NALIKA KUMUDINI, ATTORNEY-AT-LAW, (ON BEHALF OF MALSHA KUMARI)

v.

NIHAL MAHINDA, O.I.C. HUNGAMA POLICE AND OTHERS

SUPREME COURT.
FERNANDO, A.C.J.,
DHEERARATNE, J. AND
ANANDACOOMARASWAMY, J.
S.C. APPLICATION (F.R.) NO. 615/95
OCTOBER 30, 1996, AUGUST 28,1997.

Fundamental rights – Articles 11, 13(1) and 13(2) of the Constitution – Effective relief for infringement of rights – Redress by way of compensation.

Malsha Kumari a 14 year old girl was arrested at her house by police officers of the Hungama Police Station. She was questioned about the theft of a gold chain and assaulted by Police Officers both at the time of her arrest and at the Police Station. The 1st respondent, officer- in-charge of the Police Station, assaulted her with a hose-pipe and trampled her. Thereafter her hands were tied behind her back and she was hung on a tree with a rope. While she remained hung the 1st respondent beat her with a hose-pipe. Four other officers joined in the assault. She sustained injuries on her body and the spine. She also had injuries on both wrists caused when she was tied and hung.

Held:

1. The arrest and detention of the girl without producing her before a Magistrate were unlawful and that she was also subjected to torture. The 1st respondent acquiesced in and condoned the said acts which infringed her rights under Articles 11, 13(1) and 13(2) of the Constitution.

2. In all the circumstances, the petitioner came to court within a month of becoming free of the disability caused by the infringement of her rights. Hence, her application was not time-barred.

***per* Fernando, A.C.J.**

"In many cases in the past this Court has observed that there was a need for the Inspector-General of Police to take action to prevent infringements of fundamental rights by Police Officers, and where such infringements nevertheless occur, the Court has sometimes directed that disciplinary proceedings be taken. The response has not inspired confidence in the efficacy of such observations and directions, and persuades me that in this case compensation is the appropriate remedy".

Cases referred to:

1. *Lakshman v. Fernando*, S.C. 324/90 S.C. Minutes 29th September, 1995.
2. *Premadasa v. Officer-in-Charge of the Hakmana Police* S.C. 127/94 S.C. Minutes 10 March, 1995.

APPLICATION for relief for infringement of fundamental rights.

K. Thiranagama for the petitioner.

Gamini Perera for the 1st respondent.

D. Ratnayake, S.C. for the 2nd and 3rd respondents.

Cur. adv. vult.

September 24, 1997.

FERNANDO, ACJ:

This application was filed on 9.11.95 by an Attorney-at-Law ("the complainant Attorney") on behalf of a 14 year old girl, whom I will refer to as the petitioner, alleging torture, unlawful arrest and detention on 5.9.95, contrary to Articles 11, 13(1) and 13(2), by officers of the Hungama Police, including the 1st respondent, the Officer-in-Charge.

The original petition, and the supporting affidavit of the complainant Attorney, were prepared on the basis of a letter dated 1.10.95, purportedly signed by the petitioner's father, to Lawyers for Human Rights and Development ("LHRD"). That letter had been posted on 30.10.95, and had been received on 1.11.95.

On 15.11.95 this Court (G. P. S. de Silva, CJ, Kulatunga, J, and Wadugodapitiya, J.) made the following order:

"We are of the opinion that the delay can be excused and the application has been made in time. However we inform (Counsel) that he must take steps to have the minor properly represented before proceeding with this application. Moreover,

admissible evidence should also be furnished. ... support ... on 18.1. 96."

On 18.1.96, Counsel stated that LHRD had not been able to obtain an affidavit from the petitioner (as required by the order of 15.11.95), and that consequent upon letters written to the petitioner's father he had informed LHRD by telephone that they did not wish to proceed with the application because the Police Officers had asked for pardon and agreed to pay the costs. He therefore moved to withdraw the application. This Court (Fernando, J, Amerasinghe, J, and Silva, J.) said:

"Having regard to the serious allegations of torture set out in the petition, which are supported by the complaint made on 6.9.95 (the contents of which Counsel has read out to the Court), the fact that the minor had been hospitalized for several days and continues even now to receive medical treatment, and the fact that – among other things – it is alleged that the sight of one eye has been impaired and that she has not attended school since the incident, and, in particular, the fact that Counsel himself states that he feels that the father's wish to withdraw this application was because of pressure, we do not allow the withdrawal of the application."

I would add that since an Attorney-at-Law had filed that petition on behalf of the minor petitioner (not assisted by a guardian-ad-litem appointed by the Court), I doubt whether a third party even if he was the father of the minor had the right to give instructions for its withdrawal.

Accordingly, leave to proceed was granted, medical records and reports were called for, and the petitioner was granted permission to file additional documents, including the statement she had made on 6.9.95, and the instructions which the Petitioner and her father had given LHRD.

The Court also directed the 2nd respondent:

"... to ensure that neither the minor nor the other members of her family are subjected to any harassment or interference by the Police, particularly the Hungama Police, and also to take all reasonable steps for the protection of the minor and the other members of her family."

On 24.1.96 the petitioner tendered photocopies of the instructions given to LHRD by the petitioner and her mother (X2 and X3), a copy of the statement she made to the Tangalla Police on 6.9.95 (X4), and the draft affidavits prepared by LHRD in accordance with the instructions of the petitioner and her mother (X5 and X6, both dated December 1995).

Thereafter the 1st respondent filed his counter-affidavit dated 18.4.96, annexing affidavits from the petitioner's father (1R2), Dodangodage Hinniappuhamy (1R4), Dodangodage Kirthiraja (1R5), and PS Sumanapala (1R1, to which were annexed several statements recorded by him on 5.9.95). The petitioner's father said that the signature on the letter dated 1.10.95 was not his.

The complainant Attorney's counter-affidavit dated 6.5.96 was then tendered. She stated that on 20.11.95 the petitioner and her mother had visited the LHRD office in Colombo, and had given instructions for the preparaion of their affidavits (i.e. X5 and X6), but had not come to sign them; and that a few days thereafter the mother had informed LHRD by telephone that they did not wish to pursue the matter.

On 8.10.96, with notice to the respondents, the complainant Attorney tendered affidavits signed by the petitioner and her mother, and an application for the appointment of the Petitioner's mother as her guardian-ad-litem. In those affidavits the Petitioner and her mother affirmed to the truth of the averments contained in the draft affidavits (already filed as X5 and X6 respectively) which, they said, had been prepared on their respective instructions. Both stated that they had not come to the LHRD office to sign those draft affidavits because of threats and intimidation by the 1st Respondent and other Police officers from Hungama.

On 30.10.96 the Court appointed the mother as guardian-ad-litem. The 1st respondent did not seek to file any affidavit in reply to the affidavits filed on 8.10.96. No complaint was made, then or later, by Counsel of any lack of opportunity to controvert those affidavits. The application was taken up for hearing, but not concluded, on that day; and for various reasons, it could not be resumed until 28.8.97. On 30.10.96 learned Counsel for the petitioner alleged that she was being harassed by the 1st Respondent by means of certain proceedings filed in MC Hambantota 25528, and the Court directed the learned Magistrate not to take any further proceedings pending the final determination of this application, and called for the record.

THE PETITIONER'S CASE

In these circumstances, neither the letter dated 1.10.95 nor the original affidavit of the complainant Attorney, in so far as it was based on that letter, can be relied on. The direct evidence in support of the petitioner's case thus consists of the affidavits of her mother and herself filed on 8.10.96, and the draft affidavits marked X5 and X6 the truth of which they confirmed, thereby adopting them as part of their sworn affidavits. In the circumstances of this case, I consider that the draft affidavits ought to be treated as having been duly sworn.

Early morning on 5.9.95 the petitioner went to fetch water. On her way back she noticed a small red glass box on the side of the road; she picked it up and saw, inside it, a gold chain and "suraya" (which I will refer to as "the chain" for convenience); and she put it back. Kirthiraja's house was adjacent, and two members of his household, who were washing clothes, had seen this. At about 9.00 a.m. two constables (Gamini and Sunil) came to the petitioner's house, and inquired for her. Without even questioning her, one of them slapped her, telling her to return the things she had stolen from "that [meaning Kirthiraja's] house". She explained about the red glass box. They went and retrieved it. They then came back, and asked her to return the other things she had taken. When she said, she had not taken anything they dragged her to Kirthiraja's house, and beat

her with sticks, asking her about a sum of Rs. 10,000, two wrist-watches, three rings and two earrings. They then put her mother and her into a three-wheeler and took her to the Hungama Police Station.

At the Police Station, the same two constables beat her with a hose-pipe; a lady officer snatched the hose-pipe, whereupon they slapped the petitioner on both cheeks. She was then taken before the 1st respondent, who questioned her on the same lines, with the same result. He then took the hose-pipe, told her to place her head on a chair, and hit her several times on the spine, asking her to return the articles she had stolen. She fell to the ground. The 1st respondent, who was wearing shoes, trampled her. He then threatened to take her, and beat her, near her school; she cried, saying that she had done no wrong. Again she was beaten with the hose-pipe, put into the jeep, and taken to Kirthiraja's house. Her mother was not allowed to accompany her in the jeep. Her hands were tied behind her back and she was hung from a kohomba tree with a rope which Kirthiraja brought. She was raised until her head was brushing against the branches. One officer held the rope suspending her, while the 1st Respondent beat her with the hose-pipe and another hit her with a thick stick; four officers joined in this exercise. She was then lowered to the ground, put in the jeep, and brought back to the Police Station. Only then were her hands untied.

In the evening her mother came to the Police Station, but she was scolded in filth and told that her child would not be released, and that complaints were being recorded to file a case. That was at about 5.45 p.m. Her mother then met Mr. Andrahennedi, an Attorney-at-Law and a member of the Southern Provincial Council, who spoke to the 1st respondent at about 8.00 p.m. Then only was she released. Her mother was told to come with her to the Police Station the next day. When she came the 1st respondent told her to take the petitioner to an ayurvedic physician, and that if she took the petitioner to a hospital, she should say – without mentioning the Police assault – that one of the parents had hit her for some small lapse.

The petitioner vomited blood twice in the early hours of the morning on 6.9.95. She was taken to the Ranna hospital, but the medical officer was not there; a private practitioner refused to treat her when the mother said that she had been assaulted by the Police, but later gave her some medicine just for that day. Again at mid-day she vomited blood. The mother then took her to the Superintendent of Police, Tangalla, who asked her to make a complaint to the Tangalla Police, and gave her a chit addressed to the D.M.O. Tangalla. The Petitioner's statement x_4 was recorded at 2.45 p.m. on 6.9.95. She was warded at the Tangalla hospital till the 8th; and although she was discharged and went home, she again vomited blood on the 10th night. She went back to the Tangalla hospital on the 11th, but was sent to the Matara hospital, where she was warded until the 15th. But she continued to have chest pains, spine ache, swelling of the knees and the soles of the feet, lifelessness, dizziness and reduced vision, for which she took western and ayurvedic treatment for over a month. Because of the threats made by the Police, as well as her ill-health and the humiliation she had undergone, she did not go to school.

There are some inconsistencies between the petitioner's affidavit and her statement x_4. In her statement she says that no one saw her pick up the red glass box, and she does not say that the two constables retrieved the box in the morning. However, if she had undergone even half the physical and mental ill-treatment which she alleges, lapses of memory as well as errors in communication are understandable.

According to the petitioner and her mother, the 1st respondent made attempts to prevent the matter being pursued. On 5.11.95 the 1st respondent and two others told the mother that she would be given Rs. 25,000 if the complaint was withdrawn. On 7.11.95 the 1st respondent, together with five other Police officers, and one Nissanka, a Justice of the Peace, came to the petitioner's house with gifts, and asked them to withdraw the complaint, promising to pay Rs. 20,000, and also to recover compensation for her by instituting legal proceedings against Kirthiraja. Nissanka asked the petitioner's mother to sign a piece of paper which had a stamp at the bottom. When the mother wanted to read it she was told that there was no need, and because of their insistence, she signed it without reading.

On 9.11.95, the mother complained about this to the SP Tangalla. The 1st respondent did not seek to file a further affidavit to contradict any of these allegations.

THE 1ST RESPONDENT'S CASE

The 1st respondent relied mainly on the affidavits of Kirthiraja, Hinniappuhamy and PS Sumanapala as to what transpired at the petitioner's house. He denied that he was present at the petitioner's house that evening, and that the petitioner was ever at the Police station that day.

According to Kirthiraja's affidavit (1R5), the chain which he wore round his neck had fallen off while he was going to the market; later he learnt (but he does not say from whom) that the petitioner had picked up the chain; he went to her house, which adjoined his, and asked for the chain. Because she did not give it, he complained to the Hungama Police at 5.00 p.m. PS Sumanapala (and no other officer) went to the petitioner's house, and questioned her; she said that she had not picked up the chain; he then told her to return the chain, saying there was evidence. At that stage, the petitioner's father sternly told her to return the chain, and gave her a blow with his hand. She ran, and she fell into a stone quarry which was in front of the house. They helped her out. Kirthiraja noticed that she had some minor injuries. The father then hit her several times with a stick. She then brought the chain which she had hidden – Kirthiraja did not give any particulars as to how, and from where, they were brought. He identified the chain as his; and he therefore told PS Sumanapala that no further investigation was necessary. About an hour and a half later he heard cries from the direction of the petitioner's house. He later learnt that this was due to the petitioner being beaten by her father: and that is corroborated by Hinniappuhamy (1R4).

PS Sumanapala's affidavit (1R1) is extremely brief, and lacks detail. He said that Kirthiraja complained of the loss of a chain; after questioning him at length, he recorded a statement at 5.00 p.m.; and left for investigation at 5.10 p.m. without any other officer. After investigation he handed over the articles which were recovered to the owner, after identification. The owner then said legal action was not

necessary, and so he severely warned the suspect and recorded her statement; thus the matter was settled. He annexed the relevant statements and notes of inquiry.

This version is contradicted in several respects. According to Kirthiraja's statement, **someone** (unnamed and unidentified) had told him that he had seen the petitioner picking up **something** (unspecified) from the road and going on her way. PS Sumanapala does not explain why – despite his claim that he questioned Keerthiraja at length – he had not probed those matters: who was the informant, and what exactly had he seen? Why did he not try to locate the informant and get a statement from him first? Further, in his statement Kirthiraja claimed to have discovered the loss at 11.00 a.m. – but there is no explanation why he had waited till 5.00 p.m. to complain to the Police.

Although Kirthiraja claims that the petitioner had only minor injuries after she fell into the stone quarry, PS Sumanapala's notes record that she had sustained several injuries – contusions and abrasions on the hands and spine. How did he notice any injuries on her spine? Or was that put in his notes because he knew that she had been hit on the spine? It is difficult to believe that the father, despite these injuries, at once hit her again; and that the mother stood by, without at least insisting on some first aid. But leaving that aside, Kirthiraja's affidavit and PS Sumanapala's notes state that the latter told the petitioner that there was "evidence" that she had picked up the chain, when in fact there was not even hearsay evidence to that effect; they also suggest that the petitioner was allowed to go **alone** – despite having tried to run away just a few minutes before – to bring the chain; no mention is made of the place where it was supposed to have been "hidden": although that would have indicated whether the petitioner had simply picked it up and put it back, or had dishonestly taken it. But Hinniappuhamy tells quite a different story: that at about 5.30 p.m. he saw the petitioner, her father and Kirthiraja come to an overgrown spot, **near his house**, and recover something from there.

Further, PS Sumanapala's notes record that when the chain was brought, he found that it had the marks mentioned by Kirthiraja; and that was why he decided that the chain was Kirthiraja's and gave it to

Kirthiraja, who identified it as his. But in Kirthiraja's statement no identifying marks are mentioned.

In his affidavit the petitioner's father did not say anything about the incidents of 5.9.95. It is not likely that he would have admitted having severely assaulted his own daughter, and I therefore do not regard his silence as being inconsistent with the 1st respondent's version on that point. However, there is no doubt that the petitioner did receive serious injuries on 5.9.95, and if it is the 1st respondent's position that her father was responsible, I would have expected him to have caused that matter to be investigated with no less enthusiasm than the loss of Kirthiraja's chain: his failure to do so indicates that he knew that it was not the father who was responsible for those injuries.

FINDINGS

These contradictions and infirmities make it probable that Kirthiraja's and PS Sumanapala's version of the events of the evening of 5.9.95 was not true. But there is another circumstance which to me is conclusive. The unchallenged medical evidence is that on 6.9.95 the petitioner was found to have a two-inch wide injury encircling each wrist "like a bangle". That is totally inconsistent with the 1st respondent's version as to how she received injuries, and completely corroborates the petitioner's claim that her hands were tied behind her back and that she was then suspended from a tree.

I therefore reject the 1st respondent's version as to those events. I find the petitioner's version to be much more probable. Due allowance being made for her state of health, a prompt complaint was made to the Tangalla Police on 6.9.95 at 2.45 p.m., and that was in all material respects the same as what she said in her subsequent affidavits. The 2nd respondent, the Inspector-General of Police, has not tendered affidavits from the SP, Tangalla, and the appropriate officer of the Tangalla Police, and hence this Court is not aware whether, and if so what, steps had been taken – as indeed they should have been – to see whether that complaint was true, and to institute criminal and/or disciplinary proceedings against those responsible.

PRELIMINARY OBJECTION

Despite the order made on 15.11.95, learned Counsel for the 1st respondent submitted that the petition was out of time because – even ignoring the entire period between the incident and the date of discharge from the Matara Hospital – the petition could have been filed on or after 16.9.95, but not later than 16.10.95.

The order made on 15.11.95 was *ex parte*, and in my opinion it would be contrary to natural justice to deny the 1st respondent an opportunity to be heard in regard to the time bar.

Article 17 recognises that the right to institute a fundamental rights application is itself a fundamental right *Lakshman vs. Fernando*[1], for breach of which compensation may be awarded). If an aggrieved person delays the institution of such an application through ignorance of the law relating to the time bar, such ignorance would be no excuse. However, delay for other reasons is not necessarily fatal, as for instance where an aggrieved person is prevented (e.g. by arrest and detention, or even threats) or incapacitated (e.g. by injury, whether resulting in hospitalization or not) from applying to this Court in time, where it is the alleged offender who is responsible for such prevention or incapacity. That must be so, because otherwise a person who infringes the fundamental right of another can avoid liability for that infringement simply by ensuring that the victim is detained or incapacitated for over one month. The period of one month prescribed by Article 126(2) is one during which the aggrieved party is not only free of such disability, but is truly free to take the steps necessary to vindicate his legal rights. The further question may arise: What if such detention or disability is the result of the act of a third party? The answer may again be, *lex non cogit ad impossibilia*, but that however I need not determine today.

Another consideration is the minority of the petitioner. While it may be that a minor is not entitled to wait until majority to institute proceedings, minority is at least relevant in deciding whether the effect of force, duress, injury and the like has worn off.

While discharge from hospital, in the absence of other evidence, may well be proof that a victim was "free" to institute action, (unlike in *Premadasa v. Officer-in-Charge, Hakmana Police*)[2] there is evidence

that the petitioner continued to be under a real disability for a considerable period of time. That evidence has not been controverted. I hold that the 1st respondent has not established that the petitioner ceased to be under a disability, arising from the injuries inflicted by him, at least one month before the petition was filed.

I therefore overrule the preliminary objection.

ORDER

I hold that the 1st respondent acquiesced in and condoned the petitioner's unlawful arrest and deprivation of liberty; was responsible for her unjustified detention without production before a Magistrate; and subjected her to torture and to cruel, inhuman and degrading treatment, in order to extract an admission of guilt and to recover property alleged to have been stolen. I hold that he has infringed the petitioner's fundamental rights under Articles 11, 13(1) and 13(2). The torture was over an extended period. Its consequences were severe and the 1st respondent attempted, by threats and intimidation, to deter the petitioner from pursuing her legal remedies. The petitioner has prayed for compensation in a sum of Rs. 200,000, which is by no means excessive in the circumstances.

In many cases in the past this Court has observed that there was a need for the Inspector-General of Police to take action to prevent infringements of fundamental rights by Police Officers, and where such infringements nevertheless occur, this Court has sometimes directed that disciplinary proceedings be taken. The response has not inspired confidence in the efficacy of such observations and directions, and persuades me that in this case compensation is the appropriate redress.

I order the State to pay a sum of Rs. 150,000 as compensation to the petitioner. This will be deposited in the National Savings Bank in a fixed deposit yielding monthly interest, which will be paid to the petitioner's mother, to be used for the petitioner. The petitioner will be entitled to deal with this deposit only upon attaining majority. I further order the 1st respondent personally to pay the petitioner a sum of Rs. 50,000 in five monthly instalments of Rs. 10,000, commencing 30.11.97. The first instalment will be paid to the petitioner's mother to be used for the petitioner's welfare, while the remaining instalments will be deposited in the National Savings Bank on the same terms as

set out above. The State will also pay the petitioner a sum of Rs. 5,000 as costs.

The 2nd respondent is directed to ensure that neither the petitioner nor the other members of her family are subjected to any harassment or interference by the 1st respondent and the Hungama Police.

It is also necessary to refer to MC Hambantota Case No. 25528. The proceedings commenced with an application dated 24.1.96 made by the 1st respondent under section 81 of the Code of Criminal Procedure Act, in respect of seven persons, for security for keeping the peace. That application referred to three complaints, only one of which involved the petitioner: a complaint of abuse and causing annoyance by one Dodangodage Somasiri, who was not involved in the other two complaints. Another complaint was by the petitioner's mother. On 24.1.96 neither Somasiri nor the petitioner were present in Court. Without recording any reasons the learned Magistrate issued warrants, although section 84 requires a summons in the first instance, except in the circumstances set out in the proviso. Upon an application by an Attorney-at-Law, the warrants were recalled on 25.1.96. The case was called on 28.2.96, 24.4.96, and 31.7.96. On all three days the petitioner was present, but Somasiri was not, and three orders were made for the issue of a warrant. On the next day, 18.9.96 Somasiri as well as the petitioner were absent, and another order was made for the issue of warrants against both. The record does not show that the Police were asked, on any of these dates, why Somasiri had not been arrested and produced in Court. No steps were taken to inquire into the other two disputes. There was cause for the petitioner's belief that those proceedings were instituted to harass her. The record has been returned to the Magistrate's Court which will, no doubt, expedite the proceedings. The Registrar is directed to forward a copy of this order to the Judicial Service Commission for information.

DHEERARATNE, J. – I agree.

ANANDACOOMARASWAMY, J. – I agree.

Relief granted.