

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

S.C. (F/R) No. 429/2003

In the matter of an Application under

Article 126 of the Constitution.

1. Guneththige Misilin Nona, Akkara Heththedeka, Kindelpitiya, Millewa. (Mother of the deceased).
2. Guneththige Jayalatha, Akkara Heththedeka, Kindelpitiya, Millewa

Petitioners

Vs.

1. Muthubanda (10312), Police Constable Moragahahena Police Station, Moragahahena.
2. Maheepala,
Officer in Charge,

Police Station, Moragahahena.
3. Wijemanna, Police Constable Moragahahena Police Station, Moragahahena.
4. Inspector General of Police,

Police Headquarters, Colombo 3.
5. The Attorney General,

Attorney General's Department, Colombo 12.

Respondents

BEFORE : **TILAKAWARDANE.J**

SRIPAVAN.J &

IMAM.J

COUNSEL : J.C. Weliamuna for the Petitioners.

Madhawa Tennakoon, S.C., for the 4th and 5th respondents.

ARGUED ON : 01.07.2009 & 15.09.2009

WRITTEN SUBMISSIONS : 22.02.2010

DECIDED ON : 06.08.2010

Hon. Shiranee Tilakawardane J

This Court granted Leave to Proceed on 03.09.2003 to the Petitioners in respect of the alleged infringements of Articles 11, 13 (1), 13 (2), 13 (4) and 17 of the Constitution by the 1st to 3rd Respondents and several other Police Officers of the Moragahahena Police Station (hereinafter referred to as “the Police Station”).

The 1st and the 2nd Petitioners are respectively the mother and sister of the deceased Thisera Sunil Hemachandra who died on 26th July 2003 (hereinafter referred to as the deceased), while allegedly in Police custody. The deceased was a Sri Lankan citizen and 32 years of age at the time of his death. The 1st Respondent was a Police constable attached to the Police Station at the time of the death of the deceased. The 2nd Respondent is the Officer in Charge of the Police Station. The 3rd Respondent is a Police constable attached to the Police Station.

The Petitioner's version of facts is as follows. On 28.06.2003 the deceased had purchased a Sanwardana Vasana lottery from a lottery seller named 'Neil' and won the prize money of Rs. 3,003,100.00. The Lottery Agent was one Ranasinghe Lionel. According to the Petitioners, the lottery seller Neil, had initially tried to cheat the deceased by stating that he had won only a sum of Rs.5000 and had taken the lottery from deceased promising to pay Rs.5000 the same evening.

However, on 29.06.2003 the deceased was advised by the Grama Seva Niladhari of the Kindelpitiya Division that he had in fact won the sum of Rs. 3,003,100.00. At or around 4.30 pm the same day, the deceased was visited at his home by Ranasinghe Lionel the lottery agent and the 1st Respondent who offered to provide the deceased with protection at the Moragahahena Police Station. Specifically, they asked the deceased to spend the night at the Police Station and travel to the Development Lottery Board the next day in a Police jeep. However the deceased declined the offer of protection and refused to go with Ranasinghe Lionel and the 1st Respondent to the Police Station as suggested.

The Petitioners state that following this visit by Ranasinghe Lionel and the 1st Respondent, the deceased was in fear for his safety. He also feared that he could face further problems, since he did not possess a National Identity Card. He therefore gave the lottery ticket to Guneththige Piyawathie (hereinafter referred to as "Piyawathi") who is the aunt of the deceased and at whose home he had been living for over twenty years and asked her to obtain the money in her name.

On 04.07.2003 the deceased, accompanied by Piyawathie and Ranasinghe Lionel went to the Development Lottery Board and obtained the prize money in the name of Piyawathie. Thereafter the deceased had purchased a van and a three wheeler, respectively on 7.07.2003 and 14.07.2003.

The Petitioners state that about a week later a team of Police Officers from the Moragahahena Police Station including the 3rd Respondent visited Piyawathi's house and questioned her about the whereabouts of the deceased. Hearing that the deceased was in Colombo, the Police then inquired into what they had done with the money the deceased won. According to the Petitioners the 3rd Respondent had told Piyawathi that 'there happiness will not last long'. They had required Piyawathi to inform the deceased to come to the Police Station the next day.

Chanaka Dinesh (hereinafter referred to as “Chanaka”) who is the driver of the deceased’s van and the son of Ranasinghe Lionel had gone to the Police Station, the same evening to inquire as to why the deceased had been asked to call over at the Police Station. Then the Sub Inspector had informed him that they want Sunil and not Chanaka.

When the deceased had called over to the Police Station the next day, it had appeared to be that there was no Inquiry or allegation against him. One Sub Inspector had claimed money from the deceased to which the deceased had replied that the money was with Piyawathi.

In the meantime, on 21.07.2003 Chanaka had a quarrel with his father; Ranasinghe Lionel and the next day namely on 22.07.2003 at about 8.00 pm Ranasinghe Lionel and few other three-wheel drivers had attempted to assault Chanaka, after which he had gone to Piyawathi’s house to sleep for the night.

Thereafter on 21.07.2003, at about 11.15 pm a team of Police Officers arrived at Piyawathi’s house where the deceased was sleeping. According to the Petitioners the Police upon entering the house had found the deceased sleeping on the floor in the sitting room. The Police Officer had kicked the deceased on the head and asked him if Chanaka was in the house. According to Piyawathi, before the deceased could respond the officers including the 1st Respondent started to assault the deceased on his head. That same night, the Police took both the deceased and Chanaka into custody. Whilst they were being taken out of the house the 1st Respondent had pointed the deceased to another Police Officer and told “moo thama lotteria dinapu eka” (He is the one who had won the lottery ticket). The Petitioners state that Ranasinghe Lionel was parked in a three wheeler allegedly observing the whole scene and that he followed the Police jeep to the Police Station.

The Petitioners allege that the deceased had been assaulted on his abdominal area and head by all the five Police Officers in the jeep including the 1st Respondent. Chanaka had requested not to assault the deceased, upon which he had received a slap on the face by one of the Police Officers. At the Police Station, the deceased and Chanaka had been put into a cell with five other detainees.

The following morning, on 23.07.2003 at around 7.15 am the deceased had started bleeding from the nose and told Chanaka that he felt vomitish. Chanaka had alerted the Police to the deceased's condition and the Police had initially asked Chanaka to wipe the blood off the deceased's face. Since the bleeding did not stop, a Police Officer called "Malalasekara" had opened the cell for Chanaka to take the deceased to the backyard and wash the deceased's face. The deceased was unable to stand and had to lie on the floor near the tap. The deceased continued to bleed from his nose and mouth. At this point, Chanaka inquired if the Police Officers were not taking the deceased to the hospital.

Piyawathi who visited the Police Station at or around 8.00 am the same day, upon seeing the deceased's condition had started screaming, upon which one of the Police Officers had told her not to scream and informed her that the deceased was suffering from epilepsy. Piyawathi had denied any knowledge of the fact that the deceased had been suffering from epilepsy. The 2nd Respondent had arrived at the Police Station and the deceased was taken to hospital in the Police jeep. The deceased was warded at the Horana Base Hospital by the Police.

The Petitioners state that on the same day at about 2.30 pm two Police Officers from the Police Station had come to the hospital to record a statement from the deceased and having obtained permission from the two nurses, had written two pages in their notebooks. The Police Officers had then taken the thumb impression of the deceased at the end of the note they had recorded.

On 24.07.2003 Piyawathi had made a complaint to the Human Rights Commission to the effect that the deceased was illegally arrested and assaulted by the Respondents. On the same day the deceased had been transferred to the National Hospital, Colombo and treated at the A.S/N.S. ICU where the deceased had undergone a brain surgery. On 26.07.2003 Piyawathi was informed by the hospital that the deceased had passed away. On the same day Piyawathi and other members of the family went to the Police Station and statements were recorded from Piyawathie and Chanaka by the ASP of Horana.

On 28.07.2003 the Inquiry into the death of the deceased was held by the Additional Magistrate J.R. Dissanayake of the Colombo Chief Magistrate's Court. The Respondents on 31.07.2003 produced witnesses to establish that the deceased died due to a fall following an epileptic attack.

The Respondent's version of events, contradicts the above narration of facts as set out by the Petitioners. According to the Respondents, on or about 1.00 am a team of Police Officers including the 1st Respondent headed by S.I Jayasinghe left the Police Station to inquire into a complaint made by Ranasinghe Lionel against his son Chanaka alleging that he was waiting with a gang to assault the father due to some personal grudge. That night Ranasinghe Lionel had led the Police to Piyawathi's house. According to the Respondents, when the Police attempted to arrest Chanaka, the deceased had vehemently resisted the arrest and tried to assault S.I Jayasinghe. Moreover on perceiving that the deceased was after consumption of liquor, as a safety measure, the deceased had been taken into custody along with Chanaka. At the Police Station the deceased and Chanaka had been put into a cell.

An Entry had been made by the 2nd Respondent that at about 07.02 hrs on 22.07.2003, a noise of someone falling inside the cell was heard and that the deceased had fallen on the ground with his face down and was struggling. Consequent to that he was bleeding from the nose and when inquired the reason for such bleeding the deceased had replied that he was suffering from epilepsy and due to the fall his nose struck against the floor and was bleeding. Thereafter the OIC had sent him to the hospital for treatment. This chain of events is borne out by the Police extracts submitted to this Court.

Evidently the Petitioners allegation that the death of the deceased was due to assault and harassment by the Respondents is vehemently opposed by the Respondents.

The Respondents raise three preliminary objections;

1. That the 1st Petitioner is a person of unsound mind. Thus it is doubtful whether the contents of her Affidavit have been affirmed with full awareness of the facts or if it's a mere fabricated story.
2. That the 2nd Petitioner has not submitted an Affidavit along with the Petition and therefore this Application is legally unacceptable.
3. That this Application has not been made within the one month time frame as stipulated in Article 126 (2) of the Constitution. The deceased died on 26.07.2003 and the Application is

made to the Supreme Court on 08.09.2003. Moreover there had been no Inquiry held by the Human Rights Commission into this incident to enable the Petitioners to get the benefit under Section 13 (1) of the Human Rights Commission of Sri Lanka Act No.21 of 1996.

This Application had been made on 08.09.2003. The letter dated 21.08.2008 sent by the Human Rights Commission clearly states that the Inquiry into this incident has been suspended subsequent to the filing of this Application in the Supreme Court, showing that an earlier Application had been tendered to the said Commission.

The material issues are whether the death of the deceased was caused by a fall due to an epileptic attack or due to assault by the Police. In order to come to a decision on these issues, the facts have to be analysed and inferences drawn from all the available evidence, mainly from the testimony of witnesses and the official documents including contemporaneous entries of official books.

The two most important eye witnesses in this case are Chanaka and Piyawathi. A comparison between the contents of the Affidavits filed by these two witnesses and the statements made by them at the Inquiry conducted by the ASP of Horana Police reveal certain discrepancies. The Respondents contend that the Inquiry conducted by the ASP is impartial and therefore the Inquiry Notes and statements are reliable and constitute independent evidence.

At the Inquiry both Piyawathi and Chanaka have stated that the deceased was strongly addicted to alcohol and that as a habit he consumes liquor every day. Nevertheless in the respective Affidavits both of them have only said that even though the deceased consumed liquor occasionally he was never an addict.

Piyawathi has stated at the Inquiry that on the relevant day namely on 22.07.2003, the deceased was drunk and after watching television till around 11.00 pm the deceased went to sleep and that she was unaware that Chanaka was in the house. In the Affidavit she has vouched for the fact that on that day, the deceased, Chanaka, her own son and some others were talking in the living room before going to sleep.

According to the statements made at the said Inquiry by Chanaka, only the deceased was not aware of his being in Piyawathi's house that night since the deceased was drunk and sleeping on the floor in the living area of the house.

Moreover at the Inquiry Piyawathi has stated that she only saw the Police hitting the deceased on the face several times inside the house and then both Chanaka and the deceased were taken to the Police Station in a Police jeep. According to the Affidavit, inside the house the deceased had been kicked on the head by the Police and both Chanaka and the deceased were beaten by the Police outside the house.

The fact that Piyawathi saw the deceased lying on the ground, bleeding from the nose at the Police Station is consistent in both the Affidavit and the Inquiry Notes. Equally her assertion that the deceased did not suffer from epilepsy at any point is also consistent in the Affidavit and the Inquiry Notes.

Chanaka at the Inquiry stated that he saw the 1st Respondent assaulting the deceased on the head several times inside the house and there had been no mention of any assault inside the jeep apart from several slaps secured on both Chanaka and the deceased by the Policemen. Moreover Chanaka has said that the deceased was feeling perfect the next morning after spending the night in the Police cell. In fact the deceased was in a jovial mood. Thereafter Chanaka's grandmother Nancy Nona had brought tea and at that point the deceased had had a fall and he was bleeding from the nose and mouth. Since the bleeding has not stopped, Chanaka and the Police Officer called 'Malalasekara' had taken the deceased out to the backyard where Chanaka himself has given an iron rod into the hands of the deceased.

This narration of facts is quite contradictory to the contents of his Affidavit.

In the Affidavit, Chanaka states that he saw the deceased being assaulted both inside and outside Piyawathi's house and the 1st Respondent in particular assaulted the deceased on the back of his head. In the jeep too the deceased had been severely assaulted and when he shouted not to assault the deceased he had been slapped by the Police. Thereafter next day morning the deceased had

complained that he felt vomitish and he was bleeding from the nose. Later on the Police Officer Malalasekara had directed Chanaka to give an iron rod into the hands of the deceased.

It should also be noted that at the Inquiry Chanaka has said that he knew nothing of the fact that the Police had demanded money from the deceased which is contrary to what he had stated in the Affidavit.

It is important to note that the Petitioners, Piyawathi and Chanaka deny that the deceased had been suffering from epilepsy. However Nancy Nona (Chanaka's grandmother) had told the Police that the deceased was suffering from epilepsy.

The Policemen who were at the Police Station and the other detainees in the cell with the deceased and Chanaka, have stated that the fall was due to epilepsy. The Respondents state that the signs of bleeding from the nose and the way the deceased was struggling at the time, may have given them the impression that it was an attack of epilepsy.

According to the Police notes dated 24.07.2003 taken at the hospital from the deceased, he had told the Police that he had a fall in the Police cell due to epilepsy. He had also confessed that he was drunk last night and that he had been suffering from epilepsy and that consumption of liquor was his only means of avoiding the disease.

In light of the above it is doubtful as to which version of facts is more favourable and which witness is reliable. Testimonies given by the main witnesses too seem to be contradictory in certain major aspects of the case. In particular sufficient proof of assault which was alleged to have caused the death of the deceased has not been revealed. Only the fact that the deceased won the lottery is proved. The fact that the lottery agent Ranasinghe Lionel sought protection from the Police for the deceased to collect prize money is also not borne out by contemporaneous record.

Thus expert opinion evidence is admissible in this regard in the backdrop of highly contested facts. The cause of death can expected to be resolved with the assistance of a suitably qualified opinion. The Postmortem Examination Report (Report) conducted by Dr.L.B.L de Alwis, the Consultant Judicial Medical Officer, Colombo dated 29.07.03 in this regard can well be considered independent evidence.

In R v. Turner (1971) 2 WLR 56 (CA) p.60, it was observed as follows;

“An expert’s opinion is admissible to furnish the Court with.....information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary....”

Thus in this context expert evidence is necessary and of vital importance.

According to the said report the cause of death is due to an “acute sub-dural haemorrhage following a head injury caused by blunt trauma”.

“The external head injuries and other injuries are found on the left side of the body. The internal head injuries are found on the rights side of the body. This indicates that the internal head injuries are not due to direct force but due to rotational forces following acceleration and deceleration of head. This mechanism operates during a fall when the head strikes a hard surface such as a cemented floor. The injury pattern found on the deceased indicates that he has had a fall forwards, slightly laterally and to his left side.”

The report further explains the ways in which the fall could have been caused;

1. Due to a heavy blow to the back of the body either with a weapon or a kick with boots on. However there’s no such injury.
2. A fall due being pushed cannot be excluded.
3. The fall maybe accidental.
4. Following a fit. This could be due to epilepsy or due to alcohol withdrawal.

Thus according to the report the injury pattern is consistent with a fall. When one considers the possible causes of such a fall as enumerated above, one invariably thinks of 1 and 4 as possible

causes in the instant case. 1 could still be possible, as it's in line with the Petitioners version of Police assault on the deceased; however the report says that there were no injuries to indicate a definite assault which caused the fall.

The second possibility is No.4 which is that the fall may have been caused following a fit which could either be due to epilepsy or alcohol withdrawal. However the report also contains no positive findings to indicate that he was suffering from epilepsy. This leaves the cause of the fall as excessive alcohol withdrawal which is supported by the fact that the deceased had an enlarged and fatty liver which is most commonly due to long term alcohol usage. Therefore the fall being due to a fit following alcohol withdrawal is highly probable.

The question of unlawful arrest and detention appears pivotal in this case along with the disputed facts and cause of death.

Dicey defines the right to personal liberty as "a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of any legal justification"

It is evident that arrest and detention of persons must be done in strict conformity to legal guidelines or according to the procedure established by law. Therefore violation of fundamental rights occurs only when the arrest or detention of a person is illegal or in contravention of the procedure established by law.

Article 13 (1)-(4) contain specific rights:

1. No person shall be arrested except according to procedure established by law.

2. Any person arrested shall be informed of the reason for his arrest.
3. Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent Court according 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.
4. Any person charged with an offence shall be entitled to be heard in person or by an attorney-at-law, at a fair trial by a competent Court.

In the instant case both the deceased and Chanaka had been arrested without giving them the reasons for such arrest. In this instance one has to determine whether the arrest of the deceased was based on reasonable grounds.

In R v. Howell (1981) 3 All ER 383 Watkins LJ observed on the English Common Law power to arrest for breach of peace as follows:

“The public expects a Policeman not only to apprehend the criminal but to do his best to prevent the commission of crime, to keep the peace in other words. To deny him therefore, the right to arrest a person who he reasonably believes is about to breach the peace would be to disable him from preventing that of which might cause serious injury to someone or even to many people or to property. The common law, we believe, whilst recognizing that a wrongful arrest is a serious invasion of a person’s liberty, provides the Police with this power in the public interest. In those instances of the exercise of this power which depend on a belief that a breach of the peace is imminent it must be established that it is not only an honest, albeit mistaken belief but a belief founded on reasonable grounds”

The grounds upon which the deceased had been arrested by the Police are as follows:

1. The deceased attempted to assault the Police when they tried to arrest Chanaka;
2. The deceased was after consumption of liquor;
3. The deceased vouched that he would commit suicide if the Police take Chanaka away.

The complaint made by Ranasinghe Lionel relating to his fear of apprehension of an imminent attack by his son Chanaka is supported by contemporaneous evidence. Firstly the Police extract dated 22.07.2003 /20.50 hours is to the following effect:

“As I was going about my day to day business as a sweep ticket seller today at about 8.25 p.m Chanaka came to the place where I was working, abused me with uncomplimentary language, threatened and assaulted me. I make this complaint with the hope that the Police will look into my grievances”

Secondly one has to consider the entries made by SI Jayasinghe as well as the 1st Respondent who were part of the Police team that went to Piyawathi’s house to arrest Chanaka that night on 23.07.2003. According to such Police entries while the Police were conducting investigations in the night, a man jumped across the road at the Moragahahena junction, signaling the Police jeep to stop. When the Police jeep was stopped the man who turned out to be Ranasinghe Lionel begged the Police to save his life from his son Chanaka and his gang waiting to assault him. Moreover he said that he could not go home for fear of being assaulted by his son. Thereafter the Police jeep had been directed by Ranasinghe Lionel, in order to show the Police where Chanaka was staying that night. The same Police notes narrate the whole incident that happened at Piyawathi’s house that night when the Police arrived there with the intention of arresting Chanaka.

The Police notes of SI Jayasinghe state that when knocked on the door, a rather slim man with tanned complexion (identifiable as the deceased Sunil) opened the door and when SI Jayasinghe announced that they were from Morgahahena Police Station and inquired as to whether Ranasinghe Lionel's son Chanaka was in the house, he has replied "there's no one like that in the house". At that moment seeing the surreptitious movement of a figure, walking from a room towards the back of the house, which caught the attention of the Police present at the entrance of the house, the Police took a quick decision to follow him into the house. Then the man had then come forward from the kitchen and pronounced himself to be "Chanaka", at which he was informed that the Police are here to arrest him for assaulting his father Ranasinghe Lionel and subsequently arrested him at 02.10 am.

However when Chanaka was arrested, the deceased (Sunil) had followed the Police shouting and protesting that he cannot let the Police take Chanaka away and if they do so he will commit suicide. The deceased had continuously attempted to resist the Police from taking Chanaka away. SI Jayasinghe states in his noted that he got the impression that the deceased was acting under the influence of liquor when the deceased attempted to assault SI Jayasinghe. In response SI Jayasinghe had used minimal force to avoid the deceased from obstructing the Police in the discharge of their duties as Police Officers.

Thereafter the deceased had been informed by the Police that he will be arrested for obstructing the Police from arresting Chanaka and also as a precaution to safeguard the life of the deceased when he had vouched to commit suicide if Chanaka is arrested.

Thus the Police version is that both Chanaka and the deceased had been lawfully arrested that night for the reasons properly stated and explained to the two suspects before the arrest. Hence the version of facts submitted by the 1st Respondent is supported by contemporaneous evidence.

Accordingly this Court cannot in the circumstances come to a finding that the fundamental rights of the Petitioners had been violated. The Application is dismissed. No costs.

JUDGE OF THE SUPREME COURT

SRIPAVAN.J

I agree.

JUDGE OF THE SUPREME COURT

IMAM.J

I agree.

JUDGE OF THE SUPREME COURT