

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

In the matter of an application under
and in terms of Article 126 read with
Article 17 of the Constitution.

Ediriweera Arukpatabandige Sugath
Rohan Jayasuriya,
194/2, Polgahawelena,
Debarawewa, Tissamaharama.

SC (FR) Application No.43/2008

Petitioner

Vs.

1. Police Constable
Manikkaratnam,
Police Station,
Tissamaharama.
2. Constable 63623,
Police Station,
Tissamaharama.
3. Police Constable 52736
Chandimal,
Motor Traffic Unit,
Police Station,
Tissamaharama.
4. Officer in Charge,
Police Station,
Tissamaharama.
5. The Inspector General of
Police,
Police Headquarters,
Colombo 1.

6. Hon. Attorney General,
Attorney General's
Department,
Colombo 12.

Respondents

BEFORE : **TILAKAWARDANE, J.**
MARSOOF, PC, J. &
SRIPAVAN, J.

COUNSEL : Ms. Ermiza Tegal for the Petitioner.

Upul Kumarapperuma with Ms. Kaushalya Perera
instructed by K. Upendra Gunasekera for the 1st - 3rd
Respondents.

Ms. Lakmali Karunanayake, SSC, for the 6th Respondent.

ARGUED ON : 02.09.2013.

DECIDED ON : 18.11.2013.

Tilakawardane, J.

The Petitioner instituted the Fundamental Rights application before this Court on 01. 02. 2008 seeking relief against the 1st, 2nd, 3rd and 4th Respondents and/or the State for the alleged infringement of his Fundamental Rights guaranteed by Articles 11, 12(1) and 13(1) of the Constitution. At the hearing, the Counsel for the Petitioner confined his arguments to Article 11 and Article 13 of the Constitution.

In the petition dated 01. 02. 2008, the Petitioner prays for a Declaration that the 1st, 2nd and 3rd Respondents and/or the State have acted in violation of the Petitioner's Fundamental Rights guaranteed to him under Article 11 of the Constitution, constituting torture or cruel or degrading treatment when he was assaulted by the 1st, 2nd Respondent, and the 3rd Respondent Police officers, who were attached to the Tissamaharama Police Station in the District of Hambantota.

Describing the incident further, the Petitioner alleged that on 29. 12.2007, he was accosted outside a boutique in the area and assaulted twice by the 1st Respondent on the side of the head, the 2nd Respondent is alleged to have dealt a blow to his head with his gun, while the 3rd Respondent, who arrived at the scene in a police jeep after being summoned by the 1st Respondent, allegedly assaulted the Petitioner subsequent to which he became unconscious.

The version of the Respondents on the other hand was that the incident took place at a Road Block near the Debarawewa junction and that the Petitioner was riding a motorcycle towards the town when the 1st and 2nd Respondents signalled him to stop. The Petitioner at the time was drunk and had fallen off the bike, and when being questioned he attempted to escape, had fallen off the bike twice and injured himself before he was apprehended. When searched the 1st Respondent discovered two packets of heroin inside the wallet of the Petitioner. He had been taken into custody as he was drunk and in possession of heroin.

In ascertaining whether this behaviour is in contravention of Article 11, this Court has followed the following judgements that indicate the degree of proof necessary. In **Channa Peris and Other vs. Attorney General and Others (1994) (1 SLR 01)**, **Amerasinghe J** held that in considering whether Article 11 has been violated, three general observations apply:

- I. "The acts or conduct complained of must be qualitatively of a kind that a Court may take cognizance of. Where it is not so, the Court will not declare that Article 11 has been violated.
- II. Torture, cruel, inhuman or degrading treatment or punishment may take many forms, psychological and physical.
- III. Having regard to the nature and gravity of the issue, *a high degree of certainty is required before the balance of probability might be said to tilt in favour of a petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment.*"

The necessity for such a high degree of proof is re-affirmed in **Nadasena vs. Chandradasa Officer in Charge Police Station Hiniduma and Others (2006)** (1 SLR 207) where it was held that:

“...it would be necessary for the Petitioner to prove his petition by way of medical evidence and/or by way of affidavits and for such purpose, it would be essential for the Petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden.”

In evaluating the evidence on this matter the court is mindful of the need for concise, cogent and strong evidence that is required to prove a case such as this. Where two versions are presented the Court notes the importance of the Petitioner’s complaint of torture being corroborated by medical evidence, **Namasivayam v Gunawardena (1989)** (1 S.L.R. 394); in order for the Court to accept it.

The Medico-Legal Examination Report [Form No. 643/07] obtained from the Main Hospital in Tissamaharama (marked “IR 7”), where the Petitioner was initially examined when taken by the Police, records that at the time of examination, the Petitioner was drunk, his breath was smelling of alcohol and he had suffered a non-grievous injury to the right side of the head . The same Medico-Legal Examination Form and the consequent Medico-Legal Report, also issued at the time the Petitioner was examined initially, both record a statement from the Petitioner where he admitted to having received the injury as a result of an accident when he fell off his bike due to his drunken state. It is noteworthy that this was recorded almost immediately after he was taken into custody, and this version recorded by the Medical Officer contemporaneously corroborates the version of the Police Officers.

Contrary to his statement to the Medical Officer at the time contained in the Medico-Legal Report issued initially, the Petitioner after a week or so, when he was examined by another Medical Officer attached to the Hambantota Hospital, almost 8 days after the alleged incident, recorded in the Medico-Legal Report of 08.01.2008 that the injuries were sustained due to an assault by the 1st, 2nd and 3rd Respondents, though details mentioned in the affidavit of the Petitioner have not been recorded.

This Report also clearly indicates that the Petitioner complained of reduced hearing and vision in the left ear and left eye respectively. These ailments do not coincide with the evidence submitted with the petition marked “P4a” and “P4b” which indicate clearly that the non-grievous injury was sustained on the right side of the head. Furthermore, upon conducting several tests, the JMO concluded that sight and vision were normal indicating a possible fabrication (as was suggested by the Counsel for the Respondents) of ailments in order to support his contention of alleged torture and/or cruel degrading treatment. The counsel for the Respondents contended that such a false allegation had been made in order to compromise the charges filed against the petitioner for being in possession of heroin.

In ascertaining whether the injuries sustained were caused due to an assault or due to a fall, this Court takes into account the initial Medico-Legal Reports where the Petitioner was recorded to have suffered from upper lip and scalp lacerations, small injuries on the forehead as well as small scratches on his arms and legs, while these injuries, in particular the lacerations and scratches, are more likely to have been caused by a fall. Furthermore, this account of injuries sustained is corroborated by the In Entry marked “IR 8” recorded by the Police where the injury to the right side of head, lacerations on forehead and scratches on arms and legs were documented. In this context it is important to note that the state of the bike, as stated in the information book extract marked “IR 8” contemporaneously records that the bike has dent marks on the body, a dent near the oil tank as well as a misplaced side mirror and shattered signal lights, which are more indicative of the fact that the Petitioner is likely to have fallen, with the bike, to the ground.

This Court has carefully perused the differing versions of the Petitioner’s accounts of how the narrative unfolded and noted discrepancies with regard to the events stated in the Petition and his admissions made in the Medico-Legal Report in Tissamaharama as inconsistent with the Medico-Legal Report issued by the Hambantota Base Hospital. The resolution of this issue before the Court is, therefore, dependent upon the truth in the allegations made by the Petitioner which have been denied by the Respondents. This Court refers to the case of **Soogrim v**

Trinidad and Tobago (1993) (*Communication No. 362/1989*), where the United Nations Human Rights Committee accepted an allegation of ill-treatment in the form of a beating but rejected a series of other similar allegations on the ground that there was insufficient evidence. The Committee held that, in this instance, it was a case of the complainant's word against that of the detaining authorities and the burden which lay on the complainant has not been discharged. The Court feels that this high burden is warranted as confirmed by the case of **G. Jeganathan v Attorney General (1982)** (*1 SLR 294*) where it was held that if public officers are accused of violating the provisions of Article 11, the allegations must be 'strictly proved' for, if they are so proven, they will carry 'serious consequences' for such officers.

The Court notes the difficulties in proving the allegations of torture or ill-treatment as laid out by Sharvananda J in **Velmurugu v A.G. (1981)** (*1 SLR 406*). However, it is imperative that these difficulties are measured against the medical evidence that has been submitted. In this regard, this Court makes reference to the case of **Channa Peris and Other vs. Attorney General and Others (1994)** (*1 SLR 01*) where although the Supreme Court was conscious of the difficulties in the proof of allegations of torture it was held that the treatment meted out did not amount to inhuman or degrading treatment and the lack of medical corroborating evidence was cited as grounds for so deciding.

Therefore, this Court finds that in the absence of conclusive medical evidence that indicate an infliction of torture, or cruel, inhuman or degrading treatment or punishment due to the injuries sustained being, most likely, caused by a fall rather than an assault [which is consistent with the medical evidence that indicate minor lacerations and a non-grievous injury], a declaration of the violation of Article 11 of the Constitution cannot be warranted as the fact of torture or any other form of treatment falling within Article 11 cannot be conclusively and strictly proven and the burden on the Petitioner has not been sufficiently discharged.

This Court's decision in declining to make a declaration of the violation of Article 11 due to insufficient medical [and other] evidence is consistent with domestic cases such as **Kapugeekiyana v Hettiarachchi (1984)** (*2 SLR 153*) and international

cases including **Grant v Jamaica (1994)** (*Communication No. 353/1988*) where the United Nations Human Rights Committee rejected the allegation of ill-treatment in the absence of supporting medical evidence, **Fillastre (On Behalf of Fillastre and Bizouarn) v Bolivia (1991)** (*Communication No. 336/1988*) and as well as **Soogrim v Trinidad and Tobago (1993)** (*Communication No. 362/1989*) mentioned above.

Furthermore, in **Tomasi v France (1992)** (*15 EHRR 1*), the Applicant claimed that he had been subjected to inhuman treatment while in Police custody and this alleged assault was corroborated by medical evidence leading to a declaration by the Court that the Applicant's rights had been violated. The Court also feels that the police has discharged the burden placed upon them to satisfactorily explain how the injuries were caused while the Petitioner was in their custody with supporting documents wherever necessary.

The next issue that requires the consideration of this Court is, whether there was a violation of the Fundamental Right guaranteed to the Petitioner by Article 13 of the Constitution. **Article 13 (1)** reads as follows:

"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 manner in which the arrest of a suspect can be made is indicated in the *Code of Criminal Procedure Act No. 15 of 1979* wherein **Section 32(1) (a)** and **32(1) (b)** reads that

Any peace officer may without an order from a Magistrate and without a warrant arrest-

- a) any person who in his presence commits any breach of the peace;*
- b) any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;*

Thus, this Court notes that **Section 32(1) (b)** has been adhered to as the Petitioner had been driving under the influence of alcohol, as confirmed by the Medico-Legal

Report of Tissamaharama marked “1R 7”, and was in possession of two packets of heroin thereby constituting *credible information being received* by the 1st and 2nd Respondent of the genuine commission of a cognizable offence.

In ascertaining, thus, whether the Petitioner was arrested in contravention to the above procedure of law, this Court makes reference to the Affidavits submitted by the 1st and 2nd Respondents as well as the Arrest Note marked “IR 6” which indicate that the Petitioner was informed that he was being arrested for the possession of heroin.

The Petitioner has disputed this assertion and also claimed that he was not in possession of heroin at the time of arrest but that it was produced with him before the Learned Magistrate as fabricated evidence. The Counsel for the Petitioner has further attempted to substantiate this claim by providing to this Court the Case Record bearing No. 85945 pending against the Petitioner in the Magistrate’s Court of Tissamaharama for possession of two packets of heroine, where the Petitioner was discharged in accordance with Section 188 of the Code of Criminal Procedure. However, this Court notes that a discharge does not amount to an acquittal as such an acquittal will only take place provided the discharge is consistent with **Section 188(3)** which reads:

“If the order of discharge referred to in subsection (2) has been made for the second time in respect of the same offence, such order of discharge shall amount to an acquittal.”

In light of the Petitioner not being acquitted but only discharged, as well as the statement made, signed and dated by him in the presence of the Police where he admits that he was in possession of two packets of heroin he had purchased them for a friend, the reliability of the Petitioner’s claim is in doubt.

Therefore, the Court sees sufficient cause to rely on the strength of the evidence provided by the 1st and 2nd Respondent i.e. the Arrest Note marked “IR 6” that clearly indicate the reasons for Arrest dated 29.12.2007 at 23.00 and determine that the 1st and 2nd Respondent have adhered to an established procedure of law and have informed the Petitioner the reasons for arrest at the time of arrest.

The credibility of the Petitioner has also been an issue raised in this Court. In considering this issue, the Court notes the admissions and clarifications made in the Petitioner's Counter Affidavit. The Petitioner insisted that he was taken to the Debarawewa Hospital subsequent to the assault whereas he later admitted to having been taken to the Police Station in Tissamaharama prior to obtaining treatment for the head injury. Further, the Petitioner asserted that he had one prior conviction only whereas, subsequently he admitted to four previous convictions relating to the possession of Cannabis and illegal liquor, records of which were marked "IR 1", "IR 2" and "IR 3" in evidence.

Therefore as the Petitioner has a history of substance abuse, and the police witnesses had not attended court due to being on special official duty the court does not see evidence of fabrication of evidence. The differing versions of events and the subsequent admissions made, cast serious doubt upon the credibility of the Petitioner in accepting these events as true and shows that he was a person who had earlier been convicted of substance abuse.

According to the reasons given above, this Court does not find a contravention of the fundamental rights guaranteed to the Petitioner by Articles 11 and 13(1). The application is dismissed. No costs.

Judge of the Supreme Court

Marsoof, PC, J.

I agree.

Judge of the Supreme Court

Sripavan, J.

I agree.

Judge of the Supreme Court