

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

*In the matter of an application
under and in terms of Articles 11,
12, 13 (1) and 13 (2) of the
Constitution read together with
Article 126 of the Constitution of
the Democratic Socialist Republic
of Sri Lanka*

SC FR APPLICATION 296/2014

Kandawalage Don Samantha Perera,
Patapiligama,
Hettipola.

PETITIONER

Vs

1. Officer In Charge,
Police Station,
Hettipola.

2. OIC Crimes of Police,
Police Station,
Hettipola.

3. Inspector General of Police,
IGP Office,
Police Headquarters,
Colombo 01.

4. Hon. Attorney General,
Attorney General's Department,
Hulftsdorp Street,
Colombo 12.

RESPONDENTS

BEFORE : **PRIYANTHA JAYAWARDENA, PC, J.,**
L. T. B. DEHIDENIYA J. AND
S. THURAIRAJA, PC, J.

COUNSEL : Lakshan Dias with Shafuas Shandeen for the Petitioner
Upali Jayamanne with Ms. Menake Ariyapala for the 1st and 2nd
Respondents instructed by. Indra Ratnamalala and Prasanna
Saman
Kalana Kotalawala SC for the 3rd and 4th Respondents

ARGUED ON : 17th January 2020

DECIDED ON : 16th June 2020

S. Thurairaja PC. J.

The instant application has been filed by Kandawalage Don Samantha Perera (hereinafter referred to as the Petitioner) alleging that the one or more or all of the Respondents and the State have infringed the Fundamental Rights guaranteed to him under Articles 11, 12(1), 13(1), 13(2) and 13(3) of the Constitution. The Petitioner claims that he was unlawfully arrested, detained and subject to torture, cruel and inhuman treatment. On the 03rd of July 2015, leave to proceed was granted in respect of the alleged violations of Articles 11, 12(1), 13(1) and 13(2) of the Constitution.

Background of the Case

Petitioner's version

The Petitioner is a day labourer working at Fractures Ayurvedhic Dispensary in Hettipola and a former army soldier. The Respondents to this application are the Officer-in-Charge (OIC), Hettipola; OIC Crimes of Police, Hettipola; the Inspector General of Police and the Attorney General (described nomine officii). In his affidavit, the Petitioner has referred to Police Officer "Saman" and Sub-Inspector of Police (SI) Sumanaweera as the persons who violated his rights. Inspector of Police (IP) Samansiri, in his affidavit, has identified himself as the OIC of Hettipola and as the 1st Respondent. SI Sumanaweera has also filed an affidavit identifying himself as the OIC Crime of Hettipola and as the 2nd Respondent.

The Petitioner claims that he was arrested on the 13th of December 2013 at around 3.00 pm. The Petitioner further states that, at the time of his arrest, he had not been informed of the reason for his arrest. The Petitioner submits that he was repeatedly assaulted whilst in police custody by the 1st Respondent, IP Samansiri (hereinafter sometimes referred to as 1R) and the 2nd Respondent, SI Sumanaweera (hereinafter sometimes referred to as 2R) from the 13th to the 15th of December 2013.

The Petitioner states that he was produced before the District Medical Officer (DMO) of Hettipola on the 15th of December and to the Magistrate on the 16th of December 2013. The Police moved the Magistrate to handover the suspect to Kobeigane Army Camp. On the Magistrate's orders, the Petitioner had been remanded till the 24th of December 2013. On the 24th of December 2013, the Petitioner's mother produced the letter of discharge from service from the Sri Lankan army to the Magistrate. The Police had objected to bail being granted and the Learned Magistrate had ordered the prison officers to handover the Petitioner to the Boyagane military police. Although the Petitioner had been handed over to the military police on the 28th of December 2013, he had been permitted to leave as he no longer belonged to the Army.

The Petitioner states that he was admitted to Chilaw Hospital on the 31st of December 2013 as he was critically sick and that he was discharged from hospital on the 3rd of January 2014. He had complained about the assault to the DIG Kurunegala on the 7th of January 2014 and to the Human Rights Commission on the 16th of January 2014 (HRC 2012/2014). The Petitioner then sought the relief of the Supreme Court as no inquiry was held by the Human Rights Commission despite the lapse of 10 months since the complaint was made.

Respondent's Version

Both the 1st and 2nd Respondents claim that the Petitioner was arrested on the 15th of December 2013 at around 2.05 pm at the Galkanda Junction after having explained the charges against him. Respondents refute the claim that the arrest was unlawful and state that that the arrest was carried out based on the results of the preliminary investigation carried out by the Hettipola Police on a complaint made by Mohamed Rasiduge Mohamed Jaleel regarding theft of a mobile phone. Respondents also claim that the Petitioner is an army deserter attached to the 6th Vijayaba Regiment of the Sri Lankan Army.

Before proceeding to deal with the alleged infringement of Fundamental Rights guaranteed to the Petitioner under the Constitution of Sri Lanka, it is pertinent to reminisce the observations of Justice Prasanna Jayawardena in **Ajith Perera v. Daya Gamage et al.** [SC FR Application No. 273/2018 at page 23] (decided on 18th April 2019)

"it seems to me that the concept of human dignity, which is the entitlement of every human being, is at the core of the fundamental rights enshrined in our Constitution. It is a fountainhead from which these fundamental rights spring forth and array themselves in the Constitution, for the protection of all the people of the country."

I am in respectful agreement with his Lordship that '**Human Dignity**' is a constitutional value that underpins the Fundamental Rights jurisdiction of the Supreme Court. I am of the view that 'Human Dignity' as a normative value should buttress and inform our decisions on Fundamental Rights. Hence, it is with this value in mind, that the allegations against the Respondents and State are examined.

Article 13 of the Constitution guarantees to every person *inter alia* freedom from arbitrary arrest, detention and punishment. Article 13(1) guarantees that;

*No person shall be arrested except according to procedure established by law.
Any person arrested shall be informed of the reason for his arrest.*

Article 13(2) provides that;

Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

There seems to be a discrepancy in the Petitioner's and Respondent's as regards the time of the arrest. The Petitioner claims that he was arrested on the 13th of December 2013, kept in custody and assaulted till the 15th of December 2013. However, the Respondents claim that the Petitioner was arrested on the 15th of December 2013 at 2.05 pm. If the Respondent's account that the Petitioner was arrested on the 15th of December 2013 is true, then it seems to appear that the Respondents have obtained a Medico-Legal Examination Form (MLEF) by producing the Petitioner to a Medical Officer within half an hour of the time of the arrest (i.e. on the 15th of December 2013 at 2.32 pm). Although the Respondent's claim that the Petitioner was produced for an examination as he appeared to be under the influence of liquor, the MLEF relied on by the Respondents reveals that the reason for examination was to check whether the Petitioner has any injuries on his body. There

is no mention of whether the Petitioner resisted arrest or whether any violence or escape was involved. In brief, there is no material submitted to Court which reveals that the Petitioner had sustained injuries at the time of the arrest. If the Petitioner was arrested on the 15th of December 2013 as claimed by the Respondents, then the Respondents have not satisfactorily explained as to why the Petitioner was produced before a Medical Officer *immediately* after the arrest to check for injuries. Under these circumstances, an inference can be drawn that the Petitioner was arrested not as claimed by the Respondent but as described by the Petitioner. Having found the Petitioner's claim that he was arrested on the 13th of December 2013 to be credible, I find that the detention of the Petitioner from the 13th to the 16th of December 2013 without producing him before a Magistrate to be unlawful and hence violation of Article 13(2) of the Constitution.

The reasons for arrest submitted by the Respondents are theft and desertion of the army. It is a proven fact that the Petitioner was serving in the Army and that he was duly discharged from the service. As per the material submitted to Court, a statement from the Petitioner and all necessary evidence relating to the charge of theft of a mobile phone (value is not mentioned) had been obtained by the Police by the 16th of December 2013. Hence, there appears to be no valid reason for the Police to object to bail being granted. The objections raised by the Police for bail being granted to the Petitioner for the bailable offence of theft of a mobile phone, leads me to the inference that the arrest was illegal. In view of the aforementioned circumstances, I find the arrest to be improper, unlawful and a violation of the Petitioner's rights enshrined under Article 13(1) and 13(2) of the Constitution.

The Petitioner submits that at the time of his arrest, he had not been informed of the reason for his arrest. The Respondents claim that he was arrested after having explained the charges against him. Given the paucity of evidence, no finding is made in this regard.

Article 11 of the Constitution guarantees that *no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*. It is an unqualified, non-derogable right to which every person is entitled. The unqualified nature of the right together with the fact that it is an entrenched provision make it abundantly clear that the Constitution envisages 'zero tolerance' towards *cruel, inhuman or degrading treatment* which is the anti-thesis of 'Human Dignity'.

The Petitioner submits that on the 13th of December 2013, 1R and 2R assaulted him with a 2 feet long iron bar. He submits that his head was injured and that he was bleeding. When he requested for treatment, the police officer had merely thrown water at him and locked him up.

The Petitioner claims that he was assaulted again on the following day – i.e. on the 14th of December 2013. He had been asked to remove his clothes and 1R and 2R had proceeded to assault him with their hands and PVC pipes. The Petitioner's hands and thumbs had been tied backwards and he had been lifted up with the rope sent over a beam and hung from the rafter. 1R had pulled on the rope from time to time and the Petitioner claims that he was in terrible pain. The Petitioner submits that he was assaulted six times on the 14th of December 2013.

The Petitioner submits that he was assaulted once again on the 15th of December 2013 with the PVC pipes whilst he lay on the floor. The Petitioner claims that he was kept in a seating position and that 2R and 1R had given forceful blows to the soles of his feet with a wooden stick.

When investigating allegations of custodial violence inflicted by the Police, it is relevant to keep in mind the inherent difficulties in proving the allegations.

First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the Police or Armed Services would be carried out as far as possible without witnesses and

perhaps without the knowledge of higher authority. Thirdly, allegations of torture or ill-treatment are made the authorities whether the Police or Armed Services or the Ministers concerned must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence there may be reluctance of higher authority to admit or allow inquiries to be made into facts which might show that the allegations are true. Lastly, traces of torture or ill-treatment may with lapse of time become unrecognizable, even by Medical Experts, particularly where the form of torture itself leaves ... few external marks. [Jayampathy Wickramaratne, FUNDAMENTAL RIGHTS IN SRI LANKA (2nd edn, Stamford Lake Publication 2006) at p 219 citing 'Greek Case', Journal of Universal Human Rights, [1979] 1, No 4, 42)

The Respondents have denied the allegations of torture leveled against them. The Respondents claim that an internal investigation was carried out based on the complaint made by the Petitioner and that 2nd Respondent has been discharged of all allegations leveled against him. I am in agreement with Atukorale J's observations with Sharavanada CJ and LH de Alwis J agreeing in **Sudath Silva v. Kodithuwakku** [(1978) 2 Sri LR 119 at page 126 -127]

*"The police force, being an organ of the State, is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances... It is the duty of this court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental... **This court cannot, in the discharge of its constitutional duty, countenance any attempt by any police officer however high or low, to cancel or distort the truth induced, perhaps, by a false sense of police solidarity.**"*

(Emphasis mine)

The Petitioner claims that when he was produced before the Medical Officer on the 15th of December 2013, the Respondents had threatened him preventing him from disclosing any information about the assault. Thereafter, the Petitioner had been produced to the Magistrate on a Saturday and he had not been allowed to talk. Petitioner was enlarged on bail and freed from police and fiscal custody on the 28th of December 2013. On the 31st of December 2013, the Petitioner got himself admitted to the District General Hospital of Chilaw, where he had the freedom to speak to the Doctors and the Judicial Medical Officer (JMO). The Medical Legal Report (MLR) of the JMO of Chilaw states the following as the '*Short History given by the Patient*':

"While I was returning home in the evening from the working place I saw a sim card on a roadside culvert. I put it in my phone with the intention to find the owner and return. I called to a person named "Weeraman". After one week, Police came and arrested me. I was in their custody from 13/12/2013 to 16/12/2013. They physically harassed me. They hit me six times a day. They removed my clothes, tied my hands on my back and lifted up with a rope sent over the beam. They kept me in seated position and gave forceful blows to my soles with a wooden stick. They hit my face with a fisted hand. They also hit me with a rubber hose."

The Report reveals that the Petitioner had two injuries caused by a blunt weapon, i.e. 1) parallel healed linear abrasions 5cm in length and 2 cm apart on the left side of the back, directed downwards and laterally, 8cm below the inferior angle of the scapula; 2) tenderness over buttocks, deltoid and anterior thigh area. After a thorough examination, the consultant JMO Chilaw had come to the conclusion that **"injuries that I could notice are compatible with the history given by the patient"** and commented that since the Petitioner was presented to the JMO two weeks after the date of the incident, some of the injuries could have disappeared by the time of the examination. Given the fact that the Petitioner was hospitalized from the 31st of

December 2013 to the 3rd of January 2014 and in light of the conclusion reached by the independent Government Judicial Medical Officer, I find the Petitioner's claims to be sufficiently corroborated.

In view of the above circumstances, I find that the Petitioner's fundamental right under Article 11 has been violated by the 1st and 2nd Respondents.

It should perhaps be mentioned in passing that gross humiliation or driving an individual to act against his will or conscience may be deemed to amount to 'degrading' treatment [Jayamapthi Wickramaratne in 'FUNDAMENTAL RIGHTS IN SRI LANKA' (2nd edition, Stamford Lake Publications 2006) at page 208 - 209 quoting from *Denmark, Norway, Sweden, and the Netherlands v. Greece* (1969) 12 YBECHR 1 and *Tyrer v. The United Kingdom* (1978) 17 YBECHR 356]. The Petitioner claims that on the day of the arrest (i.e. the 13th of December 2013) although the Petitioner had been willing to come to the Police Station on his own motorbike, he had been handcuffed, dragged and forced to sit on the police motorbike and taken to the police station. It is pertinent to note here that if the Petitioner's claim is true, the *manner* in which the arrest was carried out can be said to be 'degrading' and hence a violation of Article 11. However, given the lack of evidence to support the Petitioner's claim, no finding is made as regards the *manner* of arrest.

In view of the violation of the Petitioner's rights under Articles 11 and 13, I find that the Respondents and the State have violated the Petitioner's right to equal protection of the law guaranteed under Article 12 (1) of the Constitution.

Responsibility of the State

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85,) has been ratified by Sri Lanka and incorporated into domestic law by

The Convention Against Torture Act No 22 of 1994. Section 12 of the Act defines Torture as,

“Torture” with its grammatical variations and cognate expressions means any act which causes severe pain, whether physical or mental, to any other person, being an act which is-

(a) Done for any of the following purposes that is to say –

- (i) Obtaining from such other person or a third person any information or confession; or*
- (ii) Punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or*
- (iii) Intimidating or co-ercing such other person or a third person; or*

(b) Done for any reason based on discrimination.

And being in every case, an act which is done by, or at the very instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

Given the circumstances, it is evident that the Petitioner has been subject to torture within the meaning of the aforementioned definition. The consistent pattern of police violence, custodial torture and death as evidenced by the considerable number of Fundamental Rights petitions filed before this Court, indicates that the State should consider addressing and mitigating the problem. Article 10 of the Convention which requires the State to ***ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment*** may provide a starting point. As a society that is committed to protecting the **Dignity and Well-being of the People** (See the Preamble/ Svasti of the Constitution), the violation of the right to liberty guaranteed by Articles 11 and

13 of the Constitution should be of serious concern and in my view, the State should take more proactive steps to address the gap between the law and practice.

Considering all material available before this Court, I am of the view that the Fundamental Rights enshrined in the Constitution, particularly **Articles 11, 12(1), 13(1) and 13(2)** have been violated by the 1st, 2nd and 3rd Respondents. I specifically find the 1st and 2nd Respondents individually liable for the violation and I direct them to pay Rs. 50,000/- (Rupees Fifty Thousand) each as compensation from their personal resources to the Petitioner.

I find the State to be liable as the Respondents have acted as agents of the State. Hence, I order the State to pay Rs. 100,000/- (Rupees One Hundred Thousand) as compensation to the Petitioner from funds of the Police Department.

Application allowed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC, J.,

I agree.

JUDGE OF THE SUPREME COURT

L. T. B. DEHIDENIYA J.

I agree.

JUDGE OF THE SUPREME COURT