

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

*In the matter of an Application
under and in terms of Articles 17
and 126 of the Constitution of the
Democratic Socialist Republic of
Sri Lanka.*

SC/FR APPLICATION 369/2013

Nandasenage Lalantha Anurdha,
Nandasena,
Pahalagama,
Mahabulankulama.

PETITIONER

Vs

1. Head Quarter Inspector of Police,
Police Station,
Anuradhapura.
2. C.I Gallage,
Officer in Charge - Crime Branch,
Police Station,
Anuradhapura.
3. S. I. Amarasingha,
Police Station,
Anuradhapura.

4. P.C. Dias,
Police Station,
Anuradhapura.
5. Inspector General of Police,
Police Headquarters,
Colombo 01.
6. Hon. Attorney General,
Attorney –General’s Department,
Colombo 12.

RESPONDENTS

BEFORE : **B.P. ALUWIHARE, PC, J.**
MURDU N.B. FERNANDO, PC, J. and
S. THURAIRAJA, PC, J.

COUNSEL : Thanuka Nandasiri for the Petitioner.
Sadamal Rajapaksha for the 2nd and 3rd Respondents.
Yuresha De Silva, SSC for the 5th and 6th Respondents

ARGUED ON : 29th June 2020.

WRITTEN SUBMISSIONS: Petitioner on 16th July 2020

DECIDED ON : 22nd October 2020.

S. THURAIRAJA, PC, J.

Nandasenage Lalantha Anurdha Nandasena (Hereinafter sometimes referred to as the Petitioner) claims that he was arrested on the 25th of September 2013 by the 2nd and 3rd Respondent. He states that thereafter he was hung on the rear door of the police jeep and assaulted by the 3rd Respondent, 4th Respondent and 4 other police Officers. The assault resulted in a fracture of his left hand and losing consciousness. When the Petitioner subsequently regained consciousness he noticed that he was at a Ayurvedic centre in Wijayapura. Thereafter he was taken to the Anuradhapura Police Station and was kept in a room adjacent to the Crime Branch. The Petitioner states that while detained in the police station, he was subjected to torture by police officers attached to the Anuradhapura Police Station including the 1st – 4th Respondents (1st Respondent is the Headquarter Inspector of Police of the Anuradhapura Police station, 2nd Respondent is the OIC – Crime Branch of the Anuradhapura Police station, 3rd Respondent is a Sub- inspector of the Anuradhapura Police station and the 4th Respondent is a Police Constable of the Anuradhapura police station.) The Petitioner states that on the following day (26/09/2013) he was taken out of the Police station by several police officers including the 2nd, 3rd and 4th Respondents. The Petitioner was put into a police jeep to set out allegedly to recover the stolen goods. While in the police jeep the 2nd Respondent had taken out his revolver and threatened to shoot the Petitioner if he reveals any information about the assault by them and further threatened to arrest relatives of the Petitioner if he speaks to them of said assault. The Petitioner was produced before the Magistrate Court of Anuradhapura on the 27th of September 2013 in Case No. B2797/2013.

The Respondents, particularly the 2nd and 3rd Respondent maintain that the Petitioner was arrested on the 26th of September by the 2nd Respondent. The

Respondents further state that a complaint was made by one Magal Bandalage Gunasena on 24/08/2013 to the Anuradhapura police station stating that his house was broken into, while he and his family members were away and gold jewelry worth Rs. 120, 000/- was stolen. After an investigation, the Petitioner and two others were arrested on 26/09/2013 in connection with the theft. The Respondents maintain that as the jeep approached the main road from the junction while taking the suspects by jeep to the police station due to a steep incline the wheels skidded and this resulted in the rear doors of the jeep springing open. The Respondents assert that the Petitioner in his attempt to escape in that moment jumped out and tripped, landing heavily on his left shoulder thereby injuring himself and deny the use of any force.

The Counsel for the Petitioner informed court that he will be confining this Application to Article 11, namely torture.

The pleadings and submissions before us establish the facts that are set out below which are pertinent to this case.

While both parties acknowledge the arrest and injury on the petitioner's left shoulder, they have opposing views on how the aforementioned injury occurred. The Petitioner submits that he was arrested on the 25th of September and that he was not informed of the reasons for his arrest. He further states that he was tied up and hung on the rear door of the jeep and assaulted as a result of which he broke his left arm. The Petitioner was arrested in the Nelumkulama area and was taken to an indigenous Ayurvedic medical practitioner (Vedha mahaththaya) at Wijayapura. Taking into consideration the place the petitioner was arrested and the area where the ayurvedic dispensary is located, it seems that the police vehicle in which the Petitioner was taken for treatment travelled passing the Anuradhapura Teaching Hospital.

The Petitioner states that he was produced before the Magistrate Court of Anuradhapura on the 27/09/2013 and at that time his Attorney – at – Law informed court that he had been assaulted by the police. The learned Magistrate cancelled the identification parade and directed that the Petitioner be admitted to the Anuradhapura Teaching Hospital for treatment. The Petitioner states that Magistrate called for a report regarding the assault however the Respondents though accepting that the Magistrate Court cancelled the identification parade and directed the Petitioner to be admitted at the Anuradhapura Teaching Hospital, they deny that a report was called for. The Petitioner was subsequently admitted to the Anuradhapura Teaching Hospital and he was released without being subjected to a medico legal examination by the Judicial Medical Officer (JMO) of the Anuradhapura Teaching Hospital.

It is evident from the information submitted to this Court by the Respondents that the police officers made entries in the relevant information books that the Petitioner received his injuries as a result of his attempt to escape. It is also further revealed that he was taken to an Ayurvedic medical practitioner.

When the Petitioner was admitted to the Anuradhapura Teaching Hospital, he had informed the doctors including the consultant of his assault by the police and they had made entries in the Bed Head Ticket (BHT). As there is no Medico Legal Report (MLR) available to us, I carefully perused the BHT and observed the following injuries; swelling, fracture of the left humerus and left wrist drop.

The Respondents submit that the petition and affidavit bear incorrect dates. According to the petition and affidavit the date mentioned is the 24th of September 2013. I perused the said petition and affidavit and find that to be correct but I observed that the affidavit was sworn by the Petitioner in front of the jailer of the Anuradhapura prison. He said that the affidavit was affirmed on 10/10/2013 and it

was filed before the Supreme Court on the 24/10/2013. Considering the nature of this allegation I am inclined to give the Petitioner the benefit of the doubt. I presume that the affidavit was signed on the 10/10/2013. The dates mentioned in the petition and affidavit maybe a typographical error as claimed by the counsel for the Petitioner.

If we were to hypothetically accept the Respondents' version of events that the Petitioner fell off the jeep while he was trying to escape, then why did the Respondents fail to produce the Petitioner to the government hospital which they are bound to do by law.

There is no material submitted before this Court that the 2nd and 3rd Respondents have reported this matter to the higher authorities of the Police Department, namely the ASP and higher. The two main factors namely the escape and the injury must be brought to the attention of the higher officials (at least up to the Divisional SSP). There are a number of Departmental Orders and circulars that set out the proper manner and procedure on how a person in police custody must be treated. The relevant provisions for this matter from the Departmental Order Bearing No. A 20, the Departmental order bearing No. E 6 and the IG circular No. 2328/2011 will be reproduced for ease of reference.

Departmental Order Bearing No. A 20 states as follows;

Responsibilities of Police and the rights of the persons under arrest-

Every police officer should keep in mind that a person who is under the custody of police is not in the state of a prisoner convicted and his protection should be considered in every aspect. If a person being held in the police custody made a special request on: food or bed and seat etc. special attention should be paid on such a request and the instructions of the Duty

officer should be sought in that regard. The Duty Officer shall facilitate such amenities unless it causes a prejudice to the custody.

2. A. - Arrest: ***when a person is arrested it should be done without the acts of violence as much as possible.*** *In a case of arresting a violent person the police powers should be used only to the extent it is required to suppress powers.*

(Emphasis added)

Departmental Order Bearing No. E 6 sets out the procedure to be followed by the police when a prisoner escapes from the custody of the police. This same procedure is applicable where a suspect attempts to escape from the custody of the police. It states as follows;

2. At every occasion when a prisoner escapes, such should be informed to the Assistant Superintendent of Police, Superintendent of Police and to the information room of the Headquarters through a telephone call or email along with a complete description of the person or persons who have escaped.

5. If an escaped accused is taken in to the custody of the Police and when he is taken into custody, it should be informed to all who had been informed earlier that he is taken back to the custody of the police.

(Emphasis added)

The IG circular No. 2328/2011 sets out the manner in which the suspects who are under the custody of the police should be protected. This circular states as follows;

02. in making an arrest of a suspect, the police should comply with Section 23 of the Code of Criminal Procedure Act No. 15 of 1979 and whereas –

*IV. When an arrested person has injuries, he should be referred to a **Judicial Medical Officer and a report should be obtained thereby.** If the suspect does not hesitate to provide a statement, a statement should be taken over the injuries.*

*X. The said telephone message should be inclusive of: the place, time in which the suspect is arrested, the reason for the arrest, and **details which describe whether special incidents happened when the suspect is arrested.** When such a telephone message is received, the Gazetted Officer in charge of the District shall promptly ascertain the information of the said arrest from the relevant police station whereas the said officer should provide all the instructions required over the further investigation of the suspect and producing him to the courts to the Officer -in- Charge and the Investigation Officer. When it is felt that the arrested suspect should have to be examined, he should visit the relevant Police Station and instructions required for examining the suspect and for the investigations should be provided.*

*XI. **All the Officers- in - Charge are liable to work in a manner which ensure the rights and protection of all persons who are being arrested. The officers in charge of the District who are monitoring such places should strictly monitor the rights and protection of the people who are under arrest.***

03.

III. All records of moving the suspect to another place should be duly noted in the information book

04. It shall be the duty of all the officers in charge of the Districts cum Divisions and the Deputy Inspector Generals who are in charge of Ranges to execute

constant monitoring process as to whether the said instructions are properly carried in to effect and rights of the arrested suspects are properly ensured.

(Emphasis added)

Thus, on examination of the aforementioned provisions it is evident that the Respondents involved in this matter had not complied with the necessary procedure as set out above. It is also unheard of that when a person is injured when trying to escape from the police custody for him to be taken to an ayurvedic medical physician to be treated.

In the given circumstances as per the Code of Criminal Procedure Act No. 15 of 1979 the police officer is compelled to produce him before a Government Medical Officer and must obtain a report (MLR) and submit the same to the Magistrate and the recoveries made by the police officer must be checked and itemized.

When taking into comparison the duties and responsibilities of the Petitioner and the Respondent Police Officers, it is evident that the petitioner is just an ordinary citizen of the country. However, the Respondents as police officers are expected by virtue of the colour of their uniform to be more accountable in their duty than an ordinary citizen of the country. A police officer is a repository of State duties, who has been prescribed with law enforcement duties. When a fundamental rights application of this nature is filed, Court expects reasonable explanation with documents and evidence and not just a mere denial. A denial in itself will not suffice. In the case of ***Ansalin Fernando v Sarath Perera, Officer – In – Charge, Police Station Chilaw and Others [(1992) SLR Vol. 2 411]*** Kulatunga J stated as follows;

I do not consider it proper to reject such an allegation merely because the police deny it or because the aggrieved party cannot produce medical evidence of injuries. Whether any particular treatment is violative of Article 11 of the

Constitution would depend on the facts of each case. The allegation can be established even in the absence of medically supported injuries.

The mission of the Sri Lanka Police Department reads as *"Sri Lanka police is committed and confident to uphold and enforce the law of the land, to preserve the public order, prevent crime and terrorism with prejudice to none – equity to all"* equity generally means what is fair and just, moral and ethical. Consequently, it can be stated that by committing acts that constitute acts of torture a police officer would be acting against the mission and vision on which the Sri Lanka Police was founded. Additionally, he or she would also be acting beyond the colours of his or her uniform.

Article 1 of The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as follows;

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No.22 of 1994 defines torture as follows;

Section 12 -

“torture” with its grammatical variations and cognate expressions, means any act which causes severe pain, whether physical or mental, to any other person, being an act, which is;

(a) done for any of the following purposes that is to say

(i) obtaining from such other person or a third person, any information or confession; or

(ii) punishing such other person for any act which he or a third person has committed or is suspected of having committed; or

(iii) intimidating or coercing such other person or a third person; or

(b) done for any reason based on discrimination,

and being in every case, an act which is done by, or at the initiation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

Article 5 of the Universal Declaration of Human Rights provides for the protection of persons from torture. It states that *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

The right to freedom from torture is enshrined in various human rights instruments and protects all individuals from being intentionally subjected to severe physical or psychological distress by, or with the approval or acquiescence of, government agents acting for a specific purpose, including to inflict punishment or to obtain information. Torture is a crime under international law. According to the relevant instruments it is prohibited and it cannot be justified under any circumstances. The right to freedom from torture is one of the most universally

recognized human rights and as such the protection from torture has attained status as a *jus cogens*. Dr. Jayampathy Wickramaratne in his book *Fundamental Rights in Sri Lanka* (1996, at page 114) writes that the intentional and wanton infliction of pain and suffering is one of the most shameful acts that one human can perpetrate on another. Torture is one of the vilest acts perpetrated by human beings on their fellow creatures. It annihilates human personality and denies the inherent dignity of a human being and should not be condoned under any circumstances.

Article 11 of our Constitution guarantees that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This is an unqualified non – derogable right and every person is entitled to it. This unqualified nature of the right and the fact that this provision is entrenched makes it abundantly clear that the Constitution envisages ‘zero tolerance’ towards cruel, inhuman or degrading treatment which is the anti-thesis of ‘Human Dignity’.

In the case of ***Amal Sudath Silva v Kodituwakku Inspector of Police and Others [(1987) Vol. 2 SLR 119]*** Atukorale J stated as follows;

“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 torture some, cruel or inhuman treatment on another. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs. The police force being an organ of the State is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to others,

irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion. This court cannot, in the discharge of its constitutional duty, countenance any attempt by, any police officer however high or low, to conceal or distort the truth induced perhaps, by a false sense of police solidarity. The facts of this case have revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can, only be described as barbaric, savage and inhuman. They are most revolting to one's sense of human decency and dignity particularly at the present time when every endeavor is being made to promote and protect human rights. Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment within the confines of the very premises in which he is held in custody. Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order. The petitioner may be a hard-core criminal whose tribe deserve no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set up, it is essential that he be not denied the protection guaranteed by our Constitution"

In ***Velmurugu v Attorney General and Another [(1981) Vol. 1 SLR 406]*** it was held that;

Article 11 which gives protection from torture and ill-treatment is the only fundamental right that is entrenched in the Constitution in the sense that an amendment of this clause would need not only a two-third majority but also

a Referendum. It is also the only right in the catalogue of rights set out in Chapter III that is of equal application to everybody and which in no way can be restricted or diminished. This right occupies a preferred position and it is the duty of this court to give it full play and to see that its provisions enjoy the maximum application.

(Emphasis added)

In the case of **Bandula Samarasekara v Vijith Alwis, OIC Ginigathhena Police Station and Others [(2009) Vol. 1 SLR 213]** Dr. Shirani Bandaranayake stated as follows;

"It is the duty of a police officer to use his best endeavour and ability to prevent all crimes, offences and public nuisances and more importantly to preserve the peace. In order to carry out his duties efficiently and effectively, it would be necessary to have the trust and respect of the public. It is not easy to command that from the public and in order to earn such trust and respect, the police officers must possess a higher standard of moral and ethical values than is expected from an average person.

In **Senthilnayagam and Others v Seneviratne and Another [(1981) Vol. 2 SLR 187]** Justice Colin Thome noted that;

"The Courts have been jealous of any infringement of personal liberty and care is not to be exercised less vigilantly, because the subject whose liberty is in question may not be particularly meritorious"

In the Indian case of **State of Uttar Pradesh vs Ram Sagar Yadav and others (1985 AIR 416)** it was held;

*"It is necessary that the Government amends the law appropriately so that **policemen who commit atrocities on persons who are in their custody are not allowed to escape by reason of paucity or absence of evidence.** Police Officers alone and none else can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak they put their own glass upon facts and pervert the truth. **The result is that persons, on whom atrocities are perpetrated by the police in the sanctum sanctorum of the Police Station, are left without evidence to prove who the offenders are. The law as to the burden of proof in such cases may be re-examined by the legislature so that hand-maids of law and order do not use their authority and opportunities for oppressing the Innocent citizens, who look to them for protection.**"*

(Emphasis added)

It must also be noted that when this application initially came before this court the Attorney general appeared for all the Respondents however once leave to proceed was granted the Attorney general did not appear for the 2nd and 3rd Respondents.

Considering the available material, I find the complaint made by the Applicant to be factual, that he was subject to torture at the hands of the 2nd and 3rd Respondent. Therefore, I find that the right of the Applicant enshrined under Article 11 of the Constitution was violated.

There are several cases decided by this court time and time again that declare that the state should take strict measures to prevent abuse of authority

by government officials, especially the police but there is no report or action plan before this court that the government has taken adequate measure to curb these situations from arising continuously.

I find the Fundamental Right of the Applicant enshrined in Article 11 of the Constitution to have been violated by the 2nd, 3rd Respondents and the State. Hence, I order the 2nd and 3rd respondents to pay Rs. 50,000/- each from their personal funds and the 5th respondent to pay compensation amounting to Rs. 100,000/- to the Applicant, Nandasenage Lalantha Anurdha Nandasena.

Application Allowed.

JUDGE OF THE SUPREME COURT

B.P. ALUWIHARE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT