THADCHANAMOORTHY AND OTHERS
vs
ATTORNEY GENERAL AND OTHERS
SUPREME COURT

THAMOTHERAM J.,
ISMAIL J., AND
WANASUNDERA J.
S.C. NOs. 63 AND 68 OF 1980
AUGUST 5, 1980.
Fundamental Rights – Torture, cruel, inhuman and degrading punishment – Time limit of one month – Onus of proof – Executive or administrative action - Administrative practice – Article 11, 126 of the Constitution.
APPLICATION -- Under Article 126 of the Constitution.
V.S.A. Pullenayagam with P. Srinivasan, G. Kumaralingam.
S.C. Chandrahasan and S. Sri Skandarajah for the petitioners in both matters.
G.P.S. de Silva, Additional Solicitor General with S. Ratnapala, State Counsel for the Attorney General (1st respondent) in both matters.
Ranjit Abeysuriya with Iqbal Mohamed for the 2nd and 3rd respondents in both matters.
September 3, 1980.
WANASUNDERA J.
These two applications – S.C. 63/80 and S.C. 68/80, which are similar in nature -- were taken up together for hearing. The applicants have petitioned this Court, under Article 126 of the Constitution, alleging an infringement of a fundamental right by executive or administrative action. They have relied on Article 11 as the fundamental right concerned, namely, the prohibition against "torture or cruel, inhuman or degrading treatment or punishment". The respondents to these applications are the Attorney General, the Officer-in-Charge of the Eravur Police Station (described *nomine officit*) and two Police constables of the Eravur Police Station, respectively. The petitioners have stated that the 2nd respondent is an Inspector of Police and the 3rd and 4th respondents are Constables, in the service of the Government and they are attached as Police Officers to Eravur Police Station.
Vadivel Mahenthiran, the petitioner in S.C. application No. 60/80 has stated that on the 25th of June, 1980, on hearing that the Police were looking for him in connection with the investigation of an offence, he **went to the Eravur Police Station accompanied by his Attorney at Law and surrendered to the Police.** He states that after his lawyer left him.
a)**the 2nd, 3rd and 4th respondents severely assaulted him with batons, fists and shoed feet for the purpose of extorting from the petitioner a confession of guilt** to an offence of murder and statements falsely implicating certain other persons they named in the same offence.
b)at about 1.30 p.m. on 26th June 1980, the 2nd, 3rd and 4th respondents took the petitioner to the residence of one such person they named, A. Thadchanamoorthy at Pullayar Kovllady, Kiran where they arrested and beat him up and in the course of such beating up the 3rd respondent jabbed the petitioner painfully in the chest with the muzzle of a gun.
c)at the Police Station, Eravur during the pre-dawn and early morning hours of the 26th May, 1980 the 2nd, 3rd and 4th respondents tied the petitioner's wrists together behind his body, hung him up by the wrists and beat him with batons and fists while so hanging twice for durations of ten to fifteen minutes each for the purpose of extorting from him a confession of guilt to an offence of murder obtaining his signature to such confession and to induce him to state to the Assistant Superintendent of Police, Batticaloa the confession so extorted and recorded by them and nothing else.
He states that thereafter, on 27th May 1980, he was taken before the Assistant Superintendent of Police, Batticaloa "who took a transcript of the confession" already recorded by the 2nd and 4th respondents. He was then taken, again to the Eravur Police Station and later produced before the Magistrate Batticaloa, who remanded him to prison custody. He also adds that he was able to obtain proper legal advice only on the 19th June. This last averment is made ostensibly to explain his delay in coming before us.
In the connected application – S.C. 63/80 – the petitioner Aiyathurai Thadchanamoorthi begins by stating that the Police arrested him at 1.30 a.m. in the morning of the 26th May, 1980 at his house in Pullayar Kovillady and held him in custody till 27th May, 1980. The discrepancy of the time of arrest in the two statements appears to be typist's error, but it is curious that this petitioner makes no mention of the presence of the other.
"In the course of such arrest, removal and detention in custody –
a)the 2nd, 3rd and 4th respondents severely assaulted me with hands, shoed feet, an axe handle and fence stick causing several injuries all over my body while still at my house and compound.
b)flung me to the floor board of the jeep and the 3rd respondent trampled me with shoed feet.

c)at the Police Station, Eravur, during the pre-dawn and early morning hours of the 26th May, 1980 the 2nd, 3rd and 4th respondents tied my wrists together behind my body, hung me up by the wrist and beat me with batons and fists while so hanging, three times for durations of ten to fifteen minutes each for the purposes of extorting from me a confession of guilt to an offence of murder, obtaining my signature to such confession and to induce me to state to the Assistant Superintendent of Police, Batticaloa the confession so extorted and recorded by then and nothing else."

It would be observed that, except for the third item which is identical in the two petitions, (save that one petitioner alleges that he was hung up three times while the other only twice), some of the details contained in one petition are not reflected in the other and *vice versa* although the events they have spoken to have, at times, merged into each other.

The 2nd, 3rd and 4th respondents have filed affidavits giving their own version of their dealings with the petitioners. The Attorney General has also filed the affidavit of the Assistant Superintendent of Police, Batticaloa, in this connection. The material in these affidavits reveal that the petitioner Vadivel Mahenthiran was wanted by the Eravur Police in connection with –

a)House breaking and robbery of a gun and cartridges regarding which a complaint had been made to M.C. Batticaloa in case No. 93861 on 19th of September, 1979.

b)Murder of Sudarman Silva, Manager, Cashew Corporation and robbery of cash and a wrist watch regarding which a complaint had been made to M.C. Batticaloa in case No. 73773 on 19th September, 1979.

On the 25th of May, 1980 at 10.30 a.m. the petitioner Mahenthiran, accompanied by his Attorney at Law surrendered to the Police. He was questioned later that evening and his statement recorded. This statement implicated the other petitioner Thadchanamoorthi in respect of both offences. That is how Thadchanamoorthi came into the picture.

In consequence of this statement, the Police went by jeep with Mahenthiran to the house of Thadchanamoorthi at Pillayar Kovillady, Kiran at about 1.30 a.m. on 26th May, 1980. The 2nd respondent explained toThadchanamoorthi the allegations against him and arrested him; but the petitioner had resisted arrest and reasonable force was used on him to prevent him from escaping. While returning in the Police jeep to the Eravur Police Station, Mahenthiran had tried to jump out and escape from custody, but this was prevented, necessitating the use of some force on him. Thadchanamoorthi himself who is a muscular person, made an effort to free himself from the handcuffs put on him and some force had to be used to prevent him from breaking the handcuffs. They were brought to the Police Station at about 4.30 a.m. on the 26th of May, 1980 and neither of them complained of any injury or had any visible injuries on them.

On 27th May, both the petitioners had volunteered to make statements and were taken to the Assistant Superintendent of Police. At the A.S.P.'s office, the petitioners were questioned by Inspector Theophilus, the Officer in Charge of the Valachchanai Police Station. It is alleged that the petitioners made confessionary statements admitting their participation in various crimes under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. They were brought back to the Police Station at about 10.15 p.m. On 28th May, 1980 the petitioners were produced in Court, on which occasion it is alleged there were counsel watching their interests.

The respondents, while denying the charges against them, state further that the petitioners have not come into Court *bona fide* but have sought the intervention of this Court with the intention of shutting out the confessionary statement they had made to the Police, which would be admissible against them in prosecutions under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

Balasuriya, Assistant Superintendent of Police, Batticaloa, in his affidavit has stated that on 29th of May 1970, he was informed by the Superintendent of Prisons, Batticaloa, that a complaint of assault had been made by the petitioners against the 2nd, 3rd and 4th respondents. On the 30th of May he proceeded to the Remand Prison, Batticaloa and recorded the statements of the petitioners. On 31st May, he recorded the statements of the 2nd and 4th respondents and thereafter on the 1st of July, 1980 sent his report to C. Ambekapathy, Superintendent of Police, Batticaola. On 7th July the Superintendent of Police, Batticaloa, gave him directions for further inquiry into this matter. Mr. Balasuriya states that the investigations are still incomplete. He also states that prior to the complaint made by the petitioners to the prison authorities, he was not aware of any assault on the petitioners.

It was brought to out notice by counsel for respondents that application No. 68/80 of Vadivel Mahenthiran has been filed out of time. The Acts complained of had taken place on the 26th of May, 1980 and his application to us is dated 4th July, 1980**. Article 126 required that the application to the Supreme Court must be made within one month of the date of the alleged infringement of the fundamental right**. This petition is clearly out of time.

Mr. Pullenayagam, however contended that the time limit in Article 126 is not mandatory but only directory and that this Courthas a discretion, in a fit case, to entertain an application outside the time limit. Counsel for the State referred us to the time limits laid down in Article 126 and argued that the limits have been put in with a purpose and the court should give effect to these time limits. Although there is much substance in the latter contention, it is unnecessary to decide this question now, as we are not disposed to entertain this application

even if a discretion, as stated by Mr. Pullenayagam, is vested in us. The explanation given by the petitioner for the delay in presenting this petition does not in our view provide an adequate excuse for his delay. We would accordingly reject application No. 68/80 and proceed to deal only with application No. 63/80 of petitioner Thadchanamoorthi.

It appears to us from the manner in which Mr. Pullenayagam submitted his case that he was relying primarily on an assault and ill-treatment which he alleges took place at the Police Station during "the pre-dawn and early morning hours of the 26th of May, 1980". For this purpose, he relied on the affidavit of the petitioners and on certain medical evidence recorded on 3oth May by the Magistrate. The corroborative evidence of the other petitioner's affidavit in the connected case would now be no longer available to him in view of our ruling. There now remains only the petitioner's affidavit and the medical evidence.

Mr. Pullenayagam submitted that the injuries sustained by the petitioner must have been inflicted on him at the Police Station, because the respondents had stated that when the petitioner was brought to the Eravur Police Station after his arrest, he did not have "any visible injury" on him. However, the Police officers have admitted that when arresting the petitioner and while bringing him to the Police Station the petitioner showed sum resistance and made an attempt to escape and accordingly they were compelled to use reasonable force to bring him under control. He was brought to the Police Station at 4.30 a.m. and when the Police say that he did not have "any visible injury nor did the complain of any injury" one cannot rule out altogether the possibility of the petitioner having some minor injuries. In fact according to the petitioner's own affidavit he was severely assaulted with hands, shoed feet, an axe handle and fence sticks and was also flung on the floor board of the jeep and trampled before he was brought to the Police Station. It is therefore common ground that some force had been used on petitioner before they reached the Police Station.

The injuries found on the petitioner are of a minor nature consisting of a few abrasions and two superficial wounds on the left and right forearms. The medical report does not carry his case any further even when viewed most sympathetically to the petitioner. The medical evidence is as follows:

"External Injuries"

Semi circular abrasion marks in both forearms just ½ inch above the wrist joint.

Right hand forearm – on the dorsal aspect 5' length, breadth about 1 inch superficial wound.

Left forearm – on the dorsal aspect 5' length about one inch above wrist joint.

Both injuries are compatible due to tightening of coir ropes.

Mild abrasion on the shoulder joint right side about one inch.

No other clinical evidence of fracture.

If, as claimed by the petitioner, he was "severely assaulted with hands, shoed feet, an axe handle and fence sticks causing several injuries" all over the petitioner's body andwas later hung up thrice by the wrists and beaten with batons and fists for durations of ten to fifteen minutes, then the nature and kind of injuries found on him do not seem to bear out these serious allegations. Mr. Pullenayagam submitted that the Police can be credited with techniques of assault which leave no tell-tale marks. I do not think that he intended to suggest that the Police have so perfected the art of assaulting that even when they use force, when making an arrest at a public place as in this case where the allegation is that part of the ill-treatment took place near the petitioner's own residence, one should not expect to find any marks of violence.

There seems to be considerable doubt as to how or when these injuries came to be suffered by the petitioner. It may well be that they were sustained at the time of arrest when the Police had to use some force to bring him under control. It is of significance that the Journal Entry of the 28th of May, 1980 the date when the petitioners were produced in open Court, does not show that a complaint of Police assault was made to the Court. In fact the affidavit of the 2nd respondent is to the effect that on this occasion the two suspects had the assistance of Lawyers to watch their interests. If the ill-treatment spoken of by the petitioner had taken place at the Police Station, then one would have thought that this was the most appropriate moment for him to have come out with his complaint. The next Journal Entry of 2nd June, 1980 indicates that two medical reports had been filed. The record however does not show as to how the medical evidence got on to the record. Mr. Pullenayagam suggested that the Court should call for this information from the Magistrate. It seems to me that this is a matter on which the petitioner himself would have been in a position to enlighten us and ought to have done so although unfortunately he has chosen not to do so, and surprisingly there is not even a reference to this matter in his petition or affidavit.

Mr. Pullenayagam was probably conscious of the weakness of his case when he stated that the material contained in the two petitions was adequate to move the Court to proceed to further inquiry in to this complaint. It would now appear that the material before us is neither clear nor cogent and falls short of even the minimum proof necessary for that purpose. I do not however propose to let the matter rest here but would like to deal with the preliminary objection taken by the learned Deputy Solicitor General and on which the parties expect a ruling from the Court.

Mr. G.P.S. de Silva for the State raised a preliminary objection that the petitioner cannot be maintained as the acts complained of do not constitute an infringement of a fundamental right by "executive or administrative

action" as required by Article 126. It was his submission that, an act done by a State functionary would not constitute State action unless it is done within the scope of the powers given to him, which means that if it is an unlawful act or is an act considered *ultra vires* it would not be considered State action but only as the individual act of the person concerned. If this is the test, Mr. Pullenayagam replied, the guarantee contained in Article 11 would be reduced to a dead letter and be devoid of content. On an examination the authorities cited to us, including some of the very material relied on by Mr. de Silva, I find Mr. Pullenayagam's approach more reasonable although I do not agree with his analysis of the matter. Mr. Pullenayagam went too far when he submitted that all acts of a public official, whether acting within the terms of his powers or acting under colour of office would be State action and should be attributable to the State. But, even he was compelled to concede that there could be a case where an act of a public officer acting under colour of office ought to be considered purely as an individual or private act of the person concerned and not as an official act.
It seems extremely improbable that a government would openly authorize acts of torture or such other cruel or degrading treatment or punishment unless in war time or in an emergency situation. It is more likely that a government may covertly sanction such illegal acts or connive in the perpetration of such acts, or sanction them or tolerate them to such an extent that they become virtual administrative practice.
The decision *Ireland v. United Kingdom* of the European Court of Human Rights referred to in Harris' "Cases and Materials on International Law" cited by learned Deputy Solicitor General contains a useful discussion of some of the issues we are called upon to consider. In this case, the Court had to consider a violation *inter alia* of Article 3 of the European Convention on Human Rights, 1950. It is worded as follows:
"Article 3 – No one shall be subjected to torture or to inhuman or degrading treatment or punishment"
Article 11 of our Constitution is however an exact reproduction of Article 5 of the Universal Declaration of Human Rights, 1948.
This was a complaint by the Irish government against the U.K. government in respect of certain violation of fundamental rights by British army officers in the course of their duties in the suppression of I.R.A. activities in Northern Ireland. Certain I.R.A. personnel arrested by the British army had been submitted to **a form of "interrogation in depth which involved the combined application of five techniques". These techniques are also called "disorientation " or "sensory deprivation" techniques**. They are described in the Judgment as follows:
"a) **Wally standing**:forcing the detainees to remain for periods of some hours in a "stress position" described by those who underwent it as being 'spreadeagled against the wall with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers.'
b) **hooding**:putting a black or navy coloured bag over the detainee's head and at least initially keeping it there all the time except during interrogation,
c) **subjection to noise**: pending their interrogations, holding the detainees in a room where there was a continues loud and hissing noise.
d) **deprivation of sleep**: pending their interrogations, depriving the detainees of sleep.
e) **deprivation of food and drink**: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.
The U.K. government frankly admitted that the use of such techniques was authorized at "high level". The judgment sets out certain developments that took place once the British public became aware of what was taking place in Northern Ireland under British Army Occupation. A committee of enquiry under the chairmanship of Sir Edmund Compton was appointed to investigate those allegations of torture. Its findings were that the "interrogation in depth by means of the techniques constituted physical ill-treatment but not physical brutality". Not satisfied with this a further committee was appointed under the chairmanship of Lord Parker of Waddington to go into the matter once again. The Parker Report (1972) was a majority opinion with Lord Gardiner dissenting. The majority report concluded that the application of the "techniques" subject to recommended safeguards against excessive use need not be ruled out on moral grounds, in view of the emergency terrorist conditions prevailing there. Both the majority and the minority however considered the methods used to be illegal under domestic law.
the United Kingdom then decided to prohibit the use of such techniques. At the hearing of the Irish case in 1977, the Attorney General of the United Kingdom made the following declaration.
'The Government of the United Kingdom have considered the question of the use of the "five techniques" with very great care and with particular regard to Article 3 of the Convention. They now give this unqualified undertaking that the "five techniques" will not in any circumstances be reintroduced as an aid to the interrogation."
In Harris, referred to earlier, at page 527 there is the following comment on this case:
" In its judgment (the Irish case) the Court approved the rule that has been developed in the Commission's jurisprudence by which local remedies need not to be exhausted where the act or acts claimed to be in breach of the Conventions is or are shown to be in consequence of an 'administrative practice'*viz,* a practice which,

although unlawful under the defendant state's law, has been adopted or tolerated by its officials or agents and not just an isolated act or acts in breach of the Convention.
The jurisprudence referred to here is the Greak case (12 Y.B.E.C.H.R. Vol. p. 194) when the Court indicated the elements from which an administrative practice can be presumed. Such an administrative practice would entail State liability. In the Greek case, the Court said:
"28…two elements are necessary for the existence of an administrative practice of torture or ill-treatment repetition of acts and official tolerance. By reptetion **of acts** is meant a substantial number of acts of torture or ill-treatment, which are the expression of a general situation. The pattern of such acts may be either on the one hand that they occurred in the same place that they were attributable to the agents of the same police or military authority or that the victims belonged to the same political category or on the other hand that they occurred in several places or at the hands of the distinct authorities or were inflicted on persons of varying political affiliations.
29. By **official tolerance** is meant that, though acts of torture or ill-treatment are plainly illegal they are tolerated in the sense that the superiors of those immediately responsible though cognizant of such acts take no action to punish them or prevent their reptetion or that higher authority, in face of numerous allegations, manifests in-difference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied."
Could it be said that there is such an "administrative practice" in this country and that it has been adopted or tolerated by the executive or the administration? Could it be said that the higher authorities have manifested indifference and had refused an adequate investigation into the complaints? Both counsel for the respondents referred us to certain provisions of the Penal Code, the Criminal Procedure Code and the Police Ordinance where violence and unlawful practices by the law-enforcing authorities are unreservedly prohibited and outlawed. They also drew our attention to certain directions given in categorical terms to Police officers to the same effect. Assistant Superintendent of Police Balasuriya has specifically stated in his affidavit that neither he nor his superior officers have authorized such unlawful actions. Further, we find that Mr. Balasuriya has taken steps to inquire into the complaint of the petitioners once it was brought to his notice by the prison authorities. In the affidavit, he states that he has already sent a report to his superior C. Ambikapathy, Superintendent of Police, Batticaola and the Superintendent of Police has brought his attention to bear on the matter and has indicated to Balasuriya certain other lines of investigation so that the investigation would be complete.
While Mr. Pullenayagam made a general statement that Police assault were common place, learned counsel for the respondents countered this by stating that invariably the gazetted officers do not condone unlawful acts of their subordinates and whenever possible complaints of such unlawful behavior have been investigated and the offenders brought to book and charged in the Courts. As far as the material before us is concerned, there is an ongoing Police inquiry into the complaint of the petitioner and this goes a long way to negative the existence of an administrative practice of torture or ill-treatment. There are also other avenues open under our law to an aggrieved person to obtain redress.
In the *Irish case* the Court proceeded to make certain useful observations as to how the Court would approach a case of this kind. There appears to be more than a superficial similarity between our functions and the functions of that Court.
"160. In order to satisfy itself as to the existence or not in Northern Ireland of practices contrary to Article 3, the Court will not rely on the concept that the burden of proof is borne by one or other of the two governments concerned in the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the parties or other sources and if necessary obtains material *proprio motu*………..…
161. To asses this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account………."
It seems to me that those principles with suitable modifications can profitably be adopted by us in the exercise of our powers under Article 126 if this Court is to function effectively as the guardian of fundamental rights in this country.
I have already referred to the nature of the evidence before us and in the light of my ruling on the preliminary objection, I am unable to hold that the petitioner is entitle to relief. In the course of the argument, there was some discussion of the scope of the redress an applicant would be entitled to under Article 126. I have no doubt whatever that our jurisdiction, in this regard is most extensive but as this petition does not succeed, it is not necessary to go into that matter here.
For the above reasons, I would dismiss this application. The 2nd, 3rd and 4th respondents are entitled to one set of costs from the two petitioners jointly in equal shares.
Thamotheram J. ---- I agree.
Ismail J. ---- I agree.
Application dismissed.

1) As the infringements complained of took place on 26.05.1980 and the application No. 68/80 was filed on 04.07.1980 beyond the one month time limit stipulated by Article 126(2) without and adequate excuse for the delay, the application had to be rejected.
2) The onus of proof being on the petitioner, where the injuries were of a minor nature and there was considerable doubt as to how or when they were sustained they would not bear out the allegation of torture, cruel, inhuman or degrading punishment.
3) When there is an ongoing Police inquiry, into the complaint of the petitioner it would go a long way to negative the existence of an "administrative practice" of torture or ill-treatment in the sense of such practice being adopted or tolerated by the executive or the administration.
4) The acts complained of do not constitute infringement by executive or administrative action.