WIJAYASIRIWARDENE
v.
KUMARA, INSPECTOR OF POLICE, KANDY AND TWO OTHERS

SUPREME COURT
NO. 191 of 1988
FERNANDO, J.
DHEERARATNE, J. AND
RAMANATHAN, J.
SEPTEMBER 20, 1989.

Fundamental Rights – Cruel, inhuman and degrading treatment – Constitution, Article 11.

The petitioner, a 16 year student of St. Paul's College, Kandy had been served a pamphlet directing him to get the students of his school on the streets throughout the week on pain of death. The petitioner attended the school the following day and found no students in his classroom but the students of the school were congregating in various places and demonstrating and shouting slogans within the precincts of the

school. He learnt the attendance Register was not being marked. So he left for athletics training but found no training was possible. He decided to return to school but finding the main gate closed he scaled the wall and iron gate and got into the school. He was clad in his track suit and was not in his school uniform. He was a six-footer and joined the slogan shouting students. He could have been mistaken for an outsider. He was apprehended and taken to the Police Station. By way of admitted injuries he had a slit lip and an injury on the cheek. He complained of Police assault. The 1st respondent's (Police) version was that the petitioner led about 500 students on to the road, began stopping vehicles and pasting posters on them. The petitioner fell on the road while attempting to stop a vehicle; then got up and addressed the students, proposing that they go in procession along the road. This was greeted with applause. At this stage the 1st respondent arrested him informing him that he was being arrested for incitement under the Emergency Regulation. There was no medical evidence even of a private Doctor about the injuries.

Held –

(1) The Police are not entitled to lay a finger on a person being arrested even if he be a hardened criminal in the absence of attempts to resist or escape. However in the circumstances of petitioner's attempt to go back to the sanctuary of the school premises the use of some force was justified, but here the force used was excessive.

(2) The use of excessive force does not per se amount to cruel, inhuman or degrading treatment. That would depend on the person and the circumstances. The petitioner's objective in returning even reluctantly to the arena must be taken into account. The 1st respondent's conduct in striking the petitioner in any event does not show any element of indifference or pleasure in causing pain and suffering, or of intentional humiliation, or of brutal and unfeeling conduct. It is often easy after and emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency.

(3) To decide whether the force used was in violation of Article 11 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; but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is. The present case is on the right side of any reasonable line that could be drawn. The excessive force used does not amount to cruel, inhuman or degrading treatment.

Cases referred to:

1. *Banco de Portugal* v. *Waterlow & Sons* [1932] A.C. 452, 506
2. *Hobbs* v. *London & S.W. Railway* (1875) LR 10 QB 111, 121
3. *Mayor of Southport* v. *Morriss* (1893) 1 QB 359, 361

APPLICATION for infringement of fundamental rights guaranteed under Article 11 of the Constitution.

Ranjith Abeysuriya, P.C. with *Miss Gayomi de Silva* for the petitioner

D.S. Wijesinghe, for the 1st respondent

A.R.N. Fernando S.S.C. for 2nd and 3rd respondens.

Cur. adv. vult.

November 03, 1989

FERNANDO, J.

The Petitioner, a 16-year old student of St Paul's College, Kandy, had been selected to compete at the All Island National Sports Meet scheduled to be held in Colombo from 21st to 25th September 1988; and for this he had been in training for some time. On 13.9.88, clad in a yellow track suit, he came to the school premises at 8.30 a.m. intending to go to the Bogambara grounds for training. He noticed there were no students in his classroom; students were congregating in various places within the precincts of the school, demonstrating and shouting slogans; he learned that the Attendance Register would not be marked that day. Having informed the Master in charge of Athletics that he was leaving for training, the Petitioner went to the Kachcheri to meet the Athletics coach of the Education Department; it then transpired that no training was possible that day, whereupon the Petitioner returned to the school around 10.45 a.m. The Petitioner fails to explain why he decided to return to school, although he would have realised earlier that morning that no work would be done; and this failure assumes greater significance in the light of the events of the previous evening, which are referred to in his statement to the Police made later that day. According to the 1st Respondent, the then Chief Inspector, Kandy Police, when he arrived at about 10.00 a.m. the students were boycotting classes, hooting and shouting slogans (of a more provocative nature than described by the Petitioner), and stopping vehicles and pasting subversive posters.

Returning to school, and finding the main gate closed, the Petitioner made an unorthodox entry into the premises, by jumping over the wall and the iron fence: clad in his conspicuous yellow track suit; this performance was not likely to have been viewed, in the prevailing situation, as a legitimate display of athletic prowess by a schoolboy, particularly as he then joined the students who were still shouting slogans. The Petitioner, a well-built six-footer, had no school books, and was (according to the 1st Respondent) the only person not in school uniform. Undoubtedly, anyone would have concluded at this stage that this was an outsider improperly entering the premises in order to incite, or at least to join in, student demonstrations and protests. At 11.30 a.m. the school bell rang indicating that the primary school sessions were over; the Petitioner was close to the main gate within the premises; he says that a Police Constable, who was standing outside the gate with the 1st Respondent, beckoned to him

to come up to the gate and to open it to let the little children out; the Petitioner opened the gate, partially, letting the children leave by creeping under his outstretched arm. Suddenly, an unidentified person, clad in shirt and trousers, crept under the Petitioner's arm, entered the school premises, and pushed the Petitioner out of the premises, The Petitioner turned towards the school premises, whereupon the 1st Respondent held him by the waist, and hit him on the cheek with a clenched fist. The unknown person twisted his right hand behind him, and hit him on the neck. He was thereafter bundled into a police jeep. No reason was given for his arrest. [The 1st Respondent's account differs considerably. He says he observed a commotion inside the premises; the Petitioner was inciting the students; not only did they chorus the slogans shouted by the Petitioner, but when he commenced throwing stones at Police Officers and vehicles on the road outside, they followed suit. The 1st Respondent says that he restrained himself up to then: then the Petitioner led about 500 students onto the road and started stopping vehicles and pasting posters on them with the same slogans. The Petitioner fell on the road whilst attempting to stop a vehicle, got up and addressed the students, proposing that they go in procession along the road; this was endorsed by applause. At this stage, the 1st Respondent arrested him, informing him that he was being arrested for incitement under the Emergency Regulations. The 1st Respondent has produced copies of the relevant entries from the Routine Information Book (made at "14.30 hours"), and from the Daily Information Book (made at "14.40 hours"), which are substantially to the same effect. However, in the latter entry, which are his detailed notes, the time of arrest has been given as "13.30 hours", this is clearly wrong (and should have read "11.30 hours"), because by 12.15 p.m. the Petitioner's father had already learnt that the Petitioner had been arrested and brought to the Police Station.]

Two persons have sworn affidavits in support of the Petitioner's version. One is a trader who observed some people gathered near St Paul's at about 11.40 a.m., and came to see what was happening; he says nothing about demonstrations and slogans, but he says that after the Police put the Petitioner into a vehicle he saw stones being thrown by some students from within the school premises. The other is the father of three students of the College, aged nine, seven and five, who, on hearing of a commotion in the school, went to the gate at about 10.15 a.m., and found the gate closed and the school

children, shouting slogans; he took no action to inquire about his children or to take them away. At 11.15 a.m. he returned, he says nothing about demonstrations and slogans at this time; after the Petitioner was taken away the students became restive, and started shouting; he does not say that stones were thrown. Later the school bell rang, whereupon the students left the premises, then he looked for his children.

The Petitioner was taken in the police jeep to the Police Station probably by about noon, for when his father arrived at the Police Station at about 12.30 p.m. the Petitioner had already been brought there. The Petitioner says that while in the jeep the 1st Respondent scolded him in foul language; five Police Officers assaulted him inside the jeep; on reaching the Station, a policeman dragged him out by the neck; inside the Station some other Police Officers hit him until he fell down, and scolded him in foul language. On the 1st Respondent's orders, he was put into a well in which there were eight others. The 1st Respondent denies such assult and abuse.

At 12.30 p.m. the Petitioner's father asked to see his son; he was asked to come when the officer-in-charge was in; he then informed the A.S.P. that he had come to make a complaint regarding the arrest of his son; he was asked to wait downstairs. At about 2.00 p.m. the Petitioner was taken to another room opposite the A.S.P.'s office; his father came into that room, and asked the A.S.P. and the 1st Respondent not to harass the Petitioner. Shortly thereafter he was taken to another room, where he met his mother and grandmother. By this time, his parents and grandmother had observed that his face was swollen and his lip was slit. There was an exchange of words between the anxious mother and grandmother on the one hand, and the 1st Respondent on the other: the mother stroked the Petitioner's face and said "You have thrashed my son," whereupon the 1st Respondent replied "Not thrashed, he should be killed"; you won't be allowed to live in peace: if you do anything to him, you will be eaten alive." Clearly, in view of the death of a lawyer in Police custody, shortly before, they feared for his life. At 4.00 p.m. telegrams were sent to the President, the Leader of the Opposition and to Mrs Sirimavo Bandaranaike, referring to the arrest of the Petitioner, expressing fears for his life" in the prevailing situation" (an obvious reference to the lawyer's death), and requesting that his life be safeguarded. It was submitted that the failure to make any reference to the Petitioner having been assaulted, although his

condition had been observed by the parents, indicated that there had in fact been no assault; this inference cannot be drawn, because obviously their predominant concern was to protect his life, redress for wrongful arrest, assault or humiliation being relatively unimportant at that point of time while he was yet in custody. He was released on bail at 7.30 p.m., after his statement was recorded.

The Petitioner then narrated the story to his father, and suggested going to the hospital; the father said that the A.S.P. did not record his complaint, and that if they go to the hospital, the Police would get to know and might kill the Petitioner as the situation there (in Kandy) was not good. Accordingly they went home. This does not ring true; it is difficult to believe that the father was afraid to make a complaint; indeed, at 12.30 p.m. that day he was intending to make a complaint regarding the arrest even before he saw his son and ascertained the circumstances. According to the father's affidavit, the A.S.P. did not refuse to record his complaint, but only asked him to wait; there was no further attempt to make a complaint. He had some links with the Sri Lanka Freedom Party, and had been attending to some work in the Party's Kandy Head Office that morning; it is perhaps for this reason that he complained to the Leader of the Opposition and the Leader of the S.L.F.P., in addition to complaining to the President. In any event, the Petitioner could have been taken to a private doctor. There is no evidence, even from members of his family, of any other injury to the Petitioner, or of any medical treatment. In these circumstances, the only inference that can be drawn is that the injuries suffered by the Petitioner did not warrant any medical treatment. We are denied the benefit of medical evidence as to the manner in which the Petitioner sustained injury to his cheek and lip: whether as a result of a blow with the fist, or a fall on the macadamised highway?

In order to decide whether the Petitioner's account of the events leading up to the arrest is true, it is necessary to consider his statement to the Police; it was admitted that he did make a statement, and neither in the petition nor by way of any counter-affidavit was it sought to explain that statement or to suggest that it had not been correctly recorded. At 7.15 p.m. on 12.9.88, when he was on his way home, two unknown persons had accosted him, and made inquiries as to the school he was attending, his class, sports activities, and the like, and gave him a pemphlet; they told him

to go to school at 6.00 a.m. the next morning, and to get the students on to the street throughout the week, threatening to kill him if he did not comply. He showed this pamphlet to his mother, who told him not to get involved. The next day he went to school at 8.30 a.m. and gave the pamphlet to the Principal. If it was not the Petitioner's intention to join in the demonstrations, he could easily have refrained from returning to school at 10.45 a.m.; he had three valid excuses, in that he had been permitted to leave school for athletic training, he knew that classes would not be held, and he had already handed over the pamphlet to the Principal, who would therefore understand why he was keeping away. It is thus likely that the Petitioner returned to school because of the threats made the previous day, in order – perhaps reluctantly – to participate in the activities that took place between 10.45 a.m. and 11.30. a.m. There are two conflicting versions as to the situation at that time: according to the Police, a very serious disturbance of the peace, involving not merely subversive slogans and demonstrations, but actual violence likely to result in injury to person and damage to property. According to the Petitioner it was just a case of students shouting slogans, a matter which did not merit any mention by his two witnesses – whose affidavits do not seem worthy of much credit. The truth appears to be somewhere in between these two versions: it appears more probable that there was more than a peaceful protest, and that there was some violence in the form of stone-throwing, as well as an attempt to go in procession along the highway, which resulted in the 1st Respondent arresting the Petitioner, in the belief that he was an adult outsider inciting students. However, the constitutionality of the arrest is not in issue, as the Petitioner was denied leave to proceed in respect of that allegation.

It is the petitioner's case that he was subjected to cruel, inhuman and degrading treatment in violation of Article 11. There is evidence only of the injury to the cheek and lip; if the Petitioner had been further assaulted as alleged by him, in the police jeep and thereafter at the Station, there would have been other injuries and contusions, but nothing of the kind is referred to in the affidavits of the Petitioner or his parents. Learned President's Counsel for the Petitioner quite rightly submitted that the Police are not entitled to lay a finger on a person being arrested, even if he be a hardened criminal, in the absence of attempts to resist or to escape. In the difficult situation that existed at 11.30 a.m. that day, I hold that the 1st Respondent

restrained the Petitioner, holding him by the waist, while arresting him; upon the Petitioner attempting to go back to the sanctuary of the school premises, the 1st Respondent dealt him a blow on the face. While the use of some force was justified in the circumstances, this was a quite excessive use of force. The use of excessive force may well found an action for damages in delict, but does not per se amount to cruel, inhuman or degrading treatment: that would depend on the persons and the circumstances. A degree of force which would be cruel in relation to a frail old lady would not necessarily be cruel in relation to a tough young man; force which would be degrading if used on a student inside a quiet orderly classroom, would not be so regarded if used in an atmosphere charged with tension and violence. I have also to take account of the objective with which the Petitioner returned to the arena at 10.45 a.m. to participate, albeit reluctantly, in the activities, far removed from sport, which he knew to have been in progress. The 1st Respondent's conduct, in striking a single blow, does not show any element of indifference or pleasure in causing pain and suffering, or of intentional humiliation, or of brutal and unfeeling conduct. "It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency." *Banco de Portugal v. Waterlow & Sons, (1).* To decide whether the force used in this instance was in violation of Article 11, "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; but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is. "*Hobbs v London & S.W. Railway* (2). A series of successive decisions may serve as landmarks which will enable the boundary to be demarcated in the future, but today I do not have to draw the precise line." It is enough for us to say that the present case is on the right side of any reasonable line that could be drawn." *Mayor of Southport v Morriss,* (3). I hold that the excessive use of force in the circumstances of this case does not amount to cruel, inhuman or degrading treatment. The Petitioner's application is dismissed without costs.

DHEERARATNE, J. – I agree.

RAMANATHAN, J. – I agree.

Application dismissed without costs.