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

In the matter of an application in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No. 233/2018

1. H. M. Punchimenike

2. S. H. M. Sumanawathi Menike

Both at Moragolla, Nagollagoda.

PETITIONERS

vs.

1. D. M. Bandula Saman Dissanayake,
Maginpitiya Road,
Dandagamuwa.

2. I. M. Premaratne,
Hikokadawala,
Mahama.

3. K. Wasantha Kumara,
C-45, Saman Uyana,
Mawathagama.

4. R. M. Saman Hemantha Rathnayake,
Ihalakagama, Nikaweratiya.

5. W. M. G. K. G. Aruna Weerakoon,
No. 76, Ihalagama,
Mihigamuwa.

6. H. M. Danushka Buddhi Prabha Ranasinghe,
No. 38/1, Katulanda,
Akaragama.

1st – 6th Respondents at
Excise Department, Kuliyapitiya.

7. Commissioner General of Excise,
Excise Department,
No. 353, Kotte Road,
Rajagiriya.

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

RESPONDENTS

Before: **Jayantha Jayasuriya, PC, CJ**
Murdu N. B. Fernando, PC, J
Arjuna Obeyesekere, J

Counsel: Ms. Thilini Vidanagamage for the Petitioners

J. M. Wijebandara for the 1st – 6th Respondents

Sajith Bandara, State Counsel for the 7th and 8th Respondents

Argued on: 9th January 2023 and 27th March 2023

Written Submissions: Tendered by the Petitioners on 2nd February 2021 and 14th June 2023

Tendered by the 1st – 6th Respondents on 26th May 2020

Tendered by the 7th and 8th Respondents on 10th May 2021

Decided on: 4th October 2023

Obeyesekere, J

The 1st Petitioner and her daughter, the 2nd Petitioner, filed this application on 19th July 2018 alleging that their fundamental rights guaranteed by Articles 11, 12(1), 12(2), 13(1), 13(2) and 13(5) of the Constitution have been infringed by the 1st – 6th Respondents [the Respondents], who are officers of the Excise Department, by their actions in a series of incidents that occurred on 19th December 2017. Leave to proceed was granted on 2nd November 2018 but only in respect of the alleged infringement of the 2nd Petitioner's fundamental rights guaranteed by Article 11.

Although this application has been filed seven months after the alleged infringement, the Petitioners have filed a complaint with the Human Rights Commission of Sri Lanka the day after the occurrence of the incidents complained of. Article 126(2) of the Constitution stipulates that an application must be filed within one month of the alleged infringement, and on the face of it, it is clear that the Petitioners have not complied with such requirement. However, Section 13(1) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 provides that, *"Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."* The learned Counsel for the Respondents did not raise any objection with regard to the maintainability of this application for non-compliance with the provisions of Article 126(2) probably in view of the said provision and for that reason, the necessity for this Court to go into the issue of time bar or whether Section 13(1) applies to this application, does not arise.

<u>The complaint of the 2nd Petitioner – the first stage</u>

The incidents complained of by the 2nd Petitioner took place during two stages on 19th December 2017. The first was at the boutique operated by the 1st Petitioner and the sister of the 2nd Petitioner, Damayanthi. The second was at the office of the Excise Department at Kuliyapitiya.

The Petitioners state that the 1st Petitioner, who was 70 years old at the time of the alleged incident, is carrying on a small boutique at her residence situated in Nagollagoda together with Damayanthi. The 2nd Petitioner lives approximately 300 metres away, together with her husband and two children. The 2nd Petitioner states that at about 9.45am on 19th December 2017, she had walked across to the said boutique to "*purchase*" breakfast for herself, despite this being *her own mother's boutique*, when at about this time, a group of six persons – i.e., the Respondents – arrived at the boutique in a blue pick-up lorry. The Petitioners claim that while one of the group was dressed in what appeared to be a Police uniform, the manner in which these individuals conducted themselves and the repeated references they made to

kasippu gave rise to a reasonable apprehension on their part that the said individuals were from the Excise Department.

The Petitioners state that the Respondents had thereafter suggested to the 2nd Petitioner that she consent to criminal charges being filed against her for possession of *kasippu* on the assurance that any action to be filed in a Court of law can be amicably resolved by the 2nd Petitioner pleading guilty to such charge and paying a fine. The 2nd Petitioner claims that as neither she nor her mother agreed to the suggested course of action, the Respondents had become aggressive and attempted to assault her sister, Damayanthi. The 2nd Petitioner had intervened only to have been slapped by the officer who was dressed in what appeared to be Police uniform. The 2nd Petitioner admits that she had then held onto the said officer to prevent herself from falling to the ground and claims that thereafter the other officers had dragged her out of the boutique and across the garden's gravel driveway and forced her into the back of the lorry, in the process of which, the draped cloth that she was wearing had come off.

The Petitioners claim that the 1st Petitioner too had been assaulted by the officer in uniform when she pleaded with the officers not to arrest the 2nd Petitioner. The 2nd Petitioner claims further that she was manhandled by the Respondents, who were all male, whilst being shouted at in obscene language in the presence of several villagers who had gathered by then, and that this caused her intense emotional suffering and humiliation. This is the first and the most critical stage of the incidents complained of by the 2nd Petitioner, as the alleged assault and the subsequent dragging of the 2nd Petitioner out of the boutique, across the gravel driveway and into the lorry, as well as the witnessing of these incidents by the other villagers, took place during this stage. The Petitioners have submitted three video recordings marked P1a, to which I shall advert to later, which the Petitioners claim support the 2nd Petitioner's position.

<u>The complaint of the 2nd Petitioner – the second stage</u>

The 2nd Petitioner states that she was thereafter taken to the office of the Excise Department at Kuliyapitiya, where the second stage of the incidents complained of took place, with the 2nd Petitioner once again being urged to agree to charges being framed against her and that the fine would be paid by the Respondents. The 2nd Petitioner states that she was surrounded by approximately ten officers, including the Respondents, and had been threatened by them as she had refused to comply with

the said suggestion. The 2nd Petitioner states further that there were no female officers present at the time.

The 2nd Petitioner had thereafter been taken to the Bingiriya Police Station where it transpired that her sister Damayanthi had already lodged a complaint against the said Respondents. A copy of this complaint has however not been placed before this Court. The 2nd Petitioner had thereafter been taken to the Hettipola Police Station and had later been produced before the Acting Magistrate at about 6.30pm that day, at a place situated on the Kuliyapitiya – Hettipola main road and thereafter enlarged on bail. As adverted to earlier, the 2nd Petitioner states that she lodged a complaint with the Human Rights Commission the next day and has produced two letters dated 10th January 2018 [P7b] and 23rd January 2018 [P7a] issued by the Human Rights Commission acknowledging receipt of the said complaint and informing the 2nd Petitioner that the said complaint has been referred for further investigation. The 2nd Petitioner has however failed to produce a copy of the said complaint nor has she made an effort to apprise this Court of the status of that inquiry, although this application and the counter affidavit were filed well after P7a and P7b had been issued.

Medical treatment

The 2nd Petitioner states further that as she was feeling unwell and due to several aches and pains following the alleged assault, she sought medical treatment the day after the incident. She had initially visited the Bingiriya Hospital but due to the lack of resources at Bingiriya, she had visited the General Hospital, Chilaw, where she had received in-house treatment for one day. According to the entry card P3a, the 2nd Petitioner had complained of an impact on her left eye, headache, dizziness and pain on the right side of the chest. No injuries suggestive of the 2nd Petitioner having been dragged along the ground or of any assault or for that matter, indicative of there having been a scuffle, have been noted. Although in the prayer to this application, the Petitioners had prayed for a direction on the Medical Superintendent of the General Hospital, Chilaw to produce the bed head ticket and other medical records pertaining to the 2nd Petitioner's medical condition and the treatment carried out on her, the Petitioners have not pursued the said prayer. As a result, there is no medical evidence of any injuries caused to the 2nd Petitioner to support her version of the incident.

Version of the Respondents

The Respondents admit that they were attached to the Kuliyapitiya office of the Excise Department. They state that they left the office at about 7.40am that morning to carry out a detection of illicit alcohol and that on their return, the 2nd Respondent received information that Ranasinghe Bandara, the husband of the 2nd Petitioner, had stored barrels of *kasippu* for sale at the 1st Petitioner's boutique. The Respondents state that both Petitioners as well as Ranasinghe have previously been convicted for possession and sale of illegal alcohol, a fact which had not been disclosed in the petition, but which gives context to the arrival of the Respondents at the boutique that morning, as well as to their version of the events that transpired thereafter. The Respondents have tendered to this Court the case records pertaining to seven cases where the 2nd Petitioner had been charged for the possession and sale of illegal alcohol during the period 2012 – 2017 and where the 2nd Petitioner had pleaded guilty on each occasion.

I am mindful that any previous convictions of the 2nd Petitioner for similar offences are immaterial as far as the alleged violation of her fundamental rights are concerned, for as stated in **Amal Sudath Silva v Kodituwakku, Inspector of Police and Others** [(1987) 2 Sri LR 119 at page 127], "*The petitioner may be a hard-core criminal whose tribe deserve no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our Constitution*."

However, it must be noted that, (a) the 2nd Petitioner had been charged in the Magistrate's Court for an incident that involved her being in possession of 15 litres of *kasippu* on 7th November 2017, which is just six weeks prior to the alleged incident, and (b) the detection that led to the filing of the above case had been carried out by the 2nd Respondent. This revelation cannot escape the raising of a doubt in the 2nd Petitioner's version of events, in particular, that she did not know that the persons who arrived at the boutique were officers attached to the Excise Department, and that it is only the '*manner in which such individuals conducted themselves, and the repeated references to kasippu (that) engendered in them the reasonable apprehension that such individuals were all Excise Officers.*'

The version of the Respondents is that having received the abovementioned information, they had proceeded towards the said boutique, arriving there at about 10.05am. Having entered the boutique, they had seen the 2nd Petitioner with a container filled with a yellow colour liquid. The Respondents claim that the 2nd Petitioner had attempted to throw away the said liquid upon her seeing the Respondents, but had been prevented by the Respondents, who had thereafter proceeded to take the 2nd Petitioner into their custody. The Respondents claim that the detection of what was immediately perceived by them to be illicit alcohol had prompted the Petitioners and Damayanthi to behave in an aggressive manner towards them, which necessitated the Respondents using minimum force to compel the 2nd Petitioner to get into the lorry. The Respondents claim that the Petitioners as well as Damayanthi used abusive language on them and attempted to prevent them from discharging their duty.

The Respondents have denied assaulting the 2nd Petitioner, but claim that she resisted arrest and that as a result, they were compelled to use minimum force. While the Respondents have not elaborated on the minimum force they claim to have used, I wish to place emphasis on the cardinal rule of law enforcement that law enforcement officials should only use force in exceptional circumstances where no other option is available, and even then, no amount of force beyond that which is reasonably necessary under the circumstances, for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, can be used.

This position is reflected in, (a) the fundamental right of freedom from arbitrary arrest and detention, guaranteed to all persons, whether a citizen or not, by Article 13(1) of the Constitution, read with Section 23 of the Code of Criminal Procedure Act, No 15 of 1979 (as amended), and (b) the judgment in **Kumara v Silva, Sub-Inspector of Police, Welipenna and Others** [(2006) 2 Sri LR 236 at page 245] where Shirani Bandaranayake, J [as she then was] stated that *'It is not disputed that use of minimum force will be justified in the lawful exercise of police powers. However, the force used in effecting an arrest should be* ***proportionate*** *to the mischief it is intended to prevent.'* [emphasis added].

In her counter affidavit, the 2nd Petitioner contends that she was determined to turn a new leaf and hence had given up the brewing and sale of illicit alcohol, and that for

this reason, the allegation of the Respondents that she was found in possession of illicit alcohol at the said premises is false.

Çases filed in the Magistrate's Court

I must note that the incidents that occurred during the first stage on 19th December 2017 have given rise to three cases before the Magistrate's Court. The first is where the Excise Department has instituted action against the 2nd Petitioner for the possession of illicit alcohol, the second is where the Bingiriya Police has instituted action against the 2nd Petitioner for interfering with the duties of public officers and the third is the plaint filed by the Bingiriya Police against the 1st – 6th Respondents on the complaint of Damayanthi. While all three cases were pending at the time of the institution of this action, neither the Petitioners nor the Respondents have apprised this Court of the present status of these cases, which could have been useful in placing in context the facts relating to the present application. Be that as it may, this Court would only be adjudicating on whether the 2nd Petitioner's fundamental rights guaranteed by Article 11 have been infringed during the course of the incidents that are alleged to have occurred on 19th December 2017 and not on the merits of any of the above cases, which would be the function of the learned Magistrate.

Article 11 of the Constitution

It is clear that human dignity underpins the application of all fundamental rights, and is the fundamental virtue sought to be protected through the securement of fundamental rights and the Rule of Law, as demonstrated by the Svasti to our Constitution.

Prasanna Jayawardena, PC, J in **Ajith C. S. Perera v. Minister of Social Services and Social Welfare and Others** [(2019) 3 Sri LR 275 at page 300] mentioned " *… that it seems to me that* ***the concept of human dignity, which is the entitlement of every human being, is at the core of the fundamental rights enshrined in our Constitution.*** *It is a fountainhead from which these fundamental rights spring forth and array themselves in the Constitution, for the protection of all the people of the country. As Aharon Barak, former Chief Justice of Israel has commented [Human Dignity – The Constitutional Value and the Constitutional Right (2015)]:*

'Human dignity is the central argument for the existence of human rights. It is the rationale for them all. It is the justification for the existence of rights.' 'The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that united the human rights into one whole. It ensures the normative unity of human rights.'' [emphasis added]

In **Kandawalage Don Samantha Perera v Officer in Charge, Hettipola Police Station and Others** [SC (FR) Application No. 296/2014; SC Minutes of 16th June 2020] Thurairaja, PC, J referring to the above passage stated that, "*I am in respectful agreement with his Lordship that '**Human Dignity**' is a constitutional value that underpins the Fundamental Rights jurisdiction of the Supreme Court. I am of the view that 'Human Dignity' as a normative value should buttress and inform our decisions on Fundamental Rights*."

Article 11 provides that, "*No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"

In **Kumara v Silva, Sub-Inspector of Police, Welipenna and Others** [supra; at page 244] this Court noted that, "*Article 11 refers to torture separately from cruel, inhuman or degrading treatment or punishment similarly to Article 5 of the Universal Declaration of Human rights, Article 7 of the International Covenant on Civil and Political Rights as well as Article 3 of the European Convention which had referred to torture separately from inhuman, degrading treatment or punishment. The importance of the right to protection from torture has been further recognized and steps had been taken to give effect to the universally accepted safeguards by the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment signed in New York in 1984, which has been accepted in Sri Lanka by the enactment of Act No. 22 of 1994 on the Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*."

Chief Justice Sharvananda in his treatise, **Fundamental Rights in Sri Lanka (A Commentary)** [(1993) at page 69] has pointed out that, "*The fundamental nature of the right of freedom from torture or inhuman treatment is emphasized by the fact that **it is an absolute right subject to no restriction or derogation** under any condition, even in times of war, public danger or other emergency. This human right from cruel or*

inhumane treatment is vouched not only to citizens, but to all persons, whether citizens or not, irrespective of the question whether the victim is a hard-core, criminal or not." [emphasis added]

In **Velmurugu v Attorney General and Another** [(1981) 1 Sri LR 406 at page 453] Wanasundera, J stated as follows:

> "*Article 11 which gives protection from torture and ill-treatment has a number of features which distinguish it from the other fundamental rights. Its singularity lies in the fact that it is the only fundamental right that is entrenched in the Constitution in the sense that an amendment of this clause would need not only a two-thirds majority but also a Referendum. It is also the only right in the catalogue of rights set out in Chapter III that is of equal application to everybody and which is (sic) no way can be restricted or diminished. Whatever one may say of the other rights, this right undoubtedly occupies a preferred position.*
>
> *Having regard to its importance, its effect and consequences to society, it should rightly be singled out for special treatment. It is therefore the duty of this Court to give it full play and see that its provisions enjoy the maximum application*."

Atukorale, J in **Amal Sudath Silva v Kodituwakku Inspector of Police and Others** [supra; at page 126] held as follows:

> "*Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. It prohibits every person from inflicting torturesome, cruel or inhuman treatment on another. It is an* ***absolute*** *fundamental right subject to* ***no restrictions or limitations*** *whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee."* [emphasis added]

Although said in the context of Police officers, the following passage by Atukorale, J is equally applicable to this application:

> *"Constitutional safeguards are generally directed against the State and its organs. The police force, being an organ of the State, is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict*

the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to others, irrespective of their ***standing****, their* ***beliefs*** *or* ***antecedents****. It is therefore the duty of this court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion*." [emphasis added]

In **Mrs W M K De Silva v Chairman, Ceylon Fertilizer Corporation** [(1989) 2 Sri LR 393 at page 403], Amerasinghe, J opined that "… *the torture or cruel, inhuman or degrading treatment or punishment contemplated in Article 11 of our Constitution is not confined to the realm of physical violence*" and "… *would embrace the sphere of the soul or mind, as well*."

Amerasinghe, J went onto state at page 405 that:

"*In my view Article 11 of the Constitution prohibits any act by which severe pain or suffering, whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person (whom I shall refer to as 'the victim') by a public official acting in the discharge of his executive or administrative duties or under colour of office, for such purposes as obtaining from the victim or a third person a confession or information, such information being actually or supposedly required for official purposes, imposing a penalty upon the victim for an offence or breach or a rule he or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person to do or refrain from doing something which the official concerned believes the victim or the third person ought to do or refrain from doing, as the case may be.*"

However, as pointed out by A.R.B. Amerasinghe in **Our Fundamental Rights of Personal Security and Physical Liberty** [(1995) Sarvodaya – at page 37], "*Torture, cruel, inhuman degrading treatment or punishment may take many forms, psychological and physical, but whether the relevant criteria have been satisfied must depend on the circumstances of each case.*"

Of the three general observations made by Amerasinghe, J in **Channa Pieris and Others v Attorney General and Others (Ratawesi Peramuna Case)** [(1994) 1 Sri LR 1 at page 105] with regard to an Article 11 infringement, the first was that "… *the acts or conduct complained of must be qualitatively of a kind that the Court can take cognizance of*." At page 106, Amerasinghe, J further noted that where physical harm is concerned, a long line of cases have adopted the criteria set out in **Mrs W M K De Silva v Chairman, Ceylon Fertilizer Corporation** [supra; at page 401], where it was held that for there to be an Article 11 infringement the degree of mental or physical coerciveness or viciousness must be such as to occasion not mere ill-treatment, but maltreatment of a very high degree. This has been emphasised in **Our Fundamental Rights of Personal Security and Physical Liberty** [supra; at page 29], where the author states that, "'*Torture' implies that the suffering occasioned must be of a particular intensity or cruelty. In order that ill-treatment may be regarded as inhuman or degrading it must be 'severe'. There must be the attainment of a 'minimum level of severity'. There must (be) the crossing of the 'threshold' set by the prohibition. There must be an attainment of 'the seriousness of treatment envisaged by the prohibition in order to sustain a case based on torture or inhuman or degrading treatment or punishment.*"

Accordingly, in determining whether Article 11 has been infringed, this Court will consider whether the level of 'intensity', 'cruelty' and 'severity' of suffering implied by and inherent to the notion of 'torture' and 'inhuman', and 'degrading' treatment has been satisfied.

The position is therefore clear. Every human being is entitled to live with dignity and not be subject to any torture or cruel, inhuman or degrading treatment or punishment. It is the duty of this Court, as the guardian of the fundamental rights of our People, to foster and protect these rights. Whenever a complaint alleging the infringement of Article 11 is made to this Court, it is our duty to examine thoroughly the facts relating to such complaint, the corroborative evidence, if any, tendered by the Petitioner in support of such complaint, the version of the Respondents and arrive at a considered decision.

Standard of proof that must be satisfied

I shall now turn to the standard of proof that a Petitioner who alleges an infringement of Article 11 must discharge.

In **Goonewardene v Perera** [(1983) 1 Sri LR 305 at page 313], Soza, J observed thus:

> "*Before I deal with the facts a word about the burden of proof. There can be no doubt that the burden is on the petitioner to establish the facts on which she invites the court to grant her the relief she seeks. This leads to the next question. What is the standard of proof expected of her? Wanasundera, J. considered the question in the case of Velmurugu v. The Attorney-General and another and held that the standard of proof that is required in cases filed under Article 126 of the Constitution for infringement of fundamental rights is proof by a preponderance of probabilities as in a civil case and not proof beyond reasonable doubt. I agree with Wanasundera, J. that the standard of proof should be preponderance of probabilities as in a civil case. It is generally accepted that within this standard there could be varying degrees of probability. The degree of probability required should be commensurate with the gravity of the allegation sought to be proved. This court when called upon to determine questions of infringement of fundamental rights will insist on a high degree of probability as for instance a court having to decide a question of fraud in a civil suit would.* ***The conscience of the court must be satisfied that there has been an infringement***." [emphasis added]

Wimalaratne, J In **Kapugeekiyana v Hettiarachchi and Others** [(1984) 2 Sri LR 153 at page 165] stated that, "*In deciding whether any particular fundamental right has been infringed I would apply the test laid down in Velmurugu that the civil, and not the criminal standard of persuasion applies, with this observation, that the nature and gravity of an issue must necessarily determine the manner of attaining reasonable satisfaction of the truth of that issue.*"

In **Channa Pieris and Others v Attorney General and Others (Ratawesi Peramuna Case)** [supra; at page 107], referring to the third general observation made with regard to an Article 11 infringement, Amerasinghe, J stated as follows:

"*… 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 or punishment****; and unless the Petitioner has adduced sufficient evidence to satisfy the Court that an act in violation of Article 11 took place, it will not make a declaration that (a violation of) Article 11 of the Constitution did take place.*" [emphasis added]

(…)

"*Would 'the* ***guarded discretion of a reasonable and just man*** *lead him to the conclusion'? is the* ***test*** *I would apply in deciding the matter. If I am in real and substantial doubt, that is if there is a degree of doubt that would prevent a reasonable and just man from coming to the conclusion, I would hold that the allegation has not been established."* [emphasis added]

Similar sentiments were expressed by my sister, Murdu N. B. Fernando, PC, J in **Ratnayaka Weerakoonge Sandya Kumari v Weerasinghe, Sub Inspector of Police** [SC (FR) Application No. 75/2012; SC minutes of 18th December 2019 at page 10] where, having considered the above cases, it was concluded that, "*The foregoing judicial decisions of this Court has clearly identified and laid down that a high degree of certainty is required before the balance of probability would tilt in favour of a petitioner endeavoring to discharge the burden of proof with regard to an allegation of torture or cruel, inhuman or degrading treatment*."

In **Edward Sivalingam v Sub Inspector Jayasekara & Others** (SC (FR) Application No. 326/2008; SC minutes of 10th November 2010), which has been referred to with approval by Shiran Gooneratne, J in **Kumarihami v Officer-in-Charge, Mahiyanganaya Police Station and Others** [(2021) 2 Sri LR 464 at page 469], Tilakawardane, J held that, "*When considering the allegations made by the Petitioner against officers of the CID it is important to bear in mind that the burden of proving these allegations lies with the Petitioner. This court has held repeatedly that the standard required is not proof beyond reasonable doubt but must be of a higher threshold than mere satisfaction. The standard of proof employed is on a balance of probabilities test and as such must*

have a high degree of probability and ***where corroborative evidence is not available it would depend on the testimonial creditworthiness of the Petitioner***." [emphasis added]

Amerasinghe, J however added a word of caution in **Samanthilaka v Ernest Perera** [(1990) 1 Sri LR 318; at page 319], which he reiterated in **Channa Pieris and Others v Attorney-General and Others (Ratawesi Peramuna Case)** [supra; at page 108], when he stated that he is conscious of the difficulties faced by a petitioner in proving allegations of torture and that therefore, due regard must be had to the circumstances of the particular case so as not to impose an undue burden on a petitioner, and thereby impede access to justice. As correctly acknowledged in **Weerasinghe v Premaratne, Police Sergeant and Others** [(1998) 1 Sri LR 127 at page 133], this Court must also be alert to the tendency of State officials to act in an '*esprit de corps*' in protecting their own and covering up their wrongs, such as through falsified medical reports and police records.

Thus, while the burden of proof of establishing allegations of torture or cruel, inhuman or degrading treatment or punishment shall remain with a petitioner to be satisfied on a balance of probability with a high degree of certainty, the Court must be guided by the facts of the particular case and the difficulties and disadvantages that a petitioner could face in proving such allegations.

Allegations of the 2nd Petitioner – revisited

It is in the above factual and legal background that I must consider the several complaints of the 2nd Petitioner and determine whether the 2nd Petitioner has proved that the Respondents committed any act amounting to an infringement of her fundamental rights guaranteed by Article 11.

In her affidavit, the 2nd Petitioner has made four allegations of which three took place during stage one, at the premises of the boutique. The first is the physical assault, including a slap across her face and her being dragged along the ground. The second is the humiliation she suffered in front of the villagers who had gathered and the abusive language used on her. The third is her draped cloth being ripped off her as she was dragged out of the boutique and into the lorry. The fourth is the intimidation and

threats made to her at the Excise Department office at Kuliyapitiya, which took place during stage two.

The 2nd Petitioner has lodged a complaint with the Human Rights Commission on the day after the incident, as borne out by the acknowledgment issued – vide P7a – but she has failed to produce a copy of the said complaint before this Court. The 2nd Petitioner has also made a complaint on the same date to the Bingiriya Police Station and on the strength of which, the Bingiriya Police has filed the 'B' report P6. The 2nd Petitioner has neglected to tender a copy of this complaint as well. The 2nd Petitioner has stated further that the Police Post at the General Hospital, Chilaw recorded a statement from her, but this statement has also not been tendered. The 2nd Petitioner had additionally sent a complaint on the day after the incident to the Minister under whose purview the Excise Department functioned at the time and on the strength of which, an inquiry was held by the Excise Department. Regrettably, a copy of this complaint too has not been tendered. In my view, these four complaints / statements could have served as contemporaneous evidence of the incidents that took place on 19th December 2017 and would have shed more light on what actually transpired, especially since this application has been filed seven months after the occurrence of the alleged incidents. The failure to file the said complaints / statements before Court in an action filed to vindicate one's fundamental rights is difficult to comprehend given the enthusiasm with which the 2nd Petitioner invoked the law enforcement machinery soon after the occurrence of the said incidents. Such failure gives rise to a substantial doubt in my mind with regard to the testimonial creditworthiness of the 2nd Petitioner.

Affidavit of Damayanthi

The 2nd Petitioner has tendered affidavits of two others to support her version. The first is that of her sister, Damayanthi, and the second is that of one Lekamlage Dayaratne who claims he was at a nearby bus halt and saw the incident at the boutique. The Petitioners have not produced statements or affidavits from the villagers who are said to have gathered and witnessed the incidents that took place at the boutique on 19th December 2017, and therefore the allegation that they were humiliated in front of the villagers has not been substantiated.

I approach with caution the affidavit of Damayanthi, who, being the 2nd Petitioner's sister, is not a disinterested witness. Damayanthi has stated as follows in her affidavit signed on 24th July 2018:

"03. අපගේ පුදුමයට මෙන් සුරාබදු, නිලධාරීන් 06 දෙනෙකු පමණ එතනට කඩා වැදී මාගේ සොහොයුරිය හට පවසා සිටියේ සාපරාධී ක්‍රියාවක් පිළිබඳව නඩුවක් පැවරීමට කරුණු ඉල්ලා සිටියද, එකී කරුණු කුමක්දැයි කියා ඔවුන් විසින් ඇයට පැවසුවේ නැත.

04. ඉහත අංක 02 ජේදයේ සඳහන් පරිදි එය ප්‍රතික්ෂේප කළ බැවින් 2017.12.19 වන දින උදේ 10.30 ට පමණ එකී නිලධාරීන් පිරිස විසින් මට පහර දීමට උත්සහ කරන විට මාගේ සොහොයුරිය එය වැළැක්වීමට උත්සාහ කළ විටදී **එකී නිළධාරීන් විසින් ඇය හට පහර දෙන ලදී.** ඔවුන් විසින් ඇයගේ වම් කම්මුලට අතුල් පහරක්ද දෙන ලදී. එවිට ඇය බිමට ඇද වැටුණි. **එවිට එකී සියළුම නිලදාරීන් විසින් ඇයට අමානුෂික ලෙස පහර දී ඇයව අප වෙළඳසැලෙන් එළියට ඇදගෙන විත් බිම දිගේ නැවත ඇදගෙන ගොස්** අත්අඩංගුවට ගන්නා ලදී. **මෙම හේතුවෙන් ඇයගේ ඇඳුම් ඉතා අධික ලෙස ඉරී තිබුණි.** ඉන්පසු ඔවුන් විසින් ඇයව නිල් පැහැති කැබ් රථයකට ඇද දමා කුලියාපිටිය සුරාබදු කාර්යාලයට රැගෙන යන ලදී.

05. මෙම සිද්ධිය අපගේ අසල්වාසින් විසින්ද දක්නා ලදුව, සොයුරියගේ ඇඳුම්ද බරපතල ලෙස ඉරී ගොස් තිබුණි. තවද, එකී නිලධාරීන් විසින් අපට පරුෂ වචනයෙන් ඉතා නින්දිත ලෙස බැණ වැදිනි. නමුත් අපට ඇයව බේරා ගැනීමට නොහැකි විය.

07. කිසිම හේතුවක් නොමැතිව එකී සුරාබදු, නිලධාරීන් විසින් සිදු කරන ලද මෙම මිලේච්ඡ පහර දීම පිලිබඳව මා විසින් බිංගිරිය පොලිස් ස්ථානයට ගොස් අංක බී 852/17 යටතේ පැමිණිල්ලක්ද සිදු කරන ලදී. ඒ අනුව පුද්ගලයන් භයදෙනෙක් මේ දක්වා අත්අඩංගුවට ගෙන ඇත."

Neither the 2nd Petitioner nor Damayanthi have produced photographs of the draped cloth that the 2nd Petitioner was said to have been wearing on the said date to prove the assertion that her clothing had been torn, thus embarrassing her in front of the villagers who had gathered at the scene. Furthermore, as I have previously noted, a copy of the complaint that Damayanthi claims she made to the Bingiriya Police Station in Case No. B 852/2017 has not been tendered to this Court, even though the 'B' report P6 itself has been tendered by the Petitioners. Once again, the contents of this complaint could have served as contemporaneous evidence of Damayanthi's version to this Court. It would also be pertinent to note that Damayanthi failed to appear at the inquiry conducted by the Excise Department on the complaint made by the 2nd Petitioner. Thus, Damayanthi's version is also replete with infirmities and therefore it may not be safe to rely on her evidence.

Affidavit of Dayaratne

I must nonetheless consider if the allegations of brutal assault that Damayanthi claims the 2nd Petitioner was subjected to, can yet be established. In that regard, there are two matters that I must consider. The first is the affidavit of Lekamlage Dayaratne, which had only been tendered with the counter affidavit of the 2nd Petitioner, although it had been affirmed one month prior to the filing of this application and was available to the Petitioners at the time this application was filed.

In his affidavit, Dayaratne has stated as follows:

"02. මා ඉහත ලිපිනයේ පදිංචිව සිටින අතර, වර්ෂ 2017.12.19 වන දින පෙ. ව. 09.00 ට පමණ මා සුරියහෙට්ට මුදියන්සේලාගේ මල්ලිකා දමයන්ති යන අයට අයත් වෙළඳසැල අසල පිහිට බස් හෝල්ට් එකේ සිටින විට නිල්පාට කැබ් රථයක් පැමිණ එකී වෙළඳසැල ඉදිරිපිට නවත්වා නිල ඇඳුමෙන් සැරසි සිට නිලධාරියෙකු ඇතුළු කිහිප දෙනෙකු බැස එකී වෙළඳසැල ඇතුලට ගිය බවත් මා කියා සිටිමි.

03. ඉන්පසු එකී වෙළඳසැල ඇතුලෙන් ගැහැණු පිරිසක් ගහන්න එපා යනුවෙන් කෑගසන ශබ්දයක් ඇසි මා වෙළඳසැල ඉදිරිපිටට පැමිණ බලන විට සුරියහෙට්ට මුදියන්සේලාගේ සුමනාවති මැණිකේ යන අයට කැබ් රථයෙන් පැමිණි නිලධාරියෙකු සහ තවත් කිහිප දෙනෙකු **පහර දුන් අතර ඇයගේ කෙස් වලින් අල්ලා ඇදගෙන ඇයව එකී කැබ් රථය තුළට දැමූ බව මා දුටුව බවත් එසේ ඇදගෙන යන අවස්ථාවේ දී ඇයගේ ඇඳුම් ද ගැලවී තිබූ බවත්** මා ප්‍රකාශ කර සිටිමි.

04. එසේ ඇයව ඇදගෙන යන අවස්ථාවේ දී **අසල තිබූ කණුවක ආධාරයෙන් ඇය එම නිලධාරීන්ගෙන් බේරීමට උත්සහ ගත් බව මා දුටු බවත් නමුත් එම අය ඇයට පහර දී** ඇයව එකී කැබ් රථයට දැමූ බවත් මා කියා සිටිමි. "

No explanation has been tendered by either Dayaratne or the Petitioners with regard to the following:

(a) Whether Dayaratne lives close by to the said boutique, which in turn would have explained his presence at the bus halt at the time of the incident at the boutique;

(b) Whether the 2nd Petitioner is someone who was previously known to him and if so, in what way, especially since he has referred to the 2nd Petitioner by her full name; and

(c) Whether he made a statement to the Bingiriya Police as to what he witnessed that day at the boutique.

While the affidavit of Dayaratne contains the above infirmities, his version also appears to be an exaggeration of what took place, as neither the 2nd Petitioner nor Damayanthi refer to the 2nd Petitioner having been dragged by her hair or the 2nd Petitioner holding on to a post to prevent herself from being dragged by the Respondents. Perhaps these matters could well have been addressed had the Petitioners disclosed to this Court the complaints / statements made to the Human Rights Commission, the Bingiriya Police or at the Police Post at the Chilaw Hospital. Thus, in light of these observations, I am of the view that this Court cannot place much reliance on the affidavit of Dayaratne, either.

Medical evidence

The second matter that I wish to consider in examining if the allegations of brutal assault have been established, is the availability of medical evidence. Before I do so however, I wish to emphasise that there may be instances where medical evidence is not available and therefore it would not be reasonable for this Court to insist upon medical evidence. In fact, in **Ansalin Fernando v Sarath Perera, Officer-in-Charge, Police Station, Chilaw** [(1992) 1 Sri LR 411 at page 419], Kulatunga, J pointed out that, "*Whilst I shall not accept each and every allegation of assault/ill-treatment against the police unless it is supported by cogent evidence I do not consider it proper to reject such an allegation merely because the police deny it or because the aggrieved party cannot produce medical evidence of injuries. Whether any particular treatment is violative of Article 11 of the Constitution would depend on the facts of each case. The allegation can be established even in the absence of medically supported injuries."* Although from a practical point of view, it may be that only medical evidence could afford corroboration, as noted by Dheeraratne, J in **Weerasinghe v Premaratne, Police Sergeant and Others** [supra; at page 134], the facts and circumstances may be such that '*One does not require medical evidence to prove the intensity of the pain which would have been caused to the body of a person (…)*'.

The 2nd Petitioner states that she sought medical assistance the very next day after the incident. As I have already stated, what has been produced are (a) the entry card [P3a] which only sets out the history given by the 2nd Petitioner– i.e., assault by a gang of people, impact and pain on the left eye, headache, dizziness and right side chest pain, and, (b) the requisition for an X-ray examination [P3b]. The Medical Officer who examined the 2nd Petitioner has not mentioned in P3a whether the 2nd Petitioner had any injuries on her body arising from the brutal assault that Damayanthi claims the 2nd

Petitioner was subjected to. Although the Petitioners have pleaded in the prayer to the application that a copy of the bed head ticket, the treatment sheet and the medical reports in respect of the 2nd Petitioner be called for from the Medical Superintendent, General Hospital, Chilaw, the Petitioners have not pursued this prayer. Yet again, this lacuna may have been overcome, at least to some extent, had the 2nd Petitioner produced the four complaints / statements that she made on 20th December 2017, where she may have referred to the assault and the injuries she alleges she sustained as a result of the incidents that took place the day before. The failure to produce any form of medical evidence to support the allegation of assault or take meaningful steps to procure such material, in spite of the 2nd Petitioner claiming that such material is available is a cause for concern.

Video evidence

This brings me to the final item of evidence tendered by the Petitioners with regard to the incidents that occurred during stage one, namely, the three video clips that have been produced with the petition, marked P1a. I have watched them carefully, but did not observe (a) any assault of the 2nd Petitioner, (b) any indication of the 2nd Petitioner being dragged along the ground, (c) the 2nd Petitioner being held by her hair, or (d) the cloth worn by the 2nd Petitioner being torn or coming off her in the process. What I did observe however, was the 1st Petitioner's abusive threats to the Respondents and the officer in uniform slapping the 1st Petitioner. As mentioned at the outset, leave has not been granted in respect of the alleged infringement of the 1st Petitioner's fundamental rights guaranteed by Article 11 and therefore I will proceed no further in this regard. I do however wish to firmly state that this amply documented aggression at the hands of a public servant is in no way condoned by this Court.

What is left to be considered is whether the 2nd Petitioner has established that the Respondents subjected her to humiliation and intimidation at the Excise Department office at Kuliyapitiya. While, as already acknowledged, Article 11 includes mental, emotional and psychological suffering, I reiterate that such suffering must also be qualitatively of the kind that this Court can take cognizance of, and must thereafter be proved on a balance of probability with a high degree of certainty, all things considered. Answering this question attracts the same infirmities observed above, regarding the evidence placed before this Court. There is an abject lack of corroborative evidence in proof of humiliation, intimidation and threats amounting to an infringement of Article 11. Accordingly, I am of the view that the 2nd Petitioner has not proved her allegation with regard to the incidents that occurred during stage two.

Inquiry carried out by the Excise Department

For the sake of completeness, I must state that following the complaint made by the 2nd Petitioner to the Minister, the 7th Respondent, the Commissioner General of Excise had proceeded to hold an inquiry into the conduct of the 1st – 6th Respondents, especially with regard to the absence of a female officer during the raid. Pursuant to the recommendation of the Commissioner of Excise (Human Resources) who conducted the inquiry, the 1st – 5th Respondents have been issued with letters of warning [7R3(A) - 7R3(E)] that they must comply with the requirements of the relevant Circulars and Departmental Orders and ensure the presence of female officers when conducting raids.

Conclusion

Taking into consideration all of the above facts and circumstances, I am of the view that the 2nd Petitioner has failed to adduce sufficient evidence to satisfy this Court that her fundamental rights guaranteed by Article 11 of the Constitution have been infringed by the Respondents during either of the two stages. The acts complained of have not been sufficiently proved for this Court to take cognizance of as constituting torture or cruel, inhuman or degrading treatment.

This application is accordingly dismissed, without costs.

JUDGE OF THE SUPREME COURT

Jayantha Jayasuriya, PC, CJ

I agree.

CHIEF JUSTICE

Murdu N. B. Fernando, PC, J

I agree.

JUDGE OF THE SUPREME COURT