

ROMESH COORAY
v
JAYALATH, SUB-INSPECTOR OF POLICE AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
RAJA FERNANDO, J. AND
SOMAWANSA, J.
S.C. (F.R.) APPLICATION NO. 663/2003
JUNE 25th, 2007

Fundamental Rights – Article 11 and 13(1) of the Constitution – Cruel and inhuman treatment in violation of Article 11 – violation of Article 13(1), arrested not according to procedure established by law – Article 126(2) – time frame within which an application regarding an infringement of fundamental rights guaranteed by the Constitution must be made – Supreme Court Rules – 30(4), 45(6), 45(8) – Human Rights Commission of Sri Lanka Act – Section 13(1) – computation of time for the purpose of Article 126 of the Constitution.

The Supreme Court Granted leave to proceed for the alleged violation of Articles 11 and 13(1) of the Constitution.

The 6th respondent also raised a preliminary objection that the petitioner has not filed the application within time in terms of Article 126(2) of the Constitution.

Held:

- (1) A preliminary objection should be raised at the earliest opportunity; either in his objections or in the written submissions.

Per Dr. Shirani Bandaranayake, J.

"The whole purpose of objections and written submissions is to place their case by both parties before Court prior to the hearing and when the

petitioner's objections are taken along with the objections and/or written submissions, filed by the respondents prior to the hearing, it would not come as a surprise either to the affected parties or to Court and the applications could be heard without prejudice to any one's rights."

- (2) Section 13(1) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 deals with the computation of time for the purpose of Article 126 of the Constitution. As the petitioner has complied with provisions laid down in Section 13(1) of the Human Rights Commission Act and had complained to the Human Rights Commission within one month of the alleged infringement of his Fundamental Rights, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month. In the circumstances the petitioner has filed his application before the Supreme Court within the stipulated time frame in terms of Article 126(2) of the Constitution. Preliminary objection overruled.

Per Dr. Shirani Bandaranayake, J.

"It has to be borne in mind that torture, cruel, inhuman and degrading treatment or punishment could take many forms, viz; psychological and/or physical and the circumstances of each case would have to be carefully considered to decide whether the act/s in question had led to a violation of Article 11 of the constitution."

- (3) When the allegations are considered in the light of section 12 of the Torture and other Cruel, Inhuman or Degrading treatment or Punishment Act, along with the available medical evidence, and on a consideration of the totality of the facts and circumstances and the conclusion and opinion of the Assistant Judicial Medical Officer, it is clear that the petitioner's fundamental right guaranteed in terms of Article 11 of the Constitution had been infringed by executive action.
- (4)(i) As there was no material produced before the Supreme Court to show that there had been any complaint against the petitioner or that there had been credible information or a reasonable suspicion that had existed against the petitioner, it is apparent that the arrest of the petitioner was unlawful and not according to the procedure established by law.
- (ii) The petitioner's fundamental rights guaranteed by Articles 11 and 13(1) of the Constitution had been violated by the 1st to 3rd respondents.

Cases referred to:

- (1) *Gamaethige v Siriwardena and others* (1988) 1 SLR 384.
- (2) *Collins v Jamaica* (Communication No. 240/87).
- (3) *Kumarasena v Sub-Inspector Sriyantha and others* S.C. Application No. 257/93 – S.C. Minutes of 23.5.1994.
- (4) *Wijayasiriwardena v Kumara, Inspector of Police, Kandy and two others*.

- (5) *Hobbs v London and South Western Railway Co.* (1875) L.R. 10 Q.B. 111.

APPLICATION complaining of infringement of the fundamental rights.

Mahohara de Silva, P.C. with *W.D. Weeraratne* for petitioner,

Mohan Peiris, P.C. with *Nuwanthi Dias* for 1st, 2nd and 3rd respondents.

Romesh Samarakkody for 5th respondent.

Senany Dayaratne for 6th respondent.

Harshika De Silva, S.C. for 7th respondent.

Cur.adv.vult.

July 2nd, 2008

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, who was the Managing Director of Ranbima Janitorial Services (Pvt.) Limited, which operated a Janitorial Service in the country at the time material to this application, complained of the violation of his fundamental rights guaranteed in terms of Articles 11, 12(1) and 13(1) of the Constitution due to the conduct of the 1st to 6th respondents. This Court granted leave to proceed for the alleged violation of Articles 11 and 13(1) of the Constitution.

The petitioner's case, as presented by the petitioner, *albeit* brief, is as follows:

The petitioner, a 26 years old bachelor, was living with his parents at his parents' house in Panadura, at the time the incident in question took place. On 06.07.2003 around 12.30 a.m., the 1st, 2nd and 3rd respondents came to his residence and had inquired about a person by the name of Romesh Cooray. At that time, only the petitioner's mother, brother and the petitioner had been present in his house and the petitioner had identified himself as Romesh Cooray.

The 1st respondent had then informed the petitioner that they are arresting him and while the petitioner was getting dressed, the 1st to 3rd respondents had searched his house, but had not found anything incriminating the petitioner.

Soon after the 1st to 3rd respondents had arrested the petitioner and had accompanied him out of his house. A white coloured van had been parked outside his residence, which was driven by a person, who was clad in a white T-shirt. The petitioner believed that the vehicle and the driver did not belong to the police.

The 1st respondent had directed the petitioner towards the said van and instructed him to sit at the back. The 2nd and 3rd respondents also sat with the petitioner whilst the 1st respondent sat in the front seat next to the driver. There were two (2) others seated at the back of the vehicle, whom the petitioner had later identified as the 4th and 5th respondents.

Before they took off, the 3rd respondent had blindfolded the petitioner with a piece of cloth. The vehicle had thereafter travelled for about 25 minutes and when the vehicle stopped, the petitioner was dragged inside a premises and afterwards his blinds were removed. The petitioner realized that he was in a room with the 1st to 5th respondents and he identified the place as the Lunawa Restaurant.

No sooner the blindfolding was removed, the 1st, 2nd and 3rd respondents started assaulting the petitioner with their fists, wooden clubs and a hose pipe, which continued for about 10 minutes. Whilst the petitioner was being assaulted, he was questioned about a house breaking of the residence of the 6th respondent. The 3rd respondent had stated that the petitioner had taken part in the said house breaking and that he had possessed a gun.

The petitioner had denied any involvement in the said housebreaking and had also denied a gun being in his possession. His position had been that the 6th respondent was a rival businessman in Panadura and that there had been a certain amount of rivalry between the two families and this had been well known in the Panadura area.

When the petitioner had denied any involvement in the said house breaking, the 1st, 2nd and 3rd respondents had started assaulting the petitioner and inquiring about the gun. When the petitioner had clearly stated that he does not possess a gun, the 4th respondent had also started kicking the petitioner. The petitioner at this point had fallen on the ground and both the 2nd and 3rd respondents had joined kicking the petitioner on his stomach and head. This had continued for over 15 minutes at which point, the petitioner had feared for his life as the 'assaults were intense and unbearable'. In the circumstances, the petitioner had told the 1st respondent that he would show where he had hidden the gun although there was no gun to show. He told that

he had kept it at his uncle's house as he believed that if he was taken to the uncle's house, he would come to his rescue.

Soon after, the kicking stopped and the petitioner was dragged into the van as he was not in a position to walk. When the petitioner was told to give instructions as to where he had hidden the gun, he gave directions to his uncle's house in Panadura. When they reached the petitioner's uncle's house, the 1st respondent told the petitioner not to reveal about the assault.

The petitioner had nevertheless informed his uncle about the beating and the search of the gun, which he does not possess. At that point the petitioner's uncle had told the 1st respondent to leave the petitioner with him and that he would bring him to the police the next day. However, the 1st respondent had not agreed to the said suggestion and had taken the petitioner in the van to the Lunawa Restaurant owned by the 4th respondent. The 2nd and 4th respondents had assaulted the petitioner inside the same room where he was put earlier for over 30 minutes and had thereafter taken him to the Panadura beach.

Then the petitioner was thrown on to the beach and the 1st and 2nd respondents had assaulted the petitioner for over 15 minutes. The 2nd respondent had taken a cellophane bag filled with petrol and made the petitioner to inhale the petrol fumes from the said bag. While all the aforesaid was happening the 3rd, 4th and 5th respondents were watching the same without rendering any assistance to the petitioner.

Thereafter the 2nd respondent had taken the petitioner to the office of the Special Crimes Division situated at Walana, Panadura, where he was pushed in to a washroom. There, the 1st and 2nd respondents had again assaulted the petitioner and had thrown him under a shower. Thereafter the petitioner was put to a room, where he was kept locked until around 11.00 a.m. in the morning.

The petitioner was brought to the Police Station and at that time his parents were present at the Police Station and the petitioner had informed them about the assault.

The petitioner was kept in the Police Station until around 2.00 a.m. and later he was taken to a Government Medical Officer. Thereafter the petitioner was brought back to the Police Station and was put in a

cell. That particular cell was occupied by another person, namely one Samson Kulatunga. The petitioner had later learned that he had been assaulted on an allegation of housebreaking.

Thereafter the 1st and 2nd respondents had produced the petitioner and the said Samson Kulatunga before the Magistrate, Panadura on an allegation of housebreaking. The petitioner was released on bail in a sum of Rs. 5,000/- (P8 and P9).

After he was released on bail, the petitioner had got himself admitted to the General Hospital, Kalubowila.

The Panadura Police had filed a B Report on 06.03.2003 informing Court of a complaint made by the 6th respondent on 28.02.2003 and the 5th respondent had stated that the petitioner had met him on two occasions armed with a pistol and had inquired from the 5th respondent as to the place where the 6th respondent keeps his valuables and jewellery. However, the respondents had not been able to maintain the Magistrate's Court case No. 24638 at the Magistrate's Court, Panadura as there was no evidence and accordingly the learned Magistrate had discharged the petitioner from the proceedings. Accordingly the petitioner alleged that the aforementioned action had violated his fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution.

When this matter was taken for hearing, learned Counsel for the 6th respondent took up a preliminary objection on the basis that the application is time barred and therefore it should be rejected and/or dismissed *in limine*. In the circumstances, before I examine the alleged infringement of the petitioner's fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution, let me consider the submissions of the 6th respondent on the basis of his preliminary objection.

Preliminary objection

The 6th respondent contended that the alleged infringement of the petitioner's fundamental rights by the 1st to 6th respondents had taken place on 06.07.2003, whereas the present application of the petitioner had been filed in this Court only on 11.12.2003. His contention was that, Article 126(2) of the Constitution has made clear provisions to the effect that any application on the basis of an

allegation regarding an infringement of a fundamental right guaranteed in terms of the Constitution, must be made within one month from the alleged infringement and that the petitioner has come before this Court well after the period provided in terms of Article 126(2) of the Constitution. Learned Counsel for the 6th respondent had referred to the decision by Mark Fernando, J., in *Gamaethige v Siriwardene and others*⁽¹⁾ in support of his contention.

Learned President's Counsel for the petitioner strenuously contended that the preliminary objection taken by the 6th respondent cannot be sustained for two reasons, Firstly, it was submitted that the 6th respondent has taken the said objection belatedly and after all the Court pleadings were completed. Secondly, it was submitted that the petitioner before filing this application had made a complaint to the Human Rights Commission in terms of Section 13(1) of the Human Rights Commission Act, No. 21 of 1996 and therefore this application cannot be regarded as time barred as that matter was pending at the time this application was made before this Court.

The petitioner filed this application admittedly on 11.12.2003 and the alleged infringement had taken place on 06.07.2003. This application was supported for leave to proceed on 13.02.2004. When leave to proceed was granted, respondents were given four (4) weeks time to file objections. Accordingly, the 6th respondent had filed his objection on 13.07.2004. In the said statement of objections, no preliminary objection regarding the time bar was taken by the 6th respondent. It is not disputed that the said objection was taken for the first time only on 25.06.2007, when this matter was taken for hearing.

The contention of the 6th respondent was that there was no necessity to have raised the said objection in his statement of objections. Learned Counsel for the 6th respondent referred to Rule 45(6) of the Supreme Court Rules of 1990, in support of his contention. The said Rule reads as follows:

"Each respondent may file counter-affidavits within fourteen days of the receipt of such notice, with notice to the petitioner and the other respondents. The petitioner may in like manner file a counter-affidavit, within seven days, replying to the allegation of fact contained in any respondent's affidavit."

Accordingly his position was that the respondent's objection should contain only 'allegations of fact' and that there is no need for matters of law and the issue of time-bar to be specially referred to in the statement of objections.

Rule 45 (6) is contained in Part IV of the Supreme Court Rules of 1990. The said Part IV deals with applications under Article 126. Nevertheless it is to be borne in mind that Rule 45(6) cannot be taken in isolation in this regard, as the other Rules also deal with specific details in filing written submissions, etc., regarding the appeals and applications and that the Supreme Court Rules are not confined to the procedures pertaining to statement of objections, as Rule 45(7) deals with the filing of the written submissions by all parties. According to Rule 45(7),

"The petitioner and the respondent shall file their written submissions at least one week before the date fixed for the hearing of the application, with notice to every other party."

The contents that should be included in the written submissions are specified under the general provisions regarding appeals and applications in Part II of the Supreme Court Rules, 1990. Rule 45(8), refers to the provisions of Part II of the Rules and states that,

"The provisions of Part II of these rules shall apply, mutatis mutandis, to applications under Article 126."

Rule 30(4) specifically deals with the contents of the written submissions of the respondents and states that,

"The submissions of the respondent shall contain as concisely as possible –

(a) a statement, in reply to the appellant's statement of facts, confining whether, and if not to what extent, the respondent agrees with such statement of facts; and a statement of the other relevant facts, referring to the evidence, both oral and documentary;

(b) the questions of law or the matters which are in issue in the appeal;

....."

Accordingly on a consideration of the aforementioned Rules, it is evident that a preliminary objection should be raised at the time the objections are filed and/or should be referred to in the written submissions that has to be tendered in terms of the Rules. The objective of this procedure is quite easy to comprehend. The whole purpose of objections and written submissions is to place their case by both parties before Court prior to the hearing and when the petitioner's objections are taken along with the objections and/or written submissions filed by the respondents prior to the hearing, it would not come as a surprise either to the affected parties or to Court and the applications could be heard without prejudice to any one's rights. Therefore, as correctly pointed out by the learned President's Counsel for the petitioner, the earliest opportunity the 6th respondent had of raising the aforementioned preliminary objection was at the time of filing his objections and written submissions in terms of the Supreme Court Rules, 1990; as the objections and/or the written submissions should have contained any statement of fact and/or issue of law that the 6th respondent intended to raise at the hearing.

Admittedly, the 6th respondent had not raised the preliminary objection on the ground of the application being filed out of time either in his objections or in the written submissions. In the circumstances, it is apparent that there is no merit in the objection raised by the 6th respondent.

It is not disputed that the petitioner had filed this application on 11.12.2003 complaining of the infringement of his fundamental rights guaranteed in terms of Articles 11,12(1) and 13(1) of the Constitution, which arose out of the incident/s, which took place on 06.07.2003. Admittedly, the petitioner had complained to the Human Rights Commission about the said infringements on 08.07.2003. The petitioner in paragraph 47 of his petition dated 11.12.2003 clearly stated thus:

"The petitioner states that he has made a complaint to the Human Rights Commission on 08th July 2003 against the aforesaid unlawful conduct of the respondents and the inquiry in respect of the same is pending in the Human Rights Commission. The petitioner annexes hereto a copy of the

*letter issued by the Human Rights Commission marked P11 in proof thereof.**

The document marked P11 is issued by the Human Rights Commission of Sri Lanka, which refers to the complaint made on behalf of the petitioner on 08.07.2003. Accordingly, a complaint had been made to the Human Rights Commission within one month from the date of the alleged incident. Section 13(1) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996, deals with the computation of time for the purpose of Article 126 of the Constitution. This section reads as follows:

"Where a complaint is made by an aggrieved party in terms of Section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."

Considering the aforementioned circumstances, it is clear that the petitioner had complied with the provisions laid down in Section 13(1) of the Human Rights Commission Act and had complained to the Human Rights Commission within one month of the alleged infringement of his fundamental rights. Further, when he had filed the present application before this Court on 11.12.2003, the inquiry before the Human Rights Commission had been still pending.

In the circumstances, it is quite clear that the petitioner had filed his application before this Court within the stipulated time frame in terms of Article 126(2) of the Constitution.

For the reasons aforesaid the preliminary objection raised by the learned Counsel for the 6th respondent is overruled.

I would now turn to examine the alleged infringement of the petitioner's fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution.

Alleged infringement of Article 11 of the Constitution

As stated earlier the petitioner's complaint was that he was brutally assaulted by the 1st to 3rd respondents. Since the petitioner's version was stated earlier, let me now turn to consider submissions made by the 1st to 3rd respondents.

According to the submissions made, at the time material to this application, the 1st respondent was assigned the task of investigating into the robbery of the 6th respondent's residence and was stationed in the Special Crimes Unit of Panadura, Walana Police-Station. This was, according to the 1st respondent, as the officers of the Panadura, Walana Police were not successful in the investigations. The 2nd and 3rd respondents had assisted the 1st respondent in the said investigations.

According to the 1st respondent, the 6th respondent had made a complaint on 28.02.2003 of a robbery at his residence of valuables amounting to approximately Rs. 450,000/-. In the course of his investigations, the 1st respondent had received information from the 5th respondent that the petitioner had sought his assistance to burgle the residence of the 6th respondent, as he was 'familiar with the' 6th respondent and his family. In relation to the said assistance, the petitioner had offered a sum of Rs. 50,000/- to the 5th respondent and although the 5th respondent had not participated in the said robbery he had been aware of the robbery and that the petitioner was responsible for the said robbery.

On the basis of this information, the 1st respondent had arrested the petitioner at his residence on 06.07.2003. The petitioner was informed of the reasons for his arrest, he was questioned inside the van and was taken to the Police Station, where he was handed over to the officers to be produced before the Judicial Medical Officer. After being examined by the Government Medical Officer, the petitioner was brought back to the Police Station and thereafter produced before the learned Magistrate. Accordingly the 1st respondent had categorically denied the allegations levelled against him by the petitioner.

The petitioner was examined by the Assistant Judicial Medical Officer of the Teaching Hospital, Colombo-South on 07.07.2003, after the petitioner was admitted to the said hospital on 06.07.2003. The Medico-Legal Report deals with several injuries and the

conclusions and opinion refer to the nexus between the said injuries and the history given by the petitioner. In the circumstances, I give below the relevant portions of the Medico-Legal Report, which deal with the history given by the petitioner, the injuries on examination and the conclusion and opinion of the Judicial Medical Officer, who examined the petitioner.

"History given by the patient"

As said by the patient on 06.07.2003 around 12.15 a.m. three (3) police officers came to the place, said they are from Police – Mirihana and took him to custody. Then put him to a hired private van, blindfolded him and took him away. Later they took him to a house at Lunawa, removed the blind fold. There were 04 people – 03 persons who were said to be of police and a person called Prasanna, the driver of the van. All of them assaulted him. He was assaulted by following ways for about 1 1/2 - 2 hrs. duration.

- (1) with a wooden pole
- (2) rubber hose
- (3) batten
- (4) butt of a gun
- (5) threw petrol on to the body
- (6) asked to breath into a petrol filled polythene bag
(face was pushed into the bag)

According to him, he was assaulted on the head, back of the chest, abdomen, elbow and knee joint, soles and thighs. Later he was put into same van, asked to sit on the floor. Then he was taken to a beach. He was asked to kneel down and then assaulted in a similar manner for about another hour.

Then he was put back to the same van, asked to sit on the floor and brought back to the same house. After that the driver of the van left the scene. The other three assaulted him in the same way as the previous two episodes ..."

Examination of Injuries

1. A contusion, tender and bluish colour measuring 5x6c.m. in size lying over the left buttock.
2. Tenderness over both soles. No visible injuries.
3. Tramline contusion on right lower shin placed on the anterior aspect each in measuring 6x0.5 c.m. in size and lying 2 c.m. apart placed obliquely with lateral end being above the medial end.
4. Contusion, bluish in colour, lying on the medial aspect of right ankle, measuring 6x8 c.m. extending to the sole.

....

Conclusion and Opinion

1. Injury No. 1 is due to blunt trauma and could have been caused by one or more methods of assault described by him. The colour and appearance of the injury is compatible with the time period given by the victim.
2. Injury No. 3 is due to blunt trauma caused by a weapon with a cylindrical striking surface. The colour and appearance is compatible with the time period given by the victim.
3. Tenderness over both soles have caused by blunt trauma. The absence of visible injuries does not exclude blunt force trauma.
4. Injury No. 4 is due to blunt trauma. The colour and appearance is compatible with the period given by the victim.*

The medical evidence thus supports the version placed before this Court by the petitioner with regard to the violation of his fundamental rights guaranteed in terms of Article 11 of the Constitution.

Learned President's Counsel for the 1st respondent contended that not every unkind act or punishment will constitute torture, but

only the act that is qualitatively of a specially reprehensible kind would meet the necessary requirement to satisfy Article 11 of the Constitution. Accordingly his contention was that the conduct complained of by the petitioner falls short of the qualitative standard of reprehensible conduct required to meet for the grant of a declaration in terms of Article 11 of the Constitution.

This submission of the learned President's Counsel that a particular act should be 'qualitatively of a specially reprehensible kind' comes out clearly in the words of Resolution 3452(xxx) adopted by the General Assembly of the United Nations at its 30th session in 1975. Article 1 of that Resolution reads as follows:

"For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he committed, or intimidating him or other persons."

The kind of torture in terms of Article 7 of the International Covenant on Civil and Political Rights had been considered in *Collins v Jamaica*⁽²⁾, where a man, who was found guilty of murder and was in death row had been subjected to search during which he was injured and forced to undress in the presence of other inmates, wardens, soldiers and policemen. He was also subjected to severe beatings, when he had invoked his rights under prison legislation. It was held that the assault by the prison wardens and subsequent injuries were violative of Article 7 of the International Covenant on Civil and Political Rights.

Article 7 provides that '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. It also states that 'in particular, no one shall be subjected without his free consent to medical or scientific experimentation'.*

Article 11 of the Constitution, which deals with the freedom from torture, is as follows:

"No person shall be subjected to torture or to cruel, inhuman or degrading treatment."

Considering the physical harm suffered by a petitioner, due to torture and/or to cruel, inhuman treatment, it would not be an easy task for the Court to decide and conclude as to what actions and conducts would constitute torture or cruel, inhuman treatment. A similar difficulty would arise when considering degrading treatment, especially when there is no physical harm encountered by the victim such as in *Kumarasena v Sub-Inspector Sriyantha and others*⁽³⁾. Accordingly, it has to be borne in mind that, torture, cruel, inhuman and degrading treatment or punishment could take many forms, viz., psychological and/or physical and the circumstances of each case would have to be carefully considered to decide whether the act/s in question had led to a violation of Article 11 of the Constitution. Our courts have not found it easy to decide whether the force used is in violation of Article 11. In *Wijayasiriwardene v Kumara, Inspector of Police, Kandy and two others*,⁽⁴⁾ considering this aspect Mark Fernando, J., referred to the statement made by Blackburn, J., in *Hobbs v London and South Western Railway Co.*⁽⁵⁾, where it was stated that,

"It is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day,...."

It would have been correct to describe the difficulty in drawing the distinction and deciding whether an incident in question would have amounted to torture, at the time relevant to the decision in *Wijayasiriwardene (supra)*. However, this position has changed since the enactment of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994, on the basis of the UN Convention on Torture. Section 12 of the said Act defines 'torture' and reads as follows:

"torture" with its grammatical variation and cognate expressions, means any act which causes severe pain, whether physical or mental, to any other person, being an act which is –

- (a) done for any of the following purposes that is to say –
- (i) obtaining from such other person or a third person, any information or confession; or

(ii) *punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or*

(iii) *intimidating or co-ercing such other person or a third person; or*

(b) *done for any reason based on discrimination, and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity".*

Accordingly, when the allegations are considered in the light of Section 12 of the Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, along with the available medical evidence, it would not be difficult to ascertain whether the act complained of was 'qualitatively of a specially reprehensible kind'.

In the circumstances, on a consideration of the totality of the facts and circumstances in this matter and the conclusion and opinion of the Assistant Judicial Medical Officer of the Teaching Hospital, Kalubowila, it is quite clear that the petitioner's fundamental right guaranteed in terms of Article 11 of the Constitution had been infringed by executive action.

Alleged violation of Article 13(1) of the Constitution

The petitioner's complaint deals with his arrest and the learned President's Counsel for the petitioner submitted that the petitioner had been arrested without any substantial evidence incriminating the petitioner regarding the robbery at the 6th respondent's residence. Article 13(1) of the Constitution deals with freedom from arbitrary arrest, detention and punishment and reads as follows:

"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

Section 32(1)b of the Code of Criminal Procedure Act, specifies the established procedure for arrest and reads thus:

"Any peace officer may without an order from a Magistrate and without a warrant arrest any person –

- (a) who in his presence commits any breach of the peace;*
- (b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exist of his having been so concerned.**

The 1st respondent had admitted that he was deployed to investigate into the robbery of the 6th respondent's residence and was stationed at the Special Crimes Unit of the Panadura, Walana Police Station. According to the 1st respondent, the 6th respondent had made a complaint on 28.02.2003 regarding a robbery at his residence of valuables amounting to approximately Rs. 456,000/-. His position was that he had received information, in the course of his investigations about the involvement of the 5th respondent and another employee of the 6th respondent, known as one Samson Kulatunga. He had thereafter received information from his private informant that the 5th respondent had left the employment of the 6th respondent shortly after the robbery and was residing at Hatton. The 1st respondent averred that he had questioned the 5th respondent and that the 5th respondent had revealed that the petitioner had befriended him and that the petitioner had sought his assistance to burgle the 6th respondent's residence as he was familiar with the 6th resident's residence. In return for the information and assistance, the petitioner had promised to pay the 5th respondent a sum of Rs. 50,000/-. According to the 1st respondent, the 5th respondent had not taken part in the robbery, although he was aware that the 6th respondent's residence was burgled in the night of 27.02.2003 and that the petitioner was responsible for the said act. Later on 06.03.2003, the 1st respondent had taken 2nd and the 3rd respondents along with the 5th respondent to the petitioner's residence in a van driven by a civilian driver and there the 5th respondent had identified the petitioner as the person, who had broken into the residence of the 6th respondent.

Except for his averments, the 1st respondent however, had not submitted any material to substantiate the aforementioned position. The 5th respondent on the contrary had submitted that he did not know the petitioner personally and that he had never had any

dealings whatsoever with the petitioner. Moreover the 5th respondent had stated that he was subjected to torture, while he was under interrogation. Under these circumstances, would it be possible to accept the contention of the 1st respondent that he had received credible information or that there existed a reasonable suspicion against the petitioner or there had been any reasonable complaints against the petitioner? Considering all the circumstances of this matter my answers to all these questions are in the negative. It is also to be noted that, as submitted by the learned President's Counsel for the petitioner, the petitioner was discharged from the proceedings in the Magistrate Court, Panadura as there was no evidence whatsoever against him (P9-Pg.4).

Considering all the circumstances, could it be said that the 1st respondent had arrested the petitioner according to the procedure established by law? There was no material produced before this Court to show that there had been any complaint against the petitioner or that there had been credible information or a reasonable suspicion that had existed against the petitioner. In the circumstances, it is apparent that the arrest of the petitioner was unlawful and not according to the procedure established by law. For the reasons aforesaid I hold that the petitioner's fundamental rights guaranteed by Articles 11 and 13(1) of the Constitution had been violated by the 1st to 3rd respondents.

I accordingly hold that the petitioner is entitled to a sum of Rs.100,000/- as compensation and costs payable by the State. I direct the 1st to 3rd respondents to pay Rs. 15,000/- each, personally as compensation. In all, the petitioner will be entitled to a sum of Rs. 145,000/- as compensation and costs. This Amount must be paid within three (3) months from today.

The Registrar of the Supreme Court is directed to send a copy of this judgment to the Inspector General of Police.

RAJA FERNANDO, J. - I agree.

SOMAWANSA, J. - I agree

Preliminary objection on time bar overruled.

Application allowed.

Compensation ordered.