

**KUMARA
VS.
SILVA, SUB-INSPECTOR OF POLICE, WELIPENNA AND OTHERS**

SUPREME COURT.

BANDARANAYAKE, J.

WEERASURIYA, J. AND

UDALAGAMA, J.

SC(FR) APPLICATION No. 121/2004.

1ST FEBRUARY, 17TH JUNE, 15TH SEPTEMBER AND 3RD, 9TH, AND
24TH NOVEMBER, 2005.

Fundamental Rights - Articles 11, 13(1) and 13(2) of the Constitution - Violation of only Article 11 of the Constitution - 1st respondent's version as to Article 13(1) and 13(2) fully accepted.

Petitioner who claimed to be an artisan who agreed to paint the police emblem for the Independence Day Celebrations was taken to the Welipenna Police on 03.02.2004 at about 8.30 a.m. by the 1st respondent sub inspector in a jeep. He said that on the way he was assaulted by the 1st respondent who also arrested one Don Shantha. He sustained injuries. At the Police Station the petitioner was taken to the 1st respondent's room and assaulted with a wicket on his shoulders, neck, arms and knees over 80 times.

The 1st respondent introduced a hand grenade and forced the petitioner to place his thumb impression on wax and to sign a statement falsely. Around 5.30 p.m. on 06.02.2004, the petitioner was produced before the Magistrate and was remanded.

The 1st respondent's version in his affidavit supported by I. B. extracts was that he arrested the petitioner, Don Shantha and others on a complaint of an armed robbery at Pareigama Stores. 1st respondent was accompanied by other police officers. As the Petitioner was pulling his pocket the 1st respondent struck him with a baton. The arrest on information was supported by I. B. extracts. It was referred on 05.02.2004 at about 6.45 p.m. As the petitioner started grappling with another police officer the 1st respondent struck again to control him. The 1st respondent denied the alleged assault at the police station.

The 1st respondent's version in respect of the arrest was corroborated by IB extracts and affidavits of two witnesses as against the petitioners version which is supported only by Don Shantha's statement. The petitioner was produced before the Magistrate on 06.02.2004 within 24 hours. However, the alleged assault at the police station is proved by medical evidence which gave 32 injuries including a fracture of the left ankle joint. The allegation of responsibility of the 2nd respondent, Inspector of Police was contradicted by evidence which shows that the 2nd respondent had given evidence in a court case on that day.

HELD:

- (1) The alleged infringement of Articles 13(1) and 13(2) were not proved; but the evidence including medical evidence proved infringement of Article 11 of the Constitution by the 1st respondent.
- (2) The 2nd respondent, Inspector of Police was not responsible for the infringement of the rights of the petitioner.

APPLICATION for relief for infringement of fundamental rights.

Cases referred to :

1. *Eshugbabai vs. Government of Nigeria* 1931 Ac 238
2. *Kapugeekiyana vs. Hettiarachchi* 1984 2 SLR 153
3. *Malinda Channa Pieris vs. A.G. and Others* 1994 1 Sri LR 1
4. *Fillastre vs. Bolivia* (HRC. 5.11.1991) UN Committee on Human rights
5. *Amal Sudath Silva vs. Kodithuwakku* - 1987 2 Sri LR 119

Sanjeeva Weerawickrama with Ravindra Jayalath for petitioner.
Nuwan Dissanayake with Anurada Megawaruna, Sanjeeva Edirisinghe and
Krishanthi Fernando for 1st respondent.
A.S.M. Perera, P.C. with Neville Ananda for 2nd respondent.

cur. adv. vult.

17th February, 2006.

SHIRANI BANDARANAYAKE, J.

The petitioner, who was 31 years of age at the time the incident in question took place, complained of violation of his fundamental rights guaranteed in terms of Articles 11, 13(1) and 13(2) of the Constitution for which this Court had granted leave to proceed.

I now proceed to set out the facts placed before this Court by the petitioner.

The petitioner, who was an Artisan by profession skilled in paintings and carvings, had returned home from Galle on 2nd February, 2004. The 1st respondent, with four other police officers, had come to his residence around 8.30 a.m. on 03.02.2004 and had wanted the petitioner to come to the Police Station to assist them to paint the police emblem for the Independence Day celebrations. The petitioner had agreed to accompany the 1st respondent and no sooner he got near the police jeep, the 1st respondent had hit the petitioner with his pistol on his chin thrice after which, blood started oozing from that wound. Thereafter the 1st respondent had kicked the petitioner with his boots and had pushed him into the police jeep. The said police officers thereafter had proceeded towards the Police station and at Galathara Junction they had arrested one Don Shantha. Both of them were brought to the Welipenna Police Station.

At the Police Station the petitioner and Don Shantha were taken to the 1st respondent's room and the 1st respondent had started hitting the petitioner with a wicket on his shoulders, neck, arms, head, spine and on his knees over 80 times. Whilst hitting the petitioner, the 1st respondent had told Don Shantha that this would be the manner in which others also would be treated and in the process of assaulting the petitioner, the 1st respondent had told the petitioner to hand over the bombs and the weapons which were in his possession and to confess about the robberies he had

carried out. The petitioner had denied any knowledge of bombs, weapons or the robberies. According to the petitioner, this had continued for about two hours and thereafter at the intervention of about 8 police officers and after one of those officers pulled the wicket from the 1st respondent's hand he had stopped assaulting the petitioner.

The 1st respondent thereafter brought a person known as Sarath, who was suffering from Tuberculosis. The 1st respondent had got the petitioner to open his mouth and told the said Sarath to spit into petitioner's mouth. In the process, the 1st respondent had told the petitioner that this was done so that the petitioner would die of the disease. On seeing this the police officer, who had intervened earlier to stop the assault, had brought a bottle of water and got the petitioner to wash his mouth.

The petitioner was kept in the police cell for about 3 days and on the third day the 1st respondent again assaulted the petitioner by punching on his chest several times and one of the punches had hit his face causing injuries. Later on that day the petitioner was taken by some police officers to the Iththapana District Hospital and was shown to a doctor. After examining the petitioner, he had refused to admit him to the hospital due to the serious nature of the injuries. The petitioner was brought back to the Police Station and later taken to the same hospital and was shown to a lady doctor. She too had refused to admit the petitioner to the hospital. Then the petitioner was taken to the Weththewa Government Hospital and thereagain the hospital authorities had refused to admit the petitioner.

That night the 1st respondent had come to the police cell with a grenade. It was taken out from a packing and the petitioner was forced to place his thumb impression on wax which was thereafter placed on the grenade. The 1st respondent had obtained the signature of the petitioner to a written statement without reading it out to him and the petitioner states that he had done it for the fear of getting assaulted by the 1st respondent.

On 06.02.2004 the petitioner was once again taken to Weththewa Hospital where the police had spoken to a gentlemen wearing a pair of shorts and obtained his signature for some documents. Thereafter he was brought to the Police Station.

Around 5.30 p.m. on 06.02.2004, the petitioner was produced before the acting Magistrate, Mathugama where the petitioner had stated about the assault and the thumb print that was taken on the grenade. The petitioner was thereafter taken to Kalutara Remand Prison and later admitted to the Kalutara Prison Hospital.

The 1st respondent in his affidavit averred that one Dharmasena, the owner of 'Pareigama Stores', had made a complaint at the Welipenna Police Station regarding a robbery that had taken place at his shop by a gang of armed men around 9.30 p.m. on 18.01.2004. Whilst in the process of investigating, he had received information from independent sources and suspects already in custody, that the petitioner was involved in the said armed robbery. Acting on that information, the 1st respondent, along with several other police officers, had arrested Don Shantha and several others on suspicion for armed robbery (1R1 and 1R2). In the course of the interrogation, the suspects who were arrested had revealed that the petitioner was in possession of fire arms and other offensive weapons. Thereafter the 1st respondent had arrested the petitioner at his residence on 05.02.2004, for being in possession of a live hand grenade (1R3).

The 1st respondent had further averred in his affidavit that the group of police officers had reached the residence of the petitioner around 6.45 p.m. on 05.02.2004, and while the 1st respondent was armed with his service revolver and the baton, the other officers were armed with their respective service weapons. The 1st respondent had advised the other officers to proceed with care as the information he had received had indicated that the petitioner could be dangerous. As they approached the petitioner's house, the 1st respondent had seen a person clad in sarong and a T-shirt walking towards them. At that time RPC Thushara who was seated close to 1st respondent, had identified that person as the petitioner and the 1st respondent had moved towards him. According to the 1st respondent, no sooner the petitioner saw the group of police officers he had reached for a weapon and therefore the 1st respondent had to react immediately. As the petitioner was pulling his hand out of his pocket, the 1st respondent had dealt him with several blows to his hand with his baton. This made the object in his hand to fall to the ground and the 1st respondent had noticed that it was a hand grenade. When the grenade fell to the ground the petitioner tried to retrieve it and the 1st respondent continued to hit him with his baton as he had feared that if he succeeded in retrieving the

grenade and used it, that would cause harm to all the police officers in that team.

At that stage, police Sergeant Asoka, who was within reach of the petitioner, had held him in an attempt to subdue him. However, when they started grappling with each other, the 1st respondent had dealt a few more blows to the petitioner's arms and shoulders. Thereafter the 1st respondent had arrested the petitioner (1R4 and 1R5). Later the petitioner was taken to D.M.O. of Weththewa Hospital and produced before the Magistrate, Mathugama from where he was sent to the Remand Prison, at Kalutara.

Accordingly, the 1st respondent denied that he had assaulted the petitioner at the Police station or that he was subjected to any form of torture. Further the 1st respondent averred that the said Sarath was arrested only at 7.45 p.m. on 09.02.2004 and by that time the petitioner was already in remand custody. Therefore the contention of the 1st respondent is that there was no possibility for the said Sarath to have spit in the mouth of the petitioner.

Since this Court had granted leave to proceed in terms of Articles 11, 13(1) and 13(2) of the Constitution let me now deal with each violation the petitioner has complained of, separately.

Articles 13(1) and 13(2) of the Constitution refer to the freedom from arbitrary arrest and detention. These two Articles are in the following terms :

"13(1) - No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

13(2) - Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

In terms of Article 13(1) of the Constitution, it is clearly a requirement that an arrest of a person should be according to procedure established by law. According to the Code of Criminal Procedure Act, No. 15 of 1979 an arrest could be either with or without a warrant. Arrest without a warrant may be made by any peace officer, viz., a police officer or a Grama Seva Niladhari appointed to perform police duties of a person against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. The command described in Article 13(1) of the Constitution requires that no police officer could act *ad arbitrium*, but only in terms of the procedure laid down by law. However, it is to be borne in mind, that Article 13(1) is not a prohibition that no arrest could be made by police officers. What it has stated is that, arrests which would be arbitrary and against the procedure established by law would be violative of the provisions of the Constitution. Article 13(1) of our Constitution reflects the principle stated by Lord Atkin in *Eshughbhai vs. Government of Nigeria*⁽¹⁾ which was to the effect that—

“in accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of law.”

In the instant case the 1st respondent's position was that the petitioner was arrested on the information received by Galatharage Don Shantha Kumara, Weligama Hewage Roshan Prasad and Waiakularachchige Chandana Pushpa Kumara *and* Ananda. The 1st Respondent had also stated that he had received information from an informant that the petitioner is in possession of dangerous weapons. The 1st respondent had in fact referred to this information in his notes (1R3).

Accordingly, it is apparent that the 1st respondent had arrested the petitioner as he had received credible information that the petitioner is in possession of dangerous weapons and that a reasonable suspicion had arisen as to the possibility of the petitioner having participated in the robbery where a complaint was made by the owner of the shop, one Dharmasena. In such circumstances it is evident that the arrest of the petitioner had not been in contravention of the provisions of Article 13(1) of the Constitution.

The next question that has to be considered is whether the petitioner was brought before the judge according to procedure established by law in terms of Article 13(2) of the Constitution.

According to section 33 of the Code of Criminal Procedure Act, No. 15 of 1979, a person who has been arrested shall within twenty-four hours from the arrest exclusive of the time necessary for the journey be taken before the nearest Magistrate's Court.

The petitioner's contention is that the 1st respondent arrested him around 8.30 a.m. on 03.02.2004 and that he was kept in his custody until 5.30 p.m. on 06.02.2004 thereby detaining the petitioner for over 81 hours clearly violating the provisions stipulated in Article 13(2) of the Constitution. However, except for an affidavit of Galatharage Don Shantha (P1) there is no other material submitted by the petitioner to support his contention that he was kept in custody by the 1st respondent for over 81 hours. The 1st respondent to the contrary, had contended that he had arrested the petitioner around 6.45 p.m. on 05.02.2004 and that he was produced before the Magistrate, Mathugama on 06.02.2004.

In these circumstances, the question of proof has to be given careful consideration. This aspect was considered in *Kapugeekiyana vs. Hettiarachchi*⁽²⁾ where Wimalaratne, J. observed that—

“In deciding whether any particular fundamental right has been infringed I would apply the test laid down in *Velmurugu* that the civil, and not the criminal standard of persuasion applies, with this observation, that the nature and gravity of an issue must necessarily determine the manner of attaining reasonable satisfaction of the truth of that issue.”

In *Malinda Channa Pieris vs. A.G. and Others*⁽³⁾ it was stated that unless the petitioner had adduced sufficient evidence to satisfy the Court, he will fail to obtain a declaration of a violation of his fundamental rights. This has been the accepted norm in International Courts as in *Fillkastre vs. Bolivia*⁽⁴⁾ the U.N. Committee on Human Rights had held that there was no violation because the allegations had not been substantiated or corroborated.

The petitioner, as stated earlier, has not filed any material other than the affidavit of Galathatrage Don Shantha in support of his averments. The 1st and 2nd respondents on the other hand had submitted notes and I.B. extracts pertaining to the information received by them about the petitioner and his subsequent arrest. According to the said information the petitioner was arrested at 6.45 p.m. on 05.02.2004 (1R1, 1R2 and 1R3) This position had been substantiated by the affidavits filed by Hema Thushara (1R4) and Gunawardana Ashoka (1R5).

The petitioner along with the others, who were arrested were produced before the Magistrate at Mathugama Magistrate's Court on 06.02.2004. Thus according to the 1st respondent's version, the petitioner had been produced before the Magistrate within 24 hours of the arrest. On a consideration of all the facts and circumstances of this application I am inclined to accept the version given by the 1st Respondent and hold that the 1st respondent had acted according to the procedure established by law in terms of Article 13(2) of the Constitution. In such circumstances, considering the material placed before this court, it is apparent that there has been no violation of Article 13(2) of the Constitution.

Having dealt with Articles 13(1) and 13(2) of the Constitution, let me now consider the question of whether there was any violation of Article 11 of the Constitution.

Article 11 of the Constitution deals with freedom from torture and reads as follows :

“No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

It is to be noted that Article 11 refers to torture separately from cruel, inhuman or degrading treatment or punishment similarly to Article 5 of the Universal Declaration of Human rights, Article 7 of the International Covenant on Civil and Political Rights as well as Article 3 of the European Convention which had referred to torture separately from inhuman, degrading treatment or punishment. The importance of the right to protection from torture has been further recognized and steps had been taken to give effect to the universally accepted safeguards by the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment signed in

New York in 1984, which has been accepted in Sri Lanka by the enactment of Act No. 22 of 1994 on the Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment.

Thus it is evident that notwithstanding the provision made in the Constitution regarding fundamental right on freedom from torture, in terms of Act, No. 22 of 1994, torture is to be an offence and any person who tortures any other person shall be guilty of an offence under the said Act.

The petitioner's complaint was that the 1st respondent had assaulted him mercilessly using a wicket after he was brought to the Welipenna Police Station. The contention of the 1st respondent was that, at the time he had arrested the petitioner he had reached for a weapon and therefore he had dealt several blows to his arms with his baton. This had caused the object in his hand to fall to the ground. After seeing that it was a hand grenade and that the petitioner was trying to retrieve it the 1st respondent had continued to assault him with his baton on his hands and shoulders.

The contention of the 1st respondent is therefore that he had used 'minimum force' to apprehend the petitioner. It is not disputed that use of minimum force will be justified in the lawful exercise of police powers. However, the force used in effecting an arrest should be proportionate to the mischief it is intended to prevent. Notwithstanding the aforementioned it would also be necessary to consider the injuries sustained by the petitioner in comparison with the version given by the 1st respondent.

The petitioner was examined by the Assistant Judicial Medical Officer of the General Hospital of Colombo on the orders made by the Magistrate. The Report of the Assistant Judicial Medical Officer dated 11.06.2004, contained 32 injuries which I reproduce below :

" 2 Examination :

2.1 General examination :

He is conscious and rational, but looks anxious. He walked into the examination room limping. His respiratory, cardiovascular and nervous systems are clinically normal.

2.2 Injuries :

2.2.1 Head and neck :

1. Healing laceration, linear, 2cm long, is situated in left ear lobe in its upper 1/3, involving the margin.
2. Resolving contusion, dark bluish purple in colour, 4 x 5.5cm, is situated in left side of the scalp, just behind the posterior attachment of ear lobe.
3. Tram line contusion, dark bluish purple in colour, 6x2cm size, is situated in the right side of the neck, in its lower 1/3 posterolaterally and obliquely.
4. Two healing split lacerations, each 2cm long, linear, are situated in right side of the jaw over its bony edge, in its front 1/3.

2.2.2 Chest and abdomen :

5. Resolving contusion, irregular shaped, 15x10cm, is situated in left side of the shoulder.
6. Resolving contusion, irregular shaped, 12x10cm, is situated in right side of the shoulder.
7. Tram line contusion, dark bluish purple in colour, 10x2 cm size, is situated in the left side of the back, over the shoulder blade in its upper 1/2 obliquely.
8. Tram line contusion, dark bluish purple in colour, 8x2cm size, is situated in the left side of the back, over the shoulder blade in its lower 1/2 obliquely.
9. Tram line contusion, dark bluish purple in colour, 22x2.5cm size, is situated in the left side of the back, over the shoulder blade extending up to the midline obliquely.
10. Tram line contusion, dark bluish purple in colour, 15x2.5cm size, is situated in the left side of the back, over the shoulder blade extending up to the midline above the injury No. 09, obliquely.

11. Tram line contusion, dark bluish purple in colour, 15x2.5cm size, is situated in the left side of the back, lateral to the shoulder blade extending downwards obliquely.
12. Tram line contusion, dark bluish purple in colour, 8x2.5cm size, is situated in the right side of the back, above the shoulder blade extending up to the midline, obliquely.
13. Two tram line contusions, dark bluish purple in colour, 10x2.5cm size, are situated in the right side of the back, on the shoulder blade extending parallel to each other, obliquely.
14. Two tram line contusions, dark bluish purple in colour, 18 x2cm size, is situated in the right side of the back, on the shoulder blade crossing of injuries No. 13, obliquely.
15. Tram line contusion, dark bluish purple in colour, 18x2cm size, is situated in the right side of the back, below the shoulder blade extending downwards from the lower ends of injuries No. 13, obliquely.
16. Tram line contusion, dark bluish purple in colour, 9x2.5cm size, is situated in the right side of the back, extending from the midline, obliquely. Its upper end is abraded and shows healing with pale scar.
17. Three healing abrasions, with dark scab formation and peripheral white margins, measuring 2x1.5cm, 2x1cm and 1x1.5cm are situated in left side of the shoulder in its back.
18. Tram line contusion, dark bluish purple in colour, 5x2.5cm size, is situated in the left side of the chest, over the lower margin of rib cage, extending obliquely.

2.2.3. Upper limbs :

19. Resolving contusion, dark bluish purple in colour, 18x6cm, is situated in right forearm laterally in its upper 1/3.
20. Tram line contusion, dark bluish purple in colour, 4x2 cm size, is situated in the right forearm, in its upper 1/3 posteromedial and obliquely.

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21. Seven tram line contusions, dark bluish purple in colour, each measuring 6x2.5cm size, are situated in left upper arm laterally. Some of them are directed obliquely and some are horizontal.
 22. Resolving contusion, dark bluish purple in colour, 18 x 6cm, is situated in right forearm laterally in its upper 1/3.
 23. Resolving contusion, dark bluish purple in colour, 10x5cm, is situated in right upper arm medially in its upper 1/3.
 24. Tram line contusion, dark bluish purple in colour, 4x2cm size, is situated in the right upper arm, in its lower 1/3 medially and obliquely.
 25. Resolving contusion, dark bluish purple in colour, 15 x 7 cm, is situated in left forearm posteriorly in its lower 1/3.
 26. Tram line contusion, dark bluish purple in colour, 1.5x2cm size, is situated in the right hand, in its back, obliquely.
 27. Abraded contusion, 2x1cm, irregular shaped, is situated in right forearm, posteriorly, just above the wrist joint.

2.2.4 Lower limbs :

28. Tram line contusion, dark bluish purple in colour, 7x2.5cm size, is situated in the right thigh, laterally, in its middle 1/3, obliquely.
29. Tram line contusion, dark bluish purple in colour, 6.5x2.5 cm size, is situated in the left thigh, laterally, in its middle 1/3 obliquely.
30. Tram line contusion, dark bluish purple in colour, 7.5x2.5 cm, size, is situated in the left leg, laterally, in its upper 1.3, obliquely.
31. Tram line contusion, dark bluish purple in colour, 8 x 2.5cm size, is situated in the left leg, laterally, in its middle 1/3, obliquely.
32. Split laceration, 1.5x0.5cm., irregular shaped, is situated in left ankle joint laterally, just above the outermost bony prominence. Underlying bone is fractured.

3. Investigations and referrals :

- (1) X-ray of the skull, chest and left ankle joint were taken and were referred to the Consultant Radiologist, National Hospital, Sri Lanka, Colombo (No. 4892)

Report revealed fracture in the lower end of left fibula bone. (Leg bone,)

- (2) He was referred to the Consultant ENT Surgeon, National Hospital, Colombo to get his opinion regarding the tinnitus of his left ear.

Report revealed normal ear drum in left ear.

- (3) Further, he was referred to the Consultant Psychiatrist, National Hospital, Colombo to get his opinion regarding his mental state subsequent to the assault. Reports revealed that his mental state at the time of examination was normal.

4. Conclusions and opinions :

- (1) Injuries No. 01-31 are non-grievous.
- (2) Injury No. 32 is grievous under limb (g) of section 311 of the Penal Code.
- (3) All injuries have been caused by a blunt weapon/weapons.
- (4) They could have been sustained in the manner as described by the examinee in the history.
- (5) Since I have to review this patient to examine whether he has been infected with tuberculosis, due to the forceful ingestion of sputum of a person believed to be infected with tuberculosis, please sent this victim to the Office of the J.M.O. Colombo."

When one compares the version given by petitioner as to what took place at the Police Station with the position taken by the 1st respondent in the backdrop of the contents of the Medico-Legal Report, it is my view that the petitioner's version is more probable than the contention of the 1st

respondent. If it was a mere assault to apprehend the petitioner with the minimum force used as described by the 1st respondent, there could not have been so many injuries on the petitioner. More importantly the A.J.M.O. had observed in his report that the petitioner could have sustained the injuries in the manner described by him. It is to be borne in mind that when the petitioner was arrested on 05.02.2004 as stated by the 1st respondent, he was not directly taken to the Magistrate, Mathugama. Firstly he was brought to the Welipenna Police Station. The petitioner had to spend that night in the Police Station and he was taken to the Magistrate, Mathugama only on following day, that being, 06.02.2004. Therefore there was every possibility that the petitioner was assaulted in the way he had described at the Police Station not on 03.02.2004, but on 05.02.2004 and the position taken by the petitioner regarding the assault is thus substantiated and corroborated by medical evidence.

Assuming that the petitioner was carrying a hand grenade in his possession as contended by the 1st respondent, would it be possible for the 1st respondent to submit him to torture, infringing his fundamental right guaranteed in terms of Article 11 of the Constitution? Moreover, if the 1st respondent had to use 'minimum force' in order to apprehend the petitioner could that be used with such force to have caused 32 injuries including one grievous injury to the petitioner? My answers to these questions are in the negative as although it is necessary in certain instances to use minimum force in order to apprehend a suspect, such force has to be used with restraint, not subjecting the person in question to torture, or to cruel and inhuman treatment. This view is clearly supported by the decision of Atukorala, J. in *Amal Sudath Silva vs. Kodituwakku*⁽⁵⁾ where it was stated that—

“ Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment, It prohibits every person from inflicting torture, cruel or inhuman treatment on another. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. **Every person in this country, be he a criminal**

or not, is entitled to this right to the fullest content of its guarantee The petitioner may be a hard-core criminal whose tribe deserves no sympathy, but if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our Constitution (emphasis added)."

Moreover, on a comparison of the injuries suffered by the petitioner with the versions given by the petitioner and the 1st respondent, it is obvious that the probabilities are more in favour with the version given by the petitioner.

Accordingly, it is clearly evident that the petitioner's fundamental right guaranteed in terms of Article 11 of the Constitution was violated.

There is only one other matter I have to deal with, before I part with this judgment. The petitioner whilst submitting that the 1st respondent had assaulted him severely, had averred that the 2nd respondent as the Officer-in-charge of the Police Station was also responsible for the violation of his fundamental rights.

The 2nd respondent had in its affidavit averred that he had left the Police Station on 02.02.2004 in order to be present at the Magistrate's Court, Ampara to give evidence in M.C. Ampara Case No. 60735. He had obtained the necessary approval from the Senior Superintendent of Police. He had submitted a copy of the proceedings dated 03.02.2004 of M.C. Ampara Case No. 60735 (2R2). After attending to the said official duties, he had reported for duty only on 05.02.2004 (2R1). Further in his affidavit the petitioner had stated that when the petitioner was brought before him on 05.02.2004, the 2nd respondent had directed that the petitioner be produced before the D.M.O. of Weththewa Hospital and thereafter the petitioner was produced before the Magistrate. It is to be borne in mind that the petitioner in his counter affidavit dated 28.10.2004 had stated that—

"..... I am aware that he (2nd respondent) was absent at the time I was brought to the Police Station initially by the 1st

respondent and tortured and kept in detention in the manner I have described in my petition.”

It is therefore evident that the 2nd respondent had not taken part in any kind of assault on the petitioner nor had he connived with the 1st respondent in any manner in such assault. In the circumstances, it will not be correct to come to the conclusion that the 2nd respondent was involved in any kind of activity leading to the violation of petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution.

Accordingly, I hold that the 2nd respondent had not infringed the petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution.

On a consideration of the totality of the circumstances of this application I hold that the petitioner has not been successful in establishing the violation of Articles 13(1) and 13(2) of the Constitution. However, I hold that the 1st respondent had violated the petitioner's fundamental right guaranteed in terms of Article 11 of the Constitution. I direct the 1st respondent to pay the petitioner a sum of Rs. 5,000 personally as compensation and costs and the State to pay a sum of Rs. 20,000 as compensation and costs. Accordingly, the petitioner will be entitled to a total sum of Rs. 25,000 as compensation and costs. These amounts to be paid within 3 months from today.

The Registrar of the Supreme Court is directed to send a copy of this judgment to the Inspector General of Police.

WEERASURIYA, J.—*I agree.*

UDALAGAMA, J.—*I agree.*

Relief partly granted.