

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

In the matter of an application under
Article 126 of the Constitution of Sri
Lanka.

D.G. Wijotmanna,
No.195, Ranawana Road,
Katugastota

PETITIONER

S.C. F.R. No: 138/2007

Vs.

1. Diyakeliyawela, Officer in Charge
2. Samarakoon, Inspector of Police
3. Bandara, Sub Inspector
4. Dissanayake, Sergeant
5. Police Officer (No. 47093)
6. Police Officer (No. 29277)
7. Abeyasinghe Jayawardene, Sergeant

1st to 7th Respondents All of Katugastota
Police Station, Katugastota

8. Victor Perera,
Inspector General of Police
Police Headquarters, Colombo

9. Hon. Attorney General, Attorney
General's Department, Colombo 12

RESPONDENTS

Before : Chandra Ekanayake, J.
Wanasundera, PC J.
Jayawardene , PC J.

Counsel : J.C.Weliamuna for Petitioners
Ranil Samarasooriya with Madhawa Wijayasriwardene
for the 1st- 7th Respondents.
A. Navavi, SSC. for 8th & 9th Respondents

Written Submissions tendered on : By the petitioner:11.8.2014
By the 1 – 7 Respondents : 05.11.2014.

Decided on: 31.03.2016.

CHANDRA EKANAYAKE, J

The petitioner by his petition dated 15. 05. 2007 (filed together with his affidavit) had sought leave to proceed against the respondents for the alleged infringement of his rights guaranteed under Articles 11,12 (1),13 (1), and 13 (2) of the Constitution of the Republic of Sri Lanka and for a declaration that the respondents have violated the rights guaranteed under the above Articles. In addition to the reliefs outlined above he had further sought compensation in a sum of Rs. 1,000,000 /= and for an order directing the 8th respondent to take disciplinary action against 1st to 7th respondents.

When this application was supported on 17. 07. 2007 this Court had proceeded to grant leave to proceed in respect of the alleged violations of rights guaranteed under Articles 11, 13(1) and 13(2) of the Constitution.

It has been alleged by the petitioner that on or about 04. 02 .2007 around 4.30 p.m. he had boarded a bus from Katugasthota town to return to his business place. As there was a person standing on the upper stand of the foot-board of the bus, he had to request that person to move inside, in order to get inside the bus. This having led to an exchange of words between two of them, the said person had kicked the petitioner hard resulting the petitioner losing his balance requiring him to hold on to the said person to prevent himself falling off the bus. However the said incident had ended without any further altercation, but it was later transpired that the said person who kicked him was the 7th respondent. As averred in paragraph 5 of the petition, following day (05. 02 .2007) around 8.30 a.m. the petitioner had gone to Katugasthota town to purchase some vehicle spare parts. When he came back to his business place at around 9.30 a.m. he had seen a police jeep parked in front of his business premises. Thereafter he had been ordered to be taken to the police jeep which was parked in front of his business place. He alleges that police officers failed to inform the petitioner the reasons for the arrest and also he was abused by the 6th respondent saying that he would be framed for possessing Ganja (cannabis) and would be sent to jail.

The petitioner complains that around 10 a.m. having reached the Katugasthota police station he was slapped by the 2nd respondent on both sides of the cheek and dragged inside

the station and put into to the cell. Thereafter the 3rd and 4th respondents who came over there had severely beaten him and after a short while the 5th respondent had taken the petitioner to the upstairs of the building. At that time petitioner submits that he saw the 7th respondent who was working on a computer in the room was the passenger who assaulted the petitioner in the bus on the previous day. As per the averments in the petition the petitioner had been severely assaulted on the face and his head had been hit against the wall several times. Further it is alleged that the 5th respondent thereafter proceeded to fill the sink fixed to the wall in a corner of the room with water and having dragged the petitioner plunged his head into the sink with water and held his head for nearly 30 seconds. In the result petitioner nearly got drowned and it caused him unbearable pain. Thereafter he had been taken to the cell on the ground floor.

Petitioner has alleged that he was kept in the police cell overnight and produced before the Magistrate, Kandy on 06. 02 .2007 around 12 noon for a charge of having in possession 1200 mg of Ganja, as evidenced by the document marked as P4 annexed to the petition to this court. Then the learned Magistrate had released him on bail.

Further he had to consult Dr. Ranjith Wicramasinghe- a Neuro-Surgeon as he was undergoing unbearable pain in the head at a channelled consultation centre in Kandy. Thereafter he had been admitted to Kandy Teaching Hospital on the same evening around 5 p.m. It is his position that a complaint was made to the Human Rights Commission (HRC)-Kandy as evidenced by the copy of the complaint marked as P2.

He has complained that in the aforesaid circumstances his arrest, detention and torture violates his Fundamental Rights guaranteed under Articles 11, 12 (1), 13(1) and 13(2) of the Constitution and has sought the reliefs prayed in the prayer to the petition.

The 1st to 7th respondents had filed statement of objections to the petitioner's application denying all the allegations made against them. A perusal of the record reveals that there had been ample evidence with regard to the torture committed at the hands of the respondents. This position is further strengthened by the Medico-Legal Report (MLR) submitted in respect of the petitioner by an Assistant Judicial Medical Officer, Dr. D.P.P Senasinghe from General hospital (Teaching), Kandy. The short history given by the patient namely Dambadeniya Gedara Vijothmanna (who is the present Petitioner) demonstrates the

version of the petitioner as to how the incident occurred on 05. 02. 2007 around 9.30 AM at his garage. The short history given by the petitioner (as appearing in the MLR) is reproduced below:

“ According to the examinee on 05-02-2007 around 9.30 a.m. some police officers from Katugasthota Police station came to his garage. They took him to the police station Katugasthota. When he got down from the jeep, 'Inspector Samarasekara' slapped him on both cheeks, near the police station. Then he was put into a police cell. Later 'Subinspector Bandara' and a officer called 'Rajan' came and hit him on the face with clenched fist. Then a traffic police officer came and took him out of the cell. He took the petitioner upstairs and hit his head on the wall and punched on his jaw. Then he was put into the cell again.”

Under ' Nature, size, shape, disposition and site of injury' following appear (at page 2 of the MLR):

- (1) Contusion, measuring 1x1 cm, circular shaped, placed on the middle of the forehead, 3cm above the root of the nose.
- (2) Contusion, measuring 3x2 cm, oval shaped, placed on the front of the right cheek, close to the right side of the nose.

The petitioner's daughter had complained to the Human Rights Commission of Sri Lanka on 05 – 02 - 07 and the officers from the Human Rights Commission came to the police station on the same day. The petitioner was produced before the Magistrate of Kandy on 06.02.2007 around noon for having in possession 1200 mg. of 'ganja' (case No.1670) and he was bailed out forthwith.

It is noteworthy that no other explanation was forthcoming from the respondents.

Since this Court had proceeded to grant leave to proceed on the alleged violations of Articles 11, 13 (1) and 13(2) of the Constitution necessity would arise to consider the above Articles. Article 11 of the Constitution thus reads as follows:-

“No person shall be subjected to torture or to cruel, inhumane or

degrading treatment or punishment ”

What has to be examined now is whether there is cogent evidence to justify violation of Article 11 in the backdrop of total denial of allegations by the police. In this regard the observations made by this court in *Ansalin Fernando Vs. Sarath Perera*, Officer in Charge Police Station- Chilaw and others (1992) 1 SLR 411 would lend assistance. In the above case after giving a detailed account of the physical assaults and humiliating treatment the 6th respondent was subjected to, at page- 491 it was observed as follows :

“He states that after such treatment he was taken to Kalutara Police Station. Events thus averred to also have the ring of truth and can be relied upon by this court. Whilst I shall not accept each and every allegation of assault / ill- treatment against the police unless it is supported by cogent evidence I do not consider it proper to reject such an allegation merely because the police deny it or because the aggrieved party cannot produce medical evidence of injuries. Whether any particular treatment is violative of Article 11 of the Constitution would depend on the facts and circumstances of each case. The allegation can be established even in the absence of medically supported injuries”

Thus it is amply clear that an allegation of torture can be established even in the absence of medically supported injuries. But in the case at hand the MLR gives the injuries on the petitioner more particularly (as appearing at page 2 of the MLR). As per page 3 of the said report doctor had been of the opinion that the two injuries were caused by blunt weapons.

The history given by the petitioner confirms the sequence of events that had taken place from the time of arrest until he was produced before the Magistrate and bailed out.

Necessity has now arisen to consider the legal principles enunciated by decided cases on torture. In this regard observations of Justice Athukorala in *Sudath Silva v Kodithuwakku* (1987) 2 SLR 119 at Pg- 126, 127 to the following effect would be relevant:

“Article 11 of our Constitution mandates that no person shall be

subjected to torture, or cruel, or inhuman or degrading treatment or punishment. It prohibits every person from inflicting torturesome , cruel or inhuman treatment on another . It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not , is entitled to this right to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs. The police force, being an organ of the State, is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every other member of the police force, so he is prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion. This court cannot, in the discharge of its constitutional duty, countenance any attempt by any police officer however high or low, to conceal or distort the truth induced, perhaps, by a false sense of police solidarity..... The petitioner may be a hard-core criminal whose tribe deserves no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our Constitution”.

Further in the case of Channa Pieris & Others vs Attorney General & Others 1994 1SLR p-1 at p.6, the Court proceeded to enunciate three (3) general observations that would apply when examining whether torture has been established: -

- “(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 cruel, inhuman or degrading treatment.”

In the case at hand the suffering occasioned was of an aggravated nature. In my view the assaults and hitting the petitioner's head against the wall, punching on his jaws, having dragged the petitioner and plunged his head into a sink filled with water holding the head for nearly 30 seconds in water would suffice to be taken cognizance of as a violation of Article 11. Having considered the nature and the gravity of the issues here a high degree of certainty exists before the balance of probability is said to tilt in favour of the petitioner. I therefore declare that the Article 11 of the Constitution was violated by 2 – 7 respondents.

Articles 13(1) and 13(2) of the Constitution are reproduced below:-

“13(1). No person shall be arrested except according to the procedure established by law. Any person arrested shall be informed of the reason for his arrest”

“13(2) Every person held in custody, detained otherwise deprived of personal liberty shall be brought before judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of an of an order of such judge made in accordance with procedure established by law.”

It has become amply clear that when the petitioner was arrested no reasons have been given for the arrest. It is the contention of the petitioner (supported by affidavit) the person who had the altercation with him on 04.02.2007 was identified on the following day at the upstairs of the police station as the 7th respondent. It appears that this altercation had

led to the arrest and detention and torture as complained of on the petitioner and therefore 7th respondent was privy to the entire incident which had taken place on 05.02.2007. The petitioner has further complained that the police told the petitioner that he would be framed for possessing '*ganja*' and would be sent to jail. In fact the petitioner has been maliciously prosecuted in the Magistrate's Court for possession of '*ganja*'. Further, the alleged version of the 7th respondent with regard to the arrest of the petitioner for having a powdered packet in shirt pocket has not been corroborated by the arrest notes of the respondents. The arrest notes have not been even produced. The stance of the respondents had been (as per note P3) which was given to the petitioner's son at his business place requesting the petitioner to be present at the police station is different to the version of the petitioner. The petitioner's stance with regard to him being arrested without giving reasons has not been controverted by any of the respondents. In view of the above I am inclined to the view that Article 13(1) has been violated. However facts and circumstances of this case can be clearly distinguished from SC.FR.No.252/2006 (SC. Minutes of 15/12/2010) R.M.Ukwatta v S.I.Marasinghe & Others.

Now what needs consideration is the alleged violation of Article 13(2):

“In *Channa Peiris v Attorney General and others* (1994) 1SLR 1 at pp. 75 and 76 Justice A.R.B.Amarasinghe having considered the previous decisions regarding the constitutional requirement to produce an arrested person before a Magistrate proceeded to outline the object of Article 13(2) in the following terms: -

“However, in general, the purpose of the provision is to enable a person arrested without a Warrant by a non-judicial authority to make representations to a judge who may apply his “judicial mind” to the circumstances before him and make a neutral determination on what course of action is appropriate in relation to his detention and further custody, detention or deprivation of personal liberty.”

Further in the case of **Queen v Jinadasa** 59 CLW 97 (1960) (CCA) it was held by the Supreme Court that section 37 of the Criminal Procedure Code and section 66 of the

Police Ordinance require that a person arrested without a warrant should be produced before a Magistrate with the least possible delay. The limit of twenty four hours prescribed in both sections does not enable the police to detain a suspect for the length of time even when he can be produced earlier or to deliberately refrain from producing him before a Magistrate. In this case per His Lordship Basnayaka C. J. at page 100:-

“The law requires (section 66 of the Police Ordinance) that an accused person taken into custody by a police officer without a warrant must forthwith be delivered into the custody of the officer in charge of the Station *in order that such person may be secured* until he can be brought before a Magistrate to be dealt with according to law. That is the lawful purpose to be served by means of detention and we would sternly and emphatically disapprove of what seems to have become the common practice of compelling an accused to accompany the Police from place to place for the purpose of participating in the detection of a crime. The delay of his production before a Magistrate in order that this unlawful purpose may be served is illegal and deserving of censure.”

The respondents have attempted to establish that the petitioner was a witness in Magistrate Court of Kandy case No.33041 filed against one A.G.Piyadasa. But no material had been submitted that they went to the business place of the petitioner on 05.02.2007 to get the relevant information in respect of prosecution witness No.3 of that case namely, one Ubaya Ekanayake. The respondents have failed in their attempt. There is no other evidence also to support their contention. Further, it appears that no evidence has been submitted by the respondents to refute the allegation that the petitioner was kept in custody without producing before a Magistrate for more than 24 hours. In view of the above it is evident that rights guaranteed under Article 13(2) also have been violated.

In view of the above analysis I accordingly grant declarations with regard to violations of fundamental rights guaranteed by Articles 11, 13(1) and 13(2) of the Constitution against 2

– 7 respondents. I award the petitioner a sum of Rs. 120,000/- as compensation. The State is directed to pay the said amount and a further sum of Rs.,30,000/- as costs of this application to the petitioner. The said amounts of money shall be paid within three (3)months from today.

Judge of the Supreme Court

Wanasundera, PC J

I agree.

Judge of the Supreme Court

Jayawardena, PC J

I agree.

Judge of the Supreme Court.