was produced before us as to the basis on which the Secretary could have formed the opinion that it was necessary to detain the petitioner under Regulation 17 (1) ; consequently the detention order Z2 was unlawful. I hold that the arrest and detention of the petitioner are violative of his rights under Articles 13 (1) and (2) of the Constitution.

As regards the alleged violation of Article 11, Sergeant Wimalasiri Goonewardena states that he is familiar with the facts and circumstances relating to the arrest of the petitioner but denies the allegation that the petitioner was assaulted whilst he remained in police custody. However, the report of the JMO who examined the petitioner on 26.09.91, whilst the petitioner was still under detention, supports the allegation of assault. The petitioner told the JMO that the officers of the Embilipitiya Police took him into custody on 19.10.90 and assaulted him with battons, wires, rubber pipes and clubs. The JMO observed the following injuries on the petitioner.

- (1) oedematous right middle finger with limitation of movement and pain over palpation.
- (2) 2 1/2" x 1" scar on left buttock.
- (3) 4 1/2" x 0.2" scar on middle 1/3 of anterior aspect of right thigh.
- (4) 1 1/2" x 0.2" scar 6" below the 3rd injury.
- (5) 0.3" long scar 1/2" below the 3rd injury.
- (6) 2" x 1/2" scar on medial aspect of left ankle.
- (7) 0.5" in diameter scar on lateral aspect of the left lower leg.

- (8) 0.5" long scar on lateral aspect of the left ankle.
- (9) 1.0" long scar on dorsal aspect of right thumb.
- (10) 0.5" long scar on left side of the back of chest in 8th intercostal aspect at midline.
- (11) 4" long linear shape scar on right shoulder joint.
- (12) 0.5" long scar on medial aspect of left wrist.
- (13) 1/4" long scar on dorsal aspect of the left hand.
- (14) 2" long scar on anterior aspect of the left lower thigh.
- (15) 1.0" long scar on left anterior chest wall.
- (16) 1/2" long scar on dorsal aspect between left thumb and index.

The J.M.O. states that he is unable to express an opinion on the above injuries as they are old wounds. The respondents have not taken up the position that the petitioner had any injuries on him at the time of his arrest. Even during the subversive attacks it was one Gunasena who was assaulted. The petitioner did not sustain any injuries at the hands of the subversives. The history given by the petitioner to the J.M.O. is consistent with the description of the assault given in the petitioner's affidavit to this Court prior to his medical examination ; and even in the absence of a clear medical opinion, there is no difficulty in taking the view that the said injuries were probably caused by the use of blunt force. In all the circumstances, I am satisfied that Sergeant Wimalasiri Goonewardena and other Police Officers of the Embilipitiya Police Station assaulted the petitioner whilst he was in police custody and caused multiple injuries to him. I hold that such conduct is violative of the petitioner's rights under Article 11 of the Constitution.

In deciding the question as to what relief may be granted to the petitioner, I have taken the following matters into consideration :

- (i) No material has been placed before this Court to establish the existence of a reasonable suspicion that the petitioner was concerned in any offence. Assuming that there was such material, it is manifest that a detention order under Regulation 19 (2) was competent to facilitate further investigation. *Nanayakkara v. Henry Perera* ⁽²⁾. The petitioner was detained under the said regulation for 90 days ; but there is no evidence of any investigations conducted during that period. These facts show that the petitioner's arrest and detention were mala fide and smack of malice.

(ii) The Secretary states that he made the order under Regulation 17 (1) on the basis of material available against the petitioner " including the material set out in the affidavits marked X1 and X2 ". The said affidavits consist of bald statements (unsupported by any other material) that the petitioner had JVP links and was involved in the subversive attacks at the Mill. If the Secretary had any other material to support the detention, such material has not been placed before this court. The irresistible inference from these facts is that the Secretary signed the impugned order mechanically and had not formed the requisite opinion. *Hirdaramani v. Ratnavale* ⁽³⁾ ; *Sanasasiritissa Thero v. P. A. de Silva* ⁽⁴⁾.

(iii) The petitioner who had an exemplary record of service and had won the confidence of his employer was arbitrarily arrested and incarcerated for a period of one year. He was subjected to torture whilst in police custody and was detained in a police cell for one month, which was itself cruel. On 27.05.91 the Attorney-General informed the SP Ratnapura and Mr. D. G. Jayalath (the Chairman of the Committee For Processing, Rehabilitation and Release of Suspects in the Ministry of Defence) that the available evidence was insufficient to prefer criminal charges against the petitioner. Had the Secretary reviewed the petitioner's case periodically (as he claimed to have done), the petitioner might have been released at that stage ; instead, he was continued in detention and was released only on 31.10.91 after 2 months rehabilitation. It seems to me that the decision for rehabilitation itself had been mechanically made, the effect of which would have been to further humiliate the petitioner.

(iv) This court has condemned torture of persons in police custody in *Amal Sudath Silva v. Kodituwakku* ⁽⁵⁾, *Geekiyanaage Premalal Silva v. Rodrigo* ⁽⁶⁾ ; *Jayarathne v. Tennakoon* ⁽⁷⁾ and *Gamalath v. Neville Silva* ⁽⁸⁾. In the last case I observed that the previous decisions have had no effect on the police and that violations of Article 11 by police officers (which symbolise man's inhumanity to man) continue. The instant case shows that the situation is still the same.

Accordingly, I grant the petitioner –

(i) a declaration that his rights under Articles 13 (1) and (2) and 11 have been infringed by executive or administrative action ; and

(ii) compensation in a sum of Rs. 15,000 for the infringement of Article 13 (1) and (2) ; and compensation in a sum of Rs. 20,000 for the infringement of his rights under Article 11, totalling a sum of Rs. 35,000 (Rupees thirty five thousand).

I direct the State to pay the said sum to the petitioner.

As the offending police officers have not been made parties to these proceedings, it is not possible to make any order against them personally. I therefore direct the Registrar to forward to the Inspector-General of Police a copy of this judgment to enable him to take appropriate action and to make a report to this Court in that regard on or before 15.09.92. The impugned order under Regulation 17 (i) was made by the Secretary to the Ministry of State for Defence and not by the 2nd respondent (Secretary, Ministry of Defence). In the days of *Hirdaramani v. Ratnavale* ⁽³⁾ there was only one officer (namely, the Permanent Secretary) who was authorised to make such order ; and H. N. G. Fernando, CJ said (p. 90) ;

" I cannot imagine that the Prime Minister would have recommended the conferment of the power to make detention Orders on the Permanent Secretary, without the confidence that he will exercise that power in good faith..."

The situation has since changed ; and the power to make detention orders is now vested in the 2nd respondent as well as in the Secretary, Ministry of State for Defence and any Additional Secretary of Defence. Whilst such delegation may have been necessitated by the increase in the volume of work in this sphere, it is hoped that the appropriate authority will ensure that such orders are not mechanically made, on the recommendation of subordinate officers.

FERNANDO, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Relief granted.