

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

In the matter of an Application under and in terms of
Article 126 read with Article 17 of the Constitution of
the Democratic Socialist Republic of Sri Lanka.

A.A. Dinesh Priyankara Perera
43/1, Shri Dharmananda Mawatha,
Gorakana, Keselwatta. Panadura.

Petitioner

SC FR 260/2011

~ v ~

1. 6118, Police Constable
Police Station, Keselwatta, Panadura-North
2. Samaraweera, Police Constable 66940 Police
Station, Keselwatta, Panadura-North
3. 77994, Police Constable Police Station, Keselwatta,
Pananadura-North
4. Rohana Kumara, Police Constable Police Station,
Keselwatta, Panadura-North
5. Gomes, Police Officer Police Station,
Keselwatta, Panadura-North
6. Withanage, Sub Inspector Police Station,
Keselwatta, Panadura-North
7. Ramya de Silva Acting Officer in Charge, Police
Station, Keselwatta, Panadura-North
8. Ranjith de Silva, Assistant Superintendent of Police
Office of the Assistant Superintendent of Police
Pananadura Division, Panadura.
9. Edmond Mahendra Senior Superintendent of Police
Office of the Superintendent of Police -Pananadura
Division, Panadura

10. P.G. Danushka Udayanga 377/1, Ranuggawatte, Hondagoda, Akuressa.
11. W. Deeptha Kumarasinghe Chairman/ Chief Executive Officer Probuild Lanka Private Limited 80/21/1, Dewala Road, Nugegoda.
12. Pearl Chandraguptha Manager Supplies, 80/21/1, Dewala Road, Nugegoda.
13. Mahinda Balasuriya Inspector General Police (retired), Police Headquarters, Colombo 1.
14. N.K. Illangakoon Inspector General Police, Police Headquarters, Colombo 1.
15. 82722, Police Constable Police Station, Keselwatte. Panadura-North
16. Hon. Attorney General, Attorney General's Department, Hulftsdorp, Colombo 12.

Respondents

Before: Chandra Ekanayake J
Priyasath Dep P.C.J
Buwaneka Aluwihare P.C.J

Counsel: Ms. Saritha de Fonseka for the Petitioner
Dulinda Weerasuriya P.C, with Darshana Edirisuriya for the 1st -7th
and the 15th Respondent
Faizer Marker for the 11th Respondent.
Indika Nelumini State counsel for the Attorney General

Argued on: 17-07-2014

Decided on: 01- 04-2016

Aluwihare PC J

The Petitioner moved this Court alleging that his fundamental rights enshrined in the Constitution had been infringed by the Respondents cited in this application and among other reliefs, sought a declaration from this court to the effect that the Respondents have infringed his Fundamental rights guaranteed under Articles 11, 12 (1), 13 (1) and 14 (1) g of the Constitution.

This court, on the 30th-08-2011, granted leave to proceed on the alleged violation of Articles 11, 12 (1) and 13 (1) of the Constitution by the 1st to the 7th and the 15th Respondents.

At the hearing of this application the learned Presidents's Counsel raised a preliminary objection that the instant application was out of time and moved court to dismiss it *in limine*.

Before I consider the merits of this application I wish to deal with the preliminary objection so raised on behalf of the Respondents.

The contention of the learned President's Counsel for the Respondents was that, the wife of the Petitioner complained to the Human Rights Commission on the 23rd of January 2011, the very day the Petitioner was taken into custody.

The learned President's Counsel pointed out that the instant application has been filed by the Petitioner only on the 27th of June 2011, well outside the 30 day period afforded, to invoke the jurisdiction of this court, in terms of article 126 (2) of the Constitution. It was also stressed that, the benefit of Section 13 of the Human Rights Act, as far as the computation of time is concerned, accrues only to "an aggrieved party" and the said section has no application in instances, where the complaint to the Human Rights Commission, is made by a person "on behalf of an aggrieved party". It was on this premise, the learned President's Counsel argued that the instant application is out of time.

For the purpose of dealing with the preliminary objection referred to above, it would be pertinent to consider the applicable provisions.

Article 126 (2) of the Constitution stipulates that,

“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 thereof**, in accordance with such rules of Court as may be in force, apply to the Supreme Court by way of a petition in writing addressed to such Court...” (emphasis added)

An exception to this rule, however, exists in the Human Rights Commission of Sri Lanka, Act No.21 of 1996 (herein after sometimes referred to as the HRC Act). This Act empowers the Human Rights Commission of Sri Lanka to entertain complaints in respect of violations of fundamental rights guaranteed by the Constitution.

Section 13 (1) of the Act reads 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 complaint is pending before the commission shall not be taken into account in computing the period of one month** within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution.” (emphasis added)

In the light of this section, it is evident that the Petitioner could avoid the lapse of the time bar if the application to the Human Rights Commission were made within one month of the alleged infringement. By virtue of the aforesaid provision, time would not run during the pendency of proceedings before that Commission. This view was supported by the judgement of this court in the

case of *Romesh Cooray vs. Jayalath, Sub-Inspector Of Police And Others*, (2008) 2 SLR 43.

Section 14 of the Human Rights Act stipulates as follows:

“The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or **a person acting on behalf of an aggrieved person** or a group of persons, investigate an allegation of the infringement or imminent infringement of a fundamental right of such person or group of persons caused-

- (a) by executive or administrative action; or
- (b) as a result of an act which constitutes and under the Prevention of Terrorism Act, No. 48 of 1979, committed by any person”.

Although the two categories, namely “a person acting on behalf of an aggrieved person” or “ a group of persons” are not referred to in section 13 (1) of the HRC Act, I propose to give a purposive interpretation. I am of the view that Section 13 (1) would be applicable, irrespective of whichever category complains to the HRC. Thus, I overrule the preliminary objection and proceed to consider the merits of this application.

The Petitioner has alleged that on the 23rd of January 2011, 1st, 2nd and the 3rd Respondent to this application had come to his residence and he had been told, that he was required to go to the Keselwatte police station, to have a statement recorded. The three Respondents referred to, however, appeared to have no knowledge as to why a statement was required from the Petitioner. The Petitioner accordingly had accompanied the 1st to the 3rd Respondents to the Keselwatte Police station.

Upon arrival at the Police station, he had been shepherded to the Crime Division and one of the officers there had demanded that he come out with

the truth. When the Petitioner responded expressing his ignorance as to any wrongdoing on his part, the 2nd Respondent had slapped him and the 3rd Respondent had held him by his neck and had yelled at him, stating that they had found out everything and demanded the Petitioner to come out with the truth.

Petitioner alleges that he pleaded with the officers that he has no knowledge of any incident, yet both the 2nd and 3rd Respondents had dealt several blows with fists.

Petitioner asserts that the 2nd and the 3rd Respondents persisted with their questioning regarding the loss of tiles belonging to a Deputy Inspector General (DIG) of Police.

The Petitioner having recollected that the 10th Respondent hired his three wheeler to transport some tiles a few months before, had indicated as such to the Police officers and had further stated that, that was all he knew of the matters in question. The Petitioner alleges that, the 2nd and the 3rd Respondents, however continued to assault him. Subsequent to these events the Petitioner had been taken to a location called Gorakana, by the 1st and the 6th Respondents in the company of some other police officers. The Petitioner states that he directed them to the location where the tiles were transported. The occupants of the house, had told the police officers that the Petitioner had only transported the tiles. Thereafter the Tiles had been loaded into a lorry and brought to the Police station. Upon returning to the Police station one 'Chutta' who had apparently lodged the initial complaint as to the loss of tiles belonging to DIG Tissa Herath, had been shown the tiles and Chutta had responded by stating that those were not the tiles that were lost. In an affidavit Chutta had filed (R 15), he had denied having made any such utterance. The Petitioner has alleged that inspite of this disclosure, he was not released, but put back into the cell.

Later the Petitioner had been taken before the 7th Respondent, the OIC of the station. He had ordered the Petitioner to kneel down and had commenced questioning him as to the rest of the missing tiles and in the process the 7th Respondent had assaulted the Petitioner with fists and followed it by kicking him.

The Petitioner has further asserted that he was taken in a van by the 2nd and the 6th Respondent in search of the 10th Respondent and having located him, he too had been brought to the Police station. Back at the police station, the Petitioner alleges that he was assaulted again by the 1st, 2nd and the 4th Respondents. The 10th Respondent, according to the Petitioner, had taken up the position that it was the Petitioner who was responsible for the theft of Tiles.

The Petitioner alleges that his initial arrest was in connection with the loss of Tiles, belonging to the DIG but when it transpired that he had no involvement with regard to the said theft, the allegation against him shifted towards loss of Tiles belonging to a private establishment known as Pro-Build Lanka Pvt. Limited, the establishment to which 10th, 11th and the 12 Respondents were attached.

The Petitioner has further alleged that the 11th Respondent walked up to the cell and upon questioning the Petitioner slapped him and the impact caused his lip to split. According to the Petitioner, the 7th Respondent had gone out with the 11th Respondent and on his return again had assaulted him and the Petitioner had fallen prostrate. Both the 1st and the 7th Respondents had stood on his hands. The Petitioner thereafter had been put back into the cell. A while later the 4th Respondent had approached the cell and questioned the Petitioner as to why he was not coming out with the truth and had pinned him by holding his head against the bars of the cell. At this juncture 1st, 2nd and the 3rd Respondents had dealt several blows to his abdomen through the bars of the cell.

The following morning, the petitioner alleges that the 2nd and 4th Respondent made several threats to the effect that they will charge him for possession of drugs, by foisting the substance on him. The Petitioner had been produced before a magistrate on the 24th January, that is the day after his arrest and he had pleaded not guilty to the charge that was read over to him. The Petitioner had been enlarged on bail and the learned magistrate had ordered that the Petitioner be produced before a Judicial Medical Officer. Subsequent to this order the Petitioner had been admitted to the Base Hospital Panadura and had been examined by the Consultant Judicial Medical Officer Dr. Abeysinghe. The Petitioner has taken up the position that on the 29th January-2011 he made a Complaint to the Human Rights Commission (P10), in addition to the complaint made by his wife (P6a).

The Petitioner alleges that even subsequent to the impugned incident, he was subjected to various acts of ridicule on the part of the police officers attached to the Keselwatte police, in particular by the 15th Respondent. Petitioner further states that he consulted Dr. Neville Fernando consultant Psychiatrist and the doctor's report is marked and produced in these proceedings. (P18a and P18b)

Doctor Abeysinghe Consultant JMO had examined the Petitioner on 25th January around 11.00 a.m., which was approximately about 48 hours after the arrest. The history given to the doctor by the Petitioner is produced in the Medico-legal- report (X). Although the Petitioner had alleged that he was assaulted by the Officer in Charge and other police officers he had not referred to the Respondents specifically. His narration of the incident to the Consultant JMO which is recorded as the history by the doctor, varies to some extent vis a vis the facts stated in the Petition to this court.

The consultant JMO had observed two abrasions, one on the left upper arm and the other on the left knee joint. He is of the opinion that the abrasions are compatible with the history given. The Petitioner had been subjected to an ultrasound scan, which revealed no underlying injuries. The doctor has,

however, observed that the Petitioner was in pain and had difficulty in walking. He had also observed tenderness over the back of the head, back of the chest, above both shoulder blades. The Petitioner, according to Dr. Neil Fernando consultant Psychiatrist, is suffering from Post Traumatic Stress Disorder with co-morbid Depression episode, a mental and behavioural disorder (P18b).

It's pertinent to note that in support of this application the Petitioner has filed an affidavit sworn by a driver attached to the Pro-Build Lanka Pvt Ltd, who had driven the 11th Respondent to Keselwatte Police station on the fateful day. In his affidavit, so filed, Jayakody had averred that that he saw the Petitioner being beaten severely by the police officers inside the Crime Division (P7). Jayakody has said that the sight was repulsive for him to watch.

The 1st to 7th Respondents and the 15th Respondent have denied that they were responsible in any way, for the violation of any Fundamental Rights of the Petitioner. The Respondents have asserted that on 23-01-2011, a complaint was lodged by the 12th Respondent Piyal Chandraguptha, the supply manager of Pro-Build LankaPvt. Ltd to the effect that some Tiles and scaffolding had been stolen from one of their construction sites (R7). The investigation into the said complaint had led them to one Danushka Udayanga who had been an ex-employee of the 12th Respondent's Company as a labourer. According to the Respondent referred to above, the said Danushka Udayanga had implicated the Petitioner as the person responsible for the removal of the scaffolding and the Tiles from the construction site. According to Danushka, as per his statement to the police (R9), he had befriended the Petitioner and had even had shared liquor with him on a few occasions.

Danushka alleges that the Petitioner came to the building site and removed the tiles and the scaffolding in his three wheeler and had threatened him with death, in the event of disclosure. Danushka alleges that the Petitioner did so on several occasions and goes on to say that he did not inform his employer due to his fear of the Petitioner. Respondents, in addition to the

statement of Danushka have also filed a copy of a statement made to the Police by one Tharangani Fernanado (R11).

Petitioner in his statement to the Police had admitted that he with the assistance of Danushka removed 175 tiles from the construction site and sold them to Tharangani Fernanado. She in turn had admitted that she bought the Tiles from the Petitioner and paid him for the tiles. In fact the Police, in the course of the investigations have recovered the tiles from the house of Tharangani Fernanado referred to above and the complainant had identified them as what they have lost from their construction site. Police also had recorded a statement from one Ajith Perera (R12), a building contractor. He had stated that it was he who acted as the middle man in disposing the tiles to Tharangani Fernanado, when the Petitioner approached him and offered the tiles for sale.

In terms of the notes of investigations made by the 6th Respondent (R10) the Petitioner had been arrested at 18.25 hrs (6,25 p.m.) on 23-01-2011, having explained the offence. Upon consideration of the material placed before this court relating this application by both the Petitioner and the Respondents, it would be reasonable to conclude that the complaint made relating to the loss of tiles and revelations made in the course of the investigation, warranted the 7th Respondent to act in terms of Section 109(5) of the Code of Criminal Procedure Act and I conclude that the arrest of the Petitioner and the subsequent steps taken with regard to the investigation are in accordance with the procedure established by law.

In view of the above, in my view, the Petitioner has failed to satisfy this court that his arrest has not taken place in accordance to the procedure established by law and as such I hold that the Respondents have not violated the Petitioner's Fundamental rights enshrined in Article 13 (1) of the Constitution.

The Petitioner has asserted that his ability to engage in his lawful occupation as a 'three wheel' driver was hampered and adversely affected and this

amounts to an infringement of his fundamental right under Article 14 (1) (g) which stems from his arrest and deprivation of his personal liberty. As I have referred to earlier, his arrest appears justified under the circumstances and consequences arising out of the arrest, which may technically impact on any fundamental right a person is entitled to enjoy, cannot be considered as a violation of such a right, unless that person is able to satisfy court that such an arrest could have been avoided; in the instant case that burden was on the Petitioner. I am of the view that the Petitioner has failed to satisfy this court that was so. Thus, I accordingly hold that the Petitioner has failed to establish that one or more of the Respondents are responsible for violation of his Fundamental Rights guaranteed under Article 14 (1) (g) of the Constitution.

It is to be noted that the alleged incident had taken place inside the police station and even the 11th Respondent a private citizen and who is not clothed with authority by the State had been permitted to slap the Petitioner. The assault on the Petitioner is supported by the affidavit of Jaykody and to an extent of the two reports, one by Consultant JMO Dr. Abeysinghe and Psychiatrist Dr. Neville Fernando. I also note that the physical violence perpetrated on the Petitioner as alleged by him is substantiated by the report of Dr Abeysinghe only to a lesser degree.

It's quite apparent that the Petitioner has suffered both physically and psychologically at the hands of the Respondents. In the case of *W.M.K de Silva Vs. Chairman Ceylon Fertilizer Corporation*, 1989 2 SLR 393, Justice Amerasinghe observed *"I am of the opinion that the torture or cruel, inhuman or degrading treatment or punishment contemplated in Article 11 of our Constitution is not confined to the realm of physical violence. It would embrace the sphere of the soul or mind as well"*.

This court has held in innumerable number of cases, where its fundamental rights jurisdiction has been invoked, that torture is a non-derogable right and that even the worst criminal is entitled to freedom against torture.

For the foregoing reasons, I hold that the 1st to 4th and the 7th.Respondents have violated the Petitioner's Fundamental rights guaranteed under Article 11 and Article 12 (1) of the Constitution.

I direct the state to pay the Petitioner a sum of Rs. 20,000 as compensation and a sum of Rs.10, 000 as costs. I further direct the 7th Respondent to pay a sum of Rs. 15,000 as compensation to the Petitioner and 1st, 2nd, 3rd and the 4th Respondents to pay Rs.10, 000 each, as compensation to the Petitioner. All payments to be made within three months from today.

JUDGE OF THE SUPREME COURT

CHANDRA EKANAYAKE J

I AGREE

JUDGE OF THE SUPREME COURT

PRIYASATH DEP PC,J

I AGREE

JUDGE OF THE SUPREME COURT

