

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

In the matter of an application under
and in terms of Article 126 read with
Article 17 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

Arshan Rajinikanth

Mirishena Watte, Bulathsinghala.

Petitioner

SC/FR Application No:-194/2012

Vs

(1) Officer in Charge

Bulathsinhala Police Station

Bulathsinhala.

(2) Sub Inspector Kumaratne

Bulathsinhala Police Station,

Bulathsinhala.

(3) ASP Matugama

Office of the Assistant Superintendent

(4)SI Pathmalal

Office of the Assistant Superintendent

Of police,

Katukurunda, Kalutara.

(5)N.K.Illangakoon

Inspector General of police

Police Headquarters,

Colombo 1.

(6)Dr. R.M.A.Rathnayake

Judicial Medical Officer

Teaching Hospital, Ragama.

(7)Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondents

BEFORE:- K.SRIPAVAN C.J.

SISIRA J.DE ABREW, J and

H.N.J.PERERA, J.

**COUNSEL:-Ms.Ermiza Tegal with Sumalika Sooriyaarachchi for the
Petitioner**

Neranjan Jayasinghe for the 1st and 2nd Respondents

Ms.Anoopa de Silva for the 7th Respondent

ARGUED ON:-24.05.2016

DECIDED ON:- 28.09.2016

H.N.J.PERERA, J.

The Petitioner complained that the 1st to 5th Respondents had violated his fundamental rights guaranteed by Article 11, 12(1), 13(1) and 13(2) of the Constitution. Supreme Court granted leave to proceed for the alleged infringements of Article 11, 12(1) 13(1) and 13(2) of the Constitution.

The Petitioner who was 22 years at the time of the incident worked as a three wheeler driver. The Petitioner states that on 13th October 2011 at about 9.30 a.m three individuals by the names of Roshan, Selvanayagam and Raja arrived on a motor bicycle at the Petitioner's residence and informed the Petitioner that he was wanted by the police. The Petitioner recognized these individuals as they lived in the same area. The two individuals named Roshan and Selvanayagam got the Petitioner on to the motor bicycle and took the Petitioner to the Bulathsinhala police station. On the way to the police station Selvanayagam accused the Petitioner of being involved in the alleged murder of a girl named Niroshini in the same area who was found dead. The Petitioner states that he had an affair with the said girl named Niroshini for some time and that in June 2011 it ended and he refuted all the allegations of having any involvement in the death of the said Niroshini.

The said Roshan and Selvanayagam took the Petitioner inside the police station and forced the Petitioner to sit on a chair. Thereafter the younger brother of the deceased woman arrived at the police station and tried to assault the Petitioner and by the intervention of the police officers this was prevented and on his request for his safety he was put inside the cell

of the police station. An hour later two officers who identified themselves as officers from the crimes division dressed in civilian clothes took the Petitioner out from the cell and while berating the petitioner in foul language took him to a room where there were three or four female officers working and questioned the petitioner regarding the death of Niroshini for about half an hour. The petitioner states that he informed the said police officers that he did not have any knowledge or information regarding the alleged murder and thereafter he was put back in to the cell.

According to the Petitioner on the 14th morning he was taken out of the cell by the 2nd Respondent and was taken to a room which appeared to be a room used by police officers to rest and sleep and was forced to sit on the floor between two beds .The 2nd Respondent questioned the Petitioner with another police officer; later assaulted the Petitioner with his hands and on his face; threatened to hang him up; and ordered the other officer to bring a rope and a pole.

On the instructions of the 2nd Respondent the other officer held his hands from behind and the 2nd Respondent again questioned the Petitioner regarding the alleged murder and questioned about the whereabouts of another person named chutte and left the room again stating that the Petitioner should be hanged. The other officer continued to question the Petitioner regarding the alleged murder and later the 2nd Respondent came back again and ordered two other officers to tie the petitioner's hands behind and a wooden pole was placed through the loop that was created by his hands and pole was raised. The Petitioner states that he screamed as he was raised in that manner and later the 1st Respondent came and ordered that he be removed from the pole and inquired from him whether he had anything to eat and was given some food on the instructions of the 1st Respondent.

In paragraph 6(f) of his petition the Petitioner alleges that after about half an hour the 2nd Respondent came back and informed that the petitioner had been saved by the 1st Respondent and ordered the petitioner to remove his sarong which the Petitioner did out of fear. The 2nd respondent with the assistance of two other police officers tied the Petitioner's hands in front of him. They also tied his legs together with rope. The Petitioner's arms were forcibly wedged between his knees. A wooden pole was passed between his legs and arms and he was hoisted up. The pole was placed on the top of two adjacent bunk beds. The petitioner states that his arms felt as if they were being pulled off and caused him to scream in pain. He was turned and his head was pushed down.

The Petitioner further claims that he was blindfolded using a piece of cloth. The petitioner's head was pulled and he was told to tell the truth. The Petitioner felt blows presumably from a wooden baton on the back of his thighs. After a period of continuous physical assault using the baton for about 5 to 10 minutes the Petitioner was removed off the pole, untied and taken to the corner of the room and made to sit between two beds. The Petitioner states that he was kept hanging for about 15 minutes. The Petitioner found it extremely difficult to sit in the corner. His back was experiencing severe pain along the spine. The petitioner told a police officer who was present at that time that he was unable to continue sitting and was allowed to stand up for a while. At about 6.p.m the 2nd Respondent arrived and ordered that the Petitioner be placed back in the cell and the Petitioner spent the night in the cell. Sometime late night the said Padmasiri alias Chuttu was also placed in the cell. The Petitioner states that he was in the cell the whole day along with the said Padmasiri alias Chuttu. The said Padmasiri alias Chutta was released on 16.10.2011.

It was the position of the Petitioner that he was kept at the police station on 15,16TH and released on bail only on the 17th at about 7.30 p.m. The Petitioner further states that he was asked to report back at the police station on the 18th and he arrived at the police station with his mother around 12.00 noon. Thereafter the 1st Respondent noticing a wound on the Petitioner's hand took him to the Bulathsinghala Hospital to be examined by a Doctor. The police wanted to verify from the Doctor whether the said wound had been contracted from an infection as stated by him or whether it was an injury or bite mark caused as a result of a possible struggle with the deceased person. Thereafter a further statement was recorded from the Petitioner and he was allowed to leave the police station at around 8.p.m. The Petitioner and his mother stayed over at a relative's house that night and on the following day morning left to Colombo to stay with his brother.

The Petitioner's mother returned to Bulathsinghala on or about 31st October and was informed by a neighbour that the police had left a note requiring the Petitioner to be present at the police station and thereafter was informed by the police to inform the Petitioner to come to the police station to record a statement on the following day morning. Accordingly the Petitioner went to the police station with his mother on 1st November 2011. It was the position of the Petitioner that on 1st November too he was subjected to inhuman treatment by the 1st Respondent. His mother was informed to leave the police station and the 1st Respondent proceeded to question the Petitioner about the said murder and accused the Petitioner of lying about the wound that was found in his hand alleging that it was a bite mark caused by the deceased; threatened to hang the Petitioner and to put chilli powder. The Petitioner complains that he was again subjected to inhuman and degrading treatment by the 1st Respondent at the police station on 1st November 2011. According to the Petitioner there were three police

officers including the 1st and 2nd Respondents in the room and the 1st Respondent ordered the Petitioner to lie down on the floor and stretch out his hands and thereafter he stepped on to the Petitioner's hands with his boots. The 1st Respondent started to physically assault the Petitioner with a wooden pole on his back near the spine for about ten minutes. The Petitioner states he screamed in pain. He was again ordered to stand up and was then ordered to sit on the floor by the 1st Respondent who thereafter took a piece of thick twine out of a bag and twisted it around the Petitioner's neck until it felt as if it was cutting into the neck of the Petitioner. The 1st and the 2nd Respondents thereafter left the place asking him to make a confession and thereafter another police officer began to interrogate the Petitioner till 6.30 p.m. The Petitioner had to stay at the police station till next day morning. On the 2nd November at around at about 8.30 a.m his mother visited the Petitioner and he informed the mother about the assault. He came to know that his brother had made a written complaint to the Human Rights Commission. The Petitioner was kept at the police station till the 4th November and was released by about 12.00 noon. The Petitioner and his mother left the police station and thereafter the Petitioner travelled to Colombo and arrived at his brother's house around 6.30 p.m.

The Petitioner states that he experienced pain when passing urine and was taken before a private medical practitioner who refused to treat the Petitioner and was admitted at the Ragama Hospital around 9.p.m and was subjected to X-ray examination at about 12 p.m. The Petitioner was not discharged but was produced before the J.M.O. The Petitioner states that he was produced before the 6th Respondent and he made a complaint regarding the ill treatment he suffered at the hands of the 1st and 2nd Respondents at the Bulathsinghala Police station. The 6th Respondent examined him and advised the Petitioner to attend the medical clinic at the said Hospital.

It was contended on behalf of the Respondents that the Petitioner in this application is suspected of a murder of a girl and that on several occasions the Petitioner and a friend of the Petitioner was called to the police station Bulathsinghala in respect of investigation and several statements have been recorded from them. The Respondents admit the fact that they were called to police station on 15, 16 and on the 17th October and was interrogated and statements recorded but deny that they were detained at the police station as stated by the Petitioner and further state that they were released after recording their statements. It was also contended on behalf of the 1st and 2nd Respondents that the Petitioner had come out with a false story and he tries to use this complaint to delay the investigations against a very serious crime.

The Petitioner says he was taken to custody on 13.10.2011 and detained until 17.10.2011. The Petitioner has also stated that the other suspect Chutta was also with him at the police station in the same cell. Kasturisinghe Arachchige Padmasiri alias Chutta had given an affidavit and stated that he met the Petitioner at Mirissa on 13, 14 and on the 15th of October 2011. The said K.A.Padmasiri has further stated that on 15th, 16th and on the 17th October 2011 he was asked to come to the police station with the Petitioner and on every day they were released and clearly states that he or the Petitioner were never detained at the police station. The affidavit filed by the said K.A.Padmasiri clearly support the fact that he and the Petitioner were suspected and questioned by the police about the death of a girl. The said affidavit also confirms the fact that the Petitioner and the said Chutta were present at the police station on the 15th, 16th and on the 17th October 2011. But the affidavit filed by the said Chutta clearly contradicts the position taken up by the Petitioner in this case that he was kept in police custody from the 15th to 17th October.

It would be appropriate to consider at this stage the question of the burden of proof in the context of alleged infringements of fundamental rights; more particularly the quantum of proof required in this type of applications.

In *Vivienne Gunawardena V Perera* (1983) 1 SLR 305, where violations of Articles 11 and 13 (1) were alleged, Soza J. held that a high degree of probability is required where it is alleged that the petitioner had been subjected to cruel, inhuman or degrading treatment.

In *Channa Peiris and others Vs Attorney General and others* (1994) 1 SLR1. Amerasinghe, J held that three general observations apply in regard to violations of Article 11.

- (1) The acts or conduct complained of must be qualitatively of a kind that a court may take cognizance of. Where it is not so, the Court will not declare the Article 11 has been violated.
- (2) Torture, cruel, inhuman or degrading treatment or punishment may take many forms, psychological and physical;
- (3) Having regard to the nature and gravity of the issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of a Petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment.

Thus it is clear that though alleged infringement of fundamental rights have to be proved on a balance of probability or on a preponderance of evidence as in a civil case, the Court requires a high degree of proof within that standard, typical with the nature of the allegations made, while at the same time ensuring that no undue burden is placed upon a petitioner.

Further in W.Nandasena V. U.G.Chandradasa, OIC police Station, Hiniduma & 2 others reported in 2005 [B.L.R]104, Shirani Bandaranayake,J held 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.

According to Petitioner he was arrested on the 13th October 2011. Though he was questioned regarding the death of the woman and kept inside the cell till the 14th morning, he was not subjected to assault or bodily harm on the 13th. But on the 14th October he was subjected to cruel, inhuman and degrading treatment in the hands of the 1st and 2nd Respondents. The Petitioner has described the acts of torture and inhuman and degrading treatment meted out to him in the Petition in paragraphs 5(a) to 5(i) and 13(a) to 13 (c). According to Petitioner, he was taken into custody on 13.10.2011 and detained until 17.10.2011. According to the Petitioner he was severely beaten and he was subjected to cruel treatment by the 1st and 2nd Respondents. The Petitioner does not state that he sought medical treatment after he was released by the police in the 17th October 2011. The Petitioner has stated that he was released from on the 17th October and was asked to come to the police station again on the 18th morning. The evidence does not disclose the fact that the Petitioner took treatment for any injuries he has sustained at the hands of the 1st and 2nd Respondent on the 17th after he was released from police custody. The Petitioner had arrived at the police station on the 18th October accompanied by his mother at about 12 noon. And the 1st Respondent noticing a wound in the hands of the Petitioner had questioned the Petitioner regarding the same. The

Petitioner states that it was only a skin rash and the 1st Respondent suspected it to be a bite mark caused as a result of a possible struggle with the deceased person. The Petitioner was accordingly taken to the Bulathsinghala Hospital to be examined by a doctor. The Petitioner admits the fact that a male doctor has examined him on the 18th and informed that it was only a skin rash. Thereafter he was taken back to the police station; a statement was recorded and was released. The Petitioner left the police station with his mother. Although the Petitioner was produced before a doctor on the 18th October and was examined, the Petitioner had not stated about an assault or injury caused to him by the Respondents. The Doctor who examined the Petitioner on the 18th October 2011 had not observed any other injury other than a skin rash.

On perusal of the affidavit filed by the Petitioner it is clearly seen that the 1st and 2nd Respondent did not hesitate to produce the Petitioner before a doctor when they felt suspicious about the skin rash that was seen in the petitioner's hands. The Petitioner has come to the police station accompanied by his mother and it was the Respondents who after noticing the skin rash in the hands of the petitioner were keen to produce the Petitioner before a doctor for the purpose of investigation in to the death of a deceased person. The Petitioner does not state that he complained to the said doctor about the cruel treatment meted out to him by the 1st and 2nd Respondents .If the Petitioner had any injuries, this was a good opportunity for him to complaint to the doctor about the conduct of the Respondents and also show the injuries that has been caused to him as a result of the treatment meted out to him by the 1st and the 2nd Respondents whilst he was in police custody. It was the contention of the Respondents that the Petitioner and the other suspect Padmasiri alias Chutta were called to police station on 15th, 16th and on the 17th.^{10.2011} but they were not detained in police station. It was also contended on behalf of the Respondents that according to the version of

the petitioner he was free to make a complaint to any authority in between 18.10.2011 to 01.11.2011 and that the petitioner had not made a complaint to any authority about his arrest or his detention or cruel treatment during the period of 13.10.2011 to 17.10.2011.

It was contended on behalf of the Petitioner that the Petitioner's account of the torture, inhuman and degrading treatment is corroborated by the treatment sheet submitted by Dr. Keerthi Gunatilalake to court with motion dated 18th May 2012, whereby the complaints of pain by the Petitioner were documented. This only shows that the Petitioner has complained of police assault and also about a backache and that X-ray examinations of the Petitioner was accordingly conducted.

The Medico Legal Report of the Judicial Medical officer 1R6, does not disclose visible injuries. In the said medico-Legal Report dated 5th November 2011 Dr.R.M.A.Ratnayake , the 6th Respondent gives a history. According to the said history the Petitioner had been assaulted by the O.I.C. of the Bulathsinghala police station.

On perusal of the said treatment sheet and the Medico-Legal Report it is clear that the said documents do not support the version of the Petitioner. The said documents indicate that the Petitioner had no injuries on his body either externally or internally at the time of examination of the Petitioner by the said doctors.

The Petitioner contends that he was arrested on 13th October 2011 and released on 17th October 2011. Although he had complained about receiving cruel and degrading treatment at the hands of the 1st and the 2nd Respondents the Petitioner has failed to establish the same through medical evidence. There is no medical evidence placed before this court to substantiate the fact that the Petitioner sustained injuries on the 14. 10.2011 as stated by the Petitioner in his affidavit.

The Petitioner contends that he was arrested again on 1st November 2011 and released on 4th November 2011. Here again the treatment sheets submitted by Dr.Keerthi Gunatillake and the Medico Legal Report of the Judicial Medical Officer Dr. R.M.A.Ratnayake do not disclose any visible injuries on the Petitioner and no way support the contention of the Petitioner that he was subjected to inhuman, cruel and degrading treatment at the hands of the Respondents whilst in police custody on 2.11.2011.

It was contended on behalf of the Petitioner that the fact that the medical evidence does not support the Petitioner's version of facts alone will not prejudice the Petitioner's case. It was contended that the Petitioner's version of facts is corroborated by his mother's Affidavit and the Affidavit of his neighbour and further that the 1st to 3rd Respondents have merely denied without any official document the allegations against them, must necessarily be held in favour of the Petitioner.

Considering the circumstances of this matter, it is clear that the 1st Respondent had questioned the Petitioner as he was suspected of causing the death of a person. The Petitioner in this application is suspected of a murder of a girl. It is also alleged that she was abducted and raped. According to the mother of the deceased, the deceased had an affair with the Petitioner and after she advised the daughter she stopped the relationship with the Petitioner. According to her, there had been an enmity between the daughter and the Petitioner after that. The mother of the deceased had clearly stated that she suspected the Petitioner for the crime. Therefore there is no doubt that the Bulathsinghala police was conducting investigation in to the death of this girl and the Petitioner was the prime suspect in addition to the other suspect called Chutta.

Considering the non-availability of any medical evidence with regard to alleged assault, it would be necessary to examine carefully the supporting documents produced by the Petitioner to substantiate his allegations against the 1st to 3rd Respondents.

It is the position of the Respondents that on several occasions the Petitioner the prime suspect and another friend of the Petitioner namely Kasturisinghe Arachchige Padmasiri alias Chutta were called to the police station Bulathsinghala in respect of investigations and several statements were recorded from them. According to the Petitioner the Petitioner was taken into custody on the 13th October 2011 and detained until 17.10.2011 and also stated that Padmasiri alias Chutta was also with him at the police station in the same cell. The said Padmasiri alia Chutta had given an Affidavit and had stated that he met the Petitioner at Mirissa on 13.10.2011, 14.10.2011 and 15.10.2011. (1R4). Padmsiri alias Chutta, very clearly contradicts the position taken up by the Petitioner that he was detained at the police station from the 13th to 17th October 2011. The said Chutta has further stated that on 15.10.2011, 16.10.2011 and 17.10.2011 he was asked to come to the Bulathsinghala police station with the Petitioner and on every day they were released and further states that they were never detained at the police station .It is very clearly seen that the said Padmasiri alias Chutta does not corroborate the version of the Petitioner that both were detained at the police station and the Petitioner was severely beaten or subjected to cruel punishment.

The 1st and 2nd Respondents deny that they ever arrested the Petitioner on the 13th October 2011 or thereafter. It is the position of the 1st and 2nd Respondents that the Petitioner and the other suspect in the said murder case arrived at the police station on the 15th, 16th and on the 17th October to give statements. They deny that they arrested or detained the Petitioner at the police station as alleged by the Petitioner in his petition

and affidavit. In his affidavit Padmasiri alias Chutta denies the fact that he was ever detained at the police station together with the Petitioner. It was contended on behalf of the Petitioner that the Respondents have tendered a false affidavit from Padmasiri alias Chutta to counter the allegation made by the Petitioner in this case. Yet the fact remains that the Respondents have tendered an affidavit by Padmasiri alias Chutta contradicting the facts stated by the Petitioner in his affidavit. This definitely weakens the position of the Petitioner. The other affidavit which was tendered by the Petitioner to support his case was from one Sirmannge Hettige Milani Tharanga P5(a). It is to be noted that Milani Tharanga too has by her affidavit marked 1R5 had contradicted and denied the contents in P5(a). Although the Petitioner has stated that his brother has made a complaint to the Human Rights Commission (P1), the Petitioner has failed to submit an affidavit from his brother to support his case. Therefore the Petitioner is left only with the affidavit given by himself and his mother to support the Petitioner's case.

The Respondents had tendered the statements recorded by the said Padmasiri alias Chutta and the Petitioner on the 16.10.2011 marked 1R1 and 1R2. The statement recorded by the Petitioner on the 17.10.2011 is also marked and tendered as 1R3. These statements clearly establish the fact that the Petitioner and Padmasiri alias Chutta were questioned and their statements were in fact recorded by the Bulathsinghala police regarding the death of a person. The affidavits of the said Chutta and Milani Tharanga was marked as 1R4 and 1R5. In her affidavit Milani Tharanga has categorically stated that she too accompanied the Petitioner and his mother and Padmasiri alias Chutta to the Bulathsinghala police station on 16th, 17th and 04.11.2011 and denies the fact that the Petitioner or Padmasiri alias Chutta was ever put inside the cell or was assaulted by 1st and 2nd Respondents at the said police station.

In the instant case, when one considers the conflicting versions placed before Court by the respective parties, there is considerable doubt as to the truth of the Petitioner's version. There is doubt as to why the Petitioner did not go before a medical officer to get treatment for the injuries he suffered on the 14th at the hands of the 1st and 2nd Respondents and as to why the Petitioner did not complain to any authority about the treatment meted out to him by the 1st and 2nd Respondents on the 14th. The Petitioner had all the opportunity to get medical treatment or to complain to an authority after he was released on 17.10.2011.

Further the Petitioner was free and was able to make a complaint to any authority in between 18.10.2011 to 01.11.2011. P2 complaint to the Human Rights Commission had been made by his brother only on 02.11.2011. A detailed complaint has been made by the Petitioner thereafter to the Human Rights Commission.

Placing much reliance on the report of the J.M.O Bulathsinghala the 6th Respondent, and stressing the fact that the Petitioner had not made no complaint of torture or inhuman, degrading treatment to any person in authority before the 2.11.2011 the learned Counsel appearing for the 1st to 3rd Respondents contended that the allegations levelled by the Petitioner were false and untenable. It is also to be noted that the Petitioner has not made any allegation against the J.M.O.Bulathsinghala the 6th Respondent or against Dr.Keerthi Gunatilleke. It was contended on behalf of the Respondents that the Petitioner had come out with a false story and he tries to use this complaint to delay the investigations against a very serious crime.

On an examination of the totality of the evidence I hold that the Petitioner in the instant case has failed to establish that his fundamental rights guaranteed in terms of Article 11, 12(1), 13(1) and 13(2) of the

Constitution have been violated by the actions of the 1st to 5th Respondents. This application is accordingly dismissed, but in all the circumstances of this case without costs.

JUDGE OF THE SUPREME COURT

K.SRIPAVAN C.J.

I agree.

CHIEF JUSTICE

SISIRA J.DE ABREW, J.

I agree.

JUDGE OF THE SUPREME COURT

