SANJEEWA, ATTORNEY-AT-LAW (ON BEHALF OF GERALD MERVIN PERERA) v SURAWEERA, OFFICER - IN - CHARGE, POLICE STATION, WATTALA AND OTHERS

SUPREME COURT
FERNANDO, J.
EDUSSURIYA, J., AND
WIGNESWARAN, J.
SC No. 328/2002 (FR)
27 FEBRUARY, 2003

Fundamental Rights – Wrongful arrest on vague information – Torture and detention at the police station – Mistaken identity of the suspect – Articles 11, 13(1) and 13(2) of the Constitution – Liability of superior officers of the police for acts of subordinates – Right of the victim to recover incurred medical expenses in addition to normal compensation.

The petitioner was arrested at about 12.45 p.m. on 3.6.2002 on the order of the 1st respondent Officer-in-Charge, Police Station Wattala, by subordinate police officers. The arrest was effected admittedly on information that one "GERRAD" had committed a murder. The petitioner was taken to the Wattala Police Station. The evidence, including medical evidence showed that he had been hung up (whilst in police custody) with a rope and beaten with an iron rod and wooden poles. His hands were burnt with lighted matches. The medical evidence supported the alleged burning.

On the advice of the Gampaha Ayurvedic Hospital for emergency treatment, the petitioner was admitted to Nawaloka Hospital where he received treatment under intensive care. After his discharge from the Nawaloka Hospital, the petitioner was admitted to the General Hospital, Colombo and discharged from there on 17.7.2002.

The petitioner had acute renal failure, loss of sensation over the 8th cervical and 1st thoracic vertebrae, damage to the median and ulnar nerves, complete loss of power of both shoulder joint muscles and inability to grasp objects with fingers consistent with suspension from a beam and assault.

No statement of the petitioner was recorded. The 1st respondent told him that they had made a mistake. Thereafter, the petitioner was released at about 11.30 a.m. on 4.6.2002.

Held :

(1) The arrest of the petitioner was not made on credible information, and the reference to "GERRAD" was not sufficient to identify the petitioner. Police officers did not even subjectively believe that the petitioner had committed an offence but were merely hoping that something would turn up. His arrest was violative of Article 13(1) and the detention was violative of Article 13(2) of the Constitution.

(2) The petitioner was subjected to torture and to cruel and inhuman treatment by the 3rd, 6th and 7th respondents, with the knowledge and acquiescence of the 1st respondent in violation of Article 11. The 1st respondent became so liable as the Officer-in-Charge of the Police Station and having control and supervision over his subordinates.

Per Fernando, J.

"The duty imposed by Article 4(d) to respect, secure and advance fundamental rights .... extends to all organs of Government and the Head of the Police (The Inspector General of Police) can claim no exemption .... A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation if not also of approval and authorization."

(3) The petitioner is entitled to compensation for infringement of his rights and further, to reimbursement of medical expenses attributable to torture.

APPLICATION for relief for infringement of fundamental rights.

D.S. Wijesinghe, P.C. for petitioner

Prince Perera with *D.D.P. Dassanayake* for 1st to 7th respondents

P.A.K. Ranasinghe, State Counsel for Attorney-General

Cur.adv.vult

April 4, 2003.

FERNANDO, J.

The Petitioner is a cook employed by Colombo Dockyard Ltd. He complains that the 1st to 8th Respondents have infringed his fundamental rights under Article 13(1) by reason of his unlawful arrest on 3.6.2002, under Article 11 by torture thereafter whilst in Police custody, and under Article 13(2) by unlawful detention till 4.6.2002. The 1st to 7th Respondents are Police Officers of the Wattala Police. The 1st Respondent is the Officer-in-Charge, the 2nd Respondent is the Officer-in-Charge, Crimes, the 3rd to 5th Respondents are Sub-Inspectors, and the 6th and 7th Respondents are Constables. The 8th Respondent is the Inspector-General of Police.

The Petitioner's Version

According to the affidavit of the Petitioner's wife, at about 11.45 a.m. on 3.6.2002, as she left home with her three-year old son in order to fetch her daughter from pre-school, she saw a Police jeep parked nearby. One Police Officer asked for her husband, and she replied that he had not returned from work. She then heard one officer tell someone on his mobile telephone that they had not found the Petitioner but only his wife, and she also heard him ask what he should do.

The Petitioner's wife attempted to proceed to fetch her little daughter but the officers restrained her, and forced her and her son into the jeep. They then asked her to telephone the Petitioner at his workplace and to tell him to come home quickly as a child was ill, but she was unable to do so. She begged the officers to let her go to bring her daughter, but they refused and took her to the bus-stand to await the Petitioner's arrival.

At about 12.45 p.m. the Petitioner got off the bus, and the officers dragged him into the jeep saying "you are the man we are looking for", but gave no reason his arrest. On the way they dropped the wife and son by the roadside.

The Petitioner's wife and brother have sworn detailed affidavits dated 19.6.2002. They stated that on 4.6.2002 at about 10.00 a.m. the Petitioner's wife, his brother and other friends and relations went to the Wattala Police Station. The wife stated that she saw several of the officers who had come to arrest the Petitioner. She further stated that she saw the Petitioner in great pain, with his body swollen, and unable to walk and to move his arms, and that Police Officers told her that the Petitioner had been arrested on wrong information – all this was corroborated by the Petitioner's brother.

The Petitioner's wife and brother also stated that the Petitioner had told them what had happened after arrest; that he had been blindfolded, his hands had been tied, and he had been hung from a beam; that he had been assaulted by the 1st to 7th Respondents and another officer, with iron rods and wooden poles for about an hour, despite crying out in pain; that while being beaten he was questioned regarding a murder, of which he knew nothing; that he had then been laid on the floor and his hands burnt with lighted matches; that no statement had been recorded from him; and that later that day he was taken to the 1st Respondent who had told him that they had made a mistake and that he would be released the next morning.

The Petitioner was admittedly released from Police custody at about 11.30 a.m. on 4.6.2002.

In view of the Petitioner's condition, his wife and bother took him to the Gampaha Wickremaarachchi Ayurvedic Hospital where the physician advised immediate emergency treatment at a leading hospital. Accordingly, they admitted him to Nawaloka Hospital, Colombo, where he was in an intensive care unit for some time. On 14.6.2002 the doctors informed the wife that his condition was critical and that his life was in danger.

The Petitioner produced the Nawaloka Hospital bill up to 25.6.2002, which showed a sum of Rs. 704,788/- (including a "deposit against professional charges" of Rs. 182,723/-) then due. He was discharged on 13.7.2002, and admitted immediately to

the General Hospital Colombo, and discharged from there on 17.7.02.

A petition dated 17.6.2002 was filed on 19.6.2002 by an attorney-at-law on behalf of the Petitioner, together with the affidavits of that attorney-at-law and the Petitioner's wife, both dated 19.6.2002. Affidavits of the brother and some others were filed soon after. The petition was supported, and leave to proceed was granted on 26.6.2002.

The Petitioner did not file an affidavit as soon as he was able to, but did so, rather belatedly, only on 5.12.2002 after the Respondents' affidavits had been filed on 11.10.2002. However, as the Respondents did not have an opportunity of replying to that affidavit, I will not act upon it, except insofar as it was in reply to new material in the Respondents' affidavits.

The Medical Evidence

The Judicial Medical Officer ("JMO") of Colombo examined the Petitioner on 16.7.2002. In his report he set out the history of torture, substantially as stated in the petition. From the investigations done at the Nawaloka Hospital, he concluded that the Petitioner had "developed acute renal failure probably due to rhabdomyolysis which necessitated haemodialysis", "changes due to axonal loss in the median and ulnar nerves", and "loss of sensation over 8th cervical and 1st thoracic vertebrae". The relevant medical records had been called for from the Nawaloka Hospital. According to the JMO, systemic examination of the Petitioner revealed complete loss of power of the muscles around both shoulder joints, and inability to move both arms at the shoulder joints; while he could move his fingers he could not grasp any object at the time of examination; and there was sensory loss around both elbow areas.

He noted certain injuries, consistent with the history given by the Petitioner; two blackish scars on the back of the right hand, consistent with burns with lighted matchsticks; two scars, near the right and left wrists consistent with being hung with a coir rope; a discolouration of the skin on the left shin, consistent with a blow with an iron bar; and weakness of both upper limbs, consistent with being suspended. In his opinion, such suspension could have

caused neuromuscular and tendon damage and weakness of the upper limbs; and muscular contusions could cause rhabdomyolysis, which could cause acute renal failure, but there was no evidence of a considerable amount of contusions at the time of his examination. The Petitioner had completely recovered from renal failure.

The 2nd, 4th, & 5th Respondents' version

These Respondents have denied any involvement in the arrest and torture of the Petitioner. They produced extracts from the Information Books ("IB's) according to which they were away from the Wattala Police Station at all relevant times: when the Petitioner was arrested when he was brought to the Station, and during the next two or three hours when he was allegedly tortured. While those IB extracts are not conclusive, yet the Petitioner's identification of the 1st to 7th Respondents at the officers who tortured him is subject to the infirmity that he was blindfolded for much of the time that he was tortured. Besides, in the condition in which he was, he may well have mistakenly included persons whom he had merely seen at the Station only after the torture. In the circumstances the Petitioner has not established their involvement on a balance of probability, although there certainly was grave suspicion, which warrants an internal probe. They are discharged from these proceedings.

The 1st, 3rd, 6th and 7th Respondent's version

The 1st Respondent admitted that the Petitioner was arrested on his directions. He did not claim that he was away from the Station when the Petitioner was brought in, or during the next few hours when the Petitioner was allegedly tortured. As Officer-in-Charge he had overall responsibility to supervise and control the conduct of his subordinates, and it was he who had the power to release the Petitioner. He is therefore liable if the Petitioner's arrest and/or detention were unlawful, and for any torture that occurred at the Station.

According to the IB extracts produced by the other three Respondents, a Police party consisting of Sub-Inspector Suresh

(3rd Respondent), Sub-Inspector Herath, Constable Nalin (6th Respondent), Constable Perera (7th Respondent), Constable Amila, and Home Guard Vineetha, left the station in a private vehicle at 12.30 a.m. on 3.6.2002 on the 1st Respondent's directions on *crime prevention duties – not to investigate the murder* which had taken place the previous day. They were armed with a revolver and two T-56 automatic weapons.

The affidavits filed by these Respondents were far from satisfactory. They denied or pleaded unawareness of every averment in the petition – even the averments that the Petitioner had been kept overnight at the Police Station and released on the 4th morning, and that he had been arrested on wrong information. Each of them affirmed, in language absolutely identical even in regard to obvious errors and omissions, that –

> "(1) I was reported for duty at about on 3.6.2002. A triable murder has taken place at Wattala area on 02.6.2002. The police team consisted of myself, Naleen Perera, Amila and Vineetha were investigating this crime. While we were investigating into this crime, we came to know from our informant that the person named Gerrad was committed this triable murder. According to this information I have taken steps to arrest this person named Gerrad with my subordinates. Accordingly, I and other police officers went to Gerrad's residence with the informant and questioned about Gerrad from his wife. At the time of questioning she informed us that Gerrad was not at home. At about 12.00 p.m. on 3.6.2002 I with my other officers arrested Mudalige Gerrad Perera, with informing the reason for arrest (i.e. charge of committing a triable murder).
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> (ii) Thereafter I ordered M. Gerrad Perera to get into the jeep. As ordered he got into the jeep. While we were returning to the Wattala Police Station we stopped our jeep at the Mabola Hotel in order to have a cup of tea. While the 6th respondent going to the Hotel by opening the back door of the jeep."
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> (iii) I had to exercise minimum force in terms of section 23(2) of the Criminal Procedure Code of No.15 of 1979. Thereafter

he was put into the police jeep, by me and other police officers and taken to the Wattala Police Station.

(iv) Theafter I questioned him about the commission of this triable murder by Gerrad Perera. After questioning I ordered Herath the Sub Inspector to take a statement. Thereafter the person named Gerrad made a statement to Wattala Police Station at about 2.15 a.m. on 4.6.2002.

(v) I state that during the course of investigation and the statement of Gerrad I found that there is no evidence against Gerred to charge him for this triable murder.

(vi) I state that thereafter I reported this to the Officer-in-Charge of the Wattala Police Station, at about 11.30 a.m. on 4.6.2002. the 1st respondent released as Gerrad Perera on 4.6.2002.

(vii) I state that at all times material to this application I acted in utmost good faith in discharging my duties. After releasing Gerred Perera, I filed a A report in the Magistrate's Court of Wattala and reported this incident to the learned Magistrate in terms of the provisions of the Criminal Procedure Code of No. 15 of 1979. (The relevant documents are marked as 3Rb and annexed hereto)."

No "A" Report was in fact annexed.

The position of these three Respondents is that they arrested the Petitioner; that all three did use "minimum force" on him, the nature and extent of which they failed to describe; and that they were continuously present from the time the Petitioner was brought to the Wattala Police Station until 2.15 a.m. the next day, when his statement was allegedly recorded. If, therefore, during that period he was tortured, these Respondents were present. Their identity and involvement are thus proved by their own admissions, independent of any assertion by the Petitioner or any one on his behalf.

The 1st, 3rd, 6th , and 7th Respondents also pleaded that the petitioner had not given an adequate description in the petition of the mode of assault and the nature of the injuries sustained, but added -

very relevantly, as it turns out - that "the manner in which the Petitioner described this alleged assault if such a thing has taken place the Petitioner could not have survived."

Although an attempt had been made in the IB extracts to explain away the injuries sustained by the Petitioner, by claiming that he had attempted to escape (from a heavily armed Police party of six!) none of the affidavits mention any such attempt. I cannot accept the IB extracts as evidence of any attempt to escape.

Finally, there were other unexplained infirmities in their affidavits. Although they claimed that the Petitioner's statement was recorded at 2.15 a.m. on 4.6.2002, the relevant IB extract produced purports to be a statement recorded at 10.30 p.m on 3.6.2002 - while the Petitioner denied making any statement at all. Their affidavits all referred to the *Police jeep* in which they travelled while the IB extracts referred to an unidentified *private* vehicle.

Preliminary Objections

Learned Counsel for the 1st - 7th Respondents took a series of preliminary objections.

He submitted, first, that the petition was not duly supported by an affidavit because the attorney-at-law who filed an affidavit had no personal knowledge of any of the facts, and urged that the application should therefore be dismissed for non-compliance with Supreme Court Rule 44(3) and section 4(1)(a) of the Oaths Ordinance.

It was pointed out to him that the wife's affidavit was quite sufficient as it was of her personal knowledge in regard to the arrest and detention, as well as the injuries resulting from the treatment meted out in custody. In any event, an affidavit based - on its face - on credible information given by the victim of an alleged fundamental rights violation, in circumstances in which he is unable to make an affidavit himself, may be accepted as sufficient for the grant of leave to proceed.

Learned Counsel immediately moved on to a second objection, that the petition had been filed (according to him) on 17.6.2002 whereas the wife's affidavit was dated 19.6.2002 - a discrepancy

which, in his submission, created doubts as to its genuineness. Reference to the record confirmed that although the petition bore the typed date 17.6.2002 it had actually been filed only on 19.6.2002, together with the wife's affidavit.

Learned Counsel then shifted to a third objection, that the application could not be maintained because, previously, on 14.6.2002, an informal application, under Supreme Court Rule 44(7), had been made by a third party on the wife's instructions. The fact that an informal application had been made was not a bar to the exercise of the Petitioner's constitutional right under Article 126, particularly where no action had been taken on it.

Finally learned Counsel submitted that the 3rd Respondent named in the petition was "Suresh Gunaratne", but that there was no such officer by that name serving at the Wattala Police Station; that therefore a wrong person had been made a party respondent; and that the application could not be maintained. The record shows that in response to the notice issued on "Suresh Gunaratne", Sub-Inspector Suraj Gunasena had filed an affidavit describing himself as the 3rd Respondent. Indeed, the IB extracts produced by him refer to "Sub-Inspector Suresh". It is clear, therefore, that those extracts and the petition both referred to the same Suresh, and that no one was misled thereby. However, to avoid any further controversy about the identity of the 3rd Respondent, I amend the caption by describing the 3rd Respondent as "Suresh Gunaratne, alias Suraj Gunasena, (Sub-Inspector), Police Station, Wattala". I must add that, in any event, the mis-description of one Respondent will not, generally, invalidate an application as against the other Respondents.

Arrest and Detention

The material on which the 1st, 3rd, 6th and 7th Respondents arrested the Petitioner was a claim by an informant that a person named "Gerrad" had committed a murder. None of the affidavits gave any particulars either about the informant and his reputation for reliablity, or the nature of the information.

Even where there is a claim that an informant was usually reliable, a bald allegation that "Gerrad" had committed a murder would not justify the arrest of any person believed to be that

Gerrad: indeed, I doubt that it would even justify questioning each and every Gerrad in the area. Further, had the Respondents been acting *bona fide* when they arrested the Petitioner, they would have promptly recorded his statement, and would then have either produced him before a Magistrate or released him. The fact that they failed to record a statement (or if the IB extracts are accurate, waited ten hours to do so) strongly suggests that they did not, even subjectively, believe that he had committed an offence, but were merely hoping that something would turn up. It is also probable that the Petitioner was not given a reason for arrest.

I therefore hold that the Petitioner's arrest by the 3rd, 6th and 7th Respondents, on the orders of the 1st Respondent, was in violation of Article 13(1).

The Respondents were not entitled to keep the Petitioner in the Station and to delay producing him before a Magistrate. He was entitled to be so produced within a reasonable time, 24 hours being the upper limit for such production. Assuming that there was truly a need to record his statement, that would not have justified a delay of more than an hour or two. By 3.00 pm. at the latest the Petitioner should have been either released or on his way to the nearest Magistrate. There is ample reason to insist on speedy production. Continued detention at Police Stations creates opportunities for ill-treatment as well as for false allegations of ill-treatment. Prolonging detention until late evening almost automatically results in detention overnight.

Besides, in this case it was manifest that the Petitioner was in need of medical treatment - whether or not he was going to be produced before a Magistrate the next morning, he should immediately have been taken to hospital. If further detention was required, this at least was certainly one case in which detention in hospital was justified.

While it was the 1st Respondent, as Officer-in-Charge, who was primarily responsible for the failure to release the Petitioner, according to the affidavits of the 3rd, 6th and 7th Respondents all of them unduly and unnecessarily prolonged the "questioning" of the Petitioner from 1.00 p.m. on the 3rd until 2.15 a.m. on the 4th; and it was only at 11.30 a.m. that they informed the 1st Respondent

that there was no evidence against the Petitioner. I therefore hold that the 1st, 3rd, 6th and 7th Respondents unlawfully detained the Petitioner in violation of Article 13(2).

Torture

The 3rd, 6th and 7th Respondents admitted that after they arrested the Petitioner all three of them used force on him: so-called "minimum force". The Petitioner's wife and brother described his condition at 10.00 a.m. the next morning. The medical evidence confirmed how serious that condition was - acute renal failure, loss of sensation over the 8th cervical and 1st thoracic vertebrae, damage to the median and ulnar nerves, complete loss of power of both shoulder joint muscles, and inability to grasp objects with the fingers, consistent with suspension from a beam and assault. The irresistible inference is that while in Police custody the Petitioner had been subjected to severe torture endangering life. There is no doubt whatsoever that he had been tortured and how exactly he had been tortured does not matter in the least. The failure to release the Petitioner promptly, or at least to secure prompt medical attention for him, was cruel and inhuman.

I therefore hold that the Petitioner was subjected to torture and to cruel and inhuman treatment by the 3rd, 6th and 7th Respondents, with the knowledge and acquiescence of the 1st Respondent, in violation of Article 11.

Liability of the 8th Respondent

It was averred in the petition that a complaint had been made on or about 14.6.2002 to the Inspector-General of Police, the 8th Respondent. The 8th Respondent did not file an affidavit either denying the receipt of such complaint or explaining what action he took. The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in Police custody shows no decline. The duty imposed by Article 4(d) to respect, secure and advance fundamental rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim no exemption. At the least, he may make arrangements

for surprise visits by specially appointed Police officers, and/or officers and representatives of the Human Rights Commission, and/or local community leaders who would be authorised to interview and to report on the treatment and conditions of detention of persons in custody, A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation (if not also of approval and authorization).

However, learned President's Counsel appearing for the Petitioner did not pursue the question of the 8th Respondent's liability.

Order

I grant the Petitioner a declaration that his fundamental rights under Articles 11, 13(1) and 13(2) have been infringed by the 1st, 3rd, 6th and 7th Respondents, and award him a sum of Rs 800,000 as compensation and costs (excluding medical expenses), payable on or before 30.6.2003. Of that sum, the 1st Respondent will personally pay Rs. 70,000, the 3rd Respondent Rs. 40,000, the 6th Respondent Rs. 20,000 and the 7th Respondent Rs. 20,000, and the State will pay Rs. 650,000.

The Petitioner also claimed reimbursement of medical expenses incurred at Nawaloka Hospital. Learned Counsel for the 1st, 3rd, 6th and 7th Respondents contended that the Nawaloka charges were exorbitant and that the Peitioner could have sought treatment at a State hospital. The evidence is that the Petitioner's wife and brother did not rush to Nawaloka in the first instance, but were content to go to the Wickramaarachchi Ayurvedic Hospital, and that it was in consequence of medical advice then received that they brought him to Nawaloka. However good the standard of treatment in State hospitals may be, there is no doubt that many Sri Lankans do opt for treatment in private hospitals - sometimes in the belief that treatment and care is better, and sometimes because of fears in regard to delays, over-crowding, strikes, shortages of

equipment and drugs, etc. Citizens have the right to choose between State and private medical care, and in the cirumstances the Petitioner's wife's choice of the latter was not unreasonable - and was probably motivated by nothing other than the desire to save his life. Article 12 of the International Covenant on Economic Social and Cultural Rights recognizes the right of everyone "to the enjoyment of the highest attainable standard of physical and mental health".

I therefore further direct the State to pay to the Petitioner the sum already paid to Nawaloka Hospital by or on behalf of the Petitioner, as well as any further sum remaining due for the period 26.6.2002 to 13.7.2002. The Petitioner will file a statment together with bills and receipts within two weeks from today. If the amount claimed by the Petitioner is disputed, the Registrar will refer the matter to this bench for further directions.

EDUSSURIYA, J. – I agree.

WIGNESWARAN, J. – I agree.

Relief granted.