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

Sachith Prabath Wijeratna,
Amunukole,
Megodawewa.
Petitioner

SC/FR/365/2020

Vs.

1. Police Inspector B.S. Chandrasiri,
   Crime Branch,
   Police Station,
   Anuradhapura.
2. Police Sergeant Sampath 32226,
   Crime Branch,
   Police Station,
   Anuradhapura.
3. Police Sergeant Nishantha 37057,
   Crime Branch,
   Police Station,
   Anuradhapura.
4. C.D. Wickramaratne,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.
5. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

Before: Hon. Justice P. Padman Surasena
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: Pradeep Fernando for the Petitioner.
Sapumal Bandara with Vishmi Abeywardena for the 2nd and 3rd Respondents.
Sajith Bandara, S.C., for the Attorney General.

Argued on: 20.06.2024

Written submissions:

By the respondents on 27.10.2023 and 30.08.2024

Decided on: 10.02.2025

Samayawardhena, J.

Factual matrix

The petitioner filed this fundamental rights application on 08.01.2021, naming five respondents and seeking declarations that his fundamental rights enshrined under Articles 11, 12(1) and 13(1) of the Constitution have been violated by the 1st, 2nd and 3rd respondents, who were police officers attached to the Crime Branch of the Anuradhapura Police Station. The petitioner further seeks compensation and costs of litigation.

Upon hearing, this Court granted leave to proceed on the alleged violations of the petitioner's fundamental rights guaranteed under Articles 11, 12(1) and 13(1) of the Constitution by the 1st, 2nd and 3rd respondents.

In their joint statement of objections and corresponding affidavits, the 1st, 2nd and 3rd respondents admit to having arrested the petitioner but

provide different reasons for the arrest and the manner in which the petitioner sustained injuries. Their position is that the arrest was lawful. The 1st, 2nd and 3rd respondents in their affidavits state: "*The facts averred by the petitioner are highly inconsistent and misleading and thus it showcases that this case has been merely instituted with a malicious intention of defaming the respondents who conducted a lawful arrest.*"

The petitioner was 24 years old at the time. According to the petitioner, he was arrested on 03.10.2020 in the village known as Yakalla and brought to the Anuradhapura Police Station at approximately 1.30 p.m. He states that he was questioned about a burglary of a shop and, upon stating that he had no knowledge of such incident, was subjected to severe torture by the 1st, 2nd and 3rd respondents, along with two other unidentified police officers, in a room close to the Crime Division of the Police Station to extract a confession. The petitioner narrates a detailed account of what took place there. In describing the main act of torture, he alleges that he was made to sit on the floor, handcuffed with his hands brought around his legs, and had a large wooden bar passed between his limbs. He was then hung (suspended) and beaten for approximately two and a half hours in turns by the said police officers, who insisted that he confess to the alleged theft. The petitioner maintains that he denied the accusation as he was not involved in any such crime.

He further alleges that, despite repeatedly requesting water, his requests were denied during this period. Subsequently, he was taken to the Crime Division of the police station, where the 1st to 3rd respondents compelled him to affix his fingerprints and signature on a blank sheet of paper at approximately 6.45 p.m. Thereafter, he was placed in the police cell. The petitioner claims that he was not provided with food or water following his arrest and only received water the next day.

The petitioner states that on the following morning, his elder brother, accompanied by some others, visited the police station. When his brother inquired about the alleged wrongdoing committed by the petitioner, the police officers have responded in a threatening manner and told him to resolve the matter in Court. The petitioner's brother has met the petitioner in the police cell, where the petitioner recounted the brutal assault he had endured while in police custody for refusing to accept responsibility for the burglary of a shop. The petitioner also showed his brother the contusions on his body. The petitioner appeared to be in a state of severe shock and mental trauma. The petitioner's brother has affirmed these events in an affidavit marked P2.

The petitioner's brother lodged a complaint regarding this incident with the Anuradhapura Branch of the Human Rights Commission on 09.10.2020, as evidenced by document P9.

The following day, the petitioner was taken to the Judicial Medical Officer (JMO) of Anuradhapura, who advised the police to admit him to the hospital immediately. The petitioner was examined by the JMO at the Anuradhapura Hospital at 1.20 p.m. on 04.10.2020, prior to the Acting Magistrate's visit to the hospital for the purpose of remanding him. The Medico Legal Report (MLR) has been submitted to the Registrar of this Court. According to the MLR, the history provided by the petitioner to the consultant JMO is as follows:

> 2020.10.03 දවල් 12.30 ට විතර යකල්ලේ දී නිශාන්ත, සම්පත් කියන පොලිසියේ දෙන්නා මට කටඋත්තරයක් ගන්න කියල අනුරාධපුර පොලිසියට අරන් ආවා. අරන් ඇවිත් මාව අත් දෙකෙනුයි, කකුල් වලිනුයි එකට ගැට ගහලා උඩ එල්ලලා පොළු වලින් එතන හිටපු මහත්තුරු හතර දෙනෙක් මට ගැහුවා. මම හින්ද පොලිසියේ දෙන්නාගේ රස්සාවට අවුලක් උනා කියල. ඊට පස්සේ ගහලා හිස් කොලයකට මගේ ඇගිලි අත්සන් ගත්තා. හිස් කොලේකට රතු පැනකින් අත්සන් ගත්තා. ඊට පස්සේ මට කුඩු වලටයි,

බෝම්බෙකටයි නඩු දානවා කියල කිව්වා. මම ජීවිතේට කුඩු බොනවාතියා දැකලවත් නැහැ. මට චන්ද්‍රසිරි කියල මහත්තයෙක් ගැහුවා. දැක්කොත් අදුනන්න පුළුවනි.

The observations of the consultant JMO are as follows:

1. *Rope mark 3 x 1 cm in size placed over lateral aspect right wrist joint.*
2. *Rope mark 6 x 1 cm in size placed over medial aspect right wrist joint.*
3. *Contusion 17 x 16 cm in size placed over left buttock.*
4. *Contusion 22 x 18 cm in size placed over right buttock.*
5. *Contused both soles.*
6. *Entrapment neuropathy of both hands.*

In conclusion, the JMO confirms that "*Evidence of torture present*".

The Acting Magistrate, along with the petitioner's lawyer, visited the petitioner at the hospital, where he was placed in remand custody until 16.10.2020. Surprisingly, according to the B report filed (P6), the petitioner was arrested with heroin in his possession. However, given the facts and circumstances of this case, the allegation regarding heroin appears to be a fabrication intended to justify the arrest and cover up police torture.

According to the B report, the petitioner informed the Acting Magistrate that, on the previous day around 2.00 p.m., three police officers had brought him to the police station under the pretext of recording a statement about a shop burglary, and he was severely assaulted. When he became ill, he was taken to the hospital, at which point he was informed that a heroin-related case had been filed against him.

While the petitioner was hospitalized, his friend, Chandradasa, visited him around 5.00 p.m. on 05.10.2020. The petitioner recounted the events that happened at the police station. Chandradasa observed

contusions on the petitioner's body and noted that the petitioner appeared to be in a state of trepidation and fatigue. Chandradasa has provided an affidavit, marked P4, attesting to these observations.

At the time, the petitioner was a young man, employed as a driver. His employer also visited the petitioner at the hospital and has provided an affidavit, marked P5. The employer observed the shock and fear in the petitioner and attested that, to the best of his knowledge, the petitioner had never used heroin, asserting that the allegation of heroin possession is entirely false.

The petitioner in paragraph 29 of the petition states that while he was receiving treatment at the hospital, the 1st respondent, accompanied by two other police officers, visited him and admitted that the arrest was a mistake. The 1st respondent pleaded with the petitioner not to pursue the matter further, assuring him that the heroin case would be withdrawn. The 1st to 3rd respondents in their affidavits have made a general denial of paragraphs 11, 13, 14, 15, 16, 18, 19, 20, 25, 29, 33 and 38 of the petition, but have not specifically denied this crucial piece of evidence.

After receiving treatment at the hospital for six days, the petitioner was taken to the Anuradhapura prison, where he remained for 10 days. He was released on bail on 19.10.2020. In addition to the inhuman assault he suffered while in police custody, the petitioner was unjustifiably detained in both police and judicial custody for a total of 16 days, and a heroin case was also filed against him.

The petitioner states that he received Ayurvedic treatment after being discharged from custody.

The petitioner complains that the violence he endured took multiple forms. The police hung him and beat him for hours, kept him starved, and deprived him of his basic human dignity.

Human dignity is the basis of human rights, of which fundamental rights are a species. It is the recognition of human dignity that compels the protection of fundamental rights, ensuring that individuals are treated with equality, respect and fairness. By safeguarding these rights, the law upholds the intrinsic worth of every person, which lies at the heart of a just and humane society.

The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, stands as the first legal document to define the fundamental human rights to be universally protected. This is the foundation of international human rights law including human rights conventions, treaties and other legal instruments. The Preamble of the Universal Declaration of Human Rights begins with: "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*" It further states: "*Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.*" Article 1 proclaims: "*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*" The Declaration also contains several additional references to "dignity" in its subsequent provisions.

The Preamble to our Constitution assures "equality" and "fundamental human rights" that guarantee "the dignity" of the People of Sri Lanka. This underscores the importance of the constitutional value of "dignity" in interpreting other rights, including the right to equality, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and, by extension, the right to life.

The petitioner states that he was arrested arbitrarily, without reasonable suspicion or credible information regarding the burglary of a shop, in contravention of the law and in violation of Article 13(1) of the Constitution. He claims that, following his arrest, he was subjected to torture and cruel, inhuman and degrading treatment and punishment, in violation of Article 11 of the Constitution. He further asserts that when the police officers failed to extract a confession through torture, producing him before a Magistrate and remanding him on the wholly false charge of possessing heroin constitutes a denial of the equal protection of the law guaranteed under Article 12(1) of the Constitution.

Against this overwhelming evidence, what is the defence of the 1st to 3rd respondents? In the statement of objections and the corresponding affidavits they state that on that day they along with some other police officers went to investigate a complaint regarding a theft of a bus and on their return journey to the police station around 7.00 p.m. they saw the petitioner close to a place known as Kawarakkulama junction sitting on a culvert with a bike with no number plates. When the 1st respondent got down from the police jeep and walked towards the petitioner, the petitioner suddenly became anxious and tried to run away by pushing the 1st respondent. While the petitioner was trying to run away, he fell into the culvert. The police officers jumped into the culvert and struggled to apprehend the petitioner. There was a brawl between the police officers and the petitioner, as the petitioner "showed immense resistance and violence". The petitioner sustained injuries as a result. When the 1st respondent examined the petitioner, a heroin packet was found in the petitioner's trouser pocket. According to the 1st to 3rd respondents, they did not even question the petitioner on a theft.

This is the version of the 1st to 3rd respondents how the petitioner sustained injuries. Although the respondents are said to have made great

efforts to control the petitioner, surprisingly, no injuries were sustained by the police officers. I am unable to accept this version. It reflects the standard defence put forward by police officers in cases of police torture. This account is completely inconsistent with the medical evidence, which supports the petitioner's version of events.

The 1st to 3rd respondents further assert that, in response to the petitioner's allegations of illegal arrest and torture in police custody, the Senior Superintendent of Police of Anuradhapura instructed the Chief Inspector of Police of the Anuradhapura Police Station to conduct an inquiry. The inquiry concluded that the respondents had followed due process of law and the police officers were exonerated. The 1st to 3rd respondents place great reliance on this report and marked it as R6. In this report, prepared by *E.M. Sanjeewa Mahanama, Headquarters Inspector of the Anuradhapura Police Station*, the HQI (as I have quoted below) indirectly questioned the integrity of the consultant Judicial Medical Officer (JMO) and the police officer who produced the petitioner to the JMO without obtaining his prior permission. This is, in my view, a serious matter.

> ඉහත සැකකරුට පහර දුන් බවට සඳහන් කරමින් සැකකරු විසින් අධිකරණ වෛද්‍යවරයාට ප්‍රකාශකර ඇති අතර, සැකකරු රෝහල් ගත කර ඇත. රෝහලේදී ගරු මහේස්ත්‍රාත් තුමා විසින් සැකකරු රක්ෂිත බන්ධනාගාර ගත කර ඇති අතර, අනතුරුව සැකකරු බන්ධනාගාර නිලධාරීන් භාරයට පත්කර වාට්ටු අංක 11 හි වැඩිදුරටත් ප්‍රතිකාර ලබා ඇත. මෙම පහර දීම සම්බන්ධයෙන් පොලිස් නිලධාරීන්ට විරුද්ධව කර ඇති පැමිනිල්ලක් වන අතර, එම පැමිණිලිකරුගේ ප්‍රකාශයක් පොලිස් අධිකාරී කාර්යාලයේ රාජකාරී කරන උ.පොප සෙනෙවිරත්න විසින් සටහන් කර ඇත. එම ප්‍රකාශ කිරීමද සිදු කර ඇත්තේ තුවාල කරු පරීක්ෂාකල අධිකරණ වෛද්‍ය නිළධාරී මහතාගේ නිලකාමරයේදී බවට ඔහුගේ සටහනේ සටහන්ව ඇත. ඊට අමතරව අධිකරණ වෛද්‍ය පොරම 276/2020 යටතේ අධිකරණ වෛද්‍ය කරුණාතිලක මහතා විසින් 2020.10.04 වන දින පැය 13.20 ට තුවාල කරු පරීක්ෂ කල බවට අධිකරණ වෛද්‍ය පෝරමයේ සටහන් කර ඇත. සැකකාර පැමිණිලිකරුගේ ප්‍රකාශ සටහන් කර ඇත්තේ 2020.10.06

වන දින පැය 09.45 ට වන අතර, එම ප්‍රකාශය සටහන් කර ඇත්තේ ඔහු නේවාසිකව ප්‍රතීකාර ගනු ලැබූ වාට්ටුව තුල නොවන අතර. එදින ප්‍රකාශ සටහන් කර ඇත්තේ අධිකරණ වෛද්‍ය නිලධාරී නිළ කාමරය තුලදීය. ඒ අනුව නැවත තුවාල කරු අධිකරණ වෛද්‍ය නිලධාරිවරයාගේ නිළ කාමරයට රැගෙන යාමද ගැටළු සහගතය. ඊට හේතුව වන්නේ ඒ වන විට තුවාල කරු අධිකරණ වෛද්‍යවරයා විසින් පරීක්ෂාවට ලක් කර අවසන්ව තිබූ බැවින්ය. මෙම විමර්ශණය අනුව මෙය පොලිස් නිළධාරීන්ට විරුද්ධව අසත්‍ය චෝදනාවක් එල්ල කිරීම සඳහා උපයෝගී කර ගන්නා ලද එක් උපක්‍රමයක් බවට හැඟී යයි.

තවද යම් සැකකරුවෙකු මොනයම් චෝදනාවකට හෝ වරදකට අත් අඩංගුවට ගත් පසු පොලිස් ස්ථානයකට භාර දීමෙන් අනතුරුව එම සැකකරුගේ පූර්ණ වගකීම මු.පො.ප/ස්ථානාධිපතිට පැවරේ. එම සැකකරුවන්ට අවශ්‍ය සුභ සාධනය සැලසීම, අසනීප තත්වයක් ඇතිවුහොත් වෛද්‍ය ප්‍රතිකාර ලබා දීම, සැකකරුවන්ගේ පැමිණිලි වලට සවන්දීම හා අනෙකුත් සපුරා ලිය හැකි අවශ්‍යතා ඉටුකර දීමද ස්ථානාධිපතිගේ හෝ මු.පො.ප වරයෙකුගේ වගකීම වේ. නමුත් කොට්ටාශ අපරාධ විමර්ශණ අංශයේ ස්ථානාධිපති වරයාගේ නියෝග අනුව 2020.10.04 වන දින පැය 12.15 ට DCDB-GCIB 192/43 යටතේ සටහන් යොදා උ.පො.ප එදිරිසිංහ විසින් මගේ අවසරයක් නොමැතිව හා මාවෙත කිසිදු දැනුම්දීමක් නොකර මා භාරයේ සිටි සැකකරුවෙකු රැගෙන ගොස් අධිකරණ වෛද්‍යවරයාට ඉදිරිපත් කිරීමද අත්තනෝමතික ක්‍රියාවක් සේ හැගේ. එයද සැකකරුට පොලිසියට විරුද්ධව චෝදනාවක් එල්ල කිරීමට අවශ්‍ය මූලික අඩිතාලමක්ද යන්න සැකයක් පවතී.

It seems that the HQI Anuradhapura who conducted the inquiry into this incident condones and encourages the torture and abuse of power by his subordinate officers who are named as the 1st to 3rd respondents. Such an attitude on the part of the HQI must be unreservedly condemned.

The standard of proof in a fundamental rights application

In a fundamental rights application, the onus is on the petitioner to prove his case. This is based on the general principle embodied in section 101 of the Evidence Ordinance that he who asserts must prove:

> *Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*

The standard of proof in a fundamental rights application is the civil standard, namely proof on a balance of probabilities, as opposed to the criminal standard of proof, which requires proof beyond a reasonable doubt. However, within both the civil and criminal standards, there can be varying degrees of proof, which must be commensurate with the occasion and proportionate to the subject matter (*Bater v. Bater* [1950] 2 All ER 458).

Soza J., in *Vivienne Goonewardene v. Hector Perera and Others* [1983] 1 Sri LR 305, referring to the opinion of Wanasundera J. in *Velmurugu v. The Attorney General* [1981] 1 Sri LR 406 stated that the standard of proof 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. However, he further elaborated at page 313:

> *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.*

In *Channa Pieris v. Attorney General* [1994] 1 Sri LR 1, Amarasinghe J. stated at page 107 that "*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". At the same page, His Lordship further remarked:

> *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.*

Article 13(1) violation

Article 13(1) of the Constitution guarantees the freedom from arbitrary arrest.

> *No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.*

The Article is two-fold in that it requires, firstly, that an arrest may only be made "according to procedure established by law" and secondly, that a person be given reasons for his arrest.

In the instant case, the petitioner was arrested to record a statement for a burglary of a shop and ended up being charged with possession of heroin. Persons cannot be arrested according to the whims and fancies of police officers. A person can only be arrested according to the procedure established by law. In terms of section 32(1)(b) of the Code of Criminal Procedure Act, No.15 of 1979, a person "*who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a*

reasonable suspicion exists of his having been so concerned" can be arrested by a police officer without a warrant.

In order to arrest a person, proof of the commission of an offence is not required, but mere suspicion of the offence is insufficient. There must be reasonable suspicion or a reasonable complaint or credible information of the commission of an offence. The test is objective, as opposed to subjective. As S.N. Siva C.J. observed in *Seneviratne v. Rajakaruna, Sub Inspector, C.I.D. and Others* [2003] 1 Sri LR 410 at 419-420 "*The wording in section 32 of the Code of Criminal Procedure Act refers to a 'reasonable complaint' or 'credible information' or a 'reasonable suspicion'. Therefore, the legislature has been emphatic that a mere suspicion alone would not be sufficient to arrest a person in terms of section 32 of the Code*."

Referring to section 32(1)(b) of the Code of Criminal Procedure Act, Dep J. (later C.J.) in *Ven. Dhamarathana Thero and Another v. Sanjeewa Mahanama and Three Others* [2013] 1 Sri LR 81 at 89 stated:

> *In order to arrest a person under this subsection there should be a reasonable complaint, credible information or a reasonable suspicion. Mere fact of receiving a complaint or information does not permit a peace officer to arrest a person. Police Officer upon receipt of a complaint or information is required to commence investigations and ascertain whether the complaint is a reasonable complaint, the information is credible or the suspicion is reasonable before proceeding to arrest a person. (…) Anyone can falsely implicate another person. A Peace officer should be satisfied that it is a reasonable complaint.*

In *Channa Pieris v. Attorney-General* (supra), Amerasinghe J. elaborated on the creditworthiness of the source of information which gives rise to a 'reasonable suspicion' as follows:

> *A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or upon a combination of both sources. He may inform himself either by personal investigation or by adopting information supplied to him or by doing both. A suspicion does not become "reasonable" merely because the source of the information is creditworthy. If he is activated by an unreliable informant, the officer making the arrest should, as a matter of prudence, act with greater circumspection than if the information had come from a creditworthy source.*

The ulterior motive behind the petitioner's arrest by the respondents becomes apparent upon considering the written complaint (P9) lodged by the petitioner's elder brother with the Human Rights Commission. In the complaint, he states that following the burglary of his shop, he had initially lodged a complaint with the Moragoda Police Station. Since no proper investigation was carried out, the petitioner's brother had made a complaint to the Deputy Inspector General of Police of the North Central Province requesting a thorough investigation into the matter. Consequently, the Anuradhapura Crime Division started the investigation again. At that point, the Anuradhapura Crime Division had recorded statements from the petitioner's mother and brother, upon which the latter had revealed the names of several individuals whom he considered suspicious. According to the petitioner's brother, one of the suspicious individuals had falsely implicated the police officers of the petitioner's involvement in the incident. It is abundantly clear that the respondents have not acted on a reasonable suspicion or a reasonable complaint or credible information of the commission of an offence.

Aluwihare J. in *Ganeshan Samson Roy v. M.M. Janaka Marasinghe and Others* (SC/FR/405/2018, SC Minutes of 20.09.2023) stated:

> *Police officers cannot mechanically make an arrest upon a mere complaint received, without forming the opinion that the allegation is credible. Thus, a police officer is required to make necessary investigations, unless the facts are obvious, to verify whether the complaint is credible or whether the information provided is reliable. An arrest upon a general or vague suspicion would lead to significantly abridging the personal liberties guaranteed to a person by the Constitution.*

In *Piyasiri and Others v. Nimal Fernando, A.S.P. and Others* [1988] 1 Sri LR 173, H.A.G. De Silva J. observed at 184:

> *No Police Officer has the right to arrest a person on vague general suspicion, not knowing the precise crime suspected but hoping to obtain evidence of the commission of some crime for which they have the power to arrest. Even if such evidence comes to light the arrest will be illegal because there will have been no proper communication of the reason for the arrest to the accused at the time of the arrest.*

People cannot be arrested on unfounded suspicion. In the instant case, there was no justification for the arrest of the petitioner. This is precisely why he was produced before the Court on an entirely unrelated charge of possessing heroin, despite having been taken into police custody (based on the evidence presented before this Court) for alleged burglary. This also explains why the 1st respondent visited the petitioner at the hospital, where he was receiving treatment for police assault, to express regret, claiming it was a case of mistaken identity, and offering to withdraw the false charge on the condition that the petitioner refrains from pursuing the matter further. It appears that, during this time, the petitioner's elder brother, who met him while in police custody, had lodged a written complaint with the Human Rights Commission. The petitioner informed everyone who met him while he was in custody, including the JMO, that

he had been severely assaulted by the police on suspicion of shop burglary. He was not questioned about heroin consumption or addiction or possession. The introduction of heroin as a convenient means to justify the arrest, assault, and remanding of the petitioner cannot be condoned.

In *Namasivayam v. Gunawardena* [1989] 1 Sri LR 394 at 401-402, Sharvananda C.J. emphasized that "*the liberty of an individual which is a matter of great constitutional importance should not be interfered with, whatever the status of that individual be, arbitrarily and without legal justification."*

Given the facts and circumstances of this case, I take the view that the petitioner had not been arrested according to the procedure established by law. Hence, I hold that the 1st to 3rd respondents have violated the fundamental right of the petitioner guaranteed under Article 13(1) of the Constitution.

Article 11 violation

Article 5 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948 states:

> *No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.*

The International Covenant on Civil and Political Rights (ICCPR) adopted by the General Assembly of the United Nations in 1966 transformed the rights set out in the Universal Declaration of Human Rights into treaty provisions. Sri Lanka acceded to the ICCPR on 11.06.1980. Article 7 of the ICCPR provides:

> "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"

Regardless of treaty obligations, the prohibition of torture and other forms of ill-treatment is now a firmly established principle under customary international law, binding all states.

Article 11 of our Constitution that guarantees freedom from torture enacts:

> *No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

It is significant to note that Article 11 is an entrenched provision with no restrictions whatsoever. The application of this Article cannot be relaxed under any condition, even in the interest of national security or during any other public emergency.

On 10.12.1984, the General Assembly of the United Nations adopted the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. This Convention against torture entered into force on 26.06.1987. Sri Lanka acceded to this Convention on 03.01.1994, and the Convention entered into force in Sri Lanka on 02.02.1994. This Convention requires signatory parties to take measures to end torture within their territorial jurisdiction and to criminalize all acts of torture.

In Article 1 of the Convention against Torture, the term "torture" is defined broadly, including both physical and psychological harm:

1. *For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person,*

or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. *This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.*

Article 2 thereof excludes defences commonly invoked by authorities in justification of torture:

1. *Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*
2. *No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*
3. *An order from a superior officer or a public authority may not be invoked as a justification of torture.*

Parliament of Sri Lanka enacted the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment Act, No. 22 of 1994 to give effect to this Convention. In the interpretation section of the Act, the term "torture" is defined in the same manner as in Article 1 of the Convention Against Torture.

"torture" with its grammatical variations and cognate expressions, means any act which causes severe pain, whether physical or mental, to any other person, being an act which is—

(a) done for any of the following purposes that is to say—

(i) obtaining from such other person or a third person, any information or confession; or

(ii) punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or

(iii) intimidating or coercing such other person or a third person; or

(b) done for any reason based on discrimination,

and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

Torture includes not only the infliction of physical pain but also mental pain, provided the pain inflicted was severe and intentional. Whether an act constitutes "torture or cruel, inhuman or degrading treatment or punishment" depends on the specific facts and circumstances of each individual case.

Although the above definition suggests that there must be a nexus between the act of torture and a purpose enumerated therein, S.N. Silva C.J. held that it is unnecessary to prove such a nexus, as "*the plain meaning of the words in Article 11 does not warrant a qualification being placed on the word 'torture' by linking it to a purpose*." As stated previously, Article 11 is an entrenched provision and constitutes an absolute right.

In *Velmurugu v. The Attorney General* [1981] 1 Sri LR 406 at 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 in 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.

Along the same lines, in *Amal Sudath Silva v. Kodituwakku* [1987] 2 Sri LR 119, Atukorale J. stated at 126-127:

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. 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.

It is often impossible to prove allegations of torture through direct evidence, as such acts are typically carried out in secrecy.

The difficulty a petitioner in a fundamental rights application would face if a very high degree of proof were expected by the Court in proving an allegation of torture was aptly explained by Amerasinghe J. in *Channa Pieris v. Attorney-General* (supra) at page 108, who cited the following passage from the *Greek Case* reported in the European Court of Human Rights Decision, *Journal of Universal Human Rights*, Vol. 1, No. 4, October-December 1979, page 42, quoted with approval by Sharvananda J. in *Velmurugu v. The Attorney General* (supra) at page 438. He stated that the Supreme Court has been conscious of the difficulties in proving allegations of torture and stated that it will have regard to the circumstances of the case, without imposing undue burdens on a petitioner which might impede access to justice.

There are certain inherent difficulties in the proof of allegation of torture or ill-treatment. First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the Police or Armed Services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority. Thirdly, when allegations of torture or ill-treatment are made, the authorities, whether the Police or Armed Services or the Ministries concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence there may be reluctance of

> *higher authority to admit or allow inquiries to be made into facts which might show that the allegations are true. Lastly, traces of torture or ill-treatment may with lapse of time become unrecognizable, even by medical experts, particularly where the form of torture itself leaves...few external marks.*

Torturing suspects to extract confessions is often resorted to by some police officers as an easy method of solving crimes. The publication *An X-Ray of the Sri Lankan Policing System & Torture of the Poor*, edited by Basil Fernando and Shyamali Puvimanasinghe (Asian Human Rights Commission, 2005), explores various aspects of torture in police custody and the underlying causes of such conduct by police officers throughout its chapters. The following factors, *inter alia*, may contribute to this malpractice:

(a) Laziness or unwillingness on the part of police officers to conduct thorough investigations.
(b) Psychological predispositions of certain police officers who derive satisfaction or a sense of power from torturing suspects.
(c) Lack of proper training in modern investigative techniques.
(d) Insufficient resources, such as forensic tools and technology, to carry out comprehensive investigations.
(e) Systemic issues such as weak internal disciplinary mechanisms, absence of effective supervision within the police force, or a culture that tolerates or implicitly condones the use of torture.
(f) Lack of accountability or lack of fear of consequences for engaging in torture.
(g) Limited timeframes within which suspects can legally be held in police custody, creating pressure to obtain results quickly.
(h) Pressure from superiors, the public or media to solve crimes within an unrealistically short period.

(i) Desire to gain recognition or approval from superiors by reporting that suspects were apprehended and they admitted committing crimes.

(j) Misguided belief among some officers that torture is a reliable or effective method of extracting truthful confessions, despite evidence to the contrary, as innocent individuals may falsely confess to stop the torture.

(k) Personal grudges, biases, or prejudices against particular class of suspects, leading to abuse of power.

It is significant to note that instances of torture in police custody almost always involve suspects from marginalized or vulnerable backgrounds, such as the poor and powerless. Such treatment is unheard of in cases involving individuals accused of high-profile white-collar crimes or those with significant social, economic or political influence.

The above list highlights systemic and individual factors contributing to this unacceptable practice, emphasizing the need for robust reform and accountability measures.

In the present case, the multiple contusions on the buttocks and soles, along with neuropathy entrapment, align with the petitioner's account of being assaulted with a bar while suspended. The Medico-Legal Report prepared by the JMO of Anuradhapura Teaching Hospital confirms the injuries as indicative of torture, while the diagnostic card attributes the injuries to police assault. The respondents' assertion that the petitioner's injuries were caused during his arrest, allegedly due to his resistance and a fall into a culvert, is untenable. The petitioner's account is substantiated by medical evidence and supported by affidavits from individuals who visited him both at the police station and at the hospital.

I hold that the 1st to 3rd respondents have violated the fundamental right of the petitioner guaranteed under Article 11 of the Constitution.

Article 12(1) violation

Article 12(1) of our Constitution reads as follows:

> *All persons are equal before the law and are entitled to the equal protection of the law.*

Article 12(1) of the Constitution seeks to guarantee two fundamental principles of equality: equality before the law and equal protection of the law. While both principles promote equality and non-discrimination, equality before the law emphasizes the uniform application of laws, whereas equal protection of the law emphasizes the uniform application of legal protections and remedies.

It must also be mentioned that equality before the law and equal protection of the law cannot be understood or applied in a purely abstract or strictly literal sense. Not all persons shall be treated alike, but all persons similarly circumstanced shall be treated alike. Equality must be ensured among equals, not unequals. Any attempt to ensure the latter would defeat the very purpose that Article 12(1) seeks to achieve. Classification among persons in itself does not violate Article 12(1), provided that the classification is not arbitrary but founded on an intelligible differentia and bears a rational nexus to the objective it seeks to achieve. What Article 12(1) seeks to prevent is unjustified differential treatment within such classifications. (*Palihawadana v. Attorney General* [1978-79-80] 1 Sri LR 65 at 68-69, *Wasantha Disanayake and Others v. Secretary, Ministry of Public Administration and Home Affairs and Others* [2015] 1 Sri LR 363 at 367, *Thilak Lalitha Kumara v. Secretary, Ministry of Youth Affairs and Skills Development and Others* [2015] 1 Sri LR 369 at 376-377)

In *Ferdinandis and Another v. Principal, Vishaka Vidyalaya and Others* (SC/FR/117/2011, SC Minutes of 25.06.2012), Bandaranayake C.J. explained that, in order to succeed in proving a violation of Article 12(1), it is necessary for the petitioners to not only establish that they had been treated differently from others, but also that such treatment was so different from others who were similarly circumstanced, and there were no grounds to differentiate them from the petitioners.

> *Our Constitution has clearly spelt out the concept of equality before the law and there are numerous instances where that right had been accepted and upheld. In the process this Court has also noted that if a person complains of unequal treatment the burden is on that person to place before this Court material that is sufficient to infer that unequal treatment had been meted out to him. Accordingly, it is necessary for the petitioners not only to establish that they had been treated differently from others, but also that such treatment was so different as the others were similarly circumstanced and there were no grounds to differentiate them from him.*

However, the contours of the right to equality have evolved over the years. As Kodagoda J. explained in *Wijeratne v. Sri Lanka Ports Authority and Others* (SC/FR/256/2017, SC Minutes of 11.12.2020), we have progressively moved away from the "*reasonable classification doctrine*" to an "*expansive and more progressive definition of the concept of equality, founded upon the concept of 'substantive equality', aimed at protecting persons from arbitrary, unreasonable, malicious, and capricious executive and administrative action.*"

Article 14 of the Indian Constitution is similar to Article 12(1) of our Constitution. In Indian jurisprudence, the doctrine of equality was expanded beyond the principle of reasonable classification. In the case of *E.P. Royappa v. State of Tamil Nadu and Another* AIR 1974 SC 555 at 583,

Bhagwati J. (as he then was) articulated this broader interpretation as follows:

> *The basic principle which, therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16.*

In *Wickremasinghe v. Ceylon Petroleum Corporation and Others* [2001] 2 Sri LR 409 at 414, S.N. Silva C.J. stated that if executive or administrative action is reasonable and not arbitrary, it necessarily follows that all persons in similar circumstances will be guaranteed the equality enshrined in Article 12(1) of the Constitution.

> *Although the objective is to ensure that all persons, similarly circumstanced are treated alike, it is seen that the essence of this basic standard is to ensure reasonableness being the positive connotation as opposed to arbitrariness being the related negative connotation. The application of this basic standard has been blurred*

> *in later cases due to an overemphasis on the objective of ensuring that all persons similarly circumstanced shall be treated alike. The case of Perera vs. Jayawickrema (1985) 1 Sri LR 285 demonstrates the ineffectiveness of the guarantee in Article 12(1) which results from the rigid application of the requirement to prove that persons similarly circumstanced as the Petitioner were differently treated. Such an application of the guarantee under Article 12(1) ignores the essence of the basic standard which is to ensure reasonableness as opposed to arbitrariness in the manner required by the basic standard. If the legislation or the executive or administrative action in question is thus reasonable and not arbitrary, it necessarily follows that all persons similarly circumstanced will be treated alike, being the end result of applying the guarantee of equality. As noted above, the effectiveness of the guarantee would be minimized if there is insistence that a failure of the end result should also be established to prove an infringement of the guarantee. If however there is such evidence of differential treatment that would indeed strengthen the case of a Petitioner in establishing the unreasonableness of the impugned action.*

This position was affirmed in later cases such as *Kanapathipillai v. Sri Lanka Broadcasting Corporation and Others* [2009] 1 Sri LR 406, *Azath S. Salley v. Colombo Municipal Council* (SC/FR/252/2007, SC Minutes of 04.03.2009), *Wijesekera and Others v. Gamini Lokuge, Minister of Sports and Public Recreation and Others* [2011] 2 Sri LR 329, *Vavuniya Solar Power (Private) Limited v. Ceylon Electricity Board* (SC/FR/172/2017, SC Minutes of 20.09.2023).

The concept of equality enshrined in Article 12(1) of the Constitution is a dynamic concept encompassing fairness, justice, and non-

discrimination, which rejects arbitrariness and promotes reasonableness.

The practice of police officers introducing drugs to fabricate charges and validate illegal arrests is evident in the following cases.

In *Justin Rajapaksha v. Prasanna Rathnayake* (SC/FR/689/2012, SC Minutes of 28.03.2016), the petitioner was arrested without reason, assaulted and thereafter produced before the Magistrate on a false charge of selling cannabis to justify the illegal arrest. De Abrew J. declared:

> *When the 1st Respondent (HQI, Homagama Police Station) arrested the petitioner without any reasons and fabricated a false charge against him, can it be said that he got equal protection of law and that the 1st Respondent applied the principle that "all persons are equal before the law" to the petitioner? This question has to be answered and is answered in the negative. It is now proved that the petitioner was arrested and detained in the police station without any reasons and the charge framed against him was a fabricated charge. Thus the principle that "all persons are equal before the law and are entitled to the equal protection of law" has not been applied to the petitioner by the 1st Respondent. For the above reasons, I hold that the 1st Respondent has violated the fundamental rights of the petitioner guaranteed by Article 12(1) of the constitution.*

In *Liyanagamage Anoma Santhi v. W.A. Mahinda and Others* (SC/FR/135/2017, SC Minutes of 29.09.2022), the petitioner lodged a complaint at Police Headquarters in Colombo regarding an illegal police raid. In retaliation, the respondent police officers falsely accused the petitioner of possessing heroin. This Court held that the arrest and remanding of the petitioner on fabricated charges violated the petitioner's fundamental rights.

The acts of the 1st to 3rd respondents in the instant case, including how they treated the petitioner while in their custody and how he was unreasonably remanded, apparently on a false charge to cover up the illegal arrest, are manifestly arbitrary and unreasonable and violative of the fundamental right of the petitioner guaranteed under Article 12(1) of the Constitution.

Conclusion

For the aforesaid reasons, I declare that the fundamental rights of the petitioner guaranteed under Articles 11, 12(1) and 13(1) have been violated by the 1st, 2nd and 3rd respondents, both individually and collectively.

With the post-argument written submissions, learned counsel for the 2nd and 3rd respondents has produced a certified copy of the death certificate of the 1st respondent to confirm that the 1st respondent died on 03.11.2023 due to a motor traffic accident.

The 2nd and 3rd respondents shall each pay Rs. 100,000 to the petitioner as compensation within one month from today. Additionally, the 2nd and 3rd respondents shall each pay Rs. 25,000 as costs of the application to the petitioner within the same period. Accordingly, the petitioner is entitled to a total sum of Rs. 250,000. The Registrar of the Supreme Court shall facilitate the due payment of the aforementioned amount.

The Registrar of the Supreme Court is also directed to send a copy of this judgment to the Chairman of the National Police Commission to make a note of the attitude of the then HQI Anuradhapura and take appropriate action as deemed necessary.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I agree.

Judge of the Supreme Court