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DIGEST

3. No counsel shall be required to present any document empowering him to act. The Attorney-General may appoint a registered Attorney to act specially in any particular case or to act generally on behalf of the State.

The form of an appointment of a registered Attorney is found in the 1st Schedule to the civil procedure code.

Now section 27(1) states with clarity that a party in order to be represented by an Attorney must make such appointment in writing and such document is further required to be filed in Court.

This Court has on several occasions dealt with the question of a defective proxy being filed of record and they may be of assistance in deciding the question before us, i.e. total absence of a proxy.

The latest of these authorities is the case of *Paul Coir v. Waas 2002* (1) in which Justice Wigneswaran cites with approval a passage from Justice Thamotheram's judgment in the case of *LJ Peiris & Co. Ltd v. Peiris* (2).

> *"The relationship of a Proctor and client may well be a contract of agency but there is no law requiring that the contract should be in writing. A proxy is a writing given by a suitor to Court authorizing the Proctor to act on his behalf. It does not contain the terms of the contract between the suitor and the Proctor. That contract is a distinct one and has nothing to do with the proxy which is an authority granted by virtue of that contract."*

Thamotheram J also proposes the following questions to be answered to ascertain compliance with section 27(1).

"(1) Is there a contract of agency between the Proctor and his client? No writing is required to establish this.

(2) Is there a writing, appointing a client's Proctor giving him authority to act on the client's behalf for the purposes mentioned in Section 27 of the Civil Procedure Code?

(3) Is this writing signed by the client?"

Therefore both justices seek to draw a distinction between the actual contract of agency between the Attorney and the client and the proxy which is to be filed in Court.

I see no reason to hold a position contrary to the learned justice's assertions.

Therefore it is now necessary to consider as to whether the default of not filing a proxy could be cured by the belated filing of proxy in view of the authority given by contract previously to the proctor to appear and make applications on the client's behalf.

In *Paul Coir v. Waas (supra)* the Justices were of the view that the proxy is not the contract of agency between the proctor and the suitor and that the two were distinct and separate. They held further that existence of such an agency depended on the validity of the contract.

In *AG v. Silva*[3] the application had been made by a proctor without a proxy. The said proctor filed a proxy after the objection was taken and a submission was made that the previous defective acts of the proctor were rectified by such subsequent filing of proxy. HNG Fernando J in his judgment suggests that such rectification may be allowed under two circumstances. Namely, when the defect is pointed

out at the earliest time and the Plaintiff is then made to file a fresh plaint.

This argument seems to suggest that Fernando J was of the view that the totality of proceedings that took place under the default constituted a nullity. His lordship refers to circumstances in which undesirable consequences would flow if unreserved rectification were to be allowed. Both examples cited relate to the default of the party instituting the proceedings. Would similar consequences ensue if the opposite party would be in default? If this were so would not a defaulter be in a position to profit from his default. If a party Defendant's default were to be brought to the attention of Court in the twilight stages of a trial would then the entire proceedings have to be recommenced?

If this were to be so, we would have disparate consequences where the Plaintiff defaults and in circumstances where the Defendant defaults. This should not be so. Rules of procedure must be certain, unambiguous and equal in application to all parties to an action. They form the foundation of fair play.

Hence it is my view that this difference can be obviated by taking the position that it is not the proceedings thereunto that are rendered a nullity, but all appearances and applications made by the proctor or the counsel as his agent.

In *Tillekeratne v. Wijesinhe*[4], the Plaintiff had granted a proxy to a proctor, which by oversight, had not been signed by the Plaintiff. The proctor acted on the proxy without any objection in the lower Court. When the case was taken up in appeal, the defendant's counsel objected to the status of the proctor in the case.

It was held by his lordship Hutchinson CJ that the requirements in section 27 of the Civil Procedure Code were merely directory and that the mistake in the proxy could be rectified at this stage by the Plaintiff signing it. It was further held that such signature would be a ratification of all the acts done by the proctor in the action.

The case of *Nelson De Silva v. Casinathan*[5] was also submitted for our consideration, which seem to take the position that even though the proxy was held to be bad as the objection **had not been taken in the lower Court** and **since the defect did not affect the merits of the case,** Court did not reverse the decree.

The said line of thinking offers much attraction due to its simplicity. However I am concerned as to whether the wording of section 27 permits such liberties. Section 27 does not reveal whether an objection to the non conformance with the provision needs to be taken at the first available opportunity and if so whether the failure to raise an objection at that time estoppes the raising of the objection later.

There are certain objections which must be raised at the earliest opportunity available. The objection to the jurisdiction of a Court is one.

In *Jalaldeen v. Rajaratnam*[6] it was held that

"An objection to jurisdiction must be taken at the earliest opportunity. Further, issues relating to the fundamental jurisdiction of the Court cannot be raised in an oblique or veiled manner but must be expressly set out. The action was within the general and local jurisdiction of the

District Court. Hence its decision will stand until the wronged party has matters set right by taking the course prescribed by law."

In my view this is because of the effect of the failure giving rise to the objection, that such promptness is required.

If a Court inquires into a matter for which it has no jurisdiction all subsequent acts constitute a nullity. If jurisdictional objections are permitted at the very end of proceedings and upheld, all proceedings would have to be held void thus wasting precious judicial time and resources and causing grave injustices. Therefore jurisdictional objectional objections are required to be taken at the first opportunity the failure of which would constitute acquiescence to jurisdiction of the Court.

A similar analysis may be useful in respect of the present question. The Respondent argues that the proceedings constitute a nullity due to the failure of the Plaintiff to file a valid proxy, whilst the appellant submits that the omission can be cured. Thus if I were to be persuaded by the submissions of the Respondent that the default of the Plaintiff amounts to a nullity according to the same analysis as above I would have to hold that the Respondent would be precluded from raising the objection to file proxy at this late stage.

Having discussed the authorities on the legal question consequences of failure to file a valid proxy I would now proceed to examine the provisions of section 27. Section 27(1) throws light on the purpose of filing a proxy. The purpose is to **appoint** a registered Attorney to appear or make any

application before court. It is mandatory that the proxy contain an address for the process to be served.

Section 27(2) adverts to the circumstances in which the proxy "loses its force." The first of which is revocation **with the leave of Court. When such revocation is granted, unless fresh proxy is filed,** the case is considered to be equivalent to a situation where a party remains unrepresented. However proceedings may continue on that footing. Obviously the proceedings that had thus far transpired would remain unaffected.

The other methods by which a proxy loses its force are the death of the client, the suspension or removal of the Attorney etc. The death of the client occasions the demise of the agency relationship and therefore requires little explanation. The other grounds support the inference drawn earlier as each of those instances render the "Attorney" incompetent to "appear or make application before Court". Yet the consequences are the same. Once the Attorney meets with such incapacity he is no longer the client's representative. The client is considered to be unrepresented then on. The foregoing analysis lends little support to the proposition that the "loss of force" of a proxy touches on the validity of the proceedings in toto.

Therefore it stands to reason that even in the case of an Attorney when he is incapable of appearing or making application due **to the total failure to the file proxy,** such default should not in any way affect the validity of the proceedings.

The case of *Udeshi v. Mather*[7] is of assistance at this point. Atukorale J's judgment in my view clearly

lays down the conditions in which the doctrine of rectification would not apply. Accordingly the first is a situation where some other legal bar stands in the way of curing the default. But more importantly the fundamental question to be asks is whether the proctor had in fact the authority of his client to do what was done although in pursuance of a defective appointment.

The case of *Kadirgamadas v. Suppiah*[7] is of direct authority. In the said case the petition of appeal was filed on behalf of the defendant. The proctor had not been appointed In writing as required by section 27 of the civil procedure code. He had however without objection from any of the parties, represented all the defendants at various stages of the proceedings. It was held by Gunasekera J that the irregularity of the appointment of the proctor was cured by the subsequent filing of a written proxy.

Therefore an analysis of the facts thus far established is necessary to ascertain whether the proctor had in fact the authority.

The journal entry dated 28.02.2001 confirms that Court was informed of the Plaintiff's death, and that Court had directed that appropriate steps be taken. On the next date, that being 28-03-2001, Mr. Iddawela who had hitherto appeared for the Plaintiff filed a petition and an affidavit moving Court to order substitution.

On 25-06-2001 the Respondent filed his objections to the substitution. However the learned District Court permitted the substitution and fixed a date for further trial. Mr. Iddawela's name continues to be in the record as being the Attorney for the Plaintiff.

On 21-11-2001 the trial recommenced and the record notes Mr. Iddawela as having appeared for the substituted Plaintiff. No objection to this was taken up by the Defendant.

From that point onwards this court notes no less than seventeen journal entries with Mr. Iddawela's name appearing for the substituted Plaintiff, whilst the substituted Plaintiff's presence in Court is also duly noted. At no time was an objection taken to Mr. Iddawela's appearance.

On 28-05-2008 on the direction of Court the petitioner filed a proxy naming the same Mr. Iddawela as his Attorney.

The aforementioned facts in my opinion, provides a sufficiently strong indication that the substituted Plaintiff had at all material times granted Mr. Iddawela **the authority to appear and make applications on behalf of him,** despite the substituted Plaintiff not filing a proxy as an overt manifestation of the granting of such authority. The facts of the substituted Plaintiff's regular presence at all Curt proceedings and the retaining of Mr. Iddawela in the Civil Appellate High Court proceedings is highly suggestive of this.

Therefore I hold that the substituted Plaintiff by virtue of filing a proxy belatedly, has succeeded in ratifying the appearances and applications of the registered Attorney and thereby supplying all such acts with legal validity. Hence this appeal is allowed. We set aside the judgment of the Civil Appellate High Court dated 16th September 2008. The judgment of the learned District Court Judge is restored. We order no costs.

SRIPAVAN, J - I agree.

WKANAYAKE, J. - I agree.

appeal allowed.

AMARASINGHE V. SENEVIRATNE AND TWO OTHERS

SUPREME COURT,
SHIRANEE TILAKAWARDENE, J.,
K. SRIPAVAN J., AND
P. A. RATNAYAKE, J.
S.C. (F/R) NO. 264/2006
SEPTEMBER 22ND, 2009

Fundamental Rights – Article 11 – Freedom from torture, cruel inhuman or degrading treatment or punishment – Laspe of time – Article 11 of the Constitution – fundamental rights jurisdiction and its exercise – Article 126 of the constitution – Standard of proof required in fundamental rights cases.

The Petitioner was an Anesthetist, attached to the Base Hospital Dambulla and was also the Chief Organizer of the United National Party for Dodandaslanda Constituency. The 1st and 2nd Respondents were Police Officers attached to the Kurunegala Police Station.

The primary issue for determination before the Supreme Court was whether the Petitioner has proved the allegation of torture or cruel, inhuman or degrading treatment against the 1st Respondent.

Held

(1) The Supreme Court has given a broad definition to the right not to be subjected to inhuman treatment, extending beyond physical violence into emotional harm as well, which is highly desirable in the present context with widespread attempts to promote and protect human rights and prevent excesses of power by public authorities.

(2) It is well established that in a Fundamental Rights case the standard of proof is that applicable in a civil case which is on a balance of probability or on a preponderance of evidence as opposed to beyond reasonable doubt as in criminal case.

Per Shiranee Tilakawardene, J., -

> "I find that it would be unfair to hold that the failure on the part of the Petitioner to inform the Magistrate of the assault as fatal to

the proof of the Petitioner's case on a balance of probability on a consideration of the special circumstances of this case"

(3) The medical evidence sufficiently satisfies the case put forward by the Petitioner against the 1st Respondent regarding the violation of his Fundamental Right under Article 11 of the Constitution.

(4) According to Article 126(2) of the Constitution the requirement of filing a Fundamental Right application within one month seems to be mandatory. The Supreme Court has repeatedly expressed the view that in situations where the Petitioner was prevented from seeking legal redress for reasons beyond his control such as continuous detention after the violation of his rights. The computation of time will begin to run from the date he was under no restraint to have access to the Court.

On the available evidence in this case it would not be reasonable to dismiss this Application on the basis of lapse of time stipulated under Article 126 (2)

APPLICATION relating to infringement of fundamental rights.

Cases referred to:

(1) *Silva v. Chairman, Fertilizer Corporation* – (1989) 2 SLR 393

(2) *Velmurugu v. Attorney – General* – (1981) 1 SLR 406

(3) *Liyanage v. Upasena* – (SC (FR) 13 and 14/97, SCM. 15.12.98)

(4) *Malinda Channa Peiris and others v. AG and others* – (1994) 1 SLR 1

(5) *Jayasinghe v. Appuhamy* – SC (FR) 15/95, SCM 28.8.1995

(6) *Sudath Silva v. Kodithuwakku* – (1987) 2 SLR 126

(7) *Namasivayam v. Gunawasrdene* – (1989) 1 SLR 394

(8) *Saman v. Leeladasa* – (1989) 1 SLR

Manohara de Silva, P.C. with *Bandara Thalagune* for the Petitioner.

Chula Bandara for the 1st Respondent.

Madhawa Tennakoon, S.C. for the 2nd and 3rd Respondents.

Cur.adv.vult.

August 06th 2010

SHIRANEE TILAKAWARDANE, J.

This Court granted the Petitioner Leave to Proceed on 13.12.2006 on the alleged violation of Article 11 of the Constitution by the Respondents.

The Petitioner is an Anesthetist, attached to the Base Hospital Dambulla and was also the Chief Organizer of the United National Party for Dodangaslanda. The 1st Respondent is a Inspector of Police of the Kurunegala Police Station. The 2nd Respondent is the Head Quarters Inspector of the Kurunegala Police Station.

The Petitioner alleges that he was assaulted by the 1st Respondent inside the Kurunegala Police Station premises on 21.06.2006 and as such the Petitioner's Fundamental Rights guaranteed under Article 11 of the Constitution have been infringed.

The primary issue to be determined in this case is whether the Petitioner has proved the allegation of torture or cruel, inhuman or degrading treatment against the 1st Respondent.

The Petitioner's version of facts is as follows. On 18.06.2006 he was informed by the Administrative Officer of the Base Hospital Dambulla that a group of police Officers of the Kurunagala Police Station had sought permission to enter the hospital premises to take the Petitioner into custody and that they had been refused entry since the Petitioner was not in the hospital at the time.

Thereafter on the same day, the Petitioner received a telephone call from an officer of the Kurunegala Police Station to call over at the Police Station to make a statement regarding certain money orders sent to the Petitioner's wife.

The Petitioner's wife had filed divorce action against the Petitioner in the District Court. Mount Lavinia bearing No. 5757/06/D. In January 2006 his wife had also filed a maintenance action against the Petitioner in the Kurunegala Magistrates Court bearing No. 54153/M/06. The Petitioner claims that he had paid the monies due for the months of April and May in accordance with the Order of the Magistrates Court Kurunegala. However the Petitioner's wife stated in Court the she did not receive the said money orders.

On 21.06.2006, the Petitioner went to the Kurunegala Police Station at around 8.30 am and was informed by the 1st Respondent that one Shashi Prabhani Ekanayake had been arrested for attempting to cash a money order sent by the Petitioner to his wife by presenting the wife's Identity Card. The Petitioner was asked to make a statement regarding the incident.

The Petitioner recorded a statement that he was unaware of the incident and that he had duly sent the monies due for the months of April and May in accordance with the Order of the Magistrates Court Kurunegala dated 28.03.2006 under the Maintenance Action No. 54153/M/06/ The Petitioner also stated that the said Shashi Prabhani Ekanayake was an ex-employee of the United National Party Office in Kurunegala and that his political opponents may have planned this incident to implicate the Petitioner in order to bring disrepute to him.

After the statement was recorded, the 1st Respondent asked the Petitioner follow him and proceeded to the Minor Offences Branch. The 1st Respondent then informed the Petitioner that he had forgotten his spectacles and proceeded

past the Minor Offences Branch towards the Police Quarters which was situated about 15 feet away to the rear of the Police Station.

Believing that the 1st Respondent would return to the Police Station having retrieved his spectacles, the Petitioner turned and walked towards the Police Station Building. At this point the Petitioner claims that the 1st Respondent kicked him from the back several times on his chest and back as a result of which the Petitioner fell down. When the Petitioner tried to get up, he had been subjected of further assault by the 1st Respondent. Thereafter the Petitioner managed to stand up and run towards the Minor Offences Branch at the Police Station.

Following this incident, the Petitioner was taken to the Magistrates Court Kurunegala by the 1st Respondent and handed over to the prison officers. Subseqently, the Petitioner was produced before the Magistrate and remanded till 05.07.2006.

As a result of this assault by the 1st Respondent, the Petitioner states that he suffered severe pain in the chest and back and had noticed contusions in those areas. The Petitioner also had difficulty passing urine and had passed blood with urine.

The Petitioner states that immediately after the Petitioner was remanded, he had made a statement to the Chief Jailor of the Kegalle Remand Prison that he was assaulted by the 1st Respondent at the Police Station on 21.06.2006.

On 22.06.2006 the Petitioner was examined by a Medical Officer and was admitted to the Kegalle Teaching Hospital where he was examined by the Judicial Medical Officer. The Diagnosis Card of the Kegalle Teaching Hospital,

marked as P7 indicates the date of admission as 22.06.2006 and the date of discharge as 03.07.2006. The Petitioner states that he suffered pain even after being discharged from hospital.

Having submitted an Application by way of Motion on 28.06.2006, the Petitioner was released on released on bail on 30.06.2006. However, the Petitioner states that he was discharged from the Kegalle Teaching Hospital on 03.07.2006 and released on bail on 04.07.2006.

The Petitioner denies any involvement in the incident involving the encashment of the money order by Shashi Prabhani Ekanayake and claims that in the circumstances the acts of the 1st Respondent on 21.06.2006 amount to torture or cruel, inhuman or degrading treatment under Article 11 of the Constitution.

The 1st Respondent's version of events is that on 21.06.2006 around 8.30 am the Petitioner appeared at the Kurunegala Police Station and that the 1st Respondent was instructed by the Officer in Charge of the Minor Offences Branch C.I. Navaratne to record the Petitioner's statement and to produce the Petitioner before the Magistrate Court Kurunegala. Accordingly at around 9.30 am the 1st Respondent recorded the statement of the Petitioner and at around 9.55 am the 1st Respondent along with Sergeant Karunarathne took the Petitioner to the Magistrate's Court Kurunegala in the Petitioner's vehicle driven by the Petitioner father. The 1st Respondent denies that he assaulted the Petitioner at any point of time.

Having considered the submissions on either side, it is clear that the case involves disputed facts relating to the events on 21.06.2006. In reaching a conclusion this Court must consider the burden of proof on the parties involved

and the credibility of the different versions submitted before this court, bearing in mind the seriousness of the allegations made by the Petitioner against the 1st Respondent.

Article 11 of our Constitution reads that:

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

All international declarations of human rights prohibit torture as well as cruel, inhuman or degrading treatment or punishment. Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant of Civil and Political Rights and Article 3 of the European Convention on Human Rights are in similar terms.

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that;

"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"

Dr. Amerasinghe J in his separate judgment in *Silva v. Chairman, Fertilizer Corporation*(1), analyzing the concept of inhuman treatment observed that;

"The treatment contemplated by Article 11 wasn't confined to the realm of physical violence. It would rather embrace the sphere of the soul or mind as well."

Thus this Court has given a broad definition of the right not to be subjected to inhuman treatment, extending beyond physical violence into emotional harm as well, which is highly desirable in the present context with widespread attempts to promote and protect human rights and prevent excesses of power by public authorities.

Now let us turn to the issue of proving the allegations made by either party.

It is by now, well established that in a Fundamental Rights case the standard of proof is that applicable in a civil case which is on a balance of probability or on a preponderance of evidence as opposed to beyond reasonable doubt as in a criminal case. (Vide *Velmurugu v. Attorney General*[2], *Liyanage v. Upasena*[3]

In the case of *Malinda Channa Peiris and others v. AG and others*[4], it had been specifically stated that having regard to the gravity of the matter in issue a high degree of certainty is required before the balance of probability is proven in favour of the Petitioner subjected to torture, or cruel, inhuman or degrading punishment to prove that Article 11 had been transgressed.

Considering the relevance of the medical evidence, the Petitioner alleged that he was assaulted by the 1st Respondent on his back and chest and as a result he suffered from severe pain on the chest and back and had also passed blood with urine. The Petitioner contends that the Diagnosis Card

marked P7 provides strong corroboration of the allegation of assault by the Respondent. Page 2 of the said Diagnosis Card in particular states 'that there were contusions in the back and chest, tenderness in the renal angle and that the urine report indicated moderately filed red cells'.

The attention of the Court is drawn to the case of *Jayasinghe v. Appuhamy*[5] where the Court held that the description given by the D.M.O. in respect of the injuries sustained by the Petitioner provided strong corroboration of the Petitioner's allegation of assault on him.

In the instant case the Diagnosis Card appears to corrobotate the injuries sustained by the Petitioner. According to the Medico-Legal Report the Petitioner had been admitted to the Hospital on 22.06.07 and the history given by the patient is an follows:

"He was asked to come to Kurunegala Police on 21.06.06. When he went there he was assaulted by a Police Officer with fist and kicked him and fell down; Following that he was taken to the Courts and sent to the prison; while in the prison he found that he was passing blood with urine and admitted to the hospital"

On the available evidence it seems that the Petitioner did suffer injuries as reflected in the Medico-Legal Report. The Diagnosis Card provide strong evidence that the Petitioner had been assaulted and bears witness to the injuries suffered by him. However it cannot be held by itself to sufficiently corroborate the fact that such injuries had been caused by the 1st Respondent and the version of facts given by the Petitioner.

In considering both the Petitioner's and Respondent's versions the question is whether there had been any attempt to distort the facts on either side. The Respondent has sought to support his position that no assault took place on 21.06.2006, by producing the affidavits of CI Navarathne, Inspector of Police Mohamed Razik and four witnesses who were allegedly present at the police station at the time when this alleged assault took place. However in the special circumstances of this particular case one is compelled to doubt the independence of these witnesses and the affidavits produced therein.

It is indeed curious that neither the Petitioner nor his attorney brought the fact of the assault to the notice of the Learned Magistrate on 21.06.2006. The 1st Respondent contends that on 30.06.2006 when the Petitioner was granted bail, Counsel appearing for the Petitioner only informed the Learned Magistrate that the Petitioner was sick Thus there had been no mention of any Police assault. The Petitioner states that he made a contemporaneous statement of the Chief Jailor of the Kegalle Remand Prison regarding the assault by the 1st Respondent. It had been submitted by the Petitioner's father that there wasn't sufficient time to retain or consult a lawyer on the day the Petitioner has been produced before the Magistrate's Court. Therefore one of Petitioner's friends had appeared before the Court on that day on behalf of the Petitioner. The Petitioner's father denies the 1st Respondent's version that the Petitioner was taken to the Magistrates Court in a car driven by him. The Petitioner's father states that when returned to the Kurunegala Police Station he was informed that the Petitioner had been taken into custody and taken to the Magistrates Court and accordingly had driven himself to the Court premises. The Petitioner's father states that when he arrived at the Magistrates Court

the proceedings had already commenced and that he was unable to talk to the Petitioner who was in his cell. He states that when proceedings were adjourned, he inquired from the Petitioner as to why his clothes were stained with mud and was informed that the Petitioner had been assaulted by the 1st Respondent. The Petitioner's father also states that he had urged the lawyers who appeared for the Petitioner to inform the Magistrate of the assault but was informed that this was not possible.

It must be determined whether P7 alone would prove the Petitioner's case on a balance of probability.

The Petitioner in *Sudath Silva v. Kodithuwakku*(6) complained that he was illegally detained at the Police Station for five days and was subject to torture. The Medical Officer of the local hospital before whom the Petitioner was produced by the Police reported no external injuries. However the Additional Judicial Medical Officer. Colombo before whom the Petitioner was produced upon an Order made by the Magistrate, found scars consistent with the Petitioner's complaint.

Atukorale J rejected the report of the Local Medical Officer as worthless and unacceptable and stated that the case disclosed a gross lack of responsibility and a dereliction of duty on his part. According to Atukorale J the failure of the Petitioner to complain to the Medical Officer or to the Magistrate before whom he was produced "must be viewed and judged against the backdrop of his being at that time held in Police custody with no access to any form of legal representation" *Sudth Silva v. Kodithuwakku (Supra)*

In light of the above and the circumstances of this particular case. I find that it would be unfair to hold that the

failure on the part of the Petitioner to inform the Magistrate of the assault as fatal to the proof of the Petitioner's case on a balance of probability on a consideration of the special circumstances of this case.

Atukorale J also observed is *Sudath Silva v. Kodithuwakku (supra)* that:

"Article 11 of our Constitution mandates that no person shall be subjected to torture or to cruel or inhuman punishment or treatment ..... Constitutional safeguards are generally directed against the State and its organs. The Police Force being an organ of the State is obliged by the Constitution to secure and advance this right and not to deny. Abridge or restrict the same in any manner and under any circumstances. It's therefore the duty of this court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right is declared and intended to be fundamental is always kept fundamental and that the Executive by its action does not reduce it to a mere illusion."

Sharvananda J in *Velmuruge v. AG (supra)* highlighted the inherent difficulties in proving a case of torture by the Police.

"There are certain inherent difficulties in the proof of allegations of torture or ill treatment. Firstly a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly acts of torture or ill treatment by agents of the Police or armed forces would be carried out as far as possible without witnesses or perhaps without the knowledge of higher authority. Thirdly 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."

Commenting on the systemic increase in allegations of torture or cruel or degrading treatment leveled against the Police Force and the duty to protect against such incidents, this Court in Gerald Perera v. Suraweera SCFR observed that;

'The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in Police custody shows no decline. The duty imposed by Article 4(d) to respect, secure and advance Fundamental Rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim on exemption.

On the fact of this case, it must be held that the medical evidence sufficiently satisfies the case put forward by the Petitioner against the 1st Respondent regarding the violation of his Fundamental Right under Article 11 of the Constitution.

The Respondents also raised the objection that the instant Application is time barred.

The Petitioner contends that he was released from remand prison only on 04.07.2006, even though bail was granted on 30.06.2006, which fact if proved would not make this Application time barred. The Petitioner supports such contention by tendering the Journal Entries dates 30.06.2006 and 04.07.2006 in the Maintenance case filed by the Petitioner's wife in the Magistrate Court of Kurunegala bearing No. 54153/06 marked P2, in which it is clearly stated

that the Petitioner was released only on 04.07.2006 which would bring the present Application within the time frame of one month. However the Respondent argues that even if the Petitioner had been released on 04.07.2009, nevertheless he had easy access to a lawyer to represent him.

Article 126 (2) states:

"Where any person alleges that any such fundamental right or language right relating to such has been infringed by executive or administrative action, he may himself or by an attorney at law on his behalf, within one month thereof, in accordance with such rules of court as maybe in force, apply to the supreme court by way of petition in writing addressed to such court praying for relief or redress in respect of such infringement. Such application may be proceeded with only leave to proceed first had and obtained from the supreme court, which leave may be granted or refused, as the case maybe, by not less than two judges"

According to this Article the requirement of filing a Fundamental Right case within one month seems to be mandatory. This Court has repeatedly expressed the view that in situations where the Petitioner was prevented from seeking legal redress for reasons beyond his or her control such as continuous detention after the violation of his or her rights, the computation of time will begin to run from the date she/he was under no restraint to have access to the Court.

As per CJ Sharvananda in *Namasivayamn v. Gunawardene*[7] "If this liberal interpretation is not accepted the Petitioner's right to his constitutional remedy under Article 126 can turn out to be illusory"

In *Saman v. Leeladasa*[8] Fernando J. was of the view that if the Petitioner did not have easy access to a lawyer

due to his status as a remand prisoner and due to subsequent hospitalization on account of the injuries he suffered, the principle of *lax non cogit ad impossibilia* applies in the absence of any lapse of fault.

In this case the Petitioner until the time he was released on bail remained as a remand prisoner. Moreover he had been discharged from the Kegalle Teaching Hospital only on 04.07.06.

Hence on the available evidence it would not be reasonable to dismiss the Application on the basis of lapse of time stipulated under Article 126 (2) .

In the light of the reasoning given above, it can well be concluded that the Petitioner's rights under Articles 11 of the Constitution have been violated by the 1st Respondent.

Accordingly this Court declares that the Petitioner's Fundamental Right guaranteed under Article 11 of the Constitution have been violated by the 1st Respondent. This Court also orders a sum of Rs. 50,000/- to be paid by the 1st Respondent to the Petitioner as compensation. This sum is to be paid in his personal capacity. Sum is to be deposited in this Court within one month from this Judgment. No Costs.

SRIPAVAN, J. – I agree.

RATNAYAKE, J. – I agree.

Relief granted.

THE FINANCE COMPANY PLC V. PRIYANTHA CHANDANA AND 5 OTHERS

SUPREME COURT,
DR. SHIRANI A. BANDARANAYAKE, J.
AMARATUNGA, J. AND
EKANAYAKE, J.
S. C. APPEAL NO. 105A/2008
S.C. (SPL.) L. A. NO. 166/2008
H. C. A. NO. 131/2005 - HAMBANTOTA
M. C. NO. 61770
JULY 2ND, 2009

Forests Ordinance – section 24 (1) b – Prohibit the transport of timber without a permit from a forest officer duly authorized to issue the same – Section 25(2) – transport of timber in Contravention of any regulation made under Section 24(1) . – Section 25(1) – penalties for the breach of any provision of, or regulation made under the Chapter (V) of the Forest Ordinance – Section 40, as amended – power of Court to confiscate timber, forest produce, vehicles used in committing such offences etc. under the Ordinance.

At the request of the 1st respondent, the appellant, a registered Finance Company, had purchased and provided on lease the vehicle (used by the 1st respondent to transport illicit timber) to the 1st respondent. Unknown to the appellant, the Beliatta Police had arrested the 3rd, 4th, and 5th respondent for transporting timber without a lawful permit, in terms of Section 24(1)(b) and Section 25(2) of the Forest ordinance. The Beliatta Police also seized the said vehicle which had been used by the 3rd, 4th and/or 5th respondents to transport the said illicit timber. The Beliatta Police filed action against the 3rd, 4th and 5th respondents. The 3rd respondent pleaded guilty and the case was fixed for trial against 4th and 5th respondents.

A confiscation inquiry had been held regarding the lorry under the Code of Criminal Procedure Act. After inquiry the learned Magistrate made order to confiscate the said lorry used for the transport of illicit timber. The appellant being the absolute owner of the lorry filed an appeal against the Magistrate's order. The Learned Judge of the High Court after hearing the appeal dismissed the same.

The Supreme Court granted special leave to appeal against the order made by the Provincial High Court in the exercise of its appellate jurisdiction.

Held:

(1) It would be necessary for the owner of the vehicle to establish that the vehicle that had been used for the commission of the offence had been so used without his knowledge and that the owner had taken all precautions available to prevent the use of the vehicle for the commission of such offence. The owner has to establish the aforesaid matters on a balance of probability.

(2) Both the absolute owner and the registered owner should be treated equally and there cannot be any type of privileges offered to an absolute owner, such as a Finance Company in terms of the applicable law in the country.
It would be necessary for the absolute owner to show the steps he had taken to prevent the use of the vehicle for the commission of the offence and that the said offence had been committed without his knowledge.

(3) The Learned magistrate had not erred when he held that the appellant had not satisfied Court that he had taken every possible step to prevent the Commission of the offence.

Cases referred to:

1. *Manawadu v. Attorney General* – (1987) 2 SLR 30
2. *Inspector Fernando v. Marther* – (1932) 1 CLW 249
3. *Sinnetamby v. Ramalingam* – (1924) 26 NLR 371
4. *Mudunkotuwa v. Attorney General* – (1996) 2 SLR 77
5. *Nizer v. I.P. Wattegama* (1978-79) SLR 304
6. *Faris v. OIC, Police station, Galenbindunuwewa* (1992) 1 SLR 167
7. *Rasiah v. Thambirak* (1951) 53 NLR 574
8. *Mercantile Investments Ltd v. Mohamed Mauloom and others* (1998) 3 SLR 32

APPEAL from an Order of the High Court of Hambantota.

I.S. de Silva with *Suren de Silva* for Claimant-Appellant-Appellant.

Riyaz Hamza, SSC, for the 6th Respondent.

Cur.adv.vult.

September 30th 2010

DR. SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the order of the High Court dated 30.06.2008. By that order the High Court had dismissed the appeal instituted by the claimant-appellant-appellant (hereinafter referred to as the appellant) and had affirmed the order of the learned Magistrate dated 25.08.2005.

The appellant came before this Court against the order of the High Court on which special leave to appeal was granted on the following question:

> "Has the learned High Court Judge misdirected himself in fact and in law in failing to appreciate that in view of the fact that there was no dispute between the parties that the appellant was the absolute owner of the vehicle bearing registration No. 227-8130, the scope of the inquiry in terms of Chapter XXXVIII of the Code of Criminal Procedure Act before the Magistrate's Court, was limited to ascertain whether or not the appellant was aware or that the said vehicle has been used in connection with or participated in the commission of the offence."

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:

The appellant is a Registered Finance Company and is *inter alia* involved in providing leasing facilities in connection with motor vehicles at the request of its customers. The appellant is the registered absolute owner of the vehicle bearing

registration No. 227-8130, which forms the subject matter of this appeal.

On 12.06.2000 at the request of the 1st respondent-respondent-respondent (hereinafter referred to as the 1st respondent) the appellant had purchased and provided on lease the vehicle, bearing registration No. 227-8130 to the 1st respondent. Unknown to the appellant, on 20.08.2000, the Beliatta Police had arrested the 3rd and/or 4th and/or 5th respondents-respondents-respondents (hereinafter referred to as the 3rd and/or 4th and/or 5th respondent) for transporting timber without a lawful permit, in terms of section 24(1) (b) and section 25(2) of the Forest Ordinance. The Beliatta Police also seized the said vehicle bearing registration No. 227-8130, which had been used by the 3rd and/or 4th and/or 5th respondent to transport the said timber. Thereafter the 2nd respondent-respondent-respondent (hereinafter referred to as the 2nd respondent), had filed action in the Magistrate's Court, Tangalle against the 3rd, 4th and 5th respondents in connection with the said offence. The 3rd respondent had pleaded guilty to the charges, where the 4th and 5th respondents had pleaded not guilty and the case was fixed for trial against the 4th and 5th respondents.

On 16.08.2001 the 1st respondent, as the registered owner of the vehicle in question had made an application for the release of the said vehicle to the 1st respondent pending the final determination of the trial. The appellant, being the absolute owner, agreed to the said application of the 1st respondent in view of the undertaking by the 1st respondent to pay a sum of Rs. 150,000/- to the appellant in respect of the rentals outstanding under the Lease Agreement. The said vehicle was released to the 1st respondent on the undertaking given by him to pay the appellant Rs. 150,000/- on or before 25.08.2001.

The 1st respondent had failed to pay the said sum of Rs. 150,000/- and on 22.11.2001, pursuant to the appellant bringing the said matter before the Magistrate's Court, learned Magistrate had directed the 1st respondent to handover possession of the vehicle in question to the appellant, subject to certain terms and conditions. The vehicle in question was accordingly handed over to the appellant and the said vehicle remains in the custody of the appellant.

A confiscation inquiry had been held regarding the lorry bearing registration No. 227-8130 in terms of Chapter XXX-VIII of the Code of Criminal Procedure Act and after inquiry, by his order dated 25.08.2005, learned Magistrate had ordered the confiscation of the said lorry. Aggrieved by this order, the appellant filed an application in revision (HCA /113/2005) in the High Court of the Southern Province, holden in Hambantota. The appellant had also filed an appeal in the High Court of Hambantota (HCA 131/2005). On 30.06.2008, learned Judge of the High Court made order dismissing the revision application (HCA/113/2005) and affirmed the order of the learned Magistrate dated 25.08.2005. The learned Judge of the High Court also made order dismissing the appeal (HCA/131/2005) for the same reasons given in the order made on the Revision application. Being aggrieved by the order made by the learned Judge of the High Court of Hambantota in the appeal (HCA/131/2005), the appellant came before this Court whereas with regard to the revision application he had filed an appeal in the Court of Appeal, simultaneously.

When the application for special leave to appeal came up for support before this Court on 03.12.2008, this Court had taken into consideration that there were two orders made by the High Court of the Provinces, in the exercise of its appellate jurisdiction and its revisionary jurisdiction.