

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

In the matter of an application in Terms of Articles 17 and 126 of the Constitution
of the Democratic Socialist Republic of Sri Lanka.

SC Application No. 54/82

Subasinghe Mudiyansele Kumarsinghe of
Madukanda, Vavuniya.

Petitioner

Vs

1. The Attorney General of Sri Lanka
2. Susila Gunawardena, Headquarters Inspector of
Police, Vavuniya.
3. Gunasinghe, Sub Inspector of Police, Vavuniya.
4. Joseph, Sub Inspector of Police, Vavuniya
5. Perera, Constable of the Vavuniya Police Station.

Respondents

BBEFORE: Wanasundara J, Wimalaratne J. and Ratwatte J.

COUNSEL: V.S.A. Pullanayagam with R. Sirinivasen, S.C. Chandrahasan
and Miss M. Kanapathipillai for petitioner

Upawansa Yapa SSC with C.R. de Silva SC for Attorney
General

D.S. Wijesinghe for 2nd to 5th Respondents

ARGUED ON: 30TH August 1982

DECIDED ON: 6TH September 1982

Wimalaratne J.

The petitioner Subasinghe Mudiyansele Kumarasinghe of Madukanda, Vavuniya complains of the violation by the 2nd, 3rd, 4th and 5th respondents of his fundamental rights:-

- (a) not to be subjected to torture or to cruel, inhuman or degrading treatment of punishment recognized by Article 11 of the Constitution
- (b) not to be arrested except according to procedure established by law and when arrested to be informed of the reason for the arrest, recognized by Article 13(1)
- (c) when held in custody to be brought before the judge of the nearest competent court according to procedure established by law and not to be further held in custody except upon the order of such Judge recognized by Article 13(2)
- (d) to the freedom of speech and expression recognized by Article 14(1) (a) and
- (e) to the freedom of movement recognized by Article 14(1) (h)

The 1st respondent is the Attorney General. The 2nd, 3rd, 4th and 5th respondents are all police officers attached to Vavuniya Police Station. He prays for declaration that he has been subjected to torture, cruel and inhuman treatment and punishment and to illegal arrest and detention as well as for directions by this court to set in motion the process of law to deal with the 2nd to 5th respondents in accordance with Article 17 read with Article 126 of the Constitution.

The petitioner says that he is the Secretary of the Vavuniya branch of a movement known as the 'Movement for Inter Racial Justice and Equality' which has campaigned vigorously for interracial justice and equality and has been occasion to criticize, condemn and even denounce the conduct of members of the Sri Lanka Police, publicly and widely through the media reasonably and presumably within the knowledge of the respondent police officers. The incident he complains of happened at about 9.30 pm on 3rd June 1982, when he was on his way home on his bicycle along the road leading to his village Madukanda. When he was passing the police officers he heard a shout, 'ado paraya, come here' He stopped, dismounted from his bicycle, went up to the 2nd respondent who is the Headquarter Inspector of the police station and told him, 'mahathaya, learn how to talk'. To this the

2nd respondent replied 'ado paraya, do you know who am I' and he retorted 'whoever you are, you must learn how to talk' The police officers then surrounded him and assaulted him with fists and rifle butts until he fell down with the bicycle. Even thereafter they continued the assault lifted him and dropped him into the carriage of a jeep and drove him to the Vavuniya base hospital informing the doctor that he was brought for drunkenness. He was removed to a ward where the DMO examined him the next morning, when he also complained about the incident which was recorded by the DMO. He was handcuffed and kept in the hospital until the evening of the 5th when he was taken to the prison's lockup room and confined there. On the 6th evening he was taken to the Jaffna Prisons and admitted to the Jaffna Prison Hospital. On the 17th he was produced before the Magistrate, Vavuniya and released on bail in a sum of Rs. 250/-.

He has attached to his application the B report (x) filed on 4.6.1982 by the police in the Magistrate's court presumably the provisions of Section 115(1) of the Code of Criminal Procedure Code Act No. 15 of 1979. According to that report, the suspect had failed to stop when he was ordered to do by the police as he was riding a pedal cycle without a light and when the police officers chased after him he fell into to a ditch with the cycle and as a result of the fall he was being warded at the base hospital suffering from body pain. The report went on to state that at the time of the arrest he was in possession of two safety cartridges and a sword without a permit. An application for a remand till 17.6.1982 appears to have been readily granted by the Magistrate.

Whilst granting leave to proceed with the application on 17.7.1982 this court directed the DMO Vavuniya to forward the bed head ticket as well as any medical reports pertaining to the petitioner. We have had the benefit of perusing these reports to which I shall revert later.

The 2nd to 5th respondents in their joint affidavit have denied the petitioner's version of the incident. According to them the petitioner cycled past them without a lighted lamp and with a sword in his hand. As the petitioner ignored their signal to halt, they gave chase, and in the process the petitioner fell into a ditch. When the police party explained the charge and attempted to arrest him he resisted and as a result they were compelled to use reasonable force to disarm him. Whilst he was being taken to the jeep he attempted to escape from custody and they were compelled to use further force.

Mr. Pullenayagam for the petitioner has drawn our attention to the serious discrepancies between the respondent's affidavit dated 6.8.82 and the B report

filed in the Magistrate's court on 4.6.82. This report merely states that the suspect failed to obey the police order to stop and that as a result of a fall whilst being chased he was suffering from bodily pain. However in their affidavit filed after this court called for the medical report they have admitted that they were compelled to use reasonable force to disarm him and to bring him under control. Again there is no mention in the B report of the suspect being after liquor whilst in the affidavit the officers say that he appeared to be after liquor. Learned Counsel therefore invited us to reject the entire version of the respondents as contained in their affidavit. There is however a reference in both the report which has been filed the very next day as well as in the affidavits to the facts that the suspect was in possession of a sword. It is not unlikely that in that part of the country people carry with them for their protection at night some sort of weapon. Although there may be no proof beyond reasonable doubt there is a strong probability that the petitioner carried a sword.

If the suspect had a sword in his possession, then that would be prima facie evidence of the commission by him of an offence under section 449 of the Penal Code which entitled the police to arrest him without a warrant. It is also not unlikely that the suspect would have attempted to evade his arrest. The retorts uttered by him to police officers in uniform about 'learning to speak' however forthright they appear to be indicate that he is not the type of person who would have willingly and humbly succumbed to an attempted arrest. When a person liable to arrest forcibly resists the endeavour to arrest or attempt to evade arrest. When section 23(2) of the Code of Criminal Procedure Act empower the person making the arrest to use such means as are reasonably necessary to effect the arrest.

But five of six police officers at least one of whom was armed with a gun have certainly exceeded that amount of force such as was reasonably necessary under the circumstances for the arrest of the suspect. When the suspect was examined by the DMO at 7.15 am on the 4th June he was found to have contusion around the left eye, linear abrasions and nail marks on the back of the neck, three linear abrasions on the front and three linear abrasions on the back of chest. All these injuries have been caused by blunt weapons and finger nails, the blunt weapon being the fist and the butt end of a gun. Although the force used appears to be excessive and not proportionate to the resistance a single person may have put up against five policemen, I am of the view that the force used in this particular case cannot be brought within the meaning of 'torture or cruel, inhuman or degrading treatment or punishment'. **The term 'cruel, inhuman or degrading treatment or punishment' has not been defined but ought to be interpreted so as to extend the widest possible protection against abuse whether**

physical or mental. The force that may be used under section 23(2) of the Code of Criminal Procedure Act to effect the arrest of a person who resists or evades arrest ought not therefore to be disproportionate to the purpose to be achieved. It may not be possible on the spur of the moment to determine what amount of force is proportionate for the purpose of effecting the arrest. **Accordingly a police officer who exceeds this proportion without being vindictive or maliciously excessive cannot be said to violate the suspect's fundamental right guaranteed by Article 11.**

Far more serious is the utter disregard, both by the police officers as well as by the Magistrate, of the procedure prescribed by the Criminal Procedure Code. On the mere B report complaining of a trivial violation of a minor offence under the vehicle ordinance, and of failure to obey a police signal to a cyclist to stop, the Magistrate has remanded a suspect who was not even produced before him for a period of 14 days. The suspect's name was known by the police and there was no allegation of the likelihood of his absconding. Even when an Attorney at Law filed a motion on 7th June and asked for bail, the Magistrate had not granted bail but had minuted that the case be called on 17th June. In the meantime, the suspect who according to the B report was suffering from bodily pains, was removed to the Vavuniya prison lock up on the 5th June and transferred to the Jaffna Prison on the 7th June where he lingered deprived of his liberty until the 17th of June. **This procedure shocks once sense of justice and fairplay.**

Section 115(1) of the Code requires the police if investigations cannot be completed within a period of 24hours, and if there are grounds for believing that further investigation is necessary, to forthwith transmit the Magistrate a report of the case together with a summary of the statements made by the witness examined and also to forward the suspect to such Magistrate. The reason given in their affidavit for the non production of the suspect along with the B report is that since the petitioner was warded on the orders of the DMO they were not in a position to actually produce the petitioner before the Magistrate within the stipulated period but in that event the police should produce a medical report to the effect that it would be hazardous to move the suspect from the hospital ward. **Magistrate should be vigilant when B reports are filed before them without the production of the suspect. If they are not satisfied with the reason adduced by the police, they should insist on a medical report as to the suspect's fitness to be produced.**

Magistrates would be abdicating to the police their judicial duty of deciding upon the period of remand if they do not bring their independent judgment

to bear. In the present case a remand for a period of 14 days was quite unnecessary. No wonder overcrowding in prisons especially in remand is causing much anxiety to prison officials ought not to be allowed to circumvent the salutary provisions of section 115(1) regarding the production of suspects before the Magistrates for seeking to give such excuses as have been given in this case. I am of the view that there has been a violation of the fundamental right guaranteed by Article 13(2) of the Constitution, but this violation has been more the consequence of the wrongful exercise of judicial discretion as a result of a misleading police report. Although we are thus unable to grant the petitioner the relief prayed for, we award him costs in a sum of Rs. 750/- payable by the respondents.

Before I conclude, it seems pertinent to draw the attention of police officers to the 'Code of conduct for Law Enforcement Officials' adopted by the United Nations General Assembly on 17th December 1979. Article 3 is in these terms:-

'Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.'

Commentary:-

(a) This provision emphasizes that the use of force by law enforcement officials should be exceptional while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders no force going beyond that may be used.

(b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.'

The Registrar is to forward a copy of this order to the Inspector General of Police for necessary action.

Sgd. D. Wimalaratne

Judge of the Supreme Court

Wanasundara J.

I agree

Judge of the Supreme Court

Ratwatte J.

I agree

Judge of the Supreme Court