

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

Janidhu Charuka Daham
Seneviratne,
No. 4A, Sapumal Mawatha,
Sirimal Uyana,
Ratmalana.
Petitioner

SC (FR) APPLICATION NO: 402/2015

Vs.

1. Sub Inspector Nelumdeniya,
Police Station,
Mount Lavinia.
2. Officer in Charge,
Special Crimes Investigation Unit,
Police Station,
Mount Lavinia.
3. Chief Inspector Chanaka
Iddamalgoda,
Head Quarters Inspector,
Police Station,
Mount Lavinia.
4. N.K. Illangakoon,
Inspector General of Police,
Police Headquarters,
Colombo 01.

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

Respondents

Before: P. Padman Surasena, J.
Janak De Silva, J.
Mahinda Samayawardhena, J.

Counsel: Shantha Jayawardena for the Petitioner.
Sudath Jayasundara for the 1st Respondent.
Ganga Wakishta Arachchi, S.S.C., for the Attorney
General.

Argued on: 02.03.2021

Decided on: 21.05.2021

Mahinda Samayawardhena, J.

The Petitioner filed this application under Article 126 of the Constitution seeking *inter alia* a declaration that his fundamental rights guaranteed under Articles 11 and/or 12(1) and/or 13(1) and/or 13(2) and/or 13(5) of the Constitution were infringed by the 1st to 3rd Respondents; compensation in a sum of Rs. 1 million from the State and Rs. 3 million from the 1st Respondent; and a direction to the 5th Respondent Attorney-General to institute criminal proceedings under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994, against the 1st Respondent and the other police officers liable for the infringement of the Petitioner's fundamental rights under Article 11 of the Constitution.

The Petitioner's complaint is that he was subjected to torture, cruel, inhuman and degrading treatment by the 1st Respondent and two others whilst he was under arrest and detained in the police cell of the Mount Lavinia police station.

This Court granted leave to proceed on the alleged violation of the Petitioner's fundamental rights guaranteed under Article 11 of the Constitution by the 1st Respondent.

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.*"

Fundamental rights were first declared and recognised in Sri Lanka in the Constitution of 1972. Article 18(1)(b) in Chapter VI under "Fundamental Rights and Freedoms" of the 1972 Constitution declared: "*In the Republic of Sri Lanka – no person shall be deprived of life, liberty or security of person except in accordance with the law.*" Although there was no express provision guaranteeing freedom from torture, cruel, inhuman or degrading treatment or punishment, these were deemed to be included in the said Article. However, this Article was subject to Article 18(2) and (3) which read as follows:

18(2) The exercise and operation of the fundamental rights and freedoms provided in this Chapter shall be subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy set out in section 16(3).

(3) All existing law shall operate notwithstanding any inconsistency with the provisions of subsection (1) of this section.

Article 11 of the 1978 Constitution, which falls within the Chapter dealing with “Fundamental Rights”, reads as follows:

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

It is significant to note that Article 11 of the 1978 Constitution is an entrenched provision with no restrictions whatsoever. The application of this Article cannot be relaxed even in the interest of national security.

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 criminalise all acts of torture.

In Article 1 of this Convention against Torture, the term “torture” is defined in the following manner:

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 reads as follows:

2(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.

The 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, “torture” is defined in the identical manner as it is defined 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.

What acts constitute “torture or cruel, inhuman or degrading treatment or punishment” will depend on the facts and circumstances of each individual case.

The Petitioner in the present application was 32 years old when he was arrested by officers of the Mount Lavinia police station on 17.09.2015 around 5.00 p.m. He was entering his residence after returning from work. The Petitioner says he was informed by the police that he would have to be produced before the Magistrate before 5.30 p.m. on that day. At the time, he was the Country Manager (Sri Lanka) for the National Tertiary Education Consortium, which is based in New Zealand. The arrest was consequent to a warrant issued by the Mount Lavinia Magistrate upon a bigamy charge based on a complaint made by his former wife. There had been matrimonial disputes between him and his former wife which ended up in a divorce, but there had been an ongoing dispute for the custody and maintenance of their child.

Since he was arrested upon returning from work, the Petitioner was clad in formal attire. After he was taken to the police station, he was locked up in the police cell. The police officers who arrested him signed off from their duties for the day at 6.00 p.m. and the 1st Respondent, SI Nelundeniya, assumed duties as the officer in charge of the night shift.

The 1st Respondent in his statement of objections says he heard someone from the cell yelling that he wants to meet the Head Quarters Inspector (HQI) CI Iddamalgoda. Although the 1st

Respondent says this person was screaming obscenities at that time, I am unable to accept it. According to paragraph 10(h) of the statement of objections of the 1st Respondent, the Petitioner had demanded that he be taken before the HQI *“to tell your HQI to keep me outside the cell.”*

The 1st Respondent admits in his statement of objections that the Petitioner was *“dressed in a white long sleeve shirt, black trousers and shoes”*. He says he *“ignored the Petitioner’s utterances and did politely request the Petitioner to remove his shoes as it is imperative for any person who has been put into a cell to remain bare feet [according to Police Department regulations]”* as shoes can be used *“to assault a third party within or outside the cell.”*

At paragraph 10 (j)-(l) of the Statement of Objections, the 1st Respondent recounts what happened when he made that *“polite request”*:

The Petitioner suddenly grabbed me by my collar as I was standing next to the cell and had attempted to kick me through the bars of the cell. As the Petitioner was still holding onto my collar and to steady myself I held on to the bars of the cell when the Petitioner bit hard the second finger of my left hand which was badly lacerated. Thereafter I managed to obtain the key to the cell from Police Sergeant Saman and opened the cell to remove the Petitioner’s shoes. The Petitioner suddenly lunged forward struck and or assaulted me on the chest. The police constable Herath had to intervene to get the 1st Respondent freed.

Thereafter, according to the 1st Respondent, he left the police station seeking medical attention. He does not speak a single word about how the Petitioner sustained injuries whilst in the cell.

To recap, according to the 1st Respondent, the Petitioner, while inside the cell, held the 1st Respondent (who was outside the cell) by the collar through the iron bars and attempted to assault him and bit his finger. Is this probable? For me, it is not.

The 1st Respondent did not tender an affidavit from PC Herath who seems to be an eyewitness to this incident. Instead, he tendered two statements – R4 and R5 – from two suspects who were at the police station.

R4 – a statement given by a female suspect who was under arrest – contradicts this story when she *inter alia* says (translated):

The 1st Respondent first told the Petitioner to remove his shoes from outside the cell and then went inside the cell and told the Petitioner to remove his shoes. Thereafter, there was a noise from inside the cell and then the 1st Respondent came out of the cell complaining that his finger was bitten by the Petitioner.

The 1st Respondent at paragraph 8 of his written submission dated 15.02.2021 tells a different story. There he says that when the Petitioner held him by the collar and bit his finger through the iron bars of the cell, he

advised the officers who were present to go into the cell and to remove his [Petitioner's] shoes. When officers entered the cell the Petitioner had engaged in a fistcuff with them.

The 1st Respondent did not tender affidavits from these “officers”.

The Petitioner’s version of events, as stated in the petition, is that when he requested that he be produced before the 3rd Respondent HQI, the 1st Respondent became incensed. The Petitioner may not have made his request politely; he may well have demanded to be produced before the HQI who was in charge of the police station to tell his side of the story to get him released from police custody. At that point, according to the Petitioner, the 1st Respondent entered the cell using abusive language and began assaulting the Petitioner. In the process, the Petitioner says the 1st Respondent held him in a head-lock position and attempted to strangle him. Unable to breathe, the Petitioner says he bit the finger of the 1st Respondent to release himself. Thereafter, the 1st Respondent summoned two persons dressed in civilian clothing into the cell and all three assaulted the Petitioner severely. The Petitioner does not know the names of those two persons. They have not been made parties to the case.

The 1st Respondent in his statement of objections did not say that he “*advised the officers who were present to go into the cell and to remove his shoes*” and “*when officers entered the cell the Petitioner had engaged in a fistcuff with them.*” That is because if he did, he would have been compelled to name the other officers involved in assaulting the Petitioner.

In the written submissions, the 1st Respondent attempts to implicate the other two persons (referred to by the Petitioner) as being responsible for the assault of the Petitioner inside the cell. In paragraph 12 of the written submission the 1st Respondent says:

Further the admission by the Petitioner that he was attacked by two others inside the cell, whom he cannot identify further substantiates the position that it was not the Respondent who was involved in attacking him.

Then in paragraph 15 of the written submission, the 1st Respondent admits that he did not use excessive force to control the situation, suggesting that some amount of force was in fact used.

Further it is evident that the provocation was sought by the Petitioner and not the Respondent in any event Respondent had refrained from using any excessive force on the Petitioner.

At the stage of filing written submissions, the 1st Respondent at least admits that the Petitioner was assaulted inside the cell.

I am more than satisfied that the 1st Respondent together with two other police officers whom the Petitioner does not identify by name assaulted the Petitioner inside the cell.

What is the nature of the injuries sustained by the Petitioner?

Before exploring the nature of the injuries sustained by him, let me first consider the injury caused to the finger of the 1st Respondent, which the Petitioner admits he inflicted in self-defence to release himself from strangulation. There are no

medical reports tendered by the 1st Respondent regarding the extent of the injury or treatment taken. The 1st Respondent produced only a Medico-Legal Examination Form marked R7, not a Medico-Legal Report (MLR), wherein non-grievous laceration is noted under injuries. The report does not even state where the alleged laceration was. The incident took place on 17.09.2015. According to R7, the Judicial Medical Officer (JMO) examined the 1st Respondent on 19.09.2015 at 10.00 a.m.

On the other hand, the Petitioner sustained multiple injuries from this incident. The Petitioner states in his petition that around 9.00 p.m. on 17.09.2015, an Attorney-at-Law retained by his mother came to the Mount Lavinia police station and upon seeing his condition, requested the Mount Lavinia police to admit him to hospital.

According to the Bed Head Ticket (BHT) sent by the Director of the National Hospital of Colombo to this Court, the Petitioner was admitted to the National Hospital at 2.35 a.m. on 18.09.2015 and was seen by a doctor at 3.00 a.m. On admission, he had visible injuries. The BHT *inter alia* states “*cleaning & dressing [the wound/s]*”, and “*tetanus toxoid*”. The MO/ENT further identifies “*traumatic perforation [ruptured eardrum] + bleeding*” in the left ear. Thereafter, the Petitioner was seen by an MO/ENT at 10.45 a.m., and “*traumatic perforation – blood clot*” in the left ear is recorded. On 19.09.2015, the Petitioner was seen by a VS [Visiting Surgeon] in ward 17 who records: “*He has got a L/TM [left tympanic membrane] perforation with blood on the TM. PTA shows L/conduction impairment.*”

On the same day, the Petitioner was seen by the JMO. The MLR states under injuries:

1. *Laceration measuring 3 cm situated over the right cheek.*
2. *Patient had complained of reduced hearing over the left ear. He was seen by ENT doctor and noted left ear traumatic perforation and associated with reduced conduction of left ear.*
3. *Tenderness noted over back of left shoulder and back of left upper chest.*

The second injury listed above is classified as a “grievous injury”.

Thereafter, the Magistrate had visited the hospital and remanded the Petitioner, and the Petitioner was transferred to the Prison Hospital on 19.09.2015.

The report sent to this Court by the Chief Medical Officer of the Prison Hospital *inter alia* says:

According to history records at Prison Hospital, there were multiple contusions over the face and body and blood clot at left ear.

The Petitioner tendered several documents along with his counter affidavit to show that he sought medical advice from various doctors for body pain and suffering.

The Police force is responsible for *inter alia* enforcing the law, maintaining public order and safety. Hence there is a special responsibility on the police to uphold and protect the fundamental rights enshrined in the Constitution. To say the least, assaulting a person in police custody is a cowardly act,

not a heroic act. A person in police custody is at the mercy of the police.

Learned Senior State Counsel for the 5th Respondent Attorney-General states in her brief written submission: “subsequent to leave being granted, the 1st Respondent was represented by private counsel”; pursuant to a disciplinary inquiry held upon a complaint made by the Petitioner to the Inspector General of Police, “the 1st Respondent had been discharged”; proceedings have been instituted against the Petitioner in the Magistrate’s Court of Mount Lavinia “for behaving in an unruly manner and for obstructing the Respondents from the performance of their duties”; and “there has been no violation of the fundamental rights of the Petitioner by the State.” Learned Senior State Counsel seems to be making a vague attempt to absolve the State from liability, whilst also indirectly condoning the assault when she says that the 1st Respondent was discharged at the disciplinary inquiry.

The protection afforded by Article 126 of the Constitution is against the infringement of fundamental rights by the State, i.e. by “executive or administrative action”, through the instrumentalities and agencies of the State. The State includes every repository of State power. If the act complained of has been committed under colour of law or office by the State official, the State is liable. The relief granted against the violation of fundamental rights is principally against the State and not against the individual miscreant, notwithstanding the latter may also be held responsible in this process. (*Mariadas Raj v. Attorney-General* [1983] 2 Sri LR 461, *Velmurugu v. Attorney-General* [1981] 1 Sri LR 406 at 422-430, *Vivienne Goonewardena*

v. Perera [1983] 1 Sri LR 305, Rahuma Umma v. Berty Premalal Dissanayae [1996] 2 Sri LR 293, Piyasena v. Associated Newspapers of Ceylon Ltd [2006] 3 Sri LR 113)

In *Sudath Silva v. Kodituwakku [1987] 2 Sri LR 119*, the Supreme Court took the view that where the Petitioner establishes that he was tortured while in police custody, the State is liable although it was not established which officer inflicted the injuries. The Supreme Court condemned torture under police custody in the strongest possible terms 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 torturous, 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. This court cannot, in the discharge of its constitutional duty, countenance any attempt by any police officer however high or low, to conceal or distort the truth induced, perhaps, by a false sense of police solidarity. The facts of this case have revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can, only be described as barbaric, savage and inhuman. They are most revolting to one's sense of human decency and dignity particularly at the present time when every endeavour is being made to promote and protect human rights. Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment within the confines of the very premises in which he is held in custody. Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order. The petitioner may be a hard-core criminal whose tribe deserve no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set up, it is essential that he be not denied the protection guaranteed by our Constitution.

The case at hand is not a difficult one. I hold that the Petitioner has succeeded in establishing the infringement of his fundamental rights guaranteed under Article 11 of the Constitution.

On a consideration of the totality of the facts and circumstances of this case, I direct that the 1st Respondent shall pay the Petitioner a sum of Rs. 150,000 as compensation and another Rs. 25,000 as costs of the application. I direct the State to pay the Petitioner a sum of Rs. 25,000 as compensation. All payments shall be made within one calendar month from today.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Janak De Silva, J.

I agree.

Judge of the Supreme Court