In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

In the matter of an Application under Article 126 of the constitution

S.C. Application FR No. 293/99

Mohamed Haniffa Siti Mariliya
Alias Mariliya Cader,
181/B, Pasyala Junction,
Pasyala.

Petitioner

Vs.

1. R. Mallawa Kumara, O.I. C., Minor Offences Branch, Police Station, Nittambuwa.
2. T. A. N. Ranatunga, (RPS 12640), Police Station, Nittambuwa.
3. Reserve police, Constable 7851, Police Station, Nittambuwa.
4. Indika Kapugoda, Head- Quarters Inspector, Police Station, Nittambuwa.
5. Police Constable 30556, Police Station, Nittambuwa.
6. Noordeen Mohamed.Faizer, Alias Faider, Noordeen Stores, Pasyala Junction, Pasyala.
7. Inspector - General of police, Police Head - Quarters, Colombo
8. Attorney - General, Attorney - General's Department, Colombo.

Respondents:

BEFORE: Fernando, J,
Edussuriya , J,
and Wigneswara, J.

COUNSEL:

Triny Gorden Rayan with M. K.P. Chandralal
And Sasi kumar Ramanathan for the Petitioner;
S. M. Perera, PC, with Shamila Daluwatte
And Neal Ananda for 1st to 4th Respondents;
M. Gopallawa, SC , for the
7th and 6th Respondents.

ARGUED ON 17th May 2001.

DECIDED ON: 21st September 2001

FERNANDO, J:

The Petitioner complains that she was arrested at about 10.30 a.m. on 7.10.99; that she was taken to the Nittambuwa Police Station, and detained overnight, and produced before the Attanagalla Magistrate only at about 3.30 p.m. the next day; that she was subjected to cruel, inhuman and degrading treatment, at the time of arrest and thereafter at the Police Station; and that thereby her fundamental rights under Articles 11, 13(1) and 13(2) were infringed.

It is common ground that the Petitioner and her husband were having disputes with their neighbour, the 6th Respondent. According to the Petitioner, on 3.10.99 the 6th Respondent, having commenced some construction activities on his land, was trespassing on their land. The 5th Respondent (a constable attached to the Nittambuwa Police) refused to record her husband's complaint. On 7.10.99, at about 9.30 a.m., the 2nd Respondent (a Reserve Police Sergeant) came to their shop-cum-house and ordered her husband "to clean the land and give the 6th Respondent space to mix cement and do anything while constructing on their land". The Petitioner replied that there was a pending District Court action and that the 6th Respondent was not entitled to make any permanent improvements. She also told him "without looking only at one side look at both sides", whereupon "he aggressively pushed the stool with his leg and kicked the vegetables that were on the floor and went out swearing to teach them a lesson". The 2nd Respondent returned at 10.30 a.m., with the 1st Respondent (the Officer-in-charge, minor offences), two female constables, and a male constable. Her husband was not in. The 1st and 2nd Respondents pulled her by the hair, hit her with a pole, and forcibly dragged her into the Police jeep. She was taken to the Police station, and made to sit on a bench until 3.00 p.m. Then the 1st and 2nd Respondents took her to the office of the 4th Respondent (the Headquarters inspector, Nittambuwa), who without any inquiry hit her all over her body with a stick, while yelling in obscene language, with the 1st and 2nd Respondents egging him on. The 4th Respondent gave an order to other policemen to arrest her husband and to torture him too. He also ordered the Petitioner to close her shop, failing which they would both be burnt alive. He added "we can kill the two of you", and he compelled her to sign a statement written in Sinhala - a language which she could neither read nor write.

On 8.10.99 the 1st Respondent told the Petitioner to be ready for fourteen days remand, took her to the Wathupitiwela Hospital at about 1.30 p.m., and told the doctor something in English. He order the Petitioner "not to tell anything to the doctor or else he would catch (her) husband and give him a worse treatment and remand both of them". She was produced before the Attanagalla Magistrate in chambers, at about 3.30 p.m., and bailed out.

According to the copy of the proceedings (produced by the 1st to 4th Respondents), she had

pleaded guilty to the charge - but there is no evidence that any charge had been framed, read or explained !

Thereafter, her sister treated her with wintogeno and ayurvedic oils, but the pain became unbearable. Her sister took her to her sister's home at Kuliyapitiya, and got her admitted to the Kuliyapitiya Base Hospital where she was warded for the 19th to the 26th of October.

Although the medical report issued at Wathupitiwela disclosed no injuries whatsoever, according to the Medico-Legal Officer of the Kuliyapitiya Base Hospital, she had contusions (each about 6 cm's long and 5 cm's wide) on her head, neck, upper arm, and thigh - all caused by a blunt weapon. She had to wear a cervical collar.

Apart from the alleged refusal to record her husband's compliant on 3.10.99, the Petitioner made no allegation against the 5th Respondent. The only allegation she made against the 3rd Respondent related to a previous incident on 1.10.99. There was no evidence of their involvement in the events of 7th and 8th October. The Petitioner also alleged that 'the 6th Respondent had instigated the 1st to 5th Respondents to infringe her rights, but the only evidence against the 6th Respondent was that he had made a complaint against her, and that is not sufficient to establish instigation of all that took place thereafter. I therefore make no order against the 3rd 5th and 6th respondents.

The position of the 1st, 2nd and 4th Respondents (whom I will now refer to as "the Respondents") was set out in three virtually identical affidavits. On 4.10.99 the 6th Respondent had made a complaint to the Police against the Petitioner's husband. On 7.10.99, on the directions of the 1st Respondent, the 2nd Respondent set out to inquire into the complaint. Having first visited the 6th Respondent, he then came to the shop-cum-residence of the Petitioner and her husband. According to his affidavit the Petitioner abused and assaulted him and he made a complaint about the incident, and:

".....the Petitioner was subsequently taken into custody on 7.10.99. A statement of the Petitioner had been recorded on the same day. On the next day the Petitioner had been produced before a medical officer at the Government Hospital, Wathupitiwela and immediately thereafter she had been produced before the Hon Magistrate who had released her on bail, since the Petitioner had informed the Magistrate that she is admitting the charge." (emphasis added)

The 2nd Respondent gave no details of the alleged abuse and assault. It is now admitted that it was the 1st and 2nd Respondents who arrested the Petitioner, and that it was the 1st Respondent who produced her before the doctor at Wathupitiwela and the Magistrate. However, in their affidavits they refer to such arrest and production as if others were responsible. They do not explain (a) who arrested the Petitioner, (b) whether, and if so what, reasons were given to her for arrest, (c) the time of arrest and (d) what degree of force was used. They did not contradict her in regard to the time at which she was produced before the Magistrate, and the 1st Respondent was content with a bare denial, and did not say whether he had seven seen the petitioner during her prolonged detention at the Police Station of which he was in charge. According to the information book extracts, her statement had been

recorded at 2.15 p.m. The Respondents did not explain why it was necessary to detain her for so long - and, indeed, why it was at all necessary to detain a female suspect overnight at the Police station.

I am therefore unable to place any reliance on the Respondents' affidavits.

ARREST

The Petitioner's claim that the 1st and 2nd Respondents took her into custody has not been denied by them. In their affidavits, they do not state that she was informed of the reason for her arrest, and they do not even say for what offence they arrested her, and they do not explain why force was used at the time of arrest.

Mr. A S M Perera, PC, on behalf of the respondents, sought to rely on several Police Information Book ('IB') extracts to amplify and explain the Respondents' affidavits. While statements recorded in the Information Books, as well as entries made by Police officers, may be used to assess the credibility of affidavits, and perhaps even to clarify averments therein, it is neither proper nor desirable to treat them as substantive evidence or to use them to cover up glaring omissions in the affidavits. In any event, those extracts do not really help the Respondents.

Mr. Perera first relied on IB extracts which showed that at 11.00 am the 2nd Respondent had made a complaint about the Petitioner, and that the 1st Respondent left the station at 11.30 a.m. (together with the 2nd Respondent, two female constables and a male constable) in order to arrest the Petitioner for having obstructed the 2nd Respondent in the execution of his duties - an offence under section 183 of the Penal Code. His "In" entry at 12.15 p.m. refers to an arrest for obstruction, and nothing else. When it was pointed out to Mr. Perera that, in terms of the First Schedule to the Code of Criminal Procedure Act ("the Code"), that was not an offence for which the Petitioner could have been arrested without a warrant, he then contended that the arrest was for that as well as for an offence under section 344 of the Penal Code - for which an arrest may be made without a warrant. For that contention, he relied on the report to Court made by the Police, which the 4th Respondent had produced. But on examination that turned out to be an amended report filed in December 1999, and that the 4th Respondent had not produced a copy of the report actually filed on 8.10.99. State Counsel then tendered a copy of that report. It turned out that the "proceedings" of 8.10.99 had been hand-written on that report, and that the 4th Respondent had produced a photocopy of these "proceedings", leaving out the report itself. That report referred to section 486 of the Penal Code - also an offence for which a warrant was required. It is clear that an offence under section 344 was not in the minds of the arresting officers.

Mr. Perera then fell back upon section 321(1)(f) of the Code. Section 32(1) empowers a peace officer, without a warrant, to arrest any person -" (a) who in his presence commits any breath of the peace; (b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made (etc) of his having been so concerned; (c) having in his possession without lawful excuse house-breaking implements; (d) who has been proclaimed as an offender; (e) in whose possession anything is found which may reasonably be suspected

to be property stolen.....; (f) who obstructs a peace officer while in the execution of his duty or who has escaped or attempts to escape from lawful custody; (g) reasonably suspected of being a deserter.....; (h) found taking precautions to conceal his presence....; (i) who has been concerned in or against whom a reasonable compliant has been made (etc) of his having been concerned in any act committed at any place out of Sri Lanka....." (emphasis added) He argued that it was in terms of section 32(1)(f) that the Petitioner was arrested, and that a warrant was not required. The Respondents' version is not that the Petitioner was arrested while obstructing the 2nd Respondent, but that she was arrested sometime later. i.e. after the obstruction had ceased. In my view, section 32(1)(f) authorizes an arrest without warrant for obstruction, only while the obstruction is taking place - and not for an obstruction which had taken place earlier. Section 32(1) refers to several different situations in which a peace officer may arrest without a warrant; in some instances, an arrest can be made for an offence committed previously, while in others arrest is authorised only while the offence was being committed. Thus under clauses (b) and (I), a person "who has been concerned" in specified offence, or against whom a reasonable complaint "has been made" that he was concerned in a specified offence, can be arrested; likewise, clause (d) sanctions the arrest of a person "who has been proclaimed". However, under clauses (a), (c) and (e), an arrest is permitted only if the offence (or other suspicious conduct) takes place in the presence of the arresting officer.

Clause (f) must be interpreted in the context of that difference. It is quite clear that arrest for obstruction is permitted, without a warrant, only of a person "who obstructs": i.e. where the obstruction takes place in the presence of the arresting officer. It does not apply to past obstruction, i.e. where a peace officer "has been obstructed....." The second limb of clause (f) is illustrative: in the case of escape from lawful custody, it authorizes the arrest not only of a person who attempts to escape but also of any one who "has escaped" from lawful custody. Clause (f) could similarly have provided for the arrest of a person "who obstructs, or who has obstructed....." But the latter phrase was omitted, presumably deliberately, and that which Parliament omitted while legislating we should not interpolate in the guise of interpretation. Besides, such an interpretation would mean that in all cases of obstruction an arrest may be made without warrant, thus creating an nconsistency with the First Schedule to the Code. I hold that the First Schedule sanctions arrest for obstruction only with a warrant, but that, exceptionally, section 32(1)(f) authorizes arrest without a warrant while the obstruction is taking place.

I must mention that, at the conclusion of the oral argument, Mr. A S M Perera asked for, and was granted, permission to file written submissions - particularly on the above aspects. Nothing was filed. I hold that the Petitioner's fundamental right under Article 13(1) WAS infringed by the 1ST and 2ND Respondents in several respects. She was not informed of the reason for her arrest. Even assuming that the 1st and 2nd Respondents had in mind the alleged offences mentioned in the "B" report filed on 8.10.99, those were offences for which the law did not sanction arrest without a warrant; and section 32(1)(f) of the Code was inapplicable. Moreover, excessive force was used at the time of arrest, contrary to the provisions of sections 32(2) and 28. If the Petitioner had resisted arrest, that was lawful resistance to an unlawful arrest.

DETENTION

In regard to detention, Mr. A S M Perera submitted that the Petitioner's arrest was actually at 11.50 a.m., and that her statement was recorded at 2.15 p.m. He submitted that she had been detained at the police station only for "a little more" than what he described as "the period of twenty-four hours allowed by section 37 of the Code" (the time taken for the journey to the Magistrate's Court being excluded). He claimed that it was "commonly understood" that the Police had a clear twenty-four hours to produce a suspect in Court.

That submission does not help him at all. Even if the arrest was at 11.50 am And assuming it took half an hour for the journey to the Magistrate's Court, the Petitioner was nevertheless in custody for over 27 hours. However, that submission is fundamentally wrong. Article 13(2) requires production before the judge of the nearest competent court "according to procedure established by law". The procedure established by law, namely the Code of Criminal Procedure Act, is that an arrested person must be produced "without unnecessary delay" (section 36). Section 37 does not alter that provision: it reiterates that an arrested person must not be confined "for a longer period than under all the circumstances of the case is reasonable".

The further provision in section 37 that "such period shall not exceed twenty-four hours", exclusive of travel time from the place of arrest (not from the Police station) to the Court, does not extend the permitted period of detention. It does not sanction detention for twenty-four hours, where twenty-four hours is neither necessary nor reasonable. On the contrary, it limits the period sanctioned by sections 36 and 37 - by providing that "necessary" or "reasonable" delay must never exceed twenty-four hours. Consequently, if detention exceeds twenty-four hours, the Court need not consider whether the period of detention was necessary or reasonable, but may presume that it was not. If, however, the period was less than twenty-four hours, the Court must consider whether the delay was necessary or reasonable.

Thus in Faiz v A.G., (1995) 1 SriLR 372, it was held that although the petitioner had been produced before a Magistrate within twenty-four hours, nevertheless "the detention was unnecessarily prolonged" (at p 379), and that Article 13(2) had been infringed. In a similar context, in Selvakumar v Devananda (SC 150/93 SCM 13.7.94) dealing with comparable emergency regulations, I held:

".....Emergency Regulations 18 and 19 do not compel, but merely authorize, detention for a period "not exceeding" ninety days; and also require production before a Magistrate "within a reasonable time.....and in any event not later than thirty days....." This does not mean that detention for the full period of ninety days is either mandatory or proper; or that production before a Magistrate can, without justification, be delayed with impunity. If in the circumstances there has been unreasonable delay, either in production or release, it is no answer that the specified time limits have not been exceeded. In the present case, detention was unnecessarily prolonged, without the shadow of an excuse....." (emphasis added) Reference was made to observations in Dissanayake v Premaratne, (1996) 2 SriLR 211, 217. The head note states that the petitioner's right under Article 13(2) was violated by reason of "detention at the Police station for a period exceeding 24 hours". That only means that the Court presumed a violation, and not that detention for a shorter period was necessarily

lawful.

I will assume, for the purpose of this case, that keeping the Petitioner in custody until her statement was recorded was justifiable. However, no sooner her statement was recorded she should either have been released or brought before the nearest Magistrate. She should not have been held overnight. I hold that detention thereafter was neither necessary nor reasonable, and that her fundamental right under Article 13(2) has been infringed, and for that I hold the 1st and 4th Respondents responsible. CRUEL, INHUMAN AND DEGRADING TREATMENT

The medical evidence establishes that on 19.10.99 the Petitioner had serious injuries consistent with an assault as alleged by her. It is probable that those injuries were caused in the course of arrest and/or whilst in Police custody after arrest. There is no reason to think that they were caused after she was released on bail. I hold that at the time of arrest excessive force was used and the Petition was treated in a humiliating manner; she was subjected to a serious assault thereafter, besides being abused and threatened; and she was needlessly detained overnight.

I hold that the Petitioner has established on a balance of probability that the 1st, 2nd and 4th Respondents have subjected her to cruel, inhuman and degrading treatment, in violation of her fundamental right under Article 11.

ORDER

I grant the Petitioner a declaration that her fundamental rights under Articles 11, 13(1) and 13(2) have been infringed by the 1st, 2nd and 4th Respondents (as set out above). I award her compensation and costs in a sum of Rs 100,000/-, of which Rs 60,000/- shall be paid by the State, and the balance personably by the 1st Respondent (Rs 15,000/-), the 2nd Respondent (Rs 5,000/-), and the 4th Respondent (Rs 20,000/-), before 31.12.2001.

JUDGE OF THE SUPREME COURT
EDUSSURIYA, J:
I agree

JUDGE OF THE SUPREME COURT
WIGNESWARAN, J:
I agree

JUDGE OF THE SUPREME COURT