

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 the
Democratic Socialist Republic of Sri
Lanka

Hewawasam Sarukkalige Rathnasiri
Fernando,
07 D, Warapitiya,
Darga Nagaraya.

PETITIONER

Vs.

SC (F/R) Application
No: 514/2010

- (1) Police Sergeant Dayarathna
(Service No 501)
Police Station,
Welipenna.
- (2) Police Constable Madusanka
(Service No 67080)
Police Station,
Welipenna.
- (3) Jayasingha
Police Staff Assistant,
Police Station,
Welipenna.
- (4) Police Inspector
A.D.Kariyawasam,
Office-in-Charge,
Police Station,
Welipenna.

(5) Inspector General of Police,
Police Headquarters,
Colombo 01.

(6) Honorable Attorney General,
Attorney General Department,
Colombo 12.

RESPONDENTS

Before:

S. Eva Wanasundera, P.C. J,
Prasanna Jayawardena, P.C. J. and
Murdu N.B. Fernando, P.C. J.

Counsel:

Shantha Jayawaradana with Chamara Nanayakkarawasam for the Petitioner
Shyamal Collure with Dilani Samayawardena for the 1st to 3rd Respondents
Varunika Hettige, DSG for the Attorney General.

Argued on: 22.03.2018

Decided on: 27.11.2018

Murdu N.B. Fernando, P.C. J,

The Petitioner has filed this application seeking a declaration that the 1st to 4th Respondents and / or any one or more of them have infringed the Petitioner's Fundamental Rights guaranteed under Article 11 and / or 12 (1) and/or 13 (1) of the Constitution.

Leave to proceed was granted on 09-12-2010 for the alleged violation of Article 11 and 12 (1) of the Constitution against the 1st to 3rd Respondents.

By order dated 15-12-2014 the preliminary objection raised by the 1st to 3rd Respondents was overruled and the Petitioner was permitted to tender fresh affidavit.

The relevant facts as narrated in the Petition is as follows,

The Petitioner at the time of the incident was 50 years of age, married with four children and was employed as a Toddy Tapper in Parapathkotuwa, in the Welipanna Police Division. He was employed under one Sanath Kumara who held a legally valid Tapping License.

On 09-08-2010 at around 3.30pm, when the Petitioner was at his place of work, the 1st and 2nd Respondents clad in civil had come on a motor bike and asked for toddy. The Petitioner has said he did not have toddy for sale. The Petitioner alleged that the 1st and the 2nd Respondents smelt of liquor at that time. The 1st and 2nd Respondents insisted that they be given a bottle of toddy and when the Petitioner indicated he does not have toddy, the 1st and 2nd Respondents have threatened the Petitioner and said “how dare you say you don’t have toddy. We are from the police”.

Thereafter the 2nd Respondent had grabbed the toddy tapping knife from the Petitioner and in the process got his palm cut and thereafter deliberately cut the Petitioner on his left shoulder with the knife and the 2nd Respondent together with the 1st Respondent assaulted the Petitioner on his face, chest and abdomen.

Thereafter the Petitioner alleged that the 1st and 2nd Respondents had removed the Petitioner’s shirt and sarong, tied the petitioner’s hands behind his back and dragged the Petitioner along the road for about 400 meters.

Having seen the Petitioner being dragged along road, several villagers had intervened and objected to the treatment metered out to the Petitioner. One had brought a sarong and got the 1st and 2nd Respondents to untie the Petitioner’s hands for the Petitioner to wear the sarong and another had bandaged the wound with a piece of cloth and another videographed the entire incident with a mobile phone.

Thereafter the 3rd Respondent came to the scene and the 1st to 3rd Respondents had tried to take the Petitioner to the Police Station in their motor bikes and on being insisted by the villagers that the Petitioner was badly wounded took him in a three-wheeler to the Police Station.

On the night of 09.08.2010 the Petitioner was taken to the Wettawa Government Hospital (District Hospital, Mathugama) where on admission the Petitioner had stated that he was assaulted by the Police. His family members visited him at the hospital and to them also he had

stated that he was assaulted by the police. That night the Petitioner developed a severe pain in his right-ear and on the next day 10.08.2010 the Petitioner was examined by the DMO (District Medical Officer). On the same day the Magistrate visited the Petitioner and at about 2 pm two police officers recorded a statement from the Petitioner and he was asked to place his signature without reading or showing it to him. At about 3.30pm the Petitioner was taken to the Nagoda Government Hospital. Then on the same day at around 10 pm the Petitioner was taken to the Kalutara Remand Prison.

Thereafter Police filed 2 cases against the Petitioner, one under Sections 315,317 and 183 of the Penal Code on 10-08-2010 and one under the Excise Ordinance on 17-08-2010 for possession of 40 drams of toddy without a valid licence. On 17-08-2010 he was produced before the Magistrate Court and enlarged on bail and on the direction of the Magistrate examined by the JMO (Judicial Medical Officer) of Colombo and referred to the ENT clinic of the National Hospital.

Meanwhile on 13.08.2010 the Petitioner's wife had made a complaint to the Human Rights Commission, National Police Commission, IGP and others regarding the violation of Petitioner's Fundamental Rights. (The complaint and the acknowledgment is marked as P6 and P7)

In their objections the 1st to 3rd Respondents claimed, that they left the Welipanna Police Station on the instructions of the 4th Respondent clad in civvies on private motor cycles to check on certain information pertaining to offences under the Excise Ordinance and having taken one person into custody they proceeded to where the Petitioner was said to be selling toddy.

The 1st and 2nd Respondents further stated that on the instructions of the 1st Respondent, the 2nd Respondent went to purchase toddy and gave the Petitioner Rs. 100 and accepted a bottle of toddy and signaled to the 1st Respondent and when the 1st Respondent approached the Petitioner to arrest him, the persons said to be drinking toddy took to their heels and the Petitioner alleged to be smelling of liquor offered a sum of Rs 1000 and begged not to arrest him. Then the Petitioner went inside, picked a manna knife and attacked the 2nd Respondent and in the process cut the 2nd Respondent's hand. Thereafter both the 1st and 2nd Respondents grappled with the Petitioner, used minimum force and retrieved the knife and then saw that the Petitioner had a cut injury on his shoulder.

The 1st and 2nd Respondents also denied that they removed the Petitioner's clothes or dragged him along the road and further claimed that these proceedings have been instituted maliciously at the instigation of certain parties with vested interests in order to discourage action being taken against illegal activities in the area.

The 1st to 3rd Respondents produced in-and-out entries and extracts of the information book as proof in this regard and maintained that minimum force was used to retrieve the knife from the Petitioner.

In ascertaining whether the Petitioner's Fundamental Rights guaranteed under Article 11 and 12 (1) of the Constitution has been violated by the 1st and 3rd Respondents, I have carefully analyzed the facts pertaining to this matter, the medical evidence submitted to this court namely, the Admission form and Treatment Sheet maintained by the Matugama District Hospital and Kalutara General Hospital, the Colombo Chief JMO's Medico-Legal Report and the ENT Surgeon's Report, the CD filed of record and the Court proceedings pertaining to the two cases filed in the Magistrate Court of Matugama.

In the Medico-Legal Report, the Chief JMO has opined that out of the five injuries sustained by the Petitioner, four on the head and lower abdomen are grievous blunt force type (assault by hand) injuries, one on the left shoulder (cut with manna knife) is non grievous sharp force type injury and the injury in the ear drum is a blunt force type (slapping) technically grievous injury compatible with the history given by the Petitioner with regard to the manner and time of causation.

The Petitioner upon his admission to Matugama District Hospital on the day of assault, namely 09.08.2010 has stated that he was assaulted by police and the Petitioner's wife in her complaint to Human Rights Commission made on 13.08.2010 has also stated that on the date of assault itself the Petitioner informed her of the assault by police.

The consistent position taken by the Petitioner with regard to the assault by police, gives credibility to the version of the Petitioner. I have also viewed the CD tendered to this court which is a contemporaneous recording which corroborates the Petitioner's version and the affidavit (P2) submitted by the person who videographed the incident on his mobile and the affidavit of

another villager (P3) and also the submissions made by the Counsel for the Petitioner in the Magistrate Court of Matugama pertaining to the assault by the police (P4).

I have also carefully analyzed the version of the 1st to 3rd Respondents, the stand, that 2nd Respondent acted as a decoy, the bare denial of the allegation of demanding toddy, use of minimum force by the 1st and 2nd Respondents on the Petitioner to retrieve the knife, the two B Reports filed in the Magistrate Court especially, the account given by the OIC of the Station pertaining to the conduct of the Petitioner being an affront to conducting raids and justifying the 1st and 2nd Respondents version, the List of productions, the proceedings in the Magistrate Court case (P4 and P5), airing of the CD by a media channel, the interdiction and reinstatement of the Respondents and disciplinary proceedings currently proceeding against the 1st and 2nd Respondents.

On a careful consideration of the available evidence, I accept the Petitioner's version which appears to be true and supported by cogent evidence including medical evidence and reject the version of the Respondents.

Before proceeding further, I wish to advert that the main allegation of the Petitioner is against the 1st and 2nd Respondents. There is no evidence to implicate the involvement of the 3rd Respondent. Therefore I observe that the Petitioner's Fundamental Rights have not been violated by the 3rd Respondent.

This Court granted Petitioner leave to proceed for the alleged violation of Article 11 and 12 (1) of the Constitution.

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

Article 12(1) provides that "all persons are equal before law and are entitled to the equal protection of the law."

In a plethora of cases, this Court has unhesitatingly condemned acts of torture whenever they were proved to have occurred and has held such acts violate Article 11 of the Constitution.

Athukorale J (with Sharvananda CJ and de Alwis J agreeing) in **Amal Sudath Silva Vs Kodithuwakku [1987] 2 SLR 119** at page 126 held, that

“Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. It prohibits every person from inflicting torturous, cruel or inhuman treatment on another. It is an absolute fundamental right subject to no restriction or limitation..... *The police force, being an organ of the State, is enjoined by the constitution to secure & advance this right.....* 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...” (emphasis added)

Shirani Thilakawardena J (with S.N.Silva CJ and Ratnayake J agreeing) in **Nandapala Vs Sergeant Sunil SC(FR)224/2006 S.C.M. 27.04.2009**, repeating Plato’s timeless quotation ‘Quis Custodiet ipsos custodes?’ or “who will guard the guardians” went on to state, I quote,

“There are both direct and indirect consequences to the Police, to Society and ultimately, to the Rule of law, that result from the systematic failures within the Police service..... We see violence like that which was apparent in the present case perpetrated with total impunity by certain police officers against civilians, to secure bribes, to extract public punishments for private disputes or often, for seemingly no reason at all other than to taunt and harass the public with “a show” of their unchecked police powers, such power ultimately blinding them to their own corruption. Power that were vested in them by the donning of uniforms to separate them and identify them as upholders of the Rule of Law are sadly used instead to subdue and pervert it....”

In the case referred to above, the van that the Petitioner was travelling was stopped at a check point to conduct a search of the vehicle and interrogate the vehicle’s occupants. The Petitioner and the other occupants of the vehicle were taken into police custody, brought to the police station and brutally assaulted. It was later revealed that the Petitioner and the other occupants were not involved in any criminal activity nor robbery as accused at the time of arrest

but were returning after attending to their legitimate furniture business and there was no justification for the conduct of the police.

Kulatunge J (with Ramanathan J and Wadugodapitiya J agreeing) in **Ratnasiri and another Vs Devasurendran [1994] 3 SLR page 127** at page 134 held,

“On the basis of the evidence which I accept, I hold that the Petitioners were whilst they remained in police custody, subjected to treatment “which caused severe pain or suffering” to them (both physical and mental) without lawful sanction, which treatment constitutes “an aggravated form of inhuman treatment or punishment which grossly humiliates the individuals before others” and that such treatment is violative of the Petitioner’s rights under Article 11 of the Constitution.”

The Honorable Judge also referred to the judgment of Amerasinghe J in *W.M.K. Silva Vs Chairman Fertilizer Corporation [1989] 2 SLR page 393* and other commentaries in deciding, that the Petitioners of the above referred case, a driver and a conductor of a private omnibus who had an altercation with the Respondent police officer in civil with regard to insurance of a bus ticket which ended up in a brawl in the bus were subjected to inhuman treatment when at the police station the police officers acting under the colour of office assaulted the Petitioners.

Justice A.R.B. Amerasinghe in his book “Our Fundamental Rights of Personal Security and Physical Liberty” at page 28 stated,

“Something might be degrading in the relevant sense, if it grossly humiliates an individual before others, or drives him to act against his will or conscience”,

Shirani Bandaranayake J (with G.P.S.de Silva CJ and Coomaraswamy J agreeing) in **Abeywickrema V Gunaratne [1997] 3 SLR page 225** expressed the view that,

“when a man who made an endeavor to earn his living by carrying on an honest occupation, is taken into custody, assaulted and locked up in a cell in my view he has been subjected to degrading treatment”

In the case referred to above the Police assaulted and arrested a three-wheel driver who had taken a passenger on hire to the Police Station, on the pretext that he was under the influence of liquor.

The MLR showed that the Petitioner had not consumed any liquor. There was no complaint made against the Petitioner and there were no reasons at all to suspect the Petitioner of having committed any offence, therefore after obtaining the AJMO's Report there was no reason at all for detaining the Petitioner and held that the Respondents in that case violated the Petitioner's rights under Article 11 of the Constitution.

In Suppaiah Sivakumar Vs Sergeant Jayaratne SC(FR)56/2012 S.C.M. 26.07.2018
Aluwihare P.C. J in holding that the Respondents violated the Petitioner's rights under Article 11 and 12 (1) of the Constitution stated,

“the Petitioner was an ordinary citizen out there enjoying Theru celebrations with his family when the Respondents assaulted him. He was dragged along the road and proclaimed to be an offender in front of his relatives and the general public. When a man is assaulted, taken into custody, and locked up in a cell, simply because he happened to be in the vicinity of a riot, in my view, he has been subjected to “degrading treatment”. The medical reports forwarded by the Kandy Hospital corroborates the physical suffering the Petitioner had to undergo on account of the Respondents' actions. The affidavits filed by his wife and the relatives further confirm that they witnessed the Petitioner being treated like an offender in front of the public. There can be no question that such a conduct caused humiliation to the Petitioner.....”

In the present case, the 1st and 2nd Respondent police officers in civvies came to the place where the Petitioner, a toddy tapper was attending to his routine daily work, and demanded toddy and when informed that toddy was not available, verbally abused and assaulted the Petitioner and subsequently removed his outer garments and dragged him along the road with his hands tied at the back. The medical evidence, the affidavits, the video recording available before this Court, confirms the physical suffering, the mental agony and humiliation that the Petitioner had to undergo in public in the hands of the 1st and 2nd Respondents.

Based on the jurisprudence of our Courts in my view, the above conduct of the 1st and 2nd Respondents amount to “degrading treatment” and causing humiliation to the Petitioner before the general public.

For the foregoing reasons, I determine and hold that the Petitioner has established that his Fundamental Right of Freedom from torture and cruel, inhuman and degrading treatment guaranteed to him under Article 11 of the Constitution and the Right to Equal Protection of Law guaranteed under Article 12 (1) of the Constitution have been violated by the actions of the 1st and 2nd Respondents.

I allow the Petitioner's application and direct the State to pay to the Petitioner Rs. 100,000 as compensation and costs fixed at Rs. 25,000. I also direct the 1st and 2nd Respondents to pay personally Rs. 50,000 as compensation from each of them respectively to the Petitioner.

Judge of the Supreme Court

S. Eva Wanasundera P.C. J

I agree

Judge of the Supreme Court

Prasanna Jayawardena P.C. J

I agree

Judge of the Supreme Court