IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. [F/R] No. 555/2009

In the matter of an Application under and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Herath Mudiyanselage Yohan Indika Herath, "Ambasevana",

Dummalasuriya.

Petitioner

Vs.

1. Ajith, Police Constable, Police Station, Dummalasuriya.
2. Ariyasena, Police Constable, Police Station, Dummalasuriya.
3. Jayamaha, Police Constable, Police Station, Dummalasuriya.
4. Officer- in-Charge, Police Station, Dummalasuriya.
5. Assistant Superintendent of Police, Office of the Assistant Superintendent of Police, Kuliyapitiya.
6. Inspector General of Police, Sri Lanka Police Headquarters, Colombo 1.
7. Hon. the Attorney General,

Department of Attorney General,

Colombo 12.

Respondents

BEFORE : **TILAKAWARDANE. J.**

SATHYAA HETTIGE.P.C. J &

MARASINGHE.J

COUNSEL : Upul Kumarapperuma with Ms. Udumbara Dasanayake for the Petitioner.

J.C. Weliamuna with Pulasthi Hewamanna for the 1st to 4th Respondents.

Ms. Lakmali Karunanayake, S.S.C., for the 5th, 6th and 7th Respondents.

ARGUED ON : 29.10.2013.

DECIDED ON : 18.02.2014

TILAKAWARDANE, J

A Fundamental Rights application was instituted by the Petitioner before this Court on the 24th of July 2009, against the 1st to the 7th Respondents. The action was initiated for the breach

of the Fundamental Rights guaranteed by the Constitution in **Articles 11, 12(1)** and **13(1),** however, during arguments, Counsel agreed to limit their arguments, on the 29th of October 2013, to the breach of **Article 11** of the Constitution. Accordingly, this Court heard arguments with regards to the alleged breach of **Article 11** of the Petitioner.

The events that preceded this application as alleged by the Petitioner are that, on the 20th of June 2009 the Petitioner's brother, one Herath Mudiyanselage Dilan Mahesh Herath organized a musical show in the Dummalasuriya Public Playground from 8:00pm to 10:00pm. The Petitioner was a member of the organizing committee of the event and alleges that upon the conclusion of the event he, along with two other friends, namely; Sooriya Mudiyanselage Niroshana Mahesh Kumar and Herasinghe Hettiarachchige Anil Indika, left and walked towards his vehicle. It is at this juncture that he asserts that the 1st, 2nd and 3rd Respondents were attacking a group of people he did not recognize. The 1st Respondent, who according to the Petitioner was under the influence of alcohol, purportedly assaulted the Petitioner. The Petitioner had clarified to the 1st Respondent that he was a member of the organizing committee however, the 1st Respondent was joined by the 2nd Respondent as well as another unidentified police officer and continued to assault the Petitioner with clubs and caused injury to his face, abdomen and head. The said officers were also allegedly under the influence of alcohol. The 1st, 2nd and 3rd Respondents has subsequently dragged him to a police jeep in the vicinity and locked him inside it, at which time the Petitioner called his brother who had arrived at the scene and requested the 1st Respondent to release the Petitioner. The 1st Respondent supposedly admitted to the Petitioner's brother that he inadvertently assaulted and detained the Petitioner. The Petitioner was requested to escort the 1st, 2nd and 3rd Respondents to the Police Station in order to discuss the events and the Petitioner agreed to accompany the Respondents to the station. At 12:00am the following morning the Petitioner was presented to the Galmuruwa Government Hospital for examination by the medical officer who was informed by the Petitioner that he was assaulted by the Respondents. The Petitioner was further detained until 10:00am and granted bail at that time. The Petitioner subsequently alleges that he spent two days at the Kuliyapitiya Base Hospital and was "observed for a head injury" by Dr. A. Kailai Nathan. The observations sheet of the said medical report has been included in

evidence and marked as "P3". The Petitioner also includes that he was threatened by a police officer attached to the Dummalasuriya Police Station on the 24th of June 2009. The Petitioner was charged with the offence of affray by fighting and was produced before the Kuliyapitiya Magistrates Court on the 26th of June 2009.

At the outset, this Court wishes to clarify that the alleged incident has undisputedly taken place on the 20th of June 2009 and the petition to the Supreme Court has only been made on the 24th of July 2009. **Article 126(2)** of the **Constitution** clearly states as follows:

> *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within **one month(***emphasis added) *thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges."*

The Petitioner has filed the application upon the lapse of the time bar that has been put in place by the Constitution and hence this application should, prima facie, be dismissed. The exception to this rule exists in the **Human Rights Commission of Sri Lanka Act No.21 Of 1996. Section 13(1)** of the act states as follows:

> *"Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaints is pending before the Commission, shall not be taken into account in computing the period of one month within an application may be made to the Supreme Court by such person in terms of Article 126 (2) of the Constitution."*

The Petitioner could avoid the lapse of the time bar if the application that was made to the Human Rights Commission was made within one month of the alleged incident. The documents marked as "P6" and "P6a" in evidence, are the proof of the complaint made to the Human

Rights Commissioner by the mother of the Petitioner. The said document is dated 23rd of June 2009 and as such the application made by the Petitioner is within the time bar for such an application.

This Court sees several issues that require the clarification and discourse of this Court. The document that portrays a somewhat polar opposite of the allegations put forth by the Petitioner is the report by the Assistant Superintendent of the Kuliyapitiya Police. This report is included in evidence and is marked as "5R6". This Court will, in due course, address the said contradictions and inconsistencies and arrive at its conclusion, however, it is crucial to put in perspective the rights guaranteed by the constitution under **Article 11** in order to determine whether a violation of the right has in fact occurred.

Article 11 of the Constitution states that:

> *"No person shall be subjected to torture cruel, inhuman or degrading treatment or punishment."*

The Fundamental Rights provision is also supplemented by the **Torture Act No. 22 of 1994** which provides criminal sanctions for torture. This Court wishes to draw from the said act, the definition of torture in order to establish whether the alleged conduct of the Respondents and the injuries reported by the Petitioner amounts to torture. **Section 12** of the said act defines torture in accordance with **Article 1** of the **Torture Convention** as follows:

"Torture, with its grammatical variations and cognate expressions, means any act which causes severe pain, whether physical or mental, to any other person, being an act which is-

(a) Done for any of the following purposes:

I. Obtaining from such person or a third person any information or confession;

II. Punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or

III. Intimidating or coercing such other person or a third person; or

(b) Done for any reason based on discrimination, and being in every case, an act, which is, done by, or at the instigation of, or with the consent or acquiescence of, public officer or other person acting in an official capacity"

This definition of torture is supplemented by the definition adopted by this Court in the case of **Mrs. W. M. K. De Silva v Chairman of Ceylon Fertilizer Corporation** *(1989) 2 SLR 393* where **Amarasinghe J** defined Torture as:

> "*In my view Article 11 of the constitution prohibits any act by which* ***severe pain or suffering****(emphasis added), whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person (whom I shall refer to as the 'victim') by a public official acting in the discharge of his executive or administrative duties or under colour of office, for such purposes as obtaining from the victim or a third person a confession or information, such information being actually or supposedly required for official purposes, imposing a penalty upon the victim for an offence or breach of a rule he or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person to do or refrain from doing something which the official concerned believes the victim or the third person ought to do or refrain from doing, as the case may be."*

He further elaborated in the said case that:

> *"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".*

The culmination of these two definitions presents to Court a framework within which acts of a public officials qualify as torture or degrading and inhuman behaviour.

There is a wealth of case law, both local and foreign, that sets out guidelines for the adjudication of what amounts to torture under this Article. The primary issue that arises with regards to the establishment of torture under **Article 11** is that if evidence or proof of the torture or inhumane and degrading treatment.

The standard of proof expected of a Petitioner seeking redress for breach of this right is high. The Court has, in the case of **G. Jeganathan v The Attorney General** *(1982) 1 SLR 294*

clarified the intent of the Court in establishing such a high standard. Here the Court stated that the alleged acts must be 'strictly proved' due to the fact that, if the allegations are proven to be true and honest they will carry 'serious consequences' for the officers concerned.

The case of **Channa Peris and Others v The Attorney General and Others** *(1994) 1 SLR 01* has established three principles that require the consideration of the Court if it is to establish torture:

I. *"The acts or conduct complained of must be qualitatively of a kind that a Court may take cognizance of. Where it is not so, the Court will not declare that Article 11 has been violated.*

II. *Torture, cruel, inhuman or degrading treatment or punishment may take many forms, psychological and physical.*

III. *Having regard to the nature and gravity of the issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of a petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment."*

The mechanism through which the Court expects the Petitioner to establish the breach is through medical reports and evidence from the medical officers who examined the victims. The Court implements a strict standard in this regard, as was clarified in the case of **Nadasena v Chandradasa Officer in Charge Police Station Hiniduma and Others (2006)** *(1 SLR 207)* where it was held that:

> *"…it would be necessary for the Petitioner to prove his petition by way of medical evidence and/or by way of affidavits and for such purpose, it would be essential for the Petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden."*

This Court emphasizes the need for cogent and strong evidence in order to establish the alleged torture that constitutes a breach of fundamental rights. The Petitioner has argued, as part and parcel of this case, the document marked as "P3" which is a copy of the observation notes of the Kuliyapitiya Base Hospital. The Respondents have also submitted medical evidence to support their assertion in the form of the Medico-Legal Examination Form, which is marked

"1R3" in evidence. Both reports indicate that the injury was not of a serious nature. The report, 1R3, which was filed by the Dummalasuriya Medical Officer (Report Number 101/09) indicates that the injury was of a "non-grievous" nature and is a "contusion" which is a result of a "blunt weapon". **The "Webster's Medical Dictionary**" defines a 'contusion' as follows:

> *"Contusion - Another name for a bruise. A bruise, or contusion, is caused when blood vessels are damaged or broken as the result of a blow to the skin (be it bumping against something or hitting yourself with a hammer). The raised area of a bump or bruise results from blood leaking from these injured blood vessels into the tissues as well as from the body's response to the injury. A purplish, flat bruise that occurs when blood leaks out into the top layers of skin is referred to as an ecchymosis."*

This definition puts in perspective for this Court the nature of the harm caused and clarifies that the injury reported is not of a serious nature and is similar to an injury that could arise out of a household accident.

The report that requires some discussion by this Court is "P3", which expressly states that the Petitioner was: "assaulted by police with blunt weapons to head, face, abdomen…"the Court clarifies that whilst this may, under normal circumstances, qualify as evidence of the assault, by the Petitioner's own admission, it was he who reported to the doctor that he was assaulted by the police. The doctor has accordingly merely entered it on the report and had no further knowledge with regards to the said incident. It is also noteworthy that though the Petitioner complained of head, abdomen and face injuries he was only 'observed' for head injuries according to the medical report. No other injuries have been recorded in the report and this is inconsistent with the statement of the Petitioner.

Accordingly, this Court feels that the evidence adduced by the Petitioner in order to establish "torture" falls short of the standard that is expected by this Court. In the case of **Kapugeekiyana v Hettiarachchi (1984)** *(2 SLR 153)* the Courts upheld that the lack of evidence to the satisfaction of the Court in order to establish torture would disable a claim of the Petitioner for the breach of fundamental rights. This view is consistent with international case law such as **Grant v Jamaica (1994)** *(Communication No. 353/1988)*, **Fillastre (On Behalf of**

Fillastre and Bizouarn) v Bolivia (1991) *(Communication No. 336/1988)* and **Soogrim v Trinidad and Tobago (1993)** *(Communication No. 362/1989).*

In the case of **Velmurugu v A.G. (1981)** *(1 SLR 406)* **Sharvananda J** highlighted the difficulties that arise out of this high standard of proof that has been repeatedly ordered by our Courts. His Lordship quoted the landmark "**Greek Case"** *Vide Journal of Universal Human Rights, Vol. 1, No: 4, Oct-Dec. 1979 at p.42* where the **European Commission on Human Rights** noted the said difficulties, as follows:

> *"There are certain inherent difficulties in the proof of allegations of torture or ill-treatment. First, a victim or witness able to corroborate his story might hesitate to describe-or reveal all that has happened to him for fear of reprisal upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the Police or Armed Services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority. Thirdly, where allegations of torture or ill-treatment are made, the authority; whether the Police or Armed Services or the Ministers concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence there may be reluctance of higher authority to admit or allow inquiries to be made into facts which might show that the allegations are true. Lastly, traces of torture or ill-treatment may with lapse of time become unrecognizable, even by medical experts, particularly where the form of torture itself leaves few external marks."*

This Court is mindful of these issues in this regard and as such will discuss the discrepancies in evidence prior to arriving at a conclusive decision. The greatest such discrepancy is perhaps the stark difference in statements of the two friends who accompanied the Petitioner on the 20th of June 2009. The statements of the said individuals were submitted as "P2a" and "P2b" in evidence by the Petitioner. In these statements, the said witnesses, namely, Sooriya Mudiyanselage Niroshana Mahesh Kumar and Herasinghe Hettiarachchige Anil Indika corroborate the Petitioner's version of events, however, a completely different version is

presented in the Police Report marked "5R6". Herasinghe Hettiarachchige Anil Indika asserted in the police report that he witnessed a physical altercation between two parties and that he saw the Petitioner being within the proximity of the police jeep. He also stated that he only heard of the assault by the police from the Petitioner's mother and that he witnessed no such incident. Sooriya Mudiyanselage Niroshana Mahesh Kumar alleged that he saw none of the incidents described and that he was about 30 meters away from the scene and as such got no clear visual of the events that were described by the Petitioner. He too stated that he only heard of the alleged assault from one 'Sithara'. Court is mindful of the fact that it is these two witnesses whose testimony constitutes the only available evidence that can affirm the allegation that the police officers were intoxicated at the time of the said incident. Accordingly, this Court sees no evidence that has been adduced in order to affirm the said allegation and is thus left with no choice but to disregard the claim. Furthermore, the 2nd Respondent was not on duty on the night of the said incident and the Police Report confirms the fact that he was at home at the time these events unfolded. It is also noteworthy to mention that the Petitioner stated that his father lodged a complaint to the Kuliyapitiya Police with regards to the incident that occurred on the 24th of June 2009. However, there appears to be no such record of the said complaint being lodged or any other evidence tendered in support of this claim. In fact the Assistant Superintendent of Police in his report denies hearing any such complaint.

This Court, taking into account the fact that the only two witnesses who are able to corroborate the story of the Petitioner have in fact provided two contradictory stories and taking into account all of the above inconsistencies, feels that the Petitioner's **Article 11** rights have not been infringed upon by the 1st, 2nd, 3rd, 4th or 5th Respondents. The case is accordingly dismissed. No costs.

Sgd.

JUDGE OF THE SUPREME COURT

SATHYAA HETTIGE.P.C.J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

MARASINGHE.J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT