

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

In the matter of an application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. M.W. Leelawathie Hariot Perera,
2. W.W. Raj Lakmal Fernando
3. W.W. Roshini Shivanthi Fernando
All of No 12, Kithalandaluwa Road,
Willorawatte, Moratuwa.

Petitioners

SC /FR/ Application No 372/2015

Vs,

1. N.K. Illangakoon,
Inspector General of Police,
Police Head Quarters,
Colombo 01.
- 1A. P. Jayasundera,
Inspector General of Police,
Police Head Quarters,
Colombo 01.
2. Officer-in- Charge,
Police Station,
Moratuwa.
3. Officer-in- Charge,
Police Station,
Moratumulla.
4. Widanalage Amesh Asantha de Mel,
No. 04/03, 1st lane, Kithalandaluwa Road,
Willorawatte, Moratuwa.
5. Hon. Attorney General,
Attorney General's Department,
Colombo 12

Respondents

Before: Eva Wanasundera PC J
 Priyantha Jayawardena PC J
 Vijith K. Malalgoda PC J

Counsel: Chrishmal Warnasuriya with Anslam Kaluarachchi and Priyanka Thevendrean
 instructed by Induni Wijesinghe for the Petitioners
 Thusith Mudalige Deputy Solicitor General for the 1st to 3rd and 5th
 Respondents

Argued on: 13.07.2017 and 04.09.2017

Judgment on: 17.11.2017

Vijith K. Malalgoda PC J

Petitioner to the present application namely, M.W. Leelawathie Hariot Perera, W.W. Raj Lakmal Fernando and W.W. Roshini Shivanthi Fernando who are the mother, brother and sister of one Rumesh Liroshan Fernando had filed the present application before this court alleging, that their Fundermental Rights guaranteed under Article 12 (1) and Article 11 had been infringed by the 1st, 2nd, 3rd and/or 5th Respondents and /or any person acting under their supervision, direction and/or command.

When this matter was supported on 29th October 2015, Court after considering the matters placed, had granted leave to proceed for alleged infringement of Articles 12 (1) and 11 of the Constitution.

As submitted on behalf of the Petitioners, one Rumesh Liroshan Fernando who was only 20 years at the time of his untimely demise, was a victim of a stabbing which took place on 24th October 2010. The victim had succumbed to his injuries at Kalubowila Hospital, and the Police Officers

who investigated into the death of the above named deceased, had reported the facts before the Hon. Magistrate of Moratuwa on 25.10.2010 under B Report No 1677/10. The 4th Respondent to the present application namely Widanalage Amesh Asantha de Mel who is said to have stabbed the deceased, was arrested by the police and produced before the Magistrate and remanded to the fiscal custody on 26. 10. 2010.

The complaint of the Petitioners before this court is based on the subsequent investigation carried out by the police, and the failure by them to expeditiously prosecute the case against the suspect before the Magistrate's Court of Moratuwa or in other words inaction by the police officers who investigated into the said offence to prosecute the offender.

In this regard, the Petitioners have placed the following material before this court.

- a) Since 26.10.2010, the date in which the suspect was produced before the Magistrate Court of Moratuwa, the case was called from 04.11.2010 until 23.06.2011 for nearly 07 months for further investigation and for the Post Mortem Report
- b) When the case was called before the Magistrate Court on 23.06.2011, police had informed the Learned Magistrate that they were filing the investigation reports and plaint and the Learned Magistrate had thereupon made order fixing the matter for inquiry on 07.07.2011
- c) When the case was called before the Hon. Magistrate on 07.07.2011, the Learned Magistrate found that the police had not forwarded the reports and were not ready for the inquiry and therefore the matter was re-fixed for inquiry on 21.07.2011.
- d) On 21.07.2011 the police once again moved for further time to obtain instructions from the Hon. Attorney General, and the Learned Magistrate made order allowing the said application

- e) Since then, the case was called before the Magistrate Court of Moratuwa on several dates over a period of 4 ½ years, to obtain the instructions from the Attorney General, the 5th Respondent to the present application.
- f) At the time the present application was filed before this court, i.e. on 25th September 2015, the matter before the Magistrate Court of Moratuwa, was still pending for Attorney General's Advice.

In addition to the sequence of events which took place from the untimely death of the deceased Rumesh Liroshan Fernando referred to above, the Petitioners have further submitted that, the said delay in prosecuting the offenders before the appropriate court had resulted,

- a) The deceased's father W.W. Philip Ranjan Fernando, gradually losing faith in the System of Justice as the case was unduly being prolonged, become ill and prematurely passed away on 05.08.2012 at the age of 65 years
- b) The three Petitioners before this court suffered severe mental stress, trauma due to the non-effective prosecution of the murder of their close relative for almost 6 years

When the notices were sent on the Respondents, the 1st Respondent who came before this court, had tendered his objection along with a document produced marked 1R1. By the said document 1R1 the Hon. Attorney General on 30th November 2015 had directed the Head Quarters Inspector of Moratuwa to commence a Non Summary Inquiry against the suspect Amesh Asantha de Mel under section 296 of the Penal Code for the murder of Rumesh Liroshan Fernando.

When the matter was taken up for argument before this court, the Learned Deputy Solicitor General who represented the 1st to the 3rd and the 5th Respondents had submitted that, the Non Summary Inquiry has now commenced before the Magistrate Court of Moratuwa, after receiving the instructions from the Attorney General. Learned Deputy Solicitor General, referring to the

journal entries filed before this court had further submitted that, the decision to refer the extracts for the advice of the Attorney General was taken by the Magistrate, and the said decision by the Magistrate cannot be questioned in the present proceedings since it amounts to a Judicial action.

In this regard the Learned Deputy Solicitor General, drew our attention to the journal entry dated 21.07.2011 to the effect “නීතිපති උපදෙස් සඳහා යොමු කරමි” and submitted that the said decision to refer the matter for Attorney General’s advice was reached by the Magistrate, and therefore it amounts to a judicial decision, to which the Respondents cannot be held liable. It is further observed in the proceeding dated 06.02.2014 where Magistrate Moratuwa had made the following order,

“මෙම නඩුවේ සැකකරුට විරුද්ධව දැනටමත් ලඝු නොවන පරීක්ෂණයක් ආරම්භ කිරීම සඳහා පැමිණිල්ලක් ගොනුකර ඇත. ඒ අනුව 2011.07.21 දින නඩුව විමසීමට ගත් අවස්ථාවේ පූර්වගාමී විනිසුරුතුමන් විසින් නීතිපති උපදෙස් සඳහා නඩුව නීතිපති දෙපාර්තමේන්තුවට යොමු කිරීමට තීරණය කර ඇත. ඒ අනුව නීතිපති උපදෙස් සඳහා මෙම නඩුව යොමු කොට ඇත. නීතිපති උපදෙස් ලැබීමට ප්‍රමාදවීම සම්බන්ධයෙන් අධිකරණයේ අවධානය යොමුවී ඒ පිලිබඳව නීතිපති දෙපාර්තමේන්තුව වෙත දැනටමත් සිහිකැඳවීම යොමු කර ඇත. ඒ අනුව රජයේ අධිනීතිඥවරයා විසින් මෙම නඩුවේ වැඩිදුර සටහන් පිටපත් ලබාගැනීම සඳහා පසු දිනක ඉල්ලීමක් කර ඇත. ඒ අනුව දැනටමත් මෙම නඩුව සම්බන්ධයෙන් නීතිපති දෙපාර්තමේන්තුවේ අවධානය යොමුවී ඇතිබවට නඩු වාර්තා පරීක්ෂා කිරීමේදී පෙනී යයි.

අද දින ඉදිරිපත් කරන ලද ඉල්ලීමට අනුව අධිකරණය විසින් යම් තීරණයකට එළඹ පැමිණිල්ලක් ගොනු කිරීමට නියෝග කලහොත් යම්, හෙයකින් නීතිපති දෙපාර්තමේන්තුව විසින් නුදුරේදී වෙනත් උපදෙසක් ලැබුණහොත් යම් ගැටලුකාරී තත්වයක් ඇතිවිය හැකිබැවින් අද දින කරන ලද ඉල්ලීම සම්බන්ධයෙන් නියෝගයක් නොකරමි. ඒ අනුව අද දින කරන ලද ඉල්ලීම පිලිබඳ නීතිපති දෙපාර්තමේන්තුවට සිහිකැඳවීමක් යොමු කරමි”

With regard to the investigations carried out by the officers of the Moratuwa Police Station, the Learned Deputy Solicitor General submitted that,

- a) Immediately after the receipt of the first complaint from one Malinda Harshana Fernando on 24th night, officers attached to Moratuwa Police Station had commenced the investigations into the said complaint, visited the scene of crime and steps were taken to
- i. record statements from the witnesses and
 - ii. arrest the suspect

the said facts were reported before the Magistrate of Moratuwa on 2010.10.25.

- b) The person who was suspected for the above crime, one Vidanalage Amesh Asanka de Mel was arrested immediately thereafter on 25.10.2010 and based on his statement, a knife too was recovered.

- c) During the said investigations, statements of the following eye witnesses were also recorded

- i. Lankawarige Harsha Fernando
- ii. Hettiyakandage Sumudu Buddika Fernando
- iii. Muthuthanthrige Gayan Danushka Peiris

and the items recovered were sent to the Government Analyst to obtain his reports through courts.

- d) The Learned Magistrate of Moratuwa decided to refer the matter for the Attorney General's Advice, since there was confusion with regard to the involvement of few others, whose statements had been recorded as witnesses, and in the circumstances, the said decision by the Magistrate of Moratuwa was taken with the intention of identifying the correct suspects before commencing the Non Summary Inquiry.

Having considered the material placed before this court by both parties, I will now proceed to analyze whether the above conduct of any one of the Respondents or their agents as alleged by the Petitioners, violated the Fundamental Rights guaranteed under Article 12 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Article 12 (1) of the Constitution reads thus,

Article 12 (1) - All persons are equal before the law and are entitled to the equal protection of the law

Article 17 which refers to the remedy for the infringement of Fundamental Rights had restricted such remedies only to executive action as follows;

Article 17- Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action of a Fundamental Right to which such person is entitled under the provisions of this chapter

Article 126 which deals with the Fundamental Rights jurisdiction of the Supreme Court, refers to the said jurisdiction as follows;

Article 126 (1) -The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any Fundamental Right or Language Right declared and recognized by chapter (iii) or chapter (iv)

When going through the above, it is clear that the alleged infringement of Fundermental Rights by Legislative Action or Judicial Action has been left out from the scope of Article 17 and therefore under 126 as well.

Wrongful exercise of Judicial Discretion under Article 17 was questioned in the case of ***Dayananda V. Weerasinghe (Fundermental Right Decision (2) 292)*** and in the said case the Supreme Court held that, “the judicial order in question was made in the exercise of the Magistrate’s discretion and as such it was not the consequence of Executive Action.”

As referred to above, the main contention of the Learned Deputy Solicitor General, who represented 1st to 3rd and the 5th Respondents was, that the action and/or inaction referred to by the petitioners before this court, comes within the Judicial Action and therefore it does not amount to executive action by the 1st to 3rd and the 5th Respondents and/or any one of them on the directives of the said respondents.

However as observed by me, the Petitioners before this court have not complained of any violation of their Fundermatal Rights guaranteed under Article 12 (1) by the Judicial Action, but it is the position taken by the Respondents, that the alleged violation was resulted due to “Executive Action” and not by the “Judicial Action”.

When considering the above, I would now like to refer to the chronology of events that took place after the death of Rumesh Liroshan Fernando on 24th October 2010.

- a) Rumesh Liroshan Fernando had received stab injuries and died at Kalubowila Hospital on 24th October 2010.
- b) Facts were reported before the Magistrate, Moratuwa on 25.10.2010.

- c) Suspect Widanelage Amesh Asanka de Mel was produced before the Magistrate and remanded for Fiscal Custody on 26.10.2010.
- d) Inquest proceedings were commence before the Magistrate of Moratuwa on 26.10.2010 by Moratuwa Police and further inquest proceeding were held on 04.11 2010 and the Magistrate had called for a short medical report.
- e) Matter was once again called on 18. 11.2010 for remand extension and for orders to the Judicial Medical Officer
- f) When the matter was once again called on 02.12.2010 for remand extension, police filed a special report with regard to certain incidents which took place after the alleged murder, from Moratumulla Police and reported that the law and order in the area is maintained.
- g) Since then the matter was called every 14 days for remand extension until 09.06.2011 and the Police too had filed further reports on those days informing that the investigations were in pregress.
- h) On 23.06.2011 when the matter was once again called for the remand extension, court recorded that the plaint was filed and issued summons on witness 1, 2, 3, 19 and 20 for 07.07.2011.
- i) On 07.07.2011 court re-issued summons on the above witnesses for 21.07.2011 and on 21.07.2011 being the 2nd date for inquiry, court made order referring the matter for Attorney General's Advice.
- j) Since then the matter was called every 14 days until 27.10.2011 for remand extension of the accused and it was recorded every day that the court is awaiting Attorney General's Advice. In between, on 10.08.2011 court receives the Government Analyst's Report and

on 13.10.2011 directs the police to submit the Attorney General's Reference Number in order to send a reminder to the Attorney General

- k) When the matter was called on 27.10.2011 the accused was enlarged on bail on the directives of the High Court of Panadura
- l) The matter was once again called before the Magistrate on 24.11.2011, 19.01.2012 and 14.06.2012 for Attorney General's Advice.

However the court subsequently made order on 14.06.2012 to release the extracts filed in the case record to SI Kannangara to be delivered to the Attorney General and the matter was fixed for 30.08.2012 for the police to submit Attorney General's Reference Number.

- m) Police failed to submit Attorney General's Reference Number on 30.08.2012 but on the next date i.e. on 18.10.2012 submits the Attorney General's Reference Number as NWP/S/42/2012
- n) Since then the matter had gone down for several dates until the present application was filed before the Supreme Court on 25.09.2015
- o) By letter dated 30.11.2015 (after the leave was granted by the Supreme Court on 29.10.2015) the Attorney General directs the police to commence a Non Summary Inquiry against the suspect

When considering the facts referred to above with the material placed before this court on behalf of the Respondents, it is revealed, that the alleged offence of murder, was based on direct evidence, and the said material was available with the police within few days from the incident. The rest of the investigation was limited to obtaining the Government Analyst's Report and the Post Mortem Report. However as referred to above, the police had taken over 08 months to conclude the said investigation and file the plaint before court.

After filling plaint and referring the matter by the Magistrate for Attorney General's Advice on 21.07.2011 the case has gone down until 14.06.2012, for nearly 11 months until the court realized that the police had not forwarded the extracts to the Attorney General, as directed by court on 21.07.2011. When the court directed the police to deliver the extracts, which were filed of record, police took nearly 4 months to submit the reference number before court.

When considering the provisions of chapter XV of the Code of Criminal Procedure Act No 15 of 1979 which deals with the procedure in conducting Non Summary Inquires, it is observed that the legislature had expected such inquiries to be concluded within one month from the date, the plaint is filed before court, and that clearly indicates the importance the legislature had imposed on Non Summary Inquiries. Even though there is no specific provision in the Code of Criminal Procedure Act restricting the period of investigation, it is observed by me that the legislature does not expect the investigating arm to act in lethargic manner taking months and months either to complete investigation or to submit extracts to the Attorney General, as taken in the present case.

This clearly indicates the inaction by the police, when considering the facts of the present case which were discussed above. In the said circumstance I observe that the inaction referred to above amounts to the violation of the equal protection guaranteed under Article 12.1 of the Constitution.

The Petitioners next complaint before this court is based on the violation of the Fundamental Rights guaranteed under Article 11 of the Constitution.

Article 11 of the Constitution read as follow;

Article 11; No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

As submitted by the Petitioners and revealed by the material placed before this court, the Petitioners are not complaining of any cruel or inhuman physical attack or punishment against the Petitioners but, the complaint was that, the severe mental suffering and trauma undergone by the Petitioners as well as the late father of the deceased, due to the undue delay in prosecuting the suspect, violated the rights guaranteed under the said Article.

In this regard the Petitioners heavily relied on the decision in ***Adhikary V. Amerasinghe reported in [2003] 1 Sri LR at 270***, where Shirani Bandaranayake J (as she then was) had gone in to the question of Psychological suffering of a victim when granting relief for violating the Fundamental Rights guaranteed under Article 11 of the Constitution.

In the said case Bandaranayake J when arriving at the decision stated that, “..... the protection in terms of Article 11 would not be restricted to the physical harm caused to a victim, but would certainly extend to a situation where a person had suffered psychologically due to such action” she had discussed the circumstances under which she reached the said decision, whilst referring to a few other decisions where this court reached the same conclusion on different circumstances.

Before analyzing the circumstances under which the said decisions were reached, I would now proceed to analyze the complaint of the Petitioners before this court. As observed by me, the Petitioners’ complaint before this court is twofold,

Firstly, they complained of the suffering the late father of the deceased Rumesh Liroshan Fernando namely W.W. Philip Ranjan Fernando had to undergo due to the delay in prosecuting the suspect, finally ended up with a premature death who died at the age of 65.

Secondly, they complained of the mental stress and trauma under gone by them, due to the non prosecution of their close relation's death.

As observed by me the first complaint of the Petitioners referred to above is unfounded. It may be true that the father of the deceased Rumesh Liroshan Fernando was interested in seeing justice being done to his deceased son, but in the absence of any material before us to say that his premature death was due to his mental suffering, I am reluctant to agree with the said submissions of the Petitioners.

In support of their second argument the Petitioners have produced marked X-15 a report issued by Professor Harischandra Gambheera Consultant Psychiatrist at National Institute of Mental Health with regard to his examination of the three Petitioners namely, M.W. Leelawathie Hariot Perera, W.W. Raj Lakmal Fernando and W.W. Roshini Shivanthi Fernando.

At the outset, it is important to note that, the report produced mark X-15 is dated 9th December 2015 and was not available at the time the papers were filed before this court on 5th September 2015. According to the said report, the three examinations were carried out on 24th November 2015 on the request of an Attorney at Law.

After his observations and findings, the Consultant Psychiatrist had submitted his conclusion as follows;

“The history and the mental state examination of all three members of the family of Liroshan Fernando revealed that they are suffering from Psychological distress following the

death of Mr. Fernando. Both his mother and the sister is suffering from depression and prolonged abnormal grief as a consequences of sudden unexpected death of their loved relative. Their depression and pathological grief remain unresolved due to non prosecution of the murder of Rumesh Liroshan Fernando five years ago. The current social circumstances where the murder suspect who lives in the same area and their unacceptable behaviour is also responsible for the maintaining of the distress and the grief.”

When going through the said conclusions it is further observed by this court, that according to the Consultant Psychiatrist, the main reason for suffering is the unexpected death of their loved relative, but the depression and Pathological grief remain, due to two reasons, firstly due to non prosecution for five years and the unacceptable behaviors of the suspect who lives in the same area.

With regard to the second reason referred to above, I observe that, other than a complaint produced marked X-9, said to have made by a witness against the relatives of the suspect in the Magistrate’s Court proceedings on 15.11.2015, there is no proof of any unacceptable behavior either by the suspect or the members of his family as referred to in the report X-15.

In the said circumstances it is clear that the depression and prolonged abnormal grief said to have suffered by the 1st and the 3rd Petitioners are due to 3 main factors, out of which there is no proof of any material with regard to the 3rd factor. The first factor being the unexpected death of the close relative, has no bearing on the present case.

With regard to the observations and findings of the Consultant Psychiatrist, I further observe, that some of the complaints of the 1st and 3rd Petitioners are unfounded as well. In addition to the document produced marked X-15, the report from the Consultant Psychiatrist, there is no material placed before us to establish whether the said Petitioners were subject to any treatment

during the period relevant to the present case. The Petitioners have failed to place any material to show, any reprimand and/or attendance sheets as referred to in the observation by the consultant with regard to the 3rd Petitioner.

Having considered the nature of the complaint before this court, I will once again proceed to analyze the legal basis under which Bandaranayake J (as she then was) declared the violation under Article 11 expanding to a situation where a person had suffered psychologically.

Whilst reaching the said decision Bandaranayake J was also mindful of the decision in ***W.M.K. de Silva V. Chairman Ceylon Fertilizer Corporation (1989) 2 Sri LR 393*** where Amarasinghe J had said in the said judgment,

“I am of the opinion that the torture or cruel, inhuman or degrading treatment or punishment contemplated in Article 11 of the Constitution is not confined to the realm of physical violence. It would embrace the sphere of the soul or mind as well”,

and the case of ***Kumarasena V. S.I. Sriyantha and Others*** (SC Application 257/93 Supreme Court minutes of 23.05.1994) where the Supreme Court held that the suffering occasioned was an aggravated kind and attained the level of severity to be taken cognizance of a violation of Article 11 of the Constitution, in the absence any physical impairment or disability with the victim.

When considering the decisions referred to above and the facts and circumstances of the case in hand, Bandaranayake J observed that the test which had been applied by our courts was that, “whether the attack on the victim is Physical or Psychological, a violation under Article 11 would depend on circumstances of each case.

The Petitioners main complaint before this court is the inaction which resulted long delay in prosecuting the suspect, who said to have killed their close relative. This court has already concluded that the said delay and/or the inaction by the 1st to the 3rd Respondents and/or their agents had violated the Fundermental Rights guaranteed under Article 12 (1) of the Constitution. However, from the material already discussed, it is also clear that the Petitioners have not being able to establish that the suffering and the trauma complained by them was in fact faced by them as a result of the inaction by the 1st to 3rd and 5th Respondents.

In the said circumstances I am not inclined to declare that the Fundermental Rights guaranteed under Article 11 had been violated by the inaction complained by the Petitioners.

I hold that the Fundermental Rights guaranteed under Article 12 (1) of the Constitution had been violated by the conduct of the 1st to the 3rd Respondents and/or by their agents. In the said circumstances I make order directing the state to pay Rs. 50,000/- as compensation to each Petitioner.

Judge of the Supreme Court

Eva Wanasundera PC J

I agree,

Judge of the Supreme Court

Priyantha Jayawardena PC J

I agree,

Judge of the Supreme Court