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 of the Constitution.

SC. FR Application No. 252/2006

Roshan Mahesh Ukwatta,
No. 16/6A, Kotigala Mawatha,
Walpola,
Angoda
(Presently at the Colombo Remand Prison)
Petitioner

Vs

1. Sub Inspector Marasinghe,
Officer in Charge,
Crime Division,
Police Station,
Welikada.

2. Sagara Liyanage,
Inspector of Police,
Officer in Charge,
Police Station,
Welikada.

3. The Inspector General of Police,
Police Headquarters,
Colombo 1.

4. Honourable Attorney General,
Department of the Attorney General,
Colombo 12.

Respondents

BEFORE : Saleem Marsoof P C, J
P A Ratnayake P C, J
Chandra Ekanayake, J

COUNSEL : Upul Jayasuriya with Sandamali Rajapaksa for the Petitioner
Upul Kumrapperuma with Suranga Munasighe for
the 1st Respondent
Riaz Hamza, SSC for 3rd and 4th Respondents.

ARGUED ON : 07.07.2009.
Written submissions
tendered on : 13th August 2009 (by the Petitioner)
03rd September 2009 (by the 1st Respondent)

DECIDED ON 15.12.2010

Chandra Ekanayake, J.

By petition dated 24/7/2006 (filed together with his Affidavit) the petitioner has sought relief from this Court for the alleged infringement of his fundamental rights guaranteed under articles 11,12, 13(1) and 13(2) of the Constitution. Leave to proceed was granted by this Court on 28.07.2006 only for the alleged violations of articles 11, and 13(2).

When the case was mentioned in open Court on 09-11-2006 the 1st and 2nd respondents were absent and unrepresented and the State Counsel who represented the 4th Respondent (Hon. the Attorney-General) had informed Court that the Attorney General was not appearing for the 1st and 2nd respondents. Perusal of the docket reveals that on 25th August 2008 the Attorney-General had intimated to Court that on investigation reports filed by the 1st and 2nd respondents the Petitioner would be discharged in the criminal proceedings. However the petitioner elected to proceed with this application.

At the outset I wish to deal with the objection taken up by the 1st respondent that this application is time barred, in that the petitioner has not invoked the jurisdiction of this Court within one month of the alleged violation as stipulated in article 126 of the constitution. Section 13(1) of the Human Rights Commission Act No. 21 of 1996 which empowers the Human Rights Commission of Sri Lanka

(hereinafter sometimes referred to as HRCSL) too to entertain complaints in respect of the violations of fundamental rights guaranteed by the constitution, and it mandates that when a complaint is made to the Commission by an aggrieved party in terms of Section 14 of the Act, within one month of the alleged infringement of a fundamental right by executive and administrative action the period within which the inquiry into such complaint is pending before the commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme court in terms of article 126(2) of the constitution. According to the complaint marked P1, same had been preferred on 24.02.2006 – that is within two days of the alleged arrest of the petitioner and as the alleged illegal detention and torture were continuing the petitioner is within the stipulated one month time frame from the alleged violations.

Further the 1st respondent objected that the complaint had not been made by the petitioner himself as mandated by Article 126(2). The answer to 1st respondent's objection is basically found in section 14 of the Human Rights Commission Act No. 21 of 1996 which states that the Commission may on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of the aggrieved person or a group of persons, investigate an allegation of the infringement or imminent infringement of a fundamental right of such person or group of persons by executive or administrative action.

Moreover, although the time limit of one month is mandatory in ordinary circumstances, in exceptional circumstances the application of the legal maxim '*lex non cogit ad impossiblia' applies* where the delay in invoking the jurisdiction of the Court under article 126 is not due to a lapse on the part of the petitioner**.** In the exceptional circumstances, the Court has a discretion to entertain an application made out of time. In this regard the decision of this Court in **Gamaethige v Siriwardane** (1988) 1 SLR 384 would lend assistance. In the above case it was held by Fernando J. - Jameel J. agreeing that:

"Three principles are discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g. of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both infringement and knowledge exists. The pursuit of other remedies judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in

exceptional cases on the application of the principle 'lex non cogit ad impossibilia', if there is no lapse, fault or delay on the part of the petitioner, this Court has discretion to entertain an application made out of time."
Saman v Leeladasa (1989 1 SLR 1), too is case where a petition filed after one month from the alleged infringement was considered with regard to a petitioner who was in remand custody. At page 10 in that judgment per Fernando J, :
"A remand prisoner cannot contact a lawyer with the same ease and facility as other persons; additional time has necessarily to be spent in sending messages to, or in awaiting a visit from, a relative, who would then have to contact a lawyer; and more time would be necessary to give proper instructions. The period of time necessary would depend on the circumstances of each case.

Here the Petitioner was hospitalised from 2.12.87 until his release, and was thus prevented from taking immediate action to petition this Court for redress; an impediment, to the exercise of his fundamental right (under Article 17) to apply to this Court, caused by the very infringement complained of. Further, the fact that he had been assaulted, or that an injury has been inflicted on him, would not *per se* bring him within Article 11; whether the treatment meted out to him would fall within Article 11 would depend on the nature and extent of the injury caused; until the Petitioner had knowledge, or could with reasonable diligence have discovered, that an injury sufficient to bring him within Article 11 had resulted, time did not begin to run."
Further in the case of **Namasivayam v Gunawardena** 1989 1SLR 394 - per His Lordship Sharvananda, C.J. (with Athukorala J, and H.A.G. de Silva J. agreeing);
'To make the remedy under Article 126 meaningful to the applicant, the one month prescribed by Article 126(2) should be calculated from the time that he is under no restraint. If this liberal construction is not adopted for petitions under Article 126(2) the petitioner's right to his constitutional remedy under Article 126 can turn out to be illusory. It could be rendered nugatory or frustrated by continued detention.'
Thus what becomes evident from all above judicial pronouncements is that - although time limit is mandatory, in exceptional circumstances, on the application of the principle *les non cogit ad impossibilia,* if it can be concluded there is no lapse, fault or delay on the one month period. In the present case the petitioner has alleged that he was arrested on 22.02.2006 around 11 a.m and having produced before the Magistrate on 28.02.2006, a remand order was made. Subsequent to that only he had been hospitalised in different hospitals. However

as per document annexed to his counter affidavit marked as CA 1 which being the proceedings had before High Court of Colombo pertaining to his bail application bearing No. HCBA-529/06 establishes that the order granting bail had been made only on 17.10.2006. His present petition to this Court had been filed on 25.07.2006 that is obviously during his incarceration. This position makes it clear that he had filed this petition even while he was under restraint i.e - to have access to Court due to incarceration. In view of the above I am inclined to take the view that 1st respondent's preliminary objection with regard to one month period is liable to be rejected and same is hereby overruled.

The complainant Krishantha Ukwatta (petitioner's brother) in his complaint [P 1] to the Human Rights Commission had stated that the petitioner, his wife and servant (Vani Karunanidhi) were arrested by the officers of the Welikada police station on 22nd February 2006 and they were being detained at the police station even on the 24th February 2006 and he made a complaint to the HRCSL to get them released and to obtain required medical treatment for the petitioner, as he had been brutally assaulted at Welikada police station. The HRCSL had acknowledged the receipt of the said complaint 'P1' by its letter dated 24-02-2006 having registered the said complaint under – Complaint No. HRC 1123/06. The said complainant Krishantha Ukwatta in his affidavit dated 23.02.2006 annexed to the said petition marked 'P3' states that after he made the complaint to the HRCSL an officer of the Commission contacted the Welikada police station (presumably by telephone) and inquired about the arrest of the petitioner and requested the police either to release the petitioner and others taken to the police station on the 22nd February 2006 or produce them before Courts immediately - vide paragraph 7 of P3.

The 1st respondent took up the position in his objections that the petitioner was arrested by him on 27-02-2006 and entries made by the reserve officers of the police station were produced marked 'R10, R11, R12 and R 13 in support of their position. Further the original Grave Crime Information Book (GCIB) of the Welikada police station containing information *inter alia* entries from 10-02-2006 to 13-03-2006 were produced in this Court on an order of Court. The Court noted that these notes had been pasted on the GCIB on 02-03-2006 and on a perusal of the relevant page 267 it was found that the date of the note was 27-02-2006.

The Counsel for the petitioner with the permission of Court submitted that although it is seen from the original GCIB that the petitioner was arrested on 27.02.2006 at 14.15 hours and was brought to the Welikada police station at 14.39 hours, in the original of R 14 of the GCIB, it is recorded that the petitioner

had been taken out of the cell at 10.00 hours on the same day. The learned Counsel for the petitioner has also invited the attention of Court to the position taken by the 1st respondent as per paragraph 4(k)of his affidavit namely that the petitioner was arrested on the 27-02-2006 had been contradicted by R 11 produced by the 1st respondent himself where it is recorded that he the 1st respondent and his team left the station on 24-02-2006 at 14 hours (2 pm) and went directly to the petitioner's residence at Himbutana and arrested him, whereas in the GCIB extract R 12 it is recorded that the petitioner was arrested on 27-02-2006 at 14.15 hours (2.15 pm). The learned Counsel for the petitioner submitted further that R 12 further contradicts the GCIB extract R 14 as it is recorded therein *inter alia* that the petitioner Roshan Ukwatta was taken out of the cell of the Welikada police station at 10.00 am on 27-02-2006 to record his statement. But according to R 12 the petitioner had been arrested at 14.15 hours (2.15 pm) on 27-02-2006, four hours and fifteen minutes after the time he was taken out of the police cell to record his statement.

The position taken up by the petitioner that he was arrested on 22-02-2006 at his residence in Himbutana is strongly supported by his brother Krishantha Ukwatta in his affidavit marked P3, which has been strongly corroborated by his written complaint submitted to the Human Rights Commission of Sri Lanka (HRCSL) on 24-02-2006 (P 1) complaining that the petitioner was arrested by the officers of the Welikada Police and was being kept at the Welikada police station even on that date. The fact that he made such a complaint to the HRCSL is further supported by the letter of HRCSL sent to him acknowledging the receipt of his complaint dated 24-02-2006 marked P2. I take judicial notice of the fact that the HRCSL is a statutory body established by the State under an Act of Parliament namely (Act No. 21 of 1996) for the protection, fulfillment and promotion of the fundamental as well as other internationally recognized rights of citizens and residents of Sri Lanka. The 1st respondent has not challenged the authenticity of the two documents P1 and P2. Moreover the report sent by the Assistant Judicial Medical Officer (AJMO) of Colombo Dr. Sameera A. Gunawardena in response to an order of this Court, reveals that the features of the injuries on the petitioner's body are compatible with the time and manner described by the victim (the petitioner) in his history further strengthening the petitioner's case.

The attention of this Court was also drawn by the petitioner's Counsel to the fact that although at page 6 of the document annexed to the petition marked as P9 there is reference to PR 75/2006, that is a receipt issued in respect of a lease document, whilst in R13 the same production receipt No. PR 75/06 is indicated as

the acknowledgment of the receipt of a sum of Rs. 179,000/- that had been taken charge from one Manjula Ukwatta who appears to be a sister of the petitioner. Further it was pointed out on behalf of the petitioner that the 1st respondent's stance that the petitioner was arrested on 27.02.2006 has been contradicted by receipt No. 53/06 which had been issued with regard to certain items said to have been recovered from the petitioner but in the same document R12, it is recorded further down that a temporary driving license issued by the Kotahena police station was also taken into custody from the petitioner for which receipt No. 25/06 had been issued. The counsel for the petitioner also submitted that therefore what becomes clear is that the last mentioned serial number of the production receipt had been issued much before the date on which the respondent had recorded as the date of arrest of the petitioner namely 27.02.2006.

On the other hand it was the contention of the 1st respondent that the Human Rights Commission to whom the petitioner's brother made a complaint about the arrest and detention of the petitioner has failed to submit any proof of follow up action taken by the HRCSL on his complaint. He also does not deny the contention of the affidavit of the petitioner's brother that the officers of the HRCSL contacted (telephoned) the 1st respondent after the complaint was made to the HRCSL, and secondly, a day after as the 1st respondent failed either to release the petitioner or to produce him before the relevant Magistrate even on 25.02.2006 that is three days after his arrest. It must be stated that the 1st respondent who speaks about the failure of the petitioner to prove follow up action has not been able to shake the authenticity of the petitioner's brother making a complaint to the Commission on 24.2.2006 in respect of the arrest of the petitioner and assault on 22.02.2006 by P1 supported by P2. In my view the documents marked P3, P11, P11A, P12 further support the petitioner's contention. Viewed in the above context I find difficult to believe the version of the 1st respondent and reject it as a concocted version manufactured, abusing his official powers.

Article 13(2) of the Constitution stipulates that –

'Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the Judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such Judge made in accordance with the procedure established by law.'

In **Channa Peiris v Attorney General and others** (1994) 1SLR 1 at page 75 Justice A.R.B. Amarasinghe having considered the previous decisions regarding the

constitutional requirement to produce an arrested person before a Magistrate proceeded to observe that, 'the Constitutional requirement must be complied in a reasonable way within a reasonable time which is a matter for Court to decide on the circumstances of each case. It was further held that a right to be brought before a Judge required by section 37 of the Code of Criminal Procedure Act No. 15 of 1979 has evolved into the status of a fundamental right'.

Further in the case of **Queen v Jinadasa** 59 CLW 97 (1960) (CCA) it was held by the Supreme Court that section 37 of the Criminal Procedure Code and section 66 of the Police Ordinance require that a person arrested without a warrant should be produced before a Magistrate with the least possible delay. The limit of twenty four hours prescribed in both sections does not enable the police to detain a suspect for the length of time even when he can be produced earlier or to deliberately refrain from producing him before a Magistrate. In this case per His Lordship Basnayaka C. J. at page 100:-

"The law requires (section 66 of the Police Ordinance) that an accused person taken into custody by a police officer without a warrant must forthwith be delivered into the custody of the officer in charge of the Police Station *in order that such person may be secured* until he can be brought before a Magistrate to be dealt with according to law. That is the lawful purpose to be served by means of detention and we would sternly and emphatically disapprove of what seems to have become the common practice of compelling an accused to accompany the Police from place to for the purpose of participating in the detection of a crime. The delay of his production before a Magistrate in order that this unlawful purpose may be served is illegal and deserving of censure."

Having subjected the evidence available and the circumstances of this case to a sharp scrutiny I am compelled to conclude that the petitioner has established on a very high preponderance of probability that he was arrested by the 1st respondent on 22-02-2006 and was detained at the Welikada Police Station from that date in violation of section 37of the Code Criminal Procedure Act No. 15 of 1979 being the procedure established by law under the circumstances, which stipulates that "Any police officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all circumstances of the case is reasonable and such period shall not exceed twenty four hours excluding of the time necessary for the journey from the place of arrest to the Magistrate".

Thus the 1st respondent had kept the petitioner in detention almost for five days in excess of the stipulated period of twenty four hours and has infringed the fundamental rights of the petitioner guaranteed to him by Article 13(2).

I shall now advert to the alleged infringement of Article 11. Same is reproduced below :

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

The issue of torture that the petitioner alleges that was perpetrated on him by the 1st respondent with two others must be examined in the backdrop of detaining the petitioner in violation of the procedure established by law. The petitioner has stated the manner in which the 1st respondent assaulted him from the time after his arrest on 22-02-2006 in his supporting affidavit filed with the petition and elaborated further in paragraphs 17(B) and 17(C) of his counter affidavit. A Medico Legal Report (MLR) p4a, P5, P6, 7, P8 and P8B were produced in respect of the injuries found on the petitioner's body supported by a Medical Report submitted by the Assistant Judicial Medical Officer (AJMO) on the orders of this Court authenticated by Dr. Sameera A Gunawardane - (received by this Court on 24.08.2006). According to said MLR 'History as given by t he prisoner' appears to be as follows:

"He has been arrested on 22nd February 2006 by the Welikada Police for questioning on suspected involvement in a robbery, which he denies. He claims that from about 11.30 a. m to 12.30 p. m, three civil clothed police officers had assaulted him while he was in custody. His hands and feet have been bound together and a crowbar had been pushed in between his elbows and knees. He was assaulted on the head, face, back, buttocks and knees mainly with police batons and also fist blows. The soles of his feet have also been beaten with a wooden pole."

Further he had also noticed blood stained discharge coming from petitioner's left ear.

The AJMO has proceeded to note down petitioner's complaints at the time of examination. Those are:

1) Aches and pains of whole body
2) Difficulty in walking
3) Difficulty in sitting
4) Unable to fully open the mouth

The AJMO in his report (prepared after an examination of the petitioner on 28.02.2006 at 2.30 p.m.) had identified 19 injuries in all on the petitioner's body. According to the said report, under sub-head 'injuries' following injuries appear:

1. Bilateral Infra Orbital Haematoma more on the left side. The eyelids were not swollen. There were no injuries to the eyes.

2. There was tenderness and swelling over the left tempero-mandibular joint and he had difficulty in fully opening his mouth or clenching his teeth. (After admission to hospital he was detected to have dislocation of the tempero-mandibular joint and mandibular fracture with occlusal derangement.)

3. A linear imprint abrasion was seen over the left mastoid region 2.5cm long. It had a thin black scab. No underlying injuries.

4. An oval shaped purple coloured contusion 3cm in the longer diameter was seen over the front of the left shoulder. The center of it was 3cm below and 1cm to the left of the outer end of the left collarbone.

5. A large triangular shaped purple coloured contusion, 6cm x 8cmx 6cm was seen on the front and lateral aspects of the right upper arm. Its base started from the lateral supra condyle of the humerus and ran upwards and inwards to end 3 cm above the elbow join line. The apex was placed on the lateral border of the arm 5 cm below the shoulder joint.

6. A tramline contusion 4cm long and 2cm wide was seen on the back of the chest on the left running downwards and outwards from the middle of the upper border of the left scapula.

7. A rectangular imprint abrasion was seen on the posterior and lateral surfaces of the distal end of the right forearm. It was 5cm long and 1.5 cm wide. It had a pale pink appearance with a dried up exudates and puckered margins.

8. A rectangular abrasion similar in appearance to injury no. 6 was seen on the distal end of the left forearm on the posterior surface. It was 2 cm x 0.5 cm in size.

9. A triangular shaped contusion 2 cm x 1.5 cm x 1.5 cm was seen over the middle of the anterior aspect of the distal end of the left forearm.

10. A small oval imprint abrasion 0.5 cm in size was placed 1 cm to the left injury number 9.

11. A blackish blue coloured tramline contusion 5cm long and 2cm wide was seen running upwards and to the left across the left buttock. Its medial end was not well defined and was placed 2cm to the right of the midline and 2 cm above the lower margin of the buttock. Lateral end was placed 3cm below and 1cm behind the left hip joint.

12. A rectangular blue-black coloured contusion 6cm x 4cm was seen placed obliquely across the right buttock. Its medial border started from a point 6cm to the right of the midline and 2.5cm above the lower margin of the right buttock and ran upwards and medially to a 1.5 cm to the right of the midline and 8 cm above the lower margin of the buttock. There was a rectangular imprint abrasion over the inner half of this contusion measuring 5cm x 1.5cm.

13. An oval shaped imprint abrasion with a brown scab was seen on the front of the right knee measuring 2 cm in diameter.

14. A semi circular imprint abrasion 4cm in length and 1cm in width was placed with its convexity facing downwards, immediately below injury no. 13 on the lower border of the right kneecap.

15. There was an imprint abrasion 1.5 cm long and 0.3 cm wide on the back of the right knee joint closer to the medial border. There was surrounding erythema and scab formation. It was placed horizontally along the joint line.

16. Similarly an imprint abrasion 2cm long and 0.5 cm wide was seen over the back of the left knee joint along the joint line with grazing over the medial end.

17. There was a bluish black coloured haematoma on the postero-latereal aspect of the left foot 1cm in diameter and placed over the base of the left fifth metatarsal bone. X ray of this area has been reported by the Consultant Radiologist as having a “discontinuity of the cortex of the base of the 5th metatarsal bone of the left side, “it is unclear whether it is due to a fracture and repeating the X ray for callus formation is required to confirm it.

18. The entire right foot was swollen and there was a dark blue discoloration over the middle of the sole suggestive of a deep seated haematoma X-rays have not revealed any fracture and after admission the swelling has been diagnosed as cellulites.

All the injuries were tender and he had considerable difficulty in walking and sitting.

Examination of other systems of the body did not reveal any abnormality. He did not have any obvious neurological impairment.

He was admitted to the National Hospital of Sri Lanka for treatment on the 28th of February 2006 at 11.55 p.m. under the Bed Head Ticket No. 652507. When he was reviewed again on the 7th of March at ward 19 following findings were noted.

"He was seen by the Consultant Oromaxillofacial Surgeon and was diagnosed as having a fracture of the left side of the mandible and dislocation of the temperomandibular joint with deviation of the mouth and occlusal degangemeny corresponding to injury no. 2 above."
19. He has been seen by the Consultant ENT Surgeon and found to have an acute traumatic perforation of the left eardrum, (*referred to as injury no. 19).*
In the said report under the sub-head 'categorization of hurt':

1. Injuries 1 and 3 – 16 are non-grievous in nature
2. Injury No. 2 is grievous in nature under limb (g) section 311 of the penal code.
3. Injuries 17, 18 and 19 needed review after 20 days to accurately assess the hurt but though the police was informed about it, the victim was not brought back to me for reassessment.

As per the report - 'features of the weapon' are as follows:

1. All the injuries suggest an application of blunt force.
2. Injuries number 6 and 11 are suggestive of assault by a blunt elongated cylindrical weapon.
3. Injuries number 7 - 10 could have occurred as a result of an agent encircling the wrist.

Under further comments the AJMO had stated that:
The features of the injuries are compatible with the time and the nature of assault described by the victim in his history.
The petitioner avers in his supporting affidavit submitted with the petition and in the counter-affidavit tendered to Court that his hands and legs were tied together and an iron rod was placed between his knees and he was lifted by the said iron rod and was placed between two bends in such a way that he could be made to revolve on the iron rod. Having placed the petitioner's body in a revolving process the 1st respondent and two other police officers who were present there began to beat him on his legs and feet and also on his face. He has further averred that due to the excruciating pain he fainted several times and fell totally unconscious. When he regained consciousness his body was soaked with water and same officers began to assault him again. He further states after sometime he had been removed from that position and had been dragged into another place.
According to paragraph 17 of the petition and corresponding paragraph in the supporting affidavit, on 28-02-2006 six days after his arrest he had been produced

before the Judicial Medical Officer of Colombo and taken to the Chief Magistrate's Court of Colombo but was not physically produced before the learned Chief Magistrate. The police officers who took him to Courts had registered a case under No. B/788/04/2006 and taken the report without the petitioner to the learned Chief Magistrate of Colombo. However the learned Magistrate had ordered them to produce the petitioner before her. On being produced the Magistrate having observed the injuries on him and the difficulty in walking and talking had committed him to fiscal custody ordering that the petitioner be given immediate medical treatment (vide P 4). The application made by the Police for further detention in their custody too was refused. The above position is amply established by the document marked as P4 – being the order of the learned Magistrate made when the petitioner was produced on 28.02.2006. P4 is reproduced below:

ආර්. මහේස් උක්වත්ත - සිටී
සැ/කට කතා කිරීමට අපහසුය. ජීප් රථයෙන් බැසීමටද අපහසුය.
පොලීසියෙන් පහර දුන් බව කියයි. ඔහුගෙ කකුල් පහල කොටස
ඉදිමී ඇත. සැ/රැ සමබන්ධයෙන් වෛද්‍ය වා/වක්ද ඉදි/කරයි.
එය නඩුවට ගොනු කරම.
පො.කො. 25032 ආයුවර්ධන විසින් සැ/කව හ/පෙරෙ. සඳහා/ඉදි කරයි.
මීලග දින හ/පෙර. සඳහා නියි ආව. සහිතව ඉදි/කිරීමට නි/කරම.
සැක/අපහසුවෙන් සිටන බැවින් වහාම වෛද්‍ය පතිකාර ලබාදීමට නි/කරම.
පරි/අව. නැත. ඇප වරැයි.
සැ/රී 06-03-13
අ.ක. / මහේස්තාත් - කොළඹ

In response to paragraph (4) of the petition the 1st respondent by paragraph (5) of his affidavit dated 25.05.2007 had admitted the petitioner being produced before the JMO on 28.02.2006 and thereafter producing before the Magistrate and had denied rest of the averments. The petitioner has pleaded that then only he was admitted to the prison hospital and thereafter to the accident ward of the National Hospital – Colombo and warded in ward No. 19 there.

The JMO Colombo who examined the petitioner, issued a letter addressed to the OPD Accident Service of the National Hospital, Colombo, for treatment and advise him for medico-legal purposes marked P4A, in which the JMO had recorded a history of assault by police and had also observed injuries on the left side mandibular joint (jaw bone-joint), right side tibia /fibula (the shin bone and another bone situated closer to the tibia in the lower part of the legs). He was later admitted to the Prison Hospital and according to the report dated 14.06.2006 (P6) addressed to the orthopedic clinic of the National Hospital, the

Medical Officer of the Prison Hospital had identified the following injuries on the petitioner:-

1. A torn ACL ligament in the right knee.
2. A contused fat pad in the right knee, (document P6).

On the said referral note the Petitioner had been examined by the senior consultant orthopeadic surgeon of the NHSL Dr. Upali Banagala, on 24-06-2006 that is four months and 2 days after his arrest and he who was still in fiscal custody. Dr. Banagala who examined him had found the following injuries as per his report dated 13.07.2006 – P7A.

1. A torn Anterior cruciate ligament of the right knee, and,
2. A contused area under the left foot.

Dr. Banagala had recommended the performance of an atheroscopy of the anterior-cruciate ligament reconstruction surgery on a future date. His report marked P7A clearly shows that the Petitioner had been treated and surgery performed in the National Hospital for the injuries that he suffered during his arrest and detention, more than four months ago. Further the Medical Officer in charge of the Prison Hospital had sent letters dated 13-03-2006 and 19-03-2006 (marked as P8A and P8B) to the Magistrate's Court, Colombo stating that the petitioner was unable to attend Court on 13.03.2006 and 20.03.2006 due to fractures of the mandible (jaw bone) and the contusions of the ankles.

The document marked P5 shows that the petitioner had been treated at the Dental Institute, Colombo to fix the dis-arrangement of his jaw bone. On the other hand the 1st Respondent's explanation as to how the petitioner came by the injuries is very short. He states that at the time of the arrest the petitioner offered resistance to the police and attempted to escape by jumping over the parapet wall of the house but could not make it and fell off the wall. 1st respondent also states that the police had to use minimum force to make the petitioner surrender. It is the position of the 1st respondent that the petitioner sustained injuries when he fell off the wall. He also stated that they tied his hands with a rope. It is very strange that a team of officers going to arrest a suspect had not taken hand cuffs with them. Further it is to be noted that none of the documents and/or material submitted on behalf of the 1st respondent explains the injuries found on the body of the petitioner, which the petitioner claims that same were caused while in police custody.

I find that none of the injuries are compatible with the cause of the injuries stated by the 1st Respondent. A reasonable man will find it difficult to believe that an

acute traumatic perforation of an eardrum could be caused by a fall such as what has been contemplated by the 1st respondent. I disbelieve the version given by the 1st Respondent as to how the petitioner sustained the injuries found on his body using the test of probability. I also reject the version of the 1st Respondent on the grounds of credibility in that the Court has found that he has falsified official document fraudulently to subvert the truth in violation of the law abusing the powers granted to them and the trust placed in him as a police officer.
Article 11 of the Constitution of Sri Lanka contains 2 composite fundamental rights namely:-

i. Torture
ii. Cruel, inhuman or degrading treatment or punishment.

Cruel, inhuman or degrading treatment or punishment is a lesser degree of ill-treatment than torture. At this juncture it would be pertinent to consider the legal principles enunciated by some decided cases on torture by the Supreme Court of Sri Lanka.
Delivering the judgment in the case of **Sudath Silva v Kodituwakku** (1987) 2 SLR 119) at pp.126, 127, Justice Atukorala observed that :
"Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman treatment, It is an absolute fundamental right subject to no restriction or limitation what so ever. Every person be he a criminal or not, is entitled 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 the right is enjoyed by every member of the police force so is he also 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 the fullest measure with a view to ensuring that his right which is declared and intended to be fundamental and that the Executive, by its action does not reduce it to a mere illusion. …… The facts of this case has revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in 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 has been made to promote and protect human rights. Nothing shocks the conscience of man so much as the cowardly act of 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 deserves 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".

In the case of **Balasekaran v OIC JOOSSP Army Camp** and others (SC-FR No. 547/98, SC Minutes of 03.05. 2000 and Bar Association Law Reports 2000 -23) where the petitioner alleged that he had been assaulted whilst he was in army and police custody with PVC pipes with his face being covered with a shopping bag containing petrol and the burning of his penis with cigarette butts, which were corroborated by medical evidence. The Court found that the injuries he sustained and the trauma he suffered were sufficient to fall into the international definition of torture. Per S.N.Silva C.J. at pg.24 in the aforesaid judgment;

"The United Nations Declaration on Torture adopted by the General Assembly in December 1975, the Convention Against Torture adopted in December 1984 and Section 12 of Act No. 22 of 1994 being the law enacted by Parliament to give effect to the Convention, define the actus reus of the offence of torture as "any act which causes severe pain whether physical or mental…"

The telltale marks observed by the J.M.O as scars reveal the severity of the attack to which the Petitioner was subjected. The intensity of the attack appears to have descended from ferocity to sadism. The attack with "P.V.C.Pipes" resulting in the injuries that have been observed by the J.M.O. And the process of the penis being burnt with cigarette butts would undoubtedly have caused severe pain to the petitioner so as to amount to torture as defined above."

The injuries found on the petitioner in the case at hand appears to be even more severe, graver and contributed inter alia to the impairment of one of his vital organs (the perforation of an ear drum) and the trauma of the multiple injuries made the petitioner to suffer both physically and mentally for a very long period. I also find that it is amply established that the injuries found on the body of the petitioner are compatible with the version given by him and have been fully corroborated by the medical evidence. The petitioner sustained the injuries described above as a result of assault and other methods of torture inflicted on

him by the 1st Respondent with two other officers of the Welikada Police Station as demonstrated above with the complicity of the 2nd Respondent - the Officer in Charge of the Welikada Police Station. The injuries suffered by the petitioner as a result of the attack undoubtedly have caused severe pain to him so as to amount to torture. Even in the AJMO's report the history given by the petitioner tallies with his version as to how the injuries were caused.

Now the credibility of the two versions viz – of the petitioner and of the first respondent has to be assessed. At page 24 of this judgment I have already rejected the version of the 1st Respondent for the reasons given therein. However one matter cannot escape the attention of this Court. That is when the totality of the evidence and material placed by the 1st respondent is scrutinized the inescapable conclusion one could arrive upon is that he had made a valiant attempt to claim the benefit of the fact that the petitioner was a person engaged in criminal activities. In this regard I wish to rely on the principle of law enunciated by Mark Fernando J. in **Sriyani Silva v Iddamalgoda, OIC – Police Station, Paiyagala** (2003 2 SLR 63) namely –

"On the question of compensation, a person who has a "bad record" is entitled to the same rights as any other person. The deceased was entitled to have the allegation against him determined by a competent court after a fair trial."

In the case at hand on instructions of the Attorney General the petitioner was even discharged from the criminal proceedings. So there was no allegation against him left for determination.

On the evidence enumerated as above I am of the view that the injuries found on the Petitioner will constitute the act of torture as contained in Article 11 of the Constitution and the definition given to torture in international legal norms and jurisprudence (vide the decision in the aforementioned **Balasekeran's** case). As such it is difficult to resist the conclusion that 1st respondent did commit torture on the petitioner in violation of Article 11 of the Constitution.

Under the procedure established by law for the administration and discharge of duties of a police station, regulations have been gazetted under the Police Ordinance and the Code of Criminal procedure Act and officer-in-charge of a police station is the Chief administrative officer. He is in charge of the entire police station and is personally responsible for overall functions of the police station. It is mandatory for him to read all information books maintained at the police station everyday at least once, as much as practicable and having read, it would suffice to make an entry to the effect that 'IB – read' vide Regulation A 17

Part 1 - paragraph (3). Further under same Regulation A 17 he is also required to give instructions to other officers about the carrying out of their duties.

Regulation A3 - part II paragraph (3) makes it mandatory on the O.I.C to inspect the cell, barracks, recreation room etc., daily and to make entries in the IB re-the matters which needs attention. From the above it becomes abundantly clear that no person could be kept in custody in violation of the procedure established by law or no injuries could be caused to any person in the custody of a police station without being noticed by the OIC.

In the case of **Sriyani Silva v Iddamalgoda** ((2003) 2 SLR 63) it was held by Justice Mark Fernando that the 1st respondent OIC's responsibility and liability is not restricted to participation, authorization, complicity, and knowledge of the acts of torture and cruelty meted out to the Petitioner. He was held liable for not ensuring that the Petitioner was being treated as the law required. Because of his culpable inaction, including the failure to monitor the activities of his subordinates that would have prevented further ill-treatment of the petitioner, and investigation of any misconduct. In the case of **Rani Fernando (SCA (FR) No. 700/2002, SC Minutes of 26-07-2004)** as per the judgment of Justice Shirani Bandaranayake, with Justice J.A.N. De Silva and Justice Nihal Jayasinghe agreeing- the OIC Negombo Prison, the Chief Jailor and the Superintendent of prisons, Negombo Prison, were found liable despite the fact that there was no evidence of their direct involvement in the assault on the deceased on the judicial finding that there had been a dereliction of their duties.

Further it is my view that the responsibility and culpability of the 2nd Respondent in this case is not of any lesser degree than that of the 1st Respondent. As the officer in charge of the Welikada police station he could have prevented both the illegal detention and the perpetration of torture on the petitioner by the1st respondent with two others who were his subordinate officers always acting on his orders. But he had facilitated the infringement of the rights guaranteed to the Petitioner under Articles 13 (2) and 11 by complicity, commission and omission. It is needless to say that the information books of the Welikada police station could never have been altered without the complicity of the 2nd respondent. I also take note of the impunity with which he treated this Court by not even appearing before this Court or even through Counsel to respond to the serious allegations of violations of fundamental rights alleged against him by the petitioner despite having issued notice on him by this Court. It is to be observed that said notices had not been returned undelivered.

On the evidence set out above I hold that the petitioner has been subjected to torture whilst in the custody of the 1st and 2nd respondents and I accordingly grant a declaration that the petitioner's fundamental right guaranteed by Article 11 has been infringed. I also hold that petitioner's fundamental right guaranteed by Article 13(2) has also been violated. Accordingly I award the petitioner a sum of Rs.80,000/- as compensation. I direct the state to pay the said sum of Rs 80,000/- and a further sum of Rs 20,000/- as costs of this application to the petitioner. The said amounts shall be paid within three months from today.

Judge of the Supreme Court

Saleem Marsoof P C, J

I agree

Judge of the Supreme Court

P. A. Ratnayake P C, J

I agree

Judge of the Supreme Court