

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

S.C FR Application No. 608/2008

In the matter of an Application under
and in terms of Article 126 read with
Article 17 of the Constitution

Sarath Kumara Naidos
312/51, Moragodawatte
Kesbewa, Piliyandala
Presently at Remand Prison, Welikada.

PETITIONER

Vs.

1. Inspector Damith
Police Station
Moratuwa.
2. Police Constable Kavinda
Police Station
Moratuwa.
3. Officer In Charge
Police Station
Moratuwa.
4. Superintendent of Police
Moratuwa Division
Office of the Superintendent of Police,
Moratuwa.
5. The Inspector General of Police
Police Headquarters
Colombo 1.

6. Hon. Attorney General
Attorney General's Department
Colombo 12.

RESPONDENTS

BEFORE: K. Sripavan C.J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: Ermizar Tegal for the Petitioner

Asthika Devendra with Kameel Maddumage
For the 1st to 3rd Respondents

Madhawa Tennakoon S.S.C for the 4th to 6th Respondents

ARGUED ON: 01.11.2016

DECIDED ON: 19.01.2017

GOONERATNE J.

This is an application filed on or about December 2008 under Article 126 read with Article 17 of the Constitution. Petitioner was a 'Mason' and a married person with young children at the time this application was filed in this court. In his petition, he admits that 3 to 4 years ago he was charged and convicted of possession of 'ganja' to which charge he pleaded guilty. He also

asserts that he had no pending criminal cases, prior to the incidents described in his petition. In the prayer to the petition, relief sought as per sub paragraphs 'e' & 'd' of the prayer, against 1st to 5th Respondents in terms of Articles 11, 12(1), 13(1) and 13(2) of the Constitution. Petitioner's complaint is more particularly focused on assault, torture, cruel and inhuman degrading treatment, by the above Respondents. This court on or about 10.06.2010 granted leave to proceed on alleged violations of Articles 11 and 13(2) of the Constitution.

The Petitioner in his petition filed in this court, refer to several acts of assault on him by the 1st and 2nd Respondents along with some other police officers (not named). It is pleaded that a woman who worked at a house where the Petitioner had worked for about three to four months had met him and inquired about house breaking and whether the Petitioner was involved. This had led to a heated argument. On 5th July 2008 at about 2.00 p.m the Petitioner was working at a site at Samagi Mawatha, Koralawella, 1st and 2nd Respondents arrived in a three-wheeler with two other police officers, and directed the Petitioner to accompany the police officers to the police station. When the Petitioner asked the police as to why he is taken to the police the 2nd Respondent assaulted him. Paragraph 4 of the petition describes several acts of assault on the Petitioner. The several acts of assault by the police as pleaded and other acts of the police are as follows:

(a) Petitioner was taken to the Crimes Division of the Moratuwa police and he was beaten. Before moving him to a cell the 2nd Respondent along with some other police officers lifted him and put him on the ground twice, at about 7.30 p.m.

Petitioner's sister and brother-in-law came to see him at the police. Sister's affidavit is annexed marked P1A.

(b) At 9.00 p.m Petitioner taken out of the cell and his fingers tied with a lace, hung with the finger, while a chair was kept below his body. He was kept in that position for about half an hour in the presence of the 1st and 2nd Respondents.

(c) On 06.07.2008 (as pleaded) Petitioner's wife and sister came to the police to see him. Petitioner informed both of them about the assault. At 9.00 p.m. Petitioner was taken out of the cell and taken to the Crimes Division. Petitioner's hands were tied and put through the legs and hung by a wicket which was kept between two tables (kept in this position for 20 minutes by the 1st Respondent). The 2nd Respondent and some other police officers had beaten the Petitioner on the legs and feet whilst questioning of house breaking incident. Petitioner denied such a house break-in incident. Petitioner's brother-in-law also came to see him and Petitioner informed his brother-in-law of the above assault. Affidavit of brother-in-law marked and produced as P1B.

(d) On 07.07.2008 Petitioner was again taken out of his cell by the 1st Respondent and other police officers who took the Petitioner into custody, threatened the Petitioner of assault. He was then beaten on the hands and feet with clubs. On being beaten police asked about

some jewellery stolen from a house where the Petitioner had worked previously.

- (e) 1st Respondent also threatened the Petitioner and informed him that a bomb would be introduced in order to keep the Petitioner in prison for a longer period. Petitioner was unable to bear he being assaulted, and informed the police he could return a gold chain. Petitioner told his wife who visited him to hand over a gold chain which belongs to his son, in order to obtain his release. On the same day Attorney-at-Law, M/s. Shamila along with Petitioner's sister, mother and a neighbour visited him at the police station. Attorney-at-Law Shamila was consulted by Petitioner's party over his arrest. It is pleaded that due to such assault Petitioner's hands and legs were all swollen.
- (f) On 8th or 9th July 2008 at 10.00 a.m the Superintendent of Police of the area visited the Moratuwa Police Station. The Petitioner was hidden inside the police mess. Petitioner verily believes that Superintendent's visit was as a result of a complaint lodged at the Superintendent's office, by his sister.
- (g) On 10.07.2008 the house owner whose house was, alleged to be broken-in visited the police. Petitioner was taken to Crimes Division and was shown to them. Petitioner denied any involvement. Thereafter the 1st Respondent on the same night assaulted the petitioner with a cricket bat on his face, buttocks and legs.
- (h) On 11th and 12th July Petitioner detained in the police station.
- (i) On 12.07.2008 another Attorney-at-Law and Petitioner's wife visited the police. The 1st Respondent informed them that the Petitioner would be produced before the Magistrate. Affidavit of Attorney Niluka and wife produced marked P1C & P1D.

(j) On 13.07.2008 Petitioner was taken to the Lunawa Hospital as he complained of a chest pain. But the Doctor did not examine his injuries caused as a result of assault. Later Petitioner was produced before the learned Magistrate. At that point Petitioner became aware that the police had filed two cases against the Petitioner bearing Nos. 89984 (theft) and 90215 (possession of 2300 mg. of heroin) on 12.07.2008. Petitioner was remanded by learned Magistrate. Court proceedings annexed marked P2A & P2B. I also note the contents of the application made to the Human Rights Commission by the Petitioner's party.

On a perusal of the record I find that extensive written submissions have been filed by parties on time bar. However on 29.07.2016, the Journal Entry indicates that the learned counsel who appeared for the 1st to 3rd Respondents informed court that the preliminary objections on time bar would not be pursued.

The 1st to 3rd Respondents have filed objections, on 15th October 2010. The affidavits filed of record of each of the three Respondents appear to be on the same lines. Allegations of assault and torture by the said Respondents are denied. These police officers also maintain that the suspect Petitioner was produced before the Magistrate within 24 hours of his arrest. The 1st Respondent was an Inspector of Police and Officer-In-Charge of the Crimes Bureau of the Moratuwa police at the relevant time and period. It is also denied by these Respondents that the Petitioner has no pending cases. It is pleaded that

the Petitioner was charged for theft and possession of 30 mg. of heroin and convicted by the Magistrate's Court of Maligakanda and Colombo respectively. Copies of the relevant M.C records are not produced since same had been destroyed but certified copies of criminal records from the police station are produced.

Moratuwa Police Station received a complaint of house breaking and death threat on 11.06.2008. On 30.08.2008 facts were reported to the Magistrate. 'B' Report No. 899 84 is produced as 1R5.

The 1st Respondent aver that he was on 12.07.2008 he was on a tour duty in Moratuwa, Koralawella area with two police officers named in his affidavit. He received information from an informant of transporting of heroin, in the area. This was at about 20.00 hours. At 20.30 hours he arrested the Petitioner at Koralawella having explained the reason for arrest. Petitioner was thereafter handed over to the Moratuwa Police, Reserved Officer, and he left for further petrol rounds. At the time of arrest the Petitioner had with him a quantity of heroin, a gold chain and a pawning receipt.

It is the position of the 1st Respondent that having handed over the Petitioner to the Reserved Officer he is unaware as to what happened thereafter. It is further pleaded that the Reserved Officer, Gamini has testified by an affidavit that there was no assault, torture or any harassment caused to

the Petitioner. On 13.07.2008 Petitioner was examined by District Medical Officer, Moratuwa Hospital. Medico Legal Report does not indicate any injuries. On the same day Petitioner was produced before the Magistrate, Moratuwa on two charges. One was on theft and the other for possession of heroin. The 1st Respondent produced marked 1R – 11 his investigation notes of arrest, etc. He further pleads that the Petitioner never complained of any assault to the learned Magistrate when he was produced in court on 13.07.2008.

The 2nd and 3rd Respondents by their affidavit support the position of the 1st Respondent as stated above. The 2nd Respondent, was according his affidavit on petrol duty along with the 1st Respondent at all relevant material times.

The material furnished to this court, and submissions both oral and documentary made by learned counsel on either side no doubt, are initiated on two Magistrate's Court cases bearing Nos. 89984 and 90215. The Judgments delivered by the learned Magistrate in the said cases are also filed of record. (no indication of an appeal). The said orders of the learned Magistrate throw more light to the case in hand and assist the Apex Court to arrive at a decision concerning Petitioner's basic rights. On the side of the Petitioner the allegation of assault, torture and degrading treatment are based and supported by documents/affidavits marked and produced as P3, P1A, P1B, P1C and P1D. It

indicates that the Petitioner was very badly treated by the police from the point of taking him to custody by the police up to the point of being produced before the Magistrate. Police on the other hand seems to have been overenthusiastic to fault the Petitioner at any cost.

The Judgments delivered by the learned Magistrate fortify the position of the Petitioner. Medico Legal Report tendered to court on 10.03.2010 and the prisons hospital treatment sheets dated 13.07.2008 had been submitted to court on 21.05.2009, they describe injuries consistent with the physical acts of assault or torture complained by the Petitioner. I note the following points considered by the learned Magistrate as follows.

Case No. 89984 (charged under Section 440 & 369 of the Penal Code)

Witness No. 1, in Examination-in-Chief describe the incident of a person being found inside the house and causing her certain injuries to her mouth which damaged her teeth in the lower jaw. Omission marked in this witness' statement to police regarding injuries caused to her teeth which has not been stated in the original statement to police. Trial Judge disbelieve the witness and also observes that the witness could not answer several questions posed by the defence, and arrives at a conclusion that this witness never saw an incident of theft, and at a certain point as admitted by the witness himself.

Occupier of the house also gave evidence, but the trial Judge concludes that she was not able to identify any lost items. This witness admits to making a belated statement to the police and deliberately conceal the correct date of incident, and was unable to answer several questions in cross-examination. This witness was shown the suspect at the police station, though she could not identify the lost items. (This is a flaw for continuation of any identification parade).

Trial Judge reject the evidence of the 1st Respondent (Police Officer) who gave evidence before the Magistrate's Court. Trial Judge holds that the 1st Respondent has given false evidence before the Magistrate's Court and express the view that 1st Respondent be tried in terms of Section 188 of the Penal Code, for giving false evidence. Trial Judge more particularly disbelieves the evidence of this witness on the question of recovery of stolen items/goods, and the date of arrest. Magistrate also refer to the contradictory nature of reports filed in court and the evidence of the 1st Respondent which does not establish that Petitioner was in possession of heroin. (particularly on 1st Respondent)

I would for purposes of clarity incorporate in my Judgment some very relevant observations of the learned Magistrate, as follows.

පොලිස් පරීක්ෂක දුමින් පෙරේරාගේ සාක්ෂිය, මෙම නඩුවේ දී චුදිතට එරෙහිව ඇති චෝදනා සම්බන්ධයෙන් සලකා බැලිය යුතුව තිබුණද ඔහුගේ බලය අයුතු ලෙස පාවිච්චි කරමින් කටයුතු කර ඇති බව ඉතා පැහැදිලිය. එසේම ඔහු අධිකරණය ඉදිරියේ අසත්‍ය සාක්ෂි දී ඇති බව ඔහු විසින්ම පිළිගෙන ඇත. එසේම ඔහු හරස් ප්‍රශ්න වලට උත්තර දෙමින් මෙම විත්තිකරුගේ සාක්ෂුවේ තිබී හෙරොයින් මත්ද්‍රව්‍ය පැකට් 23 ක් සොයා ගත් බවට අසත්‍ය සාක්ෂියක් දී ඇත. ඒ ආකාරයට අසත්‍ය සාක්ෂි දී ඇති බව නිගමනය කළ හැක්කේ ඒ බව මෙම නඩුවට අදාළ අපරාධය සම්බන්ධයෙන් දෙවන අවස්ථාවේ දී තොරතුරු ඉදිරිපත් කල බී වාර්තාවේ ඒ බව සඳහන් නොවීම තුලින්ය. එසේම එම චෝදනා ප්‍රතික්ෂේප කරමින් විත්තිකරු ඉතා පැහැදිලි සාක්ෂි දී ඇත. ඔහු අධිකරණය ඉදිරියේ හරස් ප්‍රශ්න වලට භාෂනය වෙමින් දිවුරුම් පිට පැහැදිලිව පවසා ඇත්තේ දුමින් පෙරේරා යන පොලිස් නිලධාරියා ද්වේශ සහගතව ඔහුට එරෙහිව නඩු පවරා ඇති බවය. එහෙත් සාක්ෂුව තිබී කිසිදු නඩු භාණ්ඩයක් සොයා නොගත් බවත් හෙරොයින් පැකට් 23 ම ඔහු සන්නකයේ නොතිබුණ බව ඔහු සාක්ෂි දී ඇත. එසේම විත්තිකරු අත් අඩංගුවට ගත්තේ 2008.07.05 වන දින බවත් 2008.07.13 වන දින එනම් ඉරිදා දිනක විත්තිකරුව විනිසුරුතුමා වෙත ඉදිරිපත් කල බවත් ඔහු අධිකරණයේ දී ඇති සාක්ෂි සත්‍ය සාක්ෂි ලෙස සැලකිය හැකිය. එය තහවුරු වන්නේ පොලිසිය විසින් තොරතුරු වාර්තා කිරීමේ දී විත්තිකරු අත්අඩංගුවට ගත්තේ කුමන ස්ථානයේ දී හෝ කුමන දිනයේ දී යන්න අධිකරණයට වාර්තා නොකිරීම තුලින්ය. එයින් නිගමනය කළ හැක්කේ මෙම නඩුවේ පැමිණිල්ල වෙනුවෙන් සාක්ෂි දුන් මෙම නඩුවේ අපරාධ සම්බන්ධයේ පරීක්ෂණය සිදු කළ යැයි කියන දුමින් පෙරේරා යන පොලිස් නිලධාරියා නීතිවිරෝධී ලෙස විත්තිකරු

2008.07.05 වන දින සිට 2008.07.13 වන දින දක්වා පොලිස් සිර මැදිරියේ රඳවා ගෙන ඒදින පුර්වගාමී විනිසුරුතුමා වෙත ඉදිරිපත් කර ඇති බවයි.

The learned Magistrate inter alia in his concluding remarks states that the Petitioner was kept in illegal custody in the police station from 05.07.2008 to 13.07.2008 and had been during that period assaulted and treated inhumanly. Magistrate also conclude that having considered the evidence of the Medical Officer who gave evidence for the Petitioner from the prison hospital, it is well established that injuries were caused to the Petitioner and he was treated for same as an indoor patient at the prison hospital. The learned trial Judge emphasize that during the period 05.07.2008 to 13.07.2008 the Petitioner was in police custody and within that period the Petitioner was beaten and assaulted by the police.

Case No. 90215 (charge of possession of heroin)

It is not necessary to go into details in this case. Learned Magistrate reject the prosecution case, and made observations detrimental to the police, just like the case above (89984). Trial Judge refer to the 1st Respondent's conduct and fault him.

The learned Magistrate in no uncertain terms make it very clear that the 1st Respondent's evidence was false and it was a deliberate attempt by him to conceal the truth. The police party seems to have made use of the court

to fabricate false charges against the Petitioner and bring the Administration of Justice to disrepute, merely to achieve their purpose. Even a criminal and a prisoner would be entitled to basic constitutional safe guards provided by the Constitution. In *Sudath Silva Vs. Kodituwakku (1987) 2 SLR 119 per Atukorala J.* “ Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment It is an absolute fundamental right. ... Every person in this country, be he a criminal or not is entitled to this right to the fullest content of its guarantee”.

I wish to observe that usually obtaining proof in this type of case is no easy task due to reluctance on the part of witness to testify against law enforcement authority. In *Velmurugu Vs. A.G (1981) 1 SLR 406, Sharvananda J.* refer to the ‘*Greek Case*’ as described by the European Commission on Human Rights. “There are certain inherent difficulties in the proof of allegations of torture or ill-treatment. A victim or a witness able to corroborate his story might hesitate to describe all what really happened. ...”However as regards the case in hand there was no such difficulty due to good monitoring of all events by the Petitioner’s party, notwithstanding the fact that the Petitioner himself had a criminal record. A prisoner may be an outcast of society but he remains entitled to all his civil rights in so far as they are not taken away by legislation. *Raymond*

Vs. Honey (1983) AC 1-10: Prisoner has a right of access to courts. Johnson vs. Avery 393 US 483 (1969).

Evidence led before the learned Magistrate, reveal that the Petitioner was not produced before court within the time frame permitted by law. The Police made every effort to hide the truth. It is time for the law enforcement authority to realise that a court of law cannot be misled so easily.

The material placed before this court by the Petitioner, establish without any doubt that the police subjected the Petitioner to torture and cruel, inhuman degrading treatment. I wish to observe, more particularly that the 1st Respondent was responsible for such inhuman acts, but he alone cannot be held responsible as there were other police officers who assisted and took part to cause injuries to the Petitioner. Nor was the Petitioner produced before the Magistrate according to law. As such I hold that both 1st and 2nd Respondents have infringed the Petitioner's fundamental rights guaranteed under Articles 11 and 13(2) of the Constitution. I am also of the view that the state should be held strictly liable as all inhuman acts of assault on the Petitioner occurred during the period the Petitioner was in police custody. I direct and Order both the 1st and 2nd Respondents to pay personally a sum of Rs. 100,000/- each to the

Petitioner as compensation. I also Order the State to pay a sum of Rs. 100,000/- as compensation, to the Petitioner. Thus the Petitioner will receive a total sum of Rs. 300,000/- as compensation. All payments to be made within four weeks from today.

Application allowed with costs.

JUDGE OF THE SUPREME COURT

K. Sripavan C.J.

I agree.

CHIEF JUSTICE

Priyantha Jayawardena P.C., J.

I agree.

JUDGE OF THE SUPREME COURT