

ERANDAKA AND ANOTHER
V
HALWELA, OFFICER-IN-CHARGE,
POLICE STATION, HAKMANA AND OTHERS

SUPREME COURT

S.N.SILVA, C.J.

BANDARANAYAKE, J. AND

JAYASINGHE, J.

S.C.(SPECIAL) NO.63/2001 (FR)

28TH OCTOBER, 25TH NOVEMBER

AND 1ST DECEMBER, 2003

Fundamental Rights – Article 11 of the Constitution – No evidence establishing individual liability – Assault during remand custody proved – State liability for torture upheld.

The two petitioners were arrested on the morning of 14.8.2001 by the 2nd and 3rd respondent police officers and other police officers for alleged theft of a water pump. They were examined by a medical officer of a hospital at noon the same day who found no injuries on them. The same day they were produced before a Magistrate who remanded them until 23.8.2001. Thereafter they complained to court that they were assaulted by the 2nd and 3rd respondents and another police officer at the police station and also by prison guards including the 7th respondent. The petitioners were examined on 22.8.2001 by the Judicial Medical Officer on the order of the Magistrate. The medical report found 8 injuries on the 1st petitioner and 3 injuries on the 2nd petitioner, mostly contusions.

There was no evidence to establish individual liability of any police officer or prison officer, to the satisfaction of the court. But it was clear that the petitioner had been assaulted whilst in prison.

Held:

The petitioner's rights under Article 11 of the Constitution had been infringed whilst in prison custody, for which the State is liable.

Cases referred to

1. *Senthilnayagam v Seneviratne* – (1981) 2 Sri LR 187
2. *Amal Sudath Silva v Kodituwakku* – (1987) 2 Sri LR 119
3. *Jeganathan v Attorney-General* – (1982) 1 Sri LR 294
4. *Velumunasinghe v Attorney-General* – (1981) FRD 180

5. *Thadchanamoorthi v Attoreny-General* – (1980) FRD 129
6. *Goonewardene v Perera* – (1983) 1 Sri LR 305
7. *Kapugeekiyana v Hettiarachchi* – (1984) 2 Sri LR 153
8. *Malinda Channa Peiris v Attorney-General* – (1994) 1 Sri LR 1

APPLICATION for relief for infringement of fundamental rights

A.H.H. Perera for petitioners

D.Akurgoda with *Gamini Peiris* for 1st , 2nd and 3rd respondents.

P. Ranasinghe, State Counsel for 4th, 5th and 8th respondents.

Rohan Sahabandu for 6th and 7th respondents.

Cur.adv.vult

February 27, 2004

SHIRANI BANDARANAYAKE, J.

The two complainants are brothers who were residing with their mother at Hakmana. The younger brother who was born in November 1984 was a minor at the time material to this application and was represented by his mother and therefore is the 2nd petitioner in this application. 01

According to the petitioners, in the early morning of 14.08.2001, the 2nd and 3rd respondents together with some other members of the Hakmana Police Station came to the residence of the petitioners. The two brothers (hereinafter referred to as the 1st and 2nd petitioners) were taken in a police vehicle to the Hakmana Police Station. At the Police Station the two petitioners were assaulted by the second, third and by another police constable whose identity and the regimental number are not known to the petitioners. Thereafter the petitioners were produced before the Magistrate on 14.08.2001 and they were remanded until 23.08.2001. The petitioners alleged that, at the Remand Prison, they were assaulted by three (3) Prison Officers at various times during the first three days of their incarceration. The petitioners alleged that they were beaten with short clubs similar to batons, that they were given blows with their fists handcuffed and water was poured on them during such beatings. The petitioners had identified the 7th respondent as one of those persons who had assaulted them. 10 20

When these assaults were brought to the notice of the petitioner mother, she had moved the Court by way of a motion and got the case against the petitioners called on 16.08.2001 with a view to obtaining bail. This request for bail, however was refused on the plea that investigations were not concluded and the petitioners were once again sent to the Remand Prison. The petitioners submitted that as a consequence of the aforementioned motion, the petitioners were threatened and were subjected to further assaults. The mother had filed a further motion in Court on 20.08.2001 and brought the aforementioned facts to the notice of the Magistrate whereupon an order was made to produce the two petitioners in Court on 21.08.2001. When they were produced in Court, the magistrate had made order directing the two petitioner to be examined by the Judicial Medical Officer, Matara. The two petitioners were granted bail on personal bonds in a sum of Rs. 25,000/-.

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The petitioner alleged that their fundamental rights guaranteed in terms of Article 11 of the Constitution was violated by the 2nd, 3rd and 7th respondents for which this Court granted leave to proceed under Article 11 of the Constitution.

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Learned Counsel for the 2nd and 3rd respondents, who are Police Officers, submitted that the petitioners have not sufficiently established their case against the 2nd and 3rd respondents and that there is no material against these two respondents to show that they had assaulted the petitioners. Learned Counsel for the 7th respondent on the other hand contended that the 7th respondent had no involvement in the incidents alleged by the petitioners.

It is not disputed that the petitioners were arrested by the 2nd and 3rd respondents. In fact the 1st, 2nd and 3rd respondents had averred that the petitioners were arrested on 14.08.2001 not at 4.00 a.m. as claimed by the petitioners, but at 10.15 a.m. on a complaint made against the petitioners of an alleged theft of a water pump, belonging to one Wijetilake. The 1st, 2nd and 3rd respondents have produced affidavits from one Woman Police Constable, Pathmawathie, who was on reserve duty at the time the petitioners were handed over to the respondents (2R5) and an affidavit from Borala Liyana Pathiranage Tissa, Reserve Police Constable No. 11921 (2R6). Both have averred in their affidavits that the respondents did not assault the petitioners.

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Soon after the arrest, according to the 2nd and 3rd respondents, the two petitioners were produced before the Medical Officer of Narawelpita Government Hospital, wherein the Medico-Legal Examination Forms show that there were no injuries on the petitioners (1R2). According to these Medico-Legal Examination Forms, the petitioners were examined by the Medical Officer at 12.20 p.m. on 14.8.2001. It is common ground that the petitioners were brought before the Magistrate on the same day, viz., 14.08.2001, around 2.00 p.m., where on the orders of the Magistrate the petitioners were sent to the Remand Prison.

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Considering the contents of the Medico-Legal Examination Form, it appears that the petitioners had not been subjected to any kind of torture until the time they were produced before the Medical Officer. Moreover, there is no material before this Court that at the time the petitioners were produced before the Magistrate that they had informed the Magistrate that they were subjected to torture while they were at the Police Station. Except for the version given by the two petitioners, there is no other material before this Court in support of the petitioners that the 2nd and 3rd respondents had assaulted them while they were at the Police Station. The Medical Report of the Medical Officer at Narawelpita Government Hospital, further strengthens the position of the 2nd and 3rd respondents that the petitioners were not assaulted at the Police Station. In such circumstances I am of the view that the 2nd and 3rd respondents cannot be held responsible for the alleged infringement of the petitioners' fundamental rights in violation of Article 11 of the Constitution.

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The petitioners' allegation on the assault while they were in Prison includes three prison officers, but they have named only one officer, viz., the 7th respondent (paragraph 20 of the petition). Learned Counsel for the 7th respondent contended that the petitioners have categorically stated that, they were assaulted by three prison officers at various times during the first three days of their incarceration. In fact paragraph 20 of the petition refers to the alleged assault being taken place during the first three days which would amount to be the 14th, 15th and 16th August 2001.

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The submission of the learned Counsel for the 7th respondent is that on the 14th of August the 7th respondent had reported to work at 6.00 a.m. and had signed off at 3.30 p.m. in the afternoon (7R1,

7R2 amd 7R8). On 15.08.2001 the 7th respondent had reported for work at 8.00 a.m., but had left at 9.10 a.m. Thereafter he had returned at 5.20 p.m. and had signed off at 5.30 p.m. (7R3, 7R4 and 7R7). On 16.08.2001 he had been on Parade Leave. Therefore learned Counsel for the 7th respondent submitted that the 7th respondent could not have participated in the alleged assault, which according to the petitioners, had taken place on the first three days of their incarceration. 100

The petitioners, it is to be noted, stated in their petition (paragraph 16) that at the Hakmana police station the 2nd and 3rd respondents and another Police Constable whose identity and regimental number are not known, had assaulted them. With regard to the assault at the Remand Prison the petitioners' position is that three Prison Officers including the 7th respondent assaulted them at various times during the first three days (paragraph 20). 110

In the aforementioned circumstances, it would be pertinent to consider the Medico-Legal Report pertaining to the two petitioners.

Both petitioners were produced before the Judicial Medical Officer on 22.08.2001. In the short history given by the petitioners to the Medical Officer, the petitioners had categorically stated that, they were assaulted by the Police and not by the Prison Officers.

Notwithstanding the non availability of the identity of the persons who had assaulted the petitioners, the Medico-Legal Reports of the petitioners reveal that both petitioners have sustained injuries. As pointed out earlier at 12.30 p.m. on 14.08.2001, prior to the petitioners were produced before the Magistrate, they were examined by the Medical Officer of the Government Hospital at Narawelpita and according to those Reports (1R1 and 1R2) the petitioners had not sustained any injuries. 120

However, when the petitioners were examined on 22.08.2001 by the Judicial Medical Officer, he had observed the following injuries:

1st petitioner

1. Tram Line Contusion 6 c.m. x 1 c.m. in size was situated on the upper region of the back of the left chest wall. It was in transverse position. 130

2. Tram Line Contusion 5 c.m. x 1 c.m. in size was situated on the back of the left upper arm 16 c.m. from the left elbow joint.
3. Tram Line Contusion 5 c.m. x 1 c.m. in size was situated on the back of the left upper arm, 11 c.m. from left elbow joint.
4. Tram Line Contusion 3 c.m. x 1 c.m. in size was situated over the right upper scapular region. It was in transverse position. 140
5. Tram Line Contusion 4 c.m. x 1 c.m. in size was situated over the right lower scapular region. It was in transverse position.
6. Tram Line Contusion 6 c.m. x 1 c.m. in size was situated over the back of the right thigh 15 c.m. from the right knee joint. It was extended upward vertically.
7. Tram Line Contusion 3 c.m. x 1 c.m. in size was situated over the emiterior aspect of the left upper arm 12 c.m. from the elbow joint. 150
8. There was a facture of the crown of right central incisor tooth in the upper law. This was confirmed by the Consultant, Dental Surgeon. (Report is annexed).

2nd petitioner

1. Tram Line Contusion 4 c.m. x 1 c.m. in size was situated over the upper region of the back of the left chest-wall. It was in transverse position.
2. Tram Line Contusion 5 c.m. x 1 c.m. in size was situated in the back of the right thigh, 13 c.m. above the knee joint.
3. There was tenderness over the nose. No evidence of fracture of the nasal bone. 160

Article 11 of our Constitution refers to freedom from torture and reads as follows:

“No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”

The petitioners as submitted by the respondents were arrested

by the Police on suspicion of a theft of a water pump.

When an allegation is made in respect of an infringement in terms of Article 11 of our Constitution, it is not necessary for the Court to take cognizance of the personal antecedents of the petitioner, but consider only of the circumstances the petitioner is complaining. In *Senthilnayagam v Seneviratne* ⁽¹⁾ Colin Thome, J. was of the view that, 170

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

In *Amal Sudath Silva v Kodituwakku* ⁽²⁾ Atukorale, J. has described the protection guaranteed by Article 11, quite forcefully in the following terms: 180

“It is therefore the duty of this Court to protect and defend this right which 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.....The petitioner may be a hard-core criminal whose tribe deserve 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.”

It is therefore irrelevant to consider the circumstances in which the petitioners were taken into custody and consideration should be given only to the question as to whether the petitioners had suffered any kind of cruel, inhuman or degrading treatment while they were kept in the custody of the respondents. 190

It is well settled law in this country that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and thereby the protection in terms of Article 11 of the Constitution is guaranteed to all persons. When complaints are made in respect of violation of Article 11 of the Constitution, such allegations are levelled against Public Officers and if proved they could carry serious consequences against them. Therefore it would be essential that allegations that have been complained of be strict- 200

ly proved. In fact in *Jeganathan v Attorney-General*⁽³⁾ it was held that where public officers are accused of violating the provisions of Article 11, the allegations must be strictly proved. A series of decided cases *Velumurugu v Attorney-General*⁽⁴⁾, *Thadchanamoorthi v Attorney-General*⁽⁵⁾, *Goonewardene v Perera*⁽⁶⁾, *Kapugeekiyana v Hettiarachchi*⁽⁷⁾, and *Malinda Channa Peiris v Attorney-General*⁽⁸⁾ has clearly laid down the principle that the civil standard of persuasion would apply and a high degree of certainty would be required 'before the balance of probability might be said to tilt in favour of a petitioner' who has been attempting to discharge his burden in proving that his fundamental rights guaranteed in terms of Article 11 had been violated by the respondents. However, as has been pointed out in *Malinda Channa Peiris v Attorney-General (supra)* 'unless the petitioner has adduced sufficient evidence to satisfy the Court that an act in violation of Article 11 did take place, the petitioner will fail to obtain a declaration that Article 11 was transgressed.'

In the instant case, although the petitioners have complained of violation of Article 11 against 2nd, 3rd and the 7th respondents, they have not adduced sufficient evidence to show that the three respondents or some of them had subjected the petitioners to torture or to cruel, inhuman and/or degrading treatment or punishment. In fact according to the material placed before this court it appears that the 2nd, 3rd, and the 7th respondents had not taken part in the alleged assault. In such circumstances, the petitioners have not discharged their burden of proving that these 3 respondents or some of them were responsible for the alleged violation of Article 11 and I am of the view that without having sufficient material supporting the allegations against each individual respondent, viz. the 2nd, 3rd and the 7th respondents, they cannot be held responsible for the alleged violation.

However, as pointed out earlier the Medico-Legal Reports reveal that both petitioners having been tortured had sustained a considerable amount of injuries. According to the Medical Report submitted by the 1st, 2nd and 3rd respondents at the time petitioners were produced before the Magistrate they had no injuries. In such circumstances it is apparent that the petitioners have sustained these injuries while they were in Remand Prison and thereby although a particular respondent is not held responsible for the

injuries sustained by the petitioners, the State would become responsible for the violation of the petitioners' fundamental right guaranteed to them under Article 11 of the Constitution.

In the circumstances, I hold that the petitioners' fundamental rights guaranteed in terms of Article 11 were violated by executive or administrative action. The state is directed to pay a sum of Rs. 25.000/- each for the two petitioners as compensation. This amount to be paid within 3 months from today.

SARATH N. SILVA, C.J. - I agree

JAYASINGHE, J. - I agree

Relief granted