

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

In the matter of an application under Article 126 of the Constitution of the Democratic Socialist
Republic of Sri Lanka

S.C. (FR) Application No. 363/2000 -

Nesarasa Sivakumar, Beach Road, Batticaloa.
Presently in remand at Remand Prison, Kalutara.

Petitioner:

Vs.

1. Officer in Charge, Special Task Force Camp,
Chettipalayam.
2. Officer in Charge, Police Station, Kaluwanchikudy.
3. Officer in Charge, Counter Subversive Unit, Police
Station, Batticaloa.
4. Inspector General of Police, Police Head Quarters,
Colombo 1.
5. The Superintendent of Prisons, Remand Prisons,
Kalutara.
6. The Attorney General, Attorney General's Department,
Colombo 12.
Respondents

BEFORE: S. N. Silva, C.J. Shirani A. Bandaranayake, J. Edussuriya, J.

COUNSEL : V. S. Ganeshalingam with E. Mariampillai, For petitioner
Nalin Ladduwahetti, For 1 ST. Respondent
A. S. M. Perera, PC, with Neville Ananda, For 3 rd. Respondent
D. S. Riyaz Hamza, SC, For 4 th. to 6 th. Respondents

ARGUED ON: 18. 05. 2001

DECIDED ON: 01. 10. 2001

Shirani A. Bandaranayake, J.

The petitioner, a 25 year old married person with two young children, earned his living by working as a laborer. On 19th. April 1999, when the petitioner was at his residence

Theltativu, the officers attached to the Chettipalayam STF camp arrested him. That evening he was handed over to Kaluwanchikudi Police and the next day, Viz., 20 th. April, he was handed over to the Counter Subversive Unit of the Batticaloa Police Station. The petitioner claims that, while he was kept at the Counter Subversive Unit, Batticaloa, he was tortured in the following manner and forced to sign certain documents:

- a. By being beaten with wooden rods;**
- b. Kicked on his chest and abdomen;**
- c. A shopping bag containing petrol and chillie powder being placed on his head;**
- d. being immersed in water till he suffocated;**
- e. burnt with cigarette butts ;**
- f. penis and scrotum being pulled and squeezed .**

On 15 th. June 1999, the petitioner was produced before the Magistrate, Batticaloa and was remanded under section 7 (2) of the Prevention of Terrorism Act. The Petitioner alleges that he was subjected to torture, cruel, inhuman and degrading treatment and by such action his fundamental right guaranteed by Article 11 of the Constitution was violated by the respondents.

This Court granted leave to proceed in respect of the alleged infringement of Article 11 of the Constitution.

When this application came up for hearing, learned counsel for the 1 st. Respondent took up a preliminary objection that the petitioner had not come before this Court within the prescribed time limit specified in Article 126 (2) of the Constitution. He contended that the alleged incidents had occurred in May / June 1999 and the petition had been filed only on 30 Th. May 2000. He further contended that although the petition was filed only on 30 the. May 2000, the petitioner has placed his signature on the affidavit on 07 th. March 2000. He therefore submitted that, in such circumstances, the delay between the period 07 Th. March 2000 to 30th. May 2000 cannot be justified.

It is common ground that the petitioner was arrested on 19 Th. April 1999 and since he continued to be incarcerated. Although the petitioner would have placed his signature on the affidavit, he nevertheless remained in custody and would not have been able to find an Attorney-at -law of his choice to support his application. The delay in filing this application should be excused on the basis that it was due to circumstances beyond the control of the petitioner. The preliminary objection is therefore rejected.

According to the petitioner he was produced before the JMO, Batticaloa only on the 17 Th.

August 1999 and that too was on an order of the Magistrate before whom he was produced on 15 th. June 1999. The JMO , Batticaloa, Dr. P. S. Chandrapalan has issued a Medico - Legal Report on 30 th. August 1999, to which I would make full reference subsequently. However, in addition to this report, there are four (4) Medicos - Legal Examination Forms one filed by the 1 st. Respondent and the rest filed by the 3 rd. Respondent along with their objections. The Medico - Legal Examination Form, marked 1 R 4, stipulates that the petitioner was examined on 19 Th. April 1999, when he was produced before Dr. K. Vaseekaran, DMO attached to District Hospital, Kalawanchikudi. No injuries are marked on cage 10 of the form and in the remarks column; the DMO has stated that there are "no external injuries". The Medico - Legal Examination Form, marked 3 R 3, is also issued by the DMO, Kalawanchikudi on 20. 04. 1999 and again in the remarks column he has stated that there are no external injuries.

Medico - Legal Examination Form, marked 3R6 is dated 15th. June 1999 and has been signed by Dr. Chandrapalan, JMO of Batticaloa. He has indicated that the petitioner has no injuries. The petitioner was produced before the JMO, Batticaloa once again on the same day and the Medico-Legal Form marked 3R7 has repeated the earlier observation. The 3 rd. Respondent in his affidavit has averred that the petitioner had made a confession on 15 Th. June 1999 and before and after the confession was made, he was produced before the JMO, Batticaloa.

The JMO, Dr. Chandrapalan, who examined the petitioner on 17 Th. August 1999, on the other hand has submitted a detailed report on 30 th. August, the relevant contents of which I reproduce below:

BACKGROUND HISTORY

He (petitioner) was arrested on 18. 03. 1999 at about 1.30 p.m. At his house by the STF personnel from the Cheddipalayam STF camp. Then and there he was blind-folded and taken to the Cheddipalayam STF camp, where he underwent torture in the following manner:

- i. He was beaten with wooden rod and by hands and legs, on his entire body;
- ii. His moustache was forcibly pulled out, twisting by hands;
- iii. He was kicked with boots a chest and abdomen.

The same evening he was transferred to the Police Station of Kalawanchikudi, where he was kept there the whole night, and at that time he was kicked on his chest and abdomen. Following this on 19. 03. 1999 he was handed over to the CSU, Batticaloa where also he underwent torture as below:

- a. He was beaten with wooden rod, bamboo spike, electric wires, s-lon pipe loaded with sand and also by hands and legs on his whole body;
- b. Shopping bag containing petrol and chillie powder was tied to his neck covering his face and

head completely in order to suffocate him. Later he noticed that the skin on the face got peeled off and from then onwards he felt a burning sensation on his face and irritation of his eyes;

- c. He was submerged in a water tank after tightening his limbs upside down;
- d. He was cut by a razor blade on his limbs and body;
- e. He was burnt with an ignited cigarette butt and with ignited mosquito coil on his limbs and body;
- f. He was ordered to bend down under a table and was beaten with a bamboo spike;
- g. He was also forced to place both his hands on a table and was beaten with bamboo spikes;
- h. He was slapped on ears and cheeks;
- i. He was thrown to the ground and later into a sewage canal;
- j. Once again he was. Thrown inside a sewage canal and forced to drink the polluted water;
- k. He was to kiss a deceased stray dog.
- L. his penis and scrotum were drawn and squeezed forcibly, which had caused him immense pain;
- m. He was suspended upside down from a height and after tightening the limbs...beaten with bamboo spikes;
- n. Both his legs were forcibly twisted;
- o. He was made to sit down on a chair and both his soles were elevated and beaten.

After two (2) months detention he was transferred to the normal prison, Batticaloa on 15. 06. 1999. Until now he is there and he never underwent any torture there.

FINDINGS AND EXAMINATION

- a. There was a scar of laceration ½" long vertically placed on left forehead;
- b. There was a scar of abraded laceration 3 ½ " x ½" in size placed on the left shoulder;

- c. There was a scar ...placed horizontally below the right clevice;
- d. There was a scar of laceration $3\frac{1}{2}$ " x $\frac{1}{2}$ " in size placed vertically on the postro medial aspect of the right fore-arm;
- e. There was a scar of laceration $3\frac{1}{2}$ " x $\frac{1}{4}$ " in size placed across the back of the lower right arm and it was 3 " above the elbow;
- f. There were many scars of laceration in varying sizes (3 " - 2 " x $\frac{1}{2}$ " - $\frac{1}{6}$ ") found scattered on his entire back at various directions;
- g. There was a scar of abraided laceration placed across the postro medial aspect of the right mid-thigh;
- h. There was a scar of laceration 4 " x $1\frac{1}{2}$ " in size placed vertically on calf of the right leg and it was 6" above the ankle joint;
- i. There was a scar of abraided laceration 1 " x $1\frac{1}{4}$ " in size placed on the dorsal aspect of the right big toe and below its nail;
- k. There was a scar of abraided laceration with irregular margin 2 " long placed across the right buttock;
- l. There was a scar of laceration $3\frac{1}{4}$ " x $1\frac{1}{2}$ " in size placed on postro lateral aspect of the left leg and it was 4" above the lateral maleolus;
- m. There was a tiny scar of laceration placed across the terminal phalange of the left ring finger;
- n. There were three (3) scars of incised wound placed one below the other in varying sizes (4 " - 2 ") on the anthrop lateral aspect of the left arm;
- o. There were two scars of incised wound placed one below the other ($3\frac{1}{2}$ " - $2\frac{1}{2}$ ") on the back of the right shoulder;
- p. There was a scar of incised wound $1\frac{1}{4}$ " long placed on the dorsal aspect of the second inter phalangeal joint of the right middle finger;
- q. There were two circular scars of burns 2-3 mm in size placed on lateral aspect of the left elbow and medial side of the left wrist respectively;
- r. There was circular scar of burn $1\frac{1}{2}$ " x $1\frac{1}{2}$ " in size found on the lateral aspect of the right lower fore-arm and it was $3\frac{1}{2}$ " above the wrist;
- s. There was a circular burn of 2-3 mm in size found on the lower lateral side of the right leg;
- t. His eyes were examined by the eye-surgeon for the burning sensation on his eyes and she

reported he has chronic conjunctivitis. For this he needs spectacles and advised him to attend the clinic after 3 weeks to assess the progress.

OPINION

Clause 08 - (a) to (h) and (k) to (m) . All these could be inflicted by beating by blunt weapons in the process of torture at the detainee in various positions. In the history the torturer has made use of various types of blunt weapons. Therefore any of this could be the agent to cause these injuries.

Clause 08 - (i) to (j). Specifically these two scars were placed on both the big toes. In the history he was suspended upside down after tightening both his toes together. In this instance the ligature around the big toe most probably could have caused this injury. This confirms with my findings.

Clause 8 - (n) to (p). These could have occurred either due to scratch by a pointed object or cutting with sharp thin bladed weapon. In the history, the torturer had used shaving blade. Hence most probably this could be the agent.

Clause 8 - (q) to (s). This might have inflicted either by applying a circular ignited object in the size more or less described above. In the history the torturer had applied ignited cigarette butt and ignited mosquito coil. Hence any of these might be the agent.

Clause 8 (t). This could have been followed by chronic irritation to the eyes. In the history he was suffocated by a shopping bag, which contained petrol and chillie powder. Since this application was made on him he is undergoing these symptoms. Hence the irritants found in this bag most probably might be the agent to cause the above symptoms.

CATEGORY OF HURT

Checked

"...The injuries he has sustained can be considered as grievous in nature. "

The 1 st. Respondent in his affidavit had averred that the petitioner was arrested on 19. 04. 1999 by Sub Inspector of Police Gunasiri attached to the Chettipalayam STF camp. The said Sub Inspector had been on a cordon and search operation when he had come across the petitioner who was reluctant to come towards the officers. When questioned on suspicion, the petitioner's father-in-law too had come up to the STF party and upon being questioned had admitted that the

petitioner was a member of the LTTE from 1990. He had further informed that although the petitioner was resident in Trincomalee, he had resided in Jaffna. The petitioner also stated that he had arrived in Chettipalayam area only a few days ago. Thereafter the said police party had proceeded to search the house belonging to the father-in-law of the petitioner where the petitioner had been residing and found a police constable's cap and a belt. Later the petitioner was brought to the STF camp at Chettipalayam and subsequently handed over to the camp at Kalawanchikudi. Prior to the handing over of the petitioner to Kalawanchikudi camp, the 1 st. Respondent had made arrangements to produce the petitioner before the DMO, Kalawanchikudi (1 R 4).

The 3 rd. respondent had taken up the position that, at the time the petitioner was handed over to the Kalawanchikudi Police, when the petitioner was in the custody of the said Police Station as well as before and after the confession was made by the petitioner, he was produced before the JMO, Batticaloa. Those reports, according to the 3 rd. respondent indicate that there were no injuries on the petitioner. The 3 rd. respondent had further averred that he was in charge of the Counter Subversive Unit only until 16 Th. May 1999 and Inspector G. T. Perera had taken over the functions as the OIC of the Counter Subversive Unit with effect from 17 Th. May 1999.

The 3 rd. respondent claims that the petitioner had several opportunities in complaining to offices such as the Magistrate, Superior Police Officers, DMO- Kalawanchikudi and the JMO, Batticaloa when he was produced before them during the period 19. 04 .1999 to 15. 06. 1999. He further submitted that the petitioner could have even informed the ICRC officials and the members of the HRC, if he had suffered any kind of assault. There is no evidence to indicate that the petitioner had informed the Superior Police Officers or the ICRC that he was assaulted while in detention. However, it must be noted that the Medico - Legal Report dated 30 Th. August 1999 was issued as a result of an order given by the Magistrate at the time the Petitioner was produced before him. It is indeed very unlikely for a detainee to inform a medical officer that he was assaulted while he was in custody, in the presence of those officers. Authorial, J. in Amal Sudath Silva V. Kodituwakku, Inspector of Police and others ([1987] 2 Sri L. R. 119, at pg. 125) stated that:

" It seems to me to be preposterous for any medical officer before whom a suspect is produced for a medical examination in the custody of a police officer to expect him tell the officer in the very presence of that police officer that he bears injuries caused to him as a result of a police assault. This seems particularly so when the suspect is produced at the instance of the police themselves and not upon an order of Court."

It is to be noted that the two Medicos - Legal Examination Forms marked 3R6 and 3R7 dated 15 Th. June 1999 were also issued by Dr. S. Chandrapalan, JMO, Batticaloa. If we are to rely on the Medical Reports issued prior to the final report dated 30 Th. August 1999, the inference to be drawn is that, the petitioner had received all these injuries between the period 15. 06. 1999 to 17. 08. 1999, after he was remanded on an order made by the learned Magistrate.

The Medical - Legal Report of Dr. Chandrapalan dated 30 Th. August 1999 does not refer to the probable period of time the assault would have taken place on the petitioner. The petitioner, while giving the history to the Medical Officer, had informed him that he was assaulted after his arrest and the petition and affidavit of the petitioner too confirms the position taken by him. Moreover the opinion given by Dr. Chandrapalan in his report dated 30 Th. August 1999, corroborates and substantiates the version given by the petitioner with regard to his assault. I am inclined to accept the version of the petitioner that he suffered his injuries after his arrest on the 19 Th. April 1999 and at the hands of the Counter Subversive Unit, Batticaloa. The Medico - Legal Examination Forms (1R4, 3R3, 3R6, and 3R7) produced by the respondents is self-serving evidence and no reliance could be placed on them. The person said to have been produced before the Medical Officer has been brought under police custody and returned to the same office. There is no evidence as to the identity of the person produced, except for the name given in the form which has been at all times in the custody of the Police. Their contents are totally contradicted by the Medical Report dated 30 Th. August 1999 submitted pursuant to examination carried on an order by the Magistrate. In the circumstances I place no reliance on the contents of Medico - Legal Examination Forms marked 1R4, 3R3, 3R6 and 3R7.

The respondents had taken up the position that the petitioner was arrested as he belonged to the LTTE. Atukorale, J. In Amal Sudath Silva (supra at PG. 127) Stated as follows, with which I am in complete agreement:

" 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."

For the aforementioned reasons, I hold that the petitioner's fundamental right guaranteed by Article 11 of the Constitution was violated while he was in the custody of the 3 rd. respondent, who is named only by office.

The State shall pay the petitioner a sum Rs. 25,000/- as compensation and a sum of Rs. 5000/- as costs.

I direct the Registrar of the Supreme Court to send copies of this judgment to Hon. Attorney General and the Inspector General of Police for necessary investigations and action to be taken against the persons who perpetrated torture.

JUDGE OF THE SUPREME COURT

S. N. SILVA, C. J.

I agree.

CHIEF JUSTICE

EDUSSURIYA, J.

I agree.
JUDGE OF THE SUPREME COURT

Document Actions

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