

**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,
13(1) and 17 of the Constitution
read together with Article 126 of
the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

SC/ FR Application 577/2010

Rathnayake Tharanga Lakmali
272/ A, Yapa 05, Moraketiya,
Embilipitiya.

(In respect of the infringement of the
fundamental rights of her husband
Ranamukage Ajith Prasanna who is
now deceased)

PETITIONER

Vs.

1. Niroshan Abeykoon
Inspector of Police
Officer-in-Charge
Crime Branch
Embilipitiya Police Station
Embilipitiya.

2. Suraweera Arachchige Wasantha
Suraweera, Police Sergeant 32215
Embilipitiya Police Station
Embilipitiya.
3. Police Constable 41953 Hewa
Sangappulige Chaminda
Embilipitiya Police Station
Embilipitiya.
4. Police Constable 20527
Pushpakumara
Embilipitiya Police Station
Embilipitiya.
5. Inspector of Police Peter
Embilipitiya Police Station
Embilipitiya.
6. Vijitha Kumara, Chief Inspector of
Police, Embilipitiya Headquarters
Police Station, Embilipitiya.
7. Ananda Samarasekera
Assistant Superintendent of Police
ASP's Office, Embilipitiya

8. Mahinda Balasooriya
Inspector General of Police
Police Headquarters, Colombo 01.

8A. Mr. Pujitha Jayasundara,
Inspector General of Police
Police Headquarters, Colombo 01

9. Dr. Uthpala Attygalle
Judicial Medical Officer
Embilipitiya (Discharged from the
proceedings)

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

RESPONDENTS

BEFORE : **L. T. B. DEHIDENIYA, J.,
MURDU N.B. FERNANDO, PC, J. AND
S. THURAIRAJA, PC, J.**

COUNSEL : Saliya Pieris, PC, with Lisitha Sachindra for the Petitioner
Dharmasiri Karunaratne for the 1st and 2nd Respondents
Ranjan Nayakaaratne with Kumar Gunatilaka for the 3rd and 4th
Respondents
Chrisanga Fernando, SC for the 5th, 6th, 7th, 8th and 10th
Respondents.

ARGUED ON : 28th August 2019 and
30th September 2019

WRITTEN SUBMISSIONS : Petitioner - 7th October 2019
1st and 2nd Respondents - 7th October 2019
3rd and 4th Respondents - 7th October 2019

DECIDED ON : 17th December 2019.

S. THURAIRAJA, PC, J.

This fundamental rights application was filed by the wife of the deceased, Rathnayake Tharanga Lakmali, on behalf of her husband Ranamukage Ajith Prasanna who died on the 18th of September 2010 in the custody of the Police. The Petitioner pleads that one or more or all of the Respondents and the State have infringed the Fundamental Rights of her husband guaranteed to him under **Article 11** and **13 (1)** of the Constitution.

When this matter was supported on the 25th of October 2010, this Court, upon an application made by the Petitioner, ordered that the body of the deceased be exhumed and be sent to the Judicial Medical Officer (JMO) of the Karapitiya Teaching Hospital to conduct a fresh Post Mortem Examination. On the 5th of May 2011, Court granted leave to proceed for alleged violation of fundamental rights guaranteed under **Articles 11** and **13 (1)** of the Constitution. On the same day, the learned Counsel for the petitioner moved to amend the caption excluding the 9th Respondent from the case. Of consent, the 9th Respondent was discharged from the proceedings. On the 22nd of September 2011, the Attorney General informed that he will only be appearing for the 5th, 6th, 7th, 8th and 10th Respondents and that he will not be appearing for the 1st to the 4th Respondents. The 1st, 2nd, 3rd and 4th Respondents were represented by their own Counsels.

According to the Petitioner, on the 16th of September 2010, when she was at home with her husband and children, a team of police officers including the 1st

Respondent, Inspector of Police (IP) Niroshan Abeykoon - Officer-in-Charge of the Crime Branch of the Embilipitiya Police Station had come to their house. They had searched the house and nothing was found. Subsequently, they had arrested the deceased and taken him away in a vehicle. When the Petitioner pleaded for the reason, the 1st Respondent had told her that they were taking him to record a statement.

On the following day, i.e. the 17th of September 2010, the Petitioner had gone to the Police Station of Embilipitiya to visit the deceased. However, she had not been permitted to see him. On the 18th September 2010, the Petitioner had once again gone to the Police Station. There she was informed that the deceased had been taken to her house. When the Petitioner returned home, she had been informed by her mother that a police team including the 1st Respondent had brought the deceased and shown him to them. When the child had cried, the deceased had said, *"Don't come to see your father. You won't be allowed to see your father."* ("අප්පච්චිව බලන්න එන්න එපා, අප්පච්චිව බලන්න දෙන්නේ නැහැ.")

The Petitioner's aunt – Hewavithirana Neetha Samanthika had also been present when the deceased was brought home at around 12 noon on the 18th September 2010. The aunt claims that the police officers had not allowed the deceased to speak to them. At one point, the 1st Respondent had stated *"Are you making lunch? You can have your last meal today."* ("භා උඹලා උයනවා නේද? අද උඹට අන්නිම කෑම කාලා යන්න පුළුවන්.") The deceased had been allowed to have his meal. The aunt of the Petitioner had fed the deceased while he was handcuffed. At the time, the deceased had said

"Aunt I cannot eat. Food is not going below the throat. Aunt, they have assaulted me a lot. It's very painful, they will kill me. Save me." ("අනේ නැන්දේ මට කන්න බෑ. කෑම උගුරෙන් පල්ලෙහට යන්නේ නෑ, නැන්දේ මට ගොඩක් ගහල තියෙන්නේ. මට හොඳටම අමාරුයි, මාව මරයි, මාව බේරගන්න.")

The Petitioner further submits that the Police Officers who accompanied the deceased had searched the house but had found nothing.

On the 19th of September 2010, the Petitioner had been informed by the elder brother of the deceased that the deceased was shot and taken to the Embilipitiya Hospital. The Petitioner together with her mother and aunt had gone to the police station but they had been chased away by the Police Officers who had told them *"Don't try to come and cry here. Go away from here."* (මෙතන ඇවිල්ල කැගහන්න ලැස්ති වෙන්න එපා. මෙතනින් පලයල්ලා.) At the Embilipitiya Hospital, she had been informed that the 3rd Respondent had shot her husband.

The Petitioner had identified the body at the morgue in the presence of the learned Magistrate. Initially, the Petitioner and her family had refused to accept the body because the deceased had died while he was in police custody. An inquest was held on the 20th of September 2010. The Post-Mortem Examination (PME) was held on the 21st of September. The Petitioner claims that her statements were recorded prior to the PME and that she had not been allowed to be present at the time of the PME.

Briefly, the Petitioner claims that her husband was arrested, taken away from her house illegally and killed by the police officers which violated his Fundamental Rights enshrined by the Constitution under Articles 11 and 13 (1).

The Respondents have raised a preliminary objection based on non-compliance by the Petitioner of **45 (3)** of the Supreme Court Rules. The Petitioner explains that they have tendered several due notices to the Attorney-General who appeared initially and the delay in tendering notices on the second time arose from the confusion that resulted from the change in counsels for the 1st to the 4th Respondents. I find that the reason for the delay has been adequately explained. In any event, no prejudice has been caused to the Respondents by the same. Hence, the Preliminary Objection is overruled.

The Petitioner averred that

- (a) the deceased has been arrested on false charges without any credible material and without reasons being given for the arrest,
- (b) the deceased has been detained in custody without adherence to procedure established by law and without any justification,
- (c) the deceased has been subject to torture, cruel, inhuman degrading treatment and punishment by being assaulted,
- (d) the deceased has been killed by the police whilst he was in the custody of the 1st to 4th Respondents who have thereafter fabricated a version to justify the killing.

The Respondents submit that the deceased was arrested on the 17th of September 2010 based on credible evidence that he was involved in the unsolved murder of Kanakanamge Ananda Sunil Shantha committed in the Embilipitiya area. Respondents claim that live ammunitions were recovered at the house of the deceased at the time of the arrest. Property receipts and the police information book entry regarding the seized goods have been submitted to this Court. However, a perusal of the entry reveals that the goods which were seized have not been properly sealed. The Respondents submit further that facts were reported to the Magistrate of Embilipitiya through the Assistant Superintendent of Police (ASP) i.e. the 7th Respondent and a detention order was obtained (marked 6R1). Hence, they claim that the deceased was arrested and detained properly.

Both parties relied on the inquest proceedings submitted to this Court which has been marked as **P5**.

Hewavithiranage Neetha Samanthika, the Petitioner's aunt gave evidence at the inquest. She related the incident and informed the Magistrate "මෙම මරණය පොලීසිය විසින් හිතාමතාම සැලසුම් සහගතව කරන ලද මරණයක් බවට කියලා මට සැක හිතෙනවා." (I suspect that this was a planned killing by the police). She further stated that when he was brought home on the previous day, he was pale and his face was

swollen. The mother of the deceased, Balagamage Pemawathie gave evidence at the inquest on the 28th of September 2010 and informed the learned Magistrate that the deceased was brought handcuffed on the 18th at around 12.30 pm by a team of police officers containing 12 personnel. She submitted that the deceased had told her that he would be killed, “අම්මේ මාව මරනවා කියලා කීවා”. Hewayaddehiyage Priyantha Kumara, nephew of the deceased at the inquest, stated that the deceased was brought home on the 18th around noon and that he was handcuffed. Rathnayake Tharanga Lakmali, wife of the deceased (i.e. the Petitioner) also gave evidence and submitted to the magistrate that her husband was killed by the Police.

Upon the conclusion of the inquest proceedings, before the Order was made, the Petitioner made an application before the learned Magistrate requesting that a JMO other than the JMO in Embilipitiya be directed to conduct the Post-Mortem Examination as she could not expect an accurate report from the latter. However, the learned Magistrate disallowed the application. Further the learned Magistrate made order and found that the deceased’s death was caused by the discharge of a bullet from a firearm and referred the matter to the Attorney-General.

When this application was supported for interim relief, the Petitioner made an application to direct the learned Magistrate of Embilipitiya to exhume the body of the deceased and to conduct a fresh Post-Mortem Examination by a competent JMO of Colombo or Karapitiya Teaching Hospital, Galle. This Court, after hearing submissions of both parties directed the JMO of the Karapitiya Teaching Hospital, Galle to conduct a second Post-Mortem Report and the Post-Mortem Report is available on record.

The Respondents claim that the deceased was not subject to any torture, cruel, inhuman or degrading treatment. In support of this claim, the Respondents relied on the second PMR dated 7th July 2011 issued by the JMO of the Karapitiya Teaching Hospital, Galle. The Respondents have not submitted the initial PMR issued

by the JMO of Embilipitiya. The statement of the JMO (Embilipitiya) which was recorded in the Grave Crimes Information Book is the only document available before us. The JMO of Embilipitiya has stated that no injuries could be seen on the body of the deceased. However, the subsequent PMR reveals that the middle and distal phalanxes of the left 2nd to 4th fingers were contused and hemorrhagic. The report indicates that the injuries in the left hand are of ante-mortem nature and due to application of blunt force, approximately 1 – 2 days old. Hence, it seems that the injuries to the left hand were retained when the deceased was in the Respondent's custody. The Respondents have failed to adequately explain how the ante-mortem injuries occurred on the deceased while he was under custody.

The Petitioner submits that the deceased was shot and killed while he was in police custody. The 1st, 2nd, 3rd and 4th Respondents claim that it was an accidental death and justified by law. Respondents submit that on the 18th of September 2010, the deceased was taken out of the police station at night to recover a weapon hidden in the deceased's plantain grove. They claim that on the way, the deceased had struggled with the 3rd Respondent to snatch his rifle and he was killed as a result of a single shot that went off during the struggle. It is noted that the deceased was taken out several times on the 17th and 18th of September. However, apart from the entry note that was entered on the day of the arrest, the Respondents have not submitted any notes entered in the Police information books pertaining to the deceased being taken out of the detention cell and police station.

It is a fact that the deceased was in the custody of the Police at the time of his death. According to the second PMR, the death of the deceased was caused by necessarily fatal injuries to the neck and head due to the discharge of a rifled firearm at a contact range. It is an admitted fact that the bullet was discharged from a T56 rifle in the possession of the 3rd Respondent.

The 3rd Respondent claims that he was injured during the struggle with the deceased. The Medico-Legal Examination Form (MLEF) submitted to Court

consists of a small signature initialing on three checkboxes, namely abrasion, blunt and non-grievous, with the reason for examination being “පහර දීමෙන් කුඩාල” and the conclusive remark being ‘assault’. The MLEF was issued on the 18th of September 2010 and submitted to this Court on the 6th of January 2012. No detailed Medico-legal report has been tendered before this Court up to date. Further, there is no patient history recorded in the said MLEF.

According to the material submitted to the Court, it is evident that the Respondents had information to the effect that the deceased was a person from the underworld and was involved in contract killings. It is revealed that he was so dangerous and was kept under special custody. Moreover, on the 17th and 18th noon, the deceased was transported under heavy guard. In light of the aforesaid circumstances, the 1st Respondent has failed to satisfactorily explain why the deceased was taken out at night without handcuffs with only 3 officers and the driver, in a faulty van without a door. **Section 8 (b) of the Police Department Standing Order A20 (Rules with regard to Persons in Custody of the Police)** requires police officers to provide sufficient security where there is a possibility that the suspect might escape or become hostile. **Section 8(I)** stipulates that

‘A person in Police custody will not be sent out for further inquiry from the Station except for some very good reason and then only under an escort sufficient to ensure his safe custody.’

It is evident that the 1st to the 4th Respondents have acted in complete disregard of the said standing orders.

The 1st to the 4th Respondents in their affidavits submit that the deceased had been providing overwhelming information regarding persons involved in underworld activities. 1st to the 4th Respondents indicated that therefore, the death of the deceased had caused loss of a person who could have given important information which would have led to the arrest of other culprits residing in the area. The Respondents relied on the inquest proceedings submitted to this Court. In the said

proceedings, on the 20th of September at page number 12, the 1st Respondent states as evidence, “මෙම සැකකරු මිය යාම නිසා අපරාද රැසක් විසඳ ගැනීමට හැකි උනා” (Many crimes were resolved as a result of the death of the suspect). The statement has not been corrected by either party. Therefore, this also receives our attention.

As described by the Police, the deceased would have been a person involved in grave crimes. If so, the Respondents should have been more careful in handling him. The Respondents have not explained why they allowed a person allegedly involved in criminal activities with the knowledge of handling of firearms, to be without handcuffs close to a police officer with a readily loaded and unprotected (unlocked) weapon. In these circumstances, I find the Respondents’ submissions to be highly untenable.

The 5th Respondent, the Inspector of Police of the Embilipitiya Police Station, submits that he was on special duty at the Rathnapura Saman Devalaya on the 18th of September 2010 (i.e. the day of the deceased’s death). He submits further that he filed a B Report under the case bearing number BR 1233/10 on the instructions of the Headquarters Inspector (i.e. the 6th Respondent) on the 19th of September 2010. The 6th Respondent in his affidavit affirms that a B report under his hand was filed on the 19th of September 2010.

No submissions have been made by the 7th and 8A Respondents, i.e. the Assistant Superintendent of Police, Ananda Samarasekara and the Inspector General of Police, Pujitha Jayasundera. However, a detention order (marked **6R1**) obtained by the 7th Respondent is available on record. It is evident from the detention order that although the Police had physical custody, the deceased was under the custody of the judiciary. Hence, the 7th Respondent is responsible and answerable to Courts. In the absence of any material regarding the steps taken by the 7th Respondent, I find that he has failed to fulfil his responsibility.

The Respondents have relied on Justice Weeraratne’s observation in ***Jeganathan v. Attorney General*** [1982 1 Sri LR 294]

"The petitioners' allegations against the 4th and 5th respondents if proved will carry with them serious consequences for these respondents. Furthermore, the allegations are of a very serious nature. They must therefore be strictly proved. This degree of cogency is seriously lacking in these proceedings which must fail"

To support the proposition that allegations of torture and extra-judicial killing which are of a very serious nature, must be strictly proved. In ***Jeganathan v. Attorney General***, the petitioner, a detainee at the Panagoda Army Cantonment under the Prevention of Terrorism (Temporary Provisions) Act, had failed to refer to any witnesses in his petition and affidavit to support the allegation that he was tortured. Moreover, in ***Jeganathan***, although a motion was initially filed in the Court of Appeal to get the petitioner examined by a JMO, the said application had not been supported even though five lawyers had had access to the petitioner on the day of the alleged torture. However, in the instant case, to substantiate her claim, the Petitioner has submitted affidavit evidence and the PMR issued by the JMO Karapitiya which states that *"The injuries in the left hand are of ante-mortem nature and due to application of the blunt force, approximately and 1 – 2 days old."* Hence, the Respondents cannot rely on ***Jeganathan v. Attorney General***.

Our legal system provides for investigation, inquiry, trial and punishment by proper authorities which is the base of democracy and the Rule of Law. As per **Article 13 (4)** of the Constitution, *no person shall be punished with death or imprisonment except by order of a competent court.* Hence, even a convicted criminal has a right not to be arbitrarily deprived of his life except in accordance with procedure established by law. As was observed by Justice White for the U.S. Supreme Court in ***Wolff v. McDonnell [418 US 539, 555-6 (1974)]***

*"[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. **There is no iron curtain drawn between the Constitution and the prisons...**"* (Emphasis Added)

The Fundamental Rights Chapter in our Constitution does not expressly refer to a right to life. However, the Constitution, as a living document, should not be construed in a narrow and pedantic sense. I am of the view that constitutional interpretation should be informed by the values embodied in it. The preamble/ svasti of the Constitution recognises **Dignity and Well-being of the People** as a fundamental value that should be furthered by *assuring to all People FREEDOM, EQUALITY, JUSTICE , FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY*. In my view, recognition of a right to life is in furtherance of this fundamental value.

The conclusion that the right to life is implicitly recognised in Chapter III of the Constitution is reinforced by International Conventions ratified by Sri Lanka. **Article 27 (2) (15)** of the Directive Principles of State Policy mandates the State *to foster respect for international law and treaty obligations in dealings among nations*. Interpretation of fundamental rights enshrined in our Constitution in light of Sri Lanka's treaty obligations would thus be in furtherance of the aforesaid objective spelt out in the Chapter on Directive State Policies. Thus, Chapter III, particularly **Articles 11 and 13 (4)**, when read in light of Article 3 of the Universal Declaration of Human Rights, Article 6 of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, Article 11 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and Article 10 of the Convention on the Rights of Persons with Disabilities affirm the Right to Life.

I am in agreement with the sentiments expressed by Justice Mark Fernando with Yapa J and J. A. N. De Silva J agreeing in ***Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Paiyagala and Others*** ([2003] 2 Sri LR 6 at page 76 - 77). An extract of the case is reproduced below.

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) provides that no person shall be punished with death or imprisonment except by order of a competent court. 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. (There are other exceptions as well, such as the exercise of the right of private defence.) Expressed positively, that provision means that a person has a right to live, unless a court orders otherwise. Thus Article 13(4), by necessary implication, recognises that a person has a right to life – at least in the sense of mere existence, as distinct from the quality of life - which he can be deprived of only under a court order. If, therefore, without his consent or against his will, a person is put to death, unlawfully and otherwise than under a court order, clearly his right under Article 13(4) has been infringed.

Article 11 guarantees freedom from torture and from cruel and inhuman treatment or punishment. Unlawfully to deprive a person of life, without his consent or against his will, would certainly be inhumane treatment, for life is an essential pre-condition for being human.

I hold that Article 11 (read with Article 13(4)), recognises a right not to deprive life whether by way of punishment or otherwise and by necessary implication, recognises a right to life. That right must be interpreted broadly, and the jurisdiction conferred by the Constitution on this Court for the sole purpose of protecting fundamental rights against executive action must be deemed to have conferred all that is reasonably necessary for this Court to protect those rights effectively (cf. Article 118(b)).

(Emphasis added)

Considering all material available before us, I am of the view that the Fundamental Rights enshrined in the Constitution, particularly **Articles 11** and **13** have been violated by the Respondents. I specifically find the 1st, 2nd, 3rd and 4th

Respondents individually liable for the violation and I direct them to pay Rs. 250,000/- each individually from their personal resources to the Petitioner.

The available material does not reveal that the 5th, 6th and 7th Respondents have fulfilled their responsibilities. Hence, I find them responsible for the violation and order them to pay Rs. 25,000 each from their personal funds to the Petitioner.

It is the State's responsibility to protect every citizen of this country. In the instant case, I find that the State has failed its responsibility and has violated the Fundamental Rights of the deceased. Hence, I order the State to pay Rs. 1 million as compensation to the petitioner, i.e. wife of the deceased, Rathnayake Tharanga Lakmali.

Application allowed.

JUDGE OF THE SUPREME COURT

L. T. B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT