
MUNUMULLAGE AJITH AND ANOTHER**Vs.****KALINGA DE SILVA AND OTHERS**

SUPREME COURT
PERERA, C. J.
ALUWIHARE, J.
MALALGODA, J.
SC/FR/387/2013
JANUARY 18, 2019

Fundamental rights—Articles 11 and 13(1) of the Constitution—Degree of proof for allegation of torture—Duty of Judicial Medical Officer

The 2nd petitioner alleged that he had been arrested by the 1st respondent on 10th September 2013 in connection with a complaint made against his brother, the 1st petitioner. He alleged that when he had asked the 1st respondent on what basis he was being arrested, the 1st respondent assaulted him. The 2nd petitioner was taken to the Weligama police station. Later that day, the 1st petitioner surrendered to the police station. The 1st petitioner was subjected to severe beating by the 1st respondent. The family members of the two petitioners complained to the Senior Superintendent of Police, Matara, who telephoned the 1st respondent and directed him to immediately admit the 1st petitioner to hospital. The 1st respondent then released the 2nd petitioner and took the 1st petitioner to Matara hospital. However, according to the 1st petitioner, even though the doctor who examined him had directed that he should be admitted to hospital, the 1st respondent had brought him back to the police station. The following day, the 1st respondent took the 1st petitioner to be examined by the Judicial Medical Officer (JMO). The 1st petitioner alleged that the

1st respondent threatened him with death unless he informed the JMO that he had sustained his injuries in a fall, and he complied out of fear. After he was examined by the JMO, the 1st petitioner was brought back to the police station and released on police bail after his wife agreed to withdraw the complaint lodged at the Human Rights Commission. He alleged that before his release he was forced to sign several documents at the police station. Upon being released, the 1st petitioner was treated at the Matara and Karapitiya hospitals. Thereafter the two petitioners filed the instant fundamental rights application and the court granted leave to proceed under Articles 11 and 13(1) of the Constitution.

Held:

1. The report of the JMO when the 1st petitioner was first produced to him by the 200 respondent does not mention any injuries on the body of the examinee, even though the patient's history mentioned that he had suffered injuries in a fall. It was the JMO's duty to conduct a full examination on the 1st petitioner, which he had failed to do.
2. In order to arrest a person under section 32(1) of the Code of Criminal Procedure Act, No. 15 of 1979, there should be a reasonable complaint, credible information or reasonable suspicion. There was no valid reason for the 1st respondent to have arrested the 200 petitioner on 10th September 2013 and his arrest violated Article 13(1) of the Constitution.
3. A high degree of proof is necessary for allegations of torture. This burden had been satisfied by the 1st petitioner. The 2nd petitioner had failed to submit any additional material in support of the alleged assault on him.

Cases referred to:

1. Munidasa v. Senevirathne (SC/FR/115/91, SC Minutes of 03. 04. 1992)
2. Corea v. The Queen 55 NLR 457
3. Nandasena v. Chandradasa, OIC, Police Station Hiniduma and others [2006] 1 Sri LR 207
4. Channa Peris and others v. Attorney General [1994] 1 Sri LR 1

APPLICATION under Article 126 of the Constitution for infringement of fundamental rights.

J. C. Weliamuna, P. C., with Pulasthi Hewamanna for Petitioners.

P. K. Prince Perera for the 1st Respondent.

Induni Punchihewa, S. S. C., for the Attorney General.

cur. adv. vult.

March 25, 2019

MALALGODA, J.

The two Petitioners, namely Hewa Munumullage Ajith and Hewa Munumullage Akila are two brothers who filed the instant application before this court alleging violations of their fundamental rights guaranteed under Articles 11, 12(1), 13(1) and 13(2) of the Constitution. When this matter was supported before this court on 27th June 2014, the court after considering the material placed, granted leave to proceed on alleged violations under Articles 11 and 13(1) of the Constitution.

Among the two Petitioners, the 1st is a welder by profession and the 2nd, owned a work shop by the name “Akila Iron Works”.

As submitted by the 2nd Petitioner, on 10th September 2013, several police officers had visited his work shop in the morning hours and informed him of a complaint made by the owner of one “Hotel Barakath” against his brother Ajith in connection with some damage caused to the property of the said hotel. Since his brother was away at that time, the 2nd Petitioner undertook to produce the 1st Petitioner before Weligama Police Station on his return.

In the meantime, the 2nd Petitioner visited “Hotel Barakath” around 10. 30 am to inquire about the damage caused by his brother, and promised the owner (the 2nd Respondent) to indemnify the damage caused by his brother.

The owner too had expressed his willingness to settle the matter as suggested by him, but before the 2nd Petitioner left the said premises, the 1st Respondent had visited the said “Hotel Barakath” in a police jeep.

When the 2nd Respondent introduced the 2nd Petitioner to the 1st Respondent and informed him that the 2nd Petitioner had agreed to pay damages on behalf of his brother and therefore the matter would be resolved amicably, the 1st Respondent saying “*How can a person who cannot correct his brother build the Hotel?*” and pushed him into the jeep after putting handcuffs on him.

When the 2nd Petitioner questioned the 1st Respondent the reason for him being taken into custody, the 1st Respondent, took him out of the jeep, assaulted him with a stick pulled from a nearby fence, in the presence of several outsiders and had taken him back to the jeep. Thereafter the 2nd Petitioner was taken to the house of the 1st Petitioner. In the absence of the 1st Petitioner at his house, the mother-in-law of the 1st Petitioner was informed by the 1st Respondent that he would detain the 2nd Petitioner until the 1st Petitioner turns up at the police station.

Having been informed of the arrest of his elder brother, the 1st Petitioner surrendered to the police station Weligama in the same afternoon.

Having seen the 1st Petitioner at the police station, the 1st Respondent had ordered his men to take him to the place where the alleged incident had occurred.

At “Hotel Barakath” the 1st Petitioner was severely assaulted by the 1st Respondent in presence of several others until two broomsticks were broken. When the 1st Respondent had started to hit the 1st Petitioner with a cinnamon stick, the other police officers had prevented him being assaulted with the cinnamon stick.

At the police station the 1st Respondent had once again assaulted the 1st Petitioner and whilst being assaulted, he kicked the neck of the 1st Petitioner and as a result he had vomited blood.

The relatives of the two Petitioners including the wife of the 1st Petitioner had visited the S. S. P.’s office, Matara during the same afternoon and had informed the S. S. P., of the brutal attack that took place at Weligama police station on the 1st Petitioner.

In the presence of the wife of the 1st Petitioner, S. S. P. had directed the 1st Respondent (via telephone) to admit the 1st Petitioner to the hospital immediately.

When the relatives met the 1st Respondent and requested the 1st Respondent to release both the 1st and 2nd Petitioners, the 1st Respondent informed them that he could only release the 2nd Petitioner but he had to admit the 1st Petitioner to the hospital. Immediately thereafter the 2nd Petitioner was released and the 1st Petitioner was taken to the hospital.

However according to the affidavit tendered by the 1st Petitioner before this court, he was not admitted to the hospital by the 1st Respondent even though the doctor who examined him at Matara hospital had directed that

he be admitted to the hospital, and had returned to the police station. On their way back the 1st Respondent went inside the pharmacy of the Asiri private hospital Matara and returned with some pills and had given them to the 1st Petitioner asking him to take them. As submitted by the 1st Petitioner, he was kept at the police station on 10th night and the following day around 12. 30 pm, he was once again taken to the Matara hospital. On their way to Matara, the 1st Respondent threatened the 1st Petitioner with death unless he informs the Judicial Medical Officer that the injuries on the body of the Petitioner were due to a fall and not by any assault whilst in police custody. When the 1st Petitioner was taken before the Judicial Medical Officer by the 1st Respondent, in fear he told the Judicial Medical Officer that the injuries concerned were caused due to a fall. After the medical examination by the Judicial Medical Officer the 1st Petitioner was brought back to the police station and released on police bail after the wife of the 1st Petitioner agreeing to withdraw the complaint lodged at the Human Rights Commission. However, before his release he was forced to sign several documents at the police station.

Soon after the release, the 1st Petitioner was admitted to the Matara hospital and received treatment until 14th September 2013. As a result of constant headaches and pains, the 1st Petitioner was again admitted to Karapitiya Teaching Hospital by his family members on 16th September 2013 and received treatment at the said hospital until 19th September 2013.

When the present application was filed, the Petitioners have sought interim orders as prayed in prayer [e] (i), (ii) and (iii) to the petition dated 30th October 2013 and this court on two occasions, i. e. on 03rd December 2013 and 29th January 2014 made orders directing the relevant authorities to submit to this court the medical reports referred to in the prayer referred to above. Accordingly, this court received documents both from District General Hospital Matara and Teaching Hospital Karapitiya and I will now proceed to analyze the medical reports submitted before this court.

On behalf of the Petitioners, it was prayed under paragraph (e) that,

(e) Make order

1) Directing the Medical Officer (Administration) or Director of the Matara Base Hospital to submit your Lordships' court the Bed Head Ticket, treatment sheets, all notes and medical reports pertaining to the 1st Petitioner who was treated at ward 5 therein from 11th September 2013 to 14th September 2013;

2) Directing the Judicial Medical Officer of Matara or any other appropriate official to submit to Your Lordships' court the Medico Legal Report, all notes and other medical reports pertaining to the 1st Petitioner who was examined by him on 11th September 2013;

3) Directing the Director or any other appropriate official of the Karapitiya Teaching Hospital to submit Your Lordships' court the Bed Head Ticket, treatment sheets, all notes and medical reports pertaining to the 1st Petitioner who was treated at ward 19 therein from 16th September 2013 to 19th September 2013;

As observed by this court the Director of the District General Hospital Matara had submitted the Admission Form of H. M. Ajith along with the Bed Head Ticket maintained at the said hospital with regard to him.

The said Admission Form refers to two dates, i. e. 10th September and 11th September and from the said document it is clear that the patient was first examined on 10th September but admitted to the ward only on 11th September at 4. 30 pm.

The above two entries confirm the position taken by the 1st Petitioner before this court. According to the Admission Form, the doctor who examined the 1st Petitioner on 10th September had recorded that, "*Assaulted by known person to US of the neck, back and L forearm*".

The doctor who recorded the history in the Bed Head Ticket on 11th September had recorded the history as "*Assault by police, beaten to neck L side back*". When going through the said Bed Head Ticket it appears that, the 1st Petitioner was subjected to several tests during this period and was on medication.

The Judicial Medical Officer Matara, had also submitted his report before this court and the said report refers to two examinations done by him with regard to one Hewa Mummulage Ajith, the 1st Petitioner before this court.

The 1st examination with regard to the said person was carried out on 11th September 2013 at 1. 40 pm in the presence of Police Sargent Kularathne of Weligama police station. There is no reference to the presence of the 1st Respondent in this report.

The history given by the 1st Petitioner limits to an incident that occurred on the 10th night at "Hotel Barakath" where he received some injuries due to a fall when he tried to escape from a group of persons who chased

behind him after he damaged some properties at the said hotel, but strangely the Judicial Medical Officer had not observed any injuries on the body of the examinee.

In contrary to the observations referred to above, the same Judicial Medical Officer had observed a fracture on the left forearm ulna bone, when he examined the 1st Petitioner on 14th September 2013 around 10. 00 am at ward 5 of the General Hospital Matara.

As observed by me, the 1st Petitioner was first examined by the Judicial Medical Officer on 11th around 1. 40 pm and found no injuries on his body. The Admission Form confirms that the 1st Petitioner was admitted to the General Hospital Matara on the same day (i. e. on 11th) around 4. 30 pm. Under the 2nd examination, the Judicial Medical Officer too had recorded that the person by the name Hewa Mummulage Ajith got admitted to ward 05 on 11th September 2013.

According to the Judicial Medical Officer, the examinee had given additional information with regard to an assault whilst in the police custody during the 2nd examination. The said information had been recorded by the Judicial Medical Officer as follows;

- 4) There, I told the doctors that I have been assaulted by the police
- 5) Then doctors admitted me to the ward. After examination in the ward I was referred to orthopedic treatment unit
- 6) I did not mention about the History of assault by the Police with Judicial Medical Officer during the previous examination due to the fear.

Even though the Judicial Medical Officer had recorded the new information provided by the 1st Petitioner, he had failed to carry out a thorough external examination and record whether there are any visible injuries found on the body of the examinee compatible with an assault by police. Even on the 11th, when the 1st Petitioner was examined by the Judicial Medical Officer for the 1st time, the examinee had informed him that he had a fall when he was chased by a group of people, but the Judicial Medical Officer who said to have examined the 1st Petitioner on 11th afternoon had not observed any injury on his body.

However, when the same person (i. e. the 1st Petitioner) was taken to Matara hospital on 10th evening, the Medical Officer too had directed him

to be admitted to the hospital considering the condition of the person brought before him.

Even after 11th, when the Judicial Medical Officer was informed by the 1st Petitioner, that he did not come out with the truth due to fear, it was the duty of the Judicial Medical Officer to conduct a full examination on the 1st Petitioner, but he had failed to do such examination.

In the said circumstances this court cannot rely on the report submitted by the Judicial Medical Officer-Matara since his conduct is highly suspicious. The said conduct of the Judicial Medical Officer-Matara needs to be investigated by the relevant authorities.

As revealed from the Admission Form and the Bed Head Ticket before this court, the 1st Petitioner who surrendered to Weligama police on 10th afternoon was hospitalized immediately after his release from the police custody on 11th evening and was taking treatment from Matara hospital until 14th and thereafter from 16th to 19th from Karapitiya Teaching Hospital due to an assault that took place on 10th whilst in police custody.

The arrest notes with regard to the 1st Petitioner was produced marked R1, R2 and R3 by the 1st Respondent and according to the said notes, the arresting officer, the 1st Respondent had not made any observation with regard to any injuries on the body of the 1st Petitioner at the time of his arrest and when the said Petitioner was handed over to the reserve, the reserve officer had made the following entry on the relevant information book.

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When considering the material discussed above, I have no doubt that the 1st Petitioner had sustained injuries while he was in police custody and the 1st Respondent being the arresting officer and the investigating officer is responsible for causing the said injuries to the 1st Petitioner.

However, when considering the investigation notes produced marked R1 and the affidavits tendered by the two Petitioners before this court, it appears that there was an incident that took place on 9th night at “Hotel Barakath” where the 1st Petitioner had assaulted some employees and damaged property at the hotel. A complaint had been made at Weligama

police station by the owner of the said hotel one, Mohamad Azwer Mohamad Paslam at 00. 40 hours on 10th. In the said complaint the Complainant had identified the suspect who committed the said offence as “Rathu, who is the brother of Akila” and in the said circumstances there appears to be sufficient material before the police to arrest the person who is responsible for the said offence.

However, with regard to the arrest of the 2nd Petitioner H. M. Akila, question arises whether the arrest was made in accordance with the procedure established by law. In order to arrest a person under Section 32(1) of the Code of Criminal Procedure Act No. 15 of 1979, there should be a reasonable complaint, credible information or reasonable suspicion.

In the case of *Munidasa v. Senevirathne*¹ this court held that;

an arrest without lawful reason and justification or legal cause for such arrest in terms of material to the contrary is arbitrary arrest which would not be according to the procedure established by law.

In *Corea v. Queen*² it was held that,

the arrest must be made upon reasonable ground of suspicion. There must be circumstances objectively regarded the subjective satisfaction of the officer making the arrest . . .

In the arrest notes submitted before this court marked, R3, the 1st Petitioner Ajith was arrested by the 1st Respondent at 12. 30 pm and on the same day at 12. 40 pm arrested the 2nd Petitioner Akila for allowing his brother to escape in order to avoid him being arrested by the 1st Respondent.

When compared with the two affidavits submitted by the 1st and the 2nd Petitioners before this court it appears that the place and the method of the arrest of the said Petitioners were contradictory with R3, the arrest notes submitted by the 1st Respondent. Even if I reject the version given by the two Petitioners, still it is difficult for me to consider R3 as an accurate note made by the 1st Respondent for the reason that there is no necessity for the 1st Respondent to arrest the 2nd Petitioner at 12. 40 pm after the 1st Petitioner being arrested at 12. 30 pm. As submitted by the 2nd Petitioner, when he inquired from the 1st Respondent as to the reasons for his arrest, he was taken out of the jeep and assaulted with a stick pulled out from a nearby fence, but no reasons were given for his arrest.

When considering the material already discussed, I am satisfied that there was no valid reason for the 1st Respondent to arrest the 2nd Petitioner on 10th September 2013.

The 2nd Petitioner had referred to an assault by the 1st Respondent immediately after his arrest at “Hotel Barakath” but the 2nd Petitioner has failed to submit additional material in support of his version. In the case of *Nandasena v. Chandradasa Officer-in-Charge Police Station Hiniduma and Others*³ this court observed the high degree of proof required when an allegation of torture is made as follows;

. . . it would be necessary for the Petitioner to prove his petition by way of medical evidence and/or by way of affidavits and for such purpose, it would be essential for the Petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden.

In the said circumstance I am not inclined to make any conclusion with regard to the said allegation against the 1st Respondent.

As already observed by me, this court had granted the two Petitioners leave for alleged violations under Articles 11 and 13(1) of the Constitution which reads as follows;

Article 11; No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

Article 13; No person shall be arrested except according to procedure established by law.

Any person arrested shall be informed of the reason for his arrest

In ascertaining whether the conduct of the 1st Respondent is in contravention of Article 11, this court is mindful of the degree of proof observed by Amerasinghe J. in the case of *Channa Peris and Others v. Attorney General*⁴ to the effect that;

In regard to violations of Article 11 (by torture, cruel, inhuman or degrading treatment or punishment) three general observations apply.

i. The acts or conduct complained of must be qualitatively of a kind that a court may take cognizance of where it is not so, the court will not declare that Article 11 has been violated.

ii. Torture, cruel inhuman or degrading treatment or punishment may take many forms, psychological and physical

iii. Having regard to the nature and gravity of the issue, a high degree of certainty is required, before the balance of probability might be said to tilt in favour of a Petitioner endeavoring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment.

When considering the matters already discussed in this Judgment, I hold that the 1st Petitioner was subjected to torture, cruel, inhuman and degrading treatment by the 1st Respondent and therefore the 1st Respondent has violated fundamental rights of the 1st Petitioner guaranteed under Article 11 of the Constitution.

I further conclude that the 1st Respondent has violated the fundamental rights of the 2nd Petitioner guaranteed under Article 13(1) of the Constitution.

In the said circumstances the 1st and the 2nd Petitioners are entitled to receive as compensation Rs. 150, 000/- and 50, 000/- respectively from the 1st Respondent. The 1st Respondent is directed to pay the above compensation to the 1st and the 2nd Petitioner respectively within 3 months from today.

I further direct the State to pay Rs. 25, 000/- to each of the Petitioners as cost incurred by them.

PERERA, C. J. - *I agree.*

ALUWIHARE, J. - *I agree.*

Application allowed.

Judgment by: V.K. Malalgoda, J.

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