

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

In the matter of an Application under Article
126 of the Constitution of the Democratic
Socialist Republic of Sri Lanka

Mohammed Rashid Fathima Sharmila
No. 159/FB/54,
Maligawatte Place,
Maligawatte,
Colombo 10.

SC. FR Application No. 398/2008

Petitioner

Vs.

1. K.W.G. Nishantha 31118,
Police Sergeant,
Police Station, Slave Island,
Colombo 02.
2. Siddique 5004,
Police Constable,
Police Station, Slave Island,
Colombo 2.
3. Karunathilake 30342,
Police Sergeant,
Police Station, Slave Island,
Colombo 2.
4. K.N.C.P. Kaluarachchi,
Police Inspector,
Police Station, Slave Island,
Colombo 2.
5. Officer in Charge,
Police Station, Slave Island,

Colombo 2.

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.
E.A.G.R. Amarasekara J
Kumudini Wickramasinghe J

Counsel:

M.A. Sumanthiran, PC with Divya
Mascaranghe for the Petitioner.
Madhawa Tennakoon, DSG for the
Respondents.

Argued on: 07.06.2022

Decided on: 03.02.2023

Aluwihare PC. J.,

- (1) This is a fundamental rights application by Mohammed Rashid Fathima Sharmila on behalf of her deceased husband, Mohammed Nizar Mohammed Irfan, (hereinafter also referred to as the 'deceased'). She petitions that her deceased husband was apprehended by the 1st to 4th Respondents along with three other police officers and was shot dead in the following morning by the 3rd Respondent. It is alleged by the 3rd Respondent that the shot was fired when exercising his right of private defence against an alleged violent attempt by the

deceased to escape the charge of the police officers accompanying him on a search for concealed weapons. The Petitioner claims that the arrest and execution of her husband is a violation of his fundamental rights guaranteed under Article 11, 12(1), 13(1) and 13(4). Leave to proceed, however, was granted for the alleged violation of all the Articles referred to above, sans Article 11.

- (2) Prior to addressing the issue relating to the alleged violation of fundamental rights, an illustration of the incidents that transpired leading to the present application is merited.
- (3) Around 1 p.m. on 2nd September 2008, the 1st to 4th Respondents along with three other police officers, had arrested the deceased on the charges of allegedly possessing a live hand grenade, murder, attempted murder, and robbery. About an hour later on the same day, the 1st and 2nd Respondents, according to the Petitioner, had brought her deceased husband to the Petitioner's home and searched the premises for concealed weapons, albeit unsuccessfully.
- (4) In this instance, the 1st and 2nd Respondents had also assaulted the deceased's cousin Mohammed Azar Ghouse Mahamood, a boy of 15 years, who had visited the Petitioner's home after hearing the news about the arrest of the deceased. The 1st and 2nd Respondents had proceeded to arrest the cousin as well, and left with both the deceased and his cousin in their custody. The Petitioner's account of this fact is corroborated by the said Ghouse Mahamood's complaint to the Human Rights Commission marked and produced as P4a and his affidavit marked and produced as P4b.
- (5) The deceased, thereafter, was allegedly detained at the Slave Island Police Station and he was allowed to contact his wife several times that day. According to the Petitioner, in the course of the telephone conversations, the deceased had informed her that he was threatened by the 1st and 2nd

Respondents that he would be executed if he failed to produce some weapons by 10 p.m. that night. The Petitioner who was distressed by these communications thereafter visited the Slave Island Police Station to meet the deceased and to ascertain the condition of his health, which had been around 8.30 p.m. on the same day. Police officers at the station had shown the deceased's skullcap and said "in jest" that her husband was safe and was being fed "කැඳ" [porridge]. Contradictorily, however, they have also told that her husband was safe and was taken to Anuradhapura and was no longer in the custody of the Slave Island Police Station, and that she would come to know what happened to her husband the next morning.

- (6) Early next morning [3rd September], the deceased had been allegedly taken by the police to Maligawaththa and Kotahena, for the purpose of locating weapons and to arrest two other suspects. The Petitioner, becoming privy to rumours that her husband had been shot dead near 'Gaspaha' junction (ගැස්පහ හංදිය), she had visited the said location to find her husband's dead body inside the Police vehicle No. 32-8466.
- (7) The facts of this incident had been reported to the Chief Magistrate of Colombo under case number B6578/01/2008. (Vide P5). In the course of the evidence led at the Inquest before the Magistrate, it was revealed that the deceased was travelling within the police area of Pettah, in the Police vehicle No. 32-8466 with eight (8) Police officers. While so travelling, the deceased, who was handcuffed at the time, allegedly attempted to escape from the moving vehicle by seizing the weapon of Sergeant Pulleperuma and making an attempt to fire at 3rd Respondent, Sergeant Karunathilake. At that moment, the deceased had been shot twice by the 3rd Respondent; once in the chest and once in the abdomen, allegedly exercising his right of private defence.
- (8) The cause of death, according to the Judicial Medical Officer, was "close range rifled firearm injury to the chest and abdomen." (Vide 4R3). With this sequence of events in mind, before venturing into the many inconsistencies

between the Petitioner's and Respondents' versions of events, it is pertinent to make a brief comment at the outset on the locus standi of the Petitioner.

Locus Standi of the Petitioner

- (9) Earlier, the position pertaining to *locus standi* was that a Petitioner can complain only of the violation of his or her own fundamental rights. Action could only be filed by the Petitioner or by an Attorney-at-law acting on the Petitioner's behalf, as per a "plain, natural, ordinary, grammatical and literal" reading of Article 126(2) (*Somawathie v Weerasinghe* (1990) 2 Sri LR 121 at 124).
- (10) Subsequently, however, with the pronouncement of the principles laid down by Fernando J. in the case of *Kotabadu Durage Sriyani Silva v Chanaka Iddamalgoda, Officer-in-Charge, Police Station Payagala* (2003) 1 Sri LR 14, it is now well-established and solidified law that the next of kin has a right to sue on behalf of the deceased, in order to uphold the right to life implicit in Article 13(4). To hold that no one is entitled to sue the wrongdoers in the present case, would mean that there is no remedy for a violation of Article 13(4) by causing *death itself*, but an *imminent threat* to one's life and liberty is remediable; rendering the right to life impliedly recognised by this Court under Article 13(4) merely illusory. In such circumstances, the need to avoid anomalies, inconsistencies and injustice calls for an expansive interpretation of the constitutional remedy provided by Article 126(2).
- (11) This view was endorsed by Justice Shirani Bandaranayake [as she then was] in *Lama Hewage Lal (deceased) and Rani Fernando (wife of deceased Lal) v. OIC Seeduwa Police Station* (2005) 1 Sri LR 40, 45 where her ladyship held; that after the decision of *Sriyani Silva* (supra), "*it is therefore settled law that the lawful heirs and/or dependants of a person who is deceased as a result of an act of torture should be entitled to a declaration of the violation and compensation*".

- (12) Furthermore, of particular relevance to the present case, is **Article 14.1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984**, to which Sri Lanka is a party, posits “in the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.” The interpretation that the right to compensation accrues to or devolves on the deceased's lawful heirs and/or dependants brings our law into conformity with international obligations and standards, incorporated through the enabling legislation, the **Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994**, and must be preferred. Such an interpretation is also bolstered by **Article 4(d) of the Constitution**.
- (13) In the present instance, the deceased's rights have accrued or devolved on his next of kin. The Petitioner, therefore avails herself of the remedy available to the deceased. Hence, the present Application is in accordance with Article 126(2) of the Constitution. Having established the locus standi of the Petitioner, it is apposite to consider the credibility of the Respondents’ narrative.

Shifting stances in the Respondents’ Narrative

- (14) The credibility and consistency of the Respondents’ narrative are called into question, due to the shifting of positions from the very inception to the conclusion of their account of the events that transpired, and the discrepancies that can be observed.
- (15) There is an incongruity *inter-se* between the affidavits of the Respondents even after they were re-submitted after amending, in 2011. Inconsistency is observed even in the basic fact as to who arrested the deceased at the Maligawatte Applewatte Milad Mosque. In the 1st Respondent’s affidavit, it is averred that he assisted Police Sergeant ‘Karunathilake’ in the arrest of the deceased, while the 2nd Respondent has taken up the position that it was one *Police Sergeant* ‘Kaluarachchi’ who made the arrest [paragraph 7 of the 2nd

Respondent's affidavit]. According to the affidavit of the 3rd Respondent Karunathilake, he has also assisted one *Police Sergeant* 'Kaluarachchi' in making the arrest of the deceased. Interestingly, it was the 4th Respondent, Kaluarachchi, who is an *Inspector of Police* who had made an entry in the Information Book pertaining to the arrest of the deceased (vide "4R2A"). This fact was also admitted in the testimonies of 1st, 3rd and 4th Respondents in the inquest Proceedings (vide "P5"). The lack of consistency in their own narration of events at the Magistrate's Court and before this Court is telling of the incoherence in their narrative.

- (16) Further, it is submitted by the Petitioner that her deceased husband's cousin Mohammed Azar Ghouse Mahamood [hereinafter referred to as Ghouse], a young schoolboy of 15 years of age, who had visited her house upon hearing the distressing news of the deceased's arrest, had also been arrested by the Respondents when they brought the deceased to Petitioner's home for a search. Ghouse had made a complaint to the Human Rights Commission (HRC) on 4th September 2008 and submitted an affidavit in this regard (P4a and P4b, respectively) where he states that he was arrested without citing reasons, was severely beaten, detained inside a bus outside the Slave Island Police Station and subsequently released without any charges. In his affidavit, the details about the presence of the 1st, 2nd and 4th Respondents at the deceased's house, the time at which they visited the house, and the manner and the place where the deceased was detained after being taken to the Slave Island Police station, are consistent with the IB entries pertaining to the arrest of the deceased ["4R2A"]. His account of events is corroborated by the Petitioner and the parents of the deceased who have also filed complaints with the HRC (vide "P8a"). The Respondents merely deny such substantial claims of assault and arrest in their affidavits, without countering the allegation or providing any explanation, ebbs away the credence of their version of events.

- (17) The root of inconsistency goes deeper, down to ascertaining the place of detention of the deceased. The Petitioner claims that her husband “was detained at the Slave Island police station” (paragraph 6(e) of the Petition). She had even visited the Slave Island police station in the hope of meeting her husband at which instance she received contradictory information about her husband being well and being fed porridge, and later was told that he was taken to Anuradhapura. The Petitioner’s claim that the deceased was held at the Slave Island Police station is corroborated by the affidavit of Ghouse, who states that he witnessed the deceased being “placed in a room inside the Slave Island Police Station” (paragraph 6 of “P4b”). It is also lent credibility by the Human Rights Commission complaint filed by the deceased’s parents where they state they were informed by the Legal Officer at the Human Rights Commission that their son was under the charge of one Kaluarachchi of the Slave Island police station, the location to which they hurried with the expectation of seeing their son, but were told to return the next morning. (vide “P8a” and “P8b”).
- (18) Yet the 4th Respondent [IP Kaluarchchi] claims, that as per the IB entry recording the arrest, the deceased’s investigation was to be conducted under the supervision of Officer-In-Charge of Pettah Police Station, and he was presented to the Pettah Police Station after arrest. The 4th Respondent goes further to state that the Petitioner herself was informed of this fact when he took the deceased to Petitioner’s house to search for concealed weapons. (4R2A). In the “out” entry, (4R5) which is extracted from the IB of the Pettah police station, the 4th Respondent claims that it was the Pettah Police Station they left on the morning of 3rd September 2008, taking the deceased along with them, and this is reiterated in his depositions at the Inquest Proceeding (vide “P5”, page 16). But this account by the Respondents naturally raises the question as to why the aggrieved wife, mother and father of the deceased would concern themselves with calling over at the Slave Island police station and receive such perplexing responses from the officers therein, if they were

- quite dependably informed of the whereabouts of the deceased by the 4th Respondent. The Respondents have offered no clarification regarding the same.
- (19) The credibility of the Respondents' narrative is placed in peril owing to contradictions in the material facts regarding the scuffle in which the deceased's death ensued, as portrayed in the original and the amended affidavits of the Respondents. Given that these affidavits were filed by officers of the Police who are well-versed in and much dependent upon the accuracy of the detailed notes they take pertaining to each investigation, such lapses raise incredulity. The original affidavits of the 1st to 4th Respondents filed on 18th February 2010 had stated in unanimity that they "*categorically deny that the deceased was handcuffed* while he was travelling in the Police vehicle No. 32-8466 along with 8 armed police officers", which is inconsistent with the depositions of the 4th Respondent before the Inquest (vide "P5", page 15). It also contradicts the "in" entry of the IB on 3rd September 2008 (vide "4R5A"), where he stated that the deceased *was handcuffed*.
- (20) However, the original affidavits were amended after a lapse of more than a year in August 2011, to read that the Respondents "*categorically deny that the handcuffed deceased was travelling in the Police vehicle...*", reverting from their original position and conjuring the unconvincing image of an individual defined by the Respondents themselves as an "an absconding under-world gang leader wanted by the police in connection with offences of attempted murders, murder and robbery" known to be adept at wielding a gun, being taken around with such scant security measures. This renders the narrative of the Respondents further implausible and wavering.
- (21) Irregularities are also observed as to the time of death. It is stated in the "out" entry by the 4th Respondent (Vide 4R5) and in his depositions at the Inquest (Vide P5), that 8 Police Officers left the Pettah Police Station with the deceased to Kotahena and Maligawatte at the dawn of 3rd September, 2008 at 4.05 a.m. in order to locate some weapons and arrest 'Nilafer' and 'Azmi mama', based

on information revealed through the deceased's statements (Vide 4R5). However, the "in" entry registers that at 4.50 a.m. After 45 minutes] they were still travelling towards Barber Street along the Pettah Main Street when the scuffle occurred and the deceased was shot dead (Vide 4R5A). The distance from Pettah to Maligawatte (approximately 3 Km) and the time taken to make the trip, makes it questionable why this journey had to be made while the surrounding was still dark, given that the main aim of the journey was to locate weapons. The requirement of undertaking an urgent search operation, being pressed by some urgent concern is nowhere expressed by the Respondents. It was only bound to limit the efficiency and success of their search.

- (22) The Respondents are seen to be well-aware that the deceased was an 'under-world gang leader' adept at handling weapons. Experienced Police officers acting with a mind to preventing exigencies routinely take sufficient care when transporting such a detainee. But a question is raised as to why such care was not exercised in the present instance, given that in the "out" entry, as they left for the search, Police Inspector Kaluarachchi had advised the police officers that, as they are embarking on an investigation to arrest hard-core underworld criminals and to look for their weapons, and suspects who are adept at using grenades, to be vigilant and careful (vide 4R5). Therefore, it is only natural that the officers should have, in the ordinary course of events, taken extreme care to ensure that their weapons are out of reach of the deceased suspect. However, an extra degree of care taken to prevent such an exigency is not exhibited in the conduct of the 8 police officers, with 6 out of them being armed, and the deceased's actions limited to the confined space of the moving Police vehicle.
- (23) As per the above analysis, it is my considered opinion that the Respondents' version of the events is contradictory, improbable and thus must be refuted. In this context, it should be examined whether the conduct of the Respondents

have violated the rights afforded to the deceased under Article 12(1), 13(1) and 13(4).

Violation of Article 12 (1)

- (24) Article 12 (1) of the Constitution embodies two vibrant concepts - *equality before the law* and *equal protection of the law* to all persons. The two limbs of this Article are lucidly elaborated by Ivor Jennings in, ‘**Law of the Constitution**’, 5th edition, at page 50 where he posits that,

“[e]quality before the law is a negative concept implying the absence of any special privilege in favour of any individual and the equal subjection of all classes to the ordinary law. Equal protection of the law is a more positive concept and implies equality of treatment in equal circumstances.”

- (25) In the present case, the alleged criminal record of the deceased is immaterial to a violation of his fundamental rights ensured by the Constitution. As each person ought to be subjected equally to the ordinary law of the country, the deceased should similarly be subjected to a fair trial before a competent court and be found guilty of any charges against him. In any case, he is equally entitled to receive the same protection of his fundamental rights as any other citizen in the same circumstances. It is quoted with approval that this was correctly noted by Fernando J in *Sriyani Silva v. Iddamalgoda* (supra) at pages 78-79, “[r]espondents should have concentrated their efforts to have the allegations against the deceased determined by a competent Court, after a fair trial. Until then the deceased was entitled to the benefit of the presumption of innocence.”

- (26) Annexure “4R1” which notes down fifteen allegations against the deceased is merely a sheet of paper on which 15 case numbers are typed alleging that the deceased was treated as a suspect in those cases. “4R1” is not a document maintained by the police in the normal course of their duties, but appears to be a document prepared to counter the allegations against the Respondents in the instant application, whereas the Respondents could have filed copies of the “B” Reports filed by the police when facts were reported to court citing the

- deceased as a suspect in those respective cases. In this backdrop, it is difficult to place much credence on “4R1”. Thus, the assertion on the part of the Respondents, that the deceased was a ‘wanted man’ in connection with many crimes cannot be relied upon by this court.
- (27) In any case, any such supposed allegation has not been determined by a competent court after a fair trial and until such time, the presumption of innocence will prevail as per Article 13(5) of the Constitution. Even if his record was bad, it is now rendered more serious as the deceased has lost his life, and consequently, lost the opportunity to redeem his bad record. Thus, it submitted that the argument that the deceased was a known criminal has no credibility, and has no bearing on his fundamental rights.
- (28) It is contended by the Petitioner, quoting *Dumbell v. Roberts (1944) All ER 326, 329* as cited in *Muthusamy v. Kannangara (1951) 52 NLR 324* and *Faiz v. The Attorney General (1995) 1 Sri LR 372*, that the principle ‘innocent until proven guilty’ applies to the Police function of arrest. Even in the context of the arrest being based on a mere list of cases allegedly pending against the deceased, (Vide 4R1) presented along with an IB entry claiming that the deceased held a live grenade in his possession at the time of arrest (Vide 4R2A), the deceased is nevertheless entitled to be protected by the law against violations of his life and liberty.
- (29) This notion is expressed by Justice Sharvananda, in his Treatise, ‘**Fundamental Rights in Sri Lanka**’ at page 84, where citing *Paliwadana v. A.G.*, he states,
- “The fundamental fact is men are not alike [...] what is postulated is equality of treatment of all persons in utter disregard of every conceivable circumstance of the differences...”*
- (30) Therefore, despite the allegations against him of criminal conduct, in the absence of an order of a competent court handing down a sentence, the deceased was entitled to the ordinary and equal protection of the law against the violation of his fundamental rights by the actions of the 1st-4th Respondents,

which resulted in his death. The 5th Respondent who is the officer-in-charge of the Slave Island police station, was under a duty to take all reasonable steps to ensure that persons held in custody were treated humanely and in accordance with the law. This included monitoring the activities of his subordinates. He did not claim to have taken any steps to ensure that the deceased was being treated as the law required him to be.

- (31) Thus, in light of the foregoing evaluation, it is my considered view that the 1st to 5th Respondents have violated the fundamental rights of the deceased by failing to afford equality before the law and equal protection of the law to the deceased, guaranteed by Article 12(1) of the Constitution.

Violation of Article 13 (4)

- (32) Article 13(4) prohibits punishing any person with death or imprisonment except by order of a competent court, made in accordance with the procedure established by law. In the present case, it is admitted by both parties that the deceased was shot by the 3rd Respondent and thereafter the deceased succumbed to the injuries thus inflicted. Therefore, it is not contested that the death of the deceased was *not* in accordance with an order of a competent court.
- (33) Bearing in mind the potential criminal liability of the 3rd Respondent, in the present case, the deceased was put to death by him in the absence of any order of a competent court to that effect, made in accordance with the procedure established by the law, in a deliberate violation of the sanctity of his life. This is corroborated in the Petition by the Petitioner who claims that the deceased had prior apprehension regarding his imminent execution, which was also communicated to her. (Vide paragraph 6(f) of the Petition)
- (34) The learned Deputy Solicitor General argued on behalf of the Respondents that Article 12(1) is linked to Articles 13(1) and 13(4) and as such Article 12(1) cannot stand alone but intrinsically linked to the Articles referred to. His argument appears to be that if the court cannot come to a finding that the Respondents have infringed Article 13(1) and 13(4), the court cannot proceed to consider a violation under Article 12(1). He contended further that the

deceased was arrested for possession of a hand grenade and he was informed of the reasons for the arrest. As such, the respondents cannot be held to have infringed the rights referred to in Articles 13(1) of the Constitution. It was the position of the learned DSG that there is no material before court to conclude the shooting of the deceased was to mete out a punishment to the deceased and that the exercise of the right of self [private] defence operate as an exception to Article 13(4). However, it must be noted that a person can be arrested in accordance with the law, but cannot be punished in violation of it. And this would engender a denial of equal protection of the law.

- (35) Section 89 of the Penal Code stipulates the general provision that ‘*nothing is an offence which is done in the exercise of the right of private defence.*’ However, even though under Section 93, the right of private defence of the body may extend to causing death when faced with an assault that reasonably causes apprehension of death, according to Section 92(4), the right in no case extends to the inflicting of more harm than necessary for the purpose of defence.
- (36) Even assuming that the deceased did make an attempt to escape ; in a situation where 8 trained policemen, (who were further instructed in advance to be prepared to face the dangers and exigencies involved in this operation [Vide “4R5”]) were accompanying the deceased, with 6 of them armed and easily able to overpower the deceased by inflicting lesser harm than killing him, the 3rd Respondent is seen to have acted in excess of self-defence. As per Section 92(4) therefore, that defence cannot be extended to the present case. Thus, the right of self-defence presents a weak case for exculpating the 3rd Respondent of criminal liability. Having given its mind to the attended facts and circumstances, the court indeed entertains serious doubts as to whether the scuffle has indeed transpired, as alleged by the Respondents.
- (37) In the Case of **Wijesuriya v. The State**, 77 NLR 25 (Premawathie Manamperi Case) which concerned the killing of a prisoner who was a suspected insurgent held in custody by a military officer, while a state of emergency prevailed in the country, Alles J. observed the following,

“...there was no justification for the shooting of a suspected insurgent taken into custody. What then is the position of a soldier subject to Military Law in such situation? He continues to remain the custodian of the civil law and it will be his duty to shoulder the responsibility of police duties, in the discharge of which he is as much subject to the civil law as the ordinary policeman” (at page 32, emphasis added).

- (38) It is apparent that a military officer’s duties during a state of emergency is equated to those of a police officer, who is the ‘custodian of the civil law’ and he/she can offer no justification for killing a prisoner in custody in violation of the civil law.
- (39) Even though the Fundamental Rights Chapter of the Constitution of Sri Lanka does not consist of a standalone right to life, in *Sriyani Silva v. Iddamalgoda* (supra) at page 75, this Court has upheld this right to life as impliedly recognized by Article 13(4), even if it is of a person accused of a bad record. The Court held; “Although the right to life is not expressly recognised as a fundamental right, that right is impliedly recognised in some of the provisions of Chapter III of the Constitution. In particular, Article 13(4) [...] That is to say, a person has a right not to be put to death *because of wrongdoing on his part*, except upon a court order. Expressed positively, that provision means that a person has a right to live, unless a court orders otherwise.” (Emphasis added).
- (40) This implication of right to life was also acknowledged in *Lama Hewage Lal (deceased) and Rani Fernando (wife of deceased Lal) v. OIC Seeduwa Police Station* (supra) at page 45. Bandaranayake J held that without a court order, no person could be put to death and therefore in the absence of such an order, any person has a right to live. And when such a right is created, it will naturally be followed with a remedy, as a right must have a remedy is based on the principle which is accepted and recognized by the maxim *ubi jus ibi remedium*, viz., 'there is no right without a remedy'.

- (41) Right to life is the most fundamental and basic of human rights and the fountain from which all the other human rights spring and it therefore is deserving of the greatest respect. United Nations enshrined the right to life in **Article 3** of the **Universal Declaration of Human Rights**, postulating that "everyone has the right to life, liberty and security of person".
- (42) The right to life is one of the four “non-derogable rights” which cannot be suspended even in a state of emergency, common to the **International Covenant on Civil and Political Rights** (Article 6), the **European Convention on Human Rights** (Article 2) and the **American Convention on Human Rights** (Article 4) and is considered as consisting the “irreducible core” of human rights and a part of customary international law. In light of this, the judgment of the European Court of Human Rights in *Finucane v. The United Kingdom* (**Application no. 29178/95**) 1 July 2003, upholding the states’ obligation to protect the right to life enshrined in Article 2 of the European Convention on Human Rights is of great persuasive value of the present case.

“The essential purpose of [official investigations when individuals have been killed as a result of the use of force] is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.” (para. 67)

- (43) Therefore, prevention of extra-judicial killings or custodial deaths invites raising the domestic standards to meet international obligations in upholding the inviolability of life, supplementing the fundamental rights protections of the domestic law. The Article 13(4) of the Constitution as applicable to the present case should be interpreted broadly, especially in view of the State’s responsibility of upholding fundamental rights, as enshrined in **Article 4(d) of the Constitution**, which requires all organs of government, including the Police, to "respect, secure and advance" the fundamental rights declared and recognized by the Constitution and to not “abridge, restrict or deny” such rights.

- (44) Even in the absence of a separate standalone right to life, a purposive construction of Article 126(2) read with Article 4(d) of the Constitution, would in the present case, hold the State liable for the arbitrary deprivation of the deceased's life by the Respondents utilizing extrajudicial means, in addition to the liability of the Respondents.
- (45) As Justice Sharvananda in the volume, **'Fundamental Rights in Sri Lanka'** at page 2, quoting Lord Templeman in *Societe United Dock v. Government of Mauritius* (1985) A.C.585, 605 commendably postulates,
- "A Constitution concerned to protect the fundamental rights and freedoms of the individual shall not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies."*
- (46) Therefore, relevant Articles of the Constitution should be expansively interpreted to recognize the right to life inferred in Article 13(4) and the Petitioner's right to be granted relief. Where there is an infringement of the right to life implicit in Article 13(4), and Article 126(2) must be interpreted in order to avoid anomaly, inconsistency and injustice.
- (47) This argument is in line with what Lord Wilberforce in *Minister of Home Affairs v. Fisher* (1979) 3 A.E.R.21, 25 P.C. illustrated regarding fundamental rights and freedoms provisions, stating that "those provisions 'call for a generous interpretation, avoiding what has been called the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms."
- (48) Police brutality should in no terms be allowed to become a fact of normal life and such trends can only be arrested by the broad application of Fundamental Rights which should not merely be excellent in theory. Arbitrary executions in violation of the judicial procedure, by officers of the State should be condemned. The Police Force cannot, at any instance, undermine the criminal justice mechanism of the country.
- (49) The Indian Supreme Court has delivered a string of judgements on **'encounter killings'**, which term is used to describe extrajudicial killings committed by the

law enforcement officers of that country, supposedly in self-defence, when they encounter suspects.

- (50) In **Prakash Kadam et al v. Ramprasad Vishwanath Gupta and Another (2011) 6 SCC 189**, Supreme Court of India dismissing the appeal against the refusal of bail for several police officers held as follows; “The ‘encounter’ philosophy is a criminal philosophy, and all policemen must know this...Fake 'encounters' are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law. In our opinion, if crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties.”
- (51) In *Nilabati Behera v. State of Orissa and Others* 1993 SCR (2) 581, the Supreme Court asserted that,
- “Convicts, prisoners or undertrials are not denuded of their fundamental rights... There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions.”
(Emphasis added)
- (52) As for the liability of the 5th Respondent for violation of Article 13(4), reiterating what was stated above, he was the Officer-In-Charge of the Slave Island Police Station, and was under a duty to take all reasonable steps to ensure that persons held in custody were treated in accordance with the law. That included monitoring the activities of his subordinate officers of the Divisional Crime Detection Bureau-Colombo (Central), such as the 3rd Respondent, who are attached to the Slave Island Police Station and sanctioning their actions.

Therefore, he bears responsibility for the deceased being put to death in the absence of any order of a competent court to that effect, made in accordance with the procedure established by the law.

- (53) For the aforesaid reasons this court holds that the deceased's Fundamental Right guaranteed under Article 13(4) has been infringed by the 3rd and 5th Respondents.

Violation of Article 13(1)

- (54) Article 13(1) stipulates 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.’

The Petitioner has not shown substantial cause to the establishment of the fact that the deceased was arrested except according to the procedure established by law and that he was not informed of the reason for his arrest, which was attributed as being in possession of a live hand grenade. The Respondents’ affidavits and the IB entry of the arrest unanimously claim that the reasons for the arrest were communicated to the deceased, and the reasons are consistent with those documents. Therefore, there is no material before court to hold that Article 13(1) was infringed in the present case.

Declarations and Compensation

- (55) As per Article 126(4) of the Constitution, the Supreme Court is empowered to grant such relief as it may deem just and equitable in the circumstances in respect of any Petition referred to it under Article 126(2). Hence, bearing in mind the Petitioner’s situation in life; now a single mother with three children to support, and the emotional and psychological trauma she and the children may have suffered due to the death, in addition to being deprived of the care and companionship of a husband and father, compensation is ordered under the just and equitable jurisdiction of the Court.

- (56) As referred to earlier the court held that the deceased's Fundamental Rights under Articles 12(1), have been infringed by the 1st, 2nd, 3rd, 4th and 5th

Respondents and Article 13(4) by the 3rd and 5th Respondents and by the State, and that the deceased's right to compensation has accrued to or devolved on the Petitioner.

- (57) Therefore, I order the State to pay Rs.250, 000/- as compensation to the Petitioner. In addition, I order the 1st, 2nd and 3rd Respondent to pay Rs.25,000/- each to the Petitioner. Further, I order the 4th and 5th Respondent to pay Rs. 200,000/- each to the petitioner and all payments by the respondents are to be paid personally.
- (58) Before I part with this judgement, I wish to advert to several matters which, are, to say the least, disturbing. Sri Lanka Police established in 1806, has a history of over two centuries and one would expect it to develop into a body that comprises of professional law enforcement personnel. I am at a loss to understand, in the present day and time as to why such an established law enforcement entity is incapable of affording due protection to a citizen who is in their custody. Unfortunately, it is not rare to hear instances of suspects dying in the hands of the police. It only highlights the utterly unprofessional approach to duty by the personnel who man it and as a consequence, people are increasingly losing trust in the police. It had lost the credibility it ought to enjoy as a law enforcement agency. The incident relevant to this application had taken place in 2008, however, this court observes that instances of death of suspects in police custody are continuing to happen, even today. It appears that the hierarchy of the administration had paid scant attention to arrest this trend which does not augur well for the law enforcement and the rule of law.
- (59) In these circumstances we are of the view that we should direct the 6th Respondent, the Inspector General of Police to formulate, issue and implement, guidelines to the police, elaborating the steps that should be taken by each officer to avoid 'encounter deaths' of this nature in the future.

This matter will be mentioned on 24th March 2023 and the 6th Respondent is directed to report to this court the steps taken by the 6th Respondent in this regard.

Application allowed and compensation ordered

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R. AMARASEKARA

JUDGE OF THE SUPREME COURT

JUSTICE KUMUDINI WICKRAMASINGHE

JUDGE OF THE SUPREME COURT