IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

In the matter of an application under and in terms of Article 126 of the Constitution.

SC FR 531/2012

Lakshika Dilani Kulathunga,
No.06, 1st Lane Galpotta Road,
Koswatte.

Petitioner

Vs.

1. Sisira,
Officer in Charge
Community Police Unit
police station
Kottawa.

2. Upali
Sub Inspector of Police
Acting Officer in Charge
police station
Kottawa.

3. Mr. Saliya de Silva
Senior Superintendent of Police
Nugegoda
Office of the Senior Superintend of Police
Mirihana.

4. Senapathi
Assistant Superintendent of Police
Homagama South
Office of the Assistant Superintend of Police
Homagama.

5. Inspector General of Police,
Sri Lanka Police Headquarters
Colombo 12.

6. Honorable Attorney General
Department of the Attorney General,
Colombo 12.

Respondents

Before	:	Jayantha Jayasuriya, PC, CJ Mahinda Samayawardhena, J Arjuna Obeyesekere, J.
Counsel	:	Upul Kumarapperuma with Ms. Udumbara Dasanayake, Ms. Radha Kuruwitabandara and Mr Shelly Gunaratne for the Petitioner. Nuwan Kodikara for the 1st and 2nd Respondents. G. Wakishta Arachchi SSC for Hon. Attorney General.
Written Submissions	:	04.10.2021 by the Petitioner
Filed on		27.09.2021 by the 1st and 2nd Respondents
Argued on	:	09.08.2021
Decided on	:	06.12.2021

Jayantha Jayasuriya, PC, CJ

The petitioner, a mother of a seven year old child at the time of the alleged incident has invoked the jurisdiction of this Court in terms of Article 126 of the Constitution. This Court has granted leave to proceed against 1st and 2nd respondents for the alleged infringements under Article 11, 12(1) and 13(1) of the Constitution.

1st and the 2nd respondents are named in the petition as Sisira, Officer in Charge, Community Police Unit, police station, Kottawa and Upali, Sub Inspector of Police, Acting Officer in Charge, police station Kottawa, respectively. Both these respondents filed objections and were

represented by Counsel. The 1st respondent in his affidavit dated 31st January 2013 identifies himself as "Kolom Muhandiramge Sisira", acting as a Development Assistant attached to Kottawa police station. The 2nd respondent in his affidavit dated 31st January 2013 identifies himself as "Dissanayake Mudiyanselage Upali Senerath Dissanayake", and admits that he was the Acting Officer in Charge of the Kottawa police station at the relevant time.

According to the petitioner, on or around 09th August 2012, around 5.00 pm she received a telephone call on her mobile phone. The said call had been originated from a mobile phone. The caller who identified himself as an officer attached to Kottawa police station had informed that the brother of the petitioner had been admitted to hospital after meeting with an accident. However, when the petitioner inquired about the condition of the brother, the caller proceeded to inquire in turn from the petitioner details such as places the brother frequently visits, the family background and his place of abode; without disclosing the condition of the person who was claimed to have been admitted to the hospital. Furthermore, the petitioner had been asked to come to Kottawa police station without proceeding to the hospital. At the same time, a relative of the petitioner had called and informed that she also received a telephone call from an officer attached to Kottawa police station asking for details of the petitioner's brother having informed that he had been hospitalized due to an accident. Simultaneously, the brother of the petitioner also had contacted her and informed that he had not met with an accident.

Having received this information, the petitioner had asked the caller who identified himself as an officer attached to the Kottawa police station as to the reason why she was questioned on the details of the brother. At that time the caller had asked her to come over to police station before 6.00 pm to get information about the brother. Despite the petitioner informed her difficulties to come over to the police station that evening, the caller had insisted that she should come over to the police station by 6.00 pm and any failure to do so would cause difficulties to her brother as well as to her family. The petitioner thereafter through fear, proceeded to the police station despite having had to pick her child from a child care centre by 5.30 pm. Her husband had been engaged with some prior business related commitments. At the police station the 1st respondent had identified himself as the person who called the petitioner.

When inquired, the 1st respondent had informed that a complaint of harassment had been made against the brother of the petitioner and demanded that he be produced forthwith. The petitioner's request for time till the following day had been denied and had been threatened with detention at the police station until the brother is produced. The 1st respondent had threatened

“මල්ලී පොලිසියට අරගෙන එනකල් අපි යන්න දෙන්නේ නැහැ. දන්නවනේ මේක පොලිසිය. මල්ලීව ගෙනාවේ නැත්නම් පස්සේ හුඟක් කරදර වෙන්න වෙයි.” Furthermore, the petitioner claims that she was subjected to humiliation and harassment due to the abusive conduct of a group of people who were present at the police station in the presence of the 1st respondent. The 1st respondent had demanded that the petitioner join with the said group of persons to go in search of her brother, in the police jeep. The petitioner claims that the 2nd respondent was present at the police station when these incidents took place.

While the aforesaid events were in progress, an attorney-at-law related to the petitioner arrived at the police station after being informed by the relative who informed the petitioner over the phone regarding the telephone call she received from the police station. When the said attorney-at-law inquired for the reason for the arrest and detention of the petitioner at the police station, respondents had claimed that the petitioner was at the police station on her own volition. When inquired whether there is any complaint against the petitioner, two respondents had said that there is no such complaint. Thereafter, the said attorney-at-law had taken the petitioner away from the Police station. At that stage the 2nd respondent is alleged to have remarked “පොලිසියට පාර්ටි දාගෙන එන එවුන්ගේ අඬු කඩලා දාන්න ඕනි. තවම කවුරුත් දන්නේ නැහැ පොලිසියේ තරම”. An affidavit of the said Attorney-at-Law is marked P3 and produced along with the petition and affidavit of the petitioner.

The 1st respondent admits that he was attached to the Kottawa police station and was acting as a Development Assistant. He further admits that he has no authority to arrest or detain any person but his duty was to refer complaints to inquiring police officers at the police station. This respondent sets out the details of a complaint received at the police station on 08.08.2012 relating to a receipt of nuisance telephone calls by a female person. In her complaint she had provided the number of the telephone from which these calls had originated. Furthermore, she had named the person whom the aforesaid telephone number belonged to. The 1st respondent thereafter explains that the said person denied making such nuisance calls and took up the position that his phone was handed over to a third party for repairs. The 1st respondent claims that he used a detailed telephone bill handed over by the said person (marked 1R6) and started calling different numbers recorded therein randomly. It is through this process he claims that he obtained the telephone number of the petitioner and thereafter called her to obtain further details about her brother, who is suspected to have made alleged nuisance calls.

However, it is pertinent to observe at this stage, that only one statement, among the material he had produced before this Court, predates the events relating to this application (ie the initial complaint marked 1R3). Two other statements (1R4 and 1R5) had been made on 10.08.2012 (the following day of the incident). None of these statements contain any material implicating the brother of the petitioner. It is the statements that had been recorded much later, namely on 25.09.2012, which reveals material implicating the brother of the petitioner; the statement marked 1R7 (the statement of the person in whose name the phone number used to make nuisance calls is registered) and another statement recorded on the same day (25 September 2012) reveal such material.

The 2nd respondent, admits that he was the Acting Officer in Charge of Kottawa police station at the relevant time. He further affirms that the 1st respondent was attached to Kottawa police station as a Development Assistant and the duty assigned to him was to "refer complaints to inquiring officers in the police station". Furthermore, the 1st respondent did not have any authority to arrest or detain a person, as affirmed by the 2nd respondent.

The 2nd respondent denies that he was present at the police station at the time the petitioner came over there, but says that he returned to the police station when the petitioner and the complainant were about to leave. However, he admits that it was in his presence, the 1st respondent informed the Attorney-at-Law, that the petitioner came over to the police station on her own and that she is waiting for the arrival of her brother. This respondent denies that they followed the petitioner and the attorney-at-law and made any utterance.

The 2nd respondent who also produced the information book extracts containing the statements recorded in relation to the complaint made two days prior to the principal incident relating to this application, marked 2R3, 2R4, 2R5 and 2R7 (which were produced marked 1R3, 1R4, 1R5 and 1R7 by the 1st respondent), affirms that he directed the 1st respondent to *"refer (this) matter for inquiry".*

When considering the material presented before this court by the two respondents, it is clear that the 1st respondent, who was attached to the police station in the capacity of a 'Development Assistant' did not have any authority to conduct investigations. The duty assigned to him was to *refer any complaints to officers who have the authority to conduct investigations.* However, the material presented before this court by the petitioner and the two respondents reveal that the 1st respondent had stepped outside the legal bounds of authority and had actively got involved in the investigation, to which he had no legal authority. It is difficult to comprehend, on what authority

he actively got involved in the investigation by contacting possible witnesses and suspects over the phone and questioning them on matters relating to the investigation. Even if the petitioner voluntarily came over to the police station as claimed by the 1st respondent, on what basis did he provide his personal phone number asking her to contact him when she reaches the police station? It appears that the 1st respondent arrogated to himself powers of a police officer and had got involved in the investigation, for reasons best known to him. He had acted arbitrarily, outside the scope of authority.

The 2nd respondent was the acting officer-in-charge of the Kottawa police station. In ***Ukwatta v Marasinghe and others*** [2011 BLR 120 at 129] this court had observed,

> "*Under the procedure established by law for the administration and discharge of duties of a police station, regulations have been gazetted under the Police Ordinance and the Code of Criminal Procedure Act and officer-in-charge of a police station is the Chief administrative officer. He is in charge of the entire police station and is personally responsible for over all functions of the police station"*

It is pertinent to note, section 55 of the Police Ordinance empowers the Inspector General of Police to "frame orders and regulations for the observance of the police officers". Paragraph 2 of Part I–Preamble of such Departmental Order No A3 – which sets out the 'duties of officers in charge of stations' reads,

> *"You are now in a position in which you are responsible for the efficient carrying on of their duties by all under you. You are responsible for their health, for their recreation, and comfort and* ***for their good behaviour and discipline****"* (emphasis added)

Furthermore, paragraph 6 of Order no. A3 reads,

> *"The creation and maintenance of discipline are among your most important duties. You must insist that your orders and the orders of those empowered to make orders are obeyed immediately without argument or hesitation and with cheerfulness and energy"*
>
> *"Never pass any lapse from duty, however trivial, without taking notice of it"*
>
> *"Drop hard on slackness, disobedience and slovenliness"*

The 2nd respondent, under whose direction, control and supervision the 1st respondent performed duties, fail to explain on what basis and under whose authority the 1st respondent got himself

involved in this investigation without confining himself to his duty of referring the complaint to inquiring officers at the police station. Furthermore, the 2nd respondent fails to explain the administrative mechanisms or any meaningful measures placed at the police station to ensure that the 1st respondent would not abuse his position as a Development Assistant and get involved in investigations. Nor there is any material placed before this court to establish that the 2nd respondent as the Officer-in-Charge of the station took any steps to inquire from the 1st respondent the reasons for his involvement in the investigation without any lawful authority. He neither denies any knowledge on this aspect. He just affirms that the 1st respondent's duty is to *'refer complaints to inquiring officers in the police station"*, but admits that in his presence it was the 1st respondent who explained the petitioner the details on the complaint relating to alleged incident of harassment. Furthermore, the 2nd respondent admits that it was the 1st respondent who informed the attorney-at-law who visited the police station to verify the information that the petitioner had been arrested and detained at the police station, that the petitioner voluntarily came over to the police station in response to the complaint made against her brother. Nor there is any material placed before this court to establish that the 2nd respondent as the Officer-in-Charge of the station took any steps to investigate the 1st respondent's unlawful conduct after he came to know of the same. The 2nd respondent had not only failed to prevent the arbitrary conduct but also had failed to investigate such conduct of his subordinate. When all these circumstances are taken together, it is reasonable to infer that there was tacit approval of the 2nd respondent in regard to the role the 1st respondent played in the investigation relating to the alleged incident of harassment.

Though it is repetitive, it is important to observe, that none of the statements recorded prior to the 25th September 2012, reveal any material linking the brother of the Petitioner to the alleged incident of harassment on which the first information was received on the 08th September 2012. No complaint had been made naming the brother of the petitioner as a suspect. It is also pertinent to note that the three reports filed by the Officer in Charge of the Kottawa police station in the Magistrates Court of Homagama in case B 1890/12 also reveal that it was in November 2012, police sought notice on the brother of the petitioner. The initial report filed on 10.08.2012 – the day after the incident relating to this application occurred - names a different person on whom the complainant entertained suspicion. Furthermore, it is pertinent to observe that the statement of S.K.Basnayake, a relative of the complainant (at page 3 of the IB extracts produced by the two respondents) reveal that their presence at the police station in the evening of the 09th, was due to a telephone call received from Kottawa police. According to him they had been asked

to come over to the police station as the suspect party is due to come over there. Therefore, the meeting of the petitioner and the other group of people at the police station is not a coincidence.

When all these factors are taken together with the personal interest the 1st respondent had developed in this matter and the manner in which the 2nd respondent had conducted himself despite being the acting Officer in Charge of the police station, I am of the view, that the petitioner has proved, on a balance of probability, that the alleged incidents did in fact take place in the manner described by the petitioner as opposed to the position taken up by the two respondents. In my view, the conduct of the two respondents, as revealed through the material placed before this Court is arbitrary and unlawful.

I am further of the view that securing the presence of a person at a police station through deception or through fear of harm to use as a hostage for the securing the presence of a possible suspect, without using due process of law by adhering to the relevant provisions of law which enables the securing the presence of a suspect for an investigation, is not only arbitrary but unlawful too. Any administrative or executive action tainted with such conduct warrants deterrent sanctions.

Article 12 (1) of the Constitution guarantees equality before law and equal protection of the law. This court in its' Full Bench decision in ***Sampanthan et. al. v Attorney-General et. al.*** (SC FR 351-356 & 358-361/19, SC minutes dated 13th December 2018) citing with approval jurisprudence developed in ***Jayanetti v Land Reform Commission*** [1984 2 SLR 172] and ***Shanmugam Sivarajah v OIC Terrorist Investigation Division and others*** [SC FR 15/2010 SC Minutes of 27.07.2017] held that the right guaranteed under Article 12(1) of the Constitution encompasses protection of 'Rule of Law' too.

Maintenance of Law and Order forms an integral part of protecting Rule of Law and the Police Force as the organ that is entrusted with tasks such as investigation of crimes, apprehension and prosecution of offenders carries a heavy burden to ensure that the powers vested on its officers are not arbitrarily or discriminately exercised. Such exercise of arbitrary or discriminatory power by officers of the Police Force will result in break down of law and order and would pose a serious threat to Rule of Law. In ***Sudath Silva v Kodithuwakku*** [1987 2 SLR 119 at 126] in examining an alleged violation of Article 11, it was observed,

> *"……. 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 in any circumstance."

This Court in ***Sampanthan*** (supra), citing with approval the jurisprudence in ***Chandrasena v Kulathunga and Others*** [1992 2 SLR 327], ***Premawathie v Fowzie and Others*** [1998 2 SLR 373], ***Pinnawala v Sri Lanka Insurance Corporation and Others*** [1997 3 SLR 85], ***Sangadasa Silva v Anuruddha Ratwatte and Others*** [1998 1 SLR 350], ***Karunadasa v Unique Gem Stones Ltd and Others*** [1997 1 SLR 256] and ***Kavirathne and Others v Pushpakumara and Others*** [SC FR 29/2012 SC Minutes of 25.06.2012] held that Article 12(1) of the Constitution guarantees protection against arbitrary exercise of power.

As I have already discussed herein before, the conduct of the 1st and the 2nd respondents is arbitrary and unlawful. Through such conduct the Right to equal protection of Law guaranteed to the petitioner has been breached.

Article 13(1) of the Constitution reads, "no person shall be arrested except according to procedure established by law". This Article guarantees a protection against arbitrary arrest. In ***Namasivayam v Gunawardena*** [1989 1 SLR 394] this court held that actual use of force is not necessary to constitute a breach of Article 13(1) but even a threat of force to procure the presence of a person is sufficient. Furthermore, it was held that the deprivation of the liberty to go wherever a person feels, results in an arrest. In ***Namasivayam*** (supra at 401-402) the Court held,

"The liberty of an individual is a matter of great constitutional importance. This liberty should not be interfered with, whatever the status of that individual be, arbitrarily or without legal justification."

In ***Piyasiri v Fernando*** [1988 1 SLR 173 at 183] this court held,

"....Custody does not today, necessarily import the meaning of confinement but has been extended to mean ***lack of freedom of movement brought about not only by detention but also by threatened coercion, the existence of which can be inferred from the surrounding circumstances****"* (emphasis added).

Material presented before this court reveal that the respondents secured the presence of a the petitioner at the police station by instilling fear of harm and thereafter threatened to detain her at

the police station until the brother is produced. Furthermore, the petitioner was asked to join with the police team to go in search of the brother.

In ***Lakshman de Silva v Officer in Charge Kiribathgoda Police*** [SC FR 9/2011, SC Minutes of 03.03.2017, at p 12] observed,

> *"Detention of the spouse or a family member or a relative of a suspect merely to compel or to induce a suspect to surrender to the police cannot be a reasonable reason for the Peace Officer to arrest and detain such a person in police custody under section 32(1)(b) of the Criminal Procedure Code. The arrest and detention of a spouse or a family member or any other relative of a suspect by a peace officer must be condemned and discouraged by Courts of law in this Country".*

Based on the facts as revealed in the instant matter, I have no difficulty to find that the petitioner's right guaranteed under Article 13(1) also had been breached.

On the question whether the petitioner's right guaranteed under Article 11 had been breached or not, the petitioner does not allege any kind of physical assault. In this regard, it is pertinent to observe that this Court had held that the protection guaranteed under Article 11 encompasses a protection from psychological trauma, psychological suffering, psychological injury and severe mental pain or suffering too. [***W.M.K.De Silva v Chairman Ceylon Fertilizer Corporation*** 1989 2 SLR 393; ***Channa Peiris and others v Attorney-General*** 1994 1 SLR 1; ***Adhikary v Amerasinghe*** 2003 1 SLR 270; ***Puwakketiyage Sajith Suranga v Prasad et al*** SC FR 527/2011, SC minutes dated 22.07.2016]. However, in the context of an alleged breach of Article 11 of the Constitution it is also important to note that a high degree of certainty is required for the court to hold a violation of Article 11. In ***Channa Peris*** (supra at 107) it was held,

> *".... having regard to the nature and gravity of the issue, a high degree of certainity 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 Article 11 of the Constitution did take place".*

In ***W.M.K.De Silva*** (supra at 401) His Lordship Justice Jameel observed,

> *".....ill-treatment per se, whether physical or mental, is not enough; a very high degree of mal-treatment is required"*

to constitute a violation of Article 11. His Lordship Amarasinghe J, further elaborating on this matter in ***Kumarasena v Sub-Inspector Shriyantha et al*** [SC FR 257/93, SC minutes of 23.5.1994] observed,

> *"The assessment of whether a person has been subjected to treatment violative of Article 11 depends on the nature of the act or acts complained of in the circumstances in which they were committed. (See W.R.K. de Silva v. Chairman, Ceylon Fertilizer Corporation (1987) 2 SLR 393,*[W.M.K. de Silva v. Chairman, Ceylon Fertilizer Corporation (1989) 2 SLR 393] *Fernando v. Silva and others S.C. Application 7/89 S.C. Minutes 3 May 1991). In the circumstances of this case the suffering occasioned was of an aggravated kind and attained the required level of severity to be taken cognizance of as a violation of Article 11 of the Constitution. The words and actions taken together would have aroused intense feelings of anguish that were capable of humiliating and debasing the Petitioner. I therefore declare that Article 11 of the Constitution was violated by the subjection of the Petitioner to degrading treatment."*

Her Ladyship Justice Bandaranayake, in ***Adikary*** (supra at 275) having considered ***W.M.K.De Silva*** (supra) and ***Kumarasena*** (supra) observed,

> *"…… the test which has been applied by our Courts is that whether the attack on the victim is physical or psychological, irrespective of the fact that, a violation of Article 11 would depend on the circumstances of each case."*

When all the material presented before this court by the petitioner is considered, I am of the view that the material available is insufficient to hold that there had been a violation of Article 11.

For the reasons set out above, I hold that the petitioner has established that rights guaranteed to her under Articles 12(1) and 13(1) had been infringed. Therefore, I grant the petitioner a

declaration that her fundamental rights guaranteed under Articles 12(1) and 13(1) of the Constitution have been infringed by the 1st and 2nd respondents.

I order the 1st and 2nd respondents to personally pay to the petitioner rupees one hundred thousand (Rs 100,000/-) each, within three months of today.

Chief Justice

Mahinda Samayawardhena, J

I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court