

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANK**

SC (FR) Application No. 258/2007

Petitioner:-

Uduwa Athukoralage Chandrasena, Kelinkanda Janapadaya,
Nilukitiya, Kelinkanda, Agalawatte.

Vs.

Respondent

Sub-Inspector Buddhika, Officer in Charge – Crimes, Police
Station, Badureliya

2. Officer –in –Charge; Police Station, Badureliya,

3. The Inspector General of Police;

4. Hon. Attorney General

BEFORE:

Shirani A. Bandaranayake, J; Jagath Balapatabendi, J.
& K.Sripavan,J

COUNSEL:

Sharmaine Gunaratne for the Petitioner.

P.Munasinghe, SC, for Respondents

ARGUED ON: 23.10.2008

WRITTEN SUBMISSIONS TENDERED ON

Petitioner 16.12.2008

1st & 2nd Respondents : 19.01.2009

DECIDED ON: 13.05.2009

Shiranee A.Bandaranayake, J.

The petitioner complained that he was arrested on 27.06.2007 around 11.30am.while he was on his way to attend a funeral in the Neluketiya area and that at that at the time he was arrested the 1st Respondent had assaulted him. The Petitioner accordingly alleged that due to the aforementioned action his fundamental rights guaranteed in terms of Article 11, 13 (1) and 13 (2) of the Constitution had been infringed for which this Court granted leave to proceed.

Although leave to proceed was granted on Article 11, 13 (1) and 13(2) of the Constitution learned Counsel for the petitioner confined her submissions to the infringement of petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution. Accordingly both parties were heard only on the alleged infringement of Article 11 of the Constitution.

The petitioner's case, as submitted by him, *albeit* brief, is as follows:

The petitioner, a laborer by profession, had no family and was staying at a relative's house. On 27.06.2007, while he approached the volleyball court of the village on his way to Neluketiya, he had seen two villagers, namely Martin and Sarath, being accompanied by four (4) unknown persons. Later the petitioner had become aware that the 1st respondent had led the said team.

The said persons had inquired from the petitioner for *Kasippu* (illicit liquor) to which the petitioner had replied that he has no involvement in any such brewery. However the 1st respondent and others, who had claimed to be from the "police", took the petitioner near the volleyball court and made him to hold a post therein and the 1st respondent had assaulted the petitioner with a club. When the petitioner inquired as to what offence he had committed, the 1st respondent had started that they were from Police and asked for *Kasippu* once again, while the 1st respondent and other, whose

name is not known to the petitioner, assaulted him continuously.

The said police officers had assaulted the petitioner on his arms, particularly the right arm, shoulders, legs, thighs and head. The petitioner felt dizzy, faintish and developed a headache.

The petitioner had requested the 1st respondent and the others to take him to a hospital, where the said officers had told him to go to a hospital on his own, but not to mention that he was assaulted by Police and the event they become aware that he had mentioned about the said assault, that he would be sent to jail by introducing *ganja* and heroin.

Later the petitioner was brought to the main road along with Martin and Sarath. There was a three wheeler parked at the side of the road. Two officers of the group, set off stating that they were going to Premadasa's house. At that moment a bus arrived and Premadasa was among the people, who alighted from the bus. The police officers stopped Premadasa and one officer stepped into the bus along with the petitioner, Martin and Sarath and brought them to Baduraliya Police Station around 1.30pm., and were immediately put into the cell. Later they had brought Premadasa, who was also put in to the cell. The petitioner was in pain and he had seen that Sarath, who was also assaulted by the said Police Officer, had injuries on his buttocks, but the Police did not offer any food, water or medicine to them.

The petitioner and the others were released on police bail around 9pm. Although the petitioner was feeling sick he was in fear to get him self admitted to a hospital due to the threats of the police.

On 29.06.2007, the petitioner appeared before the Magistrate's Court, Matugama. His Attorney had informed him that he had been charged with possession of *goda* and since he had not committed any offence he had pleaded not guilty. He had informed the learned Magistrate that he had been arrested on false ground and was assaulted by police. Learned Magistrate had inquired from him whether he had any injuries and he had shown his right upper arm. The petitioner was released on a Rs. 20,000/- personal bond. Along with the petitioner, Premadasa also had pleaded not guilty,

but Sarath and Martine had pleaded guilty and paid the fine.

Since the petitioner was in severe pain as there was no improvement in his condition he went to a private medical practitioner and later due to the continuous body pain and nausea he was admitted to the Kalutara - North hospital on 04.07.2007, where he was warded until 07.07.2007. During that period, the petitioner was examined by the Consultant Judicial Medical Officer of the Karapitiya Teaching Hospital. Having stated the facts of this application let me now turn to consider the submission made on behalf of the petitioner and the respondents.

The 2nd respondent being the Officer-in-Charge of the Baduraliya Police Station, in his affidavit dated 16.08.2008 had averred that on the day the petitioner was arrested, viz. 27.06.2007, he was on leave and therefore he was not present at the Police Station. He had tendered the out entry and in entry as an annexure to his affidavit in support of his contention.

The said out entry (2R3) dated 24.06.2007 stated that he had obtained leave for three (3) days with effect from 25.06.2007 and during his absence the 1st respondent would be functioning as the acting Officer-in-Charge of the station. The entry (2R4) stated that the 2nd respondent had reported for duty at 7.05a.m on 28.06.2007.

It is common ground that the petitioner was taken into custody on 27.06.2007 around 11.30a.m. On a consideration of the affidavit and the supporting documents tendered by the 2nd respondent, it is evident that the 2nd respondent had not been in the Police Station during the said period and that there was no involvement on his part with regard to the arrest of the petitioner. Furthermore, it is to be noted that, the petitioner's allegation is that, he was assaulted at the time he was arrested on 27.06.2007. Based on the submission on behalf of the 2nd respondent and the supporting documents he had tendered to this court, it is apparent that the 2nd respondent was not involved either in the arrest or the alleged assault on the petitioner and therefore I hold that the 2nd respondent cannot be held responsible for the violation of the petitioner's fundamental rights guaranteed in terms of Article 11 of

the Constitution.

The 1st respondent had taken up the position that he had not accompanied the team of Police officers, who had participated in the aforementioned raid for illicit liquor and had arrested the petitioner and three others on 27.06.2007, as he was engaged in duties at the Police Station on that day. In support of his contention, the 1st respondent had tendered extracts from daily reports of the Baduraliya Police Station (1R2), MOIB information book (1R3) and an affidavit given by one Kodippili Arachchige Ajith Prasanna (1R4). The extracts of the MOIB information book of the Baduraliya Police Station indicates that around 10.00a.m, the 1st respondent had been investigating into a road dispute between two parties.

The MOIB information book indicates that on 27.06.2007 around 9.45a.m, five officers had left the Police Station in a three wheeler to investigate in to the information received on the sale of illicit liquor within the area. The officers had returned later with Sarath, Martin, Chandrasena and Premadasa as they were in possession of illicit liquor.

On a consideration of the submissions made on behalf of the 1st respondent and an examination of the aforementioned documents, it is apparent that the 1st respondent had been involved in other duties at the Police Station by 10.00 a.m, on 27.06.2007. The 1st respondent had not denied the fact that there had been a raid on the brewing of illicit liquor. His position was that on 27.06.2007, on information received, a team of Police Officers attached to the Baduraliya Police Station headed by Sergeant Gunaratne had conducted a raid on the brewing of illicit liquor. The petitioner's allegation was that he was assaulted by the Police officers at 11.30am, near the volleyball court of the village.

It is also to be noticed that in all the relevant extracts of the MOIB Information book, there is no reference to the participation of the 1st respondent in the raid on 27.06.2007.

Expect for the version given by the petitioner, there is no material to substantiate his position that the 1st respondent was among the

group of Police officers, who had arrested the petitioner and the others at 11.30am on 27.06.2007. Learned State Counsel for the 1st respondent strenuously contended the 1st respondent had been at the station at 10.00am on the day in question. The petitioner's position was that he was arrested at 11.30am on 27.06.2007. Considering the position as to whether the 1st respondent could have been at the place in question by 11.30am on 27.06.2007, it was not disputed by the learned Counsel for the petitioner at the hearing, that the road leading to the volleyball court and the surrounding area are in a dilapidated condition, which would take a considerable amount of time to arrive at the said volley ball court from the police station.

The question of proof in fundamental rights applications was considered by this Court in **Kapugeekiyana v Hettiarachchi** ([1984] 2 Sri L.R. 153), where Wimalaratne, J. had stated that,

"In deciding whether any particular fundamental right has been infringed I would apply the test laid down in **Velmurugu** that the civil, and not the criminal standard of persuasion applies, with this observation; that the nature and gravity of an issue must necessarily determine the manner of attaining reasonable satisfaction of the truth of that issue"

This question was considered in depth by Wanasundara, J. in **Velmurugu v A.G. and others** (Fundamental Rights – Vol. I 196) and referred to Lord Stowell's Judgment, in **Loveden v Loveden** ((1810) 2 Hagg. Con. 1.3) , where Lord Stowell had started that,

"The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion."

It is to be noted that in his petition, the petitioner had stated that Martine and Sarath were accompanied by four (4) unknown persons. Having stated that the four (4) officers to be unknown, he had continued to state that later he had become aware of the name and designation of the 1st respondent. It appears that the petitioner had attempted to identify the officers, who had arrested him on 27.06.2007 subsequently, by making inquiries. However, it

is apparent that the petitioner had not been able to substantiate his position by independent evidence that the 1st respondent had led the team of police officers, who had arrested him.

On a consideration of the submissions made by the learned Counsel for the petitioner and the learned State Counsel for the respondents and on the basis of the aforementioned general tests, I am of the view that the petitioner had not satisfied this Court that the 1st respondent had been present at the time the petitioner was arrested by the Police Officers near the volleyball court on 27.06.2007. I accordingly hold that the 1st respondent had participated in the arrest of the petitioner on 27.06.2007.

Having decided on the participation of the 1st respondent, let me now turn to examine whether there had been a violation of petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution.

Article 11 of the Constitution deals with freedom from torture and reads as follows:

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

The petitioner complained that he was assaulted by the Police Officers at the time of his arrest. His complaint was that he was assaulted on his right arm, shoulder, legs, thighs and the head and that the said assaulted had been with the aid of a club. Except for the affidavit given Premadasa (P1), who was also taken into custody along with the petitioner, there is no other affidavit to substantiate the petitioner's version that he was assaulted by the Police officers at the time of his arrest.

The respondent were of the view that the petitioner was never assaulted, and had recorded that at the time of arrest that there were no visible injuries (aau;=msgska fmkSug lisoq ;=jd, ke; -1R3).

Notwithstanding the position taken by the respondents, learned Counsel for the petitioner strenuously contended that, the

petitioner was assaulted by the police officers and that he had taken treatment from the General Hospital, Kalutara. This Court had in fact called for the said Medical Report from the Government Hospital, Kalutara.

When considering allegations based on torture, in terms of Article 11 of the Constitution, this Court had considered medical evidence as sufficient to prove that the acts complained of in fact had taken place. Referring to this position Dr. A.R.B. Amerasinghe (Our Fundamental Rights of Personal Security and Physical Liberty, 1995, pg. 47) , had stated that,

"As will be seen from the Sri Lankan cases, ...a total denial supported by a conspiracy of silence, the medical evidence is very often sufficient to prove that the acts complained of did take place".

As stated earlier, it is to be noted that at the time of the arrest, the petitioner did not have any injuries and this had been recorded by the police officers at the Police Station (1R3). In such circumstances, when a person alleges that he had been assaulted, the inference is that the injuries were caused while he was in custody. In such an instance, the burden of adducing evidence, to show that the person having custody of the complainant was not responsible for such injuries shifts to him. This position was clearly stated by Kulatunga, J. in **Pita Kandalage Gamini Jayasinghe v P.C.Samarwickrama and others** (S.C. (FR) No. 157/91 – S.C. Minutes of 12.01.1994), where it was stated that,

"It is to be noted that at the time the petitioner was handed over to that Police, he had no injuries and was in perfect health. But when he was admitted to the hospital...he was a physical wreck and almost comatose. I therefore hold that the allegation of torture has been established"

A similar view had been taken earlier by Atukorale, J. in **Amal Sudath Silva v Kodituwakku** ([1987] 2 Sri L.R. 119) and it was held that where the injuries were caused while the petitioner was in the custody of state officers, that the only reasonable inference' was that they were caused by such officers.

In the above backdrop, let me now turn to refer to the Medico-Legal Report submitted by the Medico-Legal Specialist of the Teaching Hospital Karapitiya, who had examined the petitioner on 11.07.2007 at 10.00 a.m. I accordingly reproduce below the relevant parts of the said Medico- Legal Report.

Short history given by the patient

The victim was confronted by four police officers attached to the Baduraliya Police Station on 27th June 2007 on his way to a funeral. Two of them assaulted him with elongated wooden sticks. He was threatened by the same policemen not to seek medical treatment after the incident. later he had taken treatment from a general practitioner due to severe pain felt in limbs and the chest region.

Injuries

1. A scalp haematoma measuring 2cm x 3 cm place on the vertex of the head just right to the midline.
2. A broad elongated contusion was placed obliquely over the full length of the inner aspect of the right upper arm. The maximum breadth of the contusion was 10cm observed towards proximal end of the upper arm.
3. A diffuse contused area measuring 8 cm x 10cm located on the lateral aspect of the middle third of the right thigh.
4. The victim felt pain on examination over a diffuse area of the anterior chest more towards right side measuring 15cm x 10cm.

Timing of Injuries

The contused areas of the body appear macroscopically in a spectrum of purple to green colours. Two patchy areas of greenish yellow discoloration were seen in the diffuse contusion over the right thigh.

Conclusion

- The features of injuries observed on the scalp, right upper arm and the right thigh are consistent with contusions.
- The injury pattern is consistent with repeated assault by an elongated blunt weapon/s.
- The history given by the victim is in keeping with the examination findings".

In the short history given by the petitioner to the Medico-Legal Specialist at the time of examination, he had clearly referred to the incident that took place at the time of his arrest. The petitioner therefore had been consistent of how he had sustained his injuries. The Medico-Legal report clearly stated that history given by the petitioner is in keeping with the examination findings.

Considering all the circumstances of this matter, I find that the medical evidence substantiates the petitioner's allegation and therefore I declare that the petitioner's fundamental right guaranteed by Article 11 of the Constitution had been violated.

As stated earlier it is apparent that the 1st and 2nd respondents had not been involved in the arrest of the petitioner and therefore cannot be held responsible for the alleged assault. On the other hand, the Medico- Legal Report supports the version given by the petitioner that he had been assaulted at the time of his arrest. It is to be noted that although the 1st respondent had been in charge of the Baduraliya Police Station, in the absence of the 2nd respondent, who was the Officer-in-Charge, he had not indicated to the Court as to the officers, who were involved in the act.

Accordingly the petitioner had not amended the caption to add any officer as a respondent. Learned Counsel for the petitioner contented that the 1st and 2nd respondents had taken up the position to exclude themselves from liability, but had failed to look into the complaint made by the petitioner.

As stated earlier, at the time the petitioner was taken into custody it had been recorded that there were no injuries. Later however, the petitioner had been complaining that the Police officers had

assaulted him at the time of his arrest. In such circumstances, it would be the duty of the Police Officers, who are in charge of Police Stations, either to indicate as to what had caused the injuries complained of by the petitioner or in the event that there is a difficulty in identifying the officers, who had been involved in such a situation, to take steps to hold a proper inquiry into the complaint. Such an inquiry, probably with an identification parade in term of the provisions of the Code of Criminal Procedure Act, No. 15 of 1979 would assist Court to obtain reliable identification of the persons, who would have been involved in alleged assaults.

However, even if the identity of the Police Officers have not been sufficiently proved , the liability of the State cannot be ignored or treated lightly as such a violation of the petitioner's fundamental rights would be by executive and / or administrative action of State officers acting under the colour of their office. This position was considered in **Ratnasiri and another v Devasurendran, Inspector of Police, Slave Island and others** ([1994] 3 Sri.L.R.127), where reference was made by Kulatunga, J., to the identity of officers and it was stated that,

"The weakness of their case against individual officers is probably due to the fact that they have attempted to identify these officers subsequently by making inquiries from others and that in the process they based their case on hearsay evidence. In these circumstances, the rejection of their testimony against individual respondents would not necessarily render their testimony as regard the assault on them incredible especially because the allegation of assault in corroborated by independent evidence including the medical evidence"

Considering all the aforementioned circumstances, for the infringement of the petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution the liability would lie with the State.

I accordingly hold that the petitioner's fundamental right guaranteed in terms of Article 11 of the Constitution had been infringed by executive and / or administrative action and I direct the State to pay a sum of Rs. 75,000/- as compensation

and costs. This amount to be paid within three (3) months from today.

The Registrar of the Supreme Court is directed to send a copy of this judgment to the Inspector-General of Police

Shirani A.Bandaranayake, J Judge of the Supreme Court

Jagath Balapatabendi, J.I agree Judge of the Supreme Court

K.Sripavan, J I agree. Judge of the Supreme Court

04:03 AM
Wednesday
April 21st,
2010