ABASIN BANDA

v.

S. I. GUNARATNE & OTHERS

SUPREME COURT
AMERASINGHE, J.
KULATUNGA, J.
WIJETUNGA, J.
S.C. APPLICATION NO. 109/95.
OCTOBER 6, 1995.

Fundamental Rights – Constitution, Articles 13(1), and (2), Article 11 – Code of Criminal Procedure Act, Sections 32(1) (b), 36 and 37 – Inform reasons for arrest – Unreasonable delay - Torture – United Nations Convention on Torture, Articles 2.1,10, 11, 12, 13 and 16 – Act, No. 22 of 1994.

The Petitioner alleges that he was arrested at about 6 p.m. on 1, March 1995, for no reason. He was taken to the Hanguranketha Police Station where the 1st Respondent assaulted him with a piece of wood. He was produced before the Magistrate in the morning of 2, March, 1995.

The question to be decided is whether there was "unreasonable delay" and whether his detention before production was, "under all the circumstances of the case", "reasonable", rather than, the question whether the arrest was unlawful and consequently the subsequent detention was also unlawful.

Held:

1. The infringement of fundamental rights by the police continue unabated even after nearly 18 years from the promulgation of the 1978 Constitution and despite the numerous decisions of this court which have condemned such infringements. As this court had observed in previous judgments, this situation exists because police officers continue to enjoy an immunity from appropriate departmental sanctions on account of such conduct. It is hoped that the authorities will take remedial action to end this situation.

2. The 24 hour limit is the maximum time for production. Where in all the circumstances of the case it was unreasonable to delay production before the Magistrate, the person making the arrest would be acting in contravention of Article 13(2).

3. There being no grounds for arrest whatsoever, the detention overnight was unreasonable, and in failing to produce the Petitioner before the Magistrate soon after the arrest, the 1st Respondent failed to act in accordance with procedure established by law.

4. The award of compensation is useful because it provides an opportunity to demonstrate society's abhorrence of such conduct. Whereas courts are not obliged to reflect public opinion they must not disregard it, especially where there is general anger or dismay or fear over transgressions of this nature.

5. The fact that a transgressor is personally required to pay a part of the compensation assessed by the court as being just and equitable is useful to the extent that it will to some extent assuage the wounded feelings of the victim.

Cases referred to:

1. *Ratnapala v. Dharmasiri* [1993] 1 Sri L.R. 224 at 232, 233, 236.
2. *Garusinghe v. Kaduragamuwa* S.C. App 133/87 SCM 1 June 1988.
3. *Chandrasekaram v. Wijetunge* S.C. Ref. 1-3/92 SCMN 29 June 1992.
4. *Faiz v. A.G.*S.C. App 89/91 SCM 1993.
5. *Wijeratne v. Vijitha Perera* S.C. App 379/93 SCM 2 March 1994.
6. *Peiris & Others v. A.G. & Others* [1994] 1 Sri L.R. 1
7. *Mahinda Rajapakse & Vasudeva Nanayakkara v. Chief Inspector Karunaratne & Others* S.C.A. 2 & 4/93 SCM 31 March 1994.
8. *Kumarasena v. Sriyantha & Others* S.C. App 257/93 SCM 23 May 1994.
9. *Selvakumar v. Douglas Devananda & Others* S.C. App 150/93 SCM 13 July 1994.

10. *Kumara v. Rohan Fernando & Others* S.C. App 22/90 S.C.M. 21 July 1994.
11. *Pelwattage (AAL) for Piyasena v. OIC Wadduwa* SC App 433/93 SCM 28 October 1994.
12. *Jayasena v. Ramanayake & Others* S.C. (F/R) 17/94 SCM 28 October 1994.
13. *Weragama v. Indran & Others* S.C. App's 396 and 397/93 SCM 24 February 1995.
14. *Saman v. Leeladasa* [1989] 1 Sri L.R. 1.
15. *Cf. R. v. Oddy* [1974] 2 ALL E.R. 666.

APPLICATION alleging Infringement of fundamental rights.

Nimal Hapuarachchi for the Petitioner.

Kanthilal Kumarasiri for the 1st and 2nd Respondents.

V. Puvitharan, S.C. for the 3rd and 4th Respondents.

Cur. adv. vult.

November 03, 1995.

KULATUNGA, J.

The petitioner alleges that he was arrested by the 1st respondent (Sub Inspector of Police) on 01.03.95 at about 6.00 p.m. for no reason; he was taken to the Hanguranketha Police Station where the 1st respondent assaulted him with a piece of wood. The petitioner complains that by such acts his rights under Article 11, 13(1) and 13(2) have been infringed by executive or administrative action. The 2nd respondent (also a Sub Inspector of Police) was the Officer-in-Charge of the Hanguranketha Police Station. In his petition, the petitioner does not make any allegation against the 2nd respondent.

The Petitioner states that he was waiting for a bus at the Rikillagaskada junction to go home, after selling cloth. Then the 1st respondent arrived in a jeep with two Police Constables and arrested him. The petitioner was not informed of the reason for his arrest. On the 1st respondent's order the two constables put the petitioner into the jeep. He was then taken to the Hanguranketha Police Station. At the Police Station the 1st respondent told the petitioner "you are the one that I wanted ... you are having land cases with my relations you dog". This has reference to the motive for the petitioner's arrest, according to the case presented by the petitioner.

The petitioner's position on the question of motive is that the 1st respondent's sister Bisso Menika is his neighbour. She is married to one Gunaratne who is not on good terms with the petitioner due to a land dispute. Gunaratne had threatened to have the petitioner punished by his brother-in-law the 1st respondent.

At about 7.30 p.m. the petitioner was taken towards Kandy in a jeep. On the way the jeep was halted. The 1st respondent took a bottle of arrack, opened it and forced it into the petitioner's mouth. Petitioner was thus compelled to swallow a little arrack while some of it spilt on his shirt. In attempting to get the petitioner to consume arrack, the 1st respondent assaulted the petitioner on his cheek and shoulder. As a result, he fell down and injured his left elbow. He was then taken to the Government Hospital Marassana. He was shown to a doctor. The 1st respondent told the doctor that the petitioner was drunk. The doctor recorded it in a book.

Thereafter, the petitioner was brought back to the Police Station at about 10.30 p.m.; and the 1st respondent assaulted the petitioner with a broken leg of a chair. The petitioner sustained injuries on his left knee and the right shoulder. When the petitioner asked for some drinking water, the 1st respondent gave him a cup of urine.

On 02.03.95 the petitioner was taken to Court. On the way he sent a message to his wife through one Seneviratne. In Court he pleaded "not guilty" to the charge and was given bail. On the same day, he got himself admitted to the General Hospital Kandy and received treatment as an in patient in Ward No. 10. The petitioner has produced marked P1 the report of the JMO dated 31.03.95 which reads:

> "This patient was admitted to General Hospital Kandy on 02.03.1995 at 2.35 p.m., Ward No. 10 BHT No. 15315. He alleged that he was assaulted with a club by a Police Officer on 01.03.1995 around 9.00 p.m. and 11.00 p.m. He had the following injuries.
>
> (1) Parallel contusion 3" x 3/4" across the upper back of the right upper arm.

(2) Scabbed grazed abrasion 2 1/2' x 1/2" on the upper back of the right forearm.

(3) Scabbed grazed abrasion 3/4" diameter on the back of left elbow.

(4) Swelling of left knee – No fractures found vide X-ray No. 9591.

(5) Pain in the right buttock.

All injuries are caused by a blunt weapon and were non-grievous in nature".

The petitioner has annexed to his petition supporting affidavits from several witnesses including the following –

(1) One Ranasinghe Banda who states that on 01.03.95 he too was waiting for a bus at Rikillagaskada with the petitioner when the 1st respondent came in a jeep and arrested the petitioner. On the 1st respondent's order two police constables put the petitioner into the jeep – (P2).

(2) One Gnanapala who says that having heard of the arrest of the petitioner he visited the Police Station at about 6.00 a.m. on 02.03.95. At the request of the petitioner the witness gave him a shirt. The petitioner appeared to be in pain and the shirt which he was wearing was smelling – (P5).

(3) One Seneviratne Banda who says that he saw the petitioner being taken along the road by a constable. The petitioner was limping and said that he was being taken to Court. At the request of the petitioner the witness carried a message to the petitioner's wife. On the way he met the petitioner' daughter and conveyed the information to her – (P6).

The 1st respondent states that on 01.03.95 he was on Station duty and never left the Police Station; and that on 02.03.95 he signed a plaint against the petitioner in his capacity as the Officer-in-Charge of

the crime branch. He denies that he arrested the petitioner and also the alleged assault.

The 2nd respondent (R. M. K. Ranaweera) states that he arrested the petitioner at about 9.30 p.m. for drunken and disorderly behaviour. He states that when he was passing the Rikillagaskada town, he saw the petitioner on the ground and strongly smelling of liquor. His sarong had fallen off his body. In support of this version, the 2nd respondent has produced affidavits from the following witnesses, obtained in June, 1995.

(1) Ratnayake who claims to be the owner of a shop in Rikillagaskada town – (2R2).

(2) Wickremasinghe a labourer who had been to a liquor shop in the town for a drink of arrack – (2R3).

(3) Nimal who is the owner of a private van who used to ply it in the town – (2R4).

According to these witnesses the petitioner was drunk and disorderly from about 6.30 p.m. to 8.00 p.m. He was abusing in obscene language. By 8.00 p.m. he was lying on the ground. They say that nobody went to his assistance as he was in the habit of behaving in that manner after drinks.

As per the 2nd respondent's notes of investigations, at the time the 2nd respondent arrived at the scene, the petitioner was still abusive. When the 2nd respondent put him up, the petitioner became more abusive and used obscene language – (2R6). The 2nd respondent arrested the petitioner and brought him to the Police Station. According to the notes of the police officer who took charge of the petitioner at the Police Station, he had contusions and abrasions. He was also under the influence of liquor – (2R7).

Continuing his version, the 2nd respondent states that the petitioner was sent for a medical examination and produced marked

2R10 – a copy of the medico-legal examination form from police custody. 2R10 states that the petitioner was examined at 11.30 p.m. on 01.03.95 by doctor Bentota. However, it is not signed by that doctor. According to 2R10 the petitioner had abrasions, which fact is indicated by a tick against the relevant cage. By a similar tick 2R10 indicates that the petitioner was under the influence of liquor.

On 02.03.95 the petitioner was produced in Court, charged with an offence under s. 2 read with s. 12(2) of the Offences committed under the Influence of Liquor (Special Provisions) Act No. 41 of 1979. The report to Court has been produced marked 2R13.

Finally, the 2nd respondent has produced an affidavit dated 20.06.95, marked 2R19 from Ranasinghe Banda, the witness for the petitioner denying that he gave the affidavit which the petitioner produced marked P2. However, on a comparison of the signatures on 2R19 and P2, it appears plain, having regard to the formation, the shape, the angle and the letters of the two signatures that both affidavits have been signed by one and the same person namely "ආර්. එම්. රනසිංහ බණ්ඩා".

The petitioner has filed a counter affidavit reiterating his version of the incidents. He has annexed thereto *inter alia,* an affidavit marked P9 from one Ratnatilake who had been a school principal for 12 years and had held the post of Principal of Hanguranketha Vidyalaya since 1993. This witness states that he knows the petitioner. He has five children three of whom studied in his school until they obtained scholarships and joined other schools. Two children are still students in his school. The petitioner is devoted to his children. He is a good man. He attends the meetings of the School Development Society and helps the school. To the witness, knowledge, the petitioner is not a man who is prone to drunken and disorderly conduct.

On a careful consideration of the evidence, I am satisfied that the petitioner's version is intrinsically credible. It is well supported by other witnesses and the medical report P1. I reject the unsigned medico-legal examination form 2R10 produced by the

2nd respondent. Even if the petitioner had been shown to a doctor, there has been no proper examination of the petitioner for the doctor has failed to observe even the contusions which have been noted by the police constable who took charge of the petitioner.

There is no motive for the petitioner to have falsely implicated the 1st respondent. Counsel for the 1st and 2nd respondents submitted that the motive is the fact that the 1st respondent charged the petitioner under a special law which provides for a minimum sentence both as regards fine (i.e. Rs. 1000/-) and imprisonment (i.e. one year). This fact tends to show that the 1st respondent has a strong motive to have the petitioner sentenced. The motive alleged by the petitioner has not been seriously rebutted. In all the circumstances, I am satisfied that the 1st respondent did arrest the petitioner to penalise the petitioner on account of the existence of a land dispute between the petitioner and the 1st respondent's brother-in-law.

I am also satisfied that the 2nd respondent's version is false when he says that it was he who arrested the petitioner at 9.30 p.m. on the day in question. The 2nd respondent's story is a mere cover up designed to absolve himself (as the OIC of the Police Station) and the 1st respondent from liability for the acts complained of by the petitioner. It is not clear how and in what circumstances the witnesses who gave the affidavits 2R2, 2R3 and 2R4 were discovered. I reject the evidence of those witnesses.

In view of the fact that I have accepted the petitioner's version, I hold the arrest of the petitioner to be unlawful. The detention by the police which followed such arrest is also unlawful. I am also satisfied that the petitioner was assaulted by the 1st respondent. The 2nd respondent himself was aware of and deliberately tolerated and acquiesced in such assault. The Police Station where the incident occurred appears to be a small Police Station where the 2nd respondent, as Sub Inspector was the OIC. The 2nd respondent cannot feign ignorance of the assault. The condition of the petitioner

by reason of the assault was so bad that even on the morning of the next day, he was limping, on the way to the Court. The 2nd respondent who admittedly gave orders in respect of the petitioner had every opportunity of being aware of his condition. As the OIC he took no action against his subordinate. On the contrary he suppressed the occurrence of the alleged acts. It is on these facts that I hold that the 2nd respondent is also personally responsible. As such both respondents are personally responsible for the impugned acts. Vide *Ratnapala v. Dharmasiri* [1].

Accordingly, I grant a declaration that the rights of the petitioner under Articles 11, 13(1) and 13(2) have been infringed by executive or administrative action. In respect of the infringement of Article 11, I direct the State to pay a compensation in a sum of Rs. 20,000/-; the 1st respondent is directed to pay a sum of Rs. 8000/- and the 2nd respondent (SI Ranaweera) is directed to pay a sum of Rs. 8000/-. I also direct the State to pay a sum of Rs. 5000/- for the infringement of Articles 13(1) and 13(2) and costs in a sum of Rs. 2000/-. In the result, the petitioner will be entitled to a total sum of Rs. 43,000/- as compensation and costs.

I wish to add that infringements of fundamental rights by the police continue unabated even after nearly 18 years from the promulgation of the 1978 Constitution and despite the numerous decisions of this Court which have condemned such infringements. As this Court had observed in previous judgments, this situation exists because police officers continue to enjoy an immunity from appropriate departmental sanctions on account of such conduct. It is hoped that the authorities will take remedial action to end this situation.

The Registrar is directed to forward a copy of this judgment to the 3rd respondent who is directed to ensure expeditious payment of the sums ordered herein; to maintain a record of this judgment for departmental purposes; and to take other appropriate action. The 3rd respondent is also directed to make a report to this Court that these directions have been complied with. The report should be forwarded to this court on or before 31.12.1995.

AMERASINGHE, J.

I have had the advantage of reading the draft of the judgment prepared by Kulatunga, J. I agree with his Lordship's statement of the facts established by the evidence.

The petitioner was Bisso Menika's neighbour. Bisso Menika was the wife of Gunaratne. Gunaratne had a land dispute with the petitioner. Gunaratne had threatened to have the petitioner punished by the first respondent. The first respondent was the brother of Bisso Menika. The arrest was in pursuance of that threat. Article 13(1) of the Constitution provides that "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest." The petitioner was not concerned in any cognizable offence, and there was no reasonable complaint made or credible information received or a reasonable suspicion of his having been so concerned. Therefore in arresting the petitioner without a warrant, the first respondent was not acting according to the applicable procedure, namely the procedure established by section 32(1) (b) of the Code of Criminal Procedure. I therefore declare that the petitioner's fundamental right guaranteed by Article 13(1) of the Constitution not to be arrested except according to procedure established by law was violated by the first respondent. There were no grounds for arrest, and consequently no reason for his arrest in the relevant sense could have been given. I therefore declare that the petitioner's fundamental right guaranteed by Article 13(1) to be informed of the reason for his arrest was violated by the first respondent.

Article 13(2) of the Constitution provides, among other things, that "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law..." According to the applicable procedure in this matter, after taking the petitioner into custody, the first respondent should have without "unnecessary delay" taken or sent the petitioner before the Magistrate. (Section 36 Code of Criminal Procedure). Section 37 of the Code of Criminal Procedure states that a peace officer "shall not

detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate." The petitioner was arrested at about 6 p.m. on 1st March 1995 and was produced before the Magistrate in the morning of 2nd March 1995. The question to be decided is whether there was "unnecessary delay" and whether his detention before production was, "under all the circumstances of the case", "reasonable", rather than, with all due respect, the question whether the arrest was unlawful and consequently the subsequent detention was also unlawful. (See *per* Fernando, J in *Garusinghe v. Kadurugamuwa* [2], *per* Fernando J in *Chandrasekeram v. Wijetunge* [3], *per* Goonewardene, J. in *Faiz v. A.-G.* [4], *per* Goonewardene, J in *Wijeratne v. Vijitha Perera* [5], *Pieris and Others v. A.-G.* and others [6], *per* Bandaranayake, J in *Mahinda Rajapakse and Vasudeva Nanayakkara v. Chief Inspector Karunaratne and Others* [7]). The twenty-four hour limit is the maximum time for production. Where in all the circumstances of the case it was unreasonable to delay production before the Magistrate, the person making the arrest would be acting in contravention of Article 13(2). (See *per* Fernando, J in *Faiz v. A.-G. (supra); Kumarasena v. Shriyantha and Others* [8], *Selvakumar v. Douglas Devananda and Others* [9], *Kumara v. Rohan Fernando and Others* [10]). In the circumstances of this case, there being no grounds for arrest whatsoever, the detention overnight was unreasonable, and in failing to produce the petitioner before the Magistrate soon after the arrest the first respondent failed to act in accordance with procedure established by law, namely that he should have taken or sent the petitioner before the Magistrate without unnecessary delay. I therefore declare that the first respondent violated the petitioner's fundamental right guaranteed by Article 13(2) to be produced before a judge in accordance with procedure established by law.

The medical evidence is consistent with the petitioner's allegation that he was severely assaulted by the first respondent while he was in his custody. Article 11 of the Constitution provides that "No person

shall be subject to torture or to cruel, inhuman or degrading treatment or punishment". I therefore declare that the petitioner's fundamental right guaranteed by Article 11 was violated by the first respondent.

The second respondent was the officer-in-charge of the Police Station at which the petitioner was detained and assaulted. The petitioner did not allege that the second respondent was implicated in the arrest or assault, although, presumably in order to exonerate himself from possible blame that might have been attached to him as the officer-in-charge, he made explanation of the arrest which I reject as being unsupported by the evidence. However, there was no evidence that the second respondent was involved in any of the transgressions of the petitioner's fundamental rights. I therefore hold that the second respondent was not guilty of violating any of the petitioner's fundamental rights.

Judicial condemnation and the imposition of sanctions by way of requiring transgressors to personally contribute towards the compensation assessed by the Court as being just and equitable in the hope that other persons may be deterred from violating Article 11 of the Constitution has meant very little. The Court's sense of frustration has been openly expressed. (E.g. see *Pelawattage (AAL) for Piyasena v. O.I.C. Wadduwa, Jayasena v. Ramanayake and Others, Weragama v. Indran and Others.* I had in *Saman v. Leeladasa* raised doubts about the appropriateness and effectiveness of awarding compensation as a punitive measure. From my point of view, the award of compensation is useful because it provides an opportunity to demonstrate society's abhorrence of such conduct. Whereas Courts are not obliged to reflect public opinion, they must not disregard it, especially where there is general anger, or dismay or fear over transgressions of this nature. The principle of retribution is one that is most easily understood by the public. Since the Court must have regard to his means when it requires a respondent to personally contribute to the sum awarded, *(Cf. R. v. Oddy)* there is perhaps not enough awarded to make a person suffer for his actions. The fact that a transgressor is personally required to pay a part of the compensation assessed by the Court as being just and equitable is

useful to the extent that it will to some extent assuage the wounded feelings of the victim.

I am of the view that a comprehensive approach must be adopted if satisfactory results are to be achieved. Article 2.1 of the United Nations Convention on Torture, which entered into force for Sri Lanka with effect from 2 February 1994, requires the State to take "effective legislative, administrative, judicial or other measures to prevent acts of torture..." Sri Lanka has enacted legislation (Act No. 22 of 1994) making "torture" an offence. Sanctions, whether penal or disciplinary, will no doubt play their part; but a meaningful course of action to minimize violations of Article 11 should include other measures. The United Nations Convention stresses the need for education and certain procedural steps the State should adopt:

Article 10

(1) Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

(2) Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of such persons.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable

ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

I should like to add one further observation: Although the U.N. Covenant is primarily concerned with torture, Article 16 provides that–

"Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture... when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution of references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."

For the reasons set out in my judgment, I declare that the first respondent has violated the petitioner's fundamental rights guaranteed by Articles 11, 13(1) and 13(2) of the Constitution.

The State shall pay the petitioner a sum of Rs. 20,000 by way of compensation and a sum of Rs. 5000 as costs. The first respondent shall pay the petitioner a sum of Rs. 10,000 by way of compensation.

The Registrar is directed to send a copy of this judgment to the Attorney-General for such action as he may deem to be appropriate.

The Registrar is directed to send a copy of this judgment to the Inspector-General of Police. The Inspector-General of Police is directed to place a copy of this judgment in the personal file of the first respondent. The Inspector-General of Police is further directed to take such action as he deems appropriate against the first respondent and to report to this Court on or before 31 December 1995 as to the action taken by him.

WIJETUNGA, J.

I have had the advantage of reading in draft, the judgments of my brothers Amerasinghe and Kulatunga.

I respectfully agree with my brother Amerasinghe.

Relief granted.