

**DESHAPRIYA**  
**v.**  
**CAPTAIN WEERAKOON, COMMANDING OFFICER,**  
**SRI LANKA NAVY SHIP "GEMUNU" AND OTHERS**

SUPREME COURT  
FERNANDO, J.  
YAPA, J., AND WIGNESWARAN, J.  
SC NO. 42/2002 (FR)  
21ST JULY, 2003

*Fundamental Rights – Constitution, Article 11 – Personal liability of the Commander for acts of subordinate officers.*

The petitioner was serving in the Navy Ship "GEMUNU". When he was due to go on transfer on 1.9.2001 a pistol was found missing. On the instructions of the 1st respondent Commanding Officer, the petitioner was kept under close arrest (confinement) from 4.9.2001 on suspicion for the loss of the pistol. He was interrogated between 7th and 9th September. He was kept in custody till 8.1.2002.

In the application filed on 16.1.2002, the petitioner was granted leave to proceed under Article 11. He told the JMO who examined him *inter alia*, the following.

- (a) He was handcuffed and suspended from the rafter by the wrists.
- (b) A "S-Lon" pipe and a piece of barbed were introduced to his rectum. Chillie powder was also introduced through the pipe.
- (c) Burnt with a hot iron
- (d) Assaulted on elbows, shoulders, knees, ankles with battons.

Medical opinion supported the history given by the petitioner.

On 9.2.2002 the petitioner was found guilty of several charges and a jail sentence was imposed. He was also discharged from the Navy with disgrace. A writ application is pending before the Court of Appeal.

**Held :**

1. The petitioner was subjected to torture and to cruel and degrading treatment violative of Article 11.
2. The 1st, 4th, 5th, 6th and 7th respondents were responsible for the infringement of Article 11.

3. On the question of 1st respondent's liability, it is no defence for him to say that he was unaware of the alleged torture and no complaint was made to him.

*Per Fernando, J.*

"In the Forces, command is a sacred trust, and discipline is paramount. He was under a duty to take all reasonable steps to ensure that persons held in custody (like the petitioner) were treated humanely and in accordance with the law. That included monitoring the activities of his subordinates, particularly those who had contact with detainees. The fact that the petitioner was being held in custody under his specific orders made his responsibility somewhat greater,

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

*Upul Kumarapperuma* for petitioner.

*Manohara de Silva*, for 1st and 2nd respondents

*Nalinda Indatissa* for 3rd to 7th respondents

*Riyaz Hamza*, State Counsel, for 8th and 9th respondents

*Cur.adv.vult*

August 8, 2003

**FERNANDO, J.**

The petitioner was a sailor in the Sri Lanka Navy. By his application dated 16.1.2002, he complained of the infringement of his fundamental right under Article 11 whilst being detained in Navy custody.

The petitioner was serving in the Navy ship "Gemunu" at Welisara as officer in charge of the armoury. He was due to go on transfer on 1.9.2001. On 18.8.2001, in the course of handing over, it transpired that a pistol was missing. On the instructions of the 1st respondent, the Commanding Officer of the Navy ship "Gemunu" at Welisara, the petitioner was kept under "close arrest" from 4.9.2001 on suspicion that he was responsible for the missing pistol. It was

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agreed that "close arrest" involved confinement. A preliminary investigation was held, in the course of which the petitioner was interrogated between 7th and 9th September. He was kept in custody till 8.1.2002 when a summary trial by a Board of Inquiry took place, and continued in Navy custody thereafter. On 9.2.2002 he was found guilty of several charges and a jail sentence was imposed. He was then transferred to the Welikada prison to serve his sentence. After serving his sentence, on 29.4.2002 he was discharged from the Navy with disgrace. We were informed that a writ application was pending in the Court of Appeal.

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This application was filed on 16.1.2002. On 1.2.2002 this Court directed that the petitioner be examined by the Judicial Medical Officer ("JMO"). That was done on 7.3.2002. The JMO's record of the petitioner's history, as given by him, included the following :

- (a) "Handcuffs were applied around the wrists and suspended from a rafter by the wrists";
- (b) "S-Lon pipe inserted into the rectum. A piece of barbed wire was inserted though the pipe hole. Then the wire was moved around after the pipe was removed partially. Chilli powder was also introduced through the pipe";
- (c) "Burned with a hot iron"; and
- (d) "Assaulted on elbows, shoulders, knees and ankles with batons".

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I omit the many other allegations of sadistic treatment which leaves no traces.

The JMO found scars on both wrists, consistent with handcuffs; a triangular scar on the back of the right shoulder (7cm x 10cm x 9cm), the size, shape and nature of which were consistent with an injury caused by a hot iron; and a superficial linear oblique scar, 9cm long, on the inner aspect of the front of the left thigh, consistent with an injury caused by a barbed wire. He also noted that the petitioner "was in pain and walked bending the back". He concluded that the ageing of the scars was not inconsistent with the history given by the patient.

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Leave to proceed was granted only in respect of the alleged infringement of Article 11, but not of Articles 13(1) and 13(2).

It was submitted on behalf of the respondents that there was uncertainty as to the precise time at which those injuries had been inflicted. It was not suggested that the petitioner had sustained injuries either before or during, arrest. According to the JMO's report, the petitioner had stated that he had been arrested on 2.9.2001 and kept in Navy custody till 8.2.2002, and that "during that period he was assaulted". It was contended that the petitioner had failed to be precise, and that this might refer to any time from September to early February. However, the JMO's record cannot be treated as if he was making a *verbatim* record of evidence given in court. Elsewhere in the JMO's report it is stated that the Consultant Orthopaedic Surgeon had noted "History of assault September 2001". In his first affidavit the petitioner stated that he had been assaulted while being questioned about the missing pistol, and that after being assaulted the 1st respondent obtained his signature to several documents. The assault was therefore in September, probably between the date of his arrest and the conclusion of the preliminary investigation on 9.9.2001.

There is no doubt whatsoever that the petitioner had been subjected to torture, and to cruel and degrading treatment, in violation of Article 11, whilst in Navy custody.

Counsel for the petitioner submitted that the 4th to 7th respondents, together with others, were directly responsible for the injuries, and that the 1st respondent, as the Commanding Officer, was also responsible for culpable inaction.

The 4th and 7th respondents claimed that during the period that these injuries were probably inflicted - i.e. between 2nd and 9th September - they were serving elsewhere. The 4th respondent claimed that he was away for the whole of September, while the 7th respondent claimed that it was only on 12.9.2001 that he was transferred to the "Gemunu". The 5th and 6th respondents have been positively identified by the petitioner, but they have categorically denied the allegations against them. The petitioner had no reason falsely to implicate any of the respondents, and while there is no reason to disbelieve the petitioner, it cannot be said that the seri-

ous charges against those respondents personally have been established with the high degree of proof necessary. A full inquiry is necessary.

I turn now to the question of the 1st respondent's liability. Learned Counsel on his behalf urged that there was no evidence that he had participated in, authorised, or had knowledge of any act of torture or cruelty, and stressed that no one had complained to him about any such act. He contended that the 1st respondent would not be liable for whatever his subordinates might have done unless it was proved that he had knowledge thereof and nevertheless refrained from taking remedial action.

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The 1st respondent's responsibility and liability is not restricted to participation, authorisation, complicity and/or knowledge. His duties and responsibilities as the Commanding Officer were much more onerous. In the Forces, command is a sacred trust, and discipline is paramount. He was under a duty to take all reasonable steps to ensure that persons held in custody (like the petitioner) were treated humanely and in accordance with the law. That included monitoring the activities of his subordinates, particularly those who had contact with detainees. The fact that the petitioner was being held in custody under his specific orders made his responsibility somewhat greater.

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In his affidavit the 1st respondent merely denied participation, authorisation and complaints. He did not claim that he had taken any steps, either personally or through responsible subordinates, to ensure that the petitioner was being treated as the law required. Such action would not only have prevented further ill-treatment, but would have ensured a speedy investigation of any misconduct as well as medical treatment for the petitioner. It is not clear whether the petitioner did receive medical treatment. But that makes little difference to the liability of the 1st respondent. If the petitioner did receive medical treatment, then the 1st respondent ought to have known that he had been ill-treated. If the petitioner did not receive medical treatment for his injuries, the denial of medical treatment was itself inhuman treatment violative of Article 11, for which the 1st respondent shares responsibility.

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If indeed the 1st respondent really did not know how the petitioner was being treated, that was wilful ignorance due to want of care, and not a genuine lack of knowledge. 120

I hold that the petitioner's fundamental right under Article 11 has been infringed by executive or administrative action whilst in Navy custody, and I award him a sum of Rs 150,000 as compensation and costs, of which Rs 130,000 shall be paid by the State, and Rs 20,000 by the 1st respondent personally, on or before 30.11.2003. The Registrar is directed to forward copies of this judgment to the Attorney-General and to the Commander of the Navy to enable them to consider whether legal proceedings should be instituted against the 1st, 4th, 5th, 6th and 7th respondents. The Commander of the Navy is directed to issue directions and guidelines designed to ensure that persons in Navy custody are treated humanely and in accordance with the law, and to ensure the proper investigation of ill treatment whilst in such custody, and to forward a copy of such direction to the Registrar on or before 30.11.2003. 130

**YAPA, J.** - I agree.

**WIGNESWARAN, J.** - I agree.

*Relief granted.*