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 read with Article 17 of the Constitution.

M.D.Nandapala

No.541, Hendrick Peiris Mawatha,
Pallimulla,
Panadura.

Petitioner

SC (FR) Application No. 224/2006

Vs.

1. Sergeant Sunil (R 11834)
Police Sargeant,
Police Station,
Homagama.
2. P.K.K.Kumara Rathna (40156)
Police Constable
Police Station,
Homagama.
3. A.R Kumara Rajabandara(20912)
Police Sargeant,
Police Station,
Homagama.
4. Officer –in –Charge
Police Station,
Homagama.
5. The Inspector General of Police
Police Headquarters,
Colombo 1.
6. Hon.Attorney General
The Attorney General's Department
Colombo 12.

Respondents

BEFORE **: S.N Silva, C.J**
Ms.Shiranee Tilakawardene, J.,
and
P.A.Ratnayake, J.

COUNSEL :
Sharmaine Gunaratne for the Petitioner.
Saliya Peris and Rukshan Nanayakkara for the 1st Respondent.
Uditha Egalahewa for the 2nd and 3rd Respondents.
K.A.P Ranasinghe, SSC for 4th to 6th Respondents.

ARGUED ON: 8th October 2008
WRITTEN SUBMISSIONS TENDERED:3rd December 2008 & 11th November 2008
DECIDED ON :27th of April 2009

Ms.Shiranee Tilakawardene, J

The petitioner was granted Leave to Appeal on the 8th September 2006, on alleged violation of Article 11, Article 12 (1) and Article 13(1) of the Constitution. Leave was granted , taking into consideration the gravity and seriousness of the allegation directed against members of the Police Force of Sri Lanka and as previously observed by this Court in ***V.I.S Rodrigo v. Imalka and seven others (S.C.F.R.297/2007)*** on the fact that such allegations are indicative of the increasingly typical hardships suffered by the people of this country while engaged in their lawful pursuit of travel on our public roads in the exercise of their fundamental right to freedom of moment, and thereby denying the citizenry their equal protection under the law and their freedom from arbitrary arrest and detention as guaranteed by Article 12(1) and Articles 13 (1) and 13 (2) , respectively. The facts material to this case are briefly stated as follows.

At approximately 10 o' clock in the evening of the 24thof May 2006, the petitioner's van was stopped at the Godagama checkpoint by one member of the group of three police and two army officers on duty at the time, to conduct a search of the vehicle and an interrogation of the vehicle's occupants. Consequent to the passenger interrogation and vehicle search, the Petitioner and the other vehicle occupants were all taken into police custody and brought to the Homagama Police Station.

The petitioner alleges that after being brought to the Homagama Police Station, he was taken to a place immediately outside the Station and brutally assaulted by the 1st and the 2nd Respondents and an unidentified third officer, with repeated blows from a hose pipe and club delivered to his back, lower abdomen and buttocks. The Petitioner further alleges that his wife, who had been informed of the arrest, arrived at the Station the following morning with his nephew, spoke to the 4th Respondent, and obtained the release of the Petitioner and his companions by posting bail at the police station.

On or about the 5th of June 2006, the Petitioner had gone to the Homagama Police Station to meet the 1st Respondent to retrieve his driving license, as it had not been given back to him at the time of his release. The Petitioner alleges that the 1st Respondent advised the Petitioner to falsely lodge a complaint stating that he had lost the driving license. The petitioner further asserts that, at this instance, the 1st Respondent whispered to the 3rd Respondent who, apparently in tacit agreement with the ruse, recorded a fabricated statement in which the Petitioner claimed to have lost his driving license. The Petitioner emphatically alleges that he did not provide such a statement and , in fact , at this time informed the 3rd Respondent that the license was missing due to its continued detention by the 1st Respondent and not because he had lost it. This declaration, according to the Petitioner, was curtly dismissed by the 3rd Respondent.

Aggrieved by the alleged conduct of the law enforcement officers, the Petitioner lodged a complaint regarding the aforesaid arrest and the subsequent incidents of impropriety with the SSP of Nugegoda, one Mr.K.Udayapala, who in turn referred the matter to Mr. Wickrama Perera, the then Superintendent of Police of the Homagama Police Station (hereinafter referred to as the "SP of Homagama") on the 29th of May 2006, submitted in terms of Part II, Subsection 2 of Police Department order No.A7. The Petitioner subsequently filed this fundamental rights application in this Court on 23rd June 2006.In response to the complaint, Mr. Perera held a preliminary fact-finding investigation through an inquiry held on the 30th of May 2006 in accordance with Part II of the aforementioned Department order (vide Petitioner's Petition at page 5.)This Inquiry was conducted by Mr. Perera promptly, incisively and with great competence and stands as an example of an adherence to the highest standards, accountability and expectation of a public officer required by both the Doctrine of Public Trust and the Rule of Law.

In the present case, the Petitioner alleges that, at the time of arrest the 1st Respondent had assaulted him on the neck subsequent to an accusation that he and his companions were returning after a robbery. This accusation of robbery was made, according to the Petitioner on the basis of the 1st Respondent's alleged discovery of (i) a small , 3 ½ inch knife hidden in the Petitioner's waist and (ii) sum of Rs. 25,000/-

Notably, the 1st Respondent defends his decision to arrest the Petitioner on several more grounds in addition to the abovementioned ones.

i.the answers given by the Petitioner and his companions when asked about their whereabouts and the source of the money were contradictory,

ii.a bribe of Rs. 1500/- was offered to the 1st Respondent at the time of arrest. (for (i) and (ii) *vide* 1st Respondent's Affidavit, dated the 13th of July 2007),

iii.the Petitioner did not possess a driving license. (*vide* the evidence given by the 1st Respondent at the Inquiry held by the SP of Homagama)

The Petitioner denies all the aforesaid allegation upon which the 1st Respondent based his arrest and avers to Court that the arrest was an illegal one, in contravention of the right provided by article 13(1) of the Constitution that "no person shall be arrested except according to procedure established by law". The evidence presented to this Court lends much credence to the Petitioner's view of the events in as much a review of the facts disclose several instances that serve to severely undermine the testimonial creditworthiness of the 1st Respondents.

The voluntary statement made by the Petitioner contemporaneous to the time of the incident, exhibits a consistency of chronology and content with the details of the facts of the incident that have been later reiterated by him in the various pleadings and documents he has subsequently submitted before this Court. Such consistency, *per se*, lends credence in establishing the probative quality of the evidence and the testimonial reliability of the version of the incident as disclosed by the Petitioner. Likewise, the Petitioner's credibility is further

established as his statements also fully accord with (i) the contemporaneous statements made by his companions affording supporting evidence, as well as (ii) the testimony of Police Constable Herath, testimony which has importantly not since been recanted or qualified. This *inter se* consistency gives added conformity and exactitude to the version of the Petitioner and further establishes his testimonial creditworthiness.

The petitioner states that the knife was never hidden in his waist but was kept in the cubby-hole of the van, and was used for cutting polythene sheets that cover the steel furniture he is in the business of selling. This statement was corroborated by Corporal Wanipurage Wimalaratne 00113; an officer present at the arrest scene who stated at the end of his version of evidence recorded at the Inquiry held by the SP of Homagama that the knife was recovered from the cubby-hole and not from waist of the Petitioner as was claimed by the 1st Respondent.

After a perusal of the Affidavit made by the 1st Respondent and dated the 13th of July 2007, it is clear that a case had been filed in the Magistrate Court of Homagama, bearing number 82545, charging the Petitioner for being in possession of a prohibited knife in terms of Section 3 of the knives (Amendment) Act, No1 of 1983. In response to this charge, the Petitioner stated in his Written Submissions, dated the 11th of November 2008 (*vide page 9*), that he was unaware of such a prosecution against him, and that the summons for such a case, if one exists, had not been served on him to date. On further investigation to clarify this matter, this Court informed the Registrar to call for information relating to the proceedings of the Magistrate Court case, bearing number 82545. Accordingly, the Supreme Court found information and supporting evidence which revealed facts that substantiate the version of the Petitioner, establishing further his credibility in this Court:

1.The case bearing number 82545 of the Magistrate Court of Homagama had been filed on the 6th of July 2006 against the suspect Petitioner, for having been in possession of the knife, and that the said case had, apparently, been fixed for the 11th December 2006 and had later been called on the 12th of March 2007.

2 On the 12th of March 2007 the case had been dismissed because summons had not been duly served. Later, a fresh plaint had been filed on the 30th of August 2007, under case number 88011 and thereafter been fixed for the 22nd of November 2008.

3.Subsequently, this case had yet again been dismissed, due to the suspect purportedly being unavailable at the given address.

4.Furthermore, according to the records of the Magistrate Court the production, namely the knife purportedly "recovered from the Petitioner's possession" was never even handed over to the Magistrate Court of Homagama.

The Petitioner rejects the basis of arrest, stating that he clearly explained to the 1st Respondent at the time of arrest that he had earned the money from his furniture business and that he, along with his companions, were returning after engaging in their furniture business. The Petitioner also asserted that his version of the events was corroborated by all three persons who had accompanied him, and they too had given the same explanation relating to the money found in their possession. The Petitioner also emphatically stated that he had never offered a bribe to the 1st Respondent (vide, Counter affidavit dated the 19th of October 2007)

Indeed had a bribe been so offered, as alleged by the 1st respondent surely this would have been the primary charge against the Petitioner. The absurdity of the situation is that instead of the issuance of the obvious charge warranted by the facts of the 1st Respondent's version of the event, the Petitioner alone was charged under an obscure ordinance carrying a maximum sentence of one month's imprisonment and Rs.50/- fine. This was the only charge against the Petitioner. It is to be noted that the possession of this knife is not a cognizable offence under the Code of Criminal procedure Act No. 15 of 1979 and, therefore, the petitioner could not have been arrested without a warrant nor detained at the police station until the next day, as was done. At most, the Petitioner could have been warned to appear in Court in the same manner and procedure followed in the detection of a basic traffic offence.

To substantiate the Petitioner's version of events, the Petitioner has produced Affidavits of each of his three companions, made at the time of arrest: (i) Steven Koralage Piyasoma (annexed as P1a to the Petitioner's Petition dated the 23rd of June 2006), (ii) Adambarage Tharaka Malith Alwis (annexed as P1b to the Petition) and (iii) Pathirage Don Dinesh Asanka (annexed as P1c to the Petition). Their versions of the incident were consistent and corroborated in detail the version of the Petitioner.

Significantly, at the inquiry held by the SP of Homagama shortly after the incident, one of the officers on duty and present at the time of the arrest, Herath (9751), a Constable attached to the Nikavaratiya Police Station also gave evidence. Constable Herath, in a statement made by him and recorded contemporaneously, volunteered information that the Petitioner and his companions (i) had behaved respectfully at all times during the 1st Respondent interrogation, referring to the 1st Respondent as "Sir, (ii) had respectfully explained that they were

returning after a day's work in the furniture business, and (iii) had stated that the Petitioner was ill. From Constable Herath's evidence, it is also clear that (iv) the Petitioner had been slapped by the 1st Respondent at the time of the interrogation without any provocation whatsoever, (V) the petitioner had in his possession at that time of arrest a valid driving license and all other legally necessary documents, (vi) no instance of a bribe being offered was heard or observed by Constable Herath and (vii) the 1st Respondent refused to released the Petitioner and his companion though Constable Herath and two other officers had urged him to do so.

Recognizing the significance of the finding of the Inquiry in ascertaining the culpability of the Respondents, this Court directed its Registrar to request the Director of the Police Legal Division for a report in relation to what transpired after the recording of evidence at the Inquiry and the status quo of the aforesaid Inquiry as to date. The Registrar sent a letter dated the 3rd of February 2009 to the Director of the Police Legal Division requesting the same. On receiving the report the Court discovered that the 2nd Respondent had deliberately submitted an incomplete Report of the proceeding of the aforesaid Inquiry, despite the availability of a complete Report at the time of the objections, obviously in order to render nugatory certain evidence and findings against the 1st and 2nd Respondent that were contained in the Report.

The Complete Report ultimately received by this Court included the evidence of witnesses as well as several observations and valid and salient conclusion made by the SP of Homagama. More specifically, after recording witness evidence of the Petitioner, his Companions, the wife of the Petitioner (Mrs.Weralage Irin Pathmalatha), Constable Hearth, the other police constable present at the time of arrest (Mr.Samaranayake Shelton) and the 1st, 2nd and 3rd Respondents, the aforesaid SP of Homagama had made the following observations and findings:

1.On the basis of the evidence given by the 1st Respondent, the 1st Respondent had undertaken to stop the Petitioner's van and arrested the Petitioners and his companion.

2. It was blatantly clear from the recorded evidence that sufficient information existed to convince the 1st Respondent that the petitioner and his companions were returning from a legal vocation, with legally earned money.

3. The 1st Respondent had assaulted the Petitioner for no valid reason and thereafter falsely accused the Petitioner of being in possession of an unlawful knife in order to justify his unwarranted conduct.

4. Based on the evidence given by Constable Herath, it is clear that the Petitioner had all the requisite documentation to both prove his identity as well as the validity of his vehicle license.

5. The 1st Respondent had forced the Petitioner to later falsely claim the loss of his licence in order to obtain a new licence because the 1st Respondent refused to return the licence at the time of arrest and either lost it after taking it into his possession or simply wanted to inconvenience the Petitioner.

6.In light of the evidence given by the companions accompanying the Petitioner and Constable Herath, it is abundantly clear that, at the time of the arrest, the van had initially been released by Constable Herath who had been satisfied that the Petitioner had possessed all the requisite legal documentation, only to be later stopped again by the 1st Respondent without valid cause.

In light of the above observations and acknowledgement based on the evidence given at the inquiry, the SP Homagama issued the following conclusions.

1.On the 24th of May 2006, the 1st Respondent (a) unlawfully arrested the Petitioner and his companions, (b) unduly assaulted the Petitioner and (C) improperly treated the Petitioner and his companions by retaining them at the checkpoint from 19.30pm to 24.00am. For these reasons, the SP of Homagama found the 1st Respondent liable for disciplinary action.

2. On the 5th of June 2006, the 3rd Respondent, in order to cover up the inconvenience caused to the Petitioner, knowingly recorded a false complaint by the Petitioner, which read that the Petitioner had lost his driving license. For this reason, the SP of Homagama found the 3rd Respondent liable for disciplinary action.

3. Given the fact that it has been proved by the recorded evidence that the knife discovered at the time of arrest was used by the Petitioner as a tool of trade, it is clear that the allegations made by the 1st Respondent regarding the knife were part of a ruse to cover up the improper conduct of the accused police officers. Accordingly, SP of Homagama found that the case filed in the Magistrate Court on this issue should be dismissed on the next Court date.

This court has emphatically held on several instances that, for an arrest to be a valid one, there must be a reasonable suspicion for arrest at the time of arrest. (*vide* **Namasivayam v. Gunawardene ()1989 1 Sri.L.R 394, Piyasiri V.Fernando. A.S.P (1988) 1 Sri.L.R 173.** In **Elasinghe v. Wijewickrema and others (1993) 1 Sri.L.R.163,** Kulathunga, J, clearly enumerated the established principles applicable to arrest as follows:

(a) Lawful arrest-

1.It is not the duty of the Court to determine whether on the available material the arrest should have been made or not. The question for the Court is whether there was material for a reasonable officer to cause the arrest. ***(Withanachchi v.Heart (1988) II CALR 170).***

2. Proof of the commission of the offence (or a prima facie case for conviction) is not required; a reasonable suspicion or a reasonable complaint of the commission of an offence suffices. The test is an objective one. **(Joseph Perera v.Attorney-General (1992) 1 Sri.L.R. 199, Dumbell v.Roberts Gunasekera v. de Fonseka (1944) 1 AII ER 326)**

3. A suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officer's knowledge or on the statement madeby the other persons in a way which justify him giving them credit. **(Muttusamy v. Kannangara 52 N.L.R 324.Yapa v. Bandaranayake (1988) Sri.L.R 63)**

4. During a period of emergency, a wider discretion is vested in the police in the matter of arrest. As Wanasundara, J.Said in **Joseph Prera** (supra) "The wider discretion vested in the police is logical and is necessary for the proper performance of the functions of the police and for the maintenance of the law and order in the country."

(b) Duty to inform the reason for arrest-

This duty which was established by common law and recognized by statute is now a fundamental right. In **Mallawarachchi V. Seneviratne** it was held: "The Obligation is to give the reason at the moment of arrest or where it is, in the circumstances excused, at the first reasonable opportunity."

In considering the question of whether the Petitioner's arrest was based on the presence of a reasonable suspicion as provided in **Elasinghe** (Supra), one must take in to account the manner in which the Courts have sought to interpret his requirement in the past. The case of **Premalal De Silva v. Inspector Rodigo and others (1991) 2 Sri. L.R 307** aptly illustrates the bounds set for an arrest.In **Premalal**, the Petitioner was arrested without a warrant by the Panadura Police in the course of investigations into a robbery which took place at a cigarette agency. Here, the accused police officer who had effected the arrest had represented to Court that the Petitioner was suspected of a series of robberies in the Panaduara area and therefore the Petitioner was required for questioning. However, as no material had been placed before the Court to justify such a suspicion or more importantly, a suspicion that the Petitioner was involved in the robbery under investigation, the Court held that the arrest of the Petitioner failed to satisfy the requirements of Section 32 (1) (b) of the Code of Criminal Procedure Act, as it was not based on a reasonable suspicion;

It appears to be the Counsel's submission that if it is proved that the police did in fact entertain a suspicion on the basis of information in their possession this Court must uphold the arrest in the interest of investigation. I cannot agree with this submission.

In the case of **Piyasiri v Fernando (1988) 1 Sri.L.R 173**, where 14 Customs Officers were stopped, arrested and taken to the Police Station in relation to an investigation by the bribery Commission, the learned H.A.G.De Silva, J.Said with respect to the issue of whether there was , in fact , a reasonable suspicion that;

It was a general allegation of briery and as such under Section 32 (1) (b) of the Code of Criminal Procedure Act, not one of the Petitioners could have been arrested unless all or any of them were actually seen committing such an offence or there was definite information that any or all the Petitioners were concerned in the commission of such offences. The arrest of the Petitioners in my view was highly speculative and was for the purpose of ascertaining whether any of them could be detected to have committed a bribery offence. No Police Officers has the right to arrest a person on vague general suspicion, not knowing the precise crime suspected by hoping to obtain evidence of the commission of some crime for which they have the power to arrest. Even if such evidence comes to light the arrest will be illegal because there will have been no proper communication of the reason for the arrest to the accused at the time of the arrest. (Emphasis added)

While we do not go so far as learned judge in ***Piyasiri*** in saying that the information that prompts reasonable suspicion should be "definite", as we believe the police in discharging their duties and investigations cannot, of

course, be expected to only respond to public complaints that have the support of concrete evidence, we fully concur with the learned judge's holding that "vague" "general" and nebulous information is insufficient to serve as the sole basis for a reasonable suspicion and that no police officer has the right to arrest a person"...*not knowing the precise crime suspected by hoping to obtain evidence of the commission of some crime for which they have the power to arrest."* As the learned judge stated, even if such evidence eventually does come *"to light the arrest will be illegal because there will have been no proper communication of the reason for the arrest to the accused at the time of the arrest*.." Observably, Gratien, J. in **Muttusamy** (supra) states that the arresting officer cannot arrest a person in the course of a voyage of discovery, unsupported by *cogent evidence*. That the Courts have been unwilling to allow the power of arrest to devolve into a glorified fact-finding tool is due to recognition of the importance placed on human rights and individual liberty in our legal system. Time and time again, the learned judges of our Courts have interpreted "reasonable suspicion" restrictively, in order to protect and promote the rights and freedom of the people of Sri Lanka. Reasonable suspicion is certainly not a fanciful, illogical, irrational, or nebulous suspicion but, rather, one based on a reasonable interpretation of the facts and circumstances of the case, at the relevant time.

While there is consensus that suspicion of a reasonable nature can only be spurred by cogent evidence, there is predictably – given the fact – sensitive nature of this issue-no "hard and fast rule", so to speak, as to the nature and extent of what constitutes such cogency. Nevertheless, there is ample common law authority suggesting that (i) location, (ii)appearance of the Petitioner (iii)demeanour of the Petitioner, and (iv) past conduct and past convictions of the Petitioner (vide **Piyasiri v Fernando (1988) 1 Sri.L.R. 63, Elasinghe v. Wijewickrema and others (1993) 1 Sri. L.R.163)** are all useful characteristics-though by no means an exhaustive list of them-that should be taken into account by this Court in deciding whether the facts of the case satisfy the requisite cogency of evidence.

Taking into consideration the Affidavits of the companions, the evidence given by Constable Herath at the said Inquiry and the findings of the complete Report, we find that the Petitioner has proved with a high degree of probability that no reasonable suspicion could have arisen under the circumstances to warrant an arrest of the Petitioner. Assuming, without conceding that the money and the knife caused some measure of suspicion as averred by the 1st Respondent, his failure to charge all the persons traveling in the van with charges relating to suspected theft or robbery in itself imitates further against the 1st Respondent's version of the incident. Given the mitigating facts explained clearly by all those traveling in the van, and the other facts and circumstances disclosed through the inquiry held by the SP Homagama, the facts disclosed simply do not suffice as evidence cogent enough to prompt a *reasonable* suspicion of the commission of any crime. Additionally the proceedings before the Magistrate Court reveal that the police officers had not shown any attempt to pursue the matter in the Courts- a fact which further evidences a high degree of probability that the Petitioner and his companions had been falsely implicated (by the abuse of the police powers entrusted to the 1st , 2nd and 3rd Respondents) in a case merely to justify the action taken against the Petitioner. It is also clear that the possession of the small knife and money was incidental to their furniture business, a completely legitimate vocation. Accordingly, we find that the 1st Respondent's arrest and detention of the Petitioner and his three companions was unlawful and contravention of Article 13 (1). Before fully disposing of this issue, however, I find it important to advert to the fact that the Petitioner had not disputed the 1st Respondent's allegation that the Petitioners and his companions were intoxicated at the time of arrest. This is indeed in important fact for this Court to address as it is a factor that would, if true, give unequivocal reason for the 1st Respondent to arrest the Petitioner. This is so because Section 151 (1) of the Sri Lankan Motor Traffic Act (as amended) specifically prohibits any person from driving "a motor vehicle on highway after he has consumed alcohol or any drug."The aforesaid Section authorises a police officer who suspect that a driver is intoxicated to require such person to submit to a breath test or , in the case of suspected drug intoxication, to produce a driver before a government Medical Officer for examination. This Court, however, has not received any evidence from any authority, a Government Medical Officer or otherwise, to suggest that the Petitioner or any of his companions were intoxicated at the time of arrest. Moreover, the evidence given by Constable Herath at the inquiry before the SP of Homagama corroborates the Petitioner's claim that he was, in fact, ill. Had the 1st Respondent suspected that the Petitioner was driving under the influence of liquor, his failure to charge the Petitioner with drunken driving after having produced him before the medical officer and obtaining a medical repot is an inexplicable absence of action that fails to accord with, and is inimical to , the position taken up by the 1st Respondent.

The next matter to be considered in this case is the alleged cruel, inhuman, and degrading treatment of the Petitioner by the 1st and 2nd Respondents after he was arrested. The Petitioner alleges that, subsequent to the search and the interrogation at the Godagama checkpoint, the Petitioner and his companions were arrested and taken to the Homagama Police Station. Thereafter, the Petitioner was kept out of a cell while his companions were put into one. The Petitioner alleged that he was then taken by the 2nd Respondent to a place outside the Police Station and the 1st and 2nd Respondents, along with another unnamed officer, brutally assaulted him with a hose pipe and a club on his back head, lower abdomen and buttocks, after which he was placed into cell. The 1st and 2nd Respondents categorically deny the aforesaid allegations.

The Petitioner further narrates that after being bailed out of prison, he was admitted to the Panadura Base Hospital on 25th of May 2006 around 7 p.m, complaining of severe body pain and immobility due to the severe

ache in his lower abdomen. The Petitioner further states that he was discharged on 27th of May 2006 after being examined by the Hospital's Judicial-Medical Officer and having been administered treatment.

The judicial examination of the 1st Respondent on the 27th of May 2006, the report of which was produced to Court, revealed the existence of a contusion 3cm x 4cm in size, situated in the left back chest of the Petitioner. This injury is further corroborated by the Hospital's Diagnosis Card, marked P2in the Petitioner's Petition, dated the 25th of May 2006, and time stamped at 9.30pm.

Apart from the above-stated injury, P2 however, also details several other injuries. Of significance is that one of general observations stated in the medical report is the existence of *" a soft tissue injury all over the body"* Also noted are contusions over the back of the chest, tenderness over abdomen, both buttocks and left forearm, all injuries consistent with the claim of the Petitioner as to the manner of the assault and the areas of his body which had been affected by the several blows that were dealt to him, and also fully consistent with his claim that he was hit with a blunt instrument. There has also been some injury to the thigh. Further, the Petitioner's complaint of assault to the lower abdomen is corroborated by the doctor's observation of "tenderness over the abdomen". Furthermore, the SP of Homagama has also noted in his inquiry that he did, in fact, observe injuries on the Petitioner's back that appeared to be injuries due to the assault.

Noticeably, these injuries have curiously not been reported in the Medico-Legal Report. Nevertheless, given the fact the judicial medical examination took place a full two days after the first medical examination and the duration of 48 hours may have provided the chance for the injuries to disappear by the time of the second medical report, we are of the opinion that the injuries noted in the Hospital's Diagnosis Card occurred during the assault at the police station. In Medico-Legal Perspective of Torture, Dr. Niriellage Chandrasiri and Dr.U.C.P Perera, 1st Ed.,(2003) ,state that"...(i)it should be taken into consideration that the final position and shape of bruises bear no relationship to the original trauma and that some lesion may have faded by the time of re-examination" (vide page 75).In any case, the veracity of the details of neither medical report has been disputed by any of the Respondents.

According to the Medico-Legal Report, the Petitioner was admitted to the Panadura Base Hospital exactly one day after the Respondents themselves admit to having arrested the Petitioner. Given the nature and size of the wounds sustained by the Petitioner, a police officer of even minimal competence would have directed such person for immediate medical attention. The fact that this was not done indicates to this Court that such severe injuries had necessarily been sustained after arrest, and not beforehand. Having established the time of injury in relation to the arrest, we can further logically infer its source as described by the Petitioner. The accuracy of this deduction is set out in the judgment of **Amal *Sudath v.Kodithuwakku (1982) 2 Sri.L.R.119*** where this court held that "the only reasonable inference" of the source of injuries caused while the Petitioner was in the custody of state officers, was that they were caused by such officers. This Court also held in ***Pitakandalage Gamini Jayasinghe v. P.C Samarawickrama and others*** **(SC Application 157/97 SC Minutes 12 January 1994)** that "it is to be noted that at the time Petitioner was handed over to that police, he had no injuries and was in perfect health. But when he was admitted to the hospital.. he was a physical wreck and almost comatose. I therefore hold the allegation of torture to be established" It is important to note that medical evidence inherently carries with it the fact of independent expert evidence based on scientific observations. Given the nature of the medical evidence, this Court observes that such evidence corroborated the version of the Petitioner and proves with a high degree of probability the fact as alleged by the Petitioner thereby satisfying the evidentiary burden of the Petitioner.

Through it is clear to this Court that the 1st Respondent's unlawful arrest and unwarranted assault of the Petitioner revealed him unfit to serve as a member of the Police Force, the Court also found the despite the strong findings of the report of the SP of Homagama (1) Mr. K. Udayapala, the SSP of Nugegoda who had been initially forwarded the report had failed to subsequently take any action whatsoever on the recommendations of the SP of Homagama from the time he received the SP's report till his retirement from police service on the 21st of August 2007 and(2) the subsequently appointed SP, Mr.Deshabandu Tennakoon did the same. Lest it be suggested that Mr.Tennakoon's culpability is somehow limited by the fact that the Report was received before his tenure as SP of Nugegoda began, it is important to note that, pursuant to Part iii of Police Department Order A14, the Police Office is to "be inspected by the Officer-in –Charge of the District once a month and by the Office-in-Charge of the Province or Division once every half year". Furthermore, Section 7 of Part iii of the aforementioned Order provides that, in connection with the Office inspection, the inspecting officer is to consider the following:

1. Actions Papers

a. Number of action papers at the time of inspection.

b. Are any papers more than 3 days old and, if so, how many and how long are they delayed?

c. What is the officer's explanation for the arrears?

2. Pending Papers

a. Are papers arranged in chronological order of dates, pages numbered, and call-up dates noted in office papers? Test six cases and give numbers.

b. Are cases booked in call-up diary?

c. Has the call –up diary been checked regularly and action taken up to call attention to overdue replies? If not, how many days' entries remain unchecked?

Given that the Officer – in – Charge of a Division is SSP, it was patently incumbent on Mr. Tennakoon upon his appointment as SSP of Nugegoda to both survey the existing registers and to take "action" on any cases that had so far not yet been pursued. As the SP of Homagama, having conducted his inquiry and concluding the unlawfulness of the arrest and the unprovoked assault-action that would clearly constitute "Schedule A" offenses under Section 24"3 of the Establishment Code-duly reported the matter to the SSP of Nugegoda in accordance with Police Departmental Order protocol, the next steps in terms of the Establishment Code were mandatory and should have been the presentation of charge sheets against the accused officers, the opportunity for the accused officers to submit a reply, and the execution of a final panel inquiry. This was not, however, done.

In **V.I.S Rodigo (see supara)** it was found that the Petitioner had been inappropriately stooped by several members of the Police Force at a checkpoint. Like in the present case, the petitioner had been repeatedly harassed about genuine legal documents, unjustifiably accused of wrongdoing and ultimately arrested, kept in custody and later remanded despite having committed no cognizable offence whatsoever. In a strong refutation of the malfeasances committed in that case, His Lordship, the Chief Justice Sarath N. Silva, remarked that the tragic incident evinced "a clear instance of the abuse of power, rampant dishonestly and corruption and also misuse of the process of law that take place at "check Points" that have sprouted up. The tragedy is that a multitude of offences have been committed by Police Officers whose duty it is to use their "best endeavors' and ability to prevent all crimes, offences and public nuisances". Given the misbehavior in the instant case, it appears that the Police have failed to heed the words of the Chief Justice, and continued to act with a level of impunity that has continued to the serious detriment of the public.

In order to analyze the failure of existing procedural safeguard used by the Police in their self-regulation and determine what allowed the SSP of Nugegoda failure to take action on the complaint lodged by the Petitioner – an omission which amounted to a blatant and unacceptable disregard of the informed recommendations of Senior Officers on a serious case of officer misconduct- the personal file of the 1st Respondent was called for and examined by this Court. It appears that the 1st Respondent joined the Police as a reserve officer on the 12th of May 1986, and shortly thereafter, his lack of fitness to serve as an officer quickly manifested itself. On the 17th of July 1988, only 2 years after enlistment, the 1st Respondent was demobilized on orders of the then Deputy Inspector General of Colombo, a fate resulting, in part, from of an altercation with a superior officer, one S.P. Jinasena. In response to a memo from one Mr. D.D.W. Abrywardhena, Director of Personnel of the Sri Lanka Police Reserve Headquarters, a letter dated the 23rd of August 1988 was sent by one Mr.Godfrey Gunesekara, the then Superintendent of Police- Colombo Fraud Investigation Bureau, describing the lack of merit to the 1st Respondent's claim of assault, and in doing so , took opportunity to chronicle the 1st Respondent's insubordination and eventual demobilization:

At this stage, Mr.jinasena cautioned the R.P.C to do his duties properly. On hearing the loud tone of Mr.Jinasena, OIC.CFIB.C.I. Reggie Silva went to the room of Mr.Jinasena. Subsequently, Mr.Jinasena questioned the C.I as to why this R.P.C was still working in spite of the adverse report sent against him to S.L.P.R. Hqrs regarding his work and conduct.. An inquiry was held into this allegation made by the R.P.C Statement of several officers were recorded and there was no evidence forthcoming to substantiate the alleged assault.. ***The work and conduct of the above said R.P.C has been very unsatisfactory from the time he was posted to my Bureau. A report was forwarded to Commandant, S.L.P.R sometime back recommending his demobilization or to be transferred out of my Bureau.*** *On the day of this alleged incident, this R.P.C reported for duty and was found resting in the rest room. It was clear that the R.P.C. far in fear of losing his job, when Mr.Jinasena questioned the OIC.CFIB as to why he was still performing his duties in spite of the adverse report.. he would have brought this false allegation against Mr.Jinasena. As the continued service of this R.P.C would not be in the best interests of the Service, he was demobilized from the Service on order of D.I.G Colombo. (Emphasis added)*

In response to his demobilization, the 1st Respondent submitted an appeal, annexed with a recommendation letter to Mr. A.C.A. Gaffoor, the then Deputy Inspector General of Police, by one Mr.Abeyratne Pilipitiya, the then Chief Minister of the Sabaragamuwa Province, recommending that "suitable action" be taken with respect to the

appeal of the 1st Respondent. Based on a letter by K.A.K.Jinadasa, Secretary to Ministry of Policy Planning and Implementation, it appears that the matter had purportedly been looked into by Mr.Gafoor. who appears to have, despite the strong findings of fact and corroborative independence medical evidence contained in the report dated 23rd August 1988 against the 1st Respondent, recommended redress for him. Though the contents of the appeal by the 1st Respondent for reinstatement contained a complete distortion of the facts and serious, unfounded aspersions against his senior officers- an action which it self warrants a separate investigation-the only "punishment" given to the 1st Respondent for this reprehensible behavior was a full reinstatement to the Reserve Force, effective the 1st of November 1990 (vide letter dated the 20th of October 1990 by D.D.W.Abeywardhena, the Director of Human Resources-Sri Lanka Police Reserve).

Despite such checkered performance by the 1st Respondent in his short career, on the 26th of February 1997, a letter had been sent by one Mr. Upali Kodikara, the then Provincial Counselor of the Western Province, recommending the 1st Respondent for promotion to the post of Police Reserve Sergeant. One Mr. Asoka Jayawardena, then the Chief Organizer for a prominent political party, had also recommended the 1st Respondent for promotion by a letter dated the 9th of February 1997.The 1st Respondent, who by any expected standards of the Police Force was clearly unfit to continue as an officer, was ultimately and inexplicably promoted on the 3rd of March 2004 to the post of Police Reserve Sergeant.

It appears that a year before this promoting, the 1st respondent, having been ordered to transfer from the Homagama Police Station to Batticaloa, made a direct appeal by letter dated the 10th of February 2003 to one Mr. John Amaratunga, then Minister of the Interior and member of another prominent political party, seeking cancellation of the transfer. Apparently in response, Mr.Udayapala, at that time a Director attached to the Personnel Division of the Sri Lanka Reserve Police headquarters handling the transfers of reserve police, had deferred the transfer.

In 2006, the 1st Respondent made an appeal to be absorbed into the Regular Service. Interestingly, his own superior officer, the HQI of Homagama had submitted a report to the SP of Homagama on the 15th of March 2006, stating the 1st Respondent's poor attendance record, though curiously recommending the application:

1. The 1st Respondent had failed to regularly report for duty and did not report for duty for the entirety of 1988, having been demobilized as described *supra* for part of the year.

2.The 1st respondent managed to obtain 32 days of unpaid leave in 2001, 41 days of unpaid leave in 2002, 90 days of unpaid leave in 2003, 16 days of unpaid leave in 2004, and 33 days of unpaid leave in 2005, resulting, in other words, of over 7 months of leave in the prior 5 years.

In 2006, on a single, inclusive order given by the Cabinet, all reserve officers who (i) served a minimum of 8 years of service or (ii) had the minimum educational qualification for his/her respective rank was absorbed into the regular Police Force. It appears that it is under this protocol that the 1st respondent was absorbed into Regular Police Force on the 24th of February 2006 as a Police Sergeant.

That, to this day, the 1st Respondent is serving as a Police Sergeant in Maharagama and no action has been taken with respect to *any* of his transgressions is a testament to the systematic failure of the Police Force to police themselves. It is readily inferable from the above episodes in the 1st Respondent's career that due punishment for the 1st Respondent's incompetence and was either neglected or avoided by (i) his reliance on Political recommendations, (ii) the fear of , and or allegiance to, the Politicians and political parties behind these recommendations by the Senior Officers in charge of evaluating him, and (iii) a systemic failure in the Police Force with respect of self-regulation. It is simply inexplicable to this Court how Mr.K.Udayapala and Mr.A.C.A.Gaffoor, the SSP of Nugegoda and Deputy Inspector General of Police, Respectively, despite being literally handed the evidence of insubordination and impropriety of the 1st Respondent, either blindly followed the dictates of political recommendation without properly evaluating the matter at hand (Gafoor) or failed to take any action at all (Udayapala). Even the slightest perusal of the material set before them would have made it patently obvious to both Senior Officers that the 1st Respondent needed to be urgently dealt with and suitable punishment immediately imposed. It is important to note that the Appeal delivered to Mr. Gafoor by the 1st Respondent was a blatant distortion of the facts of the case and that the political recommendation annexed to, therefore, must itself have been issued without any appropriate inquiry into the merit of the 1st Respondent's claim. Had there been any attempt to preserve the autonomy expected of Mr. Gafoor and the Police, his response to the situation simply could not have been what it was, given the totality of the facts and the facts that a preliminary inquiry was held and conclusions adverse to the 1st Respondent were made.

While it is surprising that the Superior Officer of the 1st Respondent failed to address such an obvious and visible problem, such supervisory failure is an inevitable result of the lack of practical, effective guidelines and safeguards to regulate the upper echelons of the Police Force. The National Police Commission's own failure to

investigate this matter- a copy of the Petition dated the 31st of June 2006 and marked as P3 had been sent to the National Police Commission nearly 2 months after the appointment of the present Commission-cannot, however, be explained in the same manner.

With the passage of the 17th Amendment to the Constitution, more specifically under paragraph (1) (a) of Article 155G, the disciplinary control of the police was vested with the Commission. In furtherance of this vesting, the Commission promulgated the Rules of Procedure (Public Complaints) 2007, as required under paragraph (2) of the same Article, to provide itself with a protocol to deal with public complaints that, in relevant part, requires all received complaints to be investigated at various timeframes based on their categorization:

5. The Deputy Director and the Provincial Directors shall categorize the complaints into appropriate segments in Schedule I to these rules and cause forthwith an investigation made thereon. He shall ensure investigations under Segment A of Schedule I are completed within thirty days and investigations under Segments B and C are completed within sixty days of the receipt of complaint.

It is inexplicable to this Court, given their receipt of a copy of the Petition and the existence of this self –imposed mandate to investigate all such complaints, why the National Police Commission failed to appoint an independent inquiring officer to investigate this case. This failure on the part of the Commission, the ultimate disciplinary authority of the Police, is an unacceptable abdication of responsibility which leads us to repeat Plato's timeless question; *"Quis custodiet ipsos custodes?"* or "Who will guard the guardians?"

There are both direct and indirect consequences to the Police, to Society and, ultimately, to the Rule of Law, that result from these systematic failures within the Police Service.

On a direct level, we see a staggering loss to the Government in the form of compensation payments to those who've been ill-treated by police officers, with statistics revealing the payment of approximately Rs. 6,017,331/= in compensation for the years 2004-2008 to victims of Police abuse and impropriety paid as a consequence of findings by the Supreme Court against police officers in Fundamental Rights Applications. We see violence-like that which was apparent in the present case – perpetrated with total impunity by certain police officers against civilians, to secure bribes, to exact public punishments for private depute or often, for seemingly no reason at all other than to taunt and harass the public with "a show" of their unchecked police powers, such power ultimately blinding them to their own corruption. Powers that were vested in them by the donning of uniforms to separate them and identify them as upholders of the Rule of Law are sadly used instead to subdue and pervert it. We see the loss of their valuable service and an erosion of their standers, steering them further towards a life of privilege and favor through compromised integrity, rather than one of discipline and honor.

On an indirect level we see the growing loss of faith by the public in a force that has come to be seen as an organization to be feared- due to the aberrant behavior of a small minority of police officers – rather than a supportive service to which they can look for protection and help. We see the growing feeling of impunity inculcated by those officers such as the 1st Respondent in this case, that repeatedly get away with inappropriate behavior, recognizing that their actions will be protected due to political patronage and favor and are likely to receive no disciplinary repercussions at all.

Perhaps the most affected by the slow breakdown of the Police force, are those officers and ranks-the distinct majority of the Police Force, it is to be proudly stated – who operated with integrity and honesty and who easily stand among the best officers of any nation. Some of these loyal officers inevitably find themselves perturbed and discouraged at a system that marginalizes their legitimate successes and dismisses their attempts at honoring their professionalism and character in favor of crafted and nurtured political affiliations. They undoubtedly watch with apprehension, discouragement and frustration as more and more of their peers begin into deviate from the standards once held, feeling that there are no other paths to advancement beside the crooked once used by some who rise to the top or at the least, get away with behavior that should result in their removal or imprisonment. It is no surprise when some of them eventually follow the same fate. This slow erosion leads to nothing other than a decline of the standards of the Police Force, creating an unhappy and disgruntled lot of officers which will eventually destroy itself by compromising its own integrity and thereby eroding the confidence reposed in them by the public. Total break down of law and order is the end result, with irreparable and irremediable consequences to society and economy. This cannot be allowed to happen.

Those who have undertaken the commitment to become enforcers of the law must come to recognize, if they haven't already, that such enforcement is *crucial* to the maintenance and attainment of domestic peace and harmony and, ultimately, it is these traits that are the bedrocks of a sustainable economy that assures prosperity for all. Only through the enforcement of law and order can a nation ultimately come to respect the rule of its laws. Without law and order, anarchy-or at least a slow devolution towards it – is the inevitable and fatal result.

On the basis of the aforesaid findings I declare that the 1st Respondent committed an unlawful arrest and unlawful assault of the Petitioner and grant to the Petitioners the declaration prayed for, that their fundamental right to equality before the law and freedom from arrest by undue process as guaranteed under Article 11, Article 12 (1) and Article 13 (1) of the Constitution has been infringed. Given this finding and the evidence that has come to light of the several instances of negligence regarding the oversight of the 1st Respondent by the Superior Officers charged with such responsibilities, this Court makes the following further orders and declarations:

1. An inquiry is to be held by an independent inquiring officer of the National Police Commission as to why both Mr.K.Udayapala and Mr.Deshabandu Tennakoon failed to take any action regarding the recommendations of the SP of Homagama in accordance with the Departmental Police Orders binding upon them. This Court notes that such an inquiry is as important in establishing the culpability of the offenders as it is in exonerating superior officers who may currently be clouded by perceptions of impropriety regarding this matter.

2. The 2nd respondent, who filed a copy of the Inquiry report from which the findings of the SP Homagama had been deliberately removed, is to report to Court within two months of the delivery of this Judgment to explain why he chose to submit a fraudulent document and why he should not be dealt with for Contempt of this Court. The case is to be mentioned for hearing one month from the delivery of this judgment and the 2nd Respondent is to be noticed accordingly.

3. The Attorney General will consider pursuing an indictment of the 3rd Respondent for knowingly and voluntarily recording a fabricated statement of the Petitioner regarding his driver's license.

4. In recognition of the lack of effective self-governance with respect to superior officers as evidenced by the present case, the National Police Commission is to publicly set forth effective, practical procedures that provide for supervision of police officers of *all* ranks. Attention should be sought to enlist retired officers or other persons who have no personal benefits to gain through patronage of those with financial and political power to enforce such procedures. Further, the National Police Commission is to amend the existing scheme for promotions to explicitly counter political and financial influence, through the issuance of a set of specific , determined, pre-specified rules which specifically disallow the consideration of "recommendation" given by those not within the police force, or which have not been earned through specific duties of excellence as assessed by their superiors in the police force and with a provision to appeal against any partiality of superior officers This issuance of such objective criteria and the resulting transparency in the promotion process, this Court believes, will legitimize the process in the eyes of Police Officers and will no doubt reduce the desire to deviate from a path of integrity and honour.

5. The National Police Commission is to create awareness and training programs that will sensitize officers to the importance of their duties. In light of the currently centralized nature of Police training, special focus is to be made to conduct such training programs outstation posts.

6. It is strongly suggested to the National Police Commission that a division within the Police Force-known in other jurisdictions as division of "internal affaires" – be created to solely investigate and speedily review suspicions of professional misconduct by members of *any* rank of the Police Force.

Compensation in a total sum of Rs.100,000/= is to be paid by the 1st , 2nd and 3rd Respondents to the Petitioner. The 1st Respondent, the primary wrongdoer in this incident is ordered to personally pay sum of Rs.75,000/= and the balance is to be paid by the 2nd and 3rd Respondents in equal amounts.

The application is allowed. Costs to be paid to the Petitioner by the 1st, 2nd and 3rd Respondents in sum of Rs. 10,000/- each.

JUDGE OF THE SUPREME COURT

S.N. SILVA C.J

I agree.

CHIEF JUSTICE

P.A.RATNAYAKE,J

I agree.

JUDGE OF THE SUPREME COURT

11:32 AM Sunday June 13th, 2010