

**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.***

**Case no.SC/FR/157/2014**

**Case no.SC/FR/182/2014**

**Case no.SC/FR/183/2014**

**Case no.SC/FR/184/2014**

**Case no.SC/FR/185/2014**

1. Kanda Udage Malika  
Kosmo Farm, Akurukaduwa,  
Meegahakiwula.

**PETITIONER**

**VS.**

1. D.M. Aberathna  
Police Constable,  
Kandaketiya Police station,  
Kandaketiya.

2. D.P.K. Gamage,  
Police Constable,  
Kandaketiya Police station,  
Kandaketiya.

3. S.M.R.P. Kumara  
Police Constable,  
Kandaketiya Police station,  
Kandaketiya.

4. S.J.M. Jayasundara  
Civil Defence Force,  
Attach to the Kandaketiya Police station,  
Kandaketiya.
5. D.M. Wijerathna  
Reserve Staff attach to the Kandaketiya,  
Police station,  
Kandaketiya.
6. R.P. Somarathne  
Sub Inspector,  
Kandaketiya Police station,  
Kandaketiya.
7. Officer in Charge  
Kandaketiya Police station,  
Kandaketiya.
8. Dr. Jagath Perera  
District Medical Officer,  
Meegahakiwula  
Government Hospital,  
Meegahakiwula.
9. Senior Superintendent of Police (SSP)  
Badulla Range,  
Badulla.

10. Deputy Inspector General of Police

Badulla Range,

Badulla.

11. Superintendent of Prison

Badulla Prison,

Badulla.

12. Commissioner of Prison

Prison Department,

Welikada.

13. Mr. Pujith Jayasundara

Inspector General of Police,

Police head Quarters,

Colombo 01.

14. Hon. Attorney General

Attorney-General's Department,

Hultfsdorp,

Colombo 12.

#### **RESPONDENTS**

**BEFORE** : **SISIRA J. DE ABREW, J.**  
**MURDU N. B. FERNANDO, PC, J. AND**  
**S. THURAIRAJA, PC, J.**

**COUNSEL** : Mr. Lakshan Dias with Ms. Shafnas Shamdeen for the Petitioner

Mr. Pradeep Fernando for 1<sup>st</sup> to 3<sup>rd</sup> and 5<sup>th</sup> and 6<sup>th</sup> Respondents  
Mr. Madhawa Tennakoon SSC with Mr. Thivanka Attygalle SC for  
the 14<sup>th</sup> Respondent.

**WRITTEN SUBMISSIONS:** Petitioner on 18<sup>th</sup> September 2020.

14<sup>th</sup> Respondent on 21<sup>st</sup> September 2020.

**ARGUED ON** : 22<sup>nd</sup> September 2020

**DECIDED ON** : 21<sup>st</sup> May 2021

**S. THURAIRAJA, PC, J.**

#### **The Parties in Case no.SC/FR/157/2014**

The **Petitioner**; Kanda Udage Malika, is petitioning on behalf of his 17-year-old deceased son (a child), P.H. Sandun Malinga (Herein after sometimes referred to as the deceased) who was deceased in the custody of the Police.

The **1<sup>st</sup> Respondent**; D.M. Aberathna, **2<sup>nd</sup> Respondent**; D.P.K Gamage and **3<sup>rd</sup> Respondent**; S.M.R.P. Kumara are Police Constables in the Kandaketiya Police station and the **4<sup>th</sup> Respondent**; S.J.M. Jayasundara is in the Civil Defence Force, attached to the Kandaketiya Police station. The 1<sup>st</sup> – 4<sup>th</sup> Respondents are alleged to have directly violated the Fundamental Rights of the deceased while the **5<sup>th</sup> Respondent**; D.M. Wijeratna who belongs to the Reserve Staff attached to the Kandaketiya Police station, the **6<sup>th</sup> Respondent**; R. P. Somarathne Sub Inspector, Kandaketiya Police station along with **7<sup>th</sup> Respondent**; the Officer in Charge of the Kandaketiya Police station, the **8<sup>th</sup> Respondent**; Dr. Jagath Perera, the District Medical Officer of Meegahakiwula, the **9<sup>th</sup> Respondent**; Senior Superintendent of Police of Badulla, **10<sup>th</sup> Respondent**; Deputy Inspector General of Police of Badulla, **11<sup>th</sup> Respondent**; Superintendent of Prison of

the Badulla Prison, **12<sup>th</sup> Respondent**; the Commissioner of Prison, Welikada and **13<sup>th</sup> Respondent**; Mr. Pujith Jayasundara the Inspector General of the Police are alleged to have indirectly contributed to the said violation being authorities under whose guidance and/or assistance the said individuals acted, while the **14<sup>th</sup> Respondent** is the Hon. Attorney General.

The Petitioner instituted legal action in the Supreme Court under Article 126 of the Constitution of Sri Lanka against the 1<sup>st</sup> -14<sup>th</sup> Respondents on the 5<sup>th</sup> of June 2014 for the violation of the Fundamental Rights of the deceased guaranteed by Articles 11, 12(1),13(1),13(2), 13(3), 13(4) of the Constitution.

On the 3<sup>rd</sup> of March 2015 the Supreme Court granted leave to proceed for the alleged violation of the Fundamental Rights of the deceased guaranteed under **Article 11** of the Constitution against 1 – 6<sup>th</sup> Respondents and under **Articles 12(1), 13(1) and 13(2)** of the Constitution against the 1<sup>st</sup> – 14<sup>th</sup> Respondents.

It is pertinent to note that the instant case of **SC/FR/157/2014** was taken together with cases **SC/FR/182/2014, SC/FR/183/2014, SC/FR/184/2014, SC/FR/185/2014** with the agreement of the parties as the impugned conduct in all the applications is the same. The Petitioners in the above cases are the relatives of the deceased who accompanied him and who were further subject to assault by the errant police officers.

The Petitioners in particular are, in SC/FR/182/2014; Gamini Hewanayake 42 year old brother-in-law of the Petitioner to the current case and the uncle of the deceased, SC/FR/183/2014 Peruma Hewa Kasun Wiraj Madumadawa 20 year old elder son of the Petitioner to the current case and the brother of the deceased, in SC/FR/184/2014 R. A. Wijeratne a 42 year old friend of the brother-in-law of the Petitioner to the instant case and SC/FR/185/2014 Kanda Uda Kularathne 56 year old brother of the Petitioner to the current case and the uncle of the deceased. The Respondents in all the above cases are the 1<sup>st</sup> - 14<sup>th</sup> Respondents to the current case.

Accordingly, the following judgement shall bind the parties to the current case and the aforementioned cases.

### **The Facts**

The facts of the case as per the documents submitted before this Court are as follows,

On the 7<sup>th</sup> of May 2014 at around 5.30 pm the deceased along with his brother; Peruma Hewa Kasun Wiraj Madumadawa, two uncles; Gamini Hewanayake and Kanda Uda Kularathne and a friend of his uncle; R. A. Wijeratne who are the Petitioners of the aforementioned cases (herein after referred to as other Petitioners) had left to Katawatte with the intention of purchasing a three-wheeler.

The deceased was given Rs. 75,000/- by his father for the purchase of the said three-wheeler. Once the deceased and other Petitioners reached Katawatte they were further directed by the seller to the School in Bogahatenna.

In the meantime, the Kandaketiya Police had received a 119 message (Police Emergency contact) at 8.55 pm indicating that seven persons had entered the Bogahatenna forest reserve at Katawatte and were engaged in treasure hunting.

As per the instructions of the 7<sup>th</sup> Respondent, the 6<sup>th</sup> Respondent had proceeded to the reported area with 1<sup>st</sup> – 5<sup>th</sup> Respondents at 9.00 pm and had arrived at the location passed 9.45 pm.

According to the other Petitioners, when they reached the school, a group of police officers had walked towards the deceased and the other Petitioners and had surrounded them. The 6<sup>th</sup> Respondent had inquired whether they had been treasure hunting and had proceeded to beat them.

Even though the brother of the deceased stated that they did not come treasure hunting but to purchase a three-wheeler, the police officers have continued to attack them. During this time the 4<sup>th</sup> Respondent had advised the 6<sup>th</sup> Respondent as follows,

‘මුඛ බෝම්බ 5ක් දාලා ඇතුළට දාමු’

(Let's introduce 5 bombs and arrest them)

rather than attacking them at the time.

However, the 6<sup>th</sup> Respondent who decided to ignore the same had continued to assault the deceased and the other Petitioners. It is stated that the Respondents attacked the deceased and the other Petitioners using their arms, legs and even a baton.

The 6<sup>th</sup> Respondent had then instructed to bring the Police jeep to the location.

After sending the four other Petitioners to the Jeep, the 1<sup>st</sup> - 6<sup>th</sup> Respondents had continued to attack the deceased. When the brother of the deceased tried to escape from the jeep, not being able to bear the attacks against his brother, he had been hit in the ear and locked inside the jeep.

The 1<sup>st</sup> – 6<sup>th</sup> Respondents had then proceeded to take the deceased to a green path and brought him back 45 minutes later and has put him to the jeep. The other Petitioners state that the deceased had wept and complained stating that the 1<sup>st</sup> – 6<sup>th</sup> Respondents had attacked him while accusing him of treasure hunting.

Further, the 6<sup>th</sup> Respondent had stated,

‘ උඹලට මරණ එක මහ කප්පක් නෙමේ’

(Killing all of you is not a big deal)

and has proceeded to take them to the police station. The 6<sup>th</sup> Respondent while pointing at one of his scars had stated that he got the same during a mission to capture ‘Army Suranga’ and that he will provide the same fate as of ‘Army Suranga’ to the deceased and the other Petitioners.

The 1<sup>st</sup> – 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents in their statement of objections state that at their time of arrival to the scene, there was a commotion taking place between the

parties and the said Respondents only used minimum force to separate them and had questioned them later.

However, as per the Post-Mortem Report (PMR) of the deceased, the deceased had several injuries including **blunt forced head and chest injuries involving the brain, heart and Lungs** (*sic*). As per this evidence it is clear that the injuries were not due to a 'commotion' or a result of the use of 'minimal force' but due to heavy attacks possibly as described by the Petitioner.

Other Petitioners claim that the police officers had also taken their wallets.

Once the deceased and the other Petitioners were taken to the Police station, they were forced by the 6<sup>th</sup> Respondent to sign a document after which they were put in the cell in the Police station. Further he had mentioned to the uncle of the deceased (Petitioner in case application no. 185/2014) that he will not free him for a year as he was acting as if he didn't care much about the situation.

The Petitioner claims that once she was made known of the arrest of the deceased and other Petitioners by a known person, she visited them in the police cell at around 2.30 am of 8<sup>th</sup> May 2014.

At that time the deceased had complained of chest pains and requested the Petitioner to rub his chest. When she requested the reserve police officer to admit him to the hospital as she realised that he was in critical condition the officer had informed that nothing could be done as there were no officers at the station and ordered them to come later in the morning.

When the Petitioner arrived at the police station at around 7.30 am the deceased was in his worst condition, lying on the cold floor while crying. When the Petitioner rubbed his chest, she realised that the chest region was swollen.

When the Petitioner requested the 6<sup>th</sup> Respondent to take the deceased to the hospital, he had yelled at the Petitioner stating,

' කෑ ගහන්නේ නැතුව පලයව්, අපි මුන්ව ඉස්පිරිකාලේ ගෙනියන්න තමයි හදන්නේ '

(Get out without shouting, we are going to take them to the hospital)

At around 8.30 am the deceased along with the other Petitioners were taken to the Meegahakiwula District Medical Officer (DMO), who is the 8<sup>th</sup> Respondent to the case. Before producing them before the DMO, the 6<sup>th</sup> Respondent has had a private conversation with him for about 30 minutes and then has proceeded to produce the deceased and the other Petitioners.

However, it was stated that the 8<sup>th</sup> Respondent had not inquired about any wounds/ assault of any of the parties produced.

The parties had been brought back to the Kandaketiya Police station and at about 12.45 pm they had been taken to the Magistrate Court of Passara.

In the meantime, the Petitioner had gone to the Magistrate Court of Badulla as she was informed that the deceased and the other Petitioners will be produced there. Since they were not present, she had then proceeded to the Kandaketiya Police station to inquire about the absence of the deceased and other Petitioners at the Magistrate Court of Badulla , where she was informed that they were being presented at the Magistrate Court of Passara. The Petitioner had then rushed to the Magistrate Court of Passara.

However, the 6<sup>th</sup> Respondent denies such communication regarding producing all suspects at the Magistrate Court of Baddula.

The case was heard in the Chamber of the Honourable Magistrate. The Respondent had submitted that the deceased and the other Petitioners had been arrested for treasure hunting. It was stated that, at the hearing the lawyer of the deceased and the other Petitioners were not given an opportunity to present their case but was constantly interrupted by the Respondents.

As per the request of the Respondents, the Magistrate had ordered the deceased and the other Petitioners to be remanded for a period of 14 days, till the archeological report of the site in which the deceased and the other Petitioners were arrested was prepared and presented.

Following the above order, the deceased and other Petitioners were taken to the Remand Prison of Badulla where the deceased and his elder brother (Petitioner in case no. 183/2014) had been kept separately from the other three Petitioners (Petitioners in case no.185/2014, 182/2014, 184/2014). The deceased and his elder brother had fallen asleep at around 8.30 pm. The brother of the deceased had woken up at around 5.30 am on the 9<sup>th</sup> of May 2014 to see the deceased panting and struggling for breath.

Once the brother of the deceased informed the above to the prison officers, they had then taken the deceased to the Badulla Hospital. The prison officers who returned from the hospital had informed that the deceased had passed away and has requested for the contact number of the Petitioner's husband.

Accordingly, following a phone call from the prison at around 8.30 am, the Petitioner together with her husband had arrived at the prison.

The brother of the deceased stated that a report was taken from him regarding the death of the deceased. The other Petitioners had then been taken to the Judicial Medical Officer (JMO) who examined the wounds and made note of the same.

The brother of the deceased was then taken to identify the body of the deceased and taken back to the Police station while the other Petitioners were taken to the Mental Health Unit. He was later taken to the Mental Health Unit on the 29<sup>th</sup> of May 2014.

The other Petitioners including the elder son of the Petitioner were remanded till the 30<sup>th</sup> of May 2014 and was released on the same date.

In the instant case, the mother of the deceased has come before this court seeking relief under **Article 126** of the Constitution for the rights of his deceased son, guaranteed under **Articles 11, 12(1), 13(1) and 13(2)**.

### **The Violation of Fundamental Rights**

Article 17 of the Constitution provides for remedial action for breach of Fundamental Rights subject to the Article 126 which provides for the jurisdiction of the Supreme Court and its enforcement mechanism. As seen in previous cases such as **Sriyani Silva V. Iddamalgoda, Officer-in-Charge, Police Station Paiyagala and Others [2003] 1 SLR 63** this right is extended to any person with legitimate interest to prosecute. Accordingly, in the current circumstance the death of the deceased will not cease his right to take remedial actions, but the right will be extended to the Petitioner who is the mother of the deceased.

### **Alleged infringement of Article 11 of the Constitution**

Article 11 of the Constitution reads,

*"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"*

This Article in our Constitution is further in line with many International Conventions and Declarations of Human Rights such as Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights which prohibit torture, inhuman or degrading treatment and punishment.

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reads as follows,

*"Torture means any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining*

*from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, intimidating or coercing him or a third person, or any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"*

In assessing cases such as **Amarasinghe V. Seneviratne and Two Others [2010] 2 Sri LR 205, Bandula Samarasekera V. Vijitha Alwis, O.I.C., Ginigathhena [2009] 1 Sri LR 213, Channa Pieris and Others V. Attorney General and Others [1994] 1 SLR 1** it is evident that acts under Article 11 of the Constitution are broadly interpreted by this court to take many forms including both physical, psychological form.

However, in the current situation such distinction would not be necessary as there is clear evidence of physical torture.

In the instant case the burden is on the Petitioner to prove to the court on a preponderance of evidence with a high degree of certainty the violation of Fundamental Rights by the said Respondents.

As per Dr. Shiranee Bandaranayake J in **Bandula Samarasekera V. Vijitha Alwis (supra)**,

*"In order to establish alleged allegation of torture it would be necessary for an aggrieved party to corroborate his averments against the Respondents and for such corroboration it would be necessary to produce evidence including medical evidence".*

As per the petition and affidavits submitted before this court, while the deceased and other Petitioners were waiting for the seller of the three-wheeler, the 1<sup>st</sup> - 6<sup>th</sup> Respondents have reported to the area and severely assaulted the deceased and other Petitioners and further taken steps to separate the deceased from the group and

assault him for a period of 45 minutes. At the end of which, the deceased had been weeping and complaining of the assault by the 1<sup>st</sup>- 6<sup>th</sup> Respondents.

In the statement of objections, the 1<sup>st</sup>- 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents deny the above, stating that at the time of arrival to the scene, there was a commotion taking place between the parties and the said Respondents hence used **minimum force** to merely separate them.

I find this response to be rather unconvincing especially in light of the PMR of the deceased submitted to this court. The PMR lays down nine injuries (Ante mortem) including,

- i. A scalp contusion (4 x 5 cm – dark blue) with a deep haematoma of the back of the head
- ii. A contusion (10 x 13 cm – dark blue) on the chest
- iii. A graze (1 x 1.5 cm – brown scab+) with a deeper contusion (3.5 x 4 cm) on the left lower abdomen
- iv. A contusion (4.5 x 6 cm – dark blue) on the posterior aspect of the right shoulder
- v. A tramline contusion (2 x 21 cm – dark blue) on the posterior aspect of the trunk across the spine
- vi. A graze (0.5 x 1 – brown scab+) with a deep contusion (2.8 cm x 4.5 cm) on the right loin
- vii. A graze (4 x 10 cm – brown scab+) on the posterior aspect of the right elbow
- viii. A tramline contusion (2 x 8 cm dark blue) on the posterior aspect of the right thigh
- ix. Heavy blunt forces [ ii, iv & v above] have caused effect to lungs and heart

Could a 'commotion' between the deceased and the other Petitioners or 'minimum force' used by the said Respondents cause the aforementioned injuries leading to the death of the deceased? The answer to the above question is negative, as the explanation of the said Respondents do not justify the grave injuries set out above.

Further, even if the Respondents are to use minimum force this would not mean subjecting the person to torture or inhuman treatment. This is further supported by cases such as **Kumara V. Silva, Sub-Inspector of Police, Welipenna and Others [2006] 2 Sri LR 236** and **Amal Sudath Silva V. Kodituwakku [1987] 2 Sri LR 119**.

It is noteworthy to highlight the following statement of Atukorale, J. In **Amal Sudath Silva V. Kodituwakku [supra]**,

*"Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects helpless suspect in his charge to depraved and barbarous methods of treatment.... Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order "*

Therefore, as per the evidence submitted it is apparent that the deceased has been subject to torture or to cruel, inhuman or degrading treatment and accordingly the 1<sup>st</sup> -6<sup>th</sup> Respondents are in violation of Article 11 of Constitution.

### **Alleged Infringement of Article 13 (1) ,13 (2) of the Constitution**

Article 13 (1) of the Constitution reads,

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

As previously mentioned, in the case at hand the Kandaketiya Police had received a 119 message (Police Emergency contact) at 8.55 pm stating that seven persons have entered the Bogahatenna forest reserve at Katawatte and were engaged in treasure hunting. It was on this lead that the Police arrested the deceased and other Petitioners.

As per the 1<sup>st</sup>- 3<sup>rd</sup>,5<sup>th</sup> and 6<sup>th</sup> Respondents the reason for the arrest was their presence in the forest coupled up with the absence of a valid explanation, despite the other Petitioners stating their intention to purchase the three-wheeler. However, as

per the report presented by the Archeological Department, the area in question has no archeological value and no mining had taken place in the said area.

As per the above evidence the reason for the arrest in itself is an unjustified allegation. In addition to the reason for the arrest, the lawfulness of the manner in which the arrest was conducted is questionable. As discussed under Article 11, When the deceased and the Petitioners were brought to the Police station they were severely injured, with the deceased more so injured than the others.

Further, according to the statements of the other Petitioners the 6<sup>th</sup> Respondent had continuously intimidated and caused fear of injury during and after the arrest. Such conduct by the said Respondents only prove the lack of ethical and moral value which should be instilled in such peace keeping officers. As highlighted by Dr. Shirani Bandaranayake in **Bandula Samarasekera V. Vijitha Alwis** (*supra*),

*'... it would be necessary to have the trust and respect of the public. It is not easy to command that from the public and in order to earn such trust and respect, the police' officers must possess a higher standard of moral and ethical values than that is expected from an average person. '*

Accordingly, it is acts such as this that depreciate the title of police officers in the minds of the public. And considering all the above factors it is evident that the 1<sup>st</sup> - 6<sup>th</sup> Respondents have violated Article 13 (1) in the process of the arrest.

Further, as per **Article 13 (2)** of the Constitution,

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

Procedure established by law in the current circumstance would be Sections 65 of the Police Ordinance No. 16 of 1865.

*'Every person taken into custody by any police officer without warrant (except persons detained for the mere purpose of ascertaining their name and residence) shall forthwith be delivered into the custody of the officer in charge of a station in order that such person **may be secured until he can be brought before a Magistrate** to be dealt with according to law, or may give bail for his appearance before a Magistrate, if the officer in charge shall deem it prudent to take bail as hereinafter mentioned:*

*Provided always that where bail is not taken, the prisoner shall be brought before a Magistrate within twenty-four hours, unless circumstances render delay unavoidable.'* *(Emphasis Added)*

In the case at hand the deceased and the Petitioners were brought to the Kandaketiya police station late night on the 07<sup>th</sup> of May 2014 and was taken to the Magistrate Court of Passara on the 8<sup>th</sup> of May 2014 at around 12.45 pm. Accordingly, the deceased and the Petitioners were presented to the magistrate within 24 hours of the arrest.

However, it is the duty of the officers to **secure** the person till he/she is been presented to the Magistrate. Securing would mean, not the mere ensuring of the detainment of the person but also ensuring the person is in good health and free from unlawful actions.

As per the Petitioner when she reached the Kandaketiya police early morning on the 8<sup>th</sup> of May, her son had a severe chest pain following the assault by the 1<sup>st</sup> – 6<sup>th</sup> Respondents. The Petitioner had then requested the reserve officer to admit him to the hospital. However, he had stated that nothing could be done as there were no one else at the station and to come in the morning.

The deceased was not taken to the hospital even by 7.30 am, but after the request of the Petitioner they were taken to the DMO at around 8.30 am. The Petitioners further claim that the DMO who is the 8<sup>th</sup> Respondent to the case, did not inquire about any assault or apparent wounds but had merely inquired about their names and marital statuses and had proceeded to fill the requisite documentation. Accordingly, it is observed that the 8<sup>th</sup> Respondent had not fulfilled his obligation to the best of his ability as he should have given more attention to the health of the deceased and the other Petitioners.

After being presented to the Magistrate the deceased and the Petitioners were then admitted to the Badulla remand prison in the evening of the same day.

According to the Petitioners, the deceased and the other Petitioners had informed the Respondents of the Badulla remand police about the assault, however, the 1<sup>st</sup>- 3<sup>rd</sup> and 5<sup>th</sup> and 6<sup>th</sup> Respondents deny the same and state that, had they been informed they would have taken steps to present the Petitioners to the medical authorities.

However, the question I encounter is even if the Petitioners had not informed the Respondents, whether the injuries were not apparent to the said officers. When the Petitioners were in custody of the Kandaketiya police station the injuries of the deceased were said to be very severe and even the Respondents seemed to have noticed the same as the deceased and other Petitioners were presented to the DMO (even though this was after the request made by the Petitioner). Further as per the PMR there were visible injuries on the deceased. Accordingly, by this observation did the Police officers at the time not recognize their duty to present the deceased to medical attention?

In light of the above facts, I must also note the claim made by the Petitioners stating that the Magistrate did not provide the lawyer of the Petitioner to present her case as she had been constantly interrupted by the Respondents. Following which the Magistrate in the case had proceeded to remand the deceased and the other

Petitioners for 14 days. As per the records brought before this court it is evident that the deceased and the Petitioners indeed were innocent and were not in good health following the torture inflicted. Accordingly, I observe that the Magistrate in the case should have exercised his/her due diligence in order to approach the situation in a better manner.

In considering the provision on Health of Prisoners under the Prisons Ordinance no. 16 of 1877, Section 66 reads,

*' The names of prisoners desiring to see the medical officer **or appearing out of health in mind or body** shall be reported by the officer attending them to the jailer; and the jailer **shall without delay** call the attention of the medical officer to any prisoner desiring to see him, who is ill, whose state of mind or body appears to require attention and shall carry into effect the medical officer's written recommendations respecting alterations of the discipline or treatment of such prisoner'.*

*(Emphasis Added)*

Accordingly, the section states **'prisoners desiring medical attention or appearing out of health in mind or body shall be reported.'** In the current case considering the severity of the injuries, the Respondents too had this duty. Even if the Petitioners did not request such attention the Respondents had a duty to do the same.

Further Section 43 of the Prisons Ordinance reads,

*'Every criminal prisoner shall also, as soon as convenient after admission, be examined by the medical officer who shall into a book to be kept by the jailer a record of the state of the prisoner's health and any observations which the medical officer thinks fit to add.'*

Accordingly, the prison officers have a mandatory obligation to examine the prisoners as soon as convenient. In observing the phrase 'as soon as convenient' we will look at the circumstance surrounding the incident. Considering that the deceased

was subject to significant assault and there were apparent wounds on the deceased the prison officers had an obligation to refer the deceased to medical attention immediately after admission. Especially considering that the Provincial General Hospital in Badulla is in close proximity to the Badulla Prison, external or inhouse medical attention could have been provided.

As per the records submitted to the court the deceased and other Petitioners were admitted to the Badulla remand prison in the evening of 8<sup>th</sup> of May 2014. On the following day at 5.30 am the deceased was said to be in very critical condition, however the deceased was taken to the hospital only after the brother of the deceased had screamed for help. As per the PMR the death has occurred at 6.00 am on the 9<sup>th</sup> of May 2014. Further, it was after the death of the deceased, the other Petitioners were taken to the Judicial Medical Officer.

As per the PMR of the deceased, early medical attention could have saved the life of the deceased. While the prison officers could have acted more responsibly in this regard, I find that there is no violation of Article 13 (2) of the Constitution considering that its' essence has been satisfied as the deceased and the other Petitioners were brought before the Magistrate within twenty-four hours of the arrest.

### **Alleged infringement of Article 12(1) of the Constitution**

Article 12 (1) of the Constitution reads,

*"All persons are equal before the law and are entitled to the equal protection of the law"*

As per H.N.J. Perera CJ in **SC FR Application no. 351/2018 Supreme Court minutes dated 13<sup>th</sup> December 2018**, Article 12 (1) of our Constitution offers all persons protection against arbitrary and mala fide exercise of power and guarantees natural justice and legitimate expectations. Accordingly, the Article ensures that every citizen is guaranteed equal protection as a 'person' despite how or what another may consider him/her to be.

In the situation at hand, even though the deceased and the other Petitioners were arrested due to an allegation, (which was later proved to be false) the Respondents did not have any right to use the opportunity to assault them or to treat them in a degrading manner for the simple reason that, no person should be treated in such manner. In fact, the very existence of Article 12 (1) of the Constitution ensures that such conduct is contrary to the law of the country.

Considering the above matters, the 1<sup>st</sup>– 6<sup>th</sup> Respondents have violated equal treatment and equal protection that ought to be given to an ordinary person of this country, hence have violated Article 12 (1) of the Constitution.

The final question to be dealt by this court is whether the state including the higher authorities and other senior officers surrounding the actions that took place; 7<sup>th</sup>– 14<sup>th</sup> Respondents should be held liable for the direct violation of the Fundamental Rights by the 1<sup>st</sup>– 6<sup>th</sup> Respondents by virtue of State Liability.

The principle of State Liability has been discussed in this court in previous instances including the two possible branches of assessing the same. The first being the liability of the state by way of the law governing vicarious liability under the law of delict and secondly, the liability under the sui generis created by the Constitution under public law, out of which the second approach has been favoured.

The nature of liability imposed was highlighted by Lord Diplock in the case **Maharaj V. The Attorney-General of Trinidad and Tobago, No. 2 [1979] A.C. 385** as follows,

*“This is not vicarious liability it is a liability of the State itself. It is not a liability in tort at all it is a liability in the public law of the State which has been newly created”.*

In the case Lord Diplock emphasised that this was a new liability in Public law created by the Constitution of Trinidad and Tobago and should not be viewed in the perspective of any existing bases of liability. In the case **Ganeshanathan V. Vivienne**

**Goonewardene and Others (1984) 1 Sri LR 319** Soza J, while commenting on the above stated that the Sri Lankan Constitution too has created this liability under the public law.

Accordingly, it is well established that the principle of state liability in Fundamental Right matters is dealt with to hold the state liable for acts committed by the executive and administrative directly rather than considering the concept of vicarious liability under the law of delict.

In the case **Erandaka And Another V. Halwela, Officer-in-Charge, Police Station, Hakmana and Others [2004] 1 Sri LR 268** the state was said to be responsible for the violation of the Petitioners' Fundamental Rights as it was proved that the Petitioners sustained the injuries while in the remanded prison.

However, contrary to the above the assault in the current situation; the offence was committed prior to the deceased and the other Petitioners were brought to the custody of the station.

It is illogical to hold the state responsible for acts committed by such officers in pursuing their personal vengeance without the authorization or knowledge of the persons in authority. This was also highlighted in **Goonewardene V. Perera and Others [1983] 1 Sri LR 305** (Soza, J.) as follows,

*"The State no doubt cannot be made liable for such infringements as may be committed in the course of the personal pursuits of a public officer of to pay off his personal grudges. But infringements of Fundamental Rights committed under colour of office by public officers must result in liability being cast on the State. "*

In light of the above, the phrase 'colour of office' is not limited to whether or not the officers were in official uniform but includes factors surrounding the conduct of the officers and the authority given to them. In the instant case the

acts committed by the errant officers were not committed under the supervision or the orders of a senior officer. The state has not in any manner approved nor shall approve such conduct. In considering the facts laid before this court the acts of the officers were conducted in their personal capacity and not in the 'colour of office'. Further I find that the state in the current situation has given its fullest corporation to serve justice to the Petitioner.

In perusing the judgment by Sharvananda J (as he was then) in **Velmurugu V. AG [1981] 1 SLR 406** , the learned judge has highlighted the inherent difficulties in proving a case of torture by the Police. One such difficulty highlighted by the learned judge is quoted below,

*'...where allegations of torture or ill treatment are made the authorities whether the police or armed services or the ministries concerned must **inevitably feel they have a collective reputation to defend**. In consequence there may be reluctance of higher authorities to admit or allow inquires to be made into facts which might show that the allegations are true.'* (Emphasis Added)

The above situation should be distinguished from the instant case, Contrary to the above possibility, in the case at hand the higher authorities have taken action against the 1<sup>st</sup> – 6<sup>th</sup> Respondents who were directly linked to the torture.

When the conduct of the errant officers were brought to the attention of the senior officers, the relevant inquires and investigations were conducted and the errant officers; 1<sup>st</sup>- 6<sup>th</sup> Respondents were indicted for several offences including murder. The matter was referred to the **High Court of Badulla** under **Case No. 01/2015** and the said Respondents have been found guilty of the offences including the murder of the deceased, being members of an unlawful assembly and for causing hurt to the others arrested and was sentenced to death by the judgement dated 9<sup>th</sup> January 2017.

It must be placed on record that the above decision of the High Court of Badulla did in no way influence my decision in regard to the violation of Fundamental Rights of the deceased and the other Petitioners. The case presented before this court has been evaluated independently from the above, assessing the facts, circumstances and evidence presented before this court.

Accordingly, the state has fulfilled its obligation and in this circumstance the state cannot be held liable for the conduct of the errant officers. I am convinced that the state has taken prompt action against 1<sup>st</sup> – 6<sup>th</sup> Respondents hence the state is not liable for the violation of Fundamental Rights.

The police force is one of the key peace keeping forces of the country. Therefore, it's dignity and esteem ought to be protected at all times. In order to achieve the same, it is imperative that the officers conduct themselves with great respect to their office and the people of this nation while being accountable and transparent about their actions.

### **Decision**

Considering the aforementioned facts and circumstances, I hold that the 1<sup>st</sup> Respondent; D.M. Aberathna, 2<sup>nd</sup> Respondent; D.P.K. Gamage, 3<sup>rd</sup> Respondent; S.M.R.P. Kumara, 4<sup>th</sup> Respondent; S.J.M. Jayasundara, 5<sup>th</sup> Respondent; D.M. Wijerathna and 6<sup>th</sup> Respondent; R.P. Somarathne have violated the Fundamental Rights of the deceased, which is guaranteed under Article 11, 12 (1), 13(1) of the Constitution. The Petitioner is a poor village woman who was expecting to rest her life with her son whose unfortunate demise caused her shock, loss of care and support.

For the above reasons I order each of the 1<sup>st</sup> -6<sup>th</sup> Respondents to pay compensation of Fifty Thousand Rupees (Rs. 50,000/=) and litigation costs of Ten Thousand Rupees (Rs.10,000/=) to the Petitioner. Considering the facts of this case, I hold that the state has fulfilled its obligation, therefore, the state is not responsible for the violation.

In regard to the adjoining cases,

In **SC/FR/182/2014** I hold that the 1<sup>st</sup> Respondent; D.M. Aberathna, 2<sup>nd</sup> Respondent; D.P.K. Gamage, 3<sup>rd</sup> Respondent; S.M.R.P. Kumara, 4<sup>th</sup> Respondent; S.J.M. Jayasundara, 5<sup>th</sup> Respondent; D.M. Wijerathna and 6<sup>th</sup> Respondent; R.P. Somarathne have violated the Fundamental Rights of the Petitioner; Gamini Hewanayake guaranteed under Article 11 ,12 (1), 13(1) of the Constitution and I order to pay Ten Thousand Rupees (10,000/=) each as compensation and Five Thousand Rupees (Rs.5000/=) each as litigation costs to the Petitioner.

In **SC/FR/183/2014** I hold that the 1<sup>st</sup> Respondent; D.M. Aberathna , 2<sup>nd</sup> Respondent; D.P.K. Gamage, 3<sup>rd</sup> Respondent; S.M.R.P. Kumara, 4<sup>th</sup> Respondent; S.J.M. Jayasundara, 5<sup>th</sup> Respondent; D.M. Wijerathna and 6<sup>th</sup> Respondent; R.P. Somarathne have violated the Fundamental Rights of the Petitioner; Peruma Hewa Kasun Wiraj Madumadawa guaranteed under Article 11 ,12 (1), 13(1) of the Constitution and I order to pay Ten Thousand Rupees (10,000/=) each as compensation and Five Thousand Rupees (Rs.5000/=) each as litigation costs to the Petitioner.

In **SC/FR/184/2014** I hold that the 1<sup>st</sup> Respondent; D.M. Aberathna , 2<sup>nd</sup> Respondent; D.P.K. Gamage, 3<sup>rd</sup> Respondent; S.M.R.P. Kumara, 4<sup>th</sup> Respondent; S.J.M. Jayasundara, 5<sup>th</sup> Respondent; D.M. Wijerathna and 6<sup>th</sup> Respondent; R.P. Somarathne have violated the Fundamental Rights of the Petitioner; R. A. Wijeratne guaranteed under Article 11 ,12 (1), 13(1) of the Constitution and I order to pay Ten Thousand Rupees (10,000/=) each as compensation and Five Thousand Rupees (Rs.5000/=) each as litigation costs to the Petitioner.

In **SC/FR/185/2014** I hold that the 1<sup>st</sup> Respondent; D.M. Aberathna , 2<sup>nd</sup> Respondent; D.P.K. Gamage, 3<sup>rd</sup> Respondent; S.M.R.P. Kumara, 4<sup>th</sup> Respondent; S.J.M. Jayasundara, 5<sup>th</sup> Respondent; D.M. Wijerathna and 6<sup>th</sup> Respondent; R.P. Somarathne have violated the Fundamental Rights of the Petitioner; Kanda Uda Kularathne

guaranteed under Article 11 ,12 (1), 13(1) of the Constitution and I order to pay Ten Thousand Rupees (10,000/=) each as compensation and Five Thousand Rupees (Rs.5000/=) each as litigation costs to the Petitioner.

***Application allowed.***

**JUDGE OF THE SUPREME COURT**

**SISIRA J. DE ABREW, J.**

I agree

**JUDGE OF THE SUPREME COURT**

**MURDU N. B. FERNANDO, PC, J.**

I agree

**JUDGE OF THE SUPREME COURT**