

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

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

Deniyakumburugedera Sriyani Lakshmi Ekanayake of 22,
Pahalawahigala, Matale.

Presently detained at Welikada Prison,
(womens section) Colombo-8

Petitioner

SC Application No. 25/91

Vs

1. Inspector Herath Banda, Officer in Charge, Police Station, Naula.
2. Officer in Charge, Police Station, Naula.
3. Inspector Nandasena, Crime Subversive Unit, Police Station, Matale.
4. J.B. BuluMulle, Superintendent, Welikada Prison,
(womens section) Colombo-8
5. H.D. Dharmadasa, Commissioner of Prisons, Colombo-8.
6. E.E.B. Perera, Inspector General of Police, Police Headquarters,
Colombo-1.
7. General C.G. Ranatunga, Secretary, Ministry of Defense, Ministry of
Defense, Colombo-1
8. The Attorney General, Attorney General's Department, Colombo-12.

Respondents

BBEFORE: Fernando J, Ramanathan J. and Perera J.

COUNSEL: S.M. Fernando with Ms H. Fernando for the petitioner

H. Ladduwahatty, S.C. for the Respondents

ARGUED ON: 11th October 1981.

DECIDED ON: 18th December 1981

Fernando J.

This fundamental rights petition has been filed by a 18 year old Advanced Level student. According to her petition at about 9.30 a.m. on 11.9.89 whilst she was at Naula she was she was arrested by certain persons in civils and taken in a motor vehicle to the Naula Police Station she was not told why she was arrested; about two days later (this would probably be the 13th) she was taken to an upstairs room and questioned by two persons from the 'Crime Subversive Unit' of the Naula Police in the presence of a Police Matron those two persons assaulted her and asked her to remove her cloths when she refused they stripped her completely whereupon the Police Matron left the room saying that she could not witness all this. While she was naked the Police Constables were called asked to look at her she was then placed on a bench and beaten all over her body with wooden clubs; this ordeal lasted about one hour. There is no dispute that if this is true it constituted torture as well as cruel, inhuman and degrading treatment. On 20.9.89 she was taken in a vehicle to the house of the Magistrate, Matale by a(named) officer of the Crime Subversive Unit; this officer asked her not to make any complaint to the Magistrate as he could not do anything to release her she was kept in the vehicle and the Magistrate came to the vehicle and signed some papers. She was then brought to the Welikada Prison. She was thereafter detained on an order issued by the A.S.P. Matale under Emergency Regulation 19(2) for 30 days from 20.9.89 similar orders were issued in October and November 1989. Learned State Counsel informed us that due to an administrative tangle in his Department the affidavit of the Secretary, Defense and the subsequent detention order had not been filed. However both counsel agreed that it could be assumed that preventive detention orders made under Emergency Regulation 17 had been issued thereafter on the basis of the material available with the Police.

Two officers of the Matale Police have been filed counter affidavits in reply. The Headquarters Chief Inspector Kasturiratne states that the Petitioner was arrested on 14.9.89 by a party from the 'Counter Subversive Unit' of the Matale Police, led by Sub Inspector Nandasena, the Officer in charge of that Unit; Nandasena supports this, however he describes his unit as the 'Special Investigation Unit'. I can well understand the Petitioner's uncertainty as to the names of the Unit. Both deny that she was arrested on 11.9.89 and taken to the Naula Police Station. Kasturiratne states that she was arrested 'on suspicion that she had participated in anti governmental subversive activity i.e. addressing illegal meetings.' but according to Nandasena he arrested her on information received that she was conducting lectures as a member of the proscribed Janatha Vimukthya Peramuna; the entry made by Nandasena on 14.9.89 was that she was arrested on suspicion in connection with addressing illegal meetings. However the application dated 19.9.89 for the first detention order states that she was arrested at Naula on 13.9.89 on suspicion of prachanda kriya or violent acts; this same allegation appears in the information book, immediately before her statement was recorded. Both deny the allegation of ill-treatment; Nandasena adds that he is unable to check on these matters 'since no officer responsible has been named by the Petitioner'.

In the course of the hearing before us learned State Counsel stated that due to an error it was assumed that leave to proceed had not been granted in respect of the infringement of Article 11, he further stated that the notice served on the Attorney General did not state the Article in respect of which leave to proceed had been given. It seems to me that if that notice did not specify the Article the Respondent should have assumed that leave had been granted as prayed for in the petition (in this case including Article 11). The Register of this Court should take immediate action to ensure that in future parties are informed of the material portion of the order granting leave to proceed. Learned State Counsel moved for an opportunity to place further affidavits in regard to the allegation of torture. In this instance the notice issued by this Court has not misled the Respondents into the belief that leave had not been granted in respect of Article 11. Further Nandasena found himself unable to check on these matters since no officer had been named he therefore did attempt to check and one must assume that any further attempt will after 2 years be no more successful. This application is also unsatisfactory because the petitioner did identify any Police Matron a having been present. the name of the Police Matron who accompanied the petitioner for questioning on 19.9.89 is recorded there could have been no difficulty in ascertaining which Police Matron was on duty on 13.9.89 and submitting her affidavit. Leave to proceed was granted on 14.5.89 and the hearing was postponed twice on application made by the State. We did not consider this to be a fit case for the exercise of our discretion to grant yet another opportunity to submit affidavit.

In regard to the production before the Magistrate on 20.9.89 no affidavit has been submitted from the (named) officer who is alleged to have warned her not to make any complaint; Kasturiratne denies this allegation; but not of his own personal knowledge. Where a citizen is produced before a Judicial Officer, in pursuance of some legal requirement one would expect a written record of the fact of such production and of all relevant particulars. Here it is common ground that the Magistrate signed some papers which the Respondents have not produced. Had the Petitioner been given an opportunity to state her grievances to the Magistrate, I would assume that these would have been recorded by the latter with his own observations. In the absence of the relevant documents the Petitioner's averment on this matter stands uncontradicted; production does not mean being shown or exhibited to a judicial officer nor does it connote more physical proximity; production requires at least an opportunity for communication and this has been denied to the Petitioner. She was thus denied the opportunity to make a prompt complaint in respect of her arrest on 11.9.89 the failure to inform her of the reasons for arrest and the torture inflicted on 13.9.89.

In her statement recorded on 19.9.89 the Petitioner states that she attended private tuition classes at a (named) tutory in Matale as she was preparing for the G.C.E. Advance Level Examination to be held in August 1990 (for which she sat while in detention). Another girl Nadika befriended her expressing sentiments such as 'for poor children there is no such thing as free education. It is only the rich who can do anything' giving example Nadika further said 'were are pursuing the truth according to the correct path. What about you? Think about these things'. The Petitioner was attracted by this idea. Thereafter she met Nadika at almost every class and indicated she would like to join the J.V.P. with her. On 26.8.89 Nadika took the Petitioner to her house and thereafter to Naula where she met two young men; she was not allowed to return home although she said her family would come in search and she was compelled

to stay at the house of one of these young men; he too said that he was desirous of joining the J.V.P. There were bus strikes during this period and she was unable to return home. From 21.8.89 till 5.9.89 she stayed with another young couple and during this period she copied some notes given by Nadika dealing with the Indo Lanka Accord the North East problem and the betrayal of the motherland to India. It does not appear that she was forcibly detained against her will for she agreed to and did return to this house on 10.9.89 in order to meet Nadika. In her statement she states that Nadika did not come and hence at 9.00 a.m. on 11.9.89 she came to the Naula Junction where she was arrested; the notes had been taken from her at the time of arrest and the statement shows that she was asked to sign the document confirming that it was in her handwriting. She was specifically asked and denied participating in J.V.P. classes or violent activities or knowledge of the whereabouts of arms and ammunitions. That document has not been produced presumably because it contains nothing adverse to her.

The Constitution demands the protection of the right to think as you will and to speak as you think (Whiney v. California (1927) 274 U.S. 357) subject to limitations which are inherent as well as restrictions imposed by law under Article 15. Subject to that the expression of views which may be unpopular, obnoxious, distasteful or wrong is nevertheless within the ambit of freedom of speech and expression provided of course there is no advocacy of or incitement to violence or other illegal conduct. The criticisms of the educational system referred to in the Petitioner's statement of 19.9.89 were permissible. Exactly one month later the Presidential Commission on Youth was appointed and in its report (Seasonal Paper 1 of 1990) even more serious criticisms were articulated. Criticisms of government policy in regard to the Indo-Lanka Accord relation with India and the I.P.K.F. and the North East problem were within the legitimate exercise of freedom of speech. Every concerned citizen would have discussed these issues with great interest and agitation and it is a fallacy to characterize such discussions as anti governmental for dissent is inextricably woven into the fabric of democracy. Every (unprescribed) political party in a democracy expect that which is in power is constantly engaged in anti governmental activity with a view to acquiring governmental power. Anti governmental discussions are per se neither illegal nor subversive. It is said that these discussions were connected with the J.V.P. but the order prescribing the J.V.P. was revoked on 10.5.88 (see Wickramabahu v. Herath S.C. 27/88 S.C.N. 6.4.90) and our attention has not been drawn to any subsequent order prescribing the J.V.P. There is no evidence or even ground for suspicion that the Petitioner was involved in any J.V.P. activity as distinct from mere discussion.

It is in that context that I have to ascertain why she was arrested. Nandasena says because she was conducting lectures as a member of the prescribed J.V.P. but he is wrong on all these points, as a matter of law, the J.V.P. was not prescribed and he did not have a scrap of information as to membership or conduction lectures. Kasturiratne refers to 'Subversive Activity' and 'illegal' meetings but not only does this contradict Nandasena but he has not referred to any material justifying any such suspicion. Elsewhere references are made to 'violent acts' and these too are unsupported. I therefore hold that the arrest of the Petitioner was in violation Article 13(1). Having regard to the circumstances then prevailing do not think an order should be made against Nandasena personally.

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Judge of the Supreme Court

Athukorala J

I agree

Judge of the Supreme Court

H.A.G. de Silva J.

I agree

Judge of the Supreme Court