

**SRI THAMINDA, DHARSHANE AND
MAHALEKAM**
v
INSPECTOR OF POLICE AND OTHERS

SUPREME COURT
S.N. SILVA, C.J.
THILAKAWARDANE, J.
MARSOOF, J.
SC FR 463/464/465/03
JUNE 27, 2005
SEPTEMBER 2, 5, 2005

Fundamental Rights – Article 11, 13 (1) – Assault – No reason or justification? – Assaulted by crowd – Arrested by Police to prevent major skirmish – Petitioners under influence of liquor – Fundamental rights guarantee owed to any person? – Does torture per se amount to cruel and degrading treatment – Burden of proving – Torture? – Use of excessive force. – Penal Code – Sections 183, 314, and 410.

The petitioners allege violations of Articles, 11 and 13(1) by certain officers. They complain that they were arrested without justification and were brutally assaulted, and further contend that, they were subjected to torture or to cruel inhuman or degrading treatment or punishment in violation of Article 11.

The respondents contended that the petitioners were under the influence of liquor and when the 3rd petitioner was requested to move his three wheeler away, the petitioners had attacked the respondents and the Police Constable who had sustained injuries had to be hospitalised, and that the petitioners had sustained injuries at the hands of the crowd, that had gathered there to intervene and save the Police Constable from being assaulted.

Held:

- (1) The mere fact that there was an assault which carried some injury is not indicative of a violation of Article 11. The use of force does not *per se* amount to cruel, inhuman or degrading treatment and in particular a

minimum level of severity should be established to sustain a charge of torture.

The onus is on the petitioner to adduce sufficient evidence to satisfy Court that any act in violation of Article 11 did take place.

Per Saleem Marsoof, J.

"I am of the opinion that the fundamental rights guaranteed by Article 11 are owed to 'any person' which includes even persons in a high state of intoxication".

(2) Despite the failure on the part of the petitioners to identify those who violated their fundamental rights, they are entitled to a declaration that their fundamental rights have been violated by executive and administrative action.

APPLICATION under Article 126 of the Constitution.

Cases referred to:

1. *Lucas Appuhamy v Mathurata* 1994 1 Sri LR 400.
2. *Saman v Leeladasa* 1989 1 Sri LR 10.
3. *Gunasekera v Kumara and others* SC 191/88 SCM 3.11.89.
4. *Wijayasiriwardane v Kumara, Inspector of Police, Kandy and others* 1989 2 Sri LR 312.
5. *Sisira Kumara v Sergeant Perera and others* 1998 1 Sri LR 162.
6. *Malinda Channa Peiris and others v Attorney-General* 1994 1 Sri LR 1.
7. *Ratnasiri and another v Devasurendra, Inspector of Police, Slave Island and others* 1994 3 Sri LR 127.

K. Thiranagama with S.H.K.K. Kumari for petitioners.

Mohan Peiris PC for 1st – 11th respondents.

Mahen Gopallawa SC for Attorney-General.

Cur.adv.vult.

August 2, 2007

SALEEM MARSOOF, J.

These three applications have been filed alleging violations of Articles 11 and 13(1) of the Constitution by certain Police Officers who were on duty on the last day of the Kandy Esala Perahera which fell on 11th August 2003. Since they arose from the same transaction, the three applications were heard together, and it is convenient to deal with them in one judgment.

The petitioner in SC Application No. 463/03, Mahadura Pandula Sri Thaminda, and the petitioner in SC Application No. 464/03 Ruwan Darshana Fernando, were persons who were earning their living by running fruit stalls opposite the Central Market, Kandy. The petitioner in SC Application No. 465/03, Aruna Shantha Mahalekam was the driver of the three-wheeler belonging to the said Ruwan Dharshana Fernando.

The petitioners' version of the incident that gave rise to these applications, as narrated in the petitions filed in this Court, is that at about 9.30 p.m. on 11th August, 2003, the petitioners came to the fruit stalls owned by Taminda and Fernando after dinner in the three-wheeler driven by Mahalekam. When the three-wheeler was stopped at the three-wheeler park opposite the Central Market for them to get down, there were a number of Police Officers there. One Police officer asked the driver to take the three-wheeler away immediately. The driver Mahalekam told the Police Officer that he would take it way after the persons inside got down. Then the Police Officer asked him, "What did you say?" and slapped him. It is the position of the petitioners that Ruwan Dharshana Fernando had an injury on his leg and was using crutches to walk, and consequently, there was a slight delay in alighting from the three-wheeler. When Mahalekam was being assaulted, Fernando asked the Police Officer not to assault him because it was his delay. The petitioners state that at that point Police Constable 31461 Abeyratne of Galhewa Police Station, gave Fernando a blow. Then, Thaminda got down from the three-wheeler and appealed to the Police Officer not to assault Fernando because he is a disabled person on his crutches. Thaminda said to the Police Officer, "Do not assault him. There is a law in the country. Act according to law". At that time the Police bus bearing Registration No. 63-376 came there, and a Police Officer who was inside the bus inquired from PC Abeyratne, "What was the problem?". He said: "These men talk law". Thereafter, about 12 Policemen alighted from the bus. The Policemen, who got down from the bus, saying: "Who are you? We are the chandiyas," kicked the petitioners and assaulted them with hands, batons and leather belts.

According to the petitioners, they were arrested by the 1st and 2nd respondents without any justification and were dragged into the bus, and thereafter put under the seats and further assaulted. As Fernando could not walk, the Police Officers dragged him along the tarred road and put him into the bus. The petitioners asked them too, not to assault them and to act according to law. They allege that they were attacked with batons and butts of guns at the Police Station as well, and the petitioners sustained severe injuries. Thaminda claims that at the Police Station one Police Officer attacked him on his chest with the muzzle of a gun, causing a bleeding injury. The petitioners allege that Mahalekam was dealt with most brutality, and that due to the attack with batons he sustained a bleeding head injury. When he asked for some water, one Police Officer had hit him on his bleeding wound with a baton, saying "I will give you some water". With that blow he became unconscious, and they put all three petitioners into the bus which took them to the General Hospital, Kandy, where Mahalekam was admitted to ward 11. Thereafter, the other two petitioners, namely Thaminda and Fernando, were taken to the residence of the Additional Magistrate, Kandy. These two petitioners claim that while they were being taken from the Hospital to the Magistrate's Bungalow, the Police Officers put them under the seats of the bus and kept kicking them. When they were produced before the Additional Magistrate, they informed him that they have sustained injuries due to assaults by the Police, and the Magistrate ordered the Police to admit them to the Hospital for treatment. It is claimed that even when they were being taken from the Magistrate's Bungalow to the Hospital, the Police Officers continued to assault them saying "You told the Magistrate and did this to us". Even inside the Police Post at the Hospital they were assaulted saying "These are the men who put part to us". They were taken to the General Hospital, Kandy at about midnight on 11th August 2003, and although Fernando was discharged from hospital after treatment at ward 10 the next morning. Thaminda had to be treated at ward 11 for a few days.

All three petitioners were in remand custody till 19th August 2003, on which date they were bailed out. The very next day they

visited the Police Headquarters in Colombo and made the statement produced marked 'P2' with the three petitions filed in this court. Their statements are substantively in the same lines as the averments in their petitions, except that in these statements they have sought to identify the Police Officers who allegedly assaulted them. The question of identity is very crucial to applications of this nature, and will be looked into in greater detail later on in this judgment.

The petitioners have pleaded that they were arrested by the 1st and 2nd respondents without any reason or jurisdiction, in violation of their fundamental right to freedom from arbitrary arrest guaranteed by Article 13(1) of the Constitution, and that they were brutally assaulted by the 1st to 10th respondents causing serious injuries requiring hospitalization, thereby infringing their fundamental rights to freedom from torture and cruel, inhuman or degrading treatment or punishment guaranteed by Article 11 of the Constitution.

It appears from the affidavit filed in these cases and the statements recorded by the Police that the incident arose from the delay in taking away the three-wheeler from which the petitioners had alighted within a prohibited zone within 400 meters from the route of the Perahera within which parking of vehicles inclusive of three-wheelers) was not permitted for security reasons. It is not disputed by the petitioners that the incident occurred while the three-wheeler was being parked in a prohibited area. It is common ground that the incident in question took place on the last day of the Kandy Esala Perahera (the "Randoli Perahera"), at a time when tens of thousands of persons, inclusive of foreigners, had gathered by the road side to view the Perahera. Special traffic arrangements had been made in order to facilitate the conducting of the Perahera by closing certain areas for traffic and by diverting the traffic into by-roads.

The respondents' version of this incident is set out in the affidavit dated 3rd November 2003 filed by the 1st respondent and the joint affidavit dated 3rd November 2003 filed by the 2nd to 10th respondents along with their objections. As attachments to the affidavit of the 1st respondent has been produced two more affidavits marked respectively '1R4a' and '1R4b' and

affirmed to by Ekanayake Mudiyanseleage Goonethilake Banda, the senior Superintendent of Police for the Kandy Division, and Senanayake Mudiyanseleage Abeyratne, who was a constable on duty near the Kandy Market at the time of the incident. It transpires from these affidavits and the documents annexed thereto that PC Abeyratne, who was deployed near the Market, had required the driver – Mahalekam to move the three-wheeler away, but the petitioners, who were under the influence of liquor, had been incensed at this request and had turned abusive and violent. They had assaulted PC Abeyratne during the course of which the latter sustained injuries, and his uniform was torn. According to the respondents, the crowd that had gathered there had to intervene to prevent PC Abeyratne from being assaulted further, and in view of the injuries sustained by him, he had to be admitted to Hospital along with the petitioners. The respondents' position is that all three petitioners were drunk, disorderly and violent, and the crowd had set on the petitioners when they saw PC Abeyratne being assaulted by the petitioners.

At that time, the 1st to 10th respondents, who were officers of the Rapid Deployment Force (RDF) Unit of the Kandy Police were in a police vehicle parked nearby ready to meet any emergency. According to the respondents, it was a by-stander who had informed the said Police vehicle about the incident, and this Unit proceeded to take action to avoid a further breach of the peace. The Rapid Deployment Force (RDF) is a Unit of the Sri Lanka Police specially trained to deal with unusually difficult situations inclusive of the controlling of riots and other similar circumstances, and is required to play a lead role in situations which Police Units indulging in normal Police duties are unable to effectively deal with. RDF Units are stationed in principal towns in Sri Lanka and are also called upon to be present on special occasions at which large crowds gather in order to support and supplement the local Police in the area. The 1st to 10th respondents were all members of this Unit, and were led by the 1st respondent who was in rank an Inspector of Police.

Learned President's Counsel appearing for the 1st to 11th respondents submits that the 1st to 10th respondents had to act quickly in order to avert a major skirmish between the petitioners

and the crowd which had already assaulted the petitioners. The immediate concern of these respondents was to obtain medical attention to the petitioners who had sustained injuries at the hands of the crowd and the said respondents had difficulty in even getting the petitioners to board the Police bus. It is the position of the respondents that the petitioners were informed at the time of their arrest that they were being arrested for obstruction of the performance of duties by a Police Officer, for drunken and disorderly behaviour and for breach of the peace. Learned President's Counsel has referred us to Section 23 (2) of the Code of Criminal Procedure Act No. 15 of 1979, as subsequently amended, which provides that if any person forcibly resists the endeavour to arrest him or attempts to evade arrest, "the person making the arrest may use such means as are reasonably necessary to effect the arrest." He also submits that in *Lucas Appuhamy v Mathurata*⁽¹⁾, it was observed by this Court that where an arrest without warrant is effected on sufficient grounds, such arrest was not in violation of Article 13(1) of the Constitution. The petitioners have since been charged for offences punishable in terms of Sections 183, 314 and 410 of the Penal Code, and proceedings are said to be pending. It is clear from the evidence that the 1st to 10th respondents did not act at any time in excess of the powers granted to them by law in effecting the arrest of the petitioners, and that their intervention prevented the occurrence of a major breach of the peace. In these circumstances, at the hearing of this case, the learned Counsel for the petitioners indicated to Court that he was not pursuing his case under Article 13(1).

The petitioners also allege that they were subjected to torture or to cruel, inhuman or degrading treatment or punishment in violation of their fundamental rights guaranteed by Article 11 of the Constitution. In this connection, it must be stated at the outset that the medical reports made available to Court unequivocally support the allegation made by the respondents that the petitioners were drunk. However these reports need to be scrutinized closely to ascertain whether their fundamental rights under Article 11 have been infringed.

As far as the petitioner in SC Application No. 464/03 Ruwan Darshana Fernando is concerned, the Medico – Legal Report issued by Dr. T.H.L. Wijesinghe has been produced in Court. This report shows that he was examined on the morning of 12th August 2003 in ward No. 10 of the General Hospital, Kandy prior to his discharge, and it shows that he had minor abrasions and contusions of a non-grievous nature, which clearly indicates that this petitioner has been subjected to assault. Learned President's Counsel for the 1st to 11th respondents has cited the decisions of this Court in *Saman v Leeladasa*⁽²⁾ and *Gunasekera v Kumara and others*,⁽³⁾ for the proposition that the mere fact that there was an assault which carried some injury is not indicative of a violation of Article 11. In fact in *Wijayasiriwardena v Kumara, Inspector of Police, Kandy and two others* ⁽⁴⁾ and *Sisira Kumara v Sergeant Perera and others*⁽⁵⁾ this Court has taken the view that the use of force does not *per se* amount to cruel, inhuman or degrading treatment and in particular, a 'minimum level of severity' should be established to sustain a charge of torture. As Justice (Dr.) A.R.B. Amerasinghe observes in his work '*Our Fundamental Rights of Personal Security and Physical Liberty*' at page 29 –

" 'Torture' implies that the suffering occasioned must be of a particular intensity or cruelty. In order that ill-treatment may be regarded as inhuman or degrading it must be 'severe'. There must be the attainment of a 'minimum level of severity'. There must (be) the crossing of the 'threshold' set by the prohibition. There must be an attainment of 'the seriousness of treatment envisaged by the prohibition in order to sustain a case based on torture or inhuman or degrading treatment or punishment."

In *Wijayasiriwardena v. Kumara, Inspector of Police, Kandy and Two others (supra)*, the petitioners had a split lip and an injury on the cheek which he alleged amounted to a violation of Article 11, Mark Fernando, J. (with Dheeraratne, J. and Ramanathan, J. concurring) observed that -

"The use of excessive force may well found an action for damages in delict, but does not *per se* amount to cruel, inhuman or degrading treatment that would depend on the

persons and the circumstances. A degree of force which would be cruel in relation to a frail old lady would not necessarily be cruel in relation to a tough young man; force which would be degrading if used on a student inside a quiet orderly classroom, would not be so regarded if used in an atmosphere charged with tension and violence To decide whether the force used in this instance was in violation of Article 11, 'is something like having to draw a line between night and day' there is a great duration of twilight when it is neither night nor day; but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is."

The injuries suffered by Ruwan Darshana Fernando are as much consistent with the story of this petitioner that he was assaulted by the Police, as they are with the story of the respondents that he along with the other petitioners were set upon by a crowd from whom they were rescued by the Police. In my opinion, this petitioner has not been able to establish a violation of Article 11 of the Constitution. The burden of proof required in applications of this nature was explained in the case of *Malinda Channa Peiris and others v Attorney-General*⁽⁶⁾, wherein it was stressed that having regard to the gravity of the matter in issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of any petitioner seeking to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment or punishment. Accordingly, the *onus* is on this petitioner to adduce sufficient evidence to satisfy Court that any act in violation of Article 11 did take place, and this in my opinion, he has failed to do. In the circumstances, I am of the view that the application filed by this petitioner should be dismissed, but in all the circumstances of this case, without costs.

However, as far as the other two applications are concerned, the position is much more serious. The petitioner in SC Application No. 465/03, Aruna Shantha Mahalekam, was examined by Dr. D.P.P. Senasinghe on the morning of 13th August 2003 in Ward No. 11 and in the Medico – Legal Report issued by him it is expressly stated that even at that time his

breath was smelling of alcohol. However, the following injuries have been noted by the Doctor in the body of Mahalekam:-

- *1. Laceration, 6x4 cm, cruciate in shape, placed on the upper middle aspect of the head.
2. Contusion, 3x2 cm, oral shaped, placed on the back aspect of the left shoulder, at the root of the neck.
3. Contusion, 2x3 cm. band shaped, placed on the mid-back aspect of the right shoulder.
4. Contusion, 4x3 cm, oral shaped, placed 4 cm away to the left from the midline and 10 cm below the lower angle of the left scapula on the back of the left side of the chest.
5. Contusion, 5x3 cm, band shaped, placed obliquely towards right, 5 cm below and 6 cm to the left from the lower angle of right scapula on the back of the right side of the chest.
6. Contusion, 6x3 cm, band shaped, placed obliquely towards the left, on the back of the right side of the abdomen 10 cm below the injury No. 5.
7. abrasion, 2 cm, linear, placed transversely on the right outer aspect of the abdomen.
8. Contusion, 4x3 cm, oral shaped, placed on the right outer aspect of the abdomen surrounding the injury No. 7.
9. Contusion, 5x4 cm, oral shaped, placed on mid inner aspect of right arm.
10. Abrasion, 1x1 cm, irregular, placed on inner aspect of right elbow."

The very first item of injury noted above supports the story of this petitioner Mahalekam that even when he was brought to the Police Station he was bleeding with a head injury caused by a Police assault, and that when he asked for some water one Police Officer, who is not named by the petitioner in his petition or elsewhere, had hit him on his bleeding wound with a baton, and that he thereupon lost consciousness. Of course, Dr. Senasinghe has observed in his report that "there was no loss of

consciousness, vomiting or bleeding from the ears, nose or mouth,* but the injuries suffered by this petitioner are in my opinion clearly on the other side of the line, and of sufficient seriousness to justify a finding of a violation of Article 11 of the Constitution.

The petitioner in SC Application No. 463/03, Mahadura Pandula Sri Thaminda was also examined on the morning of 13th August 2003 by Dr. Senasinghe who has noted in the Medico – Legal Report issued by him that his breadth too was smelling of alcohol. He has also noted the following injuries on the body of this petitioner.

- *1. Sutured laceration, 1 cm placed obliquely, 1 cm above the inner 1/3 of the right eye brow.
2. Sutured laceration, 1 cm placed vertically, 1.5 cm away to the right, from the outer angle of right eye.
3. Sutured laceration, 5 cm, placed obliquely, on the middle of the back aspect of the head.
4. Contusion, 8x2 c., placed obliquely on the back aspect of right side of the chest over right scapula.
5. Abrasion, 1x0.5 cm, irregular in shape, placed 10 cm below and 3 cm to the right from lower angle of left scapula on the back aspect of the left side of the chest.
6. Abrasion, 4x0.3 cm, linear, placed transversely on the left lower chest, 6 cm below the left nipple.
7. Abrasion, 1 cm, linear, placed transversely on the left lower chest, 2 cm below the injury No. 6."

In my opinion the injuries found on the petitioner Thaminda are also of a fairly grievous nature, and are of sufficient seriousness to justify a finding of a violation of Article 11 of the Constitution.

In my view, it is extremely unlikely that the injuries suffered by the petitioners in SC Applications 463/03 and 465/03 were sustained in the course of a confrontation with a crowd as alleged by the respondents. In fact, if such serious injuries were

inflicted on these two petitioners by a crowd of people, it was the duty of the police to trace the persons who inflicted such injuries and take action to prosecute them. In the absence of any information regarding action taken by the police to apprehend such persons, the only reasonable conclusion one can arrive at is that they were inflicted by the police after the arrest of these petitioners and while they were in Police custody.

There is, however, one difficulty in granting these petitioners relief, and that is the uncertainty which permeates their entire case in regard to the identity of those who subjected them to torture or to cruel, inhuman or degrading treatment or punishment. It is important to note that the only person whom they have expressly identified in the petitions filed by them as a person who dealt any one of them even a blow is PC Abeyratne, whom they have not chosen to cite as respondent to these applications. All the other acts they have complained of are not attributed to any particular police officer or officers.

In the statement made by the petitioner in SC Application No. 463/03 Thaminda at the Police Headquarters on 19th August 2003 marked 'P2' and produced with his petition, the name of the 1st respondent is expressly mentioned, along with the numbers of the 2nd, 3rd, 6th, 7th, 8th, 9th and 10th respondents as those who assaulted him in the Police Station, but in addition to these persons Thaminda has mentioned PC 37434 and PC 34111 who are not respondents to these applications, and no explanation has been offered as to why these persons have not been cited as respondents. In the statement of Thaminda no reference is made to the 5th and 6th respondents, and the reliability of the statement is put into great uncertainty by the disclosure that the numbers of the Police Officers who are alleged to have assaulted Thaminda were obtained from a sincere friend whose name or identity is not mentioned in the statement. In the statement made by the petitioner in SC application No. 465/03 Mahalekam on the same day, the 2nd, 3rd, 5th, 7th, 8th, 9th and 10th respondent are identified as those who assaulted him, but he too makes reference to PC 37034 who is not a respondent to his petition. He has, however, not disclosed his source of information regarding the numbers mentioned by him, but it is most likely that

this is some information that Thaminda shared with him. The fact is, that there is no averment in the petition filed by this petitioner regarding the identity of those who allegedly assaulted him.

It is obvious that the petitioners have not been able to identify any of the Police Officers who assaulted them as they themselves were in a highly intoxicated state. However, I am of the opinion that the fundamental rights guaranteed by Article 11 are owed to "any person" which includes even persons in a high state of intoxication. On the available material I am satisfied that during the night of 11th August 2003, certain police officers attached to the Kandy Police Station and the Rapid Deployment Force (RDF) of that police station, acting under the colour of office, did assault the petitioners in SC Application No. 463/03 and SC Application 465/03 and subjected them to inhuman treatment. The situation in these applications is similar to that in *Ratnasiri and another v Devasurendran, Inspector of Police, Slave Island and others*⁽⁷⁾ in which the Supreme Court held that despite the failure on the part of the petitioners to identify those who violated their fundamental rights, they were entitled to a declaration that their fundamental rights have been violated by executive or administrative action for compensation.

However, in all the circumstances of the present applications, where the petitioners have themselves conducted themselves in a disgraceful manner on a noble occasion, and must share parts of the blame for their predicament, I am not inclined to award any compensation, and only grant a declaration that the fundamental rights guaranteed to the petitioners in SC Application No. 463/03 and SC Application 465/03 by Article 11 of the Constitution have been infringed due to executive or administrative action. In the particular circumstances of these two applications. I do not make any order for costs.

SILVA, CJ. – I agree.

TILAKAWARDANE, J. – I agree.

Only declaratory relief granted.