

JAYASINGHE  
v.  
SAMARAWICKREMA AND OTHERS

SUPREME COURT  
G. P. S. DE SILVA C.J.  
KULATUNGA J. AND  
RAMANATHAN J.  
S.C. APPLICATION NO. 157/91.  
OCTOBER 18 AND DECEMBER 02, 1993.

*Fundamental Rights - Unlawful arrest - Illegal detention - Torture - Detention under Regulations 19(2) and 17(1) of the Emergency Regulations - Constitution Articles 11, 13(1) and (2).*

The petitioner was arrested on 23.07.91 (though Police gave the date as 06.08.91) and taken to the Eheliyagoda Police Station, and questioned about suspected links there until 07.08.91, when he was taken to the Deraniyagala Police Station where he was tortured.

The petitioner had disappeared after 23.07.91. On learning he was at Eheliyagoda Police Station the petitioner's mother and father had visited him daily at the Police Station, Eheliyagoda between 26.07.91 and 07.08.91 and there he had not been assaulted. On 29.07.91 the petitioner's mother had complained to the International Red Cross. The I.G.P. had informed the petitioner's mother that the petitioner had been arrested on 23.07.91 for subversive activities by the Eheliyagoda Police and handed over to the Deraniyagala Police on 06.08.91 for further investigations.

**Held:**

(1) The Petitioner was arrested on 23.07.91 by Eheliyagoda Police and not on 06.08.91.

(2) Having regard to the conditions of civil disorder prevailing during that period and the available material it cannot be said that on a balance of probabilities the petitioner's arrest was unjustified.

(3) The detention of petitioner from 23.07.91 till 06.08.91 (without a valid detention order and without being produced before a Magistrate), was unlawful for two reasons.

(a) The Detention Order under Regulation 19(2) authorises detention at Pelawatte Detention Camp, but he had been in the custody of the Deraniyagala Police Station though hospitalized. He was moved from one hospital to another by Deraniyagala Police and presumably removed to the Deraniyagala Police Station on 23.10.91 and remained there until his detention there was regularised by the Preventive Detention Order under Regulation 17(1) dated 02.11.91.

(b) Detention under Regulation 19(2) can be justified only if it is for the purpose of further investigations and no material was placed before Court to show there were further investigations.

(4) The detention order was made on the subjective satisfaction of the 7th respondent (Secretary Defence) who had the petitioner's statement and other circumstances before him. Hence the detention order cannot be said to be unjustified. The said order was lawful.

(5) The 3rd respondent (OIC Eheliyagoda Police) kept petitioner in unlawful detention, and obviously was a party to fabricating records with the object of suppressing such unlawful detention. The 4th respondent (PC Gunatilake of Deraniyagala Police) had arranged for the torture of the petitioner and himself participated in it. The 5th respondent (O.I.C. Deraniyagala Police Station) cannot deny responsibility for the brutal assault of the petitioner and for the prolonged detention in the very Police Station where he was subjected to such assault. He deliberately encouraged, tolerated or acquiesced in the acts which infringed the petitioner's fundamental rights.

**Per Kulatunga, J.**

"I do not think that this Court can endorse blatant violations of fundamental rights under the guise of investigating subversive activities."

**Cases referred to:**

1. *Nanayakkara v. Henry Perera* [1985] 2 Sri LR 375, 385.
2. *Chandra Kalyani Perera v. Captain Siriwardena* [1992] 1 Sri LR 251, 263.
3. *Wimal Vidyamuni v. Col. Jayatilleke* S.C. Application No. 852/91 (spi) S.C. Minutes of 22.7.92.
4. *Sirisena v. Perera* [1991] 2 Sri LR 97.
5. *Ratnapala v. Hector Dharmasiri* S.C. Application No. 162/91 – S.C. Minutes of 28.4.93.
6. *Amal Sudath Silva v. Kodituwakku* [1987] 2 Sri LR 119, 127.
7. *Premalal de Silva v. Inspector Rodrigo* [1991] 2 Sri LR 307.
8. *Senthilnayagam v. Seneviratne* [1981] 2 Sri LR 187, 208.
9. *Dissanayake v. Superintendent Mahara Prison* [1991] 2 Sri LR 247, 263.

**Application** for relief for infringement of fundamental rights.

*K. Thiranyagama with Jauffer A. Hassan, Mrs. Pathirana, N. Swarna and Miss C. Malawaarachchige* for petitioner.

*D. P. Kumarasinghe DSG* for respondent.

*Cur. adv. vult.*

January 12, 1994.

**KULATUNGA, J.**

The petitioner alleges unlawful arrest and detention and torture whilst he remained in police custody. At the time of his arrest he was 29 years of age. He states that he is a mason and has not been involved in any illegal, criminal or subversive activity.

### **PETITIONER'S VERSION**

The petitioner states that he was arrested on 23.07.91 by the 1st and 2nd respondents (Police Constables) at the Eheliyagoda bus stand when he was on his way to his aunt's place at Godagampola and was taken to the Eheliyagoda Police Station. He was thereafter in the custody of the 3rd respondent (Inspector of Police) Officer-in-Charge of the Eheliyagoda Police Station until 07.08.91 during which period he was questioned about his links with the Janatha Vimukthi Peramuna.

On 07.08.91 a group of police officers (from the Deraniyagala Police Station) including the 4th respondent (Police Constable) took the petitioner from the Eheliyagoda Police Station to the Deraniyagala Police Station. On 08.08.91 the petitioner was tortured at that Police Station by a group of police officers including the 4th respondent.

The petitioner's description of the torture is that the 4th respondent first made him to squat on the ground and then twisted his arms behind his back and pulled them to the front of his body from behind in between his legs. Thereafter, both his hands and feet were tied together at the ankle. A pole was then slipped between his arms and the legs and the ends of the pole were rested on two tables. In this

position he was revolved around the pole and he was clubbed while his body was in motion.

The petitioner states that in consequence of such torture, he sustained a fracture of his collar bone and was unable to speak. In the evening of 08.08.91 he was admitted to the Avissawella Base Hospital and was warded there until 21.08.91 when he was transferred to the General Hospital Colombo as his condition worsened. He was there for about five days when a group of police officers from the Deraniyagala Police Station got him discharged and admitted him to the Avissawella Base Hospital; and on 29.08.91 he was admitted to the Deraniyagala Hospital. He was discharged from that hospital on 17.09.91 and taken to the Deraniyagala Police Station. As he had difficulty in passing urine he was readmitted to the Deraniyagala Hospital on 21.09.91. On 16.10.91 when he signed his affidavit to this application he was an inmate of that hospital.

## **RESPONDENT'S VERSION**

The petitioner alleges infringement of his fundamental rights under Articles 11, 13(1) & (2). An affidavit of objections to this application has been filed by the 7th respondent (Secretary, Ministry of Defence) annexing thereto *inter alia*, affidavits from the 3rd, 4th and 5th respondents and supporting documents. The case for the State is that the petitioner was arrested by officers of the Eheliyagoda Police Station not on 23.07.91 but on 06.08.91. The police party acting on certain information, ambushed near a petrol shed. It was led by the 3rd respondent. The police party consisted of the 1st and 2nd respondents who arrested the petitioner at the Eheliyagoda town. The petitioner told them that he was proceeding to the house of a relation. After arresting the petitioner, the 1st and the 2nd respondent produced him to the 3rd respondent. I.B. Extracts P2 and P3 have been produced in support of this version.

The 3rd respondent states that the reason for the arrest (which he explained to the petitioner) was that the petitioner was wanted by the Deraniyagala Police on account of subversive activities and that the petitioner was handed over to the Deraniyagala Police on 07.08.91. According to the I.B. Extracts P1, the petitioner had no injuries at the time of his arrest and he was in good health.

The 4th respondent states that the petitioner was arrested by the Eheliyagoda Police on 06.08.91 and was handed over to the Deraniyagala Police on 07.08.91 as he was wanted for subversive activities including collection of firearms. Petitioner's statement was recorded on the same day at 9.00 p.m. In his statement (P3) the petitioner confessed to having engaged in subversive activities as a member of the Deshapremi Janatha Vyaparaya. He with other members of that organisation, pasted posters and also engaged in the unauthorised collection of National Identity Cards and firearms. After recording his statement, a police party consisting of the 4th respondent, two other Police Constables and a Sub Inspector of Police accompanied the petitioner who volunteered to show the place where he had hidden some firearms. The police party was armed and the petitioner was handcuffed during the journey. They left the Police Station at 9.30 p.m. on 07.08.91. At about 1.15 a.m. on 08.08.91 they were at a place called Gollahinna. They were carrying torchlights. At that stage the petitioner attempted to escape. He rushed through the scrub jungle and fell on a hillside and was captured with the assistance of two villagers who came to the spot.

In his notes (P3) the 4th respondent states that when the petitioner was captured he was still with handcuffs. He had abrasions of neck, left shoulder and back. There was no bleeding and the petitioner said that he falsely volunteered to assist in recovering firearms in order to create an opportunity to escape from custody.

The 4th respondent denies the alleged torture of the petitioner. This respondent as well the 5th respondent who also gives the same version explain the injuries found on the petitioner and the condition which required his hospitalisation as being attributable to his fall in attempting to escape and to the ensuing scuffle, in the course of which the police had to use "minimum force" to apprehend him.

In defence of the impugned detention, the 7th respondent has produced marked 'Z' a detention order under Regulation 19(2) of the Emergency Regulations authorising the petitioner's detention at the Pelawatte detention camp for 90 days from 06.08.91 and a preventive detention order marked 'Z1' dated 02.11.91 issued in terms of Regulation 17(1) of the Emergency Regulations under which the 6th

respondent (The Inspector General of Police) has directed that the petitioner be detained at the Deraniyagala Police Station.

### **PETITIONER'S COUNTER AFFIDAVIT**

The petitioner in his counter affidavit reiterates the allegation that he was arrested on 23.07.91 and not on 06.08.91. In support, he has produced several documents of which A1, A3, and A5 are very relevant. He has also produced an affidavit from his mother Mary Nona who states that she found the petitioner missing after 23.07.91 and learnt that he had been arrested and detained at the Eheliyagoda Police Station. Mary Nona says that between 26.07.91 and 07.08.91 she with her husband visited the petitioner daily at the Eheliyagoda Police Station and supplied him with food and clothing. During that period the petitioner had not been subjected to any assault or torture.

Mary Nona further states that on 29.07.91 she complained to the International Committee of the Red Cross, Colombo and received their reply dated 21.08.91 (A1) informing her (with reference to her letter dated 29.07.91 and a subsequent visit to the office of the Committee) that the petitioner was in the custody of the Deraniyagala Police. Mary Nona had also complained on 13.08.91 to the Presidential Commission of Inquiry into Involuntary Removal of Persons. The Commission by its reply dated 16.08.91 (A3) informed her that the petitioner's case did not come within the Commission's terms of reference but that her complaint had been referred to the IGP for necessary action; whereupon the IGP by his letter dated 31.10.91 informed Mary Nona that the petitioner had been arrested by the Eheliyagoda Police on 23.07.91 for subversive activities and handed him over to the Deraniyagala Police on 06.08.91 for further investigations.

### **THE TRUE DATE OF PETITIONER'S ARREST**

The above material conclusively establishes that the petitioner had been arrested on 23.07.91 and that the respondent's version is false. The document A5 shows that as on 31.10.91 the police records supported the petitioner's version as to the date of his arrest. If so,

the I.B. Extracts purporting to be the notes of investigation by the 3rd respondent (P1) and the notes of the 1st and the 2nd respondent (P2) annexed to respondent's affidavits filed on 20.05.92 are fabrications.

### **MEDICAL EVIDENCE IN RESPECT OF THE PETITIONER**

On orders made by this Court, medical records in respect of the petitioner maintained at the Deraniyagala Hospital, Avissawella Base Hospital and the General Hospital Colombo have been furnished. We also have the reports of the District Medical Officer, Avissawella dated 08.10.93 and the report of the District Medical Officer, Deraniyagala dated 15.10.93. The said records and the reports reveal the following.

1. On 08.08.91 at 12.05 p.m., the petitioner was admitted to the Deraniyagala Hospital. He complained of chest pain and was unable to speak. He had a swelling over the left collar bone area. The left collar bone was "clinically fractured." At 1.30 p.m. he was transferred to the Avissawella Base Hospital as his condition was unsatisfactory.
2. The Avissawella Base Hospital Bed Head Ticket in respect of the petitioner records a history of police assault; that he was conscious but restless, did not obey commands and was unable to speak. He remained in that condition until he was transferred to the General Hospital, Colombo on 20.08.91. He had abrasions on the back of chest and left shoulder, contusions over the chest wall and tenderness of the chest. His shoulder could not move freely. He had a fracture of the collar-bone which was confirmed by an 'X' ray. His bladder was distended. He was given saline, dextrose, antibiotics and tranquilisers.
3. On 20.08.91 at his admission to the General Hospital Colombo the petitioner was still unable to speak. He had healed scars and abrasions on the back and front of chest and infected wounds on the back of chest. On 22.08.91 he

spoke with difficulty. On 25.08.91 PC 46613, presumably from the Deraniyagala Police, removed the petitioner after which it appears that he was readmitted to the Avissawella Base Hospital. On 27.08.91 he was transferred to the Deraniyagala Hospital. He had constipation and difficulty in passing urine. He was discharged from that hospital on 17.09.91. On 21.09.91 he was readmitted to the Deraniyagala Hospital with the same complaints and remained there until 23.10.91 when he was discharged.

## **CONSIDERATION OF THE CASE**

### **(i) ARREST AND DETENTION OF THE PETITIONER**

Having regard to the conditions of civil disorder prevailing during that period and the available material it cannot be said that on a balance of probabilities the petitioner's arrest was unjustified. However, in view of my finding that the petitioner was arrested on 23.07.91 it follows that he was thereafter detained at the Eheliyagoda Police Station until 06.08.91 (without a valid detention order and without being produced before a Magistrate) which detention is unlawful.

As regards the detention order under Regulation 19(2), of the Emergency Regulations for 90 days (document Z), I am of the view that it is unlawful for two reasons. Firstly, it authorises the petitioner's detention at the Pelawatte detention camp. But he remained throughout in custody at the Deraniyagala Police Station. It is true that until 23.10.91, the petitioner was hospitalised. But he was being moved from one hospital to another by the Deraniyagala Police and was presumably removed to the Deraniyagala Police Station on 23.10.91 and remained there until his detention at that Police Station was regularised by the Preventive Detention Order under Regulation 17(1) dated 02.11.91 (Z1). Secondly, as this Court has held in *Nanayakkara v. Henry Perera*<sup>(1)</sup>; *Chandra Kalyani Perera v. Captain Siriwardena*<sup>(2)</sup>; *Wimal Vidyamani v. Lt. Col. Jayatilleke*<sup>(3)</sup> detention under Regulation 19(2) can be justified only if it is for the purpose of further investigation. In the instant case no material whatever has

been placed before this Court as to what further investigations were carried out by the police after the arrest of the petitioner.

The preventive detention order 'Z1' is one made on the subjective satisfaction of the 7th respondent. It seems to me that when he made that order, he also had before him the petitioner's statement P3 in the light of which and the other circumstances, it cannot be said that the said order is unjustified. In all the circumstances, I am unable to hold that the said order is unlawful.

### **ALLEGED TORTURE OF THE PETITIONER**

I have no hesitation in rejecting the respondent's version that the petitioner's injuries and his condition which required hospitalisation from 08.08.91 to 23.10.91 were caused by a fall in the course of an attempt by him to escape from custody. Assuming the truth of the story that the petitioner was taken by a police party to Gollahinna as he volunteered to show the place where firearms were hidden, he was conducted there by an armed police party. He was handcuffed. In that state the injuries found on him could not have been sustained by a mere fall or in the course of an endeavour by the police to apprehend him. His condition including his inability to speak until 22.08.91 is clearly consistent with the alleged torture at the Deraniyagala Police Station. It is to be noted that at the time the petitioner was handed over to that Police, he had no injuries and was in perfect health. But when he was admitted to the hospital on 08.08.91 he was a physical wreck and almost comatose. I, therefore, hold that the allegation of torture has been established.

### **DETERMINATION AND RELIEF**

On the basis of the aforesaid findings, I determine that the petitioner's fundamental rights under Article 11 and 13(2) have been infringed and grant him a declaration accordingly. The State is liable for such infringement. In the light of the decisions of this Court in *Sirisena v. Perera*<sup>(4)</sup> and *Ratnapala v. Hector Dharmasiri*<sup>(5)</sup> the 3rd, 4th and 5th respondents are also responsible and liable for such infringement. The 3rd respondent (OIC Eheliyagoda Police) led the

police party who arrested the petitioner, kept him in detention at his Police Station from 23.07.91 to 06.08.91 unlawfully and has obviously been a party to fabricating records with the object of suppressing such unlawful detention. I accept the evidence that the 4th respondent arranged for the torture of the petitioner and himself participated in such conduct as alleged by the petitioner.

The 5th respondent (OIC Deraniyagala Police Station) cannot deny responsibility for the brutal assault of the petitioner. He also must take responsibility for the prolonged unlawful detention of the petitioner in the very Police Station where he was subjected to such assault. The 6th respondent (The IGP) or the 7th respondent (Secretary, Ministry of Defence) may not have been aware of the fact that the petitioner was being detained at the very place where he was tortured, and at times being removed from one hospital to another at the whim and fancy of the offending police officers. They may not have been aware of his medical condition. But the 5th respondent was aware of the facts. It was his duty to have taken steps to ensure that, in the circumstances of this case, the petitioner did not remain in custody at the Deraniyagala Police Station. His failure to do so, shows that he deliberately encouraged, tolerated or acquiesced in the acts which infringed the petitioner's fundamental rights.

This Court has in numerous judgments referred to the dicta of Añukorala J. in *Amal Sudath Silva v. Kodituwakku*<sup>(6)</sup> where he described torture by the police as "barbaric, savage and inhuman." he also said:

"The petitioner may be a hardcore 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"

See also *Premalal de Silva v. Inspector Rodrigo*<sup>(7)</sup>. I do not think that this Court can endorse blatant violations of fundamental rights

committed under the guise of investigating subversive activities. In giving relief on account of such violations the dicta of Colin Thome J. in *Senthilnayagam v. Seneviratne*<sup>(9)</sup> is also appropriate. He said:

"The Courts have been jealous of any infringement of personal liberty and care is not to be exercised less vigilantly, because the subject whose liberty is in question may not be particularly meritorious"

See also *Dissanayake v. Superintendent Mahara Prison*<sup>(9)</sup>.

In all the circumstances, I direct the State to pay the petitioner a sum of Rs. 18,500/- (Rupees Eighteen Thousand Five Hundred) and costs in a sum of Rs. 1,500/- (Rupees One Thousand Five Hundred). The 3rd respondent is directed to pay the petitioner a sum of Rs. 7,000/- (Rupees Seven Thousand). The 4th respondent is directed to pay the petitioner a sum of Rs. 5,000/- (Rupees Five Thousand) and the 5th respondent is directed to pay the petitioner a sum of Rs. 8,000/- (Rupees Eight Thousand). The petitioner will thus be entitled to a total of Rs. 40,000/- (Rupees Forty Thousand) as compensation and costs.

The 6th respondent is directed to maintain a record of these findings against the 3rd, 4th and 5th respondents for departmental purposes and to take such other action as may be appropriate on the basis of the findings of this Court. He is also directed to ensure that the compensation awarded to the petitioner is paid early and to make a report to this Court on or before 15.03.94. The Registrar is directed to forward a copy of this judgment to the 6th respondent.

**G. P. S. DE SILVA, C.J.** – I agree.

**RAMANATHAN, J.** – I agree.

*Relief granted.*