

CALDERA
v
LIYANAGE AND OTHERS

SUPREME COURT
AMERASINGHE, J.
WADUGODAPITIYA, J.
EDUSSURIYA, J.
FR 343/99
SEPTEMBER 6, 2001

Fundamental Rights – Articles 11, 13, 126 – Violation – Is it safe to accept a certified copy of any statement or notes recorded by the police without comparing it with the original ? Quis custodiet ipsos custodies ?

The petitioner who was taking a person one LF who had been injured in a motor vehicle mishap was prevented from proceeding by one ZF, the said ZF had assaulted and stabbed him with a knife and driven away, and when the petitioner went to the police station to lodge a complaint ZF was already there, and he was once again assaulted by ZF and the police. The three persons who came with the petitioner too were assaulted by the police. Later when the petitioner was taking the injured to the Ragama Hospital in a van, they were shot at by the police, and when the van stopped - the police had dragged all the passengers out and assaulted them. The petitioner also complains that he was kicked several times in his stomach and the sides of his abdomen by the police officers. The respondents were fired at by the persons in the van.

Held :

- (1) The manner in which the GCIB and RIBs etc have been altered with *impunity and utter disregard* of the law makes one wonder whether the supervising ASPs and SPs are derelict in the discharge of their duties or in the alternative condone such acts.

Per Edussuriya, J.

"In my view it is unsafe for a Court to accept a certified copy of any statement and notes recorded by the police without comparing it with the original".

- (2) The petitioner's fundamental rights guaranteed under Article 11 have been violated by subjecting the petitioner to cruel and inhuman treatment.
- (3) There are contradictions, falsification and fabrication of documents by the respondents - the petitioner's story according to the material before Court has to be believed.

Per Edussuriya, J.

"It is a lamentable fact that the police who are supposed to protect the ordinary citizen of this country have become violators of the law. We may ask with Juvenal 'quis cutodiet ipsos custodes' who is to guard the guards themselves."

APPLICATION under Art 126.

Romesh de Silva PC with *Palitha Kumarasinghe* for petitioner.

Ranjan Gunaratne for 1 - 4 respondents.

Nerin Pulle SC for 5th, 6th respondents.

Cur.adv. vult.

November 6, 2001

EDUSSURIYA, J.

The petitioner claims that in the afternoon of 25th December 01 1998 when he and three others were taking a person who had been injured in a motor vehicle mishap one Lakshman Fernando the driver of a Benz car had sounded the horn for the purpose of overtaking the vehicle driven by the petitioner, and the petitioner had allowed the Benz car to pass when there was sufficient space to do so, and that after overtaking the vehicle driven by the petitioner the Benz car had moved on at a snail's pace thereby obstructing the movement of the vehicle driven by the petitioner

and therefore the petitioner had overtaken the Benz car. Thereafter 10
the said Lakshman Fernando had once again overtaken the vehicle
driven by the petitioner and stopped the Benz car preventing the
van driven by the petitioner from proceeding. Thereafter Lakshman
Fernando had got down from the car, walked up to the petitioner
and having dealt the petitioner a few slaps, pulled the petitioner out
and stabbed him twice with a knife on the right side of the
petitioner's chest. At that time the petitioner's brother Nalaka and
one Rasanga who were in the vehicle driven by the petitioner had
come to the petitioners assistance and the said Lakshman 20
Fernando had driven away. The petitioner's brother Chaminda had
then taken the wheel and driven to the Seeduwa police station on
the way to the Ragama Hospital. By the time they reached the
Seeduwa police station, the said Lakshman Fernando was already
there and the petitioner's brother had got down from the van and
was proceeding to the police station when he was set upon by
Lakshman Fernando at first and thereafter assaulted by the 1st
respondent as well. Then, several police officers had come to the
van and dragged out the others in the van except the petitioner and
assaulted them. In the meantime the petitioner had got down from 30
the vehicle and gone into the police station and asked an officer
there to record his statement and send him to the hospital for
treatment, but his pleas had fallen on deaf ears as the police
officers were busy assaulting the others who has come in the van.
The petitioner on realising that his statement would not be recorded
had got into the van and driven out of the police station premises
and proceeded towards Negombo and then having decided to go
to Ragama Hospital turned the vehicle round and proceeded in that
direction and whilst so proceeding heard a sound similar to that of
a gunshot and at the same time heard a sound of the rear glass of 40
the vehicle being damaged and on seeing from the side mirror, a
police van coming after him and some persons firing at his van by
getting themselves "half out" of the police vehicle the petitioner
claims that he dropped speed and stopped the vehicle and as soon
as he stopped the vehicle he felt something piercing his back and
also heard gun shots. The petitioner has gone on to state in his
affidavit that within a moment he saw a few police officers firing
around the vehicle and one of them namely the 3rd respondent
(P.S. 4509) pointed a gun and shot at him over the windscreen from

the front while the petitioner was still seated in the driving seat and that he at the time closed his eyes and lowered his head and that the shot caused no harm to him. Thereafter he was dragged out of the van and one of them had said "This fellow is still not dead" and attacked him, with a blunt weapon on his back and as he fell he identified the 2nd respondent as the person who dealt that blow with a gun. The petitioner had then pleaded "will you at least now take me to the hospital?" whereupon all the police officers who were there kicked him several times on his stomach and the sides of his abdomen, The petitioner has stated that he thereafter lost consciousness.

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The 1st respondent in his affidavit and objections has stated that the said Lakshman Fernando came to the police station with bleeding injuries on his face and when he was with the said Lakshman Fernando in his office he had seen a van entering the police station with its passengers shouting obscenities in Sinhala and as he walked out "some of the occupants of the van" had rushed out and pulled Fernando onto the compound and assaulted him. That on his orders the offenders had been arrested, and that there had been in all four persons who had assaulted Fernando on the police station compound. The 1st respondent has denied that the petitioner came into the police station and stated that at the time the four persons were being arrested the others who came along with them "made a quick getaway", and that he ordered the 2nd respondent to give chase and to arrest all the offenders, and that P. C. Sunil, P. C. Kumarasiri and the 2nd respondent left in vehicle bearing No. 61 - 2273 and as they were leaving Security Assistants 397 and 390 also got into the vehicle. The 1st respondent has further stated that he came to know later that on someone in the van firing at the police vehicle, the fire had been returned and on the tyres of the van being deflated the van had come to a halt and at that point the police officers had seen a person running away from the van, and that a person who had received injuries had been taken to the Negombo Base Hospital.

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From the 1st respondent's affidavit, paragraph 23 it is clear that if at all only four persons assaulted Fernando on the compound of the police station since the 1st respondent has stated therein that he ordered the arrest of the offenders and in consequence four

It is appropriate to mention at this juncture that all statements produced by the 1st and 2nd respondents which refer to two persons getting into the van and driving out of the police station compound have been recorded after S. I. Aththanayake's entry in the RIB at 18.00 hours on 25th December 1998, and after the shooting took place. I may also add at this point that the statement of the security guard at the entrance to the police station compound R13b as well as R4 contradict the 1st respondent's notes R13 and his affidavit that Lucky Fernando was assaulted when he was in the 1st respondent's office. It must also be mentioned that as stated by the 1st and 2nd respondents in their affidavits, if a person ran away from the van as it was brought to a halt, according to the 2nd respondent's notes R28 only a single police officer was despatched to arrest the man who took to his heels who was the one who is alleged to have fired at the police vehicle, although there were in all five officers at the spot according to 1st and 2nd respondents even leaving out P. S. 4509 the 3rd respondent. Further nothing more is mentioned thereafter of the one who allegedly took to his heels in anyone of the documents that have been filed by the 1st and 2nd respondents. So that we are to understand that he was "The one that got away". Not even a note made by the police officer who allegedly gave chase to the "one that got away" has been produced.

It must also be mentioned at this point that the statement of the Reserve Sub Inspector Malindasiri who is alleged to have attempted to stop the van driven by the petitioner near a check point must be rejected as being false as he says in his statement, which said statement also has been made after 25th December 1998 that a man riding a bicycle escaped being knocked down by the van by jumping off the bicycle and that the van thereafter ran over the bicycle, in view of the bicycle owner's statement (R21) that the van ran over his bicycle which he had parked outside a boutique. It is also significant that the owner of the bicycle has stated that he did not see anyone running away.

So that it is established beyond any manner of doubt that all statements and notes relating to a second person other than the petitioner getting into the van and driving out of the police station compound and then a person firing at the police vehicle which gave

chase and the police vehicle 61 - 2273 being used in the chase and being hit by a shot fired by a person in the van have all been fabricated by the 1st and 2nd respondents to cover up their (police) firing at the van driven by the petitioner without any cause whatsoever.

I will next deal with the damage caused to the van driven by the petitioner by firing.

In this connection we have before us a report (R27) of the Additional Government Analyst made after examination of the said vehicle at the instance of the 1st respondent as well as the report of the retired senior Assistant Government Analyst prepared at the request of the petitioner's Attorneys-at-Law. 210

It must be stated at the very outset that R27 is a very skimpy report which does not even give the trajectory of the bullets which had entered the rear of the said van or even the heights from the ground at which they have entered. According to both reports there were 9 bullet entries from the rear with one of them being on the rear buffer.

The report marked X2 of the retired Senior Assistant Government Analyst gives the height (measured from the ground) at which these bullets have entered the rear of the van. The highest point of entry is at a height of 107 cms from the ground, that is 42 inches from the ground, at 2.54 cms per inch (B in report X2). B has had an upward trajectory. The bullet which had entered at C at a height of 95 cms (73.4 inches) had travelled at a horizontal trajectory parallel to the ground. The bullet which had entered at D at a height of 71 cms (27.9 inches) from the ground had also travelled horizontally. The bullet which had entered at E at a height of 80 cms (31.4 inches) had also travelled horizontally. The bullet which had entered at F at a height of 75 cms (29.5 inches) from the ground had also travelled horizontally. The bullet which had entered at G at a height of 44 cms (17.3 inches) from the ground had a downward trajectory. The bullet which had entered at H at a height of 100 cms (39.3 inches) had also had a horizontal; trajectory and the bullet which had entered at I at a height of 98 cms (38.5 inches) from the ground had also had a horizontal trajectory. 230

On this available material it is clear as day light that the bullet which entered through B which had travelled in an upward direction after entry and C, D, E, F, H and I which had travelled horizontally after entry through the rear of the van driven by the petitioner, could not have been fired from the police vehicle by a policeman seated on the left window sill of the vehicle with the upper part of his body outside the vehicle and the gun almost resting on the roof of the vehicle, as the respondents claimed and as also shown in the photographs produced by the respondents. Any bullets fired from such a position must necessarily travel in a downward direction to have penetrated the rear of the van at B, C, D, E, F, G, H and I and must continue along the same downward trajectory unless deflected since the highest point of entry of C, D, E, F, H and I is 107 cms (42 inches) from the ground. Therefore this leads me to the irresistible inference that these shots were fired by a person or persons standing on the ground. This corroborates the petitioner's statement in his affidavit that as he brought the van to a halt he felt something piercing his back and several shots were fired thereafter too. The bullet that entered through I at a height of 98 cms (38.5 inches) from the ground had travelled horizontally and passed through the back rest of the off side rear seat, through the back rest of the middle seat, got deflected towards the off side and passed through the back rest of the driver's seat and this is the bullet which undoubtedly caused the injury to the petitioner.

This firing by the police without any rhyme or reason even after the van was brought to a stop and the assault that followed with hands, feet and gun was cruel and inhuman treatment meted out to the petitioner undoubtedly intended to punish the petitioner who had left the police station with a stab injury to seek treatment as the police did not record his statement or issue a Medico Legal Examination Form.

Further, some of the statements filed by the respondents disclose that they were aware of the fact that the petitioner had an injury at the time he came to the Police Station.

The 3rd respondent has denied having accompanied the 2nd respondent in the "chase" and claims that he was at the relevant time off duty and in the barracks. However, although in R14 a copy of the 1st Respondent's notes allegedly made at 17.30 hours (5.30

p.m.) on 25th December 1998 and filed in this Court by the 1st respondent with his affidavit, S. I. Aththanayake, S. I. Mahinda (2nd respondent), P. C. 10109, 5945, P. C. 6750, P. C. 30220, 31558, 26486, 10730, Security Assistants 390, 1127, 397 and 384 are mentioned as those who assisted him to bring the incident which allegedly took place on the compound of the police station under control, the original of R14 at page 390 - paragraph 2195 of the RIB shows that P. S. 4509 is also mentioned as one of those who assisted him, but later the numerals 4509 have been scored off along with R. P. S. 2227 with a lighter red ink than the red ink with which the entry had been made and bracketed with the same lighter red ink. However, whoever did this had forgotten to score off the letters "P. S.", so that after the mention of S. I. Aththanayake, the original now reads P. S. P. C. 10109. Thus it appears that at some point of time probably after this petition was filed wherein the petitioner had identified the 3rd respondent as the officer who fired towards him after the van was brought to a halt the 1st respondent had made a most maladroit attempt to cast doubt on the allegations contained in the Petition and Affidavit.

Although the 3rd respondent claims that he returned to the police station at 3.55 am on 25th December 1998, he has in fact returned at 23.55 (11.55 p.m.) on 24th December 1998 and the time has later been altered to "03.55" by writing the "O" over the numeral "2". Further the first entry of 25th December under the date "25.12.98" has been entered at 08.00 hours (paragraph 199). Later someone has scored off "25.12.98" and written "25.12.98" on the line above the line on which the altered "03.55" has been written. The 3rd respondent has also claimed in his affidavit that, having left the police station at 08.00 hours returned at 16.00 hours. However, once again "11.00" has been altered to read 16.00 hours (paragraph 200). This is obvious from the entry which follows (page 396) where the time reads 12.30 hours and the next entry has been made at 16.25 hours. I may also add that in both entries namely the one made at 08.00 hours (exit) and the one made at the altered "16.00" hours (in-entry) the number of the vehicle has been altered from 61 - 2273 to read 61 - 2477.

On a balance of probabilities I therefore accept the averments in the amended petition relating to the 3rd respondent.

In the circumstances I have no doubt whatsoever in accepting the allegations in the petition and affidavit, and holding that the entire story of an attack on the said Lucky Fernando and the police officers who attempted to prevent it as being a total fabrication by the 1st and 2nd respondents. Can it be believed that the 1st petitioner and those who accompanied him had the audacity to assault the said Lucky Fernando whilst he was in the 1st respondent's office ? I have already referred to the contradictions relating to the place where the said Lucky Fernando was at the time of the alleged assault. I have also referred to the other infirmities in the 1st to 3rd respondents, affidavits.

It must be also stated that although the 1st respondent claims that the said Lucky Fernando came to the police station with bleeding injuries on his face and was issued a Medico Legal Examination Form on 25th December 1998 he had been examined only on 28th December 1998, and at that time the only injury he had was a contusion (R4A) which was non grievous. So that the assertions by the 1st and 2nd respondents that the said Lucky Fernando came to the police station with bleeding injuries on his face are not borne out. For there to be bleeding injuries on his face there should be lacerations.

The 2nd and 3rd respondents have been identified as those who assaulted and kicked the petitioner after he was pulled out of the van, that is after the petitioner had been injured as a result of the shooting by the police.

The question also arises whether there was a need to carry fire arms since it has been established beyond doubt that only the petitioner who had an injury on the right side of his chest left the police station in the van, and the story of a person seated on the left side of the van firing at the police vehicle is a fabrication by the police. Then, was there any need for the 1st respondent to issue an order to carry firearms or the 2nd respondent to give an order to fire at the van ? The petitioner has been granted leave to proceed under Articles 11 and 13 of the Constitution. This Court therefore holds that the 2nd and 3rd respondents have violated the fundamental rights guaranteed to the petitioner by Article 11, by subjecting the petitioner to cruel and inhuman treatment.

The injury caused to the petitioner as a result of the indiscriminate firing by the police on the orders of the 2nd respondent had left the petitioner bedridden for around one and a half years and after several surgical operations the petitioner now finds himself having to use a catheter for the rest of his life to pass urine, impotent and therefore with no hope of entering into matrimony, and unable to lead a normal life, by engaging in sports etc. and is presently on a colostomy. The petitioner who was a musician and earned his living as a musician claims that he is now not in a position to do so. 350

This court therefore orders the 2nd respondent and the 3rd respondent each to personally pay a sum of Rs. 100,000/- to the petitioner. The State shall pay the petitioner a sum of Rs. 500,000/- as compensation and costs. All sums ordered shall be paid within three months of this judgment. 360

I may add that the manner in which the GCIBs, RIBs etc. have been altered with impunity and utter disregard of the law makes one wonder whether the supervising ASPs and SP s are derelict in the discharge of their duties or in the alternative condone such acts.

In a case in which I pronounced judgment a few days ago too, I found that the GCIB had been altered, and therefore it appears that, that was not an isolated instance. Thus, the police force appears to be full of such errant officers. The question is what is the 5th respondent Inspector General of Police doing about it ? In my view, it is unsafe for a Court to accept a certified copy of any statement or notes recorded by the police without comparing it with the original. It is a lamentable fact that the police who are supposed to protect the ordinary citizens of this country have become violators of the law; we may ask with Juvenal, *quis custodiet ipsos custodes?* who is to guard the guards themselves ? 370

AMERASINGHE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Relief granted.