

**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 & 126 of
the Constitution of the Republic of
Sri Lanka.

- 1.Suriyarachchige Lakshman de Silva
 - 2.B.M.Ajantha Weerasinghe
- Both of 19/1 'Eksath" Mawatha,
Kadawatha.

PETITIONERS

SC.FR Application No:-09/2011

V.

1. Officer-In- Charge,
Edirisuriya Patabendige Chaminda
Edirisuriya.
Police Station Kiribathgoda,
Also at residence:-No.94, Maya Mawatha
Kiribathgoda.
2. Officer-In-Charge, Crime Division,
M.A.D.Ruwan Viraj,

Police Station, Kiribathgoda.

Also at residence:-No.109, Galpothgoda

Pugoda, New Town.

3. Sergeant P.L.R. Percey Dissanayake,

Crime Division, Police Station,

Kiribathgoda.

Also at residence:-No.421/A/1,

Ahugamma, Demalagama, Miragawatta

4. Police Constable R.M.Sanjwwea Suriya

Ruwan,

Police Station, Kiribathgoda.

Also at residence:-No.8, Anumethigama,

Bingiriya.

5. B.Carmer, (Proprietor)

K.C.C.Engineering Co (PVT) Ltd, No.690,

Kapuwaththa, Ja-Ela.

Also at residence:- No.214/15,

Fathima Mawatha, Kiribathgoda.

6. Deputy Inspector General of Police

Police Station, Peliyagoda.

7. Pujitha Jayasundera, Sri Lanka Police

Department, Police Head Quarters,

Colombo 1.

8. The Hon. Attorney General,
Attorney General's Department,
Hulftsdorp, Colombo 12.

RESPONDENTS

BEFORE:-S.E.WANASUNDERA, PCJ.

UPALY ABERATHNE, J.

H.N.J.PERERA, J.

COUNSEL:- Pulasthi Hewamanne with Sulakshana Senanayake for
Petitioners.

Jagath Abeynayaka for 1st to 4th Respondents

Nayomi Wickremasekera, SSC for 6th to 8th Respondents

ARGUED ON:- 20.10.2016

DECIDED ON:-03.03.2017

H.N.J.PERERA, J.

The Petitioners in this application alleged that their fundamental rights guaranteed under Articles 11, 12(1), 13(1), 13(2), 13(4) & 13(5) of the Constitution were violated by the Respondents. This Court granted leave to proceed under Article 11 and 12(1) of the Constitution.

The 1st Respondent is the Officer-in-Charge of the Police Station, Kiribathgoda. The 2nd Respondent is the Officer-in Charge of the Crime

division, Police Station, Kiribathgoda. The 3rd Respondent is a Police Sergeant attached to the Crime division, Police Station, Kiribathgoda and the 4th Respondent a Police Constable attached to the Police Station, Kiribathgoda. The 5th Respondent is the person who made a complaint to the Police station about a theft committed at his residence. The 6th respondent is the Deputy Inspector General of Police, Police Station Peliyagoda, and the 7th Respondent Inspector General of Police and 8th Respondent is the Attorney General.

The 2nd Petitioner is married to the 1st Petitioner who is a sub-contractor who does blasting paint work on heavy metal items such as ships, tanks, heavy machinery etc. The Petitioners state that from on or about 2003, the 1st Petitioner commenced work with the 5th Respondent Businessman, accepting sub-contracts from the said Respondent. The Petitioners state that on or around 2009 approximately Rs.450,000/= was owed on credit to the 1st Petitioner by the 5th Respondent for a completed sub-contract. The Petitioners state due to non-settlement of the said sum there was disagreement between the said Respondent and the 1st Petitioner, and the Petitioners state that from the time of the said disagreement, the said 5th respondent has been openly hostile towards the Petitioners.

According to Petitioners on 10.08.2010 at about 12.45 a.m whilst the Petitioners and their children were visiting relatives and when they were not at home , the 1st, 2nd, 4th and 5th Respondents had visited the Petitioners' residence in the 5th Respondents vehicle had forcibly instructed the 1st Petitioner's mother and nephew to allow them to search their house. Soon thereafter whilst still in their home, the 1st Respondent telephoned the 2nd Petitioner and ordered her to bring her husband to Kiribathgoda Police Station immediately. Due to the abusive language, and threatening manner in which the 1st Respondent addressed the 2nd Petitioner, she informed the said Respondent that she

would inform the 1st Petitioner to present himself to the Police Station on the following morning instead. After which the 1st Respondent instructed the 2nd Petitioner to bring her husband the 1st Petitioner to the police station or to come with her children. Thereafter the Respondents had left the Petitioners house.

The Petitioners' state that thereafter, on 10.08.2010 around 9.30 a.m , the 2nd Petitioner went to the Kiribathgoda Police Station and was instructed to see the 1st Respondent. Accordingly she went to the 1st Respondents office and saw the 1st and 3rd Respondents present. To the 2nd Petitioner's dismay, the 3rd Respondent Sergeant, grabbed her by her hair and dragged her to another nearby room in which a female Police Officer only identified as "Seetha" was present. When she inquired as to why she was being treated thus, the 3rd Respondent repeatedly slapped her face and abused her in derogatory, contumelious abusive language and forcefully asked her where her husband was. When she inquired as to why the Police were searching for her husband she was informed that he was wanted in connection with some theft and that the Police had video recorded proof of the 1st Petitioner's involvement. The 2nd Petitioner professed her husband's innocence and at that stage 'Seetha' too assaulted her. The 2nd Petitioner claims that thereafter the 3rd Respondent repeatedly slapped her and questioned her about the where about of her husband and that she was not allowed to leave the Police Station till 12.08. 2010. She claims that during the detention the 5th Respondent was an intermittent visitor to the Police Station. And on several occasions verbally abused the 2nd Petitioner and threatened the life of her family.

The 2nd Petitioner states that she came to know that the Police officers from the Kiribathgoda Police Station had visited her home and arrested a relative named G.A.Asitha. The 2nd Petitioner further claims that on 11.08.2010 the said Asitha was detained at the Police station and he

informed her that the Police had ransacked their house and taken into custody the 1st Petitioner's Passport and Contracts.

The 2nd Petitioner further claims that on the following day ,11.08.2010 around 10.00 am Indunil Basnayake [the 2nd Petitioner's younger brother] visited the kiribathgoda Police Station with the 2nd Petitioner's daughter and youngest son and she saw the said Indunil Basnayake being intimidated by the 3rd Respondent. The 3rd Respondent repeatedly asked the said Indunil Basnayake where the 1st Petitioner was hiding and accused him of harboring a criminal and detained him in the Police cell.

The 2nd Petitioner further claims that the children were permitted to stay with her and thereafter on 11.08.2010 the 3rd Respondent used obscene language and abused the Petitioners' daughter and threatened the life of the Petitioners and their family repeatedly asking her where her father was hiding. The Petitioners state that their daughter suffered severe mental trauma due to the said ordeal. And on 11.08.2010, the 2nd Respondent was instructed by the 3rd Respondent, to sign a letter agreeing to hand over her husband to the Kiribathgoda Police Station immediately and due to the fear she signed the said letter. The Petitioners state that thereafter at around 11 p.m, the 2nd and 3rd Respondents informed the Petitioners daughter that she was free to go home. However, due to the late hour, and as her mother the 2nd Petitioner was not permitted to leave, she indicated to the Respondents that she would remain with her family. Soon thereafter, on 12.08.2010, at around 2.am the 2nd to 4th Respondents verbally abused the 2nd Petitioner and her two children and thereafter informed them that they were free to leave, however due to the late hour the 2nd Petitioner remained at the Police Station and left at around 5 a.m in the morning.

The 2nd Petitioner further states that as she was detained at the police Station, she came to know that her husband the 1st Petitioner visited a

friend's house in the hope of retaining legal representation and that he was arrested by the kiribathgoda police on the 13th August at about 8.30 am.

This Court granted leave to proceed for the alleged infringement of Articles 11 and 13(1) of the Constitution.

The 2nd Petitioner's allegation against the 1st, 2nd and 3rd Respondents was that she was arrested on 11.08.2010 without any basis and that she was assaulted at the time she was so arrested on 11.08.2010.

Of the allegations made against the 1st to 4th respondents, let me first consider the alleged violation of Article 13(1) of the Constitution. Article 13(1) of the Constitution, which relates to freedom from arbitrary arrest, read as follows:-

“No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.”

According to the 2nd Petitioner the respondents arrested her at the Kiribathgoda Police Station on 11.08.2010 when she arrived at the said Police station to inquire as to why the police were searching for her husband. On the previous day night she was asked by the 1st Respondent to bring her husband to the police Station or to come with her children to the police station on the following day morning.

The 2nd Petitioner had also filed an affidavit from one Asitha. On consideration of the aforementioned affidavit it is apparent that the 2nd Petitioner was in police custody when he (Asitha) arrived at the police station on 11.08.2010.

Section 32 of the Code of Criminal Procedure Act No 15 of 1979 describe the instances where peace officers could arrest persons without a warrant. According to section 32(1)(b):-

“Any person may without an order from a Magistrate and without a warrant arrest any person-

(a)Who in his presence commits any breach of the peace ;

(b)Who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned.”

It is common ground that the 2nd Petitioner was arrested by the 1st Respondent.

The contention of the 1st Respondent is that the 2nd Petitioner was arrested on 11.08.2010 around 10.30 am on suspicion of offence relating to receiving stolen property and obstructing lawful arrest of a suspect. (Affidavit para 09).

The 2nd Respondent in paragraph 13 of his Affidavit states that the 2nd Petitioner was arrested on 11.08.2010 at 10.20 am at the Police Station on suspicion of receiving stolen property and causing obstructing to lawful apprehension of a person.

The 3rd Respondent too in paragraph 08 of his Affidavit states that the 2nd Petitioner was arrested on suspicion of obstructing a legal arrest of the 1st Petitioner and receiving stolen property at around 10.10 am on 11.08.2010 and released on the same day after recording her statement.

The 2nd Respondent has produced the relevant extract of the information book marked 2R3. On perusal of the said document marked 2R3 it is clearly seen that it states that the 2nd Petitioner was arrested for helping the 1st Petitioner to go into hiding. Nothing is stated that she was arrested on suspicion for retaining stolen property. It is also very clear from the statement of the 1st Petitioner marked 2R9, from the relevant extract of the information book marked 2R8 that the 1st Petitioner was

arrested only on 13.08.2010 at around 8.15 am. These documents do not support the fact that any stolen articles had been recovered by the Police officers attached to the Kiribathgoda Police Station prior to the release of the 2nd Petitioner from police custody.

The fact that the 2nd Petitioner was arrested on 11.08.2010 at around 10.30 am at the Police Station Kiribathgoda is admitted by the 1st, 2nd and 3rd Respondent in their affidavits. The fact that the 2nd Petitioner was arrested when she arrived at the Police Station Kiribathgoda on 11.10.2010 is not denied by the Respondents.

The question that arises is whether the arrest and detention of the 2nd Petitioner is in accordance with the procedure established by law. In order to arrest a person under Section 32(1) there should be a reasonable complaint, credible information or a reasonable suspicion. Mere fact of receiving a complaint or information does not permit a peace officer to arrest a person. The evidence in this case very clearly establish the fact that the 2nd Petitioner arrived at the Police Station Kiribathgoda after receiving a phone call from the 1st Respondent to inform her husband the 1st Petitioner to come to the police Station or to be present at the police station the following day morning with her children. The evidence in this case does not disclose that there was any complaint made against the 2nd Petitioner or for that matter that she did try to hide the 1st Petitioner from the Police officers of Kiribathgoda Police Station.

The 2nd Respondent in his objections has stated that after receiving a complaint from the 5th Respondent he received information that the 1st Petitioner was involved in this offence. Accordingly, he informed the officers in the mobile duty patrolling the area to look for the suspect the 1st Petitioner at his residence. He further states that he came to know that a team of officers had visited the said residence of the Petitioners

and since the 1st Petitioner was not available they informed the inmates of the house of the 1st Petitioner to report to the police station on his arrival. The Petitioners have stated that they came to know that certain police officers had arrived with the 5th Respondent at their residence when they were not at home at about 12.45.a.m on 10.08.2010. The 1st Respondent had telephoned her and ordered to bring the 1st Petitioner to the Kiribathgoda police station and that she informed him that she would inform the 1st Petitioner to be present himself to the police station the following morning. According to the 2nd Petitioner the 1st Respondent asked her to inform the 1st Petitioner to be present at the police station or for her to come to the police station with the children. The 2nd Petitioner's position is that she was detained when she arrived at the following morning to the police station and released only on the 12th morning. The 2nd Respondent or for that matter anyone of the Respondents had stated in their objections, when or how the 2nd Petitioner obstructed the police. Nor they have stated that they recovered anything belonging to the 5th Respondent from the possession of the 2nd Petitioner either.

The evidence in this case clearly shows that the Respondents had arrested and kept the 2nd Petitioner in police custody in order to compel the 1st Petitioner to arrive at the police Station or surrender to the police and the fact that the children of the 2nd Petitioner too joined her at the police station and that they too had to stay at the police station with their mother till she was released by the respondents on the following morning is not denied.

The 2nd Petitioner admits the fact that she was asked to inform her husband to be present at the Kiribathgoda Police Station the following day morning. But the 1st Petitioner has failed to appear at the police station the following day morning. Only the 2nd Petitioner has arrived at the police station and she had inquired from the Respondents as to why

they want her husband to come to the police station. But there is nothing before this Court to show that she has obstructed the legal arrest of the 1st Petitioner as alleged by the Respondents.

In Muttusamy V.Kannangara (1951) 52 N.L.R 324 it was held that:-

“A peace officer is not entitled to arrest a person on suspicion under section 32(1)(b) of the Criminal Procedure Code , except on grounds which justify the entertainment of a reasonable suspicion.”

In Corea V. queen 55 N.L.R 457 it was held that “the arrest must be made upon reasonable ground of suspicion. There must be circumstances objectively regarded- the subjective satisfaction of the officer making the arrest is not enough....”

“An arrest without lawful reason and justification or legal cause for such arrest in terms of material to the contrary is arbitrary arrest which would not be “according to the procedure established by law”. Munidasa V. Seneviratne SC (FR) 115/91, SCM 3.4.92

In this case the police commenced investigations consequent to a complaint made on 11.08.2010 by the 5th Respondent. The question is whether it is a reasonable complaint made against the 2nd Petitioner. Clearly the complaint was not made against the 2nd Petitioner and has nothing to show that she had anything to do with the said alleged theft committed at the premises of the 5th Respondent. The Respondents has recovered nothing from the possession of the 2nd Petitioner. And this court cannot see an iota of evidence against the 2nd Petitioner to connect her with the said theft.

The 1st Respondent has filed an ‘A’ report before the Magistrate Court marked 2R7 on 14.08.2010 after releasing the 2nd Petitioner from custody. It states that the 2nd Petitioner has been detained and questioned regarding retention of stolen property and released. There is

no evidence what so ever to show that any productions had been recovered from her after her arrest and before she was released from police custody. The evidence in this case clearly indicate that the 2nd Petitioner arrived at the kiribathgoda police Station on 11.08.2010 around 10.00 am and was arrested and detained in police custody until she was released on the 12th morning around 10.20 am. The document marked 2R7 indicate that the 1st Petitioner was arrested on the 13th August around 8.15 am. A statement had been recorded from him on 13th evening at around 6 p.m. The document 2R8, the notes of the 2nd Respondent indicate that the 1st Petitioner was arrested on 13.08.2010 at around 8.15 am and certain articles were recovered from the room where the suspects were staying.

It is clear from all these documents that the 1st to 4th Respondents did not have any reasonable ground to arrest the 2nd Petitioner on 11.08.2011 when she arrived at the police Station on 11.08.2010. It is also very clear from the facts in this case that the Respondents had arrested and detained in custody the 2nd Petitioner just to harass the said family of the 1st Petitioner and to compel the 1st petitioner to be present at the Kiribathgoda Police Station. There was no good reason to arrest the 2nd Petitioner when she arrived at the Police Station on 11.08.2010 by the Respondents.

Detention of the spouse or a family member or a relative of a suspect merely to compel or to induce a suspect to surrender to the police cannot be a reasonable reason for the Peace officer to arrest and detain such a person in police custody under section 32(1)(b) of the Criminal Procedure Code. The arrest and detention of a spouse or a family member or any other relative of a suspect by a peace officer must be condemned and discouraged by Courts of law in this Country. The arbitrary deprivation of the liberty of the 2nd Petitioner was caused by the Respondents not because they bona fide suspected that the 2nd

Petitioner was involved in the commission of an offence, but for the wholly improper illegal purpose of compelling the 1st Petitioner to surrender to the police. It is very clear that the Respondents kept the 2nd petitioner at the police Station as a hostage in order to compel the 1st Petitioner to arrive at the police station.

In the case of Premalal de Silva V. Inspector Rodrigo 1991 (2) S.L.R 307 321 Kulatunga J. warned that if police arrest persons in the hope of getting a break in the investigations by interrogating them, it would end up in the use of third degree methods.

In Muttusamy V. Kannangara (supra) Gratiaen J. observed:-

“I have pointed out, that the actions of police officers who seek to search homes or to arrest private citizens without a warrant should be jealously scrutinized by their senior officers and above all by the Courts.”

The importance of observing the ‘correct and proper procedure’ was correctly evaluated by justice Frankfurter in McNabb V.U.S [1943] 318 U.S 332 where he had stated that :-

“The history of liberty has largely been the observance of procedural safeguards.”

As observed by Shirani Bandaranayake, J in W. Nandasena V. U.G.Chandradasa, OIC Police Station, Hiniduma and 2 others 2005[B.L.R]104:-

“The purpose of following the correct procedure is therefore to safeguard the liberty as well as maintain law and order and thereby to mete out justice and fair play.”

In the case of Namasivayam V. Gunawardena [1989] 1 S.L.R 394, at page 402, Sharvananda CJ states that the liberty of an individual is a matter of great constitutional importance ... should not be interfered with,

whatever the status of the individual maybe, arbitrarily without justification.

Article 13 of the Sri Lankan Constitution declares the rights relating to personal liberty and criminal procedure. Articles 13(1) and (2) permit the curtailment of personal liberty only in accordance with “procedure established by law”. It is essential, therefore, that liberty should be restricted strictly as laid down by law and also strictly for the purposes laid down by law.

Where a person is arrested on suspicion that he or she has committed an offence, such suspicion must be reasonable. In *Dumbell V. Roberts* [1944] 1 All ER 326 Scott LJ observed:

“The principle of personal freedom, that every man should be presumed innocent until he is found guilty, applies also to the police function of arrest.....For that reason it is of importance that no one should be arrested by the police except on grounds which in the particular circumstances of the arrest really justify the entertainment of a reasonable suspicion.”

In *Muttusamy V Kannangara* (supra) Gratien J emphasized that the arresting officer must entertain such reasonable suspicion before he arrests the person concerned. Thus, the arresting officer cannot arrest a person in the course of voyage of discovery.

In *Dhammarathana Thero V. OIC Police Station, Mihintale*, SC(FR)313/2009. SC Minutes 9.11.2011-the Court observed that “there should be a reasonable complaint, credible information or a reasonable suspicion where arrests are made without a warrant.”

Considering the circumstances of this matter, it is clear that the 1st Respondent did not have any reasonable suspicion that the 2nd Petitioner had committed any cognizable offence. In such a situation the arrest of

the 2nd Petitioner cannot be regarded as a legal arrest and therefore the 2nd Petitioner's claim with regard to Article 13(1) of the Constitution should succeed. Therefore I hold that the arrest and detention of the 2nd Petitioner in these particular circumstances is a violation of her fundamental rights guaranteed under Article 13(1) of the Constitution.

The 2nd Petitioner has complained that the 3rd Respondent and another female police officer only identified as 'Seetha' assaulted her and thereby she has alleged that the Respondents had violated her fundamental rights guaranteed in terms of Article 11 of the Constitution.

Article 11 of the Constitution refers to freedom from torture and states as follows:-

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

The 2nd Petitioner complained that when she arrived at the Kiribathgoda Police Station on 11.08.2010 3rd Respondent grabbed her by her hair and dragged her to a nearby room in which a female police officer only identified as "Seetha" was present. When the 2nd Petitioner inquired as to why she was being treated thus, the 3rd Respondent repeatedly slapped her face and abused her in derogatory, contumelious abusive language and forcefully asked her where her husband was. It is her position that aforementioned "Seetha" also assaulted her and the 3rd Respondent repeatedly slapped her and questioned her about the whereabouts of her husband. Except for her petition and affidavit where she refers to the said assault, the 2nd Petitioner has not produced any medical evidence to substantiate her allegations against the Respondents. She also has not tendered any other document to substantiate her allegations against the Respondents. On the other hand the 2nd Respondent has produced the Medico-Legal Examination Form No.421/10 dated 11.08.2010 by Dr. S.Perera to contradict the position

that the 2nd Petitioner was assaulted by the Respondents and had injuries as alleged by her. According to 2R5 Dr.S.Perera has examined the 2nd Petitioner at the District Hospital Kiribathgoda in ward No 5 at 2.12 P.M on 11.08.2010. 2R5 states that there were no injuries what so ever.

In W. Nandasena V.U.G. Chandradasa, OIC Police Station, Hiniduma 2005 [B.L.R] 105 , Justice Shirani Bandaranayake ,J observed that:-

“When there is an allegation based on violation of fundamental rights guaranteed in terms of Article 11 of the Constitution it would be necessary for the petitioner to prove his position by way of medical evidence and /or by way of affidavits and for such purpose it would be essential for the petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden.”

Considering the non-availability of any medical evidence or any other documents produced by the 2nd Petitioner to substantiate her allegations against the Respondents, I am of the view that the 2nd Petitioner has not been able to satisfy this Court that her fundamental rights guaranteed in terms of Article 11 were infringed by the Respondents.

Therefore, though I hold that the 2nd Petitioner has not established that her fundamental rights, assured to her by Article 11 has been violated by the respondents, I hold that since the Respondents had unlawfully arrested the 2nd Petitioner on 11.08.2010, the 1st to 4th Respondents had violated 2nd Petitioner’s fundamental rights assured to her by Article 13(1).

I now turn to the alleged infringement of fundamental rights of the 1st Petitioner by the Respondents.

According to 1st Petitioner, he visited a friend’s house in the hope of retaining legal representation on 13.08.2010 and at around 3.a.m, the 5th Respondent Businessman, along with the 2nd and 4th Respondents

along with several other members of the Kiribathgoda police Station, surrounded the aforesaid friend's house and arrested the 1st Petitioner. Although no reasons were given for the said arrest, the presence of 5th Respondent, led the 1st Petitioner to believe that this was due to disagreement they had about the business transaction.

The 1st Petitioner states that he was immediately taken in the vehicle of the 5th Respondent, to the 5th Respondents house and was severely assaulted in the garden of the 5th Respondent by the 2nd, 4th and 5th Respondents. The said Respondents assaulted the 1st Petitioner using a long pole and fists and feet and he lost consciousness. When the 1st Petitioner regain consciousness he found himself in a room inside the Kiribathgoda Police Station and he was stripped down to his under wear. Soon thereafter around 9.00 a.m he was taken to a nearby room by the 3rd and 4th Respondents, in which a large horizontal iron rod was affixed approximately 6 or 7 feet from the ground. The 1st Petitioner's hands were behind his back, and he was hung from the said rod and subjected to torture and cruel, inhuman and degrading treatment.

The 1st Petitioner states that he was subjected to various forms of torture over several dates but due to post traumatic stress conditions he could recall only few methods used by the said interrogators.

The 1st Petitioner states that the 3rd Respondent assaulted the 1st Petitioner using a long wooden pole, and repeatedly asked him where the stolen goods were. The 3rd Respondent used hot coals to burn the soles of the 1st Petitioner's feet. The 1st Petitioner was forced to inhale smoke from a container which he verily believes contained hot coals and a substance of chillie powder.

The 1st Petitioner further states that a cigarette lighter was used to burn 1st Petitioner's ear lobes, and the 3rd Respondent threatened to use the

said lighter on the 1st Petitioner's eyes as well if he did not confess to where the alleged stolen goods were. When the 1st Petitioner pleaded with the said Respondent, his eye brows were burnt instead.

The 1st Petitioner states that he was tortured till he lost consciousness, and later had to undergo treatment for the injuries suffered by him. The 1st Petitioner states that another prisoner at the said police station had been similarly assaulted during the time the 1st Petitioner was detained, and subsequently died due to assault, causing the 1st Petitioner mortal fear for his life and that of his family. The 1st Petitioner states that before he was produced before the Magistrate on 26.08.2010 the 3rd Respondent made the 1st Petitioner take about 9 to 10 medicinal tablets and also applied oil and used a medicinal spray on injuries suffered by the 1st Petitioner. The Petitioners verily believe this was to permit the 1st Petitioner enough time to heal before he was produced before a Magistrate.

The petitioner's state that the 2nd Petitioner came to know that her husband had been arrested on 13.08.2010 around 8.30 a.m and visited the Kiribathgoda Police station to see her husband and was told that he was not detained at the police station. Thereafter the 2nd Petitioner fearing for her husband's life, made a complaint to the office of the Inspector General of Police. The 2nd Petitioner further states that the officials at the police headquarters thereafter made inquiries from the Kiribathgoda police station and thereafter she was informed that there was a purported Detention Order against the 1st Petitioner and that he was in fact detained at the said police station.

The 1st to 4th Respondents state that the 1st Petitioner was arrested on 13.08.2010 at or around Gampaha by a team of police officers led by the 2nd Respondent. According to the 2nd Respondent, the 5th Respondent lodged a complaint at the police station alleging that his house has been

broken into and property worth Rs.17,25,000/- including jewelry, computers and stock of foreign liquor had been stolen, while he was on pilgrimage to Madhu Church with his family. The 2nd Respondent states that he received information from an informant that the 1st Petitioner was involved in this matter, accordingly he informed the officers in the mobile duty patrolling the area to look for the 1st Petitioner at his residence. It is apparent that the Respondents did not have any reasonable grounds to suspect that the 1st Petitioner was in fact involved in the theft complained.

The 2nd Respondent further states that he came to know that the 1st Petitioner was not at his residence and instructed the said officers to inform the persons at home to inform the 1st Petitioner to report to police station on arrival. The facts relating to the complaint had been reported to the Magistrate Court under B report No 9605/05 on 11.08.2010. (2R2). The 2nd Respondent states that the 1st Petitioner was arrested on information received by the 2nd Respondent on 13.08.2010 at 8.15 a.m. at Gampaha while hiding and running away from lawful arrest. The 4th Respondent too admits the fact that he was also member of the team who arrested the 1st Petitioner near Gampaha at about 8.a.m on 13. 08.2010.

It is the position of the 2nd Respondent that a statement was recorded from the 1st Petitioner and on the facts transpired in his statement took steps to obtain an order of detention under emergency regulations under Ref.DM/ER/2010/1514 to investigate further into any involvement of the 1st Petitioner in Terrorist activities while he was in Trincomlee. The 2nd Respondent further states that since the investigations did not transpire anything substantial to sustain any further detention of the 1st Petitioner the Detention Order was withdrawn and the 1st Petitioner along with the accomplice was

produced before Magistrate Court No 5 in case No. B 9605/05 of Colombo whereupon the suspect was enlarged on bail.

The Respondents had clearly admitted that they arrested the 1st Petitioner on 13.08.2010 at 8.15 a.m. at Gampaha. It is not denied that the 1st Petitioner was thereafter kept in police custody until he was produced before the Magistrate on 26.08.2010. The 2nd Respondent states that he obtained under emergency regulation a Detention Order DM/ER/2010/1514 to detain the 1st Petitioner in custody. Although in his objections dated 06.09.2011 in paragraph 13, the 2nd Respondent had sought Courts permission to tender a certified copy of the said Detention Order once available by way of motion, but has failed to produce a copy of the said Detention Order to this Court.

Accordingly, the Respondents contend that a complaint had been made by the 5th Respondent to the police station Kiribathgoda (2R1), and the police had investigated into the said complaint and reported about the said complaint to the Magistrate Court by a B report (2R3) and thereafter produced the suspects before the Magistrate on 26th.08.2010. The 2nd Respondent also had produced document marked 2R7 to show that an A report had been filed regarding the arrest and detention and the release of the 2nd Petitioner and one Asitha and Indunil regarding the complaint made by the 5th Respondent.

Therefore, it is very clear that the 1st Petitioner has been arrested on the 13th August 2010 and was in the Respondents custody till the 26th August 2010 until he was produced before the Magistrate. It is the Respondents contention that they kept the 1st Petitioner in their custody till the 26th August 2010 under a detention order.

The Petitioners in their counter objections had stated that no Detention Order was produced, and put the Respondent to strict proof of the same.

The Respondents had clearly failed to annex a copy of the said Detention order with their affidavits. In fact, no such Detention Order issued on the 1st Petitioner had been tendered by the Respondents to substantiate the same.

Detention of the 1st Petitioner at the Kiribathgoda police station would have been lawful only if there had been a detention order under Emergency Regulations. There was no good reason why the 1st Petitioner was not produced before the Magistrate Court according to the procedure established by law. The Respondents do not dispute the fact that they arrested and kept the 1st Petitioner in police custody until he was produced before the Magistrate on 26.08.2010. There is no detention order produced by the Respondents in this instance to support the fact that the 1st Petitioner was kept in custody under a detention order. There is evidence clearly to establish that the 1st Petitioner's fundamental rights guaranteed under Article 13(1) had been violated by the Respondents. I hold that the arrest and detention of the 1st Petitioner in these particular circumstances is a violation of his fundamental rights guaranteed under Article 13(1) of the Constitution.

The 1st Petitioner has complained that 1st to 4th Respondents had assaulted him at the Kiribathgoda police station. The brutal assault on him by the said Respondents caused to him severe physical pain and thereby alleged that the 1st to 4th Respondents had violated his fundamental rights guaranteed in terms of Article 11 of the Constitution.

Article 11 of the Constitution refers to freedom from torture and states as follows:-

“No person shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.”

The fundamental rights guaranteed in terms of 11 are not restricted to merely physical injury. The words used in Article 11, viz., torture, cruel, inhuman or degrading treatment or punishment would take many forms of injuries which could be broadly categorized as physical and psychological and would embrace countless situations that could be faced by the victims. Accordingly, the protection in terms of Article 11 would not be restricted to mere physical harm caused to a victim, but would certainly extend to a situation where a person had suffered psychologically due to such action.

In *W.M.K.De Silva V. Chairman , Ceylon Fertilizer Corporation (1989) 2 Sri.L.R 393*, Amerasinghe J. said :-

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

The 1st Petitioner was arrested on 12.08.2010 at about 3.00 p.m.at a friend’s house by the 2nd and 4th Respondents and was taken to the house of the 5th Respondent and was severely assaulted by the 2nd, 4th and 5th Respondents in the garden of the 5th Respondent. It is alleged that the said Respondents assaulted the 1st Petitioner using a long pole and fists and feet and that he lost consciousness.

The 2nd Respondent in his objections has stated that he 1st Petitioner was arrested on 13.08.2010 at 8.15 a.m at Gampaha while hiding and running away from lawful arrest. The 2nd Respondent further states that the 1st Petitioner ran away obstructing his arrest and in the said attempt he tried to leap over a wall and fell.

The 4th Respondent too in his objections states that he was also a member of the team who arrested the 1st Petitioner near Gampaha at about 8.00 a.m on 13.08.2010 and that the 1st Petitioner physically resisted the arrest by running away and attempting to jump over a wall.

But the document marked 2R8 tendered by the 2nd Respondent with his objections clearly contradicts this position taken up by the Respondents in this case. According to the said I.B. extract marked 2R8 dated 13.08.2010 the 2nd Respondent had very clearly recorded that whilst trying to flee from custody the 1st Petitioner had knocked against a tree and has fallen down and was accordingly arrested.

The 1st Petitioner further allege that when he regained consciousness, it was morning and he was in a room inside the Kiribathgoda police station, and he was stripped down to his underwear. Soon thereafter he was taken into a nearby room by the 3rd and 4th Respondents, in which a large horizontal iron rod was affixed approximately 6 or 7 feet from the ground. The 1st Petitioner's hands were tied behind his back, and he was hung from the said rod and subjected to torture. The 1st Petitioner states that the 1st Petitioner suffered several injuries and was subjected to various forms of torture for several days. The 1st Petitioner states that he was –

- a) Assaulted by the 3rd Respondent using a long pole
- b) The 3rd Respondent, used hot coals to burn the soles of his feet
- c) His genitals were burnt using chillie powder
- d) A cigarette lighter was used to burn his ear lobes
- e) His eye brows were burnt

The 1st Petitioner had been produced before the Magistrate at about 4.p.m on 26.08.2010. The said Magistrate has directed that the 1st Petitioner be produced before a JMO. On 26.08.2010 when the 1st

Petitioner was produced before the Magistrate Colombo, the Counsel appearing for the 1st Petitioner had informed the court that the 1st Petitioner had been subjected to torture whilst in police custody and also had drawn the attention of the Magistrate that there are marks in the body of the 1st Petitioner to suggest that he had been subjected to torture whilst in police custody.(2R13).Accordingly the Magistrate had ordered that the 1st Petitioner be produced before the JMO Colombo and the document marked P4 clearly indicates that the Magistrate has directed the JMO to examine the 1st Petitioner and to report whether the 1st Petitioner has any injuries in his body, whether there are healed injuries and if so whether such injuries had been caused very recently.

The 2nd Respondent in his objections in paragraph 31 had stated that the 1st Petitioner was produced before a doctor before being produced in the Magistrate Court Colombo in case No 9605/B on 26.08.2010. The 2nd Respondent had tendered a true copy of the Medico Legal Examination form marked R12 to substantiate the same.

The 2nd Petitioner in her counter objections has denied the document marked 2R12 and states that the said document is contrary to document marked P5. P5 is the Diagnosis Ticket issued by Dr. S.D.F.Jayasekera National Hospital Colombo on 30th August 2010 on the admission of the 1st Petitioner to the said Hospital. According to the said document marked P5, the 1st Petitioner had been admitted to the said Hospital on 30.08.2010 and had been discharged on 25.09.2010.

It is to be noted that in the B report marked 2R2 it is nowhere stated that the 1st Petitioner was produced before the MO-DH on the 26.08.2010. According to the said Medico Legal Examination Form No 431/10 1st Petitioner has been produced before Dr. K.R.G.S.Kahatuduwa on 26.08.2010 at 12.40 p.m . The 1st Petitioner has been produced before the said doctor by PS 16012 Weerasekera and states that there were no

injuries found on the 1st Petitioner. No injuries are marked on cage 10 of the Form. The proceedings before the Magistrate's Court No 5 Colombo dated 25.08.2010 marked R13 does not disclose the fact that the 1st Petitioner was produced before a Doctor at the Kiribathgoda National Hospital before being produced before the Colombo Magistrate Courts on 26.08.2010 was brought to the notice of Court. According to document marked R13 on the application made on behalf of the 1st Petitioner by his Counsel the Magistrate has called for a medical report from the JMO Colombo.

It is common ground that the 1st Petitioner was arrested by the Respondents. It is also an admitted fact that the 1st Petitioner had been in the custody of the Respondents at the Kiribathgoda Police station until he was produced before the Colombo Magistrate's Court No 5 on 26.08.2010. It is clear that the 1st Petitioner had received any injuries if at all after he was arrested by the Respondents On 13.10.2010.

According to the Diagnosis Ticket marked P5 Dr.S.D.F.Jayasekera as the background history it is stated that the patient has informed that he was assaulted and burnt by police Kiribathgoda whilst he was under police custody. Imprisoned since 13.08.2010 Further it is stated that assaulted by sticks -burnt toes and penis 13.08.2010 using charcoal. Left side 4th and 5th toes, right side 2nd toe and 5th toe. Numbness of both upper limb. Under observations it is stated that Trans-line contusion on both lower limb and scapula. Blisters on left side 4th, 5th toes. Scar -right side 5th toe. It is also stated that genitalia – no mark of burn – right side 5th toe scares, left side 4th, 5th toe blisters. According to the treatment sheet 8 it is stated that the patient has stated that he finds it difficult to sit, numbness of left hand. In page 9 of the treatment sheet it is again clearly stated that Trans-line contusion both limbs, blisters of left side foot.

In page 15 of the treatment sheet Dr.Liyanage Neurosurgeon has informed Dr.Jayasekera that the Patient needs nerve conduction studies.

Accordingly, the 1st Petitioner had been referred to the Department of Clinical Neurophysiology Institute of Neurology, NHSL, Colombo and the said report contains the comments made by the said Institute at page 30. It states that the findings are suggestive of:-

1.Left C6,7,8 T1 lesion

2.Bilateral median nerve lesions at wrist. (not possible to differentiate From Carpal Syndrome)

3.Bilateral superficial radial (sensory) nerve lesions.

The 1st Petitioner had been in the said Hospital till the 25.09.2010 and had under gone various examinations and treatments. On page 3 of the Treatment sheet under 'procedures' made it is clearly recorded that cleaning and dressing done, and the Burns Unit had been directed to apply medicine and admit the patient' to the said Unit. A Burn Chart had been prepared and superficial injuries observed on toes of both feet.

The documents submitted to Court by the JMO Colombo does not refer to the probable period of time the assault would have taken place on the 1st Petitioner. The 1st Petitioner while giving the history to the Medical Officer, had informed him that he was assaulted after the arrest and the Petition and the Affidavit too confirms the position taken by the 1st Petitioner. In paragraph 21 of the Petition it is stated that the 2nd Petitioner returned to the Kiribathgoda Police station at or around 6.30 p.m , and was permitted to see the 1st Petitioner her husband. The 2nd Petitioner specifically states that her husband who was detained in the police cell looked in severe pain, and could not even stand upright

unsupported. The affidavit submitted by the 2nd Petitioner too confirms the position taken by the 1st Petitioner. Document marked P5 the Diagnosis ticket and the Bed head ticket and the treatment sheet and the Reports submitted by the Medical Records Officer of the National Hospital Colombo corroborates and substantiates the version given by the 1st Petitioner with regard to his assault. Medico legal Examination Form 2R12 produced by the 2nd Respondent is self serving evidence and no reliance could be placed on it. The contents of the document 2R12 is totally contradicted by the document marked P5 and other treatment sheets submitted to Court by the Medical Records Officer Colombo submitted pursuant to an examination carried out on an order by the Magistrate made on 26.08.2010. These documents are not challenged by the State. In the circumstances this Court cannot place reliance on the document marked 2R12.

The history given by the 1st Petitioner to the JMO Colombo refers to the ways in which the 1st Petitioner was ill treated by the Police at Kiribathgoda police station. There were blisters on left side 4th and 5th toes. Scar on the right side 5th toe. There were Trans-line contusion on both lower limb and scapula area. The telltale mark observed by the JMO reveals the severity of the attack to which the 1st Petitioner was subjected. And the process of penis and toes being burnt with charcoal would undoubtedly have caused severe pain to the 1st Petitioner so as to mount to torture as defined above. Before he was produced before the Magistrate Colombo the 1st Petitioner states that some members of the Kiribathgoda police station and particularly the 3rd Respondent, made the 1st Petitioner take approximately 9 to 10 medicinal tablets. The said Respondents also applied oil and used a medicated spray on the injuries suffered by the 1st Petitioner. On a perusal of P5 it is clearly seen that the 1st Petitioner has very

clearly informed the Doctor about the police assaulting the 1st Petitioner whilst he was in the police custody. Before that when the 1st Petitioner was produced before the Colombo Magistrate on 26.08.2010 the Counsel appearing for the 1st Petitioner has also informed the Court about the harassment meted out to the 1st Petitioner by the police and accordingly the Magistrate had referred the 1st Petitioner to the JMO Colombo for medical examination. The 2nd Petitioner too has made a complaint to the Inspector General of Police on 13.08.2010 and a complaint also has been made to the Human Rights Commission on 11th and 19th August 2010 by the Petitioners.

In *Ansalin Fernando V. Sarath Perera* (1992) 1 Sri.L.R 411, it was held that depending on the circumstances, an allegation of a violation of Article 11 could be proved even in the absence of medically supported injuries. In the said case Kulatunga, J observed:-

“Whilst I shall not accept each and every allegation of assault/ill treatment against the police unless it is supported by cogent evidence 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 1st Petitioner has also stated that up to date he suffers from pain throughout his body including his ears, resulting in dizzy spells and further states that he experiences numbness and loss of dexterity in his hands preventing him from carrying out his chosen work of ‘blasting paint’.

I accordingly hold that the 1st Petitioner has been successful in establishing that his fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution have been violated by the actions of the 1st to 4th Respondents.

For the foregoing reasons I hold that the 1st to 4th Respondents had violated the 1st Petitioner's fundamental rights guaranteed under Articles 13(1) and 11 of the Constitution. I also hold that the 1st to 4th Respondents had violated the 2nd Petitioner's fundamental rights guaranteed under Articles 13(1) of the Constitution.

The state shall pay each Petitioner Rs.50,000/- as compensation and Rs 25,000/- as costs. I further direct 1st to 4th Respondents each personally to pay a sum of Rs. 25,000/- to the 2nd Petitioner and 2nd to 4th Respondents each to pay a sum of Rs.100,000/- to the 1st Petitioner as compensation. All payments to be made within 3 months from today. I direct the Registrar of the Supreme Court to send copies of this judgment to Hon. Attorney General and the Inspector General of Police for necessary investigations and action to be taken against the persons who perpetrated torture.

JUDGE OF THE SUPREME COURT

S.E WANASUNDERA, PCJ.

I agree.

JUDGE OF THE SUPREME COURT

UPALY ABEYRATHNE,J.

I agree.

JUDGE OF THE SUPREME COURT

