

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

Janaka Sampath Batawalage,
P.355, Niwasipura, Ekala Ja-Ela.

Petitioner

SC (FR) Application No.393/2008

Vs.

1. Inspector Prasanna
Ratnayake,
Police Station,
Dam Street, Colombo 12.
2. Sub Inspector Seneviratne,
Police Station,
Dam Street, Colombo 12.
3. Sub Inspector Herath,
Police Station,
Dam Street, Colombo 12.
4. The Inspector General of
police,
Police Headquarters,
Colombo 1.
5. Hon. Attorney General
Attorney General's
Department,
Colombo 12.

Respondents

BEFORE:

BUWANEKA ALUWIHARE, PC, J
PRIYANTHA JAYAWARDENA, PC, J
K.T.CHITRASIRI, J

COUNSEL: Viran Corea with Sanita de Fonseka and Subhashini Samaraarachchi for Petitioner.
Shyamal A. Collure with A.P.Jayaweera for 1st Respondent.
Nayomi Wickramasekara, SSC for 2nd to 5th Respondents.

ARGUED ON: 29.09.2016

DECIDED ON: 05.03.2018

ALUWIHARE, PC, J:

This is an application where the Petitioner has invoked the fundamental rights jurisdiction of this Court alleging that, 1st to the 3rd Respondents have violated his fundamental rights enshrined in the Constitution.

Leave to proceed in this matter was granted on the alleged infringement of Articles 13 (1) and 13 (2) against all Respondents while leave to proceed was also granted on the alleged infringement of the Petitioner's fundamental rights under Article 11 of the Constitution, against the 1st and 3rd Respondents.

According to the averments in the amended Petition, the Petitioner who had been an army officer had retired after serving 10 years, as a lieutenant. At the time relevant to the present application, the Petitioner had been working for a private entity called Dialog Telecom (Pvt) Ltd. in the capacity of Human Resource Management Coordinator. It is pertinent to note that, at the time relevant to the present application, the Petitioner was a father of two children, one being an infant of 6 months.

The Petitioner who, along with his wife had come to Pettah to make certain purchases and was proceeding towards Gunasinghapura bus terminus with the intention of going to their residence at Ja-ela. According to Petitioner, they had been keen to get back home without delay because of the infant, who had to be breast fed by his wife. At one point both had half crossed the road when a three wheeler had nearly knocked into his wife. She had been shaken by this incident, but after a few awkward movements, she finally had managed to cross the road and had joined up the Petitioner. At this juncture the 1st Respondent, who had been on duty, had reprimanded the wife of the Petitioner in foul language for the manner in which she crossed the road. The Petitioner and his wife had ignored him and had proceeded towards the bus stand.

The 1st Respondent at that point had beckoned to them clapping and demanded them to approach the 1st Respondent. When they approached the 1st Respondent the Petitioner had initially introduced himself as an army officer and when the 1st Respondent demanded from him the official identity card, the Petitioner had disclosed that he had retired from service. The Petitioner alleges that the 1st Respondent continued to use foul language and held him by the collar of his T shirt and slapped him several times. Having dragged the Petitioner near a police vehicle which had been parked in the vicinity, the 1st Respondent had assaulted the Petitioner. It is alleged by the Petitioner that three other police officers had held the Petitioner and facilitated the assault. It is averred by the Petitioner that the 2nd Respondent happened to be among the three police officers referred to. The Petitioner's wife had tried to intervene, but had been chased away by the 1st Respondent. The Petitioner alleges that he was bundled into the police vehicle and was

brought to the Dam Street Police Station where both the 1st and the 3rd Respondents assaulted him. According to the Petitioner the 1st Respondent had told him that they would fabricate a charge by introducing a grenade and have him produced before the Magistrate. The Petitioner then had pleaded with the 1st Respondent to permit him to call his wife to check whether she had reached home safely. To his dismay, he was not allowed, instead had been put in the police cell and the 1st Respondent had kicked him several times.

After some time, the 1st Respondent had questioned the Petitioner about his father-in-law who happened to be a retired police officer and the Petitioner had been told that he would be released after producing him before the Judicial Medical Officer and he was further advised not to say anything to the Medical Officer.

It is the position of the Petitioner that he was traumatized by the events of that day and fearing that he will have to face a trumped-up charge, he had decided not to complain to the Judicial Medical Officer about the injuries. The JMO however, had questioned the Petitioner about the contusions and Petitioner had remained silent. The JMO had then directed the police to admit the Petitioner to the accident ward of the Colombo National Hospital. When he was taken to the accident ward he had got himself released stating that he was alright and therefore he was brought back to the police station and placed in the police cell.

The Petitioner also asserts that the attempts made by his wife and two of his associates to visit him at the Dam Street Police Station were thwarted by 3rd Respondent on the ground that no visits could be permitted after 9.00 p.m.

The Petitioner also alleges that the 1st Respondent kicked him in the chest when he refused to place his thumb impression on two envelopes produced by the 1st Respondent. Owing to his refusal, the Petitioner alleges that he was dragged out of the cell and some police officers tried forcibly to get his finger impressions on the envelopes and the 1st Respondent, enraged by his resistance, kicked the Petitioner on the head and the Petitioner had lost consciousness.

According to the Petitioner, he regained consciousness at the Colombo National Hospital. He asserted that he got himself discharged from the hospital against medical advice as the 1st Respondent had demanded that his wife have him discharged from the hospital, if the Petitioner does not wish to be placed on remand custody for an extended period.

After the Petitioner got himself discharged from the hospital, he had been brought back to the police station and he had been forced to sign a statement. He asserts that he refused to sign the statement as it carried contents which he had not stated. The 1st Respondent had told the Petitioner to place his signature with an endorsement “he does not accept what had been recorded”.

The Petitioner had then been produced before the Magistrate Maligakanda on an allegation that he possessed Cannabis in the form of cigars and had been enlarged on bail. Thereafter the Petitioner had been warded at the Negombo Hospital on 30th April, 2008 and had spent a couple of days at the hospital.

The Petitioner had complained to this court that as a result of the trauma he underwent he still suffers from health issues and in addition he was unable to report for duty for three weeks. The Petitioner also complains of the mental trauma he had undergone as a result of the assault.

The Petitioner's wife Nilanga Probodhini Wanigasundera had sworn an affidavit (P2) with regard to the events that took place on the day in question. She had confirmed the Petitioner's statement as regards the course of events that led to the incident. She had also stated that when she came to the Dam Street Police Station she heard her husband's cries of distress. She had also affirmed the events averred to by the Petitioner regarding to the institution of proceedings before the Magistrate's Court and the admission of her husband to the National Hospital, Colombo.

The Petitioner's father-in-law Upali Ananda Wanigasundera, an ex-chief Inspector of Police had also sworn an affidavit in support of the Petitioner. He had averred that he was informed by his daughter Prabodhini Wanigasundera that the Petitioner had been taken into custody by the Dam Street Police. He says he spoke to the 1st Respondent over the phone and the 1st Respondent assured him that the Petitioner would be released as soon as possible and had complained that the Petitioner had abused him (the 1st Respondent).

He had visited the Dam Street Police Station around 6.00 a.m. on the 29th August, 2008 with his daughter and had been informed that the Petitioner had been admitted to the General Hospital. He had visited the Petitioner at the hospital and observed that the Petitioner was handcuffed and two constables stationed at his bedside. The Petitioner

had told him that after he was produced before the Judicial Medical Officer (JMO) he was brought back to the Police Station and assaulted again and he lost consciousness at the Police Station and he was brought to the hospital.

Upali Wanigasundera had further averred that he returned to the Police Station and made inquiries from Inspector Rathnayake (the 1st Respondent) about the Petitioner. The 1st Respondent had stated that he would have the Petitioner remanded and exacerbate the situation unless they get the Petitioner discharged from the hospital and the Petitioner pleaded guilty to the charges that the 1st Respondent would be filed against him.

Wanigasundera had further averred that owing to the mental trauma his daughter and his son-in-law (the Petitioner) were undergoing, for an early resolution of the matter, they got the Petitioner discharged from the hospital.

The Petitioner had then been brought back to the Police Station and subsequently produced before the Magistrate of Maligakanda.

Shanike Bhagya Udawatte, a co-employee of the Petitioner from the place where the Petitioner was employed at the time, had also sworn an affidavit in support of the Petitioner. He had arrived at the Dam Street Police Station when the Petitioner's wife had phoned him and had been informed of the Petitioner's plight. He had in his affidavit had confirmed the account in the Petitioner's wife's affidavit and had also averred that when he came to the Dam Street Police Station he saw the Petitioner lying on the floor of the police cell and the Petitioner had

informed him that he had been assaulted by the Police and was in need of medical attention. When he told the 3rd Respondent who was on duty that the Petitioner needs to be attended by a doctor, the 3rd Respondent has said that the Petitioner had already been produced before the J.M.O.

Along with the counter affidavits the Petitioner has filed copies of his medical reports. (P9 and annexures)

Consultant Judicial Medical Officer, Colombo Dr. Ajith Tennakoon by his letter dated 23.07.2008 addressed to the Human Rights Commission of Sri Lanka had informed the Commission that the Petitioner had not been subjected to a medico legal examination by a Judicial Medical Officer. The letter (annexed to P9) reveals that the Petitioner had been admitted to ward 14 of the hospital (NHSL) at 1.20 a.m. on 29.04.2008 with complaints of “fainting attacks”. The doctor had attached a copy of the Bed Head Ticket (BHT) issued to the Petitioner. He had been admitted to hospital by the 3rd Respondent. The 3rd Respondent had admitted this fact in the objections filed by him. The 3rd Respondent had stated that he produced the Petitioner before Dr. Mulleriyawa, Assistant Judicial Medical Officer (AJMO) and after examining the Petitioner in the absence of the 3rd Respondent, he was directed by the doctor to take the Petitioner to Colombo National Hospital, which direction the 3rd Respondent admits he complied with. 3rd Respondent also admits that the Petitioner was admitted to the hospital.

According to the BHT the complaint of the patient is recorded as “Fainting attacks”. In his notes, the house officer had recorded, that the Petitioner claimed that he was assaulted by the Police, initially at Pettah

in a Police jeep and later at the Police Station. The Petitioner also had said that he was assaulted with fists and complained of bodily pains. The BHT also carries an endorsement, presumably made by the Petitioner, which reads *“I am getting discharged on my own against medical advice”*.

The Petitioner had also produced a Medico Legal Report issued by the AJMO, Negombo (P9). According to the same the Petitioner had been admitted to hospital on 01.05.2008 and had been discharged on 02.05.2008. The AJMO had recorded the history given by the patient as *“assaulted by a police officer (I.P. Prassanna Rathnayake) on 28.04.08, again assaulted around 11.00 a.m. with fists and feet. There were other police officers who assaulted him, in the same manner”*.

The AJMO had observed two contusions on the body of the Petitioner and had recorded that the two injuries as “non-grievous”.

Petitioner had been charged before the Maligakanda Magistrate Court for possession of 5 cigars made of cannabis. After trial the learned Magistrate had acquitted the Petitioner on the basis that the prosecution had failed to establish beyond reasonable doubt that the Petitioner was in possession of the cannabis cigars that were produced before the court as a production.

The 1st Respondent in his statement of objections had admitted that he was on duty along with the 2nd Respondent at the location where the alleged incident took place. The 1st Respondent had averred that in view of the visit to Sri Lanka of the President of Iran, measures were taken to tighten the security in the city of Colombo and as a security

measure all vehicles and persons entering the Gunasinghapura bus terminal were subjected to search. The 1st Respondent had also stated that he observed the Petitioner trying to enter the bus terminal avoiding the stile erected to ensure that all persons who enter the terminal are checked. The 1st Respondent states that he ran towards the Petitioner and held him by hand and with difficulty he did a body search of the Petitioner and recovered five cannabis cigars. The Petitioner had claimed that he was an army officer and two army personnel who were also on duty approached the Petitioner and requested him for his identity card. The Petitioner had abused them and also had stated that he was senior in rank. The two army officers, Major Sooriyarachchi and the other officer had then left the scene.

The 1st Respondent claims that he brought the Petitioner to the Dam Street Police Station in the police vehicle. Whilst categorically denying that the Petitioner was assaulted, the 1st Respondent states that the Petitioner was taken to Colombo National Hospital as the Petitioner complained of a chest pain; and on medical advice, was warded therein.

Major Sooriyarachchi swearing an affidavit (1R2) had supported the version given by the 1st Respondent in that; he also was on duty at the Gunasinghapura bus terminus with a junior officer. Major Sooriyarachchi states in his affidavit that a civilian was conducting himself in an unruly manner, claiming that he is an Army Officer and when the Major requested for his Service Identity card, the civilian concerned abused him in foul language claiming that he is an officer senior in rank and at that stage he and the junior officer who were on duty with him left the scene.

A member of the Civil Defence Committee Indika Sanjeewa who had been assisting the police officers of the Dam Street Police Station also had sworn an affidavit (1R3). He had been on duty at the bus terminus when this incident took place and had basically affirmed to the facts referred to by the 1st Respondent, including the recovery of cannabis cigars.

According to the notes of investigations made by the 1st Respondent (1R4 (a)), the Petitioner had been stopped and searched when he tried to avoid the place where people were subjected to search. According to the notes the Petitioner had tried to break the temporary stile erected to facilitate the search. The 1st Respondent had made another note pertaining to the same incident (1R4 (b)) and in these notes the 1st Respondent had recorded as the Petitioner made an attempt to creep through the wooden stile.

The 3rd Respondent Sub-Inspector Herath in the objections filed on his behalf had averred that he has nothing to do with the arrest of the Petitioner. The position of the 3rd Respondent is that he is a resident of Kandy and having obtained official leave on 27.04.2008 he travelled to Kandy and returned on the following day which was 28th. He had reported for duty only at 20.08 hrs. (8.08 p.m.) on that day. To substantiate his position he had filed an extract from R.I.B. maintained by the Dam Street Police Station (3R2). According to the same he had reported for duty at 8.08 p.m. at the Dam Street Police Station.

The 2nd Respondent in the statement of objections filed on his behalf had denied that he assaulted the Petitioner. According to the 2nd Respondent he had been on duty on the day in question and had been

engaged in controlling the traffic at a location close to where the 1st Respondent was also on duty.

As for the arrest of the Petitioner, the 2nd Respondent had affirmed the position taken up by the 1st Respondent. 2nd Respondent had referred to the need for a heightened state of security on that day due to the visit of a head of a state and the fact that the Petitioner had been questioned by the 1st Respondent when the Petitioner was observed avoiding going through the security checkpoint.

As referred to earlier, the three medical records – Admission Note (P6), the Bed Head Ticket and the Medico Legal Report (9) indicate that the Petitioner had sustained blunt trauma which is compatible with assault. The Respondent had not denied the fact that they had to admit the Petitioner to the Colombo National Hospital in the middle of the night, the reason, however; attributed by the 1st Respondent is that the Petitioner complained of a chest pain. In the history given by the Petitioner to the medical officer on admission, it is recorded as he was assaulted by the police, initially in a Police Jeep and later at the police Station with their fists.

This appears to be a spontaneous account of events which gives credence to the Petitioner's version. These facts taken together with the assertions of the Petitioner's wife, (P2) his father-in-law (P3) Bhagya Perera Udawatte, clearly establishes that the Petitioner had been assaulted by the Police officers.

The main allegation of assault is directed against the 1st Respondent whom the Petitioner alleges, in addition to abusing him in foul

language, assaulted him, initially at Pettah, and later at the Dam Street Police Station on a number of occasions. The other allegation made by the Petitioner is that he did not have any narcotics on him at the time of his arrest and the police foisted the charge on him. The Petitioner had averred that he is a non-smoker which had been affirmed by both his wife and the father-in-law.

On the other hand, this incident had been brought about as a result of the Petitioner confronting the 1st Respondent because of his uncouth behavior towards his wife. It is highly improbable that a person carrying narcotics would willingly confront or provoke a police officer and I am of the view that the charge of possession of cannabis is a trumped up one. The Petitioner had stated that, soon after he confronted the 1st Respondent, he brandished a pistol and had told the Petitioner, he will introduce a hand grenade and produce him before the Magistrate's court.

According to Bhagya Udawatta, when he phoned the O.I.C, Dam Street, police Station upon hearing that the Petitioner had been brought to the Dam Street Police Station, the O.IC. told him that the charges were yet to be framed, which gives credence to the Petitioner's version that he was arrested for no valid reason.

I shall now consider as to whether the facts referred to above had established any infringement of the fundamental rights of the Petitioner.

This court granted leave to proceed against both the 1st and 3rd Respondents for the alleged violation of Article 11 of the Constitution.

In the case of *CHANNA PIERIS AND OTHERS v. ATTORNEY GENERAL AND OTHERS (1994 1 SLR page 1)* Justice Amerasinghe observed that:-

“In regard to violations of Article 11 (by torture, cruel, inhuman or degrading treatment or punishment), 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. 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 to cruel, inhuman or degrading treatment.”

In the case of *Jeganathan v. Attorney General and Others 1982 1 SLR 294*, the Court held that, where public officers accused of violating the provisions of Article 11, the allegation must be ‘strictly proved’ for if proved they will carry ‘serious consequences’ for such officers.

I have considered the material placed before this Court by both the Petitioner and on behalf of the Respondents, in the backdrop of the decisions of this court referred to above. In the face of the cogent and credible material placed before this Court, I conclude that the Petitioner had been subjected to torture and degrading treatment.

According to the hospital admission ticket (P6) the doctor who admitted the Petitioner on the early hours of 29th April, 2008 had observed

contusions on the posterior of both arms of the Petitioner, which had been confirmed by the AJMO, Negombo (P9). The history given by the Petitioner is also consistent in that, he had stated that I.P. Prassanna Rathnayake assaulted him.

I am of the view that the Petitioner had established to the required degree of proof that his fundamental rights guaranteed under Articles 11 had been violated and as such I hold that the 1st Respondent responsible for the infringement of the fundamental right of the Petitioner guaranteed under Article 11 of the Constitution.

As far as the 3rd Respondent is concerned, he had denied causing any physical harm to the Petitioner and had taken up the position that he reported for duty at the Dam Street, police station only around 8.00pm on the day in question and had produced copies of entries made by him to that effect. Although the Petitioner had made a general allegation that the 3rd Respondent also assaulted him, the Petitioner, however, when examined by AJMO Negombo had only referred to the 1st Respondent by his name as the person who assaulted him and had made no allegation against any other officer.

Further, the 3rd Respondent had not been present at the time the Petitioner was arrested or when he was placed in custody.

Thus, I hold that, as far as the 3rd Respondent is concerned, there is no material before this court to come to the conclusion that the 3rd Respondent was responsible for violation of any of the fundamental rights of the Petitioner guaranteed under the Constitution.

As far as the 2nd Respondent is concerned the violation alleged against him are under Articles 13 (1) and 13 (2).

It appears that the 2nd Respondent had also been on duty in the same vicinity where the 1st Respondent had been performing duties. In the statement of objections filed by him, the 2nd Respondent had taken up the position that it was the 1st Respondent who took action against the Petitioner and he did not get involved in the investigation pertaining to this incident. The Petitioner, in his petition has made a reference to the conduct of the 2nd Respondent and had stated that after the 1st Respondent dragged him up to the “police cab” the 1st Respondent assaulted him while three other police officers, including the 2nd Respondent, held him. From the Petitioner's own assertion, it is evident that the 2nd Respondent's involvement is after he was detained by the 1st Respondent. Thus, there is no material before this court to come to the conclusion that the 2nd Respondent can be held responsible for the violation of Petitioner's fundamental rights enshrined in Articles 13 (1) and 13 (2) of the Constitution.

As referred to above, I reject the version of the police that the Petitioner was arrested for possession of Cannabis and hold that the charge had merely been foisted upon him to justify the arrest. When one considers the totality of the facts, the circumstances under which the 1st Respondent claims that he recovered Cannabis from the possession of the Petitioner is highly improbable. As such, I reject the version of the 1st Respondent in that regard.

In addition to Article 11 of the Constitution, I also hold that the arrest and subsequent detention of the Petitioner is not lawful and therefore the 1st Respondent is also responsible for the violation of Petitioner's fundamental rights guaranteed under Articles 13 (1) and 13 (2) of the Constitution.

Over the past 40 years or so, this court, has on innumerable instances had handed down judgements where it had held that police officers had acted in excess of authority in scant disregard for the fundamental rights enshrined in the Constitution. Especially, when dealing with the public, the police officers have a bounden duty to act with caution and restrain to ensure that they do nothing in derogation of the fundamental rights granted to all citizens under the Constitution. The 1st Respondent has failed in the discharge of that duty. The manner in which the 1st Respondent had acted on this occasion not only tarnishes the image of the police in the minds of the people, but certainly would have led to the erosion of the confidence the people have in the police as the law enforcement arm of the state.

In the instant case, this court cannot condone the Petitioner's own action on this occasion either. He being a former member of a security force ought to have known that there were security concerns affecting the country at the relevant time and there was a need to ensure that the safety of the public is maintained at a location such as the main public transport terminals in the capital. He does not appear to have rendered the cooperation expected of a citizen to the law enforcement. The affidavit of Major Sooriyarachchi amply reflects the boisterous manner in which the Petitioner was conducting himself on this occasion. It must also be said, however, that his conduct does not in any way justifies the conduct of the 1st Respondent and furthermore Article 11 is an absolute right and as such there is no room for derogation.

For the reasons set out in my judgement, I declare that the 1st Respondent violated the fundamental rights of the Petitioner guaranteed by Articles 11, 13 (1) and 13 (2) of the Constitution and that the 2nd and 3rd Respondents are not guilty of any transgression.

1st Respondent is directed to pay the Petitioner a sum of Rs.150, 000/- (Rupees One hundred and fifty thousand) as compensation and the State shall pay the Petitioner a sum of Rs.25, 000 as costs.

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA P.C

I agree

JUDGE OF THE SUPREME COURT

JUSTICE K.T CHITRASIRI

I agree

JUDGE OF THE SUPREME COURT