

GAMLATH
V.
NEVILLE SILVA AND OTHERS

SUPREME COURT.

BANDARANAYAKE, J., KULATUNGE, J. & WADUGODAPITIYA, J.

S. C. APPLICATION NO. 78/90.

JULY 16, 1991.

Fundamental Rights - Arrest - Torture - Reasonable suspicion - Articles 11 and 13 (1) of the Constitution - Code of Criminal Procedure Act, section 32(1)(b).

A suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the Police Officer's own knowledge or on statements made by other persons in a way which justify him giving them credit. An arrest under section 32(1) (b) of the Code of Criminal Procedure Act can be on reasonable suspicion. The observance of the procedure for arrest without a warrant is now a constitutional right under Article 13(1) of the Constitution which guarantees freedom from arrest. The information on which the arrest is based must be credible by the application of the objective test. An arrest based purely on the subjective satisfaction of the Police Officer would be arbitrary and in violation of Article 13(1). There was no credible information giving rise to a reasonable suspicion that the petitioner was concerned in the offence of dishonestly receiving stolen property. It was an arbitrary arrest if regard is had to the background. The lost water pump belonged to the wife of a senior Police Officer and the initial information which led to the petitioner's arrest was given by a subordinate police officer. The information itself did not touch the petitioner. The petitioner had been severely assaulted when in Police custody and subjected to torture or cruel, inhuman or degrading treatment. This is confirmed by the medical report and supported by the affidavits of witnesses and the prompt statements of the petitioner.

There was therefore violation of the petitioner's fundamental rights under Articles 11 and 13 (1).

Cases referred to:

1. *Muttusamy v. Kannagara* 52 NLR 324, 327.
2. *Chandradasa v. Lal Fernando* S. C. Application 174-5/87 — S.C. Minutes of 30 September 1988.

3. *Amal Sudath Silva v. Kodituwakku* [1987] 2 Sri L.R. 119, 127.
4. *Geekiyanaage Premalal de Silva v. Rodrigo S. C.* Application No. 24/89 — S.C. Minutes of 05.09.1990.
5. *Jayarathne v. Tennakoon S. C.* Application No. 18/89 & 10/89 — S.C. Minutes of 04.07.1991.

APPLICATION for infringement of fundamental rights guaranteed by Articles 11 and 13(1) of the Constitution.

R. K. W. Goonesekera with *Nimal Punchihewa* and *C. Swarnadhipathi* for petitioner.

S. Dheerasekera with *Mervyn Samarajewa* for 1st and 2nd respondents.

Upawansa Yapa, D. S. G. for Attorney-General.

Cur.adv.vult.

August 27, 1991.

KULATUNGA, J.

The petitioner was arrested by the Padukka Police in the course of investigations into the theft of a water-pump with a motor. He complains that his arrest is unlawful and that whilst he was in Police custody the 1st respondent (a Sub - Inspector of Police) and the 2nd respondent (a Police Sergeant) subjected him to torture or cruel, inhuman or degrading treatment. He prays for a declaration that his fundamental rights guaranteed by Articles 11 and 13(1) of the Constitution have been infringed and for compensation. The petitioner's version of the relevant events set out in the petition is as follows:

On 01.12.90 at about 3.30 a.m. the 1st respondent accompanied by four other Police Officers came to his house in a jeep and arrested him. He saw one Dharmadasa inside the jeep which was then driven to the house of one Kirthipala. The police searched for Kirthipala but failed to find him at that time. At about 4.30 a.m. the petitioner and Dharmadasa were

brought to the Padukka Police. Dharmadasa was put into a cell while the petitioner was ordered to be seated on a bench outside the cell. At about 8.00 a.m. Kirthipala was also brought. Thereafter Dharmadasa was taken out of the cell and removed to a place inside the Police Station. The petitioner then heard Dharmadasa shouting. Likewise Kirthipala was also removed in the same direction and the petitioner heard him shouting.

At about 8.30 a.m. the petitioner was taken to a room inside the Police Station where he saw Dharmadasa and Kirthipala who appeared to have been assaulted. The petitioner was taken near them and the 1st respondent threateningly told them “කියපන්” whereupon they said that they had given the water-pump to the petitioner. The petitioner denied it. Then the 1st respondent assaulted him with a “Kitul club”. In the history of injuries given to the Assistant Judicial Medical Officer, Colombo the petitioner described the weapon as a කිතුල් පටිය (a piece of flat Kitul wood) which is more consistent with the injuries found on him. The petitioner’s hands were tied with a rope and the 1st and 2nd respondents hung him by passing the other end of the rope over a beam. While he was in that position both respondents assaulted him with “Kitul Clubs”. He was then lowered to the ground and the two respondents threw chilli powder dissolved in water on his face. He was then dragged into a cell. Owing to the injuries received by him during the assault the police took him to the Padukka Hospital for treatment at about 6.30 p.m. and he was warded.

The petitioner was discharged from hospital on 03.12.90. Dharmadasa and Kirthipala had been produced before the Magistrate Homagama by the police and they were remanded. In view of the hospitalisation of the petitioner the Magistrate enlarged him on bail. On 03.12.90 he visited the Police Headquarters and reported the assault. The officers there arranged for him to make his statement to Mr. Henry Perera, Senior

Superintendent of Police, Nugegoda. His efforts to meet the S.S.P. on the same day were unsuccessful. On 04.12.90 also the S.S.P. was not there but S.S.P. Navaratne attended to him and had his statement recorded by Sergeant Gunadasa. He was then given a letter to the Officer-in-Charge, Mirihana Police Station on the strength of which Mirihana Police Station issued a police ticket to him to enter the General Hospital, Colombo. As there was no time that day, he entered the hospital on 05.12.90. That day he was examined by the Asst. J.M.O. whose report has been produced marked P1. On 14.12.90 he appeared before the Magistrate when his case was called and made a statement regarding the assault on him which was recorded.

According to the report P1, the petitioner told the Assistant J.M.O. that he had been assaulted on 01.12.90 while he was detained by Padukka Police with a "Kitul Patiya" and another long object after tying his wrists and hanging him from the roof. He had the following injuries:

1. Contusion on the medical aspect of the left elbow joint
7 c.m. × 5 c.m. in size.
2. Pressure abrasion on the back of the left upper arm 2, 1/2 c.m. × 2 c.ms. obliquely placed.
3. Two parallel contusions on the upper part of the left hip 8 c.m. long and 1,1/2 c.m. apart from each of the transversely placed.
4. Two curved parallel contusions on the lower part of the left hip 3 c.m. apart from each other 20 cms. in length obliquely placed.
5. Two parallel pressure abrasions on the postero-lateral aspect of the upper part of right hip 1.5 c.m apart from each other 23 cms. long transversely placed.
6. Two parallel pressure abrasions on the postero-lateral aspect of right hip below injury No. 5 obliquely placed 12 c.m. long and 1.5 cms. apart from each other.

7. Two parallel pressure abrasions on the postero-lateral aspect of lower part of right hip 2.5. cms. apart from each other 15 cms. long obliquely placed.
8. Contusion on the lower part of the right hip with a scab in the mid region. The contusion had pressure abrasions on the upper and lower margins 23 cms. in length, 5 cms, broad on the medical 10 cms. and 2,1/2 cms. broad on the lateral part.
9. Grazed abrasion 1 cm. \times 1 cm. on the antero-lateral aspect of the left wrist.
10. Grazed abrasion 1 cm. \times 2 cm. in size on the antero-medical aspect of the left wrist.
11. Grazed abrasion 1 cm. \times 2 cm. on the lateral aspect of the right wrist.
12. Two parallel contusions on the front aspect of right thigh 5 cm. long 3 cm. apart from each other transversely placed.
13. Two parallel contusions on the front aspect of right thigh 5 cm. long transversely placed 2 cm. apart from each other.
14. Contusion 7 cm. \times 2, 1/2 cm. in size on the front aspect of lower part of the left thigh.
15. Contusion 5 cm. \times 3 cm. on the back of the left thigh.
16. Tenderness in the lower part of left leg.
17. Tenderness on the right calf.

The Assistant J.M.O. is of the opinion that all injuries were consistent with the history of assault with a blunt weapon; and injuries 9, 10 and 11 are consistent with a history of having been tied at the wrist.

In support of his version the petitioner filed affidavits from his wife Vinitha Jayasinghe and two other relations Harischandra Welikala and Rohan Gamalath Attorney-at-Law.

Gamalath speaks to having visited the Police Station at about 7.30 a.m. on 01.12.90 on being informed of the petitioner's arrest. At that time the petitioner had not been harmed; but when he visited him again at about 10.00 a.m. on hearing that he had been assaulted he found the petitioner lying inside the cell hardly able to move or speak. On being asked the petitioner said that he had been assaulted by the 1st and 2nd respondents. His attempts to persuade the O.I.C. of the Police Station to send the petitioner to the hospital at that time were unsuccessful but in the evening at about 6.00 p.m. on his request the O.I.C. dispatched the petitioner to the Padukka Hospital.

The case for the respondents is that the petitioner along with two others, Dharmadasa and Kirthipala were arrested in connection with the loss of a water pump valued at Rs. 4,000/- from a land called Linawatte owned by Mrs. Delgoda wife of Nalin Delgoda, Superintendent of Police. The theft was reported to the Padukka Police on 20.11.90 by Punchimahattaya watcher of the estate who said that he could not name any suspect (R1); nor did the immediate investigations by the police disclose any suspect. On 01.12.90 at 2.00 p.m. Sergeant Rupasinghe of the Homagama Police called over at the Padukka Police Station and made a statement (R3) wherein he said that he knows this estate; that he used to supply labourers and attend to other requirements thereon at the request of the owner; that about a week before the loss of the water pump on a day when coconuts were being plucked he supplied two labourers Sunil and Nimal to gather nuts on the estate and that they had brought one Dharmadasa to assist them. Sergeant Rupasinghe added that he suspects Dharmadasa for the theft of the water pump as he had been arrested by the police previously for theft of similar articles.

The respondents further state that acting on the information given by Sergeant Rupasinghe a police party consisting of 4 officers including the 1st and 2nd respondents left the Sta-

tion at about 3.40 p.m. is search of Dharmadasa and arrested him at 4.10 p.m. at his house after informing him of the allegation against him. Thereafter, his statement (R5) was recorded at 4.15 p.m. wherein he confessed to stealing the water pump and selling it to the petitioner through Kirthipala for Rs. 2000/-. Consequent upon Dharmadasa's statement they arrested Kirthipala close to his house at 4.40 p.m. after informing him of the allegation against him. His statement (R6) was recorded at 4.45 p.m. wherein he confirmed Dharmadasa's version and admitted having sold the water pump to the petitioner after representing that it belonged to him. The police party next arrested the petitioner at his house at 5.10 p.m. after explaining the allegation of receiving stolen property.

Continuing their version the respondents state that while the suspects were being taken in the jeep the petitioner said that he had hidden the water pump behind a rock. So they proceeded in the direction shown by him but could not find the water pump. At that stage the petitioner slipped and rolled down the rock. He was lifted and examined for injuries but no injuries were observed. Thereafter the suspects were brought to the Police Station and locked up pending the instructions of the O.I.C.. At 6.45 p.m. the petitioner complained of being unwell and was dispatched to the Padukka Hospital at 6.50 p.m. On 02.12.90 the petitioner's statement was recorded by the police at the hospital (R12); he denied any knowledge or receipt of the water pump. R8, the Medico Legal Report of the District Medical Officer, Padukka on the petitioner states that he had been admitted to the hospital at 7.20 p.m. on 01.12.90 with a history of assault by police; and he had six injuries on his buttock and back of the calf of leg.

Mr. R. K. W. Goonesekera, learned Counsel for the petitioner submitted that the petitioner has established the infringement of his fundamental rights both as regards his arrest and the treatment which he has been subjected to whilst in police custody. It is alleged that the petitioner was not

informed of the reason for his arrest; that in any event the impugned arrest was effected under normal law namely S. 32 (1)(b) of the Code of Criminal Procedure Act, No. 15 of 1979; and that the arrest is unjustified because on the basis of the facts it cannot be said that there was a reasonable suspicion of the petitioner having been concerned in any cognizable offence. The well known test of reasonableness of a suspicion which has been often cited is that "a suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officer's own knowledge or on the statements made by other persons in a way which justify him giving them credit" per Gratiaen J. in *Muttusamy v. Kannangara* (1).

The decision in *Muttusamy v. Kannangara* is also authority for the principle relied upon by the petitioner's Counsel that the reasonableness of the suspicion is liable to be tested by Court. On this basis, Counsel submitted that the subjective satisfaction of the police officer is not sufficient; the test is an objective one. He cited in support the decision in *Chandradasa v. Lal Fernando* (2).

The facts relating to the arrest of the petitioner are interesting. A water pump is lost from an estate owned by the wife of a Superintendent of Police. The watcher cannot name a suspect. Then a Police Sergeant who is known to the owner comes in and names Dharmadasa as a suspect because he had been seen working on this estate and had been arrested by the police previously for theft of similar articles. It is not known whether he had even been charged with theft. On this material Dharmadasa is arrested. Within 15 minutes from his arrest he is said to have confessed to the offence and the disposal of the water pump. He says that when he obtained Kirthipala's assistance to sell the water pump he represented that it belonged to a person living far away and that he did not tell Kirthipala how he came by it. On this statement Kirthipala is arrested and within 10 minutes he is said to have admitted the sale of the article to the petitioner. He, however says that on

being asked by the petitioner he claimed to be the owner of the article. It was on this statement that the petitioner was arrested; however, the stolen article was not recovered.

Whilst there is no objection to the police questioning possible suspects in the course of investigations into an offence, a lawful arrest can be made only on reasonable suspicion based on credible information - *Muttusamy v. Kannangara (supra)*. This is the procedure established by law for an arrest without warrant. The observance of this procedure is now a constitutional right under Article 13(1) of the Constitution which guarantees freedom from arbitrary arrest. The information on which the arrest is based must be credible by the application of the objective test. An arrest based purely on the subjective satisfaction of the police officer would be arbitrary and violative of Article 13(1). These rules apply even in the case of an arrest for an offence under Emergency Regulations and as Atukorale J. described in *Chandradasa's case (supra)* they constitute "legal constraints" on the powers of arrest without warrant conferred on a police officer under Regulation 18(1). Having referred to the fact that police frequently invoke this regulation, like S.32(1) of the Code of Criminal Procedure Act, under the normal laws, Atukorale J. proceeded to state thus —

"It is therefore very essential that they should acquaint themselves fully with its precise nature, scope and ambit. It is all the more so in the context of the present Constitution which makes assurance to all persons the dignity and freedom of the individual by guaranteeing to them, amongst others, the freedom from arbitrary arrest and detention. Every improper invocation of this power by a police officer endangers the constitutional right and assurance of personal freedom enjoyed and held out to the people of this country".

This exhortation applies with even greater force to an arrest without a warrant under the normal laws invoked against the petitioner.

If as pointed out above the petitioner was arrested entirely on the basis of Kirthipala's statement who said that he represented to the petitioner that the water pump belonged to him after which the petitioner bought it, there is no credible information giving rise to a reasonable suspicion that the petitioner is concerned in the offence of dishonestly receiving stolen property. It is an arbitrary arrest particularly having regard to the background to the case viz. the water pump which was lost belongs to the wife of a Senior Police Officer and the initial information which led to the petitioner's arrest was given by a subordinate Police Officer. That information, even if it has any value, does not touch the petitioner. The petitioner complains that he was not informed of the reason for his arrest. Even if, as stated by the respondents, he was informed of the reason, I determine the arrest to be unlawful for non-conformity with the requirements of S.32(1)(b) of the Code of Criminal Procedure and hence violative of Article 13(1) of the Constitution. The 1st and 2nd respondents are responsible for this violation.

As regards the alleged violation of Article 11, I am satisfied that the petitioner was, whilst he remained in police custody subjected to severe assault constituting torture or cruel, inhuman or degrading treatment. This is supported by the Medical Report P1 which is in turn confirmed by the Medical Report R8 despite its brevity. The petitioner's version that he was assaulted from about 8.30 a.m. on 01.12.90 is supported by the affidavit of Gamalath Attorney-at-Law and the prompt statement of the petitioner to the D.M.O., Padukka, the complaint to the Police Headquarters and the history of injuries given to the D.M.O. Padukka and the Asst. J.M.O. Colombo. This was followed up with a complaint to the Magistrate. I reject the respondents, version that the petitioner and other suspects were arrested during the afternoon of that day and their

statements were recorded so fast and in quick succession between 4.10 p.m. and 5.10 p.m. and that by 6.45 p.m. the petitioner became so ill as to require hospitalization by reason of a natural cause or by injuries caused by rolling down a rock as the respondents attempt to make out. I accept the petitioner's version that he was arrested during the early hours of the morning and was later on tortured at the Police Station by the 1st and 2nd respondents. Presumably, this was done for the purpose of extracting a confession from the petitioner which they failed to get. Accordingly, I determine that the 1st and 2nd respondents have infringed the petitioner's rights under Article 11 of the Constitution.

In determining the relief to be granted to the petitioner, I take into consideration the fact that this is yet another case in which the police have nonchalantly indulged in unlawful arrest of a citizen and torture despite so many decisions of this Court in which the fundamental rights involved have been discussed over and over again. The strong condemnation of torture in *Amal Sudath Silva v. Kodituwakku* (3) to which reference has been made in recent judgments of this Court in *Geekiyanage Premalal de Silva v. Rodrigo* (4) and *Jayaratne v. Tennakoon* (5) has had no effect on the police. In *Amal Sudath Silva's* case Atukorale J. describes torture by the police as "barbaric, savage and inhuman" and "most revolting to one's sense of human decency and dignity". He also said —

"Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment within the confines of the very premises in which he is held in custody..... The petitioner may be a hard-core criminal whose tribe deserves no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our Constitution".

Amal Sudath Silva v. Kodituwakku. (3)

I am in respectful agreement with the above quoted views which need no improvement for emphasis except to state that despite subsequent reminders to the police, violations of Article 11 of the Constitution which symbolises man's inhumanity to man continue. Such infractions make the State primarily liable. In awarding just and equitable relief we are mindful of the fact that the State has to pay compensation out of public funds; but this Court cannot on that ground resile from making an appropriate order. The State has to pay in view of the principle of State responsibility for executive and administrative action. If payment of compensation in default is a burden on public funds, it cannot be helped. In any event, compensation ordered is payable to the citizen whose rights are violated and constitutes a just levy on public funds in favour of the citizen. In all the circumstances, I direct the State to pay Rs. 1000/- (Rupees One Thousand) to the petitioner as compensation on account of the infringement of his rights under Article 13(1) and Rs. 14,000/- (Rupees Fourteen Thousand) as compensation on account of the infringement of his rights under Article 11. The 1st and 2nd respondents are personally responsible for such infringements and are liable under Article 4(d) read with Article 126(4) to an order for relief. In the circumstances of this case, I direct the 1st and 2nd respondents to pay Rs. 1750/- (Rupees One Thousand Seven Hundred and Fifty) to the Petitioner as costs in the proportion of Rs. 875/- (Rupees Eight Hundred and Seventy Five) each but with a warning that a recurrence of such conduct by police officers may attract heavier sanctions against them including liability to pay compensation.

Bandaranayake, J. — I agree.

Wadugodapitiya, J. — I agree.

Application allowed. Compensation ordered.