

ADHIKARY AND ANOTHER
v
AMARASINGHE AND OTHERS

SUPREME COURT
BANDARANAYAKE, J.
EDUSSURIYA, J., AND
YAPA, J.

SC APPLICATION No.251/2002

10TH SEPTEMBER AND 14th AND 28th OCTOBER 2002

Fundamental Rights - Acts of indignity and assault not causing injury - Whether such acts may constitute infringement of Article 11 of the Constitution,

The 1st petitioner an attorney-at-law was proceeding in his car from Nawala to the Bandaranaike International Conference Hall (BMICH) with his wife the 2nd petitioner and his child and the mother to attend an exhibition. At Narahenpita there was traffic block. When the vehicles started moving the 1st and 2nd respondents came up to petitioner's car and pulled the petitioner out and abused him and stopped him. When the 2nd petitioner intervened they abused her also and slapped her. When the 1st petitioner disclosed that he was an attorney-at-law the respondents continued to threaten and said they will shoot and kill him. They claimed to be security officers of a Minister.

Held:

1. The respondents had infringed the petitioner's rights under 11 of the Constitution.

Per Bandaranayake, J.

"...the protection in terms of Article 11 would not be restricted to physical harm caused to a victim, but would certainly extend to a situation where a person had suffered psychologically due to such action"

2. Per Edussuriya, J (with Yapa, J agreeing)
"...it is my view that it would be a travesty if the State, which includes the ordinary law abiding citizen was made to bear the full brunt of compensation for the errant acts of two policemen."
3. The petitioners are entitled to compensation for the infringement of their rights a part of which shall be paid personally by the 1st and 2nd respondents.

APPLICATION for relief for infringement of fundamental rights.

Cases referred to:

1. *WMK. de Silva v Chairman, Ceylon Fertilizer Corporation* (1989) 2 Sri LR 393
2. *Kumarasena v Sri Sriyantha and Others* SC Application No. 257/93 SCM of 23.05.1994
3. *Saman v Leeladasa and another* (1989) 1 Sri LR 44

APPLICATION for relief for infringement of fundamental rights.

Manohara de Silva with J. Fernando, D. Weeraratne and G.W.C.B. Thalagune for petitioners.

S. Ediriweera with Lakshman Fernando for 1st and 2nd respondents.

K.A.P. Ranasinghe, State Counsel for 5th respondent.

Cur.adv.vult

February 14, 2003

SHIRANI A. BANDARANAYAKE, J.

The 1st petitioner, an attorney-at-law, with the 2nd petitioner, his wife, who is a teacher by profession, was travelling in his vehicle along with their 18 months old son, his mother, mother-in-law and sister to the Bandaranaike Memorial International Conference Hall (hereinafter referred to as the BMICH), to view an exhibition that was being held there. When he reached the Narahenpita junction, on the evening of 09th April 2002, after driving through Nawala Road, with the intention of turning towards Borella to proceed to the BMICH, there was the usual congestion due to the flow of heavy traffic. At the time of his arrival, it was a bleak scene at the Narahenpita inter-section, where the movement of traffic had virtually come to a standstill with no police officer to control the movement of traffic.

A short while later, with the assistance of a few volunteers, the congestion began to clear, and the vehicle which was in front of the petitioners' car started to move. Following suit, the 1st petitioner's car moved forward, when the 1st to 4th respondents appeared

before the 1st petitioner's vehicle preventing him from proceeding any further. Two of the respondents, punched the bonnet of the petitioner's car with their fists and told the 1st petitioner not to move. At that point, the 1st petitioner inquired from them as to why they were prevented from proceeding. The 1st and the 2nd respondents started abusing and humiliating the 1st and 2nd petitioner and the family. Suddenly, the 2nd respondent opened the door of the driver's side of the car; held the 1st petitioner by his collar; pulled him out of the vehicle to the road and slapped him. Seeing what was going on, the 2nd petitioner carrying the little child got out of the vehicle and came to the rescue of her husband. The 1st respondent stopped the 2nd petitioner moving towards her husband and slapped her while abusing her in filthy.

The 1st petitioner at this stage informed the respondents that he is an attorney-at-law by profession. No sooner this was told, the 2nd respondent once again held the 1st petitioner by his collar and started shouting saying that, "we are the security personnel of the Minister. You can do anything you want. We will shoot and kill you."; The 2nd respondent once again assaulted the 1st petitioner. At this stage the 1st petitioner's mother came to his rescue and the 2nd respondent while pushing her said that, "we are not scared. You can do anything you want, we are Minister's security guards". While all these things were happening, the 1st petitioner noticed that the respondents were carrying walkie talkies and one of them had a weapon. The respondents left the scene thereafter.

The petitioners immediately proceeded to the Narahenpita Police Station and lodged their complaints (P1 and P2). The following day the 1st petitioner had brought this incident to the notice of the President of the Bar Association of Sri Lanka (hereinafter referred to as BASL). The BASL took action by passing a resolution condemning the incident. Copies of the resolution were sent to the Prime Minister and the Ministers of Interior, Defence, Employment and Labour (PSA, P5B, P5C, PSD). Later the Bar Association informed the 1st petitioner that Mr.D.M.T.B. Kehelgamuwa, D.I. had informed that the services of 3 respondents had been terminated and steps were taken to interdict the other respondent (P3 and P9).

Learned counsel for the petitioners submitted that in or around 11.04.2001, the 3rd and 4th respondents, came to the petitioners' residence and apologized for being involved in the aforementioned incident. The petitioner therefore did not seek to obtain any relief against the said 2 respondents.

The petitioners contended that the 1st and 2nd respondents' action was in violation of the petitioners' fundamental rights for which this Court granted leave to proceed in terms of Article 11 of the 1978 Constitution. In view of the apology tendered by the 3rd and 4th respondents to the petitioners and the submissions made by learned counsel for the petitioner that the petitioners did not wish to proceed against them, the 3rd and 4th respondents were disjunctured from the proceedings at the time leave to proceed was granted by this Court.

Learned counsel for the 1st and 2nd respondents took up the position that the petitioners had not identified the respondents at the time they made the complaints at the Narahenpita Police Station. Further, the 1st and 2nd respondents in their statements made at the police station had denied taking part in the said incident.

The statements of the petitioners, of which parts are reproduced by both learned counsel for petitioner and the 1st and 2nd respondents, indicate that both the petitioners had referred to the persons who assaulted them as security guards of a Minister. The proceedings at the Magistrate's Court indicated that the 3rd and 4th respondents had not taken any part in the assault and that they had attempted to settle the matter. However, there is no reference made in the proceedings made to the effect of non-participation of the 1st and 2nd respondents in this incident. It is to be noted that the 1st to 4th respondents were arrested and their statements were recorded by the Narahenpita police. Thereafter, while in the process of making arrangements to produce the respondents before the Magistrate the respondents had run away. On 11.04.2002, a warrant was issued for the arrest of the respondents and this was re-issued on 24.04.2002 and on 08.05.2002. The 1st to 4th respondents surrendered by themselves and they were detained until 22.05.2002. In the circumstances, it is my view that it was participation by the 1st and 2nd respondents in this inci-

The allegation against the 1st and 2nd respondents made by the petitioners is based on the alleged infringement of 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'. Petitioners generally have sought a declaration of violation of the fundamental right in terms of Article 11, in situations where there had been assault and/or infliction of injuries. In this instant case, although the petitioners claimed that they were assaulted, the basic allegation is not on the physical injuries caused to them by such action. In fact there is no material before this Court regarding any kind of physical injuries and no submissions were made to the effect that the petitioners had sought any medical assistance. However, the fundamental rights guaranteed in terms of Article 11 are not restricted to mere physical injury. The words used in Article 11, viz., 'torture, cruel, inhuman or degrading treatment or punishment' would take many forms of injuries which could be broadly categorized as physical and psychological and would embrace countless situations that could be faced by the victims. Accordingly, the protection in terms of Article 11 would not be restricted to mere physical harm caused to a victim, but would certainly extend to a situation where a person had suffered psychologically due to such action.

In *W.M.K. de Silva v. Chairman, Ceylon Fertilizer Corporation* Amerasinghe, J., said,

"I am of the opinion that the torture or cruel, inhuman degrading treatment or punishment contemplated in Article 11 of our Constitution is not confined to the realm of physical violence. It would embrace the sphere of the soul or mind as well"

It is however, to be noted that in *W.M.K. de Silva vs. Ceylon Fertilizer Corporation* (supra) the distress caused to an employee of a corporation by her employer's extreme unkindness was held to be not violative of Article 11. On the other hand in *Kumarasena v. Sriyantha and others* (2) where there was no physical impairment or a disability, it was held that the 'suffering occasioned was of an aggravated kind and attained the level of severity to be taken cognizance of as a violation of Article 11 of the Constitution'. Therefore

the test which has been applied by our Courts is that whether the attack on the victim is physical or psychological, irrespective of the fact that, a violation of Article 11 would depend on the circumstances of each case.

Accordingly, it would be necessary to consider the circumstances of this case and the nature of the acts complained of to decide whether there is a violation of Article 11 of the Constitution.

It is to be noted that the incident in question took place at the Narahenpita junction, a busy intersection and a place where there is heavy vehicular traffic throughout the day and is at its heaviest during the evenings. The ordeal faced by the two petitioners was undoubtedly of an aggravated nature. The anguish faced at that time by the wife who was torn between the safety of her husband and the child, but still moved to prevent her husband being assaulted, while carrying her 18 month old child and the feelings of a forlorn husband who could not protect his wife and the little child from the abuse and assault by the 1st and 2nd respondents would in my view, suffice to prove the required level of severity that is necessary to prove violation of Article 11 of the Constitution. The psychological trauma faced by an innocent child, while in the tender hands of his mother, for no rhyme or reason, would add to the severity of the actions of the 1st and 2nd respondents. In any event, the conduct of the 1st and 2nd respondents at that time and place would certainly amount to degrading treatment of the petitioners.

Admittedly the 1st and 2nd respondents are State officers; they being police officers attached to the Ministerial Security Division. Their position becomes aggravated as they are officers who had acquired a special training to be attached to the Security Division for Ministers. The fact remains that the 1st and 2nd respondents, under the colour of their office, decided to dictate laws as to how a motorist should use the road and in the process they picked a young couple who were proceeding with the members of their family, to see an exhibition at the BMICH. Their conduct in my view amounts to a total lack of discipline, regard and respect to the general public in the country. When police officers, who are firm adherents of the law and whose duties include 'to prevent all offences, preserve peace and to apprehend disorderly characters', behave in an outrageous manner without paying heed to safe-

guarding and protecting the rights of the people, a dismal picture of such officers held in such high esteem emerges.

The 1st and 2nd respondents, as mentioned earlier attached to the Ministerial Security Division. Thus, they have 1 clothed with authority by the State. If officers with such authority are not trained to act with dignity and humility in respect of the rights of the people, it is my view that the State has an obligation to bear the costs of such action. It is not in any sense to punish the State but merely as a regret and a *solatium* for the hurt caused to the petitioners by the actions of the 1st and 2nd respondents. We must however, be mindful of the amounts to be awarded so that they would not be burdensome on the common man in the street. Referring to such situations, Amerasinghe, J. in *Saman Leeladasa and another* stated that,

"....I am unable to agree that deterrence is a relevant factor in the assessment of compensation in a Fundamental Rights action. Being as they are actions against the State, any attempt by this Court to punish the State would, I think, be imprudently venturesome. To attempt to deter it would be hopelessly futile,... Large awards will only increase the burden of the tax-payer and that of the ordinary man in the street to whom the burden of the tax-payer will, lamentably, be passed on eventually. Therefore, we need to act with restraint in awarding compensation in these matters".

For the foregoing reasons I hold that the 1st and 2nd respondents had violated the Petitioners' fundamental rights guaranteed under Article 11 of the Constitution. I direct the State to pay to the petitioners a sum of Rs.20,000 as compensation and a sum of Rs.5,000/- as costs. These amounts must be paid within 3 months from today.

EDUSSURIYA, J.

Having read the judgment of Bandaranayake J, I agree with the reasoning set out therein with regard to the complicity of the 1st and 2nd Respondents.

The 1st and 2nd Respondents, merely because they

Ministerial Security officers have conducted themselves in a manner that no right thinking person however high he may be would have acted.

In the circumstances, it is my view that it would be a travesty if the State, which includes the ordinary law abiding citizen was required to bear the full brunt of compensation for the errant acts of the policemen.

I therefore direct the 1st and 2nd Respondents each to personally pay a sum of Rs. 5000/- as compensation to the Petitioners. The State is directed to pay a sum of Rs. 15,000/- to the Petitioners as compensation and costs. All payments to be made within three months of today.

WAPA.J. I agree.

Interlocutory relief granted.

CENTRE FOR POLICY ALTERNATIVES (GUARANTEE)
LIMITED AND ANOTHER
v
DAYANANDA DISSANAYAKE, COMMISSIONER OF
ELECTIONS AND OTHERS

APPEAL COURT
FERNANDO, J.
v ASEKERA, J. AND
JANESWARAN, J.
APPEAL No. 26/2002
v APPLICATION No. 487/99
v SC APPEAL No. 27/2002
v APPLICATION No. 488/99
* MARCH, 2003

Principle of Certiorari and Mandamus - Validity of the nomination of a person to fill the vacancy of a Provincial Council member - Provincial Councils Elections Act, 1965(1) - The right of secretary of recognized political party or leader of