

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

In the matter of an Application under
and in terms of Article 17 and 126 of
the Constitution of the Democratic
Socialist Republic of Sri Lanka.

Arangallage Samantha
No 275/26, Arachchiwatta,
Nedagamauwa,
Kotugoda, Minuwangoda.

Petitioner

S.C. (F/R) Application No. 458/2012

1. The Officer-in-charge of the Police
Station
Police Station
Biyagama
2. A.S.P. Nishantha Soyza
A.S.P.'s Office, Police Station
Mirihana, Nugegoda.
3. The Headquarter Inspector of Police
Police Station, Mirihana,
Nugegoda.
4. Police Constable 40841
Kumudesh
Police Station, Mirihana,
Nugegoda.
5. Police Constable 40937
Samaraweera
Police Station, Mirihana,
Nugegoda.
6. The Inspector-General of Police
Police Headquarters
Colombo 01.

7. Hon. Attorney-General
Attorney-General's Department
Colombo 12.

Respondents

Before: Buwaneka Aluwihare, PC, J.
Murdu N. B. Fernando, PC, J. &
E. A. G. R. Amarasekera, J.

Counsel: R. Navodayan for the Petitioner.
Amaranath Fernando for the 4th and 5th Respondents.
Chrisanga Fernando SC for the Attorney-General.

Argued On: 13. 12. 2019

Decided On: 28. 01. 2020

Aluwihare PC, J,

The Petitioner, a three-wheeler driver by profession, complained of the violation of his fundamental rights guaranteed under Articles 11, 12(1) and 13(1) by the Respondents and leave to proceed was granted for the alleged infringement of the said Articles against the 4th and 5th Respondents.

The version of the Petitioner

According to the Petitioner, on the 28th of June 2012, while the Petitioner was driving his three-wheeler from Rajagiriya to Malwana, at around 8.30 am two persons who were unknown to him, had blocked his path with their motorcycle and had brought his three-wheeler to a halt. These two persons who were dressed in civilian clothing had then forcibly taken the Petitioner to the Biyagama Police Station. After being presented

before the Officer-in-charge of the Biyagama Police Station, on his instructions, the Petitioner had been kept in the police cell for about half an hour without any reasons being given for his arrest.

Thereafter, the 4th and 5th Respondents who had come over to the Biyagama Police Station from the Mirihana Police Station, had taken over the custody of the Petitioner. He had been ordered to drive his three-wheeler to the Mirihana Police Station and while he was driving, the 5th Respondent who was seated at the back of the three-wheeler had beaten the Petitioner on the head. When they reached Rajagiriya the Petitioner had stopped his three-wheeler. The Petitioner alleges that at this point the 5th Respondent again assaulted the Petitioner on his head and on one ear and due to the intensity of the attack, the Petitioner fainted. According to the Petitioner, after the assault, the Respondents had taken the Petitioner to the Mirihana Police Station in his three-wheeler.

At the Mirihana Police Station the Petitioner had been produced before the Assistant Superintendent of Police, Nishantha Soyza, the 2nd Respondent, and on his instructions the Petitioner had been detained in the police cell. In the early hours of the following day, (29th June 2012) the Petitioner had been released from police custody after having his statement recorded.

The Petitioner states that as he experienced severe pain he sought treatment at a private hospital. As his condition, however, did not abate the Petitioner had sought treatment at the District General Hospital, Gampaha on 5th July 2012, roughly a week after the alleged assault, where he had been admitted and received treatment for 6 days. The Petitioner had not produced any of the medical records relating to the treatment he is said to have obtained from the private hospital.

When one considers the material adduced by the Petitioner before court, several contradictions can be identified. The Petitioner has averred in the Petition that he was assaulted by **two** police officers. On the contrary, the history given by the Petitioner as recorded in the Medico-Legal Report (MLR) of 10th July 2012 ('P7') is that, "Assaulted by **four** police officers of the Mirihana Police on 28th June 2012 at 9.30 am with hands".

Furthermore, the version of the events narrated in the Petition varies from the version that emerges from the letter marked 'P5'. 'P5' is a copy of the message sent by the Deputy Inspector General of Police, Western Province (South), dated 13th July 2012, directing HQI Mirihana to produce the two police officers against whom a complaint had been made by the Petitioner to the said Deputy Inspector of Police. The complaint referred to in 'P5' had been made regarding two police officers attached to the Mirihana Police Station for having boarded the Petitioner's three-wheeler, and travelling in the three-wheeler the entire day up to around 12 midnight and leaving without paying any fare after having got themselves dropped near the police sports grounds at Mirihana. In addition, according to 'P5', the Petitioner is alleged to have complained that he was assaulted and threatened by the said two police officers as well. This is contradictory to the averments of the Petition where the Petitioner has asserted that he was held in custody at the Mirihana Police Station and that he was released at 1.00 am on 29th June 2012 after having a statement recorded from him.

As referred to earlier, although the Petitioner claims that following the assault he obtained treatment from a private hospital, no records of such treatment have been submitted. The submitted medical records from the District General Hospital Gampaha are from 5th July 2012 onwards. The only 'medical report' is the MLR of Dr. Wijewickrama ('P7') who had recorded that the Petitioner had no external injuries. He has noted in the MLR; "Patient was complaining of hearing loss on right side and he was referred to a Neurologist for a special test (Auditory brain stem response). Patient was advised to come back after the test to complete his medical report, but the patient did not turn up".

The other records produced are the Admission Form-District General Hospital, Gampaha dated 5th July 2012, and Audiological Evaluation Sheet- Pure Tone Audiometry ('P6'). In the counter affidavit of the Petitioner at paragraph 7, reference is made to an endorsement made on top of 'P6' (Audiological Evaluation Sheet) in Sinhala "කන් ඇසීම අඩුයි" ("hard of hearing") and it has been claimed that to be an endorsement made by the physician. The body of the entire Evaluation Sheet is

perfected in English and this endorsement is found outside the area dedicated to record findings in that sheet. Thus, to me it appears to be an endorsement made, merely to enlighten the doctor of the patient's history rather than a clinical finding by the doctor.

Consultant ENT and Head and Neck Surgeon, Dr. W. M. C. Narampanawa has referred the Petitioner to a Consultant Neurologist to assess his hearing threshold as his PTA indicated "R/S mixed hearing loss". The Brain Stem Auditory Evoked Potential Report dated 26th July 2012 obtained from the National Hospital (marked 'P2') states that "*The findings are suggestive of R/S peripheral lesion (cochlear or immediate retro cochlear) (exclusion of conductive cause is assumed)*". The Audiological Evaluation Sheet obtained two years later from the District General Hospital, Gampaha, on 08th October 2014 (marked 'P8') records a finding of "Profound sensory neural hearing loss in right ear". While these records point to hearing loss suffered by the Petitioner, neither the MLR or the other medical records produced link the physical infirmity of the Petitioner with the alleged assault by the 4th and 5th Respondents. The non-production of the immediate medical records in order to exclude the possibility of the damage being inflicted at any time during the margin between 29th June 2012 and 5th July 2012 is another deficiency of the Petitioner's case.

The violations alleged

Violation of Article 13(1):

Article 13(1) of the Constitution stipulates that "any person arrested shall be informed of the reason for his arrest". The Petitioner alleges that no reasons were given for his arrest. According to the Petitioner he had been arrested by two officers from the Biyagama Police station and produced before the OIC of the Biyagama Police station. The Petitioner had not cited the two police officers who arrested him as Respondents. According to his own admission the 4th and 5th Respondent had come to the Biyagama police station and then taken him to the Mirihana police station. By that time the Petitioner had been placed under arrest. As such the 4th and 5th Respondents who had

nothing to do with the arrest of the Petitioner cannot be held liable for unlawful arrest of the Petitioner.

I am mindful of the fact that the failure to make a person who is alleged to have violated a fundamental right, a Respondent in a petition for relief under Article 126 of the Constitution is not a fatal defect, which now is settled law under the realm of the fundamental rights jurisdiction (see *Samanthilaka v Ernest Perera and Others* [1990] 1 Sri LR 318). All what a Petitioner is required to satisfy is that a violation of a fundamental right had been occasioned by executive or administrative action.

In the instant case the only material this court has to determine the violation of Article 13(1) is the assertion of the Petitioner that he was arrested without assigning any reason. Although the Petitioner alleges that he was ‘forcibly taken’, he has not elaborated on the nature of force used. According to the Petitioner it was the officers of the Biyagama police station who had arrested the Petitioner. When this application was supported the court had thought it fit not to grant leave to proceed against the 1st Respondent who was the Officer-in-Charge of the Biyagama police station. As such I do not see a reason to consider violation of Article 13(1) in the present application. On the other hand, when one considers the infirmities of the Petitioner’s version of the events that unfolded, the bare assertion by the Petitioner that “no reason was assigned to his arrest” is not sufficient in this backdrop to hold that the Petitioner’s arrest was illegal.

The excerpt from the Information Book of the Mirihana Special Crimes Investigation Unit (marked ‘4R1’) states that the Petitioner was stopped at the Dompe junction and later asked to drive the three-wheeler to a house in Rajagiriya which was supposed to be frequented by one Dinesh Darshika whom the Police officers were seeking to arrest and had travelled in the Petitioner’s three-wheeler that day. There is no mention of the Petitioner being held in the police cell at the Mirihana Police Station. According to the excerpt, from the Rajagiriya house, the Petitioner had been taken to the Mirihana Police Station where he had been produced before the Officer-In-Charge of the Mirihana Police Station and the Nugegoda Senior Superintendent of Police, and directed to report

to the Police Station if he was called again. The Petitioner's complaint of detention without reasons for arrest therefore, does not tally with the version of the Police. Given the contradictions in the Petitioner's version of the events, the Information Book excerpts appear to be more believable.

Violation of Article 11:

The Petitioner has complained of torture at the hands of the 4th and the 5th Respondents. The Admission Form dated 05th July 2012 as well as the MLR of 10th July 2012 (marked 'P7') however, record that there were no external injuries to be seen on the Petitioner. While external injuries are not an essential indicator of torture, given the circumstances of the present case the only instance where the Petitioner alleges that he was assaulted is when he was travelling in the three-wheeler in the company of the 4th and the 5th Respondents. In addition, the Petitioner's allegation that he was assaulted on the head **while he was driving** the three-wheeler does not appear to be plausible as such reckless behavior could have led to the Petitioner losing control of the vehicle he was driving and caused an accident endangering the lives of the assailants themselves. The Petitioner has also averred that he lost consciousness at Rajagiriya due to the assault and he had further asserted that the three-wheeler was driven to Mirihana after he regained consciousness. Here, the Petitioner is not clear as to whether he had driven the three-wheeler or it was one of the Respondents who did so.

It does not appear to be a rational course of conduct on the part of the 4th and 5th Respondents to have permitted the Petitioner to drive the vehicle for the distance from Rajagiriya to Mirihana. It is doubtful as to whether any right-minded person would allow a person to drive a vehicle immediately after such person had fainted and regained consciousness.

In proceedings of this nature, the court has very limited avenues to test the veracity of these assertions and necessarily have to depend on the affidavits and other documents filed. In the circumstances, in arriving at a just and equitable decision in the realm of

the fundamental rights jurisdiction, the court necessarily has to apply the test of probability to the factual matters placed before us.

In this regard I wish to cite with approval the opinion expressed by Wanasundera J. in the case of *Velmurugu v The Attorney General and Others* 1981 1 SLR 406, where his Lordship stated that the test applicable is a “preponderance of probability” adopted in civil cases. It was stated that although the standard is not as high as that required in criminal cases there can be different standards of probability within that standard and the degree applicable would depend on the subject-matter. Further, Soza J. in *Vivienne Goonewardene v Hector Perera* 1983 SLR 1 V 305 stated;

“The degree of probability required should be commensurate with the gravity of the allegation sought to be proved. This court when called upon to determine questions of infringement of fundamental rights will insist on a high degree of probability as for instance a Court having to decide a question of fraud in a civil suit would. The conscience of the court must be satisfied that there has been an infringement.”

As alleged, the Petitioner may have been assaulted by the 4th and 5th Respondents, the issue, however, is whether the Petitioner has placed sufficient material before this court to the degree required for the court to come to a conclusion that the said Respondents have infringed the Petitioners fundamental right guaranteed under Article 11 of the Constitution.

It was well within the means of the Petitioner to have the records relating to the treatment he obtained from the private medical facility produced. According to the MLR the Petitioner had no external injuries and was requested to consult the Assistant JMO after undergoing the recommended medical test, which the Petitioner had not done. There is an endorsement in ‘P2’ (Brain Stem Auditory Evoked Potential Report) that “the findings are suggestive of R/S peripheral lesion (cochlear or retro cochlear)”. However, there is paucity of material for the court to come to a conclusion as to the cause of the medical condition referred to or whether it is compatible with the history given by the Petitioner. For the reasons given above, I hold that the Petitioner has failed

to satisfy the high degree of probability required to prove the infringement of the absolute right of freedom from torture.

Considering the matters referred to, I am unable to say that the Petitioner has proved the alleged violation to my satisfaction. The conduct and behavior of the Petitioner leaves a serious doubt in my mind as to whether or not the incidents spoken of by him happened in the manner narrated by him. In the circumstances aforesaid, I am of the view that the alleged acts of torture by the 4th and 5th Respondents has not been made out or cannot be imputed as a liability of the state as a matter of law.

For the reasons given above, I hold that the Petitioner has failed to satisfy the high degree of probability required to prove the infringement of the absolute right of freedom from torture.

As such, in the absence of proof to indicate that the Petitioner was not accorded the equal protection of the law, I am of the opinion that the Petitioner's right to equality under Article 12(1) was not violated by the 4th and 5th Respondents.

In the course of the submissions the court was informed that the 4th and the 5th Respondents were subjected to disciplinary action based on the complaint made by the Petitioner. The findings by this court on the alleged infringement of fundamental rights of the Petitioner should not have any bearing with regard to the disciplinary proceedings against the said Respondents; for the reason that this court is of the view that the disciplinary authority would be better equipped to inquire in to the allegation fully and test the veracity of the Petitioner's allegations and to come to an independent finding of its own.

It must, however, be emphasized that the members of the Police force entrusted with the task of ensuring a peaceful environment for the citizenry to live without fear of crime or violence, should not themselves consider it their right to resort to violence at the cost of the well-being of their detainees, in the achievement of those ends.

Application dismissed and in the circumstances of this case I order no costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU N. B. FERNANDO PC
I agree.

JUDGE OF THE SUPREME COURT

JUSTICE E. A. G. R. AMARASEKERA
I agree.

JUDGE OF THE SUPREME COURT