

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

SC/FR No. 578/2011

In the matter of an application under and in terms
of Articles 17 & 126 of the Constitution of the
Republic of Sri Lanka

1. S. G. P. Dilshan Tilekeratne (minor)

Appearing through his next friend

2. H. M. Y. Kumarihamy (mother)

The Petitioners of No. 31,
Urulewaththa, Yatawatta
Matale.

PETITIONERS

Vs.

1. Sergeant Douglas Ellepola
2. Police Inspector Bandara
3. Hettiarachchi
4. R. Nishshanka, Officer-in-Charge

The 1st to 4th Respondents of
Police Station, Yatawatta.

5. Inspector General of Police,
Police Headquarters,
Colombo 1.
6. Hon. The Attorney General
Attorney General's Department,
Hultsdorp, Colombo 12.

RESPONDENTS

BEFORE: S. E. Wanasundera P.C.
Upaly Abeyratne J.
Anil Gooneratne J.

COUNSEL: Pulasthi Hewamanne for Petitioners
On behalf of Legal Aid Commission

Sandamal Rajapakshe for 1st to 4th Respondents

I. Punchihewa S.C. for the Attorney General

ARGUED ON: 13.10.2015

DECIDED ON: 14.01.2016

GOONERATNE J.

The 1st Petitioner was a minor 15 years of age and the 2nd Petitioner was his mother at the time of filing this Fundamental Rights Application. 1st Petitioner by his application complains of illegal arrest, detention and torture by the 1st to 4th Respondents all being Constables/Inspectors of Police station, Yatawatta. It is pleaded that on or about 25.06.2011 the 1st Petitioner was playing near his house and two other children Sahan and Chathura from the neighborhood had brought several items to the house of the Petitioner which includes a calculator, broken CDMA phone, torch, coconuts and toys which was stored inside the house. On the next date the said Sahan had come to the 1st Petitioner's house and given him three shopping bags. Petitioners state later on he became aware that these bags were hidden in the vicinity.

On or about 30.06.2011, it is stated by the Petitioner that a police party of six from the Yatawatta Police came to the Petitioner's house and had taken the 1st Petitioner to the police Station for investigations, in spite of the 2nd Petitioner's protest not to take him to the police. It is pleaded that the 1st Petitioner was threatened and assaulted at the police by the 1st & 2nd Respondents and

thereafter handcuffed to a chair (3.30 p.m). At about 8.00 p.m 1st Petitioner was detained inside the police cell and at that time the 2nd Petitioner, visited the police station. It is stated that 1st Petitioner was not provided with meals or water whilst in police custody. The facts pertaining to assault and torture of the 1st Petitioner and police investigations and subsequent torture of the 1st Petitioner is more fully described in paragraphs 7 to 20 of the Petitioner's petition. On 01.07.2011 police party had taken the 1st Petitioner to recover the stolen items accompanied by the 1st to 3rd Respondents. Several items inclusive of the CDMA phone, sim card, calculator etc. had been recovered. In the process police party seems to have continuously threatened the 1st Petitioner and warned him that he would be killed if incident of assault were divulged. It is pleaded that the police party had also taken the 1st Petitioner to his school as the police wanted to gather more information of theft and house breaking involving other students and the 1st Petitioner. In support of the 1st Petitioner's case Medico Legal Report P2, and Medical Report P4 are also produced, along with the Petition, of the Petitioners.

In the petition filed before this court the 1st Petitioner demonstrates that the police party had been threatening, humiliating and assaulting him in order to get more information of the alleged theft. It is also stated that the 1st Petitioner was abused in derogatory contumelious language whilst in police custody.

Emphasis is made in paragraph 15 of the petition relating to certain events that took place after being brought to the police station on 01.07.2011 at 11.00 a.m as follows:

- (a) The 1st Petitioner was taken to the 4th Respondent OIC's room, and the several items 'recovered' by the police were then produced;
- (b) The Petitioners state (on 01.07.2011), that the said Respondent O.I.C ., and the 1st and 2nd Respondents were present. Further, the owner of a grocery store, in the vicinity of the Petitioners' home was also present. The Petitioners are now aware, that Sahan had sold several plucked coconuts to the said owner;
- (c) The 2nd Respondent then dragged the 1st Petitioner near the wall whilst kicking the said Petitioner several times on the back of his thighs continuously berating the said Petitioner for stealing. The 1st Petitioner states that the said assault caused a numbing sensation in his leg;
- (d) Thereafter (on 01.07.2011), the 1st Petitioner's height, weight etc. were measured, and the said Petitioner was instructed to remove his shirt;
- (e) On complying, the said Petitioner's body was checked for "identifying marks" at which point the 4th Respondent OIC, walked over to the said Petitioner and assaulted him several times on his back/shoulder area berating the said Petitioner for being involved in theft.

(f) The Officers present were laughing and ridiculing the 1st Petitioner during these events, causing the said Petitioner to feel a deep sense of shame/humiliation;

(g) Thereafter (on 01.07.2011), for the first time since being taken into custody, the 1st Petitioner was given a meal.

On 16.01.2012, Supreme Court granted leave to proceed for alleged violation of Article 11 of the Constitution. The material placed before this court indicates that the 1st Petitioner was on 01.07.2011 produced before the Matale Magistrate. Petitioner had been charged before the Magistrate's Court for committing theft in a dwelling house and for retention of stolen property. The 1st Petitioner was granted bail on the said day by the learned Magistrate. Attorney-at-Law who represented the 1st Petitioner had on 26.07.2011 informed the Magistrate of the 1st Petitioner being assaulted by the police whilst in police custody. In paragraph 18 of the petition it is pleaded that Magistrate called upon the J.M.O to submit a report.

The Medico Legal Report (P2) indicates that the 1st Petitioner shows features of Post Traumatic Stress Disorder. In the said paragraph it is also pleaded that the learned Magistrate directed the Legal Aid Commission to take steps to file

a Fundamental Rights Application (P3). The short history given by the patient demonstrates that the Respondents were responsible of ill treating the 1st Petitioner both physically and mentally, inclusive of causing harm to the genital region of the patient.

The Respondent vehemently deny all allegations of assault, harm and torture alleged to be caused to the 1st Petitioner, and also state that whatever statements made in this regard by the 1st Petitioner is misleading. It is pleaded in the objections of the 2nd and 3rd Respondents that consequent upon a complaint (1R2) lodged by one W. Gunatilleke (1R1) of loss of CDMA phone, calculator stolen from his house, investigations commenced (1R2). Police had also received information regarding the involvement of the 1st Petitioner. (1R3). Thereafter police party visited the house of the Petitioners on 30.06.2011 and had explained the reason for arrest of the 1st Petitioner and taken him to custody. It is pleaded that previously also the 1st Petitioner had stolen some items including toys (R4). Officer-in-Charge of the police station, Yatawatta police had instructed the other Respondents not to put the 1st Petitioner inside the cell. The mother of the 1st Petitioner who is the 2nd Petitioner was permitted to stay with the 1st Petitioner in the police station and was provided with food (1R5 & 1R6).

The 1st Petitioner was produced before the Magistrate and the 1st Petitioner pleaded guilty. Learned Magistrate had called for a probation report (1R11). Respondents state that 1st Petitioner never complained about alleged assault on 01.07.2011 when he was produced before the Magistrate, and after being produced before court the 1st Petitioner attended school (1R2). Respondents take up the position that 3rd parties with vested interest admitted the 1st Petitioner to the Matale hospital alleging he suffered severe pain due to alleged assault, and after three days he was discharged from the hospital. However when the case had been called on 26.07.2012 before the learned Magistrate 1st Petitioner had informed court that the 1st to 4th Respondents had assaulted him. 2nd Respondent states it was a fabricated blatant lie. Learned Magistrate called for a Medico Legal Report and a Report from the Assistant Superintendent of Police of the area.

Article 11 of the Constitution prohibits persons from inflicting torture, cruel or inhuman treatment on another. It is no doubt a right which is absolute without restrictions or limitations. The treatment contemplated under article 11 was not confined to the realm of physical violence. It could be pain or suffering, whether physical or mental. I do consider it relevant, also to keep in mind the case of Saman Vs. Leeladasa (1989) 1 SLR 1 at 12 prior to arriving at a conclusion as regards the case in hand. Fernando J. held that the Standard of proof in complaints

of violation of Article 11, is proof of preponderance of probability and that civil standard of preponderance applies.

The 1st Petitioner was a helpless young person at the time of the alleged torture. He was a minor, although found guilty of the offence of theft and retention of stolen property, the learned Magistrate very correctly brought him under a probation order. The offence he committed is separate to the allegation of torture. The Medico Legal Report (P2) support the 1st Petitioner's case to a very great extent. The learned Magistrate was informed of cruel treatment by the police and his reaction was to call for the Medico Legal Report from the J.M.O., at the very moment that application was made to the learned Magistrate. The learned Magistrate also called for a report from the Assistant Superintendent of Police of the area. The complaint to the Magistrate, though made somewhat belatedly the Medical Officer, though he could not detect any physical injury may be due to lapse of time, was able to record the case history and observed "Features of Post Traumatic Stress Disorder". Such a finding of the J.M.O could be explained in a variety of situations and an injury physical or mentally contemplated under Article 11 of the Constitution cannot be ruled out, in the case in hand.

Supreme Court of Sri Lanka has over and over again emphasized that even persons whose records are not 'particularly meritorious', per Collin Thome J.

in *Senthilnayagam Vs. Seneviratne* (1981) 2 SLR 187, 208 should enjoy the Constitutional guarantee of personal liberty and security and that even 'notorious' or 'hard core' criminal should not be subject to torture, inhuman or degrading treatment or punishment 1987(2) SLR 119; 1991(2) SLR 247

The 1st Petitioner no doubt did not complain to the authorities concerned at the first available opportunity. When he was initially produced before the Magistrate he could have done so about inhuman, degrading treatment he had to undergo at the hands of 1st to 4th Respondents. This court cannot consider such inability and be inclined to take the side of the Respondents. In fact this is what the police party attempt to urge before this court. I have considered the material contained in the counter affidavit of the 2nd Petitioner (mother) and the most relevant portion of same. I note the following in paragraph 12 of the counter affidavit of the 2nd Petitioner which explains his (1st Petitioner) position as regards above. (a) & (b) of paragraph 12 reads thus:

(a) Answering paragraph 9(a) I specifically state that the 1st Petitioner did not state the true version of events/contradict the Police, nor inform the learned Magistrate about the treatment suffered by him whilst in the custody of the police due to fear. Further I state that 1R12 has no bearing

on this application but in any event reflects that the 1st Petitioner preferred to spend time in isolation as set out in the Petition;

(b) I deny paragraph 9(b), and state that 1R11 clearly indicates that the 1st petitioner shows features of Post Traumatic Stress Disorder (hereinafter PTSD) related to the incident described in the Petition

In fact by motion dated 14.12.2011 document X1 was tendered to court under confidential cover. This document had been tendered to court prior to supporting this application for leave to proceed. Material contained in X1 is most revolting to one's sense of human decency and dignity. The third degree methods practiced by the police party to obtain information from a young boy of 15 years is totally unacceptable and unbecoming of law enforcement officers, in the police force.

I am mindful of the following decided case which need to be kept as a guide, at all times when cases involving inhuman treatment has to be considered by the Appex Court.

In his judgment in *Velmurugu v. A.G.*, (1981) 1 S.L.R 406, at 438 Sharvananda, J. referred to the following comment of the European Commission on Human Rights in the Greek case on the difficulties faced by litigants alleging that public officers had inflicted or instigated acts of

torture and observed that the comment should be borne in mind in investigating allegations of torture by the police or army.

“There are certain inherent difficulties in the proof of allegations of torture or ill-treatment. First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals 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 authorities, whether the police or armed services or the Ministries 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”. Vide Journal of Universal Human Rights, Vol. 1, No. 4 of Oct-Dec. 1979 at page 42.

It is well to bear the above comment in mind in investigating allegations of torture by the police or Army.

I am more than convinced, having examined all the material placed before court that the 1st Petitioner was subjected by the 1st to 4th Respondents to torture and cruel, inhuman, degrading treatment, in violation of Article 11 of the Constitution. I allow the Petitioner’s application. He would be entitled to a declaration that his freedom from torture and cruel, inhuman and degrading treatment guaranteed to him under Article 11, has been violated by the above

Respondents. It is just and equitable that the State should pay fair compensation for humiliation and suffering undergone by the 1st Petitioner. The 2nd Petitioner being the mother of the 1st Petitioner would have suffered mental shock having being made aware of the suffering of her son. It is just and equitable that the State should pay fair compensation to the 1st Petitioner. I direct the Inspector General of Police to pay Rs. 50,000/- as compensation to the 1st Petitioner. I also direct that the Inspector General of Police take appropriate disciplinary action against the 1st to 4th Respondents for their acts of misconduct.

Application allowed.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyratne J.

I agree.

JUDGE OF THE SUPREME COURT