

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application under Articles 17
and 126 of the Constitution of the Democratic
Socialist Republic of Sri Lanka

SC (FR) Application No: 417/2016

Hettiarachchige Gemunu Tissa,
No. 361/18H,
Nagalingam Street,
Colombo 14.

PETITIONER

Vs.

1. W. Lionel Jayaratne,
Sub Inspector of Police,
Police Narcotics Bureau, Colombo 01.
2. B.P. Sanjeewa,
Police Constable (60728)
Police Narcotics Bureau, Colombo 01.
3. R.A.I. Rathugamage,
Police Constable (74811),
Police Narcotics Bureau, Colombo 01.
4. M.N. Rangajeeva,
Inspector of Police,
Enforcement and Raids,
Police Narcotics Bureau, Colombo 01.
5. T. Ludowyke,
Chief Inspector of Police,
Officer-in-Charge,
Police Narcotics Bureau, Colombo 01.

6. L.K.W. Kamal Silva,
Senior Superintendent of Police,
Director,
Police Narcotics Bureau, Colombo 01.
7. Pujith Jayasundara,
Inspector General of Police.
Police Headquarters,
Colombo 01.
8. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: **S. Thurairaja, PC, J**
Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Senany Dayaratne with Nishadhi Wickremasinghe for the Petitioner
Varuna De Saram for the 1st – 3rd Respondents
Varunika Hettige, Senior Deputy Solicitor General for the 8th Respondent

Argued on: 7th March 2024

Written Submissions: Tendered on behalf of the Petitioner on 5th April 2024
Tendered on behalf of the 1st – 3rd Respondents on 27th March 2024
Tendered on behalf of the 8th Respondent on 12th September 2022

Decided on: 28th May 2024

Obeyesekere, J

The Petitioner filed this application on 11th November 2016 alleging that his fundamental rights guaranteed by Articles 11, 12(1), 13(1) and 13(2) of the Constitution have been infringed by the 1st – 6th Respondents, all of whom are Police Officers and who were attached to the Police Narcotics Bureau during the relevant time, and by the 7th Respondent, the Inspector General of Police. On 30th November 2016, this Court granted leave to proceed only against the 1st – 3rd Respondents [the Respondents] for the alleged violation of Articles 11 and 12(1).

Arrest of the Petitioner

The Petitioner was 47 years of age at the time of the impugned incident. He claims that he was employed as a driver of a three wheel taxi. Prior to the impugned incident, the Petitioner had been arrested on several occasions for being in possession of heroin. The Petitioner had been indicted in the High Court of Colombo in Case No. 841/2002 for possession of 66.9g of heroin and had been acquitted on 9th March 2012. The Petitioner stands indicted before the High Court of Gampaha in Case No. 337/19 for being in possession of and trafficking 12.08g of heroin on 26th June 2011. Even on the date of the alleged incident, the Petitioner was on bail ordered by the High Court of Colombo, after having been arrested for possession of heroin.

The Petitioner states that the bail conditions imposed by the High Court required him to report to the Grandpass Police Station on the last Sunday of every month. The Petitioner had accordingly reported to the said Police Station at around 10am on 28th August 2016. He states that he left the Grandpass Police Station soon thereafter in a three wheel taxi driven by one Dhammith Kumara, and proceeded towards Maradana. Somewhere in Orugodawatte, the Petitioner had noticed that the vehicle he was travelling in was being followed by two motor bicycles. When their vehicle stopped at a traffic light, the 1st and 2nd Respondents who were in civilian clothing had alighted from their motor bicycles and got inside the taxi that the Petitioner was travelling in, forcing the Petitioner to sit between them.

The Petitioner claims that once inside the vehicle, the 1st and 2nd Respondents had slapped the Petitioner and demanded that the Petitioner hand over a weapon which the said Respondents claimed was in the possession of the Petitioner. Having identified themselves thereafter as Police Officers and handcuffed the Petitioner, the 1st and 2nd Respondents had directed Dhammith Kumara to proceed towards a road off D. R. Wijewardena Mawatha, Colombo 10.

Alleged cruel and inhuman treatment meted out to the Petitioner

Having arrived at the said by-road, the 1st and 2nd Respondents had been met by the 3rd Respondent, who too was in civilian clothing and seated in a double cab vehicle. The Petitioner states that he was pulled out of the vehicle and made to lie down on the rear portion of the double cab vehicle with his legs protruding towards the rear of the said vehicle. The 1st and 2nd Respondents had thereafter demanded that the Petitioner produce drugs and weapons that he was in possession of. As he had none in his possession, it is alleged that the 1st, 2nd and 3rd Respondents had taken turns in assaulting the Petitioner on his soles and heels with an iron rod, causing him excruciating pain.

The Petitioner had thereafter been taken in the same double cab vehicle to a playground in Ganemulla where having closed his head with a plastic bag, the 1st and 2nd Respondents are alleged to have continued to assault the Petitioner with an iron rod on his legs. The Petitioner had thereafter been taken to a small township in Peliyagoda where he claims he was subjected to further assault as before by the 1st – 3rd Respondents.

The Respondents had thereafter proceeded to Kelaniya with the Petitioner in the three wheel taxi driven by Dhammith Kumara, then to the Maradana Police Station and finally arrived at the Police Narcotics Bureau in Colombo 1 at about 9pm. The Petitioner states that by this time, his feet were swollen and he was finding it difficult to walk, and he had to be carried up the stairs at the Police Narcotics Bureau. The Petitioner states further that although he was given Siddhalepa ointment to apply on his feet, the said treatment was not effective as the assault was so severe and that he could not even rest his feet on the ground.

Produced before the Magistrate's Court and the Judicial Medical Officer

Around 3pm on the next day – i.e. 29th August 2016 – the Petitioner had been produced at the Colombo Magistrate's Court on an allegation that he was in possession of 25g of heroin at the time of his arrest at Orugodawatte. The Petitioner has subsequently been indicted by the Attorney General before the High Court of Colombo in Case No. HC 1586/20 for possession and trafficking of 5.31g of heroin which is the pure quantity of heroin as determined by the Government Analyst. The trial is presently proceeding before the High Court.

The Petitioner states that while he was at the Magistrate's Court, a lawyer by the name of Inoka had noticed that the Petitioner could barely walk and inquired from the Petitioner the reason for the swelling of his feet. Having been informed of the assault, the said lawyer had accompanied the Petitioner to the chambers of the learned Magistrate and had drawn the attention of the learned Magistrate to the injuries sustained by the Petitioner. The learned Magistrate had thereafter directed the producing officers to leave his chambers and questioned the Petitioner the reasons for his injuries. The Petitioner states that he disclosed to the learned Magistrate what transpired since leaving the Grandpass Police Station on 28th August 2016. Having denied the issuance of the detention order sought by the producing officer and instead having remanded the Petitioner, the learned Magistrate had directed that the Petitioner be produced before the Judicial Medical Officer for a medical examination.

On 30th August 2016, the Petitioner had been examined by a Medical Officer at the Institute of Forensic Medicine and Toxicology. The examination and the results thereof, to which I shall advert to later in this judgment, revealed several injuries on the feet of the Petitioner. In the meantime, the mother of the Petitioner had lodged complaints with the Grandpass Police, the National Police Commission and the Human Rights Commission over the above incident and brought to their attention that the Petitioner is receiving in house treatment at the National Hospital in Colombo. Copies of these statements however have not been tendered to this Court.

On 27th September 2016, the Chief Magistrate of Colombo had directed that the 1st – 3rd Respondents as well as anyone else involved in the assault on the Petitioner be arrested and produced before the Magistrate's Court. A 'B' report had accordingly been filed in the Magistrate's Court of Colombo in Case No. 63125/4/2016 by the 5th Respondent and the progress of the investigation has been reported to Court on several occasions. Together with a motion filed on 1st April 2024, the learned Senior Deputy Solicitor General has tendered a copy of the indictment forwarded by the Attorney General to the High Court of Colombo on 28th March 2024 against six Police officers including the Respondents on four charges inclusive of a charge under Section 2(4) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994.

It is in the above circumstances that the Petitioner complained to this Court that his fundamental rights guaranteed by Articles 11, 12(1), 13(1) and 13(2) have been infringed. As leave to proceed has been granted only with regard to the alleged violation of Articles 11 and 12(1), I shall limit my discussion to the alleged violation of the said Articles by the Respondents.

The version of the Respondents

The Respondents state that the Petitioner had been arrested on numerous occasions for possession and trafficking of illegal substances including heroin. It is the position of the Respondents that in spite of having been indicted for such offences before the High Court, the Petitioner had continued to engage in the trafficking of heroin. The Respondents state that the activities of the Petitioner including his financial transactions were under investigation at the time of his arrest. This is borne out by the several confidential reports filed before the Magistrate's Court, Maligakanda in January 2016, seeking the assistance of the Magistrate's Court to probe the phone and bank account details of the Petitioner.

In the 'B' report filed under the Money Laundering Act, No. 5 of 2016, it has been alleged that the Petitioner and his 'wife' have accumulated wealth beyond their known income, and that they own several properties in Colombo 15. It has been further alleged that the Petitioner has a deposit of Rs. 10m at Sampath Bank, a claim which has not been specifically denied by the Petitioner.

It is the position of the 1st Respondent that acting on information received from a private informant that the Petitioner was meeting one of his suppliers in Wellampitiya to carry out a drug transaction that morning, the Respondents together with other officers of the Police Narcotics Bureau had carried out a surveillance of the area surrounding the Orugodawatte flyover. Around 12noon, the private informant had directed the said officers to the three wheel taxi that the Petitioner was travelling in. The 1st and 2nd Respondents claim that they stopped the said three wheel taxi under the said flyover. At that time, the Petitioner '*had jumped out of the three wheeler and run along the railway tracks*' for a distance of about 40-50 metres which compelled the said Officers to pursue and apprehend the Petitioner. Having searched the Petitioner, the Respondents state that they had found in the possession of the Petitioner a polythene bag containing a brown powder which they suspected to be heroin. The Petitioner and Dhammith Kumara had thereafter been arrested for possession and trafficking of heroin and produced before the learned Magistrate the next day.

The Respondents deny that they assaulted the Petitioner but do concede that *reasonable force had to be used to arrest the Petitioner as he was attempting to resist arrest and flee*. While the injuries of the Petitioner are admitted, the learned Counsel for the Respondents in the course of his oral submissions explained that the injuries on the feet of the Petitioner were caused as a result of the Petitioner running on the railway track trying to evade arrest.

Thus, two incidents have taken place on 28th August 2016. The first is the arrest of the Petitioner who is said to have been in possession of heroin at the time of his arrest and which has resulted in the aforementioned indictment filed by the Attorney General against the Petitioner in the High Court of Colombo for possession and trafficking of 5.31g of heroin. The second is the alleged assault of the Petitioner pursuant to such arrest, which has given rise to this application, and the indictment filed by the Attorney General against the Respondents under the provisions of Act No. 22 of 1994.

Having previously been arrested for similar offences, and being under investigation for such offences, the Petitioner could not have been unaware that an allegation of assault at the time of arrest or soon thereafter may have an adverse impact on the credibility of the prosecution version once he is charged before a Court of law for such offence. It would therefore be important for the High Court to evaluate the material and evidence relating to the charges in the indictment relating to possession and trafficking independent of the allegation that the Petitioner was assaulted subsequent to being found in possession of heroin at the time of arrest.

This being the two versions before me with regard to the cause for the injuries, I shall now consider the alleged violation of Article 11.

Article 11 of the Constitution

Article 11 provides that, "*No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"

In **Velmurugu v Attorney General and Another** [(1981) 1 Sri LR 406 at page 453] Wanasundera, J stated as follows:

"Article 11 which gives protection from torture and ill-treatment has a number of features which distinguish it from the other fundamental rights. Its singularity lies in the fact that it is the only fundamental right that is entrenched in the Constitution in the sense that an amendment of this clause would need not only a two-thirds majority but also a Referendum. It is also the only right in the catalogue of rights set out in Chapter III that is of equal application to everybody and which in no way can be restricted or diminished. Whatever one may say of the other rights, this right undoubtedly occupies a preferred position.

Having regard to its importance, its effect and consequences to society, it should rightly be singled out for special treatment. It is therefore the duty of this Court to give it full play and see that its provisions enjoy the maximum application." [emphasis added]

In Amal Sudath Silva v Kodituwakku, Inspector of Police and Others [(1987) 2 Sri LR 119; at page 126], Atukorale, J held that, “Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. It prohibits every person from inflicting torturesome, cruel or inhuman treatment on another. It is an **absolute** fundamental right subject to **no restrictions or limitations whatsoever.**” [emphasis added]

The following passage by Atukorale, J [at page 126] is equally applicable to this application:

“Constitutional safeguards are generally directed against the State and its organs. The Police force, being an organ of the State, is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the Police force, so is he prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this Court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion.” [emphasis added]

In Mrs W M K De Silva v Chairman, Ceylon Fertilizer Corporation [(1989) 2 Sri LR 393 at page 403], Amerasinghe, J stated at page 405 that:

“In my view Article 11 of the Constitution prohibits any act by which severe pain or suffering, whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person (whom I shall refer to as ‘the victim’) by a public official acting in the discharge of his executive or administrative duties or under colour of office, for such purposes as obtaining from the victim or a third person a confession or information, such information being actually or supposedly required for official purposes, imposing a penalty upon the victim for an offence or breach of a rule he or a third person has committed or is suspected of having committed, or intimidating or coercing the

victim or a third person to do or refrain from doing something which the official concerned believes the victim or the third person ought to do or refrain from doing, as the case may be."

Every human being is entitled to live in dignity and not be subject to any torture or cruel, inhuman or degrading treatment or punishment. It is the duty of this Court, as the guardian of the fundamental rights of our People, to foster and protect these rights. Whenever a complaint alleging the infringement of Article 11 is made to this Court, our duty is to examine carefully the facts relating to such complaint, the corroborative evidence, if any, tendered by the petitioner in support of such complaint, the version of the respondent/s and arrive at a considered decision.

The fact that the Petitioner, (a) has been arrested on previous occasions for possession and trafficking of heroin, (b) was under surveillance for trafficking of heroin and money laundering and that the Police Narcotics Bureau had reported facts in that regard to the Magistrate's Court, (c) is said to have amassed through the trafficking of heroin and other illegal activity a large amount of money, (d) stood indicted for possession of heroin at the time of his arrest on 28th August 2016 are not relevant considerations in deciding upon the allegations of assault made by the Petitioner against the Respondents.

In Amal Sudath Silva v Kodituwakku, Inspector of Police and Others [supra], it was held that:

"Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee." [page 126; emphasis added]

"The petitioner may be a hard-core criminal whose tribe deserve 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." [page 127]

Severity of the act complained of

Amerasinghe, J in **Channa Pieris and Others v Attorney General and Others (Ratawesi Peramuna Case)** [(1994) 1 Sri LR 1 at page 105] stated that, "... *the acts or conduct complained of must be qualitatively of a kind that the Court can take cognizance of.*" At page 106, it was further noted that where physical harm is concerned, a long line of cases had adopted the criteria set out in **Mrs W M K De Silva v Chairman, Ceylon Fertilizer Corporation** [supra; at page 401], that for there to be an Article 11 infringement, the degree of mental or physical coerciveness or viciousness must be such as to occasion not mere ill-treatment, but maltreatment of a very high degree.

This has been emphasised in **Our Fundamental Rights of Personal Security and Physical Liberty** [(1995) Sarvodaya; at page 29], where Justice Amerasinghe has stated that, "'Torture' implies that the suffering occasioned must be of a particular intensity or cruelty. In order that ill-treatment may be regarded as inhuman or degrading it must be 'severe'. There must be the attainment of a 'minimum level of severity'. There must (be) the crossing of the 'threshold' set by the prohibition. There must be an attainment of the seriousness of treatment envisaged by the prohibition in order to sustain a case based on torture or inhuman or degrading treatment or punishment."

Accordingly, in determining whether Article 11 has been infringed in this application, I shall consider whether the level of 'cruelty' and 'severity' of suffering implied by and inherent to the notion of 'torture' and 'inhuman', and 'degrading' treatment have been satisfied.

Standard of proof that must be satisfied

The standard of proof that a Petitioner who alleges an infringement of Article 11 should discharge was considered in **Goonewardene v Perera** [(1983) 1 Sri LR 305 at page 313], where Soza, J observed thus:

"Before I deal with the facts a word about the burden of proof. There can be no doubt that the burden is on the petitioner to establish the facts on which she invites the court to grant her the relief she seeks. This leads to the next question. What is the

standard of proof expected of her? Wanasundera, J. considered the question in the case of Velmurugu v. The Attorney-General and another and held that the standard of proof that is required in cases filed under Article 126 of the Constitution for infringement of fundamental rights is proof by a preponderance of probabilities as in a civil case and not proof beyond reasonable doubt. I agree with Wanasundera, J. that the standard of proof should be preponderance of probabilities as in a civil case. It is generally accepted that within this standard there could be varying degrees of probability. The degree of probability required should be commensurate with the gravity of the allegation sought to be proved. This court when called upon to determine questions of infringement of fundamental rights will insist on a high degree of probability as for instance a court having to decide a question of fraud in a civil suit would. The conscience of the court must be satisfied that there has been an infringement.” [emphasis added]

This test had been followed in Kapugeekiyana v Hettiarachchi and Others [(1984) 2 Sri LR 153 at page 165] where Wimalaratne, J stated that, “*In deciding whether any particular fundamental right has been infringed I would apply the test laid down in Velmurugu that the civil, and not the criminal standard of persuasion applies, with this observation, that the nature and gravity of an issue must necessarily determine the manner of attaining reasonable satisfaction of the truth of that issue.*”

In Channa Pieris and Others v Attorney General and Others (Ratawesi Peramuna Case) [supra; at page 107] Amerasinghe, J stated as follows:

“... having regard to the nature and gravity of the issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of a Petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment or punishment; and unless the Petitioner has adduced sufficient evidence to satisfy the Court that an act in violation of Article 11 took place, it will not make a declaration that (a violation of) Article 11 of the Constitution did take place.” [emphasis added]

(...)

“Would ‘the guarded discretion of a reasonable and just man lead him to the conclusion?’ is the test I would apply in deciding the matter. If I am in real and substantial doubt, that is if there is a degree of doubt that would prevent a reasonable and just man from coming to the conclusion, I would hold that the allegation has not been established.” [emphasis added]

Similar sentiments have been expressed by Murdu N. B. Fernando, PC, J in Ratnayaka Weerakoonge Sandya Kumari v Weerasinghe, Sub Inspector of Police [SC (FR) Application No. 75/2012; SC minutes of 18th December 2019 at page 10] where, having considered the above cases, it was concluded that, *“The foregoing judicial decisions of this Court has clearly identified and laid down that a high degree of certainty is required before the balance of probability would tilt in favour of a petitioner endeavoring to discharge the burden of proof with regard to an allegation of torture or cruel, inhuman or degrading treatment.”*

In Edward Sivalingam v Sub Inspector Jayasekara & Others (SC (FR) Application No. 326/2008; SC minutes of 10th November 2010), referred to in Kumarihami v Officer-in-Charge, Mahiyanganaya Police Station and Others [(2021) 2 Sri LR 464; at page 469], Tilakawardane, J held that, *“When considering the allegations made by the Petitioner against officers of the CID it is important to bear in mind that the burden of proving these allegations lies with the Petitioner. This court has held repeatedly that the standard required is not proof beyond reasonable doubt but must be of a higher threshold than mere satisfaction. The standard of proof employed is on a balance of probabilities test and as such must have a high degree of probability and where corroborative evidence is not available it would depend on the testimonial creditworthiness of the Petitioner.”* [emphasis added]

Thus, while the burden of establishing allegations of torture or cruel, inhuman or degrading treatment or punishment shall remain with a petitioner to be satisfied on a balance of probability with a high degree of certainty, the Court must be guided by the facts of the particular case, being mindful however of the difficulties and disadvantages that a petitioner could face in proving such allegations.

Two conflicting versions

This brings me back to the two conflicting versions of the Petitioner and the Respondents.

On the one hand, I have the version of the Petitioner who claims he was assaulted by the Respondents. On the other, I have the version of the Respondents who have denied assaulting the Petitioner but have claimed that they used reasonable force to apprehend the Petitioner who resisted arrest and tried to escape. The Respondents have not however elaborated on the minimum force they claim to have used, and I am therefore not in a position to consider if the injuries on the Petitioner are reflective of the use of such force. I have already stated that the learned Counsel for the Respondents attribute the injuries on the soles of the Petitioner's feet to him running on the railway track in a bid to evade arrest.

There are two factors that weigh heavily in favour of the Petitioner. The first is that the Petitioner complained of assault to the learned Magistrate at the first available opportunity when he was produced before the learned Magistrate on 29th August 2016. In fact, the reference to the Judicial Medical Officer was made by the learned Magistrate having seen the condition of the Petitioner. The second is the medical evidence.

Medical evidence

I must perhaps state that although medical evidence is available in this case, there may be instances where medical evidence is not available and therefore it would not be reasonable for this Court to insist upon medical evidence in every case where a violation of Article 11 is alleged. In fact, in **Ansalin Fernando v Sarath Perera, Officer-in-Charge, Police Station, Chilaw** [(1992) 1 Sri LR 411 at page 419], Kulatunga, J pointed out that, *"Whilst I shall not accept each and every allegation of assault/ill-treatment against the police unless it is supported by cogent evidence I do not consider it proper to reject such an allegation merely because the Police deny it or because the aggrieved party cannot produce medical evidence of injuries. Whether any particular treatment is violative of Article 11 of the Constitution would depend on the facts of each case. The allegation can be established even in the absence of medically supported injuries."*

The Petitioner was examined by the Assistant Judicial Medical Officer on 30th August 2016 at 11.45am. The Medico-Legal Report issued pursuant to the said examination has been produced by the Petitioner marked P3. The short history recorded in P3 as narrated by the Petitioner is similar to the narration made by the Petitioner to this Court. The general examination had revealed the following injuries:

- (a) Contusion and swelling of the right foot with severe tenderness; and
- (b) Contusion and swelling of left foot below the ankle joint with tenderness.

The Petitioner had thereafter been referred to the General Surgeon at the National Hospital, Colombo where he was diagnosed with a right side 5th Metatarsal head fracture, and cellulitis of both legs.

The opinion of the Assistant Judicial Medical Officer is as follows:

- (1) Injuries on both legs were caused by blunt force trauma and are grievous in nature;
- (2) Cellulitis is a complication of severe soft tissue injury;
- (3) Injury pattern was compatible with the history given by the Petitioner.

The Petitioner had also been produced by the Prison authorities before the Consultant Judicial Medical Officer, Colombo South Teaching Hospital, on 8th September 2016. Although a copy of this report had not been tendered with the pleadings, the parties were directed to tender a copy thereof as it formed part of the record of the Magistrate's Court Case No. 59105/4/16 under which facts had been reported relating to the impugned arrest of the Petitioner.

The following matters are evident from the said report dated 7th October 2016:

- (a) The Petitioner had a dark resolving haematoma 0.5cm x 0.3cm over the sole of the left foot placed 5cm below the base of the big toe and another dark resolving

haematoma 0.2cm x 0.3cm over the sole of the left foot placed 2cm lateral to the previous haematoma;

- (b) The Petitioners' right leg was covered with a below knee plaster of paris extending upto the base of the toes. The toes were swollen even though there was no tenderness. The X-ray taken on 2nd September 2016 confirmed a fracture of the proximal end of the 5th metatarsal of right foot;
- (c) The injuries are compatible with that caused by blunt force. The haematomas detected on the sole of the left foot are more likely to be due to an assault with a blunt weapon, as alleged by the Petitioner.

Thus, the fact that the Petitioner has suffered injuries, that they are severe, and that such injuries are reflective of the version of the Petitioner is clearly borne out by the medical evidence, thereby making the version of the Petitioner creditworthy.

The version of the Respondents – revisited

It is in the above background that I must consider the version of the Respondents. There are two explanations offered by the Respondents with regard to the injuries. The first is that minimal force was used to apprehend the Petitioner and that the said injuries are reflective of such force. I have already observed that the Respondents have not disclosed the kind of force they used and the injuries that may have been caused as a result of using such force. The second explanation is the submission of the learned Counsel for the Respondents that the Petitioner suffered injuries to his feet as a result of running 40-50 metres on the rail track. This position has not been suggested either to the Judicial Medical Officer or to the medical specialists who examined the Petitioner, with the explanation for this lacuna being that the Respondents had no opportunity of conveying to the medical specialists their position as to how the Petitioner came about his injuries. I cannot accept this explanation for the reason that a special investigation was carried out by the 5th Respondent, who was the Officer-in-Charge of the Police Narcotics Bureau at that time, into the complaint of the Petitioner that he was assaulted by the Respondents. The Respondents therefore had the opportunity of explaining their position to the 5th

Respondent which would have enabled the 5th Respondent to ascertain the veracity of the position of the Respondents. I have examined the ‘B’ reports tendered by the 5th Respondent in Magistrate’s Court, Colombo Case No. 63125/4/16 and it does not appear that the Respondents have taken up such a position.

If the Petitioner in fact suffered injuries while trying to escape, the Respondents should have afforded medical treatment to the Petitioner which admittedly has not been done. The most obvious course of action should have been to bring the injuries to the attention of the Magistrate in the ‘B’ report filed on 29th August 2016. I have examined the said ‘B’ report, as well as the further ‘B’ reports filed thereafter and find that there is no mention of any such incident or injuries in the said reports, except to state that minimum force was used when the Petitioner attempted to avoid arrest and flee [පරික්ෂා කිරීමට උත්සාහ කිරීමේදී සැකකරු පලා යාමට උත්සාහ කළ බවත් එම ඇවක්ට්වීමේදී අවශ්‍ය බලය යොදා සැකකරු නවතාගෙන ...].

Furthermore, the learned Counsel for the Petitioner submitted that during the course of his evidence before the High Court, the 1st Respondent, in response to a question posed by Court, had stated that although the Petitioner suffered an injury as a result of knocking his leg on a railway sleeper there were no other visible injuries on the Petitioner. The proceedings before the High Court tendered together with the written submissions confirms this fact, and contradicts the version that the Respondents sought to present before this Court.

Taking into consideration the cumulative effect of the above matters, I am of the opinion that:

- (a) The Petitioner has satisfied this Court with a high degree of certainty that he was subjected to cruel, inhuman and degrading treatment by the Respondents; and
- (b) The assault on the Petitioner has been severe and has been carried out with an intensity that satisfies the test laid down in Channa Peiris [supra].

Having said so, I am mindful that the Petitioner would be subjected to cross examination at the trial that the Respondents would face pursuant to the indictment filed under Act No. 22 of 1994, where the prosecution must establish its case beyond reasonable doubt.

In the above circumstances, I hold that the Respondents have infringed the fundamental rights of the Petitioner guaranteed by Article 11 of the Constitution.

Article 12(1)

I shall now consider whether the acts of the Respondents amount to a violation of Article 12(1) of the Constitution, which provides that, "*All persons are equal before the law and are entitled to the equal protection of the law*".

In W.P.S. Wijeratne v Sri Lanka Ports Authority and Others [SC (FR) Application No. 256/2017; SC minutes 11th December 2020], Kodagoda, PC, J stated that, "*It is well settled law that, at the core of Article 12 of the Constitution is a key concept, namely the concept of 'equality'. The concept of equality is founded upon the premise that, all human beings are born as equals and are free. ... The right to equality is a fundamental feature of the Rule of Law, which is a cornerstone of the Constitution of Sri Lanka, and hence the bounded duty of the judiciary to uphold.*"

Human dignity underpins the application of all fundamental rights, and is the fundamental virtue sought to be protected through the securing of fundamental rights and the Rule of Law, as demonstrated by the Sasti to our Constitution. In Ajith C. S. Perera v. Minister of Social Services and Social Welfare and Others [(2019) 3 Sri LR 275 at page 300], Prasanna Jayawardena, PC, J stated "*... that it seems to me that the concept of human dignity, which is the entitlement of every human being, is at the core of the fundamental rights enshrined in our Constitution. It is a fountainhead from which these fundamental rights spring forth and array themselves in the Constitution, for the protection of all the people of the country. As Aharon Barak, former Chief Justice of Israel has commented [Human Dignity – The Constitutional Value and the Constitutional Right (2015)]:*

'Human dignity is the central argument for the existence of human rights. It is the rationale for them all. It is the justification for the existence of rights.' 'The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that united the human rights into one whole. It ensures the normative unity of human rights.'" [emphasis added]

Human dignity and the rule of law demands that the entitlement of each person to the equal protection of the law must be respected at all times. Be it a hard core criminal or a person who has been charged for trafficking of heroin, that entitlement is paramount and must at all times be respected. It is clear to me that in this instance, the Respondents have by their conduct deprived the Petitioner of his entitlement to the equal protection of the law. I therefore hold that the fundamental rights of the Petitioner guaranteed by Article 12(1) have been infringed by the Respondents.

Conclusion

In the above circumstances, I grant a declaration as prayed for in paragraph (c) of the prayer to the petition that the fundamental rights of the Petitioner guaranteed by Articles 11 and 12(1) have been infringed by the Respondents.

JUDGE OF THE SUPREME COURT

S Thurairaja, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J

I agree.

JUDGE OF THE SUPREME COURT