

E.A.G.R. Amarasekara J.

I had the advantage of reading in draft, the Judgment written by Honourable Justice Surasena. With all due respect to his analysis of facts and conclusions, I intend to dissent and come to a different conclusion with regard to the facts revealed before us in this case. Since my brother Judge has summarised the facts of this case, I need not repeat some of them here again. My brother Judge has observed that many of the assertions made by the Petitioner are based on hearsay material or mere speculation by the Petitioner that cannot be given any evidential value. I also agree with that. However, the fact that the Petitioner's son Mariyadas Thevis Delrokson died on 08.08.2012 at the Ragama Teaching Hospital while he was in the custody of Prison authorities is not a disputed fact. Furthermore, the 4<sup>th</sup> Respondent, the Commissioner General of Prisons in reply to paragraph 6 of the Petition has stated that the deceased was remanded in Vavuniya Prison on 19.04.2010 and he had not complained of any assault by the CID. – Vide paragraph 10 of the affidavit of the 4<sup>th</sup> Respondent dated 30.03.2015. The document marked as R1 and tendered with the said affidavit also confirms that the deceased had no serious health condition at the time he was remanded.

Thus, the facts placed before this court establish;

- that the deceased was a remand prisoner,
- that he was handed over to Vavuniya Prison on 19<sup>th</sup> April 2010 in good health and

- that he died while in prison custody at Ragama Teaching Hospital on 08.08.2012.

My brother judge Surasena, J. has referred to the Post Mortem Report and the injuries found there in that report. He correctly observes that out of the 21 injuries listed on the 3<sup>rd</sup> page, the injuries Nos. 2, 3, 6, 7, 20 and 21 were sustained before the deceased was admitted to the hospital. As per the Judicial Medical Officer (hereinafter sometimes referred to as the JMO) who did the autopsy, other injuries listed on the 3<sup>rd</sup> page of the Post Mortem Report, namely injuries Nos.1,4,5 and 8 to 19 would have been sustained during the hospital stay while the deceased was in an unconscious state. However, commenting on the autopsy, the JMO, among other things, has explained the following injuries revealed by the Bed Head Ticket, CT & MRI Scans:

- A tram line contusion on the forehead (from the entries in the bed head ticket)
- Cerebral oedema and Fracture in Zygomatic bone of right side of the face (By CT Scan.)
- Shearing injuries in brain, (By MRI Scan.)
- Fracture in the distal part of left ulna. (By X-ray report)

Fracture in the left ulna is also found in the list given on the 3<sup>rd</sup> page of the Post Mortem Report as injury No. 21. These findings indicate that the brain of the deceased was swollen and fractures in bones have occurred on the right side of the face as well as on the left forearm.

The JMO further states in his report that the autopsy revealed evidence of diffuse axonal injuries and evidence of septicemia. The JMO further clarifies 'diffuse axonal injury' as follows;

"Diffuse axonal injury of the brain is used to describe a condition characterised by immediate prolonged coma (greater than 6 hours) occurring after head trauma, not associated with intracranial haemorrhage or mass lesion. This is produced by sudden acceleration-deceleration motion of the head (assault, violent shaking of head or fall) which causes stretching and/or shearing of nerve fibers. In diffuse axonal injury, the patient becomes unconscious and survives for a long period in vegetative state and death supervenes due to complications of the unconscious state. Fracture zygomatic bone in right side of the face as indicated in CT scan and BHT finding of tram line contusion on the forehead confirm that the deceased had sustained head injury caused by blunt forces resulting in diffuse axonal injury before admission to the hospital." (Sic)

As per the Post Mortem Report, death was caused due to Septicemia, Prolonged Unconsciousness and Head Injury. – Vide comment of the JMO at the last page of the Post Mortem Report.

Respondents have not taken up a position that a fall or an accident caused those injuries. Injury No. 6 on the 3rd page of the Post Mortem Report refers to a healing wound on the inner part of the left thigh. This injury suggests that legs of the deceased were open towards the side the blow came from. Fracture in the left ulna would have been caused while trying to cover or protect him from a beating. Nevertheless, the Post Mortem Report confirms

that the death of the deceased was not due to a natural cause but due to the injuries caused to the head of the deceased while he was in the custody of the prison. The deceased was the son of the Petitioner, but the Petitioner was not with the deceased at the Prison. Thus, what caused the injuries to the deceased is not within the knowledge of the Petitioner, but the Prison Authorities must have the knowledge with regard to the incident or background or circumstances that caused the injuries. 1<sup>st</sup> to 4<sup>th</sup> Respondents might not have been with or around the deceased always, but they have the authority to collect information from the relevant officers and the related books, records and journals maintained by the prisons. Thus, the circumstances that caused the injuries and/or when and where the injuries were inflicted were within the special knowledge of the prison officers, in other words within the knowledge of the State through its officers.

It is true that the prison officers have authority even to use a degree of force to maintain discipline in the prison- vide section 13 of the Prisons Ordinance. Article 4(d) of the Constitution expects all the organs of the state to respect, secure and advance fundamental rights of the people. In ***Kupugeekiyana Vs Hettiarachchi & two others (1984) 2 Sri LR 153*** it was held that even a person on the blackest of criminal charges is entitled to his fundamental rights.

Article 11 of the Constitution confirms freedom against torture, cruel and inhuman and degrading treatment or punishment. The said Article is not subject to any restriction under Article 15 of the Constitution. Thus, no derogation of the rights guaranteed by the said Article is permissible for any reason.

In **Jayasinghe Vs. Samarawickrama SCFR 157/91, SCM 12.01.1994, (1994) 2 Sri L R 18** Kulatunge, J. commented as follows:

*"At the time Petitioner was handed over to Police he had no injuries, and when he was handed over to the hospital, he was a physical wreck and comatose, and I, therefore, hold that allegation of torture had been established."*

When a person is handed over to prison as a prisoner, it is expected that the prison authorities would respect his fundamental rights. In the case at hand, the deceased was handed over to the prison in good health, and after few months he was admitted to Ragama hospital in an unconscious state, with injuries including severe internal head injuries caused by blunt forces - vide Post Mortem Report. As elaborated above, the prison authorities must have the exclusive knowledge with regard to the circumstances that caused the injuries and when and where they were inflicted or occurred. Unless there is a proper explanation by the prison authorities the facts mentioned above establish prima facie a high probability of an infringement of Article 11 since there is evidence of assault while the deceased was in prison custody.

In reply to the application made by the Petitioner, two affidavits dated 23.06.2014 and 30.03.2015 have been filed in objection by the respective officers who held the office of the 4<sup>th</sup> respondent. The affidavit dated 23.06.2014 was submitted by one Chandrarathne Pallegama, the Commissioner General of Prisons as at that date. He has not denied the averments in the petition and affidavit of the Petitioner but has stated that:

1. Consequent to a transfer of a prisoner to Boossa Prison as per an order of the Vavuniya High Court, on or around 27.06.2012, several inmates of the Vavuniya Prison engaged in a hunger strike.
2. In pursuance of their demand, on 28.06.2012, certain inmates of the Vavuniya Prison took 3 prison guards as hostages and held those 3 prison guards and other prisoners captive within the said prison premises.
3. Since negotiations to get the hostages released and regain the official control of the Prison failed, with the assistance of the Special Task force (STF), the Prison Authorities conducted a rescue operation on the 29.06.2012, where they had to use a degree of force due to the stiff resistance by the hostage-takers.
4. Subsequent to the rescue operation, fearing re-grouping, it became necessary to split up the prisoners and transfer them to different prisons.
5. Thus, they were transferred to Anuradhapura & Mahara Prisons while taking prisoners requiring medical attention to hospitals. In that process, the deceased was warded in the Ragama Hospital.

The affirmant of the said affidavit has tendered an inquiry report made in relation to the aforesaid incident as R1 and certain statements made during that inquiry by the Superintendent of Vavuniya Prison and the aforesaid hostages as R2, R3A, R3B, and R3C. The affirmant does not state that he was present in person when the aforesaid incident or transfer of prisoners that followed took place. Therefore, most of the contents may have been taken from the information he received and may be hearsay. No affidavit

is tendered in support of the contents of his affidavit from a person who was present at the incident or to verify the contents of R1, R2, R3A to R3C by the makers of such report or the statements. However, the gist of this affidavit is to indicate that the deceased would have got injured during the aforesaid incident and later on taken care by admitting him to Ragama Hospital.

Manikka Badathuruge Rohana Pushpakumara, who appears to have succeeded the affirmant of the previous affidavit dated 23.06.2014 as the Commissioner General of Prisons, by the affidavit dated 30.03.2015, denies the averments of the Petitioner's affidavit. However, he also does not state that he was present at the incident or when prisoners were transferred to other prisons. He even in support of his objection does not annex any affidavit from a person who has first-hand knowledge of the incident and/or the steps taken afterwards. Thus, his affidavit may also contain unverified hearsay evidence. Nonetheless, he, inter alia, states as follows in his affidavit.

1. That the deceased was a LTTE suspect, who had 3 indictments pending against him in the High Court of Vavuniya.
2. That the deceased was remanded in the Vavuniya Prison on 19.04.2010 and became an inmate of the Vavuniya Prison.
3. That on or around 26.06.2012 the inmates of the Vavuniya Prison, including the deceased engaged in a hunger strike consequent to a transfer of an inmate to the Boossa Detention Camp.
4. That before staging the hunger strike, the deceased and another inmate met the Chief Jailor and demanded the return of the inmate

who had been transferred to Boossa and later on, the deceased and several other prisoners vandalised the visitors' area of the prison and forced the inmates of the prison to stage the hunger strike.

5. That the inmates who staged the hunger strike took 3 prison guards as hostages and held the said 3 prison guards and other prisoners captive within the Vavuniya Prison.
6. That since all negotiations failed, the prison authorities had to seek the assistance of Special Task Force (STF).
7. That during the night of 29.06.2012, the situation escalated into a situation of a riot, and the STF had no choice but to force an entrance into the prison premises. (It is pertinent to note that as per the documents marked as R1, R2 and R3a to R3c with the affidavit dated 23.06.2014, the STF appears to have entered during day time just after 12 noon.)
8. That tear gas had to be used to dispel the rioters and a degree of force had to be used in order to rescue the prison guards and other inmates held hostage due to stiff and violent resistance by the perpetrators who were armed with iron rods.
9. That subsequent to the rescue operation, it was necessary to transfer all prisoners from the Vavuniya Prison and first they were sent to the Anuradhapura prison. However, fearing regrouping of the perpetrators, it was considered prudent to split up the prisoners and have them placed in different prisons. As such, prisoners from Vavuniya prison were transferred to Anuradhapura, Bogambara and Mahara prisons.

10. That the deceased was among the prisoners, who were transferred to Mahara Prison and the medical officers at Mahara Prison examined all the injured persons and transferred the prisoners who needed medical attention to Ragama Hospital. Consequently, the deceased was admitted to the Ragama Hospital.
11. That any injury sustained by the deceased would have been caused during the rescue operation – (vide paragraph 22 and 25 of the said affidavit).

The affirmant of the said affidavit has tendered another set of documents marked as R1, R2, R3a, R3b, R4a, R4b, R4c, R5, R6a, R6b, R7a, R7b and R8. I have already referred to R1 which indicates that the deceased was in good health when he was handed over to the prison. R3a, R3b, R4c, R6a, R6b, R7a, R7b and R8 have been marked to explain the allegations made with regard to the visits to see the deceased when he was warded in the Ragama Hospital. R4a and R4b have been marked in reply to the allegation that the deceased was chained to the bed when he was under treatment. R5 is a report sent to the Human Rights Commission which also refers to the riot that took place in the Vavuniya prison and the admittance of the deceased to the Ragama Hospital for treatment. The said R5 does not exactly state that the deceased received injuries at the riot mentioned above or that he was immediately or as soon as possible given treatment for the injuries. Since I intend to discuss the infringement of Article 11 of the constitution with regard to the injuries caused and the medical attention given, I do not expect to discuss matters concerning R2, R3a, R3b, R4a, R4b, R4c, R6a, R6b, R7a, R7b, and R8.

However, the affidavits filed on behalf of the 4<sup>th</sup> Respondent take up the positions that the injuries sustained by the deceased would have been or may have been caused during the riot. When one uses 'would have been caused' or 'may have been caused', the time of sustaining injuries is not definite. It does not exclude the possibility of sustaining injuries after the riot was quelled. However, it appears that the Petitioner and the Respondents agree that there was a riotous situation within the prison and the deceased was an inmate at that time. If the injuries were sustained after the riot, as there is no explanation from the Respondents, there is a clear infringement of Article 11 of the constitution. If the injuries were caused during the riot even the use of excessive force may sometimes absolve the Respondents from the responsibility, since the use of excessive force does not per se amount to cruel, inhuman or degrading treatment, that would depend on the person and the circumstances. [-vide **Wijesiriwardena V Kumara Inspector of Police, Kandy (1989) 2 SRI LR 312.**]. In my view this stance with regard to the time of sustaining injuries, that the injuries would have been caused during the riot, is not a statement of a responsible officer since the 4<sup>th</sup> Respondent and his department had the full authority to hold a proper inquiry and his officers involved in the incident had the full knowledge with regard to the incident and its background. They should be able to state at least that injuries were caused before the deceased was transferred from Vavuniya Prison and/or Anuradhapura Prison if the officers of the prison department responsibly followed the provisions of the Prison Ordinance. Now I prefer to refer to the relevant provisions from the Prison Ordinance.

**Section 46.**

***"All prisoners, previously to being removed to any other prison, shall be examined by the Medical Officer."***

**Section 66.**

***" The names of prisoners desiring to see the medical officer or appearing out of health in mind or body shall be reported by the officer attending them to the jailer, and the jailer shall without delay call the attention of the medical officer to any prisoners desiring to see him, or who is ill or whose state of mind or body appears to require attention, and shall carry into effect the medical officer's written recommendations respecting alterations of the discipline or treatment of such prisoner."***

**Section 67**

***"All recommendation given by the medical officer in relation to any prisoner, with the exception of orders for the supply of medicines or directions relating to such matters as are carried into effect by the medical officer himself or under his superintendence, shall be entered day by day in his journal, which shall have a separate column, wherein entries shall be made by the Superintendent stating in respect of each recommendation the facts of its having or not having been complied with, accompanied by such observations, if any, as the Superintendent thinks fit to make, and the date of the entry."***

Thus, it is the duty of the prison authorities to do a medical examination before a prisoner is transferred to another prison (Section 46). Even if the prisoner appears to be out of health in mind or body, the attending officer must report him to the jailor, and the jailor shall, without delay, call the attention of the medical officer.

The deceased had a fracture in the left ulna and a fracture in Zygomatic bone of the right side of the face. Most probably the deceased would have had a swollen face and a swollen left arm. The tram line contusion on the forehead the deceased had could be visible to the naked eye. Diffuse axonal injuries of the brain are described as a condition characterized by **immediate** prolong coma occurring after head trauma which is produced by sudden acceleration and deceleration motion of the head that causes stretching and/or shearing of nerve fibres. (highlighting by bold letters is mine).

The JMO further states in his report that the patient becomes unconscious due to this type of injuries. If this injury was caused during the riot and if the deceased did not fall into an immediate prolong coma as described by the JMO, the deceased would have shown some symptoms that he was not well and was not in good health. If the above injuries were caused during the riot as assumed by the affidavits of the 4<sup>th</sup> Respondent, the attending officer/s should have observed that the deceased was out of health and reported to the relevant officer/s. On the other hand, if the medical officer did the medical examination as per the section quoted above, the medical officer should have observed that the deceased was out of health. Thus, it is highly probable that, if the injuries were sustained during the riot, proper

medical attention was not given to the deceased until he was brought to the Mahara Prison.

At this juncture, it is pertinent to note the contents of the statement of Indrajith Udunuwara, Assistant Superintendent of Prison marked as R2 with the 1<sup>st</sup> affidavit filed on behalf of the 4<sup>th</sup> Respondent. In that statement relied by the Respondents, the said Assistant Superintendent of Prison had stated that, at the Anuradhapura Prison, while preparing to transfer prisoners to Mahara and Bogambara Prisons, he got the doctor of the prison hospital to treat the injured persons at the main gate. He also had stated that the injured who needed to be admitted to the hospital as per the recommendation of the doctor were admitted to the hospital. He further had revealed in that statement (R2) that he allowed taking police statements from all the suspects on a request made by the ASP Senarathna of Vavuniya Police. If entries relating to such medical examination in the doctor's journal or the police statements made at that time were submitted, it would have been the best evidence to show that the deceased was not in a situation that needed immediate medical care even when he was at Anuradhapura Prison or the deceased had sustained injuries before him being transferred from Anuradhapura.

Even if one assumes that it was not possible to do a medical examination before transferring from Vavuniya to Anuradhapura due to the riotous situation, non-production of the journal entries relating to medical examination done at Anuradhapura before transferring to Mahara gives rise to following assumptions.

1. That the said statement in R2 that proper medical attention was given before transferring to Mahara and Bogambara is false. As such, the prison authorities neglected to attend to the deceased prisoner as required by Section 46 and/or 66 of the Prison Ordinance, which sections are there to preserve the rights of the prisoners and their health. Such negligence amounts to inhuman or degrading treatment;  
or
2. That the result of such medical examination is not produced before this court because it is adverse to the interests of the respondents due to reasons such as follows;
  - (a) It reveals that the deceased was not in good health and needed immediate medical attention which the prison authorities failed to attend to which is indicative of inhuman or degrading treatment, or
  - (b) It reveals that the deceased was in good health, but the injuries were sustained after the removal from Anuradhapura prison which is indicative of torture, cruel and inhuman or degrading treatment or punishment after the incident of the riot.

If a police statement was taken at Anuradhapura prison as stated in said R2, it could have been tendered to show that the deceased was considerably in good health to make a police statement and he did not ask for medical attention. Non-production of such statement made to the police creates doubts

- a) as to the truthfulness of R2 and whether reference to making of such statements by the prisoners is a lie to cover up the true story and to

propose that no medical attention was needed by the deceased at Anuradhapura prison, and/or

- b) that if such statement exists, the production of such statement is adverse to the interests of the Respondents and supportive of the stance of the Petitioner.

Section 21 of the Prison ordinance provides that on the death of a prisoner the medical officer shall forthwith, among other things, record in writing the followings:

- (a) when the deceased was taken ill,
- (b) when the medical officer was first informed of the illness.
- (c) the nature of the disease
- (d) when the prisoner died etc.

Though such entries should have been with the 4<sup>th</sup> Respondent, they were not tendered to Courts. Such entries could have revealed when it was reported for the first time that the deceased was not well.

I think it is correct to have an adverse inference against the respondents due to the non - production of medical journals and entries maintained by the medical officers.

As per the Section 26 of the Prison Ordinance, the jailer shall give immediate notice of the death of a prisoner to the Magistrate having jurisdiction over the area and Section 37(1) of the Criminal Procedure Code among other things provides that when a person dies while in the custody of a prison, the officer in charge of the prisoner or the officer who had the custody of the

prisons shall forthwith give information to the Magistrate whose jurisdiction the body is found and the Magistrate shall view the body and hold an inquiry into the cause of death. Thus, the Magistrate of the area where the body is found has the power to hold an inquest with regard to death of a person who was under prison custody. As per the Post Mortem Report, the autopsy was done due to a request came from the Negombo Magistrate. As per the Journal Entry dated 18.02.2013 the learned Deputy Solicitor General who appeared that day had stated that the inquest proceedings would be submitted to this Court in due course. For the reasons best known to the State and the 8th Respondent, it has not been tendered to this Court. Thus, this court is devoid of the advantage of perusing the proceedings of an inquiry held before an impartial officer. As the inquest proceedings are not in the possession of the Respondents, I do not intend to make any adverse inference for not producing the inquest proceedings.

Facts and material placed before this court establish that the deceased who was the son of the petitioner was handed over to prison by the C I D in good health. After about four months, he died at Ragama hospital while in the custody of the prison. Among the causes of death were head injuries. The deceased also had two fractures, one in the left ulna and the other in the zygomatic bone on the right side of the face. There was a contusion on the forehead. In addition, the Injuries Nos.2,3,6,7 and 20 would have been sustained while the deceased was in Prison custody. The above are not injuries caused by natural causes. The Respondents have not taken a stance that they were caused by an accident. Thus, the injuries confirm that the deceased was assaulted while in prison custody. Those facts prima facie

establish a case of torture, cruel and inhuman and degrading treatment caused while in the prison custody unless there is an acceptable explanation by the prison authorities that the assault was needed for a reason such as the maintenance of discipline and law & order within the prison premises or among prisoners. The explanation given is that the injuries would have been caused during a riot that took place on 29.06.2012 at Vavuniya prison. This explanation only suggests how and when it happened but does not give a definite explanation as to how and when the injuries were inflicted since it does not exclude the possibility of sustaining injuries after the riot. It should be noted that the circumstances, incidents and background that caused the injuries are within the exclusive knowledge of the prison authorities and not with the petitioner. The petitioner may not know even who were the other inmates at the time the assault took place and when and where it took place. As such it is up to the prison authorities to establish those circumstances. If the assault had taken place after the riot was quelled, it amounts to torture, cruel and inhuman and degrading treatment or punishment. If it took place during the riot, the issue is whether the prison authorities took steps to give proper and timely medical treatment to the injuries caused during the actions taken to control the riot. If the entries made by medical officers, which should be with the Respondents, were produced such entries could have clearly exposed the medical condition of the deceased prior to him being transferred to Mahara Prison. Non-production of such entries has to be considered against the Respondents.

As per the Post Mortem Report, 'Defuse Axonal Injuries of the Brain' describe a condition characterised by immediate prolonged coma. Thus, I am of the

view it is highly probable that the prison authorities should have observed that the deceased was in a condition that required immediate medical attention before he was brought to the Mahara Prison if the assault took place at the riot in Vavuniya Prison. The fractures and the external injuries on the forehead should have taken the attention of the medical officers before he was transferred to Mahara Prison and even the attendant prison officers would have observed the medical condition of the deceased before he was transferred to Mahara Prison If the injuries were inflicted during the riot. As such, it is my considered view that the prison neglected to give proper and timely medical treatment and attention if the injuries were caused during the riot. Not attending to the medical needs of a prison inmate by the relevant prison officers, amount to cruel & inhuman and degrading treatment.

It is true that there is no evidence to say that the named Respondents in the caption are directly involved in the infringement, but it is clear that the infringement took place and the State is liable. Not naming the exact officer or officers involved in the infringement as respondents is not a bar to grant relief since the relief is principally granted against the State. {vide **Gunawardena V. Perera (1983) 1SLR 305, Mariyadas Raj v Attorney General FRD (2) 397, Vivienne Goonewardena v. Perera FRD (2) 426}**}

The Petitioner has stated that the deceased victim, the Petitioner and his family members have suffered immense mental agony and loss by the torture and the death of the deceased victim, his son in violation of rights guaranteed under Article 11 of the Constitution. I also observe that there is

no specific denial of the allegations made under paragraph 19 of the petition and the corresponding paragraph in the affidavit of the Petitioner.

The counsel for the Petitioner in his written submissions has dealt with denial of timely medical care which I cannot recollect him emphasizing during the oral submissions but the state was given a time to file written submissions in reply after four weeks from the date given to file written submissions of the Petitioner. No written submissions were filed by the Respondents. —Vide Journal Entries dated 31.01.2019,15.02.2019 and 22.03.2019.

Therefore, I hold that rights granted under Article 11 were infringed by the officers of the State and order to pay Rs. 200000/= as compensation to the Petitioner.

Had any assault taken place after the riot was controlled it may constitute a serious criminal offence since it caused the death of a prisoner at the end. Entries made by the relevant medical officers should provide necessary information in this respect. Thus, I bring the attention of the 5<sup>th</sup> and 8<sup>th</sup> respondents as it is within their scope to hold necessary investigations.

.....

E.A.G.R. Amarasekara J.

Judge of the Supreme Court.

