

**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 read with Article 17 of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka.

Herath Mudiyanse Lage Podi Kumarihami,  
No. 237,  
Pooja Nagaraya,  
Mahiyanganaya.

**Petitioner**

**SC (FR) Application  
No. 184/2018**

**Vs.**

1. Officer-in-Charge,  
Mahiyanganaya Police Station,  
Mahiyanganaya.
2. Senadheera,  
Police Officer,  
Mahiyanganaya Police Station,  
Mahiyanganaya.
3. Wimalasena,  
Police Officer,  
Mahiyanganaya Police Station,  
Mahiyanganaya.
4. Senior Superintendent of Police,  
Office of the Senior Superintendent of Police,  
Badulla.

5. Pujith Jayasundara,  
Inspector General of Police,  
Police Headquarters,  
Colombo 01.
6. Hon. Attorney General,  
Attorney General's Department,  
Hulfsdrop,  
Colombo 12.

**Respondents**

**Before:**           **Justice L.T.B. Dehideniya**  
                          **Justice A.L. Shiran Gooneratne**  
                          **Justice Janak De Silva**

**Counsel:**       Ms. Ermiza Tegal with Ms. Thiagi Piyadasa **for the Petitioner.**

                          Ravindranath Dabare with Ms. Savanthi Ponnampereuma and  
                          Arundathi Divisekara **for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents.**

                          Dr. Avanti Perera, SSC **for the 4<sup>th</sup> and 6<sup>th</sup> Respondents.**

**Argued on:**     23/03/2021

**Decided on:**   10/11/2021

**A.L. Shiran Gooneratne J.**

The Petitioner, a street vendor aged 52, by Application dated 07/06/2018, invoked the jurisdiction of this Court, *inter alia*, seeking a declaration that the actions and/ or inactions and/ or conduct of the 1<sup>st</sup> to 4<sup>th</sup> Respondents and/ or the State resulted in the infringement of the Petitioner's fundamental rights guaranteed under Article 11 and 12

(1) of the Constitution. The Petitioner was granted leave to proceed as prayed for in the Petition.

Provisions of Article 11 of the Constitution entrenches that *“No person shall be subject to torture or to cruel inhuman or degrading treatment or punishment”*.

The Petitioner contends that, when she intervened and resisted the arrest of her daughter Chamila Malkanthi, by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, the 1<sup>st</sup> Respondent slapped, trampled and kicked her chest several times followed by a kick to her abdomen and another kick to her left elbow. The severity and unbearable pain caused by the assault, made her urinate in her clothes. When the Petitioner knelt and pleaded with the 1<sup>st</sup> Respondent to spare her daughter from arrest, she was kicked in the back by the 2<sup>nd</sup> Respondent. The 3<sup>rd</sup> Respondent had grabbed her hair and pushed her causing her head to hit against the wall and threatened that she will be shot.

The Petitioner has attached 3 witness affidavits marked ‘P4’ to ‘P6’ in support of her contention. In paragraphs 8 and 13, of the affidavits marked, ‘P5’ and ‘P6’ respectively, Sandya Kumari, a neighbor and the estranged husband of the Petitioner, describes the incident that took place on 17/08/2017, as an inhuman assault on the Petitioner. However, in the affidavit marked ‘P4’, the daughter of the Petitioner Chamila Malkanthi, on whose behalf the Petitioner intervened and resisted arrest, does not speak to an assault at the time of her arrest by the Officer in Charge of the Mahiyangana Police and two other officers. The affidavits filed by the estranged husband and the neighbor of the Petitioner gives a verbatim account of the events which took place as narrated by the Petitioner, which led to the arrest of Chamila Malkanthi.

According to Paragraph 12 of the Petitioner’s affidavit, on 17<sup>th</sup> August 2017 night, having taken instructions from a lawyer in Kandy, the Petitioner admitted herself to the Kandy Teaching Hospital. The Petitioner contends that she was discharged from the hospital on or about 19/08/2017. However, there is no independent evidence before Court to confirm the date of discharge of the Petitioner. The Petitioner’s diagnosis card is marked ‘P1’ and the Medico Legal Report (MLR) is also filed of record.

The Petitioner in support of her claim to the violation of Article 11 and 12(1) of the Constitution, has tendered affidavits marked 'P4', 'P5' and 'P6', the diagnosis card marked 'P1', the Medico Legal Report and the document marked 'P3', in proof of the consistency of the contemporaneous complaints made by the Petitioner.

The position taken by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are that on 17/08/2017, the said Respondents and two other officers attached to the Anti-Corruption Unit of the Mahiyangana Police, approached the Petitioner's house to arrest her daughter Chamila Malkanthi, for an offence of aiding and abetting her husband Asanka, in connection with an offence of possession of drugs. The Respondents contend that the Petitioner obstructed the said team of officers from arresting Chamila Malkanthi by violently banging her head against the door, beating her chest with her hands and threatening to kill everyone and herself. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents admit that they visited the home of the Petitioner on 17/08/2017 around 2.30PM and arrested Chamila Malkanthi, according to procedure set down by law. The 1<sup>st</sup> Respondent denies that he was present at the time of the alleged incident.

### **Standard of Proof-**

The particular circumstances in each case, would be a decisive factor of the violation alleged by a victim. Therefore, the evidential burden falls on the Petitioner to adduce evidence to a fact relied upon. *"In proceedings of this nature, the court has very limited avenues to test the veracity of these assertions and necessarily have to depend on the affidavits and other documents filed. In the circumstances, in arriving at a just and equitable decision in the realm of the fundamental rights jurisdiction, the court necessarily has to apply the test of probability to the factual matters placed before us"*. (SC/ FR Application No. 458/2012, Aluwihare PC, J.)

In a civil case, the standard of proof is that a party has only to prove the case on a balance of probabilities or by a preponderance of evidence.

*"Preponderance of evidence is the greater weight of evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient*

*to free the mind wholly from all reasonable doubt is still sufficient to a fair and impartial mind to one side of the issue rather than the other” (Black’s Law Dictionary p. 1220)*

Citing *Velmurugu vs. the Attorney General and another, (1981) 1 SLR 406*, the Petitioner contends that in cases filed under Article 126 of the Constitution for infringement of fundamental rights *“the standard of proof is a preponderance of probabilities as in a civil case, qualified with the requirement for a high degree of certainty to tilt in favor of the Petitioner”*.

In *Kapugeekiyana vs. Hettiarachchi, (1984) 2 SLR 153*, Wimalaratne J. observed thus;

*“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 a series of cases decided by this Court it is clear that ‘the standard of proof in complaints of violation of Article 11, is proof of preponderance of probability and that civil standard of persuasion applies’.

In order to prove an infringement under Article 11, the admissibility of evidence received by Court comes into question before us. The burden of proof falls on the Petitioner to establish his case as a matter of law and pleadings. To discharge the burden of proof, the Petitioner heavily relies on the consistency of the contemporaneous complaints made by her marked ‘P3’, attributed to physical violence. When applying the test of consistency per se, or the test of consistency inter se, the Petitioner nor the witnesses to this incident have been subjected to any inquiry, where the Petitioner and the witnesses would stick to the same position, both in the examination in chief as well as in cross examination. When considering contemporaneity of statements made by the Petitioner, the promptness of the Petitioner in making the complaint to the relevant authorities, would be a point to be counted in her favor.

The consistency of contemporaneous statements referred to by the Petitioner, which are all dated 19/08/2017, marked 'P3', are not statements made by the Petitioner but are letters written by her Attorney-at-Law, addressed to the relevant authorities requesting their *“good officers to intervene and inquire into this matter and to take appropriate action to protect her rights”*. The letters are written for and on behalf of the Petitioner and other family members, *“who were tortured”* and also makes reference to previous incidents of assaults alleged to have taken place.

In ***Edward Sivalingam vs. Sub Inspector Jayasekara & Others (SC/FR/326/2008)***, the Supreme Court 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 thresh hold 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.”*

It is trite law that in the absence of an explanation, a delay in making a statement to the police would reduce the weight and impact of the evidence of a witness. This is true since the delay can lead to opportunities for tampering with reliable evidence.

It is not in evidence that the Petitioner at any stage made a statement to the Police regarding this incident. The independent evidence marked 'P3', brought in support of the principal testimony of the Petitioner to strengthen the reliability of events which unfolded on the date of the incident, is a narration of events set out by the Petitioner's Attorney-at-Law.

In paragraphs 6,7,8 and 9 and paragraphs 10,11,13 and 14 of the affidavits filed by the neighbor and the estranged husband, respectively, relates to a verbatim account of torture, inhuman and degrading treatment suffered by the Petitioner at the instance of the 1<sup>st</sup> to 3<sup>rd</sup> Respondents and are detailed in the following manner;

- The 1<sup>st</sup> Respondent slapped the Petitioner causing her to fall to the ground and he trampled her, kicked her chest hard several times, kicked her abdomen and her left elbow.
- The 2<sup>nd</sup> Respondent kicked the Petitioner's spine, whilst she was kneeling on the ground begging that her daughter not be taken away for no reason.
- The 3<sup>rd</sup> Respondent grabbed the Petitioner by the hair and pushed her against the wall causing her head to hit the wall. He also threatened to shoot her.

The Petitioner contends that the diagnosis card marked 'P1', and the Medico Legal Report (MLR) corroborates the Petitioner's narrative of how she was beaten and stamped by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents.

The Diagnostic Card issued on admission to the Kandy Teaching Hospital, is marked 'P1', where, apart from the presentation and the operative details, the words, "*soft, tender*" are pointed to a diagram.

The Petitioner's position is that 'softness' and 'tenderness' referred to in 'P1', is in reference to the stomach region of the Petitioner. However, it is observed that the words "*soft, tender*", pointing to a hand drawn diagram in 'P1', does not clearly refer to the stomach region or any other organ of the body. The diagnosis card has no date of discharge. Since the Medico-legal Report (MLR) was not filed along with the Petition, the Court directed the Court Registrar to call for the said report from the Judicial Medical Officer of the Kandy Teaching Hospital.

The findings in the MLR would be relevant in the nature of this case.

The Petitioner was examined by the Consultant Judicial Medical Officer, Teaching Hospital Kandy on 19/08/17. The Medico-Legal Report issued by the JMO's Office Kandy, is dated 19/08/2017.

**Short history given by patient:**

On 17/08/17, at around 2 p.m. assaulted by three police officers from Mahiyangana Police with fist, put her on the ground and stamped, knocked the head on the wall. She has reduced hearing in the right ear following it.

## **Injuries:**

There are no injuries seen.

X ray: femur, knee joints, cervical spine, skull- no fractures seen.

Abdomen: no external injuries seen. FAST scan of the abdomen was normal. Seen by ENT Surgeon: reported as no year perforation. PTA test - hearing was normal.

It is noted that, prior to the examination, a short history was recorded by the Judicial Medical Officer of the alleged torture encountered by the Petitioner. However, the MLR does not support the disclosure of the Petitioner.

## **Has the Petitioner's version qualified the test of probability?**

The Petitioner, soon after the alleged violation, left her home in Mahiyangana and proceeded to Kandy to meet her Attorney-at-Law. The Petitioner states that she did not admit herself to the Mahiyangana Hospital due to fear of further harassment by the Police. In the circumstances, one would expect a person similarly circumstanced to seek medical assistance at the nearest hospital rather than proceed to meet an Attorney-at-law based in Kandy. The Petitioner's actions in this instance have spoken louder than her words. Her priority seems to have been to seek legal advice than medical assistance.

In *Malinda Channa Pieris and others vs. Attorney-General and others, (1994) 1 SLR I*, it was pointed out that:

*“having regard to the gravity of the matter in issue, a high degree of certainty is required before the balance of probability might be said to tilt in favor of a Petitioner enduring 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 did take place, the Petitioner will fail to obtain a declaration that Article 11 that Article 11 was transgressed.”*

Facts assumed as true or a supposed fact, in conformity with knowledge, observation, and in the natural sequence, is regarded as more likely to be true than less likely.

Accordingly, on consistency of the narration put forward by the Petitioner, there is an element of improbability that the Petitioner having being beaten up in the manner in which she states, would not seek prompt medical attention. The truth of the facts as revealed in the MLR is not in issue and there is no other corroborative evidence of matters related to injuries sustained by the Petitioner. Therefore, giving credence to the supposed facts, there is more likelihood, that the Petitioner's version, to be false.

The Petitioner also contends that the 4<sup>th</sup> and 5<sup>th</sup> Respondents have failed to protect the Petitioner's rights enshrined under Article 12(1) of the Constitution by not promptly investigating the complains relating to the incident on 17/08/2017. The Petitioner alleges that having ample opportunity to investigate, there has been no investigation carried out by the 4<sup>th</sup> and 5<sup>th</sup> Respondents into the incident which took place on 17/08/2017.

However, to the contrary, the investigation notes and the arrest notes pertaining to the alleged incident of 17/08/2017, have been entered in the Information Book maintained by the Divisional Crimes Investigation Unit of the Mahiyangana Police and an investigation report has been filed to that effect in the Magistrates Court, which are produced marked 'R1(b)'. By letter dated 31/10/2018, (R5) the 1<sup>st</sup> Respondent has made a request to the Senior Superintendent of Police Badulla (4<sup>th</sup> Respondent) to conduct an inquiry under his supervision with regard to the complaint made by the Petitioner against the Respondents. It is observed that the 4<sup>th</sup> Respondent has also conducted an inquiry pertaining to the complains made by the Petitioner to the National Authority for the Protection of Victims and Witnesses, an inquiry has been held and the inquiry report is marked 'R4'. A complaint to the Office of the Superintendent of Police, Badulla has also been investigated and the investigation report is tendered marked 'R7'.

On the question of physical harm and/or suffering at the hands of the Respondents, the Petitioner's position is that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have failed to present a consistent and true narration of events. However, the related facts pertaining to the

incident on 17/08/2017, and the follow up action taken by the law enforcement authorities would prove otherwise. It is clear that the complaints made by the Petitioner has been referred to higher authorities to investigate and examine the allegations of physical violence against the Petitioner.

Although the Petitioner procured an affidavit from her daughter as an eye witness to the alleged torture, she only speaks to the physical presence of the Petitioner at the time of her arrest. If the Petitioner was assaulted in the manner as described in the Petition, it is more likely than not, the daughter of the Petitioner, who was arrested at the time of the alleged incident, would have testified to the Petitioner's Predicament.

This Court has repeatedly held that it would be necessary for a Petitioner to prove his position by way of medical evidence and/ or by way of affidavits with a high degree of certainty for the purpose of discharging the burden of proof of infringement of Article 11.

In *Vivienne Goonewardene vs. Hector Perera (1983) 1 SLR 305*, the Supreme Court observed thus;

*“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.”*

It is trite law that *“the burden of proof lies upon him who affirms, not upon him who denies”*. Therefore, the question before this Court is whether the Petitioner has placed sufficient material before this Court to the degree required to come to a conclusion that the said Respondents have infringed the Petitioners fundamental rights guaranteed under Article 11 and 12(1) of the Constitution.

Considering all the circumstances referred to above, it is apparent that the Respondents have not violated the fundamental rights guaranteed in terms of Articles 11 and 12(1) of the Constitution.

This application is accordingly dismissed. No costs ordered.

**Judge of the Supreme Court**

**L.T.B. Dehideniya J.**

I agree

**Judge of the Supreme Court**

**Janak De Silva J.**

I agree

**Judge of the Supreme Court**