PREMALAL DE SILVA
V.
INSPECTOR RODRIGO AND OTHERS

SUPREME COURT.
H. A. G. DE SILVA, J., KULATUNGA, AND DHEERARATNE, J.
S. C. APPLICATION NO. 24/89.
MAY 28, JUNE 21 AND JULY 13, 1990.

Fundamental Rights - Illegal arrest and detention - Torture - Articles 11, 13 (1) and (2) 13 (4) and 14 (1)(g) of the Constitution - sections 32 (1) (b) and 36 and 37 of the Code of Criminal Procedure Act, No. 15 of 1979.

The petitioner a Home Guard, was arrested on 19 May 1989 by the Panadura Police without a warrant on suspicion of being concerned in a robbery at a cigarette agency which had taken place on 07 May 1989. He was tortured and subjected to cruel inhuman or regarding treatment or punishment.

Held: (1) There was cogent evidence that the petitioner was arrested on 19.05.1989 and not on 23.05.1989 as stated by the Police.

(2) The respondents have failed to produce sufficient material to justify the suspicion that the petitioner was concerned in an offence; and hence

the arrest of the petitioner was unlawful for failure to satisfy the requirements of section 32(1)(b) of the Code of Criminal Procedure Act.

(3) The petitioner's detention after his arrest on the 19th without sending him before a Magistrate as required by sections 36 and 37 of the Code of Criminal Procedure Act was unlawful.

(4) While in Police custody the petitioner was subjected to torture and inhuman treatment.

(5) Of the Police Officers involved only 2nd and 3rd respondents have been adequately identified.

(6) The arrest of the petitioner is violative of his rights under Article 13(1) and his detention is violative of his rights under Article 13(2) and (4). Whilst in police custody he was subjected to torture and inhuman treatment in breach of Article 11 of the Constitution. The 2nd and 3rd respondents and the State are jointly and severally liable to compensate the petitioner.

(7) If the petitioner has disappeared the compensation is payable to his legal representatives.

Cases referred to:

1. Velumurugu v. A. G. & Others 1 FRD 180, 197 — 199
2. Goonewardena v. Perera [1983] 1 Sri LR 305, 313
3. Kapugeekiyana v. Hettiarachchi [1984] 2 Sri LR 153, 165
4. Withanachchi v. Cyril Herat, Leelaratne v. Cyril Herat S.C. Nos. 144 — 145/86 S.C. Minutes of 01.07.1988
5. Joseph Perera v. Attorney-General S.C. Nos. 107–109/86 S. C. Minutes of 25.05.87
6. Gunasekera v. de Fonseka 75 NLR 246
7. Dumbell v. Roberts (1944) 1 All ER 326
8. Muttusamy v. Kannangara 52 NLR 324, 327, 330
9. Amal Sudath Silva v. Kodituwakku [1987] 2 Sri LR 119, 127

APPLICATION for violation of fundamental rights by illegal arrest, detention, torture and inhuman treatment.

P. D. Gomes for Petitioner.

Kanthilal Kumarasiri for 1 to 5 Respondents.

Hector Yapa D.S. with *Surath Piyasena S.S.C* for 6th and 7th respondents.

Cur.adv.vult.

September 05, 1990.

KULATUNGA, J.:

The petitioner who is employed as a Home Guard attached to the Mount Lavinia Police Station was arrested without a warrant by the Panadura Police on suspicion of being concerned in a robbery at a cigarette agency which took place on 07.05.89. He alleges that he was arrested on 19.05.89 without following the procedure established by law and without giving any reasons; that he was unlawfully detained at the Panadura Police Station until the evening of 23.05.89 during which period he was also subjected to torture and to cruel, inhuman or degrading treatment or punishment; and that the 1st to 5th respondents have infringed his rights under Articles 11, 13(1), 13(2), 13(4) and 14(1)(g) of the Constitution. He prays for a declaration accordingly and for damages. At the hearing before us, learned Counsel for the petitioner informed us that he would not press the claim under Article 14(1)(g).

The petitioner states that on 19.05.89 at about 9.00 p.m. he was awaiting a bus close to the Panadura bus-stand when the 1st respondent (OIC Crimes - Panadura Police) and other officers arrived in a jeep. He was ordered to get into the jeep and was taken to the Panadura Police. No reason for his arrest was given. One Deepal Perera who had been present states in his affidavit (P2) that a Police jeep arrived and the petitioner was told to get in ("නැගපන්"). He thought that as the petitioner was attached to the Police he was being given a lift. On 21.05.89 he learnt that the petitioner had been arrested and visited him at the Panadura Police Station. The petitioner appeared to be in pain. He later sent a message about it to the petitioner's house. The petitioner's own account of the events subsequent to his arrest is as follows:

On 20.05.89 the 2nd, 3rd and 4th respondents took him to a room and ordered him to remove his shirt. He was taken tied up in a crouched position with his hands over his knees

and suspended on a pole passed through his hands and knees. The two ends of the pole were placed on two tables. The 3rd respondent then rotated him and the 2nd respondent struck his soles with an iron rod. The 4th respondent too assaulted him with the iron rod. The 3rd respondent walked on his body and kicked him. At the same time, they questioned him about a robbery said to have been committed with one Sisira at a cigarette agency. One Sisira was brought in and the police questioned him as to whether the petitioner is the other person who joined in the robbery to which Sisira answered in the negative. As a result of the assault, he sustained injuries on his hands and legs.

On 21.05.89 Deepal Perera visited him. On 22.05.89 his parents visited him, at the Police Station with Sisira Kodikara. Attorney-at-Law and made inquiries with a view to securing his release. On 23.05.89 his father Jinson de Silva visited him. On both days the police said that the petitioner will be produced before a Magistrate on 23.05.89. His parents waited in the Magistrate's Court but he was not produced. The petitioner's mother Greta de Soysa had tried to meet the Deputy Inspector-General of Police, Western Province to make a complaint but the Superintendent of Police told her that she need not do so as the petitioner will be produced before the Magistrate on 23.05.89. In support of some of the averments the petitioner has produced an affidavit from his father marked P3.

As the petitioner was not produced in Court on 23.05.89 despite the assurance given by the police the petitioner's mother addressed an affidavit dated 23.05.89 (P4) to the DIG, Western Province wherein she gives an account of the arrest of the petitioner on 19.05.89 and the subsequent torture by the police and requests that he be produced before a Court and given necessary medical treatment.

In the afternoon on 23.05.89 the police produced the petitioner before the D.M.O. Panadura where he was x-rayed and

given some injections. Thereafter, he was produced before the Magistrate at her residence and was remanded to fiscal custody. This is admitted by the 2nd respondent (Sub Inspector Ratwatte). On 24.05.89 on a motion filed on behalf of the petitioner (P5) the Magistrate directed that he be produced before the Judicial Medical Officer, Colombo for examination. The JMO examined him on 26.05.89 and made his report (P6). The short history given by the petitioner and recorded in P6 is as follows:—

> "Assault by S.I. Ratwatte and two other police officers with iron rods after tying his hand and feet and suspending him on two tables with a bar passed behind his knees on 20.05.89".

The petitioner had the following injuries:—

1. Ligature mark across the dorsum of R/wrist 2½" × ½";
2. Ligature mark across the dorsum of L/wrist 2½" × ½";
3. Healing wound 3" × 1" — front of the L/Low upperarm, extending down to the elbow;
4. Healing wound 1" × ½" anterior — lateral upper —L/forearm;
5. Lacerated wound ½" — Low, on the R/palm at the base of the right ring finger;
6. Healing wound 3" — 1¼" on the back and level aspect of the L/knee;
7. & 8. Infected lacerations — each 1" long in front of the lower R/leg 1" apart;
9. Contused abrasions — ½" × ½" front of mid left leg;
10. Healing wound — ¾" × ½" back of the lower R/leg;
11. Healing wound (laceration) ½" long on the big toe of the R/foot.

The JMO states that the injuries 1-11 are consistent with the history given by the petitioner.

According to the notes of investigation by the police (marked 'A') at the time of the petitioner's arrest the only injuries he had were a bleeding injury (abrasion) and an abrasion of the big toe both on the left leg attributed to a fall on the railway track along which the petitioner ran in a bid to escape arrest. If so, the injuries observed by the JMO on 26.05.89 have been caused subsequent to the arrest. It is not suggested that they were self inflicted or caused after the petitioner was remanded to fiscal custody on 23.05.89.

In the circumstances, Mr. Kumarasiri, Counsel for the 1st to 5th respondents was constrained to concede that an assault may have taken place at the Police Station; and he confined much of his argument to the submission that even if an assault has been proved no personal liability on the part of any of the respondents has been established.

The respondents admit the arrest of the petitioner but deny the allegation that the petitioner was arrested on 19.05.89. According to them, the petitioner was suspected for a series of robberies. On 23.05.89, Police Sergeant Wickremanayake acting on information received from a subordinate officer regarding the whereabouts of the petitioner obtained the permission of the OIC (Crimes) and left on inquiry at about 9.30 a.m. with PS 13953 and PC 15212. They spotted the petitioner around 12.30 p.m. in the Panadura town. When the police moved towards the petitioner, he started running along the railway track and fell down. Thereafter, he jumped towards a lower area in the river. He was arrested with the use of minimum force and after explaining to him the charge he was produced at the Police Station at 1.25 p.m. Thereafter his statement was recorded at 3.30 p.m. He was produced before the DMO and brought back to the Police Station at 4.00 p.m. He was produced before the Magistrate at 5.20 p.m. at her residence where he was remanded to fiscal custody. In between the police gave him his lunch and dinner (Vide the notes of investigations marked 'A' and entries regarding prisoners detained

marked 'B'). It is the submission of the petitioner's Counsel that documents 'A' and 'B' are not a truthful record of events regarding the petitioner.

On 02.06.89 the petitioner was subjected to an identification parade at which the witnesses failed to identify him and he was enlarged on bail on 08.06.89 on a condition that he should report to the Panadura Police Station once a week. On 19.06.89 he filed this application. No plaint has been filed charging him with any offence. In the meantime, on 02.02.90 a brother of the petitioner complained to this Court that the petitioner reported to the Panadura Police Station on 31.12.89 accompanied by his mother. As they delayed returning, their father also went to the Police in search of them but none of them returned. During an inquiry into this complaint by this Court, it transpired that the petitioner had reported to the Police Station on 31.12.89 but the respondents denied that the petitioner or his parents were detained at the Police Station. It also transpired that a message has been relayed to all Police Stations regarding the petitioner but he has not been traced. At the hearing before us, the Counsel for the petitioner submitted that the petitioner and his parents have disappeared. However, there is no evidence for holding that the respondents are responsible for such disappearance.

To revert to the case for the 1st - 5th respondents each of them has denied personal involvement in the impugned arrest, detention and ill treatment of the petitioner; and their Counsel has submitted that even if this Court were to hold that the petitioner has proved his allegations he has failed to establish personal liability on their part. During the argument, Counsel produced marked 'Y' a statement made by the petitioner before the Magistrate on 28.06.89 and drew our attention to certain contradictions between that statement and Deepal Perera's affidavit (P2). It was also submitted that between the petitioner's affidavit and his statement 'Y' there are certain contradictions. Counsel submitted that in view of these con-

tradictions, this Court should dismiss the allegations against individual respondents.

In his statement 'Y' the petitioner states that at the time of his arrest on 19.05.89 he was told to get into the jeep and when he inquired why, he was forcibly dragged and taken away; that on 20.05.89 the 2nd respondent Ratwatte took him upstairs; the 4th respondent PC 13820 and the 3rd respondent Piyaseeli Silva (probably a typing mistake for Piyasiri Silva) tied up and suspended him with a pole between two tables; the 2nd respondent struck him with an iron rod and questioned him about a robbery at a cigarette agency; he was also shown one Sisira and asked whether he knew him; then the 4th respondent struck him with the iron rod; the 3rd respondent also struck him with the iron rod.

It is pointed out that the statement 'Y' makes no reference to the 1st respondent; that it refers to a forcible arrest whereas Deepal Perera in his affidavit (P2) says that he thought that the petitioner was being given a lift; that in the statement 'Y' the petitioner states that the 3rd respondent struck him with an iron rod whereas in his petition he states that the 3rd respondent kicked him. More relevantly, the petition describes the 4th respondent as PC 13520. It does not disclose his name. The statement 'Y' makes no reference to any Police Constable bearing distinctive number 13520 but refers to a Police Constable bearing number 13820. Here too the name of the Constable has not been disclosed but the acts attributed to PC 13520 (the 4th respondent) in the petition are now attributed to PC 13820. Consequently PC 13820 Cyril Jayaratne came forward and filed an affidavit answering the allegations made against the 4th respondent in the petition even though the petitioner has not taken steps to join him by an amendment to the petition.

This Court has to make its determination in respect of the allegations concerned in the petition on the basis of the above material and in the light of the applicable principles of law, in

particular as regards the nature and the degree of proof required of the petitioner. On this question, the rule is that the petitioner must prove his allegations to the satisfaction of this Court. The degree of proof is not so high as in a criminal case. The test is that applied in civil cases but the degree of proof could vary depending on the subject matter. Thus where the allegation is a serious one such as torture and inhuman treatment by the executive and administrative authorities of the State a high degree of probability proportionate to the subject matter is necessary.

Velumurugu v. A.G. & Others (1) *Goonewardena v. Perera* (2) *Kapugeekiyana v. Hettiarachchi* (3)

Upon a careful consideration of the available evidence, I accept the petitioner's version that he was arrested on 19.05.89. The petitioner is corroborated by Deepal Perera and his parents. All of them have given a day to day account of events from the 19th to 23rd which does not savour of a fabrication and is intrinsically probable. No doubt there is a contradiction between the petitioner and Deepal Perera as to the manner of arrest in that whilst the petitioner states that he was forced into the jeep Deepal Perera thought that the police were giving the petitioner a lift when he was asked to get into the jeep. This in my view is not a material contradiction. The expression "නැගපන්" used by the police is equivocal and it is possible that at 9.30 p.m. after sighting the police party Deepal Perera himself may not have remained long enough at the scene to witness everything that happened. In any event, the account given by the petitioner's parents as to the events is convincing. In consequence of information given by Deepal Perera they visited the Police Station on the 22nd with Sisira Kodikara, Attorney-at-Law. Counsel for the respondents commented that no affidavit from Sisira Kodikara has been produced but that by itself does not affect the credibility of the witnesses. The record in MC Panadura 82836 shows that

although Mervyn Silva Attorney-at-Law represented the petitioner before the Magistrate, Sisira Kodikara too had taken certain action on his behalf. Thus on 31.05.89 he has applied for a certified copy of proceedings had before the Magistrate. This was followed by a motion for calling the case to enable the petitioner to make a statement. The interest that this lawyer had evinced in so assisting the petitioner tends to support the averment in the petition that on 20.05.89 he had accompanied the petitioner's parents to the Panadura Police Station with a view to securing the release of the petitioner.

It is highly improbable that all the investigations purporting to have been conducted by the police from the arrest to the remanding of the petitioner could have been carried out between 12.30 p.m. and 5.20 p.m. on the 23rd. In this connection, I accept the submission of the learned Deputy Solicitor General that the fact that the petitioner's mother was ready with her affidavit to the DIG Police (P5) on the 23rd supports the allegation that the petitioner had been arrested prior to that day. It seems to me that this submission is decisive on the point and has considerably assisted this Court in making its finding as to the date of the arrest. I wish to express my appreciation of the assistance given by the Deputy Solicitor General and his fair presentation of the case.

Whilst the available evidence considered with the attendant circumstances is cogent enough to establish the date of the arrest, the evidence as to who arrested the petitioner is not so cogent. The petition implicates the 1st respondent but the petitioner's subsequent statement (Y) makes no reference to him. The 1st respondent's own affidavit states that on 23.05.89 he was the Acting OIC of the Police Station, Horana. This would not help him as that alibi does not cover any previous period; but that alone is not sufficient to turn the scales against him, in the circumstances of this case. No motive has been alleged as to why the 1st respondent is implicated. Yet there is a possibility that he became involved by reason of his being the

OIC (Crimes). I would therefore exonerate him but express concern over the manner in which the petitioner was treated by officers attached to his branch. Even if he was not concerned in the petitioner's arrest, it is quite unsatisfactory if subordinate officers were able to detain the petitioner for over 4 days and ill treat him without the 1st respondent being aware of it. It certainly shows that the crimes branch was without supervision.

I shall now consider the question whether the petitioner's arrest has been effected according to the procedure established by law. The petitioner's arrest must satisfy the requirements of the provisions of Section 32(1)(b) of the Code of Criminal Procedure Act, No. 15 of 1979 which states —

> "Any peace officer may without an order from a Magistrate and without a warrant arrrest any person
>
> (a) .....
> (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 exists of his having been so concerned".

The petitioner was arrested in the course of investigations into a robbery which took place on 07.05.89 by unidentified persons. According to PS Wickremanayake who claims to have effected the arrest, the petitioner was suspected of a series of robberies within the Panadura Police area and he was wanted for questioning. No material has been placed before us to justify such suspicion or more particularly a suspicion that the petitioner was concerned in the robbery which was under investigation. Despite this, the Counsel for the 1st to 5th respondents strenously contended that it was unlawful for the police to have arrested the petitioner for purposes of investigation. It appears to be the Counsel's submission that if it is proved that the police did in fact entertain a suspicion on the

basis of information in their possession this Court must uphold the arrest in the interest of investigation. I cannot agree with this submission.

It is settled law that the reasonability of the arrest in such cases has to be tested by Court. To enable the Court to do so, the police must furnish relevant material to the Court. If such material is furnished it is not the duty of the Court to determine whether on the available material the arrest should have been made or not. The question for the Court is whether there was material for a reasonable officer to cause the arrest. *Withanachchi v. Cyril Herat, Leelaratne v. Cyril Herat* (4). Proof of the commission of the offence is not required. A reasonable suspicion or a reasonable complaint of the commission of an offence suffices. The test is an objective one. *Joseph Perera v. Attorney-General* (5) *Gunasekera v. de Fonseka* (6). Police are not required before acting to have anything like a prima facie case for convicting. *Dumbell v. Roberts* (7).

A suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officers' own knowledge or on the statements made by some other persons in a way which justify him giving them credit *Muttusamy v. Kannangara* (8). Gratiaen J. considering whether the arrest of the accused without a warrant was lawful said (p. 330) —

> "On the facts of this case, the legality of the arrest depended upon whether the accused were persons against whom a reasonable complaint had been made or credible information had been received or a reasonable suspicion existed of their having been concerned in the commission of the offence of theft (Section 32(1)(b) of the Criminal Procedure Code). Inspector Kannangara has nowhere in the course of his evidence referred to any complaint or information or suspicion the reasonableness of which could have been tested by the learned Magistrate, whose function it was to inquire into the officer's state of mind at the time that he ordered the arrest".

Applying these principles to the case before us, I hold that the arrest of the petitioner is unlawful for failure to satisfy the requirements of Section 32(1)(b) of the Code of Criminal Procedure Act. He was arrested on 19.05.89 and detained without sending him before a Magistrate as required by Section 36 of the Act. By producing the notes of investigation marked 'A' and entries from the register of prisoners detained - 'B' - the respondents sought to clinch the issue as to the date of arrest. No other material having the effect of discrediting the petitioner's version that he was arrested on the 19th has been produced. If so, the only way in which the police can exculpate themselves on the charge of illegal detention is by resorting to the simple devise of making entries of the kind evidenced by documents 'A' and 'B', shifting the date of the arrest, which entries would in the absence of convincing evidence as to the date of arrest appear to be genuine. I am satisfied that there is convincing evidence that the petitioner was arrested on the 19th and that the documents 'A' and 'B' do not constitute a truthful record of events. I hold that the petitioner's detention after his arrest on the 19th without sending him before a Magistrate as required by Sections 36 and 37 of the Code of Criminal Procedure Act is unlawful.

On the basis of the available evidence including the medical evidence (P6) I have no doubt that the petitioner, whilst he remained in police custody was subjected to torture and inhuman treatment. As regards personal responsibility, I hold that no case has been proved against the 4th, 5th and 6th respondents. The 4th respondent has to be exonerated in view of the fact that he has been drawn into this case only as a result of the petitioner's statement marked 'Y' and he has not been identified on the face of the petition itself. The 5th and 6th respondents are made parties purely by reason of their status as Headquarters Inspector Panadura Police and the Inspector General of Police respectively. Such status by itself would not constitute sufficient evidence to give rise to personal responsibility for an alleged violation of fundamental rights. The 2nd

respondent has been identified by name in the petition, in the petitioner's statement to the JMO (P6) and in his statement 'Y'. There is ample evidence to hold him personally responsible.

The 3rd respondent has also been identified by name in the petition and in the statement 'Y'. However, there is a conflict between the petition and the statement 'Y' as regards the part played by this respondent when the petitioner was assaulted. According to the petition, he trampled and kicked the petitioner. According to 'Y' he struck the petitioner with an iron rod. Yet on one matter the petitioner is consistent namely, that the 3rd respondent helped the 2nd respondent to prepare him for torture. There is another matter which is significant namely that the distinctive number assigned to this respondent in the petition is 16237 but it appears from the affidavit of this respondent that the correct number is 16225. This would militate against the suggestion that he has been falsely implicated. If that were so the petitioner who refers to him in the petition by name would have taken the care to ascertain the correct number before he filed his application. In my view, the erroneous reference to the number is probably due to faulty observation or recollection.

I determine that the arrest of the petitioner is violative of his rights under Article 13(1) and his detention is violative of his rights under Article 13(2) and 13(4). I also determine that the petitioner was, whilst in police custody, subjected to torture and inhuman treatment in breach of Article 11 of the Constitution; and that the 2nd and 3rd respondents and the state are jointly and severally liable to compensate the petitioner.

It remains to consider what relief may be granted to the petitioner. The decision of this Court in *Amal Sudath Silva v. Kodituwakku* (9) is of relevance in this regard. In that case, the petitioner who had been arrested and detained for 5 nights

by the Panadura Police had been subjected to torture and cruel treatment by the police.

Atukorale J. said (p. 127) —

> "The facts of this case have revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can only be described as barbaric, savage and inhuman. They are most revolting to one's sense of human decency and dignity, particularly at the present time when every endeavour is being made to promote and protect human rights. Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment within the confines of the very premises in which he is held in custody. Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order. The petitioner may be a hard-core criminal whose tribe deserves 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".

I am in respectful agreement with these views. I wish to add that if the police continue with the practice of taking into custody suspects on speculation or merely on the ground that they are persons of bad repute, in the hope of getting a break in the investigations by interrogating them, it would end up in the use of third degree methods. This presumably is what happened in the case before us.

In *Sudath Silva's* case the Court ordered compensation in a sum of Rs. 10,000/- and costs fixed at Rs. 1000/- to be paid to the petitioner. Neither the pronouncements of the Court nor

the award made appears to have deterred the police in resorting to the illegalities established in the instant case. In all the circumstances, I determine that the petitioner is entitled to a sum of Rs. 20,000/- as compensation and a further sum of Rs. 2,000/- as costs from the 2nd and 3rd respondents and the State, jointly and severally. I direct that payment be made accordingly. I dismiss the application against the 1st, 4th, 5th and 6th respondents without costs.

In view of the material which has been placed before this Court to the effect that the petitioner has disappeared I have considered whether this Court should make any direction as regards the payment of the sums ordered herein, in the event of it being established that the petitioner is dead. Under Article 126(4) the Supreme Court has the power "to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition". Thus the power of this Court is very wide and would include the power to make a direction as to the payment of the sums ordered, in the circumstances set out by me. Accordingly, I direct that in the event of it being established that the petitioner is dead, the compensation and costs ordered in this judgment be paid to the petitioner's legal representatives.

I also direct that a copy of this judgment be forwarded to the Inspector-General of Police who is the 6th respondent to these proceedings to enable him to consider further steps, by way of disciplinary action or otherwise, in the light of the findings of this Court.

H. A. G. de Silva, J. — I agree.

Dheeraratne, J. — I agree.

Application allowed. Compensation ordered.