SUPREME COURT

G. Jeganathan
V.
Attorney-General and Others
S.C. Appeal No. 12/82 — Fundamental Rights

Constitution — Articles 126 and 127 (3). Supreme Court Rules 65. Admission of Oral evidence. Violation of Fundamental Rights. Torture cruel or inhuman treatment — Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

P. was detained at Panagoda Army cantonment under an order of the Minister of Defence under the Prevention of Terrorism (Temporary Provisions) Act. The petitioner alleged torture and cruel and inhuman treatment.

The petitioner in order to prove the allegation sought to lead oral evidence before Supreme Court in terms of Rule 65 of Supreme Court.

Held 1) Petitioner had failed to make application to the Court to obtain an affidavit from the witness in the same way as it was done for obtaining the petitioner's affidavit. No permission to lead oral evidence could be given in the absence of adequate reason for doing so.

2) On the basis of the affidavit and the subsequent conduct of petitioner, it was difficult to accept as true the petitioner's story.

APPLICATION complaining of violation of Fundamental Rights.

Before: Hon. Weeraratne J
Hon. Victor Perera J., and
Hon. Sozá J

Counsel: V.S.A. Pullenayagam with R. Srinivasan, S.C. Chandrathasan, C.V. Vivekananda and Miss Mangalam Kanapathipillai instructed by T. Pakianathan for petitioner.

S.H. Silva, D.S.G. with Suri Ratnapala S.C. instructed by T.G. Gooneratne, S.A for the 1st to 3rd respondents.

K.N. Choksy, SAAL with D.H.N. Jayamaha instructed by Messrs. Silva and de Mendis for 4th and 5th respondents.

Argued on: 18th March, 1982.

Cur. adv. vult.

Decided on: 8.4.82

The motion of Counsel for petitioner to call oral evidence is refused. Order in the main petition is reserved.

WEERARATNE J.

This is an application of the 10th March 1982 under Article 126 of the Constitution made by the Petitioner, one G. Jeganathan presently detained in the Army Prison in the Army Cantonment at Panagoda, under an order made by the second respondent under the Prevention of Terrorism Act (Temporary Provisions) Act No. 48 of 1979. The Petitioner in his application alleges that he was subjected to torture and cruel inhuman and degrading treatment and punishments. He further states that for a proper adjudication of the matters in issue in these proceedings it is expedient inter alia that this Court hears and takes oral evidence of witnesses on oath in regard to the alleged acts. Affidavits and counter affidavits were filed on behalf of the petitioner and the respondents respectively. In this connection

we heard the submissions of learned Counsel appearing for the Petitioner and the five respondents.

Mr. Pullenayagam, on behalf of the Petitioner, submitted that this Court has exclusive jurisdiction wide and unfettered to permit an application of this nature. He referred to Article 126 of the Constitution which deals with the subject of "Fundamental rights, jurisdiction and its exercise" wherein it is stated:-

(1) "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement ..... by executive or administrative action of any fundamental right ....."

It was submitted by Counsel that this Court consequently has original jurisdiction to hear evidence and not merely receiving evidence, having regard to the ordinary meaning of the words "hear and determine". Counsel further submitted that under Article 127(2) the Supreme Court has power in an appeal to call for and admit evidence. Mr Sarath Silva, Deputy Solicitor General, submitted that there was no reference in the relevant papers as to who the witnesses are. Counsel for the Petitioner stated that the complaint is in regard to the events of the 6th February, 1982 and that his witnesses are numbers 1, 3 and 11 referred to in the affidavit of Mr T. Pakianathan, Attorney-at-Law at (paragraph 16). The Deputy Solicitor General, continuing his submissions stated that he came ready to meet the Motion of the Petitioner which does not mention any names, and further that, in the statement filed there was no reference to witnesses, and that even in the Petitioner's affidavit dated 23rd February 1982, no names of witnesses were given. In this connection the Deputy Solicitor General submitted that there were no names of any witnesses given by the petitioner to his Attorney-at-Law at the earliest opportunity. Further, the petitioner's affidavit has not been filed, and there was only a handwritten document (X^4). Thus we find that the Petitioner has not disclosed matters such as the names of witnesses in the first intimation to Court. It was submitted that in the ordinary course evidence would not be allowed to be led in the manner sought to be done by Counsel for the petitioner. The Deputy Solicitor General submitted that there was no reference to the giving of evidence anywhere in the relevant Articles of the Constitution and that there was only a reference to affidavits. He conceded, however, that in

very exceptional circumstances, as for instance in order to clarify an affidavit, the Court could permit evidence to be led. However, on the facts of this case he submitted that the petitioner has not made out any special reasons for his application.

Mr. Choksy in the course of his submissions stated that in regard to fundamental rights, evidence should be placed before Court by the petitioner, but not oral evidence. Even if the Court had the power to receive oral testimony, the Court would not exercise that power unless the petitioner finds it impossible to place such material before Court by way of affidavit. The date of the handwritten petition (X^4) is 6th February 1982, i.e., the very day of the alleged torture. In paragraph 5 it is alleged that the petitioner was ordered by an Army Officer, whose name he is unaware of, to wash and clean the bathroom of the detainees. The petitioner did as he was told. A few minutes later Corporal Gunasekera, the 4th respondent, is said to have escorted the petitioner and ordered him to wash and clean out the Army Officers' toilets, which the petitioner refused to do. In consequence, according to him, he was subjected to the alleged torture referred to in paragraph 8. Learned Counsel's submission in regard to this episode is that not a single witness is referred to in the petition as being present at the time of the alleged acts of torture complained against, nor is there any averment on this point.

In support of his objection to Mr Pullenayagam's application, Mr Choksy referred us to Rule 65 of the Supreme Court Rules which sets out the procedure applicable to Applications under Article 126. He referred in particular to Rule 65(1)(c) and Rule 65(5) which read as follows,

Rule 65(1):"Where any person applies to the Supreme Court by a petition in writing for relief or redress in respect of infringement or of an imminent infringement of any Fundamental Right by Executive or administrative Action in terms of Article 126(2) of the Constitution he shall:-

(a) .....
(b) .....
(c) support his petition by an affidavit and other documentary material available to him; .

(d) .....
(e) .....
(f) .....
(2) .....
(3) .....
(4) .....

(5) In proceedings held in the exercise of its jurisdiction under Article 126(1) of the Constitution, the Court may so conduct its proceedings and the duration of oral submission so as to hear and finally dispose of the petition within the time prescribed by Law."

Counsel submitted that the Court was empowered by Rule 65(5) to regulate the proceedings in an application under Article 126, and the Court would not ordinarily permit oral evidence to be led unless the petitioner could satisfy Court that there was good reason why the evidence in question could not have been made available by the petitioner to Court in the form of affidavit. He submitted that the petitioner must show that the evidence in question was beyond his power to place before the Court by way of affidavit. As an example, he gave the instance of a petitioner being unable to procure an affidavit because the witnesss in question was a public officer who was not prepared to furnish an affidavit to the petitioner; or, where relevant documents are in the possession of a third-party who was not prepared to make the same or copies thereof available to the petitioner. Such was not the case here. He also submitted that the words "material available to him (petitioner)" appearing in Rule 65(1)(c) supports his contention.

Learned Counsel for the petitioner submitted that affidavits of eye witnesses to the alleged torture practised on the petitioner could not be promptly placed before the Court because they encountered difficulty in obtaining a Justice of the Peace who has power to perform the duties of his office in the Panagoda Camp area. Counsel for the respondents submitted that if there was any evidence to be placed before the Court, then, upon an appropriate motion filed in Court their statements could have been placed before the Court which could take congnizance of the matters referred to therein under the Supreme Court Rules 65(5) so as to dispose of the matter. An Application was made to this Court to make a J.P available to attest

the petitioner's affidavit dated 23rd February 1982,but the same was not done in respect of the witnesses now sought to be called, although they are held in detention themselves at the Panagoda Cantonment. It seems to me that when a witness is available to the petitioner, an application should have been made to this Court to obtain his affidavit in the same way as was done for the obtaining of the petitioner's affidavit. No such effort was made. It is for this Court to decide the question of hearing oral evidence, on being satisfied there is adequate reason for so doing.

On the material placed before us and having regard to the submissions made by learned Counsel and the reasons stated above, we refused the application made on behalf of the petitioner to lead the oral evidence of witnesses.

Learned Counsel for the petitioner next addressed us on the substantive matters in issue as alleged in paragraph 5,6,7 and 8 of the petition dated 6th February 1981 (marked X^4). He alleges that on the above date at 6.30 a.m he was ordered by an Army Officer, of whose name he is unaware, to wash and clean the bathroom of the detainees, which he did as ordered. He then returned to his room. A few minutes later Corporal Gunasekera (the 4th respondent) ordered him to come out and escorted him to the toilets used by the Army Officers and directed him to clean and wash them. Corporal Ratnayake (the 5th respondent) also came and gave him the same order. The petitioner states that he refused to comply, whereupon he was subjected to the acts of torture, cruel inhuman and degrading treatment and punishments referred to in paragraph 8(a) to (y) of X^4. In regard to the alleged degrading treatment relating to the toilets, paragraph 12 of the affidavit of the 4th respondent Gunasekera is relevant. He states therein that he has no authority to take the detainees out of their cells except on the directions of his superiors. Further, the petitioner is permitted to be taken out of his cell only under the guard of the Sergeant Major in charge, or the Sergeant in charge. The petitioner and other detainees are kept in one section of the Detention Barracks whilst the other section housed the Administration Branch and Barracks. *Both sections are separated by a strong iron door.* The Detention Branch is under a Commandant who serves under the Commanding Officer, headquarters. One has to go from the cells of the detainees through the iron door to get to the toilets of the staff. There are permanent civilian employees

engaged in keeping the said toilets clean. The 5th respondent Ratnayake in his affidavit states that the petitioner and other detainees are allowed to go out of their cells only in exceptional circumstances, and only with the permission of the Commandant according to the directions of his superiors. Both the 4th and 5th respondents completely deny the allegations made against them by the petitioner. Lieutenant Dharmaratne, the Commandant of the Detention Barracks, states in his affidavit (3R2) that he visits each cell in the morning and speaks with each of the detainees, including the petitioner. He received no complaint from him or anyone else regarding acts of torture or degrading treatment, nor were the clothes of the petitioner torn, when he saw him on the 6th morning. Sergeant Perera, the Duty Sergeant attached to the staff, providing security to the Detention Barracks, was on duty from 5 a.m on 5th February '82 to 9 a.m on 6th February '82. In his affidavit (3R3) he avers that the petitioner was not taken out of the buildings holding them, or past the iron door, the keys of which were in his personal custody. He did not see any acts of torture or degrading treatment alleged to have been committed by the 4th and 5th respondents. The Commander of the Sri Lanka Army (the 3rd respondent) states in his affidavit that upon receiving notice of the petitioner's application to this Court, he caused inquiries to be made from the Officers in charge of the Detention Barracks and that the facts that they have disclosed are set out in the affidavits (3R1), (3R2), (3R3), (3R4) and (3R5). The Commander specifically states that if the acts alleged to have been committed by the 4th and 5th respondents are proved, they would be dealt with according to military law. Counsel for the petitioners point that no details have been given by the Army Commander in regard to the matters adverted to by him in paragraph 6 of his affidavit was countered by Mr Saràth Silva, Counsel for the respondents who submitted that the affidavits 3R1 to 3R5 give the full picture of the part played by the said Officers on that day of the alleged degrading treatment and torture. Learned Counsel for the petitioners stressed that there is no affidavit from the persons who cleaned all the toilets. This appears, to say the least, an unpractical suggestion in a complex like the Army Cantonment at Panagoda. On the question whether there is any truth that the petitioner was taken out of the heavy iron door in the setting of the affidavits sworn to by the relevant Officers in charge of the Detention Barracks, the 4th and 5th respondents affidavits are strongly supported by Sergeant Weerasinghe's affidavit (3R1), paragraphs 6 and 7, by paragraphs 5 of the Army

Commander's affidavit (3R2), Duty Sergeant Perera's affidavit (3R3), paragraph 5. The Court is asked to dismiss these averments in one sweep. Five lawyers (other than Attorney-at-Law Sivasithamparam) had access to the petitioner on the 6th of February 1982. In the handwritten petition (X^4) the petitioner sets out the various acts of physical assault and torture inflicted on him described in paragraph 8(a) to (f). It is alleged, inter alia, that the two Corporals assaulted him with fists and steel handcuffs. They dashed the head of the petitioner and attempted to strangle him by squeezing his neck. They raised his arms and handcuffed them at a height which required him to stand on his toes, for about an hour. They threw his belongings and scolded him in obscene language.

One of the lawyers named T. Pakianathan who met the petitioner on the 6th filed an affidavit dated 8th February 1982. If the petitioner was assaulted and tortured in the manner just described, would he not have shown signs of torture to the five lawyers, and particularly to lawyer T. Pakianthan? The injuries should have been apparent if there was an assault with steel manacles, etc. They would have observed the torn clothes which he was wearing, which according to him were the only clothes left. Any interested person who met the petitioner on this day in this condition would surely have made an application to have him given medical attention, if he actually saw the petitioner's condition. The petitioner would not have hesitated to show these lawyers the injuries, if he had any.

It is significant that a motion (X^2) was filed by the petitioner in the Court of Appeal initially on 11.12.81 in order to get the petitioner examined by the Judicial Medical Officer. Strangely this application has not been supported to this date, although it is recorded therein,

> "I further move that this application be listed for support on the 16th December 1981."

One would surely expect a lawyer, among the four others who saw the petitioner on the 6th February 1982 to have supported this motion in the Court of Appeal with the material he had, even sometime in February 1982, if he had actually seen the injuries the petitioner had on his person as a result of the alleged acts of physical torture. The absence of any such step, together with the lack of any statement in the affidavit of Mr Pakianathan that he observed or

was shown any injury by the petitioner when he met him on the 6th February, and the lack of any affidavits to that effect from the other lawyers who accompanied Mr Pakianathan, militate strongly against our being able to accept the petitioner's complaint as being true.The petitioner's allegations against the 4th and 5th respondents, if proved, will carry with them serious consequences for these respondents. Furthermore, the allegations are of a very serious nature. They must therefore be strictly proved. This degree of cogency is seriously lacking in these proceedings, which thus must fail.

The application of the Petitioner is for the above reasons refused.

VICTOR PERERA J. — I agree.
SOZA J — I agree.

Application refused