

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

S.C (FR) Application 136/2014

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

Naomi Michelle Cokeman,
8, Waveley Road, Coventry England
CV 13 AH, United Kingdom.

PETITIONER

Vs.

1. The Hon. Attorney General
Attorney General's Department,
Colombo 12.
2. Police Sergeant Upasena (22143)
3. Police Inspector Suraweera,
Acting Officer-In-Charge

**THE 2ND AND 3RD RESPONDENTS OF
POLICE STATION, KATUNAYAKE**

4. Officer-In-Charge
Negombo Prison, Negombo.
5. N.K. Illangakoon
Inspector General of Police,
Police Headquarters,
Colombo 1.

6. Chulananda De Silva
Controller General of Immigration and
Emigration,
Ananda Rajakaruna Mawatha,
Colombo 10.

RESPONDENTS

BEFORE: S.E. Wanasundera P.C., J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: J.C. Weliamuna P.C. with Pulasthi Hewanna
and Thishya Weragoda Instructed by Vishva de
Livera Tennakoon for the Petitioner

Parinda Ranasinghe S.D.S.G. with
Lakmali Karunanayake, S.S.C. for the Respondents

WRITTEN SUBMISSIONS TENDERED ON:

17.07.2015 (BY THE PETITIONER)
17.07.2015 (BY THE RESPONDENTS)

ARGUED ON: 26.10.2017

DECIDED ON: 15.11.2017

GOONERATNE J.

The Petitioner in this application is a British citizen and a Nurse at
the Hawkesbury Lodge, Rehabilitation, Mental Health Services, United Kingdom.

The petition and affidavit of the Petitioner describes her as a devout practicing

Buddhist and attends meditations retreats in countries like Nepal, Thailand, Cambodia and India. In the petition filed of record it is stated that “as an apt tribute to and as a personal expression of her devotion to Buddhist teachings displays a tattoo on her upper right arm of Lord Buddha seated on a lotus flower of Buddhist path”. It is stated that this was done as a mark of respect, but ultimately led to unfortunate incidents in Sri Lanka on her arrival to the island on 21.04.2014. It is pleaded that subsequently the Petitioner was arbitrarily arrested, detained and she complains of degrading treatment, culminating in her arbitrary, irrational, capricious and ultra vires deportation.

Supreme Court on 03.07.2014 granted Leave to Proceed on alleged violations of Articles, 11, 12(1) and 13(1) of the Constitution. On the day in question as pleaded Petitioner arrived in Sri Lanka at the Katunayake airport. All official steps as clearance from Customs AND Immigrations were attended and was permitted entry. She proceeded towards the exit of the airport. Petitioner was approached by a taxi driver called ‘Kelum’ who was later identified and another bystander informed her that the tattoo she was displaying on her right arm is objectionable in Sri Lanka. Thereafter another person claiming to be a member of the Civil Defence Force came to the scene and initially informed the Petitioner that the tattoo was unacceptable, and also informed her that she should proceed to the nearest police station. It is pleaded that all efforts to

reason out with the civil defence officer was of no avail and as there was no option, proceeded to the Katunayake police station with the taxi driver, Kelum and the civil defence officer. It is pleaded that there were other several uniformed officers outside the airport who took no notice nor offence of Petitioner's tattoo.

The Petition filed in this court refer to some of the following sub headings. It is relevant to consider same to ascertain the depth and extent to which the Petitioner was treated or harassed by the Respondents and all those involved in this unfortunate incident.

- (A) Incidents at the Katunayake police station
- (B) Events that took place in the Negombo Magistrate's Court.
- (C) Detention at the Negombo prison.
- (D) Detention at the Mirihana Immigration detention camp
- (E) Unlawful deportation of the Petitioner.

(A) Taxi driver accompanied the Petitioner and was the translator who translated the instructions of the police. Whilst waiting in the police an officer took photographs of Petitioner. 3rd Respondent questioned the Petitioner in poor English as to why she had a tattoo. Petitioner explained but the 3rd Respondent could not understand, according to the Petitioner. 3rd Respondent confiscated the passport of the Petitioner and refused to answer any questions or inform the charges levelled against the

Petitioner. No statements recorded but Petitioner was told to make a written statement which she did and explained her position. Petitioner was informed by the police that she would be produced before the Magistrate but the police did not inform what the charges are to her.

Petitioner was not given an opportunity to contact the British High Commission in Sri Lanka. A friend of Petitioner called 'Jennifer Hadley', was to arrive in Sri Lanka and she had no alternative but to inform the taxi driver 'Kelun' to give details of Petitioner to her friend 'Jenny' who would arrive at the airport.

(B) Petitioner was taken to the Magistrate's Court and detained behind bars with several other female suspects. Prison Guards introduced the Petitioner to an Attorney-at-Law who appeared for a fee of Rs. 5000/- for his services. However Petitioner had no opportunity to give proper instructions to the Attorney or consultant and obtain legal advice. Whilst being behind bars in the court cell, prison guard in charge of the Petitioner made several lewd, obscene and disparaging remarks of a sexually explicit nature to the Petitioner (paragraph 6(b) of petition). The Petitioner's case was called in open court. In (Case No. B 354/14) Proceedings were held in Sinhala and Petitioner was unable to understand. It is pleaded (paragraph 6 (e) that neither the Judge, officials of the court, and Attorney-at-Law

made submissions or orders in the English Language at least for the Petitioner to understand.

At the conclusion of the hearing before the Magistrate, the Attorney-at-Law who represented the Petitioner informed her that the Petitioner would be deported. Passport returned to her. 'B' report 354/14 does not give details of the provisions of law she was arrested, charged convicted or detained (paragraph 6 h).

(C) At about 3.00 p.m. on 21.04.2014 Petitioner was escorted by a woman prison officer and the prison guard who harassed her whilst in the Magistrate's Court cell. She was taken to the Negombo Prison, where she was subject to harassment and degrading treatment as follows (Paragraph 8 of the petition).

- (i) Woman Police Constable (WPC) searched petitioner's belonging and demanded Rs. 10,000/- from the amount of Rs. 13,000/- of Petitioner. WPC attempted to take Petitioner's mobile phone. Ultimately WPC took Rs. 2000/- of Petitioner's money. The prison guard who was in charge of the Petitioner continued to make obscene lewd remarks. He too demanded money. Petitioner's belongings handed over to another officer.
- (ii) Petitioner subject to a body search and kept in the area where about 60 inmates were housed and one of the inmates provided a mat to the Petitioner to sleep. On 22.04.2014,

Petitioner informed that she would be taken to a detention centre, namely 'Mirihana Immigration Detention Camp'.

(D) Petitioner taken to immigration office on 22.04.2014 prior to taking her to the Detention Camp. Petitioner's passport was confiscated by the officer at the Immigration office. Several camera crews took Petitioner's photograph. Petitioner was permitted to speak with the British High Commission in Colombo. Petitioner taken to Detention Camp and detained at the camp for two nights. Petitioner's friend Jennifer Hadley visited her at the camp. Officials of the Department of Immigration questioned the Petitioner as to how she was treated during detention. Petitioner narrated the entire incident. On 24.04.2014 Petitioner was informed by the British High Commission that the Sri Lanka Tourist Board would fund her return to the United Kingdom and provide her with a Business Class Ticket.

(E) Petitioner was escorted to the airport by officers of the Department of Immigration and Emigration. Petitioner met her friend at the airport and checked into the Business Class by flight UL 503. Petitioner's passport kept with the cabin crew and returned to her on arrival in U.K.

Petitioner is advised that deportation of foreigners from Sri Lanka are governed by Immigration & Emigrations Act No 20 of 1948. Power of deportation is with the Minister in charge of the subject.

Petitioner is advised to state that the unlawful detention was based on an order by the Magistrate who did not have jurisdiction to make such order.

I have also perused the affidavit of the Petitioner's friend Jennifer Headly, who met the Petitioner subsequent to her arrest, and both were on tour as planned earlier. This affidavit of Jennifer sets out the details and the events described by the Petitioner to an extent. The affidavit somewhat support the version of the Petitioner but the Respondents have failed to contradict Jennifer Headly's affidavit. I note the following salient matters in her affidavit.

- (i) Received a text message on her mobile phone from the Petitioner just as she landed at Katunayake airport on 21.04.2014. Message state Petitioner is in the police station, and was to be taken to court, as she had a tattoo of Lord Buddha. She had the tattoo when she came to Sri Lanka earlier. Taxi driver 'Kelum will pick her up and bring her to the court house.
- (ii) Went to the court house in 'Kelum's taxi. She saw Petitioner in the cell looking very pale and worried. Petitioner was crying. Lawyer approached her and said Petitioner would be deported. She saw the Petitioner was quite shaken.

- (iii) Lawyer told her that Petitioner would have to go back to U.K. As such Petitioner would be in detention. Lawyer also told her to find a hotel nearby so that she could spend the day.
- (iv) When coming out of the court house a female officer surround by male guards demanded for money, saying “you English woman give me money” She got into a taxi and the driver told her that the guard should be given some money. She gave Rs. 500/-. Then another guard came to ask for money, and at which point she broke down and started to shout. The guard walked away. She took charge of Petitioner luggage, went to a nearby shop to get some water and food for the Petitioner. Petitioner was seated in the court house. She gave the Petitioner food and water. She lent over to hug the Petitioner and the guard behind her threateningly put his hand on his pistol as a warning not to get closer to the Petitioner.
- (v) Taxi driver took her to a hotel near the court house and the taxi driver demanded Rs. 20,000/- although Petitioner paid Rs. 5000/-, ultimately she paid 17,000/-.
- (vi) She stayed at the Golden Star Beach Hotel. ‘She called the British High Commission and found that they knew nothing about a British woman being arrested. On 22.04.2014 in the company of a foreign lady she went to the prison. A bus came by and the Petitioner was in the bus. Petitioner shouted out for her and at that moment itself a prison guard gave details of Mirihana Detention Centre.
In the afternoon of 22nd April she got to the detention centre.

The 2nd Respondent to this application deny the allegation of the Petitioner referred to in her affidavit and state that the Petitioner had a tattoo

of Lord Buddha on a lotus flower and below it a male and female embracing, which was also observed by P.C. Jayatilleke. It is averred that many civilians present in the vicinity too became aware. The people gathered at the scene were disturbed or otherwise agitated. 2nd Respondent states he perceived an imminent disturbance of peace by the public. Statement of three witnesses are annexed to the affidavit marked and produced as 2R1, 2R2 & 2R3. 2nd Respondent states in view of above there was a need to take the Petitioner to a safer place, and he requested the Petitioner to proceed to the police station. Petitioner proceeded to the police in a taxi. At the police the Petitioner was in the custody of a female officer. 2nd Respondent aver on instructions of 3rd Respondent produced the Petitioner to the Magistrate's Court of Negombo. 2nd Respondent's notes are annexed marked R4. The 2nd Respondent states:

- (a) Facts were correctly reported to the Magistrate.
- (b) No charges were framed and the question of pleading guilty did not arise.
- (c) Hon. Attorney General's sanction will be required only if charges were being framed.

2nd Respondent affirm that he did not act maliciously. I wish to observe that 2R1, 2R2 and 2R3 are belated statements. It is nothing but self-serving statements produced to support the version of the 2nd and 3rd Respondents. The statements highlight the fact that due to the tattoo displayed by the Petitioner there were people in the crowd becoming either restless or agitated, having

seen the tattoo. Further it could result in a breach of peace. The incident took place on 21.04.2014 but statements recorded from three persons working within the airport on 15.05.2014, 26.05.2014 and 24.05.2014 respectfully.

3rd Respondent was the Acting Officer-In-Charge of the Katunayake police station, whilst denying the allegations levelled against him by the Petitioner, states he received a telephone complaint by a civilian, regarding a tattoo by a foreign lady. The Petitioner arrived in the police station in a taxi driven by driver Kelum, 2nd Respondent and P.C. Jayatilleke. He states he learnt from the 2nd Respondent due to the prevailing situation, requested the Petitioner to come to the police station. 3rd Respondent states having considered all circumstances he thought it fit to produce the Petitioner before the Magistrate for a suitable order. The Magistrate referred the Petitioner to the Mirihana Deportation Centre. 3rd Respondent states he kept the British High Commission, Senior Police Officials informed by letter 3R2, 3R3 & 3R4.

This court having considered submissions by either party states that it cannot be said that the Petitioner was not arrested. The fact that the Petitioner was produced before the Magistrate on a 'B' Report (P2) is sufficient proof of Petitioner being arrested. The 'B' Report states there was no offence allegedly committed by the Petitioner. It also reveal that police acted on information received from airport authorities and police had been convinced

that Petitioner had no intention of outrages religious feelings. By this report to court police seek an order for deportation of the Petitioner. It is further stated police do not seek to carry out further investigations. This court observes that there was no legal basis or a right to arrest the Petitioner at all. The police could arrest only on reasonable grounds of suspicion. This is nothing but an erroneous assumption of authority by the police. The 2nd and 3rd Respondents arrested the Petitioner and produced the Petitioner before the learned Magistrate of Negombo without a proper basis with a view of deporting the Petitioner. Arrest without a warrant can only be made in terms of Section 32 of the Code of Criminal Procedure Act. To permit extra judicial arrest would be detrimental to the liberty of the Petitioner. We in this court cannot encourage illegality merely to help the police.

If the Respondents acted in good faith but upon a misapprehension of the law, the courts have held that it was irrelevant in deciding whether Article 13(1) had been violated. *Premaratne and Somawathie Vs. Somapala S.C. Application 68/86; S.C Minutes 11.05.1988*. If one had a wrong appreciation of the law, court held that the infringement however remained. *Goonawardena Vs. Perera 1983 Vol 2 FRD 426 at 436*. In this case it was further held that “However anxious police officers may be to avoid the evils of laws delay and commendably assist the administration of justice, they must comply with

salutary provisions established by law designed to protect the liberty of the subject... “This also need to be done in terms of Article 4d of the Constitution which requires court to “respect, secure an advance” fundamental rights.

In Corea Vs. The Queen 55 NLR at 464

“police officer must also realise that before they arrest without a warrant, “they must be persuaded of the guilt of the accused”. They cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man meanwhile, or taking him to some spot where they can or may find further evidence” per Lord Porter in *John Lewis & Co. Ltd . V. Times 1 ((1952) A.C. 676 at 691).*”

In the ‘B’ Report itself it is stated that the Petitioner had no intention to outrage such feelings. A charge relating to Section 291 B of the Penal Code cannot be maintained i.e “outraging the religious feelings of any class by insulting its religion or religious beliefs”. There is no acceptable evidence placed before this court that there was a possibility of public outcry, though the police attempt to say so in their statements recorded. I agree with the Petitioner’s learned President’s Counsel that “surmises will not suffice”. As stated above bona fides or mala fides of the arresting officer is irrelevant in deciding whether Article 13(1) has been violated.

I accept the version of the Petitioner. On the other hand I accept the submissions of the Respondent that public officers were adhering to a judicial order. Further judicial orders cannot be challenged in Fundamental

Rights Application. But whatever that took place prior to such judicial order, (which was an illegal order) the Petitioner having been harassed or subject degrading treatment by some officers either police or a civil defence officer and prison guards is relevant in the context of the case. Money was extracted from the Petitioner and unacceptable language used on the Petitioner even prior to taking up the case before the Magistrate by some guards are horrifying and scandalous in the circumstances and in the context of the case in hand. How money was extracted is supported by the affidavit of Jennifer Hedley.

I also wish to observe that the police, in the case in hand misrepresented facts and misled the learned Magistrate into believing that a Deportation Order could be made by such court. I accept the submissions that the learned Magistrate had no jurisdiction to make an order of deportation. The deportation of foreigners is governed by the Immigration & Emigration Act No. 20 of 1948 as Amended. The power to order removal and or deportation from Sri Lanka of a person other than a citizen of Sri Lanka is vested in the Minister in charge of same. As such the 3rd Respondent has acted in misapprehension of the law in seeking an order from court. Vide *Gunawardena Vs. Perera (1983) 1 SLR 305; Channa Peiris and Others Vs. A.G 1994(1) SLR at Pg. 51.*

In all the facts and circumstances of this case I hold that Petitioner's rights have been violated, and it is established that Article 11, 12(1) and 13(1) of

the Constitution has been violated. More particularly the 2nd and 3rd Respondents have violated Articles 12(1) & 13(1). Registrar of this court is directed to forward a copy of this Judgment to the Judicial Service Commission. The Inspector General of Police and Controller of Immigration & Emigration. The provisions of the Immigration & Emigrations Act need to be strictly followed, in a case of this nature.

I direct the State to pay the Petitioner a sum of Rs. 500000/- (Five Hundred Thousand) as compensation and costs in a sum of Rs. 200000/- (Two Hundred Thousand). I also direct the 2nd and 3rd Respondents to pay Rs. 50,000/- each as compensation to the Petitioner.

Application allowed with costs.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera P.C., Actg. C.J.

I agree.

ACTING CHIEF JUSTICE

Nalin Perera J.

I agree.

JUDGE OF THE SUPREME COURT

