

**SARJUN
v
KAMALDEEN AND TWO OTHERS**

SUPREME COURT
SARATH N. SILVA, C.J.
DISSANAYAKE, J.
SOMAWANSA, J.
SC FR 559/03
MAY 14, 2007

Constitution Article 11, 14 (1) h, 13(1) – What is torture? – Is it linked to a purpose? – Roads – Public property – Illegal obstructions by Police and security personnel – Equality?

The petitioner and 3 others were transporting household furniture in their lorry, from Colombo to Katuwana. As they reached Habarana at night, he decided to spend the night at Habarana and parked the lorry on the side of the road. The petitioner had a permit to transport obtained under the Forest Ordinance, although a permit was not necessary. The petitioner claims that he obtained same out of an abundance of caution valid from 1 p.m. on 18.9.03 to 12 noon 19.9.03. Later in the night the 1st respondent came up to the lorry and wanted to inspect the furniture, and had demanded a bribe which was not given. The petitioner was thereafter taken to the Police Station and was arrested for the illegal transportation of furniture. When the petitioner denied the charge, he was assaulted, and later produced before the Magistrate. The petitioner pleaded guilty and was fined. The lorry was later released by the Magistrate.

The petitioner complains of violation of Article 11, by being subjected to torture or to cruel, inhuman, degrading treatment or punishment.

Held:

- (1) The evidence clearly shows that the petitioner was subjected to cruel, inhuman, degrading treatment or punishment.
- (2) The plain meaning of the words in Article 11 does not warrant a qualification being placed on the word 'torture' by linking it to a purpose. The assault on the petitioner may not be linked to any purpose, however since it was an intentional infliction of severe pain a suffering petitioner's fundamental right to freedom from torture has been infringed.

Per Sarath N. Silva, CJ.

"This case typifies the vicious link between abuse of authority, pursuit of graft and the infliction of torture on a citizen who insists on his right not to cave into illegal demands of gratification and abuse of authority, whilst security concerns have to be addressed. Such action should be taken with the highest concern and respect for human dignity".

Held further:

- (3) The presence of groups of armed police and security personnel who place illegal obstructions is a common sight on our roads. These officers as manifest in the facts of this case do not appreciate that roads constitute public property and that every citizen is entitled to the freedom of movement guaranteed by Article 14(1)(h); any interruption of the exercise of such freedom by Police/security personnel would amount to an arrest and has to be justified on the basis of a reasonable suspicion of having committed an offence.
- (4) A tolerant society weighted between ruthless terrorism and the abuse of authority has lost the taste of freedom; it is only through a respect for human dignity and freedom guaranteed by the Constitution to all segments of our society that peace and normalcy could be restored.

Per Sarath N. Silva, CJ.

"A person freely moving on the road in compliance with the law could be stopped and made to alight from the vehicle only on a reasonable suspicion of illegal activity. Superior officers who do not take precautions to prevent any infringement by the subordinates who are detailed for duty would themselves be liable for the infringement of the freedom of movement and the freedom from arbitrary arrest guaranteed by Article 14(1)(h) and 13(1).

APPLICATION under Article 126 of the Constitution.

Case referred to:

(1) *W.M.K. de Silva v Chairman, Ceylon Fertilizer Corporation* 1989 2 Sri LR 393 at 405.

Nizam Kariapper with M.I.M. Lynullah for petitioner.

P.K. Prince Perera with S.M.M. Mackan and I.K. Lalitha for 1st respondent.

Cur. adv. vult.

July 31, 2007

SARATH N. SILVA, C.J.

The petitioner has been granted leave to proceed in respect of the alleged infringement of his fundamental right guaranteed by Article 11 of the Constitution, by being subjected to torture or cruel inhuman, degrading treatment or punishment.

The specific allegation is against the 1st respondent, a Reserve Police Constable attached to the Habarana Police. The 2nd respondent being the OIC had been discharged from the proceedings prior to the hearing of this matter.

The petitioner was at the time material a 29 year old employee of a leading business establishment in Colombo, who had a permanent residence at Kalmunai in the Eastern Province. He purchased household furniture in Colombo including some wooden items and made arrangements to transport them to Kalmunai in a lorry belonging to his father. It appears that the family has a business establishment at Kalmunai. Although a permit was not required, out of an abundance of caution the petitioner obtained one under the Forest Ordinance for the transport of the items of wooden furniture, valid from 1.00 p.m. on 18.9.03 to 12 noon 19.9.03.

The driver and two other persons being his father's employees travelled with the petitioner in the lorry. They set off at about 2.00 p.m. on the 18th from Colombo and reached Habarana at night-fall. Since they were warned of wild elephants on the Habarana-Polonnaruwa road, they decided to spend the night at Habarana and parked the lorry on the side of the road.

Late in the night the 1st respondent and two others (not identified) came up to the lorry and wanted to inspect the furniture. They said that the lorry cannot be parked on the side of the road and should be taken to the Police Station.

The 1st respondent demanded a bribe of Rs. 5,000/- to refrain from taking any further action.

The petitioner refused to pay the bribe and insisted that he had not done any illegal act and that the items of furniture were not

being transported for trade but for personal use. Nevertheless the petitioner was taken to the police station and produced before a senior officer who examined the permit and the receipt for the furniture and stated that the petitioner could re-commence journey at 4.00 a.m. It appears that transport is not permitted between 9.00 p.m. and 4.00 a.m.

The petitioner and the others remained in the police station. At about 3.00 a.m. the 1st respondent came upto him and said that they are under arrest for the illegal transportation of furniture. When the petitioner protested that they had done nothing wrong the 1st respondent and two others, who have not been identified attacked the petitioner with a wire causing him severe bodily pain and injuries. He was forced into police cell and kept there till about 12 noon when he was taken out and produced in the Magistrate's Court. The petitioner and the others were charged with having committed offences under the Forest Ordinance. They pleaded guilty and were imposed fines of Rs. 5000/-.

Since the lorry and the furniture were subject to forfeiture the petitioner's father and he made a claim for these items and both gave evidence at the inquiry that was held. The petitioner testified substantially on the lines stated above. The version suggested to him in cross-examination was that the lorry was stopped by the police when it was travelling in the direction of Polonnaruwa at 10.00 p.m. and that an offence was made out since transport was not allowed after 9.00 p.m. The suggestion was denied by the petitioner.

The Magistrate in a well considered order accepted the version of the petitioner that the lorry was parked at the time the 1st respondent purported to arrest the petitioner and held that although wittingly or unwittingly the petitioner pleaded guilty, it was not within the objective of the Forest Ordinance to forfeit the furniture and the lorry. He accordingly released the lorry and the furniture to the claimants, being the petitioner and his father.

The 1st respondent has in his affidavit filed in this Court reiterated the suggestion made to the petitioner at the inquiry in the Magistrate Court that he violated the condition of the permit by transporting furniture at 10.00 p.m. The 1st respondent has also

denied the assault and challenged the medical certificate P5 on the basis that it is belated.

I would now examine the two disputed questions of fact with regard to the time of arrest and assault on the petitioner.

As observed by the Magistrate a permit was not required for the transport of the items of wooden furniture, considering its value as disclosed in the receipts. The petitioner stated that he obtained a permit out of an abundance of caution probably having in mind the several check points that they would have to pass to reach Kalmunai from Colombo. Considering his plight even with a permit one could imagine the degree of peril if he insisted on his right to transport the furniture without a permit. Since the petitioner had taken such precautionary action he would never have violated the conditions of the permit that prevented transport after 9.00 p.m. As observed by the Magistrate the petitioner has a valid permit for the next day as well and could have continued the journey without any problem in compliance with the permit. Furthermore, the Magistrate has noted that it is commonly known that people refrain from night travel due to fear of confronting wild elephants on that stretch of the road. In these circumstances the petitioner had no alternative but to stop the lorry on the side of the road and stay there till dawn. The 1st respondent's version that the lorry was travelling at 10.00p.m. in the direction of the elephant infested area has to be rejected. His notes of an arrest at 10.00p.m. have been concocted to make out an offence where there was none. The petitioner became a victim of the fabrication since he refused to give the bribe that was demanded by the respondent.

The other matter is with regard to the assault. The petitioner has candidly stated that the senior officer noted that no offence had been committed and that he could recommence the journey at 4.00a.m. It appears that the 1st respondent was irked by the petitioner's refusal to pay the bribe and started attacking him at about 3.00 a.m. an hour before he was free to travel. The Medical Report P5 has been issued by the Consultant Surgeon of the Ashroff Memorial Hospital in Kalmunai. The petitioner has got himself admitted to the hospital on the 22nd, after he was released from Courts. P5 records that the petitioner had triangular imprint abrasions over left arm and back of chest and also notes that he complained of assault

by police officers at Habarana with a wire, hand and weapons. These injuries could never have been self inflicted, considering their location and the nature. Understandably the petitioner's first concern would have been to get back to his residence at Kalmunai. The delay of 2 days *per se* is not significant considering the circumstances that have been pleaded by the petitioner. The 1st respondent has admitted the arrest of the petitioner and was the officer in contact with the petitioner whilst in custody. He is therefore responsible for the assault resulting in injuries.

For the reasons stated above I would accept the version of the petitioner in respect of both disputed questions of fact.

The petitioner has stated that the assault on him resulted in severe bodily pain and injuries. The medical report supports this allegation with regard to the injuries and undoubtedly an assault of this nature would have resulted in severe bodily pain. The petitioner has alleged that he was assaulted in the presence of his father's employees to humiliate him since he refused to pay the bribe and insisted on his innocence. Further, he was pushed into the cell and kept there several hours till he was taken to the Court house the next day. These allegations are proved by the circumstances relevant to the arrest, the institution of criminal proceedings admitted by the 1st respondent and the Medical Report P5. The petitioner was thus subjected to cruel, inhuman, degrading treatment or punishment.

In the case of *W.M.K. de Silva v Chairman, Ceylon Fertilizer Corporation*⁽¹⁾ at 405, an observation has been made in an opinion stated by the Judge that to constitute torture the intentional infliction of severe pain or suffering whether physical or mental should be for one of the purposes set out in the judgment. The link to a purpose has been derived with reference to the provisions of the UN Declaration on Torture of 1975 and the Torture Convention (C.A.T.). On that line of reasoning the infliction of severe pain or suffering would amount to torture if it is for the purpose of obtaining information or a confession or as a punishment for an act that has been committed or for some reason based on discrimination. The question is whether to constitute torture in terms of Article 11 of our Constitution the infliction of severe pain or suffering should be linked to such a purpose.

Article 11 reads as follows:

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

The plain meaning of the words does not warrant a qualification being placed on the word "torture" by linking it to a purpose.

As noted by Dr. Wickremaratne in his work titled "Fundamental Rights in Sri Lanka" – 2nd Ed. Pages 272 to 274, "the freedom from torture is declared in Article 11 as an absolute right and entrenched by Article 83, which bars any inconsistent legislation without a two-third majority in Parliament and approved by the People at a Referendum and should be given its ordinary meaning as prohibiting any act by which severe pain or suffering whether physical or mental that is intentionally inflicted, without any requirement of proof of purpose. This guarantee safeguards human dignity which is a material element in the concept of law. "The principle of human dignity is described as the point of convergence of the contentual elements which sustain the structure of every order of positive law".

The assault on the petitioner may not be linked to any purpose as stated above. However, since it was an intentional infliction of severe pain or suffering I hold that the petitioner's fundamental right to freedom from torture has been infringed.

The facts of the case reflect the hapless plight of an innocent citizen who takes every precaution to comply with the law of the land. The concern of national security resulting from the threat of terrorism has made it necessary to impose safeguards and check points on our public roads. The case typifies the vicious link between abuse of authority, pursuit of graft and the infliction of torture on a citizen who insists on his right not to cave into illegal demands of gratification and abuse of authority. Whilst security concerns have to be addressed such action should be taken with the highest concern and respect for human dignity.

The presence of groups of armed police and security personnel who place illegal obstructions is a common sight on our roads. These officers as manifest in the facts of this case do not appreciate that roads constitute public property and that every citizen is entitled to the freedom of movement guaranteed by Article 14(1)(h) of our

Constitution being the Supreme Law of the Republic. Any interruption of the exercise of such freedom by police/security personnel would amount to an arrest and has to be justified on the basis of a reasonable suspicion of having committed an offence. A tolerant society wedged between ruthless terrorism and the abuse of authority has lost the taste of freedom. It is only through a respect for human dignity and freedom guaranteed by the Constitution to all segments of our society that peace and normalcy could be restored. Therefore a heavy responsibility lies on all Senior officials who detail armed personnel on our roads to take every precaution to ensure that ordinary officers such as the 1st respondent (being only a Reserve Police Constable) do not abuse their authority, violate the law or inflict suffering on innocent citizens. Such personnel have to be firmly instructed that they have to act with the highest degree of caution and sensitivity with due respect for human dignity.

A person freely moving on the road in compliance with the law could be stopped and made to alight from the vehicle only on a reasonable suspicion of illegal activity. Such suspicion would have to be justified in Court. Superior Officers who do not take precautions to prevent any infringement by their subordinates who are detailed for duty would themselves be liable for the infringement of the freedom of movement and the freedom from arbitrary arrest guaranteed by Article 14(1)(h) and 13 (1) of the Constitution.

For the reasons stated above, I allow the application and grant the declaration prayed for in prayer "b" of the prayer of the petitioner that the petitioner's fundamental rights guaranteed by Article 11 of the Constitution has been infringed.

The 1st respondent is directed to pay a sum of Rs. 100,000/- as compensation to the petitioner and the State will pay a sum of Rs.50,000/- as costs.

The Registrar is directed to send copies of the judgment to the Secretary, Ministry of Defence and Inspector General of Police, for their information and necessary action.

DISSANAYAKE, J. - I agree.

SOMAWANSA, J. - I agree.

Application allowed.