

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

In the matter of an application under Article 126 of
the Constitution of Sri Lanka.

Herath Mudiyansele Wasantha Anura Kumara of
Thammitagama, Nagollagama.

Petitioner

S.C. (FR) Application
No: 388/2010

Vs.

1. Headquarters Inspector Channa Abeyratne
Police Station, Maho.
2. Sub-Inspector of Police Ananda
Police Station, Maho.
3. Police Sergeant 55008 Asanka
Police Station, Maho.
4. Police Constable 55037 Navaratne
Police Station, Maho.
5. Deputy Inspector General of Police
North Western Province,
D. I. G's Office, Kurunegala.
6. Mahinda Balasuriya,
Inspector General of Police,
Police Headquarters,
Fort, Colombo 1.
7. The Hon. Attorney General,
Attorney General's Department,
Hulftsdorp, Colombo 12.

Respondents

Before: Buwaneka Aluwihare, PC, J.

L.T.B. Dehideniya, J.

S. Thurairaja, PC, J.

Counsel: K. Tiranagama with Mahbooba Rifaideen and Swarnapali
Wanigasekera for the Petitioner.

Anura Meddegoda, PC, with Nadeesha Kannangara for the 1st
Respondent.

Induni Punchihewa, SC, for the 2nd – 7th Respondents.

Argued on: 14. 01. 2020

Decided on: 26. 07. 2021

Judgement

Aluwihare PC. J.,

The Petitioner, a tenant cultivator, complained of the violation of his fundamental rights guaranteed under Articles 12 (1), 13 (1) and 13 (2) of the Constitution by the 1st, 2nd, 3rd and 4th Respondents. Leave to proceed was granted for the alleged infringement of Articles 12 (1) and 13 (1) by the said Respondents.

The Version of the Petitioner

- (1) The Petitioner is a tenant cultivator of a land called Kolongahamulla Henyaya in Ratmale, Nagollagama. According to the Petitioner, he had cultivated Papaya in an extent of 5 acres. The Petitioner asserts that, on 7th June 2010, after he returned home having worked at his papaya plantation, at around 5.30 pm, Police Sergeant Asanka [the correct name is 'Asoka'], the 3rd Respondent and Police Constable Navaratne, the 4th

Respondent came to his house, and took him into custody, stating that Venerable Bandiyawatte Pannananda Thero of the Nagollagama Raja Maha Viharaya had made a complaint against him, and had brought him to the Maho Police Station, which was about 14 km away from his home. He had been detained at the Police Station until the arrival of 1st Respondent, the Headquarters Inspector [HQI].

- (2) According to the Petitioner, the 1st Respondent had arrived at the Police Station at around 11.30 pm and admonished the Petitioner and had warned him; not to step into the papaya plantation hereafter. The 1st Respondent had threatened that he would break the Petitioner's legs and have him jailed for seven-eight months, if he dared to enter the plantation again. The Petitioner claims that he was only allowed to go home around midnight. He had returned home with his uncle Sunil on his motorcycle, who had come to the police station on hearing that the Petitioner had been brought to the police station.
- (3) The Petitioner alleges that it was the 1st Respondent who was mainly responsible for his arrest and detention, from about 5.30 pm to 12 midnight, at the Maho Police Station. The Petitioner has tendered two Affidavits in support of his allegation that it was the 1st, 3rd and 4th Respondents who were responsible for his arrest; one, being the Affidavit of the Petitioner's mother, Anulawathie Kumari ('P6') and the other being the Affidavit of a co-worker, Weerasiri Dissanayake ('P7'). Both of them have affirmed that they witnessed the arrest of the Petitioner by the police officers, in the manner alleged by the Petitioner.
- (4) The Petitioner's mother states in her Affidavit that, after her son was taken away in a Police Jeep, she went to her brother, Nandasena's house where her other brother Sunil had also been present. She states that she related to them, as to what happened and sought their help. She claims that in response to her plea, her brother Sunil went to the Maho Police Station on his motorcycle and returned with her son late at night. She

states that when dropping off her son, Sunil told them that he secured the Petitioners' release on bail upon the arrival of the H.Q.I. (the 1st Respondent).

- (5) Weerasiri Dissanayake, who worked in the Petitioner's papaya plantation states that after work, he accompanied the Petitioner to his house so that he could receive his day's wages. He states that he saw three police officers arrive at the Petitioner's house in a police jeep and that he saw them take the Petitioner with them. He states that the Petitioner's mother then went to Nandasena's house to inform him of what had happened. The Affirmant states that he then stayed at the house till the Petitioner's return. He states that the Petitioner was dropped off by his uncle Sunil around midnight, and that he heard him say that he (Sunil) secured his release on bail.
- (6) Although the Petitioner, in his petition, had averred that some damage had been caused to his plantation on the following day, i.e., 8th of June, those events, have no bearing on deciding the issues before us. As such I do not wish to refer to those events here.

The Version of the 1st Respondent

- (7) According to the 1st Respondent, on 7th June 2010, at 11.30 am he had left for "Mahawa Jayasumana Pirivena" to put in place security measures, in connection with the visit of the Hon. Prime Minister to the temple on that day. In support of this assertion, he has annexed copies of the relevant "out" and "in" entries made by him in the Daily Information Book [DIB] maintained at the Maho Police Station ['1R2'].
- (8) The 1st Respondent's position is that, in the afternoon, whilst the 1st Respondent was on duty, Ven. Bandiyawatte Pangnananda Thero of Nagollagama Raja Maha Viharaya had informed the Maho Police over the telephone that the Petitioner had encroached upon a land belonging

to the said priest and had commenced cultivating the said land. Thereupon, the 1st Respondent had directed the 3rd Respondent to investigate into this complaint and to advise the parties to maintain peace. On the instructions of the 1st Respondent, the 3rd and 4th Respondents had proceeded to the Nagollagama Temple, and the 4th Respondent had recorded a statement from the priest with regard to the complaint he had made against the Petitioner [A copy of the statement of the priest has been annexed marked '1R4']. According to the entry made by the 3rd Respondent at the police station, whilst the statement of the priest was being recorded by the 4th Respondent, he had made observations of the land in question.

- (9) After meeting the priest, the 3rd and 4th Respondents had met the Petitioner and informed him about the complaint against him. According to these Respondents, the Petitioner had informed the 3rd and 4th Respondents that he had just returned home from his cultivation and that he would come to the Police station later that day. The 3rd and 4th respondents had advised the Petitioner to do so and had returned to the Police Station. A copy of the notes of investigation of the 3rd and 4th respondents recorded on 7th June 2010, has been produced marked '1R5'.
- (10) On the same day the Petitioner had come to the Police Station as undertaken by him and his statement had been recorded by the Police. In his statement, the Petitioner insists that the dispute over the ownership of the land that is being cultivated by him, had already been settled with the true owner of the land on 5th May 2010 and that the Petitioner would be leaving the land in 4 months' time ('1R5').
- (11) The 1st Respondent had categorically denied that the Petitioner was arrested and brought to the Police Station. His position is that the Petitioner attended the police station on his own volition. An Affidavit

from the Petitioner's uncle Sunil has been tendered, in order to substantiate the position that the Petitioner went to the Police Station on his own volition ('IR7').

- (12) The 1st Respondent claims that the Petitioner had wished to meet him but as he was not at the Police station the Petitioner had opted to wait for the 1st Respondent's return. The 1st Respondent states that when he returned to the Police station at around 10 pm, the Petitioner informed him that the priest had made a further complaint against him. The 1st Respondent states that he advised the Petitioner to maintain peace and to resolve the matter after consulting Mrs. Chandrika Samarasuriya, who according to the Petitioner, had title to the disputed property. The 1st Respondent claims that at no point in time was the Petitioner subjected to unlawful arrest and/or detention, and that the Petitioner on his own volition remained there until the 1st Respondent returned to the Police Station.
- (13) Further, the 1st Respondent had denied the allegation that he abused and/or threatened the Petitioner and had stated that, had he conducted himself in the manner alleged by the Petitioner, the Petitioner's uncle Sunil who was present at the time would have witnessed such incident. Sunil, however, had not made reference to any abuse and/or threat by the 1st Respondent, in his Affidavit ['1R6'].
- (14) The main form of evidence, in support of the 1st Respondent's version of the incident, emanates from the Affidavit of the Petitioner's uncle, Sunil. He had averred that he along with the Petitioner went to the Police Station on a motorcycle and both of them left the police station around 11.00 pm. Strangely, Sunil is silent on the aspect of the Petitioner being abused and/or threatened by the 1st Respondent. It is pertinent to note that in the counter affidavit filed by the Petitioner, he had failed to explain the discrepancy between his version and the version given by his uncle Sunil, particularly with regard to the arrest of the Petitioner.

Violation of Article 13 (1)

- (15) Article 13 (1) of the Constitution stipulates that “*No person shall be arrested except according to procedure established by law. Any person arrested shall be*
- (16) *e informed of the reason for his arrest.*” The Petitioner alleges that the 1st Respondent is mainly responsible for the illegal arrest on 7th June 2010, while the 3rd and 4th Respondents were guilty of the same, as they carried out the orders of the 1st Respondent.
- (17) In the instant case, the material before this court, to determine whether there has been a transgression of Article 13 (1) is the assertion of the Petitioner, which is supported by 2 Affidavits on the one hand and the assertion of the 1st Respondent supported by an Affidavit [of Sunil] and the relevant excerpts from the Police Information Book (‘1R2’, ‘1R3’, ‘1R4’ and ‘1R5’) on the other.

Was the Petitioner subjected to an illegal arrest?

- (17) Article 13 (1) is comprised of two limbs.
- (a) The arrest should be in accordance with the procedure established by law.
- (b) The person being arrested shall be informed of the reasons for his arrest.

The above postulates that before the police deprive any person of his or her personal liberty, in the course of discharging what they conceive to be the powers vested in them, the procedure prescribed by law must be strictly adhered to and must not be departed from, to the disadvantage of the person affected.

- (18) The phrase ‘procedure established by law’ refers to the ordinary and well-established rules of the Code of Criminal Procedure Act No.15 of 1979 read with the amendments thereto.

According to Section 23 (1) of the Code of Criminal Procedure Act; *“In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested.”*

- (19) The Petitioner denies that on 7th June 2010, he visited the Maho Police Station on his own volition and asserts that he was arrested by the 3rd and 4th Respondents and taken to the Maho Police Station. The Petitioner further states that when the 3rd and 4th Respondents arrested him, he was informed by them that the priest concerned, had made a complaint against him.

- (20) In the instant case, the question arises as to whether the Petitioner was arrested as alleged by him in the first place. The version of the Respondents is that the Petitioner was requested to come to the police station in order to inquire into the complaint made by the priest. The sequence of events averred by the 1st Respondent is as follows;

- i. The 1st Respondent maintains that whilst he was on duty at a location outside the police station, he was informed over the phone that the priest concerned had lodged a complaint against the Petitioner.
- ii. He gave instructions to the 3rd Respondent to conduct investigations into the said complaint.
- iii. The 3rd and 4th Respondents having gone to the Temple, had recorded the statement of the priest. According to the same [‘1R4’] the statement had been recorded at 5.40 pm and the officers have returned to the police station at 7.35 pm.
- iv. The return entry reveals that the officers had returned to the station after having inspected the land over which the dispute

had arisen and after meeting the Petitioner and instructing him to come to the police station for an inquiry.

- v. According to the entry made in CIB at 8.15 pm [‘1R5’] the Petitioner ‘had appeared at the police station as instructed’. The 3rd Respondent had then proceeded to record the statement of the Petitioner.
- vi. This position is supported by Sunil who states in his Affidavit that his nephew [the Petitioner], intimated to him that officers of the Maho police station had requested him to attend the police station.
- vii. Sunil, in his Affidavit, states that around 6.00 pm the Petitioner left for the police station [on a motorcycle] and he also went there.
- viii. It is common ground that the Petitioner was allowed to return home and the 1st Respondent’s version is that the Petitioner had waited at the police station until his arrival at the police station.

(21) Upon consideration of the material placed before court, this court cannot attribute any reason to disregard the version of the Respondents, especially in light of the fact that the Petitioner had not controverted the averments of the affidavit of his uncle, Sunil.

(22) It is to be noted that, as per paragraph 31 of the petition, the Petitioner is seeking an order from this court in the form of a declaration relating to the transgression of his fundamental rights of *“freedom from arbitrary arrest and illegal detention and equality and equal protection of the law...”* in connection with the events of 7th June 2010. Although the petition had referred to a series of subsequent events, those events in my view are not relevant in deciding whether there had been an illegal arrest and/or detention of the Petitioner on 7th June 2010.

(23) This court is mindful of the fact that the burden of establishing the alleged violations is squarely on the Petitioner. The duty of the police is to investigate

offences using the lawful powers vested with them. In the instant case, there in fact was a complaint against the Petitioner and when one considers the totality of the facts, this court cannot say with certainty that the Petitioner was arrested as alleged by him. Going by the notes of investigation, his statement relating to the complaint made by the priest had been recorded sometime after 8.00 pm. According to Sunil, he and the Petitioner had left the police station around 11.00 pm. According to the 1st Respondent, he had not been at the police station when these investigative steps were taken at the police station and the Petitioner had remained at the station on his own volition, wanting to meet the 1st Respondent. This position of the 1st Respondent cannot be rejected either.

- (24) In the circumstances, this court is required to give its mind as to whether the Petitioner has discharged the burden of establishing the alleged violations under Article 12 (1) and Article 13 (1) of the Constitution.
- (25) As his Lordship Justice Amerasinghe observed, in the case of **Samanthilaka v. Ernest Perera and Others** 1990 1 SLR 318, where leave to proceed was granted for the alleged violation of Article 13 (1) of the Constitution among others; *“Being serious allegations of misconduct on the part of an agent of the State-the police-I looked with caution for a high degree of probability in deciding which of the facts alleged had been established.”* (at page 320)
- (26) This court has consistently held that the burden is on the person who alleges the transgression of his fundamental rights, to establish the violations alleged, with a high degree of probability. Upon a careful consideration of the affidavits and examination of the other material filed in this case, on behalf of both the Petitioner and the Respondents together with the analysis of the material by the learned counsel who represented the parties, I find the Petitioner had failed to establish the transgressions alleged, to a degree of probability required by law, in fundamental rights applications.

(27) Considering the above, I hold that the Petitioner has failed to establish that the Respondents have infringed his fundamental rights enshrined in Articles 12 and 13 (1) of the Constitution and accordingly this application is dismissed.

In the circumstances of the case, I do not order costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA J.

I agree.

JUDGE OF THE SUPREME COURT

S. THURAIRAJA PC, J.

I agree.

JUDGE OF THE SUPREME COURT