

## KODITUWAKKUGE NIHAL

v.

### POLICE SERGEANT KOTALAWALA AND OTHERS

SUPREME COURT  
AMERASINGHE, J.  
DHEERARATNE, J. AND  
WIJETUNGA, J.  
SC APPLICATION NO. 126/94  
13<sup>TH</sup> SEPTEMBER, 1994

*Fundamental rights - Torture whilst in police custody - Article 11 of the Constitution - Illegal order by the Magistrate directing the Superintendent of Prisons to take the petitioner to prison custody - Article 13(2) of the Constitution - Section 37 of the Code of Criminal Procedure Act.*

The 1<sup>st</sup> to the 10<sup>th</sup> respondents were police officers attached to the Police Guard Room, Boralessgamuwa which comes under the Maharagama Police Station. On 04. 03. 1994, the petitioner was arrested by the 1<sup>st</sup> and 2<sup>nd</sup> respondents for a traffic offence and taken to the Police Guard Room, Boralessgamuwa after using much force on him. Whilst in police custody, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents assaulted him. He was assaulted with a rubber hose whilst the 3<sup>rd</sup> respondent, a Sub-Inspector of Police, struck him on his right ear. On the 3<sup>rd</sup> day after the arrest, the petitioner was admitted to the Kalubowila Hospital under police custody where he remained until 11. 03. 1994 when he was taken over by Prison Officers on the Order of the Magistrate, Gangodawila and admitted to the Prison Hospital. According to the discharge ticket of the Kalubowila Hospital, the petitioner had sustained contusions, fractures and perforations of both ear drums.

The Order for the transfer from police custody to prison custody was made by the Magistrate on the application of the officer-in-charge, Maharagama Police Station whilst the petitioner was at the Kalubowila Hospital. That order which is dated 06. 03. 1994 (a Sunday) states "Suspect . . . Nihal present. Remand until 16. 03. 94"

#### **Held :**

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents violated the petitioner's fundamental right protected by Article 11.

*Per Dheeratne, J.*

"We are unable to find any provision of law granting sanction for a Magistrate to make such a remand order which is capable of so insidiously eroding the liberty of the subject (see Article 13(2) of the Constitution and Section 37 of the Code of Criminal Procedure Act No. 15 of 1979"

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

*A. H. H. Perera with Gamini Perera* for petitioner.

*K. Kumarasiri with Chandima Withanarachchi* for 1<sup>st</sup>-8<sup>th</sup> and 10<sup>th</sup> respondents.

*D. Weerasuriya, SSC* for 11<sup>th</sup> and 12<sup>th</sup> respondents.

*Cur. adv. vult.*

October 06, 1994

**DHEERARATNE, J.**

The petitioner was granted leave to proceed for the alleged violation of Article 11 of the Constitution by the 1<sup>st</sup> to 10<sup>th</sup> respondents who were police officers attached to Borelesgamuwa police guard room on 04. 03. 1994. The medical evidence which will be referred to in detail later discloses the presence of several injuries on the petitioner received at or about the time he was in police custody.

The petitioner states that at about 8.30 a.m. he travelled on the pillion of a motor cycle ridden by one Ranjith and about 200 meters before reaching the Borelesgamuwa police guard room, he alighted from the pillion because he wore no protective helmet. Ranjith proceeded but was stopped by the 1<sup>st</sup> respondent a short distance before approaching the guard room. When the petitioner walked up to the spot where the 1<sup>st</sup> respondent was, he was detained by 1<sup>st</sup> respondent who asked for his name and his national identity card. The petitioner told the 1<sup>st</sup> respondent that he had not committed any traffic offence and refused to give his name or the identity card. Ranjith was issued a spot fine ticket by the 1<sup>st</sup> respondent having taken into custody his driving licence. Ranjith was

asked to leave. Thereafter the 1<sup>st</sup> respondent got on to his motor cycle and proceeded towards the police guard room while the petitioner went in the direction of the bus stand which was in the vicinity. When the petitioner was near the bus stand, the 1<sup>st</sup> respondent came there along with the 2<sup>nd</sup> respondent on foot. They held the petitioner by his belt at the waist and endeavoured to frog-march him to the police guard room. The petitioner told the 1<sup>st</sup> and 2<sup>nd</sup> respondents that he would accompany them voluntarily but the two respondents next caught him by his wrists and continued to twist them causing severe pain to the petitioner. When they approached the guard room, several police officers in mufti came out and assaulted him. There was an "ongoing scuffle in which the petitioner was flaying his hands to escape the blows", states the petitioner. At the guard room 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents assaulted him. The 3<sup>rd</sup> respondent, the OIC of the guard room, directed a search of the petitioner's person. The petitioner states at that stage some police officers wanted to implicate him in a narcotic offence and they introduced some packet into his wallet. Petitioner pleaded with the 3<sup>rd</sup> respondent to refrain from doing so and requested that he be examined medically to verify whether he was addicted to drugs or not. The 3<sup>rd</sup> respondent who was annoyed at what the petitioner stated closed the petitioner's left ear and rained a series of blows on his right ear. Petitioner was taken to the barrack room and assaulted by the 5<sup>th</sup> respondent and some constables with a rubber hose and two wooden slats. The 4<sup>th</sup> respondent placed the petitioner against a wall and assaulted him. The right wrist of petitioner was handcuffed to a bed and he was made to lie face upwards under the bed. Sometime in the afternoon, the petitioner was produced before a medical officer at the Kalubowila hospital from police custody. The medical officer wanted the petitioner to be warded, but the police took him back to the guard room. He was readmitted to the hospital on the following day and remained there till the 11<sup>th</sup> of March when he was taken to the prison hospital by some prison guards.

The respondent police officers 1 to 10 gave a different version as to how petitioner came by his injuries. The 1<sup>st</sup> and 2<sup>nd</sup> respondents stated that they were on traffic duty on the 4<sup>th</sup> morning when they detected a motor cyclist coming from the direction of Colombo carrying a pillion rider who wore no protective helmet. The 1<sup>st</sup> respondent signalled the rider to stop. Thereafter the 1<sup>st</sup> respondent asked the pillion rider who is now identified as the petitioner for his name and identity card. The petitioner turned aggressive and refused to divulge the information; the 1<sup>st</sup> respondent then asked petitioner to accompany him to the police station but he refused. At that stage the 2<sup>nd</sup> respondent held the petitioner by his wrist and 'advised him' to come to the police station. The petitioner then struck the 2<sup>nd</sup> respondent on his face and the 2<sup>nd</sup> respondent fell down. When the 2<sup>nd</sup> respondent got up, he saw the 1<sup>st</sup> respondent struggling with the petitioner on the ground and there was an exchange of blows between them. In order to extricate the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent struck the petitioner on his arms and legs several times with his baton. The 2<sup>nd</sup> respondent's right eye was swollen as a result of the blow inflicted by the petitioner. There was no assault on the petitioner thereafter and nothing happened inside the guard room or the barrack room which could have caused injuries on petitioner. The 3<sup>rd</sup> respondent stated that on the same day the petitioner was produced before a medical officer at Kalubowila hospital, but as the petitioner declined to be warded, he was brought back to the police station. On the 5<sup>th</sup> morning on a request made over the telephone by the medical officer who examined the petitioner the previous day that he be permitted to prepare a report after examining petitioner, petitioner was taken back to the hospital where he was warded. The 7<sup>th</sup> respondent was kept at the hospital to guard the petitioner. The 3<sup>rd</sup> respondent further stated that as the Borelesgamuwa guard room came under the Maharagama police station, on 06. 03. 94 the OIC Maharagama had reported the facts about the incident to the Magistrate, Gangodawila.

The discharge ticket issued by the Kalubowila hospital dated 11. 03. 94 shows that the petitioner had an undisplaced fracture of the lower end of the ulnar and perforations of both ear drums. The medico-legal report of the JMO Colombo issued to this court after examination of the petitioner on 31. 03. 94 (apart from the 'tenderness' found at two places) disclosed the presence of the following injuries.

- (1) 3"x2" contusion of the right groin.
- (2) 2"x2" contusion of the left groin.
- (3) contusion over medical aspect of the right collar bone - 2" with an underlying acromio clavicular joint subluxation (displacement).
- (4) Fracture of the distal end of left ulnar bone (forearm) with minimal displacement.
- (5) Fracture of the styloid process of the left ulnar bone.

At whatever point the petitioner alighted from the pillion of the motor cycle, on his own showing, he was detected by the 1<sup>st</sup> respondent of having committed an offence under the Motor Traffic Act. The Motor Traffic (Amendment) Act No. 40 of 1984 amended section 158 of the principal enactment to read as follows:

*158(3) Where the driver of a motor cycle carries on his motor cycle any person who does not wear a protective helmet of a type approved by the Minister under subsection (2), both such driver and such person shall be guilty of an offence under this Act.*

It is likely that the petitioner's obstinate refusal, which he admits, to disclose his name and identity would have aroused the ire of 1<sup>st</sup> respondent. It is also possible that petitioner did give a blow to the 2<sup>nd</sup> respondent while resisting arrest and that 2<sup>nd</sup> respondent received a contusion near his right eye as a result.

In any event it is difficult to relate the perforation of petitioner's ear drums to the acts allegedly done by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in bringing the petitioner under control while resisting arrest. I hold that the petitioner received those injuries after he was brought to the police guard room in consequence of 3<sup>rd</sup> respondent raining blows on his right ear as narrated by petitioner. Regarding the rest of the injuries, the learned counsel for petitioner rightly submitted that the force and intensity of inflicting the injuries could be measured by the fact that they were still present when the petitioner was examined by the JMO twenty seven days after he was subjected to assault. Particularly the injuries on the right collar bone and left forearm appear to have been received by petitioner more in consequence of violent assaults inflicted as deposed by him rather than as a result of using reasonable force as stated by the police officer respondents. However I am mindful of the fact that the entire episode was brought about by petitioner's own folly.

I hold that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents have violated the petitioner's fundamental right protected under Article 11. The case against 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> respondents was not pressed by learned counsel for petitioner and I make no order against them. I order the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents to pay a sum of Rs. 2000/= each as compensation and a sum of Rs. 500/= each as costs to the petitioner. Petitioner will be thus entitled to a sum of Rs. 10,000/= as compensation and Rs. 2500/= as costs from the 1<sup>st</sup> to 5<sup>th</sup> respondents.

Before parting with this judgement I would like to deal with one aspect of this case which deeply troubled this court. The petitioner averred that when he was warded at the Kalubowila hospital (Colombo South General Hospital) between 05. 03. 94 - 11. 03. 94 he noticed that the police officer who was guarding him got replaced by a prison guard; he was never produced before a Magistrate during that period. From the Kalubowila hospital the petitioner was taken by prison

guards to the remand prison and then to the prison hospital. The petitioner was produced before the Gangodawila Magistrate on 16. 03. 94 under prison custody. Explaining the change of custody of the petitioner from police to prison personnel, the 3<sup>rd</sup> respondent stated that the Borelesgamuwa police post comes under the Maharagama police station and that "on 06. 03. 94 the OIC Maharagama police station reported the facts to Court on a 'B' report in case No. 86778 of Magistrate's Court Gangodawila." A bare copy of this 'B' report was produced wherein no other entries appeared. In these circumstances we called for this record from the Magistrate's Court Gangodawila for our perusal.

According to that record, the last paragraph of the "B' report (as translated), reads as follows:

*"Reporting these facts to court I beg that an order be made to the Superintendent of the Welikade prison to take into remand custody the abovenamed suspect who is **now** being treated at the accident ward of the Colombo South hospital under police custody and to produce him before the Magistrate Gangodawila on 16. 03. 94.*

*(signed) OIC Maharagama"*

The 1<sup>st</sup> journal entry on this 'B' report (as translated) reads:

*"1994. 03. 06  
suspect*

*(1) Wagegoda Kodituwakkuge Nihal - **present** Remand until 16. 03. 94.*

*I order that the suspect be immediately taken to the custody of prison officers.*

*(signature)"*

In the warrant of detention signed by the Magistrate dated 06. 03. 94 the following entry (as translated) appears at the top margin on page 1 above the printed letters.

**Superintendent of Prisons Welikada.**

Take charge immediately suspect who is **now** being treated at the accident ward of the Colombo South General hospital and produce him on the due date before court.

(signed) Magistrate Gangodawila

06. 03. 94 was a Sunday. Although the journal entry of 06. 03. 1994 indicates that the petitioner was present, it would appear from the last paragraph of the 'B' report that the petitioner was not being physically produced before the Magistrate. Moreover the last part of the Magistrate's order of remand made on 06. 03. 94 and his entry made on the top margin of the warrant of detention, make it clear that when he made that remand order the petitioner was **not present** before him physically; otherwise they carry no meaning and are unnecessary. We are unable to find any provision of law granting sanction for a Magistrate to make such a remand order which is capable of so insidiously eroding the liberty of the subject. (See Article 13(2) of the Constitution and section 37 of the Code of Criminal Procedure Act No. 15 of 1979). The seriousness of this matter compels us to direct the Registrar of this Court to bring it to the notice of the Chairman of the Judicial Service Commission for such action he deems appropriate.

**AMERASINGHE, J.** - I agree.

**WIJETUNGA, J.** - I agree.

*Relief granted.*